[2015] UKUT 0002 (TCC)

Appeal number: FTC/106/2013

VAT – whether veranda sold with a static caravan is zero-rated as part of a single supply – Group 9, Sch 8 VATA – whether principles in Card Protection Plan (CPP) apply – Talacre Beach, French Undertakers and Morrisons considered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

COLAINGROVE LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: THE HON MR JUSTICE WARREN
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 10 November 2014

Roderick Cordara QC, instructed by PwC Legal LLP, for the Appellant

Jeremy Hyam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant, Colaingrove Limited ("Colaingrove"), operates holiday parks and resorts in the UK. As part of its business it sells what are described as "static caravans" or "residential caravans". They are holiday homes providing living accommodation.

2. No VAT is charged on the sale of the static caravan itself. That supply is zero-rated by virtue of Group 9 of Schedule 8 to the Value Added Tax Act 1994 ("VATA"). By contrast, if it were separately supplied, a veranda, which is bolted to the caravan and sometimes also fixed to the land on which the caravan is sited, would not fall within the zero-rating provided for by Group 9, and so would be a standard-rated supply. The question in this appeal is whether that zero-rating applies to a veranda when it is sold with the caravan.

3. For reasons we shall explain, the First-tier Tribunal (Judge Hellier and Mr Marsh) ("FTT"), in its decision released on 12 June 2013, decided that the verandas were not zero-rated. It is from that decision that Colaingrove now appeals.

The law

4. It is convenient to start with the statutory provisions. There is no appeal on the FTT's findings of fact, which are set out at [5] to [15] of its decision, and which we need not repeat here.

5. As a transitional measure, member states are permitted, by way of derogation from the requirement under VAT Directives to apply a minimum rate of VAT, to apply reduced rates or to grant exemptions with deductibility (which in the UK is referred to as zero-rating). That follows from article 110 of the Principal VAT Directive (2006/112/EC):

> "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.
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> The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

6. The provisions of article 110 were derived from article 28(2)(a) of the Sixth Directive (77/388/EC). Prior to 1992 a similar derogation applied by reference to zero-rating in force on 31 December 1975.

7. By s 30 VATA, effect is given to zero-rating by providing that in the case of such a supply no VAT is to be charged but that in all other respects (including therefore deductibility of input tax) it is to be treated as a taxable supply. Zero-rating applies if the goods or services are of a description specified in Schedule 8, or the

supply is of a description so specified. At the material time for this appeal (which relates to periods between March 1989 and June 2008) Group 9 of Schedule 8 VATA relevantly provided:

> "Item No.
>
> 1. Caravans exceeding the limits of size the time being permitted for use on roads of a trailer drawn by a motor vehicle having an unladen weight of less than 2030 kg.
>
> …
>
> Note: This Group does not include --
>
> (a) removable contents other than goods of a kind mentioned in item 3 of Group 5 …"

8. For completeness we should mention that Item 1 has been amended by the Finance Act 2012 with effect from 6 April 2013, and that at the same time the erroneous reference to item 3 in Note (a) has been amended to reflect the correct cross-reference to item 4 of Group 5. None of those changes are material to the question before us.

The *CPP* principles

9. It is a feature of this appeal that the parties are agreed that, if the *CPP* principles apply, the sale of a caravan with a veranda would be a single supply. Although the *CPP* principles are not confined to transactions which may be analysed as comprising a principal element and one or more ancillary elements, there was no argument in this case that the nature of such a single supply in this case would be anything other than one comprising a principal element of a caravan, and an ancillary element, the veranda. According to those principles, but subject to the arguments in this case, it was common ground that that single supply would have the tax treatment afforded to the principal element, namely that of the caravan, and so would, as a whole, be zero-rated.

10. The principal question, therefore, is whether, in the circumstances of this case, the *CPP* principles apply, and if so how they are to be applied. Those principles had their genesis in the judgment of the Court of Justice ("ECJ") in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ("*CPP*"), and have been applied and refined in subsequent case law of the ECJ. The principles are aimed essentially at determining from the essential features of a transaction whether what is being supplied to the typical consumer is several distinct supplies (of services or goods) or a single supply from an economic point of view which should not be artificially split.

11. *CPP* itself concerned a card protection plan which provided holders of credit cards with protection against financial loss and inconvenience from the loss or theft of their cards and certain other items. The indemnification of financial loss was covered by a block insurance policy arranged by CPP. The services provided by CPP which

corresponded to the terms of the policy included the payment of an indemnity in certain events, such as fraudulent use of a card.

12. When the case reached the House of Lords, a reference was made to the ECJ, which included questions as to the proper test to be applied in deciding whether a transaction consists for VAT purposes of a single composite supply or of two or more independent supplies. In its judgment the ECJ answered those questions in the following way:

> "26. By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.
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> 27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
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> 28. However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411–2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
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> 29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that 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, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
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> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).
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> 31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that

> there is a single service. However, notwithstanding the single price, if circumstances such as those described in paras 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin* (at 1208, paras 45 and 46)).
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> 32. The answer to the first two questions must therefore be that it is for the national court to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply."

