Neutral Citation: [2025] UKFTT 00658 (TC)

Case Number: TC09541

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2022/12962

VALUE ADDED TAX – application of reduced rate to supplies of cider in the course of restaurant and catering services – whether cider fell within the exclusion from the reduced rate of alcoholic beverages in Group 14 of Schedule 7A to the Value Added Tax Act 1994 ("Group 14") – consideration of the rules of statutory construction under UK domestic law including the principle outlined in Inco Europe Limited v First Choice Distribution ("Inco") for correcting obvious errors in the legislation in certain circumstances – concluding that, in this case, prior to considering whether the Inco principle applied, the language used in the definition of "alcoholic beverage" in Group 14 could not be construed in such a way as to include cider but that the conditions necessary for the Inco principle to apply were satisfied, with the result that a reference to cider should be inserted into the definition – this meant that cider fell within the exclusion from the reduced rate of alcoholic beverages – consequently, the appeal would be dismissed – consideration of whether, if the Inco principle had not applied, the terms of Group 14, containing an exclusion from the reduced rate of alcoholic beverages other than cider, was in accordance with paragraph (12a) of Annex III of Directive 2006/112/EC (the "PVD"), the provision enabling the United Kingdom to introduce the reduced rate for food and beverages supplied in the course of restaurant and catering services – concluding that it was not in accordance with that paragraph because the terms of the paragraph did not allow a Member State which applied the reduced rate permitted by that paragraph to exclude some alcoholic beverages but not others from the reduced rate and, in addition, the application of the reduced rate to cider but not to certain other alcoholic beverages infringed the European Union principle of fiscal neutrality – a conforming interpretation of Group 14 was therefore required to the effect that cider should be added into the definition of "alcoholic beverage" and taken outside the reduced rate – consequently, even if the Inco principle had not applied as a matter of statutory construction under UK domestic law, the appeal would have been dismissed

Heard on: 4, 5 and 6 March 2025
Judgment date: 3 June 2025

Before

TRIBUNAL JUDGE TONY BEARE
MR MOHAMMED FAROOQ

Between

JD WETHERSPOON PLC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Akash Nawbatt KC and Mr Max Schofield, of counsel, instructed by the General Counsel to JD Wetherspoon PLC

For the Respondents: Mr Ben Elliott and Mr Joshua Stevens, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is a decision on a preliminary issue. That issue arises in the context of an appeal made by the Appellant against the rejection of its claim for overpaid value added tax ("VAT") in respect of supplies of cider made over the period from 15 July 2020 to 31 March 2022 (the "Relevant Period").

2. Over the Relevant Period, reduced rates of VAT applied to certain supplies of food and drink made in the course of restaurant and catering services. The legislation that introduced that reduced rate was the Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Coronavirus) Order 2020 (the "RR Order"), as subsequently amended by the Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Extension of Time Period) (Coronavirus) Order 2020 (the "RR Extension Order") and Sections 92 and 93 of the Finance Act 2021 (the "FA 2021").

3. The reduced rate for which the legislation referred to above provided did not extend to beverages which were subject to excise duty as spirits, beer, wine or made–wine. The preliminary issue which we are required to address is whether the same exclusion should be regarded as having applied to beverages which were subject to excise duty as cider.

4. The Appellant contends that it did not and that therefore the reduced rate allowed by Item 1 of Group 14 of Schedule 7A to the Value Added Tax Act 1994 (the "VATA 1994") ("Group 14") applied to all supplies of beverages which were subject to excise duties as cider.

5. The Respondents' position is that, having regard to the purpose of the RR Order, after taking into account the context in which it was enacted, the legislation should be interpreted as specifying that supplies of beverages which were subject to excise duty as cider were to be treated in the same way as beverages which were subject to excise duty as spirits, beer, wine or made–wine, and were therefore excluded from the reduced rate applicable during the Relevant Period.

THE AGREED FACTS

6. Before setting out the legislation relevant to this preliminary question, we will first set out those facts which the parties have agreed.

7. These are as follows:

(1) the Appellant is an owner and operator of pubs in the UK which makes supplies of food and beverages (including alcoholic and non-alcoholic beverages), including during the Relevant Period;

(2) in March 2020, the UK went into "lockdown" in response to the Coronavirus pandemic;

(3) on 8 July 2020, the UK Government announced a temporary reduced rate of VAT (at 5%) to certain supplies, modifying Schedule 7A to the VATA 1994, which included the introduction of Group 14 to that schedule. This 5% rate applied from 15 July 2020 to 30 September 2021, following which a temporary reduced rate at 12.5% applied from 1 October 2021 to 31 March 2022, spanning the entire Relevant Period;

(4) during the Relevant Period, the Appellant made supplies of "cider" (as defined in Section 1(6) of the Alcoholic Liquor Duties Act 1979 (the "ALDA"). It also made supplies of beverages labelled as "cider" but which are categorised as "made–wine" (as defined in Section 1(1) of the ALDA) for excise duty purposes because they contain various flavourings and/or contain an alcohol by volume ("ABV") content of 8.5% or more, including (but not limited to) Thistly Cross Ginger, Dr Devil's Leaf, Mr Whitehead's Toffee Apple Cider, Dr Strawberry, Thatchers Fusion Berry and Thatchers Fusion Lemon;

(5) the Appellant initially submitted its VAT returns and accounted for VAT on all of its supplies of alcoholic beverages (including cider) during the Relevant Period at the standard rate;

(6) on 27 May 2022, the Appellant submitted (in the form of an error correction notice (the "original ECN")) a claim (pursuant to Section 80 of the VATA 1994) for overpaid VAT in the sum of £4,950,044 during the Relevant Period. The Appellant claimed that the VAT in question was overpaid because supplies of cider should have benefitted from reduced rate of VAT:

(a) at 5% for the period from 15 July 2020 to 30 September 2021 under the RR Order 2020, as amended by the RR Extension Order and Section 92 of the FA 2021; and

(b) at 12.5% for the period from 1 October 2021 to 31 March 2022 under the RR Order 2020, as amended by the RR Extension Order and as further amended by Section 93 of the FA 2021;

(7) the original ECN appended a list of alcoholic drinks which included beverages that were cider but, mistakenly, also included some which were made–wines;

(8) on 9 June 2022, the Respondents rejected the claim;

(9) on 6 July 2022, the Appellant requested a statutory review;

(10) on 9 September 2022, the statutory review upheld the Respondents' decision refusing the claim;

(11) on 6 October 2022, the Appellant appealed to the First-tier Tribunal (the "FTT");

(12) on 20 November 2023, the Appellant sent an amended version of the original ECN (the "amended ECN") to the Respondents, reducing the amount of VAT claimed to reflect the fact that some of the VAT claimed in the original ECN had related to made–wines; and

(13) on 19 December 2023, the Appellant amended its grounds of appeal to reflect the changes made by the amended ECN.

THE DISPUTE IN THE APPEAL AS A WHOLE

8. The dispute in the appeal as a whole concerns the entitlement of the Appellant to a repayment of VAT in respect of the supplies of the beverages set out in the amended ECN.

9. The specific issues that fall for determination in that context are as follows:

(1) during the Relevant Period, were supplies of cider to be subject to VAT at the reduced rate under Item 1 of Group 14?

(2) If so:

(a) were all of the supplies that are the subject of the amended ECN supplies of "cider" (as defined during the material periods in Section 1(6) of the ALDA)?

(b) were all of the supplies "for consumption on the premises on which it is supplied" (within the meaning of Item 1 of Group 14)? and

(c) is the quantification of the claim correct?

10. The parties have asked the FTT for an initial determination in principle of the issue set out in paragraph 9(1) above and have agreed that, in the event that the Appellant succeeds in relation to that initial determination in principle, the determination of the issues set out in paragraph 9(2) above should be deferred and subject to a subsequent hearing before the FTT (to the extent that those issues cannot be agreed). This decision is therefore confined to the determination in principle of the issue set out in paragraph 9(1) above.

10. In making that determination in principle, we have had the benefit of the oral submissions made by the parties at the hearing and written submissions made by the parties following the hearing at our request in relation to two additional matters. We have taken all of those submissions into account in reaching the determination.

THE RELEVANT LEGISLATION

The UK domestic legislation

11. The legislative history relating to the excise duty and VAT treatment of cider in the UK is set out in some detail in Appendix 1 to this decision.

12. For the purposes of the main body of this decision, it suffices to note the following:

(1) at the time of the RR Order:

(a) VAT was imposed under the VATA 1994;

(b) Section 4 of the VATA 1994 provided for VAT to be charged on supplies of goods and services, other than exempt supplies;

(c) the standard rate of VAT was 20% but this was subject to (among others):

(i) Section 29A of, and Schedule 7A to, the VATA 1994, which provided for a reduced rate of 5% to be charged on certain supplies falling within Schedule 7A to the VATA 1994;

(ii) Section 30 of, and Schedule 8 to, the VATA 1994, which provided for a zero rate to be charged on certain supplies falling within Schedule 8 to the VATA 1994. Those included inter alia, supplies of food falling within Group 1 of Schedule 8 to the VATA 1994. Group 1 of Schedule 8 to the VATA 1994 excluded from the scope of the zero rate:

(A) "Beverages chargeable with any duty of excise specifically charged on spirits, beer, wine or made–wine and preparations thereof" – see "Excepted item 3" or "EI 3"; and

(B) "Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals and other products for the preparation of beverages" – see "Excepted item 4" or "EI 4"; and

(d) Section 96(9) of the VATA 1994 provided that each of Schedule 7A and Schedule 8 to the VATA 1994 was to be interpreted in accordance with the notes set out in those schedules;

(2) pursuant to Sections 29A(3), 29A(4), 96(9) and 97(5) of the VATA 1994, Schedule 7A to the VATA 1994, including the notes in that schedule, could be amended by an order made by HM Treasury ("HMT") by way of a statutory instrument to be laid before the House of Commons which would take effect from the date stated in the statutory instrument but would be "subject to annulment in pursuance of a resolution of the House of Commons". Pursuant to Section 5 of the Statutory Instruments Act 1946, any such annulment would be required to occur within forty days from the date on which the statutory instrument was laid;

(3) the RR Order was made on 13 July 2020 by HMT and the Respondents pursuant to the powers described above. It was laid before the House of Commons on 14 July 2020 and was stated to come into force on 15 July 2020. Thus, as noted above, it took effect from 15 July 2020 but was subject to annulment by the House of Commons within forty days from the date on which it was laid. No such annulment occurred;

(4) Articles 2 to 4 of the RR Order (for which HMT, as opposed to the Respondents, were responsible) inserted Group 14 as a new group in Schedule 7A to the VATA 1994 for the period from 15 July 2020 to 12 January 2021. Group 14 provided as follows:

"GROUP 14 – COURSE OF CATERING

Item No

1 Supplies in the course of catering of—

(a) any food or drink for consumption on the premises on which it is supplied, or

(b) any hot food or hot drink for consumption off those premises,

except supplies of alcoholic beverages.

NOTES

(1) Note (3A) to Group 1 (Food) of Schedule 8 applies in relation to this Group as it applies in relation to Note (3) in that Group.

(2) Notes (3B) to (3D) to Group 1 (Food) of Schedule 8(4) apply in relation to this Group as they apply in relation to that Group.

(3) "Alcoholic beverage" means a beverage within Item 3 in the list of excepted items in Group 1 of Schedule 8.

…";

(5) the effect of the RR Order was extended, pursuant to Section 29(3) of the VATA 1994, until 31 March 2021 by Article 2 of the RR Extension Order, which came into force on 11 January 2021;

(6) the effect of the RR Order, as so extended, was then further extended:

(a) to 30 September 2021 by Section 92 of the FA 2021, which came into force on 10 June 2021 but with retrospective effect to 31 March 2021 (when the term of the RR Order as extended by the RR Extension Order had ended); and

(b) to 31 March 2022, by Section 93 of the FA 2021, but with an amended 12.5% rate (instead of the 5% rate) applying with effect from 1 October 2021; and

(7) for completeness, EI 3 was amended by paragraph 15 of Schedule 13 to the Finance (No 2) Act 2023 (the "F (No 2) A 2023") to refer to all beverages chargeable with alcohol duty under that Act – spirits, beer, cider, wine and other fermented products – but that change post–dated the Relevant Period.

The EU legislation

13. The UK was permitted to introduce the reduced rate of VAT for which Group 14 provided by Article 98 of Council Directive 2006/112/EC (the "PVD"). That permits Member States to apply one or two reduced rates "only to supplies of goods or services in the categories set out in Annex III". The list in Annex III of the PVD ("Annex III") includes paragraph (12a), which refers to "restaurant and catering services, it being possible to exclude the supply of (alcoholic and/or non-alcoholic) beverages".

THE ALDA

14. At the time when the RR Order was laid before the House of Commons, in order to be subject to excise duty under Section 1(1)(e) and Part V of the ALDA as "cider", a beverage was required:

(1) to have an ABV of more than 1.2% but less than 8.5%;

(2) to be obtained from the fermentation of apple or pear juice;

(3) to have no added alcoholic liquor or liquor or substance communicating colour or flavour, in each case other than such as the Respondents allowed as appearing to them to be necessary to make the beverage;

(4) to have satisfied the pre–fermentation juice requirement set out in Section 1(6) of the ALDA (which, broadly, required not less than 35% of the volume of the pre–fermentation mixture to be apple or pear juice);

(5) to have satisfied the final product juice requirement set out in Section 1(6) of the ALDA (which, broadly, required not less than 35% of the volume of the final product to be apple or pear juice); and

(6) to have not been "up–labelled" – by which we mean that it was required not to be in a container with a label stating, or tending to suggest, that its ABV was 8.5% or more

– see Sections 1(6) and 55B of the ALDA.

15. In the rest of this decision, unless the context otherwise requires, references to "cider" mean a beverage which, at the time when the RR Order was laid before the House of Commons, satisfied the definition set out in paragraph 14 above.

16. At the time when the RR Order was laid before the House of Commons, alcoholic beverages which did not satisfy the definition set out in paragraph 14 above but had an ABV of more than 1.2% were subject to excise duty under the provisions of the ALDA other than Section 1(1)(e) and Part V of the ALDA.

17. In the rest of this decision, unless the context otherwise requires, references to an "other alcoholic beverage" mean an alcoholic beverage which, at the time when the RR Order was laid before the House of Commons, was subject to excise duty pursuant to one or more of those other provisions of the ALDA.

18. There are some further terms which we think it would be helpful to define for the purposes of this decision. Accordingly, in the rest of this decision, unless the context otherwise requires:

(1) references to a "low alcohol cider" mean a beverage which, at the time when the RR Order was laid before the House of Commons, would have fallen within paragraph 14 above but for the fact that it had an ABV of no more than 1.2%;

(2) references to a "low alcohol beverage" mean a beverage which, at the time when the RR Order was laid before the House of Commons, would have fallen within paragraph 16 above but for the fact that it had an ABV of no more than 1.2%;

(3) references to a "high alcohol cider" mean a beverage which, at the time when the RR Order was laid before the House of Commons, would have fallen within paragraph 14 above but for the fact that it had an ABV of 8.5% or more and therefore fell within paragraph 16 above; and

(4) references to "fruit cider" mean a fermented fruit beverage with an ABV of less than 8.5% which, at the time when the RR Order was laid before the House of Commons, would have fallen within paragraph 16 above as a made–wine.

THE EVIDENCE

The witness evidence

19. The only witness at the hearing was Mrs Ishrat Haider Ali, a senior policy lead in the indirect tax directorate of the Respondents.

