TC03058

Appeal number: TC/2012/05799

VAT – Whether dental payment plan administrator provided services to patient for consideration – Whether these services were exempt or standard rated supplies – If exempt whether change in contractual arrangements from 1 January 2012 amounted to a "Halifax" abusive practice – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

D P A S LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at 45 Bedford Square, London WC1 on 22 – 24 May and 26 June 2013 with further written submissions received from the Appellant on 24 September 2013 and 6 November 2013 and from the Respondents on 31 October 2013

John Walters QC and Conrad McDonnell, instructed by Wilsons Solicitors, for the Appellant

Andrew Macnab and Elizabeth Kelsey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by DPAS Limited ("DPAS") against a decision of HM Revenue and Customs ("HMRC") contained in a letter, dated 17 April 2012, that supplies of services by DPAS, made in relation to the administration of dental plans, are either single, standard rated supplies of services to dentists or standard rated supplies of services to dentists and standard rated supplies of services to the dentists' patients.

2. Although HMRC's decision concerned supplies made by DPAS both before and after 1 January 2012 (when there was a change in the arrangements under which DPAS supplied its services), after taking account of correspondence between the parties, the circumstances in which its supplies were treated as exempt and the reasons why DPAS was deregistered for VAT in 2004, HMRC confirmed, by email on 27 November 2012 and in a letter dated 28 November 2012, that it would not pursue any claim that VAT was due from DPAS before 1 January 2012.

3. In addition to the grounds set out in HMRC's letter of 17 April 2012, Mr Andrew Macnab and Ms Elizabeth Kelsey, who appeared for HMRC, contended that the alteration in DPAS's contractual arrangements from 1 January 2012, if effective, amounted to an abusive practice and as such fell within the doctrine enunciated by the European Court of Justice ("ECJ")[1] in *Halifax & Others v Customs and Excise Commissioners* [2006] Ch 387 ("*Halifax*").

4. The case advanced for DPAS by Mr John Walters QC, who appeared with Mr Conrad McDonnell, was that, from 1 January 2012, in addition to a standard rated supply of services to dentists DPAS also made a separate supply of services to their patients which was an exempt supply of "payment services" within Item 1 of Group 5, Schedule 9 to the Value Added Tax Act 1994 ("VATA") and Article 135(1)(d) of Directive 2006/112/EC (the "PVD") and not a *Halifax* type abusive practice.

5. On 23 July 2013 the Court of Appeal handed down its judgment in *Pendragon plc v HMRC* [2013] EWCA Civ 868 ("*Pendragon*") which overturned the decision of the Tax and Chancery Chamber of the Upper Tribunal in that case. Having referred to the decision of the Upper Tribunal in *Pendragon* during the closing submissions in relation to the principles of abuse of law, HMRC wrote to the Tribunal on 13 August 2013, stating, inter alia:

> … we believe that it is only right that the Appellant should be afforded an opportunity of making further written submissions if it believes that there are points to be made in relation to the [*Pendragon*] judgment.

6. On 16 August 2013, DPAS's solicitors, to whom HMRC's letter had been copied, wrote to the Tribunal requesting an opportunity to make further submissions in relation to *Pendragon*.

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[1] Although throughout this decision I have referred to the ECJ this should also be read, where appropriate, as a reference to the Court of Justice of the European Union.

7. I therefore directed that such further written submissions could be made by DPAS before 30 September 2013 and allowed HMRC until 31 October 2013 to respond. I also directed that DPAS could reply to any new issue raised by HMRC in their further written submissions by 14 November 2013.

8. Written submissions were received on behalf of DPAS on 24 September 2013 and from HMRC on 31 October 2013. A response from DPAS was received on 6 November 2013.

9. As is the usual practice, this case was listed for a hearing before a Judge and a Member of the Tribunal. However, the Member who was to hear the case with me, Mr Harvey Adams, had previously sat as a Member with Mr Walters (who appears for DPAS in this appeal) when Mr Walters was sitting as a fee paid judge of the Tax Chamber of the First-tier Tribunal.

10. In the circumstances, and prior to the commencement of the hearing, the parties brought to my attention the decision of the House of Lords in *Lawal v Northern Spirit Ltd* [2003] ICR 857. The facts and decision in that case are helpfully set out in the headnote, which I set out in full, as follows:

> An employment tribunal dismissed the applicant's complaint of race discrimination and victimisation against his former employers, holding that since the alleged discriminatory act had occurred after the termination of the employment relationship it had no jurisdiction to hear his claim. On appeal by the applicant the employers were represented by counsel who was also a recorder and in that capacity had sat as a part-time judge in the Employment Appeal Tribunal with one of the two lay members of the appeal tribunal panel. The applicant raised a procedural objection to the appearance of the recorder as counsel before the appeal tribunal, relying on the right to an "independent and impartial tribunal" in article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and on the common law and contending that there was a real possibility of bias. The appeal was adjourned and relisted for hearing before the President of the Employment Appeal Tribunal and two lay members neither of whom had sat with the recorder. The Employment Appeal Tribunal ruled that, applying the test of the fair-minded and informed observer who had considered the facts, there had been no possibility of bias. It dismissed the substantive appeal on the ground of lack of jurisdiction. The Court of Appeal by a majority dismissed the applicant's appeal on the issue of bias.
>
> On appeal by the applicant—
>
> **Held**, allowing the appeal, that if counsel appeared before a panel of the Employment Appeal Tribunal that included one or two lay members with whom he had previously sat as a part-time judge a fair-minded and informed observer might conclude that there was a real possibility of such lay members being subconsciously biased in favour of counsel's submissions; that public confidence in the system was thereby undermined and the practice permitting such appearance should be discontinued; and that it should be declared that the applicant

had been entitled to succeed on the issue of bias and the matter remitted to the Court of Appeal for a ruling on the issue of jurisdiction

11. Given the similarity between *Lawal v Northern Spirit* and the present case, in particular that Mr Walters has sat judicially with Mr Adams, I considered that it was inappropriate for me to hear this appeal with Mr Adams.

12. As it was not possible to replace him with another Member at short notice, and after taking account of the practical difficulties of adjourning and re-listing this appeal (eg the availability of counsel and witnesses), I heard the appeal without a Member.

Evidence

13. Having made witness statements in support of DPAS, Mr Gary Anders, its Operations Director, and Mr Quentin Skinner, its founder and Chairman, both gave oral evidence and were cross examined by Mr Macnab.

14. I was also provided with additional documentary evidence including details of the contractual arrangements implementing the dental plans and copies of correspondence between the parties.

Facts

Background

15. DPAS was established by Mr Quentin Skinner in 1996 who coined the company's name as an acronym of "Dental Plan Administration Services".

16. DPAS was registered for VAT from the commencement of its business which, as its name suggests, is the design and implementation of independent dental plans under which the private patients of dental practices, which are registered with DPAS, can spread the cost of basic dental healthcare evenly throughout the year. This is by way of monthly direct debit payments from a patient's bank account in favour of DPAS. Each direct debit payment includes:

(1) the amount due from the patient to the dentist;

(2) the amount due to from the patient to the insurer; and

(3) the fee payable to DPAS.

DPAS accounts to the dentist each month for the aggregate amount payable to him or her in respect of all of the patients who have paid the monthly fee less an amount retained by DPAS in respect of its charges.

17. Mr Anders explained that DPAS cannot market its dental plans to the "man in the street" who would usually have a long-lasting and trusting relationship with his own dentist. As such DPAS would not be able to point him in the direction of a new dentist just because it had a relationship with that dentist and therefore, a dentist is DPAS's "only channel to market". For that reason the dental plans administered by DPAS are "practice branded" in that they are offered in the name of, and under the "brand" of a

dental practice. While it is possible for a practice to have a dental plan and no patients a patient cannot have a plan without a practice.

18. Mr Anders also explained that a dental practice could not establish its own dental plan as it would be administratively too cumbersome to do so because, unlike DPAS, it would not be a direct debit originator.

19. There are two broad categories of dental plans available to dental patients. These are described in the literature produced by DPAS as "Capitation" and "Maintenance" plans.

20. A Capitation plan includes dental services designed to prevent oral health deterioration, eg examinations, hygienist appointments, and small X-rays, but extending to include certain restorative dental treatment procedures such as fillings, root canal treatment and in some cases crowns and bridgework. The monthly fee paid by a patient will depend on the range of services to be provided under the plan and the oral health of the patient at the time of enrolment. This would involve an in-depth examination by the dentist, who would assess the amount of time and treatment required, before a patient was accepted for a Capitation plan.

