



Neutral Citation Number: [2023] EWHC 2354 (Admin)

Case No: CO/2132/2021

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22 September 2023

**Before :**

**MRS JUSTICE FOSTER DBE**

**Between :**

**The King**  
**on the application of**  
**Royal Surrey NHS Foundation Trust**

**Claimant**

**- and -**

**The Commissioners for**  
**His Majesty's Revenue and Customs**

**Defendant**

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**David Scorey KC and Stephen Donnelly** (instructed by **Hempsons**) for the **Claimant**  
**Eric Metcalfe** (instructed by **General Counsel and Solicitor to**  
**His Majesty's Revenue and Customs**) for the **Defendant**

Hearing date: 05 October 2022  
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**Approved Judgment**

This judgment was handed down remotely at 04.30pm on 22 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

## MRS JUSTICE FOSTER DBE:

### INTRODUCTION

1. The Royal Surrey NHS Foundation Trust (previously known as The Royal Surrey County Hospital NHS Foundation Trust and referred to here as “the Trust”) is authorised under the National Health Service Act 2006. The primary purpose of the Trust is to provide NHS services to NHS patients and users.
2. This application concerns the Trust’s claimed entitlement to the benefit of a concession in respect of the onward supply by them of certain specialist radiation therapy devices (“the Concession”). HMRC do not accept they are entitled to any concession, which concerns the repayment of sums equivalent to an amount of input tax paid by them on the purchase of those devices.
3. The machines, known as “Linacs”, are usually used in radiation therapy for cancer patients to provide external beam radiation treatments on all parts of the body. They deliver high energy x-rays or electrons to the region of the patient’s tumour. The cost of two Linac machine was at the relevant time about £4,112,586 inclusive of VAT. HMRC accept that the purchase price to the Trust for the two machines included £685,431.06 worth of output tax that NHS Supply Chain had previously paid to the supplier, Varian, for the Linacs.

### BACKGROUND

4. This case involves a claim for a payment that was not, in my judgement, when properly analysed, VAT however the basic background to that tax’s operation is important context. In short (and much simplified), in a typical, simple, commercial transaction VAT is charged on the supply of goods (and services) by a trader where that supply is taxable and made in the course of business. The supplying trader must account to the Revenue for that part of the price represented by tax (output tax), and by the same token, a recipient of such a supply may recover as input tax that fraction of the total cost he has paid on the supply representing tax, if the goods (or services) he receives are a cost component of his own onward supply in the course of business. Accordingly, in such a situation, and absent any other complicating factors, tax only “sticks” with the end user or consumer (see VAT Act 1994 (“VATA”)) where by Section 4:

*“(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.*

*(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.”*

Supply is a term of art in the context of VAT.

5. In healthcare some entities are treated differently for the purpose of VAT. The Trust is part of the NHS VAT Division, along with other NHS bodies in England, and for the

purposes of VAT, all member NHS bodies are treated as the same one entity. Accordingly, intra-divisional supplies are ignored for the purposes of VAT, and supplies are deemed to be by and from the same entity, namely the NHS VAT Division. This operates not unlike a VAT group (under section 43 of VATA), but each body files its own VAT return. It is not in dispute that because the divisions remain part of a single legal entity (the corporate body), any supplies of goods or services between divisions of the same corporate body are intra-company supplies and are outside the scope of VAT. As a result, no tax will be accounted for on such supplies and no VAT invoices will be raised.

6. As it was expressed in the statement by Mr Ross Dunworth, the Director of Finance of the Trust, giving background information to the claim:

*“The Trust is a member of the NHS divisional VAT registration for England (‘NHS VAT Division’), along with other NHS entities in England. Although not formally a VAT group under section 43 of the VAT Act 1994, nor a divisional registration under section 46(1) of the VAT Act 1994, at the relevant time HMRC treated all English NHS bodies as if they were part of the same VAT registration, despite the fact that they were separately VAT registered and, unlike VAT groups, submitted individual VAT returns.*

*At times relevant to the issues that arise in this judicial review another member of the NHS VAT Division was an entity known as NHS Supply Chain (‘Supply Chain’) which supplied logistics to other NHS bodies and operated a central purchasing function for the whole of the NHS. Most NHS entities, including the Trust, made purchases centrally from Supply Chain who acquired the goods from third parties or manufacturers. When Supply Chain passed on, for example, goods to the Trust since they were both members of the NHS VAT Division the supplies were ignored for the purposes of VAT.”*

and

*“Supply Chain, would, of course, incur input tax charged by the third party supplier to them but they did not deduct the input tax. It operated, in effect, as a central purchasing function for the NHS with obvious commercial benefits of the combined purchasing power of the entire NHS. Thus, most NHS entities, such as the Trust, made purchases centrally from NHS Supply Chain who, in turn, would acquire the goods from third party suppliers and/or manufacturers.”*

7. Since any supplies by NHS Supply Chain to other NHS bodies who were members of the NHS VAT Division were ignored for VAT purposes, NHS Supply Chain did not issue VAT invoices. When acquiring goods on behalf of NHS entities, NHS Supply Chain would incur input tax charged by a third party manufacturer but because almost all Supply Chain’s purchases for NHS entities were for the non-business activity of the provision of healthcare by a public body, it would appear that as a matter of practice, Supply Chain did not deduct the tax. The Trust understood, and indeed the materials in evidence suggest, that NHS Supply Chain passed on the input tax it incurred as part of the price charged to the relevant NHS entity.
8. It is important that the majority of purchases for NHS entities were and are for the purposes of non-business activities, that is to say the provision of health care by a public body which do not fall into tax, so the only true “input tax” as such, was incurred by NHS Supply Chain in respect of the Linacs which they bought for and/or on behalf of

the Trust. The only statutory claim to actual input tax properly so-called, was therefore that of the other NHS body, Supply Chain, in respect of their purchase from the manufacturer or supplier.

9. In the present case the Claimant relies upon a mechanism it says is reflected in an NHS published Note, whereby, for these NHS entities, where goods were in fact acquired for a business use, the acquirer could deduct that element that represented input tax by means of an HMRC concession. The Concession indicated that alternative means of proof of the purchase would, in the appropriate circumstances, be acceptable to HMRC to found a refund where, as here, no VAT invoice had been provided by Supply Chain.
10. The Claimant emphasises particularly the first paragraph cited from Mr Dunworth's statement above, that the Trust is a separate and distinct legal entity from NHS Supply Chain. There had been no application to HMRC to register in divisions under section 46(1) of the VAT Act 1994, either on its own account or with other NHS trusts. As he states, at the relevant time HMRC treated all English NHS bodies as if they were part of the same VAT registration although they were not. Mr Scorey KC pointed out on behalf of the Trust, the individual VAT registration numbers of all members of the NHS VAT Division began with the three digits 654, followed by six digits specific to each NHS entity. It was therefore easy to identify those entities who were also members of the NHS VAT Division.
11. Further background was explained by Mr Dunworth thus:

*“The Trust is home to St Luke's, a specialist tertiary Cancer Centre, which offers state of the art diagnostic and treatment services to a population of up to 2 million people across Surrey, West Sussex, Hampshire and to patients from across the UK and abroad. NHS England is the main commissioner of the Trust's specialist cancer activity. The Trust also provides cancer services to private patients.*

*18. As the regional cancer network hub, the Trust operates an outreach radiotherapy service from the hospital in Guildford as well as another local trust. Oncology facilities include five Linacs at Guildford and two Linacs at Redhill. Chemotherapy services are provided in partnership with local trusts.*

