Neutral Citation Number: [2022] EWCA CIV 249

Case No: CA-2021-000606

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
JASON COPPEL QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
[2021] EWHC 882 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2022

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE WILLIAM DAVIS
MR JUSTICE ZACAROLI

- -

Between:

(1) FIRST ALTERNATIVE MEDICAL STAFFING LTD **(2) DELTA NURSING AGENCY LTD**	**Appellants/ Claimants**
- and -	
THE COMMISSIONERS OF HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents/ Defendants**

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Michael Firth (instructed by **Morrisons Solicitors LLP**) for the **Appellants**
Eleni Mitrophanous QC (instructed by **HMRC**) for the **Respondents**

Hearing date: 8 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 10.30 a.m. on Friday 4 March 2022.

Mr Justice Zacaroli:

1. The question in this appeal is whether the Appellants can apply an extra-statutory concession made by HMRC, referred to as the 'Nursing Agencies Concession' (the "NAC"), retrospectively so as to exempt past supplies from VAT. It arises in the context

of assessments relating to the period September 2014 to end of April 2016 in the sum of £221,325 in the case of the first Appellant, 1st Alternative Medical Staffing Ltd ("1st Alternative"), and to the period March 2013 to end of September 2016 in the sum of £1,865,246 in the case of the second Appellant, Delta Nursing Agency ("Delta") (together, the "Assessments").

Background

2. The background is fully set out in the careful judgment of Jason Coppel QC, sitting as a deputy judge of the High Court. The following is a summary sufficient for the purposes of the sole issue raised by this appeal.

3. The Appellants are employment bureaux which provide nurses and other medical staff (for convenience, "nurses") on a temporary basis to hospitals and care homes.

4. When a nurse is placed with a client by the Appellants, the client pays the Appellants a charge per hour which includes both a wage element and a commission element by way of agency fee. The Appellants pay the wage element to the nurse.

5. Employment bureaux such as the Appellants can choose to adopt one of two business models. They can either act as principal in the supply of workers, or as agent making supplies of intermediary services. If the bureau acts as principal, it essentially buys-in the services of the worker and makes their own supply of staff to the client. If the bureau acts as agent, it simply introduces the worker to the client, and it is the worker that provides their services to the client.

6. At all material times, the Appellants charged and accounted for VAT on the basis that they were acting as agent. The Appellants therefore charged and accounted for VAT on the commission element only of the amounts paid to them by clients. A helpful illustration was provided in the Appellants' skeleton argument:

   (1) Assume that the Appellants charged their client £20 for providing a nurse, of which £12 represents the amount paid to the nurse and £8 represents the Appellants' commission.

   (2) The Appellants charged the client VAT in the sum of £1.60 on the commission element of £8 and accounted to HMRC for that £1.60 of VAT.

7. The Assessments sought payment of additional VAT on the basis that the Appellants were at all material times acting as principal. It is common ground that the Appellants were in fact acting as principal. Absent any concession by HMRC, and subject to any applicable statutory exemption, an employment bureau acting as principal is liable to account for VAT on the whole of the amount paid to it by its client (in the example above, the whole of the £20 fee charged to the client, resulting in a VAT charge of £4).

8. Delta had received a letter from HMRC dated 14 January 2004 (the "2004 Letter") which confirmed that it was correct to charge and account for VAT on the commission element, primarily because Delta was acting as agent for the employment of temporary staff rather than as principal.

9. The Appellants sought judicial review of HMRC's decisions to assess them to additional VAT, contending among other things that they had a legitimate expectation they would be treated as agents, not principals, arising from the 2004 Letter. The judge held that, while the 2004 Letter was capable of giving rise to such a legitimate expectation, by 2013, as a result of subsequent HMRC public statements, the Appellants could no longer rely on that legitimate expectation. Popplewell LJ refused the Appellants permission to appeal against that aspect of the judge's decision.

