[2017] UKUT 431 (TCC)

Appeal number: UT/2016/0007

VALUE ADDED TAX – distance learning courses – classification of supply - whether supply of books within item 1 Group 3 Schedule 8 VATA 1994

JURISDICTION – legitimate expectation of agreed classification – whether assessment depended on prior decision – section 84(10) VATA 1994

VALUE ADDED TAX – entitlement to repayment supplement – whether taxpayer entitled to VAT credit – section 79 VATA 1994

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

METROPOLITAN INTERNATIONAL SCHOOLS LIMITED — **Respondent**

TRIBUNAL: Mr Justice Mann
Judge Ashley Greenbank

Sitting in public in London on 14, 15 and 16 February 2017

Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Roger Thomas QC, instructed by Grant Thornton UK LLP, for the Respondent

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DECISION

INTRODUCTION

1. This is an appeal from a decision of the First-tier Tribunal (Judge Howard Nowlan and Mr Julian Stafford) (the "FTT") which was released on 2nd October 2015 (the "FTT Decision"). The FTT Decision is reported at [2015] UKFTT 517.

2. In that decision, the FTT found that the supplies made by Metropolitan International Schools Limited (the "School") of distance learning services to customers should be treated as a single zero rated supply of books (under section 30 and item 1 of Group 3 of Schedule 8 to the Value Added Tax Act 1994 ("VATA")) and allowed an appeal by the School against a decision by HMRC that supplies made by the School should be treated as standard rated for VAT purposes. HMRC appeals against that decision. We have referred to this issue as the "principal issue" in this decision.

3. The FTT Decision also set out the FTT's views on two issues that would have been relevant if the School had failed on the principal issue. These issues are summarised at paragraph [10] below and described in more detail later in this decision. In summary, the FTT decided that, if it had not found in favour of the School on the principal issue, it would have rejected the School's claims in relation to these other issues. In the event that HMRC succeeds in its appeal on the principal issue, the School cross-appeals against those decisions.

BACKGROUND

4. The background to this dispute is set out in the FTT Decision (FTT Decision [8] to [21]). We have summarised the main points below.

5. Following an agreement between HMRC and the School in 1999, the supplies made by the School to its customers were treated as involving two separate supplies: one of books (which was zero rated); and one of educational services (which was standard rated). The agreement contained a method for determining the proportion of supplies made by the School that would be treated as zero rated and the proportion that would be treated as standard rated. In broad terms, the result was that 75% by value of the supplies made by the School were treated as zero rated and 25% as standard rated.

6. In 2009, in connection with the review of a claim for repayment of VAT made by the School for 2006, HMRC withdrew its agreement to the agreed method on the grounds that the supplies made by the School should be treated as a single supply of standard rated educational services following the decision of the House of Lords in *College of Estate Management Limited v. HM Customs & Excise* [2005] UKHL 62, [2005] STC 1597 ("*CEM*").

7. At least initially, HMRC sought to withdraw its agreement to the agreed method not only for future periods but also retrospectively for all periods for which revised assessments could be made. There followed an exchange of correspondence between the School, its advisers and HMRC, which we have described in more detail below,

during which HMRC's position on whether the withdrawal of the agreement should apply retrospectively changed from time to time, but in the event, the relevant HMRC officer, Miss Abida Rashid, issued assessments for all open periods on 26th March 2010.

8. The School appealed to the FTT against the revised assessments. The School also applied for judicial review of HMRC's withdrawal of the agreement.

9. Following the issue of the application for judicial review, HMRC conceded that it would not pursue the assessments for prior periods. The judicial review proceedings however continued in relation to certain issues. Mr Justice Warren ordered that the judicial review proceedings be remitted to the Upper Tribunal and stand behind the appeals against the assessments. However, those issues were not before us in these proceedings, which relate only to the appeals from the FTT.

10. There were, however, two issues, which were derived from the judicial review proceedings, and which the School ran before the FTT, in addition to its appeal against the assessments and over which the School asserted the FTT had jurisdiction. Both of these issues were only relevant if HMRC was successful on the question of the nature of the supplies made by the School.

(1) The first was a claim by the School that, when HMRC withdrew the agreed method, the School had a legitimate expectation that it would be permitted to continue to operate the previously agreed method in relation to contracts that had been entered into before HMRC's withdrawal of its agreement to that method in 2009 (the "run-off period issue"). The School asserted that the FTT had jurisdiction in respect of this claim under section 84(10) VATA.

(2) The second was a claim by the School for repayment supplement in relation to payments of VAT for periods prior to 2009 that had been withheld following HMRC's initial decision that the agreed method should be withdrawn retrospectively (the "repayment supplement issue").

11. The issues before the FTT were therefore three-fold: the correct classification of the supplies made by the School (i.e. the principal issue); the run-off period issue; and the repayment supplement issue.

12. We will discuss the findings of the FTT on each of these issues in more detail in the context of our discussion of each one of them, but, in summary, the FTT decided, on the principal issue, that the School made a single supply to its customers and that supply was a supply of books, which was zero rated under item 1 Group 3 Schedule 8 VATA (FTT Decision [120] to [122]).

13. Having decided the principal issue in this way, the FTT did not need to decide the repayment supplement issue or the run-off period issue. However, having heard argument from the parties on both points, it indicated that, if it had reached a different conclusion on the principal issue, it would have decided the other issues in the following ways:

(1) in relation to the run-off period issue, the FTT did not have jurisdiction to determine the issue, but if the FTT had had jurisdiction, it would have decided that the School should have been permitted to operate the previously agreed method in relation to the pre-2009 contracts (FTT Decision [172] and [174]);

(2) in relation to the repayment supplement issue, the School was not entitled to a repayment supplement equivalent to interest on the repayment of VAT to the School for the past periods because it would not have an excess of input tax over output tax and so would have no VAT credit capable of giving rise to a claim for repayment supplement under section 79 VATA (FTT Decision [139]).

14. HMRC appealed to the Upper Tribunal with the permission of the FTT. In the event that HMRC was successful in its appeal, the School cross-appealed against the FTT's finding on the repayment supplement issue and its decision that it had no jurisdiction to hear the run-off period issue (as set out in [13](1) and (2) above).

THE PRINCIPAL ISSUE

15. We will turn first to the principal issue.

The FTT Decision

16. The FTT reviewed extensive evidence regarding the nature of the supplies made by the School and heard several witnesses. In the FTT Decision, it set out first a general description of the trade of the School (FTT Decision [27] to [60]) and then some findings of fact (FTT Decision [64]).

The FTT's description of the supplies made by the School

17. We will not set out in full the text of the general description of the School's trade from the FTT Decision. We have summarised the main points in the paragraphs below.

18. The School provided "blended distance learning courses" (FTT Decision [27]). The courses were designed to prepare customers for third party examinations such as those provided by the City & Guilds. The School did not provide its own qualifications.

19. The courses cost between £5,000 and £7,000 for a three year course. The School's customers would often enter into finance agreements to pay for a course.

20. The School had somewhere between 40,000 and 60,000 active customers at any one time. The School had 14 employees, of whom six dealt with administration and the others had some role in relation to tutorial support for the various courses (FTT Decision [42]).

21. One element of all of the courses was the provision to customers of a set of highly professional manuals. It was anticipated that customers would spend 10 to 15 hours each week reading the relevant manuals (FTT Decision [28] and [29]).

22. The manuals were sent to customers one at a time. At the end of each manual was an assessment comprising a series of multiple choice questions designed to test the customer's understanding of the content of that manual (FTT Decision [35]). These assessments are referred to as "tutor marked assessments" or "TMAs".

5 23. The customer would answer the questions in a TMA and send them to the School over the internet. The questions would then be marked by computer. The customer would be notified of his or her results and provided with some help and guidance in the form of a progress report. The reports, help and guidance were generated by computer (FTT Decision [37]).

10 24. When a customer completed a TMA successfully, the School would send the customer the next manual in the series. Although the general rule was that a TMA would have to be passed before the next manual would be sent to the customer, there were circumstances in which a customer would be sent a manual even if a TMA had not been successfully completed (FTT Decision [38]).

15 25. In addition to the manuals, TMAs and progress reports, the School provided certain other services to its customers. Some of these services applied to all courses provided by the School. For example:

(1) students were provided with support from tutors by phone or email (FTT Decision [32] and [39]);

20 (2) the School undertook to pay the examination fee for suitable courses if a customer passed the requisite TMAs.

26. The School also provided other services to customers. The nature of these services would depend upon the type of the course in question. The FTT heard evidence in relation to two categories of course: the first being trade courses; and the 25 second being animation and computer games courses.

27. The further services in relation to the trade courses included:

(1) a DVD reproducing some of the information from the manuals (FTT Decision [48]);

(2) a "virtual room" on the School's website enabling customers studying 30 the electrical course to study the wiring of various appliances (FTT Decision [49]);

(3) a one week or two week practical course for customers who passed all the TMAs in relation to the technical aspects covered in the manuals (FTT Decision [50]).

35 28. The further services provided in relation to the animation and computer games courses included:

(1) some computer software, which, although readily available commercially, was required in order to undertake the computer based courses set out in the manuals (FTT Decision [53]);

(2) a web forum to enable customers to demonstrate their designs and discuss them with others on the website, which was moderated by the School (FTT Decision [55]).

29. The marketing material emphasised the blended nature of the course. However, the aim of marketing was to emphasise the benefits in terms of future job prospects for those who undertook further training (FTT Decision [59]).

30. The marketing material for each course refers to the availability of support from "tutors" by phone or email (FTT Decision [32] and [39]). It was acknowledged that this support was genuinely available. However, although there was some dispute as to the extent to which tutorial support was used by customers, the level of use was relatively low.

31. Potential customers were interviewed before being permitted to engage in the courses (FTT Decision [58] and [59]). This process was not intended to control access to courses in terms of academic ability. It was intended to ensure that students fully understood the nature of the time commitment and, given that many students entered into financing arrangements to fund their courses, their financial obligations.

The FTT's further findings of fact

32. At [64] in the FTT Decision, the FTT made the following further findings of fact.

> "1. The Appellant's aim was that the manuals should be entirely comprehensive, and that the information contained in them would be all that was required to enable customers to master the particular subjects.
>
> 2. In contrast to the position in the CEM case there was no additional provision of classroom tuition.
>
> 3. The "tutor support", provided via phone calls or emails virtually always referred customers making enquiries back to the relevant passages in the manuals, reflecting the fact that the manuals had been drafted to include all the required information and explanations.
>
> 4. The TMAs were simply a more efficient, and much more informative, means of dealing with multiple-choice questions that were set out at the end of each of the manuals. The answers invariably directed customers back to the appropriate part of the manuals when further study was required.
>
> 5. In relation to the trade courses, the provision of DVDs designed to repeat the content of the manuals, the web-based virtual room to practice and test the information derived from the manuals, and the rarely requested practical sessions did not provide any additional technical information but each simply repeated the information and enabled customers to practice what they had learnt. The suggestion that the person overseeing a practical session might assist if one of the participants was doing something wrong did not undermine the unchallenged evidence that the purpose of the presence of that person was to ensure that health and safety requirements were duly met.

6. In the case of the animation and computer games courses the provision of the down-loads of Photoshop etc did not provide education, but constituted the equivalent of the provision of paper and paints to an artist, namely required tools to enable customers to practice what they had learnt.

7. In the case of these same courses, it was acknowledged that periodic tips might be offered to customers in their preparation of their own designs and animations, but the essential purpose of the exercise, on the part of the customers, of providing such designs and animation was to illustrate "their own work".

8. Albeit that an employee of the Appellant might act as moderator in the on-line discussion sessions, these sessions were designed for students to discuss amongst themselves what they had learnt and whether their various designs and animations met with approval from others, and the sessions barely involved any supply of any relevance from the Appellant at all.

