Neutral Citation Number: [2024] EWCA Civ 300

Case No: CA-2023-000861

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Edwin Johnson and Upper Tribunal Judge Thomas Scott
[2023] UKUT 00054 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

THE PRUDENTIAL ASSURANCE COMPANY LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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- -

Zizhen Yang (instructed by **Baker McKenzie LLP**) for the **Appellant**
Peter Mantle (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 23 and 24 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal raises difficult questions as to the relationship between section 43 of the Value Added Tax Act 1994 ("VATA 1994"), which lays down rules in respect of value added tax ("VAT") groups, and regulation 90 of the Value Added Tax Regulations 1995 ("the VAT Regulations"), which makes provision with respect to the time at which continuous supplies of services are to be treated as supplied for VAT purposes. Section 43 explains that any supply by one member of a VAT group to another is to be "disregarded" and that "any business carried on by a member of the group shall be treated as carried on by the representative member". Does this mean that no VAT is chargeable on an intra-group supply regardless of whether the supplier has left the group by the time consideration for the supply is the subject of a VAT invoice and paid? Or is section 43 inapplicable in respect of continuous supplies insofar as the consideration is invoiced and received only after the supplier is no longer a member of the VAT group because regulation 90 provides for the services to be treated as supplied at the time of the invoice or payment?

2. The appeal was very well argued by both Ms Zizhen Yang, who appeared for the appellant, The Prudential Assurance Company Limited ("Prudential"), and Mr Peter Mantle, who appeared for HM Revenue and Customs ("HMRC", which term I shall also use to refer to their predecessors).

Basic facts

3. Prudential was at the relevant time carrying on with-profits life and insurance business. Silverfleet Capital Limited ("Silverfleet") provided Prudential with investment management services in relation to the with-profits fund known as "the Funds Fund". Under an investment management agreement dated 30 August 2002, the consideration which Silverfleet received for its services comprised (a) a management fee calculated by reference to the amount of investments made in the Funds Fund during the period in which services were provided and (b) performance fees, payable in the event that the performance of certain sub-funds exceeded a set benchmark rate of return. Similar provision was made in a further investment management agreement dated 31 August 2004.

4. When Silverfleet was rendering its investment management services, Prudential was the "representative member" of a VAT group of which Silverfleet was also a member. However, on 8 November 2007 a management buy-out was effected, as a result of which Silverfleet ceased to be a member of Prudential's VAT group. It also ceased to provide management services to the Funds Fund.

5. During 2014 and 2015, the hurdle rate set under the 2002 investment management agreement was passed. Silverfleet accordingly invoiced Prudential at various dates between 16 January 2015 and 11 July 2016 for performance fees totalling £9,330,805.92 ("the Performance Fees") plus VAT at 20%.

The appeal

6. What is at issue in this appeal is whether the Performance Fees are subject to VAT. The First-tier Tribunal (Upper Tribunal Judge Malcolm Gammie CBE KC) ("the FTT"), in a decision dated 26 February 2021, decided the point in favour of

Prudential. However, HMRC succeeded in an appeal to the Upper Tribunal ("the UT"). In a decision dated 6 March 2023, the UT (Edwin Johnson J and Upper Tribunal Judge Thomas Scott) concluded that VAT was chargeable on the Performance Fees.

7. In its decision, the FTT queried whether regulation 90 of the VAT Regulations went so far as to direct that Silverfleet's services had not been provided within a VAT group and had been "supplied in the course or furtherance of a business that in the VAT group world was not being carried on": see paragraph 72. Further, the FTT was "unable to see what feature distinguishes [Prudential's] case from that of the taxpayer in [*B J Rice & Associates v Customs and Excise Commissioners*]": see paragraph 73.

8. In contrast, the UT considered that, pursuant to regulation 90 of the VAT Regulations, Silverfleet's services were to be treated as having been supplied when invoiced and, hence, at a time when Silverfleet and Prudential were no longer members of the same VAT group. That being so, section 43 of VATA 1994 was not, in the UT's view, in point. The UT also considered that the FTT had erred in regarding itself as bound by *B J Rice & Associates v Customs and Excise Commissioners* [1996] STC 581 ("*B J Rice*") to allow the appeal. Unlike Mr Rice, the UT said in paragraph 114(3) of its decision, Silverfleet "was not entirely outside the scope of VAT when the Services were rendered, but rather it was subject to a specific set of assumptions and disregards".

The statutory framework

9. VATA 1994 provides for VAT to be charged where a "taxable supply" of goods or services is made in the United Kingdom by a "taxable person" in the course or furtherance of a business: see sections 1 and 4. By section 1(2), VAT on any supply of goods or services becomes due "at the time of supply", and section 6(1) explains that the provisions of the section apply "for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT". By section 6(3), the starting point in relation to a supply of services is that the supply "is treated as taking place at the time when the services are performed", but that principle is qualified in the remainder of section 6. Thus, if a person making a supply of services issues a VAT invoice or receives a payment in respect of it before the services are performed, the supply "shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received": section 6(4). Further, section 6(14) empowers HMRC to make regulations with respect to the time at which a supply is to be treated as taking place where, among other things, "it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period". In such a case, section 6(14) explains in a tailpiece, "the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals".

10. In pursuance of section 6(14) of VATA 1994, provision in respect of "Continuous supplies of services" has been made in regulation 90 of the VAT Regulations. Regulation 90(1) states that subject to paragraph (2) (which is not material):

> "where services **…** are supplied for a period for a consideration the whole or part of which is determined or payable

> periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times—
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> (a) each time that a payment in respect of the supplies is received by the supplier, or
>
> (b) each time that the supplier issues a VAT invoice relating to the supplies."

11. VATA 1994 allows for companies satisfying certain requirements to opt to be treated as a group. Section 43 deals with the consequences of being so treated. During the relevant period, section 43(1) stated:

> "Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and
>
> (c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—
>
> (i) in the case of goods acquired from another member State, for the purposes of section 73(7); and
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> (ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,
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> as acquired or, as the case may be, imported by the representative member;
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

12. Member States are permitted to provide for VAT groups by article 11 of Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ("the Principal VAT Directive" or "PVD"). Article 11 states:

> "After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

13. In Case C-85/11 *European Commission v Ireland* [2013] STC 2336, the Court of Justice of the European Union ("the CJEU") said this in paragraph 47 of the judgment about the aims of article 11 of the PVD:

> "it is apparent from the explanatory memorandum to the proposal which resulted in the adoption of the Sixth Directive (COM(73) 950) that, by adopting the second subparagraph of art 4(4) of the Sixth Directive, which was replaced by art 11 of the [PVD], the European Union legislature intended, either in the interests of simplifying administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that member states would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality."

14. Advocate General Jääskinen had said this about VAT grouping in his opinion:

> "45. VAT grouping does not create economic benefits when a purchase is made for activities subject to VAT, since the purchaser is entitled to deduct input VAT. In such a situation it is in principle irrelevant whether the purchase is made within the VAT group without input VAT or with input VAT from outside of the VAT group. However, as a VAT group's internal transactions are disregarded for VAT purposes, VAT grouping may entail cash flow advantages for economic operators with respect to activities that are subject to VAT.
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> 46. In certain situations members of a VAT group may gain economic benefits from belonging to the group. This, in my opinion, is simply an inevitable consequence flowing from the basic fiscal policy choice of a member state to permit VAT grouping.
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> 47. Membership of a VAT group can be beneficial, for example, in a situation in which the member making a purchase

> subject to VAT had, because of the VAT exempt nature of its activities, no right to deduct VAT at all, or no full VAT deduction right. If such a member purchases from a supplier outside the VAT group, VAT would be incurred. If, however, it makes the purchase from another member of the group, no VAT is incurred.
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> 48. Where an economic operator is not entitled to deduct input VAT incurred in a purchase, it might be economically advantageous for it to produce the goods or services itself. For example, a bank that is not entitled to deduct VAT might benefit economically if it produces IT services needed for its banking activities internally rather than buying them from a third party. However, if the VAT grouping option is available, it may outsource its IT service provision to a subsidiary belonging to the group and still gain the same advantage.
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> 49. Hence, VAT liability can and does have an impact on the structure and functioning of business activities. But VAT grouping allows the member states to diminish the influence of VAT on the way economic operators organise themselves. It can do this by reducing the difference in costs between producing a service in-house and buying it from a dependent supplier with separate legal personality. Thus, VAT grouping supports fiscal neutrality by enabling appropriate business structures without negative consequences in terms of VAT liability. Moreover, the possibility of including non-taxable persons as members of a VAT group places corporate structures that include such persons in the same position as other corporate structures. An example is found in such company groups where a holding company possesses majority holdings in all other companies of the group."

