



[2021] UKFTT 0071 (TC)

TC08056

Value Added Tax - whether supply of car parking services by NHS Foundation Trust an 'economic activity' – yes - whether Trust supplied car parking services under a 'special legal regime' – no – whether supply of car parking services an activity closely related to hospital and medical care – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/04103

BETWEEN

**NORTHUMBRIA HEALTHCARE NHS
FOUNDATION TRUST**

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 9 and 10 January 2020

Elizabeth Kelsey, counsel, instructed by Liaison VAT Consultancy Limited, for the Appellant

Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Northumbria Healthcare NHS Foundation Trust (the ‘Trust’) charged patients, visitors, hospital staff and others for the right to park vehicles at some of its sites. This appeal concerns the VAT liability of car parking provided by the Trust.

BACKGROUND TO THE APPEAL

2. The Trust was established under the Health and Social Care (Community Health and Standards) Act 2003. The Trust’s statutory activities include the provision of hospital and community health services in Northumberland.

3. The Trust operates 14 hospitals which include North Tyneside General Hospital, Hexham General Hospital, Wansbeck General Hospital, Northumbria Specialist Emergency Care Hospital and Berwick Infirmary. The Trust also operates from a number of smaller community hospital facilities and healthcare centres including Rothbury Community Hospital, Haltwhistle War Memorial Hospital, Blyth Community Hospital, Morpeth NHS Centre, the Whalton Unit and Alnwick Infirmary.

4. It was common ground that the carrying out by the Trust of its statutory activities, including the provision of NHS medical services, is not an economic activity for VAT purposes because such activities are non-business or outside the scope of VAT. The Trust’s supply of private medical services is an economic activity but is exempt under the medical services exemption in Article 132(1)(b) of Council Directive 2006/112/EC (the Principal VAT Directive or ‘PVD’) as implemented in the United Kingdom by item 4 of group 7 of Schedule 9 to the Value Added Tax Act 1994 (‘VATA’).

5. At some of its sites, the Trust provides pay-and-display car parking to patients, visitors, hospital staff, both clinical and non-clinical, and other hospital attendees such as contractors etc. The Trust accounted for VAT at the standard rate on the fees that it charged for parking. In 2017, the Trust submitted a claim, under section 80 VATA, for repayment of VAT accounted for on the provision of car parking (among other matters no longer in dispute) which the Trust accounted for in VAT periods 05/13 to 03/16. The Respondents (‘HMRC’) considered that VAT was chargeable on the supplies of car parking and refused to repay the VAT. The Trust appealed to this Tribunal. The amount at stake in this appeal is £267,443.92 but a large number of similar appeals by NHS bodies are stayed behind this one.

GROUND OF APPEAL

6. In this appeal, the Trust contended that its supplies of car parking services are not subject to VAT on three grounds, which may be summarised as follows:

- (1) in relation to car parking services, the Trust is not to be regarded as a taxable person for the purposes of VAT pursuant to Article 13(1) PVD and section 41A VATA; or
- (2) if the Trust is a taxable person in relation to the supply of car parking, it is an activity closely related to supplies of hospital and medical care, and therefore exempt under Article 132(1)(b) PVD and Item 4 of Group 7, Schedule 9 VATA; or
- (3) in the circumstances, the supply of car parking services by the Trust does not constitute an economic activity.

7. The first two grounds raise a number of issues but both grounds assume that the provision of car parking by the Trust is an economic activity. It seems to me to be more logical to consider the third ground first as, if I conclude that the provision of car parking by the Trust is not an economic activity, the other grounds fall away.

EVIDENCE

8. The Trust served statements from two witnesses, Ms Julie Reed and Ms Claire Riley. Ms Reed has been employed by the Trust and its predecessor organisations since 1990. In 2004, she became the Deputy Director of Finance of the Trust, a position which she still holds. Ms Riley is the Director of Communications and Corporate Affairs at the Trust, a post which she has held for approximately ten years. She is responsible for the policy and delivery of car parking at each of the Trust's various sites. Ms Reed and Ms Riley described various aspects of the Trust's provision of car parking and produced contractual and related documents.

9. At the hearing, Ms Reed and Ms Riley expanded on some points in their statements in response to questions from Ms Kelsey, who appeared on behalf of the Trust, and answered questions put by Mr Watkinson, who appeared for HMRC, in cross-examination. I found both witnesses to be credible and fully accept their evidence of fact.

10. On the basis of the written and oral evidence, I find the material facts to be as follows.

FINDINGS OF FACT

11. The Trust provides healthcare services to a local population of around 500,00 people in an area of north-east England that stretches from the northern part of the Newcastle conurbation to the Scottish border, and across to the edge of Cumbria. As a result of patient choice, a large number of patients from Cumbria also choose to receive care in the Trust's hospitals. The area covered by the Trust is mostly rural and the availability of public transport can be limited or non-existent for some patients and visitors. Around 80% of people attending the Trust's main hospital sites do so by car.

12. Ms Riley produced a Department of Health report on the National Patient Choice Survey from 2008 which showed that the availability of appropriate car parking was an important consideration for 46% of respondents when choosing which hospital to attend. That was higher than factors such as the reputation of the consultant, a good personal experience or the convenience of the appointment time. While I have no reason to doubt the findings of the survey, I do not consider that the importance of car parking to patients is relevant to any of the issues in this appeal.

13. The Trust provides services to the Northumberland and North Tyneside clinical commissioning group under an NHS contract as defined by section 9 of the National Health Service Act 2006 ('NHS Act'). The contract for the year 2014-2015 includes the conditions of the NHS Standard Contract and, among other things, requires the Trust to comply with or have regard to, as applicable, guidance and guidelines issued by bodies such as the Department of Health and NHS England.

14. The Trust's constitution, last updated in July 2016, provides at paragraph 3.4 that, in addition to its principal purpose of providing goods and services for the purpose of the health service in England, the Trust may also carry on activities for the purpose of making additional income available in order better to carry on its principal purpose.

15. The Trust produced a document titled "Car Parking Policy and Procedures" in June 2016 which set out the policy and purpose behind its management of car parking at the Trust's sites. The policy and procedures followed guidance provided by the Department of Health and NHS described below.

