

[2019] UKFTT 264 (TC)



**TC07104**

**Appeal number: TC/2017/03135**

*VALUE ADDED TAX – zero rating - dispensing of medicines - prescriptions written by UK registered and non-UK registered doctors - different VAT treatment - interpretation of “registered medical practitioner” - UK and EU approaches to construction - application of EU principle of fiscal neutrality - “Marleasing” conforming construction*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PEARL CHEMIST LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents**

**REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE MARILYN MCKEEVER**

**MR JOHN ADRAIN**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 8 to 10 January 2019**

**Mr Tarlochan Lall Counsel, instructed by MHA MacIntyre Hudson, for the Appellant**

**Mr Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. Pearl Chemist Limited (“Pearl”) carries on the business of a pharmacy and dispenses prescriptions including private prescriptions. This appeal concerns whether Pearl was entitled to zero rate certain of the supplies it made of prescription medicines which were dispensed on private prescriptions.
2. HMRC assessed Pearl to VAT and interest in the sum of £156,782.41 by a notice dated 15 April 2016. The assessment relates to VAT periods from 1 May 2012 to 30 May 2014. HMRC initially made their decision in a letter dated 6 April 2016. Pearl applied for a review of that decision on 6 May 2016. The review was concluded some ten months later by a letter from HMRC of 13 March 2017 and Pearl appealed against that decision on 11 April 2017.

### THE FACTS

3. The facts are not in dispute.
4. Mr Vijay Patel, who gave evidence at the hearing, is a qualified pharmacist and started Pearl Chemist as a sole trader business in 2001. His brother is also a pharmacist and they merged their businesses. The business grew and was incorporated and became Pearl Chemist Limited in May 2012. Mr Patel and his brother are directors of the company which owns 11 retail pharmacies and employs 11 pharmacists in total.
5. In 2007, during the sole trader period, Pearl Chemist entered into a contractual relationship with Hexpress Limited (“Hexpress”), a Guernsey company which continued, following incorporation, until 2013.
6. Hexpress operated websites which offered medical screening and services, primarily for conditions such as erectile dysfunction, hair loss and obesity/weight loss. Hexpress contracted with a UK company, E-med Private Medical Services Limited (“E-med”) to carry out the medical screening services. E-med employed the doctors who actually carried out the screening.
7. Customers of Hexpress could undertake an online consultation with E-med’s doctors. If the doctor decided to issue a prescription, the written prescription would be sent to Pearl where it would be reviewed by a qualified pharmacist. Pearl would then despatch the medicine directly to the individual customer on behalf of Hexpress which would collect payment. Pearl issued an invoice at the end of each month in respect of all the online orders fulfilled that month which Hexpress would pay promptly.
8. Pearl had a similar arrangement with a Mauritian company called Gloxinia (which was unrelated to Hexpress, but also used E-med to provide the medical services) between 2010 and 2013. In this case, Pearl collected payment from the customers on behalf of Gloxinia, retained an amount equal to its agreed fees and remitted the balance to Gloxinia.

9. Pearl treated all these supplies as zero-rated.
10. Initially, E-med employed only doctors registered in the UK with the General Medical Council (“GMC”). At that time, only GMC registered doctors could lawfully issue prescriptions which Pearl could dispense.
11. The law changed in 2008. The Medicines for Human Use (Prescribed by EEA Practitioners) Regulations 2008 (the “2008 Regulations”) provided that a UK pharmacy, like Pearl, would be authorised to dispense medicines on the prescription of a doctor who was lawfully engaged in medical practice in an EEA state, which includes Norway, Iceland and Liechtenstein. Mr Patel was aware of the change and assumed that the zero-rate would also apply to supplies made on the prescription of an EU doctor.
12. The 2008 Regulations also allowed a doctor to issue prescriptions in electronic form.
13. In June 2012 Hexpress introduced an electronic prescription service and E-med began to provide EU registered doctors to provide the medical services. Before the introduction of electronic prescriptions, it would not have been feasible to use EU doctors as it would not have been possible to meet Hexpress’ next day service promise if prescriptions had to be sent by post.
14. During the period to which the assessment relates, the relevant prescriptions were mostly written by two doctors. Dr Poupalos was a qualified doctor registered with the GMC in the UK. Dr El-Kharoubi was also a qualified doctor. He was not registered with the GMC, but was appropriately registered and licensed to practice with the equivalent body in Romania. It appears from the copy prescriptions included in our bundles that he actually practised in the Czech Republic, but there was no suggestion that that affected the position.
15. Both doctors lawfully wrote prescriptions for identical medicines which Pearl lawfully dispensed to customers of Hexpress and Gloxinia.
16. Hexpress’ customers were primarily based in the EU although there were a few non-EU sales. Mr Patel indicated that about 60% of Hexpress’ customers were UK based and the remaining 40% were based in other EU countries. This was the case throughout the period in question. We do not have any figures for Gloxinia’s customers.
17. In August 2014 Pearl was inspected by an officer of HMRC, who did not raise any issue about the zero-rating of the supplies on the two doctors’ prescriptions at the time. It was raised in correspondence with Pearl’s advisors after Pearl gave details about the prescribing doctors.

## THE LAW

18. Group 12 of Schedule 8 to the Value Added Tax Act 1994 (“VATA”) provides for the zero-rating of certain medical supplies. It stated, during the period in question, so far as relevant:

**“Group 12—Drugs, medicines, aids for the handicapped**

Item No

[1 The supply of any qualifying goods dispensed to an individual for that individual’s personal use on the prescription of an appropriate practitioner where the dispensing is—

- (a) by a registered pharmacist, or
- (b) in accordance with a requirement or authorisation under a relevant provision.]

...

*Notes:*

...

[(2B) In item 1 “appropriate practitioner” means—

- (a) a registered medical practitioner;
- (b) a person registered in the dentists’ register under the Dentists Act 1984;
- (c) a community practitioner nurse prescriber;
- (d) a nurse independent prescriber;
- (e) an optometrist independent prescriber;
- (f) a pharmacist independent prescriber;
- (g) a supplementary prescriber.

For the purposes of this Note “community practitioner nurse prescriber”, “nurse independent prescriber”, “optometrist independent prescriber”, “pharmacist independent prescriber” and “supplementary prescriber” have the meanings given in [regulation 8(1) of the Human Medicines Regulations 2012].

(2C) In item 1 “registered pharmacist” means a person who is registered in [the register maintained under article 19 of the Pharmacy Order 2010 or in the register of pharmaceutical chemists kept under] the Pharmacy (Northern Ireland) Order 1976.”

19. So medicines dispensed by a registered pharmacist such as Pearl are zero rated if they are dispensed on the prescription of an “appropriate practitioner”. Note 2B to Group 12 (“Note 2B”) sets out an extensive definition of the persons who qualify as “appropriate practitioners”. For present purposes, the relevant category is that in paragraph (a) a “registered medical practitioner”. Section 9 VATA provides that Schedule 8 VATA is to be interpreted in accordance with the notes to the schedule, so Note 2B forms part of the legislation to be applied.
20. In essence, the result of Note 2B is that medicines dispensed on the lawful prescription of a doctor are zero-rated only if the prescription is written by a registered medical practitioner.

## THE ISSUE

21. The issue in this case may be shortly stated. It is not disputed that Dr Poupalos was a registered medical practitioner and the supplies dispensed on his prescriptions were correctly zero-rated. The question is whether Dr El-Kharoubi was a “registered medical practitioner”. If he was, Pearl correctly zero-rated the supplies made pursuant to prescriptions written by him and must succeed in their appeal. HMRC contend that that Dr El-Kharoubi was not a registered medical

practitioner and the resultant supplies made by Pearl on his prescriptions should have been standard rated and the VAT and interest assessed are due.

### **THE APPELLANT'S SUBMISSIONS**

22. There are two overlapping strands to Pearl's case. They say that, as a matter of statutory construction, Dr El-Kharoubi was a registered medical practitioner. If not, the fact that he is not is a breach of the EU principle of fiscal neutrality and Pearl must be provided with a remedy, by this Tribunal adopting a construction of that term which is in accordance with EU law.
23. The Appellant argues that the expression "registered medical practitioner" should be given its ordinary meaning and on this basis and for the reasons set out below, Dr El-Kharoubi falls within the description.
24. To adopt a purposive construction which allows zero-rating where a pharmacist dispenses a medicine on a lawful prescription would not involve any extension of the zero-rating provisions as, if one looks at the legislative history of this provision, this was in contemplation from the outset.
25. If UK principles of construction do not allow zero-rating in the present case there is clear discrimination between identical supplies made on the prescription of UK doctors and doctors from other EU countries and this is a breach of the principle of fiscal neutrality.
26. That breach entitles and requires this tribunal to adopt a conforming construction of Note 2B so that it is in accordance with EU law or to provide some other remedy.
27. Mr Lall's skeleton argument also included points based on the EU Treaty rights of freedom of movement and freedom of establishment but these were not pursued at the hearing.

### **THE RESPONDENT'S SUBMISSIONS**

28. An EU qualified doctor who is not registered with the GMC is not a registered medical practitioner within the meaning of Note 2B.
29. First, the definition of the term in the Interpretation Act 1978 applies, and that includes only doctors registered with the GMC. Secondly, the purposive approach for which the Appellant contends focusses on the lawfulness of the prescription, whereas Note 2B, throughout its history has focussed on the identity of the prescriber.
30. The provisions of Note 2B do not breach the principle of fiscal neutrality, but if HMRC are wrong about this, this tribunal cannot impose a conforming construction of the sort the Appellant contends for as this would require us to stray beyond interpretation into amendment of the provisions.
31. Nor does the Appellant have any directly enforceable right under EU law which would give rise to an alternative remedy.

## DISCUSSION

32. It is appropriate to begin with a little history.
33. VAT was introduced into UK law by the Finance Act 1972 on the UK's entry into what was then the "Common Market". The VAT system at the time was not harmonised across the member states and, in particular, different states allowed zero-rating of different items for social reasons. From the outset, the UK had a zero-rating provision equivalent to what is now Item 1 of Group 12 of schedule 8 VATA. Various amendments were made to EU VAT law with a view to harmonising the tax across member states, including significant amendments in 1991 and 1992. The UK legislation was consolidated in 1983 and again by the VATA.
34. The current source of EU VAT law is the Principal VAT Directive 2006/112/EC which is implemented in UK domestic law by the VATA,
35. Article 110 of the Principal VAT Directive provides, so far as relevant:

"Member states which at 1 January 1991 were granting exemptions with deductibility [zero-rating] of the VAT paid at the preceding stage ...may continue to grant those exemptions...

The exemptions...referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."
36. This is sometimes called the "standstill" provision. In other words, whilst the UK is permitted to retain the categories of zero-rating which were in force on 1 January 1991, it cannot introduce new categories or extend the existing ones.
37. With that preamble, we now turn to the arguments on the various issues.

### **The Interpretation Act 1978 issue**

38. The categories of "appropriate practitioner" in each of paragraphs (b) to (g) of Note 2B are defined by reference to specified statutory provisions. The expression "registered medical practitioner" in paragraph (a) of Note 2B is not so defined.
39. Mr Mantle says the reason for this is simple; the term "registered medical practitioner" is defined in the Interpretation Act 1978 ("Interpretation Act").
40. Mr Lall submits that when one considers the legislative history of what is now Group 12 of schedule 8 VATA together with the Interpretation Act 1978, the 1978 Act definition does not apply in the context of Note 2B.
41. Group 14 of schedule 4 to the Finance Act 1972 provided for the zero-rating of:

"The supply of any goods dispensed by a person registered in the register of pharmaceutical chemists kept under the Pharmacy Act 1954... on the prescription of a person registered in the register of medical practitioners, the register of temporarily registered medical practitioners or the dentists' register".

