TC03361

Appeal number: TC/2012/03030 & TC/2012/05911

VALUE ADDED TAX – supply of replacement box sash windows and supply of draught stripping for windows - installation of energy-saving materials - supplies at reduced rate of VAT - whether single supply or separate supplies so that supply of draught stripping for windows is a supply at reduced rate - if single supply, whether nevertheless the reduced rate of VAT should be applied to draught stripping work as a concrete and specific aspect of the single supply - on the facts the supply of draught stripping for windows is a separate supply taxable at the reduced rate of VAT - appeal allowed - s 29A and Group 2, Sch. 7A VATA 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

ENVOYGATE (INSTALLATIONS) LIMITED **Appellants**
RICHVALE LIMITED

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER
J R CHERRY FCA

Sitting in public at Bedford Square on 10 and 11 February 2014

Timothy Brown, of counsel, instructed by Taxwise Business Services, for the Appellant

Lesley Bingham and Richard Mansell of HMRC Appeals and Reviews Department, for the Respondents

DECISION

Introduction

1. This is an appeal by two associated companies, Envoygate (Installations) Limited and Richvale Limited (together, "the Appellants") against assessments to value added tax made by The Commissioners for Her Majesty's Revenue and Customs ("HMRC").

2. The Appellants carry on the business of supplying and fitting high quality bespoke box sash windows and also of supplying and fitting draught stripping for windows. In most cases a customer of the Appellants ordering replacement sash windows will additionally order draught stripping to be fitted when the windows are fitted, but some customers purchase only draught stripping to be fitted to existing windows, and some customers purchase replacement windows without on the same occasion purchasing draught stripping.

3. During the period with which this appeal is concerned the Appellants charged VAT at the standard rate on all supplies of replacement sash windows, but charged VAT at the reduced rate of 5% on all supplies of draught stripping, including those occasions where the customer purchased both replacement sash windows and draught stripping.

4. HMRC accept that supplies of draught stripping qualify for the reduced rate of VAT. However, they argue that where a customer purchases both sash windows and draught stripping there is a single supply made by the Appellants, and that supply is a supply of a window with draught stripping and as such is chargeable to VAT at the standard rate.

5. The Appellants case is, first, that they are making two separate supplies where a customer purchases both replacement sash windows and draught stripping, and that therefore they have correctly charged the reduced rate on the supply of draught stripping. In the alternative, the Appellants argue that even if in these circumstances there is a single supply for VAT purposes, the draught stripping element is a concrete and specific element of that supply which the VAT legislation recognises should be taxable at the reduced rate and accordingly the Appellants are entitled to charge VAT at the reduced rate on that element of the supply.

6. The assessments against which the Appellants appeal (all of which are made to best judgment by HMRC) are as follows:

> (1) Assessments made on 9 June 2011 against Envoygate (Installations) Limited for its quarterly VAT accounting periods during the period 1 October 2007 to 31 March 2011. The amount of tax assessed is £330,167.00, and interest of £14,682.85 is assessed.

(2) Assessments made on 10 January 2012 against Envoygate (Installations) Limited for quarterly VAT accounting periods 6/11 and 9/11. The amount of tax assessed is £64,070.00, and interest of £612.55 is assessed.

(3) Assessments made on 15 February 2011 against Richvale Limited for its quarterly VAT accounting period 12/07. The amount of tax assessed is £4,534.00, and interest of £573.12 is assessed.

(4) Assessments made on 16 June 2011 against Richvale Limited for its quarterly VAT accounting periods 03/08, 06/08 and 09/08. The amount of tax assessed is £29,843.00, and interest of £3,156.95 is assessed.

7. As mentioned, all the assessments were made to best judgment. It transpired at the hearing that in making the assessments no allowance had been made by HMRC for the fact that a portion of the supplies made by the Appellants are supplies of draught stripping for windows only (that is, where there were no supplies of replacement sash windows). HMRC accept that those supplies are properly taxable at the reduced rate of VAT, and therefore even if the assessments were to be upheld in principle, adjustments (by way of reduction) would be necessary to the assessments to take account of those reduced rate supplies. Since our decision is to allow the Appellants' appeal the point does not arise.

8. The Appellants respectively appealed against the assessments to the tribunal, on the ground that the supplies of draught stripping for windows were separate supplies from the supplies of windows. As mentioned, by the time of the hearing the Appellants had added an alternative ground of appeal.

