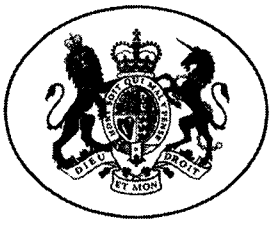
C-459/19-1



Appeal number: UT/2019/0009

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

The Commissioners for Her Majesty's Revenue and Customs

Appellants

– v –

The Wellcome Trust Limited

Respondent

ORDER FOR REFERENCE TO
THE COURT OF JUSTICE OF THE EUROPEAN UNION

Upon Application by the Respondent on 15 February 2019, and consideration of the Appellant's response to the Application dated 21 February 2019 and the subsequent correspondence between the parties

IT IS ORDERED THAT:

1. The request for a preliminary ruling set out in the Schedule attached hereto is to be made to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

2. All further proceedings in this matter shall be stayed until after the Court of Justice of the European Union has given its ruling on the questions referred to it.

3. The matter of costs is reserved.

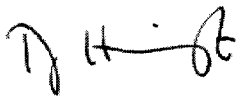
REASONS

1.In my view many of the points made by each party on the other's draft question has merit and accordingly I have sought to combine elements of both in my formulation of the questions, which, as can be seen, has resulted in two questions being asked.

2.I have dealt with HMRC's concerns that it should be clear that the issue relates to the business activities of WTL rather than its private activities by spelling out the actual activities for which the investment management services were acquired. By describing the activities and that way, it is clear that we are talking about business rather than private activities.

3.I also accept HMRC's position that WTL's draft question did not identify a key issue between the parties regarding whether a supply that does not come within the specific provisions for place of supply must fall within either article 44 or article 45 and accordingly the second question seeks to deal with that issue.

4.I was broadly content with the terms of the supporting memorandum, as provided by HMRC, although I have made a few amendments reflecting points from WTL's own draft which had not been incorporated.



TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 13 June 2019

REQUEST FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Questions Referred

1. Is Article 44 of Directive 2006/112 to be interpreted as meaning that when a taxable person carrying on a non—economic activity consisting of the purchase and sale of shares and other securities in the course of the management of the assets of a charitable trust acquires a supply of investment management services from a person outside of the Community exclusively for the purposes of such activity, it is to be regarded as "a taxable person acting as such"?

2. If Question 1 is answered in the negative and Articles 46 to 49 of the Directive do not apply, does Article 45 of the Directive apply to the supply or does neither Article 44 or Article 45 apply to the supply?

Introduction

1. This request for a preliminary ruling from the Court of Justice of the European Union ("**CJEU**") is made by the Upper Tribunal (Tax and Chancery Chamber) in the United Kingdom (the "**Upper Tribunal**") in the context of an appeal by Her Majesty's Revenue and Customs ("**HMRC**") against the decision of the First-tier Tribunal (Tax Chamber) (the "**First-tier Tribunal**") in this matter dated 10 October 2018[1]. The VAT in issue is £13,113,822.

2. The issue before the national court concerns the place of supply of investment management services **("the Services")** made to the Wellcome Trust Ltd **("WTL")** by non-EU suppliers. It arises because it is agreed that (i) WTL is a taxable person under Articles 2 and 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ("the **Directive**") and (ii) that it used the Services for its business activity and not for private purposes, but also (iii) that WTL did not use the Services for taxable supplies within Article 2(1) of the Directive. The key

[1] [2018] UKFTT 0599

question therefore is whether in such circumstances it can be said that WTL is "a taxable person acting as such" within Article 44 of the Directive. HMRC claim that Article 44 applies, in particular (i) on the basis of the language and aim of the provision and related provisions and (ii) on the basis that for legal certainty a place of supply must be identifiable and, as there is no claim that the supplies come within Article 45 or that any of the specific rules set out in Articles 46-59 apply, Article 44 must apply. WTL argues that as it is not a taxable person 'acting as such' within Article 2(1) of the Directive, it is also not a taxable person 'acting as such' within Article 44.