10. The NAC at the heart of this appeal was first set out in HMRC Brief 12/10 on 18 March 2010. The relevant part of it reads as follows:

> "By concession (HMRC regularly reviews these), nursing agencies (or employment businesses that provide nurses and midwives, as well as other health professionals) may exempt the supply of nursing staff and nursing auxiliaries supplied as a principal to a third party, if the supply is of…"

11. There then follows a list of specific requirements as to the nature of the staff that fall within the concession and further matters with which the agency must comply to qualify for the concession. The judge noted, at [19] of his judgment, that HMRC does not dispute that the Appellants at all material times satisfied those requirements. HMRC say that is wrong, and they have never accepted that the Appellants satisfy the substantive requirements of the NAC. The Appellants contend that HMRC are not now permitted to dispute that those requirements are satisfied. Given my conclusion on the issue raised by the appeal, it is unnecessary to determine this dispute, and I proceed on the assumption that the Appellants do satisfy the substantive terms of the NAC.

12. The judge concluded that the Appellants could not now rely on the NAC, because it cannot be invoked retrospectively. The Appellants appeal against that aspect of the judge's decision with the permission of Popplewell LJ.

13. For completeness, the Appellants also contend that their services were exempted from VAT as supplies of medical care, pursuant to the VAT Act 1994 ("VATA"), Schedule 9, Group 7, item 1. HMRC disagree and there is a pending appeal to the First-tier Tribunal on that issue, currently stayed pending the outcome of these judicial review proceedings.

The Judgment of the Deputy Judge

14. The judge dealt with the NAC issue at [44] to [66] of his judgment. The essential question was one of construction of the NAC: should it be interpreted as enabling a taxpayer to apply it with retrospective effect?

15. He regarded it as implicit in the purpose and function of the NAC that a trader had a choice whether or not to rely upon it. The NAC could not be construed as *requiring* HMRC to apply the concession wherever the various conditions for its application were present since, in that situation, there would be two conflicting positions, one of which (by statute) applies by default.

16. The question was then whether that choice had to be made prior to the relevant supply or may be made retrospectively.

17. Before the judge, as before us, both parties placed reliance on the decision of the Court of Appeal in *R (ELS Group Ltd) v HMRC* [2016] EWCA Civ 663 ("*ELS*"). Given its importance to the issues raised by this appeal, I will set out the relevant parts of that case in some detail.

18. ELS supplied lecturers to further education colleges. In 1997 HMRC introduced a temporary statutory concession under which bureaux that acted as principals could elect not to charge VAT on the salary costs of the workers placed with their clients where the client paid the staff directly. That concession applied, however, only where the bureau supplied its own employees rather than self-employed staff. This concession (the "staff hire concession") was expected to be withdrawn once new legislation came into effect requiring bureaux to act as principals when applying temporary staff.

19. That new legislation came into effect in 2004, as the Conduct of Employment Agencies and Employment Business Regulations 2003 (SI 2003/3319). At the same time, HMRC announced that the staff hire concession would continue for a further 18 months to enable it to undertake a review of the continuing need for the concession in light of the new legislation. By its Business Brief 10/04 ("BB10/04"), HMRC also said that the choice afforded by the staff hire concession would also be available to employment bureaux which had previously acted as principals when they contracted with self-employed staff to provide services to clients. BB10/04 stated:

> "Until Customs have completed their review, employment bureaux can continue to choose whether to act as an agent or as a principal for VAT purposes, even though the new DTI regulations may mean that they are in reality acting as principals. This choice is also available to employment bureaux which had previously acted as principals when they contracted with self-employed staff to provide services to hirers.
>
> VAT will be due only on the commission element of the charge made by employment bureaux that choose to act as agents for VAT purposes…"

20. There then followed detailed provisions as to how bureaux should charge and account for VAT depending on the choice they made under the concession.

21. At the material times, ELS had not charged or accounted for VAT on the supplies it made. That was because it claimed the benefit of a statutory exemption which applied to the supply of educational services where the consideration payable is ultimately a charge to funds provided by the Learning and Skills Council for England. Subsequently, HMRC concluded that ELS was making supplies of staff, not educational services. Having initially accepted that ELS could take advantage of the concession in BB10/04 retrospectively, HMRC changed its mind, informing ELS that they were not prepared to allow retrospective use of the concession because ELS had not at any time done anything to indicate to its customers that it was acting or intended to act as agent. HMRC's position thereafter remained that the choice to be taxed as agent had to be made no later than the date of the relevant supply and could not be made with retrospective effect.

