



NCN: [2020] UKFTT 517 (TC)

**TC0993**

**Appeal numbers: TC/2013/06950 & 07332**

*VALUE ADDED TAX – package of supplies of admission to ice skating rink and hire of children's ice skates – whether single standard rated supply or multiple supplies – remittal by Upper Tribunal to find further facts about the options available to purchasers of the package and to reconsider decision at earlier hearing – on basis of facts so found, held that there were two separate supplies – appeals allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE ICE RINK COMPANY LTD  
PLANET ICE (MILTON KEYNES) LTD**

**Appellants**

**- and -**

**THE COMMISSIONERS FOR HER  
MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE RICHARD THOMAS  
SIMON BIRD**

**Sitting in private via video link on 8 and 9 June 2020 treated as taking place in London.**

**Charlotte Brown, instructed by Hopwood VAT, for the Appellants**

**Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

**[This decision has been amended in minor particulars in accordance with rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The changes are in paragraphs 81, 99, 106, 111, 113 and 143.]**

### Introduction

1. This was the second hearing by the First-tier Tribunal (“FTT”) (Judge Richard Thomas and Mr Simon Bird) of appeals by the two appellants (“IRC”). The first hearing took place in Birmingham on 28 and 29 June 2017, where Ms Brown represented IRC, as here, and the respondents (“HMRC”) were represented by Mr Golder, one of their litigators.
2. The decision of the Tribunal released on 20 September 2017 was that IRC succeeded on one out of two grounds put forward. That was sufficient for the appeals to be upheld. HMRC sought leave to appeal to the Upper Tribunal (“UT”) which the FTT denied. HMRC renewed their appeal to the UT and leave was granted (Judge Roger Berner). IRC cross-appealed against the FTT’s dismissal of their second ground of appeal.
3. The hearing before the UT (Judge Jonathan Richards and Judge Jonathan Cannan) took place on 28 February 2019, with Ms Brown representing IRC and Mr Hill HMRC (we assume it was Mr Hill who drafted the application for leave to appeal).
4. On 8 April 2019 the UT released their decision. They overturned the FTT’s decision on the first ground and upheld its decision on the second ground. But although they found an error of law in the FTT’s approach they did not remake the decision. Instead they remitted it to the FTT to find further evidence and to give a new decision. The reasons why they did that and the terms on which they did it are set out below (there was a dispute between the parties as to precisely what the UT required the FTT to do).
5. By a direction made by Judge Thomas the hearing was in private. In fact a private hearing is normally only necessary where the Tax Chamber’s own Video Platform (TVP) is used, as the TVP cannot accommodate many participants. This hearing in fact used the HMCTS Cloud Video Platform which can accommodate larger numbers of participants. Thus it would have been possible to allow a member of the public to watch or listen to the proceedings. In pre Covid-19 times there was no information available to the public about Tax Chamber hearings<sup>1</sup>. Notice of current hearings is now published on the Tax Chamber part of the HMCTS website, including this hearing, so that it was in fact open to any prospective spectator who knew that the FTT had just started to

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<sup>1</sup> Details of hearings of the Tax Chamber would commonly be available in the public area of the hearing venue on the day or perhaps before the day of the hearing, and there may be cases where such information was published on the internet (eg when for a short period there were Tax Chamber hearings in the Royal Courts of Justice in London). But we can say that no one not connected with the parties ever attended a hearing in which either of us sat.

publish such notices to apply to the Tribunal to watch the proceedings, but none in fact did so. In those circumstances we do not consider that our making the hearing private was contrary to the interests of open justice or otherwise failed to comply with the overriding objectives of the Tribunal.

### **The issue**

6. It was common ground that the supply of certain sizes of ice skates by IRC by way of sale or hire in a standalone transaction fell to be treated as zero rated, as it was a supply of articles designed as footwear for young children within Item 1 Group 16 (Clothing and Footwear) in Schedule 8 to the Value Added Tax Act 1994 (“VATA”).

7. The issue dividing the parties was whether section 30 and Schedule 8 VATA applied to zero rate the supply of ice skates where the skates were supplied together with a supply of admission to an ice rink which was admittedly standard rated (“the package”).

### **The law**

8. Nothing turned on any provision of VATA or the EU’s Principal VAT Directive. The issue in the case has however been the subject of several decisions both of the Court of Justice of the European Union (“CJEU”)<sup>2</sup> and the UT. The parties included five such cases in their list of authorities, two of them from the CJEU by HMRC and three (one CJEU and two UT) by IRC. All the cases were concerned with the treatment of packages of more than one supply and in particular whether each supply should be treated as a separate supply or whether there was a single “composite” supply.

9. It is in our view unnecessary to say very much about the cases as the UT considered four of them and made a summary (at [26]) of the principles derived from them as part of its own decision. We start with that summary and add some further material from the cited cases which we think fleshes out some of these principles, while bearing in mind that in [25] and [26] the UT also said:

“[25] In their submissions on *Levob* and *Deutsche Bank* in particular, both parties invited us to draw conclusions from the underlying facts of those cases. ...

26. We regarded such reasoning by analogy as being of limited utility since decisions of the ECJ serve to give guidance on the interpretation of EU law so that their principles, rather than their facts, are relevant. ...”

10. The summary in [26] of the UT decision (“UT Summary”) says:

“(1) The ECJ has not given exhaustive guidance that covers all situations.

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<sup>2</sup> One of the cases cited was heard by the court when it was the European Court of Justice. We use the abbreviation CJEU to cover both.

(2) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(3) Given the nature of the supplies at issue in this appeal, we consider that the *Levob* line of authority<sup>3</sup> is more relevant. Since skating cannot be enjoyed without both access to an ice rink and a pair of ice skates, the question of which element of a skating with skates package is “principal” and which is “ancillary” is unlikely to be of much assistance in determining whether the skating with skates package involves single or multiple supplies.

(4) Therefore, a relevant question in this appeal is whether the constituent elements of a skating with skates package as supplied to a typical customer of that package are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

(5) The question in paragraph (4) above must be answered by reference to all the circumstances in which a supply of skating with skates takes place.

(6) If a typical consumer has a choice as to whether or not to purchase one or more constituents of a skating with skates package, that is a relevant circumstance. If the freedom to choose is genuine and reflects the economic reality of the arrangements between the parties, it will be an important factor<sup>4</sup>.

(7) If a skating with skates package involves a single supply, then the question of whether that single supply is standard-rated or zero-rated would fall to be determined by considering whether the supply of the children’s skates, or the supply of admission to the rinks predominates. However, Ms Brown was not seeking to argue that, if there was a single supply, it was zero-rated and therefore we will not consider this issue any further in this decision.”

11. In relation to UT Summary (1) this is a reference to *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-973 (“*CPP*”) at [27]:

“27....[It] is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.

12. Thus we would say that while UT Summary (1) is a correct statement, what the CJEU actually said was that it was “not possible” to give exhaustive guidance, obviously because the circumstances of each case all of which have to be considered will be different from the others.

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<sup>3</sup> This is a reference to Case C-41/04 *Levob Verzekeringen & OV Bank v Staatssecretaris van Financiën* [2005] ECR I-9433 (“*Levob*”). Before *Levob* the CJEU had decided a case involving a package, Case C-349/96 *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-973 (“*CPP*”) which had determined the case by looking at whether one supply was merely ancillary to the other.

<sup>4</sup> This is derived from, among others, the three cases cited by IRC: *BGŻ Leasing sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie* (Case C-224/11) ECLI:EU:C:2013:15 (“*BGŻ*”); *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 250 (TCC) (“*Middle Temple*”) and *HMRC v Wheels Private Hire Ltd* [2017] UKUT 51 (TCC) (“*Wheels*”).

13. In relation to UT Summary (2) we note that *CPP* at [29] added an explanation for the “no artificial split” rule, repeated in later cases:

“second, ... a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system.”

14. Thus the normal rule, that each supply is separate, is not to be so rigidly adhered to as to make an artificial split in a single composite supply.

15. In relation to UT Summary (4) and the “typical consumer” who made their appearance in *CPP*, the UT itself made the point at [19]:

19. The “typical consumer” is mentioned in paragraph 29 [*of CPP*], not as an arbiter of whether it would be artificial to split a single service into constituent parts, or whether one element of a supply is ancillary to another but rather as an aid to identifying precisely what has been supplied and whether that amounts to a single composite supply or several separate supplies. It therefore necessarily follows that the “typical consumer” must be a recipient of the package of supplies whose characterisation is in dispute, and not simply a general customer of the business.

This last sentence is the point which we got wrong in our decision in the first hearing.

16. *CPP* was a “principal/ancillary” case which this is not, and the UT added at [21]:

“21. Again, the concept of a “typical consumer” is relevant as it focuses attention on what is supplied and whether the elements or acts supplied are so closely linked as to form a single indivisible economic supply. It follows that the points made at [19] apply with necessary adaptations.”

17. UT Summary (6) is the crux of this case and we deal with the competing arguments and how they relate to the case law in our conclusions.

### **Findings of fact: the first decision**

18. Consideration of the evidence presented in this case in accordance with the UT’s remittal, any further findings of fact we make based on that evidence and indeed our decision on those facts need to be seen in the context of the facts we found in the first decision. The UT said that those findings were unchallenged by HMRC on appeal and so stand, and it is convenient to set out the summary of them made by the UT, adding any further clarification where necessary in square brackets.