Relevant background facts

3. WTL is the sole trustee of a charitable trust, the Wellcome Trust, which makes grants for medical research. It receives income from investments and also has a number of comparatively minor activities including sales, catering and rental of properties in respect of which it is registered for VAT. Investment income is predominantly from overseas investments in relation to which WTL receives services from investment managers from within and outside the EU. The investment income is the source of the majority of the funding for the grants that WTL provides. In the case of *Wellcome Trust Ltd v Customs and Excise Comrs* (Case C-155/94) EU:C:1996:243, the Court of Justice of the EU replied to questions posed by the VAT tribunal, stating that the concept of economic activities within the meaning of art 4(2) of the Sixth Directive (now art 9(1) of the Directive 2006/112) did not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. As a consequence, WTL was denied input tax recovery on the entirety of the costs incurred in relation to its non-EU portfolio. WTL's activities are agreed to be substantially unchanged from those considered in the 1996 CJEU decision.

4. When WTL purchased the Services from non-EU suppliers it did so exclusively for the purposes of its non-economic business activity. It did not provide its VAT number to any of the suppliers from whom those services were purchased. It is agreed that WTL is a taxable person within Articles 2 and 9 of the Directive and that its non-economic activities are nevertheless not private activities, but business activities.

5. Under the Scheme of the Wellcome Trust WTL is required to have paramount regard to the charitable status of the Trust and is prohibited, amongst other things, from engaging in a trade.

Proceedings before the FTT and its decision

6. From 2010 onwards, WTL accounted for VAT on the Services under the reverse charge mechanism on the basis that the place of supply was the UK. Between April 2016 and June 2017, WTL submitted claims under Section 80 of the Value Added Tax Act 1994 (the "**VATA 1994**") claiming that it had overaccounted for output tax in relation to the Services on the basis that, following the judgment of the CJEU in Case C-155/94 *Wellcome Trust Ltd v Commissioners of Customs and Excise*, WTL is a taxable person under Articles 2 and 9 of the Directive but is not a taxable person acting as such within Article 44 of the Directive where it is engaged in the investment activities which are substantially unchanged from those considered by the CJEU in its decision.

7. The FTT decided that the Services did not come within Article 44 because the words 'acting as such' effectively excluded WTL from its scope; it was not necessary that supplies (which did not fall within the specific rules) had to fall within either Article 44 or Article 45; and this did not give rise to legal uncertainty because Article 18 of the Council Implementing Regulation (EU) No 282/2011 (the "**Implementing Regulation**")[2] meant that a supplier could rely on whether the customer had provided its VAT number to determine whether it ought to apply VAT to its supplies. The FTT considered that the note accompanying the inclusion of the words "acting as such" in the final version of the *Travaux Preparatoires* was not determinative but indicated that the words were meant to mean something.

8. The FTT also determined that the UK implementation of Article 44, which identified the place of supply as the UK on the basis that WTL was a taxable person acting in a business capacity, was non-compliant with Article 44 and had to be given a conforming interpretation.

9. HMRC appealed to the Upper Tribunal, which has stayed proceedings in order to make a Request for a Preliminary Ruling.

[2] OJ 2011 L 77, p. 1 - Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax

The issue in dispute

10. The issue between the parties is whether the place of supply of the investment management services received by WTL from suppliers established outside the EU is the United Kingdom. The resolution of that issue turns on the Community law meaning of Article 44 of the Directive.

Relevant Legislation

EU law

11. The relevant rules for determining the place of supply of services are set out in Articles 43 to 45 of the Directive and read as follows:

> ***"Place of supply of services***
> ***Section 1***
> *Definitions*
>
> ***Article 43***
>
> *For the purpose of applying the rules concerning the place of supply of services:*
>
> 1. *a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;*
>
> 2. *a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.*
>
> ***Article 44***
>
> *The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.*
>
> ***Article 45***
>
> *The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or*

fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides."

12. Article 196 of the Directive provides for the application of a 'reverse charge' in certain circumstances:

> *VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State.*

13. Under Article 262 of the Directive:

> *Every taxable person identified for VAT purposes shall submit a recapitulative statement of the following:*
>
> *(a) the acquirers identified for VAT purposes to whom he has supplied goods in accordance with the conditions specified in Article 138(1) and (2)(c);*
>
> *(b) the persons identified for VAT purposes to whom he has supplied goods which were supplied to him by way of intra-Community acquisitions referred to in Article 42;*
>
> *(c) the taxable persons, and the non-taxable legal persons identified for VAT purposes, to whom he has supplied services, other than services that are exempted from VAT in the Member State where the transaction is taxable, and for which the recipient is liable to pay the tax pursuant to Article 196.*