42. There was no definition of “the register” and no indication that it was intended to be limited to a UK register. Mr Lall contends that the purpose of the legislation as originally drafted was to make zero-rating available for all lawfully supplied prescription medicines. At the time, prescription medicines could only be prescribed lawfully in the UK by GMC registered doctors.
43. When it came into force, schedule 1 of the Interpretation Act provided a definition of “registered medical practitioner” as being:

“a fully registered person within the meaning of the Medical Act 1956.”
44. The definition was updated in 1983 to:

“a fully registered person within the meaning of the Medical Act 1983”

And it was further updated by the Medical Act 1983 (Amendment) Order 2002 to mean:

“a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practice under that Act”.
45. Meanwhile, the VAT legislation was also revised, but the expression “registered medical practitioner” was not used.
46. Group 14 in Schedule 5 Value Added Tax Act 1983 provided for the zero rating of:

“The supply of any goods dispensed by a person registered in the register of pharmaceutical chemists kept under the Pharmacy Act 1954 or the Pharmacy and Poisons Act (Northern Ireland) 1925, on the prescription of a person registered in the register of medical practitioners, the register of temporarily registered medical practitioners or the dentists' register.”
47. “Visiting EEC practitioners” could be registered in a special list in “the register of medical practitioners” and Note 2 to Group 14 provided for a person who was not registered in that list, but who could have been, to be treated as registered in urgent cases.
48. The Medical Act 1983 section 55 defined a “fully registered person” as

“a person for the time being registered under [the 1983 Act] as a fully registered medical practitioner or...as a visiting medical practitioner from a relevant European State..”
49. So the 1983 VAT legislation recognised that EEC doctors could now issue lawful prescriptions as long as they were registered under the Medical Act 1983, and drugs supplied pursuant to those prescriptions could be zero-rated.
50. The Appellant argued that this was not an extension of zero rating as it was within the original purpose of allowing medicines to be zero rated where they were lawfully prescribed. Mr Lall further argued that the VAT legislation, from its inception, had required medical practitioners to be registered, but there had never been

any tie in to a **UK** register, so one had to apply the normal meaning of “the register of medical practitioners”.

51. The VATA, which was a consolidating act, repeated the 1983 wording in Group 12 of schedule 8.
52. The version of Group 12 of Schedule 8 VATA as set out in paragraph 18 above was introduced by the Value Added Tax (Drugs and Medicines) Order 2009 (“the 2009 Order”). The expressions “appropriate practitioner” and “registered medical practitioner” were used for the first time.
53. The Explanatory Memorandum to the 2009 Order explains the changes made.

“2 .... The current description of the supply refers only to goods prescribed by doctors and dentists. Other health professionals are now permitted to issue prescriptions and these new categories of prescribers have been added to the description of the supply.  
...

4.2 Since Items 1 and 1A were last amended the categories of health professionals who are permitted to issue prescriptions have been substantially extended.

...

#### **Amendment of Group 12 of Schedule 8 of the Act**

7.7 Since the inception of VAT the zero-rate has been applied to supplies of goods for medical and surgical treatment which are dispensed on prescription to an individual for his personal use.

7.8 The legal restraints on who may prescribe and who may dispense controlled drugs on prescription have altered on several occasions since that time. The Group was last updated in connection with such changes in 1997 ...

7.9 Since that amendment there have been a number of further changes to rules governing prescribing and dispensing.

7.10 The categories of health professionals entitled to issue prescriptions have been substantially enlarged. Initially the power to prescribe was extended to suitably qualified nurses ... Thereafter the power to prescribe was extended to other health professionals who are appropriately registered such as midwives, pharmacists, chiropractors, physiotherapists and radiographers.

7.11 ...

7.12 The changes made by this instrument to Group 12 ensure that the supplies of qualifying goods dispensed on prescription to an individual for that individual’s personal use are fully described so as to maintain the zero-rate which is applied to these supplies”

54. This indicates that the purpose of the 2009 Order is to reflect the expansion in the categories of person who may lawfully issue prescriptions.



55. Drugs dispensed on the the prescription of an “appropriate practitioner” are to be zero rated. Note 2B of the relevant provisions sets out the definition of an “appropriate practitioner”. It will be seen from Note 2B as set out above that all the categories of authorised prescriber are defined by reference to a UK statute with the notable exception of “registered medical practitioner”. There are various footnotes to the provisions of the 2009 Order explaining when and how certain provisions were amended and giving details of the various Acts and Regulations referred to.
56. Footnote (c) is critical. It states “registered medical practitioner” is defined in Schedule 1 to the Interpretation Act 1978...as amended by S.I. 2002/3135”.
57. The original definition of “registered medical practitioner” which appeared in the Interpretation Act (apparently with effect from 1 January 1979) was “a fully registered person within the meaning of the Medical Act 1956”. The amendment made in 2002 provided that:
- ““registered medical practitioner” means a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practice under that Act”.
58. Paragraph 48 above sets out the definition of a “fully registered person” under the 1983 Act and it is clear that it requires registration under that Act.
59. The 1983 Act, sections 2 and 3 provide, so far as material

**“2.— Registration of medical practitioners.**

- (1) There shall continue to be kept by the registrar of the General Council (in this Act referred to as “*the Registrar*” ) [a register]<sup>1</sup> of medical practitioners registered under this Act containing the names of those registered and the qualifications they are entitled to have registered under this Act.
- (2) The [register referred to is]<sup>2</sup> “the register of medical practitioners” consisting of [the following lists]<sup>3</sup> , namely—
- (a) the principal list,  
[  
(aa) if anyone is registered under [section 18A](#), the emergency powers doctors list,  
]<sup>4</sup>  
[...]<sup>5</sup>
- (c) the visiting overseas doctors list, and  
[  
(d) the list of visiting medical practitioners from relevant European States.  
]<sup>6</sup>  
[...]<sup>7</sup>
- (3) Medical practitioners shall be registered as fully registered medical practitioners or provisionally [...] <sup>8</sup> as provided in [Parts II and III](#) of this Act and in the appropriate list of the register of medical practitioners [...] <sup>9</sup> as provided in [Part IV](#) of this Act.  
[
- (4) [Section 35C\(2\)\(da\)](#) (the necessary knowledge of English) shall not apply in determining whether a person's fitness to practise is impaired for the purposes of registration under this Act.”

**“3.— Registration by virtue of primary United Kingdom or primary European qualifications.**

(1) Subject to the provisions of this Act any person [ whose fitness to practise is not impaired and]<sup>2</sup> who-

[  
(a) holds one or more primary United Kingdom qualifications and has satisfactorily completed an acceptable programme for provisionally registered doctors; or

]<sup>3</sup>  
(b) being a national of [any relevant European State]<sup>4</sup> , holds one or more primary European qualifications,  
is entitled to be registered under this section as a fully registered medical practitioner.”

60. It is clear from this that “the register” is the register maintained by the General Medical Council. That is, a UK register. If, as the Appellant contends, previous references in the VAT legislation were not confined to a UK register, this would constitute a significant narrowing of the categories of doctors whose prescriptions fell within zero rating. It would be surprising if this narrowing of categories had been made without any explanation or note, especially in an instrument whose stated purpose was to widen the categories of practitioners whose prescriptions were eligible for zero rating. Mr Lall pointed out that the Interpretation Act 1978 has contained a definition of “registered medical practitioner” from 1979 at least and the present definition was included in 2002, yet the term was not included in the VAT legislation (which had been amended several times in the period) up to 2009. Nor was the VAT Act 1994 amended to reflect the additional requirement in the 2002 version of the definition that a registered medical practitioner not only had to be registered under the Medical Act 1983 but also had to hold a licence to practice under that Act. He argues that Parliament cannot have intended the 2009 Order to make significant changes in the law without even mentioning that it was doing so.
61. Mr Lall’s starting point is that the original reference to “the register of medical practitioners” in the VAT Act 1972 was not restricted to a UK register. The words were to be given their ordinary meaning and supplies of medicines were to be zero rated where they were dispensed on a lawful prescription. At the time, only UK registered doctors could lawfully issue prescriptions, but as the categories of lawful prescribers have expanded, the VAT legislation has been extended to reflect this by bringing prescriptions issued by such persons within the ambit of zero-rating. This does not represent an extension of zero-rating, as it is within the original purpose of the Group.
62. Footnote (c) to the 2009 Order appears unhelpful to the Appellant’s argument in that, on the face of it, it says that the (otherwise undefined) expression “registered medical practitioner” is defined in the Interpretation Act 1978 and that definition unequivocally requires the prescriber to be registered on a UK register.
63. Mr Lall submits that the reference in footnote (c) to the Interpretation Act is no more than comment to help the reader by identifying where that expression may be found and does not conclusively determine that the definition applies in this case. He drew our attention to the Statutory Instrument Practice (5th edition, 2017) which is published by the National Archives which is addressed to those

involved in preparing and making statutory instruments. Paragraph 1.1.5 indicates that it is not intended to be a legal textbook, but rather a guide to good practice and proper procedure. Paragraph 3.21 which deals with footnotes says:

“Footnotes are there to help the reader, for example by referring to definitions in the parent Act , or by telling people where they can find useful external information. The information in the footnotes helps to contextualise the legislation.”

64. Section 5 of the Interpretation Act 1978 provides that the definitions in schedule 1 apply “unless the contrary intention appears”.
65. Mr Lall submits that the original VAT legislation did not refer to the expression “registered medical practitioner” and the correct interpretation of the zero-rating provision in what was then Group 14 of schedule 4 VAT Act 1972 zero-rated medicines supplies on a lawful prescription. There was no limitation to doctors registered on a UK register, although, at the time, they were the only people who could issue a lawful prescription in the UK.
66. Parliament cannot have intended the 2009 Order to restrict the category of doctors whose prescriptions resulted in zero-rating given the legislative history of the zero-rating provisions including the 2009 Order itself which expanded the categories of practitioners within the scope of zero-rating. Had such a change been intended, one would have expected it to be highlighted in the explanatory memorandum and there was no such note.
67. Accordingly, when one took account of the provisions as a whole, they evidenced a “contrary intention” and we were invited to disregard the definition of a “registered medical practitioner” in the Interpretation Act, the reference in footnote (c) being for convenience only. Mr Lall submitted we should give those words their ordinary meaning in the light of the original 1972 provisions in the VAT legislation.
68. We were taken to the House of Lords case of *Floor v Davis (Inspector of Taxes)* [1976] STC 457 which considers how a contrary intention may be discerned by looking at the relevant provision in context.
69. That case concerned whether there was a “contrary intention” displacing the normal rule in the Interpretation Act 1899 that the singular should include the plural and *vice versa*. Viscount Dilhorne, who gave the majority judgement said:

“If it can be said that an intention contrary to reading words in the singular in paragraph 15 (2) in the plural appears, then it would follow that the context required 'control' to be construed otherwise than in accordance with paragraph 3 of Schedule 18. While of course it is right to have regard, when construing one provision of an Act to its other provisions (see *Attorney-General v. Prince Ernest Augustus of Hanover* [1957] A.C. 436), I must say that I did not find it helpful to have my attention drawn to every other provision in the Finance Act 1965 in which the word 'control' appears for those provisions do not throw in my opinion any light on whether the context required 'control' in paragraph 15 (2) to be construed otherwise than in accordance with paragraph 3 of Schedule 18.

If, however, on examination of the application of the Interpretation Act and construing 'control' in accordance with paragraph 3 led to paragraph 15 (2) being unworkable, or if not unworkable, to a result that Parliament could not have intended, then it can be concluded that an intention contrary to the application of the Interpretation Act appears and that 'control' is not to be so construed.”

70. This indicates that a contrary intention can be discerned from the fact that a provision would be unworkable or that Parliament cannot have intended the result of applying the normal rule. It also shows that, whilst one can construe a term in the light of the other provisions of the same legislation, one must consider the relevant term in the specific context in which it is found.

