



UT Neutral citation number: [2023] UKUT 28 (TCC)

UT (Tax & Chancery) Case Number: UT/2021/ 000155

**Upper Tribunal  
(Tax and Chancery Chamber)**

Hearing venue: The Rolls Building,  
London EC4  
5,6,7 & 10 October 2022

**Judgment given on 30 January 2023**

**Before**

**MR JUSTICE LEECH  
JUDGE RUPERT JONES**

**Between**

**THE KING (ON THE APPLICATION OF  
GLOUCESTERSHIRE HOSPITALS NHS FOUNDATION TRUST)**

Claimant

**and**

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

Defendants

**Representation:**

For the Claimant: Owain Thomas KC, instructed by KPMG

For the Defendants: Peter Mantle, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

## DECISION

### I. Introduction

1. This is a claim for judicial review where the central issue is whether a single supply of healthcare facility services has been made to the Claimant for the purposes of obtaining a refund of Value Added Tax ('VAT') or whether there have been multiple and separate supplies of consumable goods and healthcare facility services.
2. The Claimant, the Gloucestershire Hospitals NHS Foundation Trust ('the Trust'), applies for judicial review of the decision of the Defendants, the Commissioners for His Majesty's Revenue & Customs ('HMRC'), dated 11 December 2020. HMRC decided that the Trust was not entitled to a refund of VAT in respect of consumable goods ('Consumables') used in its operating theatres for the treatment of patients that are provided to the Trust under a wide-ranging contract for the supply of healthcare facilities by Genmed.Me Limited ('Genmed').
3. The VAT was charged to the Trust pursuant to an 'Agreement for the Management and Administration of Surgical Facilities' dated 22 December 2017 (the 'Agreement'). In summary the Agreement provided that Genmed would supply the Trust with managed surgical theatre facility services. The managed services include maintenance services, facilities and sterilisation services, data analytics, stock control, management and other services necessary for a surgical theatre to be available and ready for use. The services also include support services for the operation of the theatre itself (cleaning, sterilisation, waste disposal and premises related services) and services which relate directly to goods, such as stock management, IT services, catalogue management, negotiating with and dealing with suppliers and product recall.
4. The goods which Genmed supplied to the Trust under the Agreement broadly consisted of four categories: (i) structural items, furniture and operating systems, such as operating tables; lights, generator machinery and heating and cooling equipment; (ii) re-useable operating equipment and machinery, such as patient monitors, ultrasounds, anaesthetic machines, ventilators, microscopes and scalpels; (iii) single use goods, which are used in the course of procedures on patients and include items such as sutures, bandages and gauze; and (iv) prostheses, such as hip and knee joints, which are provided to patients during the course of surgery. Categories (iii) and (iv), i.e. the single use goods and prostheses, constitute the Consumables.
5. HMRC allowed the Trust a refund in respect of VAT paid on all the services and goods in categories (i) and (ii) provided under the Agreement but refused a refund of VAT in respect of the Consumables. In doing so HMRC decided that the VAT on the Consumables fell outside the refunds available under Heading 45 of the Contracted-Out Services Direction ('COSD' or the 'COS Direction') for healthcare facilities permitted by section 41(3) of the Value Added Tax Act 1994 ('VATA') in relation to VAT chargeable on Government departments including NHS Foundation Trusts.
6. HMRC refused to allow a refund insofar as VAT was incurred on the provision of Consumables on the basis that they fall to be considered as a separate supply of goods from the supply of fully functioning theatre facility services. Moreover, HMRC did not consider the supply of those goods to be closely related to the supply of those services. The Trust claims that HMRC have unlawfully decided that it is not entitled to a refund of the amount of VAT incurred on the Consumables under the terms of the COS Direction. The Trust claims that the Consumables are part of a single composite supply of services for VAT purposes where the services and goods are practically and economically indissociable.

## II. The grounds for judicial review

7. The Trust has been granted permission to pursue four grounds for judicial review challenging the lawfulness of HMRC's decision. The first three grounds rely on the proposition that the decision is simply incorrect in law and that for the purposes of the COSD regime the Trust is entitled to the relief claimed. The fourth ground relies on a public law right of challenge which is free-standing. The Trust claims as follows:

**Ground 1:** It is entitled to a refund of VAT in respect of the Consumables on the basis that the supply falls within List 2, Heading 45 to the COS Direction ('COSD 45'), which provides for refunds on the operation of healthcare facilities and the provision of any related services.

**Ground 2:** Title to the Consumables does not pass from Genmed to the Trust under the Agreement so that there is no supply of goods by Genmed to the Trust under the Agreement (the 'Title Issue'). But in any event the supply of the Consumables is an element of a single supply of managed theatre services under the Agreement which falls within the description in COSD 45, namely, the operation of healthcare facilities (the 'Single Supply Issue').

**Ground 3:** The supply of the Consumables is a supply of goods closely related to the supply of managed theatre services and qualifies for a refund under paragraph 2(c) of COSD.

**Ground 4:** HMRC have adopted differential and inconsistent treatment for contracted out theatre services such that its treatment of the Trust is unfair, irrational and an abuse of power.

## III. The hearing

8. We had the benefit of four days of detailed oral argument from counsel during the hearing, in addition to their helpful Skeleton Arguments. Both counsel referred to a wide range of statutory, case law and legal materials, which were collected into the joint bundles of authorities which were before us. We also had the benefit of a core bundle, comprising the witness statements and the other principal documents in the appeal, and full bundles of all of the evidence. Neither party applied to cross-examine any of the witnesses. Subject to questions of weight and emphasis, we accept the evidence of all of the witnesses.

## IV. The procedural background

9. There is no statutory or other right of appeal to the First-tier Tribunal (the 'FtT') against a decision regarding non-statutory clearance under the Contracted-Out Services ('COS') regime. Section 83(1) VATA lists the most relevant VAT decisions over which a taxpayer has a right of appeal to the FtT and a decision to refuse a refund of VAT under COSD is not listed there. Moreover, the VAT in question is not the Trust's 'input tax'. HMRC's decision letter for this reason contains no reference to any right of appeal. The Trust's only remedy, in the absence of HMRC making an assessment, is to challenge the decision by way of judicial review. In the event that HMRC were to issue an assessment then there would appear to be a right of appeal to the FtT. This position is agreed by HMRC.

10. Once judicial review proceedings were issued in the High Court, the Trust invited the Administrative Court to transfer the claim to the Upper Tribunal (the 'UT') and that order was duly made on 13 August 2021 pursuant to section 31A of the Senior Courts Act 1981. The UT granted the Trust permission to pursue all four grounds on 8 September 2021.

## V. Ground 1

11. The issue for determination on Ground 1 is whether the relevant supplies of the Consumables received by the Trust from Genmed fall within COSD 45 as a matter of simple language or classification and without recourse to the substantial body of VAT law in relation to the supply of goods and services. The Trust's position is that the entitlement to the benefit of the refund of VAT requires only that the combined services which Genmed has provided under the Agreement correspond to the description in COSD 45.

12. HMRC contend that COSD 45 only applies to supplies of services as that term would be understood under VAT legislation and that Genmed made separate supplies of goods and services. HMRC contend, therefore, that the Trust is not entitled to a VAT refund on the cost of the Consumables.

### A. The law

13. The purpose of the COS regime was to encourage central government and certain other public bodies (such as NHS Trusts), which carried out non-economic activity, to contract-out certain types of services which they would otherwise have carried out in-house using their own employees. Those contracted-out services, supplied to NHS Trusts by third party suppliers, were generally subject to VAT and, in general, that VAT incurred was not 'input tax' and could not be recovered by the relevant agencies under s 25 and 26 VATA. But for the COS regime the VAT incurred by NHS Trusts would have been a disincentive to contracting-out relevant types of services. The purpose of COS was to remove that potential disincentive and so encourage the contracting-out of certain services.

14. COSD was an administrative provision introduced to achieve that objective and it permits NHS Trusts and certain other public bodies to obtain a refund of VAT incurred in relation to that body's "non-business activities" (and in the case of NHS Trusts the provision of healthcare by a publicly funded body was treated as a "non-business" activity). Section 41(3) VATA conferred a statutory power to implement the COS regime by a Treasury Direction and its purpose was explained in more detail in *R (Northumbria NHS Trust) v HMRC* [2020] EWCA Civ 874; [2020] STC 1720 ('*Northumbria*') at [7]:

"7. The Trust's claim to a refund of VAT which it incurred on the acquisition of cars is made under section 41 (3) of the Value Added Tax Act 1994 ("VATA"). This is a domestic provision which does not owe its origin to EU law. The purpose underlying the enactment of section 41 was to encourage public authorities to "outsource" the provision of services. When they perform services in-house, using their own employees, they incur no VAT. If they were to outsource those services, they would be exposed to having to pay VAT charged by the outside contractor. That was seen as a disincentive to outsourcing the provision of services. Hence the need to provide for a refund of VAT....."

15. Section 41 VATA provides as follows:

"Application to the Crown

(1) This Act shall apply in relation to taxable supplies by the Crown as it applies in relation to taxable supplies by taxable persons.

(2) ...

(3) Where VAT is chargeable on the supply of goods or services to a Government department, or on the acquisition of any goods by a Government department from a place outside the member States and the supply, acquisition or importation is not for the purpose:—

(a) of any business carried on by the department, or

(b) of a supply by the department which, by virtue of section 41A, is treated as a supply in the course of furtherance of a business, then, if and to the extent that the Treasury so direct and subject to subsection (4) below, the Commissioners shall, on a claim made by the department at such time and in such form and manner as the Commissioners may determine, refund to it the amount of VAT so chargeable.

(4) The Commissioners may make the refunding of any amount due under subsection (3) above conditional upon compliance by the claimant with requirements with respect to the keeping, preservation and production of records relating to the supply, acquisition or importation in question.

(5) ...

(6) In this section "Government department" include...any body of persons exercising functions on behalf of a Minister of the Crown...

(7) For the purposes of subsection (6)–

...

(c) an NHS Foundation Trust

...

are each to be regarded as a body of person exercising functions on behalf of a Minister of the Crown."

16. For the purpose of section 41(3) VATA the Treasury published a series of 'Refund Directions' in the London, Edinburgh and Belfast Gazettes listing the services eligible for refund. The COS Direction states as follows in paragraphs 2 and 3 and List 2:

"This direction shall come into operation on 2nd December 2002.

2. Subject as provided in paragraph 3, a Government department listed as belonging to a category of departments listed in List 1 of this direction may claim and be paid a refund of the tax charged on:

(a) the supply to it of any services of a description in List 2;

(b) the supply to it of leased accommodation for more than 21 years as part of the supply to it of any services of a description in List 2; or

(c) the supply to it or acquisition from another Member State of importation from outside the Member States by it of goods closely related to the supply to it of any services of a description in List 2.

3. A tax refund as described in paragraph 2 will only be paid if:

(a) either the supply of those services or goods is not for the purpose of:

(i) any business carried on by the department; or

(ii) any supply by the department which, by virtue of directions made under section 41(2) and (5) of the Value Added Tax Act 1994, is treated as a supply in the course or furtherance of a business; and

(b) the department complies with the requirements of the Commissioners of Customs and Excise both as to the time, form and manner of making the claim and also on the keeping, preservation and production of records relating to the supply, acquisition or importation in question."

[Emphasis Added]

List 2

Eligible Services

Heading 45

Operation of hospitals, health care establishments and health care facilities and the provision of any related services

[This is "Heading 45" or "COSD 45"]

17. HMRC administer the system of refunds but have only limited powers to determine the conditions for eligibility. They may (i) determine the time, form and manner of any claim made pursuant to section 41(3) and (ii) make refunds 'conditional upon compliance ... with requirements with respect to the keeping, preservation and production of records relating to the supply, acquisition or importation in question'.

18. The funding allocated to public bodies who are able to recover VAT under the COS Direction takes into account the irrecoverable VAT which they may incur (including any VAT which is not

intended to be recoverable under the COSD headings). Apart from the powers expressly conferred on them by section 41 VATA, HMRC do not have any general power or discretion to regulate recovery under COS. Specifically, they have no power to interpret, narrow or extend the right to refund under COS.

19. HMRC has published guidance in Internal Manual VATGPB9700; VATGPB9720 and VATGPB10630 on the operation of COSD 45 which states as follows:

“When considering whether a supply qualifies for recovery under one of the COS Headings, Government departments and NHS bodies should initially refer to guidance in the VAT Supply and Consideration manual to determine whether the supply they are receiving is a single or multiple supply.”

20. The guidance also provides a non-exhaustive list of goods and services which HMRC treat as being included in COSD 45. That list includes the following entries:

- “• The ancillary provision of equipment together with the service of operating and maintaining that equipment, for example heating, cooling and ventilation equipment; fire protection equipment; specialised lighting; nurse call systems; and medical gas supply piping;
- Utilities when provided as part of the whole package under the same contract and paid for within the single unitary charge – the utilities may be invoiced separately to the rest of the charges;
- Hyperbaric chambers/ mobile theatres, as long as these are supplied on a fully managed and serviced basis.”

21. However, the guidance also indicates that HMRC do not treat the following items as falling within COSD 45:

- “• “The hire of equipment alone;
- The separate supply of utilities.”

22. This guidance demonstrates that HMRC confine the operation of COSD 45 to cases where the service corresponds to the description set out in the list and only includes goods where they are supplied as part of a composite single supply applying conventional VAT law principles. HMRC accept that the language of the guidance and, in particular, the reference to ‘single or multiple supply’ and ‘ancillary’ provision of equipment shows that in approaching COSD 45 they adopt conventional VAT principles and ask whether what is supplied or provided amounts to a composite single supply of services for VAT purposes. Ground 1 requires us to consider whether this approach is correct as a matter of law.

## B. The Trust’s Argument

23. Mr Thomas KC started from the position accepted in *Northumbria*, namely, that the COS system is separate from the VAT system and is not concerned with concepts which flow from the jurisprudence of the Court of Justice of the European Union (‘CJEU’) concerning the extent of a supply (and whether single or multiple) or any other feature of VAT law. He submitted that it was a purely domestic relief and that it was unnecessary to have recourse to any of those concepts.

24. He submitted that where there is a supply of a healthcare facility and the component parts of that healthcare facility include both goods and services then in accordance with the plain terms of COS 45 the supply of the healthcare facility qualifies for the relief. He argued, therefore, that the only requirement which the Trust was required to satisfy in order to obtain a rebate was that the Agreement imposed an obligation upon Genmed to provide a fully managed theatre facility which corresponded to the description ‘the operation...of healthcare facilities’. He also submitted that if

this requirement was satisfied then every individual item which Genmed provided under the Agreement fell within the scope of COSD 45 without more.

25. Mr Thomas accepted that both section 41(3) VATA and the COS Direction itself contain references to a ‘supply’ of services. However, he submitted that the use of this word was not enough to justify the UT adopting the same construction as in EU VAT law. In particular, he submitted that the COS regime was not part of VAT system legislated for in VATA or provided for by the Principal VAT Directive – 2006/112/EC (‘PVD’) because the PVD, which VATA 1994 implements, contains no reference to a relief of this type whereby certain public authorities are nonetheless entitled to deduct VAT they bear on their costs used for non-business activities. He also submitted that such a position, namely, the deduction of VAT used to make exempt supplies, is directly contrary to the principle of the VAT system and the fact that it makes no provision for this kind of relief is not surprising.

26. He accepted that the refund which the Trust seeks is a refund of ‘VAT’. That is because it is not in dispute that the Agreement provides that Genmed will charge the Trust VAT. But no other aspects of the VAT system apply. The COS headings are not published in the form of VAT Regulations nor are they contained in any form of statutory instrument as is the case with subordinate measures issued pursuant to VATA 1994 either by the Treasury or HMRC. Instead, they are published in the London Gazette from time to time. In short, they have no place in the functioning of the VAT system.

27. Mr Thomas also submitted that the concept of a ‘supply’ only needs to be construed as a statutory term of art and in accordance with EU law when HMRC or the UT apply the provisions of the PVD or VATA to all transactions which fall within the scope of the VAT system and he relied on the CJEU’s discussion of the issue of single/multiple supplies in Case C-349/96 *Card Protection Plan v CEC* [1999] STC 270, (‘CPP’) and all subsequent cases where the Court has acknowledged that the concept of a single/multiple supply is rooted in considerations which arise in the VAT system:

“27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.

...

29. In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

28. He argued that none of these issues (place of supply, VAT rate, integrity of exemptions, fiscal neutrality etc) have any part to play in the operation of the COS regime. In particular, he argued that the relief in question is inherently a distortion of the VAT viewed from the perspective of the relevant principles on deduction of VAT. On these grounds he submitted that a VAT law analysis deployed for the purposes of the PVD or VATA should not be applied to the COS headings.

### C. Decision

29. We reject these submissions and Ground 1 for the reasons which Mr Mantle gave on behalf of HMRC. In particular, we agree with Mr Mantle that the concept of the supply of goods or services present in COSD is no different from the concept of ‘supply’ of goods or service in VATA or in the PVD. We have reached this conclusion for the following reasons.