9. In testing whether the manuals were the principal supply and whether the "add-on" functions were ancillary, and then applying the case law test that something that constitutes an end in itself is the principal element and something that does not constitute an end in itself cannot be a separate principal function, we consider that the manuals are the Appellant's principal provision and all other items are ancillary. This results not only from the fact that the manuals in isolation are intended to be, and we consider them to be, sufficient to achieve the customers' desired end in itself, and the "add on" items are irrelevant in this context, but the majority of customers continued with the courses and continued to receive and, presumably, to study the manuals, yet many (indeed we were told a considerable majority) made no use of the "add-on" functions whatsoever. This is not to say that they were not available and part of the contracted supply. Of course they were. But if the end could be, and often presumably was, attained without resort to any of the "add on" functions, this demonstrates that the add-on functions must have ranked as ancillary.

10. In the event that customers, or some customers, aimed to finish their courses in order to take third-party examinations and to obtain third-party qualifications, these ends were not part of the supply offered by the Appellant. More relevantly, when we were told that in the case of the trade courses, it was a requirement before the Appellant would pay for a customer to sit third-party examinations, that the practical sessions had been attended, and we were told that only a very small minority of trade course customers took the practical sessions, we find it difficult to accept that the end sought by the objective and average customer was "an education, culminating in an examination and a qualification". There was no evidence as to the aims of customers beyond the confines of the actual supplies made by the Appellant. Some might have been entirely content simply to have gained considerable additional knowledge for career purposes, and in the case of the animation courses, some might simply have aimed to foster hobby activities.

11. Some of the marketing information may have involved an element of hard selling, and may have over-stressed the supposedly blended nature of the courses. We will deal in the decision itself with whether this will have been decisive. For present purposes, we simply say that representations along the lines of "Your tutor, teacher, friend and mentor" will assist you at all stages, and that

it is important to contact the tutor to discuss course work are all something of an exaggeration. They were not strictly untrue because the phone and email facility to seek help from tutors was real, but it was somewhat ramped up in the marketing information. Whether we should apply VAT by reference to the supplies that were made or to a ramped up description that will either have been believed or disregarded, we will deal with in our decision."

The FTT's decision on the single supply/separate supplies issue

33. The FTT first had to decide whether the supplies made by the School to its customers should be treated as a single supply or as separate supplies. That issue was not before us on this appeal, where both parties accepted that the supplies made by the School should be treated as a single supply. In particular, the School did not seek to argue – as it had done before the FTT – that it should be treated as having made separate supplies to customers.

34. The FTT identified two tests (at FTT Decision [66]) for determining whether supplies should be treated as a single supply:

(1) first, the various elements should be treated as a single supply if one element was the "principal" element and the other elements were ancillary to that principal element (the "principal/ancillary test");

(2) second, the various elements should be treated as a single supply if, from an economic point of view, it would be artificial to split the elements into two or more separate supplies (the "single economic supply test").

35. The FTT found that there was a single supply in this case. It did so on the basis that the provision of the manuals was the principal element and that all other elements were ancillary to it. That is, it applied the principal/ancillary test. The FTT noted, however, that it would have reached the same conclusion if it had applied the single economic supply test, that is, whether or not it would be artificial, from an economic point of view to split the supplies (FTT Decision [120]).

The FTT's decision on the principal issue: the nature of the supplies made by the School

36. On the issue that is before us on this appeal, namely the classification of the single supply made by the School, the FTT identified from the case law four separate tests for determining the nature of the supply with the possible addition of a fifth test, that of "the simple application of common sense".

37. The four tests were as follows:

(1) In a case where the various elements were treated as a single supply by virtue of one element being regarded as the principal supply and the other elements as ancillary, the single supply should be characterised by reference to the nature of the principal supply (FTT Decision [69]).

(2) The second test applied in circumstances where the customer wants a composite service. In these cases, the single supply should be

characterised by reference to the "predominant" element of the supply (FTT Decision [73]).

(3) The third test was applicable where two components were placed on an equal footing. In those circumstances, the single supply will be treated as comprising both elements and, if as a result, the single composite supply did not fall within the description of any zero rated supply or exempt supply, the service was standard rated (FTT Decision [75]). (We observe that this is not so much of a test as the possible result of tests (1) and (2) not resulting in a characterisation based on one of the elements of the supply.)

(4) The fourth test was that where there are various elements to a single supply, an "overarching" description of the single supply that aptly describes the entire service could be adopted (FTT Decision [76]).

38. The FTT's conclusions on the application of these tests are set out in the FTT Decision at [121]. In summary, having found that the various elements supplied to customers by the School constituted a single supply on the grounds that there was a principal element (that of the manuals) to which all the other elements were ancillary, the FTT decided that the nature of that single supply must be characterised by the nature of the principal element, in this case, books. The FTT therefore applied the first test that it had identified from the case law.

39. As regards the other tests, the FTT commented as follows (FTT Decision [121]):

(1) if and to the extent that the second test (that of the predominant supply) had been applied, the answer would have been the same, that is that the predominant supply was one of books and that should characterise the nature of the single supply;

(2) on the FTT's reasoning, the third test (supplies on an equal footing), was not relevant;

(3) the fourth test (that of the overarching description of the supply) was also in the FTT's view irrelevant, but if it was relevant, the FTT's view was that it would have again produced the same result, that is, that the overarching description of the supply should be one of books.

The Grounds of Appeal

40. HMRC appeals against that decision. The grounds of HMRC's appeal are set out in its notice of appeal. They are as follows:

> "Ground 1: The FTT erred in its determination that the manuals were the principal supply and the other elements ancillary. The FTT erred by asking the wrong legal questions, in particular (i) by considering how the supply was used rather than how it would objectively be viewed by the typical customer and (ii) by asking whether each individual element was an end in itself or independently provided education. The FTT also erred in the reasons it relied on in concluding that the manuals were the principal supply and the other elements were ancillary.

> The FTT also erred in arriving at a determination that was inconsistent with the only reasonable conclusion."
>
> "Ground 2: The FTT erred in its determination that the manuals were in any case the predominant or the overarching supply. The FTT misinterpreted the relevant case law and failed to ask the right question (i.e., what was the economic purpose of the typical customer?). It also came to its conclusion simply on the basis of its primary conclusion that the manuals were the principal supply."
>
> "Ground 3: The FTT made a number of errors in its factual findings and in its assessment of the facts in particular in failing to take account of relevant matters in concluding that the manuals were the principal supply. That conclusion was unreasonable and not one that was open to it."

The arguments of the parties (in outline) on the characterisation test

41. The arguments of the parties on this point were extensive and detailed, and we do not set them out in detail though we have considered them all carefully. They can, for present purposes, be summarised as follows.

42. Ms Mitrophanous for HMRC submitted that the FTT erred in the tests that it applied because the application of those tests failed to apply what she says was an overall test (or perhaps more accurately principle), which was to ascertain the character of the supply from the objective viewpoint of the typical consumer so as to capture the consumer's aim in purchasing the supply. This should have been the lens through which any other tests should have been applied and seemed to lead her to proposing a test of identifying the "over-arching" nature of the supply. The FTT erred in applying the four tests, though she seemed to accept that the tests, or some of them, were ways of approaching the problem provided one had in mind her over-riding principle. The essence of her case seems to have been that such tests as might be applied must be done with her over-riding principle in mind, and the FTT failed to do that.

43. So far as the approach of the FTT was concerned, she criticised the application of the four tests and said that they came up with an unsustainable result. Amongst other things, the FTT was said to have mis-assessed the significance of the students' working towards a qualification and the absence of an internal qualification, over-emphasised the low take-up of practicals and tutorials, failed to appreciate how the supplies were held out in the School's publicity material, and wrongly asked whether the services other than the provision of manuals were an end in themselves (significant in assessing a principal/ancillary dichotomy, which is said to appear in the authorities and which we narrate below). She also said there was a circularity in the FTT's reasoning – she says the FTT held that the desired end was to learn through manuals, therefore the manuals were the principal supply and all other elements were ancillary in that context; that was said to be faulty reasoning. Other matters were said to have been wrongly ignored or their significance mis-assessed. For all those reasons the FTT Decision was said to be faulty.

44. Mr Thomas QC for the School emphasised that the decision of the FTT was a fact-sensitive one involving a number of factors leading to a VAT classification. As such, an appellate tribunal should approach an appeal "with circumspection" before interfering merely because the appellate tribunal would have put the case on the other side of the line (*CEM* at [27]). In any event the FTT was right in its decision and reasoning. There was no error of law. The characterisation should be based on the "predominant element" of the supply, assessed qualitatively, which was books; alternatively one should seek to identify whether one element was a principal element to which other elements were ancillary. The FTT found books to be predominant, or the principal supply, and the other items supplied by the School were ancillary items or add-ons. Although the FTT applied other tests, one of the tests it applied was the predominance test, and the FTT's answer to that question should be respected (and was correct). So far as the fourth test (over-arching) was concerned, Mr Thomas submitted that this was heresy, with no basis in European law.

45. The main difference between the parties on the test or tests to be applied seems to us to come down to whether there is a possible test of the "over-arching nature" of the supply. At the end of the day we did not detect that Ms Mitrophanous disputed the possible application of the "predominance" test, or of the "principal/ancillary" test, provided that the correct lens is used. She did, of course, dispute that the FTT applied any of the tests correctly.

The proper approach and the proper tests

46. There are several European cases which deal with or relate to the characterisation of single supplies where those supplies contain various elements, but the question has arisen in various contexts which have inevitably skewed the consideration of the court from case to case. The most recent of them is *Mesto Zamberk v Financni reditelstvi v Hradci Kralove* [2014] STC 1703 ("*Mesto*"). That is the case which most clearly contains the predominance test, and Ms Mitrophanous's important lens, so we will start there.

47. In *Mesto* the Court of Justice of the European Union ("CJEU") had to consider an aquatic centre with two sorts of facilities. Some were sporting facilities such as a swimming pool divided into lanes, a beach-volleyball court and table tennis. Others were more recreational in nature – a paddling pool, waterslides and a natural river for swimming. The relevant provision of Council Directive 2006/112 (the "Principal VAT Directive"), article 132(1)(m), provided for VAT exemption for "the supply of services closely linked to sport or physical education". The first question that the CJEU had to consider was whether non-organised and non-systematic sporting activities, not aimed at competition, fell within the exemption. It held that they could. That is not relevant to the present case.

48. The second question is directly relevant. The question was:

> "26. … whether art 132(1)(m) of the VAT Directive must be interpreted as meaning that access to an aquatic park which offers visitors not only facilities for engaging in sporting activities but also other types of amusement or rest may constitute a supply of services closely linked to sport."

49. In paragraph [28], the CJEU reflected on the circumstances in which it is necessary to consider whether there is a single supply for VAT purposes, made up of two or more elements, a situation which case law says can exist. Although this was not apparently a specific question raised in the reference, the Court understandably considered that it was something which had to be considered for the purpose of answering the question raised.

> "28. There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen and OV Bank, para 22; Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, para 53; and Bog, para 53). There is also a single supply where one or more elements are to be regarded as constituting the principal supply, while other elements are to be regarded, by contrast, as one or more ancillary supplies which share the tax treatment of the principal supply (see, in particular, *CPP*, para 30; *Levob Verzekeringen and OV Bank*, para 21; and *Bog*, para 54 and case law cited)."

50. Paragraphs [29] and [30] are the origin of Mr Thomas's submission that there is now a primary test, that of predominance.

> "29. In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of art 132(1)(m) of the VAT Directive although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774, [1996] ECR I-2395, paras 12 and 14; *Levob Verzekeringen* and *OV Bank*, para 27; and *Bog*, para 61)."

> "30. It follows from the case law of the court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, *Levob Verzekeringen and OV Bank*, para 22, and *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v Revenue and Customs Comrs* (Case C-276/09) [2011] STC 316, [2010] ECR I-12359, para 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under art 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, *Bog*, para 62)."

51. Paragraph [30] and the following paragraphs are the origin of Ms Mitrophanous's submission as to the overall principle to be applied. The Court went on to consider the proper approach on the single complex supply question and held:

> "32. As regards the existence of a single complex supply in the main proceedings, it is necessary to examine whether the facilities in the aquatic park at issue form a whole so that access to the whole constitutes a single supply which it would be artificial to split."

