Neutral Citation: [2024] UKFTT 00352 (TC) TC09152

Case Number: TC/2018/03180
TC/2021/10172

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

VALUE ADDED TAX – whether certain cosmetic skin treatments exempt under Group 7 of Schedule 9 VATA – item 1 considered – held that treatments were not for the primary purpose of protecting, restoring or maintaining health and so not "medical care" – appeal dismissed

PROCEDURE – whether assessment issued within the time limit set out in s 73(6)(b) VATA – no – appeal upheld

Heard on: 20-24 February 2023
Judgment date: 25 April 2024

Before

TRIBUNAL JUDGE VIMAL TILAKAPALA
SONIA GABLE

Between

GILLIAN GRAHAM T/A SKIN SCIENCE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth of Counsel, instructed by Appleton Richardson & Co

For the Respondents: Sarah Black of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and the remote platform the Tribunal video hearing. The documents to which we referred were included in a hearing bundle of 772 pages and skeleton arguments were submitted by the Appellant and Respondents.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This is a joined appeal by the Appellant, Gillian Graham (trading as Skin Science) against two decisions made by the Respondents (HMRC):

   (a) The first is a decision by HMRC contained in a letter dated 12 January 2018 that the Appellant would be compulsorily registered for VAT in respect of her supplies of skin care treatments (the **First Appeal**).

   (b) The second is a VAT assessment issued on 18 March 2021 for the sum of £212,897 in respect of a single period running from 1 November 2007 to 28 February 2018 (the **Second Appeal**).

4. The Appellant claims that her supplies of skin care treatments are exempt from VAT as they are supplies of medical care. The Appellant contends also that the VAT assessment is out of time and otherwise procedurally invalid.

5. HMRC claim that the supplies are subject to VAT at the standard rate and that the VAT assessment is valid.

Issues for the Tribunal to determine

6. There are three issues for the Tribunal to determine. They are:

   (a) Whether the Appellant's supplies are exempt or standard rated supplies for VAT purposes (the **Liability Issue**).

   (b) Whether the VAT assessment issued on 18 March 2021 (in respect of a prescribed accounting period running from 1 November 2007 – 28 February 2018) was issued within the prescribed time limits (the **Time Limit Issue**).

(c) Whether the VAT assessment is otherwise procedurally invalid (the **Procedural Validity Issue**).

7. The Procedural Validity issue involves consideration of HMRC's ability to create a single VAT accounting period of such a long duration. Before considering this issue the Tribunal must first determine whether it has jurisdiction to do so.

Preliminary issues

8. The Appellant sought to introduce witness statements provided by Dr Ananti Dayah, Louise Walker, Dr John Schetrumph and David Hicks. HMRC objected to the inclusion of these statements and the Appellant agreed at the outset of the hearing that they would not be relied upon. Although included in the hearing bundle these witness statements have not, therefore, been taken into account.

RELEVANT FACTS

9. We made the following findings based on the information contained in the hearing bundle and the oral evidence that we heard. Additional findings of fact are set out where relevant in the discussion relating to the issues that we consider.

Procedural History

(1) In a letter dated 25 April 2017 HMRC wrote to the Appellant explaining that information provided in her self-assessment returns indicated that she had been trading in excess of the VAT registration threshold.

(2) In a letter dated 19 May 2017 the Appellant responded advising HMRC that in her view she did not need to be registered for VAT as she was a registered general nurse and her work consisted of providing medical care for patients.

(3) Following a meeting and further discussions between the parties, HMRC issued a registration decision letter dated 12 January 2018 (the **Registration Decision Letter**) to the Appellant stating that there was insufficient evidence to conclude that her supplies were VAT exempt and they were therefore standard rated. HMRC also advised the Appellant that she would be compulsorily registered for VAT from 1 May 2007.

(4) HMRC formally notified the Appellant in a letter dated 17 January 2018 that she had been registered for VAT with effect from 1 May 2007 (the **Registration Notification**).

(5) Both the Registration Decision and the Registration Notification contained standard HMRC information relating to review and an appeal to the tribunal as well as links to guidance.

(6) Following further correspondence between the parties, the Appellant requested a statutory review of the Registration Decision on 5 February 2018. The review upheld the Registration Decision and date of registration and a review conclusion letter dated 18 April 2018 was sent to the Appellant.

(7) The Appellant notified an appeal against the Registration Decision to the Tribunal on 14 May 2018. This is what we refer to in this judgment as the First Appeal.

(8) As the Appellant had not submitted any VAT returns, HMRC issued a best judgement VAT assessment (the **Prime Assessment**) on 7 September 2018 for the period 1 May 2007 to 28 February 2018 for the sum of £270,648.91.

(9) The parties attempted to settle the dispute through alternative dispute resolution and a meeting was held on 28 November 2018. No resolution was reached.

(10) In an email dated 29 January 2019 HMRC wrote to the Appellant's representative advising that the effective date of registration (**EDR**) should be amended. This was on the basis that Appellant's supplies only became taxable from 1 May 2007 onwards, and so the registration requirement arose only when the registration threshold had been exceeded, which was a later date. The email requested details of the Appellant's monthly sales from 1 May 2007 to enable HMRC to assess when the registration threshold was exceeded.

(11) As no sales figures were received, HMRC used estimated figures based on the turnover declared in the Appellant's self-assessment returns to calculate when she had become liable to be registered for VAT, determining that date to be 30 September. The EDR was accordingly revised to 1 November 2007 and the Appellant notified of this in a letter dated 26 March 2019.

(12) The Appellant appealed the decision to amend the EDR to the Tribunal on 3 May 2019 on the ground that she did not agree that she should be registered for VAT at all.

(13) The Appellant has not disputed that if her supplies are standard rated the revised EDR date and the Registration Decision would be correct.

(14) A hearing of the First Appeal was listed for 19-20 February 2020. This was postponed on the Appellant's application as the Appellant's chosen barrister was not available.

(15) The hearing was re-listed for 1-2 April 2020. This was also postponed on the Appellant's application as the Appellant's representative was not available on the hearing dates as a result of the Covid-19 pandemic.

(16) The Appellant applied to the Tribunal on 16 July and 6 August 2020 to issue witness summons to two HMRC members of staff. On 15 August 2020 these applications were rejected by the Tribunal, and this was confirmed by the Tribunal on 14 October 2020. The Tribunal also declined to order the production of a "statement" by one of the HMRC officers. The objections were on the basis of, *inter alia*, materiality and the fact that some of the evidence requested related to without prejudice discussions between the parties as part of their ADR process.

(17) On 23 October 2020 the Appellant submitted an application to amend her grounds of appeal to add the following ground "the registration date of 1 May 2007, the VAT period from 1 May 2007 to 28 February 2018 and the assessment purportedly made in respect of that VAT period are invalid". The Appellant's argument being that HMRC's decision to create a single prescribed accounting period (**PAP**) running from 2007 to 2018 was invalid as a matter of domestic law and EU law.

(18) The Tribunal asked the Appellant to amend the application to explain the Tribunal's jurisdiction in respect of the additional ground of appeal by reference to s 83 VATA 1994 or otherwise as appropriate. The Appellant served a reply in relation to the jurisdiction point "A's reply Re Jurisdiction" on 22 December 2020.

(19) HMRC objected to the Appellant's application to amend the grounds of appeal on 21 January 2021. However, the preliminary hearing to determine the Application was cancelled as the issues to be decided no longer needed to be determined as a result of events following submission by the Appellant of a nil return on 27 October 2020.

(20) The Appellant submitted a "nil return" on 27 October 2020. This resulted in the Prime Assessment being what HMRC have described as "cancelled" or "superseded".

(21) Following cancellation or superseding of the Prime Assessment, HMRC issued a new assessment on 18 March 2021 (the **2021 Assessmen**t). The Appellant appealed to the Tribunal against the 2021 Assessment on 24 March 2021. This is what we refer to in this judgment as the Second Appeal.

(22) The Tribunal gave a direction on 26 May 2021 for the First Appeal and Second Appeal to be joined.

Facts relating to the Appellant and her business

(23) The Appellant runs a clinic at 10 Harley Street, London under the name "Skin Science". The clinic has been running since October 2001.