*19. The Linac is used in radiation therapy and is the device most commonly used for external beam radiation treatments for patients with cancer. It delivers high-energy x-rays or electrons to the region of the patient's tumour. These treatments can be designed in such a way that they destroy the cancer cells while sparing the surrounding normal tissue. The Linac is used to treat all body sites.*

*20. The Linacs that are the subject of this claim for judicial review were acquired through NHS England's Radiotherapy Modernisation Programme ('RMP') for 2017/18. They were acquired to replace Linacs that were nearing the end of their useful lives. Funding was awarded to the Trust in the form of public dividend capital ('PDC'), which, in simple terms, is non-repayable financial assistance provided by the Department of Health and Social Care. Awards were made under the RMP with the expectation that the efficiency of cancer services would improve through better equipment utilisation, increasing the number of patients treated as new Linacs were commissioned. It was a condition of the award that the Trust would participate in future Radiotherapy Networks and that the equipment would be delivered and on*

*site by 31 March 2018. As part of the usual purchasing regime, those Linacs were to be purchased via NHS Supply Chain.”*

12. The Claimant explains the sequence of events as follows.
13. In 2017 Healthcare Partners Ltd, the eventual recipients of the Linacs machines, was conceived and formed by the Trust. It is an entity of which the Trust is the sole shareholder, and is registered under the Companies Act. It was established to provide the Trust with fully managed healthcare facilities - this includes radiotherapy services.
14. The first Linac (referred to by the Trust as “LA3”) was bought in this way:
  - i) On 22 August 2017, Supply Chain issued a ‘Pricing Schedule’ to the Trust saying they would sell LA3 for the total price of £2,052,792.20 (which the Trust says represents £1,710,660.17 plus VAT of £342,132.03). The total amount would be charged to the Trust.
  - ii) On 26 October 2017, the Trust submitted purchase order number 130369463 to Supply Chain in respect of LA3.
  - iii) **On 1 March 2018** a Revised Business Plan was decided upon by the Trust (see below) involving supply of the Linacs to HPL in the course of business for HPL’s onward supplies of services.
  - iv) **On 24 March 2018**, the LA3 was physically supplied to the Trust.
  - v) On 29 March 2018 NHS Supply Chain issued invoice 9058002535 for 95% of the cost of LA3 under the Pricing Schedule, in the sum of £1,950,152.56.
  - vi) 1 April 2018 master lease of Linacs between Claimant and HPL with the Linacs scheduled to it.
  - vii) On 18 May 2018, the Trust paid invoice 9058002535.
  - viii) On 17 May 2018 NHS Supply Chain issued invoice 9059000815 for the remaining 5% of the cost of LA3 under the Pricing Schedule, in the sum of £102,639.61.
  - ix) On 3 September 2018, the Trust paid invoice 9059000815.

[Emphasis added.]
15. The second Linac, (but referred to as “LA4”) was purchased as follows:
  - i) On 21 November 2017, NHS Supply Chain issued another schedule to the Trust indicating Supply Chain would sell LA4 for £2,059,794.20 (broken down again by the Claimant as £1,716,495.17 plus VAT of £343,299.03), as charged to the Trust.
  - ii) On 30 November 2017, the Trust submitted purchase order number 13074981 to Supply Chain in respect of LA4.

- iii) **On 1 March 2018** the Revised Business Plan was decided upon by the Trust involving supply to HPL in the course of business for HPL's onward supplies of services.
- iv) **On 24 March 2018** LA4 was physically supplied to the Trust.
- v) On 29 March 2018 NHS Supply Chain issued invoice 9058002533 for 95% of the cost of LA4 under the Pricing Schedule, £1,956,804.49.
- vi) 1 April 2018 master lease of Linacs between Claimant and HPL with the Linacs scheduled to it.
- vii) On 18 May 2018, the Trust paid invoice 9058002533.
- viii) On 7 June 2018 NHS Supply Chain issued invoice 9059001068 for the remaining 5% of the cost of LA4 under the Pricing Schedule, £102,989.71.
- ix) On 3 December 2018, the Trust paid invoice 9059001068.

[Emphasis added.]

16. Accordingly, so the Claimant submits, the total "*input tax*" incurred by Supply Chain of £685,431.06 as charged by Varian was passed on to, and paid by, the Trust and that sum was recoverable on presentation of the paperwork indicated in the Concession document upon which the Claimant relies. The two Linacs transactions were processed through the accounts on 29 March 2018.
17. As indicated by the evidence in this application from Mr Dunworth, on 1 March 2018 (after the Linacs were ordered by the Claimant but before they were supplied to them by Supply Chain), the Trust's Board approved a revised final business plan for the provision of fully-managed healthcare facilities as a service by HPL to the Trust, which included the transfer by the Trust of medical equipment (including the Linacs) in the relevant facilities to HPL for use by HPL in the provision of its services. For VAT purposes, this transfer constituted a business activity for the Trust.
18. By various communications the Claimant sought initially to recover input tax under VATA on the sale and were refused by Decision on 25 June 2019 on the basis that the Trust did not hold a VAT invoice. Supply Chain had the claim to input tax, and at the relevant time neither Supply Chain nor the Trust had an intention to use the Linacs for a business purpose.
19. An initial appeal was made to the Tribunal against HMRC's refusal in 2019, of the Trust's claim for an input tax refund under VATA. That appeal was opposed by HMRC, and it was eventually withdrawn; and a further decision under the terms of the claimed Concession was invited.
20. Thereafter the Claimant relied upon the Concession, but its claim was refused on 31 March 2021. HMRC denied there was any concessionary regime that would allow the recovery of input tax in the circumstances of the case. That decision is challenged in these judicial review proceedings.

## FRAMEWORK

21. There was no dispute as to the applicable law.
22. The principles applying to concessions and to the recovery of input tax under VATA were thus common ground such that where HMRC guidance contained a “*clear and unambiguous representation*” a taxpayer might rely upon it. As stated in *R (Aozora GMAC Investment Ltd) v HMRC* [2019] EWCA Civ 1643, [2020] 1 All ER 803 at [32]—[33] per Rose LJ, citing Bingham LJ’s observation in *R v Inland Revenue Comrs, ex parte Underwriting Agencies Ltd* [1990] 1 WLR 1545,1569, that:

“... a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them.”

23. Further, as HMRC helpfully expressed it, a legitimate expectation can only be founded on a promise which is “*clear, unambiguous and devoid of relevant qualification*” (*R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569 per Bingham LJ). Whether a public body has made such a representation requires the Court to undertake:

“a detailed examination of the precise terms of the promise or representation made the circumstances in which the promise was made and the nature of the statutory or other discretion” (see *R (Coughlan & Ors) v North & East Devon Health Authority* [1999] EWCA Civ 1871 at para 56 per Lord Woolf MR).

The test is how:

“On a fair reading of the promise it would have been reasonably understood by those to whom it was made” (see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, at para 56 per Dyson LJ).

24. It was not sought to be said that the Concession in issue was unclear or was ambiguous, but HMRC defended its decision in substance, and submitted that the meaning placed on it by the Trust was wrong, further, that they had not brought themselves within the terms of any concession, as correctly interpreted, and the Trust had not shown that their intention (or that of other material entities) at relevant time, was for the business use of the Linacs.