20. The Respondents' purpose in relying on the evidence of Mrs Ali was to support their submissions in relation to the background to the enactment of the RR Order. Unfortunately, there were a number of deficiencies in this approach, as follows:

(1) first, Mrs Ali had been appointed to her role only in March 2021, which was some nine months after the RR Order was laid. This meant that she had no direct or indirect experience of the views within the Respondents or HMT at the time when the RR Order was laid as to whether cider was intended to fall within the definition of "alcoholic beverage" in the new Group 14. Mrs Ali explained that this was not because the people who had been involved in producing the RR Order were not available to give evidence at the hearing. It was instead because it was the Respondents' policy in relation to litigation to ask the officer responsible for the area relevant to the litigation within the

Respondents at the time of the hearing to attend the hearing. We should say in passing that, as a general matter, not confined to the present proceedings, we find it regrettable that the Respondents have adopted this policy. It greatly detracts from the utility of the witness evidence and is therefore unhelpful to the just and fair resolution of the proceedings in question;

(2) secondly, this deficiency was compounded by the fact that, in her witness statement, Mrs Ali referred to the fact that she had reviewed relevant documents and spoken to various colleagues in relation to the views within the Respondents at the relevant time but she did not identify which documents she had reviewed or name the colleagues to whom she had spoken and did not produce any written notes of the conversations in question. This inevitably called into question the reliability of her evidence; and

(3) thirdly, notwithstanding the clear view of the FTT, as expressed in cases such as *CF Booth Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 813 (TC) at paragraph [10], *Elbrook Cash and Carry Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 252 (TC) at paragraph [24] and *Sintra Global Inc and Parul Malde v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 00365 (TC) at paragraphs [13] to [16] to the effect that observations, expressions of opinion, submissions and comment have no place in the witness statements of witnesses as to fact, many of the paragraphs in Mrs Ali's first witness statement did exactly that. Following objections raised by the Appellant prior to, and then again at the start of, the hearing, the Respondents indicated on the first day of the hearing that they would not be seeking to rely on those paragraphs but it is disappointing that those objections needed to be raised in the first place.

21. From the above, it will be apparent that we have not placed much reliance on the witness evidence of Mrs Ali but there are a few points arising out of her evidence which are worth noting.

22. The first is that, although Mrs Ali was not in her current position in July 2020, when the RR Order was laid, she was in that position on the two occasions that the period over which the reduced rate in Group 14 applied was extended and, to the extent that the Respondents' understanding, at those times, of the ambit of the definition of "alcoholic beverage" in Group 14 is relevant to this decision, her evidence was that, at those times, her belief, and the belief of others involved with VAT policy within the Respondents, was that cider fell within EI 3 and was therefore within the definition.

23. The second is that Mrs Ali explained that the Respondents work in partnership with HMT to advise ministers on the development and delivery of tax policy. HMT leads on strategic tax policy development, supported by the Respondents, and the Respondents lead on tax policy maintenance and delivery, supported by HMT. That policy partnership covers, inter alia, VAT, customs and excise duties and Coronavirus schemes for which the Respondents have responsibility and all direct and indirect taxes and duties. This was helpful context in terms of identifying how the views within the Respondents in relation to any particular matter of tax policy were likely to be shared by HMT.

24. The third is that Mrs Ali exhibited to her witness statement a number of documents which shed light on the understanding within the Respondents and HMT at or prior to the date when the RR Order was laid and which we will summarise in the paragraphs below. Mrs Ali provided us with the dates of certain of those documents which were undated on their face.

25. Finally, Mrs Ali also exhibited to her witness statement a number of photographs and screenshots to which we refer in the paragraphs below. That evidence could simply have been

provided to us by the Respondents in the course of their submissions but Mrs Ali was able to explain the context in which the photographs and screenshots had been taken.

The written evidence

Introduction

26. The written evidence which is relevant to this decision can most conveniently be divided into four categories, as follows:

(1) material relating to the exclusion of alcoholic beverages from the application of the reduced rate;

(2) material relating to the Eat Out to Help Out Scheme (the "EOTHO Scheme");

(3) material relating to the understanding by the Appellant and others of the scope of the RR Order; and

(4) material relating to the relationship between cider and other alcoholic beverages and the changes to the alcohol duty regime in 2023.

Material relating to the exclusion of alcoholic beverages from the application of the reduced rate

27. On 8 July 2020, the Rt. Hon Rishi Sunak MP, who was then Chancellor of the Exchequer, (the "Chancellor") gave his "A Plan for Jobs" speech, in which he announced two measures to aid the hospitality and tourism sectors following the lifting of Coronavirus restrictions:

(1) a reduced rate of VAT "on food, accommodation and attractions" including "[eat]-in or hot takeaway food from restaurants, cafes and pubs"; and

(2) the EOTHO Scheme.

28. The HMT Policy Paper "A Plan for Jobs 2020", published alongside the Chancellor's speech on 8 July 2020, said as follows:

"Temporary VAT cut for food and non-alcoholic drinks – From 15 July 2020 to 12 January 2021, to support businesses and jobs in the hospitality sector, the reduced (5%) rate of VAT will apply to supplies of food and non-alcoholic drinks from restaurants, pubs, bars, cafés and similar premises across the UK. Further guidance on the scope of this relief will be published by HMRC in the coming days."

29. HMT also published on the same day a lengthier "Plan for Jobs (CP 261)" paper which was presented to Parliament by the Chancellor. This said as follows:

"2.30 Eat Out to Help Out – In order to support around 130,000 businesses and to help protect the jobs of their 1.8 million employees, the government will introduce the Eat Out to Help Out scheme to encourage people to return to eating out. This will entitle every diner to a 50% discount of up to £10 per head on their meal, at any participating restaurant, café, pub or other eligible food service establishment. The discount can be used unlimited times and will be valid Monday to Wednesday on any eat-in meal (including on non-alcoholic drinks) for the entire month of August 2020 across the UK. Participating establishments will be fully reimbursed for the 50% discount.

2.31 Temporary VAT cut for food and non-alcoholic drinks – From 15 July 2020 to 12 January 2021, to support businesses and jobs in the hospitality sector, the reduced (5%) rate of VAT will apply to supplies of food and non-alcoholic drinks from restaurants, pubs, bars, cafés and similar premises across the UK. Further guidance on the scope of this relief will be published by HMRC in the coming days."

30. On 9 July 2020:

(1) the Respondents published a paper entitled "Policy paper – Guidance on the temporary reduced rate of VAT for hospitality, holiday accommodation and attractions. In that paper, the Respondents said that the temporary reduced rate would apply, inter alia, to "food and non–alcoholic beverages sold for on–premises consumption, for example, in restaurants, cafes and pubs" and "hot takeaway food and hot takeaway non–alcoholic beverages";

(2) the Respondents published guidance on the temporary reduced rate for hospitality, holiday accommodation and attractions. In the section of that guidance headed "Hospitality", the Respondents said that, whereas supplies of food and non–alcoholic beverages for consumption on the premises were currently subject to the standard rate of VAT, the reduced 5% rate of VAT would apply to such supplies made between 15 July 2020 and 12 January 2021 and the same would apply to hot takeaway food and hot takeaway non–alcoholic beverages; and

(3) the Respondents updated their guidance entitled "Catering, takeaway food (VAT Notice 709(1)". In that guidance, the Respondents said that the temporary reduced rate applied, inter alia, to "supplies of … hot and cold non–alcoholic beverages for consumption on the premises on which they are supplied [and] hot takeaway non–alcoholic beverages for consumption off the premises on which they are supplied" and noted that the supplies benefiting from the temporary reduced rate "do not include any supplies of alcoholic beverages".

31. When the RR Order was laid before the House of Commons on 14 July 2020:

(1) it contained an explanatory note (the "Explanatory Note") which included the following:

"EXPLANATORY NOTE

(This note is not part of the Order)

This Order modifies Schedule 7A to the Value Added Tax Act 1994 (charge at reduced rate) ("Schedule 7A") by inserting new Groups to provide for a temporary reduced rate for certain supplies in the course of catering, holiday accommodation and admission to shows and other attractions…

The relief is introduced in response to the coronavirus health emergency by way of time-limited modifications. The relief and the consequential changes to the flat-rate scheme both have effect for the period from 15th July 2020 to 12th January 2021.

A Tax Information and Impact Note covering this instrument will be published on the website at https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins."; and

(2) it was accompanied by an explanatory memorandum (the "Explanatory Memorandum") which stated that it had been "prepared by [the Respondents], where relevant on behalf of HM Treasury" and that, in light of the urgent nature of the matter, the convention of laying a statutory instrument twenty–one days before it came into force was being breached.

Paragraph 7 of the Explanatory Memorandum said as follows:

"7. Policy background What is being done and why?

…

7.2 For the hospitality sector, the relief will cover all supplies made of hot and cold food and hot and cold non-alcoholic beverages consumed on premises in restaurants, cafes, pubs and similar establishments. It will also cover supplies of hot takeaway food and hot takeaway non-alcoholic beverages for consumption off the premises. Supplies of cold takeaway food and cold takeaway beverages for consumption off the premises remain subject to the current rules i.e. the items are zero rated for VAT purposes, unless they fall under one of the excepted items in Group 1 of Schedule 8 to VATA, in which case they are standard rated.

…".

At paragraph 12.3, in the section headed "Impact", the Explanatory Memorandum said that a Tax Information and Impact Note covering the RR Order would be published on the website at https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins.".

32. The Tax Information and Impact Note (referred to in both the Explanatory Note and the Explanatory Memorandum) was a policy paper issued by the Respondents on 15 July 2020 (the day the RR Order came into force) entitled "Information on the reduced rate of VAT for hospitality, holiday accommodation, and attractions". This included the following:

"Current law
…

Group 1, Schedule 8 to the Value Added Tax Act 1994 (VATA) …applies a zero–rate to a limited number of drinks but expressly excludes alcoholic beverages…

Proposed revisions

A temporary reduced rate will be introduced by adding new Groups 14, 15 and 16 into Schedule 7A VATA.

The reduced rate will cover the following supplies:

hospitality: hot and cold food and hot and cold non-alcoholic beverages sold for on-premises consumption – for example, in restaurants, cafés and pubs – and hot takeaway food and hot non-alcoholic beverages sold for consumption off the premises. It does not include alcoholic beverages of any kind …".

33. On 15 July 2020, the Chancellor gave evidence to the Treasury Committee, which included the following exchange:

"Felicity Buchan: We have heard from a number of pubs that they are concerned that alcoholic drinks are not part of the VAT reduction. What was your thinking there?

Rishi Sunak: I think it was probably just the obvious one. There is a public health imperative alongside it as well. It is fairly common. From memory, both Ireland and France have excluded alcoholic drinks from similar measures that they have taken, and I think Germany actually excluded non-alcoholic drinks as well. I do not think it is uncommon. We want to be mindful of the public health side of things as well…".

34. In the 2020 version of the Respondents' VAT manual, the Respondents said as follows:

"Under excepted item 3, all alcoholic beverages which are chargeable with excise duty are standard–rated. This provision is self–explanatory and applies the standard rate of tax to beer, wine, made–wine, cider, perry, spirits and liqueurs".

The same sentence appeared in the 2009 version of the Respondents' VAT manual.

35. On 3 March 2021, shortly before the expiry of the reduced rate period following its first extension, the Respondents published a policy paper entitled "Introduction of a new reduced rate of VAT for hospitality, holiday accommodation and attractions". In the section headed "Current law" in that paper, the Respondents said that:

"Group1, Schedule 8 to the VATA applies a zero rate to … a limited number of drinks but expressly excludes alcoholic drinks."

Material relating to the EOTHO Scheme

36. The EOTHO Scheme, that was announced alongside the reduced rate of VAT as noted in paragraph 27 above, was enacted through the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Eat Out to Help Out Scheme) Direction (the "EOTHO Direction") and was stated to apply to sales of food and non–alcoholic drinks for immediate consumption on restaurant premises on particular days.

37. The EOTHO Direction did not contain a definition of "non–alcoholic drink". It merely provided in paragraph 7.2 that "a qualifying sale is a sale of food or non–alcoholic drink…"

38. Moreover, the original guidance in relation to the EOTHO Scheme which was issued by the Respondents on 9 July 2020 also contained no definition of non–alcoholic drink". It simply specified that the discount could not be applied to, inter alia, "alcoholic drinks".

39. However, the guidance was amended on 30 July 2020 to include a definition of the term "alcoholic drink" as a drink with an ABV of more than 1.2% (thereby aligning with the ABV threshold for the imposition of excise duty).

Material relating to the understanding by the Appellant and others of the scope of the RR Order

40. We were provided with the following written evidence in relation to the understanding by the Appellant and others of the scope of the RR Order:

(1) an error correction notice submitted by the Appellant on 7 April 2022 seeking repayment of VAT for which the Appellant had accounted on its supplies of alcoholic beverages with an ABV of less than 1.2% between 15 July 2020 and 23 January 2022 (the "low alcohol ECN"). In the low alcohol ECN, the Appellant also informed the Respondents that it would make a correction through its VAT returns for the VAT attributable to its supplies of alcoholic beverages with an ABV of less than 1.2% between 24 January 2022 and 31 March 2022;

(2) an exchange of questions and answers between the Association of Taxation Technicians (the "ATT") and the Respondents which showed that the Appellant's initial understanding in relation to low alcohol beverages, which was that they were also precluded from qualifying from the reduced rate, as noted in paragraph 40(1) above, was shared by the ATT;

(3) the original ECN and the amended ECN, in which certain of the other alcoholic beverages which had been included in the original ECN had been removed because they were in fact made–wine, as noted in paragraph 7(12) above;

(4) a statement made by the Regency Purchasing Group (the "RPG") of 25 July 2020 to the effect that:

"If a customer orders a bottle of wine, a pint of lager or a bottle of cider, it's very clear and straightforward. These sales are still part of the 20% VAT rate"; and

(5) a statement made by Tom Stainer, the chief executive of the Campaign For Real Ale ("CAMRA"), reported in the Morning Advertiser on 9 July 2020, to the effect that:

"It is also disappointing to see no direct support for independent brewers and producers who will not benefit from a VAT cut that specifically excludes beer and cider".