22. ELS sought permission to apply for judicial review of that decision, including on the ground that HMRC were wrong about BB10/04 not being capable of being applied retrospectively. The Upper Tribunal (Tax and Chancery Chamber) found in favour of HMRC. The Court of Appeal dismissed ELS's appeal.

23. Patten LJ, with whom Floyd LJ and Baker LJ agreed, said (at [24]) that the most influential contextual element in the process of construction was the statutory default position, namely that VAT was due on the whole of the value of the supplies made by ELS. Section 1(1) of VATA imposed the charge to VAT, which became due at the time the supplies were made: section 1(2).

24. At [25], he noted that counsel for ELS conceded that, had ELS invoiced the colleges in respect of taxable supplies of staff which it had supplied as principal, and therefore charged and accounted for VAT on the full amount of its fees, it would not have been possible for it subsequently to change its mind about the basis upon which it wished to be taxed for those past accounting periods. That was because, although there is a legislative route to correcting any errors in VAT returns (regulations 34 and 35 of the Value Added Tax Regulations 1995, SI 1995/2518, the "VAT Regulations"), that was only possible, in any case where the supplies exceeded £2,000, where the understatement or overstatement of tax in the return was an error.

25. ELS submitted, however, that what made the difference in that case was that ELS never made a choice between being treated as a principal and being treated as an agent for the purposes of BB10/04. The argument is worth reciting in full, as it is reflected to a large extent in the argument of the Appellants in this case:

> "It [ELS] purported to make exempt supplies of educational services so that the issue never arose. The claim to be making exempt supplies was an error and has been subsequently corrected under the statutory machinery. To construe the concession as including the ability to make the necessary choice with retrospective effect does not therefore conflict with the operation of the statutory machinery for the recovery of VAT in this case. Having ruled that the supplies of services were taxable, HMRC could raise an assessment for the VAT due and ELS could then exercise its right to be taxed as an agent under BB10/04 in respect of those accounting periods."

26. Patten LJ concluded (at [34]) that the language of the concession indicated that the necessary choice would be made prior to or at the date of supply so as to dictate the way the services were invoiced for and thereafter their tax treatment. He rejected ELS's case that to allow the choice to be made retrospectively would not conflict with the operation of the machinery of VAT and the VAT Regulations, for two reasons:

> "35. The first is that extra-statutory concessions such as BBl0/04 operate in effect as a decision by HMRC not to collect tax that becomes statutorily due under VATA in respect of the supplies that were in fact made. That militates strongly in my view against giving the concessions any greater scope than a fair and normal reading of the language of the concession dictates. If the election to be taxed as an agent was to be capable of being operated

> retrospectively then it would in my opinion require clear words in order for it to be given that effect. Here the language used is entirely prospective.
>
> 36. The second reason is that the correct interpretation of BBl0/04 has to be one which accommodates the ordinary circumstances in which the employment bureau will come to exercise the right to be treated as an agent. Although in the present case ELS had not invoiced the colleges for VAT on the supply of the lecturers because it continued to maintain that the services it supplied were educational in nature and exempt, in the cases contemplated by the concession the bureau will be making taxable supplies of staff and its choice (or not) to be taxed as an agent will be irreversible for the reasons already explained once the supplies are made. The concession was drafted in terms to deal with cases of this kind and, as Miss McCarthy accepts, there is simply no statutory machinery in the VAT Regulations which would permit a subsequent choice to be taxed as an agent to be given retrospective effect in relation to earlier supplies. To construe the concession in that way would therefore create an obvious inconsistency with VAT Regulation 35 and is a powerful reason why the concession should be assumed and interpreted not to have that effect. The fact that the necessarily prospective nature of the election will prevent taxpayers like ELS who have attempted but ultimately failed to obtain exemption from VAT for their past supplies from claiming the benefit of the concession for those past tax periods is to my mind neither here nor there. It cannot dictate an interpretation of the concession which is inconsistent with the statutory machinery within which it was intended to operate."

27. In the present case, the judge applied the reasoning in those paragraphs of Patten LJ's judgment. The judge adopted as the starting point in construing the NAC that extra-statutory concessions operate in effect as a decision by HMRC not to collect tax which is due under statute. That, he said, militates against giving the concession any greater scope than a fair and normal reading of the language dictates. If the choice was to be capable of being operated retrospectively, then it would require clear words for the concession to be given that effect. As applied to this case, he said (at [59]):

> "The VAT basis on which supplies are made has real world consequences in terms of traders charging their customers, invoicing their customers, and then accounting for tax to HMRC. As a matter of fact, during the relevant periods the Claimants charged their customers VAT on their agency fees, issued invoices accordingly and then accounted for VAT to HMRC, claiming input tax by way of deduction from the VAT due. They would have done none of these things if they had elected to rely upon the NAC before the relevant supplies were made."