16. The guidance followed by Trust included the "NHS patient, visitor and staff car parking principles", updated on 29 October 2015, ('2015 Parking Principles') which states that:

"NHS organisations should work with their patients and staff, local authorities and public transport providers to make sure that users can get to

the site (and park if necessary) as safely, conveniently and economically as possible.¹”

17. The footnote to that statement provides:

“Each site is different and very few will be able to provide spaces for everyone who needs one. Since 2010, national planning policy no longer imposes maximum parking standards on development, and no longer recommends the use of car parking charges as a demand management measure to discourage car use.”

18. The 2015 edition of the “Health Technical Memorandum 07-03 on NHS car-parking management: environment and sustainability” (‘HTM’) is intended to help NHS organisations identify best practice in car park management and sustainable transport to improve the patient and visitor experience and support staff on their journeys to and from work. The HTM contains best practice guidance which aligns with the statutory and policy framework. Paragraph 3.5 states:

“NHS sites that are close to city/town centres may need to ensure their car-parking charges are not lower than local car-parks otherwise commuters and visitors may be tempted to use their car-parks instead. It may be necessary to increase charges if this is occurring.”

19. The Department of Health issued guidance on “Income Generation: Car Parking Charges – Best Practice for implementation” in December 2006 (‘Car Parking Best Practice’). The guidance was described as follows:

“Advice to the NHS on the factors to consider when operating car parking schemes on their premises under income generation rules, including what kind of car parking scheme to offer, what changes to impose and what concessions to consider.”

20. The first two paragraphs of Chapter 1 of the Car Parking Best Practice make clear that car parking on healthcare sites should only be considered as part of a wider travel plan and that the NHS body might not provide parking (see paragraph 2 “assuming its decided that car parking should be offered on healthcare sites”). If car parking is offered, the guidance states that one of the factors to be considered is:

“How the misuse of the car park (particularly if based near a town centre or motorway) by people using healthcare facilities for free or cheap parking will be avoided”.

21. In deciding whether to provide parking at new sites, the Trust takes account of wider travel plans and the other guidance. Chapter 2 of the Car Parking Best Practice states that:

“NHS bodies are allowed to charge for car parking and to raise revenue from it as an income generation activity as long as certain rules are followed. Income generation activities must not interfere to a significant degree with the provision of NHS core services. They must be profitable, as it would be unacceptable for monies provided for the benefit of NHS patients to be used to support commercial activities, and this profit must be used to improve health services.”

22. Chapter 5 of the Car Parking Best Practice deals with the viability of car parking schemes. Paragraph 24 of Chapter 5 is as follows:

“How Much Should we Charge?”

It must be remembered that you are in competition with both other means of transport and alternative car parking facilities. Hence attention should be given to:

- the regularity of public transport and its charges;
- other car parking charges in the area;
- availability of free parking on nearby streets and roads;
- your catchment area;
- the need to cover costs;
- the need to disincentivise non service users;
- the need to make a profit to be used to improve health services.”

Chapter 5 also states that car parking charges currently attract VAT at the standard rate on revenue received.

23. The Trust has a significant percentage of elderly and/or infirm patients and visitors, as well as others who suffer with high levels of social deprivation. Accordingly, the Trust is required by its stakeholders and the guidance referred to above to ensure that its sites and services are accessible at reasonable cost. That obligation includes the provision of parking for patients and visitors at a reasonable price.

24. The Trust provides car parking facilities at all its sites for staff, patients and visitors. The demand for parking spaces is such that the Trust must manage the access to and use of car parks, eg by adjusting visiting and shift times. I accept that the Trust would not operate as effectively if it did not manage parking efficiently.

25. The availability of alternative parking arrangements for the Trust’s sites varies and is limited. For example, Northumbria Specialist Emergency Care Hospital has little or no alternative parking and the alternatives at North Tyneside General Hospital are limited and would not be suitable for patients, staff or visitors as they are not close enough to the hospital. Some alternative parking facilities are available for the sites based in towns, such as Hexham General Hospital, Blyth Community Hospital and Alnwick Infirmary. The parking areas at those sites are limited and they are often fully utilised by those using the healthcare facilities so would not be available to persons visiting the town, eg shoppers or commuters.

26. The provision of car parking at the Trust’s sites is part of an integrated transport policy. In conjunction with the Local Authority, the Trust makes an annual payment of around £150,000 to local public transport providers in order that buses etc. are routed via the Trust’s hospitals.

27. I accept that the parking facilities on the Trust’s sites are mostly used by persons accessing the hospitals and healthcare facilities. The location of some of the Trust’s sites means they are not generally suitable for parking and visiting somewhere else. That is not always the case, however, and some sites may be used by people for general purposes unconnected with the Trust when spaces are available. An example of this is that one of the Trust’s sites was used for unofficial airport parking and the Trust took steps to deter such users by changing its fees for parking at that site.

28. The car parking charges made at the Trust’s various sites during the claim period were generally as follows:

Duration	Amount of Charge
First 20 minutes	Free
Up to 1 hour	£2
Up to 2 hours	£3

Up to 3 hours	£4
Up to 4 hours	£5
Up to 24 hours	£6

29. The 2015 Parking Principles provide that charges should be reasonable for the area and provide concessions, including free or reduced charges, for certain groups, including the following:

- (1) disabled people;
- (2) frequent outpatient attenders;
- (3) visitors with relatives who are gravely ill;
- (4) visitors to relatives who have an extended stay in hospital;
- (5) carers of people in the above groups where appropriate;
- (6) staff working shifts that mean public transport cannot be used.

30. The Trust provides car parking free-of-charge to a range of hospital users, including cancer patients and those visiting patients that are in hospital for an extended period of time. The Trust's staff pay reduced rates for parking depending on the level of staff. Contractors working on the Trust's sites and needing to park pay something.

31. The charges for car parking bring in income for the Trust. The income from parking is shown in the Trust's annual accounts for 2013-14 under "Other Operating Income" as "other income". A note to the accounts states that "other income" includes "amounts in respect of fleet solutions and other commercial services, catering services, car parking income and property rentals". The income from parking charges does not cover the costs associated with providing car parking at all sites. The Trust makes a small surplus at three of its four major sites. The surplus is ploughed back to improve the provision of healthcare at the Trust. In the case of Hexham General Hospital, the Trust provides car parking at a loss. The Trust provides free parking at some four or five local health centres for historic reasons. The cost of providing free parking is met from charges for parking on the Trust's other sites.