71. Mr Lall found further support in the dissenting judgement of Lord Wilberforce who said:

“It does not require authority to establish that the Act is one for the convenience of drafting, 'for further shortening the language used in Acts of Parliament', or that a contrary intention may be gathered from the sense and intention of the Act in question. Though the Act appears to state a presumption this is not a strong one.”

28. Similar points were made by Lord Keith, in his dissenting judgment where he quoted Lord Morris of Borth-y-Gest in *Blue Metal Industries Ltd v R W Dilley* [1969] 3 All ER 437 at 441, [1970] AC 826 at 846:

'Prima facie it can be assumed that in the processes which lead to an enactment both draftsman and legislators have such a provision in mind ... in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole.'

72. Taking account of these comments, Mr Lall concludes that when one considers the scheme of the VAT legislation as a whole, taking account of its history, Parliament cannot have intended, in 2009 to expand the categories of prescribers as a whole and at the same time to narrow the description of those doctors whose prescriptions are eligible for zero-rating. These considerations demonstrate a contrary intention, so that the Interpretation Act definition of registered medical practitioner does not apply to Note 2B.

73. The changes in VAT law, to include within the scope of zero-rating medicines dispensed on a lawful prescription, simply reflect the changes in medical law which have expanded the categories of permitted prescribers. This is within the original purpose of the zero-rating provisions so it is not an expansion of zero-rating to include medicines dispensed on a prescription written by a doctor registered in the EU.

74. The Appellant finds further support for this interpretation in the principle that the law is “always speaking”. That is to say, the law can be interpreted to accommodate changes in technology and circumstances, so that where a new situation is within the original purpose intended by Parliament, the courts can adopt a purposive approach to construe the law in a way which enables them to apply it to those new circumstances.

75. The Upper Tribunal case of *Ryanair Ltd v Revenue and Customs Commissioners* [2013] STC 1360, concerned an exemption from Air Passenger Duty which depended on whether two flights were “connected”. One of the conditions for the exemption (the “ticketing condition”) required that the tickets for each flight had to be contained in the same “booklet of tickets” or if they were in separate booklets, there had to be statements that each was to be read in conjunction with the other to show that they related to a single journey. These provisions were appropriate for paper tickets, but on the face of it, e-tickets could never comply with the ticketing provision. The tribunal employed the “always speaking” principle to construe the ticketing condition as applying also to e-tickets. The tribunal said:

“103. The parties agree that legislation which has not kept pace with technological change must be construed in accordance with “always speaking” principles—that is, it is necessary to ascertain what it is that Parliament intended and apply the words used, in a manner which respects that intention, to (in this case) a technique for documenting the right to take a flight not contemplated by Parliament in 1994, albeit, as [s 43\(1\)](#) shows, a “document” and, correspondingly, a “ticket” need not consist of paper.

104. The move from paper to electronic tickets is only one example of such an unforeseen change; another is the scientific advance in human genetics which was the subject-matter of *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 . The correct approach was described by Lord Bingham of Cornhill in this way: “[8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

[9] There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking....”

105. He then went on to cite what he described as the authoritative observation of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822:

“In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.”

76. The First Tier Tribunal case of *Harrier LLC v HMRC* [2011] UKFTT 725 (TC) concerned the zero-rating of books. The question was whether a photobook was a “book” for these purposes. The tribunal said:

“44. Nor can the domestic provisions be construed so as to reflect only the circumstances applicable at the relevant date of 1 January 1991. Mr Thomas referred in argument to [Article 110](#) being a “standstill” provision. It is that, in the sense that the domestic law had to provide for the zero-rating at 1 January 1991, and no new zero-rating could later be introduced. But a provision which provides for zero-rating for a category of goods cannot itself stand still, any more than the commercial world can (or will) do

so. Technological advances in printing mean that products which in 1991 would not have been conceived of are now a reality, and fall to be classified for VAT purposes. If the construction of the domestic provisions encompasses those new products, they will fall to be zero-rated.”

77. The subsequent paragraphs of the judgement indicated that the tribunal was considering the ordinary meaning of the word “book” and was looking to see if an item not contemplated at the time the legislation was enacted fell within that ordinary meaning. So, at paragraph 47:

“47. The words “book” and “booklet” are accordingly to be given their ordinary meaning, devoid of context. The ordinary meaning of “book” refers to an object that has the necessary minimum characteristics of having a significant number of leaves, usually of paper, held together by front and back covers usually more substantial than the leaves. ...To be a book or booklet the item in question must be one that is to be read or looked at. A diary or address book could not qualify on this basis, because it consisted of blank pages. But books and booklets are not confined to literary works to be read; works comprised solely of images to be looked at can equally be books or booklets.”

78. Applying these principles to the present case Mr Lall submits that between 1973 and 2009 Parliament had not tied the registration of doctors to a UK registration for the purposes of zero-rating under what has evolved to become Group 12 of schedule 8 VATA. That cannot have changed in 2009. One has to apply the “always speaking” principle to the changes in the underlying medical law which allow EU doctors to issue lawful prescriptions for medical supplies in the UK and take account of Parliament’s intention from the outset of VAT zero-rating. On this basis, a doctor registered in the EU but not the UK is a “registered medical practitioner” and the Interpretation Act 1978 does not apply to note 2B.
79. Mr Lall submits that it follows that Doctor El-Kharoubi was a registered medical practitioner for the purposes of zero rating and the Appellant is entitled to zero-rate medicines dispensed on his prescriptions.
80. Mr Mantle, on the other hand, argues that footnote (c) in the 2009 Order means exactly what it appears to mean: that the Interpretation Act definition of “registered medical practitioner” applies to Note 2B. Far from there being any contrary intention, Parliament intended that definition to apply and that definition firmly links zero-rating to registration on a UK register.
81. Mr Mantle agrees that it would have been odd if the 2009 Order had made a substantial change to the law, by narrowing the category of doctors whose prescriptions allowed zero-rating, without mentioning it. His response is that the 2009 Order did not change the law in that way and that, from the outset, zero-rating had been linked to registration on a UK register.
82. He suggested that the Appellant’s submissions had focussed on the intention of Parliament being to permit zero-rating of medical supplies dispensed on a lawfully issued prescription. That is, the critical factor is the lawfulness of the prescription. Whilst Parliament could have done that, Mr Mantle submits that it did not. Instead, Parliament focussed on the identity of the prescriber. Mr Lall said in reply that he did not contend that zero-rating was tied to lawful prescriptions, but the zero-rating framework was only available for lawfully supplied goods.

83. Group 14 of schedule 4 to the Finance Act 1972 provided for the zero-rating of:  
 “The supply of any goods... on the prescription of a person registered in **the** register of medical practitioners...”. (emphasis added)
84. The use of the definite article indicates that it is referring to a particular register. At that time, only UK registered doctors could lawfully issue prescriptions so the relevant register must be the UK register of doctors. The legislation would not have allowed zero-rating of goods dispensed on the basis of unlawful prescriptions.
85. Group 14 of schedule 5 to the VAT Act 1983 again refers to “the register of medical practitioners”. There is no definition identifying the register referred to, but on the same day as the VAT Act 1983 came into force, the Medical Act 1983 also came into force and that defined “the register of medical practitioners” as meaning two registers containing four lists maintained by the General Medical Council. It seems reasonable to infer that this is the same register as that referred to in Group 14. At that time, pharmacists could not dispense on the prescription of an EU doctor.
86. As noted, the 2009 Order permitted zero-rating of medical supplies on the prescription of an “appropriate practitioner”. In every case except “registered medical practitioner” the Order itself set out the statutory provisions which applied to the different categories of prescriber. Dentists had to be registered under the Dentists Act 1984 and other prescribers such as a “community practitioner nurse prescriber” or “optometrist independent prescriber” were to have the meanings set out in the Prescription Only Medicines (Human Use) Order 1997, as amended. Mr Mantle took us in some detail through examples of those definitions and in all cases, the definitions required registration on a register maintained by a UK body.
87. The Medicines for Human Use (Prescribing by EEA Practitioners) Regulations 2008 (“the 2008 Regulations”) allowed UK pharmacists to dispense medicines against a prescription issued by an “EEA Health Professional”.
88. The original definition was:  
 ““EEA health professional” means—  
 (a) a doctor who is lawfully engaged in medical practice in an EEA State other than the United Kingdom or in Switzerland; or  
 (b) a dentist who is lawfully engaged in dental practice in an EEA State other than the United Kingdom or in Switzerland (including a person whose formal qualifications as a doctor are recognised for the purposes of the pursuit of the professional activities of a dental practitioner under Article 37 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications),  
 and who is not otherwise a doctor or a dentist for the purpose of these Regulations;”
89. We note that an EEA Health Professional’s prescribing powers were more limited than those of the equivalent UK doctors and dentists in that they could not prescribe “controlled drugs”.

90. We also note that these Regulations predated the 2009 Order, but Parliament chose not to include EEA Health Professionals in the definition of “appropriate practitioner” for VAT zero-rating purposes.
91. In HMRC’s submission, the 2009 Order did not make any changes to the basis of zero-rating; from inception, it had been linked to registration on a UK register.
92. The new categories of prescriber were all defined by statute and/or regulations which led to UK registers. There was no need to define “registered medical practitioner” in the 2009 Order because that term was defined in the Interpretation Act, as footnote (c) stated.
93. Mr Mantle took us to a statement in Benion on Statutory Interpretation, seventh edition at page 451 that “If material is put in the form of a footnote it is still fully part of the Act and must be construed accordingly.” The case of *Evan Warnink BV v J Townsend & Sons (Hull) Ltd* [1982] 3 All ER 312 was cited as authority for this proposition. Mr Mantle pointed out that the Statutory Instrument Practice was mere guidance as to the approach to footnotes.
94. Mr Lall contended that *Warnink* was not a general authority that a footnote was part of the Act (or statutory instrument in our case). In *Warnink*, the provision was a form in the schedule to the Supreme Court of Judicature Act 1875 which provided for interest to run from a particular date. The date was left blank, but a footnote supplied the date. It was held that a change in the footnote changed the relevant date. Mr Lall distinguished this case from *Warnink*, on the basis that in the latter case, the footnote filled in an operative part of the form. In Pearl’s case, the footnote was merely a reference to help the reader and show that the term had been defined, which was why it was necessary to demonstrate a contrary intent.
95. Mr Mantle agreed that when considering whether there was a contrary intent *Floor v Davis* required one to look at the legislation as a whole and the context of the relevant provisions. The Appellant had suggested that presumption that the Interpretation Act applied subject to a contrary intent was a weak one. This might have been the case in the minority judgement, but the majority judgement put the bar somewhat higher. Viscount Dilhorne had stated “It must be borne in mind that the Interpretation Act 1889 is to apply unless a contrary intention is shown. It is not the case that an intention that the Act should apply has to be shown for it to apply.”
96. Further, the test for contrary intention referred to in paragraph 69 above requires the Interpretation Act meaning to be unworkable or to produce a result that Parliament “cannot have intended”.
97. If, contrary to Mr Mantle’s main submission that the footnote is incorporated in the Order, we find it is not, Mr Mantle submits that the footnote indicates that Parliament intended the Interpretation Act is to apply. The test for contrary intention is not met.
98. Mr Mantle’s next submission is that the “always speaking” principle has no application in the present case. The principle allows the courts to adopt a purposive approach to interpret the meaning of ordinary words like “ticket” as in *Ryanair*, or “book” as in *Harrier*. The Appellant argued that the term “registered medical



practitioner” also had an ordinary meaning. Between 1972 and 2009 the relevant expression was a person “registered in the register of medical practitioners” which became “registered medical practitioner” under the 2009 Order. For 37 years, the expression had operated without a specific definition and there is no reason to believe that the provisions cannot work without a specific definition after 2009. This, Mr Lall says, is why one can ignore the Interpretation Act. The ordinary meaning of registered medical practitioner requires one to ask only “are you a medical practitioner?” and “are you registered?”. “Medical” includes doctors and “practitioner” means a person who may practice ie someone who is allowed under the Medical Act 1983 to practice. On this definition a person who was, say, a registered doctor in Canada (or elsewhere outside the EEA) and able to practice in Canada (or other jurisdiction) would not be an “appropriate practitioner” because his prescription could not be used to supply medicines lawfully in the UK and the zero-rating provisions would not apply to unlawful supplies.