28. While the language of the NAC was less clear than that in the *ELS* case, the judge considered that it was nevertheless "entirely prospective", and there were no clear words to suggest that retrospective election was permissible. He said (also at [59]):

> "Put another way, in order to establish a legitimate expectation of reliance upon the NAC, the Claimants must show that HMRC has made a clear, precise and unequivocal representation that they will be permitted to claim reliance upon the NAC retrospectively, after supplies have been made to which they would wish the concession to apply. In my judgment, the NAC is not clear, precise and unequivocal to that effect."

29. The judge also considered that Patten LJ's reasoning at [36] of *ELS* was equally applicable in this case, namely that the correct interpretation of the NAC has to be one which accommodates the ordinary case contemplated by it, when a bureau's choice whether to be taxed as principal or agent would be irreversible as the VAT Regulations would not permit a subsequent choice to be given retrospective effect in relation to earlier supplies. At [60] the judge said:

> "A similar point applies here: an agency which meets the criteria set out in the NAC can choose whether to account for VAT as a principal (as per the underlying legislation) or for its supplies to be exempt, and a subsequent change of mind could not be given effect retrospectively because the earlier choice would not be an error. This is not the Claimants' situation: they did not make any such choice because they considered that they were required to account for VAT as agents. But it was not the situation of the ELS Group either – it had proceeded on the basis of a different error (that its supplies were exempt) and so had not made a choice either way pursuant to the concession as to whether to be taxed as principal or agent. The reasoning of the Court of Appeal, however, was that the concession fell to be construed in the light of the ordinary case with which it was intended to deal, and not so as to cater for the unusual circumstances of the ELS Group. That reasoning is equally applicable to the present case."

30. The judge rejected the Appellants' argument that Delta had made it sufficiently clear in 2004 that it would wish its supplies to be exempt in the event it were regarded as supplying staff as principal. He concluded (at [64]) that, as that was some years before the NAC was promulgated, it could not be regarded as the necessary election, particularly when supplies then in fact proceeded on the basis that the Appellants were supplying staff as agents.

31. He recognised the harsh impact of the conclusion that the Appellants could neither rely on the 2004 Letter nor on the NAC, in circumstances where – but for their mistaken continued reliance on the 2004 Letter – they would have opted to exempt their supplies pursuant to the NAC. He concluded, however, that the particular consequences for the Appellants in the present case should not be a significant factor in construing the NAC, as it must apply in all cases. Ultimately, to the extent that the Appellants suffer significant financial consequences it is a result of their failure to appreciate the

significance of and/or act upon the various notices and publications of HMRC subsequent to the 2004 Letter.

The grounds of appeal

32. The Appellants contend that the judge made the following three errors of law:

(1) concluding that the NAC could not be relied on retrospectively as a matter of domestic law;

(2) failing to consider whether the NAC could be relied on retrospectively as a matter of EU law, under the principle of legitimate expectation and in light of the principle of legal certainty, or, alternatively, deciding that the NAC could not be relied on retrospectively as a matter of EU law; and

(3) applying the wrong test and reaching the wrong conclusion as to whether the Appellants had sufficiently exercised any choice required to be made under the NAC.

(1) Retrospectivity in domestic law

33. The Appellants claim to be entitled to rely on the NAC as an extra-statutory concession giving rise to a legitimate expectation that they could exempt supplies to their clients retrospectively.

34. The parties were agreed that in order for an extra-statutory concession to be capable of giving rise to a legitimate expectation on the part of a taxpayer, it must be clear and unambiguous, and that the question is how, on a fair reading of the concession, it would have been reasonably understood to those to whom it was addressed (i.e. the ordinarily sophisticated taxpayer): *Re Finucane's application for judicial review* [2019] UKSC 7, per Lord Kerr at [62]; *Paponette v Attorney-General of Trinidad and Tobago* [2010] UKPC 32, per Lord Dyson at [30].