15. In the 2009 "Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax" ("the 2009 Communication"), the European Commission explained in paragraph 2:

> "The concept of VAT group was only introduced in Community legislation by Article 4(4) of the Sixth VAT Directive. According to the Explanatory Memorandum, the aim of the provision on VAT grouping is to allow Member States, for the purposes of administrative simplification or combating abusive practices (e.g. when a business is split into several taxable persons so that each may benefit from a special scheme), to not regard as separate taxable persons those whose 'independence' is purely a legal technicality."

Authorities

16. In *B J Rice*, Mr Rice had done work for a client, and invoiced £150 for it, when he was not yet registered for VAT. The client did not pay until more than four years later. HMRC, relying on regulation 23 of the Value Added Tax (General) Regulations 1985 (i.e. the predecessor of regulation 90 of the VAT Regulations), assessed Mr Rice to VAT on the basis that the supply was to be treated as supplied when the payment was received and Mr Rice was by then registered for VAT.

17. The Court of Appeal held by a majority (Ralph Gibson LJ dissenting) that no VAT was payable. Staughton LJ observed at 584 that HMRC's interpretation of the legislation produced an "unjust result": "[e]ither Mr Rice will be unable to recover the tax from his customer, and will have to pay it out of his own pocket; or else Mr Partridge, the customer, will have to pay tax although it was not chargeable at the time when he both contracted for and received the services of Mr Rice". Having noted at 583 that section 2 of the Value Added Tax Act 1983 ("the 1983 Act") (i.e. the predecessor of section 4 of VATA 1994) involved four elements ("(1) a supply of goods or services in the United Kingdom, (2) which is a taxable supply (in other words, not exempt), (3) by a taxable person (someone who is or ought to be registered for VAT), (4) in the course or furtherance of any business carried on by him"), Staughton LJ explained at 585 that it was Mr Rice's case that "[o]nly if all four requirements are met does one proceed to inquire what was the actual or deemed time of supply for the remaining purposes of the 1983 Act". Mr Rice arrived at that result, Staughton LJ explained, by pointing to the words "for the purposes of the charge to tax" in what was then section 4(1) of the 1983 Act (now section 6(1) of VATA 1994): those words, Mr Rice said, "are only applicable if there is first a charge to tax within the ordinary meaning of s 2(1)".

18. Staughton LJ concluded at 585 that, aside from a section of the 1983 Act which he regarded as a "special provision, derogating from s 2":

> "in all other respects the existence of a chargeable transaction has to be determined at a time when the supply is actually made. Common sense and justice point to that result; ss 4 and 5 remain to determine the amount to be charged and the time when the charge takes effect. To impose a tax on Mr Rice in respect of a supply which was not taxable at the time when it was made seems to me perilously close to retrospective taxation …."

19. Staughton LJ explained that he found some assistance in the decision of the Value Added Tax Tribunal in *Broadwell Land plc v Customs and Excise Commissioners* [1993] VATTR 346 ("*Broadwell*"), where this had been said at 355:

> "It follows from our analysis so far that the wording of section 4 and 5 do not create any charge to VAT: their role is to identify the time of the supply, given that there has been one which is in charge under section 2(1). This conclusion is in line with the opening words of section 4(1), which define the role of sections 4 and 5 as applying 'for determining the time when a

> supply of goods or services is to be treated as taking place for the purposes of the charge to tax'."

20. The judgment of the other member of the majority, Ward LJ, is to similar effect. He, too, cited the passage from the decision in *Broadwell* and regarded HMRC's contention as leading to an "absurd, unfair result": see 590 and 591. Ward LJ said at 590:

> "… I do not accept that reg 23 arises at all. It comes in by virtue of s 5(9) [i.e. the predecessor of section 6(14) of VATA 1994]. I accept that, because s 4(3) is expressly made subject to the provisions of s 5, treating the supply of services as taking place at the time when the services are performed is qualified by s 5(9). But the whole of the provisions of s 4 and s 5 are of application only 'for determining the time when a supply of ... services is to be treated as taking place for the purposes of the charge to tax' (see s 4(1)). 'The charge to tax' throws us back to s 1 which provided that the tax was to be charged in accordance with the provisions of the Act. Section 2(1) provided that the tax was charged where the supply was made by a taxable person and s 2(3) [i.e. the predecessor of section 1(2) of VATA 1994] made it plain that it was the time for payment not the imposition of liability which was 'subject to provisions about accounting and payment'. Among such provisions are those provisions contained in ss 4 and 5. They are obvious bookkeeping sections. For bookkeeping purposes the time of performance of the service can be supplanted by the time of payment or the time of issuing a tax invoice if that happens before performance (see s 5(1) [i.e. the predecessor of section 6(4) of VATA 1994]) or the date of the tax invoice if it is issued 14 days after performance (see s 5(2) [i.e. the predecessor of section 6(5) of VATA 1994]) or within such other period (see s 5(3) [i.e. the predecessor section 6(6) of VATA 1994]) or event (see s 5(5) [i.e. the predecessor of section 6(10) of VATA 1994]) as the commissioners may direct. For continuous supplies of services under s 5(9) and reg 23, it is by definition necessary to have an accounting device to fix a point in time in the continuum.
>
> In my judgment, ss 1 and 2 determine whether a liability for tax arises and ss 4 and 5, presupposing that there is a liability, determine when, but not whether, the tax is to be charged. The fictions for determining the time of supply for accounting purposes do not in my judgment govern the ordinary meaning of the language in ss 1 and 2 which make supply by a taxable person a prerequisite of liability."

21. In essence, therefore, the case was decided on the basis that "the existence of a chargeable transaction has to be determined at a time when the supply is actually made" (to quote from Staughton LJ), with the time of supply provisions then found in

sections 4 and 5 of the 1983 Act "determin[ing] when, but not whether, the tax is to be charged" (to quote from Ward LJ).

22. The next case to which we were taken was *Customs and Excise Commissioners v Thorn Materials Supply Ltd* [1998] 1 WLR 1106 ("*Thorn*"). There, two subsidiaries of Thorn EMI plc ("Materials" and "Resources") had agreed to sell goods to a third subsidiary ("Home") on the basis that 90% of the price would be paid at once and the balance on completion. Materials, Resources and Home were all members of the same VAT group when the contracts were made, but Materials and Resources had left that group by the time completion took place. Relying on sections 5(1) and 29(1) of the 1983 Act (the predecessors of sections 6(4) and 43(1) of VATA 1994), Materials and Resources argued that VAT was payable on only 10% of the price, not on the 90% paid when they were in the same VAT group as Home. To the extent of 90%, it was said, the supplies were to be treated as having been made when payment was received and, hence, to be disregarded in accordance with section 29(1). In contrast, HMRC maintained that the only relevant supply for VAT purposes was the transfer of property in the goods which occurred when they were delivered, at which stage Materials and Resources no longer belonged to the group.

23. The House of Lords decided by a majority (Lord Hoffmann dissenting) that VAT was payable on the entire price. The main speech was that of Lord Nolan, with whom Lords Browne-Wilkinson and Lloyd agreed. Lord Nolan concluded at 1113:

> "When Materials and Resources left the Thorn E.M.I. Plc. group they emerged into the value added tax world as separate taxable persons, each carrying on its own business for VAT purposes. The delivery of the goods by them to Home undoubtedly constituted a transfer of the whole property in the goods in the course of business. It constituted a supply of the goods within the meaning of paragraph 1(1) of Schedule 2, taxable under section 10(2) upon the amount of the consideration whether already paid or still payable. The appellants' objection that this approach disregards the fact that, to the extent of 90 per cent., the supply was to be treated as having taken place when the advance payment was made must fail because this disregard is precisely what section 29(1) requires. It follows that, in my judgment, the whole value of the supplies in question falls fairly and squarely within the charging provisions of the Act according to the normal principles of construction which should be applied to a taxing statute."

24. While, therefore, section 5(1) of the 1983 Act might provide for the supplies to have taken place as to 90% when the advance payments were made, such supplies fell to be disregarded pursuant to section 29(1).

25. Mr Mantle placed particular reliance on this passage in Lord Nolan's speech at 1113:

> "… I … accept [counsel for Materials and Resources'] further submissions that the time of supply rules, including section 5(1), must be applied to determine whether and if so when a

> supply between members of the same group took place. It is essential to apply the time of supply rules in order to determine whether the supply took place while the group relationship still existed. Unless a supply during the period of the relationship is identified as having taken place there is nothing upon which section 29(1) can bite. One can hardly disregard something which did not happen."

26. Mr Mantle did not go so far as to suggest that this represents binding authority that the time of supply rules now to be found in section 6 of VATA 1994 and regulation 90 of the VAT Regulations "must be applied to determine whether and if so when a supply between members of the same group took place", but he argued that it is strongly persuasive.