Material relating to the relationship between cider and other alcoholic beverages and the changes in the alcohol duty regime in 2023

41. We were provided with the following written evidence in relation to the relationship between cider and other alcoholic beverages and the changes in the alcohol duty regime in 2023:

(1) a copy of a specimen menu from one of the Appellant's restaurants showing the sale of ciders alongside, and at similar prices to, fruit ciders;

(2) a screenshot of a menu from one of the Appellant's restaurants showing the sale of ciders alongside fruit ciders;

(3) photographs exhibited to Mrs Ali's witness statement showing the sale of ciders alongside fruit ciders in a supermarket aisle headed "Cider";

(4) a screenshot from the websites for each of ASDA, Tesco and Sainsbury showing the sale of ciders alongside fruit ciders on the website page relating to ciders;

(5) an article from the Carling website headed "The Current Market and Future Trends of Cider" which said, inter alia, that fruit cider was the "new kid on the block" since 2009 with large increases in the market each year and was predicted to become the major component of cider sales by 2022;

(6) an article from the website of Future Market Insights Inc which said, inter alia, that:

(a) cider was "becoming more popular among people who drink alcoholic drinks, because it doesn't have gluten and can be much sweeter and more refreshing than beer". The demand for gluten–free products was going up because more people were getting celiac disease and people in general (and particularly younger people) were generally becoming more health–conscious; and

(b) the "flavoured" segment of the cider market was "growing due to several factors, such as increasing consumer preferences for unique and diverse [flavours], growing awareness about the health benefits of [flavoured] ciders made from natural ingredients, and increasing availability of a wide range of [flavoured] ciders in the market. Additionally, the growth of the [flavoured] cider segment can also be attributed to the growing popularity of fruity and sweet [flavours], especially among younger consumers";

(7) an extract from Hansard recording a debate in the House of Commons on 25 October 2010 on the Alcoholic Liquor Duties (Definition of Cider) Order 2010, which made changes to the qualifying requirements for cider and in which Ms Justine Greening MP, the Economic Secretary to HMT, noted that high alcohol ciders " ... cause much concern to health and homelessness groups, which rightly identify them as cheap sources of alcohol. The cider industry, too, has shown concern because these so–called industrial ciders bear no resemblance to the traditional products consumed by reasonable drinkers….Consequently, industrial ciders should not benefit from the same rate of duty for cider that helps to support an important local and national industry. The order intends

to tackle the problem by introducing a new standard for products to be considered as cider for duty purposes. Those products that do not meet the standard will have to pay duty at the significantly higher made–wine rate. The order will introduce a new minimum juice content for products to be considered as cider. First, it requires that the mixture from which the cider is fermented must contain at least 35% fruit juice. That will ensure that the products made by fermenting high-strength sugar solutions containing minimal amounts of apple or pear juice no longer qualify as cider";

(8) a paper entitled "Alcohol duty review: Call for evidence" issued by HMT and the Respondents in September 2020 (the "Alcohol Duty Review"), which:

(a) stated, inter alia, that:

(i) at the time of the review, cider was subject to excise duty at differing rates based on its ABV but the bands applicable to cider were wider than those applicable to beer;

(ii) cider was subject to excise duty at a much lower rate than other alcoholic beverages of equivalent ABV, such as beer and made–wines;

(iii) accordingly, the qualifying criteria for cider were important as they could significantly affect the pricing of the product. Products that did not meet these criteria were instead liable to excise duty as made–wine;

(iv) to qualify as cider for excise duty purposes, a product had to be made almost exclusively from apples or pears (without the addition of any other alcohol product) and only a limited number of additives were permitted;

(v) products marketed as "fruit ciders" (which were made using fruit other than apples or pears) were liable to excise duty as made–wine; and

(vi) a cider with an ABV of 8.5% or more was not subject excise duty as cider but was instead subject to excise duty as made–wine;

(b) contained at paragraph 3.2 a graph which showed that, whilst the rate of excise duty applicable to cider was generally considerably lower than the rate of excise duty applicable to other alcoholic beverages such as made–wine, that was not invariably the case and it all depended on the ABV of the particular beverage in question. For example:

(i) cider with an ABV of just over 1.2% was subject to excise duty at a higher rate per unit than beer or spirits with the same ABV; and

(ii) cider with an ABV of just under 8.5% was subject to excise duty at a higher rate per unit than beer, spirits or still wine with the same ABV;

(9) a table of historic rates of excise duty which showed that, for the most part, the rate of excise duty applicable to cider was considerably lower than the rate of excise duty applicable to other alcoholic beverages such as made–wine;

(10) an extract from Hansard recording a debate in the House of Commons on 1 December 2021, in which Bill Wiggin MP said, inter alia, that:

(a) fruit ciders, rosé ciders, mulled ciders, cider with honey, cider and elderflower and spiced cider were all treated as made–wine for excise duty purposes;

(b) flavoured ciders had a 22.8% market share of the UK's £2.1 billion cider industry; and

(c) commercially–produced ciders with a high ABV, such as "white ciders" with an ABV of 7.5% sold in 2.5 litre bottles at a cheap price, gave rise to concerns about problem drinking and a "consumer who indulges in a craft, artisanal, small–batch cider is different from the consumer who buys a £4 bottle of white cider",

and, in her response, Helen Whately MP, the Exchequer Secretary to HMT, said, inter alia, that:

(i) sales of fruit ciders had increased from one in one thousand ciders sold in 2005 to one in four ciders sold;

(ii) the new measures were keeping the definition of "cider" as a drink made wholly from apples and pears; and

(iii) maintaining the difference between ciders and flavoured ciders "[helped] to safeguard traditional cider's valuable contribution to local heritage and agriculture";

(11) a paper from the House of Commons library relating to the new alcohol duty system introduced by the F (No 2) A 2023, which referred in Section 5.3 to the fact that, in its comments on the reforms to the system, the Institute of Alcohol Studies had called for an end to ""cider exceptionalism" (where cider had a preferential excise duty treatment compared to other alcohol products)";

(12) Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duty on alcohol and alcoholic beverages (the "Structures Directive"), which provided the following, inter alia, in its recitals:

"…it is advisable to permit Member States to apply reduced rates of duty to all kinds of wine and other fermented beverages provided always that the actual alcoholic strength of the products does not exceed 8,5 % vol.; …

in the cases where Member States are permitted to apply reduced rates, such reduced rates should not cause distortion of competition within the internal market";

(13) the initial draft of the directive which introduced paragraph (12a) of Annex III – Council Directive 2009/47/EC (the "Reduced Rate Directive"), which was published, along with an explanatory memorandum, on 9 July 2008.

The explanatory memorandum stated that:

(a) the objective of the Commission in producing the Reduced Rate Directive was to stimulate economic growth by reducing VAT rates in sectors employing many low–skilled workers and where the supplier and customer were located in a geographically–limited area;

(b) as such, the reduced VAT rates were unlikely to cause distortion of competition;

(c) paragraph (12a) had been included because restaurant services were a locally–supplied service; and

(d) alcoholic beverages had been excluded from paragraph (12a) in order to be consistent with paragraph (1) of Annex III. It was expedient to avoid a reduced rate for beverages supplied in the course of catering or restaurant services when the standard rate applied to such beverages when they were supplied other than in the course of such services; and

(14) Chapter 22 of the UK Integrated Online Tariff, an online search tool that sets out the duties and taxes affecting the import, export and transit of goods – headed "Beverages, spirits and vinegar" – as at 24 February 2025, which showed that cider fell within the code 22 06 "Other fermented beverages (for example, cider, perry, mead, sake); mixtures of fermented beverages and mixtures of fermented beverages and non–alcoholic beverages, not elsewhere specified or included" and had a different code from the codes applicable to spirits, beer and wine.

FINDINGS OF FACT

42. We make the following findings of fact in relation to the matters which are in issue in this decision:

(1) at the time when the RR Order was laid before the House of Commons, it was the view of the Respondents and HMT that cider fell within EI 3 and therefore it was the intention of the Respondents and HMT that cider would fall within the definition of "alcoholic beverage" in Group 14. We base that finding on the material referred to in paragraphs 27 to 39 above;

(2) during the Relevant Period, it was the understanding of the Appellant that both cider and low alcohol beverages fell within the ambit of the definition of "alcoholic beverage" in Group 14. We base that finding on the fact that the Appellant initially accounted for VAT at the standard rate in respect of both of those categories of beverage and only subsequently filed the original ECN (and the amended ECN) and the low alcohol ECN;

(3) at the time when the Appellant made its claim for repayment of VAT in the original ECN, it did not appreciate that some of the beverages which were included in that claim were fruit ciders (and were therefore in fact made–wines and not ciders), with the result that it then filed the amended ECN. We base that finding on the terms of the original ECN relative to the terms of the amended ECN;

(4) at the time when the RR Order was laid before the House of Commons, the understanding of the Appellant which is recorded in paragraph 42(2) above was shared more generally. We base that finding on the statements made by the ATT, the RPG and the chief executive of CAMRA referred to in paragraphs 40(2), 40(4) and 40(5) above;

(5) during the Relevant Period, fruit ciders:

(a) often had the word "cider" in their name and were frequently marketed and sold alongside ciders;

(b) like ciders, were gluten–free and therefore more attractive to health–conscious consumers than other alcoholic beverages which were not gluten–free; and

(c) had a growing share of the market.

We base that finding on the material referred to in paragraph 41 above;

(6) at the time when the RR Order was laid before the House of Commons:

(a) cider had generally been subject to excise duty at a more favourable rate than other alcoholic beverages; and

(b) it was generally considered that the market for high alcohol ciders was not the same as the market for ciders.

We base that finding on the material referred to in paragraph 41 above; and

(7) during the Relevant Period, ciders were often sold in a similar setting to that in which other alcoholic beverages were sold – for example, in supermarkets, pubs and restaurants – but there were many circumstances in which ciders were not sold in the same settings as those in which other alcoholic beverages were sold – for example, in general, ciders were not sold at beer festivals or wine–tastings. We base that finding on our own empirical observations.

THE ISSUES IN THIS DECISION

Issue One

43. The Respondents submit that it would be anomalous and absurd for cider to be treated as falling outside the definition of "alcoholic beverage" in Group 14, given that every other alcoholic beverage – spirits, beer, wine and made–wine – clearly falls within that definition, and particularly given the similarities between cider and made–wine in the form of fruit ciders, and that therefore we should construe the definition of "alcoholic beverage" in Group 14 purposively in such a way as to include cider.

44. The Appellant submits that:

(1) given the legislative history relating to the imposition of excise duty and VAT on cider, cider has always been treated differently from the other alcoholic beverages specified above and therefore the fact that cider falls outside the definition of "alcoholic beverage" in Group 14 is neither anomalous nor absurd; and

(2) in any event, the language used in the definition is clear and unambiguous and therefore the definition cannot be construed in such a way as to include cider within its ambit.

45. In this decision, we will refer to this issue as "Issue One".

Issue Two

46. The Respondents submit that, even if they are wrong in relation to Issue One, the authorities show that the courts have the power to correct obvious drafting errors in legislation in certain narrowly–defined circumstances – see in that regard the Supreme Court decision in *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 ("*Inco*") – and that this is a case where that course of action is appropriate. Accordingly, a reference to "cider" should be read into the definition of "alcoholic beverage" in Group 14.

47. The Appellant submits that the present circumstances do not satisfy the high threshold for correcting legislation set out in *Inco* and that, were we to adopt the approach urged on us by the Respondents, we would be impermissibly usurping the legislative function and making an error of law.

48. In this decision, we will refer to this issue as "Issue Two" and to Issue One and Issue Two together as the "UK Domestic Law Issues".

The EU Law Issue

49. It is common ground that:

(1) even if the Respondents are wrong on both of the UK Domestic Law Issues, the Appellant cannot rely on the terms of the UK legislation to the extent that that legislation does not comply with the legislation of the European Union (the "EU") or the principles of EU law; and

(2) if that is the case, a conforming interpretation is required to be applied to the UK domestic law provisions to ensure that they do comply.

50. In that regard, the Respondents submit that, if the definition of "alcoholic beverage" in Group 14 is required to be construed as not including cider and cannot be corrected under the *Inco* principle in such a way as to include cider, then the terms of the definition are contrary to the PVD (and, more specifically, paragraph (12a) of Annex III), when that is read in the light of the principle of fiscal neutrality which is a fundamental part of EU law, and that therefore we need to apply a conforming interpretation of the definition to ensure that that is not the case. That entails the addition of a reference to "cider" in the definition of "alcoholic beverage" in Group 14.

51. The Appellant submits that the terms of the definition of "alcoholic beverage" in Group 14 are entirely consistent with paragraph (12a) of Annex III when that is read in the light of the principle of fiscal neutrality so that the question of a conforming interpretation does not arise.

52. In this decision, we will refer to this issue as the "EU Law Issue".

Conclusion

53. It will be apparent that, in order for the Appellant to succeed in relation to the preliminary issue to which this decision relates, it needs to succeed on each of the three issues described above.

THE UK DOMESTIC LAW ISSUES

ISSUE ONE

The relevant authorities

54. During the course of the hearing, we were referred to numerous authorities in relation to matters of statutory interpretation. Leaving aside for the moment the authorities relating to circumstances in which the courts have considered it appropriate to rectify a legislative provision – to which we will come when we address Issue Two – the cases have set out a number of general principles of statutory construction, as follows:

The importance of the words used

(1) it is important to bear in mind "the respective roles of Parliament and the courts. Parliament enacts legislation, the courts interpret and apply it. The enactment of legislation, and the process by which legislation is enacted, are matters for Parliament, not the courts" – see Lord Nicholls in *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816 at paragraph [55];

(2) the intention of Parliament can be determined only from the words that Parliament has used. If those words are not capable of the construction which is sought to be applied to them, then the courts "must apply them as they stand, however unreasonable or unjust the consequences; and however strongly we may suspect that this was not the real intention of Parliament" – see Lord Reid in *Commissioners of Inland Revenue v Hinchy* [1960] AC 748 ("*Hinchy*") at 767. As Lord Reid said in the later case of *Black–Clawson International Limited v Papierwerke Waldhof–Aschaffenburg AG* [1975] 1 AC 591 ("*Black–Clawson*") at 613G, "[we] often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said";

(3) the "intention of Parliament" is an objective concept and not a subjective one and the phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. "It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or the individual members or even the majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate" – see

Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited* [2001] 2 AC 349 ("*Spath Holme*") at 396G;

(4) when seeking the meaning of the words that Parliament has used, those words need to be considered purposively. As such, the words should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment – see Lord Sales in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("*PACCAR*") at paragraph [41];

(5) there is an important constitutional reason for having regard primarily to the statutory context. As Lord Nicholls explained in *Spath Holme* at 397:

"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

The same view was expressed by Lord Hodge DPSC in *R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3 ("*R(O)*") at paragraph [29];

The presumption against absurdity

(6) there is a presumption against absurdity and that presumption is an important tool in determining the meaning which Parliament intended a statutory provision to have – see Lord Sales in *PACCAR* at paragraph [37]. In *PACCAR* at paragraph [43], Lord Sales expanded on this as follows:

"The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used … As the authors of *Bennion, Bailey and Norbury* say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "[the] strength of the presumption ... depends on the degree to which a particular construction produces an unreasonable result"";

(7) however, in the same paragraph of that decision, Lord Sales added that the courts must be astute in ensuring that "they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation";

Knowledge of the law

(8) Parliament is presumed to legislate in the knowledge of the current state of the law when it is doing so – see *Campbell v Gordon* [2016] UKSC 38 ("*Campbell*") at paragraph [44] and *Lachaux v Independent Print Limited* [2019] UKSC 27 ("*Lachaux*") at paragraph [13];

The admissibility and relevance of secondary material

(9) external aid to interpretation – such as reports and consultations preceding the enactment of the legislation in question, advisory committees, explanatory notes, policy papers, impact assessments, ministerial statements and public statements by Government departments – may assist the court in carrying out a purposive interpretation because they disclose the background to the enactment and may identify the mischief at which the enactment is aimed and the purpose of the enactment.

As Lord Hodge DPSC said in *R(O)* at paragraph [30]:

"The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2….".

In *R (Westminster City Council) v National Asylum Service* [2002] 1 WLR 2956 ("*Westminster*") at paragraph [5], Lord Steyn explained that "the language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene where an ambiguity has arisen";

(10) it is for the court, when determining the legal meaning of a provision, to decide what weight or importance to attach to any admissible external aids to construction that are admitted. The weight to be attached to that material will vary from case to case – see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition) 2020 ("*Bennion*") at paragraph 24.4, citing, inter alia, Lord Nicholls in *Spath Holme* at 399D – E;

(11) however, external aids to interpretation must necessarily play a secondary role. It is important to remember that it is the legislative text which is being construed. The secondary material may inform the interpretation of that legislative text but cannot be allowed to supplant it. They cannot "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity"

– see Lord Hodge DPSC in *R(O)* at paragraph [30] and also the Court of Appeal in *BlueCrest Capital Management (UK) LLP v The Commissioners for His Majesty's Customs and Excise* [2025] EWCA Civ 23 ("*BlueCrest*") at paragraphs [62], [63], [93], [94] and [108].