“4. The Companies were, at all material times registered for VAT and operated ice rinks, though PIMK had ceased trading by the time of the hearing before the FTT.

5. Customers of the Companies could choose:

(1) to hire skates without paying separately to use the Companies’ ice rinks. This option was referred to in the proceedings as “skate hire only”.

For example, a customer could hire skates, take them to a different venue to use them and return them after use. In addition, sometimes a third party, such as an ice-hockey club, might hire the rink for a match. If the match finished early, the Companies would allow the rink to be used by members of the public who were present. The Companies would not charge those members of the public for admission to the rink (since they had already received payment for access to the rink from the club) but the Companies would charge for skate hire.

(2) to pay for admission to the Companies' ice rinks during a particular time window using their own skates. This was referred to in the proceedings as "skating without skates" because although the customers would obviously need skates, they would not be hiring the Companies' skates specifically. We prefer the expression "rink admission only" and will use that expression in this decision.

(3) to buy a package consisting of both admission to the Companies' ice rink during a particular time window and the hire of skates during that window. This was referred to in the proceedings as the "skating with skates" package.

[It is only this "skating with skates" package with which this second hearing is concerned]

(The Companies provided other services to their customers for a fee such as the use of lockers, but these other services are not relevant to this appeal).

6. It appears that the prices the Companies charged varied depending on the day, or time of day. However, the FTT recorded illustrative figures indicating that, in one time window, the charge for skating with skates was £10 and the price for rink admission only was £8. Those figures might suggest that, in that time window at least, the price of skate hire only would be just £2, the difference between the two prices. However, the FTT found at [51] of the Decision that "skate hire only" [our quotation marks] cost much more than this difference because skates taken off-site had to be inspected, and perhaps sharpened, on their return and, at [47] of the Decision found that, in the same time window, "skate hire only" would cost £8.50.

7. If a child was identified as being under 15 and opted for skate hire only or skating with skates, sales personnel would simply select "child" on the till system, but that would not result in a lower price being charged.

8. A single price was charged for the skating with skates package. That price was not broken down into a part relating to admission to the rink and a part relating to the hire of skates. The prices chargeable for the various options were publicised on, for example, the Companies' websites. At [63] of the Decision, the FTT found:

We accept Mr Lloyd's assertions that "It is clear to the customer that skate hire is an optional and additional purchase" and "there is a clear distinction between the skate only option and the option to purchase a skating with skates package" are true of IRC and PIMK.

9. The FTT found that around 45.1% of the Companies' customers owned their own skates, and around 54.9% did not. However, the FTT found that those customers who owned their own skates tended to use the rinks more frequently than those who relied on hiring them from the Companies. Therefore, at [66], the FTT inferred:

It follows ... that while a minority (just) may have their own skates, a majority of visits in any one year will be by those who have their own skates.

10. At [59], the FTT found that the Companies both had shops in their reception areas that sold skates. Therefore, although the FTT did not say so expressly, it was possible that a customer might arrive at a rink without skates intending to purchase a skating with skates package but, on arrival, decide instead to buy a pair of skates and, having done so, pay only for admission to the rink. The FTT was not, however, presented with much evidence as to how common it was for customers to do this, or on matters that might have enabled the FTT to form its own judgement on that issue (for example, the cost of skates in the Companies' shops)."

### **The evidence at this hearing**

19. We had two witness statements from Mr Matthew Lloyd for IRC. The second of these (Mr Lloyd's third overall) was made following HMRC's outline of their case. In that outline HMRC pointed out what they considered to be omissions from the first witness statement and failures to provide the information which the UT had said was necessary for this Tribunal to make a decision and specified points which they would challenge under cross-examination. The outline also effectively contained further evidence from HMRC in rebuttal of Mr Lloyd's points. Accordingly Mr Lloyd sought to address these omissions and challenges in his second statement.

20. Mr Lloyd gave evidence at the first hearing and we said about him then (at [5] to [8]):

“5. Mr Lloyd had in his capacity as consultant designed and introduced community initiatives for the appellants, and had provided services to the appellant using Insight Data. The Insight Data he supplied to us related to ice rinks in the UK as a whole. He also provided evidence about the operation of ice rinks generally, the different uses made of them and about the economics of them.

6. He also described the “customer experience” when attending the ice rinks of the appellants, and his statement on this matter is agreed by Mr Petrouis to be accurate.

7. Mr Lloyd has impressive credentials, being a former paralympian in Ice Sledge Hockey, having a degree in Business Information Systems and being Vice Chairman of Sport Birmingham and Chairman of the British Sledge Hockey Association. He had also written the Sports Development Plan for three of the four national governing Bodies of ice rink using sports.

8. We consider his to be expert evidence of fact and we accept it as relevant and credible. There are opinions in his witness statement and where they related to the law and the matters we have to decide we discount them except to the extent that they were advanced by Ms Brown as the appellant’s submissions where we treat them as just that.”

We say the same about his evidence generally before us in this hearing (though there are instances where we have not been satisfied that inferences Mr Lloyd has drawn from his data are supported by the data).

21. Mr Lloyd presented two types of factual evidence. From the Insight Data there were tables (which he called Schedules) of answers to questions of ice rink users (showing, we assume, the percentage who answered “yes”) and screenshots from websites illustrating the cost of purchasing skates at different outlets or retailers. The wording in italics underneath the tables we have recreated below is what appears in Mr Lloyd’s exhibits to his witness statements as the source and timespan of his figures.

22. In addition to the tables created by Mr Lloyd from Insight Data and the screenshots he exhibited and the conclusions he drew from all of them, he made other statements which amount to speculation and opinion, much of which was challenged by Mr Hill, though not specifically on the basis that it was inadmissible. As at the first hearing, we give Mr Lloyd’s opinions and speculation such weight as we think appropriate having regard to Mr Hill’s criticisms of them.

23. It is we think necessary to set out in some detail what Mr Lloyd’s clearly factual evidence was for this hearing. But first we set out his understanding of the purpose of his witness statements set out at [6] of the first<sup>5</sup>:

“I understand that the remitted appeal is to deal with the narrow question of what the typical consumer of the skate with skate hire package for children think they are getting. In particular, the issue of whether there is a realistic option for those customers between the package and the other options offered by the Appellants. The evidence below seeks to deal with this point.”

24. Our difficulty with this paragraph of his statement is that the first point, whether narrow or not, is not what this hearing is about, except in a general sense. The problem with our decision after the first hearing was that we looked at the supply from the standpoint of the typical customer of IRC, not at the typical consumer of the package. We have no doubt about who the typical consumers of the package are, and Mr Lloyd’s evidence about the attributes of a typical customer<sup>6</sup> do not help us in arriving at our decision in this hearing. Ironically, at [7] of his first witness statement he says:

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<sup>5</sup> For the avoidance of doubt, references after this to Mr Lloyd’s “first” or “second” witness statement are to the first and second for *this* hearing. The notation in those statements used the formula MBL2/ and MBL3/, because they were the second and third statements made in the appeals: the statement for the 2017 hearing using MBL1/.

<sup>6</sup> “Consumer” and “customer” seem to us to be interchangeable terms, and in this decision we tend to follow the usage of the relevant person, be they an individual or a Court/Tribunal.



“There is not a “typical” consumer of the skating with skate hire package for children.”

The second sentence of [6] (quoted in paragraph 23 above) does correctly state the issue in this hearing.

25. [7] to [17] of Mr Lloyd’s first witness statement dealing with his researches into who a typical consumer is are irrelevant to this hearing and we have not considered them except to the extent Mr Lloyd refers to that part of his statement when discussing the options available. This means his Schedule 1 is partly relevant as he refers to it in his “options” section, but his Schedule 2 is not. His Schedule 3 does have relevance to the option issue.

26. Mr Lloyd prefaced his new evidence by saying that the evidence exhibited in his witness statement for the first hearing showed that nearly half of all participants in an ice rink session do not hire skates and that the majority of participants were through sports clubs rather than as members of the public, and of the sports club participants 84% owned their own skates. This evidence was not challenged at the first hearing or before the UT so stands for this hearing.

*Table 1 (Mr Lloyd’s Schedule 1)*

27. In this table we have taken Mr Lloyd’s Schedule 1 and changed the order of the columns of percentages so that they start with category 1 as “first timers” and move to the most frequent category at 6 “at least once a week”. This is because we found Mr Lloyd’s order somewhat confusing. Thus:

Category 1 is “first visit”

Category 2 is “2 or 3 times”

Category 3 is “3 or 4 times a year”

Category 4 is “once a month/every six weeks”

Category 5 is “2 or 3 times a month”

Category 6 is “at least once a week”

Category 7 shows the result for everyone canvassed so includes all the other categories.

We have also simplified the percentage figures, rounding them up or down to the nearest integer rather than using two places of decimals as the table does.

Questions	1	2	3	4	5	6	7
Do you own your own skates?	11	18	25	43	60	83	46
Did you contact the rink or look on the website for times and prices before you visited the rink?	53	60	60	50	44	46	51

Are you aware that you can use your own skates at the rink rather than hiring them?	65	83	83	81	81	92	83
Are you aware that you can buy skates online from retailers such as Amazon and eBay or in person from retailers such as Sports Direct, Tesco's etc.?	57	73	73	69	71	84	73

*Data Taken from May 19 to October 19*

28. Mr Lloyd made the following statements about this table:

(1) It showed that even though ownership of skates increased with frequency of attendance, some regular users would still choose the package.