21. In contrast a Maintenance plan includes only those services designed to prevent oral health deterioration and excludes restorative dental treatment. Consequently the monthly fees for such plans are lower than those for Capitation plans and an examination is not necessary for a patient to be accepted on a Maintenance plan.

22. Insurance, referred to as "Supplementary Insurance" in the documents although there is no other insurance to which it is supplementary, is included as an element of both of the dental plans. This Supplementary Insurance, which is underwritten by ACE European Group Limited ("ACE"), is procured for the patients by DPAS, acting as an agent for ACE. It is intended to cover the cost of emergency dental treatment while the patient is away from home and provides cover, eg for treatment following injury up to a certain amount, emergency treatment, call-out charges, hospital cash benefit and oral cancer benefit. The patient cannot have the dental plan without the Supplementary Insurance and cannot have the Supplementary Insurance without the dental plan.

23. Additionally DPAS provides a worldwide emergency helpline for patients under a dental plan.

24. Although the agreement to obtain dental services under a plan is made between a dentist and patient with the price, including dental plan charges, being agreed between them, the role of DPAS is to manage the administration, finance and insurance aspects of these plans. It also provides advice to the dentist and his or her practice staff in respect of setting up the plan and produces marketing materials such as brochures, leaflets and posters, registration forms, correspondence/headed note-paper and plan membership cards branded in the dentist's name.

25. In addition DPAS gives dentists administrative and marketing training and support through its business development manager, practice consultants and customer service advisers.

26. The "standard pricing" adopted by DPAS for the overwhelming majority of its clients is calculated by a combination of a monthly standing charge of £366.66 and what is described as a "per-patient charge" both of which are paid together on a monthly basis by direct debit.

27. The monthly standing charge is made up of a flat charge of £66.66 to the dentist in respect of dental plan services and a flat charge of £300 described as the "group patient charge to be divided equally according to the number of patients registered under the dental plan.

28. The per-patient fee is charged at different rates as follows:

Standard (A)	£0.94;
Standard (B)	£1.14;
Introductory (A)	£2.00;
Introductory (B)	£2.50; and
Group	£1.35 to £2.90

The Standard Fee is an "insurance and administration fee". Standard (A) and Standard (B) represent a difference in the amount of insurance cover under the Supplementary Insurance. Under the Standard Fee, there is also a "practice fee" which appears to be the flat fee of £366.66 referred to above. The Introductory Fees do not have any additional separate practice fee charged. The Standard Fees and Introductory Fees include £0.20 paid to ACE for underwriting the Supplementary Insurance and insurance premium tax. The remaining part of the fee represents direct debit facilities provided to the patient. Group Fees are stated to be "offered to patients of large multi-practice companies and on a per patient basis".

29. In 2008 a £10 registration fee was introduced. This is charged to the patient and retained by DPAS as a means of recovering directly from the patient the costs of registration onto a dental plan.

30. Mr Anders summarised the benefits to patients of being members of dental plans as follows:

> (1) Convenience, as a dental plan enabled patients to participate and pay monthly fees automatically without direct personal involvement;
>
> (2) Patients are able to budget and spread payments for regular dental care;
>
> (3) The structure, in the case of Capitation Plans, optimises treatment prescription;
>
> (4) The plans encourage more frequent attendance at practice and therefore improve patients oral health; and

(5) The accident and emergency insurance cover provides for those "unforeseen" risks.

He described the following as benefits that a dental practice could expect if it operated a dental plan:

(1) Through the patients more frequent attendance a dentist is able to provide more regular preventative dental care and advice on oral hygiene, a "win win" situation for dentist and patients;

(2) A regular source of income for the practice as opposed to the ad hoc revenue generated by fee-per-item dentistry;

(3) Additional revenue over and above dental plan revenue can often be raised from specialist dental procedure (eg cosmetic dentistry, teeth whitening etc.) and through the supply of oral hygiene accessories (eg toothbrushes, mouth wash, toothpaste etc.) as a practice becomes a one-stop-shop for dental needs; and

(4) The profile of a practice in a locality is likely to be higher and more positive through the provision of services to the local community.

Pre-2012 Contractual Arrangements

31. Mr Skinner, who established DPAS, explained that although there were benefits to patients and the direct debit instruction that they signed was in favour of DPAS, a commercial decision was taken to package DPAS's services in favour of the dentists as the VAT treatment was thought to be the same whether the supply was to the dentist or patient. This was because of the concern, which Mr Skinner considered more imagined then real, within the dental profession in the 1990s about the dangers of third party interference in the dentist/patient relationship in reflection of the situation with dental funding in the USA and warnings issued by the British Dental Association ("BDA") about how dental plan administrators might interfere with this relationship.

32. The suggestion from the BDA was that such interference was not only that a plan administrator may manage dentists' remuneration in a downward direction, but also may start to interfere on clinical matters by way of controlling costs.

33. For these reasons DPAS entered into contracts with a dentist for the provision of its services and charged the dentist a fixed monthly fee of £366.66 and the "per-patient" charge. DPAS collected these fees by deducting them from the amounts it collected from the patients of the dentist via direct debit.

34. DPAS also contracted with ACE (as agent of ACE) for the Supplementary Insurance provided to the patients.

35. Insofar as they are material to the present appeal, DPAS's then "General Terms and Conditions of Business" in its agreement with dentists provided as follows:

1. Interpretation

In these terms and conditions –

'we', 'us', and 'our' means DPAS Limited, …; and

'you' and 'your' means our customer carrying on the business of dentistry (whether as a body corporate, an individual dental practitioner or a partnership of dental practitioners).

2. Collection of patient fees

2.1 Subject to condition 2.2, we will collect by Direct Debit periodic fees payable by patients under the terms of your dental plan.

...

2.3 In collecting patient fees we act as your agent; and, subject to these terms and conditions, amounts we collect belong to you and pending remittance to you will be held in a designated trust account.

2.4 We will remit, to such bank account as you notify to us in writing from time to time, amounts due to you on a monthly basis; and provide a monthly statement in this respect.

...

3. Our charges

3.1 Charges for the services we provide are as stated in our quotation, subject to periodical review.

3.2 Where any charge is stated in our quotation to be payable per patient, we will deduct the charge from patient fees collected and you have no further liability.

3.3 Where any charge is stated in our quotation to include insurance arranged for the benefit of your patients, we undertake to account to insurers for premiums due.

3.4 Charges other than those payable per patient are payable as stated in our quotation; provided, however, that where we have agreed to accept payment of any such charge by deduction from patient fees collected you are relieved of liability to pay the charge only to the extent that it is satisfied by such deduction.

3.5 Where you have engaged us to provide any set-up service in preparation for you receiving an ongoing service from us but do not, in the event, avail yourself of the ongoing service in question, you will remain liable to pay the whole or a fair proportion of the charge for the set-up service according to the extent it has been provided.

3.6 We reserve the right to deduct from any money held by us on your behalf any amounts you owe to us.

...

10. Third party rights

A person who is not a party to the contract between us shall not have any rights under or in connection with it.

36. There was no reference to DPAS in the practice branded brochure (the "Old Brochure") and leaflets explaining the dental plans that were provided to patients, eg

in a brochure describing a Maintenance Plan, the section headed "How do you join our plan" stated:

> There is no need for an assessment. All you have to do is complete a registration form and Direct Debit Mandate.
>
> In addition on your first monthly payment, a one off registration fee of £10 per person will be charged and will be included in your first Direct Debit payment

37. The registration form mentioned in the Old Brochure made no reference to DPAS.

38. If a patient's direct debit was not paid DPAS would write to him or her as follows:

> On behalf of your dental practice we are writing to inform you that we have been unable to collect your dental plan payment this month (shown on your bank statement as "DPAS Dental Plan"). ...
>
> ...
>
> If you wish to cancel your plan membership or have any other queries please contact your practice as soon as possible."

VAT Deregistration

39. Although DPAS had been registered for VAT from the commencement of its business, in 2003 Mr Skinner realised that, due to similarities with the ECJ case of *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] STC 932 ("*SDC*"), that the services provided by DPAS were predominantly exempt supplies.