### The Concession document

25. The Concession was reflected in NHS Newsletter 1/98 issued by the Commissioners, and repeated in materials from 2004. It permits tax deduction for the business activities of entities in the NHS VAT Division and provides as follows:

#### ***“ACCEPTABLE ALTERNATIVE EVIDENCE FOR INPUT TAX PURPOSES***

***Customs & Excise recognise that within the NHS, members of the VAT Divisional Registration will make purchases for their business activities from NHS Supplies (which itself is a member of the English NHS VAT Division) and will, therefore, require proper evidence of the VAT paid in order to recover their input tax.***

### ***NHS Supplies***

*NHS Supplies cannot issue tax invoices to NHS VAT Division customers, but special arrangements have been made to allow NHS Supplies to issue ‘VAT acceptable’ documentation to Divisional registration customers. This documentation, which is regarded by Customs & Excise as ‘Acceptable alternative evidence for input tax purposes’ will not be in the form of a tax invoice, but will contain the necessary information to enable NHS VAT Divisional Customers to recover input tax. Customs & Excise have agreed with NHS Supplies that they will issue this alternative evidence only where the customer requires it to substantiate a claim to input tax. It will not be issued for those purchases which are used by the VAT Divisional customer in the provision of NHS healthcare. This arrangement is a concession and only applies in respect of business activities such as the supply of confectionery.”*

[Emphasis added].

26. VATA provides relevantly as follows. Provisions as to the time of supply of goods are contained in section 6:

***“6 Time of supply.***

*(1) The provisions of this section shall apply ... for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.*

*(2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place—*

*(a) if the goods are to be removed, at the time of the removal;*

*(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;*

...

*(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.*

*(5) If, within 14 days after the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it, then, unless he has notified.”*

27. Where input tax is disputed, an appeal may be made to the First-tier Tribunal (“the Tribunal”). The only provision that might found jurisdiction in the present case, is as follows:

***“83 Appeals.***

*Subject to [ F4 sections 83G and 84], an appeal shall lie to [ F5 the tribunal] with respect to any of the following matters—*

*(a) ...*

*(b) ...*

*(c) the amount of any input tax which may be credited to a person...”*

28. There is no jurisdiction in the Tribunal to challenge the effect of an extra-statutory concession, nor the failure to repay monies that are not, under VATA, technically, input tax.
29. Reference was made by HMRC to a number of guidance documents, as follows.

### **Notice 706 and other guidance**

30. Notice 706 gives guidance in the context of VAT itself (and partial exemption and other input tax issues not relevant here) in the following terms, explaining how a trader may show what his intention was and when is the relevant time to judge that intention.

31. Paragraph 3 provides materially:

*“3.2 direct attribution of input tax*

*Direct attribution of input tax is the identification of VAT incurred on purchases that you use, or intend to use exclusively in making:*

- taxable supplies or other supplies that carry the right to deduct*
- exempt supplies*

*This process should be carried out on the basis of the use you make, or intend to make of those purchases. Attribution is undertaken at the time you receive the purchases.*

*3.3 directly attributed input tax you can recover*

*You can recover, in full, input tax on purchases that are used, or to be used, exclusively in making taxable supplies or other supplies that carry the right to deduct.*

*...*

*13. Intended use of supplies received and changes of intention*

*13.1*

*Section 3 explains that attribution of input tax should be carried out at the time you receive purchases on the basis of the use you make, or intend to make, of them.*

*It's important that you establish the use or intended use at this time so that the input tax incurred can be accurately attributed to the onward supplies to which it relates.*

*However, there may be occasions when intentions are not clear or where you change your intention before you use, or when you actually use, these purchases. There may also be occasions where your use changes over a period of time.”*

HMRC refer to Internal Manual VGROUPO9350 10 April 2016, HMRC which states:

*“Because the divisions remain part of a single legal entity (i.e., the corporate body), any supplies of goods or services between divisions of the same corporate body are intra-company supplies and consequently are outside the scope of VAT. As a result, no tax should be accounted for on such supplies and no VAT invoices should be raised.”*

32. *“The National Health Service: A Guide to Value Added Tax”* published by HMRC in October 2004, also provides as follows:

### *“3.2.7 VAT ON GOODS AND SERVICES NOT USED FOR YOUR BUSINESS*

*.... In general, the non-business activities of the NHS are those which are carried out on a statutory basis and, or, for no consideration (see Section 5 for full details on business and non-business activities). VAT charged on goods and services which you do not use for your business activities is not input tax and you cannot reclaim it as such ....*

#### *5.1.2 NON-BUSINESS*

##### *Non-business activities*

*In simple terms, the non-business activities of the NHS are activities which are carried out on a statutory basis and/or for no consideration. They are outside the scope of VAT. This includes the statutory provision of Healthcare and the recovery of money under the Road Traffic Act.*

*The NHS carries out its statutory duties under various NHS Acts, and the vast majority of its activities are deemed to be of a non-business nature.*

*As a result, under the normal VAT rules, the NHS cannot reclaim VAT incurred on purchases made for its statutory health care purposes. However, as a concession, VAT may be eligible for a refund on certain contracted-out services under the Contracted-Out Regulations.*

*The Contracted-Out Services Regulations are an entirely separate issue from the normal VAT rules applicable to business activities, and should be treated as such.*

*In addition to the above, supplies within and between NHS bodies within the Divisional VAT Registration are also considered to be non-business activities (see Section 8 for further details). Even when a fee is charged by one NHS body to another, VAT must not be added by the NHS supplier and consequently, VAT cannot be reclaimed in respect of the purchase by the NHS customer. This is a basic rule applicable to Divisional VAT Registrations in general.”*

33. HMRC also make reference to HMRC Guidance - VIT25600 published 13 April 2016, which includes:

*“(‘Is it input tax: changes in the use of goods’)*

*Change of original intention before first use*

*If the business has not recovered any VAT on the basis that the initial intention was to [use] the goods or services for wholly non-business or private use the expense is not a business cost, and no input tax can ever be recovered regardless of any subsequent business use. This principle was confirmed by the CJEU’s decision in the case of Waterschap Zeeuws Vlaanderen (see VIT62520).”*

## **THE ARGUMENTS**

### **Previous correspondence and decisions**

34. It is necessary to understand elements of the previous dispute in the Tribunal to give context to the way in which the subsequent arguments have developed concerning the Trust’s claim under the Concession.
35. Previously, and as challenged in the Tribunal, HMRC had rejected the Claimant’s input tax claim under VATA. The Trust had appealed on the basis it was entitled to a payback claim under VATA and the relevant Regulations because, before using the equipment, the Trust changed its initial non-business use intention, and instead leased the equipment outside the NHS VAT division, to HPL, and that supply by the Trust was taxable. HMRC contended that from information provided to them by NHS Supply Chain who had made the supply to the Trust, they, Supply Chain, had allocated the supply to a wholly non-business use, and the Trust could not change that allocation. HMRC described the position (in its Statement of Case) as *“After the equipment had been purchased but prior to the equipment being used the Appellant (the purchaser) decided to lease the equipment to one of its wholly-owned subsidiaries.”*
36. A letter (“Review Conclusion Letter”) was written on 6 June 2019 and HMRC repeated that the decision was:
- “... due to NHS Supply Chain treating the initial purchase of the two pieces of machinery (Linacs) as being for a wholly non-business use (VAT not recovered), any future VAT incurred on the purchase of the equipment is not eligible for adjustment under the “payback” provisions.”*
37. The issue, HMRC stated, was whether or not they were correct to say the Claimant was not entitled to recover VAT because the initial purchaser had not recovered VAT or charged VAT on the onward sale. Any further supplies they say would be outside the scope of UK VAT. At this point no mention was made of the date of supply for VAT purposes, or acquisition in any other sense, nor the Trust’s intention at that time.
38. By letter of 27 November 2020 the Trust argued this was not in fact a “normal” VAT reclaim subject to the usual rules, asserting that the intention of Supply Chain was irrelevant. They relied on the Concession, whose wording was repeated in *The National*

*Health Service – A Guide to Value Added Tax – 2004.* Letters evidencing the continuation of the Concession were attached, and a decision pursuant to the Concession was requested. The letter noted there was no issue, but that Supply Chain incurred input tax but did not deduct it, and passed it on in the price charged for the Linacs. The letter stated in terms that “*whether or not the recipient of [the relevant supply] was entitled to deduct depended upon its intention at the time of supply*”.