32. With effect from 31 January 2013, the Trust outsourced the management of car parking at the Trust's sites to a car parking enforcement company called Private Parking. Private Parking patrolled the car parks and levied penalty charges where parking rules had not been obeyed. The enforcement action did not result in much additional income for the Trust but led to complaints from hospital users. Within weeks, it was apparent from feedback that the car parking enforcement company's actions were damaging the reputation of the Trust. As a result, the Trust terminated its contract with Private Parking at the end of April 2014 and resumed managing the car parking itself. Although the Trust's car parking was managed by the company during the period covered by the Trust's claim for repayment of VAT (VAT periods 05/13 to 03/16), I was told by Ms Kelsey that the claim in relation to car parking does not include the period when the parking services were outsourced.

DISCUSSION

Is the supply of car parking services by the Trust an economic activity?

33. The Trust's third ground of appeal, which I consider should logically be considered first, is whether the provision of car parking services by the Trust is an economic activity.

34. Article 2(1)(c) of the PVD provides that supplies of services for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT.

Article 9(1) of the PVD defines ‘taxable person’ as any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. There is no dispute that the provision of healthcare services by the Trust free or as a public body under Article 13 PVD (see [46] below) is not an economic activity. Nor is there any dispute that the Trust supplies car parking services for consideration. However, in its third ground of appeal, the Trust contends that the provision by it of car parking for consideration is not an economic activity.

35. Article 9(1) of the PVD defines ‘economic activity’ in the following terms:

“Any activity of ... persons supplying services ... shall be regarded as ‘economic activity’. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.”

36. Ms Kelsey, who appeared for the Trust, submitted that the supply of car parking was outside the scope of VAT because the supply did not involve participation in any market. Ms Kelsey relied on passages from the Opinion of Advocate General (Kokott) and the judgment of the CJEU in Case C-520/14 *Gemeente Borsele v Staatssecretaris van Financiën* [2016] STC 1570 (*Borsele*). Ms Kelsey stated that the relevant market was the provision of car parking services at the Trust’s sites. She submitted that participation in a market requires actual or potential competition and, as the sites were owned by the Trust, there was no possibility of a private operator establishing car parking services in the same market. Accordingly, there was no competition for the car parking provided by the Trust.

37. HMRC’s position is that the provision of car parking services by the Trust constitutes an economic activity, involving a supply made for consideration and remuneration in a market alongside commercial operators.

38. On this issue, the burden of proof is on the Trust to show that it is not carrying on an economic activity and, if relevant, that there is no competition.

39. The Court of Appeal set out the correct approach to determining whether supplies constitute an ‘economic activity’ for the purposes of Article 9 PVD in *Wakefield College v HMRC* [2018] EWCA Civ 952. Having reviewed the relevant CJEU authorities, including *Borsele*, David Richards LJ stated at [54] and [55]:

“54. ... The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made ‘for remuneration’. The important point is that ‘remuneration’ here is not the same as ‘consideration’ in the Article 2 sense, and in my view it is helpful to keep the two terms separate, using ‘consideration’ in the context of Article 2 and ‘remuneration’ in the context of Article 9.

55. Whether Article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply ‘for the purpose of obtaining income’ might in other contexts, by the use of the word ‘purpose’, suggest a subjective test, that is clearly not the case in the context of Article 9. It is an entirely objective enquiry.”

40. There can be no doubt in this case that the Trust made supplies of car parking for consideration for the purposes of obtaining income therefrom on a continuing basis and I did not understand Ms Kelsey to contend to the contrary. That is clear from the passages from

the Car Parking Best Practice quoted in [21] and [22] above, which show that car parking is regarded as an income generation activity which must be a profitable commercial activity in order to improve health services, and from the Trust's annual accounts which show income from car parking as other income and not a one-off item.

41. I do not accept Ms Kelsey's submissions that the supply of car parking by the Trust was outside the scope of VAT because the supply did not involve participation in any market. I do not need to decide whether the existence of purely theoretical or potential competition is sufficient to establish the existence of a market for this purpose as it is clear on the evidence that there was actual competition. The Car Parking Best Practice states explicitly in paragraph 24 that car parking on NHS sites is in competition with alternative car parking facilities. Paragraph 3.5 of the HTM warns NHS bodies that sites close to city/town centres may be used by persons not attending the healthcare facility, eg commuters and visitors to the area, if the car parking charges are lower than local car parks. This shows that the market for car parking includes both the Trust's car parks and other car parks or parking areas in or near the Trust's hospitals and health centres. Further, until it changed its charges, one of the Trust's sites was used by persons traveling from the local airport and thus was in competition with airport parking.

42. I also consider that Ms Kelsey's reliance on *Borsele* is misplaced. That case concerned the provision of school bus services by a local authority. The CJEU stated in [35]:

“... that the conditions under which the services at issue in the main proceedings are supplied are different from those under which passenger transport services are usually provided, since the municipality of Borsele, as the Advocate General observed in point 64 of her Opinion, does not offer services on the general passenger transport market, but rather appears to be a beneficiary and final consumer of transport services which it acquires from transport undertakings with which it deals and which it makes available to parents of pupils as part of its public service activities.”

43. The Trust is not in the same position as the local authority in *Borsele*. On the evidence that I have seen, the Trust cannot be regarded as in the position of beneficiary and final consumer of the parking services but is clearly the supplier.

44. Accordingly, I conclude that the supply of car parking at the Trust's sites for consideration was an economic activity carried on by the Trust.

Is the Trust to be regarded as a taxable person when it supplies car parking?

45. In the first ground of appeal, the Trust contends that it provides the car parking services as a public authority and is not to be regarded as a taxable person pursuant to Article 13(1) PVD and section 41A VATA.

46. Article 13 of the PVD provides:

“1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.”

47. It is common ground that car parking is not one of the activities listed in Annex I to the PVD.

48. Section 41A VATA states as follows, in respect of supplies of goods or services made by public bodies:

“41A. Supply of goods or services by public bodies

(1) This section applies where goods or services are supplied by a body mentioned in Article 13(1) of the VAT Directive (status of public bodies as taxable persons) in the course of activities or transactions in which it is engaged as a public authority.

(2) If the supply is in respect of an activity listed in Annex I to the VAT Directive (activities in respect of which public bodies are to be taxable persons), it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business unless it is on such a small scale as to be negligible.