(2) The majority (53%) of first time customers undertook research before attending a skating session, by contacting the rink or looking at the website for times and prices. For all customers, whatever their frequency, the percentage making prior contact was 51%.

(3) Two-thirds of first time visitors were aware that they had the option of purchasing their own skates.

(4) 83% of people participating in a public session were aware that they could use their own skates rather than hiring them.

(5) 11% of people attending an ice rink (all, not just IRC's) for the first time had their own skates.

(6) A significant number of people did not come again after their first visit.

(7) 57% of those attending a public session at a rink for the first time were aware that skates could be bought from mainstream retailers (including online) and 73% of all users were aware that skates might be purchased online or in store at various retailers.

(8) In his conclusion Mr Lloyd said of his Schedule 1 (Table 1):

“Based on the Insight Data it is clear that customers are aware that that they can take their own skates and that skates are available to purchase from retailers other than the ice rink. As shown in Schedule 1, 82.59% of all customers are aware that they can use their own skates at the rink rather than being obliged to hire them at the rink.”

29. Before the hearing HMRC specifically questioned whether, as the final question in the Table implies, skates could be bought at Tesco and if so at which store. Mr Lloyd's response was:

“On [the] basis [that] the question is seeking to ascertain whether ice rink customers are aware that ice skates can be purchased from mainstream retailers as well as ice sport specialist retailers and in this case, Tesco's is simply being used as an example of a mainstream

retailer (hence the use of the phrase “such as”). It is used as a generic reference within a question to obtain Insight Data and is not intended to be used as a specific retailer.”

Table 2 (Mr Lloyd’s Schedule 3)

30. This table shows admissions figures for the period 1 October 2018 to 1 October 2019. Columns 1 to 6 refer to the figures from each of six different IRC ice rinks. In this table “skate only” means that the customer only paid for admission to the rink and did not hire skates from IRC.

	1	2	3	4	5	6	Average
Adult skate only	7153	958	1928	1640	590	4531	2800
Adult skate with skates	24046	15113	5261	22000	18229	15571	16703
Child skate only	8571	7881	877	11825	11472	4550	7529
Child skate with skates	16354	18202	6538	14602	17555	19788	15507
Total	56124	42154	14604	50067	47846	44440	42359
Adult skate only %	13	2	13	3	1	10	7
Adult skate with skates %	43	36	36	44	38	35	39
Child skate only %	15	19	6	24	10	10	16
Child skate with skates %	29	43	45	29	37	45	38
% of CSS of all child	66	69	88	55	79	82	70

Ice Rink in Area [since]	1960	1991	2007	1984	1965	2012

31. Mr Lloyd said of this table:

- (1) The data shows that the longer an area has had an ice rink the greater the number of transactions would be the child “skate only” option.
- (2) The transactions shown are based on throughput and do not show actual customer numbers, as the same person might go skating multiple times per year. (We take this to mean that this is the number of admissions)

(3) The table shows only the transactions that took place in a publicly accessible session by people seeking to skate on a casual basis. It does not include people who were seeking to skate who obtained admission through membership or multi-use prepaid passes which are exclusive of skate hire, and thus people obtaining access this way would have their own skates.

(4) From the data it is possible to see that the child’s skating with skates package accounted on average for 38% of all public skating sales across the six sites currently operated by IRC.

(5) If the data in Schedule 2 [not shown] is applied to the data in this table it is clear that first time users purchasing the child package represented approximately 9% of the total customers who visited an IRC rink to participate in a public skating session.

*Table 3 (Mr Lloyd’s Schedule 4)*

32. This table shows the distance from the same 6 IRC ice rinks as in Table 2 to different types of skate retailers

	1	2	3	4	5	6
Distance to nearest shop selling ice skates (km) – ie a shop in the rink	0	0	0	0	0	0
Distance to nearest non-specialist shop selling ice skates (km)	2.2	1.3	.3	3.8	7.3	.85
Nearest supermarket (km)	.45	.05	1.6	1	4	.26

*Source Googlemaps*

33. Mr Lloyd says that the distance to the nearest supermarket is important, as ice skates were often a seasonal item for supermarkets to sell and they also provided “click and collect” services for other retailers.

*Table 4 (Mr Lloyd’s Schedule 5)*

34. This table shows sales of children’s skates at the same 6 rinks. “3P” means the shop is operated by a third party, not the appellants.

	1	2	3	4	5	6
Child	3P	7	30	3P	117	132
Adult	3P	11	37	3P	86	96
Total	3P	18	67	3P	203	228

*1st October 2018 until the 30th September 2019*

35. Mr Lloyd says of this data:

(1) The Solihull rink (column 5) was more likely to sell skates from the rink shop due to the distance to the nearest independent retailer, while the Widnes rink (column 6) was likely to sell more because it is a newer rink and it was less likely that there were second-hand skates in circulation in the area.

(2) Since 46% of all users said that they owned their own skates and the total skate sales on site equated to only a small percentage of rink users, it is clear that majority of customers with their own skates chose to source their skates elsewhere than in the rink shops.

#### *Data about retailers and others*

36. Mr Lloyd exhibited data about mainstream retailers of ice skates in his witness statement for the first hearing. In his witness statement for this hearing he exhibited documents which, he said, showed that ice skates were available from websites such as eBay and Gumtree for less than the price difference between skating only and the skating with skates package.

#### *Other statements*

37. Mr Lloyd also made the following (relevant) statements in his first witness statement which we regard as of a purely factual nature or are inferences from the facts:

(1) Ice rinks only had a finite number of skates on site to hire and therefore there would be occasions when a customer was required to buy their own skates if they wanted to participate in a particular session.

(2) As the business model for ice rinks has changed little since the first ice rink opened in London in 1866, customers who had participated in ice skating previously or had done some research were likely to be aware that the hiring of skates was optional and that customers were able to utilise their own skates if they so desired.

(3) If potential customers had done any other research, such as talking to friends, then they were likely to be aware that skate hire was optional and it was also likely, especially in areas which had had an ice rink for a number of years, that friends or family might have ice skates which could have been lent to the first time user.

(4) In all of the rinks the shops were located by the reception so it was clear to customers that skates were available to purchase. The shops stocked ice skates and the accessories required, such as skate guards. They would also stock ice sports specific equipment, such as ice hockey sticks.

(5) There were not different types of ice skate for leisure and for sports use. All ice skates either had an ice hockey blade, a figure skating blade or a speed skate blade although speed skates were not generally available to hire as they are very specialist. In a schedule Mr Lloyd showed diagrams of the different types of ice skates.

*Mr Lloyd's second witness statement*

38. In his second witness statement Mr Lloyd responded to a number of “points of dispute” that HMRC had raised in a letter of 2 April 2020 (which does not seem to have been in our bundle). These were points which HMRC had said they wished to cross-examine Mr Lloyd about, and were included in that letter to indicate why HMRC did not think a video hearing was appropriate.

39. Before addressing the points in dispute, Mr Lloyd made some further statements about children's skates. He said:

(1) Skates were unisex and, although they might be marketed as male or female, in reality hockey skates were often marketed as men's skates and figure skates marketed as women's skates.

(2) Further, most skates were not aimed specifically at an age group and the same model of skates would be sold in both child and adult sizes regardless of how they are marketed. One of his exhibits, he said, clearly showed a pair of skates in a child's size in VAT Notice 714 (size 38, or UK 5) marketed as an adult skate.

(3) In another exhibit he showed an example of a pair of skates for sale on Amazon which were marketed as ‘Women's’ skates but were clearly sized for children (x-small/size 29-32, which are UK junior sizes 11-13.5).

(4) Skates that were intended specifically for children were often adjustable for shoe size as this enabled parents to ensure that the child would be able to continue to use the skates for a period of time regardless of a child's feet growing.

(5) The exhibit referred to in (3) also showed that skates would often be marketed as gender specific using adult gender terms even though the skates were clearly intended to be used by a child.

(6) Retailers would also offer packs which included a number of items applicable to a new skater which were attractively priced, as evidenced in another exhibit. These were clearly marked as unisex and show the pack price started at £21.74 for skates, blades, blade guards and a bag.

40. HMRC had queried whether it was realistic for a typical consumer of the package to buy either online or from an alternative retailer other than the rink shop. Mr Lloyd's response was (including factual statements and inferences only):

(1) ... [O]ver 65% of all first-time customers knew that they could bring their own skates rather than having to hire them from their rink (with this percentage increasing the more often the customers visited). Of that majority of customers, over 53% would have researched their visit in advance. His Schedule 2 [not shown above] provided data specific to the various rinks owned by IRC and showed that 20-31% of customers were first time users of the rinks, meaning that 69-80% will have visited before and have been aware that they are not obliged to hire skates from the rink.

(2) While the data in that Schedule referred to all customers of the rinks and not just the package customers, this data may be extrapolated to apply specifically

to the package customers. Consequently, over 65% of the package customers visiting the rink for the first time would know that they could bring their own skates, over 53% would have researched their visit in advance and in relation to the specific rinks in this appeal, at least 69% would have visited the rinks previously and have been aware that the skating with skate hire package is not the only option available for children wishing to skate.