99. The 2008 Regulations provided for EEA practitioners to be able to issue prescriptions for use in the UK. There is no explanation as to why EEA practitioners were excluded from the 2009 Order. The always speaking principle can be applied on the basis that Parliament’s policy was to allow the prescriptions of EEA practitioners to be used lawfully in the UK. The VAT legislation does not reflect this so the legislation can be interpreted on a purposive basis to allow the zero-rating of medical supplies issued on the prescription of registered EEA doctors. Further, bearing in mind the legislative history of these provisions, this does not represent an extension of zero-rating but an interpretation which is consistent with the original legislative purpose.
100. We have carefully considered the submissions of both parties on the meaning of “registered medical practitioner” and we prefer Mr Mantle’s approach.
101. It is clear that from the outset that zero-rating of medical supplies was linked to those registered on a UK register. The reference to “the register” indicates a specific register and the register in question is to be found in the medical law legislation. There is no ordinary meaning of the expression “registered on the register of medical practitioners”. If the term is not defined by reference to a particular register, it is difficult to see how the expression can be cut down to include only EU doctors. The Medical Act 1983 includes doctors qualified in Norway, Iceland and Liechtenstein, which are EEA, but not EU states and doctors qualified in Switzerland which is outside both groupings. The link to lawfulness, is not, in our view sufficient.
102. It might be arguable that the expression “registered medical practitioner” went wider than practitioners registered in the UK were it not for the fact that this expression first appears in the 2009 Order. The Order defines all other categories of “appropriate practitioner” by reference to UK statutes and registers and by a footnote indicates that the expression “registered medical practitioner” is defined in the Interpretation Act. The Interpretation Act 1978 definition, consistently with the legislative history of zero-rating, requires registration on a UK register maintained by the GMC.

103. Whether or not footnote (c) is part of the Order or mere guidance, it is clear that it expressly states that the Interpretation Act definition applies. Its helpful guidance (if it is merely guidance) is to explain why there is no statutory definition of that term in the body of the Order when Note 2B defines all other categories of prescriber by reference to stated legislation. The only conclusion from this is that Parliament intended that definition to apply. We are unable to discern any contrary intention.
104. On the basis that “registered medical practitioner” is a technical term defined by statute, we also agree that there is no room to apply the “always speaking” principle which applies to situations where the law has not kept up with the development in meaning of ordinary words.
105. For these reasons we conclude that, applying normal UK principles of statutory construction, Dr El-Khourabi was not an “appropriate practitioner” within the meaning of Note 2B so that medical supplies dispensed on his perfectly lawful prescriptions were not entitled to be zero-rated.
106. Having rejected the Appellant’s arguments on the interpretation of the VAT provisions as a matter of domestic law, we must now turn to the EU principle of fiscal neutrality.

### **The Fiscal Neutrality issue**

107. The principle of fiscal neutrality may be summarised as requiring two supplies which are similar in the eyes of the consumer to be taxed in the same way. The test is set out in the judgement of the European Court in the case of *Rank Group Plc v HMRC* Cases C-259/10 and C260/10 [2012] STC 23 (*Rank*). The Court said, at paragraph 32:

“32. According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 22; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03) [2005] STC 1547, [2005] ECR I-4427, paras 41 and 54; *Marks & Spencer plc v Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283, para 47, and *European Commission v Netherlands* (Case C-41/09) (3 March 2011, unreported), para 66).

...

36. Having regard to the foregoing considerations, the answer to question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.”

108. The Court continued, at paragraph 44:

“44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being

whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see, to that effect, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 27, and, by analogy, *FG Roders BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam* (Joined cases C-367/93 to C-377/93) [1995] ECR I-2229, para 27, and *European Commission v France* (Case C-302/00) [2002] ECR I-2055, para 23).”

109. The fundamental question is: does it make any difference to the consumer whether he receives one supply or the other? If the answer is “no”, the supplies are similar and should be treated in the same way for VAT purposes.
110. HMRC accept that the supplies of drugs are treated differently, depending on whether the prescribing doctor is registered and licensed by the GMC or not, but argue that the different treatment in this case does not breach the principal of fiscal neutrality.
111. A difference in VAT treatment is permissible where the difference is objectively justified. See for example paragraph 51 of *Marks & Spencer Plc v Revenue and Customs Commissioners* C-309/06 [2008] STC 1408 (*M&S 2*) where the European Court observed:

“In this connection, the general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified.”
112. It is common ground that there is not directly effective EU right to zero-rating. The Court in *M&S 2* said at paragraph 28:

“where, under art 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a member state has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies, a trader making such supplies does not have a directly enforceable Community-law right to have those supplies taxed at a zero rate of VAT.”
113. It is also common ground that the “standstill” nature of Article 110 of the Principal VAT Directive means that member states cannot extend the scope of zero-rating beyond the zero-rates in force on 1 January 1991 (*Talacre Beach Caravan Sales v CCE* Case C-251/05 [2006] STC 1671). Mr Mantle submits that zero-rating applies, and in 1991 applied, only where the prescribing doctor is UK registered and to include medicines supplied on prescriptions issued by non-UK registered doctors would be an impermissible extension. The Appellant argues that the inclusion of non-UK registered doctors would not constitute an extension of zero-rating.
114. The relationship between Article 110 of the Principal VAT Directive and the principle of fiscal neutrality was considered by the European Court in the case of *Ideal Tourisme SA v Belgian State* Case C-36/99 [2001] STC 1386. The appellant in that case operated international passenger transport by coach. Such services were subject to a VAT rate of 6%. International passenger transport by air was zero-rated under provisions which pre-dated the standstill provisions of Article 110. The appellant contended that this distinction was a breach of the principle of fiscal neutrality. The Court did not consider whether the two forms of transport

were similar in the context of the case, but held that there was no breach of the principle of equal treatment. The Court said:

“30. By its first question, the national court essentially asks whether the principle of equal treatment precludes legislation of a member state which, first, in accordance with art 28(3)(b) of the Sixth Directive, continues to exempt international passenger transport by air and, second, taxes international passenger transport by coach.

31. *Idéal Tourisme* claims that as a coach transport undertaking it competes directly with air transport operators over intermediate distances, that is, distances from 300–400 km to 2,500–3,000 km. It submits that the difference in taxation is therefore unjustified and breaches the principle of equal treatment. The Belgian State and the French and Portuguese governments contend, on the other hand, that those two means of transport are not sufficiently interchangeable to be regarded as belonging to the same market. The Commission states that the difference in taxation according to the means of transport used by the taxable person, whether or not objectively justified, must be regarded as consistent with the Sixth Directive as long as the Community legislature has not put an end to the transitional provisions on exemption.

32. It must be noted at the outset that art 28(3)(b) of the Sixth Directive, read in conjunction with Annex F thereto, clearly and unambiguously authorises member states to continue to apply, under the same conditions, certain exemptions which were provided for in their legislation before the entry into force of the Sixth Directive. While that article consequently does not permit member states to introduce new exemptions or extend the scope of existing exemptions following the entry into force of that directive, it does not prevent a reduction of existing exemptions, especially as their abolition constitutes the objective pursued by art 28(4) of the directive (see *Norbury Developments Ltd v Customs and Excise Comrs* (Case C-136/97) [1999] STC 511 at 523, [1999] ECR I-2491 at 2513, para 19).

33. It follows that a member state which, like the Kingdom of Belgium, imposes VAT on the international transport operations of coach passenger transport operators and continues to exempt international air passenger transport would not be authorised to extend to the former the exemption allowed to the latter, even if the difference in treatment infringed the Community principle of equal treatment. On the other hand, it could tax air transport as well, in order to remove such a difference in treatment.

34. However, a member state may continue on the one hand to exempt, under the conditions set out in art 28(3)(b) of the Sixth Directive, international passenger transport by air, and on the other hand to tax international passenger transport by coach.

35. The principle of equal treatment is indeed one of the fundamental principles of Community law. That principle requires that similar situations are not to be treated differently unless differentiation is objectively justified (see *Klensch and ors v Secrétaire d'État à l'Agriculture et à la Viticulture* (Joined cases 201/85 and 202/85) [1986] ECR 3477 at 3507, para 9).

[2001] STC 1386 at 1398

36. As *Idéal Tourisme* rightly submits, it also follows from *Klensch*, that when member states transpose directives into their national law they must comply with the principle of equal treatment (see [1986] ECR 3477 at 3508, para 10).

37. However, the Community system of VAT is the result of a gradual harmonisation of national laws in the context of arts 99 and 100 of the EC Treaty (now arts 93 EC and 94 EC). As the court has repeatedly stated, this harmonisation, as brought about by successive directives and in particular by the Sixth Directive, is still only partial (see *ORO Amsterdam Beheer and Concerto v Inspecteur der Omzetbelasting* (Case C-165/88) [1991] STC 614 at 625, [1989] ECR 4081 at 4100, para 21).

38. As the Belgian State stated at the hearing, the harmonisation envisaged has not yet been achieved, in so far as the Sixth Directive, by virtue of art 28(3)(b), unreservedly authorises the member states to retain certain provisions of their national legislation predating the Sixth Directive which would, without that authorisation, be incompatible with that directive. Consequently, in so far as a member state retains such provisions, it does not transpose the Sixth Directive and thus does not infringe either that directive or the general Community principles which member states must, according to *Klensch* [1986] ECR 3477, comply with when implementing Community legislation.

39. With respect to such a situation, it is for the Community legislature to establish the definitive Community system of exemptions from VAT and thereby to bring about the progressive harmonisation of national VAT laws (see, to that effect, *Royscot Leasing Ltd v Customs and Excise Comrs* (Case C-305/97) [1999] STC 998 at 1015, [1999] ECR I-6671 at 6705, para 31).

40. The answer to the first question must therefore be that, in the present state of harmonisation of the laws of the member states relating to the common system of VAT, the Community principle of equal treatment does not preclude legislation of a member state which on the one hand, in accordance with art 28(3)(b) of the Sixth Directive, continues to exempt international passenger transport by air, and on the other hand taxes international passenger transport by coach.”

115. *Ideal Tourisme* articulates a number of relevant principles.

- (1) It is for the member state to determine which supplies are to be zero-rated for VAT.
- (2) The member state can retain that exemption, as long as it complies with what is now Article 110.
- (3) The member state cannot introduce new exemptions or extend the scope of existing exemptions to other, similar, supplies even where this would constitute a breach of the principle of fiscal neutrality in the absence of authorisation in Article 110.
- (4) The member state could tax the previously exempt supply in order to avoid discriminatory treatment.

116. It follows that a member state can continue to discriminate between different kinds of supplies where one was zero-rated in 1991 and the other was not.

117. The leading UK case on the relationship between zero-rating and fiscal neutrality is the Court of Appeal case of *Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners* [2014] STC 2508 (*Sub One*). McCombe LJ, who gave the judgment of the Court said:

“[57] The second point was a point of law, namely that the EU principle of fiscal neutrality cannot have the effect of overriding the UK's socio-political decision to exclude certain hot take away food from the zero-rate exemption. The decision taken by the UK could only be supervised at an EU level in so far as the measures taken fell outside the scope of a concept of a clearly defined social reason: see the Respondents' skeleton argument, paras 18 and 19.

...