In *Flora v Wakom (Heathrow) Limited* [2006] EWCA Civ 1103 at paragraphs [15] and [16], Brooke LJ cited the warning given by Lord Steyn in *Westminster* at paragraphs [2] to [6] to the effect that, whilst explanatory notes cast light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, and are therefore an admissible aid to construing the statute, "[the] aims of the Government in respect of the meaning of clauses as revealed in the Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted";

(12) having said that, there are occasions when secondary material can go further than simply providing the background or context for the provision in question. Instead, it may influence its meaning – see Lady Arden JSC in *R(O)* at paragraphs [64] to [76]. Of particular relevance in the present context is the following extract from Lady Arden's decision:

"Lord Nicholls [in Spath Holme] immediately entered a caveat about the constitutional implications of statutory interpretation. He held that in view of the constitutional implications of statutory interpretation the courts should be slow to allow external aids to be used for meanings which were otherwise clear and unambiguous and not productive of uncertainty. But Lord Nicholls did not say that the pre-legislative material could never displace the apparent meaning of a provision. While I do not doubt the presence of constitutional implications – statutory interpretation is bound to engage the courts' relationship with Parliament – it is difficult to see that there are adverse implications from the courts aiming to find a better–informed interpretation of a provision by reference to pre–legislative material which Parliament is more likely than not to have acted on. The process is quite different from finding a meaning which is not justified by the words that Parliament has used, or which is selected for some reason other than the presumed

intention of Parliament. Neither of those approaches is in accordance with the principles of statutory interpretation" – see *R(O)* at paragraph [66];

(13) not all secondary material is admissible in this context. For example:

(a) press releases and other contemporaneous statements made during the passage of a Bill through Parliament but outside the Parliamentary process is seldom, if ever, of assistance in construing the resulting Act. This is because it typically fulfils a political purpose and is couched in general terms which means that it is of little or no use as an interpretive aid – see *Bennion* at paragraph 24.15, citing Sales J (as he then was) in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) ("*Bogdanic*") at paragraphs [55] to [57];

(b) views expressed in private by the draftsman or the executive and unpublished internal department policy are not admissible as an aid to construction. To be admissible secondary material, the views need to have been expressed in public and to have been available to the legislature at the time when the relevant provision was enacted. The need for legal certainty means that only material in the public domain can be treated as having any bearing on the proper construction of a provision. The rules by which a citizen is bound should be ascertainable by him, or, more realistically, by a competent lawyer advising him – see the Supreme Court in *Re Agricultural Sector (Wales) Bill* [2014] UKSC 43 at paragraphs [36] to [39] and Sales J in *Bogdanic* at paragraph [13], citing *Black–Clawson* at 614A, 638D–H and 645C–H and *Fothergill v Monarch Airlines Limited* [1981] AC 251 at 279F–280B; and

(c) a view publicly expressed by the sponsoring Government department after the legislation has been enacted is not an admissible aid to interpreting the legislation but can be of "some persuasive interest" – see Blake J in *Islington London Borough Council v Unite Group plc* [2013] EWHC 508 (Admin) at paragraph [25]; and

(14) finally in this context, it is important to distinguish between:

(a) the use of legislative debate as secondary material to assist a court in identifying the mischief at which the relevant provision was aimed or the purpose of the relevant provision – which is the subject of paragraphs 54(9) to 54(13) above; and

(b) the rule in *Pepper v Hart* [1993] AC 593 ("*Pepper*"), pursuant to which a court may have regard to legislative debate for the purposes of ascertaining the meaning of the relevant provision provided certain conditions are met.

This distinction was made clear by Lord Mance in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the General Counsel for Wales* [2015] UKSC 3 at paragraph [55] and by the Judicial Committee of the Privy Council in *Presidential Insurance Company Limited v Resh St Hill* [2012] UKPC 33 at paragraphs [23] and [24].

Under the rule in *Pepper*, statements made by a Government minister may be used to determine the meaning of a statutory provision only if the three conditions set out by Lord Browne–Wilkinson in *Pepper* at 640 are met. Those are:

"(i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity;

(ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and

(iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering"

– see Lord Hodge DPSC in *Re O* at paragraph [32].

In this case, the legislation in question – the RR Order – was not subject to any debate in the House of Commons. Accordingly, the rule in *Pepper* is of no relevance in the context of Issue One although, as we shall see in due course, the Appellant does place some reliance on the rule in the context of Issue Two in relation to the Parliamentary statements referred to in paragraphs 27 and 33 above.

55. The principles set out in paragraph 54 above were pithily summarised by Sir Launcelot Henderson in *BlueCrest* at paragraph [63] as follows:

"While all of this guidance is important, I emphasise in particular that (a) the words which Parliament has chosen to enact are "the primary source by which meaning is ascertained", for "the important constitutional reason" explained by Lord Nicholls in the Spath Holme case that citizens "should be able to rely upon what they read in an Act of Parliament"; (b) "[external] aids to interpretation must therefore play a secondary role"; (c) no external aids can "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity"; and (d) "the intention of Parliament" is an objective concept in the sense lucidly explained by Lord Nicholls in Spath Holme [2001] 2 AC 349, 396."

56. In addition to the general principles of statutory construction set out in paragraphs 54 and 55 above, the authorities contain some more specific guidance in relation to how to interpret:

(1) definitions which appear in the legislation; and

(2) tax legislation (and, more particularly, VAT legislation) –

two areas which have particular resonance in the context of these proceedings.

57. In relation to the interpretation of definitions, the authorities show that:

(1) when a later enactment incorporates a definition from an earlier enactment, the definition must be assumed to bear the same meaning in the later enactment as in the earlier one, regardless of the context in which the later enactment came into being or the mischief at which the later enactment was aimed. To adopt a different approach would be "both inconsistent with the plainly expressed will of Parliament … and a recipe for uncertainty in future cases of statutory interpretation" – see Lord Neuberger in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at paragraphs [72] and [73];

(2) an exhaustive definition – typically taking the form "X means…" – provides a comprehensive description of everything covered by the defined term and displaces any meaning that the defined term would otherwise have had – see *Bennion* at paragraph 18.2. It is to be contrasted with an inclusive or exclusive definition, each of which modifies the natural meaning of the defined term; and

(3) that is not to say that the interpretation of a definition cannot be coloured by the defined term itself, particularly in cases of doubt. In an appropriate case, "the potency of the term defined" may provide some guidance as to the meaning of that term as set out in the statutory definition – see *Bennion* at paragraph 18.6. In each case, it is necessary to consider the language used in the definition and the strength or weakness of the inherent or established meaning of the term which is being defined. As Lord Sales explained in *PACCAR* at paragraphs [48] and [49], "[where] Parliament has taken the trouble to provide a definition, it is the words of the definition which are the primary guide to the meaning

of the term defined. The weaker the inherent or established meaning of the term defined, the weaker must be its ability to throw light on Parliament's meaning when setting out the express words of the definition which falls to be construed".

58. In relation to the interpretation of tax legislation, the authorities show that:

(1) tax legislation is to be construed in the light of ordinary principles of statutory interpretation, giving the provision in question a purposive construction to identify its requirements – see Lord Nicholls in *Barclays Finance Limited v Mawson* at paragraphs [32] and [33]. Tax legislation is subject to the same rules of statutory construction as apply in the case of all legislation – see Lord Briggs JSC in *Balhousie Holdings Limited v The Commissioners for Her Majesty's Customs and Excise* [2021] 1 WLR 2164 at paragraph [24];

(2) however, as noted by the Senior President of the Tribunals in *Nathan Gardiner v Hertsmere Borough Council* [2022] EWCA Civ ("*Gardiner*") at paragraph [49], "statutory provisions for taxation ought in general, to be strictly construed and effect given to the clear terms in which the Parliament may be expected to enact such provisions. As Mr Justice Rowlatt said in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 K.B. 64 (at p. 71):

"... [In] a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"."

In *R (IDT Card Services Ireland Limited v The Commissioners for Her Majesty's Revenue and Customs* [2006] ("*IDT*") at paragraph [110], Arden LJ (as she then was) said that, whilst, as a general matter, "a person affected by legislation must be able to foresee the manner in which it is to be applied …that must particularly be so where the legislation has financial consequences for him such as flow from the imposition of the requirement to account for VAT";

(3) the VAT legislation is unusual in that it draws distinctions between different types of supply which can sometimes appear to be arbitrary. In *News Corporation UK & Ireland v The Commissioners for His Majesty's Revenue and Customs* [2023] UKSC 7 ("*News Corp*") at paragraph [113], Lord Leggat – who concurred with the majority but chose to express his reasons separately because important questions of principle had been raised by the case on which his views did not coincide in all respects with the majority – said as follows:

"Ms Mitrophanous KC gave a number of examples of differences in tax treatment between items for which there is no clear rhyme or reason. For instance, oranges are zero-rated but juice squeezed from oranges is taxed at the standard rate of VAT; chocolate cakes are zero-rated but chocolate coated biscuits are taxed at the standard rate; during the relevant period women's sanitary products were subject to a reduced rate of VAT but incontinence products were taxed at the standard rate. The pattern of the legislation approaches what Ronald Dworkin described as a "chequerboard" statute, which treats different cases differently without a clear principled reason for doing so: see Law's Empire (1986) pp 178-184. With a statute of this kind the scope for purposive interpretation of the words used to ascertain their intended effect is extremely limited. There is not – and does not need to be – an overall logic or coherence in the items specified by Parliament which would permit reasoning by analogy"; and

(4) a provision of the VAT legislation which confers an exemption or a reduced rate of VAT on supplies is to be interpreted strictly – see the European Court of Justice (the "CJEU") in *Belgium v Oxycure Belgium SA* (C–573/15) at paragraph [25] and *Commission v France* (C–492/08) at paragraph [35] and, in the domestic law context, the Court of Appeal in *Expert Witness Institute v The Commissioners for Her Majesty's*

Revenue and Customs [2001] EWCA Civ 1882 ("*Expert Witness*") at paragraph [16]. However:

(a) that does not mean that the provision is required to be construed restrictively. The court's task is to give the provision "a fair interpretation" and not one that is strained or overly–narrow – see *Expert Witness* at paragraph [17] and *Greenspace (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2023] EWCA Civ 106 ("*Greenspace*") at paragraphs [33] and [36]. Nevertheless, in *Greenspace*, the Court of Appeal held that a provision in the VAT legislation conferring the reduced rate could not be extended beyond its plain words. The choice of where to draw the line between supplies at the standard rate and supplies at the reduced rate was for the legislator and it was not for the courts to attempt a re–definition of that boundary – see *Greenspace* at paragraph [36]; and

(b) where a provision of the VAT legislation conferring an exemption or a reduced rate is subject to an exception (which thus preserves the standard rate for the matters covered by the exception), the exception is not to be construed narrowly – see the CJEU in *The Commissioners for Her Majesty's Revenue and Customs v Isle of Wight Council* (C–28/07) [2008] STC 2964 ("*Isle of Wight*") at paragraph [60] and Falk LJ in *Northumbria Healthcare NHS Foundation Trust v The Commissioners for His Majesty's Revenue and Customs* [2024] EWCA Civ 177 ("*Northumbria*") at paragraphs [66] and [81].

The Respondents' submissions

59. Mr Elliott, who was appearing for the Respondents alongside Mr Stevens, said that:

(1) the authorities which we have summarised above meant that legislation should always be construed on a purposive basis and in the context in which it had been enacted – see *PACCAR* at paragraph [41];

(2) in particular, where a literal constriction of a statutory provision would give rise to an absurd or anomalous result, a court should apply a purposive construction to avoid that result, even if that meant that the language in the provision was being strained – see *PACCAR* at paragraph [43]. The more absurd or anomalous the result, the more the language used in the relevant provision could be strained in order to avoid that result;

(3) the authorities had also established that the objective purpose of Parliament in enacting legislation could be determined by reference to admissible secondary material. All of the secondary material described in paragraphs 27 to 39 above was admissible in this context – see *Westminster* at paragraph [5], *R(O)* at paragraph [30] and *PACCAR* at paragraph [42]. More particularly:

(a) the policy papers and guidance mentioned in paragraphs 28 to 30 above, the Explanatory Note and the Explanatory Memorandum accompanying the RR Order when it was laid before the House of Commons mentioned in paragraph 31 above and the Tax Information and Impact Note issued on 15 July 2020 mentioned in paragraph 32 above all revealed the understanding of HMT and the Respondents, who were responsible for the drafting of the RR Order, at the time when the RR Order was laid before the House of Commons;

(b) the statement made by the Chancellor in giving his evidence to the Treasury Committee mentioned in paragraph 33 above revealed the thinking of the Government in bringing forward the RR Order;

(c) the statements in the Respondents' VAT manual in 2009 and 2020 mentioned in paragraph 34 above and the policy paper mentioned in paragraph 35 above

showed the long–standing nature of the Respondents' belief as to the ambit of EI 3; and

(d) the EOTHO Scheme material mentioned in paragraphs 36 to 39 above was relevant because that scheme was introduced along with the VAT reduced rate for hospitality supplies as part of a double–pronged single package to stimulate the hospitality sector. It was therefore part of the context in which the RR Order had been enacted and shed contemporaneous light on the thinking within HMT and the Respondents at that time;

(4) the admissible secondary material described above was of particular relevance in this context because the RR Order had been brought in at great speed and without the usual period between the laying of a statutory instrument and its taking effect. In consequence, there had not been the usual period of consultation and reflection that accompanied such instruments and it was therefore more likely that a drafting error would have been made and the instrument would have failed to say what it was intended to say;

(5) in this case, the Respondents accepted that EI 3, in the form which it took at the time when the RR Order was laid before the House of Commons, did not include cider. However, it was clear from the admissible secondary material that HMT and the Respondents were under the mistaken impression that it did include cider, and that cider was thus included in the definition of "alcoholic beverage" in Group 14 and thereby excluded from the reduced rate. Nothing in the admissible secondary material indicated that cider was intended to be excluded from that definition and the natural meaning of the term "alcoholic beverage" was apt to include cider;

(6) in addition, it would be absurd and anomalous for cider to fall outside the definition of "alcoholic beverage" in Group 14. This was because:

(a) although cider had become subject to VAT and excise duty later than had spirits, beer, wine and made–wine, cider had been subject to VAT at the standard rate since 1974 and subject to excise duty since 1976. Thus, cider had been subject to both VAT at the standard rate and excise duty for a considerable period of time before the RR Order was laid before the House of Commons and was therefore indistinguishable from other alcoholic beverages in the VAT context. It made no sense for cider to fall outside the definition of "alcoholic beverage" and thus qualify for the reduced rate of VAT when other alcoholic beverages did not;

(b) since made–wines were often marketed as "cider", and were in many cases simply beverages which would have amounted to cider, but for added flavourings or additives or an ABV of 8.5% or more, omitting cider from the definition of "alcoholic beverage" would give rise to an inexplicable distinction between similar products for VAT purposes. No reasonable justification for that distinction had been advanced by the Appellant and no rational intention behind that distinction could be attributed to the House of Commons;

(c) as noted above, the RR Order had been introduced at the same time as the EOTHO Scheme and as part of a single package with that scheme. The EOTHO Scheme also did not apply to alcoholic drinks and, although the EOTHO Directive itself did not include a definition of "alcoholic drink", the guidance which was issued shortly after the EOTHO Scheme was introduced made it clear that the term included cider. It would be anomalous for cider to be excluded from the EOTHO Scheme but included in the reduced rate; and

(d) the policy reasons for excluding alcoholic beverages from the reduced rate as revealed in the Chancellor's response to the Treasury Committee on 15 July 2020 set out in paragraph 33 above applied just as readily to cider as they did to other alcoholic beverages falling within EI 3;

(7) in short, in the words of Clarke LJ in *R (Confederation of Transport UK) v Humber Bridge Board* [2003] EWCA Civ 842 ("*Humber Bridge*") at paragraph [63], it would be "surprising and incongruous" for cider to be included within the scope of the reduced rate when other alcoholic beverages were not. No rational purpose could be attributed to that approach;

(8) the absurd and anomalous result meant that this was not a situation akin to the one addressed in *BlueCrest* at paragraphs [89] to [95] where the plain meaning of the provision which was being considered captured the objective purpose of Parliament in enacting the provision;

(9) moreover, it was a result which had not been noticed by anyone at the time when the reduced rate was operating, which was why the Appellant had accounted for VAT at the standard rate on its supplies of cider. Accordingly, this was not a case where the Appellant had relied on the distinction in accounting for its VAT liabilities in the first place; and

(10) it was possible to avoid that result by reading the word "means" in the definition of "alcoholic beverage" in Group 14 as saying "means but is not limited to" so that the other alcoholic beverages falling within EI 3 were just examples of the beverages falling within the definition. By construing the relevant definition non–exhaustively in that way, we would be following the injunction in *PACCAR* at paragraphs [48] and [49] to use "the potency of the term defined" to provide guidance as to the meaning for that term set out in the definition where that was appropriate. In this case, there was general consensus as to the boundaries of the term "alcoholic beverage". The natural meaning of that term was that it would include cider in the same way as it included other alcoholic beverages. As such, unlike the term "claims management service", which was in issue in *PACCAR*, significant potency could be attached to the term itself in determining the meaning of the term.