(3) Package customers were able to purchase skates from an online or other retailer. Schedule 3 [Table 2] shows that 30% of children's skating related to children who brought their own skates (16% of the total customers purchased the skate only option and 38% of all customers purchased the skating with skate hire package. Consequently, the 16% accounts for 30% of all the purchases relating to children).

(4) Children's skates could be purchased from the rink shop or from an alternative retailer (whether online or otherwise). In his previous witness statements, he referred to the ability to purchase skates online or from physical retailers. He had also exhibited distances of the closest retailers to the IRC rinks [Table 3].

(5) Most online retailers could deliver within 24 hours. Purchases from a physical retailer are immediate, subject to stock availability.

(6) Noting that in their Outline of Case HMRC had calculated the percentage of sales of children's skates in the rink shops compared to the sales of the children's skating with skate hire package, he said that the skates bought at rink shops were not representative of the number of skates that were acquired by customers, as the majority of customers were aware that they did not have to hire skates and those that made a choice not to hire skates had opportunities to acquire skates prior to a visit.

41. In cross-examination Mr Lloyd made the point that the skates available for hire were somewhat crude and had received unfavourable comments on Trip Advisor etc with some people calling them "wellington boots on blades". He called them "cheap and cheerful."

42. HMRC had queried how much skates cost in the Appellants' rink shop. Mr Lloyd's response was:

(1) The price of the skates in the shops operated by IRC were competitively priced, starting at around £30 a pair, and in line with prices available in shops or online, although the range might not be as extensive as was available online.

(2) The photo evidence provided by HMRC clearly showed a pair of skates being retailed for £31.00 and a copy of this was exhibited [by him] with the relevant pair of skates and price highlighted by a yellow circle. It was normal for skates for all ages to range from £0 to approximately £700, and they were not gender specific and so, for example, a pair of hockey skates could fit both a teenage male and an adult female.

43. In support of the statement at 42(1), Mr Lloyd exhibited a table showing the price that the appellants sold child skates to customers:

*Table 5 (Mr Lloyd's Exhibit MBL3/7) Ice Skate Shop Prices*

Product Name	IRC Sold Price £	Amazon	Skates.co.uk	Icebox	Demon Extrem	SkateHut
Bauer Supreme 140 – Junior	35.00	51.99				
SBK DK6 Kids	40.00	-				
Graf PK110 Child	45.00	64.99				
Graf Davos Gold Child	48.00		54.95			
Bauer NS Skates Yth	52.00	56.95				
X200 skates Jnr	52.00	54.95				
CCM 1092 Jnr	55.00	45.66				
Graf Bolero Black Junior	62.00	-				
Graf Bolero White – Junior	62.00	75.95				
Nexus NSX Jnr	65.00			59.95		
Bauer Vapor X300 Jnr	75.00	58.82				
Graf 500 Black Child	75.00	99.95				
Graf 500 White Child	75.00	79				
GRAF 101 Kids	80.00				59.95	
Jackson Mystique Jnr	85.00					114.95
Risport Venus Jnr	90.00	99.95				
Edea Motivo Jnr	115.00	149.95				
Edea Overture Child	150.00		189.95			
Bauer Vapor X500 Skates Jnr	151.00	-				

*The above is based upon actual sale price for the model of skates sold to a customer at an IRC rink during October 18-October 19. This does not mean that cheaper or second hand skates were not in stock by IRC rinks, however the best available evidence available was actual sales data.*

*The comparison price provided is based on the advertised price for the same model of skates. Prices were obtained from Amazon.co.uk unless unavailable from that retailer.*

44. Mr Lloyd said of this table:



(1) It showed prices at which the same model was advertised as selling for in May 2020 and that in the majority of cases the IRC shop was cheaper than the online retailer.

(2) It had not been possible to ascertain current stock and prices in IRC shops due to COVID-19, but it was possible to confirm that there have not been any price increases applied to skates sold in IRC shops in 2020.

45. HMRC had asked for the average age of a child receiving a skating with skates package. Mr Lloyd’s response was (including factual statements and inferences only) exhibit MBL3/8 :

*Table 6 (Mr Lloyd’s Exhibit MBL3/8)*

Insight data showing age groups of children attending the rinks who do not own their own skates

Age	Percentage of Respondents
Under 5 (A8)	6.05%
6 -9 (A1)	32.05%
10-13 (A7)	61.89%

*Data: 18/5/2019 – 17/3/2020*

and to comment:

“Based on the Insight Data exhibited at Schedule 7 it can be seen that that age of the average child purchasing the skates with skates package is in the age bracket 10-13, which accounts for 61.89% of all purchasers of the child with skates package based on customers who answered no to the question “Do you own your own skates?” and who also indicated a specific age bracket.”

46. HMRC had asked how frequently the average child enjoying the package visits the Appellants’ ice rinks. Mr Lloyd’s response was to show:

*Table 7 (Mr Lloyd’s Exhibit MBL3/9)*

**Children who don’t own skates**

	Under 5	6-9	10-13	All ages
This is my first visit	45	40	33	36
Only been 2 or 3 times	14	27	27	26
3 or 4 times a year	6	9	12	11

Once a month/every six weeks	3	2	7	5
2 or 3 times a month	6	4	7	6
At least once a week	27	12	12	13
Other	0	5	4	4

### Children who do own skates

	Under 5	6-9	10-13	All ages
This is my first visit	11	4	4	3
Only been 2 or 3 times	4	4	4	4
3 or 4 times a year	0	3	4	3
Once a month/every six weeks	4	4	4	4
2 or 3 times a month	13	4	7	6
At least once a week	57	69	61	63
Other	11	11	18	15

and to comment:

“As shown in MBL3/8 if the average age of a child receiving the skates with skates package is 10-13 then 67.36% of customers who purchase the children’s skating with skate hire package have visited the rink more than once”.

47. HMRC had disputed Mr Lloyd’s statement that “As to the price at which skates can be purchased away from the rink shop, [his exhibit] shows that skates are available ‘for less than the price difference between skating only and the skating with skates package’”. Mr Lloyd’s response was:

- (1) Skates were available to purchase from multiple sources and in multiple ways including pre-owned for a fixed priced, pre-owned though an auction and brand new.
- (2) While auction sites offered both the opportunity to purchase pre-owned fixed price and pre-owned through a competitive auction, there were also local selling sites such as Gumtree where pre-owned skates could be purchased for a

fixed price less than the price of hiring skates, as evidenced in his first witness statement.

(3) That statement showed skates available on Gumtree for free and skates available on eBay at auction starting at less than £1.

(4) HMRC have provided screenshots of the cheapest prices that they could find skates for sale during January 2020 at a number of retailers. These do not take account of auction sales as referred to above.

(5) His exhibits showed skate prices from some of the same retailers during May 2020 which showed that skates were available at cheaper prices than HMRC have identified and at prices which were comparable to the prices evidenced in his witness statement for the first hearing.

48. HMRC had asked how many days before a skating trip the typical consumer of the package decides to go skating. Mr Lloyd's response was (including factual statements and inferences only):

(1) It would be impossible to answer this, and having accessed the Open University library he was clear that there is no academic work that could be used as a basis to develop a method to collect the information or which could give an indicative answer.

(2) IRC had only recently started offering the option for customers to purchase skating in advance (although pricing and options were available online at the time of the transactions in dispute) and an exhibit (MBL3/10) shows that the option to buy online and therefore in advance had not been adopted consistently by customers across all rinks, but it does show the rinks where customers have adopted the practice of buying in advance.

(3) It should be noted that there was no way of counting the number of customers who visited the rink for the first time and then exercised the choice not to purchase any sort of skating product once they became aware that skate hire is not included in the price of entry.

*Table 8 (Mr Lloyd's MBL3/10)*

**Percentage online sales**

	1	2	3	4	5	6
Half term online	249	35	16	226	25	155
Half Term Rink	436	333	145	388	366	220
Percentage online	36	10	10	37	6	41

*Figures are for family tickets bought for half term either in the rink or through a half-term family ticket bought online.*

49. When Mr Lloyd was asked by Mr Hill whether he thought it was an economically sensible decision for a parent to buy skates for say £25 on a first time session when the

hire cost was at most £2 per session, he replied that decisions by parents about how to treat their children and to respond to children's desires were not always taken with economic factors uppermost in their minds.

### **Our findings of fact in this rehearing**

50. So far as it is not speculation or opinion, we accept Mr Lloyd's evidence, particularly his Schedules (our tables) and we find as fact those statements made and inferences drawn by Mr Lloyd which we have set out above and which we list here:

- (1) Those at paragraph 28(1) to (7) in relation to Table 1. As to (8) we would qualify Mr Lloyd's statement to add "most" before "customers".
- (2) Paragraphs 29 and 30 in relation to Table 1.
- (3) Those at paragraph 31(2) to (5) in relation to Table 2.
- (4) That at paragraph 33 in relation to Table 3, though we would substitute "occasionally" for "often".
- (5) Those at paragraph 35 in relation to Table 4.
- (6) Those at paragraph 37.
- (7) In relation to his second witness statement, those at paragraphs 39, 40(1) and (3) to (6), 42 and 44 to 47 inclusive.

51. In relation to paragraph 31(1) we do not think that what Mr Lloyd says is borne out by the figures. For example, rink 4 opened in 1984 (third in the list) has a lower percentage than all the others.