27. For her part, Ms Yang stressed an earlier part of Lord Nolan's speech, at 1112, in which he commented on what the position would have been "if the sequence of events in the present case had been reversed, and if the sale agreement and advance payment had taken place before Materials and Home became members of the same group, but the agreement had been completed after that date". Lord Nolan appears to have considered that, in that situation, "any tax charged on the advance payment would fall to be refunded". "The transfer of ownership in the goods, and thus their supply, would duly have taken place," Lord Nolan said, "but this would have to be disregarded under section 29, and so, for the purposes of the charged tax, the chargeable event anticipated by the charge of tax upon the advance payment would have failed to materialise."

28. I have to say that I do not find it easy to reconcile those remarks with the passage quoted in paragraph 25 above. If "the time of supply rules … must be applied to determine whether and if so when a supply between members of the same group took place", it would on the face of it seem to follow that, in a case where the parties to a contract for the sale of goods became members of the same VAT group after an advance payment had been made, the supply should to the extent of that payment be treated as having taken place when the money was paid and, hence, at a time when the parties were not in the same VAT group.

29. It is clear, I think, that Lord Hoffmann did not agree that tax would have fallen to be refunded in a case where the parties to a sale had become members of the same VAT group only after an advance payment had been made. Lord Hoffmann said at 1118:

> "Take the case of a company which agrees to sell goods, receives the whole price in advance, but before the goods are delivered or the property has passed, joins the same group as the buyer. Under the time of supply rules, the whole supply is deemed to have taken place when the price was received and the seller is liable for tax. But the completion of the transaction takes place within the box. If it cannot be seen, there was no supply within the definition of a supply in Schedule 2. Is the seller entitled to repayment of the tax? [Counsel for HMRC] seemed cheerfully willing to accept that he was. But this, too, seems an extraordinary anomaly. On the other hand, a straightforward application of the time of supply rules leads to

> the conclusion that the entire supply took place before the seller joined the group and that nothing therefore happened within the group which requires to be disregarded. If the seller had received 90 per cent. of the price in advance, a supply as to only 10 per cent. would have to be disregarded."

30. Those comments are consistent with the analysis which follows. Lord Hoffmann said at 1118-1119:

> "Paragraph (a) [of section 29(1) of the 1983 Act] requires one to identify a supply which has occurred while the parties were members of the same group. There is in my view no way in which one can identify such a supply except by application of the time of supply rules in sections 4 and 5. There is in the judgment of Beldam L.J. a suggestion that the time of supply rules presuppose that the supply is taxable and therefore cannot apply to a supply which must be disregarded. This in my view is logically impossible and the commissioners did not support it. As I explained earlier, the question of whether a supply is taxable often depends upon the time at which it is treated as having taken place. Thus the question of taxability must be determined by applying the time of supply rules. The only alternative is to use some kind of meta-rules, derived from fairness, common sense and other such concepts lodged in the judicial bosom. This seems to have been the technique used by a majority of the Court of Appeal in *B.J. Rice & Associates v. Customs and Excise Commissioners* [1996] S.T.C. 581. In that case the meta-rules led to the transaction being treated as having occurred at a time when it was not taxable. On the other hand, if the court had concluded that it happened at a time when it was taxable, they would presumably then have applied the time of supply rules, which may have treated it as having occurred at some other time. This cannot be right. The time of supply rules are in my view the only criteria for deciding whether the transaction is to be treated as having occurred at a time when it was taxable."

31. Lord Clyde, the other member of the majority in *Thorn*, recorded at 1121 that it had been "common ground between the parties before us that the provisions in sections 4 and 5 [of the 1983 Act] are of general application for establishing the time of supply whether or not there is a charge".

32. In the third case to which we were taken, *Svenska International plc v Customs and Excise Commissioners* [1999] 1 WLR 769 ("*Svenska*"), a subsidiary of a bank had provided services to a branch of the bank. The subsidiary ("Svenska") and the branch were not members of the same VAT group when the services were rendered, but they had become so by the time Svenska issued an invoice in respect of them. HMRC disputed Svenska's right to recover input tax on goods and services which it had used in providing services for the branch. They argued that the services supplied by the branch to third parties were, pursuant to section 29 of the 1983 Act, to be regarded as

supplied by Svenska (as the VAT group's representative member) so that Svenska was to be considered to have used the supplies to it to make exempt supplies.

33. Lord Hutton, with whom Lords Slynn, Hope and Clyde expressed agreement, explained as follows at 783:

> "[Counsel for Svenska] submitted that article 10 drew a distinction between the 'chargeable event' and the tax becoming 'chargeable,' and that regulation 23(1) related to the time when the tax became 'chargeable' and not to the 'chargeable event,' so that the regulation did not prevent the services in fact supplied by Svenska to the London branch prior to 1 August 1991 being taxable supplies.
>
> [Counsel] also referred to the decision of this House in *Customs and Excise Commissioners v. Thorn Materials Supplies Ltd.* [1998] 1 W.L.R. 1106 and submitted that it established that when the time of 'supply' provisions fixed a supply to take place at a time when the two parties were in a group, that 'supply' should be ignored, but that it did not follow that the delivery of goods or the supply of services which took place between the parties was not a 'taxable supply' chargeable to tax."

34. Lord Hutton did not, however, accept these submissions. He said at 783:

> "In my opinion section 5(9) of the Act of 1983 and regulation 23(1) make it clear that where there is a continuous supply of services, no supply shall be treated as having been made until there has been a payment or a tax invoice has been issued."

35. Distinguishing *Thorn*, Lord Hutton said at 784:

> "In my opinion Svenska cannot derive assistance from that decision. In the *Thorn* case section 29(1) [of the 1983 Act] required the supply which was to be treated as taking place at the time of the payment of 90 per cent. of the price to be disregarded. Therefore there was a supply which took place in the normal way at the time of delivery of the motor cars pursuant to section 4(2)(b). But in the present case Svenska cannot argue that as after 1 August 1991 the supplies provided by it to the London branch are to be disregarded pursuant to section 29(1) because they were members of the same group, the consequence must be that the 'actual supplies' provided by Svenska to the London branch prior to 1 August 1991 can be regarded as supplies for VAT purposes. The reason why Svenska cannot advance this as a valid argument is because the effect of regulation 23(1) is that those 'actual supplies' cannot be treated as supplies for VAT purposes. In short, the distinction between the present case and the *Thorn* case is that in the latter the Act and the Regulations of 1985 permitted the

> delivery of the motor cars to be treated as a supply, whereas in the present case regulation 23(1) prohibits the 'actual supplies' provided by Svenska to the London branch between 1987 and 1 August 1991 being treated as supplies because prior to the latter date no payment had been received and no tax invoice had been issued. Accordingly the present case has to be approached on the basis that, no matter that in fact Svenska supplied services to the London branch prior to 1 August 1991, as a matter of the law governing VAT no supplies were made during the period 1987 to 1 August 1991."

36. The other key authority is *Royal & Sun Alliance Insurance Group plc v Customs and Excise Commissioners* ("*RSA*"). Like *Svenska, RSA* concerned recovery of input tax. Royal & Sun Alliance Insurance Group plc ("RSA") had been charged VAT on the rent and service charges payable in respect of a number of properties of which it was the tenant. In time, RSA itself elected to waive exemption from VAT as regards the properties, and it sought repayment of the VAT it had incurred in periods when it had ceased to occupy the properties but not yet elected to tax its own supplies. The claim was made under regulation 109 of the VAT Regulations on the basis that RSA had incurred input tax with the intention of using the premises in making exempt supplies but had subsequently decided to use them in making taxable supplies. The House of Lords ([2003] UKHL 29, [2003] 1 WLR 1387) ultimately held, by a majority (Lords Woolf and Clyde dissenting), that the claim failed.

37. An important issue in the case was whether what had been supplied to RSA by a superior landlord should be seen as a single supply of the leasehold estate or as involving the grant of "rights of occupation in successive units of months, quarters, or whatever, depending upon the stipulated intervals for payment of the rent" (to use the words of Lord Hoffmann, at paragraph 33). In the High Court ([2000] STC 933), Park J had taken the view that the supplies to RSA during a vacant unelected period were supplies of the same leasehold property as it intended to sublet later as a taxable supply. Park J considered that, as a matter of general principle, "[t]he landlord makes one supply to the tenant, not a succession of different supplies for each rental period" and "VAT law is framed consistently with the proposition that the grant of a lease is one supply, not as many supplies as there are rental periods": see paragraphs 42 and 43. Park J further concluded that regulations 85 and 90 of the VAT Regulations, between which he saw no relevant difference, did not change the position.

38. Regulation 85 of the VAT Regulations provides that, where the grant of a lease is deemed a supply of goods and consideration for it is payable periodically or from time to time:

> "goods shall be treated as separately and successively supplied at the earlier of the following times—
>
> (a) each time that a part of the consideration is received by the supplier, or
>
> (b) each time that the supplier issues a VAT invoice relating to the grant".