(24) Prior to establishing her clinic the Appellant was an intensive care nurse working for the NHS. She worked subsequently for large clinics such as the Harley Medical Group and Transform Medical Group where she was a nurse in the skin care department.

(25) The Appellant is a registered general nurse (**RGN**) and qualified as such in 1994.

(26) As an RGN the Appellant must submit revalidation every three years to the Nursing & Midwifery Council (the **NMC**). The revalidation process requires her to show to the NMC evidence of the scope of her professional practice including; evidence of hours worked, case studies, discussions with other medical professionals to obtain feedback and attending training courses.

(27) The Appellant's realm of practice is disorders of the skin.

(28) The Appellant is, and has since 2011 been, a nurse prescriber. To qualify as a nurse prescriber she attended London Metropolitan University for one year (between 2010 and 2011). Her course involved studying the medication that she would be providing in her realm of practice and sitting exams relating to prescribing.

(29) Although as a nurse prescriber the Appellant can legally prescribe any medicine in the British National Formulary, as a professional matter she is able to only prescribe medicines relating to her realm of practice.

(30) All treatments provided by the Appellant involve the prescription of medicines.

(31) The Appellant is able to prescribe the required medicines only after making an assessment and diagnosis. This is a requirement of the Nursing Code, a set of professional standards published by the Nursing & Midwifery Council with which the Appellant is obliged to comply. Specifically, section 18 of the Nursing Code provides that nurses must "Advise on, prescribe, supply, dispense or administer medicines within the limits of [your] training and competence, the law, our guidance and other relevant policies, guidance and regulations". It was not established whether this amounted to a legal requirement.

(32) Before becoming a nurse prescriber, doctors would prescribe on behalf of the Appellant and the Appellant would administer the treatments. In these cases the Appellant would see the patient and make her nursing diagnosis. The doctor would come in and also assess the patient to make a medical diagnosis before prescribing the medicine he or she thought necessary.

(33) The Appellant has no qualifications in psychology, is not a pyschiatrist and is not a specialist mental health nurse. An RGN's training does, however, include some content relating to psychology. The Appellant considers that this element of her training as a general nurse qualifies her to make diagnoses "under the umbrella of psychological care".

(34) The diagnoses that the Appellant considers herself qualified to make "under the umbrella of psychological care" include a range of conditions including

low self esteem, social isolation, poor body image and anxiety. The Appellant is entirely confident as to her ability to make her diagnoses and to treat the conditions diagnosed. She confirmed several times that she regarded herself as "absolutely qualified" to do so.

(35) Patients generally attend the Appellant's clinic by choice and are not referred to the Appellant by a doctor (whether specialist or general practitioner), or psychologist. Some clients might see the Appellant following referrals from beauticians who may be unable to carry out the treatment required for conditions such as sun damage.

(36) The Appellant states that the "vast majority" of her patients come to her as they are suffering from medical conditions caused by "UV damage".

(37) The treatments that the Appellant provides to her patients are not generally part of a treatment plan which involves other professionals. Although some patients might be undergoing treatment with separate medical specialists, the Appellant would not liaise with those specialists. The Appellant does, however, take into account her clients' other health issues when devising their treatment programmes – this is a requirement of the Nursing Process.

(38) The Appellant could not confirm whether psychiatrists, psychological professionals or doctors would (as she does) prescribe fillers or toxin for the conditions that she diagnoses. She believes however that some of those conditions would be treatable by the National Health Service using fillers or toxin, in certain circumstances. An example of such a circumstance would be where a patient suffering from HIV might receive treatment (using fillers) for facial atrophy if they were suffering from low self-esteem/body image because of the atrophy.

The treatments/what the Appellant actually does

(39) When a patient attends the Appellant's clinic she operates the Nursing Process. This is a method of planning that guides nurses in providing care. The Appellant has described it, in her correspondence with HMRC, as "the Healthcare Treatment Programme, which I use to provide positive health outcomes for all my patients".

(40) The Nursing Process consists of 5 stages:

a. Assessment

b. Diagnosis

c. Planning

d. Implementation

e. Evaluation

(41) The assessment takes the form of an initial consultation with the Appellant which usually takes an hour but can be up to two and a half hours. This is free of charge irrespective of whether she subsequently offers the patient treatment and irrespective of whether the patient chooses to take up the treatment if offered.

(42) The initial consultation involves the completion of a medical questionnaire followed by a physical assessment of the patient's skin.

(43) After the assessment the Appellant will make her diagnosis and may then offer to treat the patient, if she thinks it appropriate.

(44) The Appellant may, on occasion, advise a client to see another healthcare professional if she finds something that she thinks requires medical treatment which she is unable to provide. She would not, however, make the referral herself - it would be up to the patient to seek help. Notes of an HMRC meeting with the Appellant (on 17/8/2017) record her as saying that she would not make specific referrals as she "did not want to leave herself open to any future complaints". The Appellant was only able to give one example of where she had made such a recommendation. The recommendation made was in the case of a patient with active acne and very inflamed skin - here she said that a dermatologist would know more. Under the Nursing Code she is obliged to refer on if she cannot provide the best care.

(45) The diagnoses made by the Appellant are of conditions listed in the World Health Organisation (WHO) international classification of diseases (ICD) or "Recognised Nursing Diagnoses".

(46) The conditions diagnosed by the Appellant include psychological conditions arising from the emotional consequences of what patients are dealing with. The Appellant sees this as within the realms of her practice.

(47) The WHO defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".

Patient details

(48) The Appellant has provided to HMRC 24 patient case studies representing one month of her work in 2014. The case studies are anonymised but set out the Appellant's diagnoses, details of the treatment provided by her and her evaluation of the result. The Appellant has confirmed that the case studies "reflect what she does". The case studies were provided as a representative sample and HMRC has not challenged them nor their representative status.

(49) HMRC has submitted copies of various on-line reviews from a number of the Appellant's patients.

The treatments provided by the Appellant

(50) We were not provided with a comprehensive list of the treatments provided by the Appellant. From correspondence between the Appellant and HMRC and the witness statement of Joseph John White (signed on 04/03/2022) a list of treatments shown as available from the Appellant at the relevant time (together with a verbatim summary of the descriptions provided) was as follows:

Restylane - Restylane replenishes the skin's hyaluronic acid, enhancing lips, smoothing lines, furrows and wrinkles thus helping to erase the signs of ageing. This can also be used for adding volume to cheekbones and any area of the face where volume has been lost.

Pix Cannula [no description]

Teosyal light filling redensity - A new concept treatment between filling injections and mesotherapy, which redensifies your skin deep down and restores its ability to reflect light. This innovation guarantees a uniform and totally natural result.

Muscle relaxing injections - A muscle relaxing injection is injected into certain muscles on the face to relax them, and limit the ability to contract. The purified protein lessens the appearance of wrinkles that result from our daily expressions such as crow's feet, worry lines, frown lines and lip lines. It can also be used to lift the lips and tip of the nose.

Dermal roller - This is a cosmetic hand held device which consists of a roller (containing 192 micro needles) and a handle which is used to treat a range of skin conditions. It is applied to the skin where it stimulates the body into producing collagen and estalin as a repair mechanism. This can help with fine lines, uneven skin, scar tissue and we are researching the treatment of cellulite with this device –watch this space!

Glycolic Acid Peel - The Glycolic Acid Peel treatment is a specific technique for skin renewal. It is ideal for treating and reducing skin damage, lines, dull skin tone, enlarged pores and hyper-pigmentation including age spots. The suggested areas suitable for this treatment are: face, neck, chest and hands.

The (Easy) TCA Peel - The (Easy) TCA Peel will reduce pigmentation and improve ageing skin.

Botox - Relaxes and dramatically improves frown lines, crows feet, transverse forehead lines. Helps soften indented chins and lifts eyebrows, Also can lift the corners of the mouth and soften vertical lip lines. Can also lift tip of nose and tighten jaw line a little.

Belotero Volume -This is beautiful for gentle volumising of the face and cheeks.