(1) Approach

30. The proper approach to interpreting the COS Direction generally and COSD 45 in particular is helpfully set out by the Court of Appeal in *Milton Keynes Hospitals NHS Foundation Trust v HMRC* [2021] EWCA Civ 942, [2021] STC 1395 (*‘Milton Keynes’*) at [18] to [23]:

“18. The important point, however, is that the public sector refund schemes are not part of the European framework. They are purely domestic provisions. In *R (Cardiff County Council) v Customs & Excise Commissioner* [2003] EWCA Civ 1456, [2004] STC 356 at [12] Schiemann LJ described a similar scheme involving local authorities as follows:

"In effect what the section provides is a subsidy by the state to councils of VAT which is not recoverable under the VAT regime set up by the Act pursuant to our obligations as a member of the European Community. The provision for the subsidy could have been contained in separate legislation."

19. He went on to say at [38] that the refund scheme under consideration in that case "has nothing to do with rights given under Community law." Provisions of this kind are not, therefore, required by European legislation; but there is nothing to preclude such provisions as part of domestic legislation.

20. This court described the policy underlying section 41 in *HMRC v Northumbria Healthcare NHS Foundation Trust* [2020] EWCA Civ 874, [2020] STC 1720 at [7] as follows:

"The purpose underlying the enactment of section 41 was to encourage public authorities to "outsource" the provision of services. When they perform services in-house, using their own employees, they incur no VAT. If they were to outsource those services, they would be exposed to having to pay VAT charged by the outside contractor. That was seen as a disincentive to outsourcing the provision of services. Hence the need to provide for a refund of VAT."

21. In addition, if a public body financed out of general taxation were itself required to pay tax, the money would simply go round in a circle from one public budget to another.

22. Although it would serve that policy to permit a public authority to reclaim a refund of VAT properly incurred on a supply to it, it would not serve that policy to permit a public authority to retain the amount of a refund (or a subsidy) to which it was not properly entitled. Nor would it accord with that policy for a public authority to retain more than its fair share of public money. As I said in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753, [2013] 1 WLR 3785 at [24] (omitting citation of authority):

"The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other.... In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole."

23..... Mr Southern frankly accepted that the consequence of his argument would be that a public sector body is entitled to retain public funds to which it was never entitled. That, to my mind, is at least one pointer to the conclusion that his argument is not correct. But in my judgment the policy argument is amply borne out by the language and structure of VATA."



31. We agree with Mr Mantle that when construing COSD 45 regard must be had to the language of the heading, the context, the scheme and its purpose: see [22] (above). We must, therefore, interpret the particular provision and its language, so far as possible, in a way which best gives effect to the legislative purpose. We are not confined to a literal interpretation of the words but must also have regard to the context and scheme of the provisions as a whole.

*(2) Language*

32. It is important to begin with the language of s 41(3) VATA and the text of the COS Direction itself. Section 41 applies in relation to taxable supplies by the Crown. Section 41(3) VATA provides that the Treasury may direct refunds of VAT chargeable on ‘the supply of goods or services’ to a Government department including an NHS Trust by virtue of section 41(7). We agree with Mr Mantle that the term ‘supply’ in s 41(3) VATA must have the same meaning as the term ‘supply’ in sections 2 and 4 VATA (and ‘supply’ in the PVD) and we note that s 5 defines ‘supply’ for the purposes of all provisions in VATA. Although the definition is an inclusive and not an exhaustive one (see s 5(2)(a)), there is no suggestion that it was not intended to apply to s 41(3).

33. Paragraph 2 of COSD provides for payment of a ‘refund of the tax charged on: (a) the supply to it of any services of a description in List 2’. Moreover, the concept of a ‘supply of services’ (or a ‘supply of goods’) may be found throughout the COS Direction: see, in particular, COSD paragraphs 2(b), 2(c) and 3(a). Indeed, the descriptions given in the list in paragraph 2(a) of COSD are all descriptions of supplies of services in the VATA sense of a ‘supply’ (and, indeed, the VATA sense of ‘services’).

34. Moreover, both VATA and the COS Direction clearly operate by reference to the concept of a ‘supply’ of either ‘goods’ or ‘services’. Sections 1, 2, 4 and 5 VATA distinguish clearly between both forms of supply and List 2 refers only to supplies of services and not to supplies of goods whereas paragraph 2(c) refers to ‘closely related’ supplies of goods. We consider the relationship between paragraphs 2(a) and 2(c) and their application to these facts under Ground 3. But the limitation of paragraph 2(a) to supplies of services and the limited extension in paragraph 2(c) make little sense if the jurisprudence in EU law relating to the term ‘supply’ was not applicable to the COS Direction. We are satisfied, therefore, that the term should be construed in the same way as it is construed throughout VATA and that ‘supplies of services’ and ‘supplies of goods’ should be construed accordingly.

*(3) Context*

35. Section 41(3) provides the immediate context in which the COS Direction must be applied and, in those circumstances, it would be unusual and inconvenient if the terms and concepts used in VATA more generally (and, especially the concepts of ‘supply’, ‘goods’, ‘services’ and ‘business’) are not imported into the direction itself. Moreover, if different meanings or concepts were to be used, one would expect the COS Direction to include an express, bespoke and alternative definition of ‘supply’. Mr Thomas did not suggest that it did so or advance such a definition.

*(4) Scheme*

36. It is not in dispute that the COS Direction does not implement any EU Directive nor does it form any part of the EU VAT scheme. This is a domestic arrangement and subject exclusively to domestic law. It follows that the ‘amount of VAT’ incurred by the public body, to which the COS Direction is addressed, is not ‘input tax’ as defined in VATA and the refund is of an amount equivalent to the VAT incurred by the public authority (but not recoverable under the VAT rules).

It therefore represents a mechanism whereby a government body, here an NHS trust, can obtain a significant financial benefit where it outsources supplies which qualify. The VAT refund in this case would amount to circa £3.3 million per annum and represents a very significant financial benefit for the Trust. The scheme of the legislation is, in our judgment, neutral. The refund involves a purely domestic arrangement but it is of VAT charged under normal principles.

*(5) Purpose*

37. COSD 45 provides for the inclusion of ‘Operation of hospitals, health care establishments and healthcare facilities and the provision of any related services’. Both paragraph 2(a) of COSD and Heading 45 itself are limited to services. On the facts of *Milton Keynes* ‘in-house’ services performed by employees of NHS Trusts were not subject to VAT whereas VAT would normally be incurred on ‘contracted-out’ services and the burden of that VAT would be a disincentive to contracting out services unless it were to be refunded to NHS Trusts.

38. In our judgment, the primary purpose of COSD was to provide refunds of VAT incurred in the supply of COS services to a governmental body but not VAT incurred on goods supplied separately (unless they were fell within a single composite supply under paragraph 2(a) or were closely related to the supply of services such as to fall within paragraph 2(c)). This also explains the hierarchy of services over goods. The underlying objective was to encourage public authorities to ‘outsource’ the provision of services: see *Northumbria* (above) at [7]. However, the purpose of COSD was not to allow NHS Trusts to make independent purchases of goods free of VAT including those goods which are ultimately used by clinicians employed or engaged directly by NHS Trust to carry out surgical and related procedures on patients (which they would have had to purchase in any event from third party suppliers).

*(6) Application*

39. The Trust’s argument on Ground 1 proceeds on the basis that the relevant service in List 2 was the operation of a health care facility and that Genmed provided such a service. We are prepared to assume on the facts that Genmed (as opposed to the Trust) can be treated as operating a healthcare facility for the purpose of COSD 45 although the healthcare facility in question is a facility for the provision of surgical operations or procedures and the Trust provides that facility to patients not Genmed. This was not a point taken by Mr Mantle on behalf of HMRC.

40. But in any event, we take the view that the operation of a healthcare facility (which may include separate supplies of both goods and services for VAT purposes) cannot by itself be a supply of services or, at least, not without a further and more detailed analysis of the underlying facts by reference to the normal VAT concepts of ‘supply’, ‘goods’ and ‘services’. There are elements of the relationship between Genmed and the Trust which, if viewed independently and in isolation, are clearly supplies of goods. The provision of those goods may form part of a single supply of services or be closely related to a supply of services. But it is not enough to bring them within the COS Direction that they all form elements of a complex contractual procurement relationship which the parties have chosen to describe as the management of healthcare facilities or the provision of managed healthcare facilities. There is no short cut, in our judgment, which enables the Trust to avoid the analysis required under Ground 2 or Ground 3 (below).

41. Mr Thomas identified no formulated rules which would enable the Tribunal to take such a short cut or any authority for the proposition that the Tribunal should view the relationship in the round in order to decide whether the goods and services supplied by Genmed fell within COSD 45. This is unsurprising because the authorities all assume that the approach to ‘supply’ in VATA and the

PVD and the principles relevant to the single/multiple supply issue, should be applied to the COS Direction. These principles conform to and require an economically realistic approach, well-suited to securing the purpose of COSD.

42. We derive no assistance from the decision of the Supreme Court in *Balhousie Holdings Ltd v HMRC* [2021] UKSC 11 (*Balhousie*) upon which Mr Thomas relied. In that case Lord Briggs stated that the CJEU cases were not helpful in interpreting paragraph 36(2) of Schedule 10 to VATA: see [24]. However, that provision addresses a disposal of interests and not a provision concerning a supply (let alone a supply of services or whether it is a single or multiple supply). *Balhousie* concerned a complex series of lease and buy back arrangements and Lord Briggs acknowledged that the case law was ‘*heavily context-dependent*’ and that there was ‘*no single answer that applies across the entire field of VAT*’: see [23]. The majority of the Supreme Court did not consider or apply the CJEU case law of *CPP* or *Levob* but rather the case law in *Mydibel SA v Etat belge (Case C-201/18)* and related cases (all of which apply to lease and leaseback financing arrangements) when deciding whether they constitute a single transaction for VAT purposes. These authorities do not apply established principles on what constitutes a single or multiple supply under the *CPP/Levob* jurisprudence (which we consider below).

#### (7) Conclusion

43. In our judgment, the correct and mandatory approach to deciding whether or not a transaction (or elements of it) fall within COSD 45 is to apply the concept of a ‘supply’ in VATA including the binding domestic and CJEU case law on the question whether it is a single or multiple supply. Ground 1 is therefore dismissed. We turn therefore to consider whether pursuant to the Agreement Genmed has made a single composite ‘supply’ to the Trust of services and goods which falls within COSD 45.

## VI. Ground 2

44. Ground 2 requires us to determine whether the Trust received a single supply of services from Genmed which included the provision of both services and goods but which was a single supply of services for VAT purposes. The Trust submitted that it was a single supply of services. In particular, it submitted that the Consumables were not supplied to the Trust at all because the Trust never acquired legal title to them nor the right to dispose of them as owner and that Genmed retained both title and the right to ownership throughout. We refer to this as the ‘Title Issue’. It also submitted that whether or not title passed, there was a single supply of healthcare facility services of which the provision of consumables was an integrated part. We will call this the ‘Single Supply Issue’.

### D. The Title Issue

#### (1) The Agreement

45. The Services which Genmed agreed to provide under the Agreement were defined in clause 1.1 as ‘the provision of managed facilities, excluding the provision of clinical services, the principles of which are described in Schedule 1 and any relevant Facility Schedule’. Schedule 11 contained a template of the detailed Facility Schedule into which the parties intended to enter for each site for which Genmed was to provide the managed facilities.

46. As we explain when we come to deal with the Single Supply Issue, the principal issue between the parties was whether a refund was available in respect of the VAT which Genmed (and ultimately the Trust) paid on ‘Consumables’. In clause 1.1 the parties defined the term ‘Consumables’ as ‘Non-

Surgical Consumables’ and ‘Surgical Consumables’. The term ‘Non-Surgical Consumables’ was defined as ‘single or limited use parts, products or instruments which are not Surgical Consumables’ and the term ‘Surgical Consumables’ was defined as ‘single or limited use parts, products or instruments which are used for surgical procedures and patient care as part of composite supply in theatre and pre and post-operative areas’.

47. Schedule 1 to the Agreement set out the general principles governing the provision of the Services and this schedule contained the principal contractual terms which applied to the provision of Consumables by Genmed to the Trust. Part 1, paragraph 2 provided that Genmed’s activities would include (but not be limited to) the ‘Purchase and supply of theatre stock and consumables necessary for specialities’ and ‘Obtaining and managing products, all necessary support services, applications support and maintenance’. Paragraph 2.2 also provided as follows:

“The Trust's current requirements are for a managed surgical facility services, incorporating management, equipment, maintenance, parts and consumables it has chosen and is desirous of procuring the delivery and subsequent use of same together with the provision of maintenance, on-site support to clinician activity, training and advisory services, parts and supplies applicable to such equipment and surgical procedures over the Term. The Trust may from time to time have additional requirements and if it so wishes the Trust will invite Genmed to provide these on substantially the same terms subject to applicable Law, the details to be agreed in a relevant Facilities Schedule.”

48. The Agreement contained no terms which expressly provided for the sale of Consumables to the Trust. It contained no terms of sale nor any term providing for title to pass or the retention of title by Genmed. Where it was necessary for the Agreement to determine or deal with the physical or legal transfer of Consumables or the use to which they could be put it invariably used the word ‘supply’. Given the level of detail in the Agreement, it is hard to resist the inference that this was a deliberate drafting technique. By contrast with the position which the parties adopted for Consumables, they took a straightforward attitude to the sale of equipment by the Trust to Genmed and the assignment of contracts: see paragraph 3.1.

49. There are, however, some provisions which give insight into the parties’ intentions. Clause 5 was headed ‘Shelf Life and Stability’ and in that clause Genmed gave a series of undertakings in relation to the quality of the Consumables. Clause 5.5.6 expressly provided that the ‘Trust shall in no way modify, alter or change any item or any products without the written consent of Genmed’. Clause 6 was headed ‘Obligations of the Trust’ and in clause 6.2 the Trust covenanted that in respect of the Equipment (which was defined to include the Consumables) the Trust would:

“6.2.2 not remove, or alter any name, identification mark, serial number or any other mark on the Equipment; and 6.2.3 not amend, modify or alter the Equipment without the prior written consent of Genmed.”

50. Mr Thomas placed considerable reliance on these restrictions. However, those provisions must be contrasted with Schedule 1, paragraph 9 which was also headed ‘Trust Obligations’. In that paragraph the Trust agreed:

‘9.1.1 to provide Genmed with as much information as reasonably possible including accurate and detailed forecasts of its future requirements for the Consumables at each Delivery Location in order to enable Genmed to provide the SCA; and

9.1.2 Subject to Genmed's achievement of the Savings Targets and save in circumstances where Genmed is unable to supply the Consumables due to lack of stock [or Genmed refuses to supply Consumables], at all times during the term of the Agreement, to purchase the Consumables for delivery

to the Delivery Locations exclusively through Genmed and not from any other person or party (including without limitation direct from any supplier);

9.1.3 Subject to any applicable Law and subject always to the Trust's right to load such data as is required to the PPIB National Benchmarking Tool, the Trust agrees not to disclose the commercial details of pricing and volume commitments set out in the Agreement with any third party or NHS or public sector body without the written consent of Genmed, acknowledging that Genmed may have same imposed upon it by the Wholesaler.'

## *(2) The Factual Matrix*

51. There was no dispute that Genmed stored the Consumables under its control until required by the Trust and that it provided the Consumables to the Trust at their point of use. There is no dispute either that the Trust was contractually entitled to use both Surgical and Non-Surgical Consumables in the course of performing surgical operations and procedures and that (as their name implies) the Trust would in practice use them once and once only. Some Consumables such as dressings or sutures would only be used once during a surgical procedure and other Consumables such as a prosthesis would be permanently provided to the patient. Finally, there was no dispute that the Agreement imposed an obligation on the Trust to pay Genmed for the Consumables on a 'cost plus' basis. The Trust was liable for the cost price paid by Genmed plus a contractual mark up of 3% or 6% (and the higher percentage was to be paid by the Trust if the VAT was refundable and the lower percentage if it was not).

52. We describe the witnesses and their roles in greater detail below. But in this context Mr Thomas placed particular reliance upon the second witness statement of Mr Keith Davis, Genmed's chief commercial manager, in which he stated as follows:

"Genmed then retains ownership of the items there onwards. This is notwithstanding that the Trust may implant the items into a patient...and the prosthesis may/may not be in Genmed's possession at all times. The reason that Genmed retains title/ownership of the prosthesis is so that all risk associated with the prostheses rests with Genmed, and this includes all of the risk post-surgery. By way of example Genmed would be responsible for managing the product recall and Genmed would be financially liable to the Trust/patient for any damages arising from a fault in the prostheses."

53. He also placed reliance upon passages in the witness statements of Ms Alexandra Gent and Ms Jolene Rayner to the same effect, namely, that title to the Consumables remained vested in Genmed throughout and did not pass to the Trust.