14. Articles 43 to 45 were introduced by **Directive 2008/8/EC** which amended the Directive as regards the place of supply of services. The recital of Directive 2008/8/EC sets out the basis for the amendments including the following:

> *(3) For all supplies of services the place of taxation should, in principle, be the place where the actual consumption takes place. If the general rule for the place of supply of services were to be altered in this way, certain exceptions to this general rule would still be necessary for both administrative and policy reasons.*
>
> *(4) For supplies of services to taxable persons, the general rule with respect to the place of supply of services should be based on the place where the recipient is established, rather than where the supplier is established. For the purposes of rules determining the place of supply of services and to minimise burdens on business, taxable persons who also have non-taxable activities should be treated as taxable for all services rendered to them. Similarly, non-taxable legal persons who are identified for VAT purposes should be regarded as taxable persons. These provisions, in accordance with normal rules, should not extend to supplies of services received by a taxable person for his own personal use or that of his staff.*
>
> *(5) Where services are supplied to non-taxable persons, the general rule should continue to be that the place of supply of services is the place where the supplier has established his business.*
>
> *(6) In certain circumstances, the general rules as regards the place of supply of services for both taxable and non-taxable persons are not applicable and specified exclusions should*

apply instead. These exclusions should be largely based on existing criteria and reflect the principle of taxation at the place of consumption, while not imposing disproportionate administrative burdens upon certain traders.

(7) Where a taxable person receives services from a person not established in the same Member State, the reverse charge mechanism should be obligatory in certain cases, meaning that the taxable person should self-assess the appropriate amount of VAT on the acquired service.

15. Council Implementing Regulation (EU) No 282/2011 (the "**Implementing Regulation**") sets out the following in its recital:

(2) Directive 2006/112/EC contains rules on value added tax (VAT) which, in some cases, are subject to interpretation by the Member States. The adoption of common provisions implementing Directive 2006/112/EC should ensure that application of the VAT system complies more fully with the objective of the internal market, in cases where divergences in application have arisen or may arise which are incompatible with the proper functioning of such internal market. These implementing measures are legally binding only from the date of the entry into force of this Regulation and are without prejudice to the validity of the legislation and interpretation previously adopted by the Member States.

(3) Changes resulting from the adoption of Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services should be reflected in this Regulation.

(4) The objective of this Regulation is to ensure uniform application of the current VAT system by laying down rules implementing Directive 2006/112/EC, in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions. In accordance with the principle of proportionality as set out in Article 5(4) of the Treaty on European Union, this Regulation does not go beyond what is necessary in order to achieve this objective. Since it is binding and directly applicable in all Member States, uniformity of application will be best ensured by a Regulation.

(5) These implementing provisions contain specific rules in response to selective questions of application and are designed to bring uniform treatment throughout the Union to those specific circumstances only. They are therefore not conclusive for other cases and, in view of their formulation, are to be applied restrictively...

(18) The correct application of the rules governing the place of supply of services relies mainly on the status of the customer as a taxable or non-taxable person, and on the capacity in which he is acting. In order to determine the customer's status as a taxable person, it is necessary to establish what the supplier should be required to obtain as evidence from his customer.

(19) It should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person. Communication by the customer of his VAT identification number to the supplier is sufficient to establish that the customer is acting in his capacity as a taxable person, unless the supplier has information to the contrary. It should also be ensured that a single service acquired for the business but also used for private purposes is only taxed in one place.

16. The Implementing Regulation lays down the following relevant rules in respect of the place of supply rules in the Directive.

"Place of supply of services

(Articles 43 to 59 of Directive 2006/112/EC)

Subsection 1

Status of the customer

Article 17

1. If the place of supply of services depends on whether the customer is a taxable or non-taxable person, the status of the customer shall be determined on the basis of Articles 9 to 13 and Article 43 of Directive 2006/112/EC.

2. A non-taxable legal person who is identified or required to be identified for VAT purposes under point (b) of Article 214(1) of Directive 2006/112/EC because his intra-Community acquisitions of goods are subject to VAT or because he has exercised the option of making those operations subject to VAT shall be a taxable person within the meaning of Article 43 of that Directive.

Article 18

1. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a taxable person:

(a) where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name and address in accordance with Article 31 of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

(b) where the customer has not yet received an individual VAT identification number, but informs the supplier that he has applied for it and the supplier obtains any other proof which demonstrates that the customer is a taxable person or a non-taxable legal person required to be identified for VAT purposes and carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks.

2. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him.

3. *Unless he has information to the contrary, the supplier may regard a customer established outside the Community as a taxable person:*

(a) *if he obtains from the customer a certificate issued by the customer's competent tax authorities as confirmation that the customer is engaged in economic activities in order to enable him to obtain a refund of VAT under Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory;*

(b) *where the customer does not possess that certificate, if the supplier has the VAT number, or a similar number attributed to the customer by the country of establishment and used to identify businesses or any other proof which demonstrates that the customer is a taxable person and if the supplier carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks.*

Subsection 2

Capacity of the customer

Article 19

For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of Directive 2006/112/EC, a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person. Unless he has information to the contrary, such as information on the nature of the services provided, the supplier may consider that the services are for the customer's business use if, for that transaction, the customer has communicated his individual VAT identification number.

Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of Directive 2006/112/EC, provided there is no abusive practice."

17. Under the heading "Obligations of taxable persons and certain non-taxable persons", Article 55 provides

"For the transactions referred to in Article 262 of Directive 2006/112/EC, taxable persons to whom a VAT identification number has been attributed in accordance with Article 214 of that Directive and non-taxable legal persons identified for VAT purposes shall be required, when acting as such, to communicate their VAT identification number forthwith to those supplying goods and services to them.

The taxable persons referred to in point (b) of Article 3(1) of Directive 2006/112/EC, who are entitled to non-taxation of their intra-Community acquisitions of goods in accordance with the first paragraph of Article 4 of this Regulation, shall not be required to communicate their VAT identification number to those supplying goods to them when a VAT identification number has been attributed to them in accordance with Article 214(1)(d) or (e) of that Directive."

UK law

18. The relevant place of supply rules have been implemented in UK law in Section 7A VATA:

"7A Place of supply of services

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

...

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax,

and the services are received by the person otherwise than wholly for private purposes."

WTL's arguments in summary

19. In summary, WTL's case is that:

i. Article 44 PVD provides that the place of supply of services is the place of the recipient's establishment when those services are received by a "*taxable person*

acting as such". The requirement in Article 44 is concerned with the capacity in which the recipient receives the services. It is not sufficient that the recipient '*be*' a taxable person; it must also be '*acting as*' a taxable person.

ii. In Case C-155/94 *Wellcome Trust Ltd v Commissioners of Customs and Excise*[3] the CJEU held that, when it engaged in its investment activities, WTL was not a "*taxable person acting as such*" within the meaning of what is now Article 2(1)(c) PVD.

iii. The words "*taxable person acting as such*" appearing in Article 44 PVD must, in the absence of an express provision to the contrary, be given the same effect and meaning as those same words appearing in Article 2(1) PVD.

iv. WTL's construction of Article 44 gives effect to the context and objectives of the legislation by ensuring consistency and simplicity.

    a) It ensures that services received by taxable persons whether for private use or non-economic use are treated in the same way;

    b) It ensures that services received by persons for private or non-economic use are treated in the same way irrespective of whether those persons happen also to be registered for VAT in respect of unrelated taxable activities;

    c) It ensures that the rules on the place of supply of services align with the rules on the intra-community acquisition of goods, which draw no distinction between services received by taxable persons for private or non-economic use.

v. The European Union institutions considered at some length whether distinctions should be drawn between private and non-economic use by taxable persons and concluded that they should not. The words "acting as such" were deliberately introduced into Article 44 after detailed consideration of the scope and application of the rules governing the place of supply of services. (See COM(2003) 822, 23

[3] Wellcome Trust Case C-155/94, ECLI:EU:C:1996:243

December 2003[4]; FISC 78, 1 April 2004, at pp. 16-17[5]; FISC 116, 28 May 2004, at p. 6[6]; FISC 144, 8 July 2004 at p. 4; FISC 150, 4 August 2004, at p. 6[7]; FISC 42, 16 March 2006 at page 7[8]) .

vi. The effect of HMRC's arguments is to reverse the clear policy choices agreed by the EU legislature.