Dermal fillers - Dermal fillers naturally and instantly fill out wrinkles, Most areas of the face can be treated. Fillers can fill out lip lines, which are commonly referred to as "smokers lines", frown lines, nose to mouth lines and some types of scars, Fillers can also be used for volumizing [sic] areas of the face, which have started to sag. Having the cheek areas volumized [sic] can have wonderful results.

Full face lift - A Haute Couture treatment result achieved in approx. 3 sittings, This includes 7 syringes of a range of filler products to add volume at the

correct points. A microcannula is used to ensure minimal bruising, reduced paid and no downtime. This extensive treatment of the face is more sophisticated in comparison to a classic wrinkle treatment by injection.

Full face lift package - As above, with the addition of amazing yet natural looking Botox and chemical peels to ultimately finish off the whole process beautifully.

Hollywood Eye Magic Serum - This product INSTANTLY removes puffiness around the lower eye. Natural ingredients. Last 12 hours, for day wear.

Belotero Soft - A nice soft filler which can be used for crow's feet around the eyes and other fine lines.

Sclerotherapy: legs - A treatment for unsightly broken/spider veins on the legs.

TCA Peel - Removes pigmentation and improves ageing skin. Can be used on face, neck, chest and hands.

Dermaroller and Dermastamp with absorption of bespoke skin products for maximum effect - Softens scars, reduces pigmentation, restores firmness and tightness to skin, smoothes wrinkles and lines, improves the appearance of large pores. Face, neck, chest area and hands can all be treated.

Various prices are also given for the treatments offered.

(51) Prescription medicines include: Lidocaine, Botulinum, Scleremo, Zinerate and Tretinoin.

(52) From the case studies, the treatments offered included: fillers, hyalauronic acid, botox/toxin and retinol.

The Liability Issue

10. We deal first with the Liability Issue.

The relevant legislation

11. The relevant legislation is as follows:

Article 132 of Council Directive 2006/112/EC (the Principal VAT Directive or "**PVD**") provides so far as relevant:

Article 132

1 Member States shall exempt the following transactions:

(a) ….

(b) Hospital and medical care and closely related activities undertaken by bodies governed by public law or, under the social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) The provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

Article 132 was implemented into UK law in the Value Added Tax Act 1994 ("**VATA**") as amended by the Value Added Tax (Health and Welfare) Order 2007 SI 2007 No.206 (the "2007 Order") as follows:

31 Exempt Supplies and acquisitions

(1) A supply of goods or services is an exempt supply if it is a description for the time being specified in Schedule 9 and an acquisition of goods from another Member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply.

(2) The Treasury may by order vary that Schedule by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it, and the Schedule may be varied so as to describe a supply of goods by reference to the use to which has been made of them or to other matters unrelated to the characteristics of the goods themselves

Schedule 9 – the Exemptions

Group 7 – health and welfare

Item No

1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following –

(a) the register of medical practitioners ….;

…..

(d) the register of qualified nurses, midwives and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001;

12. The arguments before us on the Liability Issue focus on whether the services provided by the Appellant consist of the provision of medical care falling within the medical care exemption in Item 1 of Group 7. It is for us to determine whether, on the facts as we find them, the exemption applies.

13. The burden of proof is with the Appellant to demonstrate that her treatments constitute the provision of medical care provided by a suitably qualified person for the purpose of the medical care exemption. The standard of proof is the usual civil standard which is the balance of probabilities.

14. The scope of the medical care exemption has been considered in several cases both in the European Court of Justice and domestically.

15. Mr Firth (Counsel for the Appellant) and Ms Black (Counsel for HMRC) have very helpfully taken us through a selection of these cases and drawn our attention to aspects of the cases which they consider material to the issues before us.

Case law principles

16. A number of principles can be identified from the cases brought to our attention and we outline below those principles that we consider relevant.

17. We have not set out the facts of these cases other than where we consider it necessary to do so. This is because the facts have been set out in several other FTT cases such as *Skin Rich Ltd v The Commissioners for HMRC* [2019] UKFTT 514 (TC). It should also be noted that some of the principles mentioned are of course referred to in several of the cases and we have not sought to give all references:

(i) The medical care exemption is to be interpreted strictly as it is an exception to the general principle that VAT should be levied on all services supplied for consideration by a taxable person. Interpretation must, however, not be so restrictive as to deny the objective of the exemption which is to ensure that the benefits of medical care are not hindered by the increased costs of that care if it was subject to VAT - *D'Ambrumenil* C-307/01 at [52]].

(ii) The concept of the "provision of medical care" does not include medical interventions carried out for a purpose other than that of diagnosing, treating and in so far as possible, curing diseases or health disorders. *D&W* [2000] ECR I-6795, *D'Ambrumenil* [57] and *Kugler* ECR I-6833 [38]. This purpose should be the principal purpose of the medical service – *D'Ambrumenil* [60]. It is the purpose of the medical intervention rather than merely the qualifications of the person providing it that is key.

(iii) Although the provision of medical care must have a therapeutic aim and this is the determining factor for it to be exempt, it does not necessarily follow that the therapeutic purpose must be confined within an especially narrow compass – *D'Ambrumenil* [58] referring to *EC Commission v France* [2001] ECR I-249 [23], *Future Health Technologies* [37-38] and *Skatteverket v PFC Clinic AB* (Case C-91/12) [26].

(iv) It is not always easy in individual cases to distinguish medical care within the meaning of the exemption – which is to say medical procedures with a therapeutic aim - from other medical activities. Whether a supply falls within the exemption must be determined on the facts or by reference to the factual context of the transaction - *PFC Clinic* [30 – 32].

(v) Medical interventions of a prophylactic nature can come within the exemption - *D'Ambrumenil* [59].

(vi) Health problems may be psychological, they are not limited to physical problems - *PFC Clinic* [33].

(vii) Where treatment is for purely cosmetic reasons it cannot be within the exemption. Where, however, the purpose of the treatment is to treat or provide care for persons who as a result of illness, injury or a congenital physical impairment are in need of plastic surgery or other cosmetic treatment then this may fall within the concept of medical care - *PFC Clinic* [29].

(viii) When determining the purpose of an intervention, the subjective understanding of the person undergoing the cosmetic treatment is taken into consideration, but that subjective understanding is not in itself decisive in determining whether the intervention has a therapeutic purpose. As this is a

medical assessment it must be based on findings of a medical nature made by a person qualified for that purpose - *PFC Clinic* [34 - 35].

(ix) The fact that services are undertaken by licensed members of the medical profession or where the purpose of the interventions is determined by a professional may influence the assessment of whether the interventions fall within the concept of medical care - *PFC Clinic* [36].

(x) The exemption is limited to medical services supplied by the persons specified in the exemption who must be supplying them in the course of their professions, vocations or businesses - *Evans v Commissioners of Customs and Excise* [1976] VTD 285.

(xi) Consultations which consist of explaining diagnoses and potential therapies as well as suggesting changes to treatment followed, since they enable the person concerned to understand his or her medical situation or as the case may be to take action as a result in particular by taking or not taking particular medication, are likely to have a therapeutic purpose and on that basis to come within the concept of provision of medical care. In contrast, services which consist of communicating information on diseases and therapies but which are not likely as a result of their general nature to contribute to protecting, maintaining or restoring human health cannot come within that concept – *X GmbH* (C-48/19) [31-32].

HMRC's Submissions

18. HMRC contend that the treatments offered by the Appellant are overwhelmingly cosmetic and so do not satisfy the requirements of the medical care exemption. They point out that the burden of proof is with the Appellant to demonstrate that the requirements of the exemption are satisfied and that she has failed to do so. HMRC contend also that the Appellant is not qualified to provide some of the treatments that she offers, specifically those which involve the diagnosis and treatment of psychological conditions.

The Appellant's Submissions

19. The Appellant contends that the requirements for the medical care exemption are satisfied and this is the case for all of the treatments that she provides. She diagnoses recognised medical conditions, provides treatment to address those conditions and is fully

qualified to do so. As all of her treatments are aimed at treating or curing those recognised medical conditions, they inevitably have a therapeutic purpose. Although they may improve the appearance of the patients and in some cases be regarded as inherently cosmetic, this is consequential as the primary purpose is to address an underlying medical condition whether physical or psychological or both. She adds that, in any event, purpose should be determined by a medical professional and not by HMRC.