54. In our judgment, this evidence is not admissible on the question as to whether the Agreement involved a supply of goods by Genmed to the Trust for the purposes of VAT legislation. This question involves both the construction of the Agreement and also the application of the law to the terms of the Agreement (so construed). The views of a witness of a fact are admissible on neither of those issues. But even if they are admissible, we attribute very little weight to the evidence of Mr Davis, Ms Gent and Ms Rayner given the careful drafting of the Agreement. None of them are lawyers and their opinions could only have been based on the legal advice which was given to Genmed (and which was not in evidence).

## *(3) The Law*

55. For the reasons which we have given under Ground 1 (above) the concept of a 'supply of goods' for the purposes of the COS Direction, the PVD and VATA is, in our judgment, the same. A 'supply of goods' can therefore be identified by reference to the PVD and the CJEU's case law on the

relevant subject. Article 14(1) PVD provides that a ‘supply of goods’ means: ‘The transfer of the right to dispose of tangible property as owner.’ Moreover, in the case law the CJEU has consistently held that such a transfer can occur even if there is no transfer of legal ownership of (or title to) the property: see, e.g., *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV* (Case C–320/88) [1991] STC 627 at [7].

56. Accordingly, the right approach in the present case is to ask whether the Trust is entitled to dispose of the Consumables (for which it pays costs plus 3% or 6% to Genmed) as if it were the owner of them. This involves deciding the technical legal issue whether title in the Consumables passes from Genmed to the Trust. But even if we are satisfied that no transfer of legal title took place, there may nevertheless be a supply of the Consumables by Genmed to the Trust because the effect of the Agreement was to confer the right to dispose of the Consumables on the Trust.

57. Furthermore, in addressing the question whether there has been a supply of goods it is also appropriate to follow the conventional approach to VAT analysis and analyse the transfer of the right by reference not only to the interpretation of the relevant contract but also by taking account of economic reality. There is binding authority for the proposition that this is the correct approach: see, e.g., *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 and *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509 at [47].

#### (4) *The Trust’s Argument*

58. Mr Thomas submitted that the conclusion to be drawn from the Agreement and the contractual framework was that the Trust was permitted to use the Consumables for the purpose of surgical procedures and insofar as Consumables were used for that purpose, the Trust paid Genmed for the use of those goods (and everything else which the Trust also uses in the course of a surgical procedure). He also submitted that where Genmed ordered Consumables but the Trust did not use them, the Trust did not pay for the relevant goods and never obtained title to them. Indeed, Genmed itself did not obtain title to those goods until the point in time at which the goods were used and the Trust was not invoiced for the Consumables separately.

59. Mr Thomas also argued that the issue of title or entitlement to dispose of the Consumables was not relevant because some Consumables (e.g. sutures or dressings) were single use and disposable and others (e.g. a knee joint) were implanted into a patient. In relation to prosthetic units, he submitted that the question whether the Trust or Genmed acquired title did not arise and that it was unnecessary for Genmed to pass title to the Trust because prosthetic units of all kinds were supplied free of charge and the only rights which the Trust needed to acquire was the right to provide the relevant patients with the items which they needed in the course of the procedure. Finally, he submitted that Genmed retained both the risk and the ability ‘to maintain, dispose, or use the items as Genmed considers necessary’.

60. Mr Thomas accepted that Schedule 1, paragraph 9.1.2 contained an express acceptance that the Trust was the purchaser of the Consumables but he submitted that it had to be read in the context of an exclusive purchasing agreement and had no wider significance where the Agreement was otherwise silent in relation to the sale and purchase of the Consumables and the passing of title. He contrasted paragraph 9.1.2 with clauses 5.5.6, 6.6.2 and 6.6.3, which restricted the Trust’s ability to amend or alter the Consumables and submitted that they were a clear indication both that Genmed retained title and that it retained the right to dispose of the goods as owner. He submitted that the Trust was simply paying for the right to use the consumables and no more.

#### (5) *Decision*

*(i) Construction of the Agreement*

61. We begin with the construction of the Agreement itself. We accept that it does not expressly provide that goods are sold by Genmed to the Trust or that legal title passes from one to the other. However, in our judgment, in paragraph 9.1.2 the parties have accurately described the legal effect of the Agreement for the supply of Consumables themselves. Mr Thomas conceded that the effect of paragraph 9.1.2 is to impose an exclusive obligation upon the Trust to purchase Consumables from Genmed and not from third parties (save in limited circumstances). But we reject his submission that in context this paragraph is of limited significance. In our judgment, the remaining terms of the Agreement give effect to the obligation in paragraph 9.1.2 to purchase Consumables from Genmed and, if it were otherwise, the Trust would be unable to comply with the covenant in this paragraph.

62. Indeed, we attach significant weight to the fact that paragraph 9.1.2 is not simply a negative covenant preventing the Trust from purchasing Consumables from third parties but also imposes a positive obligation to purchase them from Genmed. It might be possible in theory to impose a covenant on the Trust not to purchase Consumables from third parties in circumstances where the Trust never bought any Consumables at all. But paragraph 9.1.2 also imposes a positive obligation upon the Trust to purchase Consumables from Genmed throughout the term of the Agreement. In our judgment, this amounts to a clear recognition by the drafter of the Agreement that the effect of the contractual rights and obligations in the Agreement was a sale of the Consumables.

63. Moreover, consistently with paragraph 9.1.2, we consider that the sale of Consumables provides the best legal description of those rights and obligations when the Agreement is viewed against the admissible background. In our judgment, title to a suture or a dressing must pass from Genmed to the Trust at the latest when the Trust uses it in a surgical procedure. Likewise title to a prosthesis must pass from Genmed to the Trust at the latest when the surgeon implants it into a patient. There is no contractual restriction on the use to which the Trust can put the suture or dressing or prosthesis once the surgical procedure begins. The surgical team can use it in the procedure or throw it away and ask for a new one. Finally, there is no suggestion that the surgeon or nurse is acting as the agent of Genmed rather than the Trust in carrying out the procedure. Indeed Schedule 1, paragraph 2.1.8 makes it clear that the Trust is responsible for the procedure and not Genmed:

“For the avoidance of doubt the responsibility of Trust staff will remain for contacting patients to arrange the operations, checking that the theatres are set up properly, and all medical care and treatment of the patients.”

64. We accept that Genmed retained the risk in relation to the quality of the Consumables and would be ultimately liable to the patient for defects in their manufacture. But, as every law student knows, there is a difference between the transfer of risk and the transfer of title and a seller of goods may expressly retain the risk in relation to the goods even after the transfer of title has taken place. In our judgment, the retention of risk by Genmed explains the restrictions contained in clauses 5.5.6, 6.2.2 and 6.2.3 (and we consider this in more detail below). They are consistent with Genmed retaining the risk in relation to the quality of the Consumables (in a chain of liability which may include the original manufacturer, the supplier and the Trust itself). Although these provisions impose obligations upon the Trust not to change a product without the Genmed’s consent, they cannot prevent the Trust from consuming and using up the Consumables in the course of a surgical procedure either until they have no residual value or have been implanted in the patient. For instance, clause 5.5.6 cannot prevent a clinician from cutting a suture, gauze or a bandage to adapt them to the needs of the patient during medical treatment without Genmed’s consent. The

application of these clauses must be limited, therefore, to the position before title passes and a surgical procedure takes place.

65. We also find it telling that Mr Thomas could not provide an alternative legal analysis for the supply of Consumables by Genmed to the Trust which the Trust then consumed in the course of its surgical procedures. To say that Genmed provided Consumables for the use of the Trust but that it was unnecessary for title to pass is simply to restate the question. If the contractual relationship was not one of sale and purchase, what was it? It could not have been a loan relationship because the Trust never returned the Consumables (which had been consumed). Nor was it a bailment for reward because the Trust was not storing the Consumables for Genmed's benefit and then giving them back. It was using them for its own purpose and Genmed was storing them for the Trust's benefit rather than the other way round. It was not an involuntary bailment because Genmed provided the Consumables to the Trust for the Trust's use and at a price.

#### (ii) Economic Reality

66. Finally, in our judgment the economic reality was that the Trust was free to dispose of the Consumables provided by Genmed as if were their owner. The Trust paid the full price for each item which its clinical staff consumed or applied in the course of a medical procedure together with a mark-up to Genmed for the procurement, storage and delivery by Genmed to the Trust at the point of use. However, at that point the Trust was free to dispose of the Consumables as if it were the owner. All surgery and medical procedures performed in the relevant surgical facilities are carried out by doctors, nurses and other medical staff who are employed by and engaged by the Trust rather than by Genmed.

67. For example, it is the Trust's medical staff who implant a prosthesis into a patient, or who use other Consumables in the course of performing surgery or medical procedures on patients receiving medical care from the Trust. The Trust's medical staff use the goods as they see fit and will use the Consumables to destruction, permanently implant them or dispose of them in the course of performing surgery or treating patients. Moreover, the fact that Genmed has undertaken contractual responsibility for the onward waste disposal does not diminish the Trust's rights in any way. Indeed, this was an additional service which Genmed was providing to the Trust rather than an exercise in ownership.

#### (iii) Conclusion

68. We are satisfied, therefore, that the Trust acquires both legal title to Consumables before their use in any surgical procedure and that it has the right to dispose of those Consumables as their owner in the course of any surgical procedure. Where Consumables are not used as part of the procedure and are returned to storage, Genmed retains title until they are used in any surgical procedure or otherwise disposed of. There is, therefore, a supply of Consumables by Genmed to the Trust under the Agreement as part of the supply of a managed theatre facility which is capable of constituting a supply of goods for the purposes of VAT.

### E. The Single Supply Issue

69. The central issue to be decided on this application for judicial review is, therefore, whether Genmed makes for VAT purposes a single composite supply of services or multiple and separate supplies of goods and services to the Trust. If there is a single composite supply to the Trust under the Agreement, then HMRC accepts that it is a supply of services, namely, managed theatre services and that this supply falls within COSD 45.



*(1) The Evidence*

*(i) The Witnesses*

70. The following witnesses made witness statements and gave written evidence on behalf of the Trust:

- (i) Keith Davis, Chief Commercial Manager of Genmed;
- (ii) Alexandra Gent, Head of Shared Services at the Trust;
- (iii) Robert Neale, Senior Business Partner for Surgery at the Trust;
- (iv) Candice Tyers, General Manager of Theatre, Anesthetics, DCC, Pain Service and Pre-Operative Assessment Services at the Trust;
- (v) Jolene Rayner, Director of Operations of Genmed; and
- (vi) Ruth Billen, Chief Financial Officer of Genmed.

71. Their statements and exhibits are very substantial and they produced a significant amount of documentary evidence in relation to this issue. HMRC did not challenge any of this evidence or ask to cross-examine any of the witnesses or challenge the relevance of any of the individual documents. We therefore accepted their evidence as accurate without qualification except where (as above) it was inadmissible or of little weight.

*(ii) The Trust's Priorities*

72. The Trust is an NHS Foundation Trust. It provides comprehensive medical care across two sites and 27 surgical theatres including surgical procedures in the following specialties (among others):

- (i) Trauma and Orthopaedic
- (ii) Emergency
- (iii) Ophthalmology
- (iv) Gynaecology
- (v) Vascular
- (vi) Upper Gastrointestinal Surgery
- (vii) Colorectal
- (viii) Urology
- (ix) Breast Surgery
- (x) Oral and Maxillo Facial Surgery
- (xi) Ear, Nose, and Throat.

73. The Trust's witnesses gave evidence (which we accept) that the delivery of fully functioning theatres is a highly specialist and intensive logistical exercise which require extensive resources. There is a very complex supply chain to be integrated and managed to ensure the surgical team can use the facilities to deliver surgery to a very specific caseload. This involves some 70+ contracted suppliers of sterilisation, cleaning, laundry, waste disposal, maintenance and repair services and provision of equipment and consumables and vast numbers of additional suppliers where the services or Consumables are not provided under a specific contract. Until the Trust entered into the Agreement with Genmed, this placed a huge burden on theatre nurses to step away from their clinical role and spend time and energy on managing these challenges. At the same time there was the risk that different parts of the Trust's procurement process were not fully integrated or co-ordinating their activities to provide a seamless service.

74. There was also pressure on NHS resources (staff and infrastructure) to undertake and schedule surgical procedures, to reduce and avoid long waiting lists and costs overruns. By way of example, NHS Institute for Innovation and Improvement's analysis of 70 acute Trusts in 2014 and 2015 found that nearly 9% of total costs were incurred in theatres and theatre inefficiencies. A recent audit by the Welsh Audit Office into the direct costs of operating theatres found that it costs on average £14 per minute to run a surgical theatre.

75. The evidence was that the causes of cancelled theatre sessions or delays vary. But a large proportion are the direct result of the management of the supply chain so that it is essential that the theatre facility is ready set up with the correct specification of the surgical trays and equipment for a given surgeon for surgical procedures and the scheduled order of theatre sessions. This impacts on patient care if sessions end late or are delayed in starting and can lead to subsequent scheduled sessions being cancelled. It was therefore considered imperative from the Trust's perspective that it was able to minimise delayed start times or cancellations and that the use of session and turnaround times were optimised. The efficiencies sought included, for example, (i) effective scheduling; or (ii) optimising theatre operations and clinical service based on information and insight provided by IT systems and data analysis to inform and identify opportunities to improve.

76. The Trust also has to carefully manage a variety of fixed cost components (services and goods) in order to provide treatments to patients in an efficient manner. This is particularly challenging given the finite resources available to the Trust and therefore the Trust had to look at ways in which it could streamline the provision of surgical treatments and patient care without an associated impact on quality of care provided.

77. As part of the Trust's plan to improve the efficiency of its overall healthcare services, it considered ways in which it could better provide surgical treatments to patients. Up to 22 December 2017 the Trust had been independently managing a large number of contracts involving numerous different suppliers (and other parties) in order to deliver its theatre service, which came with a risk due to the complex structure of the contracts and the skillset required in order to manage them. For example, the Trust formerly operated a manual ordering system which included entering into 70 different contracts to deliver a managed theatre service. This system involved manual orders being placed which increased variation in stock and meant that there was a lack of consistency in the ordering process and pricing. The Trust therefore looked at alternative delivery models where the risk and responsibility for all aspects of the theatre facility save for the clinical staff (i.e. the theatre facility and all associated services in order for the facility to operate) rested with a third party rather than the Trust. As a result of this, the Trust entered into the Agreement with Genmed to effect this.

### (iii) The Managed Theatre Facilities

78. Under the Agreement Genmed provides a fully managed healthcare facility to the Trust across two Trust sites (Gloucestershire Royal Hospital and Cheltenham General Hospital) and 27 theatres across its acute sites. Genmed provides all relevant services for these facilities, from those services necessary for its use and function such as maintenance, repair, cleaning and disinfection to the procurement and provision of integral Consumables and other goods. The provision of Consumables is, therefore, part of a wider package of services: see clause 2.1 (which we set out below).

79. All of the witnesses gave evidence (and we accept) that the purpose of the Agreement was to help the Trust achieve operational efficiencies and better manage costs without impacting the quality of healthcare being provided. The Agreement helps the Trust target funds towards direct patient care and ensure better value for money through efficiencies in back office and administrative

functions. They also gave evidence that the Trust contracted with Genmed for the provision of a managed theatre facility because the Trust required a high level of bespoke service delivery to receive an end-to-end managed theatre service.

80. Moreover, the services which Genmed provide are tailored to the specific needs of the Trust and involve considerable change management, process management, stock management, trouble shooting and data analytics (and other sophisticated procurement services). They differ substantially from a traditional procurement contract pursuant which would not require the supplier to provide this level of overall management including maintenance services, facilities and sterilisation services, data analytics, stock control and management and other services, all of which are necessary for a theatre to be available and ready for use. These are the services which the Trust requested that Genmed provide to the Trust and are described in further detail below.

81. Section D of the background to the Agreement and the facilities schedules contain a detailed specification of the services which Genmed provides. They are defined as the provision of ‘fully managed healthcare facilities where all services relevant to these facilities, excluding medical and nursing services, will be provided as described in this Agreement and any relevant Facilities Schedule’. They include (but are not limited to) support services such as disinfection and sterilisation, appropriate linen and laundry services, cleaning, maintenance, service, replacement and repair of the surgical facilities and the equipment provided within it, as well as other integral support services and any Consumables which are ancillary, incidental or integral to the provision of Genmed’s managed services theatre facility.

82. Part 1, Schedule 1 also describes Genmed’s role in terms of the provision of a fully managed theatre for the listed specialties (clause 1), specifies certain elements of the administration and management services themselves (clause 2) which include both the obligation to ‘ensure availability’ of the theatres described and also administration and management services of all facilities in the pathway including patient preparation areas, anaesthetic areas, operating theatres and patient recovery areas (clause 2.1.1). The provision of Consumables forms part, therefore, of the following wider package of services set out in Schedule 1, paragraphs 2.1 and 2.2 (which we set out in full):

“2.1 Genmed is provider of managed facility services provision, which as described includes integration of supplier’s provision, surgical consumables and management of third party suppliers, all as the case may be, with its own on site personnel, back office staff and/or with the supplier’s personnel from time to time.