vii. Article 55 of the Implementing Regulation requires WTL to provide its VAT number to suppliers "*when acting as*" a taxable person. WTL has not provided its VAT number to suppliers because it is not "*acting as*" a taxable person in receiving the disputed services. Though this appeal is concerned exclusively with the receipt of services from non-EU suppliers, EU-based suppliers of services would be justified in charging VAT *in their own jurisdiction* to WTL on the basis of this Article. There is, therefore, no risk of non-taxation.

viii. In Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet*[9] ("***TRR***") the CJEU emphasised the significance and import of the words "*taxable person acting as such*" as appearing in Directive 77/388/EEC (the "**Sixth Directive**") and decided the case before it on the basis that those words "acting as such" were absent from Article 9(2)(e) of the Sixth Directive.

ix. Like the other provisions of the Sixth Directive considered by the CJEU in *TRR*, Articles 2(1) and 17(2)[10], Article 44 of the VAT Directive also indicates that a condition that the recipient uses those services for the purposes of its economic activity must be satisfied in order for it to apply. According to HMRC's argument however, the words "acting as such" in Article 44 are meaningless.

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[4] COM/2003/0822 Final, 23 December 2003, 'Proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services'

[5] Council of the European Union Interinstitutional File 2003/0329 (CNS), ST 8057 2004 INIT (FISC 78)

[6] Council of the European Union Interinstitutional File 2003/0329 (CNS), ST 9961 2004 INIT (FISC 116)

[7] Council of the European Union Interinstitutional File 2003/0329 (CNS), ST 11857 2004 INIT (FISC 150)

[8] Council of the European Union, 16 March 2006, 'Amended proposal for a Council Directive amending Directive 77/388/EEC as regards the place of supply of services and Regulation (EC) No 1798/2003 as regards the exchange of information', ST 7512 2006 INIT (FISC 42)

[9] *Kollektivavtalsstiftelsen TRR Trygghetsrådet*) Case C-291/07, ECLI:EU:C:2008:348 (opinion) at paragraph 40 and ECLI:EU:C:2008:609 (judgment) at paragraphs 28 and 29

[10] The relevant current provisions are Articles 2(1)(c) and 168 of the PVD.

x. It would breach the principle of equal treatment to treat WTL differently from (a) another charity which purchases exactly the same services but is not registered for VAT because it does not engage in any incidental (and unconnected) taxable activity; and/or (b) a person engaged in private use of the relevant services (whether or not registered for VAT). This latter breach would be particularly egregious in circumstances where WTL was held by the ECJ to be engaged in non-economic activity precisely because its activities were to be equated to those of a private investor[11].

xi. Article 43 does not undermine or contradict any of the foregoing propositions. That article has a single stated purpose, namely to determine the status of a person. Article 43 confirms that a taxable person who carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) of the VAT Directive is, nonetheless, to be regarded as having the status of being a taxable person insofar as that activity is concerned. In accordance with Article 43, WTL has the status of taxable person. Whilst the CJEU confirmed this to be the case in any event in *TRR*, that judgment was published well after the terms of Articles 43 had been finalised.[12]

xii. Article 43 cannot be read as deeming the recipient to be "acting as" a taxable person for the purposes of Article 44 (as the Respondents contend) for a number of reasons:

a) Articles 17 to 19, and 55, of the Implementing Regulation confirm that Article 43 PVD is concerned with 'status' and Article 44 with 'capacity';

b) Article 19 of the Implementing Regulation confirms that a taxable person who engages in private use is to be regarded as a non-taxable person. That article does not refer to (non-private) non-economic use and simply has no application to WTL's supplies;

c) Article 43 does not distinguish between different types of non-economic activity (whether private or business) and it is therefore incapable of importing such distinctions into Article 44;

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[11] See *Wellcome Trust* Case C-155/94, ECLI:EU:C:1996:243 at paragraphs 36 to 39

[12] Directive 2008/8/EC, though it became effective on 1 January 2010, was adopted on 12 February 2008. The Judgment of the CJEU in *TRR* was not delivered until 6 November 2008.

d) The proposal for Article 43 (COM(2003) 822) expressly excluded private use from the scope of Article 43. The subsequent removal of that exclusion proves (a) that private use is included in article 43 and (b) that the European Council consciously and deliberately decided to treat a person as a taxable person whether or not they were also conducting private activities alongside their economic activity;

e) Article 55 of the Implementing Regulation only requires a purchaser to provide its VAT number to suppliers "when acting as" a taxable person. WTL has not provided its VAT number to its suppliers, nor should it, because it is not "acting as" a taxable person when doing so.