39. The letter of 27 November 2020 importantly also stated that HMRC’s previous decision did not address the entitlement under the concessionary regime and asked for a decision squarely on that basis. It noted that such a decision would not be within the jurisdiction of the Tribunal.
40. The Decision Letter in response was dated 31 March 2021 and dismissed the claim on the basis that Supply Chain’s intention was relevant, made the further points about Linacs and confectionary, non-business purpose stating the goods were “*purchased to support the non-business activities of the trust*” and did not fall within the scope of the Concession.
41. HMRC referred back to the original letter of 25 March 2019, denying an entitlement to recover the input tax incurred by NHS Supply Chain. Nothing is said about the Trust’s intention at the time of supply. Any analysis involving “*supply*” is absent. The Claimant does not descend to any argument on that issue either.
42. That letter accepted that the adviser was correct concerning Supply Chain not charging output tax, in that the divisional registration allowed for inter-divisional supplies to be treated as outside the scope of VAT. It’s essential reasoning was:

*“The linacs in question are not confectionery and they are not items that could only ever be purchased for business activities. The linacs are pieces of equipment that were purchased to support the non-business activities of the trust, so do not fall within the scope of issuing alternative evidence.*

*Even if NHS Supply Chain has the ability to issue alternative evidence, there is no ‘concessionary regime’ that would facilitate recovery of input tax on the purchase of linacs by the trust. Nor would the simple existence of the NHS divisional registration allow for recovery.”*

43. HMRC suggested there was “*no evidence*” that Supply Chain’s intention was irrelevant. They emphasised that the concessionary alternative documentation may only be issued when making “*... purchases for business activities. Furthermore, the newsletter gives a very specific example of confectionery, which is an item that could only ever be purchased for business purposes.*”
44. The Trust’s PAP letter of May 2021 to HMRC following the decision, set out the framework above, namely that the Trust’s intention was the relevant issue. The letter included the following:
- “Whether or not a recipient of the supply (e.g., the NHS trust) was entitled to recover the VAT thereby incurred (viz, the input tax paid by NHS Supply Chain) depended upon its intention at the time of supply. In this respect, the intention of NHS Supply Chain was irrelevant — even assuming that NHS Supply Chain had any intention given***

*that it merely operated as a centralised purchasing agent, unaware of the ultimate use of the goods and/or the intention of the member of the English NHS divisional registration which had ordered the relevant item.*

...

***On 1 March 2018, the Trust’s Board approved a proposal for the Linacs to be used by its wholly-owned subsidiary, Healthcare Partners Limited (‘HPL’) in the provision of fully- managed healthcare facilities. This was a business activity for both the Trust and HPL.***

***The Linacs were delivered to the Trust on 24 March 2018. They were processed for the purposes of the Trust’s accounting system on 29 March 2018. In accordance with the approval in March 2018, the Linacs were then leased to HPL by way of schedules to a master lease between the Trust and HPL.***

...

***... you failed to take into account a relevant consideration, namely that at the time of the supply of the Linacs, the Trust’s intention was to use them for business purposes; It is right to note that the Trust originally intended to use the Linacs for its own non-business and exempt purposes. However, this intention changed on 1 March 2008, as explained in paragraph 17 above. Thus, at the time of delivery, it was clear that the Linacs would be used for business purposes.”***

[Emphasis added].

45. A response of 1 June 2021 denied the existence of any concessionary regime as set out in the PAP letter. HMRC said of the PAP letter:

*“HMRC note the essential points as follows:*

***(1) On 29 March 2018, the Trust purchased two linear accelerators (‘the Linacs’) from NHS Supply Chain for £4,112,586. It is common ground between the parties that, at the time of purchase, (i) NHS Supply Chain did not apply VAT to the sale; and (ii) the Trust intended to use the Linacs for its own non-business and exempt purposes;***

***(2) On 1 March 2018, the Trust approved a proposal to lease to Healthcare Partners Limited (‘HPL’), its wholly-owned subsidiary, for the provision of fully-managed healthcare facilities (i.e., a business purpose for both the Trust and HPL).”***

[Emphasis added].

46. In other words, HMRC refer again to the date of purchase generally, and do not refer to supply and the date of delivery, do not note the distinction between a date of delivery of the goods, and the antecedent decision of the Board on 1 March 2018. They assume the date of delivery is the “purchase” date, and “purchase” although a non-statutory word, is taken to be synonymous with “supply”. They state the matter is agreed.
47. On the 18 June 2021 Mr Dunmore swore a statement in the judicial review and explained the sequence of events upon which the Trust relies in this Court.

## The Case before this Court

48. The Claimant's essential case is that HMRC have:
- i) failed to give due effect to the concessionary regime/misdirected themselves as to the effect of the Concession;
  - ii) failed to take into account a relevant consideration, namely that at the time of the supply of the Linacs, the Trust's intention was to use them for business purposes; and
  - iii) taken irrelevant considerations into account, namely: the supposed intention of NHS Supply Chain when the Linacs were supplied; that the Linacs were not confectionery; that the Linacs were capable of being used for a purpose other than a business purpose.

49. The Trust points to a number of matters accepted by HMRC which they say means their claim as to the Concession must succeed.

50. They rely upon the fact that HMRC now effectively accept that NHS bodies such as the Trust are entitled to recover VAT incurred on supplies by NHS Supply Chain and recharged to the Trust under the Concession if such supplies are in respect of the Trust's business activities. They refer to the Grounds of Defence where HMRC say as follows:

*"33. In the first instance, there is no dispute that supplies between members of the same NHS divisional VAT registration are not taxable: c.f. s46(1) VATA 1994 and HMRC Internal Manual VGROUPS09350 (previously GROUP0935) Divisional registration: inter-divisional supplies. To the extent that the Newsletter provides a concession in respect of evidence of entitlement to make deductions, however, it refers only to a concession where members of the same VAT Division "make purchases for their business activities from NHS Supplies". It later reiterates that the arrangement only applies in respect of business activities such as the supply of confectionery."*

*34. There is, in other words, no concession as regards the evidencing of supplies between members of the same NHS divisional VAT registration in relation to their non-business activities. Nor is there any concession which might enable an NHS body to alter an initial allocation by reference to a subsequent change of intention:*

*i. paragraph 13.16 of VAT Notice 706: "VAT which is initially allocated entirely for non-business purposes is not eligible for adjustment";*

*ii. VIT10600: "VAT incurred on costs that support non-business activities cannot be claimed as input tax"; and*

*iii. VIT25600: "If the business has not recovered any VAT on the basis that the initial intention was to [use] the goods or services for wholly non-business or private use the expense is not a business cost and no input tax can ever be recovered regardless of any subsequent business use."*

[Emphasis added].