9. The parties were agreed that the appeal relates to those transactions where the Appellants supply to their customers on the same occasion both replacement sash windows and draught stripping for windows. In relation to those transactions the issue we have to decide is whether, for VAT purposes, there is a single supply of a window, or two separate supplies (a supply of a window and a supply of draught stripping for windows). If we decide that there is a single supply of a window, we then have to decide whether the element of that single supply which comprises the provision of draught stripping for windows is nevertheless taxable separately at the reduced rate of VAT.

10. Our decision, for the reasons given below, is that the Appellants, in relation to the transactions with which this appeal is concerned, make two separate supplies, and that the supply which comprises the provision of draught stripping for windows is taxable at the reduced rate of VAT. That decision determines the matter and results in us allowing the Appellants' appeal. If we are wrong in our conclusion, so that there is a single supply of a window, it is our decision that there is no provision for taxing separately at the reduced rate of VAT that element of the single supply which comprises the provision of draught stripping for windows, and that accordingly that single supply is taxable in its entirety at the standard rate.

The relevant legislation

11. This case principally concerns the United Kingdom legislation, the relevant part of which is found in the Value Added Tax Act 1994 ("VATA 1994"). Section 29A VATA 1994 provides for the reduced rate of VAT:

> **29A Reduced rate**
>
> (1) VAT charged on-
>
> (a) any supply that is of a description for the time being specified in Schedule 7A, or
>
> (b) any equivalent acquisition or importation,
>
> shall be charged at the rate of 5%.

12. Group 2 of Schedule 7A VATA 1994 is headed "Installation of energy-saving materials", and comprises two Items:

> 1 Supplies of services of installing energy-saving material in residential accommodation.
>
> 2 Supplies of energy-saving material by a person who installs those materials in residential accommodation.

(For the periods to which this appeal relates Items 1 and 2 also applied to supplies made in connection with buildings intended for use solely for a relevant charitable purpose. Such supplies are not relevant to the Appellants' case. It is accepted that the supplies they made were to "residential accommodation".)

13. Note 1 to Group 2 is headed "Meaning of 'energy-saving materials'". So far as relevant to this appeal it provides:

> 1 For the purposes of this Group "energy-saving materials" means any of the following -
>
> (a) ...;
>
> (b) draught stripping for windows and doors;
>
> .... .

14. The parties agree that the provisions of Schedule 7A VATA 1994 must be construed strictly, since they provide an exception to the general principle that supplies are chargeable to VAT at the standard rate. However, HMRC accept that the draught stripping which the Appellants provide to their customers comprises draught stripping for windows within Note 1, so that the supplies made by the Appellants in relation to installation of that draught stripping (assuming they are separate supplies) are within Group 2 and the VAT charged on such supplies falls to be charged at the reduced rate of 5%.

15. The European basis for the United Kingdom legislation is (so the United Kingdom government claims) found in Article 98 of Council Directive 2006/112/EC on the Common System of Value Added Tax ("the VAT Directive"). Article 98 is in Section 2 (headed "Reduced rates") of Chapter 2 of Title VIII, which deals with rates of tax. So far as relevant, Article 98 provides:

> 1 Member States may apply either one or two reduced rates.
>
> 2 The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

Annex III is headed "List of Supplies of Goods and Services to which the Reduced Rates referred to in Article 98 may be applied". In the list set out in Annex III the following are the relevant items:

> (10) provision, construction, renovation and alteration of housing, as part of a social policy;
>
> (10a) renovation and repairing of private dwellings, excluding materials which account for a significant part of the value of the service supplied;

16. We were told that the European Commission takes the view that these items in Annex III do not extend to the supply of energy-saving materials and related installation services, and that in consequence infraction proceedings have been commenced against the United Kingdom. The parties to this appeal are, however, agreed that the Appellants can rely on the United Kingdom legislation in bringing their appeal to this tribunal.

The evidence and findings of fact

17. In evidence we had before us a bundle of documents which included: the assessments under appeal; correspondence between the parties prior to and subsequent to the issue of the assessments; product specifications and prices for the box sash windows supplied by the Appellants; sample brochures produced by the Appellants advertising their products to potential customers; and order forms and invoices for a sample of customers of both Appellants where the relevant Appellant had supplied replacement box sash windows and draught stripping.