f) Article 18(2) of the Implementing Regulation allows a supplier to assume that the recipient is a non-taxable person for the purposes of Article 45 PVD where that purchaser has not communicated its VAT number. In the case of an intra-EU supply of services, the application of Article 18(2) results in the place of supply of services to a taxable person acting in a non-economic capacity being determined in accordance with Article 45 where that person has not supplied its VAT number to the supplier.

g) For the foregoing reasons, there is no risk of the non-taxation of intra-EU supplies under WTL's and the First-tier Tribunal's analysis[13] of the relevant legislation. However, HMRC's proposed position would in fact entail double taxation in an intra-EU context because the supplier would be required to treat the place of supply as being where they are established (pursuant to Article 18(2) Implementing Regulation and consequently Article 45 of the PVD). At the same time, under HMRC's proposed position, a recipient who is a taxable person would also be required, under Article 44 PVD, to treat the same supplies as taking place where they are established.

h) HMRC's construction of Articles 43 and 44 would place WTL in a uniquely invidious position. Were its share-dealing activities economic

[13] Ibid. at paragraphs 25 to 29

in nature, it would be liable to self-account for VAT on the purchase of services from outside the EU but it would consequently enjoy the right to deduct all such input VAT incurred pursuant to Articles 135(1)(f) and 169 PVD as the counterparties to its share transactions are based outside the EU. If WTL was purchasing the services for private use it would have no obligation to self-account for VAT on the purchase of services from non-EU suppliers and so the question of VAT deduction would not arise. WTL is said, however, to be required to self-account for VAT as though it were engaged in economic activity but to be denied input tax deduction on the basis that it is carrying out an activity equivalent to that of a private individual. There is nothing in the legislation to suggest that charitable bodies were intended to be penalised in this way.

xiii. HMRC's reliance on the Recitals of Directive 2008/8/EC and the Implementing Regulation to support their construction of Articles 43 to 45 is misplaced. The travaux preparatoires highlighted in paragraph 22(v) above demonstrate that the EU legislature considered at some length which conditions must be satisfied in order for the place of supply to be the location of the customer under Article 44. It was agreed by the EU legislature after detailed consideration that the material condition in Article 44 should be "acting as such", in order to align the rules on the place of supply of services with the rules applicable to the intra-Community Acquisition of goods. It is clear that the recitals were not amended to take account of the substantive and carefully considered changes made to Articles 43 and 44[14]. In any event, the recitals are clearly not the law nor can they override the clear terms of the PVD itself (as affirmed by the CJEU in *Skatteverket v Srf konsulterna AB* (Case 647/17))[15].

HMRC's arguments in summary

27. In summary, HMRC contend as follows:

1. It is agreed between the parties that WTL is a taxable person within Articles 2 and 9 of the Directive. Although it is not a taxable person 'acting as such' within Article 2(1) of

[14] Council of the European Union Interinstitutional File 2003/0329 (CNS), ST 11439 2005 INIT (FISC 86) [22 July 2005]; Council of the European Union Interinstitutional File 2003/0329 (CNS), ST 16112 2005 INIT (FISC 167) [23 December 2005]

[15] *Skatteverket v Srf konsulterna AB* Case 647/17 , ECLI:EU:C:2019:195

the Directive, it is engaged in a business activity, rather than a private activity, when it receives the Services (Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën* EU:C:2009:88). There is an express distinction drawn between private and business activity in Article 19 of the Implementing Regulation.

2. The place of supply of the Services must fall within Article 44 for two key reasons. First, interpreting Article 44 to include the supplies of Services to WTL is the only interpretation that is in accordance with the objectives of the place of supply rules. Secondly, the interpretation accords with the recitals and related provisions in the Directive, Directive 2008/9 and the Implementing Regulation.

3. As to the objectives of the place of supply rules, the general principle that the place of supply is the place of consumption and that VAT is in principle owed to the member state in which the service is consumed (Case C-605/12 EU:C:2014:2298 *Welmory sp z.o.o* Advocate General paragraphs 22-30) supports the view that the place of supply should be the UK, where WTL is established.