13. As the FTT noted, at [23], those principles (along with further developments of them, as in *Levob Verzekeringen BV and anor v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, which we need not summarise) have since *CPP* been applied in many domestic cases.

14. The scope of the effect of the *CPP* principles had to be addressed by the ECJ in the particular context of Group 9 of Schedule 8 VATA in the case of *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (C-251/05) [2006] STC 1671. The case concerned the VAT treatment of items of removable contents which, as is apparent from the legislation we have referred to, are specifically excluded from the scope of the zero-rating by Note (a). The argument for the taxpayer was that the sale of a caravan and its contents was a single indivisible supply which should thus be subject to a single rate of VAT, the appropriate rate being the zero rate applicable to the supply of the caravan, as the principal supply.

15. That argument was rejected by the ECJ. It said:

> "19. In the present case, it is not disputed that in so far as the VAT Act exempts, with refund of the tax paid, caravans of the kind supplied by Talacre, those conditions are fulfilled. Specifically, it is acknowledged that the zero-rate was in force on 1 January 1991 and that it was established for social reasons.
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> 20. It is also common ground that the VAT Act specifically excludes some items supplied with the caravans from exemption with refund of the tax paid. It follows that, so far as those items are concerned, the conditions laid down in art 28(2)(a) of the Sixth Directive, in particular the condition that only exemptions in force on 1 January 1991 can be maintained, are not fulfilled.
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> 21. Therefore, an exemption with refund of the tax paid in respect of those items would extend the scope of the exemption laid down for the supply of the caravans themselves. That would mean that items specifically excluded from exemption by the national legislation would

be exempted nevertheless pursuant to art 28(2)(a) of the Sixth Directive.

22. Clearly, such an interpretation of art 28(2)(a) of the Sixth Directive would run counter to that provision's wording and purpose, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation on 1 January 1991. As the Advocate General observed in paras 15 and 16 of her opinion, art 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period.

23. Furthermore, as the Court has pointed out on a number of occasions, the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly (see, to that effect, *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189, [1998] ECR I-6229, para 34; *EC Commission v France* (Case C-384/01) [2003] ECR I-4395, para 28; *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, paras 15 and 16; and *Jyske Finans A/S v Skatteministeriet* (Case C-280/04) [2005] All ER (D) 133 (Dec), para 21). For that reason as well, the exemptions with refund of the tax paid referred to in art 28(2)(a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature.

24. The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case law on the taxation of single supplies, relied on by Talacre and referred to in para 15 of this judgment, does not relate to the exemptions with refund of the tax paid with which art 28 of the Sixth Directive is concerned. While it follows, admittedly, from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid.

25. In this connection, as the Advocate General rightly pointed out in paras 38 to 40 of her opinion, referring to para 27 of *CCP* [1999] STC 270, [1999] 2 AC 601[1], there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account. In the light of the wording and objective of art 28(2)(a) of

[1] Sic. The reference should be to *CPP*.

> the Sixth Directive, recalled above, a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the member state concerned, for social reasons and for the benefit of the final consumer. In the present case, the United Kingdom of Great Britain and Northern Ireland has determined that only the supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans.
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> 26. Lastly, there is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system (see, by analogy, *Centralan Property Ltd v Customs and Excise Comrs* (Case C-63/04) [2006] STC 1542, paras 79 and 80).
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> 27. In the light of all the foregoing, the answer to the question referred must be that the fact that specific goods are counted as a single supply, including both a principal item which is by virtue of a member state's legislation subject to an exemption with refund of the tax paid within the meaning of art 28(2)(a) of the Sixth Directive and items which that legislation excludes from the scope of that exemption, does not prevent the member state concerned from levying VAT at the standard rate on the supply of those excluded items."

The FTT's decision

16. Relying on an earlier decision of the First-tier Tribunal, *McCarthy & Stone (Developments) Ltd and another v Revenue and Customs Commissioners* [2014] SFTD 625, the FTT held as follows:

> (1) The ECJ in *Talacre* had held that the *CPP* single supply rules were trumped by the nature of the zero-rating derogation (FTT, at [25]).
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> (2) The reasoning of the ECJ in *Talacre* was not dependent on a specific exclusion in the domestic legislation nor on what was only expressly included in it, but hinges on what was intended to be encompassed in the domestic legislation so far as is apparent from that legislation (FTT, at [26]; *McCarthy & Stone*, at [65]).
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> (3) The relevant enquiry was not as to the "specific semantic form" of the legislation, but on the intention of the state in the measure it enacted. According to *Talacre*, at [25], it is the specific legal framework, and not the words themselves, that must be taken into account. As the national measure can only be applied if it was in force on 1 January 1991, the task was to address what was "the content of the national legislation in force" on that date: see *Talacre*, at [22] (FTT, at [26]; *McCarthy & Stone*, at [65] – [67]).
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> (4) In construing the UK's zero-rating provisions, it was necessary to approach them as a UK court would have done before the decision of the ECJ in *CPP* (*McCarthy & Stone*, at [70]). That entailed application of the domestic case law in relation to single and multiple supplies before *CPP*.