18. The Appellant had one witness, Mr John Rose, the founder of the Appellants. Mr Rose had prepared a witness statement. He appeared at the hearing and gave further evidence in chief, and was cross-examined by Mr Bingham, who represented HMRC at the hearing. Mr Rose's evidence dealt with the following matters: the trading history of each of the Appellants; the nature and construction of the products provided by the Appellants to their customers; the techniques of fitting and installing replacement box sash windows and of fitting and installing draught stripping; the terms of the order form/contract entered into between an Appellant and its customer; the invoicing of customers; the different rates of VAT charged on the supplies made by the Appellants; and the extent to which the Appellants supplied draught stripping without supplying replacement sash windows and the extent to which they supplied replacement sash windows without supplying draught stripping.

19. Mr Rose was an entirely credible witness, and we accept his evidence without reservation.

20. From the evidence we find the facts as follows.

21. Envoygate (Installations) Limited was formed in September 1987 and registered for VAT purposes on 1 April 1988. Richvale Limited was formed in March 1992 and registered for VAT purposes on 6 April 1992. Both Appellants have, at all material times, remained registered for VAT purposes. The two Appellants are associated with each other, but the nature of that association was not disclosed to us - it is not in any event relevant to this appeal.

22. Both Appellants traded under the trade name "The Original Box Sash Windows Company". The business of both Appellants included the manufacture and installation of replacement wooden box sash windows and the manufacture and installation of draught stripping in residential properties.

23. Richvale Limited's business related to the more expensive end of the market, supplying bespoke replacement sash windows constructed of hardwoods and bespoke draught stripping. At the peak of its business it employed 37 employees (of whom 29 were engaged in manufacturing replacement sash windows and draughts stripping) and engaged 6 sub-contractors as sales agents and 6 sub-contractors to fit and install replacement sash windows and draught stripping. Its business declined in the economic downturn, and by 2010 most of its trading activity had been transferred to Envoygate (Installations) Limited.

24. Envoygate (Installations) Limited's business related to the mid-market, supplying bespoke replacement sash windows constructed of softwoods and bespoke draught stripping. At its peak it employed 19 employees (of whom 11 were engaged in manufacturing) and engaged 4 sales agents and 5 fitters. Competitive pressures resulted in the company ceasing to carry on this business at the end of 2011.

25. The bespoke draught stripping which both Appellants manufactured and fitted was supplied under the trade name "Sashslide". Its features and qualities are described below.

26. Apart from the different woods from which replacement sash windows were constructed, there was no material difference between the respective businesses of the Appellants or the way in which their businesses were carried on.

27. The Appellants supplied replacement box sash windows, that is, the sub-frames and glazing which slide within the fixed window frame of sash windows. They did not replace the fixed window frame. Box sash windows are more usually a feature of older properties, and replacement sash windows were bespoke, that is manufactured for the particular customer's window frame and to accord with the style of the fenestration of the customer's dwelling. The sub-frames of replacement windows were manufactured by joiners in natural timber. Different types of glazing could be fitted to meet the requirements of customers. A customer would replace his sash windows for one or more of several reasons: because the existing window had rotted or was damaged; to restore the window to its original style and design; to renovate the window so that it was a better fit (and thereby reduce noise, dust and draughts); to replace the glazing with energy efficient sealed glass units; or to replace the glazing with glass having thermal, acoustic and security properties.

28. The Appellants also supplied bespoke draught stripping. The draught stripping was made by the Appellants of timber and a cushioning material (like very small brushes), and, as with the replacement sash windows, was made specifically for each customer to fit his window. Draught stripping was manufactured at the same premises of the Appellants as were manufactured the replacement sash windows, but by a separate team of joiners.

29. The draught stripping was installed by fixing it directly to the customer's fixed window frame (and not to the sub-frame of the customer's sash window). In a limited number of cases, where the Appellants were replacing a double sash window (in circumstances which required them to replace the dividing frame), the relevant part of the draught stripping would be affixed to that dividing frame supplied by the Appellants. The draught stripping was installed so that the two sliding sections which made up the sash window sub-frame were at all times cushioned within the fixed window frame, further blocking (when the window was closed) draughts and damp air from outside and further reducing noise and dust penetration.

30. The brochure supplied by the Appellants to potential customers during the period with which this appeal is concerned identified draught stripping ("Bespoke draught control for energy saving and reduced noise") as a separate product which the customer could have installed.

31. Some customers of the Appellants purchased draught stripping without purchasing replacement sash windows from the Appellants. Approximately 10% of the Appellants' business comprised supplies of draught stripping only.