Park J said in paragraph 49 that "[a]ll that [regulation 85] is doing is staggering the timing of the single supply so that it is spread over the period while the rents are being paid" and that "it would be a mistake to read the reference to goods being treated as 'separately and successively supplied' as meaning that for all purposes there is, each time that a quarter's rent is paid, a notional separate supply lasting for only three months". In paragraph 50, Park J found confirmation of his analysis in an examination of the statutory power under which regulation 85 had been made. Having noted that the power was conferred by section 6(14) of VATA 1994 and also cited section 6(1), Park J said in paragraph 50:

> "So the section which created the power to make regs 85 and 90 is only dealing with the time of a supply. It is not concerned with the nature of a supply: other sections are, in particular s 5. The regulations should be construed so as to accord with, and remain within the ambit of, the power under which they were made. (For authority in support of this see *B J Rice & Associates v Customs and Excise Comrs* [1996] STC 581, especially the judgment of Ward LJ.) In my view this confirms my conclusion that regs 85 and 90 cannot be used by the commissioners to convert the inputs to RSA into a series of successive inputs, each lasting for only three months and each (if it arose in a vacant unelected period) having expired before it could be used in making future supplies by way of taxable sublettings."

39. The Court of Appeal, by a majority, dismissed an appeal from Park J's decision: [2001] EWCA Civ 1476, [2001] STC 1476. Dissenting, Arden LJ said in paragraph 43 that she "would not accept that reg 85 has to be regarded as limited in such a way that the time of supply rules do not affect the question whether a trader has a right to make a deduction". She went on in paragraph 44:

> "In my judgment the deeming of the time of supply must affect the nature of the supply and thus no valid distinction can be made between (on the one hand) the staggering of the time of supply for the purpose of determining when outputs must be accounted for and when credit can be taken for input tax and (on the other hand) determining what goods and services have been supplied for the purposes of reg 109. For both purposes it is necessary to know whether an input should be treated as related to a specific period. The tailpiece to s 6(14) of the 1994 Act in my judgment would have been unnecessary if power was being taken merely to make rules as to the time of supply without any further substantive effect. That tailpiece is expressly replicated in regs 85 and 90."

In paragraph 48, Arden LJ said:

> "it seems to me in principle that in determining whether tax on a supply is available for deduction against tax for which the trader must account one must, in the context of periodic payments, continue to apply the time of supply rules. There is

> nothing in the regulations or in the Sixth Directive to which our attention has been drawn which indicates that there is a distinction to be drawn here. Nor does the case of *B J Rice & Associates v Customs and Excise Comrs* [1996] STC 581, a decision of this court, on which the judge relied (see [2000] STC 933 at 947, para 50) require this distinction to be made: in that case very different considerations arose because the issue was whether the time of supply rules could result in the imposition of a liability to account for VAT on a person who was not a taxable person at the time he supplied and raised an invoice for the services in question (and in so far as the case is thought to establish any wider restriction on the time of supply rules, see per Lord Hoffmann, dissenting, in *Customs and Excise Comrs v Thorn Material Supply Ltd* [1998] STC 725 at 738, [1998] 1 WLR 1106 at 1119)."

40. In the House of Lords, Lord Hoffmann, with whom Lord Steyn agreed, said that, in his opinion, VAT law viewed leases and licences as involving the superior owner "granting rights of occupation in successive units of months, quarters, or whatever, depending upon the stipulated intervals for payment of the rent": see paragraphs 33 and 34. In paragraph 36, he said:

> "Before the tribunal, it appears to have been regarded as uncontroversial that a lease involves separate and successive supplies of goods or services, so that the goods and services supplied during the vacant unelected period are not the same as those supplied afterwards. There was no reference to regulations 85 and 90 but the submission of counsel for the commissioners to this effect is recorded [1999] V & DR, 336, 354, without further comment. But Park J disagreed. He said [2000] STC 933, 947 that the regulation dealt with 'the time of a supply' but not 'the nature of a supply'. So the supply may take place separately and successively, but the goods or services supplied are nevertheless the same. The majority of the Court of Appeal agreed, although Sedley LJ's acceptance of the proposition may have been influenced by his view that VAT was a world 'in which factual and legal realties are suspended or inverted': [2001] STC 1476, 1490. But I find the notion of the same goods or services being supplied over and over again too hard to grasp. In my opinion the plain effect of the regulations is to treat each successive supply as different from the one before. On this point I agree with the tribunal and Arden LJ."

41. The other member of the majority was Lord Walker, with whom Lord Steyn expressed agreement. Lord Walker said in paragraph 83:

> "In my opinion Arden LJ was correct in her analysis and conclusion as to the scope of section 6(14) and regulation 85. That does not necessarily involve saying that *B J Rice & Associates v Customs and Excise Comrs* was wrongly decided,

> as it was concerned with a different factual situation (an invoice sent to a client before the consultant was registered for VAT). On this point I cannot usefully add more to the observations of my noble and learned friend, Lord Hoffmann, whose opinion I have had the advantage of reading in draft."

The issues

42. Ms Yang advanced contentions founded on, *first*, the fact that section 43(1)(a) of VATA 1994 provides for intra-group supplies to be disregarded and, *secondly*, the provision in the opening words of section 43 for any business carried on by a member of a VAT group to be treated as carried on by the representative member. I shall take these in turn.

The implications of section 43(1)(a)

The parties' cases in outline

43. Section 43(1)(a) of VATA 1994 provides that, where bodies corporate belong to the same VAT group, "any supply of goods or services by a member of the group to another member of the group shall be disregarded" ("the Disregard"). Ms Yang argued that, in consequence, regulation 90 of the VAT Regulations has no application where the real-world supply took place at a time when the parties to it belonged to the same VAT group. As a result of the Disregard, there is no "supply" to which section 6 of VATA 1994 or regulation 90 can apply. Alternatively, even supposing that section 6 and regulation 90 can serve to deem Silverfleet to have supplied its services after it had left the VAT group, the deeming cannot go so far as to create a charge to tax where there would not otherwise be one. In this respect, Ms Yang relied on *B J Rice*.

44. In contrast, Mr Mantle, supporting the UT's decision, argued that the Disregard is relevant only where the parties to a supply were members of the same VAT group at the point at which, applying the time of supply rules in VATA 1994 and the VAT Regulations, the supply is to be treated as having been made. Here, by reason of paragraph 90 of the VAT Regulations, the services which Silverfleet supplied to Prudential are to be considered to have been supplied when the Performance Fees were invoiced, and Silverfleet had by then left the VAT group.

The effect of B J Rice

45. It is convenient to consider *B J Rice* at this stage. A good deal of the argument before us related to the relevance, if any, of that decision to the present case.

46. As I have indicated, *B J Rice* was decided on the basis that the time of supply rules determine "when, but not whether," VAT is chargeable, with the existence of a chargeable transaction falling to be determined "at a time when the supply is actually made". While, however, Mr Mantle did not dispute that *B J Rice* was correct on its facts, he submitted that, having regard to subsequent authorities, it should be interpreted narrowly and, in particular, should not be understood to be in point in the present case. The key difference between this case and *B J Rice*, Mr Mantle said, is that, not yet being registered for VAT, Mr Rice was entirely outside the scope of the VAT system when he made his supplies.

47. The passages from Lord Hoffmann's speech in *Thorn* which I have quoted in paragraphs 29 and 30 above plainly indicate, I think, that he thought the basis on which *B J Rice* had been decided was erroneous. So far as he was concerned, "[t]he time of supply rules are … the only criteria for deciding whether the transaction is to be treated as having occurred at a time when it was taxable", a view reflected in his incredulity at the proposition that tax could be reclaimed in circumstances in which a company had agreed to sell goods, received the whole price in advance, but joined the same group as the buyer before completion. However, there can be no question of Lord Hoffmann's remarks of themselves entitling us to depart from the ratio of *B J Rice.* Not only was he dissenting, but comparison between his approach to the hypothetical case mentioned earlier in this paragraph and the part of Lord Nolan's speech quoted in paragraph 27 above indicates a significant difference between Lord Hoffmann's analysis and that of the majority.

48. At first sight, Lord Nolan's acceptance in *Thorn* that "the time of supply rules, including section 5(1) [now section 6(4) of VATA 1994], must be applied to determine whether and if so when a supply between members of the same group took place" (see paragraph 25 above) does not sit comfortably with the Court of Appeal's reasoning in *B J Rice*. If the role of the time of supply rules is to determine "when, but not whether" VAT is chargeable, how can it be right to apply those rules to determine whether a supply between members of the same group took place? However, (a) it seems to have been common ground in *Thorn* that the predecessor of section 43(1)(a) of VATA 1994 was in point, (b) the correct interpretation of Lord Nolan's remarks is put in doubt by his comments on the availability of a tax refund where a company that has received an advance payment in respect of a sale joins the buyer's VAT group before completion (see paragraphs 27 and 28 above) and (c) Mr Mantle fairly accepted that Lord Nolan's comment is to be seen as "highly persuasive" rather than binding on us. In the circumstances, Lord Nolan's speech does not, I think, provide us with a sufficient reason not to regard ourselves as bound by *B J Rice*.