(5) Although there might be considerable overlap between the *CPP* principles and the domestic law test, there is a difference of emphasis which makes them capable of producing different results. The domestic test was not based on the functioning of the VAT system but on statutory construction; the domestic test may have regard to physical dissociability, the *CPP* test has regard only to economic dissociability; the domestic test is concerned with whether one element "dominates" the other, the *CPP* test may be concerned with whether one serves the other; the question whether there was a single price seemed more important in the domestic test than in the *CPP* test (FTT, at [42]).

(6) The guiding principles of the domestic authorities were that in deciding as a matter of statutory construction what was the true and substantial nature of the consideration given for the payment, (a) whether a supply was single or multiple was very much a question of impression; (b) the answer required the application of common sense and the avoidance of artificiality; (c) the test to be applied was: in substance and reality was A a necessary or integral part of, or merely ancillary or incidental to, B where merely ancillary meant subordinate or incidental or that A was so dominated by B as to lose its separate identity; and (d) Parliament should not be taken to have intended an absurd result (FTT, at [43]).

(7) Applying those principles, the FTT concluded that although the veranda served the caravan and promoted its enjoyment, it was not "subordinate to" the caravan. Further, the veranda was attached to the caravan, but it was not integral to it (FTT, at [50] – [51]).

(8) In relation to an alternative argument on behalf of Colaingrove, the FTT found that, accepting a submission for HMRC that although the veranda was not fixed to the ground it was something adapted or designed to be in a fixed place and not to be taken from one place to another, whilst static caravans retained enough possibility of movement to justify the epithet "caravan", the attached veranda did not fall within that word (FTT, at [47]).

(9) According, the FTT decided that the verandas were not zero-rated.

Colaingrove's grounds of appeal

17. Colaingrove's grounds of appeal may be distilled from the summary in its notice of appeal dated 11 September 2013, as developed in argument before us:

> (a) The FTT failed to apply the correct test as to whether the supply in question was a single supply or a multiple supply. The *CPP* principles should have been applied. Had the FTT applied the *CPP* principles it would have found that there was a single, zero-rated, supply of a caravan.
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> (b) In the event that the *CPP* principles did not apply to the circumstances of the instant appeal, regard must then be had to the pre-*CPP* UK case law on single and multiple supplies. However, the FTT erred in failing to understand that such case law almost inevitably would have given the same answer as the *CPP* test.

(c) In any event, not only was the analysis of the pre-*CPP* case law flawed, but the entire project of trying to analyse case law which by definition was subordinate to the later *CPP* line of cases was additionally flawed. *CPP* case law is to be treated as always having applied.

(d) The FTT erred by failing to apply the definition of caravan in the Caravan Sites and Development Act 1960. Had the FTT applied this definition, it would have found that the veranda was part of the caravan and therefore within the scope of what Parliament intended to zero-rate. There would be no danger of this offending the principle that a zero-rate cannot be extended.

The application of the *CPP* principles

18. In support of his submission that the *CPP* principles should be applied, and that the FTT was wrong to conclude to the contrary on the basis of *Talacre*, Mr Cordara, for Colaingrove, referred us to the decision of the Upper Tribunal in *Wm Morrison Supermarkets plc v Revenue and Customs Commissioners* [2013] STC 2176, which was decided after the FTT had released its decision in this case and which, argued Mr Cordara, would have resulted in the FTT taking a different view. Before turning to *Morrisons*, however, we must first refer to another case in the ECJ, that of *European Commission v France* (Case C-94/09) [2012] STC 573 (commonly referred to as "*French Undertakers*").

19. In *French Undertakers*, the issue concerned the derogation under article 98 of the Principal VAT Directive which enables member states to apply reduced rates of VAT to supplies of services by undertakers set out in Annex III to the directive. The provisions applicable in France provided for the reduced rate to apply only to the transportation of the body. The European Commission brought an action seeking a declaration that France had failed in certain obligations under the directive because it had failed to apply a single rate of VAT to the supply of goods and services by undertakers, it being argued that those supplies constituted a single complex supply which should, consequently, be subject to a single rate of tax.

20. The ECJ held that article 98 enabled a selective application of the reduced rate provided that there was no distortion of competition. Subject to observing the principle of fiscal neutrality, a member state could limit the application of the reduced rate to concrete and specific aspects of that category. The criteria for determining whether a transaction including several elements should be considered to be a single supply or two or more separate supplies, which might be applied to prevent an artificial splitting of a transaction which from an economic point of view should be regarded as a single transaction, were not decisive for the purpose of the exercise by member states of the discretion given to them as regards the application of the reduced rate.

21. *French Undertakers* was thus another example of the ECJ, in the circumstances of that case, declining to give definitive force to the *CPP* principles. Although in the context of a derogation, as in *Talacre*, the ECJ did not refer to *Talacre* in its judgment. It rested its judgment on existing case law, namely *Finanzamt Oschatz v*

Zwekverband zur Trink wasserversorgung und Abwasserbeseitigung Torgau-Westelbien (Case C-442/05) [2009] STC 1 and *EC Commission v France* (Case C-384/01) [2003] ECR I-4395 by virtue of which the reduced rate could, at the discretion of member states, be selectively applied, the exercise of the discretion being subject to general and objective criteria, and not the application of the *CPP* principles.