[60] On the second point, in my judgment, the short answer is that the learned judge's rejection of it, [2013] STC 318 at paras [79] and [80] of his judgment, was correct. In those paragraphs, the judge said:

[2014] STC 2508 at 2530

'[79] Counsel for HMRC pointed out that zero-rated supplies falling within art 110 were not harmonised. She submitted that it was for the UK to determine the boundary between zero-rated supplies and standard-rated supplies in accordance with its own social policy, and that the principle of fiscal neutrality could not be relied upon to challenge the UK's decision as to where to draw the line. She further submitted that this proposition was supported by the judgments of the CJEU in a series of cases, in particular *Idéal Tourisme* (see [2001] STC 1386, [2000] ECR I-6049, paras 35–39 of the judgment), *Talacre* (see [2006] STC 1671, [2006] ECR I-6269, paras 24–25 of the judgment), *Rank* (see [2012] STC 23, paras 53–54 of the judgment) and *Isle of Wight* (see [2008] STC 2964, [2008] ECR I-7203, para 44 of the judgment).

[80] I accept counsel for HMRC's submission to the extent that the starting point is that it is for UK to determine the boundary between zero-rated supplies and standard-rated supplies. I also accept that the CJEU's judgments in *Rank* and *Isle of Wight* demonstrate that the principle of fiscal neutrality cannot be relied upon as depriving the UK of its discretion in this respect. It does not follow that the UK can draw the line in such a way as to discriminate between objectively similar supplies. On the contrary, art 110 is explicit that exemptions must be in accordance with Community law. In my judgment *European Commission v France* and *Marks & Spencer II* make it clear that the maintenance of the exemption is only permissible in so far as it complies with the principle of fiscal neutrality. As in *Idéal Tourisme* and *European Commission v France*, the UK can distinguish between supplies [which] are different from the point of view of the consumer; but, as in *Rank*, it cannot distinguish between supplies which are the same from the point of the consumer.'

118. This emphasises that it is for the UK to determine what supplies are to be zero-rated in order to achieve its social policy but, having drawn the line, it must apply the principle of fiscal neutrality to similar supplies which are on the same side of the border. McCombe LJ dealt with that point in response to HMRC'S argument that

“...the decision of the CJEU in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951, ..., threw additional light on the matter.

[62] In that case the German Federal Finance Court applied to the CJEU for an answer to the questions:

'1. Is the management of security holdings (portfolio management), where a taxable person determines for remuneration the purchase and sale of securities and implements that determination by buying and selling the securities, exempt from tax – only in so far as it consist in the management of investment funds for a number of investors collectively within the meaning of art 135(1)(g) of EC Directive 2006/112 or also

– in so far as it consists in individual portfolio management for individual investors within the meaning of art 135(1)(f) of EC Directive 2006/112 (transactions in securities or the negotiation of such transactions)?

...

[63] The Advocate General and the court decided that the exemption provided by art 135(1)(f) of the Principal VAT Directive did not require individual portfolio management services to be included in the scope of the exemption from VAT for which that article provided. ...

The court endorsed that conclusion in these terms:

'45. Lastly, it must be stated that that conclusion is not called into question by the principle of fiscal neutrality. As the Advocate General stated at point 60 of her opinion, that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions.'

[64] The Respondents seek to extend those comments in the *Deutsche Bank* case to the national legislation here. However, I accept Miss Whipple's submission that the case was concerned with a 'black letter line' setting the boundaries of an exemption to be found in the Directive itself. The exemption had to be construed strictly and fiscal neutrality principles could not flex those boundaries. **Here we are not concerned with such boundaries. We are concerned with a differentiation in treatment between traders supplying similar goods within the same national exemption category.** The Appellant submits that if an exemption is in principle permitted in national law by the VAT Directive it must be applied consistently with the principle of fiscal neutrality. I think that Miss Whipple's submission in this respect is supported by the authorities cited in para 60 of the Appellant's skeleton argument, ie *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen* (Case C-45/01) [2005] STC 228, [2003] ECR I-12911, para 42) and *CopyGene A/S v Skatteministeriet* (Case C-262/08) [2010] STC 1799, [2010] ECR I-5053, para 64.

[65] I also consider that the Appellant's submission accords with my understanding of the general principle of the fiscal neutrality rules as found in the more general cases on the subject..." (emphasis added)

119. HMRC's position in the present case is that supplies on the prescription of GMC registered doctors and doctors registered elsewhere fall on different sides of the border. The Appellant submits that we are dealing with supplies within the same national exemption category and the VATA discriminates between similar supplies within that category.
120. Mr Mantle submitted that differences in the regulatory regime applying to supplies can justify different VAT treatment and referred to *Rank* and the European Court case *EC Commission v French Republic (Republic of Finland Intervening)* C-481/98 [2001] STC 919 ("*French medicines case*"). In *Rank*, the Court stated, at paragraph 50:
- “...the differences in the legal systems relied on by the referring courts are of no relevance to the assessment of the comparability of the games concerned.  
50. That outcome is not called into question by the fact that, in certain exceptional cases, the court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (*European Commission v France (Finland intervening)*) (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 27, and *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* (Case C-357/07) [2009] STC 1438, [2009] ECR I-3025, paras 38, 39 and 45).”
121. The Court accepted that there were cases where differences in the regulatory framework justified a difference in the VAT treatment. However, it is not the fact of the regulatory differences which permits the differences but whether those differences create a distinction in the eyes of the consumer in terms of satisfaction of his own needs. It also emphasised that those cases were “exceptional”.

122. *Rank* itself concerned different types of slot machines, one type being exempt from VAT, the other type being chargeable. The two types of machine were subject to different legal and regulatory regimes. On this question, the Court concluded:

“51. Having regard to the foregoing considerations, the answer to question 1(a) in Case C-259/10 and to the first question in Case C-260/10 is that, where there is a difference in treatment of two games of chance as regards the granting of an exemption from VAT under art 13B(f) of the Sixth Directive, the principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation.”

123. On the other hand, the different treatment of games with different stakes, prizes and chances of winning was justifiable as such matters would have a significant influence on consumers in deciding which games to play.

“57. In that regard, differences relating to the minimum and maximum stakes and prizes, the chances of winning, the formats available and the possibility of interaction between the player and the slot machine are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning.

58. In the light of the foregoing considerations, the answer to the second question in Case C-260/10 is that, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning.”

124. Such distinctions mean that the games are not “similar” for the purpose of applying the principle of fiscal neutrality.

125. The *French Medicines* case was one of the exceptional cases. Under the French social security system, the cost of certain medicinal products was reimbursable to the consumer. Other medicinal products which had the same preventative or curative effects were not reimbursable. The distinction was based on objective criteria, for example that one was more expensive than the other. The reimbursable medicines were subject to VAT at 2.1% and the non-reimbursable medicines were subject to VAT at 5.5%. The European Court held that this difference in treatment complied with the principle of fiscal neutrality because the factor which had an influence on the choice of the average consumer was whether the cost of the medicine was reimbursable or not and not the VAT rate: the products were not in competition with each other. The Court said:

“25. It is clear that, in introducing and maintaining in force a VAT rate of 2.1% solely for reimbursable medicinal products, the French legislation did not, and does not, infringe the principle of fiscal neutrality. Reimbursable and non-reimbursable medicinal products are not similar products in competition with each other.

26. In the first place, a medicinal product is included on the list of reimbursable medicinal products pursuant to objective criteria and in accordance with EC Council Directive 89/105. Under that directive, even though two medicinal products have the same curative or preventive effect, one may be reimbursable and the other not, inter



alia, because the latter product is considered to be too expensive. This distinct classification is none the less in accordance with Community law.

[2001] STC 919 at 931

27. Next, it must be noted that the effect of this classification is that the two categories of medicinal products are not similar products in competition with each other. Once included on the list of reimbursable products, a medicinal product will, vis-à-vis a non-reimbursable medicinal product, have a decisive advantage for the final consumer. This is why the consumer, as the Advocate General notes in para 66 of his opinion, seeks in preference medicinal products coming within the category of those that are reimbursable, and consequently it is not the lower rate of VAT which provides the reason for his decision to purchase. The reduced rate of VAT on reimbursable medicinal products does not have the effect of favouring the sale of such products over the sale of medicinal products that are not reimbursable. The two categories of medicinal products are thus not in a situation of competition in which the difference in the rates of VAT could be relevant.”

126. Mr Mantle also referred to the First Tier Tribunal case of *News Corp UK & Ireland Limited* [2018 UKFTT 129 (TC)]. This case concerned whether there was a breach of the principle of fiscal neutrality in charging the standard rate of VAT on digital editions of newspapers whilst zero-rating physical newspapers. The case, referring to *Sub One*, also drew a distinction between a difference in treatment between supplies on either side of a boundary drawn by the national law (permitted) and a distinction between similar supplies on the same side of the boundary (not permitted). In that case, Judge Brannan decided that zero-rating for physical newspapers, which was a supply of goods, could not be extended to supplies of newspapers in electronic form which were supplies of services. He said:

“I have concluded that applying a different VAT treatment (standard rating) to the digital editions of the titles from that applicable to the newsprint editions (zero rating) does not offend against the principle of fiscal neutrality. Although I am satisfied that (with the exception of The Sun Interactive App) the digital editions were similar to the newsprint editions from the point of view of the consumer, I do not consider that the principle of fiscal neutrality can operate to extend the scope of zero rating from its original application to goods (i.e. newsprint) to services (i.e. digital editions).

231.

The zero rating in respect of “newspapers” in 1991 applied only to printed matter. That “exemption with refund” complied with Community law because in 1991 “newspapers” could only have meant printed matter. There was no disparity in treatment between printed newspapers and digital editions because the latter did not exist (and neither party suggested that they did).<sup>2</sup> The zero rating provisions of Item 2 Group 3 Schedule 8 applied only to the supply of goods i.e. to printed newspapers. The scope of the zero rating provision was effectively “frozen” at 1991 (see the “standstill” references in *Talacre Beach*: Advocate General at [16] and the Court at [22]). By analogy, in that case the EU law principles concerning single supplies could not be used to expand the scope of a national law zero-rating statute. In my view it follows that the scope of the zero rating provision cannot be extended from the supply of goods to the supply services after 1991.

232.

Effectively, this appeal involves a “black letter” boundary contained in Item 2 Group 3, to use McCombe LJ’s terminology, which cannot be extended. This is not a case, like *Sub One*, where there was different treatment between traders supplying goods within the same exemption category. The digital editions of the titles, which constitute a supply of services, are simply not within the zero rating provisions and the

scope of those provisions cannot be enlarged by the application of a principle of interpretation, such as that of fiscal neutrality. To expand the meaning of Item 2 Group 3 Schedule 8 to cover the digital editions would be an impermissible extension of those provisions.”

127. We now turn to apply these cases and principles to Pearl.
128. The starting point is to see whether there is a difference in VAT treatment in relation to supplies which are similar or identical from the point of view of the average consumer and which meet the same needs (*Rank*). In considering whether supplies are similar, regulatory or legal differences may be relevant, but this will be the exception and they will only be significant where the regulatory or legal differences affect the choice of the consumer (*Rank* and *French Medicines*).
129. The categories of zero-rating which applied in 1991 may continue to apply and it was for the member state to determine which supplies were to be zero-rated. However, the categories cannot be extended nor can new ones be introduced, even where there is a breach of the principle of fiscal neutrality (*Ideal Tourisme*).
130. There is a distinction between the different treatment of supplies which are on different sides of the “border” which the member state has chosen to draw and a difference in the treatment of supplies which are within the same national zero-rating category (*Sub One*).
131. A distinction between similar supplies is permitted where the distinction is objectively justified (*M&S 2*).
132. Returning to the original incarnation of the zero-rating provision in Group 14 in schedule 4 Finance Act 1972, the relevant goods were “goods dispensed by a person registered in the register of pharmaceutical chemists...on the prescription of a person registered in the register of medical practitioners”.
133. The “goods” were, essentially, prescription medicines. At that time, only doctors and dentists registered on the relevant registers (which we have found were UK registers) could lawfully write prescriptions. We find that the boundary which the UK chose to draw was between prescription medicines (which had to be lawfully prescribed) and other medicines which did not require a prescription. “Over the counter” medicines bought without a prescription and food supplements including most vitamins are standard rated. Such supplies are on the other side of the boundary.
134. On this basis is not an extension of the zero-rating category—a crossing of the boundary—to extend the class of people on whose prescription prescription drugs may be dispensed. As we have seen, as additional categories of health professionals were given the power to write prescriptions under medical law, the categories of permitted prescribers were extended for the purposes of VAT, although the correlation was not exact.
135. The Medical Act 1983 allowed “visiting EEC practitioners” to be registered in a special list in the UK register. The VAT Act 1983 provided that a person who was entitled to be registered on that list, but who was not registered was to be treated as so registered in urgent cases.