32. Replacement box sash windows could be fitted without the need for draught stripping. Some customers of the Appellants purchased replacement box sash windows only. In some cases the customer was precluded by planning constraints from installing draught stripping (as where the customer's property was a Grade 1 or Grade 2 listed property) and in other cases the customer either did not install draught stripping or had draught stripping installed on a later occasion by another supplier. 1% to 2% of the Appellants' business comprised supplies of replacement box sash windows only.

33. Customers who purchased replacement box sash windows from the Appellants were given the option to purchase, at the same time, draught stripping. Most customers chose to purchase both replacement windows and draught stripping, and over 85% of the Appellants' business comprised orders of this kind. The draught stripping had to be fitted after the replacement windows had been installed. Most customers required the draught stripping to be fitted as soon as the replacement sash windows had been installed (and usually this would be by the fitter who had installed the replacement windows) but in some cases the draught stripping was installed on a later occasion.

34. Where customers purchased both replacement sash windows and draught stripping, the cash price of the draught stripping was approximately 50% of the cash price of the replacement windows.

35. A typical order form and contract between an Appellant and its customer set out in the schedule to the document a detailed description (with full measurements, finish, type of glazing, and a sketch) of the required replacement box sash windows and, separately, if ordered, the "Optional Draught-Proofing" (described by measurements and finish, and related by description to each replacement window ordered). The cash price for the replacement windows was shown together with the applicable VAT rate (i.e. the standard rate) and the amount of VAT payable. Separately, and by reference to the "optional items" shown in the schedule, the cash price for the draught stripping was shown together with the applicable VAT rate (i.e. the reduced rate) and the amount of VAT payable. There is then shown a "Grand Total Price (including VAT)" which comprises the aggregate of the cash price and VAT for the replacement windows and the cash price and VAT for the draught stripping. Usually the Appellants offered a rebate on the Grand Total Price to give a "Rebated Cash Price (including VAT)", and the order form then set out when instalments of the Rebated Cash Price were payable by the customer. The order form set out in detail the terms and conditions of sale, none of which are relevant to the issues we have to decide.

36. The Appellants invoiced the customer separately for the replacement windows (shown as "joinery/glazing") with VAT shown at the standard rate, and for the draught stripping (shown as "optional draught proofing") with VAT shown at the reduced rate. The invoices for the draught stripping were often issued on a different date from that of the invoices for the joinery/glazing work for the same customer.

37. In charging the reduced rate of VAT on the supplies of draught stripping the Appellant acted on professional advice.

A single supply or two separate supplies?

38. The first issue we have to decide is whether, when the Appellants supplied replacement box sash windows and draught stripping pursuant to the same order placed by a customer, they were for VAT purposes making a single supply or two separate supplies. It is the Appellants' case that they made two distinct supplies, one of the replacement windows, taxable at the standard rate of VAT, and the other of draught stripping, taxable at the reduced rate of VAT.

39. A series of decisions in the courts have provided guidance on the approach which the tribunal should adopt in deciding whether a transaction comprises a single supply or two or more distinct supplies.

40. The Court of Justice of the European Union ("ECJ") was concerned with this issue in the case of *Card Protection Plan v Commissioners of Customs and Excise* (Case C-349/96) [1999] STC 270. In that case the taxable person provided a credit card registration and loss notification service to its customers and also indemnification of its customers against financial loss should a registered card be lost or stolen. The issue was whether the taxable person was making two supplies (one taxable, the other exempt) or a single (taxable) supply. Having noted that, in deciding whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies which are to be assessed separately for

VAT purposes, it is necessary first to have regard to all the circumstances in which the transaction takes place, the judgment of the ECJ continues as follows:

> "29 In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30 There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998] ECR I-6229, paragraph 24).
>
> 31 In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paragraphs 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event."

41. In the case of *Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 the ECJ repeated its guidance as set out in the *Card Protection Plan* case, and said, in addition that there is a single supply "where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split." (see paragraph 22). In that case the taxable person supplied to its customers functional software which had specifically been customised to the customers' individual requirements. Separate prices were charged for the supply of the basic software and for its customisation. The separate pricing was held not of itself to be decisive, and since those two elements were so closely linked that, on an objective basis and viewing the whole transaction economically, it would be artificial to split them, the transaction constituted a single supply for VAT purposes.