35. In this case, therefore, the essential question is whether the ordinarily sophisticated taxpayer would understand that the NAC may be relied on retrospectively.

36. Mr Firth, who appeared for the Appellants, submitted as follows: (1) the NAC contains no express reference to a time limit, or qualification as to when reliance may be placed on it, and it would have been easy to do so, for example by including a sentence that said a taxpayer could only rely on the NAC if it exempted the supply before making it; (2) the judge failed to construe the NAC from the perspective of the ordinarily sophisticated taxpayer, who would not understand that it contained any such time limit or qualification; (3) there is nothing inherent in the existence of a choice relating to exemption such that it must be made prior to the supply taking place, relying on cases in which a choice to rely upon an exemption was made retrospectively; (4) the suggested time limit or qualification was arbitrary; and (5) the wording was materially different to that in *ELS*, so that the judge was wrong to place reliance on the decision of the Court of Appeal in that case.

37. Mr Firth also submitted that there was no basis on which a time limit could be introduced into the NAC by way of implication or presumption.

38. Ms Mitrophanous QC, who appeared for HMRC, did not dispute that the NAC must be interpreted from the perspective of the ordinarily sophisticated taxpayer. She submitted, however, that the ordinarily sophisticated taxpayer would understand perfectly well that to exempt a supply means neither charging, nor accounting for, VAT on that supply, and that the choice to do so was something which is necessarily made at the time of supply. Whereas BB10/04 (the concession in issue in *ELS*) needed to spell out the consequences (in terms of the appropriate tax treatment) for the taxpayer depending on whether it chose to act as agent or principal, there was no need to do so in the NAC, because the necessary tax treatment flows inexorably from the choice made. If the taxpayer chose not to exempt the supply, then the tax treatment would be whatever was appropriate to that supply. But if the taxpayer chose to exempt the supply, then the consequence was obvious: no VAT would be charged or accounted for in respect of the supply. Accordingly, while the wording of the NAC is different from that of BB10/04, that difference is not material.

39. In my judgment, in agreement with Ms Mitrophanous, the short answer to this appeal is that the NAC would be understood by the ordinarily sophisticated taxpayer as requiring a choice to be made in relation to each supply at the latest by the time the client is invoiced in respect of that supply. That is because the choice to exempt a supply requires positive action by the taxpayer. To "exempt" a supply means not to charge or account for VAT on it. The positive action required by the taxpayer is to exclude, rather than include, VAT when invoicing its client. The choice "to exempt" a supply is therefore one that has necessarily to be made at the time of the supply.

40. I do not accept that this conclusion is precluded because of any lack of clarity or ambiguity as to the precise time at which the choice is to be made. It is true that section 6 VATA provides a range of times at which a supply of services is deemed to take place: the date the services are performed (section 6(3)); the receipt of payment or the date of invoice, if either is prior to the date the services are performed (section 6(4)); or the date of invoice, if issued within 14 days after the date the services are performed and the taxpayer has not notified HMRC that he elects not to avail himself of this option (section 6(5)). Subsections (6) to (14) provide for other variations. This range of possibilities does not affect the critical point, however, that at some point in the course of a supply the taxpayer must commit to either charging VAT or not. The relevant question – so far as retrospective application of the NAC is concerned – is whether it can be applied *after* the taxpayer has committed to either charging or not charging VAT. In the present case, the Appellants did commit to charging VAT, on the commission element of the fee, at the latest when they invoiced their client. That was clearly inconsistent with the application of the NAC, which would have required no VAT to be charged at all.

41. Nor do I accept that the judge failed to apply the ordinarily sophisticated taxpayer test. While he did not expressly refer to the test in that part of his judgment dealing with the NAC, he was clearly aware that it was the appropriate test for considering whether a taxpayer could rely on a legitimate expectation arising from an extra-statutory concession, as he quoted the passage from Rose LJ's judgment in *R (Aozora) v HMRC* [2019] STC 2486, at [31], in which the test was referred to (see [37] of the deputy judge's judgment). More importantly, for the reasons already given, I am satisfied that the judge's interpretation of the NAC is consistent with how it would be understood by the ordinarily sophisticated taxpayer.