136. The 2009 Order expanded the classes of permitted prescribers to include certain nurses and others and the Explanatory Note expressly stated “It modifies and clarifies the scope of Group 12 by (1) applying the zero rate to the supply of qualifying goods prescribed by health professionals who, in addition to doctors and dentists, are permitted to prescribe medicines that are available only on prescription”.
137. Regulation 214 of the Human Medicines Regulations 2012 (“the 2012 Regulations”) updated the list of practitioners who could prescribe prescription only medicines setting out the existing categories which were reflected in the 2009 Order, the existing category of EEA Health Professionals which was not included in the 2009 Order and adding podiatrist independent prescribers, and physiotherapist independent prescribers (both defined by reference to UK statutes and registers).
138. The original definition of “EEA health professional” is set out in paragraph 88 above. This definition has itself been extended and the 2012 Regulations, as amended, now provide:
- “[“EEA health professional” means [a person in a relevant European State who is]—
- (a) a doctor of medicine, a nurse responsible for general care, a dental practitioner, a midwife or a pharmacist as those professionals are defined within the meaning of [Council Directive 2005/36/EC](#);
- (b) a professional exercising activities in the health care sector which are restricted to a regulated profession as defined in [Article 3\(1\)\(a\)](#) of Directive 2005/36/EC; or
- (c) a person of equivalent professional status to a health care professional within the meaning of regulation 8;]”
139. The VAT legislation was expanded in 2014 by the Value Added Tax Act (Drugs and Medicines) Order 2014 (“2014 Regulations”) to include podiatrist independent prescribers and physiotherapist independent prescribers within Note 2B. Significantly, the 2014 Regulations did not insert EEA health professionals into Note 2B. This follows the pattern of the 2008 Regulations and the 2009 Order, in that the former expanded the class of lawful prescribers to include EEA Health Professionals, whilst the 2009 Order included in the categories of prescriber whose prescriptions give rise to zero-rating all the classes mentioned in the 2008 Regulations except for EEA Health Professionals.
140. The crucial question in the present case is: is there “a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer”. The test for similarity is that “two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other”. That is, we must apply the test set out in *Rank*.
141. Dr Poupalos and Dr El-Kharoubi were both doctors, properly qualified and registered in their respective countries and both permitted to write lawful prescrip-

tions which would allow a pharmacist in the UK to dispense drugs on those prescriptions. Dr Poupalos was registered in the UK. Dr El-Kharoubi was registered in Romania although it seems he practiced in the Czech Republic. Although there were some restrictions on Dr El-Kharoubi; he could not write prescriptions for use in the UK for controlled drugs, those restrictions did not apply for present purposes.

142. We were taken to a number of examples of pairs of prescriptions written by Dr Poupalos and Dr El-Khourabi respectively. They covered the same time period and were for identical drugs. Most of the example prescriptions were for Viagra and equivalent drugs. Some were for oral contraceptives or antibiotics to treat sexually transmitted infections. Mr Patel gave evidence that the majority of prescriptions were issued in connection with erectile dysfunction, weight loss and hair loss. We infer that the average customer using the services of Hexpress was not seeking a diagnosis of their condition but were rather seeking medication to treat it.
143. The prescriptions set out the name and address of the prescribing doctor, the medication prescribed and instructions for its use. They also set out a series of basic medical questions and answers about height, weight, blood pressure and allergies with additional questions depending on the medication. These were presumably the questions and responses obtained from the screening process mentioned below. Each prescription had a sticker on it showing it was dispensed by Pearl Chemist.
144. On the face of it, the supplies by Dr Poupalos and Dr El-Khourabi are not merely similar, but identical, from the point of view of the consumer and they meet the same needs of the consumer. The only difference between the supplies which may have been apparent to the consumer is the name and address of the doctor who issued the prescription. We were not informed of the exact process a prospective customer would go through when they visited Hexpress' website. Mr Patel's witness statement referred to prospective customers undertaking an online consultation. MHA Macintyre Hudson's letter to HMRC of 16 April 2015 states:

“A patient visiting the website and wishing to buy a pharmaceutical product must go through a medical screening and prescription process which, if satisfactory, will result in the appropriate product being prescribed for them. Only then will an order be accepted. .... no sales are made without a prescription”.
145. We consider that it is unlikely that Hexpress' customers would be able to choose which doctor considered their screening questionnaire and they may not have been aware of where the doctor was based until they received the prescription. It is not even clear whether the customers saw the prescriptions at all. In any event, the prescriptions, at most, showed where the doctors were based. They did not give any indication of their qualifications or where they were qualified or registered, other than to give them both the title “doctor”. We note in this context that a foreign qualified doctor can apply to be registered and licensed by the GMC, although Dr El-Khourabi had not done so.
146. In summary, we had no evidence that customers of Hexpress were even aware of the differences between the doctors issuing the prescriptions and even if they

were, and even if the customer could choose which doctor screened them, there is no indication that the difference exerted a “significant influence on the decision of the average consumer to use one such service rather than the other”. This is not one of the exceptional cases such as *French Medicines* where regulatory or legal differences affect the choice of the consumer. The customers were seeking treatment for their conditions through the Hexpress website and they obtained the same goods at the same price following the same screening process by doctors who could lawfully issue prescriptions for the goods and did so.

147. We have found that the supplies were not on different sides of the border between categories which are zero-rated and those which are standard rated. They are both within the domestic category of lawfully prescribed prescription medicines.
148. We are therefore satisfied that the supplies of medicines dispensed on the prescriptions of Dr Poupalos and Dr El-Khourabi were similar or identical from the customers’ perspective and met the same needs. It follows that in treating such supplies differently for VAT purposes, the legislation *prima facie* is in breach of the principle of fiscal neutrality.
149. HMRC sought to argue that any such differences were “objectively justifiable” so as to prevent such a breach.
150. Mr Mantle asserted that it was not “practically impossible or excessively difficult” for an EU qualified doctor to become registered on the GMC register. He stated that it was not at all onerous. We had no evidence about this one way or another, but we do not consider that the fact that Dr El-Khourabi could have become GMC registered is relevant to the question under consideration.
151. We were taken to a screenshot of the Hexpress EU website which was in both German and English. That page proclaimed that some of the benefits of using the website were “free shipping, no hidden fees, confidential service, British doctors and pharmacy”. It was acknowledged that this page was printed in November 2018, after the period in question and that Hexpress is now a UK company (it was based in Guernsey at the time). Mr Patel also indicated that the company now provides a wider range of services. Mr Patel was unable to comment on what the website said at the relevant time.
152. Mr Mantle relies on this screenshot as evidence suggesting that whether a doctor is registered in the UK is a relevant consideration for a typical consumer. He suggested that it cannot be assumed that a consumer views a medicine prescribed by an EU doctor as the same as the identical medicine prescribed by a UK doctor, although he did not indicate why not.
153. Mr Patel gave evidence that the reference to British registered doctors had only been included on the website from July 2018. The Care Quality Commission (CQC) which regulates doctors and online pharmacies encouraged Hexpress to register with the CQC. They applied in 2017 and were registered in July 2018. One of the CQC’s requirements is that the provider must demonstrate who the doctors they use are. By that time, all the doctors used were UK registered. Mr Mantle suggested that the fact that the CQC required companies registered with it to provide information as to where the doctors were registered must have been

for the benefit of the supplier and that this suggests that it makes a material difference to customers whether their prescription is written by a UK registered and licensed doctor or not.

154. Mr Mantle found further support for his arguments on the CQC's website which provides advice to the public. In the section on "Choosing an online healthcare service" it suggests that people should "check who is dealing with your query and giving you advice". It goes on to say "If they are registered overseas what are their details? Doctors who are not GMC registered will not necessarily work to the same clinical standards".
155. Whilst it may be true that clinical standards vary from country to country, the fact that EEA health professionals (as defined in the 2012 Regulations) can issue lawful prescriptions for use in the UK must indicate that clinical standards in the relevant countries are, at the least, acceptable, and the average UK consumer is likely to find some reassurance as to that in the fact that such prescriptions are lawful. We do not accept Mr Mantle's suggestion that it makes a material difference to the average consumer generally whether the prescribing doctor is registered in the UK or elsewhere in the EU, or indeed, the EEA for the following reasons.
156. Mr Mantle pointed out that MHA MacIntyre Hudson's letter of 16 April 2015 stated that where a UK delivery address was entered, the customer would be directed to Hexpress' UK website. However, that letter and Mr Patel's evidence was that supplies were made to customers throughout the EU with some supplies being made to non-EU destinations. Mr Patel indicated that a substantial proportion of the customers, around 40%, throughout the period in question were based in EU countries other than the UK.
157. It might be regarded as presumptuous to assume that a customer in Romania, or the Czech Republic, or Germany or France would automatically assume that medicines dispensed on a prescription written by a UK registered doctor were superior to identical medicines dispensed on a prescription written by a Romanian, or Czech, or German or French doctor.
158. Having regard to all the evidence, and in particular the EU-wide customer base, we are satisfied that the difference between the supplies by reference to the place of registration of the prescribing doctors would not have had a significant influence on the choice of the average consumer. Such supplies would have been "similar or identical" from their point of view.
159. We can find no objective justification for the different VAT treatment.
160. We conclude that the supplies made by Pearl Chemist of medicines dispensed on the lawful prescriptions of UK and non-UK registered doctors respectively are similar and that treating them differently for VAT purposes by zero-rating the former supplies and standard rating the latter is a breach of the principle of fiscal neutrality.

## **The remedy issue**

161. Having found that the VAT standard rating of medicines issued on Dr El-Khourabi's prescriptions is in breach of fiscal neutrality, we now consider what the consequences of that breach might be.
162. Mr Lall put forward three possibilities.
163. First that the Interpretation Act definition of "registered medical practitioner" did not apply and we could treat Dr El-Khourabi as being an "appropriate practitioner" so that Pearl was correct to zero-rate the medicines supplied on his prescriptions. We have rejected that approach.
164. Secondly, he argued that although there is no directly effective EU right to zero-rating, *M&S 2* provides a right to a remedy by way of a refund of wrongly paid VAT where there has been an underlying breach of EU law. The European Court said, at paragraphs 34-36:

"32. The second question asks, in essence, whether a trader has a right, under the general principles of Community law, including the principle of fiscal neutrality, to claim a refund of the VAT which was wrongly levied, when the rate which should have been applied stems from national law.

...

34. It thus follows that the principles governing the common system of VAT, including that of fiscal neutrality, apply even to the circumstances provided for in art 28(2) of the Sixth Directive and may, if necessary, be relied on by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles.

35. As regards, more specifically, the right to a refund, as is apparent from the settled case law of the court, the right to obtain a refund of charges levied in a member state in breach of rules of Community law is the consequence and the complement of the rights conferred directly on individuals by Community law (see in particular, to that effect, *Marks & Spencer* (para 30 and the case law cited)). That principle also applies to charges levied in breach of national legislation permitted under art 28(2) of the Sixth Directive.