2.1.1 Genmed ensure availability of the Theatres described within the scope of surgical activity for the Agreement and for any further Facility Schedules the Trust may enter into. This will include administrative and management services of all facilities as provided for the patient pathway including;

- Wards<sup>1</sup>,
- Patient preparation areas,
- Anaesthetic areas,
- Operating Theatres,
- Patient Recovery areas.

2.1.2 Genmed will provide fully managed healthcare facilities where all services relevant to these facilities, short of medical and nursing services, will be provided as described in this Agreement and any relevant Facilities Schedules. These include, and are not limited to, support services involving disinfection and sterilisation services, appropriate linen and laundry and composite supply integral to support the services provided and ancillary provision of equipment together with the service of

---

<sup>1</sup> In practice Genmed ultimately did not provide these services in respect of the wards (although Genmed did provide the services in respect of the other areas provided for in the list set in clause 2.1.1)

maintaining that equipment and utilities as part of the managed services. Any goods supplied by Genmed under this Agreement are ancillary, incidental and/or integral to the provision of the managed healthcare facility.

2.1.3 Genmed will manage and maintain catalogues on its ERP System, and will liaise with the Trust centre contacts or appropriate member of staff to seek resolution to anticipated or actual issues which may affect the service. Genmed will engage relevant subcontractors and suppliers in order to provide the managed healthcare facilities, including any management of inventory;

2.1.4 Providing assistance in the strategic and business planning of the Trust with regard to the Trust's future clinical requirements and to preserve flexibility in its planning;

2.1.5 Finance and Resource management; providing procurement services for theatre requirements, in close collaboration with procurement, finance clinical and materials management staff.

2.1.6 Management of subcontractors and suppliers; to manage compliance to service level agreements, maintenance of facilities'.

2.1.7 Communication of relevant information in a timely manner to Trust management and including as required technical specialist and clinical training activities more particularly described later.

2.1.8 For the avoidance of doubt the responsibility of Trust staff will remain for contacting patients to arrange the operations, checking that the theatres are set up properly, and all medical care and treatment of the patients.

2.2 The Trust's current requirements are for a managed surgical facility services, incorporating management, equipment, maintenance, parts and consumables it has chosen and is desirous of procuring the delivery and subsequent use of same together with the provision of maintenance, on-site support to clinician activity, training and advisory services, parts and supplies applicable to such equipment and surgical procedures over the Term. The Trust may from time to time have additional requirements and if it so wishes the Trust will invite Genmed to provide these on substantially the same terms subject to applicable Law, the details to be agreed in a relevant Facilities Schedule.”

83. As part of the above facilities management services, Genmed also provides the following service elements and the following goods elements:

- (i) *Site based personnel to manage and maintain the theatre facilities and equipment.* The personnel include on-site managers, assistant staff, dedicated back office staff for the provision of management reporting information and adherence to the Key Performance Indicators ('KPIs').
- (ii) *The preparation and provision of management information.* This includes data analytics, the monitoring of costs and facility activity as well as the preparation of monthly management reporting and budgets. As Genmed bears the risk and responsibility of ensuring the service is efficient for the Trust and is within the parameters of the KPIs, the preparation of the management information is necessary to ensure administrative tasks are carried out as well as invoicing and data analytics (including quarterly; business reports and the focus on patient cancellations as a KPI).
- (iii) *Stock ordering and management of stock.* This is to ensure the timely provision, and availability, of consumables and instruments as part of the provision of the facility as required by the Trust to carry out surgical treatments.
- (iv) *Advice, support, guidance and training.* Genmed provides this to Trust staff as required to ensure the safe and effective use of the facilities, equipment and instruments. Such training is to be provided on a periodic basis and covers initial training on the equipment as well as refresher training at certain points during the life of the Agreement.
- (v) *The provision, implementation and maintenance of web-based IT systems.* These include Health Logistics and handheld computers for the use by the Trust (e.g. nurses) including training on how to use the systems and device.

- (vi) *Waste disposal services.* These include clinical, domestic and maintenance waste disposal services to ensure that any clinical waste is disposed of correctly and safely following surgical treatments.
- (vii) *Building, renovation and refurbishment of the theatre facilities.* Over the duration of the Agreement £500,000 excluding VAT per annum of capital expenditure (and Schedule 5 to the Agreement which deals with the Premises and Appendix A contains outlines of the facilities plans).
- (viii) *The provision of ancillary equipment.* This covers equipment necessary for the Trust to use the facilities and to carry out patient treatments (e.g. operating theatres including lights, operating tables, machinery and sterilisation rooms) as well as of the surgical instruments (e.g. theatre tray sets). It also provides related services: for example, Genmed is responsible for the purchase, set-up and maintenance of the equipment as well as the provision of back up equipment in the event there is a fault which would otherwise prevent the Trust from carrying out patient treatments from the facilities; and
- (ix) *Consumables.* Such consumables include implants, sutures, anchors, screws, plates and dressings together with related services including those set out in (iii), (iv) and (vi) (above) and the H-Trak's licensed software system (below).

(iv) The H-Trak software system

84. A key component of the services provided by Genmed is a proprietary IT software system licensed to H-Trak. This is a web-based IT system through which Genmed prepares and supplies certain management information, including data analytics, the monitoring of costs and facility activity, as well as the preparation of monthly management reporting and budgets. The software provides analysis on matters including, but not limited, stock management; theatre usage, cost overruns; supply surpluses; and product tracking, in order to give Genmed full oversight and management of the managed theatre facility. It links the supply of services and goods to ensure that the theatres are available and by ensuring that the correct stock is available. This is beneficial to the patient, as this reduces the risk of theatre cancellations which are extremely disruptive to the patient and may impact upon the patient's clinical care. The H-Trak software assists Genmed in its stock ordering and the management of stock, to ensure the timely provision and availability of goods and instruments as part of the provision of the facility. In particular, the H-Trak solution includes the following functions:

- (i) Inventory control.
- (ii) Stock consumption and reordering.
- (iii) Patient procedure data - times, products used.
- (iv) Reporting on costing of procedures.
- (v) Record of Lot number and serial number for implantable devices.

85. It is also important to note that the H-Trak software system directly supports the Trust in managing the clinical governance risk of tracking and tracing the use of equipment and Consumables (clamps, swabs etc) during surgery.

(v) Goods: the Categories

86. The goods supplied by Genmed to the Trust pursuant to the Agreement fall into four categories (and the goods in categories (iii) and (iv) are Consumables):

- (i) Structural items, furniture and operating systems such as operating tables, lights, generator machinery and heating and cooling equipment;
- (ii) Re-useable operating equipment and machinery such as patient monitors, ultrasounds, anaesthetic machines, ventilators, microscopes and scalpels;
- (iii) Single use goods, which are used in the course of the procedure on the patient and include items such as sutures, bandages and gauze; and
- (iv) Protheses, such as hip and knee joints, which are provided to the patient during the course of surgery.

87. HMRC decided that Genmed supplies the Consumables separately to the Trust and that they fall outside the scope of COSD 45 because they are not supplied as part of a fully managed theatre facility. HMRC do not dispute that goods in categories (i) and (ii) fall within the scope of COSD 45. Those categories of goods were either purchased by Genmed from the Trust at the outset as legacy equipment or they comprise new equipment purchased by Genmed from third parties. Because Genmed not only retains title to the goods provided for the use of the Trust in categories (i) and (ii) but they are also subject to maintenance and repair obligations under the Agreement, HMRC accept that the goods in these two categories fall within the scope of the guidance for the provision of equipment with associated service obligations. HMRC does not accept, however, that Consumables within categories (iii) and (iv) fall within that guidance.

(vi) The Integrated Nature of the Services

88. The Trust's case (supported by the evidence of its witnesses) is that all of the component parts of a fully managed theatre facility including Consumables are integral to each other and indispensable to the achievement of the Trust's aims in outsourcing this service to a single provider and that this is clear from a consideration of the relationships outlined above. We stress that this is not the legal test and we consider (below) the questions of indivisibility and indispensability of the supplies of services (which gives rise to a mixed question of fact and law). Nevertheless, the integrated nature of the services forms a key part of the Trust's case and its evidence on this point was unchallenged. Most of the witnesses gave evidence on this point but we quote only the evidence of Candice Tyers (which is broadly representative of the evidence of all of the witnesses):

*"Implementation of the Managed Theatre Service*

37. The Trust's requirements were and remain for a single managed surgical facility service, which included all of the component parts necessary for the day-to-day operation of the Trust's theatres. It was therefore essential that the supply included the services, equipment and consumables.

38...it was essential that Genmed provide the services, equipment and consumables necessary and integral to maintain a fully functioning theatre facility and for the Trust to carry out specialised surgical treatments. It was therefore essential to the Trust that Genmed's supply included management of the theatres, the provision of maintenance and on-site support, equipment, parts and consumables, training and advisory services.

39. The Trust sought to outsource the provision of the theatres, including the consumables management, to deliver efficiency, transfer all risk to one supplier and to improve their performance as a trust. As detailed in Recital D and paragraph 2 of Appendix 1 of the Agreement, Genmed were contracted to provide a fully managed healthcare facility, inclusive of all services relevant to the facility, albeit excluding medical and nursing services. Inherent in this supply are:"

89. Ms Tyers also gave detailed examples in relation to the following headings of services supplied by Genmed as part of the Agreement and the benefits to the Trust that they give rise to:

- (i) Staff on site;

- (ii) H-Trak Software;
- (iii) Ownership of ‘end to end’ service and transfer of risk;
- (iv) Elimination of cancelled procedure due to operational failures;
- (v) Management and uptime of theatre sessions;
- (vi) Impact on speed of operations;
- (vii) Catalogue management;
- (viii) [Clinical] Governance of products;
- (ix) Stock management logistics;
- (x) Product Recall;
- (xi) Improve Patient Safety / Regulatory compliance;
- (xii) Efficiencies, tracking and optimizing loan kit;
- (xiii) Management and integration with wider services.

90. All of the witnesses were clear that the value of the ‘end to end’ managed theatre facility supply would not be capable of being delivered if all of the necessary equipment and the Consumables from swabs, sutures, screws, anchors, implants, beds, lighting and medical equipment were not provided in a very exacting fashion sterilised and organised in order to allow the Trust clinical team to arrive and undertake the theatre sessions scheduled for that day in the order they were scheduled at the time due to commence.

91. Genmed engages with third party suppliers to support its provision of the managed theatre services to the Trust. Where relevant contracts were already in place between the Trust and third party suppliers for services which were previously being managed by the Trust, the remainder of the term of these contracts were novated to Genmed: see clause 31.2 and Schedule 9 (which lists a number of contracts covering laundry, linen, cleaning, disinfection, medical engineering from a variety of third parties).

92. Genmed also engaged the Trust’s property and facilities services subsidiary company (‘GMS’) for the provision of some support services contained in the Agreement. There were a number of advantages in choosing GMS. At the same time as making the decisions to acquire a fully managed theatre service from Genmed, the Trust was in the process of setting up GMS as a facilities and estates management company. GMS would therefore have extensive knowledge of the Trust’s estate and set-up. In addition, GMS would have responsibility for other areas of the Trust’s wider (non-surgical) estate e.g. wards, ICU, radiology etc. Genmed were free to choose whoever they wished, however, it made commercial sense to use GMS.

93. A copy of the agreement between GMS and Genmed forms part of the Facilities Schedule to the Agreement and identifies the following services which Genmed provide to the Trust which were in turn subcontracted to GMS from 1 April 2018 as part of its provision of the fully managed theatre facility to the Trust:

- (i) General theatre cleaning (at the Gloucester Site) including deep cleaning required for the facility and equipment;
- (ii) CSSD cleaning; and
- (iii) Site and building maintenance.

94. The Agreement also confirms that Genmed may enter into subcontracts with third parties in order to fully provide its services to the Trust. Genmed remains contractually responsible to the Trust for providing those services. The legal recourse and relationship remain between Genmed and the Trust for all services under the agreement and is subject, inter alia, to the performance provisions set out below. The only party with any recourse against the subcontractors is Genmed. Furthermore,

GMS's performance in turn forms part of the overall measure of Genmed's performance of its obligations to the Trust (for example there was a reduction in incident reports since Genmed's appointment).

(vii) KPIs and Performance

95. The KPIs with which Genmed must comply are also set out in the Agreement. For example, clauses 9.15 to 9.17 contain obligations in relation to the availability of Genmed's equipment for the use of the Trust. Genmed is required to ensure that the availability of equipment including Consumables is 98% across all services unless specified otherwise and should it fall below this then the Trust is entitled to a service credit of 5% for availability of 95% to 98%, 7% for availability of 90% to 95% and 10% for availability below 90%. Clauses 9.18 and 9.19 require Genmed to ensure that stock availability is 100% for patient booked procedures and that there are no cancellations. Clause 9.20 includes penalties for each occasion when stock availability leads to patient booked procedures being cancelled of a fixed fee equivalent to the current year's Tariff Charges (which are set out in Appendix A to Schedule 18) for the particular surgical operation which has been cancelled.

96. Further KPIs are set out in Schedule 18 which incorporates a broad KPI 'Delivery against milestones of contract' against which the services provided in connection with theatre facilities are measured. Genmed must ensure that the services are delivered in accordance with a number of business milestones, which reflect the levels of risk and responsibility resting with Genmed. The associated Service Credits that will become chargeable in the event Genmed does not meet the milestone KPI (and the other KPIs outlined in Schedule 18) are set at significant levels in order to reflect the impact of their achievement on the Trust's ability to provide surgical treatments and patient care. The evidence was that it was unnecessary to impose Tariff Charges because Genmed's performance has been effective to date. Indeed, since Genmed began to provide services under the Agreement there have been no penalties and the rate of cancellations or other incidents has fallen by about 80%.

(viii) Payment and charges

97. In clause 18.2 the Trust agreed to pay Genmed in accordance with Schedule 15 and any relevant facility schedule. Schedule 15, paragraph 1 provides that the monthly contract charge is to be calculated by reference to a financial model made up of charges for the facilities and equipment including maintenance, building and refurbishment, a CSSD element and clinical Consumables. The table of charges sets out the element of the charge payable for clinical Consumables and it represents £11,743,985 of the total charges of £17,033,243 and, therefore, approximately 70% of the total charges levied by Genmed. The balance of the charges is made up of the total equipment element of £445,344, the CSSD element of £2,204,000, the building and refurbishment element of £500,000 and the total facility and equipment maintenance element of £2,139,914. For the services elements Genmed agrees to provide them for cost plus 0%. For the goods elements (i.e. both the building refurbishment element and clinical Consumables element) the Trust agrees to pay a charge of cost plus 6%. However, this assumes that COS recovery of VAT has been authorised by HMRC. If the COS refund of VAT is not permitted this uplift is reduced to 3%.

(ix) Benefits and Efficiencies

98. The Trust has identified a number of efficiencies and operative savings as a result of the implementation of the Agreement and the provision of the supply of services and goods thereunder by Genmed to the Trust. These benefits and efficiencies include the following:



- (i) Patient cancellations have been reduced due to improved theatre availability and clear oversight of available stock levels.
- (ii) Genmed has undertaken contract and supplier management.
- (iii) The Trust has taken the opportunity to introduce new and innovative products which enhance the quality and outcomes of surgery for patients if clinically endorsed for use.
- (iv) It has also upgraded theatre equipment and environment supporting improved patient safety because Genmed ensures that the Trust has the right equipment and sterilised stock in the right place at the right time.
- (v) Genmed has undertaken detailed equipment and stock audits, there has been an increase in the standardisation of kit across theatres and hospitals resulting in financial savings and consistency in patient treatment. There has also been a significant reduction in the use of loan kits with the introduction of the agreed loan kit lists.
- (vi) The use of the H-Trak software system has enabled the Trust to conduct patient level costings enabling a comparison of surgeon practice and equipment usage, which was previously unachievable.
- (vii) Genmed has improved stock control and re-ordering, there is increased transparency over the procurement process and order management with the consequence that all new products entering the system are highlighted by Genmed to the management team to ensure that proper governance is undertaken.
- (viii) Genmed has improved longer term stock management, all instrumentation is tracked and traced to avoid the misapplication of prosthetics and other products and in the event of a product recall, the stock management software will provide the patient level detail, thereby making the process more effective.
- (ix) Genmed is a vendor neutral supplier and has no interest in the brand of equipment used by the Trust. Genmed's aim is to provide services which help the Trust to become more efficient and to future proof its surgical offering. Genmed is then able to offer the surgeons clinical choice regarding the products or equipment used and make recommendations drawing down on their extensive expertise and further analysis derived from the H-Trak system.
- (x) Improved stock monitoring and monitoring of expiry dates reduce wastage and ensure compliance with patient safety regulations on use. Genmed are able to review stock in real time.
- (xi) Patient level costing has been made possible enabling the comparison of surgeon practice and equipment usage. The Trust had no ability of doing this prior to the implementation of this contract.
- (xii) Genmed has introduced improved governance for large capital equipment provision and the introduction of new products into theatres. This has ensured a timely delivery equipment and a more efficient operation of the theatre on a day-to-day basis.
- (xiii) The Agreement has resulted in stronger relations with clinical staff. As Genmed have a designated team of specialists on site, this has helped to build stronger relationships with clinical staff to give more confidence in the supply of products to theatres.
- (xiv) Having one party responsible for the management of theatres reduces the administrative burden on the Trust's clinical staff to chase for deliveries or loan kits or to place orders and prevents expensive clinical staff time being taken up performing these activities.