40. Representations to this effect were therefore made to HMRC by and on behalf of DPAS during 2003. As a result, it was accepted that the supplies made by DPAS were exempt supplies of "payment services" falling within VATA Schedule 9, Group 5, Items 1 and/or 5 and Article 13B(d)(3) of the Sixth Directive and, following a voluntary disclosure, DPAS received a VAT repayment of £133,601. It was deregistered for VAT with effect from 31 January 2004.

Axa

41. On 28 October 2010, the ECJ gave judgment in Case C-175/09 *Revenue and Customs Commissioners v Axa UK plc* ("*Axa*") [2010] STC 2825.

42. This case concerned the proper VAT treatment of supplies by Denplan Ltd ("Denplan") a competitor of DPAS, which, like DPAS, operated dental payment plans on behalf of dentists. As with DPAS, payment was made by patients via direct debit from their bank accounts to Denplan which accounted to the dentist for payments received. The service of "collecting payments" was described by the ECJ, at [19] as comprising of:

> "… the collection, processing and onward payment of sums of money due from third parties, namely patients, to Denplan's clients, namely, dentists. That service consists, in particular, in transmitting information

> to the third party's bank calling for the transfer of a certain sum of money from the third party's bank account to the service supplier's bank account in reliance on a standing authorisation given by that third party to his or her bank, and subsequently giving an instruction to the service supplier's own bank to transfer funds from its account to the client's bank account. Meanwhile, the service supplier sends to its client a statement of the sums received and contacts third parties from whom it has not received a transfer of the sum requested."

43. The Court held that those services were specifically excluded from the exemption in Article 13B(d)(3) as "debt collection" and were therefore liable to VAT at the standard rate ruling that:

> "Article 13B(d)(3) ... is to be interpreted as meaning that the exemption from VAT provided for by that provision does not cover a supply of services which consist, in essence, in requesting a third party's bank to transfer to the service supplier's account, via the direct debit system, a sum due from that party to the service supplier's client, in sending to the client a statement of the sums received, in making contact with the third parties from whom the service supplier has not received payment and, finally, in giving instructions to the service supplier's bank to transfer the payments received, less the service supplier's remuneration, to the client's bank account."

44. That this decision was not expected is clear from the comments of Rimer LJ after *Axa* had returned to the Court of Appeal (reported at [2012] STC 754) where he said, at [57]:

> "I can understand Axa's dismay about the course of events that unfolded in Luxembourg. The suggestion that Denplan's service was 'debt collection' had not been uttered in the domestic proceedings. Whilst Axa had asserted that Denplan's service fell within the exemptions and HMRC had argued the contrary, it was no part of HMRC's case that that was because it was a 'debt collection' service."

45. On 12 January 2011, HMRC published Revenue & Customs Brief 54/10 which set out HMRC's position in the light of *Axa*.

46. In July 2011, HMRC agreed to allow businesses to delay the implementation of the decision in *Axa* until 1 January 2012.

47. As a result of the decision of the ECJ in *Axa* it was recognised that the VAT basis on which DPAS had operated since 2003 was no longer sustainable given that, as Mr Anders agreed in cross examination, the description of Denplan's services by the ECJ at [19] of *Axa* was also a fair description of what DPAS was doing at that time. DPAS therefore restructured its underlying contractual arrangements with the intention that, in addition to its supplies to dentists, it would also make supplies directly to patients.

48. HMRC were kept fully informed of these proposed changes through correspondence and a series of meetings with DPAS and its advisers.

Post 1 January 2012 Contractual Arrangements

49. From 1 January 2012 DPAS produced new branded brochures for dentists (the "New Brochure"). In contrast to the Old Brochure which has no mention of DPAS (see paragraph 36, above) under the section "How do you Join Our Plan", the New Brochure describing a Maintenance Plan states:

> There is no need for an assessment. Joining is very simple. All you have to do is complete a registration form for us and a Direct Debit mandate and an authorisation form for DPAS.
>
> In addition to your first monthly payment, an initial registration fee of £10 per person will be charged by DPAS and will be included in your first Direct Debit payment.

In addition, and unlike the Old Brochure which did not refer to DPAS at all, it clearly states on the New Brochure that:

> Research shows that preventative dentistry delivered on a regular basis greatly reduces the risk of dental disease and provides a platform for a lifetime of improved oral health. We encourage such an approach and with this in mind have joined with DPAS Limited to design a dental plan to reward loyal patients. This plan will be administered by DPAS who will make a separate agreement to manage your payments under the plan. …

50. On 8 September 2011, DPAS wrote to its existing dentist clients in the following terms (with emphasis as stated in the letter):

> Dear Dr …
>
> **DPAS private dental plans and VAT – proposed administrative changes**
>
> You may have heard earlier this year that there have been changes regarding the VAT treatment of private dental plans in the UK. This has resulted from a legal case between HMRC and AXA Denplan, wherein the European Court of Justice pronounced last November that Denplan's operation was that of 'debt collection', and therefore was not exempt from VAT. This pronouncement caused HMRC to issue a new policy document in January, which has a severe effect on DPAS Limited's operation, as it removes the exemption to VAT that we agreed with HM Customs & Excise some years ago.
>
> Rather than simply increase our charges to dental practices to account for the 20% of our revenue that this new policy effectively removes, we have been spending considerable resources this year in seeking a solution that mitigates this adverse position. I am pleased to say that we now have a proposal that will allow us to move forwards without increasing our charges as a result of this VAT ruling, which I now set out below. **May I emphasise that these changes are purely administrative, reflecting the nature of the reality of our services; they have no effect *whatsoever* on the amounts either you or your patients are charged and make no practical difference to the current arrangements.**

Proposed changes

Up until now, apart from the contract between you and your patient for the delivery of dental care, the dental plan arrangements have been made up of the following contractual arrangements:

1. A contract between DPAS and the dentist for the delivery of dental payment plan services.

2. A contract between DPAS as agent for our underwriters and the patient for the supply of dental accident and emergency insurance cover (Supplementary Insurance).

We now propose to vary this arrangement, by splitting the former into two, consisting of:

(a) A contract between DPAS and the dentist for the delivery of taxable dental payment plan services and

(b) A contract between DPAS and the patient for the provision of dental payment plan facilities.

The monetary value of the DPAS charges will remain unaltered, but will be split into charges to both the dentist and the patient in respect of dental plan services and the amount relating to the Supplementary Insurance. Further details of this are given in the attached "Your Questions Answered" document.

The financial implication of this is that DPAS will suffer VAT on the revenue flow from contract (a) above, which I am pleased to say that we propose to absorb ourselves at no cost to any of our customers. All of the other contracts remain VAT exempt.

Practical implications

To put this new arrangement into effect, we need to agree with you a new set of Terms & Conditions, and to write to all your current DPAS dental plan patients to explain the changes. Although this communication to patients will necessarily include an acceptance form, it will make clear that this is an administrative change only and that **the patient need do nothing**. We propose to put this into effect from 1st January 2012.

We enclose a new set of Terms & Conditions, and would ask that you sign both copies of these and return them to us as soon as possible. Should a colleague at the practice also receive this letter, please return only one set of Terms & Conditions in duplicate, signed by all relevant parties. We then aim to communicate the changes to your patients in November, and we enclose a copy of the intended letter for your information. **If we do not hear from you by 26th October, we will assume that you have accepted the new Terms & Conditions and are happy for us to write to your patients in this regard.**

Conclusion

This whole episode has been extremely costly and time consuming for us at DPAS to sort out. However, the solution we propose has been carefully considered and put together in full consultation with leading tax Counsel, commercial lawyers and VAT accountants and we have

made HMRC aware of our proposals. We believe that this will allow us to continue to service the provision of your dental plan arrangements in the same cost-efficient manner as before, and that this will have no effect whatsoever on the relationship between you and your patients. The alternative would be for our charges to increase to cover the additional VAT suffered, which will simply be an unwanted cost to you and your patients.

51. The new terms and conditions enclosed with the letter, insofar as they are material, provided:

1. Interpretation

In these terms and conditions –

'we', 'us', and 'our' means DPAS Limited, …; and

'you' and 'your' means our customer carrying on the business of dentistry (whether as a body corporate, an individual dental practitioner or a partnership of dental practitioners).