Discussion

20. We examine the various contentions and make observations before making our overall conclusion.

Initial comments on the Appellant's reliance on ICD Codes and the nursing diagnoses

21. At various times during the hearing the Appellant and Mr Firth suggested that the Appellant's diagnoses are approved by the WHO. There is some confusion here.

22. First, it is the conditions rather than the diagnoses which are recognised by the WHO. The fact that the conditions are recognised does not mean that the diagnoses are approved by the WHO.

23. Second, not all of the Appellant's diagnoses are of WHO recognised conditions. Some of the diagnoses are, as the Appellant acknowledges in her witness statement, "nursing diagnoses".

The WHO ICD codes

24. Our hearing bundle contains a list of specific conditions which the Appellant has diagnosed and the WHO "ICD" reference codes for those conditions.

25. We are aware that the ICD or "international classification of diseases" list is a standardised list of diseases and related health disorders which is produced by the WHO and intended to be used as a basis for health recording and statistics on disease globally.

26. We have not, however, been given any indication as to the status, in the context of UK (or indeed non-UK) medical practice, of the list or the conditions identified. In short, we cannot assess whether or how the ICD codes and the conditions referenced are used in medical practice.

27. We also note in this regard the WHO definition of "health" which is set out in the Appellant's witness statement. This is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".

28. We do not comment on the merits of this definition but we recognise that by stating that it goes beyond "the absence of disease and infirmity" and by including "social well-being" it is broad.

29. As with the ICD codes, we have not heard evidence on the extent to which this definition is used or is an accepted definition in the context of UK (or non-UK) medical practice.

30. This is an important issue as acceptance of the definition would in effect set the parameters of the medical care exemption given that the exemption applies to medical interventions carried out for the purpose of "diagnosing, treating and if possible curing diseases and health disorders" (*D&W*, *Kugler*, *D'Ambrumenil*).

31. We note also that if the WHO definition of "health" is an appropriate definition in the context of UK medical practice, it might be necessary to consider its compatibility with the medical care exemption in more detail. This is because the case law to which we have been referred does not consider expressly the application of the exemption to "social well-being". There is therefore a potential boundary issue dependent on interpretation of the ECJ's reference to "diseases and health disorders" in the context of the exemption (see for example *D'Ambrumenil* at [57]).

32. Without hearing evidence and argument on the point, it is not an issue which is readily capable of determination by us. It is not possible for us to make any inference from what has been made available to us.

The Nursing Diagnoses

33. The Appellant refers in her witness statement to the "nursing diagnosis list" an extract of which has been included in the hearing bundle.

34. Again, we observe here that no evidence has been provided as to the status of this list, its provenance or its acceptance in medical practice. The extracted pages simply reference "nurselabs.com" and are printed off from a google search.

35. As with the WHO ICD codes, we cannot infer that all of the nursing diagnoses are inevitably recognised as medical conditions for the purposes of the medical exemption.

The diagnoses made by the Appellant

36. The diagnoses contained in the Case Studies show a high degree of uniformity (the codes referred to below are the ICD codes provided by the Appellant).

37. All but four of the clients have been diagnosed with: Code L 57 “chronic effects of UV radiation on the skin”.

38. All but one of the clients have been diagnosed with either (or in some cases both) Code L 98.8 or 98.9 “disorder of the skin and subcutaneous tissue” or “unspecified disorder of the skin or subcutaneous tissue” respectively.

39. These seem to us to be broad categorisations and the Appellant provides limited, and in some cases no, additional information in relation to them. Where additional information is given it appears fairly generic. In the case of the L57 diagnoses the reasons seem to be primarily “sun exposure”. For the L98.8 and L98.9 diagnoses more varied reasons are given but they again appear to us to be fairly generic: “UV radiation and photodamage” feature in 15 of the 24 examples. Other reasons given include “excessive muscular contractions” (featuring in 6 of the 24 examples) which also seems to us to be imprecise.

40. The impression given is one of a lack of clinical precision.

41. Other ICD Code conditions diagnosed more than once and which to us appear to lack precision include: L 85.3 Dry skin, referred to also as “xerosis cutis” (for 5 patients), L 90.5 acne scarring, disfigurement due to a scar (for 3 patients).

42. Other conditions diagnosed more than once (and for which ICD codes have not been provided) include facial lipoatrophy (for 2 patients) which we understand to mean a loss of fat tissue from around the face, and dermatocholasis (for 9 patients) which we understand to be a term used for loose skin around the eye lids.

43. No evidence has been provided to help us to understand these diagnoses in context. In particular, we are unable to determine the extent to which the conditions diagnosed are, as contended by HMRC, simply a result of normal ageing. We note in this regard that of the patients involved in the survey, only 2 are under 50 and half are in their 60s or 70s. On a simplistic (and again) a non-medical basis one would expect some degradation of the skin to occur as part of a normal ageing process and sun or UV exposure over the years. There is nothing in the Appellant’s records which, in our view, differentiates clearly or which seeks to differentiate between what could be termed normal or typical age related issues and those issues which are outside of that spectrum. We note, for example, that the risk of skin cancer is mentioned several times – but this is not developed in any detail and there are no references to medical referrals made in respect of cancer risk.

44. The Appellant states in her witness statement that "I also diagnose my patients with many different nursing diagnoses. These diagnoses are from a International List Of Standardized Nursing Terminology, founded in 1982".

45. The exhibit referred to in support of that statement is a 6 page print out from "nurselabs.com" headed "Nursing Diagnosis List" which includes some of the headings that we see in the case studies – such as "situational low self esteem" and "deficient knowledge". The introduction to the list states as follows "in this section is the list or database of NANDA nursing diagnosis examples with their definitions that you can read to learn more about them or use them in developing your nursing care plans".

46. The relationship between the nursing diagnoses and the WHO conditions is not explained, although the nursing diagnoses appears to us to list more psychological conditions (for example low self esteem) and the WHO physical ones.

Is the Appellant's suitably qualified to diagnose and treat psychological conditions

47. To fall within the medical care exemption, as well as constituting medical care, the medical services must be provided in the exercise of the relevant medical and paramedical professions as defined by the Member State concerned.

48. The Appellant has made it clear in her evidence and in the case studies that her treatments are intended to and do in fact result in improvements in her patients' emotional well-being. Mr Firth has also made the point several times that a treatment which might appear cosmetic is in fact addressing a psychological condition.

49. In almost all the case studies the Appellant records how her treatments have restored the particular client's physical, social and emotional health. In 5 of the case studies she refers specifically to her clients feeling "more confident" after having the treatments done or being "less self-conscious". In 10 of the case studies she refers to her clients feeling "better emotionally" having had the treatments. In 2 of her case studies she specifically mentions a diagnosis of "depression".

50. It is clear therefore that the Appellant sees her services as including the diagnosis and treatment of psychological conditions.

51. There is no dispute as to whether psychological conditions are covered by the medical care exemption. However, HMRC contend that the Appellant is not suitably qualified to diagnose and/or treat psychological conditions. As no challenge has been raised in this regard

in respect of the physical conditions diagnosed and treated by the Appellant we do not consider them in this context.

52. Section 31(1) VATA states that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9, Group 7 (health and welfare) which provides that the following are exempt supplies:

> Item No 1
>
> "The supply of services consisting in the provision of medical care by a person registered or enrolled in ….
>
> (d) the register of qualified nurses and midwives maintained under article 5 of the Nursing and Midwifery Order 2001"

53. In *Evans*, the Commissioners of Customs & Excise argued (in relation to the predecessor to Schedule 9, Group 7, Item 1 - Finance Act 1972, Schedule 5, Group 7, Item 1) that services provided by a nurse would fall within the medical care exemption only if they were provided within the scope of his or her role as a registered nurse and that if the law was interpreted otherwise it would lead to an absurdity as all supplies made by a registered nurse would fall within the exemption. The Tribunal agreed, stating that (in relation to Item 1):

> "... item 1 must be construed to be limited to services supplied both by persons therein set out and in the course of their professions, vocations or businesses as such. Otherwise, it is our view that the exempting provisions of Group 7 would amount to an absurdity"

54. Although this case preceded the PVD, we agree with HMRC that it still represents the law.

55. In *Evans* the specific question for the Tribunal was whether the provision by a registered nurse of acupuncture fell within the exemption. It found that it did not. Although the nurse was a highly qualified acupuncturist, the Tribunal found that the provision of acupuncture was not within the course of a registered nurse's profession.