(3) If the supply is not in respect of such an activity, it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business if (and only if) not charging VAT on the supply would lead to a significant distortion of competition.

(4) In this section “the VAT Directive” means Council Directive 2006/112/EC on the common system of value added tax.”

49. In summary, both Article 13(1) PVD and section 41A(3) VATA provide that where public authorities make supplies (not listed in Annex 1 to the PVD) for consideration as public authorities, they are not treated as taxable persons unless treating them as non-taxable persons would lead to significant distortions of competition.

50. In Case C-288/07 *HMRC v Isle of Wight Council* [2008] STC 2964 (*‘IoW’*), the CJEU held, at [21], that:

“... activities pursued as public authorities within the meaning of that provision are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators.”

51. HMRC accept that the Trust is a public authority for the purposes of the PVD and a government department for the purposes of the VATA. It follows that there are two issues to be decided in relation to this ground of appeal. The first is whether the Trust provides car parking under a special legal regime applicable to it as a public authority. The second issue is whether the treatment of the Trust as a non-taxable person in relation to its supplies of car parking would lead to significant distortions of competition. The Trust bears the burden of proof in relation to the first issue and HMRC bear the burden on the second point.

Does the Trust provide car parking under a special legal regime?

52. In relation to the first issue, Ms Kelsey submitted that the Trust provides the car parking services under a special legal regime, namely the National Health Service Act 2006

(‘NHS Act’). Mr Watkinson contended that the Trust does not provide car parking as a public authority under a special legal regime.

53. The concept of ‘special legal regime’ is not found in the PVD. As Warren J pointed out in [19] of *The Durham Company Ltd (t/a Max Recycle) v HMRC & Anor* [2016] UKUT 417 (TCC), the phrase seems to have first been used in the context of VAT in Joined Cases 231/87 and 129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d’Arda v Comune di Carpaneto Piacentino* [1989] ECR 3323 (‘*Carpaneto Piacentino*’). In that case, the ECJ stated in [16]:

“... the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities ‘as public authorities’ within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting ‘as public authorities’. It is for the national court to classify the activity at issue in the light of that criterion.”

54. In Case C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2001] STC 560, which involved parking provided by a local authority, the ECJ followed the approach in *Carpaneto Piacentino* and, at [19] – [22], provided the following further guidance:

“19. In determining whether such an activity is engaged in by the CMP [the local authority] as a public authority, it must be noted, first, that this cannot depend on the subject-matter or purpose of the activity ...

20. Similarly, whether or not CMP owns the land on which the activity at issue in the main proceedings is carried on, or whether that land is part of its public or private property, is not in itself determinative of whether it is carrying on that activity as a public authority.

21. The national court must ... analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators.

22. The fact that the pursuit of an activity such as that at issue in the main proceedings involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime.”

55. In summary, in determining whether transactions are engaged in by a public authority acting as such, certain features are irrelevant, such as the subject-matter or purpose of the activity and whether or not the activity is carried out on property owned by the authority. Public authorities engage in activities under a special legal regime where transactions are carried out under a public law regime, ie a regime which applies to them as public authorities and is not applicable to private traders. The use of public powers, not available to private traders, in connection with the transactions shows that the activities are subject to a public law regime. If, on the other hand, the public authorities’ transactions are subject to the same legal conditions as apply to private traders carrying out the same or similar transactions then they are not carried out under a special legal regime.

56. Ms Kelsey identified a special legal regime in the provisions of the NHS Act. She submitted that the Trust is a creature of statute, namely the NHS Act. The Trust’s Constitution reiterates that the powers of the Trust are those set out in the NHS Act. Section

9 of the NHS Act provides for the provision of services under contracts between NHS commissioning bodies and providers, which include NHS trusts:

“9. - NHS contracts

(1) In this Act, an NHS contract is an arrangement under which one health service body (‘the commissioner’) arranges for the provision to it by another health service body (‘the provider’) of goods or services which it reasonably requires for the purposes of its functions.

57. The provision of goods and services by an NHS foundation trust is addressed in section 43 of the NHS Act:

“43. -Provision of goods and services

(1) The principal purpose of an NHS foundation trust is the provision of goods and services for the purposes of the health service in England.

(2) An NHS foundation trust may provide goods and services for any purposes related to

(a) the provision of services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness, and

(b) the promotion and protection of public health.

(2A) An NHS foundation trust does not fulfil its principal purpose unless, in each financial year, its total income from the provision of goods and services for the purposes of the health service in England is greater than its total income from the provision of goods and services for any other purposes.

(3) An NHS foundation trust may also carry on activities other than those mentioned in subsection (2) for the purpose of making additional income available in order better to carry on its principal purpose.

58. The contract between the Trust and the Northumberland and North Tyneside clinical commissioning groups for the year 2014-2015 includes the conditions of the NHS Standard Contract and, in particular, the requirement that the Trust must provide its services and perform all its obligations under the contract in accordance with the law and good practice, and comply with applicable guidance and regulatory recommendations. Ms Kelsey referred me to the guidance relating to car parking in the 2015 Parking Principles, HTM and Car Parking Best Practice described above. Ms Kelsey submitted that there were no similar documents, or considerations, applicable to private economic operators. Ms Kelsey also relied on the fact that the Trust is required to be accessible, which includes the provision of car parking for patients and visitors.

59. I do not accept that the car parking was supplied by the Trust under a special legal regime. Ms Kelsey could not point to any statutory or contractual provision that stated that the Trust must provide parking or provide it in a particular way. Unlike in *Carpaneto Piacentino*, the Trust does not have any public powers to authorise or restrict parking on a public highway but instead relies on contractual agreement with those who wish to park their cars on the Trust’s own land. Such an activity is a matter of private law and not of public law. I accept that the Trust must have regard to guidance issued by the NHS and Department of Health but the guidance is just that: it is not a special legal regime. The fact that the Trust is required by its contract with the Clinical Commissioning Groups and the guidance to take certain matters, eg reasonable cost and local travel plans in the area, into account that private operators are not required to consider does not elevate guidance into a public law regime.

60. In conclusion, I consider that the Trust has not shown that the provision of parking services is made under a special legal regime or that it provides car parking under legal

conditions which differ from those that apply to private traders. Accordingly, the Trust must be regarded as a taxable person in relation to the supplies of car parking services.