51. HMRC defended the decision first on the basis there was an alternative remedy in the Tribunal and judicial review ought not to be granted, the Trust having not exhausted its remedies. Second, they argue, as a substantive point in any event, that the factual basis for the claim under what they describe as “*the so-called concession*” is not made out. A number of procedural points concerning the evidence were made in particular in relation to Mr Dunmore’s statement.
52. Their position is that, accepting that supplies between NHS members are not taxable, in terms, and “*it refers only to a concession where members of the same VAT Division make purchases for their business activities from NHS Supplies*”. The arrangement “*only applies in respect of business activities such as the supply of confectionery*”. Further, there is no mechanism which allows an NHS body to change an “*initial allocation of VAT*” because of a subsequent change of intention.
53. HMRC point back to evidence in the Tribunal proceedings deposed to by Mr Dunworth in the context of arguments under VATA for the recovery of input tax, in which he uses the phrase “*at the time of purchase*”, when pinpointing the time at which the Trust’s intention was non-business, and explaining how that intention changed “*before use*”, HMRC submit that in their Grounds of Appeal to the Tribunal, dated 25 June 2019, the Trust had “*admitted*” that “*when [it] purchased the Linacs*”, its original intention was to use them itself for both NHS and private patients, but before using the equipment, [it] changed its intention and instead, leased the Linacs to [HPL] HMRC argue this is an admission that at the time of supply to the Trust, the intention was non-business. They refer to the first witness statement of Mr Dunmore dated 21 October 2019 and his statement “[w]hen [the Claimant] purchased the linacs, the intention was for [it] to use them itself for both NHS and private patients”.
54. HMRC say this illustrates that the Claimant has now resiled from an original admission there had been a change of intended use “*after the Linacs had been supplied to them by Supply Chain*”. This was maintained despite Mr Dunmore’s subsequent explanation of the position and his disavowal of any intention to characterise the purchase he refers to as being at the time of the delivery the Linacs.
55. HMRC rely upon the earlier materials as part of their argument that in truth the intention at the relevant point was non-business use, i.e. that “*purchase*” meant “*supply*”.
56. This particular construction, as may be seen from the history of the arguments, was not a point of focus until a late stage, given the scope of the earlier dispute.
57. The Claimant relies on a number of factors contained in HMRC’s Grounds of Defence. For example, that “*the purchase price the Claimant paid included £685,431.06 worth of output tax that Supply Chain had previously paid...*”, which reflects the recognition that as the Trust says, the claim is extra-statutory in nature, and made under the terms of the Concession, not pursuant to VATA; it therefore it does not relate to a right to deduct input tax as such.
58. HMRC has narrowed the issues to the following effect they say:
  - i) HMRC do not dispute that a concessionary regime exists whereby they will repay VAT incurred by NHS bodies, such as the Trust, in respect of goods acquired for business purposes, viz., the Concession.

- ii) The central issue is agreed to be whether the Linacs were acquired by the Trust for a business purpose at the time of supply. It is not disputed this is 29 March 2018.
  - iii) Thirdly, in those circumstances, it is submitted, the critical issue is the Trust's intention at the relevant time and the Commissioners' assessment of that intention.
59. The Trust says HMRC's current approach is an unfair misreading of their evidence before the FTT, including of their statement in the pre-decision representations. The witness statement of Mr Dunworth in the judicial review explains the 1 March Board resolution evidencing the new purpose - before the Linacs were supplied.
60. In that statement Mr Dunmore says that on 1 March 2018, after the Linacs were ordered but before they were delivered or invoiced, the Trust's Board had approved the new business plan in which HPL were to provide a number of services as supplies in the course of business, including of fully-managed healthcare facilities, to the Trust, and that HPL would own the equipment in respect of those fully managed services. Other equipment and supplies would continue in the Trust's ownership. He details a number of intended benefits of this structure of operation including facilitating delivery of profitable clinical services by lowering operational costs. Included in the business plan were the two Linacs – as yet not supplied or invoiced or paid for. He explains how the decision was reached to lease, rather than sell the machines, and that VAT is charged on the lease payments and output tax has been accounted for to HMRC on the taxable business supply. He detailed the earlier claim for ordinary input tax, and stated that Supply Chain had declined to provide evidence so that an input tax deduction could be made.
61. The statement of 21 October 2019 in the Tribunal had stated:
- “when [the Trust] purchased the Linacs, the intention was for the Trust to use them itself for both NHS and private patients. However, before using the equipment [the Trust] changed its intention and instead, with effect from 1 April 2018, leased the Linacs to [HPL], a wholly owned subsidiary of [the Trust].”*
62. The Claimant says that the new statement indicates that the earlier intention was held at the time when it was decided to purchase the Linacs in 2017, namely the time when the Purchase Orders were submitted, that is 26 October 2017 and 30 November 2017.
63. Mr Dunmore says of his statement dated 21 October 2019:
- “In that statement, I said that when the Trust purchased the Linacs, its intention was to use them for both NHS and private patients. HMRC consider this to be a non-business purpose. In the course of further work on this dispute, I have looked into matters further. As explained above: (1) That was the Trust's intention when the decision was made initially to order the Linacs from NHS Supply Chain in 2017. At that point in time, it was envisaged that the Linacs would be used by the Trust itself to provide healthcare.”*

64. The Trust has produced to HMRC and to this Court its materials evidencing the decision-making process and the documentation from 2017 and through to the period around 1 March 2018 when it was resolved to use the proposed HPL model and the intention changed. In any event, there is sworn evidence supported by clear documentation:
- i) Evidencing the purchase orders of 2017.
  - ii) Evidencing the Trust's business intention on 1 March 2018.
  - iii) Evidencing the delivery of the Linacs to the Trust.
  - iv) Evidencing cost and payment for the Linacs.
  - v) Showing that before supply of the Linacs to the Trust, the Trust had a business intention with regard to them.
65. The essential submissions from HMRC were to the effect firstly, that this was a matter that should be before heard the Tribunal, not this Court, and secondly, that the Commissioners were entitled to regard what they saw as a change of position with significant scepticism – a submission, in effect, they were entitled to disbelieve it, or at least disregard it, and uphold HMRC's decision that the intention was not at the material time to use the Linacs in the course of business - which he submitted could not be impugned on public law grounds.
66. Alternatively, HMRC invited the Court to say that because the decision-maker had not had the second Mr Dunmore statement before he made his decision, the application must automatically fail, or be withdrawn and a new decision be reached. To determine otherwise was in effect to give way to a rolling judicial review which, it was trite, a considerable body of authority deprecated. Mr Metcalfe relied on the many expressions in the caselaw to that effect.
67. Mr Metcalfe submitted this was a case where there was a dispute of fact, as to what the intention was at the relevant date so the issue must be resolved in favour of the public authority citing Burnett CJ in *R (EVAWC) v DPP* [2021] EWCA Civ 350 at paragraph [18 ]:
- “Subject to a small number of exceptions which have no bearing on this case, the court in judicial review proceedings is neither concerned nor equipped to resolve issues of fact. The public authority's evidence of the facts will be accepted. There is a consistent line of authority to that effect starting with R v Board of Visitors of Hull Prison ex p St Germain (No 2) [1979] 1 WLR 1401 at 1410 H and more recently encapsulated in para 135 of R (Watkins-Smith) v. Aberdare Girls High School [2008] EWHC 1865 (Admin); [2008] FCR 203). The court: "must proceed on the factual basis put forward by the defendant or resolve any disputes of fact in the defendant's favour. This principle has been frequently applied".”*
68. Mr Metcalfe set out in his skeleton an acceptance, correctly, that there are exceptions to this rule such as those cases where a conclusion is capable of being described as manifestly wrong. He submits that HMRC's conclusions on the central issue could not be described as “*manifestly wrong*” (*S v Airedale NHS Trust* [2002] All ER (D) 79), nor

is it the case that HMRC “cannot be correct” (per *R (Westech College) v SSHD* [2011] EWHC 1484 (Admin) per Silber J at paragraph [26].