52. And at paragraph [33] the Court emphasised the importance of an objective view, from the point of view of the typical consumer, when considering whether the predominant element was the opportunity to engage in sporting activities within article 132(1)(m) of the Principal VAT Directive:

5 > "33. As for the question whether, in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within art 132(1)(m) of the VAT Directive or, rather, pure rest and amusement, it is necessary to make that determination, as has been pointed out at paragraph 30 of the present judgment, from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different types of facilities offered, their fitting out, their number and their size compared to the park as a whole."

15 53. In that connection the subjective views of just some visitors was not relevant:

> "35. On the other hand, the fact that the intention of some visitors does not relate to the predominant element of the supply at issue determined in this way cannot call that determination into question.
>
> 36. An approach consisting in taking account of the intention of each visitor taken individually as to the use of the facilities which are made available would be contrary to the objectives of the VAT system of ensuring legal certainty and a correct and straightforward application of the exemptions provided for in art 132 of the VAT Directive. In that regard, it should be pointed out that, to facilitate the measures necessary for the application of VAT, regard must be had, save in exceptional cases, to the objective character of the transaction in question …"

54. We agree with Ms Mitrophanous that there is an over-riding principle in the nature of that which she propounds. It must be right that the characterisation is assessed objectively (and the CJEU said so), and that matters must be viewed through the eyes of the typical consumer. But, if one stopped there, there would be no guided way of answering the question that arises. The intellectual act of characterisation requires a further breakdown in the intellectual process. In *Mesto*, that is provided by the exercise of assessing whether there is a "predominant" element, and if so identifying it. If that can be done, the predominant element characterises the supply.

55. We acknowledge that that may not always be possible. There may be cases where the weighing up of the relevant characteristics of the supply does not produce a predominant element. In such a case a straight predominance test cannot provide a positive answer to what the character of the supply may be, though that may not matter much if the question is a question as to what the characterisation is not – for example, if the question is whether or not the supply falls within a given exemption. In such cases, if the supply has no single predominant characteristic then the supply will not fall within the exemption (see *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank* [2012] STC 1951 ("*Deutsche Bank*")).

56. The predominance test is therefore a test which can be applied. Having said that, Ms Mitrophanous's principle needs to be applied through it, so that the assessment of predominance is done viewing the supply and the qualitative importance of its elements through the eyes of a typical consumer.

5 57. We observe that this seems to be the same test as that applied in *Levob Verzekeringen and another v Staatssecretaris van Financiën* Case C-41/04 [2006] STC 766 ("*Levob*"), where a supplier supplied its standard software plus modifications to make it more appropriate for its customer's business. The question which arose was whether this was a single supply or two supplies, if a single supply
10 whether it was a supply of goods or a supply of services, and if a supply of services, where those services were supplied. On the first point the CJEU held that there was one supply and not two separate supplies because in reality they were "part of a single economic transaction" (paragraph [25]). In relation to the second question, the CJEU held that the national court had correctly concluded that supply was one of services
15 and not of software because of the importance of the customisation (paragraph [30]):

> "it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software."

20 58. The concept of something being "minor" or "ancillary" is borrowed from another test, albeit one applied in the context of having to determine whether a supply was a single complex supply or multiple supplies. It comes from *Card Protection Plan v Customs and Excise Commissioners* [1999] STC 270 ("*CPP*"). The facts involved the supply of insurance against the loss of credit cards together with various
25 other services. It was necessary to decide whether one of those services, namely insurance, was a separate supply attracting exemption from VAT. In that context the CJEU was asked what the criteria were for deciding whether there was one supply or more than one. This was therefore not a case in which it was necessary to decide the nature of the supply in terms. It is nonetheless significant because it seems to us that
30 the test it applied is capable of being used for the purposes for which it was deployed below, namely as a test of characterisation (the principal/ancillary test), although the predominance test is likely to produce the same answer in the cases in the principally/ancillary test can apply.

59. In paragraph [27] of *CPP*, the CJEU warned that it would not be possible to
35 give exhaustive guidance applicable universally:

> "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
> 40 to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases."

60. We think that that could apply in relation to characterisation.

61. Paragraph [30] sets out a proposed test:

> "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)."

62. The words "in particular" show that this is but one test, though it is obviously the test that was favoured by the Court in that case because in paragraph [32] it directed the national court to apply it:

> "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."

63. The formulation used there "so that it receives the same tax treatment" is clearer than the paragraph [30] formulation "which share the tax treatment of the principal service".

64. It seems to us that if this test is used to determine the single/multiple supply question in favour of a single supply, then that will also have answered the question as to the nature of the supply. To that extent, therefore, the principal/ancillary test could be used to determine the question of characterisation. However, the principal/ancillary test is only apt to apply in circumstances where it is possible to identify one principal element of the supply to which the other elements are subservient or subordinate or where the other elements are so minor that they can, in effect, be disregarded. Furthermore, as we have observed, it is not easy to imagine circumstances in which it would generate a different answer from the "predominance" test. A principal supply will almost inevitably predominate.

65. The last CJEU case on this point tends to support the "predominance" test, though it involved a slightly different question. *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] STC 774 ("*Faaborg*") concerned restaurant facilities on a ferry. It was necessary to decide whether what was supplied was goods (food) or services in order to determine where they were supplied for VAT purposes. The CJEU held that the supply was a supply of services because services other than the provision of food were supplied.

> "14. Consequently, restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely *predominate*. They must therefore be regarded as supplies of services …" (our emphasis)

66. Ms Mitrophanous seemed to rely on this as an instance of a different test, namely whether there was an "overarching" supply, even though that sort of test was not expressed in the judgment in that case. We do not think that that is correct. The paragraph sets out the basis of the decision – of the two potential characterisations (goods or services) the characteristics representing services supplied the relevant characterisation because they predominated, not because the supply of services was an appropriate over-arching description.

67. Her principal support for her "overarching" test comes from UK tax cases. The *CEM* case was the case which triggered the withdrawal in the present case of HMRC's agreement to the split characterisation regime which had been agreed with the School. It involved distance learning with an emphasis on the provision of books. An average student was expected to spend 94% of his or her time using the printed materials supplied by the college. The VAT Tribunal had decided that the relevant supply was the supply of education, and it was not correct to view the situation as one of two supplies – books and education. It accepted the view that the supply of books was ancillary to the supply of education. Lord Walker delivered a lead judgment with which the rest of their Lordships agreed. He considered that the view of the FTT was correct so far as it determined that there was one overall supply and not two supplies, but rejected the finding that the supply of books was ancillary to the supply of education. It is not clear what sort of test he would have said governed the finding that the overall supply was one of education, and it is not clear what test the tribunal applied either but Lord Walker seems to have favoured an appeal to "economic reality":

> "32. Lightman J perceived this difficulty [viz the difficulty of treating the books as ancillary] and sought to deal with it in para 34 of his judgment, which I have already quoted. But he seems, with respect, to have been hindered by the same perception that every case had to be squeezed into a matrix of what was "principal" and what was "ancillary". What the judge called "a component part of a single supply" may be (in the fullest sense) essential to it—a restaurant with no food is almost a contradiction in terms, and could not supply its customers with anything—and yet the economic reality is that the restaurateur provides a single supply of services. Without the need to resort to gnomic utterances such as "the medium is the message", the same sort of relationship exists between the educational services which the College provides to a student who takes one of its distance-learning courses and the written materials which it provides to the student."

68. However, Lord Rodger's speech comes closer to providing a test, and is relied on by Ms Mitrophanous in support of her "overarching supply" test or perhaps an "economic reality" test. He said:

> "12. But the mere fact that the supply of the printed materials cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes. One has still to decide whether, as a matter of statutory interpretation, the College should properly be regarded as making a separate supply of the printed materials or, rather, a single supply of education, of which the provision of the printed materials is merely one element. Only in the latter event is there a single exempt supply, to which section 31(1) of the Act applies

and section 30(1) does not apply. The answer to that question is not to be found simply by looking at what the taxable person actually did since ex hypothesi, in any case where this kind of question arises, on the physical plane the taxable person will have made a number of supplies. The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some *over-arching single supply*. According to the Court of Justice in *Card Protection*, at para 29, for the purposes of the directive the criterion to be applied is whether there is a single supply "from an economic point of view". If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the value added tax system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.

13. In the present case the tribunal, having taken into account all the factors, concluded that the College made one supply, the provision of education. In my view, the tribunal were entitled to reach that conclusion on the basis of the findings which they made - especially their finding that the students took the courses in order to obtain the relevant qualification offered by the College. The transaction was therefore one which gave the students the opportunity, by successfully studying the printed materials and completing the other necessary steps, to obtain a valuable qualification. That was what the students were purchasing. For the reasons given by Lord Walker, I am accordingly satisfied that the Court of Appeal erred in disturbing the tribunal's conclusion. On that basis the College made no zero-rated supply of books in terms of section 30(1) of the Act. The appeal should accordingly be allowed."

(The emphasis in paragraph [12] is ours.)

69. This case was, of course, pre-*Mesto*. However, it does provide some support for Ms Mitrophanous's point.

70. The same point is said to emerge from *Byrom v HMRC* [2006] STC 992 ("*Byrom*"). In that case the dispute was whether the owners of premises licensed as a massage parlour (for which they provided premises and some services) provided standard rated services or made an exempt supply of a licence to occupy land. Warren J held that the supply was not that of a licence to occupy land. The test he applied in characterising the supply appears in paragraph [70] of his decision:

"70. In the light of that conclusion, it is then necessary to categorise the resulting single supply viewed as a complex of elements (the provision of the licence and of the various services). In my judgment, the over-arching single supply is not to be treated as a supply of a licence to occupy land. The description which reflects economic and social reality is a supply of massage parlour services, one element of which is the provision of the room. That, in my judgment, is the correct conclusion even if, which for my part I think probably is the case, the provision of the room was, to the masseuse, the single most important element of the overall supply and, indeed, one predominating over the other elements taken together. This is a case where the tax treatment of the

> supply is self-evident once it is established that the other service elements are not ancillary to the provision of the licence."

71. It is plain that he did not adopt predominance as a test. Indeed, he expressly arrived at his conclusion *despite* his view that the licence was the "single most important element" of the supply. Once again, however, this decision pre-dates *Mesto*.

72. Ms Mitrophanous relies on this for obvious reasons. It does indeed support Ms Mitrophanous's submission and is the clearest exposition of the point. She also claims support from the prior House of Lords decision in *Dr Beynon v C & E Commissioners* [2005] STC 55 ("*Dr Beynon*"). The context of the decision was the classification of a supply when a doctor prescribed and administered medicines – was it the supply of medicines (standard rated) with other services or was it the overall supply of medical services (exempt)? The House of Lords held in favour of the latter. The context of the case was a "one supply or two" context, but the analysis is capable of affecting characterisation. In his judgment Lord Hoffmann referred to *CPP* as being the appropriate source for the test and emphasised the need for economic reality:

> "20. The Court of Justice observed, in paras 27-29, that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction took place. Every supply of "a service" is by definition distinct and independent but a supply which "from an economic point of view" comprises a *single* service should not be artificially split into separate "services". What matters is "the essential features of the transaction"."

73. His conclusion applied that:

> "31. Besides raising the question of what authority a doctor would have to dispense drugs to patients who were not regulation 20 patients, this approach seems to me to involve the kind of artificial dissection of the transaction which the Court of Justice warned against in para 29 of its judgment in the *Card Protection case* [1999] 2 AC 601. In my opinion the level of generality which corresponds with social and economic reality is to regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units. If one takes this view, then in my opinion the correct classification is that which the NHS has always taken of the personal administration of drugs to non-regulation 20 patients, namely that there is a single supply of services."

74. We do not consider that this gives much support to the "over-arching" test. Lord Hoffmann was considering the "number of supplies" point, and in that context held it was artificial to split them. So there was just one supply. His characterisation comes from one sentence and is based on "economic reality". It is capable of being viewed as a choice from two alternative components of the supply – goods and medical services rather than a third over-arching alternative as in *Byrom*. It could be justified by viewing the services as predominant.