61. My decision that the Trust must be regarded as a taxable person in relation to the supply of car parking at its sites disposes of this ground of appeal but, in case I am found to be wrong in my conclusion on this point, I will now consider the second issue.

Would treating the Trust as a non-taxable person lead to significant distortions of competition?

62. In *IoW*, the CJEU considered three questions relating to the meaning of the phrase “would lead to significant distortions of competition” in Article 4(5) of Sixth Council Directive 77/388/EEC of 17 May 1977 (the predecessor to Article 13(1) PVD). The questions arose in the context of the provision of off-street car parking by the Isle of Wight Council. In brief, the CJEU held that:

- (1) the distortions of competition must be assessed by reference to the activity in question and not in relation to any local market in particular (see [53]);
- (2) the phrase “would lead to” encompasses not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical (see [65]); and
- (3) the word “significant” means that the actual or potential distortions of competition must be more than negligible (see [79]).

63. In Case C-344/15 *National Roads Authority v Revenue Commissioners* (2017), the CJEU provided more guidance on the subject of potential distortion of competition. At [41] – [44], the CJEU held that a purely theoretical possibility of a private operator entering the relevant market which is not borne out by any matter of fact, any objective evidence or any analysis of the market does not demonstrate the existence either of actual or potential competition or of a significant distortion of competition.

64. I can deal with this ground of appeal shortly on the basis of facts already found (see [18], [20], [22], [25] and [27]). On the basis of those facts, I have concluded (see [41] above) that:

- (1) the Trust participated in the market for car parking in areas where it provided parking; and
- (2) there was actual competition between the Trust’s car parks and parking provided by private operators in or near those areas.

Those findings would, in my view, apply equally to other NHS Trusts and bodies elsewhere in the United Kingdom such as those whose appeals are stayed behind this one.

65. Further, on the basis of my findings of fact, I conclude that treating the Trust as a non-taxable person would lead to actual or potential distortions of competition which are more than negligible. This is shown by the fact that the HTM identified a need for bodies such as the Trust (which followed the HTM and other guidance) to ensure that their car-parking charges are the same as or higher than those charged in local car parks to discourage commuters and visitors from using the hospital and health centre car parks instead. The implication of the HTM is that lower charges (as might occur if the VAT element ceased to be chargeable) would lead to more people choosing to park in the Trust’s car parks. A similar conclusion can be drawn from the extract from the Car Parking Best Practice quoted at [20] above and the fact that that one of the Trust’s sites was used as parking for the local airport until the Trust increased its charges (see [27] above). It is, to my mind, obvious that if the Trust is not required to charge and account for VAT, it could undercut commercial car

park operators by providing parking more cheaply. Whether the Trust chose to reduce its charges to patients and NHS staff by an amount equal to the VAT which was no longer chargeable or simply pocketed the additional income is nothing to the point. In both cases, there would be distortion of competition because either the cost of parking would be cheaper or the profit derived from it would be higher than in the case of parking provided by private operators. The amount of the potential difference in pricing or profit between parking provided by the Trust and that provided by commercial operators were VAT to cease to be chargeable by the Trust cannot, in my view, be described as negligible.

66. Accordingly, if I am wrong in concluding that the Trust must be regarded as a taxable person in relation to the supply of car parking, this ground of appeal would still not succeed because treating the Trust as a non-taxable person would lead to significant distortions of competition.

Is the supply of car parking by the Trust exempt?

67. If the Trust is to be regarded as a taxable person in respect of the provision of car parking services, the Trust's alternative ground is that the supply of car parking by the Trust falls within the scope of the 'medical services' exemption provided for in Article 132(1)(b) PVD and Item 4 of Group 7, Schedule 9 VATA as activities closely related to hospital and medical care.

68. Article 132(1)(b) PVD exempts:

“hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature”.

69. The exemption in Article 132(1)(b) is subject to Article 134 PVD which provides:

“The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

- (a) where the supply is not essential to the transactions exempted;
- (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.”

70. The two limbs of Article 134 are alternative, not cumulative (see Case C-495/12 *HMRC v Bridport and West Dorset Golf Club Limited* [2014] STC 663 at [23]). It follows that the exemption for hospital and medical care and closely related activities under Article 132(1)(b) does not apply to supplies of goods and services which come within either of the two cases in Article 134.

71. The provisions of the PVD have been implemented in UK law by the VATA and regulations made under it. The medical services exemption in Article 132(1)(b) is implemented by section 31(1) VATA in conjunction with Group 7 of Schedule 9 to VATA. Section 31(1) VATA states:

“A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9”

72. Item 4 of Group 7 of Schedule 9 VATA provides that the following are exempt:

“The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution.”

73. Article 132(1)(b) PVD does not refer to goods or services but to “activities” which are closely related to hospital and medical care. I accept Ms Kelsey’s submission that that, in this context, “activities” includes goods and services. I consider that is clear from Article 134 which refers to the “supply of goods or services ... as provided for in [Article 132(1)(b)]”. If “activities” in Article 132(1)(b) does not include services then Article 134 makes no sense. That is also the view of the Advocate General (Sharpston) at [17] – [24] of her Opinion in Case C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* [2014] STC 2197 and the CJEU in Case C-394/04 *Diagnostiko & Therapeftike Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* [2006] STC 1349 (‘Ygeia’) at [18].

74. It is clear that Item 4 of Group 7 only exempts goods supplied in connection with the provision of care or medical or surgical treatment and not services. The provision of car parking for consideration is a supply of services. If the words of Item 4 are given their plain meaning, the exemption does not extend to car parking even if it is supplied in connection with the provision of care or medical or surgical treatment and this ground must be rejected.

75. Ms Kelsey submitted that Item 4 of Group 7 of Schedule 9 VATA does not properly implement Article 132(1)(b) PVD. Mr Watkinson contended that Article 132(1)(b) is correctly implemented by Item 4 because there are no identified services in the UK which are closely related to “the provision of care or medical or surgical treatment” that pass the “essential to the transactions exempted” test in Article 134 which are distinguishable from the provision of care or medical or surgical treatment itself.