49. Turning to *Svenska*, it is fair to say, as Ms Yang did, that it involved a situation in which the real-world supply took place between taxable persons *before* they came to be members of the same VAT group and that what was at issue was recovery of input tax. The facts were thus rather different from those of either *Thorn* or *B J Rice*. Further, although *B J Rice* was cited in argument (see 770), there is no reference to it in the speeches. However, the time of supply rules played an important part in Lord Hutton's reasoning. He stated in terms at 783 that "section 5(9) of the Act of 1983 and regulation 23(1) [of the 1985 Regulations] make it clear that where there is a continuous supply of services, no supply shall be treated as having been made until there has been a payment or a tax invoice has been issued" and, at 784, said that "the effect of regulation 23(1) is that those 'actual supplies' cannot be treated as supplies for VAT purposes": see paragraphs 34 and 35 above. While, therefore, in *B J Rice* the Court of Appeal proceeded on the basis that time of supply rules determine "when, but not whether" VAT is chargeable, in *Svenska* Lord Hutton considered that application of what is now regulation 90 of the VAT Regulations prevented the real-world transactions from being treated as supplies at all. That seems to me to imply at least a qualification to the reasoning on which *B J Rice* was decided.

50. There is also, I think, an inconsistency between the ratio of *B J Rice* and that of *RSA*. The majority of the House of Lords in that latter case rejected Park J's view that

regulations 85 and 90 of the VAT Regulations dealt only with "the time of a supply", not "the nature of a supply", and endorsed Arden LJ's analysis to the effect that "the deeming of the time of supply must affect the nature of the supply". Moreover, it appears to me that the majority's conclusions on this point were necessary to their decision. Arden LJ had observed that the "tailpiece to s 6(14) of [VATA 1994] would have been unnecessary if power was being taken merely to make rules as to the time of supply without any further substantive effect" and that that tailpiece was "expressly replicated in regs 85 and 90": see paragraph 39 above. Lord Walker said that he considered Arden LJ to have been "correct in her analysis and conclusion as to the scope of section 6(14) and regulation 85" and Lord Hoffmann said that he agreed with Arden LJ that regulations 85 and 90 had the effect of "treat[ing] each successive supply as different from the one before" (see paragraphs 40 and 41 above), thus accepting that regulations 85 and 90 had significance beyond just timing.

51. Lord Walker explained in *RSA* that his conclusions did "not necessarily involve saying that [*B J Rice*] was wrongly decided" and, as I have mentioned, Mr Mantle did not so contend before us. In the light, however, of *Svenska* and *RSA*, I do not think the ratio of *B J Rice* can be binding on this Court.

52. Ms Yang, however, argued that, even if *B J Rice* is now to be understood as authoritative only in cases where "the time of supply rules could result in the imposition of a liability to account for VAT on a person who was not a taxable person at the time he supplied and raised an invoice for the services in question" (to adopt words of Arden LJ in *RSA*), Silverfleet was not a "taxable person" when it made the supplies at issue in this case. In that context, Ms Yang took us to Case C-162/07 *Ampliscientifica Srl v Ministerio dell'Economia e delle Finanze* [2011] STC 566, where the CJEU said at paragraph 19 of its judgment:

> "the effect of implementing the scheme established in the second sub-paragraph of art 4(4) of the Sixth Directive [i.e. the predecessor of article 11 of the PVD] is that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Thus, where that provision is implemented by a member state, the closely linked person or persons within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of art 4(1) of the Sixth Directive (see, to that effect, *van der Steen v Inspecteur van de Belastingdienst* (Case C-355/06) [2008] STC 2379, [2007] ECR I-8863, para 20). It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations."

In a similar vein, Lord Hodge remarked in *Taylor Clark Leisure plc v Revenue and Customs Commissioners* [2018] UKSC 35, [2018] 1 WLR 3803, at paragraph 22, that,

where there is a VAT group, "the single taxable person is the representative member". Silverfleet having been a member of a VAT group whose representative member was Prudential, Ms Yang submitted, the "single taxable person" was Prudential and Silverfleet "cannot be treated as a taxable person".

53. Unlike, however, Mr Rice, Silverfleet was within the scope of the VAT regime when it made the relevant supplies. Had it not opted to belong to a VAT group, it would have been required to be registered in its own right and so a "taxable person" within the meaning of section 3 of VATA 1994. Having chosen to be a member of a VAT group, intra-group supplies fell to be disregarded and supplies made to outsiders were treated as supplies by Prudential. The fact remains, however, that supplies made by Silverfleet to somebody who was not a member of the VAT group were subject to VAT and, moreover, that Silverfleet, in common with other members of the group, was jointly and severally liable for any VAT due: see the closing words of section 43(1) of VATA 1994. I do not think, therefore, that Silverfleet's position can be equated with that of Mr Rice.

54. In all the circumstances, it seems to me that *B J Rice* is not in the end of any help in the present case. Its ratio can no longer be binding and Silverfleet's situation was by no means identical to that of Mr Rice. I shall therefore turn back to the legislation.

The legislation

55. To echo the UT in paragraph 17 of its decision, section 43 of VATA 1994 and regulation 90 of the VAT Regulations might be said to present something of a chicken and egg problem. If section 43 is applied before paragraph 90, there is no supply to which paragraph 90 can be applied: Silverfleet's supplies to Prudential should be disregarded pursuant to section 43. If, on the other hand, resort is first had to paragraph 90, section 43 would seem to have no application: Silverfleet was not a member of Prudential's VAT group at the time deemed relevant by regulation 90.

56. Ms Yang argued that the role which section 43 of VATA 1994 plays, consistently with article 11 of the PVD, means that this is not appropriately viewed as a chicken and egg question. Section 43, she contended, gives effect to the principle that a transaction between members of a VAT group simply has no existence for VAT purposes. Thus, in *European Commission v Ireland* Advocate General Jääskinen said in paragraph 42 of his opinion that "[t]ransactions between the individual members of the group … are considered as having been carried out by the group for itself" and "[c]onsequently, a VAT group's internal transactions do not exist for VAT purposes". Similarly, in Joined Cases C-108/14 and C-109/14 *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham* [2015] STC 2101 Advocate General Mengozzi said in paragraph 49 of his opinion that "the VAT group's internal transactions, that is to say, transactions effected for consideration between the constituent members, do not exist, in principle, for VAT purposes". Further, in the 2009 Communication the European Commission said, in paragraph 3.4.2, that "the VAT situation of the group and the treatment of its incoming and outgoing transactions are fully comparable to those of a taxable person with different branches".

57. Ms Yang argued that such authorities confirm that, where a real-world transaction has taken place between members of a VAT group, it cannot be considered a chargeable

transaction, regardless of what regulation 90 says about time of supply. Saying, however, that transactions between members of a VAT group "do not exist for VAT purposes" does not seem to me to remove the need to determine the date at which the parties must have belonged to the same group.

58. As Mr Mantle submitted, section 43(1) of VATA has a temporal aspect. It provides that "[w]here … any bodies corporate are treated as members of a group … any supply of goods or services by a member of the group to another member of the group shall be disregarded". That invites the question, "*when* did the supply at issue take place?". The supply will fall to be disregarded if it took place at a time when the parties were members of the same VAT group, but not if it was made at some other time.

59. The question then arises: do the time of supply rules contained in and made under VATA 1994 determine when a supply is to be considered to have been made for the purposes of deciding whether section 43 is in point? On balance, it seems to me that the answer is "Yes".

60. The starting point is that section 6 of VATA 1994 deals on its face with "Time of supply". It is so headed, and section 6(1) states that the provisions of the section apply "for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge for VAT". Further, section 6(14), pursuant to which regulation 90 was made, authorises regulations making provision "with respect to the time at which … a supply is to be treated as taking place" and providing for goods or services "to be treated as separately and successively supplied at prescribed times or intervals".

61. VATA 1994 nowhere states that either section 6 or regulations made under it are not to be applied when deciding whether companies were members of the same group at the time of a supply. Further, there is no indication that "supply" as used in section 43 has any different meaning to "supply" as used in section 6 or in regulation 90 of the VAT Regulations. Moreover, it is apparent from *Thorn* and, especially, *Svenska* and *RSA* that the time of supply rules found in VATA 1994 and the VAT Regulations have consequences beyond merely fixing the time of a supply: see paragraphs 49 to 51 above. On top of that, as can be seen from the passages from *European Commission v Ireland* and the 2009 Communication quoted in paragraphs 13 and 15 above, VAT groups are designed to simplify administration and combat abuses, not to confer any exemption from VAT. Holding that VAT can be payable where the supplier is no longer a member of a VAT group cannot, therefore, be objectionable on the basis that that would serve to deprive the parties of an exemption.