2. Payment of patient fees

2.1 Subject to condition 2.2, we will arrange for you to receive out of the payments by participating in the dental plan ("Participating Patients") which we have managed and administered for the patients concerned the net sums referred to in condition 2.3 below. The net sums referred to in that condition will belong to you from and after our allocation of the charges and premiums referred to below and, pending remittance to you, will be held in a designated trust account.

2.2 We are not responsible for the failure or cancellation of and Direct Debit mandate; and where a mandate is dishonoured on three consecutive occasions reserve the right to cease attempting to administer payment of fees for the Participating Patient in question with the result that no further sums would be receivable by you in respect of the Participating Patient.

2.3 The net sums referred to in this condition are the total of the plan payments received by us from the Participating Patient net of the amounts we allocate to (a) the charges we make to the Participating Patients for managing and administering their plan payments under the agreements made by us with them; (b) payments of the Supplementary Insurance premiums; and (c) the charges we make to you in accordance with condition 3.

2.4 We will remit, to such bank account as you notify to us in writing from time to time, amounts due to you on a monthly basis; and provide a monthly statement in this respect.

...

3. Our charges

3.1 Charges for the services we provide are as communicated to you from time to time, and subject to periodical review.

52. DPAS also entered into a similar agreement on identical terms and conditions with any new dental practice ie one that first used DPAS's services after 1 January 2012.

53. The letter to be sent to existing patients with a dental plan, envisaged under the "practical implications" sub-heading in the letter sent to the dentists (see paragraph 50, above), was to be written on the dental practice's own letterhead in the following terms (with emphasis as stated in the letter):

> As you are aware, your monthly Direct Debit is paid through DPAS Limited, which devised, provides and administers your dental plan using its Direct Debit administrator status. Although in the past, of course, DPAS has had a relationship with you, we, the dental practice, have paid an administration charge to DPAS out of the Direct Debit payment that you made.
>
> Following a review, we have agreed with DPAS to make some changes in the dental plan administrative arrangements. From now on, it is proposed (as explained in the DPAS Acceptance Form enclosed) that part of the total monthly Direct Debit amount to be paid by you to DPAS will be retained by DPAS in respect of its obligation to you to manage and administer your dental plan payments and to manage and administer your Supplementary Insurance cover and dental emergency helpline.
>
> **WE WANT TO REASSURE YOU THAT THESE ARE PURELY ADMINISTRATIVE CHANGES. THEY WILL NOT ALTER THE COVER PROVIDED UNDER THE DENTAL PLAN OR AFFECT THE LEVEL OF YOUR TOTAL MONTHLY PAYMENTS.**
>
> Please read and sign the enclosed DPAS Acceptance Form and return it in the envelope provided.
>
> If you would like any further details of this proposed new arrangement please do not hesitate to call DPAS on [telephone number].

54. The "DPAS Acceptance Form" for existing patients referred to in the letter was addressed to the patient. It stated (with emphasis as in the original document):

> **DPAS ACCEPTANCE FORM**
>
> Please read and sign this DPAS Acceptance Form. It forms the basis of your agreement with DPAS that they will manage and administer your dental plan payments for you.
>
> **IF YOU DO NOT SIGN THIS DPAS ACCEPTANCE FORM AND DO NOT CONTACT US, WE SHALL ASSUME YOU ARE HAPPY TO PROCEED ON THE BASIS OUTLINED BELOW AND DPAS WILL PROVIDE YOU WITH THE DENTAL PLAN MANAGEMENT AND ADMINISTRATION SERVICES SET OUT BELOW.**
>
> I agree with DPAS Limited (DPAS) that DPAS will manage and administer the payments to be made by me in respect of my/our dental plan(s).

> In return for its management and administration services, I authorise DPAS to deduct and retain from the total monthly payments that I/we have agreed with my/our dentist(s) from time to time a monthly charge which will not exceed £3.00 per patient*. This charge includes the premium payable in respect of the Supplementary Insurance cover and the dental emergency helpline.
>
> *The monthly charge per patient will be made up of £0.94 plus an equal share of a monthly group patient charge of £300.00 to be divided equally according to the number of patients registered under the dental plan(s). The total monthly charge will not exceed £3.00 per patient. This charge is subject to periodical review.

55. The letter and Acceptance Forms were sent to approximately 340,000 patients and over 80,000, approximately 30%, of these were returned to DPAS. DPAS also received over 3,000 telephone calls to a helpline established to deal with issues raised by the letters with 90% of these calls sought confirmation that the amount they were paying for the dental plan would not be increasing.

56. From 1 January 2012 any patient who wished to join a dental plan, irrespective of whether he or she had become aware of the plans from reading the Old Brochure which did not mention DPAS or the New Brochure which did, was required to complete an authorisation form. After space for inserting personal and bank account details the form continues as follows (with emphasis as in the form):

> **DPAS AUTHORISATION: Please read and sign this DPAS Authorisation. It forms the basis of your agreement with DPAS that they will manage and administer your dental plan payments for you.**
>
> The answers on this form contain your personal data. DPAS Limited (DPAS) records, processes and holds your personal data in accordance with the Data Protection Act(s). Your personal data will only be used by DPAS and/or its subcontractors in the management and administration of your dental plan and for no other purpose.
>
> The Supplementary Insurance policy is designed to meet the demands and needs of patients who require insurance cover for treatment costs arising from dental injury or emergency. The policy forms part of your dental plan and is mandatory. No recommendation has been made in connection with the Supplementary Insurance policy.
>
> I confirm that I have read and fully understand the explanatory brochure and the Supplementary Insurance Policy Summary. I am also aware of any registration fee payable.
>
> I agree with DPAS that DPAS will manage and administer the payments to be made by me in respect of my dental plan. In return for its management and administration services, I authorise DPAS to deduct and retain from the total monthly payments that I have agreed with my dentist from time to time a monthly charge which will not exceed £3.00*. This charge includes the premium payable in respect of the Supplementary Insurance cover and the dental emergency helpline.

…

*The monthly charge per patient will be made up of £0.94 plus an equal share of a monthly group patient charge of £300.00 to be divided equally according to the number of patients registered under the dental plan(s). The total monthly charge will not exceed £3.00 per patient. This charge is subject to periodical review.

Under the DPAS authorisation, on the same document, is a direct debit mandate to be completed in favour of DPAS.

57. In the event that a patient's Direct Debit was not paid, the letter sent to that patient after October 2012 would have been in the following terms:

> As administrators of your dental plan payments we are writing to inform you that we have been unable to collect your dental plan payment this month (shown on your bank statement as "DPAS Dental Plan"). ...
>
> ...
>
> If you wish to cancel your plan membership or have any other queries please contact your practice as soon as possible."

As with the earlier letter (set out at paragraph 30, above) the direct debit payment would have included the fee due to the dentist from the patient.

58. When asked whether, leaving aside the question of who is now doing what for whom, the description of Denplan's services by the ECJ at [19] of Axa (see paragraph 42, above) was a fair description of DPAS's services post 1 January 2012, Mr Anders agreed that it was.

Discussion

59. It is not disputed that the plan is administered by DPAS on behalf of the dentist and that the services DPAS supplies to dentists is a standard-rated supply. However, the following issues arise:

(1) Whether DPAS also makes a supply of services to the patient for consideration; and if so

(2) Whether that supply is an exempt supply of payment services (schedule 9, Group 5, Item 1/Art 135 PVD) or a taxable supply of services such as management of the dental plan or debt collection; and

(3) If an exempt supply to patients whether the change in the contractual arrangements from 1 January 2012 amount to an abusive practice which must therefore be re-defined to restore the position that would have prevailed in the absence of that abusive practice.

Supply to Patients for consideration?