22. Since the release of the FTT's decision in this case, the Upper Tribunal (Vos J as he then was) in *Morrisons* has had cause to consider the scope and effect of both *Talacre* and *French Undertakers*. In *Morrisons* the argument concerned the applicability of the reduced rate of VAT on the supply of domestic fuel to charcoal contained within disposable barbecues. It was common ground, first, that if the *CPP* analysis was applied it would have resulted in the supply of disposable barbecues being a single, standard-rated, supply. Secondly, it was agreed that, if the *French Undertakers* analysis were to be applied, the supply of the charcoal contained in a disposable barbecue was a concrete and specific element of the supply, so that it would be subject to the reduced rate of VAT.

23. In his decision, Vos J found, at [59], that there was nothing in the authorities that made *French Undertakers* of general application whenever reduced rates of VAT were invoked. The test was applicable only where the member state sought to limit or restrict the application of a reduced rate. At [68] Vos J went on to say in this respect that it was only in those circumstances that it would be appropriate to ask whether the restriction in question was in respect of a "concrete and specific aspect" of the supply. If it is, it will not matter that the whole supply would have been regarded as a single supply by the application of a *CPP* analysis. The *French Undertakers* test has not "trumped" the *CPP* test in any meaningful sense.

24. As regards *Talacre*, on which Morrisons placed great reliance, Vos J said this (at [62]):

> "… *Talacre* … does not, in my view, take Morrison where it seeks to go. The decision in *Talacre* was simplicity itself. The United Kingdom domestic legislation had said that caravans themselves, but not fittings within them, were zero-rated. The CJEU simply gave effect to that provision. It was an art 110 case where caravans had historically been at a reduced rate in the United Kingdom, and it was the first attempt to use the *CPP* analysis to gain an advantage for the taxpayer. It was in that context that the Advocate General said that the *CPP* analysis could not be used 'systematically', and 'all the circumstances must be taken into account, including the specific legal framework' when determining the scope of a supply. The main circumstance there was the express limitation in the United Kingdom statute. The CJEU simply said that the *CPP* analysis could not be used to extend the restricted art 110 exception for caravans to include their contents. It did not make any general statement abrogating the application of the *CPP* test when one needed to determine for EU law purposes whether there was a single or a multiple supply. Nor did the CJEU have anything to say about the application of the 'concrete and specific aspects' test.

25. Reverting to *French Undertakers*, Vos J, at [64], added that, just as in *Talacre*, the ECJ had not said that the *CPP* test was abrogated by the justified restriction of the reduced rate to concrete and specific aspects; it was simply that the *CPP* test could not be used to override the legitimate restriction imposed by French legislation.

26. The conclusions reached by Vos J are summarised at [70] – [71] as follows:

> "[70] In my judgment, the FTT was right when it said: '*CPP* is concerned with defining the nature of transactions for VAT purposes', and *French Republic* is 'concerned with whether member states can identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate'. The FTT reached the correct conclusion because '[i]n the present circumstances the UK domestic legislation does not seek to carve out the charcoal element of the supply so as to subject it to a reduced rate'. Moreover it was insightful to say that '[i]t is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply', and that HMRC 'are simply seeking to apply Sch 7A which on its terms has no application to the supply of a disposable barbecue'.
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> [71] Whilst it is true that *Talacre* held that the scope of the reduced rate could not be extended by the use of a *CPP* analysis (as suggested by Mr Scorey's sixth point), it does not follow that a reduced rate that a member state has made applicable to one type of supply must be respected, even if it has been decided upon for socio-economic reasons, whether or not that supply is to be properly regarded as only a constituent part of a single supply for VAT purposes on a *CPP* analysis. The reasoning confuses the obvious importance of member states being able to decide for socio-economic reasons, and within the limits of the Principal VAT Directive and EU law which supplies should be at a reduced rate, and the technical rules that decide whether those rules are effective. The *French Undertakers* test is simply there to decide if a limitation imposed by the member state is effective; it will only be so, as a matter of EU law, if it carves out a 'concrete and specific aspect' of the supply. The *CPP* test will always, subject to the provisos in that case itself, be used to decide the character of a supply—whether it is properly to be regarded under EU law as a single or multiple supply."

27. The circumstances of *Morrisons* were of course different from those in this case. In *Morrisons* the taxpayer was seeking to apply the provisions of a reduced rate to an element of what would otherwise be a single standard-rated supply. In this case, Colaingrove argues that the supply of a caravan and a veranda is a single supply, so that all elements of that supply should fall into the zero-rating for caravans.

28. Mr Hyam agues that this makes all the difference to the analysis. He says that HMRC does not seek to argue that *Talacre* is authority for a wide-ranging abrogation of *CPP* principles, but submits that *Talacre* is clear authority for the proposition that where a taxpayer seeks to gain a tax advantage by use of the *CPP* analysis to extend the scope of a stand-still derogation as at 1991, the *CPP* analysis cannot be used to

achieve that end. Mr Hyam argues that nothing in *Morrisons* or *French Undertakers* changes that conclusion.