Discussion

Introduction

60. We have not set out the submissions made in relation to this issue on behalf of the Appellant by Mr Nawbatt and Mr Schofield because we largely agreed with them and they are reflected in the discussion which follows.

The identity of the legislator

61. Given that the authorities described above emphasise the importance of a purposive approach to construing enactments, the starting point in addressing Issue One must be to identify the "legislator" whose purpose is to be taken into account in construing the RR Order.

62. As noted in paragraph 12 above, in this case the relevant part of the RR Order was made by HMT, it was made by way of a statutory instrument that was required to be laid before the House of Commons and it was subject to annulment pursuant to a resolution of the House of Commons. It follows that, in our view, the legislator whose purpose is to be determined and taken into account in construing the RR Order is the House of Commons. This contrasts with the position in *Humber Bridge*, where the statutory instrument in question had not been required to be laid before Parliament so that the person whose purpose was to be taken into

account was the Secretary of State who had made the instrument – see *Humber Bridge* at paragraph [37].

63. At the hearing, Mr Elliott pointed out that, in *Bogdanic* at paragraph [52vi], Sales J had referred to the Secretary of State, who had promulgated the subordinated legislation in question in that case, as being the "relevant legislator" and suggested that this meant that the legislator in relation to the relevant provisions of the RR Order in this case was HMT. We disagree. In our view, the "legislator" in the case of a statutory instrument which has been laid before the House of Commons or Parliament and subject to the negative resolution procedure (or, for that matter, the affirmative resolution procedure) must necessarily be the House of Commons or Parliament and not the Government minister or department by whom the statutory instrument in question was drafted.

64. The commencement order which was in issue in *Bogdanic* had not been subject to the approval of either House of Parliament – see *Bogdanic* at paragraph [30]. Not all statutory instruments are subject to the negative resolution procedure of the House of Commons or the affirmative resolution procedure of the House of Commons or Parliament. Some statutory instruments are required to be laid before Parliament after being made but are not subject to Parliamentary scrutiny and others do not require to be laid before either House at all, as was the case in *Humber Bridge*. It all depends on the terms of the primary legislation which enables the statutory instrument in question.

65. Sections 162(1) and 162(6) of the Nationality, Immigration and Asylum Act 2002, which were the provisions of the primary legislation that enabled the commencement order in *Bogdanic*, did not require the commencement order to be laid before Parliament. As such, Sales J was right to describe the Secretary of State who had made the commencement order as "the legislator" in relation to the commencement order. (We accept that this was not the case with the Carriers Liability Regulations 2002, which were also mentioned by Sales J in paragraph [52vi)] of *Bogdanic* as having been legislated by the Secretary of State. Those regulations had been the subject of Parliamentary approval pursuant to Section 166 of the Immigration and Asylum Act 1999. We therefore respectfully disagree with him to that extent for the reason given in paragraph 63 above).

The purpose of the legislator

66. Having said that, whether the relevant legislator in this case was HMT (which drafted the relevant provisions of the RR Order) or the House of Commons (which approved the RR Order by way of the negative resolution procedure) makes very little difference to our conclusions in relation to the objective purpose of the definition of "alcoholic beverage" in Group 14. This is essentially for the reasons advanced by Mr Elliott and summarised in paragraph 59 above. In short, we agree with Mr Elliott that:

> (1) the secondary material to which we have referred in paragraphs 27 to 39 above is all admissible in determining the purpose of the legislator in enacting the RR Order, for the reasons he gave; and
>
> (2) the content of that admissible secondary material, together with:
>
> > (a) the limited scrutiny which was given to the RR Order when it was enacted; and
> >
> > (b) the absurdity of excluding cider from the definition of "alcoholic beverage" when other alcoholic beverages fell within the definition
>
> all suggest that the purpose of the legislator in enacting the RR Order was to include cider within the definition.

67. In relation to the point made in paragraph 66(2)(b) above, we agree with Mr Elliott that excluding cider from the definition would be anomalous and absurd for the reasons summarised in paragraph 59(6) above. In the words of Laws LJ in *R (Kelly) v The Secretary of State for Justice* [2008] EWCA Civ 177 ("*Kelly*") at paragraph [18], "there is no rational explanation for the omission". We are not persuaded that the differences which were put to us on behalf of the Appellant between cider and other alcoholic beverages mean that the exclusion of cider from the definition is perfectly rational and is not an absurdity or anomaly. We would add that we are encouraged in that belief by the fact that the Appellant, the RPG and the chief executive of CAMRA, amongst others, believed, at the time when the reduced rate was operating, that cider fell within the definition. In other words, their understanding reflected the fact that it would be absurd and anomalous were that not to be the case.

The application of a strained interpretation

68. The above conclusion suggests that it might well be appropriate to adopt the strained construction of the definition of "alcoholic beverage" urged on us by Mr Elliott – to the effect that the definition should be read as including a reference to cider – were it not for two compelling reasons for concluding that the definition cannot be construed in that way.

69. The first is that, before applying the *Inco* principle – which raises different issues and to which we turn when we consider Issue Two – when adopting a strained construction of a provision, there is only a certain amount of violence that can be done to the language which was actually used in the provision no matter what the purpose of the legislator may have been and no matter how absurd or anomalous the literal meaning of the language in the provision may be – see Lord Reid in *Hinchy* at 767. In this case:

> (1) the definition of "alcoholic beverage" used the word "means" and not "includes". It was therefore exhaustive and not inclusive; and
>
> (2) the definition referred to an existing definition elsewhere in the legislation which was of long standing. (EI 3 was enacted in 1994 and the language used in EI 3 dates back to the origins of the VAT legislation in the Finance Act 1972 (the "FA 1972"). That language has therefore been in the legislation for over fifty years.) Although HMT and the Respondents were under the mistaken apprehension that EI 3 included cider, it quite clearly did not (and the Respondents now accept that it did not). More particularly, the House of Commons should be presumed to have known that EI 3 did not as it is presumed to know the existing law at the time it legislates – see *Campbell* at paragraph [44] and *Lachaux* at paragraph [13].

70. Consequently, we do not see how, even applying a strained construction of the language used in the definition of "alcoholic beverage", cider can be said to have been included in the definition.

71. In that regard, we do not agree with Mr Elliott that the Respondents can rely on the "potency of the term defined" to negate this point. As noted by Lord Sales in *PACCAR* at paragraph [49], "where Parliament has taken the trouble to provide a definition, it is the words of the definition which are the primary guide to the meaning of the term defined". Thus, even though the term "alcoholic beverage" does have a potent meaning, that is not sufficient to override the terms of a definition which was exhaustive in nature.

72. There is a second, more–nuanced, reason why, before applying the *Inco* principle, the definition of "alcoholic beverage" cannot be construed as including cider even on a strained construction and that is as follows.

73. Since it is now common ground that, at the time when the RR Order was enacted, EI 3 did not include cider, the only way that the definition of "alcoholic beverage" in Group 14 can

be construed purposively so as to include cider would be to read into the definition a specific reference to cider in addition to the reference in the definition to the other alcoholic beverages falling within EI 3. However, we know from the admissible secondary material that it simply cannot have been the intention of the House of Commons – or, for that matter, HMT – to include such a reference because, at the time when the RR Order was enacted, everyone, including HMT, the Respondents and the Appellant, was under the misapprehension that cider fell within EI 3. It therefore cannot have been the purpose of the legislator to include in the definition a specific reference to cider because it was (mistakenly) thought that cider already fell within the definition as a result of the express reference in the definition to EI 3. It is precisely for that reason that the Respondents are now seeking to apply the *Inco* principle to the definition in the context of Issue Two.

Conclusion

74. For the two reasons set out in paragraphs 69 to 73 above, we have concluded that, before applying the *Inco* principle, it is not possible to construe the definition of "alcoholic beverage" in Group 14 as including cider. We therefore determine Issue One in favour of the Appellant.

75. For completeness, we should say that our reasons for declining to adopt a strained construction of the definition of "alcoholic beverage" in this context do not include the fact that the reduced rate of VAT permitted by Article 98 of the PVD and paragraph (12a) of Annex III (and item 1 of Group 14) is an exception to the general rule that supplies of goods and services should be subject to VAT at the standard rate and is therefore not susceptible to a strained construction.

76. It is true that there is a general principle of VAT law to the effect that a provision conferring an exception to the standard rate is to be interpreted strictly, with the result that Item 1 of Group 14 as a whole needs to be interpreted strictly. However, in this case, we are not construing the general language in Item 1 of Group 14. Instead, we are construing the definition of the term "alcoholic beverage" in paragraph (3) of the notes to that item, which defined term sets out the parameters of the exception from Item 1 of Group 14. As supplies falling within that definition are exceptions to the general language in the item, the definition serves to restore the general position to the effect that economic activity should be subject to VAT at the standard rate. As such, by parity of reasoning with that adopted by the CJEU in *Isle of Wight* at paragraph [60] and by the Court of Appeal in *Northumbria* at paragraphs [66] and [81] in the context of public authority car parking, the definition is not required to be construed strictly. An exception to a provision conferring a reduced rate must be construed broadly in the same way as an exception to a provision conferring an exemption and, in *Target Group Limited v The Commissioners for Her Majesty's Revenue and Customs* [2023] UKSC 35 at paragraph [17(4)], Lord Hamblen JSC said that a phrase in an article conferring an exemption "must be construed broadly because it is an exception to the exemption".

77. It follows that we have not reached our conclusion in relation to Issue One in reliance on the principle of construction described in paragraphs 75 and 76 above.

ISSUE TWO

The relevant authorities

Introduction

78. The general principles of statutory construction set out above are subject to a quite separate principle to the effect that, in certain very limited circumstances, a court is able to correct an obvious defect in legislation without impermissibly usurping the legislative powers of Parliament. This is commonly referred to as a "rectifying interpretation" but, in reality, it is no more than another method of purposively interpreting the legislation, albeit in a way that

goes beyond even the most strained construction of the words that have been used in the legislation – see *Bogdanic* at paragraph [43].

79. It is important to note at the outset that this principle is not entirely consistent with some of the general principles of statutory construction set out in paragraphs 54 to 58 above for the obvious reason that it necessarily involves amending the terms of the relevant legislation and not merely applying the existing language in the relevant legislation. It is therefore contrary to some of the pronouncements we have cited in the summary set out above in relation to Issue One, in particular, those that refer to the primacy of the words actually used in the legislation over other material – see, for example, Lord Reid in *Hinchy* at 767 and *Black–Clawson* at 613G (as mentioned in paragraph 54(2) above), Lord Hodge DPSC in *R(O)* at paragraph [30] (as mentioned in paragraph 54(9) above) and Lord Steyn in *Westminster* at paragraphs [2] to [6] (as mentioned in paragraph 54(11) above).

The relevant case law

80. The expression of the principle in *Inco* itself at 592E to 593A was as follows:

"This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1979] 1 All ER 286 at 289, [1980] AC 74 at 105–106). In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Ltd v Schindler]1976] 2 All ER 393 at 404, [1977] Ch 1 at 18 Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

81. It can be seen from the above that the principle is of extremely narrow application. Not only do the three conditions enumerated in the first of the paragraphs set out in paragraph 80 above have to be satisfied but, even then, as noted in the second of those paragraphs, there may be circumstances where it is inappropriate for the court to give effect to the legislator's purpose.

82. The courts have applied the *Inco* principle in a broad range of circumstances. For instance, it has been applied where:

(1) the legislation gives rise to arbitrary and unjustified distinctions – see *Kelly* at paragraphs [18] to [23];

(2) the legislation gives rise to an irrational result – see *Pollen Estate Trustee Company Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] 1 WLR 3785 ("*Pollen*") at paragraphs [47] to [49];

(3) there is a clear internal inconsistency within the terms of the same legislation – see *Humber Bridge* at paragraphs [36] to [56] and [65] to [83]; and

(4) there is a clear inconsistency between the terms of subordinate legislation bringing primary legislation into effect and the terms of that primary legislation – see *Bogdanic* at paragraph [52].

83. The principle applies just as readily in the case of secondary legislation as it does in the case of primary legislation – see *Kelly* (where it was simply assumed to be the case without comment), *Humber Bridge* at paragraphs [33] to [36] and *Bogdanic* at paragraph [40].

84. Given the very different circumstances in which the principle is potentially applicable, the courts have taken into account a wide range of matters, depending on the legislation in question, in determining whether to apply the principle. In some cases, the relevant court has relied solely on the fact that the legislation in question gives rise to an arbitrary and unjustified distinction or an irrational result or inconsistency – see *Kelly* and *Pollen* – whilst, in others, it has taken into account factors extraneous to the legislation in question such as:

(1) in the case of *Humber Bridge*, explanatory notes accompanying the relevant order, and the inspector's report and the Secretary of State's decision letter preceding the relevant order; and

(2) in the case of *Inco* itself, reports and consultations which preceded the enactment of the legislation in question – see Inco at 590G to 591B.

85. The principle does not apply merely because the court suspects that an error has been made. There are examples of cases where, even though the court considered it likely that a mistake had been made in enacting the relevant legislation, it ultimately concluded that the high bar necessary for the principle to apply had not been surmounted.

86. For example, in *The Joint Administrators of LB Holdings Intermediate 2 Limited v The Joint Administrators of Lehman Brothers International (Europe) and others* [2017] UKSC 38 ("*Lehman*") at paragraphs [117] to [123], Lord Neuberger (with whom Lord Kerr and Lord Reed agreed) declined to uphold a claim against the liquidators of a company for interest which would have been payable by the company's administrators had the administration not been followed by the company's liquidation before the interest was paid out, preferring "a coherent, if unattractive and quite possibly unintended, outcome, which paid proper, if reluctant regard to the applicable provisions of the 1986 Act and the 1986 Rules" – see *Lehman* at paragraph [123].

87. Similarly, in *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16 ("*Enviroco*"), the Supreme Court held that the Parliamentary material relating to the legislation which was in issue in that case – changes made to the legislation as it passed through Parliament and statements made in each House by a representative of the Government at the time in relation to the legislation – on which reliance was being placed by the party seeking to rely on the *Inco* principle, did not satisfy the three tests in *Pepper* and therefore did not lead to the satisfaction of the *Inco* principle, even though the result was "certainly odd and possibly absurd". In relation to the potential application of the *Inco* principle, Lord Collins said that there was no relevant ambiguity in the provision in question and no clear statement which cast any light on any question of interpretation which arose on the appeal. In his view, the ministerial statements on which reliance was being placed fell far short of a case for the application of even the most generous application of *Pepper* and the drafting history did not throw any light on the reason for the form taken by the provision. He added that, although it seemed likely that there had been an error, the ministerial statements at the time of the legislation shed no light on precisely what that error was. There was therefore no clear basis on which the court could be abundantly sure that there was a drafting error of a nature which the court could correct – see *Enviroco* at paragraphs [45] to [49].

88. In relation to the circumstances in which the principle might not apply, of particular relevance in the context of the present proceedings is the exception noted by Lord Nicholls in *Inco* in the second paragraph of the extract set out in paragraph 80 above. In relation to that exception, Lord Nicholls was not saying that there was an absolute bar on the principle's applying in every case where the legislation in question called for a strict interpretation. He was merely recognising that:

> (1) in certain contexts, there will be a palpable tension between, on the one hand, the need for legal certainty and, on the other hand, the need to give effect to Parliament's intention; and
>
> (2) in those cases, the bar for the application of the *Inco* principle is higher and it will not always be appropriate to apply the principle in such cases

– see *Kelly* at paragraphs [26] and [27] and *Bogdanic* at paragraphs [45] to [51]. Ultimately, in both *Kelly* and *Bogdanic*, the fact that the legislation in question pertained to criminal law did not prevent the principle from applying.

The Appellant's submissions

89. Mr Nawbatt submitted that, if we were to apply the *Inco* principle in this case to include cider within the definition of "alcoholic beverage" in Group 14, that would amount to an impermissible usurpation of the legislative function.