75. One issue between the parties is essentially whether *Mesto* has displaced or over-ruled an "over-arching" supply test, or otherwise stands in its way. As will appear, a decision on this point does not make a difference to the result of this appeal, so we will not consider the point in depth. However, we nonetheless express some views on it.

76. There are good reasons for saying that it has or may have a part to play in at least some cases. First, it seems to have been the sort of point taken by the majority of the House of Lords in *CEM*. Second, in some cases at least it may reflect how the typical consumer (whose viewpoint is critical – see *Mesto*) views a transaction. It would be entirely consistent with a regime in which a supply question has to be answered by reference to the view of the typical consumer of the supply. Third, in many cases a consideration of the point may assist in deciding whether a given element predominates or not in the eyes of the typical consumer for the purposes of the legislative provision in question. Thus in the circumstances of *Byrom*, the *Mesto* question would be what the typical consumer thinks he or she is acquiring. In order to determine that, a *Mesto* analysis has to consider the elements in the supply, and whether they fall predominantly within the relevant characterisation or not by judging their relative importance from the point of view of the typical consumer. It may be that, as in *Byrom*, there is a main element which, at least quantitatively, predominates over the others. But if the consumer thinks that he or she is acquiring something larger, that is to say massage parlour services, then the licence of the room cannot be said to predominate for the purposes of the *Mesto* test. Whether or not it is a separate test, the factor is at least capable of being a counterweight to an element that might otherwise be thought to predominate or, within a *Mesto* test, an indication of the qualitative importance attached to other elements by a typical consumer. It may be that *Dr Beynon* is an example of that. We do not think that if the consumer would have an overall perception it could be ignored consistently with *Mesto*.

77. To that extent, therefore, the reasoning underpinning a separate "overarching" test has a part to play in the reasoning in other tests. We would, were it necessary, be minded to go further and say that there may be some cases where the economic realities justify its application as a separate test. We say this for two reasons. First, as appears above, the CJEU has recognised the difficulties in prescribing definitive tests for all cases in relation to the "number of supplies" point, and that is capable of applying to the characterisation point as well, bearing in mind its close relationship to the "number of supplies" point. Second, there may well be cases in which the economic realities, which again underpin the exercise, require it to be adopted. Whether or not the present case is one of them is not something we have to decide, because we can reach our decision on other grounds by reference to the other tests, where available.

78. On the basis of those authorities we find:

(1) The *Mesto* predominance test should be the primary test to be applied in characterising a supply for VAT purposes.

(2) The principal/ancillary test is an available, though not the primary, test. It is only capable of being applied in cases where it is possible to identify a

principal element to which all the other elements are minor or ancillary. In cases where it can apply, it is likely to yield the same result as the predominance test.

(3) The "overarching" test is not clearly established in the ECJ jurisprudence, but as a consideration the point should at least be taken into account in deciding averments of predominance in relation to individual elements, and may well be a useful test in its own right.

79. Last under this head, we record that we were referred by Ms Mitrophanous to other FTT decisions in this area in which, on their own facts, it was concluded that the supply was one of education. With all due respect to the Tribunals involved, we do not think it useful to consider those. We have our own facts to consider and those decisions are not binding on us.

Did the FTT err in the principles it applied?

80. It needs to be remembered that the FTT had before it an issue as to whether there was one supply or two, albeit that this was a secondary point taken by the School in the event that its characterisation of the supply as one supply of books was not accepted. As we have observed above, they decided that issue in favour of one supply on "principal and ancillary" grounds, determining that on the facts the books were the principal supply and the other elements of the supply were ancillary. The FTT Decision sets out that test in paragraph [66] without referring to authority, but the same paragraph acknowledges that another test might be applied, namely whether it is economically artificial to split the elements of the supply into more than one supply. The FTT returned to the point in paragraph [95], referring to the application of the principal/ancillary test as a method of resolving the question of the number of supplies. It summarised its contentions thus:

> "96. We consider that in this case, the end result sought by customers from the supply make by the Appellant was to learn and to accomplish that aim by reading the vast amount of printed material.
>
> 97. The Appellant's essential supply was the sale of manuals…"

81. It then elaborated on this, dealing with certain arguments, and thus concluded that there was a single supply (being one of books) (FTT Decision [120]). There is no issue about the conclusion (one supply), as opposed to the underlying reasoning, on this appeal. The FTT then went on to consider the question of the characterisation of the supply, having previously identified possible tests as set out above. It concluded shortly:

> "121. Once we conclude that there was a principal supply and ancillary add-ons, the single supply takes its nature from the principal supply, namely the zero-rated provision of books. Insofar as many of the European authorities have concluded that the nature of the single supply should be based on the nature of the predominant supply, the answer remains of course the same … Were we to seek to apply the test that has been adopted in some of the UK domestic decisions, namely the identification of the overarching supply, we would first say that the test was irrelevant in the present

case, or if it was relevant, then the overarching supply was still one of the provision of manuals."

82. It seems to us that the FTT therefore correctly identified the tests that could be applied to determine the characterisation of the supply. It decided that the applicable test in this case was the principal/ancillary test, but that, even if it had applied the predominance test, it would have reached the same result. Although it considered the overarching supply test irrelevant, it would have reached the same conclusion if it had applied that test.

83. Having identified the tests, if there is an error here it can only be in that the FTT misapplied those tests (Ms Mitrophanous's first two grounds of appeal) or that the FTT came to conclusions that were not open to it on the basis of the evidence before it (Ms Mitrophanous's third ground of appeal).

84. All of these grounds involve an assessment of the evaluation of the facts of this case by the FTT. For that reason, we will consider them together. In doing so, we take into account the following points.

85. First, as regards the contention that the FTT misapplied the tests of classification, perhaps the most important issue in this case is the proposition that the principal/ancillary test is the appropriate test to apply. As we have mentioned above, if the principal/ancillary test can apply in a given case, the predominance test is likely to produce the same result, but that logic will break down if it is inappropriate to apply the principal/ancillary test to the facts of the case.

86. Second, the question of classification of a supply for VAT purposes is a question of law. However, it is essentially one of fact and degree. For these reasons, we bear in mind the respect to be shown to this sort of evaluative treatment by a lower Tribunal which has heard all the evidence and seen the witnesses – see *Dr Beynon* at [27].

87. As regards Ms Mitrophanous's third ground of appeal, if it is to succeed on this ground, HMRC needs to be able to show that there was no evidence which could properly support the findings made by the FTT or that the determination reached was one that no Tribunal properly instructed could have reached (*Edwards v Bairstow* [1956] AC 14). Once again, this is an issue on which appropriate respect must be shown for the fact finding role of the lower Tribunal. This Tribunal is not entitled to substitute its own judgment merely because it disagrees with the conclusion below.

88. With those points in mind we turn to the criticisms of the FTT Decision to see whether Ms Mitrophanous makes out her case that the FTT erred in its decision-making process in an appealable fashion.

89. Ms Mitrophanous made the following detailed submissions in support of her submissions that the FTT misassessed the situation in coming to the conclusion that the supply of books was the principal supply or that it was predominant. Her submissions were intended to demonstrate that the FTT failed to give proper weight to the other services provided by the School. She submitted:

90. The FTT failed to take into account key aspects of control of entry on to the course and the monitoring of progress through the course, which are typical of the provision of an educational course, but not of a supply of books.

(1) The School controlled access to the course. The contract stated that the student would be assessed for suitability. That process included an assessment of suitability and aptitude. There was witness evidence of this process before the FTT. However, the FTT failed to recognise this process as an assessment of suitability and instead understood it as a marketing exercise (FTT Decision [59]).

(2) The School controlled progress through the course by the TMAs. The evidence before the FTT showed that a student had to pass the TMAs to obtain the next manual, to obtain certain DVDs, or to obtain entry to practical courses. For some courses, a student had to attend the practical course to take the exams. This is ignored in the key findings of fact (at FTT Decision [64]).

(3) The general rule was that TMAs had to be passed for further manuals to be provided. Although in some cases, manuals were provided to students on request even if TMAs were failed, this was in a minority of cases. The witness evidence was that only one in six of the manuals from the electrical trade course, and one in four of the manuals for the computer animation and games course were requested by customers outside the TMA system. The FTT ignored this fact.

(4) The FTT referred to TMAs being at the end of the manuals, but did not record evidence that progress to future TMAs was restricted by a code which was given to students only after successful completion of a TMA. The FTT commented that it had not seen an example of a student progress report (FTT Decision [37]). Examples of both a report for a successful student and an unsuccessful student were in the evidence before the FTT. The report for the successful student contained the code to progress to the next TMA. The report for the unsuccessful student did not.

(5) The FTT ignored witness evidence that a student needed software and a code from the student progress report to access the virtual room for the electrical course. Instead, the FTT described the virtual room as simply being on the School's website (FTT Decision [49]).

91. The FTT failed to give appropriate weight to the importance of tutorial support provided to students.

(1) The FTT found that the School was contractually obliged to provide tutorial support and that such support was available (FTT Decision [39] [44] [45]), but ignored this component of teaching altogether on the basis of its low take up.

(2) In coming to its views that the level of take up of tutorial support was low, the FTT failed to take into account the drop-out rate for the courses. The figures for the take up of tutorial support were based on the total

number of contracted students (approximately 60,000) and did not reflect the drop-out rate (and therefore the number of active students). For example, there was evidence before the FTT that only 47.9% of the manuals on the trade courses and 66.7% of the manuals on the computer games courses were taken up.

(3) The FTT failed to consider the benefits of tutor support. There was evidence before the FTT that tutors would answer questions from students by telephone or by webmail. The FTT found (FTT Decision [40]) that tutors would only direct the student to the right part of the manual. Even if this was correct, in the context of technical and difficult manuals, this was important assistance.

(4) But, in fact, there was evidence before the FTT from the School that assistance was provided by tutors to those students who were taking the computer games courses in the preparation of their portfolios by pointing out the ways in which the student had not done enough to pass. The portfolio accounted for up to 75% of the marks in the relevant examinations for the computer games courses (FTT Decision [54]). So this was critical information. While the FTT acknowledged the importance of the student's portfolio for the relevant exam, it ignored the tutorial support on the basis that the portfolio was supposed to be the student's own work (FTT Decision [64] sub-para 7).

(5) The FTT's view was also that it was not intended that the tutors attending practical courses would teach and therefore put no weight on the finding that in fact if help was required by a student it would be provided (FTT Decision [50]).

92. In its findings of fact, the FTT ignored other critical elements of the supply made by the School which are typical of an educational course but not a supply of "books":

(1) The FTT failed properly to take account of the content of the student progress reports which were issued after the submission and marking of a TMA. These reports identified mistakes, provided the right answers and offered tutorial assistance as well as providing access to the next TMA. The FTT treated these as simply being the provision of answers to the TMAs (FTT Decision [37]).

(2) The FTT emphasised that the student progress reports were provided by 'computer', and ignored the fact that they could have only initially have been written by a tutor even if they were then sent out on an automated basis (FTT Decision [37]).

(3) No weight was given to the fact that the courses were designed to work towards a qualification (FTT Decision [60]) because the qualifications were provided by third parties (FTT Decision [64] sub-para 10). This was an error. Numerous providers of educational courses, such as schools and colleges, prepare students for examinations for qualifications which are awarded by a third party.

(4) The FTT recorded that take-up of practical courses was low (FTT Decision [64] sub-paras 5 and 10). The evidence before the FTT was that 24.6% of those that qualified for the practical courses by passing the relevant TMAs took the practical courses. This fact is not recorded in the FTT Decision. It is material. It contradicts the FTT's finding (FTT Decision [64] sub-para 5) that the practical courses were "rarely requested".

(5) The FTT also failed to record that the level of take-up of practical courses was a result of the control and monitoring of progress through the course.