42. Mr Firth's submission that there is no inherent bar on a choice relating to exemption being applied retrospectively was based on the decision of the Court of Justice of the European Union in *VDP Dental Laboratory NV v Staatssecretaris van Financiën* (C-144/13) and the decision of the Supreme Court in *Investment Trust Companies v HMRC* [2017] UKSC 29. The choice that the taxpayer faced in those cases was between (1) relying on an exemption provided by an EU Directive with direct effect in the member state, or (2) relying on domestic law which was contrary to the Directive (and which, for that reason, the member state could not enforce against the taxpayer). Only the latter case referred expressly to retrospectivity. It did so in the context of working out what happens when a decision of the court which itself has retrospective effect determines that tax was not lawfully due at the time it was paid. At most, these cases demonstrate that retrospective application of a different tax treatment is possible, even though that requires the consequences of the earlier tax treatment to be undone. Since, however, the relevant VAT treatment applied retrospectively as a matter of law, neither case assists in identifying whether the NAC is to be construed as having retrospective effect.

43. The fact that there are significant differences between the wording of BB10/04 and the NAC does not mean, as Mr Firth contended, that the reasoning of the Court of Appeal in *ELS* does not provide support for the conclusion reached by the judge. The key reasoning in the Court of Appeal's decision in *ELS* which the judge in this case applied is that which appears in [35] and [36] of the Court of Appeal's decision.

44. The reasoning in [35] is that, because extra-statutory concessions operate as a decision by HMRC not to collect tax that is statutorily due in respect of supplies actually made, there would need to be clear words for a concession to be given retrospective effect. That applies equally in this case irrespective of any difference in the wording of the concession.

45. The NAC of course stands to be construed on its own and, in considering whether clear words can be found, comparison with the language of the different extra-statutory concession in *ELS* is of limited use. The most that can be said in this respect on behalf of the Appellants is that the judge noted, at [59], that the language of the NAC is entirely prospective "as in *ELS*". Mr Firth pointed to the fact that whereas the choice in *ELS* (to act as agent or principal) is one which necessarily has to be made before making a supply, that is not so in the case of the choice envisaged by the NAC (to exempt the supply from VAT). Mr Firth accepted, however, that the choice in *ELS* was to act as agent *for VAT purposes* only, and making that choice would not require a taxpayer to act – so far as the underlying transaction was concerned – any differently than if it had not made the choice. Accordingly, exercising the choice in *ELS* simply meant charging and accounting for VAT in a particular way. That is the same way in which a taxpayer would exercise the choice provided by the NAC (albeit the manner in which VAT would be charged and accounted for upon exercising the choice is different as between the two cases).

46. Mr Firth also submitted that the judge mis-interpreted or misapplied the reasoning in [36] of *ELS*. The essence of the Court of Appeal's reasoning in that paragraph was that any construction of the concession had to accommodate the ordinary circumstances in which reliance may be sought to be placed on it. Mr Firth submitted that the judge interpreted this (in the passage from [60] of his judgment quoted above) as requiring

the scope of the concession to be cut down so that it applied in the ordinary case, but not in the unusual circumstances of this case.

47. I disagree with that reading of the judge's judgment. The point made by Patten LJ to which the judge was referring was that any construction of the NAC would need to accommodate the ordinary case of retrospective application, and not merely the special circumstances of the particular taxpayer before the court. The ordinary case was one where the taxpayer had made a choice at the time of supply (to act as principal and charge VAT on the whole value of the supply) but later sought to rely on the exemption. Later application of the concession was not possible in that ordinary case, because there is no statutory machinery in the VAT Regulations which would permit a subsequent choice (in that case to be taxed as agent) to be given retrospective effect in relation to earlier supplies. Accordingly, the concession ought not to be construed as having retrospective effect in the circumstances in which ELS sought to rely on it.

48. The same is true here: in the ordinary case where a taxpayer made a supply of staff as principal but did not choose to exempt the supply under the NAC, then it would have charged, and accounted for, VAT on the whole value of the supply. There is similarly no machinery which would permit a subsequent choice (to exempt the supply) to be given retrospective effect in that case. Accordingly, the Court of Appeal's conclusion in *ELS* applies with equal force in this case: the NAC cannot be interpreted as permitting retrospective exemption of supply if retrospective exemption does not work in the ordinary case.