99. So far as financial savings are concerned, the Trust made an overall saving of £252,892 in the financial year 2019/20 and is projected to make a £470,171 saving for the financial year 2020/21. This includes a saving on the orthopaedic budget which was passed through from the NHS supply chain as a result of removing the margin on certain services, equipment and Consumables. These savings are reflected in the Managed Service Savings Programme. These savings are exclusive of

any savings which were made or are to be made in respect of the VAT costs (whether incurred on services, Consumables or equipment). Nevertheless, the VAT refund is of considerable importance for the Trust and it would amount to approximately £3.3 million per annum. This represents the total VAT refund which would be due if the Trust's claim succeeds.

100. In his witness statement on behalf of the Trust Robert Neale summarised the financial benefits and savings to the Trust by the services supplied under the Agreement and the other benefits obtained such as efficiency, patient safety and the running of fully operational and fully managed theatres:

“31. As is clear from the financial modelling, whilst the VAT costs were one of the considerations that the Trust took into account when onboarding Genmed, it was not the only consideration nor was it the overriding objective of the arrangement. It was clear from the modelling that the financial benefits to the Trust (regardless of the VAT position) were overwhelmingly in favour of a managed theatre service model and therefore it was in the Trust's best interests to engage with Genmed.

32. Genmed are operating more than a procurement function. As indicated, previously the Trust had limited visibility on stock levels; equipment ordering processes and controls; and the nature of the stock being acquired by surgeons and used in theatres. Genmed have introduced strong governance procedures and control discipline, whilst also providing the Trust with substantial data and analysis regarding the cost and effectiveness of surgical procedures. This has enabled the Trust to implement greater rigour around clinical consistency which has a tangible benefit to patient safety and the financial wellbeing of the Trust.

33. The value in the Genmed supply is that the Trust received an integrated, end-to-end managed theatre service consisting of services and consumables which are essential to meet the Trust's overall objective which is the operation of efficient, safe and fully operational and fully managed theatres.

34. The value to the Trust in the Genmed service is for the provision of the whole package of services, support and expertise that Genmed provides. The value to the Trust would be greatly diminished if the Trust were required to separately procure the consumables and equipment. In addition, in my view as Genmed's services, including the data analytics, benchmarking and financial analysis, maintenance and stock management, are closely connected with the procurement of the equipment and consumables, it would not be in the Trust's best interest and neither would it be realistic for the Trust to source the equipment and consumables from a different third party.”

## (2) *The Law*

101. There is a wealth of domestic and European authority on the issue what constitutes a single supply as opposed to multiple supplies for the purposes of VAT. The CJEU case law has established that there are two types of single composite supply, namely:

(1) There is a single supply where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not amount to an end in themselves for customers but a means of better enjoying the principal service supplied: see *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973 (*'CPP'*) at [30].

(2) There is a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form (objectively) a single, indivisible economic supply, which it would be artificial to split: see *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433 (*'Levob'*) at [22].

102. In the present case the parties are agreed that the *CPP* approach, namely, to determine whether one supply is ancillary to the other, is not relevant to an analysis of the supplies provided by Genmed under the Agreement and that we should apply the *Levob* test, namely, whether they form a single,

indivisible supply when deciding whether there is a single or multiple supply. They also agree that in applying the *Levob* test it is not necessary to decide which is the predominant element in the supply because that issue only arises when deciding how to characterise the nature of a single supply (i.e. what type of goods or services they are and whether, for example, they are exempt) once it is accepted that there is a single composite supply: see *Gray and Farrar v HMRC International LLP* [2021] UKUT 293 (TCC); [2022] STC 94 at [69] to [72].

103. The CJEU has applied both the *CPP* and *Levob* approaches to the classification of single or multiple supplies in a number of cases across the entire field of VAT transactions. The effect of these principles was summarised by the Upper Tribunal in *Middle Temple v HMRC* [2013] UKUT 250 (TCC); [2013] STC 1998 (*'Middle Temple'*) at [60]:

“(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.”

104. In *Spectrum Community Health CIC v HMRC* [2022] UKFTT 237 (TC) (*'Spectrum'*) the Chamber President of the First-tier Tribunal, UT Judge Sinfield, addressed more recent CJEU case law at [50] to [53]:

“50. Since *Middle Temple*, the CJEU has given further guidance on how to determine whether a transaction that comprises a bundle of elements and acts should be regarded as a single composite supply or several separate supplies. In Case C-581/19 *Frenetikexito - Unipessoal Lda v Autoridade*

*Tributária e Aduaneira* (*Frenetikexito*), the CJEU identified three exceptions to the principle that each individual supply must be regarded as distinct and independent for VAT purposes.

51. The first exception is where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. This is the single supply first identified in *Levob*. In paragraphs 22 to 33 of her opinion, which were specifically approved by the CJEU, the Advocate General (Kokott) in *Frenetikexito* set out how to determine whether a bundle of goods and services is a *Levob* type single supply. The first step is to ascertain the essential features or characteristic elements of the transaction from the perspective of the ‘typical consumer’, ie the typical recipient of the supply. The perspective of the typical consumer is to be determined according to the generally accepted view, ie the understanding of the general public. The Advocate General then identified four “indications” which should be considered from the perspective of the typical consumer. These are:

- (1) Indivisibility of the elements of the supply, ie do the individual elements of the supply merge into a new distinct supply such that, in the generally accepted view, there is only a single supply?
- (2) Separate availability of the supplies, ie are the different elements that make up the supply available separately or must the customer take all the elements together?
- (3) Indispensability of the elements of the supply for the aim of the supply, ie does the transaction have a single economic aim or is the combination of different elements important to the typical recipient of the supplies?
- (4) Separate invoicing as an indication that supplies are divisible, ie is there a single invoice and price for all the elements or are they invoiced and/or charged separately?

52. The CJEU condensed the Advocate General’s observations into a single paragraph as follows (cases references removed):

“39 ... it is necessary to identify the characteristic elements of the transaction in question from the perspective of the average consumer. The body of evidence relied on for this purpose comprises various elements, the first of which, being of an intellectual nature and of decisive importance, seek to establish whether or not the elements of the operation in question are indivisible and its economic purpose, whether or not this is unique, and the second of which, being of a substantive nature and not of decisive importance, support, where appropriate, the analysis of the first elements, such as separate access or joint access to the services in question or the existence of a single invoice or a separate invoice.”

53. Although the CJEU endorsed the Advocate General’s analysis, it went further than she did. The CJEU did not call two of the matters to be considered, ie indivisibility and indispensability, “indications” but described them as “of decisive importance” while assigning the other two elements only a supporting, and not decisive, role.”

105. As Mr Mantle pointed out, the CJEU handed down judgment in *Frenetikexito* [2021] EUECJ C-581/19; ECLI:EU:C:2021:167 (which was cited in *Spectrum* (above)) on 4 March 2021 although the Advocate General’s opinion was made available in October 2020. The decision was, therefore, handed down after ‘IP completion day’, i.e. the end of the implementation period following the UK’s withdrawal from the European Union, which was 31 December 2020. By virtue of section 6(1)(a) of the European Union (Withdrawal) Act 2018 (‘the Withdrawal Act’), a court or tribunal is not bound by any principles laid down or any decisions made by the European Court on or after that date. We remind ourselves, therefore, that we are not bound by the judgment of the Court or the Advocate General’s opinion in *Frenetikexito*.

106. We add that there is some difference of emphasis between the Advocate General’s opinion and the judgment of the Court in *Frenetikexito* as explained in *Spectrum*: see [53] (above). Nonetheless, by virtue of section 6(2) of the Withdrawal Act we may have regard to the Court’s

judgment in *Frenetikexito* and we consider it particularly useful to do so in circumstances where that judgment attempts to summarise principles from existing law by which we are bound.

### *(3) HMRC's Argument*

#### *(i) The Typical Consumer*

107. Mr Mantle submitted that the provision of the services and the provision of the Consumables under the Agreement were not so closely linked that they formed (on an objective basis) a single, indivisible economic supply, which it would be artificial to split from the perspective of a typical consumer (such as an NHS Trust or other organisation carrying out surgical procedures). He also submitted that the typical consumer could in fact be any hospital carrying out surgical procedures and, indeed, there was evidence from Ms Rayner that Genmed had been approached by private hospitals to provide a managed theatre service.

#### *(ii) Separate Availability*

108. Mr Mantle also submitted that the correct approach to the Single Supply Issue was not to look at the relevant contract and ascertain whether the receiving party has agreed to accept all of the elements supplied under that contract solely from the supplying party for the duration of the contract. He argued that but for the obligation to purchase them exclusively from Genmed, it was easy for the Trust to purchase Consumables directly from manufacturers or wholesalers or retailers who currently supply them to Genmed itself. Indeed, many of them (or other suppliers of a similar nature) would have previously supplied them directly to the Trust. He also argued that Trust staff would have received identical goods for use in performing surgical procedures if they had sourced them from third parties and, therefore, that Consumables were separately available and that it would not be artificial to split them from the supply of services.

109. Mr Mantle also contended that it was difficult to see (in broad terms at least) why the Trust could not buy services from a third party supplier or suppliers of the service elements without the need to purchase the services and Consumables from the same party. This is because the services also involved procurement by Genmed from a third party, handling and getting them to the right operating theatre at the right time. A typical consumer would, therefore, purchase Consumables separately from obtaining services similar to those provided by Genmed and either source them directly itself or used Genmed as its agent. Given that Genmed was acting as a procurement provider, it was natural for it to source the Consumables as agent on behalf of the Trust rather than acting as a principal.

#### *(iii) Pricing*

110. Mr Mantle also relied on the pricing, invoicing and relative costs of the services and the Consumables under the Agreement. He argued, and we accept, that it is a relevant factor whether a single price is charged for a supply under a contract and that although pricing is not decisive, a single price suggests a single service and vice versa: see, e.g., *CPP* at [31]. Mr Mantle submitted that it is apparent from the price mechanism and without adopting an artificial and commercially unrealistic view of the Agreement, a separate price is clearly charged and paid for the Consumables. In particular, Genmed must charge and the Trust must pay the purchase price of each Consumable plus a mark-up of 6% (or 3% if the Trust is not entitled to a full refund under COSD of all of the VAT it incurs on supplies made to it under the Agreement).

#### *(iv) Indivisibility*

111. Mr Mantle also submitted that it was relevant to consider and compare the characteristic elements of the transaction under consideration both in terms of quality and in terms of *quantity*: see *Město Žamberk v Finanční ředitelství v Hradci Králové* [2014] STC 1703 (Case C-18/12) at [30] and *Gray & Farrar* at [72](3). He submitted that the cost incurred by Genmed in purchasing the Consumables comprised approximately 70% of the value of the contract charge payable by the Trust to Genmed and in the Detailed Grounds HMRC asserted that the Trust paid £11.7million out of a total of £17million: see [54]. He also submitted that the comparative total prices charged to the Trust for the Consumables and the Services is a factor indicating that Consumables are not indivisible from, nor indispensable to, the supply of services.

112. In answer to the Trust's point that it would be artificial to split the supply of services and Consumables because Genmed took the risk of supplying defective goods, Mr Mantle argued that the risk of defective consumables goods being supplied under the Agreement is completely separate from the risks which the managed theatre facility was designed to address, namely, the risk of clinical procedures being cancelled or delayed. To meet the Trust's point that it needed to source the Consumables from Genmed because of the restrictive procurement rules under the NHS, he submitted that that NHS procurement rules should be ignored because the typical customer for Genmed's services should not be treated as an NHS trust. He also submitted that the evidence which the witnesses gave all related to the procurement of equipment rather than Consumables and that even if private providers had more flexibility in purchasing Consumables than the Trust under NHS procurement rules, there was an alternative procurement model readily available, namely, an agency arrangement under which Genmed could procure the Consumables as an agent or sub-contractor without acquiring title to them.

113. Mr Mantle also submitted cases such as *Spectrum* (above) and *Nuffield Health v HMRC* [2013] UKFTT 291(TC) (*'Nuffield'*) (where the provision of both pharmaceutical supplies and prostheses was held to form elements of a single exempt supply of healthcare services) could be distinguished from the present case because Genmed is not providing healthcare to the Trust but rather the Trust is providing healthcare to the patient and the typical consumer is the NHS Trust not the patient undergoing surgical care. He relied on the fact that the Trust was able to source Consumables from other suppliers before it entered into the Agreement (although he accepted that in doing so, it would be subject to NHS procurement rules).

114. Mr Mantle's fundamental point was that simply because the Trust chose a procurement model under which Genmed was to provide every element of both the services and the Consumables, this did not establish that there was a single, indivisible supply because the Consumables were all separately available. He made a number of specific points which we summarise as follows:

(1) This is not a case where the customer is required to purchase both goods or services as part of a package deal under which they were not available separately or the customer did not want the complete package. The Trust could have entered into standalone procurement contracts under which it purchased the equipment and Consumables.

(2) Genmed supplied services under the Agreement which had no direct connection to the Consumables. Whilst there were services connected to the provision of Consumables (procurement, stock control, delivery to theatre, IT services through the H-Trak software system, catalogue management), Genmed also provided support services for the operation of the theatre itself (cleaning, sterilisation, disposal and maintenance of the fabric of the building) which had no connection to the Consumables. Moreover, many of those services were provided by the Trust's own subsidiary, GMS.

(3) Further, Genmed could provide those separate, independent services even if it did not purchase the Consumables and acquire title to them. There was a single purpose or unifying aim to the services which Genmed provided for getting both the Consumables and the theatre ready in time for an operation and avoiding cancellations. But the supply of the Consumables also had an entirely different aim, namely, to ensure that the Trust had Consumables of an appropriate quality and description for use in an operating theatre.

(4) The Trust was able to achieve operational efficiencies by adopting the Genmed procurement model and these may have had an effect on patient safety. However, these benefits arose from the supply of the services and not the purchase of Consumables. The Trust could have achieved the same operational efficiencies and enhanced patient safety whether it bought the Consumables through Genmed or from a third party or directly. Moreover, the costs savings which Genmed achieved by as a bulk buyer was no indication of a single supply because it would have been able to achieve the same savings as an agent for the Trust (and other NHS trusts).

(5) Genmed could also generate the same cost savings by using the proprietary HTrak software system whether or not it acquired title to the Consumables and sold them on to the Trust. It could provide the same management information, manage stock and meet the Trust's requirements and source the relevant Consumables without it being necessary for Genmed to buy them itself.

(6) Genmed did not need to buy Consumables and retain title to them before selling them on to the Trust in order to manage or reduce the risks associated with defective goods. Moreover, any liability which Genmed incurred for defective goods would be passed on to the manufacturer in the same way as it would have been when the Trust purchased Consumables from third parties. Moreover, the liability for defective goods was of a different form from a liability for any failure by Genmed to provide its services and meet the KPIs associated with ensuring that operating theatres were ready on time and that a patient might die or suffer lasting injury as a consequence of the cancellation of an operation.

115. In conclusion, Mr Mantle argued that the separate availability of the Consumables was directly relevant to the question whether there was an indivisible supply of goods and services and to the question whether it was artificial to split them or treat them separately. He submitted that the Tribunal had to look at the objective reason advanced by the Trust for justifying the inclusion of all of the elements in one contract and treating them as a single supply. The Trust had to justify the inclusion of the Consumables in the overall package and it had failed to do so. The KPI targets and financial penalties set out in the Facilities Schedule related to the supply of services and not the goods themselves. The HTrak software system enabled decisions to be made about stock levels and which Consumables to order. But this was all related to the services and not the goods themselves. He submitted that on the *Levob* test, it is not enough to say that the goods and services form part of a single contractual package which promotes the aim of making theatres available and reducing or eliminating cancellations. He submitted that the test is not satisfied because there is no economic unity between the supply of services and the supply of goods because this aim could have been achieved if the Trust had purchased both services and Consumables separately (as it had done before) and it is artificial to combine them together to obtain a refund of VAT.

#### *(4) Decision*

116. We remind ourselves that we must decide whether Genmed's supply to the Trust under the Agreement is a single composite or integrated supply of managed theatre services which falls within the description in COSD 45. The parties agree that we should apply the *Levob* test in answering this question, namely, whether, from the perspective of a typical consumer, two or more elements or

acts supplied by the taxable person are so closely linked that they form (when viewed objectively) a single, indivisible economic supply which it would be artificial to divide up or split. We accept that we must stand back and apply this test holistically. But in the present case we find it useful to break it down into its constituent elements and to address the following four issues:

- (i) Are the different elements of the transaction closely linked?
- (ii) Do they form a single, indivisible economic supply?
- (iii) Would it be artificial to split the different elements into separate supplies?
- (iv) How would the typical consumer regard the different elements of the transaction?