42. In *Byrom and others (trading as Salon 24) v Revenue and Customs Commissioners* [2006] EWHC 111 (Ch) there is an extensive review of the case law on this issue, including the decision of the House of Lords in the case of *College of Estate Management v Customs and Excise Commissioners* [2005] STC 1597. In the *College of Estate Management* case the taxable person provided distance-taught

educational courses and training, and in the course of that it provided books and similar material to its students. The issue was whether it was making a single exempt supply of educational services or separate supplies of the written materials (zero-rated) and the remainder of the educational package (exempt, as a supply of educational services). The House of Lords pointed out that in no sense could the supply of written materials be regarded as ancillary to the supply of the other services (most of the education given to its students related to the use and application of written material), but that looking at matters from an economic point of view there was a single supply which should not be split artificially other than at the cost of distorting the functioning of the system of VAT - and that supply was of educational services (exempt).

43. Applying the guidance offered by these cases to the circumstances of this appeal, we accept without doubt the case as put to us on behalf of the Appellants by Mr Brown.

44. First we note that the draught stripping and the replacement box sash windows were offered by the Appellants to prospective customers as separate and independent products. That is the manner in which they are presented in the Appellants' brochure. Most customers chose to have both, but some chose to have draught-stripping only, and some (albeit a very small proportion) chose to have replacement windows only. Where there is a supply of draught stripping alone, HMRC accept that it is properly taxable at the reduced rate of VAT.

45. We conclude from this that, where the Appellants supply both replacement windows and draught stripping to a customer in the course of a single transaction, then viewing that transaction from an economic viewpoint those two elements of the transaction cannot be said to be " so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split." The fact that if these elements were supplied by different taxable persons (as can happen where, in Mr Rose's evidence, the Appellants have supplied replacement windows and other suppliers have fitted draught stripping) each supply would be taxed at the different applicable rates of VAT demonstrates clearly that there is no distortion to the system of VAT in regarding the Appellants' transaction as two separate supplies.

46. Other essential features of the transaction support this conclusion - they are not decisive in themselves, but together contribute to a clear picture. Thus, the order placed by the customer identifies clearly and with detailed description the different products which the relevant Appellant is to supply to him, and the form of the order allows the customer, where several windows are to be replaced, to opt for draught stripping for some of those windows rather than all (and, indeed, to opt additionally for some windows that are to be retained to be fitted with draught stripping). Further, the different elements are individually priced in the order form, and that separate pricing is credible and justifiable not only because it is related to the detailed description in the order form of the work to be carried out, but because, from the Appellants' viewpoint, it can be related back to the cost of the respective elements since the replacement windows and the draught stripping are manufactured by separate teams of joiners, and the fitting of each element is a separate if (usually)

consecutive task which can individually be costed. In addition, the customer can choose when the replacement windows are fitted and when (on a later occasion) the draught stripping is fitted. All these circumstances indicate that customers knew that they were purchasing two distinct products, and that it was their intention to do so.

47. If we look at the nature and function of what is supplied we see further factors which support the conclusion that we have in this case two separate supplies. Physically the customer receives, and has fitted separately, two distinct items, the replacement window and the draught stripping. Neither is, as to its nature, features or its function, dependent upon the other. The draught stripping is not attached to the replacement window, but to the customer's fixed window frame. The replacement window functions as a window (letting in light, keeping out weather whilst closed, letting in air whilst open) without the draught stripping. The draught stripping only functions, of course, when there is a window for which it provides a cushion, but that does not have to be the window which is the replacement window. The replacement window has the greater value, but (at 50% of the value of the replacement window) the draught stripping is a product of significant value in its own right.

48. HMRC's case, as put to us by Mr Bingham and Mr Mansell, is that the draught stripping is ancillary to the replacement window in that it provides a means for the better enjoyment of the replacement window. Leaving to one side the point that a case could possibly be made out that the replacement window provides a means for the better enjoyment of the draught stripping, this is to confuse function with the nature of the supply. A replacement window may fulfil some of its functions more effectively because it is cushioned by draught stripping, but that is not to say that the supply of the draught stripping is ancillary to the supply of the replacement window. The supply of the draught stripping can fairly be said to be an aim in itself. It renders the entirety of the window more draught proof by improving the fixed frame in which the replacement sash window - and possibly any subsequent replacement window - rests. In any event, cases such as *Levob* and *College of Estate Management* have shown that it may not be fruitful to try to characterise elements of a transaction as principal or ancillary in nature, and that the question of whether those elements comprise a single supply can, in some circumstances at least, best be answered by looking at the entirety of the transaction from an economic viewpoint. On that basis, as we have concluded above, the Appellants made separate, and not single, supplies.