93. The FTT ignored other evidence that demonstrated the importance of other elements of the supply.

(1) The FTT Decision suggests that the customer could obtain all the information that was required from the manuals (FTT Decision [28], [29]). In particular, the FTT found that the software provided to students on the computer games and animation course was merely the provision of the tools to enable customers to practice what they had learnt (FTT Decision [64] para 6). This was an error. The provision of the software was an essential part of the provision of the computer games course. The manuals for the course did not make sense without the software. The FTT acknowledged that the software was needed 'to enable the customers to create, modify and animate the images the manuals would describe' (FTT Decision [53]), but failed to appreciate that by their nature the manuals could not be used alone.

(2) The FTT relied on the low take up of components other than tutorial support in arriving at the conclusion that they were ancillary (FTT Decision [64] sub-para 9). There was no evidence that the TMAs, student progress reports, DVDs, software for the computer games courses and access to virtual room were not often taken up and indeed the FTT acknowledged that the take-up of TMAs may have been significant (FTT Decision [114]).

(3) The FTT Decision (at [48] and [64] sub-para 5) described the DVDs provided to students as simply reproducing some of the information from the manuals. In fact, the DVDs were summaries of the course information; in essence a revision guide and separate educational tool.

(4) The FTT placed insufficient weight on the evidence of other components such as the virtual room on the School's web site which allowed those on the electrician's course to obtain hands on practice, and the webinars with leaders in the computer games industry who discussed their experiences in the industry.

94. The FTT failed to give appropriate weight to evidence which demonstrated that a typical consumer would not regard the single supply as being one of books.

(1) The contracts for the courses referred to the self-study program, the availability of practical courses and the payment of examination fees.

(2) The website and related study guides emphasised the nature of the courses as blended educational courses, described the role of the course provider and the tutorial team, and set out the key objectives of the course. A student could not think that he or she was just buying the manuals when entering into the contract.

(3) There was evidence before the FTT of marketing of the courses by the School which emphasised the need to obtain a qualification to progress on the career ladder. This evidence was relevant to what a typical consumer would understand of the course but was ignored by the FTT.

(4) The FTT noted (at FTT Decision [60]) that the courses were designed to prepare students for particular examinations, but erred in its finding that the qualification could not be an aim of the students in purchasing the supply on the basis that the qualifications were provided by third parties (FTT Decision [64] sub-para 10 and [105]). This finding ignored the fact that the School had a critical role in providing courses designed for the particular exam and in paying the exam entry fee and therefore providing access to the qualification.

95. For the School, Mr Thomas argued that the FTT did not make factual errors and/or was entitled on the evidence before it to reach the conclusions that it reached. He made the following specific points.

(1) It is not the case that the interview process for access to the course was designed to test intellectual aptitude. There were other factors taken into account in determining suitability for the course.

(2) The virtual room was clearly ancillary to the manuals.

(3) The student progress reports did not provide answers to the TMAs. They simply referred back to the manuals to the place at which the answer could be found.

(4) HMRC relied on the fact that TMAs had to be passed in order to progress to the next manual and so through the course. But there was evidence that it was not necessary to do so. Manuals were provided on request to students that asked for them.

(5) HMRC's arguments based on the level of take up of the manuals were misconceived. The percentages quoted for the two example courses (47.9% and 66.7%) failed to take into account relevant factors. First the evidence before the FTT did not include manuals delivered for a seven month period in 2008 because information was not available due to a change in the School's warehousing system at the time. Second, the figures before the FTT showed a snap shot. Some of the students taken into account would only just have started a two or three year course and so would not have requested the manuals for the later stages of the course.

(6) In the light of these factors, the FTT could not be criticised for its conclusion that only a small minority of students contacted tutors by telephone or email. The assumptions that the FTT made in relation to the take-up of other components (at FTT Decision [113]) were equally entirely reasonable.

(7) The figure of 24.6% for the take-up of practical courses for the trade courses was based on the total number of students who were "eligible" to undertake a practical course because they had progressed through the course and passed the relevant TMAs. The actual figure for the take-up from the total number of participants in the course was 6.95%. This was in evidence before the FTT. It was not unreasonable on those facts for the FTT to refer to the trade practical courses as "rarely requested" (FTT Decision [64] sub-para 5) or as taken-up by a "very small minority" of trade course customers (FTT Decision [64] sub-para 10).

(8) The payment of the exam fees was not a key component of the supply. All that the School did was to pay a third party provider on behalf of the student.

96. We can usefully consider Ms Mitrophanous's points by grouping them.

97. First there are a group of findings or failures to make findings which Ms Mitrophanous says demonstrate that the FTT failed to take into account the element of control which the School had over the entry of students on to courses and over progress of students through the course.

(1) As regards the control of entry on to the course, the FTT described the interview process as essentially a marketing exercise (FTT Decision [59]). Whilst we agree with Ms Mitrophanous's criticism, the evidence before the FTT did not necessarily support her contention that the interview process was designed to control access to the course by reference to aptitude. Rather, as Mr Thomas described, the evidence appeared to show that the interview process was primarily directed at ensuring that students understood their financial obligations to pay for the courses and were likely to be able to meet them. This was particularly the case given that many of the students would enter into finance agreements to assist with their payments.

(2) The FTT did identify some of the aspects of the control of progress through the courses to which Ms Mitrophanous referred, and in particular, the need, as a general rule, for students to complete a TMA successfully in order to obtain the next manual. However, we do acknowledge Ms Mitrophanous's point that the other elements of control of progress, largely through the provision of codes for access to the next TMA or for access to the virtual room on the electrical trade course, were not properly reflected in the FTT's findings and may be regarded as indicative of a supply which was not simply one of books.

98. Second there are the findings which, Ms Mitrophanous says, incorrectly downplay the significance of tutorial support in the supply made by the School.

(1) In relation to these submissions, it is clear to us that the School was contractually obliged to provide tutorial support and did do so. The FTT took this into account.

(2) We also gain little from the arguments about the correct calculation of the number of active students and its effect on the percentage of students who requested tutorial support by 'phone or email. Whatever the correct numerical result, it is clear that the level of tutorial support actually requested and provided was relatively low. The FTT was entitled to reach the view, as it did at FTT Decision [114], that the take up of tutorial support by 'phone or email was "low or minimal". However, that finding does not necessarily reflect the proper significance of this support.

(3) As regards the other aspects of tutorial support – the fact that tutors would only direct students to answers in the manuals and the limited role of tutors involved in practical courses or in assisting students with their portfolios for the computer games course – these facts are correctly recorded by the FTT, but we accept Ms Mitrophanous's criticism that, even though the role was limited, these were important elements of the supply, and more important than is reflected in the FTT Decision.

99. The third category includes those findings which diminish or fail to reflect the importance of the other components in the supply.

(1) We accept most of Ms Mitrophanous's points in this respect. In particular, we have not been directed to any evidence of low take-up of other components of the supply to which the FTT referred in support of its conclusion that those aspects were ancillary in FTT Decision [64] sub-para 9 or for its statements that those components were "irrelevant" and that a majority of students made "no use of [them] whatsoever" in the same sub-paragraph. The FTT does recognise the presence of these components in the supply but, we agree with Ms Mitrophanous, that even if their role is to reiterate and reinforce material that is contained in the manuals, that does not mean that they are not important elements of the supply. It is to be expected that the text book for a course will be "comprehensive" (FTT Decision [64] sub-para 1); but that does not mean that other aspects of the supply which reinforce and reiterate the course material or give students the opportunity to practice elements of it can be dismissed as "irrelevant" or "add-ons" (FTT Decision [64] sub-para 9). One also has to bear in mind that the question is not so much one of measuring take-up, but what the offering was and how it would be perceived by students as typical consumers. It was not suggested that the offer was a sham, or that the School did not intend to offer (for example) tutorials or practicals to students who wanted them, or that they were in substance valueless. They were real, and apparently useful (at least to some) and in our view have to be viewed as significant parts of the offering. We do not consider the FTT Decision to reflect that adequately.

(2) On a specific point, we also agree that the FTT's reference to the provision of the software for the computer games and animation course as

the equivalent of the provision of "paper and paints to an artist" (FTT Decision [64] sub-para 5) fails to recognise the importance of the software. The particular manual makes no sense without the software and, although the software could have been obtained from another supplier, it is an integral part of the supply in this case.

100. The final category is those findings which relate to the manner in which a customer would have perceived the supply that the School was offering to make.

(1) The FTT recorded the obligations of the School to supply all of the components and referred to the marketing of the courses, its emphasis on the blended nature of the courses and the focus on career development (FTT Decision [59], [64] sub-para 11). However, the FTT attached "little importance" (FTT Decision [119]) to the form of the marketing in arriving at its conclusion that the manuals were the principal supply and the other components were ancillary to them. In the context of a test for the classification of a supply that should be determined by reference to the qualitative importance of the elements to the typical consumer, we think that was an error. We agree with Ms Mitrophanous in that respect.

(2) We place the dismissal of the fact that the courses were all designed to lead to an examination on the ground that the examinations were provided by third parties in the same category. The courses were designed to lead to relevant third party examinations. The marketing material referred to this fact and was in evidence before the FTT. Once again, in the context of the appropriate test, this was a factor that should have been taken into account in the qualitative importance of the various elements to the typical consumer, but the FTT dismissed it on the basis that there was no evidence of the aims of customers beyond the supplies made by the School (FTT Decision [64] sub-para 10).

101. We therefore consider that the FTT Decision, albeit apparently demonstrating a thorough consideration of the facts, fails to give adequate weight to a number of matters. We bear in mind that the overall evaluation of the facts is a matter of assessment for the FTT, and that its decision (as we have observed above) is entitled to great respect. Nonetheless, we consider that the shortcomings to which we have referred require and justify the conclusion that the FTT Decision is not sustainable because it does not give adequate weight to significant matters, and a proper approach to those matters makes the decision one that a reasonable Tribunal properly instructed could not reach.

102. This is particularly the case in relation to the application of the principal/ancillary test. In our view, the transactions could not fall to be treated as involving a single supply on the basis of the principal/ancillary test and so it was inappropriate to use that test as a means of characterisation of the single supply.

103. The manuals could not be described as the "principal" element of the supply as that term is used in the case law. We accept that the provision of the manuals may have been the main element of the supply when judged quantitatively. However, it was not the "principal" element in the sense that all of the other characteristic

elements of the supply were "not an end in themselves" but "for the better enjoyment of" the manuals (to adopt the words of the CJEU in *CPP*) or "subservient, subordinate or ministering" to the provision of the manuals (to use the words of Lord Walker in *CEM* at [30]).

104. Whilst it might be said that the TMAs were "ancillary" to the manuals in that sense, in that they were simply a more efficient means of marking the multiple choice tests provided at the end of each chapter of the manuals, the same could not be said of most of the other elements. Most of the other elements had value in themselves: some were other means of delivering or reinforcing the information that had to be conveyed to the student as part of the course (we put the tutor support, the DVDs of revision information, the practical courses and the virtual room for the electricians' course into this category); some allowed students to test their knowledge and ideas either with tutors (through tutorial support) or with other students (through the web room); others were essential for progressing towards an external qualification (such as the practical courses and the payments for examination fees); and some, although independently available were integral to the course (such as the software for the computer games and animation course). For these reasons, we cannot agree with the FTT's finding that the other elements were "irrelevant" (FTT Decision [64] sub-para 9).

105. This is not a case like *CPP*, where the insurance services were fundamentally what the purchaser was intending to purchase and the other elements were either ancillary to the insurance or so minor that they could not affect the characterisation of the supply. In this case, there are other essential elements that need to be taken into account and properly weighed in the balance.

106. So far as it proceeded on the basis of a principal/ancillary test, the FTT Decision failed to acknowledge that some elements were not ancillary at all, and failed to give sufficient weight to others. For this reason, in our view, the decision on this point demonstrated an error of law. Its decision on the predominance test flowed automatically from its decision on the principal/ancillary test, and thus becomes reviewable. Likewise its decision so far as it applied the "overarching" test.

107. Having reached that conclusion we move to consider our own decision on the point in the case. We have concluded that the correct answer is that the supply by the School was not the supply of books on the basis of the case law on any of the relevant tests. If one starts with predominance (which should be the starting point on the basis of *Mesto*) it can probably be said that the provision of books was quantitatively the predominant matter, but that is not the test.