117. In addressing these questions we have had regard to the CJEU's judgment in *Frenetikexito* and have checked our conclusions against the test of decisive importance set out at [39], namely, whether or not the elements of the operation in question are indivisible and share an economic purpose. We also have in mind the four questions set out by the Advocate General at [22] and [23]:

- (1) *Indivisibility of the elements of the supply*: Do the individual elements of the supply merge into a new distinct supply such that, in the generally accepted view, there is only a single supply?
- (2) *Separate availability of the supplies*: Are the different elements that make up the supply available separately or must the customer take all the elements together?
- (3) *Indispensability of the elements of the supply for the aim of the supply*: Does the transaction have a single economic aim or is the combination of different elements important to the typical recipient of the supplies?
- (4) *Separate invoicing as an indication that supplies are divisible*: Is there a single invoice and price for all the elements or are they invoiced and/or charged separately?

118. In applying the *Levob* test and testing our conclusion against *Frenetikexito* we are satisfied that objectively considered, from the point of the Trust, the supply of the services and Consumables under the Agreement are so closely linked as to form a single indivisible economic supply which it would be artificial to split. We are therefore satisfied that there is a single composite supply of services to the Trust of which the consumables form an indivisible and indispensable part. These services, a managed theatre services, are of a healthcare facility and hence qualify for a refund of VAT under paragraph 2(a) of COSD and Heading 45 in List 2. We now explain our reasons for reaching this conclusion.

(i) Are the elements of the supply closely linked?

119. It was the Trust's unchallenged evidence that its primary interest in entering into the Agreement was the provision of a managed theatre facility which included all individual elements which Genmed supplied under the Contract (including both goods and services). Mr Thomas accepted on behalf of the Trust that the inquiry is an objective one and that evidence of the subjective intention of the Trust's witnesses are not relevant to this inquiry or carry little weight. Nevertheless, we are satisfied that the Trust's witnesses all focused on objectively verifiable factors which demonstrated the advantages of entering into the managed healthcare facility model, how it operates in practice and the consequential benefits which flow from adopting that model.

120. We have set out or summarised the relevant evidence in section (1) (above) and we are satisfied that the evidence which we have set out or summarised in that section establish that the different elements supplied by Genmed under the Contract were closely linked because they were directed



to a single objective, namely, the preparation and readiness of surgical theatres to enable the Trust's clinicians to perform and treat patients in surgery. All of the relevant witnesses attested to this 'ready to go' objective. For example, in her witness statement Alexandra Gent gave the following evidence at [13] (which we accept):

"The Trust's aim was that the clinical teams would be able to walk into the operating theatre and save for the provision of medical care, the responsibility for everything else in that room would be outsourced to a third party. Under a managed healthcare facility model, a third party is responsible for the complete management, operation, stocking and maintenance of the theatres. This includes any repair, maintenance, sterilisation and other estate and facilities management services. The third party therefore provides all services and related equipment and consumables save for the clinical team and would be a complete outsourced solution and end to end process."

121. HMRC did not apply to cross-examine Alexandra Gent or any of the Trust's other witnesses and we are entitled to accept this evidence at face value where it was consistent with the objective facts. We accept her evidence in relation to the Trust's objective in entering into the Agreement and we are also satisfied that the contractual arrangements between the Trust and Genmed support the conclusion that the goods and services which Genmed supplied are fully integrated when viewed objectively. Moreover, we consider that this conclusion is supported by other VAT decisions in the context of healthcare. In particular, it is commonplace for the provision of healthcare services in association with goods allied to those services to be treated as one composite transaction including the goods supplied (which are often drugs or prosthetic units): see *Spectrum* and *Nuffield* (above).

122. In *Nuffield* the FtT had no difficulty in concluding that the supply of drugs and prostheses by private hospitals were part of a single composite supply of healthcare notwithstanding that the principal medical services (the services of the surgeon installing the prosthesis and of anaesthetist) were supplied separately. Nevertheless, they formed part of a single, composite supply for VAT purposes which included the remaining goods and services supplied by the hospital including medical overview and nursing care formed part of a package with the goods and one supply for VAT purposes.

123. *Spectrum* involved the delivery of a range of medical services and goods to NHS England for the benefit of prisoners in a range of prisons in England. The FtT made findings which concerned the integrated nature of the supplies set out in the apex contracts between *Spectrum* and NHS England: see [23] to [28], [30] to [31] and [40]. The FtT concluded that the services were part of an integrated overall service and that the fact that some services had been subcontracted by *Spectrum* was not relevant: see [59] to [61], [67] and [68].

124. We accept that the Trust's case is different on the facts because the typical consumer in the present case is the provider of medical services. The Trust does not receive healthcare services from Genmed but it has the same ultimate interest in purchasing an integrated service from Genmed: to enable it to provide healthcare to its patients. We therefore consider that these two cases provide useful illustrations of the integrated nature of the supply of services and good in the provision of healthcare services. In *Nuffield* the consumer was the patient but in *Spectrum* the consumer was a healthcare body commissioning the service. We see no difference in the present case.

*(ii) Is there a single, indivisible economic supply?*

125. *Separate Availability*. The foundation of HMRC's case was that the Trust could have achieved the same benefits by structuring the Agreement differently and, in particular, that it could have obtained the benefit of Genmed's services and acquired Consumables separately either by purchasing them directly from third parties or by engaging Genmed to act as its agent. It was HMRC's case that because the Trust

could have achieved the same advantages without purchasing Consumables from Genmed, the supplies of services and Consumables did not form one indivisible supply. We are satisfied both that this approach is wrong in law and also that it is not supported by the facts.

126. In our judgment, the test for separate availability (and also whether it would be artificial to split the relevant supplies) does not turn on whether the Trust might have been able to buy Consumables separately or independently from the supply of the services under the Agreement. The question is a narrow one and turns on whether the customer, in this case the Trust, has the choice to obtain the services and the Consumables separately: see, in particular, the Advocate General's Opinion in *Frenetikexito* at [29]. Moreover, this is no more than a statement of the principle set out in the existing authorities: see, for example, *Middle Temple* at [60](10) (above).

127. The Agreement imposes an obligation upon to Genmed to provide all of the services comprised in the managed theatre facility and for the Trust to accept them. It contains no option to provide (or accept) some elements but not others and the Trust has no choice whether to accept the services or the Consumables either independently or as part of a single package. It is irrelevant, therefore, whether the Trust could have acquired the same benefits by negotiating with Genmed to adopt a different procurement model (e.g. by acting as the Trust's agent) or by negotiating with Genmed to provide certain services only and then purchasing the Consumables from third parties. The FtT made this point specifically in *Middle Temple*: see [60(7)] (above). Moreover, it is clear that the proposition stated in that paragraph was derived from authority which is binding on this Tribunal. In *David Baxendale v HMRC* [2009] EWCA Civ 831 Patten LJ stated as follows at [22] and [24]:

“The determination of this question “whether, from an objective view, they form a singling indivisible economic supply which it would be artificial to split” will depend upon a global assessment of all facts relevant to the transaction under which the supply or supplies took place...The fact that the same or similar goods or services could be provided separately from different sources is irrelevant in my view to the question whether, in the particular transaction under consideration, their combination produced a different economic result.”

128. It is not permissible, therefore, to invite the Tribunal to speculate about the terms which the Trust could (or might) have achieved if it had negotiated different terms with Genmed or with a different contractual counter-party for a different procurement model and Mr Mantle did not take us to any decided case in which the relevant tribunal had undertaken such a comparative exercise. Moreover, in all cases where there is an individually negotiated contract it would be possible to say that the parties might have negotiated different terms to achieve either the same or a comparative result.

129. But in any event, we do not accept the factual premise of HMRC's argument. At the heart of Mr Mantle's submissions was the assumption that the Trust could have acquired the Consumables on the same terms if Genmed had been its agent or it had negotiated directly with third parties and that it had artificially included the Consumables in the contract specification to give Genmed a profit element (which would be increased if there was a VAT refund). The principal basis for this assumption was the price formula which Genmed adopted (cost plus a percentage of either 3% or 6%) and the amount of the contract price which was attributable to the Consumables. Moreover, Mr Mantle's submissions also assumed that because the Trust and Genmed entered into a contract which had been individually negotiated (rather than standard form terms and conditions), the Trust could have negotiated the same terms with Genmed for its services even if it sourced the Consumables from third parties directly.

130. But he did not apply to put any of these propositions to the Trust's witnesses and we are not satisfied that we could properly find that the Trust could have achieved the same benefits if Genmed had not supplied the Consumables to the Trust. Not one of the witnesses was cross-examined nor were their statements challenged on the basis on the basis the Trust could have achieved the same saving or benefits of the Agreement by adopting a different procurement model which did not involve Genmed supplying the Consumables.

131. Moreover, a number of the witnesses gave positive evidence that it would not have been possible or practical for the Trust to enter into a contract with Genmed to supply the same services at the same price but to purchase Consumables directly from third parties or through Genmed as its agent. For example, Ruth Billen gave the following evidence in her witness statement:

“29. The HTrak solution was integrated by Genmed into Genmed's SAP Business One system which is the financial system used by Genmed for ordering, invoice processing and reporting. This involved a separate SAP instance (a software integration package) and the use of APIs/Webservice functionality to allow for the automation of data flows between systems. The software functionality is standard, although Genmed work closely with the software provider in respect of the product road map and additional functionality to be developed specifically for the Trust. The key to the software is tailoring the catalogues and the usage of the products to the Trust, the specific theatre requirements and the ordering routes, therefore the implementation of the system and getting the set up correct are essential to ensuring continuity of supply, accurate pricing data and inventory control.

30. In so doing, Genmed worked in partnership with HTrak's software developers, Prospitalia, to build a reporting structure and product road map which is bespoke to the Trust. This involves analysing the Trust's surgical divisions on a line by line basis, detailing the stock type, supply route, costs and stock levels. This is a very long process and specific to the Trust. As a result, it would not be possible to use HTrak without Genmed's own SAP system as there is no interface with any of the Trust's procurement system. Genmed hold all the catalogues and supplier agreements which the Trust only have access to through Genmed.

...

43. If the Trust were to order the consumables from another party or parties, Genmed's management of the stock would be almost impossible, as Genmed would be unable to interface the HTrak/ IDocument systems of catalogues, ordering and authorisations (which are software system designed and managed by Genmed and hosted on Genmed technology) with consumables/ equipment purchased and managed by a third party. Further, it is almost impossible to work or integrate a similar suite of technology within the NHS systems as they are now very antiquated and disjointed. This would mean that similarly, the value in Genmed's reporting and benchmarking tests would be substantially diminished due to the lack of interfacing between the reporting service and the physical consumables/ equipment.”

132. In his witness statement Robert Neale gave evidence to similar effect:

“34. The value to the Trust in the Genmed service is for the provision of the whole package of services, support and expertise that Genmed provides. The value to the Trust would be greatly diminished if the Trust were required to separately procure the consumables and equipment. In addition, in my view as Genmed's services, including the data analytics, benchmarking and financial analysis, maintenance and stock management, are closely connected with the procurement of the equipment and consumables, it would not be in the Trust's best interest and neither would it be realistic for the Trust to source the equipment and consumables from a different third party.”

133. Alexandra Gent also stated that an additional management fee would have been payable if the Trust had continued to source the Consumables separately (and we have no reason to believe that

NHS procurement rules would have required the payment of this fee even if Genmed had been acting as the Trust's agent):

“10.d. There was a growing need for the Trust to deliver efficacies and savings, as at the time most of the Theatre spend came through NHS supply chain. Whilst the NHS supply chain could use a degree of leverage across the NHS to achieve better pricing and discounts on products, they charged a management fee on top of the individual product pricing averaging 4%.”

134. Finally, it was never put to the Genmed witnesses that Genmed would have been willing to negotiate or whether it would have insisted that the Trust purchase Consumables from it as part of the contractual package on the table. In the absence of any evidence to that effect, we are satisfied that the Consumables and services were not separately available to the Trust under the Agreement as a matter of fact or law. We are also satisfied that it was an essential part of Genmed's model that the services and the Consumables were not available separately and the Trust had to take all the elements together.

135. *Indispensability.* We are also satisfied that all of the elements, the supply of both the services and the Consumables are indispensable to the achievement of the Trust's objective, namely, the supply of a managed theatre facility. In particular, without the provision of the Consumables, the managed theatre service would be incomplete and it would be impossible to prepare a theatre for a surgical procedure or then to carry out that procedure. In particular, we accept the evidence of Candice Tyers which she gave about the integrated nature of the services and the Consumables:

“37. The Trust's requirements were and remain for a single managed surgical facility service, which included all of the component parts necessary for the day-to-day operation of the Trust's theatres. It was therefore essential that the supply included the services, equipment and consumables.

38. As is indicated in the following diagram, it was essential that Genmed provide the services, equipment and consumables necessary and integral to maintain a fully functioning theatre facility and for the Trust to carry out specialised surgical treatments. It was therefore essential to the Trust that Genmed's supply included management of the theatres, the provision of maintenance and on-site support, equipment, parts and consumables, training and advisory services.

138. She also provided detailed examples of the services which Genmed supplied and how the supply of Consumables by Genmed was integral to them. Again, this evidence was not challenged and we accept it:

41. Ownership of end to end service/transfer of risk: Genmed as the sole provider carries the contractual risk for delivering an end to end managed theatre facility, so that all the elements managed by different aspects of the Trust and the burden on the front line theatre nurses is taken on by Genmed's team instead, on and off site. This includes the risk of non-delivery of the consumables but extends more widely to the provision of a fully equipped and functioning operating theatre facility. This means that the speed of the surgical sessions is improved and the number of sessions that occur as planned in a period increase.

42. Elimination of cancelled procedures due to operational failures: Genmed are responsible for ensuring the availability of the theatre facility so that any delays or cancellations of theatre sessions result in Genmed paying the tariff for the session as a penalty. If an item of equipment or consumable was unavailable to the Trust, for example, despite it being ordered in a timely manner, then the operation would have to be postponed until the item was received and Genmed would be obligated to pay for the procedure in question. Since implementing the Agreement, there have been no instances in which necessary equipment or consumables have not been available when required, accordingly, this provision has not been utilised to date.

43. Catalogue Management: Catalogue management is a complex time-consuming task with 100,000's of product lines, price changes, equivalents matching, and alternatives. Genmed's role is not focused on the actual 'buying products' per se. Genmed is focused on managing which products are purchased, at what cost, at the volume required and managing where they need to be bought from and from which suppliers. Using the HTrak software (described further below), Genmed can match what has been ordered to what has been delivered, what has been spent and what has consumed in procedures, which is a fundamental basis for costing procedures. In addition, the HTrak software enables Genmed to collect and analyse data on the apparent differences in efficiencies between surgeons; type of surgical case; complexities of cases, and further, to track those costs across the patient's journey through theatres complex.

44. Governance of products: Through the HTrak system (see paragraphs 61 to 65 below), Genmed can immediately identify if a product is used in theatres which has not been approved through the correct internal governance procedures. Genmed will highlight this inconsistency to the relevant Trust teams. This helps to ensure that the Trust is consistent in terms of the processes applied and followed within the theatre and also ensures that the consumables procured are of a consistent quality.

45. Stock Management Logistics: Stock is physically maintained across two sites and the ten storage locations. Using the HTrak system and having Genmed staff on site and in their administrative offices with experience of using the software, ensures that the stock can be easily located across the whole site and transported between sites and theatre locations as required. This ensures best practice and optimised use for both costly and high volume, high spend consumables for the Trust.

...

47. Product recall: The software allows Genmed to effectively manage product recalls, as the system logs which products/consumables have been used/ implanted into which patients. In the event that there is a product recall from any suppliers (e.g. the breast implants), the new system will allow Genmed to search for the relevant product LOT number/serial number and will instantly bring up a list of patients who have the implant etc. This was previously a labour-intensive task by Trust staff who would otherwise be required to manually review patient records or theatre books.

48. Improved patient safety/ Regulatory compliance: As indicated, Genmed maintains data on all components and equipment in an accurate and readily available database. This has the effect of improving the Trust's Care Quality Commission position and further, provides a clear audit trail of every product used in a theatre session on a line by line basis: the data available identifies per historical theatre session and/or surgeon, which stock items were used in which surgical sessions; when those sessions were carried out; the patient details; the age of the stock items used and age relative to the expiration date; the stock batch numbers; the LOT/ serial numbers; supplier details and full traceability record including how many are unused in stock.

53. Each of these component parts are essential to Genmed's supply of the managed theatre service and Genmed's supply would be significantly devalued to the Trust if Genmed were unable to provide these services. These services are imperative to ensure patient safety and operational success."

(iii) Would it be artificial to split the different elements into separate supplies?