49. For these reasons we allow the Appellants' appeal.

If a single supply, are the component elements of the supply separately taxable?

50. Having reached the conclusion that the Appellants were making separate supplies rather than a single supply where they supplied to their customers both replacement sash windows and draught stripping, it is not necessary for us to decide whether, if they were making a single supply, the element comprising the supply of draught stripping should nevertheless be taxable at the reduced rate of VAT. However, the parties argued the point before us, and the issue would be relevant if we were found to have reached the wrong conclusion on the single supply issue. This alternative issue is entirely a question of law. Since on any appeal as to the single

supply issue the alternative issue is most likely to be argued in detail, it will be sufficient for us to record the arguments of the parties before us and to set out in summary our conclusion.

51. The Appellants' case is that if there is a single supply comprising both the provision of the replacement sash windows and draught stripping, then the draught stripping is a separately identifiable part of the supply and as such it is a concrete and specific element of the supply which can and should be charged at the reduced rate of VAT. If it is so charged it does not offend the principle of fiscal neutrality, since if the replacement window is supplied by the Appellants and the draught stripping by another supplier, the supply of draught stripping is unquestionably taxable at the reduced rate of VAT.

52. The Appellants rely on a series of judgments of the ECJ. In *Talacre Beach Caravan Sales Ltd v Commissioners of Customs and Excise* (Case C-251/05) [2006] STC 1671 the taxable person sold fixed "mobile home" caravans which were fitted out with all the fixtures and contents required for them to function as caravans. The supply of such caravans is a zero-rated supply, but the supply of the fixtures and contents included in the sale of the caravans would, as a separate supply, be taxable at the standard rate - the legislation which provides that the supply of caravans is zero-rated specifically provides also that the supply of removable contents of a caravan is not zero-rated. It was agreed that there was a single supply, but that since the fixtures and contents were by express provision excluded from the scope of the zero-rated supply, the element of the supply comprising the sale of the fixtures and contents could be taxed at the standard rate: if the whole of the single supply were taxed at the zero-rate, that would have the effect of extending the scope of zero-rating beyond that permitted by the legislation. The Appellants argue that the principle of this decision can and should be applied to circumstances such as theirs where an identifiable part of the supply is, as a separate supply, taxable at the reduced rate.

53. The Appellants also cite the case of *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* (Case C-442/05) [2009] STC 1, the case of *Commission of the European Communities v French Republic* (Case C-384/01) ECR I-4395 and the case of *European Commission v France* (Case C-94/09) [2012] STC 573 as authority for the proposition that different elements within the same supply can in principle be taxed at different rates provided that concrete and specific aspects of a category of supply can be identified, and provided further that the principle of fiscal neutrality is not thereby infringed.

54. HMRC rely on the decision of the Upper Tribunal in the case of *Wm Morrison Supermarkets plc v HMRC* [2013] UKUT 247 (TCC) and the recent decision of this tribunal in the case of *A N Checker Heating & Service Engineers v HMRC* [2013] UKFTT 506 (TC). HMRC argue that the cases on which the Appellants rely are concerned with the issue of whether a provision in national legislation which restricts the application of a reduced rate of VAT is compatible with VAT Directive provisions. If that is so, the national legislation can apply the reduced rate even in circumstances where it results in an element of a wider single supply being taxed at the reduced rate, provided that that element is a "concrete and specific aspect" of the

single supply. The Appellants are required to show that the United Kingdom legislation provides for the provision of draught stripping to be taxed at the reduced rate when it is a concrete and specific aspect of a wider single supply where that single supply is not itself capable of being taxed at the reduced rate. In the present case the wider single supply is the supply of replacement sash windows together with draught stripping. It is not sufficient that the legislation provides for the supply of draught stripping alone to be taxed at the reduced rate.