29. As well as placing reliance on the judgment of the ECJ in *Talacre*, from which we have earlier quoted passages, Mr Hyam referred us to various passages from the opinion of the Advocate General (Kokott) in that case. The relevant paragraphs of the Advocate General's opinion are at [35] to [42]:

> "35. If one were to apply the principles developed in the case law on composite supplies irrespective of the particular circumstances of the present case, one might conclude that caravans and their removable contents in fact constitute one single supply. Only one rate of VAT would then have to be applied to that supply, namely the rate applicable for the principal element of the supply. Assuming that the principal element is the caravan, the zero rate would have to be extended to the ancillary supply of the removable contents.
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> 36. However, in the present situation the extension of the exemption would be contrary to the objectives of art 28 of the Sixth Directive, as set out above. This conflict between the principle that national exemptions under art 28(2)(a) of the Sixth Directive should not be extended and the rules developed in the case law for the treatment of composite supplies can be resolved by comparing the purpose of each principle.
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> 37. The rules established in *CPP* [1999] STC 270, [1999] 2 AC 601 and other relevant decisions are based on the consideration that splitting transactions too much could endanger the functioning of the VAT system. In contrast to this objective, is the concern to limit national derogations from the rules of the Sixth Directive to those which are absolutely necessary.
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> 38. When balancing these objectives, the interest in not undermining the harmonisation of law achieved by the Sixth Directive by extending national exceptions should be given priority over the objectives pursued by the Court with its rules determining the scope of a supply. In essence those rules have been developed only for reasons of practicality and do not claim absolute application.
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> 39. Thus in *CPP* [1999] STC 270, [1999] 2 AC 601, para 27 the Court emphasises that the question of the correct method of proceeding when determining the scope of a supply cannot, in view of the diversity of commercial operations, be answered exhaustively for all cases. The rules laid down in *CPP* cannot therefore be applied systematically. Instead, when determining the scope of a supply all the circumstances must be taken into account, including the specific legal framework. In the present case, it is necessary to have regard to the particularity that the United Kingdom has established the exemption in a specific way in accordance with its socio-political evaluation and that national reliefs under the transitional regime of art 28 may continue to exist but may not be extended.
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> 40. The application of a national exemption under art 28(2)(a) of the Sixth Directive is permissible only if it is—in the view of the member

> state—necessary for precisely defined social reasons for the benefit of the final consumer. In that regard the United Kingdom has determined that the zero rate should be applied only to the supply of caravans. It did not consider that the inclusion of the removable contents was justified on social grounds. This assessment of the national legislature cannot simply be overridden.
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> 41. Moreover, the functioning of the VAT system is not seriously called into question if the supply of caravans and their removable contents—possibly departing from the principles laid down in *CPP*—had to be regarded as separately taxable transactions. In particular it is not apparent that the separate indication of the relevant components of the price and the application of different rates of taxation to those components presents significant difficulties, as the manufacturer of the caravan already sets out both parts of the supply separately in its invoice to Talacre.
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> 42. Finally, although it must be conceded that the Court has accepted that tax exemptions for the principal element of a composite supply may be extended to ancillary supplies connected with it, nevertheless, as the United Kingdom Government rightly submits, those cases concerned exemptions under art 13 of the Sixth Directive, and therefore exemptions enshrined in the scheme of the directive and in the application of which the right of deduction is excluded. In contrast, the national exceptions under art 28 lie outside the harmonised framework. They are not directed at the same objectives as the exemptions provided for in the directive itself and differ in form from those exemptions. Consequently, in those cases it is necessary to take particular care that the exceptions are not extended.
>
> 43. In summary, I reach the following conclusion: The rules on determining the scope of a transaction cannot be understood in such a way that they require a national exemption under art 28(2)(a) of the Sixth Directive to be extended to items which national law expressly excludes from the scope of the exception."

30. The dispute in this case is about the applicability of the *CPP* principles, and their effect, or lack of effect, in the case of zero-rating provisions which constitute a derogation from the principal VAT Directive by virtue of article 110. We do not consider the ECJ in *Talacre* to have jettisoned the *CPP* principles in such cases. In our view, the ECJ was careful to confine its judgment to the tax effect of the case law on single supplies, and not to the application of *CPP* in determining whether there is a single supply; its reference, in [24] of *Talacre*, to that case law not precluding some elements of a supply being taxed separately, is consistent only with those elements first having been resolved, on *CPP* principles, into a single supply. The same reference to a separate rate of tax being applied to some elements of the supply, in that case of fitted caravans, in other words including the contents, is made by the ECJ at [26].