90. He made a number of points in support of this submission.

Point 1 – the non–admissibility of the Parliamentary Material

91. First, it was clear from *Enviroco* that reliance could not be placed on Parliamentary material in satisfying the three conditions of the *Inco* principle unless the three conditions set out in *Pepper* were satisfied in relation to that Parliamentary material. In this case, the Parliamentary material on which the Respondents were seeking to rely in establishing that the *Inco* principle applied were:

> (1) the statement made by the Chancellor on 8 July 2020 referred to in paragraph 27 above; and
>
> (2) the evidence given by the Chancellor to the Treasury Committee on 15 July 2020 referred to in paragraph 33 above

(together, the Parliamentary Material").

92. The Parliamentary Material did not satisfy the first and third of the three tests set out in *Pepper* because:

> (1) the terms of Group 14 including the definition of "alcoholic beverage" were not ambiguous and obscure and did not lead to absurdity; and
>
> (2) the Parliamentary Material did not contain a clear and unequivocal statement on the point of interpretation which we were considering.

93. It followed that no reliance could be placed on the Parliamentary Material in this context.

Points 2 and 3 – excessive reliance on admissible secondary materials

94. Secondly, although the authorities showed that admissible secondary material such as that summarised in paragraphs 28 to 32 and 34 to 39 above could shed light on the context in which a particular legislative provision had been enacted, and the purpose of the legislative provision, the authorities also showed that the weight to be given to admissible secondary material could not be so great as to supersede the clear language used in the legislative

provision itself. The language used in the legislative provision had always to be pre–eminent – see paragraph 54(11) above. In this case, that language said clearly that the term "alcoholic beverage" was confined to a beverage falling within EI 3. Accordingly, if we were to use the admissible secondary material to go beyond that language and include cider within the definition, that would be giving excessive weight to the admissible secondary material and would amount to an error of law.

95. He added that, in addition to that general point, the EOTHO Direction should carry limited weight in this regard as not only did it not relate to VAT but neither it nor the original guidance which was published with it contained a definition of the term "non–alcoholic drink". The term as it was used in the context of the EOTHO Scheme was defined only later when the guidance was amended.

96. Thirdly, and following on from the second point, it was notable that none of the cases in which the *Inco* principle had been applied involved the use of admissible secondary material to subvert the language used in the relevant statutory provision. For example:

(1) in *Inco* itself, the House of Lords had relied on the incompatibility between the provision which was being construed and the rest of the legislation to reach the conclusion that it did. It did not rely on admissible secondary material in making its decision;

(2) similarly, in *Bogdanic*, there was an incompatibility between the primary legislation and the subordinate legislation which justified the application of the *Inco* principle in the case of the subordinate legislation; and

(3) even in *Humber Bridge*, where the Court of Appeal had had recourse to admissible secondary material in the form of the inspectors' reports and the decision letters of the Secretary of State in reaching the conclusion that the *Inco* principle applied to the subordinate legislation in that case, the Court of Appeal had also relied on inconsistencies within the relevant orders (in the case of the 1997 and 2000 orders) and the historical context (in the case of all three orders) in order to reach its conclusion.

Point 4 – insertion required too big or the subject matter of the provision calls for strict interpretation

97. Fourthly, the House of Lords in *Inco* had said that, even where the three conditions set out in that case were satisfied, it would sometimes be inappropriate for the court to interpret the relevant statutory provision in accordance with the underlying intention of Parliament because the alteration might be too far–reaching – see *Inco* at 592H to 593A. Examples of this were:

(1) where the insertion required would be too big or too much at variance with the language used by the legislator; or

(2) where the subject matter called for a strict interpretation of the statutory language, as in penal legislation.

The definition of "alcoholic beverage" in Group 14 was an example of both of those scenarios. The change required was too much at variance with the language used in the definition and the authorities showed that tax legislation needed to be construed strictly – see *Gardiner* at paragraph [49] and *IDT* at paragraph [110].

Point 5 – the arbitrary nature of the VAT legislation

98. Fifthly, and related to the previous point, the VAT legislation was unusual in that it was replete with examples of arbitrary distinctions between items without clear rhyme or reason – see Lord Leggatt in *News Corp* at paragraph [113]. It was therefore perfectly possible that the

House of Commons might have wished to treat cider differently from other alcoholic beverages.

Point 6 – the definition made sense as it stood

99. Sixthly, the circumstances in which the *Inco* principle had been applied were those where the legislation in question made no sense without judicial intervention. In *Muller UK and Ireland Group LLP, and other companies v The Commissioners for Her Majesty's Revenue and Customs* [2024] UKUT 273 (TCC) ("*Muller*"), the Upper Tribunal had prefaced its consideration of whether or not to apply the *Inco* principle in that case by saying that, "[logically], the first question to ask before engaging with the *Inco Europe* principles is whether the language works without amending the wording…." – see *Muller* at paragraph [83]. The Upper Tribunal had concluded that, on the facts in that case, the relevant legislation did not make sense so that it was appropriate to apply the *Inco* principle. In contrast, in this case, the definition of "alcoholic beverage" in Group 14 did make sense, particularly in the light of the distinction which had been drawn historically between cider and other alcoholic beverages.

Points 7 and 8 – legislative history

100. Seventhly, the legislative history showed that cider had historically been treated differently from other alcoholic beverages. For example:

(1) cider had become subject to excise duty only in 1976. In an exchange recorded in Hansard on 3 May 1932, Sir John Ganzoni had made the point that "cider is untaxed, where…the national drink, beer, is made prohibitive by taxation". Similarly, in an exchange recorded in Hansard on 2 June 1964, Mr Mitchison had described cider as "a simple sort of drink" which was different in character from wine and Mr Bryant Godman Irvine had noted that "cider was subject to Purchase Tax in the soft drinks category";

(2) the rates of excise duty on cider had generally been considerably lower than the rates of excise duty on other alcoholic beverages;

(3) under the Purchase Tax Act 1963, cider had fallen within Group 35 in Part I of Schedule 1 and had been subject to a 15% purchase tax, whereas other alcoholic beverages had been excluded from that group;

(4) so far as VAT was concerned:

(a) because it had not been subject to excise duty in 1972, when the FA 1972 was enacted, cider had fallen within excepted item 4 of Schedule 4 to the FA 1972, whereas other alcoholic beverages had fallen within excepted item 3 of Schedule 4 to the FA 1972;

(b) that distinction had been maintained in the two consolidations of the VAT legislation which had taken place in 1983 and 1994, initially in the terms of excepted item 3 and excepted item 4 of Group 1 of Schedule 5 to the Value Added Tax Act 1983 (the "VATA 1983") and subsequently in the terms of EI 3 and EI 4 in Group 1 of Schedule 8 to the VATA 1994; and

(c) consequently:

(i) cider had not been subject to VAT for the period from 1 April 1973 to 31 March 1974; and

(ii) cider had been subject to VAT thereafter as a result of falling within a different excepted item from the excepted item applicable to other alcoholic beverages.

It followed that the House of Commons, who were presumed to know the existing law when enacting the RR Order – see paragraph 54(8) above – knew that the reason why cider was excluded from Group 1 of Schedule 8 to the VATA was because it fell within EI 4 and not EI 3 and it was perfectly understandable that the House of Commons might have intended to exclude cider from the definition of "alcoholic beverage" in Group 14. It would have been a rational decision for the House of Commons to make.

101. Eighthly, in addition to the fact that the House of Commons was assumed to know the law at the time when it enacted legislation, the authorities showed that, where an enactment cross–referred to a definition in another enactment, that definition must carry the same meaning in the enactment in question – see paragraph 57(1) above. Since it was common ground that, at the time when the RR Order was enacted, cider fell within EI 4 and did not fall within EI 3, it must follow that cider could not fall within the definition of "alcoholic beverage" in Group 14 and the House of Commons must be assumed to have known that when it enacted the RR Order and chose to cross–refer to EI 3 within the definition.

Discussion

Introduction

102. We will not set out the submissions made in relation to this issue on behalf of the Respondents by Mr Elliott and Mr Stevens because we agreed with them and they are reflected in the discussion which follows.

The evidence to be considered

103. The answer to this question necessarily turns initially on whether the high threshold which is implicit in each of the three conditions making up the *Inco* principle is satisfied. For that purpose, it is necessary to determine the intentions of the legislator – in this case the House of Commons – in relation to the provision in question – in this case the RR Order.

104. The next stage is to identify what evidence can be adduced in order to determine the intentions of the legislator in relation to the provision.

105. It is at this point that a small difference becomes apparent between the determination of Issue One and the determination of Issue Two.

106. In considering Issue One, we concluded that all of the secondary material set out in paragraphs 27 to 39 above was admissible in reaching a purposive construction of the RR Order because it was evidence of the background to the RR Order and the circumstances in which the order was laid before the House of Commons. It therefore shed light on the purpose of the House of Commons in enacting the RR Order and had to be taken into account in construing the terms of the order.

107. However, it is plain from the decision in *Enviroco* that a different approach is required in determining Issue Two so far as the Parliamentary Material is concerned.

108. In this case, since the RR Order was not debated in the House of Commons, the Parliamentary Material is somewhat limited in scope. Nevertheless, we agree with Mr Nawbatt that *Enviroco* is authority for the proposition that the Respondents cannot rely on the Parliamentary Material in supporting its submissions in relation to the *Inco* principle unless the three conditions in *Pepper* are satisfied in the case of that material.

109. As regards the application of those tests:

> (1) we do not agree with Mr Nawbatt in relation to the first condition in *Pepper*. In our view, for the reasons set out in paragraph 59(6) above, the failure to include cider in the definition of "alcoholic beverage" in Group 14 was absurd and anomalous; but

(2) as for the third condition in *Pepper*, although the Parliamentary Material, with its references to alcoholic beverages in general, does provide implicit support for the proposition that cider was intended to be included in the definition, we agree with Mr Nawbatt that the terms of the relevant statements fall short of clearly stating that intention expressly.

110. It follows that we agree with Mr Nawbatt that no reliance can be placed on the Parliamentary Material in determining whether the *Inco* principle applies in this case.

111. Having said that, the Parliamentary Material is only a small part of the secondary material which is set out in paragraphs 27 to 39 above. Considerable evidence of the purpose of the legislator in enacting the RR Order can be seen in the secondary material summarised in paragraphs 28 to 32 and 34 to 39 above.

112. We have considered whether we are bound by the decision in *Enviroco* to apply a prescriptive approach similar to the first condition in *Pepper* – to the effect that there must be an ambiguity in the legislation before the relevant secondary material can be taken into account – in determining the admissibility of that other secondary material and have concluded that we are not.

113. In the first place, there is nothing in the decision itself which suggests that the Supreme Court was intending to make a more general point about the nature of the evidence on which reliance could be placed in determining the legislator's purpose. In *Enviroco*, the only secondary material on which reliance was being placed were the drafting history and the Parliamentary statements made in that case. It was inevitable that the Supreme Court, when faced with that material and the precedent of *Pepper*, would find that the material in question would need to satisfy the three conditions in Pepper before it could be adduced. After all, if it is necessary for Parliamentary material to satisfy the three conditions in *Pepper* before it can be taken into account in determining the meaning of a provision before considering any amendment to that provision, then the same must be true for Parliamentary material on which reliance is being placed to establish that the provision in question should be amended.

114. However, the Supreme Court in *Enviroco* was not being asked to consider the admissibility of other secondary material in that context. The ratio of the decision is simply that drafting history and Parliamentary statements on which reliance is being placed in order to establish that the *Inco* principle is satisfied in relation to a provision must meet the same three conditions in *Pepper* as it is necessary to satisfy before reliance can be placed on that material in order to establish the meaning of that provision.

115. In the second place, we do not think that it can be suggested that, by implication, there is required to be some ambiguity in the legislation before reliance can be placed on any secondary material in order to establish that the *Inco* principle is satisfied. The Supreme Court in *Enviroco* was not being that prescriptive. If that had been its intention:

(1) it would surely have said so; and

(2) that would have been contrary to a number of cases relating to the *Inco* principle where reliance has been placed on secondary material without invoking any of the conditions in *Pepper* (including a requirement to the effect that the legislation be ambiguous) – not least in *Inco* itself (at 590G to 591B).

116. In fairness to Mr Nawbatt, we did not understand him to be going so far as to suggest that the decision in *Enviroco* is authority for the proposition that there needs to be an ambiguity in the relevant legislation before any secondary material can be taken into account in determining the potential applicability of the *Inco* principle but, for the above reason, if that had been his submission, we would not have agreed with it.

117. It follows from the above analysis that, in our determination of this issue, we cannot take into account the Parliamentary Material but we can and should take into account the admissible secondary material referred to in paragraphs 28 to 32 and 34 to 39 above.

The Inco principle conditions

118. Turning then to our analysis in relation to the applicability of the *Inco* principle in this case:

(1) we have already said in the context of Issue One that excluding cider from the scope of the definition of "alcoholic beverage" in Group 14 would be anomalous and absurd, given that all other alcoholic beverages fell within it; and

(2) we believe that the admissible secondary material makes it abundantly clear that:

(a) the purpose of the House of Commons, in enacting the RR Order, was clearly that cider would be included within the definition so that the exception to the reduced rate extended to all alcoholic beverages which were subject to excise duty and not just to spirits, beer, wine and made–wine; and

(b) the reason why cider was not included in the definition was that, at the time when the RR Order was enacted, the Respondents and HMT were under the misapprehension that cider fell within EI 3.

119. It follows from this, that, in our view, each of the first two conditions set out by Lord Nicholls in *Inco* is plainly met in relation to the definition of "alcoholic beverage" in this case. In other words, we are abundantly sure that the purpose of the House of Commons as the relevant legislator was to include cider in the definition and that, by inadvertence, the draftsman (HMT) and the House of Commons failed to give effect to that purpose.

120. It also follows from this that the third condition set out by Lord Nicholls in *Inco* is plainly met in relation to the definition. In other words, we are abundantly sure of the substance of the provision which the House of Commons would have enacted had the error in the RR Order been noticed. That is that the relevant provision would have been drafted so as to include cider within the definition, in addition to the other alcoholic beverages falling within EI 3.

121. The facts in this case are clearly distinguishable from those addressed in *Lehman* at paragraphs [117] to [120] where, although the Supreme Court noted the anomaly to which the legislation gave rise, and suspected that an error had been made, it did not have sufficient certainty as to the purpose of Parliament to apply the *Inco* principle in order to amend the relevant legislation. We infer from the words of Lord Neuberger in that case to the effect that "[it] seems likely that there was an oversight on the part of those responsible for revising the 1986 Act [but] … it is not normally appropriate for a judge to rewrite or amend a statutory provision in order to correct what may appear to be an oversight on the part of Parliament" that, whilst the majority suspected that an error had been made, they were not sufficiently certain of Parliament's purpose in that regard to be able to conclude that the first two conditions for the *Inco* principle to apply had been met.

122. That is not the position in the present case, given that the purpose of the House of Commons in enacting the RR Order is abundantly clear even after disregarding the Parliamentary Material.

123. For the above reasons, we think that the three conditions necessary for the *Inco* principle to apply are satisfied in the present case.

The exceptions

124. Moreover, we consider that this is not a case where, notwithstanding the satisfaction of the three conditions, we should find ourselves inhibited from interpreting the provision in

accordance with what we are satisfied was the underlying intention of the legislator – for example because the alteration in language may be too far-reaching, too big, or too much at variance with the language used by the legislature or because the nature of the legislation (as tax legislation) may call for a strict interpretation of the statutory language – see *Inco* at 592H to 593A.

125. We accept the underlying proposition that tax legislation, like penal legislation, has severe consequences for the persons to whom it applies and that therefore a somewhat higher threshold might apply before the *Inco* principle can operate in relation to that legislation – see *Gardiner* at paragraph [49] and Arden LJ in *IDT* at paragraph [110]. Nevertheless, there is not an absolute bar on the application of the *Inco* principle in those circumstances – see *Kelly* at paragraphs [26] and [27] and *Bogdanic* at paragraphs [45] to [51], as mentioned in paragraph 88 above. In our view, where the purpose of a provision is as clear as it was in this case, the relevant threshold for applying the *Inco* principle in the tax context is met.