52. In relation to paragraph 40(2) we are unable to see from what was said by Mr Lloyd that the data in 40(1) which applies to all customers of IRC is necessarily the same for package customers only. There is no survey material on package customers alone.

53. In relation to paragraph 41 we had no evidence in the form of actual skates or photographs to show that the hired skates were inferior, but Mr Hill did not seek to challenge the answer nor to be allowed to put forward rebuttal evidence. We therefore accept as correct what Mr Lloyd said.

54. In the statements in paragraph 44, we excluded from our findings Mr Lloyd's inference from the data that the IRC shop prices were competitive. But we nevertheless find from our examination of the table and other material in evidence that IRC shops were competitive, though they stocked a smaller range than many retailers.

55. In relation to paragraph 47 we consider that the statement made by Mr Lloyd described there can only be correct in the most unusual of circumstances, that is where skates are advertised on platforms like eBay and Gumtree for prices like £1 and that is the price at which the auction concluded. We do not accept that what Mr Lloyd said as described at paragraph 47 answers the question posed by HMRC. Realistically it is not a correct statement.

56. After he had made his second witness statement HMRC asked Mr Lloyd for further clarification and disclosure. Mr Lloyd supplied answers where he had them to the requests. We do not find it necessary to relate or summarise what as said, save where we indicate in our discussion below.

57. HMRC also submitted evidence of internet material to demonstrate that certain statements of Mr Lloyd could not be supported by his evidence. We find as fact that that material showed what HMRC claimed. We discuss the significance of both Mr Lloyd's and HMRC's website material where it is necessary to do so in our discussion.

58. We reiterate that the findings of fact made in the first hearing also stand as findings for this hearing (see paragraph 18).

### **Submissions by IRC**

59. In her skeleton Ms Brown set out IRC's position as to the facts and their application as follows:

- (1) The "typical consumer" ("the Consumer") had the option to purchase the package or to bring their own skates and purchase the "skating without skate hire" ("admission only") option if they wanted to skate at IRC's rinks.
- (2) There were separate prices for these two options available on the website and at the rink reception.
- (3) The majority of Consumers were aware of these options before entering IRC's rinks.
- (4) If a potential Consumer exercised the option to purchase admission only, they had to provide their own skates. These could have been obtained from a variety of sources, including:
  - (a) Borrowed from friends or family;
  - (b) Gifted from friends or family;
  - (c) Purchased from online retailers;
  - (d) Purchased from online auction sites;
  - (e) Purchased from physical retailers; and
  - (f) Purchased from a rink shop.
- (5) There were a large variety of styles and price points available for those wishing to purchase children's skates.
- (6) If purchasing online, delivery or collection could be arranged to take place from as short a period as within 24 hours.
- (7) There were a number of stores selling children's skates that were situated in close proximity to IRC's rinks, where the skates may be purchased immediately subject to availability.

(8) The shops at the rinks stocked a selection of children’s skates. Whilst they may not have the variety available online or from large retailers, they were competitively priced.

(9) Statistically, the preferred option was to purchase skates from retailers outside the rink.

(10) Whilst children’s feet continue to grow, the average age of the Consumer is 10-13 and their feet grow approximately one shoe size per year.

(11) Adjustable children’s skates are available to purchase to provide greater longevity.

(12) Skate sharpening is a matter of personal preference and costs approximately £5 - £8. Some retailers offer a free “grind” included in the price of the skates.

60. Ms Brown referred to the UT decision at [26] setting out the legal principles found in *Middle Temple*, and in particular [26(6)] about choice:

“If a typical consumer has a choice as to whether or not to purchase one or more constituents of a skating with skates package, that is a relevant circumstance. If the freedom to choose is genuine and reflects the economic reality of the arrangements between the parties, it will be an important factor.”

and to the UT decision at [19] and [21] about why the Consumer is relevant to the question the FTT needs to decide.

61. She cited in particular the CJEU in *BGŻ* at [35], [36] and [43] to show that even if the two components of a package are connected, such as in that case the supply of a leased item and insurance to cover risks arising from it, that does not in itself determine whether there is a single complex transaction or not, since in the circumstances of that case insurance could be obtained from the insurance company of the Consumer’s choice, not simply *BGŻ*.

62. *BGŻ* she said was followed in *Middle Temple* where at [57] the UT said:

“We consider that [the CJEU decision in *BGŻ*] indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. In our view, [the CJEU decision in *BGŻ* also] shows that, while the ability to choose is an important factor in determining that there is more than one supply, it must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

63. And at [60(10)] as part of its summary of the principles to be applied and at [61]:

“... The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there

must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.”

[61] It appears that the difference between Field Fisher Waterhouse and cases such as Tellmer and BGZ is that in Field Fisher Waterhouse, it is apparent from the questions asked by the referring court that, under the terms of the leases, the tenants had no choice but to receive the services from the landlords. Unlike the tenants in Tellmer and the customers in BGZ, the tenants in Field Fisher Waterhouse had no right or opportunity to obtain the services in question from a third party. In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply.”

64. Although the UT in *Middle Temple* held that there was a single supply of leasing immovable property including a supply of water, that was because the tenants were unable to choose to obtain their water supply from a third party. There was therefore no freedom of choice and the component parts were “inseparable and indispensable”.

65. In *Wheels* the UT endorsed the approach taken in *Middle Temple* where it was not a requirement that the taxi driver take out the insurance offered by the taxpayer despite it being a legal requirement that some insurance was held, but most chose to do so as the cost was competitive.

66. Ms Brown quoted *Wheels* at [26]:

“As the Tribunal noted in *Middle Temple*, it appears that a key distinction between *BGZ* and other cases where there was held to be a single supply was whether the customers had a choice whether to receive all the services from the principal supplier or obtain some services optionally from a third party. It appeared to the Tribunal in *Middle Temple* (and we take the same view) that the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a single composite supply.”

67. Ms Brown stressed the findings in *Middle Temple* and *Wheels* that the existence of a “genuine *contractual* freedom” supported the existence of separate supplies.

68. In relation to the facts in this case and the application of the principles established in the cases to those facts, she submitted that the supply by IRC of the package is a mixed supply and that the original FTT Decision should be upheld.

69. Specifically, in the context of the question of the potential options available to the Consumer, IRC’s position was that that Consumer had a genuine freedom to choose to purchase the constituent parts as a package or separately and this choice reflected the economic reality of the arrangements between the parties.

70. In this context, IRC submitted that “genuine” and “realistic” have their ordinary, everyday meaning.

71. First, the Consumer's freedom of choice is "genuine" in the sense that the Consumer has a true, or real, ability to purchase the component parts separately, free from any contractual obligations to purchase them as a package. Secondly, the option was also realistic in the sense that it existed as a matter of fact and was not artificial.

72. The Consumer clearly had a genuine freedom of choice as to whether or not to purchase one or both constituent parts of the package; whilst a child needs both admission and skates in order to go skating, they are not bound to purchase the package if they want to go skating at IRC's rinks (see *BGŽ* at [35], [36], [43]). They could purchase the Supply, or they could opt for an admission only ticket and use alternative skates to those that may be hired at the rinks. The latter was a genuine option.

73. Further, in addition to there being a genuine freedom to choose, the Consumer was faced with realistic options; these existed as a matter of fact, statistically the option was actually exercised and it was not "within the realms of the artificial" that a potential Consumer would bring their own skates and purchase admission only.

74. As to the evidence of Mr Lloyd it established the genuineness and reality of the option. In particular:

- (1) The options and pricing are shown on the website, and 53% of first time customers have checked them there.
- (2) 89% of all customers and 65% of first timers knew they could bring their own skates to the rink
- (3) 73% of all customers and 65% of first timers were aware that skates could be bought outside the rinks.

75. Ms Brown acknowledged Mr Lloyd's caveat that these statistics referred to customers generally, but said that, as Mr Lloyd had stated, statistically they are equally applicable to the Consumer

76. It followed that the Consumer's options are available to them before they arrive at the rink and the majority of Consumers attending the rink know that the package is not the only option they have. They are not, therefore, restricted to purchasing the package, nor are they restricted to purchasing children's skates from the rink shop as the only alternative to purchasing the package. And if the Consumer is aware of their options in advance, it is realistic that they could:

- (1) purchase children's skates in advance
- (2) bring borrowed or gifted skates
- (3) buy skates from outside the rink from a retailer or online.

and thus exercise their option not to purchase the package.

77. The option is genuine and realistic because:

- (1) 30% of children skating bring their own skates



(2) There is a large variety of skates to purchase suitable for children including adult styles if the size is under the VAT Notice maximum.

(3) There are physical retailers close to the rinks.

78. As to HMRC's point about economic substance, contrasting the cost of cheapest skates generally available in the IRC shops or other retailers and the cost of hire per session, IRC say that children's skates may be purchased at a variety of prices. They may be acquired second hand and those who skate frequently can find it cheaper than hiring them and can be found new from £20.

79. 60% of children aged between 10 and 13 skate at least once a week, so that in a year there is a cost difference of £104 (52 x £2). That difference is enough to allow even more expensive skates and sharpening of blades to be cheaper or not sufficiently dearer than hiring to make such a purchase economically realistic.