60. The principles to be applied in relation to this issue were helpfully summarised by the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Esporta Ltd* [2013] UKUT 173 (TCC) (Judges Sinfield and Sadler) as follows:

> "12. As is made clear by article 24(1) of the VAT Directive and section 5(2)(b) of the VAT Act 1994, the issue is whether Esporta has done anything for a consideration. If so then, regardless of what that 'anything' is (so long as it is not a supply of goods), Esporta has made a supply of services.
>
> 13. In Case C-270/09 *MacDonald Resorts Limited v HMRC* [2011] STC 412 ("*MacDonald Resorts*"), the Court of Justice of the European Union ("CJEU") was asked to provide guidance as to the classification of supplies of services by the appellant in the course of its timeshare usage rights business. The CJEU referred at [16] to the well-established rule that a supply of services is effected 'for consideration', within the meaning of what is now Article 2(1)(c) of the VAT Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. The CJEU then observed at [18] that:
>
> > "… it is necessary to examine the components of that contract in order to identify the services supplied as consideration for the fees charged by the supplier of services."
>
> 14. Applying the CJEU's guidance in *MacDonald Resorts*, we consider that the appropriate starting point in a case such as this is the contract under which the services are supplied. In examining the agreement between Esporta and its members, we adopt the same approach as the First-tier Tribunal in *Reed Employment Ltd v HMRC* [2011] UKFTT 200 (TC). The Tribunal set out its approach at [64] – [72] of the decision. At [64], the Tribunal stated:
>
> > "64. There was no dispute between the parties as to the approach we should adopt in determining the nature of the supply. We were referred to a number of authorities, key among which, in our view, are the recent judgment of the ECJ in *HM Revenue and Customs v Loyalty Management Ltd and Baxi Group Ltd* (Cases C-53/09 and C-55/09) [2010] STC 2651 and *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588."
>
> 15. Having reviewed those cases, as well as others such as *Tesco plc v Customs and Excise Commissioners* [2003] STC 1561 and *A1 Lofts Ltd v HMRC* [2010] STC 214, the Tribunal summed up the approach to determining the nature of a supply at [72] as follows:
>
> > "72. What we take from all this is that the contracts between the various parties are necessarily a starting point,

> but may not be determinative of the nature of the supply or the consideration that has been given for it. That may depend on an objective analysis of all the facts, having regard to the economic purpose of the transactions. The search is for the economic reality, which may or may not be determined by the contractual arrangements between the parties."

61. Therefore, as a starting point, it is necessary to consider the contractual arrangements. This raises the question of whether it is necessary to analyse the arrangements before 1 January 2012 in addition to those applying after that date given that this appeal is in relation to the post 2012 circumstances.

62. In *Debenhams Retail plc v Customs and Excise Commissioners* [2005] STC 1155 ("*Debenhams*") Mance LJ said at [12]:

> "The tribunal found it helpful to start with the arrangements prior to 2000. DR takes issue with their relevance. However, it is clear that the only motive for the change of arrangements in 2000 was to reduce the VAT payable. It is of potential relevance in understanding and analysing the new arrangements from 2000 to understand what the arrangements were, and presumably would still be, apart from that motive; and it is on any view relevant to understand the previous arrangements in so far as they took effect expressly by way of variation of the prior arrangements."

63. Mr Macnab submitted, relying on this passage from *Debenhams*, that although HMRC do not seek recovery of VAT during periods before 1 January 2012, it is necessary to consider the arrangements in place before 1 January 2012 in order to determine the correct VAT treatment of supplies after that date.

64. However, Mr Walters contended that this was the wrong approach and submitted that if a competitor were, on starting up, to institute arrangements identical to those of DPAS post 1 January 2012, they would have to be analysed on their own merits and without any reference to any pre-existing arrangements. The VAT treatment of the competitor's supplies could not, as a matter of fiscal neutrality, be different from the treatment of DPAS's supplies after 1 January 2012.

65. I agree with the submission of Mr Walters. Accordingly I do not consider it necessary to consider the contractual arrangements in force prior to 1 January 2012 and note that these could have applied from the commencement of DPAS's business if it had not been for the concerns of the BDA and dental profession about potential interference in the dentist/patient relationship by dental plan administrators. However, for the avoidance of any doubt, I should make it clear that I find that the purpose of these new arrangements was to circumvent the effect of the ECJ decision in *Axa*.

66. Before turning to the contractual arrangements I consider that it is worth noting that a trader is entitled to structure his business so as to limit his tax liability. This is clear from the decision of the ECJ in *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] STC 3132 ("*Part Service*") where the Court stated:

"47. By way of a preliminary point, it must be recalled that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, taxpayers may choose to structure their business so as to limit their tax liability (*Halifax and Others*, paragraph 73).

48. Nevertheless, when a transaction involves the supply of a number of services, the question arises whether it should be considered to be a single transaction or as several individual and independent supplies of services requiring separate assessment.

49. That question is of particular importance, for VAT purposes, for applying the rate of tax or the exemption provisions in the Sixth Directive (see Case C-349/96 *CPP* [1999] ECR I-973, paragraph 27 and Case C-41/04 *Levob Verzerkeringen and OV Bank* [2005] ECR I-9433, paragraph 18).

50. In that regard it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent (see *CPP*, paragraph 29 and *Levob Verzerkeringen and OV Bank*, paragraph 20).

51. However, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent.

52. Such is the case for example, where, in the course of a purely objective analysis, it is found that there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service (see, to that effect, *CPP*, paragraph 30 and *Levob Verzerkeringen and OV Bank*, paragraph 21). In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (*CPP*, paragraph 30 and the facts of the dispute in the main proceedings giving rise to that judgment).

53. It can also be held that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen and OV Bank*, paragraph 22).

54. It is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single transaction.

55. In that context, it may find it necessary to extend its analysis by seeking evidence of indications of the existence of an abusive practice, which is the concept with which the question referred is concerned."

67. With this in mind I turn to the post 1 January 2012 contractual arrangements and first consider the position with regard to existing patients (ie those who took out a dental plan before 1 January 2012).

68. The information provided to existing patients, whose dental plan commenced before 2012, would have been contained in the Old Brochure. It is clear that such patients would have contracted solely with the dentist. The contractual arrangements on which DPAS relies are the letter to existing patients from their dental practice and the Acceptance Form (which I have set out at paragraphs 53 and 54, above).

69. Mr Macnab submits that these do not have the contractual effect contended by DPAS either under "simple" contract law or having regard to the wider considerations required by *Part Service*.

70. He contends that it does not contain anything that has a contractual effect or which can be construed as a variation to the existing contractual arrangement between the dentist and patient. He submits that the patient did not have the authority from the dentist to deduct any monthly charge from the fee which remained due and payable to the dentist. In any event, he contends, DPAS does not require any authority from the patient to deduct and retain the sums in question as the right to do so is expressly provided by Clauses 2.1 and 2.3 of the post 2012 agreement it has with the dentist. Under that agreement the full sum gets paid by the patient to DPAS, DPAS makes its various deductions and passes the balance to the dentist. Accordingly, he contends, there is no consideration passing from the patient to DPAS for a supply of services.

71. However, Mr Walters referred to the following passage in the letter to the patient from the dentist, on the headed paper of the practice:

> … From now on, it is proposed (as explained in the DPAS Acceptance Form enclosed) that part of the total monthly Direct Debit amount to be paid by you to DPAS will be retained by DPAS in respect of its obligation to you to manage and administer your dental plan payments and to manage and administer your Supplementary Insurance cover and dental emergency helpline.

I consider, as Mr Walters submitted, that this has the effect of varying the terms of the agreement between them so that the monthly charge is no longer payable to the dentist but to DPAS in accordance with the new agreement made between the patient and DPAS. This new agreement is contained in the Acceptance Form under which the patient is to give monetary consideration to DPAS in return for management and administration services.

72. Clearly this applies to the 30% of patients who returned their Acceptance Forms to DPAS confirming their agreement to the new contractual arrangements and I find that the post 2012 contractual arrangements did apply to these patients. However, a question arises in relation to the remaining 70% of patients who did not return their Acceptance Forms but nevertheless continued to make payments via direct debit to DPAS in respect of their dental plans.

73. Although the Acceptance Form refers to an assumption by DPAS that those who did not return it are "happy to proceed on the basis" described in the form, Mr Macnab contends that this is not sufficient for a contract to exist as an offeree who does nothing in response to an offer is not bound by its terms.

74. In *Felthouse v Bindley* (1862) 11 CB (N.S.) 869, as every law student knows, an uncle offered to buy a horse from his nephew for £30 15s adding "if I hear no more about him I shall consider the horse mine at £30 15s". In the absence of a response from the nephew it was held that there was no contract.

75. In *Linnett v Halliwells LLP* [2009] EWHC Ramsey J said at [45]:

> "The general principle derived from *Felthouse v Bindley* and applied by the Court of Appeal in *Allied Marine Transport Ltd v Vale de Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925 at 927, 937 and the House of Lords in *Vitol SA v Norelf Ltd* [1996] CLC 1159 at 1165; [1996] AC 800 at 812 is that acceptance of an offer cannot be inferred from silence, except in exceptional circumstances."