56. The Tribunal accepted that a common-sense approach should be applied and took into account evidence provided by the registrar of the General Nursing Council as to the scope of a nurse's role. One of the points made by the registrar was the distinction between the role of a nurse and a registered medical practitioner – the scope of a nurse's role being narrower in relation to initiating treatment:

> "A nurse undertakes such treatment as is necessary to combat a particular disease under the orders of a registered medical practitioner. It would be highly unusual for a nurse to initiate treatment and this would be in a large measure unacceptable as it is not the proper work of a registered nurse."

57. Of course nursing has changed significantly since *Evans* and the scope of a nurse's role is much wider. However, the Appellant must still show that diagnosing and treating psychological conditions is within the scope of her role as an RGN.

58. In *Evans*, although not the basis of its eventual decision, the Tribunal took into account evidence showing that acupuncture was at the time not an element of nurse training nor something that was covered at all in a nurse's career.

59. Here, the Appellant has informed us that psychology is included as a module in the general nursing syllabus and that she considers herself fully qualified to diagnose and treat the conditions identified.

60. Although these two facts are not disputed, this is insufficient for the purpose of determining whether the medical care exemption applies. As the Appellant is not a psychological professional under Item 1(c) of Group 7 (health professionals) or a psychiatrist under Item 1(a) (medical practitioners), the focus must be on what is within the scope of an RGN's profession.

61. Other than being told that psychology is a module in the general nursing syllabus, no further information has been provided on this issue. In particular, no evidence has been provided as to the role of an RGN, whether generally or in the Appellant's realm of practice, in relation to diagnosing and treating psychological conditions, nor any explanation as to how the role of an RGN relates to that of a registered psychologist or medical practitioner.

62. The fact that psychological professionals who are not medical practitioners have a specific register so bringing them within Item 1(c) of Group 7 suggests to us that psychology requires specific qualifications for those who are not medical practitioners.

63. We find, therefore, that the Appellant has not proven her case that diagnosing and treating conditions which are psychological is within the scope of her profession as an RGN.

64. We must point out here that we cannot determine the extent to which the Appellant is actually required to diagnose and treat psychological conditions and we accept that this may not be necessary with all of her patients. However, the Appellant has made it clear to us in her evidence that the emotional well-being of her patients is significant and that patients may

come to her because they are suffering from depression or low self-esteem. Several of her case studies (including FM, NR and JR) specifically mention this. In addition, Mr Firth has stressed to us that when assessing the therapeutic nature of the Appellant's treatments we must take into account the fact that she treats psychological as well as physical disorders. The psychological aspect is therefore a material one for us to consider.

The purpose of the treatments

65. We turn next to consider the purpose of the treatments.

66. As we have outlined above, to be exempt, the Appellant must satisfy us that the principal purpose of the treatments is the protection, including the maintenance or restoration of health as per *D'Ambrumenil* at [60].

67. In *PFC Clinic*, the ECJ considered the application of the medical care exemption to services provided by a clinic which included cosmetic and reconstructive plastic surgery as well as some skincare services. The ECJ found that:

> "… services such as those at issue in the main proceedings, in so far as their purpose is to treat or provide care for persons who, as a result of illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of "medical care" in Article 132(1)(b) of the VAT Directive and "the provision of medical care" in Article 132 (1)(c) thereof respectively. However, where the surgery is for purely cosmetic reasons it cannot be covered by that concept" [29]

68. In other words, if there is a need for cosmetic services, those services are capable of falling within the medical exemption. At the other end of the spectrum – if the services are purely cosmetic and there is no medical need for them, then the exemption cannot apply.

69. We take "need" in this context to be a reference to therapeutic need. Medical treatments provided for purely cosmetic rather than therapeutic reasons cannot be said to have a purpose of providing medical care.

70. In the Appellant's case *D'Ambrumenil* already requires the principal purpose of her treatments to be therapeutic and *PFC* could be seen as not adding anything to that test – other than (i) confirming that cosmetic treatments can fall within the medical exemption if the purpose test is satisfied, and (ii) confirming that where there is no therapeutic purpose the medical exemption cannot apply.

71. Mr Firth contends that the "principal purpose" test (i.e. the requirement for medical care to be the principal purpose of the intervention) does not apply where the services in question are of an intrinsically medical nature.

72. On this basis he contends that the principal purpose test does not apply to the Appellant's services and the effect of *PFC Clinic* is that a therapeutic purpose needs only to be one of the purposes and not necessarily the most important purpose of her treatments.

73. In support of his contention Mr Firth draws our attention to the fact that the words "principal purpose" are used in *D'Ambrumenil* where the intervention (preparing a report) was not intrinsically medical, but not used in cases such as *PFC Clinic*, *Copygene* or *Future Health Technologies* where the interventions were more intrinsically medical. He then takes us to *CIG Pannonia* where the words are used once more – in the context of a non-inherently medical intervention (again report preparation).

74. We do not agree that the principal purpose test outlined in *D'Ambrumenil* should be construed so narrowly.

75. The ECJ in *D'Ambrumenil* was summarising the general position under the Sixth Directive and that interpretation cannot be dependent on the particular intervention in question – the principles must, logically, remain the same.

76. In our view, the ECJ judgment simply makes it clear that purpose is paramount and that in some circumstances, the context in which a medical service is provided can be such as to demonstrate that the principal purpose test is not satisfied. This was, in the ECJ's view, the factual position in *D'Ambrumenil* and potentially in relation to expert medical report services generally. There is no suggestion in the judgment of this being a general principle to be applied to all non-intrinsically medical services.

Cosmetic/therapeutic purpose

77. HMRC contend that the Appellant's treatments are overwhelmingly cosmetic and that their principal purpose is not therapeutic. Ms Black has also taken us to the relatively recent decision of the First Tier Tribunal in *Skin Rich* where she says arguments similar to those made by the Appellant were heard in relation to treatments similar to some of those provided by the Appellant. Ms Black points out that in *Skin Rich* the Tribunal found that the taxpayer had not satisfied them that the principal purpose of the treatments was to protect restore or maintain the health of the individual rather than for cosmetic reasons (at [100]) and so were outside the medical care exemption. She considers that the Tribunal should, as a matter of

judicial comity, follow that decision unless we are satisfied that it is incorrect. The principle of comity is well established (see for example *Fiander v HMRC* [2021] UKUT 156 UT at [36]). However, notwithstanding the potential similarity of the treatments, each case must be determined on its own facts and the purpose of the treatments in question established by reference to the particular facts.

78. In terms of assessing whether a medical intervention involving cosmetic treatments has a therapeutic purpose *PFC Clinic* makes it clear that the health problems may be psychological as well as physical. In terms of determining purpose the ECJ said:

> "However, the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not itself decisive for the purpose of determining whether that intervention has a therapeutic purpose.
>
> Since that is a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose.
>
> It follows that the fact, referred to in the fourth question, that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such interventions is determined by a professional, may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concepts of "medical care" or "medical treatment" within the meaning of Article 132(1)(b) and (c) of the VAT Directive respectively." [34-36]

79. In short, the views of the patients are to be taken into account, but they are not decisive and the determination is ultimately a medical one. The fact that treatments are provided by a medical professional and the determination of purpose is made by a professional is influential.

The patients' views

80. Mr Firth has suggested that the patients' views are not relevant in determining the purpose of the Appellant's treatments. We disagree, as per *PFC Clinic* they are relevant although not decisive.

81. We are unable to assess directly the views of the Appellant's patients as none have been called as witnesses. What we have are the case studies prepared by the Appellant and several on-line reviews provided to us by HMRC. We have also seen printouts of the Appellant's

website (from around the relevant time) which give us an insight into the way her treatments were marketed.