76. I do not accept Mr Watkinson’s submission that Item 4 properly implements Article 132(1)(b). As Ms Kelsey pointed out, such an interpretation ruled out the possibility of any services closely related to hospital and medical care existing in the UK. I consider that, in Articles 132(1)(b) and 134, the PVD clearly contemplates “activities”, ie supplies of goods and services, which are essential to but distinct from hospital and medical care. The fact that HMRC have not identified any such services does not exclude them from exemption or justify their omission as a category from the exemption. Mr Watkinson suggested that any such services would be hospital or medical care and exempt as such. I cannot accept that proposition. It seems easy to imagine services that are not “hospital or medical care”, ie services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see Case C-86/09 *Future Health Technologies v HMRC* [2010] STC 1836 at [37] – [38]), but are essential to it. Indeed, it is clear from [50] and [52] of Case C262/08 *CopyGene A/S v Skatteministeriet* [2010] STC 17999 that the collection, testing and processing of umbilical blood and storage of stem cells, which was also the subject of *Future Health Technologies*, are examples of services that are not medical care but are potentially closely related to it. In that case, however, the services were not closely related because the medical care had not been performed, commenced and was not even envisaged at the time of performance of the services. In conclusion, I consider that Item 4 of Group 7 of Schedule 9 VATA does not correctly implement Article 132(1)(b) PVD because it does not exempt services supplied in connection with the provision of care or medical or surgical treatment in a hospital or regulated institution.

77. The Trust did not argue that Article 132(1)(b) PVD is sufficiently precise and unconditional so as to have direct effect (see Case 592/15 *British Film Institute v HMRC* [2017] STC 681 at [13]). Instead, Ms Kelsey submitted that if I conclude (as I have) that Item 4 of Group 7 does not, on its face, properly implement Article 132(1)(b) then I should apply the principles of conforming construction established in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-6363 (‘*Marleasing*’). Mr Watkinson agreed that was the appropriate approach in the circumstances. Ms Kelsey and Mr Watkinson differed, however, as to the consequences of a *Marleasing* approach.

78. The *Marleasing* principles are helpfully summarised by the Court of Appeal in *HMRC v Coal Staff Superannuation Scheme Trustees Ltd* [2019] EWCA Civ 1610 at [70] – [76]) as follows:

“70. There was no dispute before us as to the principles which apply in such circumstances. The Court or Tribunal is required to interpret the provisions of domestic legislation which are incompatible with EU law, so far as possible, to make it compatible. In order to do so, the Court may read in or excise words or phrases, or limit provisions, as long as the amendments ‘go with the grain’ or the cardinal features of the legislation. See *Vodafone 2 v HMRC* [2009] EWCA Civ 446, [2010] Ch 77, at paragraphs 37-38 and *Test Claimants in the FII Group Litigation v HMRC* [2010] EWCA Civ 103, [2010] STC 1251, at paragraph 97.

71. As the UT pointed out at paragraph 130 of its decision in this case, the relevant principles when determining whether legislation is amenable to a conforming interpretation were succinctly set out by the then Chancellor, Sir Andrew Morritt, in the *Vodafone 2* case. That was a case in which the Court was required to determine whether the relevant provisions in ICTA concerned with controlled foreign companies were amenable to a conforming construction, the CJEU having determined in an earlier case that they introduced a restriction on freedom of establishment contrary to article 43 of the TEC which could be justified only if the objective of the restriction were to prevent wholly artificial arrangements designed to escape the tax normally payable. Accordingly, if the measure applied where it was proven, on the basis of objective factors, that despite the existence of tax motives, the controlled company was actually established in the host Member State and carried on genuine economic activities there, it was contrary to article 43 of the TEC. The Court of Appeal held that a conforming construction was possible and could be achieved by inserting an additional exception to the conforming foreign company legislation. See paragraph 44.

72. Sir Andrew Morritt C (with whom Longmore and Goldring LJ agreed) set out the guiding principles as follows:

‘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* [1989] AC 66; *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135; *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546; *Imperial Chemical Industries plc v Colmer (No 2)* [1999] 1 WLR 2035; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252; *HMRC v EB Central Services Ltd* [2008] STC 2209 and the *Fleming/Condé Nast* cases [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 (per Lord Oliver of Aylmerton in the *Pickstone* case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p 126B and per Lord Nicholls of Birkenhead in *Ghaidan’s* case, at para 32); (c) it is not an

exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H-121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114).”

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: (a) the meaning should ‘go with the grain of the legislation’ and be ‘compatible with the underlying thrust of the legislation being construed’: see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *HMRC v EB Central Services Ltd* [2008] STC 2209, para 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 per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 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 the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.”

73. Longmore LJ also noted at paragraph 70 that:

‘In the human rights context it has been said that the boundary between interpretation and legislation will have been crossed if it is proposed to give a statute a meaning which departs substantially from a fundamental feature of the Act (see *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, para 40, per Lord Nicholls of Birkenhead), if the proposed meaning would remove the ‘core and essence’ or ‘the pith and substance’ of the Act or if it would insert something inconsistent with one of the Act’s ‘cardinal principles’: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, paras 111 and 114, per Lord Rodger of Earlsferry. Nor can the process of interpretation create a wholly different scheme from any scheme provided by the Act: per Lord Rodger of Earlsferry at para 110.’

74. The issues were also considered in *Test Claimants in the FII Group Litigation v HMRC* [2010] EWCA Civ 103; [2010] STC 1251. One of the questions for the Court was whether the advance corporation tax provisions could be interpreted so as to be compatible with EU law, as declared by the CJEU in that case. Arden LJ, with whom Stanley Burnton LJ agreed, stated at paragraph 97 that:

‘... It is well-established that the court must interpret a statute which is on the face of it inconsistent with Community law so far as possible so that it is compatible with Community law. This enables the court to read in words or limit provisions, provided that this can be done by the process of interpretation properly so called and does not go against ‘the grain’ or cardinal features of the legislation: *R (IDT Card Services Ireland Ltd) v Customs and Excise* [2006] EWCA Civ 29, [2006] STC 1252; and *Vodafone 2 v HMRC* [2009] EWCA Civ 446, [2010] 2 WLR 288.’

75. Furthermore, in *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 AC 337 Lord Sumption held at paragraph 176 that:

‘*Marleasing*, at any rate as it has been applied in England, is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom. It is no doubt correct that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision. But it does not follow that there was not, at the time, an unlawful requirement to pay the tax. It simply means that the unlawfulness consists in the exaction of the tax by the Inland Revenue, in accordance with the non-conforming interpretation of what must (on this hypothesis) be deemed to be a conforming statute ...’