The manner in which the principle applies

126. It is not entirely clear from *Inco* whether, if the three stages of the test outlined in Inco are satisfied in a particular case and the limited qualification discussed in paragraphs 124 and 125 above is not in point, the relevant court has a duty to correct the obvious error in the legislation or merely has a power to do so.

127. In *Inco* at 592C, Lord Nicholls described the process of applying the *Inco* principle as part of "the role of the courts in construing legislation", which implies that a court has an obligation to correct the error in such circumstances, in the same way as it always has a general obligation to construe the applicable legislation. That is certainly consistent with what was said by Sales J in *Bogdanic* at paragraph [43] – see paragraph 78 above.

128. However, Lord Nicholls then referred, at 592E, to the process as involving the exercise of a "power" by the court.

129. Very little turns on this in the present context because, if we merely have the power to correct the error in the legislation and not a duty to do so, given the high threshold which is implicit in the three stages of the test in *Inco* and our conclusion that the limited qualification discussed in paragraphs 124 and 125 above is not in point, we would consider that we should exercise our discretion to exercise that power.

130. We realise that applying the *Inco* principle has its dangers in terms of a consequent loss of certainty and impact on constitutional principles. As Laws LJ noted in *Kelly* at paragraph [24], "there is a price to be paid in the coin of legal certainty, and in a debasement, however marginal, of the constitutional truth that it is the legislature's will, found from the words of the Act, and not the executive's will, found from the promoter's intentions, that drives the meaning of statute law". Nevertheless, we think that this is an appropriate case in which to apply the *Inco* principle for the reasons described above.

The Appellant's submissions

Introduction

131. At the hearing, Mr Nawbatt provided several reasons why we should not reach the above conclusion.

132. We have outlined those reasons in paragraphs 89 to 101 above. Our views on each of those submissions are set out in the paragraphs which follow.

Point 1 – the non–admissibility of the Parliamentary Material

133. We have already dealt with this point extensively in paragraphs 103 to 117 above. We agree with Mr Nawbatt that we cannot take the Parliamentary Material into account in our

determination of this issue because of the decision in *Enviroco* and we have not taken it into account in reaching the conclusion set out above.

Points 2 and 3 – excessive reliance on admissible secondary materials

134. We agree that, in construing legislation before taking into account the *Inco* principle, the words of the legislation are "the primary source by which meaning is ascertained", as noted by Lord Nicholls in *Spath Holme*, and admissible secondary material must necessarily play a secondary role. However, we can see no reason why, in the context of applying the *Inco* principle, the same primacy necessarily exists. After all, it is implicit in applying the *Inco* principle that something has gone wrong with the drafting of the enactment such that the words used in the enactment do not reflect the purpose of the legislator. It therefore follows that, in an appropriate case – which is to say where the three conditions for the *Inco* principle to apply are plainly satisfied – the language which was actually used in the enactment in question can be outweighed and superseded by the appropriate evidence to the contrary.

135. In determining whether or not that is the case, each situation in which the *Inco* principle falls to be considered will turn on its own facts. In some cases, the application of the principle will be appropriate because a literal reading of the enactment in question gives rise to an absurdity. In other cases, the application of the principle will be appropriate because there will otherwise be an inconsistency between the enactment and the legislation as a whole. Another reason for concluding that the principle should apply is that there is compelling extraneous evidence to demonstrate that the purpose of the legislator was not reflected in the enactment. That compelling extraneous evidence could take the form of admissible secondary material. There is no explicit or implicit limit on the basis for reaching the conclusion that the three conditions for the *Inco* principle to apply have been satisfied.

136. It therefore follows that, in an appropriate case, the content of admissible secondary material can outweigh and supersede the language used in the relevant enactment. Indeed, in *Inco* itself, the House of Lords relied in part on admissible secondary material in reaching its conclusion – see *Inco* at 590G to 591B.

137. It is for this reason that we said in paragraph 79 above that the general principle of statutory construction to the effect that the words in the legislation must always enjoy primacy over admissible secondary material is not consistent with the *Inco* principle. As we have said, this seems to us to flow inexorably from the very principle itself but support for this proposition may be found in the passage from Lady Arden JSC from *R(O)* set out in paragraph 54(12) above. In that passage, Lady Arden JSC was not referring to the role to be played by admissible secondary material in the application of the *Inco* principle as such but simply to the role played by admissible secondary material when applying ordinary principles of statutory construction. However, it seems to us that precisely the same point can be made about the impact of admissible secondary material in the context of considering the potential application of the *Inco* principle.

138. It is a matter for the relevant court or tribunal in each case to determine how much weight should be accorded to admissible secondary material when considering whether or not to apply the *Inco* principle but the key point is that there is nothing in the authorities which supports a prescriptive approach to determining purpose when that involves the use of admissible secondary material.

139. We would add that:

(1) in *Humber Bridge*, the Court of Appeal placed considerable reliance on secondary material – in each case, the explanatory note, the inspector's report and the decision letter of the Secretary of State – in concluding that the toll should apply to large buses despite

the fact that the language used in the operative provisions in each order made no mention of large buses. Indeed, at paragraph [38], Clarke LJ said that, if anything, he would have made more use of the explanatory note to apply the principle than had the judge in that case; and

(2) in *Pollen*, the Court of Appeal applied the *Inco* principle simply on the basis that the relevant provision, as drafted, gave rise to an anomaly or absurdity. In reaching that conclusion, the Court of Appeal did not have recourse to admissible secondary material. We conclude from the fact that the *Inco* principle can apply in a case where the relevant provision gives rise to an anomaly or absurdity without being supported by any admissible secondary material that there cannot be a bar on the application of the principle where the relevant provision gives rise to an anomaly or absurdity and the application of the *Inco* principle is supported by admissible secondary material.

140. As regards Mr Nawbatt's specific point in relation to the weight to be attached to the EOTHO Direction, we recognise the limitations mentioned in paragraph 95 above. However, against that should be set the fact that:

(1) the EOTHO Scheme was announced alongside the reduced rate of VAT for items falling within Group 14 as part of the same package of measures intended to stimulate the hospitality sector during the Coronavirus pandemic. We therefore consider that the approach to alcoholic beverages that was adopted in the EOTHO Direction does inevitably shed some light on the purpose underlying the approach to alcoholic beverages in the RR Order;

(2) although neither the EOTHO Direction nor the original version of the guidance on that direction contained a definition of the term "non–alcoholic drink", the guidance was updated on 30 July 2020 to make it clear that the term included all non–alcoholic beverages with an ABV of more than 1.2%. That update was made only two weeks after the RR Order was laid before the House of Commons and it is reasonable to place some weight on that update given the proximity of the two events; and

(3) in any event, the EOTHO Scheme material is just part of the admissible secondary material and, whilst it would not have been sufficient, by itself, to establish that the conditions for the *Inco* principle to apply have been satisfied in this case, it is nevertheless part of the whole and supplements the other admissible secondary material.

Point 4 – insertion required too big or the subject matter of the provision calls for strict interpretation

141. In making this point, Mr Nawbatt relied on the qualification set out at in Inco at 592H to 593A to the effect that the principle might not apply in certain cases even though all three of the conditions necessary for the *Inco* principle to apply have been met.

142. For the reasons set out in paragraph 125 above, we consider that, as was the case in *Inco* itself, that qualification is not applicable in the present instance.

143. We would add that, in *Bogdanic*, Sales J placed considerable weight on the fact that it would be appropriate to apply the *Inco* principle where the "legislative instrument has a clear, objectively assessed meaning, having regard to all the circumstances and all indicators of the legislator's intention available to the person subject to the law (assisted as necessary by his legal advisers), and that meaning is contrary to the literal meaning of the text of the instrument" – see *Bogdanic* at paragraphs [42] and [52i)]. In this case, despite the literal meaning of the definition of "alcoholic beverage" in Group 14, it would have been apparent to the persons to whom the RR Order applied, including the Appellant, that all alcoholic beverages (including cider) were intended to fall within the definition and therefore outside the scope of the reduced rate. Indeed, the fact

that the Appellant accounted for VAT at the standard rate in respect of cider and applied only belatedly for a repayment strongly supports that proposition.

144. At the hearing, Mr Nawbatt said that the intended scope of the exclusion for alcoholic beverages in Group 14 was not clear because much of the admissible secondary material suggested that all alcoholic beverages, including those with an ABV of no more than 1.2%, were excluded from the reduced rate. He said that that was why the Appellant had initially accounted for VAT at the standard rate on low alcohol beverages and then submitted the low alcohol ECN on 7 April 2022 – see paragraph 40(1) above. He pointed to the questions raised with the Respondents by the ATT referred to in paragraph 40(2) above, which showed that the ATT were also under the impression that low alcohol beverages were excluded from the reduced rate.

145. We agree that the fact that low alcohol beverages were intended to fall within the reduced rate was unclear from much of the admissible secondary material. However, in our view, that does not support the Appellant's case because:

(1) in this context, we are not addressing the question of whether the Appellant would have understood that low alcohol beverages qualified for the reduced rate. Instead, we are addressing the question of whether the Appellant would have understood that cider was precluded from qualifying for the reduced rate; and

(2) regardless of the fact that the Appellant might have been under a misapprehension as to whether the scope of the exclusion for alcoholic beverages in Group 14 included low alcohol beverages, there can be no doubt that the Appellant understood that cider was intended to fall within the exclusion, and believed that it fell within the exclusion, as drafted.

Point 5 – the arbitrary nature of the VAT legislation

146. Whilst it is true that the VAT legislation does often "[treat] different cases differently without a clear principled reason for doing so" – see Lord Leggatt in *News Corp* at paragraph [113] – that is not relevant to the question of whether the *Inco* principle should apply in this case. Insofar as Mr Nawbatt sought to argue that that was the case, we do not agree.

147. First, when it comes to applying the statutory principles of construction, including the *Inco* principle, there is nothing exceptional about VAT per se. The fact that the provisions of VAT law can sometimes appear to lack an overall logic or coherence and thus limit the scope for reasoning by analogy – which is what Lord Leggatt was saying in that paragraph of his decision – is not the same as saying that the ordinary principles of purposive statutory construction somehow do not apply to provisions in the VAT legislation.

148. As Lord Briggs JSC made clear in *Balhousie* at paragraph [24], those ordinary principles of statutory construction apply just as readily in the context of VAT as in other contexts. He said that:

""The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically." Per Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454, para 35…It is nothing to the point that the present case is not about tax avoidance, or that it is about VAT rather than taxes on income or gains. This principle of construction is of general effect"

and that was the approach adopted by the other four Supreme Court Judges in *News Corp* – see *News Corp* at paragraphs [27] and [44] to [47].

149. Secondly, the answer to the question of whether the *Inco* principle should apply in this case does not depend on whether the House of Commons might have wished to treat cider

differently from other alcoholic beverages. Instead, it depends on whether the House of Commons did wish to treat cider differently from other alcoholic beverages. Those two are not the same. Regardless of whether the House of Commons might conceivably have wished to treat cider differently from other alcoholic beverages, there can be no doubt that the House of Commons did not actually wish to treat cider differently from other alcoholic beverages. That is apparent from the admissible secondary material set out in paragraphs 28 to 32 and 34 to 39 above.

150. It is worth adding that, even though the answer to the question of whether the *Inco* principle should apply in this case depends on whether the House of Commons actually wished to treat cider differently from other alcoholic beverages, and does not depend on what the House of Commons might have wished in that respect, our conclusion on the relevant question is reinforced by the fact that:

(1) the public health reason for excluding alcoholic beverages from the scope of the reduced rate – which was articulated by the Chancellor to the Treasury Committee on 15 July 2020 as referred to in paragraph 33 above – applies just as readily to cider as it does to other alcoholic beverages;

(2) at the time when the RR Order was enacted, cider had been subject to VAT at the standard rate in the same way as other alcoholic beverages since 1974 and had also been subject to excise duty since 1976;

(3) there was no mention in any of the admissible secondary material of a desire to treat cider any differently from other alcoholic beverages when it came to the reduced rate under Group 14; and

(4) there was no policy reason to make that distinction – see *Bogdanic* at paragraph [52ii)] and Pollen at paragraph [20] to [23].

Point 6 – the definition made sense as it stood

151. Whilst it is true that, in *Muller* at paragraph [83], the Upper Tribunal prefaced its analysis in relation to the *Inco* principle by asking itself "whether the language works without amending the wording", we do not think that, in so doing, the Upper Tribunal was saying that there was an additional test – beyond the three conditions set out in *Inco* itself – which needed to be satisfied in order for the *Inco* principle to apply. Indeed, there is no support for that proposition in any of the other authorities. Instead, it was simply pointing out, as a prelude to its consideration of the *Inco* principle in that case, that, on the facts in that case, the legislation in question did not make sense as drafted. The fact that it did not make sense as drafted was inevitably a relevant factor for the Upper Tribunal to bear in mind when it addressed the potential application of the *Inco* principle – as Sales J did in *Bogdanic* at paragraph [52ii)] – but the Upper Tribunal was not saying that that was a self–standing additional condition to be satisfied before the *Inco* principle could be applied.

152. We therefore consider that this is not a question which needs to be answered in the negative before the *Inco* principle can apply.

153. We would add that, in *Pollen*, the language in the provision in question certainly "worked" without amending the legislation. It was just that, in the opinion of the Court of Appeal, it "worked" to produce an anomalous and absurd result so that the *Inco* principle was applied – see *Pollen* at paragraphs [45] to [49]. In this case, the definition of "alcoholic beverage" "works" to the same extent. The distinction which it creates between cider and other alcoholic beverages is perfectly clear from the drafting but there is no intelligible or rational basis for that distinction.

Points 7 and 8 – legislative history

154. Whilst we agree that cider was historically treated in a different manner from spirits, beer, wine and made–wine – which is why the drafting lacuna in EI 3 exists – cider had been subject to both excise duty and VAT for approximately 50 years at the time when the RR Order was laid before the House of Commons. Thus, there is no reason to think that the House of Commons would have wished to exclude cider from the definition of "alcoholic beverage" to which the reduced rate did not apply when that definition – and hence that exclusion – included all other alcoholic beverages.

155. Whilst it is true that it is a general principle of statutory construction that the legislator should be assumed to have known the existing law at the time when it legislated, that presumption is rebuttable and, in those cases in which the *Inco* principle has been applied, it has repeatedly been rebutted. In many of those cases, the error which has been identified and rectified using the *Inco* principle has stemmed from an apparent failure on the part of the legislator to understand the legal context in which the legislation in question had been enacted. For example:

> (1) in *Inco*, the error which was rectified arose because, in making an amendment to the legislation in question, Parliament apparently failed to understand the interaction between that legislation and earlier legislation, with the result that the amendment had the effect of barring an appeal to the Court of Appeal from any decision under the relevant part of the earlier legislation and not simply carrying forward into the legislation in question the restrictions on appeal contained in that part;
>
> (2) in *Bogdanic*, the error which was rectified arose because, in making the commencement order, the Secretary of State apparently failed to understand that the carriers liability regime included penalties for evading immigration control in a prescribed immigration control zone as well as on UK territory itself; and
>
> (3) in *Kelly*, the error which was rectified arose because, in dealing with the transition from one regime which dealt with the release of prisoners to another such regime, Parliament apparently failed to understand that each prisoner's right to be released unconditionally and to have his licence terminated once he had served three–quarters of his sentence remained in place despite the new regime's entering into force.

156. It follows that the assumption that Parliament would have known that EI 3 did not include cider when it chose to enact a definition of "alcoholic beverage" which cross–referred to EI 3 is rebuttable and, on the facts of this case, is rebutted.

Conclusion

157. For the above reasons, we have concluded that, based on the application of the *Inco* principle, the definition of "alcoholic beverage" in Group 14 should be treated as including cider as well as the other alcoholic beverages referred to in EI 3. We therefore determine Issue Two in favour of the Respondents.