62. The approach for which Mr Mantle contended also has the merit of achieving clarity. The time of supply rules in VATA 1994 and the VAT Regulations provide certainty as to the dates on which companies must belong to the same group for section 43 to apply. If, on the other hand, the applicability of section 43 were to be determined by reference to when the real-world transactions had occurred, the position might be less clear. Mr Mantle illustrated the point by positing a case in which a construction project had involved continuous supplies of services; the supplier had left the VAT group when the bulk of the work had been done but there had been snagging to attend to afterwards; and, under the terms of the contract, there had been no entitlement to any payment until the work had been completed. Citing section 19 of VATA 1994,

Ms Yang countered that cases in which work had straddled a supplier's departure from a VAT group could be addressed through apportionment. Even so, I agree with Mr Mantle that application of the time of supply rules laid down in the legislation gives greater certainty.

63. Ms Yang drew a comparison with branches. In this connection, Ms Yang relied on Advocate General Jääskinen's observation in *European Union v Ireland*, at paragraph 49, that:

> "VAT grouping allows the member states to diminish the influence of VAT on the way economic operators organise themselves. It can do this by reducing the difference in costs between producing a service in-house and buying it from a dependent supplier with separate legal personality. Thus, VAT grouping supports fiscal neutrality by enabling appropriate business structures without negative consequences in terms of VAT liability."

Consistently with that aim, Ms Yang argued, a supply by one branch of a company to another should be treated in the same way as a supply by one company in a VAT group to another. Yet, Ms Yang said, HMRC's approach could generate disparity. An inter-branch supply could never result in liability to VAT whereas a supply by, say, a subsidiary to a parent could do so if the subsidiary left the group before payment was made.

64. I do not find the analogy persuasive, however. The relationships between branches within a company and those between distinct companies within a VAT group are too dissimilar. Where a branch provides another with services, the company might record the matter in accounting records for internal purposes, but no contractual obligation can arise and, having no separate legal personality, neither branch could leave the company as such. The business of a branch could, of course, be transferred to some other legal entity, but the transferee could not inherit a pre-existing entitlement to payment for inter-branch services. Any such claim would have to arise pursuant to the terms of the transfer, not pursuant to a prior contract. The position is quite different where a member of a VAT group leaves: the members of the group will already have their own legal personalities and, in consequence, can already owe contractual obligations to each other.

Conclusion

65. In short, it seems to me that the Disregard is not in point where, as in the present case, regulation 90 of the VAT Regulations provides for the relevant supply to be treated as having been made at a time when the parties were no longer in the same VAT group.

The assumption in the opening words of section 43

66. For a supply of goods or service to be subject to VAT, it must have been made by a taxable person "in the course or furtherance of any business carried on by him": section 4(1) of VATA 1994. The opening words of section 43 provide that, "[w]here … any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member"

("the Assumption"). For so long, therefore, as Silverfleet belonged to the same VAT group as Prudential, any business carried on by the former fell to be treated as carried on by the latter. This has the consequence, Ms Yang argued, that no VAT can be payable on the Performance Fees even if, by reason of regulation 90 of the VAT Regulations, the services for which the Performance Fees were invoiced and paid are treated as having been supplied only after Silverfleet had left Prudential's VAT group. Having regard to the Assumption, Ms Yang submitted, Silverfleet will not be considered to have made the supply in the course or furtherance of any business carried on by it. The business will instead be assumed to have been carried on by Prudential.

67. For his part, Mr Mantle argued that the Assumption makes sense in relation to supplies as between members of a VAT group and third parties but is irrelevant to intra-group supplies. An intra-group supply, he pointed out, will simply fall to be disregarded under section 43(1)(a) of VATA 1994; there is no need to make any assumption as to which company is carrying on the business. Where, in contrast, a supply is made by a member of a VAT group to a third party, or by a third party to such a member, the supply will be "treated as a supply by or to the representative member" in accordance with section 43(1)(b). But for the Assumption, there would have been scope for argument that such supplies were not made in the course or furtherance of any business carried on by the representative member and so were not subject to VAT. The Assumption, Mr Mantle explained, serves to bar such a contention. Mr Mantle cited in this connection a passage from Lord Hoffmann's speech in *Thorn* in which he said, at 1117:

> "The purpose of the assumption is simply to enable any supplies made or deemed to be made by the representative member to be treated as made 'in the course or furtherance of any business carried on by him' and therefore chargeable to tax under section 1. It is quite unnecessary to deduce from the assumption any consequences beyond those which it necessarily entails."

68. Another point that Mr Mantle made was that Ms Yang's submissions, if correct, would produce anomalous results where a member of a VAT group had supplied services to a third party before leaving the group. On Ms Yang's case, the supply would escape VAT if the supplier had been an "ordinary" member of the VAT group because its business would be treated as having been carried on by the representative member and, accordingly, not by the supplier. If, on the other hand, the supplier had been the representative member, VAT would be payable because there would be no question of anyone else having carried on the business.

69. Plainly, there is no reason to suppose that Parliament intended such consequences. Nor, as it appears to me, does article 11 of the PVD provide any justification for adopting Ms Yang's interpretation of the law.

70. The UT said this in paragraph 33 of its decision:

> "The assumption in the opening words of section 43(1) that any business carried on by any group member is carried on by the representative member applies only 'where … any bodies

> corporate are treated as members of a group', in relation to supplies taking place while they are members of the same VAT group. It does not have the effect that in respect of supplies taking place at any time after the supplier has left the group, without time limit, no VAT can arise because during the period of group membership the business was treated as carried on by the representative member."

71. I agree. In my view, regulation 90 of the VAT Regulations is applicable as regards both the Disregard and the Assumption. If, applying the time of supply rules contained in VATA 1994 and the VAT Regulations, a supply was made at a time when the supplier was not a member of a relevant VAT group, it seems to me that section 43 will not be in point. More specifically, if, as in the present case, a member of a VAT group supplies continuous services to another member of the VAT group but leaves it before receiving full payment, the supply will to that extent be deemed to be made when the outstanding amount is invoiced or paid and, the supplier not being a member of the group at that stage, section 43 will not be relevant: the supply will not fall to be disregarded under section 43(1)(a) and the business in the course of which it was made will not be treated as carried on by the group's representative member rather than the actual supplier pursuant to the Assumption.

Overall conclusion

72. I would dismiss the appeal.

Lord Justice Nugee:

73. I am very grateful to Newey LJ for his lucid account of the issues in this appeal and the relevant legislation and authorities. I have found the appeal, which was indeed, as he says, very well argued on both sides, a difficult one to resolve, but I have the misfortune to disagree with his conclusion, and I will try and explain why. I will assume that any reader of this judgment has already read Newey LJ's judgment and will adopt the same abbreviations as him.

74. The central question to my mind is whether the decision of this Court in *B J Rice* requires us to allow Prudential's appeal. That requires answering the following issues: (1) what was the *ratio* of *B J Rice*? (2) if the *ratio* is binding on us does it determine the present appeal, or is it distinguishable? (3) is the *ratio* binding on us?

75. The first two issues can I think be dealt with relatively shortly. So far as the first is concerned, I agree with Newey LJ (see paragraph 21 above) that the basis of Staughton LJ's decision is that "the existence of a chargeable transaction has to be determined at a time when the supply is actually made". To spell this out in a bit more detail, he accepted that section 2 of the 1983 Act required four elements for there to be a chargeable transaction, namely (1) a supply of goods or services in the UK (2) which is taxable (that is, not exempt) (3) by a taxable person (4) in the course or furtherance of a business carried on by him (see at 583d-e); that the second of these (whether the supply is exempt or taxable) fell to be determined at the time of deemed supply rather than actual supply (see at 585g); but that in all other respects (that is elements (1), (3) and (4)) the existence of a taxable supply had to be determined at the time of actual supply.

76. I also agree that the basis of Ward LJ's decision is similar. His conclusion is at 590e which is set out by Newey LJ at paragraph 20 above, and is that the timing provisions in sections 4 and 5 of the 1983 Act "determine when, but not whether, the tax is to be charged" and do not affect sections 1 and 2 which "make supply by a taxable person a prerequisite of liability".