82. The case studies are notes prepared by the Appellant which have been written in a way which seems intended to illustrate her contention that her treatments are therapeutic rather than cosmetic. We say this as the wording of the case studies and the headings used correspond very closely to factors which have been identified as relevant to the medical exemption. This affects the weight we have put on the cases studies. In all of the case studies the Appellant has specified the particular medical conditions that are addressed by her treatments and there is minimal reference to appearance or cosmetic effect. In the majority of the case studies the Appellant concludes that her treatments have restored both the physical and emotional health of the patients. In one she has indicated specifically an improvement of appearance (LW – visible lump under the eye) but has explained that in her view this is not cosmetic as the lump was distressing the patient. In another (FO) she refers to appearance but adds that the treatment in this case "restored social health" as the patient worked in an industry where appearance contributed to her being able to find employment.

83. We note that none of the Appellant's patients appear to have been referred to her by medical specialists. Although a medical referral is not a precondition for treatment to be regarded as therapeutic, the absence of evidence or mention of any of the Appellant's patients having previously consulted a medical practitioner in relation to their conditions (whether physical or psychological) is noteworthy. It could be seen as an indication of her patients seeing their treatments as cosmetic rather than therapeutic. We say this as we would have expected at least one of her patients to have sought medical advice from a medical practitioner prior to seeing the Appellant if they were suffering from medical conditions that needed treatment

84. The patient reviews obtained from the internet by HMRC are focussed generally on the cosmetic aspects of their treatment. We set out some of them below:

> Deborah UK "my skin looks wrinkle free", "My forehead always looks perfect after treatment. Filler Similar around the mouth and little in the Lips. Gillian also has a very good Technic with treatment for wrinkles. Also Skin Peel is very good after 2 or 3 my skin looks amazing." "I have been going to Gillian for 15 years. She's amazing. She always makes me feel good and my ……"

Andrea Falkirk "Amazing I now have no line at all now". "Gillian has an easy way about her, and puts you at ease straight away. Had treatment for wrinkles and line filler injected in the very deep lines between my eye brows. Amazing; I now have no line at all now, completely smooth. Love the results."

Debra UK "Highly recommended." "I have been seeing Gillian for the past 12 years and have never been disappointed and always had amazing results after seeing Gillian for treatments. I would never trust anyone else as Gillian makes me feel totally relaxed and within days of having treatment look years younger."

Louisa UK "Lip fillers look fantastic" "Gillian was very professional and pleasant. My treatment looks great, very natural and lip fillers look fantastic. I would highly recommend. Private and discrete."

85. We accept and have taken into account the fact that these are selected reviews only and no attempt has been made to contact the clients. We appreciate also that patients with medical problems might not want to post publicly on the internet. These factors have affected the weight we ascribe to these reviews. Taking those factors into account, we find that the reviews indicate that these clients were likely to have sought treatment from the Appellant for cosmetic reasons. As well as the tone of the reviews, there are no indications that any of them sought treatment from the Appellant for psychological or other medical conditions.

The advertising

86. We have also taken into consideration the manner in which the Appellant has advertised some of her treatments. As well as potentially incentivising patients to come to the clinic, it also gives some insight into what the Appellant regards as attractive to her patients.

87. As set out in the witness statement of Joseph White, we highlight the following descriptions which were set by the Appellant against some of the products offered:

Restylane; "replenishes the skins hyaluronic acid, enhancing lips., smoothing lines, furrows and wrinkles thus helping to arrest the signs of ageing"

Muscle relaxing injections; "the purified protein lessens the appearance of wrinkles that result from our daily expressions such as crow's feet, worry lines, frown lines and lip lines ..."

Glycolic acid peel; "ideal for treating and reducing skin damage lines, dull skin tone, enlarged pores and hyper pigmentation, including age spots"

Dermal roller; "cosmetic hand held device"

The (Easy) TCA Peel; "will reduce pigmentation and improve ageing skin"

Botox; "relaxes and dramatically improves frown lines, crows feet, transverse forehead lines …"

Dermal fillers; "naturally and instantly fill out wrinkles …. Fillers can fill our lip lines which are commonly referred to as "smokers lines", frown lines, nose to mouth lines and some types of scars. Fillers can also be used for volumizing areas of the face which have started to sag. Having the cheek areas volumized can have wonderful results."

88. These descriptions are in our view indicative of the treatments being intended for cosmetic rather than therapeutic purposes, the focus being on improving appearance.

The Appellant's view

89. Mr Firth refers us to *PFC Clinic* and the ECJ's direction that determination of the purpose of an intervention is a medical assessment which must be based on the findings of a medical nature by a person qualified for that purpose [*PFC* at 35]. He contends that as a medical professional, the Appellant is far better placed than HMRC to determine whether her treatments are therapeutic or cosmetic and that as she is the only medical professional involved, her views must be determinative.

90. We agree with Mr Firth as to the requirement for a medical determination by a suitably qualified person and we accept that HMRC's view is not supported by a medical opinion.

91. However, we must take into account the evidential burden. It is for the Appellant to prove (to the usual civil standard) the therapeutic purpose of her treatments. It is not for HMRC to disprove her assertions.

92. We make the following observations.

93. We accept that the Appellant's treatments are intended to treat the conditions that she diagnoses. That is not the same as accepting that all of those treatments are inevitably therapeutic in the manner contemplated by the medical care exemption.

94. *PFC Clinic* suggests that there must be a medical need for the treatment and it is that need which brings cosmetic treatments within the medical exemption. The Appellant has not satisfied us that there will always be a medical need for her treatments.

95. We are unable to determine the extent to which some of the treatments are intended to deal simply with the normal consequences of ageing. No independent medical evidence has been provided to assist us on this issue even though it is a key one. Half of the Appellant's patients in the case studies are over sixty years old and on a common-sense basis it cannot be unreasonable to expect them to have experienced, for example, a loss of facial fat, drooping eyelids or a degree of sun damage. We are not persuaded that treatments aimed at dealing with the normal consequences of ageing are necessarily therapeutic.

96. We are also unable to determine the extent to which all of the treatments are "necessary" as a medical matter. The evidence provided by the Appellant does not enable us to evaluate this and again no independent medical evidence has been provided in this regard.

97. The way in which the Appellant (at the relevant time) advertised her treatments on her website and the focus on their appearance enhancing results, combined with the selected reviews of her patients, indicate a strong cosmetic emphasis.

98. The Appellant's case requires us to find that all of her treatments, without exception, have as their principal purpose a therapeutic purpose. Whilst this may be the case in some circumstances we cannot determine from the information available whether this would be the case in all cases. Here we note that in *PFC Clinic* the ECJ acknowledged the Danish tax authority's concern that examining the purpose of individual treatments would be onerous and potentially difficult, and that the same taxable person could be carrying out both exempt and non-exempt activities depending on the circumstances. It concluded however that this was an inevitable consequence of the legislation and that in cases where the purpose of treatments differed, the situation would be addressed by the partial deductibility provisions of the VAT Directive (Article 173). We have not been given the option to consider partial deductibility as the Appellant's position is that all her treatments are exempt. Consequently, if there are any circumstances where those treatments do not satisfy the principal purpose test then her appeal must fail.

Overall conclusion on the Liability Issue

99. We find that the Appellant has not satisfied us that, on the balance of probabilities, all of the treatments she provides are within the medical exemption.

100. Our determination takes into account the observations we have made and the following conclusions:

(a) We are unable to conclude from the evidence presented to us that conditions defined by reference to the WHO categorisations or which are Nursing Diagnoses will inevitably be "diseases or health disorders" as contemplated for the purpose of the VAT medical exemption.

(b) The Appellant has not proved to the required standard that diagnosing and treating psychological conditions is within the scope of her professional practice as a registered general nurse.

(c) The Appellant has not proved to the required standard that the principal purpose of her treatments is the protection, including the maintenance or restoration of health.

(d) Whilst there may be circumstances where a treatment provided by the Appellant would fall within the medical care exemption this is unlikely to be the case in respect of all of them.

101. On this basis we find that the treatments are standard rated supplies and therefore the Registration Decision stands. The First Appeal is therefore dismissed.