4. More importantly still, a key objective of the rules is that they should identify with legal certainty the place of supply for the avoidance of non-taxation and double taxation and the identification of the entitlement of any Member State to VAT on a supply (*Welmory* in particular paragraphs 39-46 and 54-56 of the CJEU judgment; Case C-37/08 *RCI Europe v Commissioners for Her Majesty's Revenue and Customs* EU:C:2009:507 AG Opinon at EU:C:2009:226 paragraphs 48-50; and Case 647/17 *Skatteverket v Srf konsulterna* AB EU:C:2019:195 paragraphs 28-29). WTL does not claim that Article 45 applies to the Services (nor could it, given that WTL is a taxable person and one who is not acting for a private purpose) or that the relevant supplies are such as to fall within the particular provisions within Articles 46 to Articles 59 of the Directive. It follows from this that WTL's position is in fact that none of the place of supply rules apply: neither Article 44, nor 45, nor any of the particular provisions. It is wholly contrary to the key aim of legal certainty that a supply should have no place of supply at all. That a supply must fall within one of the place of supply rules is confirmed by Case 647/17 *Skatteverket v Srf konsulterna AB* EU:C:2019:195 paragraph 21.

5. Nor is it possible to argue that Article 18 of the Implementing Regulation means that there is no uncertainty. It is of particularly limited application. All that Article 18 does is allow a supplier to assume when a customer has not provided an identification number that he is dealing with a taxable person "[u]nless he has information to the contrary". Thus, it cannot provide any certainty at all where a supplier knows that WTL is in fact a taxable person and yet one who has not supplied an identification number. The place of supply rules are intended to, and should as far as possible be interpreted to, provide certainty as to the place of supply so that (i) taxable persons know which rules apply, (ii) Member States know whether they are entitled to VAT and (iii) so that the appropriate Member State benefits from the relevant taxation. Only HMRC's position achieves all three.

6. As to the related recitals and provisions:

   (a) Article 43 states that a taxable person who also carries out activities that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him. This article does not extend the Article 45 category, as that relates only to non-taxable persons. Its role can only be to widen Article 44, or at least to clarify that those taxable persons falling within Article 43 must be regarded as also falling within Article 44 when they are in the position of receiving supplies. WTL's position renders Article 43 meaningless: WTL says both that Article 43 grants only a certain status and also that this status is of no effect. Further, Advocate General Mazăk in Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet*[16] stressed the importance of the place of supply rules' providing legal certainty, being predictable and reducing the burden on traders. In that regard, he noted the present rules (which were not applicable in that case) and stressed that Article 43 now provides that those who also carry out activities not considered to be taxable supplies under Article 2(1) shall be regarded as taxable persons in respect of supplies to them (paragraph 44). This accords only with HMRC's position.

[16] *Kollektivavtalsstiftelsen TRR Trygghetsrådet*) Case C-291/07, ECLI:EU:C:2008:348 (opinion) and ECLI:EU:C:2008:609 (judgment).

(b) Article 44 uses the term 'acting as such' only to exclude from its scope those acting in a private capacity. This is made clear by Article 19 of the Implementing Regulation which states that a taxable person who receives services exclusively for private use shall be regarded as a non-taxable person. The clear implication is that other taxable persons (such as WTL, who it is agreed receives the Services for a non-private business use) shall still be regarded as a taxable person. This is also reflected in recital 19 of the Implementing Regulation which states that when services supplied to a taxable person are intended for private use the taxable person cannot be "deemed to be acting in his capacity as a taxable person". Again, the implication is that in other cases, taxable persons are indeed deemed to be 'acting' as taxable persons, *i.e.* to be taxable persons acting as such and therefore within Article 44. Contrary to WTL's claim therefore, HMRC's position does not render the term 'acting as such' meaningless and in fact makes sense of Articles 43 and 44 and the relevant provisions in the Implementing Regulation.

(c) As with Article 43, being regarded as a taxable person, must mean being regarded as a taxable person acting as such within Article 44. The only options the rules provide are that a customer is a taxable person acting as such or a non-taxable person. It follows that as WTL is not the latter, it must be the former.

(d) The recital to Directive 2008/08 which introduced the relevant place of supply rules made clear (i) that the general rule for supplies of services should be that these should be based on the place where the recipient is established; (ii) that taxable persons who also have non-taxable activities should be treated as taxable persons when they are customers in receipt of supplies (recital 4); and only refer to the place of supply being the place where the supplier is established in cases where supplies are made to non-taxable persons (recital 5). All three of these aims are met only by the view that the Services fall within Article 44.