31. We agree, therefore, with Vos J in *Morrisons* when he said, at [71], that, subject only to the provisos in *CPP* itself, the *CPP* test will always be used to decide whether what is provided is a single supply or multiple supplies. We do not accept the submission of Mr Hyam that Vos J was confining those remarks to circumstances

such as those in *French Undertakers* or to the particular circumstances in *Morrisons*, where the taxpayer was attempting to obtain a reduced rate for an element of a composite supply. Although the ECJ in *Talacre*, at [25], expressly approved what the Advocate General said, at [38] to [40] of her opinion, to the effect that there was no set rule for determining the scope of a supply from the VAT point of view and that all the circumstances, including the specific legal framework, had to be taken into account, that was in the context of the ECJ having acknowledged, at [24], the existence of a single supply, and having focused on whether certain elements of that supply could nevertheless be taxed separately. The ECJ regarded the factor of the specific legal framework as relevant, not to the question whether there was a single supply, but whether the national legislation had limited the scope of what elements of that single supply could fall within the zero-rate.

32. The FTT, at [38], sought to draw a distinction between the applicability of the *CPP* principles generally to the classification of a supply as exempt, and what it found was the non-applicability of those principles to zero-rating. The basis of that distinction, the FTT reasoned, was that the exemptions form part of "the fabric of the Directive", whereas zero-rating is a derogation. In our view, as we have explained, whilst *Talacre* emphasises the particular nature of the derogation under article 110, and the contrast between exemptions enshrined in the scheme of the directive and national exceptions outside the harmonised framework (see in particular the Advocate General's opinion, at [42]), we do not consider that case to have decided that such a distinction has the effect that *CPP* does not apply at all outside such a framework. The significance of the difference between exemptions and provisions for zero-rating in this respect is not to set a boundary for the application of *CPP* in determining whether a composite transaction is a single supply, but to limit the effect of a single supply analysis so as to enable the national legislation, where relevant, to apply zero-rating only to a specific element or specific elements of such a single supply.

33. In our judgment, the *CPP* principles are of general application in determining the nature of a supply, namely whether a composite transaction is a single supply or multiple supplies. Determining that question is a step required whatever the putative tax treatment of the supply or supplies at issue; whether standard-rated, exempt or zero-rated. The difference is at the next stage. Where the question concerns a putative exempt or standard-rated supply, the *CPP* analysis answers that question as well. But where the question is whether an element of what is regarded, on *CPP* principles, as a single supply can fall within a zero-rating, permitted by way of derogation under article 110, it is at that stage of the enquiry that *Talacre* may operate to exclude the result that would otherwise follow from the application of *CPP*, and so to allow some elements of a single supply to be taxed separately.

34. It being accepted that, on application of the *CPP* principles, the supply of a caravan and its attendant veranda is a single supply, the question is whether the effect of that analysis is, as *CPP* itself provides, to apply to the ancillary element, namely the veranda, the same tax treatment as that of the principal element, the caravan. This turns on the extent to which consideration of the specific legal framework can result in an element of that single supply being excluded from the zero rating.

35. Mr Cordara argues that what is critical is that the element of the single supply that is putatively to be afforded a separate tax treatment has to be singled out for that tax treatment by the use of express terms in the legislation. That was the position in *Talacre* where there was an express exclusion of removable contents from the scope of the zero-rating. Referring to *French Undertakers*, Mr Cordara submits that the element has to be of a sufficiently concrete and specific nature to sustain such special treatment. In essence, he submits, where a member state wishes to tax a single supply at two different rates, it has to say so in express terms.

36. Mr Hyam, on the other hand, supports the conclusion arrived at by the FTT, in particular in its reliance on what had been said by the First-tier Tribunal in *McCarthy & Stone*, at [65] and [66]. Paragraph [66] emphasised what the ECJ in *Talacre* had said, at [25], concerning the determination of the UK to subject only the supply of caravans themselves to the zero-rate, and the intention of the UK in the fact that it did not consider that it was justified in applying the zero-rate also to the supply of the contents of those caravans. The tribunal in *McCarthy & Stone*, and the FTT in this case, took the view that the reasoning of the ECJ was not dependent on a specific exclusion in the domestic legislation nor on what was only expressly included in it, but hinged on what was intended to be encompassed in the domestic legislation so far as is apparent from that legislation.

37. We agree with the FTT to this extent. It would be wrong, in our view, to be too prescriptive as to the circumstances in which it might be held that a zero-rating provision evidenced an intention on the part of a member state to exclude a particular element of a single supply from its scope. The position in *Talacre* was clear. There was an express exclusion of removable contents. But that was simply one example of a case on its own facts. There may be other cases where the language of the provision for zero-rating can properly be construed to restrict the scope of the zero-rating to a certain element or certain elements only of a single supply. But that, in our view, will only be the case where there are clear words of limitation to that effect. Adopting the language of the Advocate General in *Talacre*, at [35] of her opinion, the limitation must be both particular and specific.

38. That is a matter of statutory construction. We do not consider that *French Undertakers* adds anything to the normal rules of construction in this regard. As we have said, the ECJ in its judgment in *French Undertakers* did not refer to *Talacre*. Furthermore, although *EC Commission v France* (Case C-384/01) [2003] ECR I-4395 was cited in *Talacre*, the ECJ did not make reference to what had been said there concerning "concrete and specific aspects" of a supply, and the Advocate General, at [34], stated that it was not possible, in the circumstances of *Talacre*, to draw wide-ranging conclusions from that case.