Fiscal neutrality

102. The Appellant raised the issue of fiscal neutrality and for completeness we now deal with that.

103. In her Notice of Appeal, the Appellant states that "the second reason I am appealing is on the grounds of fiscal neutrality". She goes on to say that she will be "at a twenty percent disadvantage to all my competitors around me" and that her reputation may be damaged if her patients become aware that her services are not within the VAT medical exemption but those of other clinics are. She adds that similar clinics around her have not had a VAT compliance check and may not do so for several years.

104. Fiscal neutrality is an established principle of EU VAT law which precludes treating similar goods and supplies of services differently for VAT purposes. This is to prevent the distortion of competition, the assumption being that the similarity of the goods or services makes it likely that they will be in competition with each other - see for example *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc* [2011] ECR I-109.

105. For the Tribunal to consider an argument based on fiscal neutrality we would require evidence to substantiate the claim of inconsistent treatment and to support the contention of

similarity. This has not been provided and so this is not an argument that we can determine. It also seems to us that the Appellant's actual point is that HMRC have not reviewed the VAT position of certain businesses that she regards as competitors and that she finds this unfair. This is not an issue that the Tribunal can determine and is instead a matter for the High Court on an application for judicial review.

General

106. We would make the following additional points.

107. Our conclusion relates to the treatments provided by the Appellant. In reaching our determination we have considered in some detail the initial consultation process and the diagnoses provided by the Appellant but this has been to inform our decision on the treatments. We accept, as pointed out by Mr Firth, that the consultation and diagnoses provided by the Appellant are not provided for consideration. No argument has been raised before us as to the existence of a composite supply (although that is not to say that it would have made any difference to our conclusion).

108. Our determination should not be seen as a criticism of the Appellant's professionalism or dedication to her patients which was very apparent to us from the evidence. We are also not disputing the fact that the Appellant's treatments have a positive effect on her clients. Our decision relates to the specific requirements of the VAT exemption for medical care.

The Time Limit Issue

109. We now turn to the Time Limit Issue and consider whether the 2021 Assessment was issued within the statutory time limits.

110. The burden of proof in respect of this ground of appeal is with HMRC and it is for HMRC to demonstrate to the usual civil standard that the assessment was properly issued in time.

Relevant Legislation

111. The relevant domestic provisions governing the registration for VAT, submitting VAT returns, and assessments are as follows:

VATA provides as follows:

"3. Taxable persons and registration

(1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.

(2) Schedules 1 to 3A shall have effect with respect to registration.

…

25. Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall-

(a) in respect of supplies made by him, and

(b) …

Account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provisions for different circumstances.

Schedule 1 to VATA provides:

'1—

(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule —

(a) at the end of any month, if the person is UK-established and the value of his taxable supplies in the period of one year then ending has exceeded [the registration threshold];

…

5—

(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

(2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

(3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered.'

In respect of making assessments, VATA provides:

73 Failure to make returns etc.

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

…

(9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3), (7), (7A) or (7B) above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

112. The Appellant contends that the 2021 Assessment was made out of time as it was not within the time limits of s 73(6) and so cannot be valid.

113. As the prescribed accounting period in respect of which the 2021 Assessment was made started on 1 November 2007 and ended on 28 February 2018 and the 2021 Assessment was issued on 18 March 2021, the 2021 Assessment would be within the time limits only if s 73(6)(b) were satisfied, s 73(6)(a) being irrelevant as it was made more than two years after the end of the prescribed accounting period.

114. As the time limit in s 73(6)(b) extends to one year after evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to their knowledge, the issue depends on whether such circumstances existed and when they arose.

115. HMRC's position is that submission by the Appellant of the nil return on 27 October 2020 which they say had the effect of superseding or cancelling the Prime Assessment issued on 7 September 2018, was the fact that justified the making of the new assessment.

116. The Appellant contends that (i) evidence sufficient for HMRC to make the 2021 Assessment was known to HMRC prior to 18 March 2020 and (ii) the submission of the nil return was not evidence for the purpose of section 73(6)(b).

117. The HMRC officer who issued the 2021 Assessment (Officer White) has provided evidence to us. We found him a credible and consistent witness.

118. Officer White's evidence shows how he took over the case on 19 January 2021 from Officer Pullar. The evidence describes how he reviewed the material on the file including Officer Pullar's conclusion of her investigations on 11 January 2018 and her decision in relation to the liability of the Appellant's supplies which led to the earlier Prime Assessment. He also explained how he spent time reviewing the correspondence on the Appellant's file and on the HMRC case management system to ensure that he had a good understanding of the circumstances of the case before taking any action. In addition to reviewing the file he said that he had also had several conversations with Officers Pullar and Rawlsey (although no notes of these specific conversations were made). It became apparent from Officer White's evidence that he had also relied on case management notes which had not been included in the hearing bundle.

119. In his evidence, Officer White stated that he needed to issue a new assessment in order to "re-establish a liability for the period". This was necessary he said because the nil return "had the effect of replacing Officer Pullar's assessment of 7 September 2018 and the

assessment on file was automatically superseded". His new assessment was issued on 18 March 2021.

120. Office White issued the 2021 Assessment on 18 March 2021. As well as describing the trigger for that assessment (which was submission of the nil return) Officer White's witness statement also explains why the amount of his new assessment (£212,897.00) differed from the Prime Assessment (£270,648.91). The reasons given were that (i) use of the revised EDR date of 1 November 2007 rather than 1 May 2007, (ii) his ability to use the Appellant's actual self- assessment turnover declarations rather than the estimated averages used by Officer Pullar, and (iii) his decision to use the Flat Rate Scheme as a guide for allowing input tax.

121. The amended EDR date was communicated to the Appellant on 26 March 2019 and the turnover declarations were included in the Appellant's self-assessment returns for the relevant years. Both items of information were, therefore, known to HMRC more than a year before the 2021 Assessment was issued. No reason was given for Officer White's decision to use an alternative basis to determine input tax – although there was no suggestion that it was based on new information.

122. When asked about the initial decision to create the long PAP – Officer White was unable to give any detail. He admitted that he did not know the specific reason behind the choice of the long period and assumed that it was to lessen the administrative burden in the circumstances. When pressed on the matter, one of the potential reasons given was that it would avoid multiple penalties. This reason was subsequently dismissed by Mr Firth who explained that there were other ways in which multiple penalties could have been avoided. Officer White accepted this. The reason for the long PAP therefore remained unclear.

Discussion

123. The legal principles relating to time limits for VAT assessments are well established. Mr Firth and Ms Black directed us to the exposition of those principles set out in *Pegasus Birds [2000] STC 91* and a more recent confirmation of those principles in *Safestore [2021] STC 35*.

124. The key principles are as follows:

(a) The burden of proof is on the taxpayer to establish that HMRC's assessment was out of time

(b) It is the subjective opinion of the assessing officer that is relevant – rather than any objective evaluation by the FTT - although the FTT is able to infer the officer's subjective opinions from the relevant surrounding circumstances

(c) The one year time limit runs from the time the last piece of evidence of the facts necessary to justify the making of the assessment became known to the officer.

125. As outlined above, Officer White was clear in his evidence that the only new information which caused him to issue the March Assessment was the Appellant's nil return.

126. The Appellant's position is that submission of a nil return cannot be new information for this purpose and that this is clear from the High Court decision in *Parekh v Customs and Excise Commissioners* [1984] STC 284.

The effect of Parekh

127. In *Parekh* the Commissioners issued two assessments in July 1979 covering a period from October 1975 to March 1976. Appeals were entered against both assessments and the Commissioners applied to strike out those appeals on the grounds that the required tax returns had not been made. On 3 December 1981 the taxpayers submitted nil returns. The Commissioners then withdrew the original assessments and issued two new assessments in December 1981. The new assessments were for the same amounts and covered the same periods as the July 1979 assessments. The taxpayers appealed contending that the new assessments were out of time.

128. The High Court had to consider the application of section 31(3)(2)(b) of the Finance Act 1972 (the predecessor to s 73(2)(b)) which, so far as relevant, required assessments to be made by the commissioners no later than; "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"

129. The Commissioners argued that submission of the nil returns amounted to new facts sufficient in their opinion to justify the making of the new assessments. If this was the case the assessments would be in time.