80. Even if it were relevant to know, as HMRC insist, how many days before attendance the Consumer decides to go skating, the fact was that skates purchased online can be delivered in 24 hours or by click and collect as well as being purchased instore. As those who bring their own skates prefer to purchase them outside the rink the Consumer had time to make the purchase.

81. And of course the Consumer may buy skates at the rink. IRC agree that the majority of those bringing their own skates will buy them outside the rink. But the prices in the rink shops are competitive, as shown by Table 5.

82. HMRC had sought to explain that the real cost of hiring is much less than £2, because skates need sharpening. Mr Lloyd had said in his witness statement for the first hearing that sharpening would cost a purchaser of skates between £5 and £8, but it was accepted that when skates are hired that cost falls on IRC. Ms Brown said that first "grinds" may be offered as part of the purchase price of skates and that many parents do not have their children's skates sharpened.

83. Ms Brown's submissions on whether the package is a mixed supply were:

(1) There is nothing to displace the rule that "every supply must normally be regarded as distinct and independent" and the essential features are not "so closely linked" that it would be artificial to split them.

(2) While there is a link, as a child cannot go skating without both components, that does not prevent the package from being a mixed supply (see *BGŻ* at [35], [36], [43]).

(3) In the present appeal, the Original FTT Decision already recorded as a matter of fact at [63] that:

"It is clear to the customer that skate hire is an optional and additional purchase" and "there is a clear distinction between the skate only option and the option to purchase a skating with skates package" are true of IRC and PIMK."

This was recorded as a finding of fact at [8] of the UT Decision. Therefore, the Consumer clearly considers that they are receiving two independent supplies.

(4) Objectively, it would not be artificial to split these components. IRC does supply the components separately, with separate pricing, hence the options available to the Consumer. They are therefore physically and economically dissociable.

(5) All of the circumstances of the case (to be considered in determining whether it would be artificial to split the package or not - UT Decision at [26(5)]), include the information available to the Consumer in advance of entering the rink, the different means by which children's skates may be obtained and the statistics showing that children's skates and admission are, as a matter of fact, purchased separately. These support IRC's assertions that the package is a mixed supply.

(6) The Consumer does have a genuine freedom of choice and this reflects the economic reality, as explained in detail. This is an important factor.

84. That Consumer, the typical consumer of the package, has a genuine freedom to choose to purchase the separate components of the Supply. There is nothing to displace the rule that "every supply must normally be regarded as distinct and independent" and the essential features are not "so closely linked" that it would be artificial to split them. From the Typical Consumer's viewpoint, the two components are dissociable, both physically and economically.

### **Submissions by HMRC**

85. Mr Hill submitted that from *Levob* and *Deutsche Bank* it was clear that the typical customer must be a customer of the specific transaction in question.

86. In *Levob*, the customer had acquired pre-existing software which was of no use to it together with a customisation of it for the specific type of consumer. The CJEU said it was not possible, "without entering the realms of the artificial" to take the view that "such a consumer" (i.e. a typical consumer entering into the specific type of transaction in question) "has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it".

87. In *Deutsche Bank* the CJEU decided that a portfolio management service, consisting of two elements (analysis/monitoring of the assets of client investors and purchasing/selling securities) was a single supply. That was because the typical or average investor using that specific service sought "precisely a combination" of the two elements as a single service. The Court reached that conclusion even though in other contexts, other consumers might wish to buy the elements separately. [HMRC's emphasis]

88. The UT was clear as to who the relevant typical consumer was in the present case: it was specifically a consumer who was a recipient of the skating with skates package for their children and not "simply a general customer of [IRC's] business".

89. HMRC accepted that in determining whether a typical customer of the skating with skates package viewed that package as a single supply from an economic point of view, it was relevant that there was an option to purchase skate hire only, or rink admission only, separately from the skating with skates package – but it would only be an important factor “if the freedom to choose is genuine and reflects the economic reality of the arrangements between the parties”.

90. But first, it was necessary to be clear on the significance of other options available to the typical consumer of the skating with skates package. The key point is not whether that consumer had other theoretical options, but whether they were realistic for a typical consumer of that service.

91. IRC had focussed in the outline of their case and in their documentary and witness evidence on whether the customers for the skating with skates package knew that it was optional to hire children’s skates or that they could instead decide to bring their own skates to the rink. The flaw in this argument is that, for the freedom to exercise an option to be genuine and to reflect economic reality, it is not enough for consumers to know that the option exists. It also must be a realistic option – see *Levob* at [24].

92. Secondly, it is necessary to consider which options are available to the customer of the “skating with skates” package. The UT said that “A “typical consumer” of a skating with skates package has, by definition, not purchased either constituent of that package separately

93. The consumer of the package was either a person whose children did not own skates, or who had either forgotten or chosen not to bring them to the rink. The option which such a typical customer had when deciding which service to buy at the rink was between buying the package, or buying new skates at the rink shop. At that point there was no option to buy skates elsewhere from a third party “bricks and mortar” or online retailer.

94. It was that effect of the option to buy skates from the Appellants’ rink shop which the UT remitted. What it could not determine without further evidence was whether it was realistic for typical customers of the package to buy skates at the rink shop instead of renting them as part of the package.

95. It was significant that, before the UT, IRC did not suggest that it would be realistic for a customer of the skating with skates package to buy skates other than from the rink shop. Indeed, [38] of their UT skeleton makes it clear that the focus was on the Appellants’ rink shop:

“...customers of the package could realistically have opted to buy a pair of skates from the rink shop and just purchased admission rather than the package, but they chose not to. This is very different from the cases where the component parts may be supplied separately by third party providers”.

96. That specific issue was what the UT remitted. They referred at [33] to the fact that:

“the FTT might have needed evidence on the price of skates in the Companies’ shops and whether those prices were competitive, and on the number of customers who purchase skates from the Companies each year”

97. The relevance of that particular option was what the UT remitted in [49] and [52] of its decision. IRC’s submission at this hearing moved away from that to consider options before the customers reach the rink.

98. The UT also suggested a number of factual matters that were relevant that we would need to consider:

- (1) How much skates cost in the Appellants’ rink shop.
- (2) Whether those prices were competitive.
- (3) The average age of a child receiving a skating with skates package.
- (4) How frequently the average child enjoying the skating with skates package visits the Companies’ ice rinks.
- (5) How common it was for customers for the skating with skates package to buy skates instead in the rink shop, comparing those customers with the number each year who purchase the skating with skates package.

99. From the factual material available to the parties before the hearing it can be seen that:

- (1) The cheapest skates on the price list in Table 5 are £35.
- (2) The difference in two time-windows between the charge for skating with skates and rink admission only was £2.
- (3) That implies that a child would have to skate more than 17 times with even the cheapest £35 pair of skates for it to be worthwhile for the parents to buy skates rather than rent.
- (4) Added to the purchase price is the cost of maintaining the skates. The FTT has already found that “The cost of sharpening a pair of ice skates varies between £5 and £8”. The cost of maintenance increases the number of times the child would have to skate to make it worthwhile to buy rather than rent.
- (5) None of the skates which IRC sell in their rink shops are adjustable. It is clear from Mr Lloyd’s second witness statement that just over 60% of the children who receive the package are in the 10-13 age range. Those children’s feet are still growing, so that the parent considering whether to buy at the rink shop would know that the child could only wear the skates whilst their feet fitted the particular skate size.
- (6) A child would have to be keen to take up skating as a sport for it to be worthwhile buying skates from the rink shop. But relatively few children who are customers for the package are in that category. A high percentage visit ice rinks infrequently. The majority of the relevant group of customers for the skating with skates package are either “first-timer users who want to see if their

child will like skating before purchasing their own skates” or they are casual customers who simply want to skate occasionally either with their family or other children.

(7) On that basis, it would simply not be worthwhile for the parents of a typical child receiving the skating with skates package to buy skates instead. That was borne out by Mr Lloyd’s Table 4. This shows the number of skates sold in children’s sizes at the rink shops. This can be compared with the number of children’s skating with skates packages sold in the same period – see Table 2. This varies from 7 skate sales as compared to 18,202 packages at Blackburn (ie 0.03% of potential customers of skating with skates opted to buy) and 132 skate sales as compared to 19,788 packages at Widnes (ie 0.66% of potential customers of skating with skates opted to buy)

(8) The only conclusion must be that very few customers buy at the last minute at the rink shops as it is not worthwhile for them to do so.

(9) As to the possibility of customers of the skating with skates package deciding to buy online or at a third party retailer, even if this is relevant (which HMRC do not accept, for the reasons given), it is unrealistic for the typical customer of the skating with skates package to do so – considering again the cost of purchase and maintenance of the skates as compared to the likely number of times that such a customer would be likely to use the skates.

100. Accordingly, the Commissioners submitted that the appellants had not demonstrated that it was realistic for the typical customer of the package to buy skates for their children, rather than to hire them. And so, it would enter “the realms of the artificial” to take the view that the typical customer of the package buys access to the rink and separately hires skates, both from the appellants. Rather, applying *Levob*, both elements are “so closely linked that they form, objectively, a single, economic supply, which it would be artificial to split”.

## Discussion

101. The Upper Tribunal’s remission to us was described in their decision thus at [52]:

“... we are remitting the appeal to the FTT to enable it to find additional facts (relating to the significance of the option referred to at [49]) which it has not previously found.”