108. If we follow the approach of the CJEU in *Mesto*, we must weigh the importance of the various elements of the supply by reference to objective factors. If we look objectively at what has been provided, it is clear to us that the School provided a blended course. It was contractually obliged to provide and did provide all of the different elements. While we accept that the manuals were a significant part of that supply, there were many other elements which have to be taken into account, none of which could be classified as "books".

109. In applying that test, we have to consider whether the typical consumer would view the supply of books as being the qualitatively predominant element of the supply. We consider that the typical student, viewing the course as presented in the marketing and contractual material, would not consider that he or she was predominantly buying books to be read and absorbed, with some other bits and pieces, but was buying a package in which books were important, and indeed central, but in which the books do not predominate (any more than the food in *Faaborg* predominated). They were part of an overall package, with real additional benefits, and the package was sold as such (though the terms of the marketing are far from conclusive on this point). It is not possible to say that books predominated in those circumstances.

110. That means that the supplies do not fall within the zero-rating given to the supply of books. It is unnecessary to go further and identify another characteristic which does characterise the supply, because it is sufficient that it is not the supply of books. But if we had to do so we would characterise the supply, in the eyes of the typical consumer, as the supply of educational services. That would be the characteristic if one were allowed to characterise by reference to an "over-arching" characteristic. We do not need to apply that particular characterisation; it is sufficient to say the supply is not the supply of books. But identifying an over-arching characteristic in that way does assist in arriving at a view as to whether anything else predominates. In our view it does not.

111. Accordingly on the main point as to the characterisation of the supply we would allow the appeal.

The "number of supplies" point revisited

112. We need to return to this point briefly. As we have recited, the FTT decided this point in favour of one supply on the principal/ancillary basis. We have decided that they reached an unsustainable answer on this basis. That, however, does not mean that its decision was wrong on the "number of supplies" point. We would agree that the same result is reached on the economic non-severability analysis (i.e. the single economic supply test), which was the alternative basis of its conclusion.

THE RUN-OFF PERIOD ISSUE: SECTION 84(10) VATA

Background

113. In the FTT, the School ran a point about this section in order to deal with the particular problem of longer term contracts. The School entered into a number of contracts whose payments ran over 3 years and whose terms did not provide for any increase in recovery if the VAT treatment was changed during the contract. The School wished to be able to say that, in the event that the supplies were not to be treated as supplies of books, it had a legitimate expectation of a phased withdrawal of a previously agreed regime which would have allowed it to apply the old regime to the workout of those 3 year contracts. The route through which it sought to get there was section 84(10) VATA, to whose terms we will come. Since the FTT decided in the School's favour on the main point (the VAT status of the supplies) it did not have

to rule on this point, though it did consider the point in case it was wrong on the main point, and decided that the School's arguments failed. The School preserved it via a cross-appeal or respondent's notice. Since we have now decided that the FTT was wrong on that main point, the section 84(10) point becomes live and we have to consider and rule on it.

114. Section 84(10) apparently has the following effect. Where the FTT is considering an appeal from HMRC's decision B, and decision B depended on a prior decision A, the tribunal can allow the appeal on decision B if it would have allowed an appeal on decision A even if decision A is not a decision which itself could have been appealed. That effect is achieved by the wording:

> "(10) Where an appeal is against an HMRC decision which depended upon a prior decision taken in relation to the appellant, the fact that the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

115. Section 83 is the section of the Act which lists the kinds of decisions which can be appealed to the FTT. It is unnecessary to reproduce it here.

How section 84(10) is said to apply and the FTT Decision on the point

116. In the present case, decision B is said to be each of the assessments raised by HMRC's Miss Rashid (there are a number of them) covering a number of quarters. It was those assessments which were the subject of the appeals to the FTT. There are two decision As. The first is a decision of Mr Harris on 22nd January 2010 in which he did not give a concession covering run-off contracts, and the second is said to be a decision of another officer, Mr Winder, in a letter of 22nd March 2010 in which he rejected a suggestion that any abatement (including a retrospective one) should be made. In order to understand the significance of those decisions, and subsequent concessions, it is necessary to set out a short history, in more detail than appears above, much of which already appears in the FTT decision.

117. Debate about the proper VAT treatment of the School's supplies has a long history. The parties were debating it as long ago as 1998. An HM Customs & Excise ("HMCE") note of a meeting on 29th April 1998 records a statement by HMCE that a compromise position was both possible and desirable. Over the following months a compromise position was reached. HMCE was told that details could be supplied of the numbers of students undertaking or benefiting from various particular activities and a lot of HMCE's questions were answered. The parties moved towards a regime under which part of the activities of the School would be zero rated and part would be standard rated. The notes of a meeting on 28th May 1999 record the views of both parties that "whatever formula or method was ultimately agreed, … it needed to be one which would persist. There would be no point in revisiting this process every six months or every time there is a change in HMCE personnel." At the same meeting the School still suggested that the whole supply should be zero rated, but the HMCE representative said that HMCE would not take that view.

118. Eventually the parties reached an agreement recorded in a letter from HMCE dated 14th January 2000:

> "I am writing to confirm the method agreed at our meeting of the 21 December 1999 to be used to apportion the course fees between standard and zero rated supplies.
>
> The method is to be used from 1 October 1998, and is based on the costs involved in making both the standard and zero rated supplies. Should there be any changes in your business which prevents this method giving a fair apportionment of the course fees you must notify us immediately. This method may be reviewed, amended or withdrawn by Customs and Excise at any time. You may apply to this office for a change of method if this one no longer produces a fair and reasonable result."

119. The letter then goes on to set out a method for producing an apportionment between standard and zero rated supplies. It is not necessary to set out that method.

120. There matters rested until the decision in the *CEM* case. It appears that that decision caused HMRC to revisit the School's VAT supplies and Miss Rashid wrote on 26th August 2009 saying that checks had been carried out and she had discovered the VAT treatment of the supplies was incorrect. She stated that the supplies ought to have been standard rated. There was reference to the case just referred to (and others) and she said the School's repayment claim for the period 06/09 was being withheld pending further inquiries. The School replied by referring to the January 2000 agreement and challenging HMRC's stance.

121. On 24th September 2009, HMRC wrote complaining about some information that had not been supplied and pointing out that previous periods would be looked at with a view to correcting returns based on HMRC's recent decision. Thus HMRC was looking to impose standard rating retrospectively.

122. The School instructed accountants (Grant Thornton) to deal with the matter on its behalf and, on 23rd October 2009, they wrote to Miss Rashid making various points, the relevant one for present purposes being an invocation of the legitimate expectations of the School that if there was to be a withdrawal of the previously agreed regime it should not have retrospective effect and that the effective date should be one which was 6 months from the date on which the decision to withdraw it was irrevocably confirmed (which had not yet occurred because there was an outstanding review). The appeals team responded to that letter, on 9th December 2009, upholding the decision that the supplies should be treated as standard rated and saying the legitimate expectation argument and the effective date of the liability were matters for the local officer.

123. On 22nd January 2010, Mr Harris of the Local Compliance Complaints Team responded to the "legitimate expectation" point and agreed that the School could rely on the agreed method of apportionment until it was reviewed, amended or withdrawn. That could happen at any time, and happened when Miss Rashid sent her letter. He recommended that there be no retrospective action prior to 27th August 2009, but he

said nothing about the longer period which had been proposed by Grant Thornton – apparently he did not accept that. That was the extent of his decision. He offered a further review if his decision was not acceptable. So far as necessary, the School now says that that decision was wrong because it did not go far enough. It did not deal with the run-off period of the 3 year contracts. This was not surprising – the point was not taken at the time by the School. This decision is the first of the two decisions which are said to be within section 84(10) – a decision A.

124. Grant Thornton returned to, and reiterated, their proposal for a 6 month transitional period from the confirmation of the liability decision in a letter of 4th February 2010. This was responded to by Mr Winder on 19th February 2010 who rejected the transitional period proposal. He ended by saying that Mr Harris was proceeding with his recommendation about retrospective action and he would let someone (not specified - presumably the School or Grant Thornton) know whether "this has been authorised".

125. When Mr Winder next wrote it was on 22nd March 2010, giving what the School says is a second decision A for section 84(10) purposes. He said he was able to provide HMRC's decision on the request for concessionary treatment (noting that it would not be relevant in the event that the formal challenge on liability, which he understood to have been made to the Tribunal, succeeded). He said:

> "HMRC has decided that it does not have the power to refrain from collecting the tax which it believes is legally due in this case. The visiting case officer Abida Rashid has therefore been instructed to issue any appropriate assessment. Your client will be notified shortly."

126. This decision not only refused the concession as to a transitional period, it also re-imposed retrospectivity.

127. Miss Rashid acted on this in raising her assessments – decision B. She also added insult to injury by suggesting that the School might have to pay an "inaccuracy penalty", a suggestion which was not pursued.

128. As the FTT Decision records (at [130]) the School then started judicial review proceedings. At that point HMRC changed tack again and conceded that assessments which had been made for the periods prior to 27th August 2009 should not be enforced. They therefore withdrew the restrospectivity threat. They did not, however, concede the transitional period point.

129. In the meanwhile the School had launched its appeals on the various assessments. The appeal notices took the legitimate expectation point as an apparently blanket response to any attempt to impose the new assessments. The notices went on:

> "In addition, the appellant contends on this same ground [i.e. legitimate expectation] that any ruling to its detriment should not take effect until a sufficient transitional period (6 months) has passed to allow it to make changes to its pricing and business model."

130. The contractual run-off point, by way of substitution for the 6 month transitional period point, was not taken at that time. It was not taken until January 2013, in the context of the current appeal proceedings in the FTT. A skeleton argument which supported an amendment to introduce the run-off point relies on what it said was a prior indication in a witness statement that the point was being taken, but that indication is fairly oblique. However, in that skeleton argument, dating from January 2013, the School indicated a desire to plead that the decision to make the assessments was unfair because it failed either to take account of "a transitional period in which to continue to apply the ruling" or alternatively in failing to ensure that the standard rate would not apply in respect of goods and/or services made under contracts entered into before the date on which the School had been notified of the withdrawal of the 2000 decision (in effect, the run-off point).

131. The FTT did not rule on the amendment, saying (FTT Decision [165]):

> "Whether the Upper Tribunal, to which any remaining judicial review has been referred by Mr Justice Warren, would allow pleadings to be amended after the long period of time is a matter on which we make no comment. This is the one Application that we indicated we would not deal with in the last sentence of paragraph 125."

132. The judicial review proceedings referred to are the rump of the judicial review proceedings which existed once HMRC had made its concession about retrospectivity. As we understand it, once that had been done, the judicial review proceedings were not pursued at the time and it was accepted that, while they had been transferred to the Upper Tribunal, they were not actually before us, as the Upper Tribunal, now. All that we have before us is the appeal from the decision of the FTT.

133. The FTT did not strictly have to deal with this point at all because it had decided the bigger question (namely whether the supply was of books or educational services) in favour of the School. However, it did express a view on it in case it was wrong. It decided that it did not have jurisdiction to deal with the point. It declined to hold that it could take legitimate expectations as such into account in considering an appeal in relation to the actual assessments, apparently because that was a judicial review-type consideration which exceeded the jurisdiction of the FTT. This sort of point was disclaimed by the School as a basis for appeal before us.

134. When it came to the application of section 84(10), the FTT expressed its puzzlement as to how the subsection was supposed to work (with which we have some sympathy) and considered some of the authorities. It then concluded that the section was not "engaged" because the relevant earlier decision was not a decision which had anything to do with later supplies under pre-August 2009 contracts. It said that that particular point was simply not considered in the earlier decision. If that determination was wrong, and ignoring the fact that the point was not pleaded (because the FTT did not rule on the application to amend) then the FTT said it would have held that HMRC's concession as to pre-August 2009 supplies ought to have been extended to post-August supplies under pre-August contracts – in other words that HMRC ought to have allowed the old regime to apply to those contracts. It rejected an argument advanced by HMRC that the reservation of the right to withdraw

the arrangement at any time would have allowed or justified a sudden reversal without catering for those pre-reversal matters.