139. In the light of our conclusions in relation to separate availability and indispensability we are satisfied that each element of the supply which Genmed provided under the Agreement (including the Consumables) not only contributes to the provision of a single service of a managed theatre facility but merges into this new distinct supply such that there is only a single supply. But we have also tested this conclusion (as we are required to do) by asking the separate question whether it would be artificial to split the separate elements into separate supplies. We have reached the conclusion that it would be artificial to split them for the following reasons.

140. *Single Contractual Obligation.* We have tested this issue against, perhaps, the most important example of the benefits which the Trust seeks to achieve under the Agreement. The principal objective of the Trust is to reduce or eliminate the cancellation of surgical procedures and the principal benefit which it obtains under the Agreement is the achievement of that objective. The Trust achieves this by placing contractual responsibility upon Genmed for the provision of all facilities necessary for the performance of a particular surgical or clinical procedure ‘ready to go’ at the specified time. The constituent elements of that service can be summarised as follows:

- (i) Provision of consumables;
- (ii) Operation of stock control to ensure the availability of consumables;
- (iii) Provision of instruments;
- (iv) Sterilisation services e.g. for the instruments;
- (v) Provision of linen services;
- (vi) Maintenance of surgical facilities;
- (vii) Provision of cleaning services; and
- (viii) Provision of theatre beds, anaesthetic machines, lights and other equipment.

141. Schedule 1, paragraph 2 of the Agreement contains the contractual obligation which is imposed upon Genmed to provide this integrated service is set out in Schedule 1, Part 1 paragraph 2.1.2 (above). In the light of the evidence which we have also set out (above), we are satisfied that paragraph 2.1.2 is not merely a convenient label or general description of the individual goods and services which Genmed is required to provide but that it imposes a single contractual obligation for the provision of the managed healthcare facility which is integral to the achievement of the Trust’s objective to minimise or eliminate the cancellation of surgical procedures.

142. *HMRC’s Concession* Moreover, in considering whether it is artificial to split these services we also take into account the fact that HMRC conceded or accepted that Genmed is entitled to the benefit of a refund under COS 45 for the services which it provides under the Agreement except in respect of Consumables. In our judgment, it is more artificial to split the goods and services supplied by Genmed in the way in which HMRC have chosen to do, rather than to treat them as a single, indivisible supply.

143. Genmed provides four categories of goods and equipment under the Agreement: see [86] (above). Genmed acquired and retains title to the goods set out in categories (i) and (ii) (above) and carries out associated maintenance and repair obligations. We have found that Genmed transfers legal title to Consumables in categories (iii) and (iv) to the Trust and that those items are either used by the Trust and disposed of by Genmed under its waste disposal obligations or given to patients for their long-term or short-term use. Contrary to HMRC’s position we do not consider that this difference justifies the conclusion that there is a separate supply of Consumables. They are not the subject of any onward supply by the Trust to third parties for VAT purposes and it is less artificial to see the model as a fully managed service provision in which the supply of the Consumables is integrated.

144. *The HTrak software system.* We also consider that it would be artificial to split the different elements of the supply given that Genmed provides the bespoke and proprietary IT software system

to integrate the supply of goods in all four categories to achieve the Trust's principal objective. As we have already stated, this is a web-based IT system through which Genmed prepares and supplies management information, data analytics, the monitors costs and facility activity and prepares monthly management reporting and budgets. Genmed personnel working on site identify what products are needed and where they can be stored. The HTrak software is integrated into Genmed system for ordering goods and Genmed personnel deploy it through the use of handheld scanners used for stock management and ordering goods. By using the HTrak system Genmed has improved and made the process of purchasing products better than the Trust had done in the past with more efficiency and oversight.

145. *Assumption of Risk.* We also consider that the incidence of risk supports the conclusion that it would be artificial to split the supply of Consumables from the rest of the services which Genmed supplies. As the initial purchaser of the Consumables, Genmed now takes the risk of faulty, lost, missing and obsolete stock and of product recall before use. Clause 5.5 provides one illustration of this assumption of risk. In that clause Genmed has undertaken to ensure that any Consumables have a lifetime usage cycle agreed with the Trust which enables them to be used in the normal course of business and within the manufacturer's recommended expiration dates. Clauses 9.15 to 9.18 also impose obligations upon Genmed to ensure the availability and performance of the Consumables.

146. We add that the obligation imposed upon the Trust not to modify, alter or change the Consumables, which we considered in the context of the passing of title, falls within clause 5.5 and must be construed in that context. That obligation is not concerned with title to the Consumables but with their shelf-life and stability. Because Genmed assumes the risk of ensuring that they remain fit for purpose and are used within their shelf-life, the Trust cannot modify the Consumables in a way which would significantly increase the risks which Genmed has assumed.

147. *Single supplier.* Finally, we take into account the fact that before it entered into the Agreement the Trust had previously sourced goods from more than 70 suppliers directly. We are satisfied that this produces both practical and legal benefits. The Agreement removes the administrative burden from the Trust and imposes it upon Genmed saving costs and freeing up clinical staff. Further, because Genmed is not simply an agent but assumes the risks associated with a seller of goods (including the specific obligations in clauses 5 and 9), the Trust need only look to a single contractual counter-party for a remedy.

(iv) The Typical Consumer

148. In our judgment, the typical consumer in the present case is an NHS trust. Whilst it is possible that Genmed might be engaged to supply similar services to private healthcare providers, there was no evidence before us that it was able to do so and Mr Mantle chose not to explore this issue with any of the Trust's witnesses. We accept Ruth Billen's evidence, therefore, that Genmed has the benefit of being vendor neutral and is able to obtain benefits as a bulk buyer of Consumables and discounts which might not be available if they were acting as agents for the Trust. We also accept the evidence of Alexandra Gent that there is a marked advantage to Genmed procuring the Consumables rather than the Trust:

"11. As a public body, NHS organisations are required to operate in accordance with the European Procurement Directives and Regulations, which have set timeframes which often lead to delays and substantial paperwork, which is time intensive and resource heavy. Based on the Trust's experience when sourcing these solutions in-house, the Trust's view was that there would be more flexibility if the solution was outsourced to a private provider, as they would not be subject to the public contract

regulations and would therefore have more flexibility and freedom to commercially negotiate the buying in of product. This again was projected to deliver savings to the Trust.”

149. Mr Thomas also took us through the Public Contracts Regulations 2015 which had applied to the Trust. It is apparent that the procurement of a similar quantity of Consumables over a similar period of time would have been subject to a fixed and more rigid timetable and additional administrative requirements. Moreover, the regulations would not have permitted the Trust the freedom to negotiate a price for Genmed’s services on a commercial basis.

(v) Invoicing and Pricing

150. *Invoicing.* In *Frenetikexito* the Advocate General considered that separate invoicing (and by extension separate pricing) is an indication that supplies are divisible. We therefore address this issue separately. In the present case, we consider that invoicing and pricing are neutral and do not support HMRC’s case that there are separate supplies of services and Consumables. Genmed does not invoice the Trust for individual Consumables separately. Nor does it invoice the Trust for all Consumables and all services separately. It provides a single invoice to the Trust with a single unitary charge each month. There is a single tax point and it is not broken down on any invoice nor described by reference to the cost of the consumables.

151. Mr Mantle showed us detailed spreadsheets which set out the price of individual Consumables supplied to the Trust over various periods. But these were not lists of prices paid by the Trust but lists of Consumables supplied and scanned on to the HTrak system. There is no evidence that the Trust was asked to approve or accept these prices or that the Trust ever did so. We accept that the price lists provide evidence of the prices which Genmed paid (and on which it charged the relevant mark-up). But they had no contractual force and simply a record of what Genmed had paid.

152. *Pricing.* The Consumables represent about 70% of the total costs of the supply and we can understand why HMRC may consider that it goes beyond the policy of the COS Directive to permit a refund in the present case. But once it is accepted that the COS Directive employs the concept of a ‘supply’ in CJEU jurisprudence, then that concept has to be applied by the UT. (Indeed, for the purposes of Ground 1 HMRC argue strongly that the Tribunal should apply that jurisprudence.)

153. We attribute little weight to the relative prices of the individual elements of the supply. We were not taken to any authority for the proposition that the relative cost of individual elements should be treated as an important indicator of whether there is a single or multiple supply. This is not identified as a relevant factor in the *Middle Temple* case and we do not consider this surprising. The relative costs of individual elements of the supply does not tell the UT anything about the connection between the elements of the supply and whether they are sufficiently closely linked as to be a single indivisible transaction for VAT purposes. For example, the Consumables required for a highly specialist operation may far exceed the establishment costs and the labour costs of the clinical team. But they have the same degree of connection as a routine operation where the Consumables cost far less.

154. We accept that a disparity in price might actually underline the principal or ancillary nature of either goods or services. But it is common ground that the Trust does not have to establish that the supply of services predominates over the supply of goods to establish a single supply. We also accept that a significant imbalance between the price of goods and services might establish that it is artificial to treat them as a single supply. However, we are satisfied that it would be artificial to split the different elements of the supply for the reasons which we have given. Even if the parties were strongly motivated by a desire to maximise the prospect of a VAT refund, we are satisfied on an



objective basis that the services and Consumables form a single, indivisible supply for VAT purposes.

#### *(5) Conclusion*

155. The claim for judicial review succeeds on Ground 2. HMRC's decision to refuse a refund of VAT under COSD 45 was, in our judgment, unlawful. Even though we have found that title to the Consumables passes from Genmed to the Trust under the Agreement, we are satisfied on an objective basis and from the point of view of the typical consumer, namely an NHS trust, that the supply of the services and Consumables are so closely linked that they form a single, indivisible economic supply which it would be artificial to split. We would describe that single composite supply as the supply of a fully managed theatre facility and we are satisfied that it falls within paragraph 2(a) of COSD and COSD 45 either as the operation of a healthcare facility or as services related to the operation of healthcare facilities by the Trust itself.

156. We have tested this conclusion against the indicia set out by the Advocate General in *Frenetikexito* which is not binding on us but which provides helpful guidance (particularly in relation to earlier CJEU jurisprudence). In particular, we are satisfied that the elements of the supply are not separately available (either as a matter of law or as a matter of fact) and that both Consumables and services are indispensable to the economic aim of the supply and, in particular, the Trust's aim to reduce or eliminate the delay and cancellation of theatre appointments and procedures. Finally, we consider the invoicing and cost-plus pricing of Consumables to be neutral and we attribute little weight to the comparative cost of goods and services under the Agreement.

### **VII. Ground 3**

157. The Trust also claims that even if it did not receive from Genmed a single supply for VAT purposes of a managed theatre facility (and the provision of Consumables is a separate supply of goods for VAT purposes), then the supply of the consumables is 'closely related' within the meaning of COSD, paragraph 2(c) of COSD, to the supply of healthcare facilities by Genmed.

158. The parties addressed us in detail about the scope and meaning of a supply of goods 'closely related' to a supply of services for the purpose of paragraph 2(c). The Trust's case was that paragraph 2(c) must have a wider ambit than paragraph 2(a) and that a supply of goods would qualify for a refund under paragraph 2(c) even if the *Levob* test was not satisfied for the purposes of paragraph 2(a). HMRC's case was that paragraph 2(c) was introduced at a time when the CJEU jurisprudence had not been fully developed and that paragraph 2(c) either covered the same ground or imposed a more restrictive test and only applied to the supply of those goods necessary to provide or perform the service under paragraph 2(a).

159. It is unnecessary for us to decide the precise scope of paragraph 2(c) and we leave the issue of construction for determination in a case where the Tribunal is not satisfied that there is a single composite supply for the purposes of paragraph 2(a). We have decided that the supply of Consumables is so closely linked to the supply of services that the services and goods form a single, indivisible economic supply. We are satisfied, therefore, that whatever construction of paragraph 2(c) is adopted, the supply of Consumables under the Agreement is closely related to the supply of services and would qualify for a refund under paragraph 2(c).

### **VIII. Ground 4**

160. The Trust also challenges HMRC’s decision on public law grounds. Given our conclusions in relation to the claim for judicial review on Grounds 2, it is also unnecessary to decide this issue. Nevertheless, we heard full argument on Ground 4 and HMRC urged us to decide this issue because it raised allegations of irrational conduct against individual officers, which should not be left undecided. We therefore go on to decide whether the claim succeeds on Ground 4 on the assumption that our decision on Ground 2 is wrong.

161. The Trust claims that HMRC’s decision not to grant a refund under COSD 45 in respect of Consumables was irrational and unfair because they gave different and unequal treatment to the Epsom & St Helier University Hospitals NHS Trust (‘Epsom’) and Epsom received a refund in respect of VAT on Consumables pursuant to an agreement for managed theatre services made with Genmed and dated 1 June 2016 (‘the Epsom Agreement’). Moreover, before the UT HMRC accepted that the Epsom Agreement was identical to the Agreement in all material respects. However, their case was that the relevant officers did not have a copy of the Epsom Agreement available or take it into account when they made the decision to refuse a refund to the Trust.

162. On 11 January 2017 HMRC produced a ruling that Epsom was entitled to the benefit of a refund (‘the Epsom Ruling’) and it continued to receive a refund until 9 September 2022 when HMRC decided to withdraw the ruling on the basis that it was incorrect. However, it was common ground that this change of view has no bearing on the question whether the Trust is entitled to have the decision quashed as unlawful because HMRC decision to refuse the Trust a refund was taken between August and December 2020.

## F. The Facts

### *(1) The Epsom Ruling*

163. By letter dated 8 August 2015 KPMG LLP (‘KPMG’) requested a ruling in relation to a VAT refund under COSD 45 on behalf of Epsom in respect of the Epsom Agreement. It is common ground that KPMG’s letter enclosed a copy of the Epsom Agreement and that HMRC received it at the time. HMRC also accept that the Epsom Agreement was identical to the Agreement in all material respects including the supply of services and Consumables. By letter dated 12 October 2016 HMRC Officer David Whittle responded to the clearance request by asking for further information. In relation to Consumables he expressed the following initial view:

“My initial position on the consumables provided would be they are provided as part of the main service agreement to be within the scope for VAT recovery under COS 45... Where separately contracted via a stand-alone agreement the consumables cost would be regarded as supply of goods.....Please confirm there is no stand-alone contract for consumables.”

164. By email dated 11 November 2016 KPMG provided further information on behalf of Epsom and by letter dated 11 January 2017 Officer Stephen Heads wrote to KPMG setting out HMRC’s decision and providing the Epsom Ruling. He stated as follows:

“Whilst I am happy that on this occasion, for this contract only, there is a clear demonstration of the elements required to allow full VAT recovery under COS Heading 45 please be aware that this decision is not intended to apply to any other contract of the same or similar nature for any NHS body. Each future instance must still be evaluated on a case by case basis.”

### *(2) The Clearance Request*

165. By letter dated 18 January 2019 (although wrongly dated 18 January 2018) KPMG, who were also acting on behalf of the Trust, wrote to HMRC requesting a ruling to HMRC on whether the Trust was entitled to a refund under COSD 45 in respect of the Agreement ('the Clearance Request'). They stated that:

"We have reviewed the VAT recovery status of the Agreement in light of the abovementioned HMRC guidance. We have also formed our view based on a review of a prior ruling which has been provided by HMRC in relation to a managed theatres contract between Genmed and another NHS Trust. Whilst the prior ruling is largely on par with the Agreement, there is one specific area in relation to the timing of Genmed's provision of some of the services in this Agreement which is different and which has created uncertainty as to the VAT recovery position of the Agreement. But for this area of uncertainty in the Agreement, we believe it is in line with the prior ruling and we would expect a consistent application of VAT relief."

166. In the covering email dated 21 January 2019 Jessica Wells, who was an Assistant Manager, Indirect Tax, wrote to HMRC stating as follows:

"We have addressed the letter to Stephen Heads who previously assisted us in providing a ruling on a very similar contract for Epsom & St Helier NHS Trust involving Genmed. However following our email below, we understand that Stephen has now moved on and we have been advised to send this ruling request to the general NHS Public Bodies VAT team. Given the similarities in fact pattern between the contract which is the subject of our current ruling and the contract with Epsom & St Helier NHS Trust, and the fact that it involves the same supplier (being Genmed) we think it is pertinent to take into account the earlier ruling provided by Stephen and we would be grateful if you could consider it when considering our non-statutory ruling request for Gloucester Hospitals NHS Foundation Trust. Should you require any further information in order to provide a response, please do not hesitate to contact us."

167. Below this email she forwarded an email chain which began with an email dated 16 December 2016 from Officer Heads to Vijay Shah at KPMG relating to the Epsom Ruling and a reply dated 12 January 2017 which enclosed the letter dated 11 January 2017. In that email Officer Heads stated as follows:

"As promised please find attached my response for Epsom & St Helier. I have kept the letter extremely succinct as I see no need to go into great depths on each area in question due to the fact I have agreed that all services rendered from Genmed, in my opinion, encapsulate a single supply recoverable under 45. If you have any questions please don't hesitate to contact me. Without getting too heavily involved in specifics I think it worth noting that all outstanding items raised by Dave Whittle, are again, in my opinion, recoverable under separate headings prosthetics 45, cleaning, 35, IT – 14 etc. and given the transactional and invoice arrangements showing only a single supply I am happy that in this instance only, all services are allowable under 45. First let me apologise for the delay in my response to your request for information."