76. It is also accepted that it is only if a conforming interpretation cannot be formulated that the Court is required to disapply the unlawful provision but only to the extent which is necessary to ensure that the person who has suffered the restriction is not deprived of their directly enforceable rights under EU law.”

79. Ms Kelsey contended that I should simply read Article 132(1)(b) PVD into Item 4 of Group 7 of Schedule 9 VATA so that the latter reads:

“The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods *or services*, in any hospital or state-regulated institution.”

80. I agree. As already discussed at [73] above, Article 132(1)(b) clearly exempts supplies of both goods and services which are closely related to hospital and medical care. It seems to me to be clear that, in order to give effect to Article 132(1)(b), it is necessary to insert a reference to services in addition to goods in Item 4 of Group 7. An alternative, mirroring the use of “activities” in Article 132(1)(b), would be to read “the supply of any goods” as “any supply”. Nothing turns on which of the two possible readings is adopted and I am content to accept the reading suggested by Ms Kelsey.

81. Ms Kelsey submitted that, as Article 134 PVD has not been implemented into UK law, the only question is whether, as required by Article 132(1)(b), the supplies of carparking are closely related to the provision of hospital and medical care. Mr Watkinson contended that if a *Marleasing* approach must be applied then Article 134 should be read into Item 4 of Group 7 of Schedule 9 VATA as well because the conditions in Article 134 are essential to defining the exemption in Article 132(1)(b) correctly. Mr Watkinson said that the Trust could not ‘cherry pick’ which parts of the exemption should be given effect by a *Marleasing* approach. Mr Watkinson found support for his contention in the decision of Judge Kempster in *Loughborough Students Union v HMRC* [2017] UKFTT 518 (TC) (‘*Loughborough*’).

82. The issue in *Loughborough* was whether supplies by the students' union of stationery, art materials and other items to students were exempt under Article 132(1)(i) PVD as supplies closely related to university education. At [82] to [86], Judge Kempster set out three reasons why he considered that Item 4 of Group 6 of Schedule 9 VATA did not accurately import Articles 132 and 134 PVD. The first two reasons relate to the education exemption and are not relevant to this appeal. The third reason, in [85], was that:

“... the second restriction in art 134 (no exemption “where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT”) is mandatory but has not been imported into Item 4.”

83. Judge Kempster concluded, in [86], that he should adopt a *Marleasing* approach and apply Article 132(1)(i) but also take account of the conditions in Article 134. At [89] and [90], he found that the students' union had not established that the supplies were essential to the transactions exempted and that the basic purpose of the supplies was to obtain additional income for the students' union through transactions which are in direct competition with those of commercial enterprises subject to VAT.

84. Ms Kelsey submitted that I should not follow the Tribunal's decision in *Loughborough*. She contended that to do so would mean that HMRC would be relying on a provision, namely Article 134, which the UK had failed to implement which is contrary to the well-established principle that a Member State cannot rely on its own default to the detriment of the individual (see Case 152/84 *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723 at [48]). Mr Watkinson submitted that it was not a matter of the UK seeking to rely on its failure to transpose a directive correctly against an individual but a question of how Article 132(1)(b) PVD should be read into item 4 Group 7 Schedule 9 VATA.

85. As a decision of another First-tier Tribunal, the decision in *Loughborough* is not binding on me and, in any event, Judge Kempster's observations on the application of Article 134 are obiter (see [78] of the decision). However, I consider that Judge Kempster's approach was correct and will follow it. It seems to me that if, as I have decided, a *Marleasing* approach is required in this case and the words “or services” must be inserted into Item 4 to reflect the wording of Article 132(1)(b) then the word “services” that is thus inserted must have the same meaning as it has for the purposes of that provision. I consider that a *Marleasing* approach leads to item 4 being read as including services in the sense that the word is used in Article 132(1)(b) as modified by Article 134. That is to say that the word “services” means services:

- (1) closely related to hospital and medical care;
- (2) which are essential to the hospital and medical care; and
- (3) where the basic purpose of the supplies is not to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

86. The first question, therefore, is whether the supplies of parking by the Trust to patients, visitors, staff and others are closely related to hospital and medical care. The meaning of “closely related” in the context of hospital and medical care was considered by the CJEU in *Ygeia*. The issue in *Ygeia* was whether the supply of telephone services and the hiring out of televisions to in-patients by a medical establishment and the supply by that establishment of beds and meals to persons accompanying in-patients amounted to activities closely related to

hospital and medical care within Article 13A(1)(b) of the Sixth Directive (the predecessor to Article 132(1)(b) PVD).

87. In *Ygeia*, the medical establishment submitted that the provision of the various services to in-patients and persons accompanying them assisted the patients from a psychological point of view and therefore aided fast recovery. The CJEU held that such services could not generally be regarded as activities “closely related to” hospital and medical care. The CJEU set out its analysis between at [14] and [35]. The relevant passages are as follows:

“18. ...services fall within the concept of an ‘activity closely related’ to hospital or medical care...only when they are actually supplied as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service.

...

24. The hospital and medical care envisaged by this provision is ... that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders...

25. Accordingly... it follows that only the supply of services which are logically part of the provision of hospital and medical-care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to ‘closely related activities’ within the meaning of that provision.

...

29. It follows that the provision of services which, like those at issue in the main proceedings, are of such a nature as to improve the comfort and well-being of in-patients, do not, as a general rule, qualify for the exemption provided for in Article 13A(1)(b) of the Sixth Directive. It can be otherwise only if those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied.

31. ... subjecting services which are not of an ancillary character to VAT does not have the effect of increasing the cost of the hospital and medical care the accessibility of which this provision seeks to ensure for individuals

...

...

35. Consequently, the answer to the question asked must be that the supply of telephone services and the hiring out of televisions to in-patients by persons covered by Article 13A(1)(b) of the Sixth Directive and the supply by those persons of beds and meals to people accompanying in-patients do not amount, as a general rule, to activities closely related to hospital and medical care within the meaning of that provision. It can be otherwise only if those supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care and their basic purpose is not to obtain additional income for the supplier by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.”