49. Mr Firth sought to avoid that conclusion by contending that the reason retrospective application was outlawed in the ordinary case was either because the taxpayer, having made its choice, could not go back on it or because, even if the taxpayer made no deliberate choice *not* to take advantage of the NAC (for example because it was unaware of it), if it charged and accounted for VAT on the whole amount of the supply, then the lack of machinery to recover the VAT paid and accounted for meant that there could be no purpose in trying retrospectively to exempt the supply. He submitted that the present case was distinguishable because the Appellants, being unaware at the time of supply that they were making supplies as principal, made no decision in respect of the NAC *and* because they only charged and accounted for VAT on a portion of the value of the supply. It should be possible now, therefore, to apply the NAC retrospectively to that part of the supply on which VAT had not been charged.

50. This is similar (as I have already indicated) to the argument made by ELS (referred to at [26] of the judgment of Patten LJ), which was rejected for the reasons set out at [35] and [36] of Patten LJ's judgment. It should be rejected for similar reasons here. If anything, as Ms Mitrophanous pointed out, the Appellants – so far as this argument is concerned – are in a worse position than the taxpayer in *ELS*. In *ELS*, the taxpayer did not charge any VAT at the time of supply, believing it was entitled to exempt the supply altogether. In this case, however, the Appellants did charge VAT to their clients. That had real consequences which (as Mr Firth accepts) cannot be undone. These include not only the lack of machinery for the Appellants to reclaim VAT for which they wrongly accounted, or for HMRC to recover any input tax which the Appellants wrongly offset in their VAT returns, but also the fact that neither payment of the VAT element of the invoice by the client, nor any offsetting of that VAT as input tax against any VAT received on supplies made by it, could be reversed.

51. In addition, the argument should be rejected because it depends upon viewing either the supply as being divisible into two parts, or the exemption under the NAC as being applicable to only one part of the supply. Neither is, in my judgment, possible.

52. The supply was a single indivisible supply. It is just that, at the time, the Appellants treated it as a supply of agency services, whereas it was (on the assumption made for the purposes of these proceedings) a supply of staff by the Appellants acting as principals.

53. Similarly, the NAC permits the taxpayer to exempt "the supply" where nurses were supplied as principal. It does not permit a taxpayer to exempt one part only of the consideration for that supply, having already charged and accounted for VAT on another part of that consideration.

54. As Ms Mitrophanous submitted, there are three possible VAT treatments (ignoring any extra-statutory concession) for the supply of staff by an employment bureau (adopting the figures in the example at [6]] above):

    (1) Case A, where the bureau makes a taxable supply of agency services, charging a fee of £8 (the worker supplying their services to the client for £12), in which case VAT of £1.60 is charged on the fee;

    (2) Case B, where the bureau makes a taxable supply of services in the form of staff for a £20 consideration, in which case VAT of £4 is charged to the client; or

    (3) Case C, where the bureau makes an exempt supply for £20, in which case no VAT is charged.

55. The NAC permitted a bureau which fell within Case B to exempt the supply, and thus charge no VAT, in which case it would be treated as falling within Case C.

56. In reality, the VAT treatment which the Appellants seek is not Case C (retrospective exemption of the supply as a whole), but Case A (VAT treatment as if the supply had been of agency services). That is impermissible, especially where that is the (now acknowledged to be incorrect) treatment which the Appellants sought (but failed) to have applied to them via the judicial review claim based on the 2004 Letter. This serves to reinforce the point made by the judge at [64] of the judgment, that the unfortunate position in which the Appellants find themselves is the consequence of the error they made in continuing to structure their supplies on the basis of the 2004 Letter after (as the judge found) they were no longer entitled to rely on it as giving rise to a legitimate expectation.

57. Mr Firth supported his argument by distinguishing between the question whether the NAC gave rise to a legitimate expectation that the supply could retrospectively be exempted and the question as to what effect could in practice be given to that retrospective application in any given case. He submitted that the practical difficulties in unravelling the consequences of VAT having been charged at the time of supply were relevant only to the second question and ought not to preclude a legitimate expectation arising in the first place. In this case, he submitted that there was a legitimate expectation that the concession may be applied retrospectively, and that it was only at the "fair to frustrate" stage of the argument that account had to be taken of the inability

to reverse the consequences of VAT having been charged on the commission element at the time of supply. By this, he was referring to the fact that in any case where a legitimate expectation has been established, it is then necessary to consider whether and to what extent it is fair to frustrate that legitimate expectation.