Can the point be taken now?

135. Before going any further we have to deal with a procedural point.

136. HMRC said that the School should not be allowed to take the point because it was not properly pleaded, or otherwise taken, before. We have set out above how the point arose in 2013, and how the FTT had an application to amend before it. Up until that time, the appeal to the FTT relied on section 84(10) in combination with legitimate expectation, but the expectation was said to be the 6 month adjustment period. Unfortunately the FTT did not deal with the application to amend (again, see above). It seemed to have considered that the point would be dealt with in the Upper Tribunal in association with a judicial review point, but the judicial review point is not in fact before us. In any event, when faced with an application to amend the notice of appeal the FTT ought to have dealt with it one way or the other. It is unfortunate that it did not do so.

137. Technically it is questionable whether the application for permission to amend the original notice of appeal is before us because Mr Thomas did not raise the amendment point or complain about the failure to deal with it, in his respondent's notice, or in any other form of appellate document. However, we propose to cut through all the technical points that have unnecessarily arisen. Ms Mitraphanous accepted that her client knew what the point below was, saw it coming, ran its case on it, the School ran its case, the FTT delivered a form of decision and all that was missing was a ruling on the amendment. In other words, she accepted that the point was fully run. Her complaint about the amendment was purely one of lateness – three years was too late. There seems to have been no disadvantage to HMRC in not having the case formally pleaded. In the circumstances the sensible and fair thing to do is to allow the point to be taken despite the formal absence of a pleading. We shall do so, and insofar as may be necessary, we would permit the amendment necessary to allow it to be taken.

The facts relevant to the sub-section

138. The FTT made limited findings of fact relevant to this point. The process by which the parties achieved agreement in 2000, and its terms, and the subsequent process under which HMRC sought to undo the effect of that agreement are all set out above. At paragraph [142] of its decision, the FTT found (as was common ground) that there were contracts, involving financiers, under which payments for the course were to be made over three years, and that the liability for VAT was treated as being spread across the same period pro rata to the payments. The contracts did not allow for a change of consideration in the event of a change in the VAT regime. The FTT made no finding as to whether or not HMRC knew of the existence of contracts of this nature prior to the Harris and Winder letters, and indeed held that point to be irrelevant (FTT Decision [174]) because even if it were ignorant of them at the time of the contracts it would have been relevant to have considered them when (if) they were drawn to HMRC's attention when it was re-considering its position.

139. Looking at the evidence, it seems that the unchallenged evidence of Mr Shamdas (who provided accounting support to the School) was that on two or more occasions he showed his methodology for preparing returns to visiting HMRC officers. That methodology showed the School accounting for VAT on financing arrangements in the manner just described. His evidence was apparently not challenged on the point. There is therefore some evidence that, at some level, HMRC was aware of those procedures. However, we consider that that is of little weight in the legitimate expectation argument. The most it demonstrates is that HMRC was apparently content for the time being with the manner in which VAT was recovered and accounted for. It does not go further and show that HMRC accepted the practice for any other purpose, or that it knew, let alone accepted, that VAT recovery rates could not be adjusted in the arrangements that the School had with its students and their finance company. Its visiting officers simply knew it was happening and, in a situation in which the main purpose of the visits was presumably to see how the apportionment procedure was working, any greater significance would not have been appreciated by HMRC.

The effect of section 84(10) VATA

140. This subsection seems to us to be a very odd provision. It purports to allow an appeal to be based on a decision which is not susceptible to an appeal, with no indication as to the basis on which such a non-appeal can be decided. However, it is a statute, and we have to apply it.

141. It was common ground below and before us that the purpose of the sub-section was to reverse the effect of *HMCE v J H Corbitt (Numismatists) Ltd* [1980] STC 213 ("*Corbitt*"). That rationale was accepted by Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072 ("*National Westminster Bank*"), though without any indication of why he was satisfied about that. It seems to us to be some part of the received wisdom of the tax world, and since it is accepted to be the case by both parties we will assume that it is right (so far as it is relevant at all).

142. Beyond that there is little guidance in authority (or statute) as to how the section is supposed to operate. In *National Westminster Bank* Jacob J simply held there was no relevant prior decision on the facts. In *Customs & Excise Commissioners v Arnold* [1996] STC 1271 ("*Arnold*"), Hidden J likewise held there was no relevant prior decision.

143. The case of HMRC before us was that there was no jurisdiction to consider the question of legitimate expectation under this head. Ms Mitrophanous submitted that this was established by *HMRC v Noor* [2013] STC 998 ("*Noor*"). We think that that is correct so far as there is a direct assault on the assessment on a legitimate expectation basis. However, as the case was argued before us, Mr Thomas did not put his case that way. The School sought to introduce the concept within the context of section 84(10), not by way of direct assault on the assessments. Ms Mitrophanous made some generalised statements to the effect that legitimate expectation was a public law concept which had no place in appeals, but she did not develop her case on

that. Instead she submitted that there was no relevant prior dependent decision, and no legitimate expectation on the facts.

144. We will deal with those points, but before doing so make one general point. The point taken by Mr Thomas is a striking one. As we have observed, he cannot run legitimate expectation in relation to the actual decision appealed from, and did not seek to do so. One of the reasons for that is that it is, as Ms Mitrophanous submitted, a public law concept which is appropriate for judicial review, not appeals. The FTT has no inherent or general judicial review jurisdiction, and the Upper Tribunal only a limited one. Judicial review is surrounded by a number of safeguards. If the School is right in its analysis and submissions it benefits from what would seem to us to be an anomaly. It could not take the point directly in relation to the decision which is appealed, but because it can find a prior decision which is said to underpin the appealed decision it can run this public law point free from judicial review restraints and in a tribunal which has no general judicial review jurisdiction. That would be a very odd state of affairs. It requires one to subject the operation of section 84(10) to close scrutiny because it seems to us to be unlikely that Parliament intended to introduce what would in substance be a substantial judicial review jurisdiction by such a back door.

145. The important word in the subsection is "depended". We consider that in its context it imports a greater degree of dependency on the prior decision than its merely being part of a factual chain of decision-making. It connotes a decision A which has to be taken before decision B both as a matter of fact and as a matter of legal necessity or requirement. This can be illustrated by the facts of *Corbitt*. In that case, the taxpayer sought to rely on an exceptional VAT scheme which applied only in certain circumstances. One of those was in Article 3(5) of a 1972 Order:

> "Article 4 [from which the taxpayer sought to benefit] does not apply to any supply by a person unless he keeps such records and accounts as the Commissioners may specify in a notice published by them for the purposes of this order or may recognise as sufficient for those purposes."

146. The taxpayer had not kept records in accordance with the published notice, so its claim to benefit from the scheme was dependent on the Commissioners recognising what it had done as sufficient. The Commissioners did not do so and it was held that the court had no power to review that decision. Looking at the facts of that case, there is a close dependency between recognition and the right to rely on the exceptional VAT accounting regime. The decision not to recognise was one on which the decision to assess on a different basis truly, and as a matter of law, depended. If the Commissioners had decided to recognise the books as compliant the taxpayers would have been entitled to their special treatment. If they decided not to then the taxpayer was not so entitled. There was dependency in that strict sense. If it is right that the section was intended to reverse the effects of the decision then it can be taken to require (at least) that degree of dependency.

147. This analysis of the operation of the section is supported by *Arnold*. In that case, a refusal of a refund was preceded by a refusal to apply an extra-statutory concession. The taxpayer claimed that the first refusal in time could be challenged

via section 84(10), but Hidden J said it could not. At page 1289d, Hidden J accepted the argument propounded by Dr Lasok (of counsel). The relevant part of counsel's argument thus accepted appears at page 1281h-j:

> "For s 84(10) to be properly invoked, the tribunal must be validly seized of an appeal concerning a decision over which it has jurisdiction, and that decision (the disputed decision) must *depend* upon a prior decision taken by the commissioners. In that, the legal basis for the disputed decision must have been determined by another decision or must follow automatically from or be a necessary consequence of that other decision (the prior decision). The prior decision must have been a conclusion, determination or ruling, and thus a distinct decision of the Commissioners and not a part of the reasoning on which the disputed decision is based. The prior decision must have been taken 'in relation to the appellant' and thus must be a decision on the appellant's case as opposed to a decision on a general measure adopted by the commissioners in relation to a general class of situations (into which the appellant may happen to fall) but not one specifically ruling on the appellant's case. The prior decision must be defective in some material respect such as to cause the tribunal to conclude that if it had jurisdiction over the prior decision, it would have allowed an appeal against it." (Hidden J's emphasis).

148. Hidden J himself went on (at page 1289d):

> "I am satisfied that there was here no basis for assuming such jurisdiction since there was no previous decision which could bring into play the s 84 jurisdiction. There was one decision by the commissioners and one only in the commissioners' refusal of the claim to a refund."

149. The key words in the analysis accepted by Hidden J are the words "depend" (which he emphasised) and the words "legal basis" in the following sentence. One is looking for a degree of dependency which amounts to putting in place a legal basis for the decision actually appealed. In *Corbitt*, that legal basis was the prior decision of the Commissioners not to "recognise" the form of record keeping.

150. Applying that analysis to the present case, there was no prior decision A which was one on which decision B (the assessment) was dependent in any relevant legal sense. The decisions to require a full assessment were prior in time, but they were not ones which it was legally necessary to take before directing the assessments in the same sense as the Commissioners' decision on the books and records was a necessary legal precursor to the operation of the scheme in *Corbitt*. On the facts, HMRC had to deal with it first because it was raised in negotiation by the taxpayer, but it did not otherwise have to. The point might have arisen after the assessment, in which case HMRC would still have had to have dealt with it. That cannot be said of the relevant prior decision in *Corbitt*.

151. An alternative way of approaching the matter, which may amount to different way of carrying out the same analysis, is the alternative approach apparently used by Hidden J. On one reading of his judgment he considered whether there was, in substance, one decision, and not two, and concluded there was just the one. If one applies that to the present case then one reaches the same result. The decision to raise

an assessment for the full amount was the real decision, and in arriving at that decision there had to be a consideration of any factors which might point against it, one of which (if not the only one of which) was a decision not to accede to a request not to assess in the full amount. But that decision making process was all part of one decision, not one decision based on a separate dependent prior decision.

152. We therefore determine that this limb of the appeal fails.

153. It is therefore unnecessary for us to consider legitimate expectation and its applicability by the FTT or this Tribunal on an appeal. We confine ourselves to observing that on the facts, that while HMRC plainly reserved a right to re-visit the question of the correct treatment of supplies, there was equally plainly a legitimate expectation that that would not be applied retrospectively. Nothing in the reservation in the relevant letter suggested that that might happen, and common sense and plain business dealings would have led to the expectation that it would not. The School was obviously entitled to rely on that. However, we do not consider that that legitimate expectation went so far as to allow the School to have a 3 year run-off period for long-term contracts. The School was not entitled to assume that it was entitled to conduct its business affairs in such a way as to impose such a period on HMRC, and there was no evidence which would support the suggestion that HMRC indicated that such things were acceptable in the possible context of their revisiting the tax treatment of outputs.

REPAYMENT SUPPLEMENT

Background

154. The VATA contains a provision providing for a taxpayer to receive compensation for late payments of sums which returns show to be payable to the taxpayer. The payments might be thought to be in the nature of interest, but are not described or provided for as such in the legislation. The legislation describes the payments as "repayment supplements". The School claimed such a supplement in respect of the period ending 30th June 2009. In that period the return submitted by the School showed input tax exceeding output tax in a sum which, on the face of the return, would have generated a repayment to the School of just over £816,521. However, at this time HMRC was revisiting its views on the chargeability of VAT (as appears above) and took the view that more output tax ought to have been accounted for, which would have extinguished the repayment claim. HMRC was seeking to backdate the withdrawal from the 2000 arrangement. It therefore did not pay the credit ostensibly shown as being due on the June return. Eventually it relented on this retrospectivity point in relation to the period before it withdrew the 2000 arrangement (again, see above) and paid the amount of the VAT credit shown in the June return, but it did not pay a repayment supplement in respect of that delayed repayment on the footing that the School did not come within the words of the statute.