130. Woolf J held that the making of the nil returns did not amount to "evidence of facts" for the purposes of s 31(2)(b).

131. He was careful, however, to make it clear that his decision was based on the content of the returns in question, noting as follows:

> "The making of nil returns did not amount to "evidence of facts" for the purposes of s 31(2)(b). In saying this I should make it clear that I am referring here to the contents of the particular returns. Sometimes returns could contain evidence of facts which were not previously within the knowledge of the commissioners. If this is the case, and this evidence resulted in there being evidence sufficient in the opinion of the commissioners to justify the making of an assessment which would not have been justified before this evidence came to the knowledge of the commissioners, then the position would be different." [p. 287 - 288]

132. He went on to say that the intent of s 31(2) was: "to protect the taxpayer from tardy assessments" adding that if the interpretation sought by the commissioners was correct that protection would in many cases be "illusory." [p.288]

133. He gave two hypothetical scenarios of where this would be the case:

> "In the normal way a return has to include information of over-declarations and under-declarations, i e inaccuracies in earlier returns. Therefore, on the Commissioners' interpretation, it will always be open, once a return has been made, to contend that as the assessment is based on that return, it is incomplete or incorrect and they were in time to make the assessment notwithstanding that they had been aware for a very substantial period of the evidence which they were relying on for saying that the return was incorrect or incomplete and, but for the return, they would undoubtedly have been out of time. Furthermore, in those cases where there has not been a return, the Commissioners would be in the happy position that if they make an assessment, the taxpayer cannot appeal by virtue of the provisions of s 40 until such time as he has made a return. If he does not make a return so as to appeal, the assessment will become final and the amount specified therein deemed to be the amount of tax due from him under s 31(6). If he does make a return so as to appeal, the Commissioners can do what they did in this case, withdraw the original assessment which was out of time and make a new assessment based on the return made for the appeal which would be in time." [p. 288]

134. Each of the scenarios identified by Woolf J involves HMRC seeking to rely on submission of a return as a fact justifying the making of an assessment (or fresh assessment) that would be in time in circumstances where HMRC would otherwise have been out of time to assess the taxpayer.

135. Woolf J also noted specifically that:

> "The commissioners were not obliged to withdraw the previous assessments which were made prior to the making of the returns and they should have continued to rely on them." [p. 288]

136. We do not see *Parekh* as Mr Firth does as authority for a general principle that submission of a nil return can never amount to evidence of facts.

137. Although the judgment establishes a clear principle that if a return contains no new information, submission of the return or the contents of that return cannot be regarded as evidence of facts, it indicates that there are circumstances where it could be. The most obvious example is a return that contains new information. In *Parekh* there was simply no new information shown in the nil return.

138. The nil return submitted by the Appellant in this case did not contain any new information. Although the 2021 Assessment issued by Officer White was for a slightly different period and for a slightly different amount – those differences were determined by (i) facts known to HMRC more than a year prior to the assessment and (ii) Officer White's decision to use a different VAT recovery rate (the reason for which was not given).

139. We find therefore that the submission of the nil return itself by the Appellant was not evidence of facts for the purpose of s 73(6)(b).

140. Ms Black made the point that the *Parekh* was decided at a time before the electronic return system was in place and at a time when submission of a return did not have the automatic effect of "cancelling" an existing in-time assessment. On this basis she contends that *Parekh* can be distinguished on its facts.

141. There is, we agree, an implicit assumption in Woolf J's judgment in *Parekh* that submission of a return will not have the effect of cancelling an existing in-time assessment. This is apparent from his specific observation that:

> "The commissioners were not obliged to withdraw the previous assessments which were made prior to the making of the returns and they should have continued to rely on them." [p. 288]

142. It is also consistent with his view of the purpose of the section being to protect taxpayers against "tardy assessments". Allowing a taxpayer, by submitting a return, to

extinguish an assessment issued against it for failing to submit a return would not be consistent with that purpose.

143. We consider accordingly that if an existing in-time assessment was cancelled mandatorily by reason of submission of a nil return, submission of that nil return and its contents and the extinguishment of the taxpayer's liability could be evidence of facts justifying the issue by HMRC of a new assessment.

144. The issue to determine is, therefore, whether the Prime Assessment was automatically cancelled or extinguished by submission of the nil return. By this we mean a cancellation or extinguishment not within HMRC's control.

145. We are not persuaded that this was the case here.

146. Officer White, in his evidence, referred to the Prime Assessment being "superseded" or "cancelled" by the nil return. Ms Black referred to it being "extinguished". There has been no examination of what precisely happened nor a suggestion of any legislative basis for it. Ms Black's conclusion seems to be that it is simply a consequence of the administrative system put in place by HMRC.

147. We were referred by Mr Firth to *Bestline Data Ltd v HMRC [2009] UKFTT 42* which although not binding on us is helpful. Here the taxpayer (Bestline) submitted a missing return to HMRC unaware that it had already been assessed to tax under s 73(1). As a result of HMRC not returning certain documents to the taxpayer, Bestline's tax return was incorrect and HMRC invited it to submit an amended return. The amended return was not submitted. HMRC sought to rely on its original assessment to tax. Bestline argued that the effect of submitting its return was to cause HMRC's assessment to be automatically terminated. The Tribunal Judge summarised the argument as follows:

> "Principally, he [the Appellant's solicitor] contends that when an assessment is made in the absence of a return, it must automatically be disregarded once the missing return is made. He maintains that the assessment in the instant case having been made in the absence of a return, once the return was submitted, the ground on which it was based is no longer relevant. Consequently HMRC must then review the documentation and, if they believe the return is incomplete or incorrect, they must then make a new assessment to the best of their judgment and notify the person assessed accordingly. He also relies in part on the Report of the Committee on Enforcement Powers of the Revenue Departments (Cmnd 8822) Vol 1 para 3.4.10

where it was said that HMRC withdraw assessments in the majority of cases where returns are subsequently furnished." [15]

The Tribunal Judge concluded:

> "I am unable to accept that an assessment made in the absence of a return must automatically be disregarded when the missing return is made. As Woolf J said in *Parekh v Customs and Excise Commissioners* [1984] STC 284 at 288, a case which involved a missing return but which was decided on the basis that assessments made subsequent to the furnishing of such a return were made out of time, "the commissioners were not obliged to withdraw the previous assessments which were made prior to the making of the returns and they should have continued to rely on them". (The assessments in that case were made under section 31 of the Finance Act 1972, the predecessor of section 73 of the 1004 Act). Plainly, HMRC may withdraw an assessment or assessments made in the absence of a return, and may in practice do so in the majority of cases, but they are not required to do so. In the instant case, they chose not to do so."

148. HMRC have not shown that the position is any different in this case. We agree with the Appellant that the 2021 Assessment was not issued within the time limits required by section 76(2)(b) and was therefore out of time.

149. We have taken into account in our determination the fact that Officer White's assessment was not identical to the Prime Assessment; it was for a slightly different period and for a different amount. This does not alter our conclusion. This is because the information that led to those changes was not new information.

Conclusion on the Time Limit Issue

150. For these reasons we find that the 2021 Assessment was not issued within the applicable time limits set out in s 76 (3)(b) VATA. As the 2021 Assessment is out of time the Appellant's appeal must succeed. The Second Appeal is therefore allowed.

Other issues

151. The Appellant has raised an additional point under the Time Limit Issue. That point is whether s 73(6) operates by reference to 3 month prescribed accounting periods even in cases where HMRC have sought to vary the length of the period under regulation 25 of the VAT Regulations 1995. The Appellant contends that if this is the case, when determining time

limits for an assessment spanning multiple three month periods, each three month period must be considered separately and if any period is out of time then the entire assessment is rendered out of time.

152. Our finding in relation to the application of s 73(6) to the 2021 Assessment means that it is not necessary for us to decide this issue and so we have not done so.

153. Our finding on the Appellant's second ground of appeal also means that it is not necessary for us to decide the Appellant's third ground of appeal – the Procedural Invalidity Issue. Any findings we might make would also be obiter.

CONCLUSION

154. For the reasons given, the Appellant's appeal is upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

155. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

VIMAL TILAKAPALA

TRIBUNAL JUDGE

Release date: 25th April 2024