36. The answer to the second question must therefore be that where, under art 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a member state has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them."

165. We were also taken to the "fifth question" in that case and the Court's response.

"58. By this question, the national court is essentially asking the court whether Community law requires or permits a national court to remedy the infringement of the principle of equal treatment referred to in paras 52 to 54 of this judgment by ordering that the tax which was wrongly levied be repaid in its entirety to the trader adversely affected by that infringement, even if such a repayment enriches him unjustly, or whether it requires or permits a court to grant some other remedy in respect of that infringement of the principle of equal treatment.

...

60. It is thus the task of the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to in paras 52 to 54 of this judgment.

61. However, it is for the court to indicate certain criteria or principles of Community law which must be complied with when that assessment is being made.

62. In the course of that assessment, the national court must comply with Community law and, in particular, with the principle of equal treatment, as stated in para 51 of this judgment. The national court must, in principle, order the repayment in its entirety of the VAT payable to the trader who has suffered discrimination, in order to provide compensation for the infringement of the general principle of equal treatment, unless there are other ways of remedying that infringement under national law.

63. In that regard, as the Advocate General observed in point 74 of her opinion, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the favoured category.

64. Consequently, the answer to the fifth question must be that it is for the national court itself to draw any conclusions with respect to the past from the infringement of the principle of equal treatment referred to in paras 52 to 54 of this judgment, in accordance with the rules relating to the temporal effects of the national legislation applicable in the main proceedings, in compliance with Community law and, in particular, with the principle of equal treatment and the principle that it must ensure that the remedies which it grants are not contrary to Community law.”

166. Mr Lall particularly stressed paragraphs 62 and 63 of the Court’s judgement to the effect that the national court can set aside a discriminatory provision without waiting for the legislature to take action. However, those comments must be read in the context of the case.
167. *M&S 2* involved the correct VAT treatment of chocolate “teacakes”. The company had accounted for VAT at the standard rate on the basis that HMRC took the view that the teacakes were biscuits, which were standard rated rather than cakes, which were zero-rated. HMRC subsequently acknowledged that the teacakes were cakes and should therefore have been zero-rated. The company claimed a VAT repayment of £35 million. In this case, the legislation itself was not in breach of the principle of fiscal neutrality. The UK was entitled to continue the zero-rating of cakes and standard rate supplies of biscuits. HMRC had, however, mistakenly treated the teacakes as falling within the wrong category. The European Court decided that where a member state has *misinterpreted* its legislation so that VAT has been charged on supplies which should have benefited from zero-rating, Community law, including the principle of fiscal neutrality gives a trader a right to recover the VAT mistakenly charged.
168. This is a very different situation from the present case, and *M&S 2* cannot be regarded as authority for a general right to recover VAT where there has been a breach of EU law. It does not therefore help the Appellant in this case.
169. Nor is there any right to reimbursement in the opposite situation where a taxpayer has been correctly charged to tax in circumstances where other taxpayers have wrongly been exempted from tax on similar supplies, as was the case in *Sub One*. The Court of Appeal said at paragraph 90:



“I accept the submission of the Respondents, summarised in para 46 of their skeleton argument, that there is no EU law right in a taxpayer, at least none that I observe in the case law, to be treated in the same way as other taxpayers who have secured an historic windfall due a misapplication of the law. As the CJEU put it in the *Rank* judgment ([2012] STC 23, [2011] ECR I-10947, paras 62–64):

'62. ... the fact remains that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act in favour of a third party ...

63. It follows that a taxable person cannot demand that a certain supply be given the same tax treatment as another supply, where such treatment does not comply with the relevant national legislation.

64. ... the principle of fiscal neutrality must be interpreted as meaning that a taxable person cannot claim reimbursement of the VAT paid on certain supplies of services in reliance on a breach of that principle, where the tax authorities of the member state concerned have, in practice, treated similar services as exempt supplies, although they were not exempt from VAT under the relevant national legislation.'

[91] This seems to me to be the reverse of the situation that arose in *M&S 2* where the taxpayer had been wrongly taxed under domestic law whereas others had not.”

170. Mr Lall’s third submission is that we can apply the rule of interpretation found in the European Court case of *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-10/89 (“*Marleasing*”). The rule, that a national court should, so far as possible, adopt a construction of its national law which is in conformity with EU law is set out in its judgement as follows:

“7However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

8In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.”

171. *Marleasing* related to a directive, which is of direct effect, and required the national court to consider the purpose of the directive and seek a construction of the national law which achieves the result intended by the directive.
172. The *Marleasing* principle was considered in the UK First Tier Tribunal case of *Rapid Sequence Limited v HMRC* [2012] UKFTT 432 (TC). This concerned the UK’s obligation under the Principal VAT Directive to provide exemptions for the provision of medical care. In summarising the applicable principles, the Tribunal said, at paragraph 26:

“(6) If a provision of national law is inconsistent with the principles of a Directive it must, so far as possible, be interpreted in the light of the Directive and so as to be consistent with EU law, unless it is clear that Parliament specifically intended to depart from the Directive. This may involve a substantial departure from the language used although not from the fundamental or cardinal features of the legislation. It is possible to read the legislation up (expansively) or down (restrictively) or to read words into the legislation (*IDT*)...”

173. This illustrates that the scope of the principle is wide, but it is not unlimited. Although a powerful tool, it is a tool for the *construction* of legislation only. It must give way to a clear intention by Parliament to depart from the Directive and it must respect the “fundamental or cardinal” features of the legislation.
174. We are not, of course, dealing with the implementation of a Directive in the present case but Mr Mantle acknowledged that that did not rule out a conforming construction in accordance with *Marleasing* in principle.
175. The Court of Appeal in *Vodafone 2 v Revenue and Customs Commissioners (No 2)* [2009] STC 1480 (“Vodafone 2”) set out the proper approach to a conforming construction.

“[37] We were referred in the parties' respective written arguments and orally to a number of reported cases on the principles to be observed in looking for a conforming interpretation in either the European Community or human rights contexts. In chronological order they are *Pickstone v Freemans plc* [1988] 2 All ER 803, [1989] AC 66; *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135; *Litster v Forth Dry Dock & Engineering Co Ltd (in receivership)* [1989] 1 All ER 1134, [1990] 1 AC 546; *Industrial Chemicals Industries plc v Colmer (Inspector of Taxes)* [1999] STC 1089, [1999] 1 WLR 2035; *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411; sub nom *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *Revenue and Customs Comrs v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, [2006] STC 1252; *Revenue and Customs Comrs v EB Central Services Ltd* [2008] EWCA Civ 486, [2008] STC 2209 and *Fleming (t/a Bodycraft) v Revenue and Customs Comrs; Condé Nast Publications Ltd v Revenue and Customs Comrs* [2008] STC 324, [2008] 1 WLR 195. The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:

'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

- (a) It is not constrained by conventional rules of construction (see *Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver);
- (b) It does not require ambiguity in the legislative language (*Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [32], [2004] 2 AC 557 at [32] per Lord Nicholls);
- (c) It is not an exercise in semantics or linguistics (see *Ghaidan* [2004] 3 All ER 411 at [31] and [35], [2004] 2 AC 557 at [31] and [35] per Lord Nicholls; per Lord Steyn at [48]–[49]; and Lord Rodger at [110]–[115]);
- (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (*Litster* [1989] 1 All ER 1134 at 1138, [1990] 1 AC 546 at 577 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [31], [2004] 2 AC 557 at [31] per Lord Nicholls);
- (e) It permits the implication of words necessary to comply with Community law obligations (see *Pickstone* [1988] 2 All ER 803 at 814–815, [1989] AC 66 at 120–121

per Lord Templeman; *Litster* [1990] 1 AC 546 at 577, [1989] 1 All ER 1134 at 1138 per Lord Oliver); and

(f) The precise form of the words to be implied does not matter (*Pickstone* [1988] 2 All ER 803 at 807, [1989] AC 66 at 112 per Lord Keith; *Ghaidan* [2004] 3 All ER 411 at [122], [2004] 2 AC 557 at [122] per Lord Rodger; and *IDT Card Services Ireland Ltd* [2006] STC 1252 at [114] per Arden LJ).<sup>1</sup>

[38] Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

[2009] STC 1480 at 1494

(a) The meaning should “go with the grain of the legislation” and be “compatible with the underlying thrust of the legislation being construed.” (*Ghaidan* [2004] 3 All ER 411 at [33], [2004] 2 AC 557 at [33] per Lord Nicholls; Dyson LJ in *EB Central Services* [2008] STC 2209 at [81]). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* at [33] and [110]–[113] per Lord Nicholls and Lord Rodger respectively; Arden LJ in *IDT Card Services* at [82] and [113]) and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at [33]; Lord Rodger at [115]; Arden L in *IDT Card Services* at [113].)’”

176. It is clear that a court or tribunal has wide powers in adopting a conforming construction, even to the extent of adding in words which are not there. In *Vodafone 2* itself, the Court of Appeal, effectively added an additional exception to the controlled foreign companies legislation in order to make it comply with EU law. It was specifically stated that the proposed addition was in accordance with the “grain or thrust” of the legislation.
177. It is more difficult to apply the principle in the present case as we are not dealing with a Directive and Article 110 does not say what the scope or purpose of zero-rating is or should be.
178. Mr Lall suggested the wording which might be included to achieve a conforming construction, although *Vodafone 2* indicates that this is not necessary in the light of paragraph 37(f) of that judgement set out above. The breach of fiscal neutrality could be remedied, he suggests, by including, as an additional category of prescriber within the definition of “appropriate practitioner” in Note 2B, the words “EEA health professional within the meaning given in Regulation 213(1) paragraph (a) of the Human Medicines Regulations 2012”. As noted, that was the only category mentioned in the 2012 Regulations which was not incorporated in Note 2B by the 2008 or the 2014 VAT Regulations.
179. *Sub One* also considered the *Marleasing* principle and used it to adopt a conforming construction in relation to zero-rating. In that case, the question was whether toasted sandwiches (“subs”) and another product-meatball marinara were “supplies of hot food for consumption off the premises” within Schedule 8 Group 1 Note 3(b) VATA. Group 1 zero-rates food, but there is an exception in relation to supplies within Note 3(b). Such supplies are standard rated. The appellant’s supplies of subs and meatball marinara had been standard rated whereas other similar supplies by other traders had been zero-rated. The discrepancy arose

from the interpretation of the domestic law to require the application of a subjective test in the Court of Appeal case of *John Pimblett & Sons Ltd v Customs and Excise Commissioners* [1988] STC 358 which had been followed for many years. The Court found that EU law required the imposition of an objective test and the question was whether the Court could interpret the domestic legislation to conform with EU law by adopting a conforming construction requiring an objective test.

“[43] Within those principles then [those set out in *Vodafone 2*], can this legislation now be re-construed as to achieve an obligation to determine fiscal liability according to objective, rather than subjective, criteria, as required by *BLP*?

[2014] STC 2508 at 2526

[44] Mrs Hall QC for the Respondents argued that such a construction is possible, or indeed that, *Pimblett* apart, the legislation properly construed required an objective construction. Mrs Hall invited us to cast our attention rather wider than indent (i) of Note (3)(b) (importing the 'purposes' element of the test) to the wording of the exception as a whole. She argued, as I understood it, that the focus should be on the supply which in fact is effected at above ambient air temperature and must have been heated for the purposes of enabling consumption above that temperature. She said, looked at as a whole, a toasted sandwich supplied in a state in which in fact it could be eaten 'hot', and had been heated in a manner which achieved that result, could and should be taken to have been heated for those purposes.