55. We agree with HMRC's submissions on this issue.

56. The decision in the *Morrison* case is clearly in point, and is reached following a detailed review of the authorities by Vos J. In that case the taxable person made supplies of disposable barbecues which included charcoal as a component. That was a single supply. HMRC argued that the single supply was taxable at the standard rate. Morrison claimed that the charcoal element of the supply was a concrete and specific aspect of the single supply, and should be taxed at the reduced rate, on the basis that (as was agreed) the supply of charcoal for use in barbecues (if itself a single supply) was a supply within the relevant Item in Group 1 of Schedule 7A VATA 1994 ("Supplies for qualifying use of coal, coke or other solid substances held out for sale solely as fuel"). It claimed, citing in support the *EC v France* case, that the United Kingdom had, by enacting that provision in Schedule 7A VATA 1994, specifically legislated for the reduced rate to be applied to an element within a single supply where that element was within the scope of the supplies falling within the legislative provisions.

57. Morrison's case was dismissed by the First-tier Tribunal and then on appeal by the Upper Tribunal. It was held that the ECJ authorities establish that a member state may, by its national legislation, restrict the reduced rate to definable supplies and to concrete and specific aspects of a wider single supply. But for the national court the question is whether the legislation has, in the circumstances of the particular case, provided that the reduced rate should apply to such aspects of a single supply where that single supply is taxable at the standard rate. In Morrison's case Schedule 7A VATA 1994 does not expressly identify "charcoal as part of disposable barbecues" as a supply to which the reduced rate applies, and therefore the concrete and specific aspect of the wider supply (the standard-rated supply of disposable barbecues) identified by Morrison is not within the scope of the provisions providing for supplies that are taxed at the reduced rate.

58. This reasoning was followed in the *A N Checker* case by Judge Nicholas Paines QC. In that case the appellant installed domestic central heating boilers and, by regulation, energy-saving materials such as thermostatic valves, central heating and hot water system controls, and insulation were required to be installed when new boilers were supplied. The supply of the boiler and of the energy-saving materials was a single supply. The supply of a boiler is a standard-rated supply, but a supply of energy-saving materials such as those which the appellant was required to install alongside central heating boilers is (if a separate supply) taxable at the reduced rate. HMRC argued that the single supply made by the appellant was taxable at the standard rate. The appellant argued that the provision of the energy-saving materials

was a concrete and specific aspect of that single supply and as such, on the authority of the ECJ decisions referred to above, should be taxed at the reduced rate.

59. The tribunal considered whether, as a matter of construction of the VAT legislation, that legislation applies a reduced rate of VAT to the supply and installation of energy-saving materials when provided as part of a wider supply of the installation of a boiler and energy-saving materials. The tribunal examined the legislative history of the relevant provisions in detail, and in the context of Parliament's intentions in the light of developing case law on multiple elements comprising a single supply. The tribunal concluded that the reduced-rate provisions as found in section 29A and Schedule7A VATA 1994 apply unambiguously to "a supply" and cannot be construed to apply the reduced rate to elements within a single supply which is otherwise taxable only at the standard rate. Accordingly, the tribunal concluded that when the appellant installed energy-saving materials together with a boiler, it was making a standard-rated supply of which the energy-savings materials were an element, and the relevant legislation did not provide that in such a case the energy-savings material element should be taxed at the reduced rate.

60. The Upper Tribunal decision in the *Morrison* case is, of course, binding on us, and we find the carefully and fully reasoned decision of this tribunal in the *A N Checker* case to be compelling. We did not have argument on the construction of the reduced-rate provisions in the light of their history, and on that issue we have no reason at all to question the thorough survey carried out by Judge Nicholas Paines QC, and the conclusions he reaches, in the *A N Checker* case. That analysis and conclusion is directly relevant to the circumstances of the Appellants' appeal, and we adopt them without reservation in this case.

61. Mr Brown argued that the analysis in the *A N Checker* case is flawed in that it fails to construe the United Kingdom legislation so as to give effect to European Union law (that is, the VAT Directive as applied by the relevant ECJ decisions) which permits two different rates to be applied to the different elements of a single supply. That argument, it seems to us, misses the point that neither the *Morrison* case nor the *A N Checker* case prescribes that the United Kingdom legislation could not, if Parliament had so chosen, have effect to permit such different elements to be taxed at different rates - they conclude instead that the legislation has been drafted so that (at least in those cases - and we say in the Appellants' case also) it does not have that effect. These are not circumstances where the Appellants can argue for the direct effect of Directive provisions, since the VAT Directive permits member states to provide for a reduced rate of VAT in certain circumstances, but does not require them to do so.

62. Our decision therefore is that if, contrary to our conclusion above, the Appellants made a single supply of replacement sash windows and draught stripping, the entirety of that supply is taxable at the standard rate.

Right to apply for permission to appeal

63. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 27 February 2014