155. The School maintained its claim for that payment. The FTT did not have to decide this point because its decision that the services all fell to be zero rated meant that the technical defence of HMRC fell away, but it nonetheless expressed its views on it, and decided that had it been wrong on the main issue, it would have rejected the

claim to the repayment supplement because strictly speaking the School could not bring itself within the statute for the reasons pressed by HMRC and which we set out below. Once again, since we differ from the FTT on the main issue the point becomes relevant and the School has cross-appealed the FTT decision in relation to the repayment supplement. We therefore have to decide the point.

The relevant legislation

156. The right to a repayment supplement arises under section 79 VATA. So far as relevant it provides:

> "79 **Repayment supplement in respect of certain delayed payments or refunds**
>
> (1) In any case where –
>
> (a) a person is entitled to a VAT credit, or
>
> [various circumstances in which a person is "entitled" to a refund]
>
> and the conditions mentioned in subsection (2) below are satisfied, the amount which, apart from this section, would be due by way of that payment or refund shall be increased by the addition of a supplement equal to 5 per cent of that amount or £50, whichever is the greater.
>
> (2) The said conditions are:
>
> (a) that the requisite return or claim is received by the Commissioners not later than the last day on which it is required to be furnished or made, and
> (b) that a written instruction directing the making of the payment or refund is not issued by the Commissioners within the [relevant period], and
> (c) that the amount shown on that return or claim as due by way of payment or refund does not exceed the payment or refund which was in fact due by more than 5 per cent of that payment or refund of £250, whichever is the greater.
>
> (2A) The relevant period in relation to a return or claim is the period of 30 days beginning with the later of –
>
> (a) the day after the last day of the prescribed accounting period to which the return or claim relates, and
> (b) the date of the receipt by the Commissioners of the return or claim.
>
> (6) In this section "requisite return or claim" means –
>
> (a) in relation to a payment, the return for the prescribed accounting period concerned which is required is to be furnished in accordance with regulations under this Act …"

157. The dispute in this part of the appeal turns around the apparent requirement of the School to demonstrate that it was "entitled to a VAT credit". There was no

dispute as to the other requirements of the section. The entitlement to a credit is governed by section 25:

> "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) in respect of the acquisition by him from other member States of any goods,
>
> 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 provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.
>
> (3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit"."

158. The quarter in respect of which the claim to repayment supplement is made was the last quarter before HMRC changed its stance. It was in that quarter that the School submitted a VAT return which showed, on its face, a credit due to it of the £816,000 odd. As appears from the narrative appearing above in relation to section 84(10), HMRC at one stage sought to backdate the withdrawal of the previous VAT arrangements. In relation to the quarter in question, that view, if successful, would not only have resulted in the £816,000 credit being unclaimable, a sum would have been payable by way of output tax to HMRC. HMRC only withdrew that stance when judicial review proceedings were taken. Until then it had not actually paid the £816,000 during the course of these events. In due course, pursuant to its concession that the arrangement should not be backdated, it did pay the VAT credit shown on the relevant return, but did not pay the repayment supplement which the School now says is due. The amount of the repayment supplement currently stands at about £50,000 if due.

The parties' submissions

159. The points taken by HMRC can be quite simply stated. HMRC starts from the proposition that the correct tax treatment of the School's VAT supplies is (as we have determined to be the case) that none of them were zero rated. That being the case, the June 2009 return was not correct in showing a repayment due to the School, and indeed if it had been correctly stated there would have been more VAT due to HMRC. When HMRC eventually accepted that it would not seek to impose what it considered

to be the correct regime retrospectively, it exercised a discretion not to recover tax, or otherwise to seek the reconstruction of more historic returns, but the exercise of that discretion did not validate the June 2009 return which was, as such, improperly constructed because it reflected a zero-rating which did not, in law, apply. In those circumstances when input and output tax were properly treated there was technically no "VAT credit" within the meaning of section 79. The exercise of the discretion did not give rise to a credit in law. Ms Mitrophanous relied on *Noor*, an Upper Tribunal case. This was, in essence, the argument accepted by the FTT in this case.

160. The School argues that that analysis is faulty. It argues that HMRC was entitled to issue the ruling that it did in 2000, and the School was entitled to rely on it fully and in all respects. The result was that the only output tax for which the School should have accounted, prior to the withdrawal of the arrangement, was that which actually appeared in the returns, including the June 2009 return, so that it was entitled to a credit within the meaning of the section when input tax exceeded output tax, with a consequential entitlement to repayment supplement when that credit was paid late. Reliance is placed on *R (on the application of Lower Mill Estate Ltd) v HMRC* [2008] EWHC 2409 (Admin) ("*Lower Mill Estate*").

Discussion

161. We think there is little doubt where the merit of this point lies (it lies with the taxpayer), but its proper resolution lies in considering the technicalities properly. When thus viewed we consider that HMRC is correct. On the basis of our finding on the main issue the return submitted by the School was technically incorrect. It ought to have contained a higher figure for output tax, which would have eclipsed the input tax and prevented there being any net credit. The concepts of input tax, output tax, VAT credits and (particularly relevantly for present purposes) repayment supplement are statutory creatures. Repayment supplement only applies where a taxpayer is entitled to a "VAT credit". As a matter of law the School was not entitled to such a thing, for the reasons just given.

162. The situation is not changed by the fact that the School had a legitimate expectation that it was entitled to construct its returns as it did. That expectation arose from the arrangements we have described above, and although HMRC reserved the right to withdraw the arrangements it cannot have been contemplated by either party that they could be withdrawn retrospectively. The School had a legitimate expectation that the arrangements would continue until a date of withdrawal, at which point the position would change. But that did not mean that the statutory definitions and provisions were varied as a matter of law. The legal provisions stood, even though the School had a right to expect that they would be applied in a different way (until withdrawal). That does not give rise to the statutory creature, a "repayment supplement".

163. *Lower Mill Estate* does not go far enough to assist the taxpayer. We understand that it was relied on to demonstrate that if HMRC reaches an agreement with the taxpayer then that should be treated as binding, and that in the present case that would have the effect that a repayment supplement could arise because a VAT credit had

arisen. We do not think that the case goes that far. The principal paragraphs from the judgment of Blake J on which Mr Thomas relied were the following:

> "23. It seems to me apparent, first, that HMRC do have the power, in the exercise of their management of the tax statutes, to give indications or rulings as to whether or not a VAT invoice should be rendered at all, and at what rate the tax should be charged upon that invoice; whereas *Davies* was a case about income tax and capital gains for a period of alleged residence, and the issue is whether the taxpayer was a true resident in the UK at that particular period of time.
>
> 24. The present case concerns VAT where, it seems to me, issues of policy make it even more important that the taxpayer should be able to enquire, and rely upon soundly the unambiguous representations from the Commissioners as to whether they should have charged VAT in respect of their transactions. If a transaction is a transaction to which standard rate VAT is to apply, the taxpayer needs to know that at the time he, or she, renders supplies and invoices to clients, and to others with whom they have business transactions. It will be too late to retrospectively claim that tax back from others, many years after the event, when the invoices were not so rendered and the whole commercial transaction was based upon an understanding that tax was not payable."

164. At first sight, and taken out of context, it might be thought that those paragraphs would allow HMRC to reach an agreement which meant that as a matter of law something could become input tax when it was not actually input tax, thereby giving rise to a tax credit which would otherwise not be a tax credit, and thus creating a right to repayment supplement. However, that is not in fact what Blake J is saying. He was having to resolve the question of what should go first – a statutory appeal or judicial review on the footing of legitimate expectation. In the passages cited, he is in fact stating what would underpin a judicial review claim by a taxpayer based on legitimate expectation. Blake J was concerned to rebut the idea that agreements by HMRC about tax matters, where such agreements were relied on by the taxpayer, were ultra vires. It is of the essence of his reasoning that they were not necessarily ultra vires and could therefore be used to found a legitimate expectation argument. But he was not going further and saying that they could be used to alter the actual legal nature of such things as input tax, output tax and tax credits. That is made clear by his next paragraph:

> "25. Therefore, the fact that there are third parties affected by the transaction, and the taxpayer would normally have been able to pass on any tax that it was due to that third party, makes it even more appropriate that unambiguous representations can be relied upon. If the relevant foundations are made out on the facts, there would be a strong case of abuse of power to permit the commissioners to depart from their representation with retrospective effect here. The tax in dispute was for the periods before February, there being no dispute that they may be entitled to make a fresh decision, subject to the appeal, for the periods after February 2008."

165. In other words, he was determining that the acts of HMRC would be capable of giving rise to a legitimate expectation which would itself provide a case for saying that if it were frustrated there would be an abuse of power. All that is judicial review

territory. It is not material for saying that agreements were capable of changing the legal nature of statutory creations, which is what the taxpayer would have to establish in order to succeed on this point in this appeal.

166. The true position is made clear by HMRC's authority, *Noor*. The status of representations made by HMRC as (potentially) giving rise to legitimate expectations but not actually altering the legal status of things provided for by the Act is made clear in 3 paragraphs:

> "88. In our view, the subject matter of section 83(1)(c) ("the amount of input tax which may be credited to a person") is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under VATA 1994 , reflecting the provisions of, now, the principal VAT Directive (2006/112/EC) . Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the F-tT is formulated, in the case of section 83(1)(c) , by reference to those concepts. The F-tT is not, expressly at least, given jurisdiction under this provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions.
>
> 89. Suppose then that a taxpayer had received express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation. Suppose that the Administrative Court were prepared to grant a remedy in order to give effect to that legitimate expectation. We are not clear precisely what such a remedy would be, but one thing it could not do would be simply to order that HMRC give credit for the input tax. Take the present case as an example. Obviously the Administrative Court could not declare the VAT on the Invoices to be allowable input tax – it clearly was not. Indeed, it would not have been input tax even if Mr Noor had claimed it within the 6 month time limit since it would only have been counted (section 24(6)(b)) or treated (Regulation 111(1)(a)) as input tax. Nor, we consider, could the Administrative Court order HMRC to authorise Mr Noor to treat the VAT on the Invoices as if it were input tax for the purposes of Regulation 111(1) : that would fly in the face of Regulation 111(2) . What we think the Administrative Court could do is to order HMRC to treat Mr Noor as entitled to a credit of an amount equal to the VAT on the Invoices. But that amount is not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a "credit" within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC.
>
> 90. We can put this point in a slightly different way. The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, prima facie , to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is "input tax" (or what can be counted or treated under the legislation as input tax e.g. under section 24 or Regulation 111) or what can be

> "credited" for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of "input tax which may be credited" to a person. The F-tT has no jurisdiction to effect that financial adjustment since its jurisdiction under section 83(1)(c) relates only to "input tax which may be credited" to a person."

167. As a decision of the Upper Tribunal, this analysis is not binding on us, but it is persuasive. Mr Thomas did not seek to challenge it, whether by reference to *Oxfam v Revenue & Customs Commissioners* [2010] STC 686 (referred to in *Noor*) or otherwise, and indeed we proceed on the basis that it is not only persuasive but correct. It shows that as a matter of law the School in this case cannot claim a repayment supplement. It may well have a legitimate expectation-type claim, but that cannot be dealt with on this appeal.

168. The School's claim on this point fails on this appeal and we dismiss the appeal. However, it may well be something which was within the judicial review proceedings which we have identified above and which were transferred to this Tribunal by Warren J. We do not have any detail which enables us to judge that. But if that is right then it may well be open to the School to revive those proceedings and make its claim within them. If it were convenient to do so we would be minded to make directions to cater for that, subject of course to HMRC's observations on the point. That can be dealt with after the delivery of this decision.

Costs

169. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Mr Justice Mann

Ashley Greenbank
Upper Tribunal Judge

Release date: 10 November 2017