77. So far as the second issue is concerned, if *B J Rice* remains binding on us, then I do not think it is distinguishable and it would follow that the appeal ought to be allowed. There is in the present case no dispute that the supply was "actually made" at a time when Silverfleet was a member of the same VAT group as Prudential, and that section 43(1)(a) of VATA 1994 therefore provides that the supply by Silverfleet to Prudential "shall be disregarded". If it is to be disregarded it cannot be a chargeable transaction. That I did not understand to be contentious: so long as two companies are in the same VAT group, a supply by one to the other does not give rise to a chargeable transaction as they are treated in effect as a single taxable person for VAT purposes and transactions between them are ignored for VAT purposes, being no more chargeable than a transaction between two departments of the same legal entity.

78. If *B J Rice* remains binding on us, in other words, then just as the supply by Mr Rice of services to his client Mr Partridge was not a chargeable transaction when it was actually made (because Mr Rice was not then a taxable person) and did not become one when payment was later made (at a time when he was), so equally the supply by Silverfleet of investment management services to Prudential was not a chargeable transaction when it was actually made (because Silverfleet was then a member of the same VAT group as Prudential and hence section 43 required the supply to be disregarded for VAT purposes) and would by parity of reasoning not become one when payment was later made (at a time when Silverfleet was no longer a member of the VAT group).

79. So the critical question is whether *B J Rice* is binding on us. As a prior decision of this Court, it is binding unless it has been overruled by, or cannot stand with, a subsequent decision of the House of Lords or Supreme Court. (There are other exceptions to the general rule that this Court is bound by its own previous decisions, but none of them applies here.) It is not suggested that *B J Rice* has been expressly overruled. So the question is whether it can stand with the subsequent decisions of the House of Lords to which we were referred, namely *Thorn*, *Svenska* and *RSA*. I will take each in turn. It is of course important to identify what was in issue in each case, what the arguments were, and what the decision was.

80. I can take *Thorn* quite briefly as I agree with Newey LJ. As he says Lord Hoffmann fairly clearly considered that the reasoning in *B J Rice* was wrong, but what he said was in a dissenting speech (see paragraph 47 above). And although what Lord Nolan said seems more promising for the Commissioners, I agree that this does not oblige, or entitle, us to regard *B J Rice* as not binding on us (see paragraph 48 above). Indeed although the arguments of counsel in *Thorn* are not reported, they are succinctly summarised by Lord Nolan at 1110G to 1111A from which it appears that the argument was not over whether the disregard (then provided for by section 29(1)(a) of the 1983 Act in similar terms to section 43(1)(a) of VATA 1994) applied, but was over what the consequences were of such disregard. It seems to have been common ground that the 90% supply which was deemed to have taken place at the time of the advance payments fell to be disregarded, Mr Prosser for the taxpayer submitting that

the effect of the disregard was that the 90% supply was not liable to be taxed and only the remaining 10% supply could be taxed, and Mr Pleming for the commissioners submitting that the effect of the disregard was that the 90% supply should be ignored, so that the actual supply should be taxed as a 100% supply. Neither party's case was inconsistent with the *ratio* of *B J Rice* that the existence of a chargeable transaction has to be determined at the time that the actual supply is made – nor indeed was the decision – as there was no dispute that at the time of actual supply of the goods there *was* a chargeable transaction, the only question being the value of that supply and how that was affected by the disregard.

81. The next case is *Svenska*. Here Svenska, a UK company registered for VAT, acquired goods and services from third parties and paid VAT (input tax) on them. It supplied management services to the London branch of the Swedish bank, and claimed back the input tax attributable to the supplies it intended to make to the London branch pursuant to a regulation (regulation 30(1) of the 1985 regulations) which permitted "the input tax on such … supplies as are wholly used or to be used by [it] in making taxable supplies" to be deducted. But although Svenska in fact supplied management services to the London branch between 1987 and 1 August 1991 at a time when the London branch was not in the same VAT group as it (and hence when such supplies would in principle be taxable), it did not invoice, or receive payment from, the London branch for such management services until 1992 by which time the London branch was in the same VAT group as it (having become a member of the group on 1 August 1991).

82. The decision of the majority, found in the speech of Lord Hutton, can be summarised as follows. The effect of regulation 23 of the 1985 regulations was that the services in fact supplied by Svenska to the London branch were to be treated as supplied in 1992. Since the London branch and Svenska were then in the same VAT group the effect of section 29(1)(a) of the 1983 Act was that such supplies were to be disregarded. That meant that the intended taxable supplies to the London branch were treated as never taking place, and instead any services supplied by the London branch to third parties were to be regarded as supplied by Svenska which was the representative member of the VAT group. Since such supplies included exempt supplies, Svenska was liable to repay to the Commissioners a proportion of the input tax it had claimed to deduct, pursuant to regulation 34 of the 1985 regulations which applied where a person who had been credited with an amount of input tax in respect of a supply attributed to an intended taxable supply "uses or appropriates for use any such … supply in making an exempt supply".

83. Two main submissions were advanced by Mr Milne on behalf of the taxpayer. One was that there was an actual supply of services by Svenska to the London branch between 1987 and 1 August 1991, and that regulation 23, which related to the time at which tax became chargeable and not to the chargeable event, did not prevent the services actually supplied being taxable supplies: see at 782B-E, 783A-B. That was rejected by Lord Hutton on the basis that although there were actual supplies in the pre-group period, those actual supplies could not be treated as supplies for VAT purposes: the effect of regulation 23 was to prohibit the actual supplies being treated as supplies (because there had been no payment received or tax invoice issued) and hence that "as a matter of the law governing VAT no supplies were made during the

period 1987 to 1 August 1991": see at 784G-H, cited by Newey LJ at paragraph 35 above.

84. Is this part of Lord Hutton's judgment inconsistent with the *ratio* of *B J Rice*, such that the latter cannot stand with it? With admittedly some hesitation I do not think it is. The *ratio* of *B J Rice* is that the time of supply rule in regulation 23 does not make a transaction chargeable that was not chargeable at the time of actual supply (subject to an exception in relation to element (2)). In other words if a supply is not a chargeable transaction at the time of actual supply (because one or more of elements (1), (3) and (4) was then missing), regulation 23 does not turn it into one if those elements are all present at the time of deemed supply. What Lord Hutton decided in this part of his decision in *Svenska* is that even if all four elements are present at the time of actual supply, they still do not give rise to a chargeable transaction (a taxable supply) if the effect of regulation 23 is that for VAT purposes the supply is not deemed to happen until a later time by which time the transaction is no longer chargeable (because the parties are by then in the same VAT group). I do not think these two propositions are inconsistent with each other such that they cannot logically both be correct. But unless this can be said, then I do not think we should conclude that *B J Rice* cannot stand with *Svenska*. I accept that the reasoning, in particular the rejection of Mr Milne's submission that regulation 23 is only concerned with timing and not with chargeability, is in tension with some of the reasoning in *B J Rice* – particularly that of Ward LJ – but as I understand it that is not enough. *Svenska* was not concerned with a supply that was not chargeable at the time of supply because one of the requisite elements was then missing; and I do not think it can be said to have impliedly overruled *B J Rice*.

85. Mr Milne's second main submission in *Svenska* was that Svenska had not done anything that could be regarded as a use or appropriation (see at 786B). That was also rejected by Lord Hutton, but has no relevance to the issues in the current appeal and takes matters no further.

86. That then leaves *RSA*. The issue in this case was whether RSA could claim repayment of input tax which it had paid on rent on leases of premises at a time when it intended to sub-let them on exempt subleases. That depended on whether it could bring itself within regulation 109 of the 1995 regulations which required it to have incurred input tax on goods or services with the intention of using them in making exempt supplies and subsequently forming an intention to use "the goods or services concerned" in making taxable supplies. That in turn depended on whether the supply of a leasehold property to RSA by its landlord was (i) a single supply of a leasehold estate in consideration of periodic payments or (ii) a series of successive rights of occupation each quarter: see per Lord Hoffmann at [32]-[33]. Lord Hoffmann considered that VAT law had clearly adopted the second analysis, as the relevant regulations provided that the goods or services were to be treated as separately and successively supplied each time that a payment was made or invoice issued, and he held that the plain effect of the regulations was to treat each successive supply as different from the one before: see at [34]-[36].

87. That conclusion involved a rejection of the view expressed by Park J at first instance. He had said at [50] that section 6 of VATA 1994 was only dealing with the time of a supply and was not concerned with the nature of the supply, and found support for that in *B J Rice*, especially the judgment of Ward LJ. In this Court the majority

followed Park J in treating the relevant supply to RSA as the grant of the lease (see per Aldous LJ at [76]), albeit without reference to *B J Rice*. Arden LJ in her dissenting judgment took a different view, concluding that the deeming of the time of supply in regulation 85 also affected the nature of the supply (see at [44]), such that Park J was wrong to hold that the lease was a single supply, and should have held that the time of supply rules applied in determining, for the purposes of regulation 109, what goods and services had been supplied relative to any input tax which the trader sought to have adjusted (see at [45]). At [48] she said that in determining whether tax on a supply is available for deduction against tax for which the trader must account one must continue to apply the time of supply rules; and that *B J Rice* did not require such a distinction to be made, adding "in that case very different considerations arose because the issue was whether the time of supply rules could result in the imposition of a liability to account for VAT on a person who was not a taxable person at the time he supplied and raised an invoice for the services in question": see the passage cited by Newey LJ at paragraph 39 above.