58. While attractively presented, I do not accept this argument. The relevance of the impossibility of unravelling the consequences of the choice made at the time of supply (whether to charge no VAT at all, as in *ELS*, or to charge VAT on the basis that the supply was of agency services, as in this case) is not merely that they create "practical difficulties". The main relevance is that the lack of statutory machinery to reverse the effect of the earlier decision means that to permit retrospective application of the concession would conflict with Regulation 35 of the VAT Regulations: see *ELS* at [36]. It points strongly against, therefore, interpreting the NAC as permitting a taxpayer retrospectively to exempt a supply.

59. My conclusion that the judge was correct to find that the Appellants could not rely on the NAC retrospectively as a matter of domestic law is based on the interpretation of the NAC as it would be understood by the ordinarily sophisticated taxpayer. It does not depend upon any implication or presumption. Accordingly, it is unnecessary to address Mr Firth's submissions on those latter points.

(2) Retrospectivity in European law

60. I can take this ground of appeal relatively briefly as, apart from the following four points, Mr Firth did not suggest there was any real difference between the principle of legitimate expectation in domestic law, and the principle of protection of legitimate expectation of economic agents in European law (see, for example, *Elmeka NE* C-181/04, at [31]).

61. He submitted that there are nevertheless four reasons why the conclusion for which the Appellants contend is even stronger under EU law.

62. First, he submitted that EU law recognises that a choice regarding exemption may be made afterwards. That, however, was based on the two authorities to which I have referred above, at [42], neither of which assists in construing the meaning or effect of the NAC.

63. Second, he submitted that it is incompatible with legal certainty to imply a time limit or qualification through "over-interpreting particular words". I do not accept that the conclusion reached above, as a matter of domestic law, is based on over-interpretation of the words used in the NAC. On the contrary, it is based on a straightforward reading of the NAC which permits a taxpayer "to exempt" a supply, and the consequences which the ordinarily sophisticated taxpayer would understand follow from choosing to exempt a supply.

64. Third, he submitted that to the extent that the Appellants' case is answered by the practical difficulties to which retrospective application of the NAC would give rise, then those practical difficulties are the consequence of the NAC being in the form of a mere administrative practice rather than clear legal enactment. He contended that administrative practices are not compatible with the EU law principle of legal certainty and the UK cannot take advantage of its own wrong. This argument is difficult to

follow. It is the Appellants who seek to rely on the concession. If it is a "wrong", because it is incompatible with EU law (assuming for this purpose that it is), that cannot have any effect on the manner in which it falls to be interpreted. In any event, the conclusion that the NAC does not permit retrospective exemption of a supply is based principally on the interpretation of its wording (see above), not on the practical difficulties to which that would give rise.

65. Fourth, he submitted that there is no authority to support HMRC's contention that the concession should be construed strictly or restrictively. Since my conclusion is not based on any such contention advanced by HMRC, it is unnecessary to deal with this point.

(3) Whether the Appellants sufficiently exercised a choice to exempt supplies

66. I can deal similarly briefly with the Appellants' third ground of appeal. Mr Firth's submission that the Appellants had elected to treat the supplies as exempt was based on the contention that HMRC had been aware, since 2004, that insofar as Delta made supplies as principal, it wanted to treat them as exempt. The subsequent error was a misclassification as to whether the supplies fell within the treatment and did not reflect any change of decision.

67. I reject this submission. Whatever HMRC may have understood the Appellants wished to do – if they supplied nurses as principals – in 2004 is of no relevance to the question whether the Appellants elected to exempt supplies made by them in 2013-2016. The fact is that the Appellants purported to supply agency services after 2004, including during the whole of the period to which the Assessments relate. The most that can be said is, because they did not appreciate they were supplying nurses as principal, they gave no thought to the NAC as they thought it did not apply to them. I do not see any way in which that can be viewed as a choice made by the Appellants, when they made supplies in the period 2013-2016, to exempt those supplies from VAT.

Conclusion

68. For the above reasons I would dismiss the appeal.

Lord Justice William Davis:

69. I agree.

Lady Justice Asplin:

70. I also agree.