76. Exceptional circumstances are considered in *Chitty on Contracts* (31st edition, 2012) at [2-072] which states:

> … there may be exceptions to the general rule that an offeree is not bound by silence. If the offer has been solicited by the offeree, the argument that he should not be put to the trouble of rejecting it loses much of its force, especially if the offer is made on a form provided by the offeree and that form stipulates that silence may amount to acceptance. Again, if there is a course of dealing between the parties, the offeror may be led to suppose that silence amounts to acceptance: *e.g.* where his offers to buy goods have in the past been accepted as a matter of course by the despatch of the goods in question. In such a case it may not be unreasonable to impose on the offeree an obligation to give notice of his rejection of the offer, especially if the offeror, in reliance on his belief that the goods would be delivered in the usual way, had forborne from seeking an alternative supply. It has been held that one party's wrongful repudiation of a contract may be accepted by the other party's failure to take such further steps in the performance of that contract as he would have been expected to take, if he were treating the contract as still in force; and similar reasoning might be applied in the present context. There may also be "an express undertaking or implied obligation to speak" arising out of the course of negotiations between the parties, *e.g.* "where the offeree himself indicates that an offer is to be taken as accepted if he does not indicate the contrary by an ascertainable time." The offeree's failure to perform such an "obligation to speak" could thus be treated by the *offeror* as an acceptance by silence. But it is not normally open to the *offeree* in such cases to treat his own silence (in breach of his duty to speak) as an acceptance. This course would be open to him only in situations such as that in *Felthouse v Bindley*, in which the offeror had indicated (usually in the terms of the offer) that he would treat silence as an acceptance. There is also the possibility that silence may constitute an acceptance by virtue of a custom of the trade or business in question.

> Yet a further possibility is that parties may have entered into a binding contract but have left some of its terms to be settled in later negotiations. Where one party then made a proposal as to the contents of such a term or terms, it was held that "lack of objection to those terms is to be regarded as an acceptance of them." An "implied obligation to speak" could in such a case be said to have arisen out of the antecedent negotiations between the parties.

Mr Macnab submits that no such exceptional circumstances apply in the present case.

77. However, at [2-047] *Chitty* states that, as in the present case, an "offer may expressly … waive the requirement of communication of acceptance" and gives the following examples:

> One situation in which this may be the case is that in which an offer invites acceptance by conduct. For example, where an offer to supply goods is made by sending them to the offeree it may be accepted by simply using them; and where an offer to buy goods is made by ordering them, it may sometimes be accepted by simply despatching them. Similarly a tenant can accept an offer of a new tenancy by simply staying on the premises; and an employer's offer to pay an employee a bonus may be accepted simply by the employee's staying in the employment.

78. Mr Walters contends that such a situation applies in the present case and by continuing to pay DPAS by direct debit a patient who has not replied to the Acceptance Form has accepted its terms by conduct. This is similar to the example in *Chitty* of the tenant accepting an offer of a new tenancy by simply staying on in the premises. As such I consider that post 2012 contractual arrangements also apply to the 70% of existing patients who did not return the Acceptance Form to DPAS.

79. Turning to the patients who joined a dental plan after 1 January 2012 (the new patients), these were required to complete a DPAS Authorisation Form. This was the case whether or not they had become aware of the dental plans from reading the old brochure which did not mention DPAS or the new brochure which states that the "plan will be administered by DPAS who will make a separate agreement to manage your payments under the plan."

80. It is clear from this form (which I have set out in full at paragraph 56, above) that there is an agreement between the patient and DPAS under which "DPAS will manage and administer the payments to be made by [the patient] in respect of [his or her] dental plan."

81. Therefore, on the basis of the post-2012 contractual arrangements I consider that DPAS are providing services in return for consideration to the both existing and new patients.

82. However, my conclusions regarding these contractual arrangements may not necessarily be determinative of the nature of the supply or the consideration that has been given for it. It may depend on the economic reality of the situation. As Mance LJ said in *Debenhams* at [10]:

> "The reasonable expectations, reactions and understanding of an ordinary customer in relation to a transaction or document must in my view be relevant to its objective analysis. Even when a transaction is in writing, its interpretation involves 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the condition in which they were at the time of the contract' (see *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, [1998] 1 All ER 98 at 114 per Lord Hoffmann, an approach as relevant, in my view, in a European as in a domestic context).

83. Such an approach has recently been confirmed by the Supreme Court in In *WHA Limited & Anor. v HMRC* [2013] UKSC 24, where Lord Reed, giving the judgment of the Court said:

> "26. As this court has recently observed (*Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited* [2013] UKSC 15, para 68), decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another. It is therefore necessary to begin by considering carefully the facts of the present case. As was also noted in the *Aimia* case at para 38, the case-law of the Court of Justice indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction in question takes place. Furthermore, as Lord Walker explained in *Aimia* at paras 114-115, in cases where a scheme operates through a construct of contractual relationships, as in the present case, it is necessary to look at the matter as a whole in order to determine its economic reality. Accordingly, although the transaction of particular importance is that between the garage and WHA, it has to be understood in the wider context of the arrangements between the insured, NIG, Crystal, Viscount, WHA and the garage.
>
> 27. The contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point. I shall begin with the contract of insurance between the insured and NIG. Two sample policies have been produced in these proceedings. Their terms, so far as material, are to similar effect, and it is sufficient to refer to one of them, described as "Motor Cover". The policy makes it clear that the insurer is undertaking to meet the cost of repairs to the vehicle falling within the scope of the policy: it is not undertaking responsibility for the repairs themselves. The policy states, for example, that "following a mechanical breakdown of your vehicle, this policy will assist with the cost of repair of the parts listed"; and the terms and conditions provide that "NIG will not pay more than the limits shown on the proposal form or, if lower, in this policy document". Although the terms and conditions also provide that NIG "reserves the right to provide replacement parts and to carry out repairs under this policy or to arrange for their provision by other persons", the implication of that clause is that NIG is under no obligation to do so."

84. Mr Macnab contends, after looking at the contractual arrangements and beyond, as he submits I must given the approach of the ECJ in *Part Service* at [54], the reality is that DPAS is making a single supply, namely the dental plan services to the dentist. Mr Macnab also contends there is a single supply if considered from a patient's perspective as the patient pays for and receives a supply of dental services from the dentist in return for the full amount he pays according to the terms of the plan.

85. Although Mr Walters accepts that the commercial and economic reality of the arrangements need to be established, he submits that these are satisfied when a patient signs up with their dentists to a dental plan designed by DPAS. He contends that they are, as a matter of commercial and economic reality, doing something more than paying for dental services in advance but are buying, in addition to the dental services, the ability to spread payments, the guarantee of a fixed agreed price for the dental services covered, whatever those services turn out to be, and the other benefits in terms of oral health which the discipline of this financial structure produces.

86. I agree with Mr Walters. It is clear from the Acceptance and Authorisation Forms and the New Brochures that the patient is paying for and receiving something more than a supply of dental services from a dentist, namely the administrative and management service of DPAS.

87. In the circumstances I conclude that DPAS does, as a matter of economic and commercial reality, make a supply of services to the patient for consideration.

Whether an Exempt Supply

88. Having concluded that DPAS does supply services to patients for consideration it is necessary to consider whether these are exempt or standard rated supplies. The relevant legislation is contained in the PVD and VATA.

89. Insofar as it is material to the present case the PVD provides:

> **Article 2**
>
> 1. The following transactions shall be subject to VAT:
>
> ...
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;
>
> **Article 135**
>
> 1. Member States shall exempt the following transactions:
>
> (a) insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents;
>
> ...
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;

90. Article 135(1)(d) of the PVD is materially identical to its Article 13B(d)(3) of the Sixth Directive which it replaced. This was implemented into UK law by VATA the relevant parts of which provide as follows:

> **1. Value added tax**
>
> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply), ...
>
> and references in this Act to VAT are references to value added tax.
>
> **4. Scope of VAT on taxable supplies**
>
> (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.
>
> **5. Meaning of supply: alteration by Treasury order**
>
> ...
>
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.
>
> **31. Exempt supplies and acquisitions**
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ...