88. Then in the House of Lords Lord Walker at [83] agreed with Arden LJ's conclusion as to the scope of section 6(14) and regulation 85, adding that this "does not necessarily involve saying that [*B J Rice*] was wrongly decided, as it was concerned with a different factual situation (an invoice sent to a client before the consultant was registered for VAT)": see the passage cited by Newey LJ at paragraph 41 above.

89. I accept that both Lord Hoffmann's speech, and Lord Walker's (with its approval of Arden LJ's conclusion on the scope of regulation 85), proceed on the basis that the time of supply rules such as regulation 85 or regulation 90 of the 1995 regulations can affect not only the time of supply but also the nature of supply. I also accept that this means that the blanket statement by Ward LJ in *B J Rice*, that the time of supply rules are concerned with "when, not whether" VAT is chargeable, can no longer be regarded as authoritative. But I am not persuaded that this means we are at liberty to treat *B J Rice* as no longer binding on us.

90. First it is noticeable that not only was *B J Rice* not overruled or said to be wrong, but both Arden LJ and Lord Walker said that it was a different factual situation and appear to have accepted that it was right on its facts. (Lord Hoffmann did not himself say anything about *B J Rice* at all). *B J Rice* is no doubt not now to be regarded as authority for the wide proposition that the time of supply rules cannot affect the nature of a supply, but as I read both Arden LJ and Lord Walker they regarded it as still justifiable on the basis that if services were supplied (and an invoice raised) at a time when the supplier in question was not a taxable person, the time of supply rules did not have the effect of subsequently imposing liability. And although both Arden LJ and Lord Walker refer to the raising of an invoice, I do not see how that affects the question. If at the time of actual supply of the services the person in question is not registrable, then whether or not he raised an invoice at the time, it would not have been a VAT invoice and I do not see what difference it could make to the VAT position whether he raised a non-VAT invoice. In fact Mr Rice did send Mr Partridge a bill (necessarily not a VAT invoice), but suppose Mr Partridge had told Mr Rice he could not pay before Mr Rice had issued his bill, and Mr Rice had written off the debt without ever formally billing him; the analysis would in that case so far as I can see have been exactly the same. Mr Rice would still have supplied services at a time when he was not a taxable person and the transaction would still not have been

chargeable at the time, and on the basis of the majority's decision, the subsequent payment by Mr Partridge at a time when Mr Rice had become registrable would still not have turned the transaction into a chargeable supply.

91. Second, and in any event, *RSA* was not concerned with whether a transaction that was not chargeable at the time of actual supply could become chargeable through the operation of the time of supply rules. It was concerned with a different question, which is whether the time of supply rules could treat the grant of a lease as a series of separate and successive supplies. The answer given to the latter question is Yes, but that is not inconsistent with the answer to the former question given by this Court in *B J Rice*, such that the decision in *B J Rice* cannot stand with it.

92. I have therefore reached the conclusion that we are not at liberty to treat *B J Rice* as no longer binding on us. For the reasons given earlier I think that means that we are obliged to apply its *ratio* to the effect that if a supply is not a chargeable transaction at the time of supply it does not become one later through the operation of the time of supply rules (subject to the exception in the case of exempt supplies); and in my view it follows that Silverfleet's supply of services to Prudential, being at the time of actual supply an intra-group supply and not chargeable, has not become chargeable through the operation of regulation 90. I would therefore allow its appeal.

Lord Justice Underhill:

93. The primary question in this appeal is whether we are bound by the decision of this Court in *B J Rice.* Newey and Nugee LJJ have reached opposite conclusions on that point. Although I have not found the point straightforward, I agree with Newey LJ that we are not bound. Thanks to the fullness and clarity of their judgments I can state my reasons fairly shortly.

94. The starting point is to define the ratio of *B J Rice*. Staughton LJ's ratio appears at pp. 585-586 and can be summarised as being that the existence of a chargeable transaction has to be determined at a time when the supply is actually made, and that for that purpose the time of supply rules (which I will call "the TOSR", to avoid having to trouble with the different regulations in which they have been embodied over the years) has no application. It is true that the particular circumstance which on the facts of *B J Rice* itself meant that the relevant transaction was not chargeable was that Mr Rice's firm was not registered (or registrable) for VAT at the actual date of supply; but the principle on which Staughton LJ decided the case is entirely general (as appears, among other things, from his endorsement of the reasoning in *Broadwell*¸ which concerned very different facts). Although Ward LJ's judgment is differently expressed, his ratio seems to me substantially the same: see in particular his statement at p. 590e that "[the TOSR], presupposing that there is a liability, determine when, but not whether, the tax is to be charged".

95. I do not think that the ratio of *B J Rice*, so understood, can stand with the dispositive reasoning of the House of Lords in either *Svenska* or *RSA.* I take them in turn.

96. The facts and decision in *Svenska* are succinctly summarised by Newey LJ at paras. 32-33 of his judgment. As there appears, the actual dispute concerned the recoverability of input tax, but that issue ultimately depended on whether there had been a chargeable supply of services. The House of Lords determined that there had

not been by applying the TOSR: these had the effect that the supply in question was deemed, contrary to the fact, to have occurred at a time when the taxpayer was part of a VAT group and accordingly fell to be disregarded. It is true that, as Nugee LJ identifies at para. 84 of his judgment, the situation can be distinguished from that in *B J Rice* because the effect of the application of the TOSR in *Svenska* was to render non-chargeable a transaction which would otherwise have been chargeable, whereas in *B J Rice* the issue was whether they were effective to render chargeable a transaction which otherwise would not have been. He says that for that reason the propositions on which the two decisions depend are not "inconsistent with each other such that they cannot logically both be correct". He acknowledges a tension between the actual reasoning in *Svenska* and in *B J Rice* (in particular that of Ward LJ) but he says that that is not enough, short of actual logical inconsistency between the two outcomes.

97. I respectfully disagree. The proposition with which we are concerned is, straightforwardly, that the TOSR have no application in determining whether a chargeable transaction has occurred: see para. 94 above. I agree with Newey LJ that the passages from the speech of Lord Hutton which he identifies at para. 49, and which are necessary to the decision in *Svenska*, are indeed inconsistent with that proposition, because they apply the TOSR for the purpose of such a determination. I do not believe that it is relevant that the proposition took effect in different ways in the two situations.

98. Turning to *RSA*, I agree that the reasoning of the majority is also inconsistent with the ratio of *B J Rice*, for the reasons given by Newey LJ at para. 50 above. Nugee LJ's contrary view depends on the two points developed at paras. 90 and 91 respectively. I take them in turn.

99. As to the first, Nugee LJ accepts that the effect of the reasoning of the majority, and in particular its approval of the reasoning of Arden LJ in this Court, is that *B J Rice* cannot be regarded as authority for "the wide proposition that the time of supply rules cannot affect the nature of a supply", but he reads it as having approved the decision on the basis that if services were supplied at a time when the supplier in question was not a taxable person, the TOSR did not have the effect of subsequently imposing liability. I am not myself sure that either Arden LJ or Lord Walker went so far as positively to endorse the outcome in *B J Rice*; but I agree that they accepted that it might well be correct on the more limited basis indicated. But if so, that is still enough to undermine its actual ratio: I consider at para. 101 below whether the more limited basis on which it may be justified avails the Appellant in the present case.

100. As to the second, Nugee LJ's point is that the actual issue in *RSA* was whether the grant of a lease gave rise to a series of separate and successive supplies for the purpose of the VAT Regulations: it was not directly concerned with the TOSR at all. That is no doubt so, but the application of the TOSR to determine the chargeability of the supplies was an essential part of the reasoning of Arden LJ and of the majority in the House of Lords.

101. It is for those reasons that I believe that the actual ratio of *B J Rice* has no application in the present case. As for the more limited basis on which Arden LJ and Lord Walker thought it might still be justified, I do not believe that that has any application to the present case, for the reason given by Newey LJ at para. 53 of his judgment: in

short, the effect of applying the TOSR in this case is not to bring within the VAT regime a transaction which would otherwise have been wholly outside it.

102. If, as for those reasons I believe to be the case, we are not bound by *B J Rice*, the question becomes one of construing the words of the legislation without any direct assistance from authority. As to that, I respectfully agree with the reasoning and conclusions of Newey LJ at paras. 55-71 of his judgment.

103. Accordingly, despite the contrary view of Nugee LJ this appeal must be dismissed.