(e) Article 55 of the Implementing Regulation in relation to transactions in Article 262 of the Directive, requires taxable persons when acting as such, to communicate their VAT identification number to their supplier. In relation to services, Article 262 refers to a supplier submitting a recapitulative statement of taxable person customers in relation to services for which the recipient is liable to pay the tax

pursuant to Article 196. Article 196 in turn refers to Article 44. Thus, Article 55 must be applied in light of the position in Article 44. WTL should accordingly provide its identification number when its supplier is in another Member State as WTL is a taxable person acting as such within Article 44 and Article 55. That a supplier may assume (unless it has information to the contrary) that a customer who has not provided its number is a non-taxable person is not of course a basis for arguing that the customer is indeed a non-taxable person or for denying that it should provide its number. On HMRC's interpretation of the position, WTL would accordingly come within Article 55 and provide its number so that its supplier would properly assume that the reverse charge applies. Contrary to WTL's claim therefore, there is no risk of double taxation on HMRC's account.

(f) WTL apparently accepts that there must be a place of supply in every case, including in this one, but considers that a supplier can assume under Article 18 of the Implementing Regulation that Article 45 applies where WTL does not provide its identification number. In fact, as noted above, that assumption is of limited application. The supplier cannot make that assumption where it has information to the contrary and therefore will (unsurprisingly) still need to be able to identify the place of supply, as will the Member States authorities. The risk of non-taxation of course arises precisely if the rules do not identify in each case the place of supply. HMRC's position ensures that this is identified in every case; WTL's position provides no answer to the key question where is the place of supply for the Services.

7. The *Travaux Preparatoires* do not in fact support the view that Article 44 only includes within its scope supplies received by those acting as taxable persons within Article 2(1). Indeed, the first introduction of the words 'acting as such' in Council of the European Union Interinstitutional File: 2003/0329 (CNS) 8057/04 COR 1(en) FISC 78 was in substitution of the phrase 'other than services supplied to him for his own private use'. Further, WTL places reliance on FISC 144, 8 July 2004 and FISC 150, 4 August 2004 but omits reference to FISC 197, 8 October 2004 in which the phrase 'acting as such' was in fact deleted from the text thus rendering any prior inclusion redundant. Further, WTL is simply wrong to claim that 'private use' must be included in Article 43 because of the removal of the words "except for his own private use or that of his staff" from an earlier draft form of Article 9. First, this last phrase can of course be merely

clarificatory. And secondly, and in any event, as the exception was in fact removed, with it was gone any implication WTL hopes to read into the temporary inclusion of the exception.

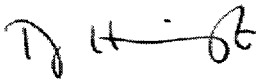
8. There is no basis for WTL to complain about claimed unequal treatment. It cannot claim a deduction of tax because it does not use the relevant Services to make taxable supplies. WTL also cannot complain that it is not being treated in the same way as a private person; WTL accepts that it is acting in a business capacity when it receives the Services, that its main business is of investments. Any different treatment of private persons is expressly supported by Article 19 of the Implementing Regulation. Furthermore, by virtue of the fact that WTL is a taxable person, it of course can claim some deduction of VAT on its overheads and that is a key benefit not open to a private investor. It is open to WTL to structure its business in a different way; but while it chooses to be a taxable person who also carries out activities that are not taxable supplies within Article 2(1), it is to be regarded as a taxable person within Article 44 as required by Article 43, Article 44 and Article 19 of the Implementing Regulation.

9. HMRC say that the answer to the question should therefore be as follows:
If none of the specific rules of place of supply in Articles 46 to 59 apply, a supply must fall within either Article 44 or Article 45 as there must be a certain place of supply and where a taxable person receives a supply and uses it for non-private business purposes, that person is a taxable person acting as such within the meaning of Article 44 of the Directive.

The reasons why a preliminary ruling is sought

28. The parties and the Upper Tribunal note that there is no UK or CJEU case law which considers the meaning of the words "acting as such" in Article 44 of the Directive, which

is the central issue in dispute. A preliminary ruling from the CJEU is therefore necessary to enable the Upper Tribunal to give judgment.



TIMOTHY HERRINGTON

Judge of the Tax and Chancery Chamber of the Upper Tribunal of the United Kingdom

Date: 13 June 2019