91. Schedule 9 VATA provides:

> **GROUP 2 — INSURANCE**
>
> **Item No.**
>
> 1. Insurance transactions and reinsurance transactions.
>
> 4. The provision by an insurance broker or insurance agent of any of the services of an insurance intermediary in a case in which those services—
>
> (a) are related (whether or not a contract of insurance or reinsurance is finally concluded) to an insurance transaction or a reinsurance transaction ; and
>
> (b) are provided by that broker or agent in the course of his acting in an intermediary capacity.
>
> **GROUP 5 — FINANCE**

Item No.

1. The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.

...

4. The provision of intermediary services in relation to any transaction comprised in item 1,2,3,4 or 6 (whether or not any such transaction is finally concluded) by a person acting in an intermediary capacity.

92. In *Axa* the ECJ stated:

"25. It is also clear from the case-law that the terms used to specify the exemptions set out in Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must not deprive the exemption in question of its intended effect (see, to that effect, *Don Bosco Onroerend Goed*, paragraph 25 and the case-law cited; *Future Health Technologies*, paragraph 30; and Case C-581/08 *EMI Group* [2010] ECR I–0000, paragraph 20).

26. It should also be noted that the transactions exempted under Article 13B(d)(3) of the Sixth Directive are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service (see *SDC*, paragraphs 32 and 56; Case C-305/01 *MKG-Kraftfahrzeuge-Factoring* [2003] ECR I-6729, paragraph 64; and *Swiss Re Germany Holding*, paragraph 44 and the case-law cited). The exemption is therefore not subject to the condition that the transactions be effected by a certain type of institution or legal person, where the transactions in question relate to the sphere of financial transactions (see, to that effect, *SDC*, paragraph 38; *Velvet & Steel Immobilien*, paragraph 22; and *Swiss Re Germany Holding*, paragraph 46).

27. Finally, the Court has ruled, as regards various exemptions under Article 13B(d) of the Sixth Directive, that, in order to be regarded as exempt transactions the services in question must, viewed broadly, form a distinct whole, fulfilling the specific, essential functions of a service described in that provision (see, to that effect, *SDC*, paragraphs 66 and 75 (relating to Article 13B(d)(3) and (5) of the Sixth Directive); Case C-235/00 *CSC Financial Services* [2001] ECR I-10237, paragraphs 25 and 27 (relating to Article 13B(d)(5)); and *Abbey National*, paragraph 70 (as regards Article 13B(d)(6)).

28. As regards the service in question in the main proceedings, it is appropriate to point out that its purpose is to benefit Denplan's clients, namely dentists, by the payment of the sums of money due to them from their patients. Denplan is, in return for remuneration, responsible for the recovery of those debts and provides a service of managing those debts for the account of those entitled to them. Therefore, as a matter of principle, that service constitutes a transaction concerning payments which is exempt under Article 13B(d)(3) of the Sixth

> Directive, unless it is 'debt collection or factoring', a service which that provision, by its final words, expressly excludes from the list of exemptions."

93. In *Sparekassernes Datacenter (SDC); v Skatteministeriet* [1997] STC 932, which concerned the provision by SDC of data handling services which included the execution of transfers at the request of banks and their customers, the ECJ stated, at [66]:

> "In order to be characterised as exempt transactions for the purposes of points 3 and 5 of Article 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions."

94. In *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* [2012] STC 1951 the ECJ stated:

> "41. … it is not possible to regard the elements of which that service consists as constituting a principal service on the one hand and an ancillary service on the other. Those elements must be placed on the same footing.
>
> 42. In that regard, it is established case-law that the terms used to specify the exemptions referred to in Article 135(1) of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, Case C-8/01 *Taksatorringen* [2003] ECR I-13711, paragraph 36, and *DTZ Zadelhoff*, paragraph 20).
>
> 43. Consequently, since that service may be taken into account for VAT purposes only as a whole, it cannot be covered by Article 135(1)(f) of Directive 2006/112."

95. The Court of Appeal in *Bookit Ltd v HMRC* [2006] STC 1367 held that the receipt of bookings and payments from customers for cinema tickets by Bookit, which retained its "handling charge" and transferred the balance to the cinema, was a transaction concerning payments and therefore an exempt supply. Chadwick LJ (with whom Sedley and Arden LJJ concurred) said at [46]:

> "It was submitted on behalf of the Commissioners that the transfer of funds to the credit of Bookit's account with Girobank was a matter of no importance to the customer; and, in particular, that the customer was unlikely to be aware of – and would probably be indifferent to –

> whatever arrangements or obligations might exist between Bookit and Girobank under the MSA. I accept that the machinery by which payment would be effected is unlikely to have been in the mind of the customer when he requested and accepted services from Bookit. But, as it seems to me, there can be no doubt that, in requesting and accepting Bookit's services, the customer contemplated and intended that some payment would be made which would enable him, on his attendance at the cinema of his choice, to collect the tickets which he needed; and intended that Bookit would arrange for that. The services which Bookit supplied – as identified by the tribunal – did have the effect which the customer contemplated and intended that they would have. The fact that the customer was indifferent to the machinery by which that effect was achieved seems to me irrelevant. The relevant questions are (i) what services were supplied by Bookit to the customer and (ii) did those services attract the exemption for which article 13B(d)(3) provides. As I have said, I am of the view that the answers which the Vice-Chancellor gave to those questions were correct."

96. It is clear from these authorities that the exemption must be interpreted strictly, that it is the nature of the service provided and not the person making or receiving the supply that is important and it is necessary to evaluate the service or services supplied as a whole in order to determine whether or not it falls within the exemption.

97. Mr Walters contends that the supplies made by DPAS fall within the purpose and ambit of the exemption, as in *SDC*, and when viewed broadly they have the effect of transferring funds and entail changes in the legal and financial situation forming a distinct whole and fulfilling the specific essential functions of a transaction concerning payments. As such, he submits, the services are analogous to those provided to cinema goers in *Bookit* and are therefore exempt supplies.

98. Mr Macnab argues that the supply made by DPAS is wider than that of merely payment administration or handling, and, as it includes the setting up, operation, management and administration of the dental plan management system as a whole, it does not fall within the exemption but is a standard rated supply.

99. Alternatively, he contends that DPAS is caught on Morton's fork: either its supposed services to the patient do not have the characteristics of those described in *Axa* at [28], in which case they do not fall within the exemption; or they do, in which case they are explicitly excluded from the exemption as "debt collection".

100. Having considered the circumstances of the case, in particular the evidence of Mr Anders in relation to the description of Denplan's services in *Axa*, I find that DPAS's supplies to patients do have the characteristics of those described in *Axa* at [28]. However, I agree with Mr Walters that there is a crucial distinction between the supplies in that case and those in the present, in that in *Axa* the supplies were to the dentist, who is a creditor, and not the patient who is not.

101. In my judgment, debt collection must amount to a service of collecting debts and therefore, as Mr Walters submits, the person to whom the service is supplied is a significant and important factor.

102. In *Customs and Excise Commissioners v Redrow Group plc* [1999] 1 WLR 408, Lord Millet, whose comments were was endorsed by the majority of the Supreme Court in *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 42, said at pages 412-413 that:

> "The fact is that the nature of the services and the identity of the person to whom they are supplied cannot be determined independently of each other, for each defines the other."

103. Mr Macnab contends that this is an incorrect approach submitting that it is clear from *Axa* that the identity of the person concerned is not material to the nature of the supply and that in order to determine whether or not the service supplied by DPAS is one of debt collection it is necessary to look at the transaction not the identity of recipient or supplier.

104. Although it is clear from *Axa* at [26] that the exemption is defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service, in my view it does not follow that this also applies to an exception from the exemption such as debt collection services, which must, by definition, be services for the collection of debts and, in my judgment, this can only be performed for a creditor.

105. I accept, as Mr Macnab submits, that there is no ECJ authority to support the proposition advanced on behalf of DPAS that debt collection must be a service that can only be provided to a creditor however, , at [142] of *Paymex Ltd v HMRC* [2011] SFTD the Tribunal (Judge Berner and Mrs Sadque) found, after considering *Axa*, *HBOS plc v HMRC* [2009] STC 486 and *Barclays Bank plc v HMRC* (2008) VAT Decision 20528 that:

> "In our view all of these cases are distinguishable from this appeal. All involved services provided to the creditor, whereas [the appellant's] services are provided to the debtor. This is a material factor, and we agree in this respect with the tribunal in *Barclays* when, after referring to the observation derived from *MKG* that the exempt transactions are defined solely in terms of the nature of the services listed, since no reference is made to the status of the persons supplying or receiving them, it said (at para 16) that this was not to be taken to mean that it does not matter whether negotiations are carried on for the debtor or creditor. Debt collection by its nature can only be performed for the creditor."