## CONSIDERATION

69. I have come to the clear conclusion the Trust is entitled to the benefit of the Concession reflected in HMRC Note 1/98, and repeated in HMRC’s *The National Health Service – A Guide to Value Added Tax – 2004*, giving directions as to the appropriate evidence required for taking advantage of the Concession and recovering monies representing input tax in the circumstances set out.
70. In a telling phrase, Mr Scorey KC in oral submissions described a “*mis-alignment of the contentions*” emerging from the exchanges between the parties. In my judgement that well describes what happened when the arguments between the parties evolved, and a VATA claim, based on notions of first use and changing intention, changed to one founded on the wording of the 1/98 Notice. The Concession required ascertainment of the date of supply for the purposes of the supply of goods in question, and recognition of when the admitted change of intention of the Trust took place.
71. There was, as Mr Scorey KC submitted, also a tendency of HMRC to look at the Concession claim still through the lens of a normal VATA claim – not in terms of the actual wording of the Concession. Importantly, when the dates of the Board decision on 1 March 2018 and delivery of the Linacs three weeks later were set out by the Trust, no analysis by HMRC of when the tax point in fact arose appears to have taken place. It was asserted by HMRC only that “*purchase*” took place at the date of delivery - the question of supply was not mentioned. HMRC appeared to have assumed that “*purchase*” a non-statutory word, was synonymous with supply, a term of art in respect of VAT matters.
72. For the reasons which appear below, the case on the Concession succeeds, but I turn first to the procedural points raised by HMRC.

## Evidence and rolling review

73. Mr Metcalfe submitted that the new material from Mr Dunmore, was not available for the primary decision-maker, accordingly the judicial review ought properly to be rescinded and a new decision made.
74. The course of correspondence and exchanges of argument have been set out reasonably fully because they demonstrate, in my judgement on occasion, a failure, by HMRC, to grip the issue of time of supply for the purposes of judging the relevant intention of the Trust. The real issue between the parties did not crystallise, although touched on by the Trust, until a late stage. For that reason, it would be wrong and unjust to require a further decision to be made, and this judicial review to be aborted, particularly in the absence of any suggestion that there is further relevant material available to cast doubt on that now before the Court.
75. I therefore accept, as submitted by the Trust that although HMRC were correct to say the later explanatory statement of Mr Dunmore was not available to the decision-maker,

it must be considered by the Court. In my judgement firstly, it is not on its face, inconsistent with his first, admittedly non-expert, statement that did not mention supply but spoke of purchase. It is not a necessary construction of that statement that he was asserting in 2019 that at the time of supply (whether delivery or payment) the intention was for a non-business use of the Linacs. Accordingly, this is different from a case where wholly new material is put before the Court. As noted, a statement had already been made by the Trust, in the letter of November 2020, before HMRC's Decision Letter, in March 2021, that they believed they were within the Concession, and that they were aware that the time of supply was the relevant point, saying in terms: "*whether or not the recipient of [the relevant supply] was entitled to deduct depended upon its intention at the time of supply*". Against this background, the judicial review evidence can be seen as seeking to explain a position the basis for which had already been indicated before the final decision.

76. Further, and in any event, this is not a case where it would be just to refuse to consider the material in support of the judicial review. The case law is clear (see for example also the cases set out in The Administrative Court Judicial Review Guide 2023 paragraph 7.11.4) that there is no hard and fast rule. It is indeed generally better if judicial review proceedings are not treated as "*rolling*" or "*evolving*" and it is simpler and more cost-effective to avoid looking at post-decision material, procedural flexibility is essential in order to do justice between the parties. This is one of those cases.
77. This is a case in which it would be unjust to require the Claimant to request a further decision, in circumstances where HMRC indicate that, in the face of the Claimant's judicial review materials, they nonetheless maintain their substantive decision refusing to grant relief under the Concession. I have said that no evidence has been put forward to counter the significant evidential material from the Trust supporting their case. Rather HMRC sought to whittle away the effect of the Trust's evidence suggesting, in reality it could not be relied upon because in their submission it was wholly different from what was said before. That is a point that can be considered, by the Court, and appropriate weight given. I have already said that I do not accept that the two statements read properly, are mutually inconsistent.
78. The fact is that neither side clearly addressed their minds until late on to the technicality of the position under the Concession – but this position does not cast doubt upon Mr Dunmore's explanation, now supported by evidence, rather it reinforces the fact that what was said in 2019 did not bear the significance HMRC seek to put upon it. In any event, again as stated, the first statement not inconsistent with the later statement, viewed in the context of the correspondence and the point at issue accordingly, I reject these procedural contentions of Mr Metcalfe.

### **Disputed question of fact**

79. I accept also as submitted by Mr Scorey KC, that this is not as was argued by HMRC, a case of a disputed question of fact such that the Court is obliged to accept the facts as stated by the Commissioners (*R (EVAWC) v DPP (supra)*, *R v Board of Visitors of Hull Prison ex p St Germain (No 2)* [1979] 1 WLR 1401, *R (Watkins-Smith) v Aberdare Girls High School* [2008] EWHC 1865 (Admin), [2008] FCR 203). It is not a "*factual basis put forward by the authority*" (see Burnett CJ in *R (EVAWC)*) which is disputed, but rather a differing interpretation of what is said and, rather, that HMRC decline to

accept the Trust's case on the evidence, and make a judgement on the intention of the Trust at the relevant time, in that light.

80. A decision not to accept the evidence, or to seek to minimise its significance is not a "*dispute of fact*" as such, or one that should – or could – be remitted to the Tribunal as suggested.
81. HMRC may, (and do) submit the Court should place little weight on the Dunmore evidence filed in this judicial review. They say that they have good reason to interpret the 2019 statement of Mr Dunmore as conceding the supply point and therefore may maintain the refusal of the Concession on public law grounds. These are submissions the Court may weigh, and decide whether the conclusions reached are rationally based – affording the primary decision to HMRC on the question. This is different from accepting HMRC's assertion as to the proper interpretation of the facts, because there is a contest as to that interpretation.
82. In any event, were I wrong on this, this is in my view one of the exceptional cases where it could on the evidence be said that the decision of HMRC "*cannot be correct*" or is "*manifestly wrong*" on the basis of the evidence, including the documentary evidence available to the Court.

### **Alternative remedy**

83. As to the alternative remedy point, the Trust submitted the Tribunal would be bound to say that there was no VAT supply – there is no invoice; therefore, the Tribunal has no jurisdiction. I agree. The point at issue does not concern the question of a supply for the purposes of VAT and so does not concern input tax as such and so is not a matter in which the Tribunal has jurisdiction. There is no input tax under VATA here – the Concession document relied upon uses that term, but HMRC's analysis that the only input tax claim was that of supply chain must, in my judgement be correct.
84. This was the view of Sir Ross Cranston when granting permission. I have in any event revisited the matter myself, and am clear that the issues in dispute are beyond the jurisdiction of the Tribunal.
85. HMRC defended the decision as a matter of substance, but raised the preliminary point about forum, on the basis set out in their skeleton argument that the judicial review constituted a collateral attack on HMRC's decision made on 25 March 2019 refusing requests for the recovery of the tax paid on the Linacs. Accordingly, the proper forum for the dispute was the Tribunal. I disagree: the case made in the judicial review, on the basis of the 31 March 2021 decision is founded on the Concession, for which the Tribunal has no jurisdiction. Once it is recognised that there is no question in this case of an assertion of recovery other than pursuant to the Concession, the provisions of section 83, cannot apply. The second decision of 31 March 2021 is a separate decision, and cannot be seen as in some way a collateral attack on the earlier decision in 2019.