102. At [49] it had said:

“... the parties were agreed that ... the existence of the option to purchase skate hire only or rink admission only separately from a skating with skates package was relevant to the question whether there was a single supply. However, they were not agreed on the conclusions to be drawn from the existence of the option: Mr Hill submitted that it was ‘unrealistic’ that a potential customer of a ‘skating with skates’ package would decide, instead to buy a set of skates and having done so, purchase rink admission only, but Ms Brown submitted that the existence of this option was important.”

103. Directions made by the Tribunal on 12 November recited at [2] that:

“The remittal is on the basis that any findings of primary fact made in the FTT’s decision of 20 September 2017 should stand. The remittal will only require the FTT to find additional facts in relation to the possible choice open to customers of the “skating with skates package” to purchase the constituent parts separately.”

104. We have made our findings of primary fact as set out in paragraphs 50 to 57.

105. Although the UT counselled against reasoning by analogy with the decided cases, we think it is a useful exercise to examine what the cases said about the concept of an option given to the typical consumer to choose an alternative method of supply of one of the elements of a package. This is because there can be little doubt that in the cases in question here the CJEU, while paying lip service to the fact that the cases before it were references on a preliminary point and that it was for the national court to consider the circumstances in the light of their guidance, was making it clear what its answer would be had it been deciding the case directly.

106. In *Levob* the Advocate-General, Juliane Kokott, made it clear (at [68]) that in a case where one supply is not subsidiary or ancillary to another (as in *Levob*, but not *CPP*), it could be concluded that necessarily the two supplies cannot be regarded as a single comprehensive supply.

107. She said at [72]:

“The customer could in theory entrust a third party with the task of carrying out the customisation. However, *Levob* did not opt for this approach with good reason, as sharing the tasks between two actors would create legal and practical difficulties. From a legal point of view, it would probably be necessary to obtain the author’s consent in order to modify the program. From a technical point of view, the third party would have to possess the necessary knowledge of the program structure in order to be able to make adaptations.”

108. This can reasonably be construed as saying that the option of using a third party in that case was not a realistic choice.

109. The CJEU itself did not refer to this option, but stressed at [24]:

“... as the Netherlands Government has correctly pointed out, it is not possible, without entering the realms of the artificial, to take the view that such a consumer has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it.

110. In *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) ECLI:EU:C:2012:484 (“*Deutsche Bank*”) the CJEU did not refer to an option as such but said thus:

“24. It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.

25. However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.”

111. In *BGŻ* the CJEU did not require an opinion from the Advocate-General. It stressed at [41] that the normal rule is that each supply is separate and that:

“it must be observed that, as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction.”

despite the fact that the two items are normally supplied together and that the insurance is of no use without the asset which is insured. Then at [43] it refers to an option:

“The fact that insurance covering the leased item is required by the lessor, as appears to be the case in the transaction at issue in the main proceedings, does not invalidate that finding. In particular, it must be observed that, in the circumstances at issue in the main proceedings, if the lessee is required to ensure that the leased item is insured, he has the option of insuring that with the insurance company of his choice. Thus, the requirement for insurance cover cannot, in itself, mean that a supply of insurance by the lessor, such as that at issue in the main proceedings, is indivisible or ancillary to the supply of the leasing services.” [our emphasis]

112. There is no indication in the judgment of the percentage of customers who insured the leased assets with a third party insurer rather than through BGŻ. It seems from [19] that BGŻ obtained insurance from an insurer and invoiced the cost to the customer. Economically that is, we would think, likely to be cheaper or at least no dearer than the separate insurance a customer might opt for.

113. The CJEU at [48] was very plain that:

“... it is clear, a fortiori, from the foregoing considerations and the fact mentioned in para 36 of the present judgment, that the insurance and leasing services at issue in the main proceedings cannot be regarded as being so closely linked that, objectively, they form a single indivisible economic supply which it would be artificial to split, for the purpose of the case law set out in para 30 of this judgment.

114. The “foregoing considerations” included the option to take one own’s insurance, the separate pricing which reflected the interests of the consumers and that the decision about insurance is taken independently of the decision to conclude a leasing agreement. Thus the answer to the question posed by the national court in the *dispositif* at [1] was:

“that the supply of insurance services for a leased item and the supply of the leasing services themselves must, in principal [*sic*], be regarded as a distinct and independent supplies of services for VAT purposes. It is for the referring court to determine whether, having regard to the specific circumstances of the case in the main proceedings, the transactions concerned are so closely linked that they must be regarded as constituting a single supply or whether, to the contrary, they constitute independent services.”

115. In *Middle Temple*, the Upper Tribunal analysed the decision in *BGZ* in depth. At [57] they said:

“At para 43, the CJEU referred to the fact that the lessee does not have to take the insurance offered by BGZ but can insure with the insurance company of its choice. The CJEU stated that this showed that the requirement that the goods are insured does not, in itself, mean that a supply of insurance by the lessor is indivisible or ancillary to the supply of the leasing services. We consider that this indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. The CJEU then referred, at para 45, to the separate pricing and invoicing reflecting the interests of the parties in *BGZ*. The CJEU also stated that the lessee’s decision to obtain insurance from the lessor was made independently of the decision to lease the goods. In our view, this shows that, while the ability to choose is an important factor in determining that there is more than one supply, it must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.”

116. At [60] the UT set out the 12 principles which the UT in this case adapted. One of those was:

“(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.”

And at [61] it went to say:

“It appears that the difference between *Field Fisher Waterhouse* and cases such as *Tellmer* and *BGZ* is that in *Field Fisher Waterhouse*, it is apparent from the questions asked by the referring court that, under the terms of the leases, the tenants had no choice but to receive the services from the landlords. Unlike the tenants in *Tellmer* and the customers in *BGZ*, the tenants in *Field Fisher Waterhouse* had no right or opportunity to obtain the services in question from a third party. In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply.”



The UT decided that there was a single supply, because among other things there was no option at all, no choice for the tenants who had to take both water and premises from the Middle Temple.

117. In *Wheels* the FTT had found at [35]:

“(i) The appellant company runs a taxi-hire business. It provides radio support for customer hire requirements, which it then relays to the drivers.

(ii) Most of the drivers own their own vehicles. However, the appellant hires to other drivers 70-80 vehicles. In addition to rental for the vehicle and a further sum for radio support the drivers may elect to purchase insurance cover from the appellant company to satisfy the RTA’s requirements. It is at a competitive rate and the appellant does not derive any significant profit from providing it. The receipt of any additional sums for insurance cover is accounted for separately by the appellant.”

118. At [22] and [23] of its decision the UT repeated much of what it had said about choice and *BGŻ* in *Middle Temple* (perhaps not surprising as Judge Greg Sinfeld was a judge in both cases). And at [26] it added:

“As the Tribunal noted in *Middle Temple*, it appears that a key distinction between *BGŻ* and other cases where there was held to be a single supply was whether the customers had a choice whether to receive all the services from the principal supplier or obtain some services optionally from a third party. It appeared to the Tribunal in *Middle Temple* (and we take the same view) that the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a single composite supply.”

119. We note that the UT in both *Middle Temple* and *Wheels* refer to the choice to obtain some services from a “third party”. In this case it was IRC’s argument before the UT that the relevant choice was of buying skates from IRC’s shop. IRC is not a “third party” in the normal sense of the phrase, but we note from Mr Lloyd’s evidence (see Table 4 at paragraph 34) that some of the shops in his sample were operated by third parties. We consider it would be too technical a point to say that the option to buy could only count if it was from a third party shop. As a matter of fact in *BGŻ* the option was to go to a third party so it is not surprising that that was the term used there and in the subsequent UT cases we have mentioned. And we also note that Mr Hill did not raise this point.

120. In this hearing IRC argued that it was not only “at the counter” that the question of choice arose, where, in our view, the only possible realistic option would be to purchase in the IRC shops. In the appellants’ view the option had to be considered at the point when a decision was taken by the customer that they or, particularly, their child would like to go skating. In that case, they said, the possibility of purchasing skates on the internet, at a high street retailer or in the IRC shops was open to them.

121. Mr Hill for HMRC emphasised the fact that, before the UT, Ms Brown had only referred to an on-the-spot in-the-rink purchase. That is what her skeleton and response for the UT suggest, though we note at [38] of the response Ms Brown says:

“IRC provided a number of options to customers, so there was a genuine freedom of choice; customers of the package could realistically have opted to buy a pair of skates from the rink shop and just purchased admission rather than the package, but they chose not to.” [Our emphasis]

But she only describes one realistic option, not a number.

122. We do not think this matters. The remittal was to enable us to find facts about the options available and their significance for the overall decision. We do not read the UT decision as in any way limiting our enquiry into options. At [32] the UT gives purchase at the counter as an *example* of choice. In [33], [49] and [52] and in the agreed directions no such limitation is mentioned.

123. And we think it is relevant that IRC, like most suppliers of goods and services to a mass market (though perhaps more slowly than many) are moving to a model where purchasing decisions are made not at a counter but in front of a screen. And as Mr Lloyd’s material has shown, a substantial majority of customers know their options before buying, whether from the internet, from phone enquiries, from friends and relations or from previous experience. We therefore agree with IRC and disagree with HMRC that we are not bound only to consider at-the-counter sales when judging what and how realistic the options are.