106. Having found that the supplies made by DPAS to patients are of a type described at [28] of *Axa* it must follow that, unless it is 'debt collection', which for the above reasons it is not, the service supplied "as a matter of principle" constitutes a transaction concerning payments which is exempt under Article 135(1)(d) of the PVD and Item 1 of Group 5 Schedule 9 VATA.

107. The issue of the £10 registration fee was also the subject of submissions by the parties. I have previously (in paragraph 29, above) referred to this being introduced in 2008 as a means of recovering directly from the patient the costs of registration onto a

dental plan and of it being retained by DPAS. Mr Macnab rightly points out neither the Authorisation Form or brochure refers to the registration fee being payable to or charged by DPAS in respect of any services it provides to the patient and, as such, submits that it cannot be consideration for any exempt supply of payment services.

108. However, I agree with Mr Walters who submits that it is an addition to the consideration which DPAS receives for the services provided to patients similar to a an arrangement fee charged by a bank for a loan or overdraft facility and as such should be treated as an ancillary part of the exempt supply by DPAS.

Whether an Abusive Practice

109. Given that I have found in favour of DPAS it is necessary to consider whether the change in DPAS's contractual arrangements from 1 January 2012 amount to an abusive practice.

110. In its judgement in *Halifax* the ECJ, after noting at [73] that where there is a choice of two transactions, the Sixth Directive does not require a trader to choose the one which involves paying the highest amount of VAT and that taxpayers may choose to structure their business so as to limit their tax liability, observed that:

> "74 … it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> 75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.
>
> 76 It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting such an abusive practice has taken place in the case before it (see Case C-515/03 *Eichsfelder Schalchtbetrieb* [2005] ECR I-0000, paragraph 40)."

111. Where an abusive practice is found, as is clear from *Halifax* at [94], the transactions involved "must be re-defined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."

112. In *Pendragon* the Court of Appeal considered *Halifax* and the subsequent decisions of the ECJ in *Part Service*, *HMRC v Weald Leasing* [2011] STC 596 and *HMRC v RBS Deutschland Holdings* Case [2011] STC 345 and the Court of Appeal in *WHA Ltd v HMRC* [2007] STC 1695.

113. Lloyd LJ (with whom Lewison and Gloster LJJ agreed) concluded:

> "67. … it is indeed necessary to assess the aim of the particular series of transactions objectively, and not by reference to the actual intentions of the parties.
>
> 68. Nor despite some variation in the language used by the European Court, does it seem to me that there is a significant difference between the test as formulated in different judgments of that Court. In *Halifax* there was reference both to "sole purpose" (Judgment paragraph 82, and having "no other explanation": Advocate General at paragraphs 70, 86 and 91) and to "essential aim": Judgment paragraphs 75 and 86. In *Part Service* it was said that it could be sufficient if obtaining the tax advantage constitutes the principal aim of the transactions at issue: paragraph 45. The reference to "sole purpose" in paragraph 82 of *Halifax* was explained as referring to the fact that the test was already satisfied in that case. As it seems to me, *Part Service* did not create a substantial change from the principle set out in *Halifax*, not least because I find it difficult to see a significant difference between "principal" and "essential" aim: in either case there could be some other incidental or ancillary aim. This does not fit exactly with some of the reasoning of the Advocate General in *Halifax*. However, the fact that no Opinion was required of him before the Court proceeded to judgment in *Part Service*, and the fact that the Court did not express itself as intending to modify the principle set out in *Halifax*, seems to me to make it clear that all that was achieved by *Part Service*, in this respect, was to clarify a possible tension between the use of the phrase "sole purpose" in paragraph 82 and of the phrase "essential aim" in paragraphs 75 and 86 in *Halifax*. Nor did the Court in *Weald Leasing* consider that *Part Service* had made any significant difference to the test: see paragraph 30 of that judgment, quoted at paragraph [57] above. In particular, I do not see that there is any basis for suggesting that the formula used in *Part Service* involves any departure from the requirement of an objective approach laid down in *Halifax*.

114. The ECJ in *Velvet and Steel Immobilien und Handels GmbH v Finanzamt Hamburg-Eimsbüttel* [2008] STC 922 at [24] identified the purpose of the exemption for financial transactions contained in Article 13B(d) Sixth Directive (now Article 135(1)(d) of the PVD) which:

> "… as the Commission of the European Communities explains in its written observations, is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit."

It also recognised, in *Gemeente Lausden and another v Staatssecretaris van Financiën* [2007] STC 776 at [76], that:

> "… preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive."

115. Mr Macnab contends that the principal aim of the implementation, by DPAS, of the post 1 January 2012 arrangements was to obtain a tax advantage, and that it is

contrary to the purposes to the principles of fiscal neutrality and to the aims of the PVD for DPAS's supplies of services to be treated as exempt as this would give DPAS a distinct commercial advantage over its competitors. However, it would appear that this submission is based on a comparison of the contractual position before and after 1 January 2012 whereas the *Halifax* test requires an examination of the actual transactions in question, ie those after 31 December 2011.

116. Mr Walters submits that these arrangements are neither contrary to the purposes of the PVD nor was there a "tax advantage" within the meaning of the first part of the *Halifax* test as there is no policy in the VAT legislation that requires a provider of dental plans to make supplies only to dentists and not patients.

117. This must be right, as the VAT treatment of any transaction must depend on the circumstances of the particular case.

118. Also, as is clear from the decisions of the House of Lords in *Lex Service plc v Customs and Excise Commissioners* [2004] STC 73 and *Hartwell plc v Customs and Excise Commissioners* [2003] STC 396, that it is not contrary to the principle of fiscal neutrality for there to be differing approaches to similar circumstances. As Lord Walker said, in giving the decision of the House of Lords, at [29] of *Lex Service*:

> "Mr Prosser [counsel for Lex Service] submitted that it was absurd that there should be different VAT treatment of identical transactions. But in my opinion these are not identical transactions. Hartwell, no doubt learning from Lex's experience, decided to adopt a scheme which explicitly made a different attribution of value, possibly with different commercial repercussions (your Lordships do not know how up-market franchisers would take to the scheme) and certainly with different tax implications for the customer if he were registered for VAT (for instance, as proprietor of a number of hire cars or taxis). So whether or not the Court of Appeal correctly stated Mr Prosser's submission, I would not accept it. [transcript day 1 pp37-42] re fiscal neutrality"

He concluded his speech at [31] saying:

> "… in the VAT system legal certainty is important, as well as fiscal neutrality, and if a supplier wishes to give a discount it is up to him to make his intention clear, especially in the context of a part-exchange transaction. *Hartwell* shows that it is possible, with appropriate documentation."

119. In addition to the application of fiscal neutrality these cases also illustrate that the use of contractual arrangements to specifically avoid a perceived VAT disadvantage is a legitimate and not an abusive practice. I also note that it was accepted in *Part Service* at [47] and indeed *Halifax* itself at [73], that a taxable person can structure his business so as to limit his tax liability without it being an abusive practice.

120. Having found, as a matter of economic and commercial reality that, under the contractual arrangements in place from 1 January 2012, DPAS does make exempt

supplies of payment services to patients it must follow that such supplies cannot be artificial in nature. Taking account of these matters I therefore do not consider that DPAS's contractual arrangements from 1 January 2012 amount to an abusive practice.

Decision

121. For the above reasons the appeal is allowed.

Costs

122. On 14 November 2012 the Tribunal (Judge Sinfield) directed that this appeal be re-allocated from the Standard to the Complex Category Direction, therefore, and I am not aware of any written request by DPAS to exclude the costs regime, the Tribunal may make an order in respect of costs under rule 10(1)(c) of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

123. As I have not heard submissions on costs I direct that, given the decision and if advised to do so, DPAS may either file and serve written submissions in support of an application for costs on the Tribunal and HMRC (to which HMRC may respond within 28 days of receipt) within 28 days of release of this decision or alternatively make an application for an oral hearing within that time. In the absence of any application for an oral hearing and should DPAS apply for costs, I will decide the matter on the basis of written representations.

Right to apply for Permission to Appeal

124. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2013