168. The email chain which Ms Wells copied to HMRC also included a much more recent email dated 14 December 2018 from Mr Stephen Brooks, a Director of KPMG, to Officer Heads. This email was copied by Ms Wells immediately below her own email and it stated as follows:

"I worked with Vijay on the submission you helped review in 2017 for Epsom & St Helier NHS Trust involving Genmed managed theatre contract. I wanted to give you advanced notice, (and to check it is ok with you) to sending you a submission for a Trust (Gloucester) for a non statutory VAT ruling on almost identical facts for a Genmed managed Theatres contract to the ruling below you provided for Epsom. This is because to me it makes sense that this is viewed by someone who has looked at exactly the same contracts and issues (even if it is 18 months ago) and gone into the detailed analysis of the

factors that are important in consideration. I have highlighted in the submission the key areas of difference in the submission but wanted to send this in to you which I trust is ok.”

169. It is clear from this correspondence (and we so find) that by 21 January 2019 the relevant officers considering the Clearance Request had been informed by KPMG that (i) Genmed had entered into a contract with Epsom, (ii) HMRC had made a ruling in relation to the refund of VAT under COSD 45 in relation to that contract, (iii) the ruling was that the entire managed theatre service was subject to the COS 45 regime, (iv) the Trust considered that the contracts were almost identical and (v) the Trust invited HMRC to consider the other ruling in the context of the ruling being requested in this case.

### *(3) The Decision*

170. In her witness statement Officer Joanne Birbeck confirmed that she received the Clearance Request and the covering email dated 21 January 2019 (above). Her evidence was that she conducted various searches in HMRC’s internal systems and electronic folders including the file for Epsom but that she was unable to find the relevant documents (including the Epsom Ruling and the Epsom Agreement). She was unable to find the decision letter or any further correspondence and none of them were attached to the Clearance Request itself.

171. It is also important to note that Officer Heads no longer worked in the NHS team of HMRC when the Clearance Request was received. Officer Birbeck spoke to other tax specialists within HMRC’s NHS Team to see if they knew about Epsom’s position generally or whether they had a copy of the Epsom Ruling. However, she was unsuccessful in obtaining any further information. She only discovered Officer Whittle’s letter dated 12 October 2016 much later and he did not have a copy of either the Epsom Ruling nor the Epsom Agreement. HMRC therefore approached KPMG for copies of the documents. But KPMG were not prepared to provide copies on grounds of confidentiality. By email dated 11 November 2019 KPMG wrote to stating that the ruling should be on their files and that they could not share it with HMRC because of client confidentiality.

172. In the meantime, by letter dated 7 November 2019 KPMG wrote to HMRC providing further information about the operation of the Agreement and setting out its detailed case in relation to COSD 45. In section 9 of that letter KPMG set out extracts from Officer Heads’ letter dated 11 October 2016 and the Epsom Ruling itself but without identifying Epsom or the Epsom Agreement. These extracts were said to relate to a contract for a ‘Trust in South West London’. Unfortunately, Officer Heads was identified as ‘HMRC Officer Stephen Hands’.

173. On 19 August 2020 Officer Birbeck issued the original decision refusing a VAT refund under COSD 45 in respect of Consumables under the Agreement. In her witness statement she gave evidence (and we accept) that she did not obtain a copy of either the Epsom Ruling or the Epsom agreement before making her decision. She also stated as follows:

“I did not refer or mention the Epsom ruling in the Decision Letter as it was not taken into consideration. It is Public Bodies group practice that we do not look at other taxpayers’ records unless we have a clear and obvious business reason to do so, and that each case must be decided on its own merits. Regardless of that policy, I also did not have copy of the Epsom Ruling or the agreement between Epsom and Genmed that would have allowed me to do a proper comparison.”

### *(4) The Review*

174. On 9 October 2020 the Trust submitted a reconsideration request to HMRC and Officer Simon McDermott carried out a review. He read through all of the papers which the Trust had submitted

and carried out a search for the Epsom clearance request and the Epsom Ruling. He looked in the relevant electronic folders including HMRC document storage systems called Caseflow and EF as well as the Controlled Access Folder. He searched Officer Whittle's Controlled Access Folder and found the letter from HMRC dated 12 October 2016 providing an initial view and requesting further information. He did not, therefore, have copies of either the Epsom Ruling or, perhaps more importantly, the Epsom Agreement either. His view was that the initial view expressed by Officer Whittle in relation to Consumables in his letter dated 12 October 2016 did not help him to understand the elements of the supply received by the Trust from Genmed. He summarised the position in his witness statement as follows:

“From the little I did know, I did not think the case of Epsom would help me in my decision for the Trust. It is Public Bodies' group practice that we do not look at other taxpayers' records unless we have a clear and obvious business reason to do so and that each case must be decided on its own merits. For example, it would not have been appropriate to contact the Trust for extra information on Epsom or to contact Epsom directly.”

175. In November 2020 Officer McDermott made further attempts to obtain the Epsom Ruling and the Epsom Agreement in response to requests from HMRC's policy team. But he was unable to locate them. On 11 December 2020 he made his final decision in relation to the review of the Clearance Request. He did not refer to either the Epsom Ruling or the Epsom Agreement in the decision and it formed no part of his reasoning.

#### (5) *Discovery*

176. On or around 10 March 2021 Officer McDermott found the Epsom Ruling dated 12 January 2017 together with the Epsom Agreement. He was working on an unrelated case involving a refund under an entirely different COS heading. He discovered that in 2019 Epsom had been subject to a full COS inspection and that during this process Epsom's COSD 45 refund had been checked. He also discovered that the documents had been sent to the officer conducting the checks on 26 July 2019.

### G. The Law

177. HMRC accept that they are under a duty in general terms to treat taxpayers fairly, including those claiming a refund under the COS Direction. The parties were also agreed that the categories of unfairness are not closed but a challenge to the conduct of HMRC based on conspicuous unfairness or unfairness amounting to an abuse of power is to be regarded as a challenge that is based on a 'particular and distinct form of irrationality': see *R (on the application of City Shoes Wholesale Ltd) v HMRC* [2018] EWCA Civ 315, [2018] STC 762 ('*City Shoes CA*') at [66] and *R (on the application of Lewisham London BC) v AQA* ('*AQA*') [2013] EWHC 211 (Admin) at [111] (Elias LJ).

178. In *R (on the application of British Sky Broadcasting Group plc) v CCE* [2001] EWHC Admin 127, [2001] STC 437 ('*BSkyB*') Elias J accepted that the duty to act fairly applies to HMRC in their dealings with taxpayers and that they can be in breach of this duty where, as taxing authorities, they give different treatment to taxpayers who are in the same or a similar position. Nevertheless, he also accepted that the threshold for a finding of unfairness amounting to an abuse of power is a high one: see, in particular at [8], [13], [14], [16], [20] and [35].

179. In *R (on the application of City Shoes Wholesale Ltd) v HMRC* [2016] EWHC 107 (Admin); [2016] STC 2392 ('*City Shoes*') Whipple J (as she then was) applied *BskyB* and adopted a three

stage or three limb test (which Court of Appeal approved in *City Shoes CA*). She set out that test at [67]:

“[67] I would order the various points made by Elias J in *BSkyB* in the following way: (1) first, it is necessary to establish whether the Commissioners knew or ought to have known of the alleged disparate treatment at the time the decision was made. If not, the challenge surely fails. (2) If that knowledge or constructive knowledge is established, then it is necessary, secondly, to establish as a matter of fact whether the Commissioners considered there to be a material difference or differences between the two groups of taxpayers, justifying the different tax treatment. If no material difference was identified, then it is difficult to see how the Commissioners’ decision can stand (although issues may arise about differences which have since been identified—not an issue in *BSkyB* or this case). (3) If a material difference was identified by the Commissioners, then, thirdly, the court should examine that asserted difference to determine whether it was ‘rational and defensible’, or alternatively, ‘material’, such as to justify the different tax treatment. There are a number of notes to append to this third step, all of which emerge from Elias J’s judgment: (a) the court’s analysis is to be undertaken based on the material which was before the Commissioners at the time of their decision. (b) The court is exercising a supervisory jurisdiction, testing the legality of the decision and not substituting its own decision. (This was confirmed by Elias LJ, as he became, in *AQA*, referred to above.) (c) The fact that the Commissioners are prohibited from collecting the tax from other taxpayers who were in a similar position does not, in and of itself, amount to a ‘material’ difference between the two groups of taxpayers.”

#### H. The Trust’s submissions

180. Mr Thomas submitted that KPMG had drawn the attention of HMRC to the Epsom Agreement and the Epsom Ruling, that HMRC had copies of both documents in its possession but that neither of the officers who made the decision and upheld it on review had consulted either document or considered whether the different treatment of the Trust could be justified. He also submitted that although neither officer was able to locate the documents at the time and KPMG was unable to disclose them because of client confidentiality, HMRC could easily have approached Epsom or Genmed directly for a copy of the Agreement and, if necessary, the Epsom Ruling. Finally, he submitted that if either of the officers had obtained copies of the two documents, they would have appreciated that the Epsom Agreement was identical in all material respects to the Agreement itself. He also took us through the relevant provisions of the Epsom Agreement to make good that submission.

181. Mr Thomas submitted that in these circumstances, the first limb of Whipple J’s test in *City Shoes* was satisfied and that HMRC either knew or ought to have known that they were giving two taxpayers differential or disparate treatment. He submitted that the second limb was also satisfied because HMRC now accepted that there was no material difference between the Epsom Agreement and the Agreement and that they could not justify departing from the Epsom Ruling in the present case. He also submitted that given that HMRC now accepted this fact, the caveats contained in the Epsom Ruling did not permit or authorise differential treatment between taxpayers. Finally, he submitted that the third limb of the test did not arise because HMRC did not seek to argue that any differences between the Epsom Agreement and the Agreement itself justified a different tax treatment.

#### I. Decision

##### *(1) The Threshold*

182. We have to be satisfied that it was irrational and *Wednesbury* unreasonable for HMRC to refuse a VAT refund under COSD 45 without obtaining copies of the Epsom Agreement and the Epsom

Ruling and taking them into consideration. We remind ourselves that this is a high threshold for the Trust to meet, especially in circumstances where both officers tried to obtain copies of the two documents but were unable to do so. In substance, the Trust's case is that once HMRC were on notice of the ruling and what it contained, it was the duty of the officers to obtain copies of both documents and not to take a decision until they had done so. For reasons which we now explain, we consider that this would require a significant extension to the current law.

*(2) Limb 1*

183. Mr Thomas did not apply to cross-examine either Officer Birbeck or Officer McDermott or to suggest to them that they were both aware that they were treating the Trust and Epsom in a disparate or differential manner. Both gave evidence that it was not their group practice to look at other taxpayers' records and that they did not take the Epsom Ruling or the Epsom Agreement into account when making their decisions. This evidence was not challenged and we accept it. We find, therefore, that neither officer was consciously aware that they were guilty of differential or unequal treatment. The real issue is whether they should have been aware of this fact and, in our judgment, this turns on whether HMRC owed a positive duty to obtain copies of the two documents.

184. We accept that there may be cases in which it is the duty of an officer to obtain a copy of a particular document before making a decision. But, in our judgment, this is not one of those cases. We are satisfied that both Officer Birbeck and Officer McDermott took reasonable steps to locate the Epsom Ruling (and Epsom Agreement) in HMRC's records. We accept that other officers or administrative staff may have been careless in filing the two documents. But we do not consider that this justifies a finding of irrationality and Mr Thomas did not suggest that it did. If both officers took reasonable steps to locate the documents internally but were unable to do so, the question then arises whether they should have taken steps to obtain them directly from Epsom or Genmed.

185. In our judgment, they owed no duty to do so. They asked KPMG to provide the relevant documents and KPMG declined to do so on grounds of client confidentiality. We were initially attracted by the view that HMRC could easily have solved the problem themselves and asked for the documents directly from Epsom or Genmed. But on reflection we are satisfied that the burden was on the Trust itself and not HMRC to obtain the documents. Given that KPMG were asserting client confidentiality, it was not for HMRC to approach their client directly far less Genmed, their client's contractual counter-party.

186. Moreover, if it was easy for HMRC to approach either Epsom or Genmed, it was equally easy for the Trust or KPMG to do so too. KPMG have been provided with active assistance by Genmed throughout these proceedings. It would have involved no breach of client confidence for the Trust or KPMG to ask for Genmed's consent to approach Epsom to ask for the consent of both parties to rely on the Epsom Agreement and the Epsom Ruling. If Epsom had refused to permit disclosure and asserted that the Epsom Ruling was confidential, HMRC could hardly be criticised for failing to obtain a copy.

187. Accordingly, we are not satisfied that either Officer Birbeck or Officer McDermott owed a duty to approach Epsom or Genmed directly for copies of the Epsom Ruling and the Epsom Agreement once they had failed to locate them in HMRC's records. We accept that with the benefit of hindsight it might have been better if they had gone back to KPMG one more time to make it clear that they were unable to locate the documents and to ask KPMG to go back and approach Epsom themselves. But we do not consider that this provides the basis for a finding of irrationality.

188. This leaves one final issue, namely, whether either officer should have appreciated that they were guilty of disparate or differential conduct (or that there was a risk that they might be) because they had notice of the Epsom Ruling from the correspondence alone. Again, Mr Thomas did not apply for permission to put this to either of them and we are not prepared to make such a finding. It is clear from the evidence of both witnesses that they were unable to tell simply from the correspondence whether the Trust's position was on all fours with Epsom's position. Moreover, once Mr Thomas took us through the Epsom Agreement, we were satisfied that before either officer could have taken the view that the Trust and Epsom were in an identical position, they would have needed to see the Epsom Agreement and to compare its terms with the Agreement. We are not satisfied, therefore, that Officers Birbeck and McDermott ought to have known that the supplies made by Genmed pursuant to the Agreement and the Epsom Agreement were identical from the correspondence with which they were supplied.

*(2) Limb 2*

189. The Trust's application for judicial review also fails under the second limb. Neither Officer Birbeck nor Officer McDermott were able to form a judgment whether there was a material difference between the Trust and Epsom. They did not know. Mr Mantle fairly accepted that there was no material difference between the Epsom Agreement and the Agreement in the present case and unsurprisingly Mr Thomas placed great reliance on that concession. But in our judgment, it is not sufficient to establish that there was no material difference between the two taxpayers at the date of the application for judicial review. Limb (2) is clearly directed at the subjective understanding of the relevant officers at the date of the decision. Moreover, Whipple J's formulation of the test suggests that the application for judicial review will fail if the officers did not have the relevant information available at the time. Indeed, in complex cases it may fail where the officer or officers formed the subjective but mistaken view that there was a material difference between the relevant taxpayers.

*(3) Limb 3*

190. In the circumstances, limb (3) does not arise. But we remind ourselves that under limb (3) the UT is exercising a supervisory jurisdiction and testing the decision against the information which was available at the time. We have set out the relevant correspondence above and, subject to one point, we are satisfied that it was both rational and defensible for Officers Birbeck and McDermott to go on and consider the Trust's position on the merits rather than take further steps to obtain the Epsom Ruling and the Epsom Agreement.

191. The one caveat which we add is as follows. We should not be taken to have approved the internal practice not to refer to other taxpayers' records unless there is an obvious 'business reason' to do so. It was common ground that HMRC had a duty to act fairly. This is not a matter of business efficacy or commercial judgment but of procedural fairness and equal treatment. However, we stress that we were not addressed in detail about the internal practice and Mr Thomas did not submit that the adoption of this practice was irrational in itself. It may be that the practice encompassed wider considerations of fairness and we note that both officers attempted to obtain copies of the Epsom Ruling and the Epsom Agreement. A full consideration of the internal practice should await an appropriate case.

## J. Conclusion

192. We therefore dismiss the public law challenge on Ground 4. We are satisfied that it was not irrational or perverse for HMRC to decide whether the Trust was entitled to a refund under COSD



45 without obtaining copies of the Epsom Ruling and the Epsom Agreement and that they did not owe a public law duty to obtain copies of those documents. We are satisfied that the relevant officers were not aware that they were guilty of differential or unequal treatment or that the Epsom Agreement was identical to the Agreement in all material respects.

## **IX. Disposal**

193. The Trust's application for judicial review succeeds on Ground 2. We therefore declare that the Trust it is entitled to a refund of VAT pursuant to paragraph 2(a) of the COS Direction and COSD 45 in respect of the VAT charged to it by Genmed under the Agreement and we quash both Officer Birbeck's decision to refuse the refund and Officer McDermott's decision to uphold her decision on review of that refund.

**Signed on Original**

**MR JUSTICE LEECH  
JUDGE RUPERT JONES**

**RELEASE DATE: 30 January 2023**