[45] My Lord, Briggs LJ, in argument invited Mrs Hall to comment on whether the distinction was to be found in the objective assessment of whether the temperature of the food, enabling consumption of it 'hot', was or was not the essential nature of the 'deal' between supplier and customer. In other words, was the deal that the supplier was selling and the customer was buying a sandwich which could be eaten 'hot'. Her answer was, I think, a qualified 'yes' and she referred us to para 28 of her skeleton argument, which was in these terms:<sup>1</sup>

'28. Note 3 applies to supplies, which can only be a reference to supplies made in exchange for consideration. See [section 5](#) of the VAT Act 1994. A customer who has paid for the privilege of having food heated for his own purposes, (so that he can consume it hot), will have a keen interest in whether food has been heated for him and a keen interest in whether it is hot when it is provided to him. Thus, even if the *Rank* approach to fiscal neutrality is applied, the test is clearly met. Heated-to-order food meets a different consumer need to food which is fortuitously hot, such as hot bread, not sold or advertised as such. It is because those are the very qualities for which consumers of hot takeaway food pay, that Parliament has excluded them from the benefit of the zero-rate. They do not fall within the clearly defined social reason for zero-rating everyday food.'

[46] The answer to this from Miss Whipple QC for the Appellant was that it is not possible to apply this legislation objectively in a manner which respects the requirement of legal certainty and fiscal neutrality. She submitted that what we were being invited to do was to import into the 1994 legislation the sort of words that have ultimately been introduced into domestic legislation by s 196 of, and [Sch 26](#) to, the Finance Act 2012<sup>2</sup>. The fact that Parliament has legislated showed that the Respondents' suggested construction of the [VATA 1994](#), as unamended, crossed the line that marks out permissible interpretation of legislation and impermissible amendment of it, as drawn in the principles quoted in [38] of the judgment of Morritt C in *Vodafone 2*. She drew our attention to the requirement that the legislation must be objective in character in that the activity in question must be 'considered per se and without regard to its purpose or results' (*Optigen Ltd v Customs and Excise Comrs*; *Fulcrum Electronics Ltd v Customs and Excise Comrs*; *Bond House Systems Ltd v Customs and*

*Excise Comrs* (Joined cases C-354/03, C-355/03 and C-484/03) [2006] STC 419, [2006] Ch 218, para 43). She emphasised that the legislation must be sufficiently

[2014] STC 2508 at 2527

certain and foreseeable in application by those subject to it—ie 'legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them': see *Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2008] STC 2964, [2008] ECR I-7203, para 47. Finally, the boundary had to be drawn so as to respect fiscal neutrality so as to be determined from 'the point of view of a typical consumer ... avoiding artificial distinctions based on insignificant differences ... [which] ... do not have a significant influence on the decision of the average consumer to use one such service or the other': see *Rank Group plc v Revenue and Customs Comrs* (Joined cases C-259/10 and C-260/10) [2012] STC 23, [2011] ECR I-10947, paras 43–44.

[47] Miss Whipple submitted that the Respondents' proposed construction simply transposed the focus from the subjective intention of the supplier to the subjective intentions of the consumer. Further, with regard to the *Marleasing* approach, it was argued that this court did not see such an approach as possible in *Pimblett* and that, in effect, in all tribunal cases for the last 26 years the focus has remained on the subjective intentions of the suppliers. The proposed construction has never been advanced in the period since 1984 and it is now too late to apply it.

[48] I confess readily that my own mind has wavered as to the correct answer to this aspect of the case. In this respect, I have wondered whether the Respondents' proposed construction could really be spelled out of the words, in particular because that construction did not clearly emerge at all, even in argument before us, until the pithy question asked by my Lord, Briggs LJ, to which I have already referred.

[49] In the end, however, I conclude that this provision can be 'read down' in accordance with the *Marleasing* principle to supply an objective test, as advanced (in the end) by the Respondents, which I have sought to summarise in para [44] and [45] above, with the assistance of Briggs LJ's pithy question. This approach to the matter searches for the assumed common intention of the supplier and the consumer as to whether it is a term of the bargain that the product be supplied in order to be eaten hot. By this entirely objective enquiry, the court derives the terms of the bargain from what each party to the contract says and does (including the presentation of the supply in the shop and in any advertising)."

180. Mr Mantle submitted that whilst the *Marleasing* principle could be applied in a binary situation like that in *Sub One*; was the test subjective or objective, it could not be applied in the present case as there was no indication of what EU law sought to achieve and it was unclear how the definition of "appropriate practitioner" should be interpreted in order to remedy the alleged breach of fiscal neutrality. The Appellant's suggested insertion would include doctors in all EEA states (other than the UK which is specifically excluded in the Regulation 213(1)(a) definition). It would, however, include doctors from countries which are not member states as the EEA includes Iceland, Liechtenstein and Norway and would also include doctors from Switzerland. He submitted that to attempt to introduce such an additional category crossed the line from interpretation to amendment which was beyond the jurisdiction of this Tribunal.
181. Mr Mantle further submitted that such an interpretation went "against the grain" of the legislation and was contrary to a "fundamental" or "cardinal" feature of the legislation, namely that zero-rating was confined to medicines prescribed by those on a UK register.

182. Mr Lall submits that the *Marleasing* principle is wide enough to include his suggested inclusion. He submits that, as in *Sub One*, in the present case we are dealing with a situation where there is unequal treatment of traders on the same side of the zero-rating boundary. We agree with that point. He distinguishes *Sub One* on the facts on the basis that *Pimblett* had caused the zero-rating boundary to be drawn in the wrong place and the Court of Appeal corrected that by applying *Marleasing* to adopt an objective approach. Having corrected the position, the Court considered whether it could grant a remedy by providing equal treatment with traders who should never have had the exemption in the first place. It was hardly surprising that they did not.
183. Mr Lall points out that there is no subjective element in the present case. It is clear that pharmacists can lawfully dispense medicines on the prescriptions of UK or EU registered doctors, the supplies are identical and he submits that there is no rational explanation for the discrimination.
184. We agree that the *Marleasing* principle of conforming construction is very wide in scope and permits the insertion of words in legislation. In *Vodafone 2* itself the Court found that it was permissible to add an additional exemption to the UK's controlled foreign companies legislation in order that it did not offend against the requirements of the EU principle of freedom of establishment. This clearly went beyond interpretation in the sense of giving meaning to the words actually in the legislation. It might be argued that this amounts to an amendment of the domestic legislation but the Court held that such an extension was permissible. The head-note reads:
- “**Held** – (1) The obligation of the national court was to examine the whole of the national law to consider how far it might be applied so as to conform to enforceable Community rights. The special commissioners had been wrong to conclude that their consideration of a conforming interpretation was limited to the motive test in s 748(3). The court was entitled and bound to consider all parts of the CFC legislation in ascertaining whether it was amenable to a conforming interpretation (see [34], [36], [72], [73], below).  
 (2) The extension of the CFC legislation contended for by the Revenue was permissible. It did not alter the impact on other CFCs that were not excepted by any other exception. It did provide an additional exception, but the grain or thrust of the legislation recognised that the wide net cast by s 747(3) was intended to be narrowed by s 748. Further, the terms of the various exceptions were not intended to be either mutually exclusive or immutable. It was plain that geographical distinctions were consistent with the grain of the CFC legislation because, for example, s 748(1)(e) provided for exactly that distinction. The insertion of another such exception in s 748 along the lines suggested by the Revenue would leave unaffected the impact of the CFC legislation on those companies to which it continued to apply. It followed that the CFC legislation could be interpreted in a way that conformed with Community law...”
185. It is important that the Court considered it plain that the proposed extension was consistent with the grain of the legislation.
186. Applying these principles to the present case, we consider that, subject to the constraints on *Marleasing* discussed below, it would be permissible to interpret Note 2B by including an additional category of prescriber, if that was needed to construe the legislation as complying with EU law.

187. We must, however, consider whether the Appellant's proposed insertion is permissible, bearing in mind the constraints set out in *Vodafone 2* and *Rapid Sequence*. Those constraints are:
- (1) The interpretation must go with the grain of the legislation;
  - (2) It must be compatible with the underlying thrust of the legislation;
  - (3) An interpretation which is inconsistent with a fundamental or cardinal feature of the legislation crosses the boundary between interpretation and amendment;
  - (4) The Court/Tribunal must not make a decision for which it is not equipped or which gives rise to practical repercussions it not equipped to evaluate; and
  - (5) A conforming construction cannot be adopted where it is clear that Parliament specifically intended to depart from EU law.
188. The zero-rating provisions for prescription medicines have, from the outset and throughout their evolution, operated by specifying categories of prescribers on whose prescriptions supplies of medicines may be zero-rated. From the outset and throughout the evolution of the provisions, those categories have been defined by reference to registration on a UK register. Medical law has, from time to time recognised additional classes of health professional who can issue lawful prescriptions. Some of these developments reflect domestic considerations and some were in response to EU requirements. The relevant VAT provisions have also been expanded from time to time, but not always at the same time as, or in such a way as to correlate with, the changes in medical law. The 2008 Regulations and the 2012 Regulations permitted lawful prescriptions to be issued by EEA health professionals. We find it particularly significant that the 2009 Order incorporated the new classes of prescriber introduced by the 2008 Regulations (who were all on UK registers) into Note 2B, but excluded the new category of EEA health professional. Further, the 2014 Regulations incorporated the additional categories of UK registered lawful prescribers specified in the 2012 Regulations two years earlier into Note 2B but again excluded EEA health professionals. This cannot have been accidental. Taking account of the history and development of medical and VAT law, the only conclusion is that Parliament specifically intended to exclude EEA health professionals from the classes of prescribers within Note 2B. This might, as we have found, be in breach of the principle of fiscal neutrality, but it seems that Parliament made a decision that medicines prescribed by such persons should be standard rated. The benefits of zero-rating are to be confined to medicines prescribed by UK registered health professionals.
189. The interpretation put forward by the Appellant, which would involve including certain EEA health professionals within Note 2B, would go against the grain of the VAT legislation and be inconsistent with a fundamental feature of the legislation. Parliament appears to intend not to extend zero-rating to non-UK registered health professionals and to adopt the Appellant's construction would cross the boundary from permissible interpretation to impermissible amendment.

190. We are also mindful of the point made at paragraph 38(b) of the judgement in *Vodafone 2*, that we should not make a decision which might have practical repercussions we are not equipped to evaluate. The definition of “EEA health professional” has itself been amended from the original version set out in paragraph 88 above to the current version in paragraph 138. It now includes certain nurses, midwives and pharmacists as defined by EU law. UK registered pharmacists are not included in Note 2B at all. If we were to adopt Mr Lall’s suggested amendment, the class of permitted prescribers might change in unpredictable ways with unpredictable consequences. We do not, of course, have to adopt Mr Lall’s precise wording, but this illustrates the point that formulating our own definition, especially without the guidance of a directive as to the objective to be achieved, could have significant practical consequences that we cannot properly evaluate.
191. We conclude that although the restriction, by Note 2B, to the zero-rating of supplies of medicines to those issued on the prescriptions of UK registered practitioners breaches the principle of fiscal neutrality, we can neither interpret the legislation to conform to EU law, nor prevent HMRC charging VAT by reference to the medicines prescribed by Dr El-Khourabi.
192. Mr Lall included some comments on freedom of movement of workers and freedom of establishment in his skeleton argument, but did not pursue them at the hearing. We agree that they are not relevant to the present case and do not comment further.

## **Decision**

193. For the reasons set out above we have concluded that Dr El-Khourabi is not within the definition of “registered medical practitioner” within Note 2B, that the exclusion of medicines prescribed by him from the zero-rating provisions of Group 12 Schedule 8 VATA constitutes a breach of the principle of fiscal neutrality, but that this Tribunal is unable to provide an effective remedy for that breach.
194. Accordingly, we dismiss the appeal and affirm HRMC’s assessment.
195. 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.

**MARILYN MCKEEVER**  
**TRIBUNAL JUDGE**



**RELEASE DATE: 23 APRIL 2019**