39. On this basis, we conclude that the ability of member states to restrict the application of a reduced rate to "concrete and specific aspects" of a category of supply permitted under article 98 or 102 of the Principal VAT Directive has no application to a zero-rating provision in existence at 1 January 1991 which has effect by virtue of the derogation in article 110. It is that provision, at that date, which is relevant. There is no relevant restriction to what was then permitted to be zero-rated.

40. In construing the provisions of Group 9 of Schedule 8 VATA, we start from a different position to that of the FTT. The FTT concluded that the *CPP* principles did not apply, so that there was no single supply according to those principles. It was therefore necessary for the FTT to determine whether the zero-rating for caravans could nonetheless include verandas. The FTT reasoned, again adopting the position in *McCarthy & Stone*, that this should be done by construing the provision in the way a UK court would have done before the judgment of the ECJ in *CPP*.

41. For the reasons we have given, we consider the approach of the FTT to have been misconceived. In our view, the *CPP* principles fall to be applied to determine whether there is a single supply comprising the respective elements of the caravan and the veranda. There is no need to have recourse to any perceived notion of a separate domestic principle to similar effect. The only question is whether, construed in accordance with the principles we have described, either verandas are excluded from the scope of the zero-rating or the zero-rating applies only to the caravan element (that is, not including the veranda) of the single supply.

42. We consider that the FTT placed too much weight on the reference by the ECJ in *Talacre*, at [22], to what is now article 110 being a "stand-still" provision. Contrary to what the FTT appears to have considered, that does not carry with it any implication that the effect (as opposed to the existence) of a domestic provision must be frozen in time. Such a provision is not to be construed so as to reflect only the circumstances applicable at the relevant date of 1 January 1991. Article 110 is a "stand-still" provision, but only in the sense that the domestic law had to provide for the zero-rating at 1 January 1991, and no new zero-rating could later be introduced. The ECJ in *Talacre* itself refers to the "content" of the legislation in force on 1 January 1991 as being the decisive factor in ascertaining the scope of the supplies in respect of which the derogation applies; it is the content, and not the historic application, which is material.

43. The point is that the decisions of the ECJ and of the UK Courts tell us what the law is and always has been. Thus, suppose that the *CPP* principles as explained by the ECJ had in fact been explained by the House of Lords itself in, say, 1992 without their lordships having felt any need to make a reference. It would, we think, have been impossible for anyone to contend, in say 1993, that those principles should not apply in ascertaining, in relation to a provision in force at 1 January 1991, whether a supply of a caravan with a (non-integral) veranda was a single supply, irrespective of any different view that might have been held before the hypothetical decision of the House of Lords. Further, it would have been equally impossible, we consider, for anyone to have contended that the scope of the zero-rating before 1991 was, as a matter of law, any different from what it was applying the newly-explained principle. In applying the zero-rating provisions today, they fall to be construed in accordance with the law as it has now been established to be and not by reference to some earlier understanding.

44. In our judgment, there is nothing in Group 9 of Schedule 8 to exclude a veranda from the scope of zero-rating by reason of being part of a single supply of which the principal supply is a caravan. We can discern no legislative intention to do so. There

are no express words of exclusion, nor is there any particular or specific language confining the zero-rating to only that element of a single supply that comprises simply the distinct element of the caravan itself, without the veranda. Group 9 contains, in this respect (and in contrast with the removable contents exclusion in *Talacre*) neither words of exclusion nor words of limitation. The mere reference to "caravan" does not suffice. Just as exemption of a principal element of a composite supply extends to elements of that supply that are ancillary to the principal supply, we consider that the same applies to zero-rating subject only to the possibility of exclusion, under national law, of such an extension. However, in our judgment, such an extension must be express or necessarily implicit in the domestic legislation. Accordingly, the reference in Item 1 of Group 9 to "caravan", without more, encompasses as well ancillary elements of a single supply which share the tax treatment of the caravan, unless excluded. It would be necessary for the specific language of the provision to have the effect of excluding that result in respect of a particular element of the supply. Absent such language, therefore, application of the *CPP* principles, in relation to a single supply of which the caravan is the principal element and the veranda is the ancillary element, has the effect that zero-rating applies to the whole of the single supply, including the veranda.

45. Mr Hyam submitted that this conclusion would have the result of extending the scope of the zero-rating beyond that permissible under article 110. We do not agree. Once it is understood that article 110 permits zero-rating to be continued according to the content of the legislation in force on 1 January 1991, and that, absent a construction of the legislation that excludes elements of a single supply, or limits the zero-rating to certain elements, all elements of a single supply will be accorded the zero-rating, that is not an impermissible extension of zero-rating, but a proper application of those provisions according to both domestic and community law.

Application of pre-*CPP* case law

46. In view of our decision on the issue of the application of the *CPP* principles, it is not necessary for us to consider in any detail Colaingrove's second ground, namely that, if the pre-*CPP* case law were relevant, the FTT erred in its application to the facts.