### **The Concession**

86. In my view the Concession recognises and seeks to mitigate the effects of the NHS Division structure in those circumstances (increasingly common within the NHS) where a business transaction is involved. Properly understood, the Concession is a

derogation from the usual regime in respect of the right (in this case the lack of a right) to deduct input tax pursuant to VATA.

87. With regard to the scope of the Concession, I do not accept that it applies only to sweets. Mr Metcalfe did not seek to support such a contention orally, which on one interpretation was relied upon in early correspondence. He was right not to do so. The text clearly gives confectionary as an example. Nor do I accept that the scope is limited to goods that may only be supplied in the course of business. The words, read in context, do not support such an interpretation. Further, as the Trust submitted, it is almost impossible to think of any goods that are incapable of being supplied for a non-business purpose - and to so construe the document would lead to numerous unnecessary time-consuming disputes and exchanges of evidence, and debate.
88. In oral submissions Mr Metcalfe contended that HMRC, as the primary finders of fact, were entitled to find that at the material time, the intention of the Trust was non-business supplies, and may maintain that position on the evidence before the Court. I disagree.
89. HMRC were aware from before the initiation of the judicial review of the Trust's stance as to their entitlement, and, through Mr Dunmore, immediately after the Claim was made, of the materials supporting the contention that at the time of VAT-relevant supply, the Trust's intention was business use.
90. I have noted that Mr Metcalfe did not suggest there was other evidence that was material to the issue of intention at the time of supply; the thrust of his response was, in effect, that HMRC did not believe the new evidence. He said it was surprising there was no evidence that Trust had told Supply Chain about the changes, he noted that although the documentation gave the date of 1 April 2018 as the release date, that was a Sunday and he suggests that in truth, that the material showed that what Mr Dunmore had meant in his first statement, by saying "*purchase*" was the date of delivery, and thus the date of supply. Mr Metcalfe also suggested the Board documentation, which referred to obtaining confirmation in writing from advisers, was only conditional and could not be regarded as a changing intention. I disagree, as Mr Scorey KC submitted, there were no preconditions and the document evidences the fact that the Board gave its approval to this business supply model. The business case was approved on 1 March 2018.
91. There is no evidence upon which Mr Metcalfe could, properly, call into question the *bona fides* of the Trust's evidence and I entirely reject any suggestion that there is any shadow over it.
92. Mr Metcalfe also referred to the numerous occasions in the documentation where reference is made to the date of "*use*" why, he asked rhetorically, did Mr Dunmore not say "*supply*" earlier, if that's what he meant? Again, this was part of the same point, and the argument that the Court should not believe the evidence that is now submitted. I reject those contentions. Again, as Mr Scorey KC submitted it is plain that neither side was clear what the four corners of the case were, until a late stage; for this reason, it is, in any event, not possible to make adverse deductions from the use or non-use of particular words or phrases at earlier stages.
93. Mr Metcalfe maintained the position that that HMRC were entitled, indeed obliged, to take the intention of Supply Chain when supplying the Linacs as the relevant intention – to do otherwise would be inconsistent with Article 13 of the Principal VAT Directive

(“the PVD”). Orally, he put his case also on the alternative bases: the intention of Supply Chain was a helpful indicative factor and required to be taken into account, alternatively it was not unlawful and an error of law for HMRC to have considered Supply Chain’s intention.

94. I do not accept these arguments. The correspondence and decision-making shows that HMRC regarded Supply Chain’s intention as the relevant intention for judging the character of the supplies. I accept in some circumstances it may not be entirely irrelevant what the primary supplier intended, however, as Mr Scorey KC submitted, Supply Chain had no reason to know the use to which Trust would put the materials supplied, and whether that intention might, between making an order, and receiving a supply, change. It was not relevant to the present case.
95. In my judgement the continued reference to Supply Chain was part and parcel of HMRC’s misunderstanding of the effect of the meaning and scope of the Concession. There was no requirement in the terms of the 1/98 Notice for particular notification to be given to Supply Chain. The Concession was not expressed in terms of agreement with Supply Chain as to use, or any other factor, at any particular point. Mr Metcalfe accepted the document did not indicate how you are supposed to go about the process – but submitted that the only sensible way of doing it is by indicating to Supply Chain. I do not agree that it is a necessary implication of the 1/98 Note that the recipient of a supply from Supply Chain was obliged to notify in any manner, nor that the absence of such correspondence is sinister, or throws doubt on the position as it is stated to be in this judicial review.
96. I do, however, accept Mr Metcalfe’s contention that it is necessary to look at the 1/98 document (or the 2004 reiteration of the policy) in the wider context of HMRC considerations of input tax, attribution, and time of supply. I did not understand Mr Scorey KC to dissent from that proposition. To an extent this was part of Mr Metcalfe’s submission that it was extraordinary there were months in which the Trust did not expand upon or explain their submission regarding the difference between the time of purchase and the time of supply for VAT purposes. This cast doubt on the present evidence, he said. He accepted, when questioned by the Court, that HMRC did not correct the Trust, at any point, and impress upon them that the issue of use was not central to all arguments, and that the time of supply, and purchase was the point. His main submission was that the court should attach “*little credence*” to the second statement of Mr Dunmore since it had arrived so late in the process of discussing the Trust’s tax position – a submission that I reject.
97. HMRC were not alive, until a late point, to the fact that there might be a distinction in the minds of the Trust, between the time at which the Linacs were “*purchased*” the time at which they were “*supplied*” to them, and the time at which they were “*used*”. Both parties were taken up with arguments under VATA, and HMRC was always concerned with Supply Chain’s intention. They did not apply their own minds to the question of supply - save obliquely and without reference to the relevant term, to assert that the “*purchase*” took place on the date when delivery was accomplished.
98. In oral submissions the Trust focussed on documents leading to the Board decision of 1 March 2018, in particular a document dating from February 2017 which is a proposal for Board approval of a new “*thick*” business model for the Trust, offering, it is said, a transformation of the delivery and procurement of non-clinical services. Reference is

made to other entities that have adopted such a model, and that the product of a number of professional advisors was that it would be of benefit on a number of fronts. It would involve the transfer of medical equipment assets to HPL through sale or long lease. This was in effect what was later ratified on 1 March 2018.

99. The confusion as to which concepts were of relevance, or at least, which required examination and discussion, further, could have been dispelled by HMRC after the Trust representative had written on 27 November 2020 asserting a right to claim under the Concession, and stating correctly that whether or not a recipient of the supply was entitled to deduct depended on its intention at the time of the supply. The Trust provided HMRC in their PAP letter with the date of delivery, the date of payment, and the date at which the Trust formed its intention for business use of the goods, that is to say, before these judicial review proceedings were in train. There is no suggestion in reply perhaps because the matter was not correctly analysed by HMRC, as to the implications for the Concession as HMRC appeared to understand it. The significance was missed, Mr Dunmore's statement clarified matters, by the production of the information that had been outlined in the PAP letter.
100. In my view the progression of the case and the correspondence show that there is no inconsistency between the evidence in the VATA case advanced at an early stage, and the Concession case advanced latterly, and the evidence produced in the judicial review puts the matter beyond doubt. In particular there are purchase orders dated 26 October 2017 and 30 November 2017 reflecting the orders from Supply Chain. Mr Dunmore's use of "*purchase*" as comprehending a stage earlier than delivery, and distinct from the point of technical VAT supply, is quite explicable in this context.
101. This bears out the argument that "*purchase*" was not used synonymously with the VAT term of art "*supply*". The thrust of his earlier evidence was (necessarily, given the scope of the arguments at that point), directed to showing that before the Linacs were used, the original intention had changed; this is not inconsistent with the position now advanced. Mr Dunmore's short statement in the Tribunal was not a forensic document nor has the material he relied upon in the judicial review been countered with any contrary material – and his documents pointed clearly to a conclusion that at the material time – namely supply, the intention had been for a business use of the Linacs. I accept that submission. In any event, as Mr Dunmore himself says, even if he did give the impression that he was suggesting that, as at 29 March 2018, when the delivery of Linacs was processed through the accounts, the Trust's intention was non-business use, that is just a mistake – as the documentation overwhelming demonstrates – the Trust resolved on a business intention use before the goods were supplied.
102. To be clear, I reject the implicit argument on behalf of HMRC that "*at time of purchase*" must have meant supply as per the HMRC guidance. In other words, in effect Mr Dunmore is said to be tailoring his current evidence (to put it politely) in order to support the case he now advances that the intention of the Trust at the material time was for business use.
103. I accept as Mr Scorey KC submits that "*purchase*" is not a term of art, and it is beyond doubt on the documentation that the Trust changed its intention at the latest by resolution of 1 March 2018 by the Board's decision to use HPL as a business provider of the services and to whom it supplied the Linacs machines. The materials show that several weeks before either were delivered, and four weeks before they were paid for,