88. Ms Kelsey submitted that the provision of hospital and medical care is only of value to patients if they, hospital staff and visitors are able to access the Trust’s sites. Such access would be rendered significantly more difficult, if not impossible, in the absence of car parking facilities. I have already described the evidence on the importance of car parking facilities to patients, staff and visitors to the Trust’s sites (see above). On this topic, Ms Reed said that the provision of parking at each of the Trust’s sites is imperative to the successful

delivery of healthcare for the population of the area served by the Trust. Recovery might depend on having visitors and they need to park. Staff are essential to healthcare and they need to park. In Ms Reed's opinion, the Trust needs to offer parking in order to deliver healthcare. Not everyone comes into hospital by ambulance and about 80% come by car.

89. While I accept that those are Ms Reed's sincerely held views and I have no reason to doubt that access to healthcare may sometimes be dependent on being able to park at or near a hospital or healthcare centre, I do not consider that the evidence shows that the Trust's supplies of car parking fulfil the description of services closely related to hospital and medical care in *Ygeia*. The key requirement, it seems to me, is that the service must be an indispensable stage in the supply of hospital and medical services for the purposes of achieving the therapeutic objectives, namely diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. It is not sufficient that services improve the comfort and well-being of the patients. I do not consider that the Trust has shown that the car parking is an indispensable stage in the provision of healthcare to patients. It is, of course, important that patients can access the hospital or health centre where the medical services are provided but that does not make the supply of parking for patients and staff (much less for visitors and contractors) an indispensable stage in the supply of diagnosis, treatment and care. Car parking may make accessing the hospital and medical care easier but the ability to park on site is not a necessary precondition or essential part of the diagnosis, treatment or care.

90. My conclusion that supplies of parking by the Trust to patients, visitors, staff and others are not closely related to hospital and medical care does not necessarily mean that they are not exempt. At [29] and [35] of *Ygeia*, the CJEU held that services that are not closely related, as described in that case, may nevertheless be exempt if they are essential to achieve the therapeutic objectives sought by the hospital and medical care. The meaning of "essential" in Article 134 was considered by the CJEU in Case C-434/05 *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [2007] ECR I-4793 ('*Horizon College*') at [39] and in Case C- 699/15 *HMRC v Brockenhurst College* [2017] STC 1112 ('*Brockenhurst*') at [28] and [29]:

"28. ... it follows from paragraph 39 of the judgment of 14 June in *Horizon College* ..., that, in order to be classified as supplies of services essential to the exempt activities, those supplies must be of a nature and quality such that, without recourse to them, there could be no assurance that the education provided by the body referred to in Article 132(1)(i) of Directive 2006/112 and, consequently, the education from which their students benefit, would have an equivalent value.

29. In the present case, it is apparent from the order for reference that the practical training was designed to form an integral part of the student's curriculum and that, if it were not provided, students would not fully benefit from their education."

91. I find it difficult to see any real distinction in practice between 'closely related', as explained by the CJEU in *Ygeia* and 'essential' in *Brockenhurst*, at least in relation to a case such as this one. It seems to me, however, that it cannot be said that the provision of hospital and medical care by the Trust could not be assured without supplies of parking by the Trust. That is clear from the fact that not all patients arrive at the Trust's by car or require parking on site. Nor do I consider that the Trust has shown that the provision of car parking by the Trust is an integral part of the diagnosis, treatment or care of patients. For the same reasons as I have decided that the supplies of car parking are not closely related to the supplies of hospital and medical care, I conclude that the supply of parking is not essential to the hospital and medical care.

92. That is sufficient to exclude the supplies of car parking by the Trust from the exemption under Article 132(1)(b) PVD but, in case I am wrong in my analysis of the relationship between the car parking and the hospital and medical care, I now consider the final condition in Article 134. That condition is imposed by Article 134(b) and is that the basic purpose of the Trust's supplies of car parking must not be to obtain additional income for the Trust through transactions which are in direct competition with those of commercial enterprises subject to VAT. If the purpose of the supplying car parking to patients, visitors, staff and contractors is to enable the Trust to generate income and, in doing so, the Trust competes with commercial operators then, whether or not the parking is closely related to the supply of hospital and medical care, the Trust's supplies are not exempt.

93. I can deal with this point quite briefly. I have already found, at [40] above, that the basic purpose of the Trust in providing car parking facilities is to obtain additional income for the Trust. I have also found, at [41] and [64] – [65] above, that the Trust provides car parking facilities in direct competition with commercial operators who must charge VAT. I consider that the Trust is in the same position as the medical establishment in *Ygeia* where the CJEU concluded at [35] (see above) that the basic purpose of the supply of telephone services and the hiring out of televisions to in-patients, and the supply of beds and meals to people accompanying in-patients was to obtain additional income for the supplier by carrying out transactions which were in direct competition with those of commercial enterprises liable for VAT.

94. In conclusion, the supplies of car parking by the Trust are neither closely related nor essential to the supply of hospital and medical care and the basic purpose of supplying parking is to raise additional income for the Trust from car parking provided in competition with commercial operators.

CONCLUSION

95. For the reasons set out above, I have decided that the supply of car parking services by Trust constitutes an 'economic activity' for VAT purposes carried on by the Trust as a taxable person and those services are not an activity closely related to exempt hospital and medical care. Accordingly, the Trust's supplies of car parking services are chargeable to VAT at the standard rate.

96. I am grateful to Ms Kelsey and Mr Watkinson for their extremely clear and helpful presentations, both written and oral, of the issues in this case.

DISPOSITION

97. For the reasons set out above, the Trust's appeal is dismissed.

COSTS

98. This case was allocated to the Complex case category under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') and the Trust has never requested that the proceedings be excluded from potential liability for costs under rule 10(1)(c) of the FTT Rules. Accordingly, the Tribunal has power to award costs on an application or of its own motion. Any application for costs in relation to this appeal must be made in writing within 28 days after the date of release of this decision together with a detailed schedule of costs claimed as required by rule 10(3)(b) of the FTT Rules.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

RELEASED DATE: 11 MARCH 2021

POSTSCRIPT

I apologise to the parties for the delay in producing this decision. It was partially complete at the time that the country entered lockdown due to the Covid-19 in March 2020 but I regret to say that work on it then ceased as other matters occupied my attention. Subsequently, I found it difficult to find time to focus on writing the decision and, due to the passage of time, completion of the remainder took far longer than it should have done.