47. In our judgment, there can be no dichotomy between the *CPP* principles, as expounded by the Court of Justice, and the domestic principles that were developed, to the same purpose, prior to *CPP*. There is a single principle. As with any such principle, case law will inevitably develop the jurisprudence surrounding the principle, applying it to various and novel facts and circumstances. But those developments at once form part of the single principle, and lose any separate significance or application. No part is capable of being applied to the exclusion of all other parts, still less by reference to an historic stage of the development of the principle.

48. There are, as the FTT itself observed, and as would be expected, differences in the way the UK courts and the ECJ have expressed the principles governing the classification of a transaction as a single supply or multiple supplies. Developments

in the case law from *CPP* and since have ironed out those differences. It would, in our view, be a retrograde step, and contrary to principle, to revert to a former purely domestic expression of a principle which is now well-established and refined as a matter of EU law by the Court of Justice.

49. If authority is needed for this proposition, it can be found in the opinion of Lord Hoffmann in *Dr Beynon and Partners v Customs and Excise Commissioners* [2005] STC 55, with whom all other law lords agreed, at [19]:

> "In the course of argument your Lordships were also referred, as were the courts below, to a number of cases, both in this country and in the Court of Justice, which were decided before the *Card Protection* case. Submissions were made as to whether the principles upon which those cases were decided had application to this case. Their Lordships think that there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further."

50. The error into which the FTT fell was to regard *Talacre* as having the effect that the domestic legislation fell to be construed without reference to *CPP*. Once the FTT had come to that conclusion it was driven to apply some other means of determining the nature and scope of the supply or supplies where the transaction consisted of a number of separate elements. Otherwise, a construction devoid of the *CPP* principles, or some alternative, would necessarily give rise to cases in which a supply which comprised a single supply of goods or services (or goods and services) from an economic point of view would be artificially split. One example, to which the FTT itself referred, would be the supply of biscuits in a tin which, in *Customs and Excise Commissioners v United Biscuits (UK) Ltd* [1992] STC 326, the Court of Session found was a single supply of biscuits, and thus as a whole zero-rated. Absent *CPP*, a single supply analysis would only be possible, and an otherwise artificial split of the supply from an economic perspective would only be avoided, if something analogous to the *CPP* principles could be applied. But once it is established that the *CPP* principles do apply, then, subject to there being no relevant exclusion or limitation in the zero-rating provision in question, that issue falls away. There is never any need to have recourse to the pre-*CPP* approach of the domestic courts, and in doing so the FTT erred in law.

The meaning of "caravan"

51. Our conclusion on the application of the *CPP* principles also makes it strictly unnecessary for us to consider the further alternative ground put forward by Colaingrove, namely that a veranda is part and parcel of a "caravan" as that term is to be construed for the purposes of Group 9. Logic, possibly, would dictate that this question would fall to be considered before any question of the application of the *CPP* principles; if everything that is supplied falls within the description of the item to be zero-rated, there is no need for the application of principles treating a composite transaction as a single supply or multiple supplies.

52. In view of our decision on the application of the *CPP* principles, we have decided to say very little about this further alternative ground. It may be argued that, in its (brief) reasoning at [44] to [48], the FTT was in error in failing to give any, or any sufficient, weight to the element of static functionality that Mr Cordara submitted attracted zero-rating, as opposed to the capacity for movement favoured by the FTT. It may also be argued that the FTT erred in asking itself (at [47]) whether the veranda fell within the meaning of "caravan" rather that whether the assembly as a whole fell within that meaning. If we were to accept either or both of those arguments, we consider that it would be necessary to remit the matter to the FTT to re-make its determination in accordance with further directions which we would need to make. That is unnecessary in view of our earlier conclusion. If this matter goes further, and the Court of Appeal takes a different view from us on the application of the *CPP* principles, that court will be in as good a position as we are to make findings on the question whether the caravan together with the veranda falls within the statutory meaning of "caravan" in Group 9, and to remit the case to the FTT if it is appropriate to do so.

Fiscal neutrality

53. Mr Cordara raised the issue of the principle of fiscal neutrality in further support of his argument that the proper construction of "caravan" in Group 9 should include the attached verandas. He based this submission on the fact, as he put it, that HMRC had ruled that verandas manufactured as an intrinsic part of the caravan such that they are physically inseparable from it at all times bear the same tax treatment as the caravans, in other words the supply of such a caravan, including the integrated veranda, is zero-rated. He argued that applying this principle, the supply of the veranda in this case should likewise be taxed in the same manner as the rest of the supply.

54. This was not an argument raised before the FTT, nor was it a ground on which Colaingrove relied in its notice of appeal. As Mr Hyam rightly submitted, the FTT made no finding in respect of caravans with integrated verandas or their tax treatment. It would not be appropriate for us to consider this issue. It would not in any event affect the outcome of this appeal.

Reference to ECJ

55. Neither party invited us to refer any question, particularly in relation to the application of the *CPP* principles, to the Court of Justice. In the event, we consider the law to be clear, and we do not entertain any such doubts as would make it appropriate for us to make a reference.

Decision

56. For the reasons we have given, we allow this appeal.

THE HON MR JUSTICE WARREN

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 15 January 2015