the Trust had changed its intention from mixed NHS and private use of the machines to a supply of them in the course of business to HPL for all the reasons set out in papers supporting the resolution. This brings the Trust within the wording of the Concession.

104. At the time of the first statement of Mr Dunmore, the Trust were seeking to make out a case founded on a VATA based entitlement to repayment. To that extent, the relevant consideration regarding intention was before first use. The first statement of Mr Dunmore did not specify what actions “purchase” was intended to connote – no material was exhibited to explain or enlarge on that term. By contrast his second statement, made in these proceedings is clear as to what took place and when it took place. It is obvious that the change of intention took place before either delivery or their processing though the accounts i.e. before their supply in VAT terms.
105. The Trust argued that even taking HMRC’s case at its highest, the payback rules show there was qualifying intention as it was a mixed intention at worst, at the time of delivery; I do not need to deal with this secondary case in light of my conclusions on the primary argument.

### Conclusions

106. Accordingly, in my judgement the Claimant has brought themselves within the terms of the 1/98 Note, the Concession. Although Mr Metcalfe referred at one time to a “so-called concession”, it is clear that a Concession does exist. The document does presuppose that, on presentation of acceptable evidence, as per the 1/98 Note, sums equivalent to input tax charged on a price for a supply from Supply Chain to a body such as the Trust, would be recoverable. The Note is premised on the Concession existing, and the repetition of the substance of the Note in the 2004 document makes clear that such a concession was taken to exist. The words of the document itself state that it constitutes a concession.
107. This is a representation of the nature of that referred to by Bingham LJ at page 1569 A-D of *MFK* (supra):

*“I am, however, of the opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. **The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: Reg. v. Attorney-General, Ex parte Imperial Chemical Industries Pic. (1986) 60 T.C.I, 64G, per Lord Oliver of Aylmerton. Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of "One should be taxed by law, and not be untaxed by concession:" Vestey v. Inland Revenue Commissioners [1979] Ch. 177, 197 per Walton J. No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the revenue is of a less formal nature a more detailed D inquiry is in my view necessary.”***

[Emphasis added.]

108. This is a case of a statement published to the world: the issue for the Court being whether, HMRC were reviewably wrong to determine that the Claimant did not fall within its scope.
109. I have concluded that the Claimant did clearly fall within the Concession's terms, properly understood, and that HMRC made public law errors in reaching the contrary conclusion. This was both in its understanding of the requirements of the Concession, leading it to take irrelevancies into account, and in its failure to appreciate, in reaching its decision, the case that was made on the Trust's behalf. This led to its erroneous equation of "purchase" with "supply". All these are matters that were available to be considered before the Decision Letter was written. Furthermore, the decision plainly cannot be defended in the light of the evidence submitted for this judicial review, for the reasons given. The manner in which the particular public law wrong is described is not decisive in this case.
110. In *MFK* at page 1572D Bingham LJ concluded against the Claimants:
- "I do not, however, think that in the disputed cases the revenue has promised to follow or indicated that it would follow a certain course so as to render any departure from that course unfair. I do not accordingly find any abuse of power. I would therefore refuse relief. Had I found that there was unfairness, significant enough to be an abuse of power, I would not exercise my discretion to refuse relief."*
111. The analysis, whether as unfairness, abuse of power, failure to have regard to a legitimate expectation, or the manifestation of an error of law, does not in the present case make any difference to the approach of the Court. In this case there was disagreement as to a large number of matters, including:
- i) The meaning and scope of the Concession.
  - ii) The relevance of VATA to the Concession.
  - iii) Whose intention was the central concern of the decision-maker.
  - iv) What the effect of the Trust's decisions and actions were within the context of the Concession read with VAT law, particularly as to intention and supply.

I have concluded that in each of these areas HMRC made reviewable errors which would found the quashing of the decision of 31 March 2021.

## SUMMARY

112. The parties had prepared a helpful list of issues for this case. I set out below what I take to be the essence of those issues, together with the answers which flow from the reasons given above.
- i) Did the Claimant have an alternative remedy in the First-tier Tribunal, such that its claim for judicial review should be dismissed? *ANSWER: No, the question before this court is whether or not the Claimant can bring itself within the terms of the Note of 1/98 operating as a concession, it does not concern input tax recovery under VATA, the*

*Tribunal has no jurisdiction. Further it is not in truth a “conflict of fact” case.*

- ii) Ought the Court to disregard evidence in this judicial review that was not before the decision-maker in 2019 or 31 March 2021 when HMRC made decisions as to the Claimant’s claims? *ANSWER: No, for the reasons given above, in particular as to the scope of the previous correspondence, and HMRC’s responses, it would be unjust to do so, the newer material is in any event not inconsistent with the earlier materials before the Tribunal and the decision-maker.*
  - iii) Did the Defendant fail to give due effect to the Concession or otherwise misdirect itself as to the effect of the Concession? *ANSWER: Yes, HMRC failed to consider the decision within the correct framework of the Concession. The reliance upon Supply Chain’s intentions was wrong, further, the policy cannot reasonably be read as excluding supplies other than those which may only be supplied in the course of business, and the reference to confectionery, to the extent that it was considered to constrain the scope of the Concession, was an error.*
  - iv) When deciding question iii) is it appropriate to analyse the matter on the basis of a failure to take into account material matters, errors of law, or some other approach? *ANSWER: In this case, the various analyses all yield the answer that the decision is susceptible of challenge on the basis of public law error. That comprehends errors of law in terms of construction and application of the Concession, an erroneous approach to the evidence – leading to an unsustainable, i.e. perverse, conclusion on the question of intention which is a question of fact and degree. In the present case had HMRC asked itself the correct questions, and correctly analysed the statements made to it by the Trust, they could only have concluded that the Trust’s intention at the relevant time, namely at the time of the supply of the goods, was as to a business use. That evinces an error of law in misapprehending the meaning of the Concession, a failure to address the correct analysis, namely not asking themselves the right questions about the time of supply, even though the Trust had asserted that time of supply was the test. It also involved the error of assuming, that “purchase” was synonymous with “supply” in VAT terms and had been used in that sense. After the decision, the erroneous analysis of the Concession continued; the evidence in the judicial review made the contrary position quite unarguable.*
  - v) If the claim succeeds, what relief should be granted? *ANSWER: The Court should declare that the Claimant is entitled to the benefit of the Concession contained in Note 1/98. The decision of 31 March 2021 should be quashed.*
113. This claim for judicial review, accordingly, succeeds.