124. The first question we ask is whether there is a “genuine contractual freedom”. The answer must be yes: having skates is a necessity to permit admission to the ice, but hiring skates is optional. Actually owning or being in possession of skates is not a precondition of admission. Again we do not think that HMRC seriously argue otherwise.

125. The second question is whether any of the options is a realistic one, rather than one where to contemplate its actual exercise would be to enter the “realms of the artificial”. We have held (at paragraph 55) that an option to acquire skates through an online auction site is not a realistic one. There is far too much uncertainty, as many readers of this decision would no doubt agree. And even if a bid wins there can be substantial uncertainty over delivery.

126. On the other hand we consider that online retailers or bricks and mortar retailers (other than the shops in the rinks) are a realistic alternative source, with this caveat. Both are subject to stock issues, ie whether a suitable skate in the right size etc is actually available, and in the case of an online purchase can be delivered within an appropriate timeframe.

127. IRC shops are also a possible choice when a decision is made before arriving at the rink to skate. It is not necessary to obtain admission to the ice to go to the shop and

buy, and this could be done before the event. And there is the possibility of buying skates from the shops on the day, the example in the UT decision.

128. We also take into account Mr Lloyd's unchallenged statement in his first witness statement (and repeated in cross-examination) that it was quite possible that a person seeking to acquire the package would find that there were no skates for hire of a suitable size available at the time. From this we infer that as well as the option of buying skates from the shop, someone who found that they could not hire skates had the option of not going skating at all.

129. One of the examples given by the UT (at [33]) of evidence that might be needed in this hearing on the question of realism of the options was of how frequently the average child visited the rinks, so that we could gauge whether the outright purchase of skates was a realistic alternative to the package.

130. There is nothing in Mr Lloyd's first witness statement which seems to answer this question. In their "Outline of Case" HMRC point this out. Mr Lloyd's response in his second witness statement says:

"27. As shown in the Insight Data MBL3/9 if the average age of a child receiving the skates with skates package is 10-13 then 67.36% of customers who purchase the children's skating with skate hire package have visited the rink more than once."

131. Exhibit "MBL3/9" is Table 7 at paragraph 46. 67.36% is the total of the percentages in the 10-13 column in the first sub-table, "Children who don't own skates" excluding the 32.64% for whom the visit was their first. In our view this figure cannot be taken to be an answer to the UT's question. Those questioned on their first visits may make further visits. Those who had been only 2 or 3 times might also make further visits. What can be said from the figures is that 11.57% of 10-13 year olds who don't own skates said they visited at least once a week (potentially 52 visits a year) and 6.34% "2 or 3 times a month" (potentially up to 36 visits a year). As one would expect the sub-table for those who do own their own skates shows a much higher percentage skating at least once a week (60.63%).

132. Mr Hill made forceful submissions to the effect that the disparity between the hire cost (the additional amount the package costs over the cost of admission only) and the cost of the cheapest skates in the shops showed that it was simply not a feasible proposition that a parent would choose buying skates. Mr Hill used the figure of £35 for a suitable pair of skates for a child and pointed out that a child would need to attend more than 17 sessions to make the benefit of purchase outweigh the hire costs, and that if the costs of sharpening were taken into account the multiple was much bigger.

133. We agree that for many customers this would be true, taking into account purely economic considerations. But even for the large majority of children who go skating without their own skates and who skate less often than 2 to 3 times a month, the comparison has no regard to the respective quality of the items ("wellington boots"), nor of "pester power", a point made by Mr Lloyd in cross-examination. It is we think relevant to note that the customers in the other cases cited by the parties in relation to

options were themselves in business, not retail customers (B2B not B2C in the VAT jargon) and certainly not children and their parents, and those B2B customers might be expected to consider their choices primarily, but not necessarily exclusively, by reference to a cost/benefit analysis. But even in the situation in *Wheels* or *BGŻ* a customer of the package in those cases might prefer to stick with their own insurer even if it is dearer, for other, “softer”, reasons than pure economics.

134. We do not therefore rule out as unrealistic the options we have described, where the likely minimum cost of skates is around the £25 mark (ignoring special offers etc) and the cost of hire is £2 or less, simply on the basis that no one would realistically exercise the option because of the price disparity. We take judicial knowledge of the fact that parents’ purchases for their children are based on many factors, of which a price comparison is just one, and that many expensive purchases (such as of fancy skates) may languish at the back of a cupboard after one or two uses; or these days they may be recycled using eg online auction sites so as to recoup some of the purchase price.

135. And the Table 7 figures bear this out. 19% of child package users would seem to attend more than 17 times a year, but they do not have their own skates, so their parents or they are not it seems making the best economic choice.

136. Mr Hill also points to the numbers of sales of children’s skates in the IRC shops (Table 4 at paragraph 34) and calculates (and we agree) in the case of two busy and well-established rinks that:

“Even on the assumption that every single pair of children’s skates purchased at the rink shops was by a customer who would otherwise have purchased the skating with skates package (which the Commissioners do not admit), the percentage of children’s skates sales as compared to the sales of children’s skating with skates packages between 1<sup>st</sup> October 2018 and 1<sup>st</sup> October 2019 was [0.66%].”

137. We agree with the point made by HMRC that even these figures are not necessarily limited to customers who would otherwise have purchased the package, and Mr Lloyd accepted in his second witness statement that:

“the total skate sales on site equate to only a small percentage of rink users”

but this is directly relevant only if we are obliged to consider at-the-counter decisions, which we have held we are not.

138. We do not think that Mr Hill’s analysis of Tables 4 and 7 is quite as starkly contrasting as he suggests (paragraph 99(7) above). Nothing in the facts we have found in either hearing nor anything said in the UT decision means that we can only consider the options for purchase or other acquisition of skates on the first occasion on which a child might be a consumer of the package. We have accepted Mr Lloyd’s evidence that the skates for hire are not of the best quality, and it is likely that this is a factor that would affect the continuing acquisition of the package after several uses. If one

assumed that on average a child package customer used the rinks 10 times a year, the shop sales alone would be 6.6%, a not insignificant number.

139. The evidence overall is insufficient for us to be able to say with any precision what the numbers are of package customers who decided at the counter to buy skates from the rink shop<sup>7</sup>, but it is certainly unlikely to be greater and may well be less than the figures Mr Hill referred to in Table 4. Even less can we say with any degree of precision what the number is of package customers who decided to buy skates at other outlets or obtain them from other sources, but given the apparent lack of choice at the rink shops and the unavailability there of adjustable skates (points stressed by HMRC) we would expect the number to be larger.

140. We do not think this insufficiency in the evidence results from the appellants' failing to produce evidence in support of their case that they could have. We do not see what statistical evidence might reasonably have been obtained that would enable us to say with any degree of precision what the numbers of those actually exercising the options we have described in the period in question was.

141. We have therefore considered all the evidence, including the data in the tables and elsewhere, and asked ourselves whether the facts we have found from that evidence enable us to say, on the basis of them, whether it is more likely than not that there were more than insignificant numbers of purchases of skates by customers of the package, more likely than not that the number of purchases of skates from other outlets was greater than from the rink shops and more likely than not that there were more than insignificant numbers of cases where a child without their own skates obtained them from friends or family.

142. We have used the term insignificant here to denote that an option with an insignificant number of takers might reasonably be regarded as unrealistic leading to the conclusion that it would be artificial to split a package. But we do not read the case law as suggesting that there is any bright line here and that an insignificant number of cases where the option was exercised would be bound to be dismissed as *de minimis*. *Wheels* is a case in point. An option might at one extreme not be exercised at all but might still have been a realistic one. On the other hand the option in *Levob* of having the software customised by a third party was not only not taken up but would inevitably have been uneconomic and contrary to good business sense.

143. Our answer to the questions we have posed ourselves is that it is more likely than not that the numbers referred to in paragraph 141 were not insignificant. That in itself enables us to characterise the options as realistic, despite HMRC's point about the disparity in purely economic terms between the costs of hire and of purchase, a point which does not take into account the relative quality of the skates and "pester power". We should make it clear that even if we were limited to considering the options at the counter, we would still find for the appellants on the option issue.

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<sup>7</sup> We completely discount as unrealistic the notion that a customer might at the rink counter decide to go to a retailer in the same town to buy skates.

144. This finding by itself is not decisive. We also need to take into account other facts we found in the first hearing such as that:

(1) there was no separate pricing for the components although the amount by which the package exceeded admission only was obvious to anyone.

(2) either element of the package was available separately, and each taken alone was cheaper than the package.

145. We have also taken into account that this case was unlike those in the parties' authorities in that it was a B2C case; that in most cases the person paying (the parent) was not the person gaining the benefits of the supply (the child). We also note that the two elements of the package consisted of a supply of services (admission) and a supply of goods (hire of skates) and that there was not the connection between them that there was in *BGŻ* between the leasing of an asset and the insurance of that asset.

146. Having taken all these matters into account, we have come to the view that the typical consumer of the package would not regard themselves as receiving a single supply of admission and hire of skates, but two separate supplies and that it would by no means be artificial in this case to split the supply of the package into its two separate components. We are therefore respecting the principle that in general each supply stands on its own.

147. We therefore uphold the appeals.

148. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**RICHARD THOMAS**

**TRIBUNAL JUDGE**

**RELEASE DATE: 27 AUGUST 2020**