CONCLUSION IN RELATION TO THE UK DOMESTIC LAW ISSUES

158. The conclusion we have reached in relation to Issue Two is sufficient to determine the preliminary issue – and, hence, this appeal – in favour of the Respondents. The appeal is accordingly dismissed.

159. However, since the parties made extensive submissions to us in relation to the EU Law Issue, we set out below the submissions which were made, and our conclusions in relation to, that issue.

INTRODUCTION TO THE EU LAW ISSUE – THE APPLICATION OF EU LAW AND THE PRINCIPLES OF EU LAW

160. While the UK remained a member of the EU, EU law in EU Treaties (as defined in Section 1(2) of the European Communities Act 1972 (the "ECA 1972")) passed into UK law by the medium of Section 2(1) of the ECA 1972 – see *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 ("*Miller*") at paragraph [19]. This included the general principles of EU law.

161. A significant general principle of EU law was the principle of "fiscal neutrality". This is "a fundamental principle of the common system of VAT" – see *Marks & Spencer plc v Commissioners of Customs and Excise* (C–309/06) – and an expression of the general principle of equal treatment in the area of VAT – see *NCC Construction Danmark A/S v Skatteministeriet* (C-174/08) [2010] STC 532 at [40] to [44]). It precludes treating similar goods or services, which are thus in competition with each other, differently for VAT purposes – see *Commission v France* (C–481/98) at paragraph [22]. The purpose of the principle is to ensure that the incidence and rate of VAT does not influence decisions by consumers in the market.

162. In addition, the UK courts were obliged to "interpret all domestic legislation, if at all possible, so as to comply with EU law" – see *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135 ("*Marleasing*") at paragraph [8], *IDT* at paragraphs [108] to [111], and *Miller* at paragraph [64]). This is known as the "*Marleasing* principle" or the doctrine of "conforming interpretation".

163. It follows from the above that, while the UK remained a member of the EU, VAT legislation had to be interpreted in conformity with

(1) the principle of "fiscal neutrality"; and

(2) the principle of "conforming interpretation".

164. The ECA 1972 was repealed from 11.00 pm on 31 January 2020 when the UK left the EU by Section 1 of the European Union (Withdrawal) Act 2018 (the "EUWA 2018"). However, it is common ground that, for the reasons set out in Appendix 2 to this decision, EU law and the principles of EU law continued to apply in relation to the provision of UK law which is at issue in the present decision throughout the Relevant Period.

165. This gives rise to the EU Law Issue which we described briefly in paragraphs 49 to 52 above.

THE EU LAW ISSUE

The relevant authorities

166. The relevant CJEU decisions in this area establish the following principles:

(1) a Member State making use of the permission in the PVD to charge a reduced rate of VAT on supplies described in Annex III is entitled to apply the reduced rate to only certain aspects of a category of supply falling within a paragraph of Annex III (as distinct from the whole category of supply in question) as long as two conditions are satisfied:

(a) first, that the reduced rate is applied to a concrete and specific aspect of the category of supply in question (the "First Condition"); and

(b) secondly, that doing so does not give rise to a breach of the principle of fiscal neutrality (the "Second Condition")

– see *Commission v France* (C–94/09) [2012] STC 573 ("*France*") at paragraphs [25] and [26] and *Pro Med Logistik GmbH v Finanzamt Dresden–Süd and Eckard Pngratz v*

Finanzamt Würzburg mit Außenstelle Ochsenfurt (Joined cases C454/12 and C–455/12) ("*Pro Med*");

(2) as regards the First Condition, it is necessary to consider whether the specified supply is identifiable separately from other supplies in the relevant category – see *France* at paragraphs [35] to [39] and *Pro Med* at paragraph [47];

(3) as regards the Second Condition, it is necessary to consider whether the specified supply is similar to another supply which is subject to the standard rate. In doing so, "account must be taken of the point of view of a typical consumer … avoiding artificial distinctions based on insignificant differences. Two supplies are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one service or the other" – see *The Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc* (Joined cases C–259/10 and C–260/10) ("*Rank*") at paragraphs [43] and [44];

(4) in considering this question:

(a) account should not be taken of artificial distinctions based on insignificant differences – see *Rank* at paragraph [43] and *Pro Med* at paragraphs [52] and [53];

(b) differences in the legal systems or regulatory frameworks which are applicable to each supply will generally not be relevant to the comparability of the two supplies but it can be in exceptional cases – see *Rank* at paragraphs [45] to [50] and *Pro Med* at paragraphs [56] to [59]; and

(c) account should be taken of:

(i) the matters which are liable to have a considerable influence on the decision of the average consumer to choose one supply over the other – see *Rank* at paragraphs [56] and [57] and *Pro Med* at paragraph [54]; and

(ii) the context in which in which each service is supplied – see *Pro Med* at paragraph [55]; and

(5) in considering this question in a case where the supplies which are being compared are both beverages, the court should take account of:

(a) the ingredients used to make each beverage;

(b) the consistency and external appearance of each beverage;

(c) the taste and smell of each beverage;

(d) the temperature at which each beverage is supplied;

(e) the context in which each beverage is supplied;

(f) whether or not the typical consumer might order additional ingredients with one beverage but not the other, thereby impacting on one or more of the features referred to above;

(g) the consumption need met by each beverage; and

(h) any matter which might have a decisive influence on the choice of the consumer to purchase one or other of the beverages

– see *YD v Dyrektor Krajowej Informacji Skarbowej, interested party Rzecznik Malych I Średnich Przedsiębiorców* (Case C–146/22) ("*YD*") at paragraphs [45] to [54].

Discussion

Introduction – the questions to be addressed

167. It was common ground that, if the Appellant was entitled to succeed in relation to both of the UK Domestic Law Issues, with the result that, as a matter of the UK domestic law principles of statutory construction, the definition of "alcoholic beverage" in Group 14 was properly to be construed as not including cider, then:

(1) it was necessary to consider whether the failure to include cider within the definition was compliant with the PVD because the doctrine of "conforming interpretation" described in *Marleasing*, *IDT* and *Miller* showed that the UK domestic legislation had to be interpreted in conformity with the PVD; and

(2) in order for the failure to include cider within the definition to be compliant with the PVD, the selective application of the reduced rate of VAT to cider (and not other alcoholic beverages) needed to meet:

(a) the First Condition – in other words, cider needed to be a "concrete and specific aspect" of the category of supplies set out in paragraph (12a) of Annex III; and

(b) the Second Condition – in other words, the application of the reduced rate of VAT and not other alcoholic beverages) needed not to give rise to a breach of the principle of fiscal neutrality.

168. The parties disagreed on whether each of the First Condition and the Second Condition was met in this case. However, it was common ground that, if either or both of them was or were not met, then:

(1) it would be necessary to bring the terms of the UK legislation into line with the PVD through the doctrine of conforming interpretation (if that was possible) or disapply the relevant part of the UK legislation entirely to the extent that it was incompatible with the PVD – see *Marleasing* at paragraph [8], *IDT* at paragraphs [49], [68], [73] to [92] and [108] to [111], *Vodafone 2 v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWCA Civ 446 ("*Vodafone 2*") at paragraphs [37] to [39] and *The Trustees of the Panico Panayi Accumulation and Maintenance Settlements Numbers 1 to 4 and Redevco Properties UK1 Limited v The Commissioners for His Majesty's Revenue and Customs* [2024] UKUT 00319 (TCC) ("*Panayi*") at paragraphs [51] to [53]; and

(2) conforming interpretation "[permitted] departure from the strict and literal application of the words which the legislature has elected to use" and "[permitted] the implication of words necessary to comply" with the PVD as long as the meaning went "with the grain" of the provision of the PVD in question and was compatible with the underlying thrust of the provision (see *Vodafone 2* at paragraph [38]). As the Upper Tribunal noted in *Panayi* at paragraph [58(2)], "an interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment".

169. Given the above, the parties were agreed that the EU Law Issue gave rise to four distinct questions, as follows:

(1) did the inclusion of cider within the scope of the reduced rate when other alcoholic beverages were excluded satisfy the First Condition – to the effect that only concrete and specific examples of the category of supplies set out in a paragraph of Annex III can be specified in the national legislation?

(2) as regards the Second Condition– the need for any selective application of a category in Annex III not to breach the principle of fiscal neutrality – did the Appellant have the burden of proving that no such breach arose or did the Respondents have the burden of proving that such breach arose?

(3) in the light of the answer to the question raised in paragraph 169(2) above, had the party with the burden of proof discharged that burden on the balance of probabilities? and

(4) assuming that, on the balance of probabilities, either or both of the First Condition and the Second Condition had not been satisfied, how should the doctrine of conforming interpretation be applied to the UK domestic law provision – which is to say, Group 14?

170. Before summarising the parties' submissions and our conclusions in relation to each of the above questions, we should make it clear that the discussion which follows proceeds on the assumption that, contrary to the conclusion which we have reached following our consideration of the UK Domestic Law Issues, the UK domestic legislation should properly be construed as having failed to include cider in the definition of "alcoholic beverage" and that it is necessary for us to consider whether the failure of the UK to include cider within that definition was compliant with EU law and the principles of EU law.

Question (1) - the first condition – the application of the reduced rate only to concrete and specific aspects of paragraph (12a)

The submissions of the parties

The Respondents' submissions

171. As regards the First Condition, Mr Elliott began by saying that he accepted the general proposition that a Member State enacting national legislation to give effect to one of the paragraphs of Annex III would be able to meet this condition as long as the supplies to which it chose to apply the reduced rate were concrete and specific examples of the category of supplies described in the relevant paragraph of Annex III. That much was apparent from the various authorities cited above – see, for example, *Pro Med* at paragraph [43].

172. However, he submitted that, in relation to paragraph (12a) specifically, the language in the paragraph established only three concrete and specific examples of supplies of beverages which could qualify for the reduced rate – namely:

(1) supplies of all beverages;

(2) supplies of all alcoholic beverages; and

(3) supplies of all non–alcoholic beverages.

173. Consequently, national legislation which provided for the reduced rate to apply to only some alcoholic beverages but not others, or only some non–alcoholic beverages but not others, did not meet the First Condition.

174. This construction was supported by:

(1) the use of the parenthetical "(alcoholic or non–alcoholic)" within paragraph (12a) itself. If the intention was that the reduced rate could apply to some alcoholic beverages but not others and/or some non–alcoholic beverages but not others, then the words in brackets would not have been necessary; and

(2) the language used in recital (3) of the Reduced Rate Directive, which was the directive that introduced paragraph (12a) into Annex III. This recital stipulated that a Member State "may include or exclude the supply of alcoholic and/or non–alcoholic beverages when applying a reduced rate to the supply of restaurant and catering services".

It therefore suggested that only an all or nothing approach in relation to each category of beverage was permitted.

The Appellant's submissions

175. Mr Schofield made a number of points in response to this.

176. First, he said that the background to the enactment of the Reduced Rate Directive (which had brought paragraph (12a) into existence) did not support the Respondents' proposed construction.

177. As it was originally drafted in the proposal to enact the Reduced Rate Directive, paragraph (12a) referred to the "supply of restaurant and catering services excluding the supply of alcoholic beverages". This was intended to ensure consistency between the scope of paragraph (12a) (which related to supplies of food and beverages in the course of restaurant and catering services) and the scope of paragraph (1) of Annex III, which related to supplies of food and beverages other than in the course of such services. That much was clear from the explanatory memorandum accompanying the draft – see paragraph 41(13)(e) above.

178. Paragraph (1) referred to "[foodstuffs] (including beverages but excluding alcoholic beverages) for human and animal consumption; live animals, seeds, plants and ingredients normally intended for use in the preparation of foodstuffs; products normally used to supplement foodstuffs or as a substitute for foodstuffs". It was common ground that paragraph (1) was not relevant in the present case because the Appellant's supplies of cider took place not as supplies of goods alone but in the course of, and as a component of, supplies of restaurant and catering services.

179. Consistent with the approach described in paragraph 177 above, recital (5) in the original draft of the Reduced Rate Directive specified that:

"Since alcoholic beverages are already excluded from the category of foodstuffs, allowing reduced VAT rates for alcoholic beverages under the coverage of restaurant and catering services would create inconsistencies and would offer possibilities of circumvention. It is therefore appropriate to exclude such beverages from that category."

180. However, the original language in paragraph (12a) had been changed prior to the enactment of the Reduced Rate Directive so that it now took the final form set out in paragraph 13 above. As such, the final form made provision for the exclusion of both alcoholic and non–alcoholic beverages and recital (3) to the Reduced Rate Directive explained that:

"(3) With respect to the supply of alcoholic and/or non-alcoholic beverages in the framework of restaurant and catering services, it may be justified to provide a different treatment of those beverages from the treatment provided for in the framework of the supply of foodstuffs; it is appropriate to provide explicitly that a Member State may include or exclude the supply of alcoholic and/or non-alcoholic beverages when applying a reduced rate to the supply of restaurant and catering services referred to in Annex III of Directive 2006/112/EC."

181. It could be seen that the original draft of paragraph (12a) was consistent with the terms of paragraph (1) of Annex III in that it:

(1) did not allow the reduced rate to be applied to any alcoholic beverage; and

(2) allowed the reduced rate to be applied to non–alcoholic beverages

but required that, if a Member State wished to introduce a reduced rate for supplies of restaurant and catering services, it had to include all non–alcoholic beverages within that reduced rate. There was no ability to exclude any non–alcoholic beverage from the scope of the reduced rate.

182. However, the terms of recital (3) of the Reduced Rate Directive demonstrated that the EU Council had ultimately decided to provide for a different (and more permissive) regime in the context of restaurant and catering services from the one applying under paragraph (1) of Annex III to supplies of food and beverages outside that context. Member States were to be permitted to "include or exclude the supply of alcoholic and/or non–alcoholic beverages when applying a reduced rate to the supply of restaurant and catering services".

183. The intention underlying the change was clearly to provide greater flexibility to Member States in the way in which they chose to apply the reduced rate to supplies of beverages in the course of restaurant and catering services. It was intended that a Member State which chose to apply that reduced rate should have the flexibility to exclude any beverage, whether alcoholic or non–alcoholic, from the scope of the reduced rate.

184. If the Respondents' proposed construction of paragraph (12a) were to be correct, then the EU Council would simply have moved from one inflexible regime to another. Moreover, whereas, under the original proposal, a Member State had had no ability to exclude any non–alcoholic beverage from the reduced rate which it introduced, the Council would now have created a situation where that Member State was unable to exclude any non–alcoholic drink from that scope unless it also excluded all non–alcoholic drinks. That inflexibility was directly contrary to the purpose underlying the change made to the original draft. It was not consistent with the stated purpose of the Reduced Rate Directive, which was to encourage consumers to go to restaurants – see recital (2) to the directive – and it was also inconsistent with the terms of paragraph (1) of Annex III, which allowed a Member State to apply the reduced rate to some non–alcoholic beverages but not others.

185. Secondly, Mr Schofield pointed out that, in enacting their own national legislation pursuant to paragraph (12a), two other Member States – Poland and Bulgaria – had adopted an approach which was consistent with the Appellant's proposed construction of the paragraph. Poland had excluded certain non–alcoholic beverages (carbonated drinks, mineral waters and coffee or tea infusions) from its reduced rate for restaurant and catering services – see the CJEU decision in *J.K. v Dyrektor Izby Administracji Skarbowej w Katowicach* (C – 703/19) ("*JK*") at paragraph [12] – and Bulgaria had included some but not all alcoholic drinks in its reduced rate for restaurant and catering services – see the summary of the relevant measure in the "EU PolicyWatch" prepared by the European Foundation for the Improvement of Living and Working Conditions.

186. Thirdly, Mr Schofield said that the terms of paragraph (12a) in the other language versions of the Reduced Rate Directive were consistent with the Appellant's proposed construction. They were all worded so as to allow the reduced rate to apply to any beverage, "whether alcoholic or not". For example:

(1) the Spanish text provided for "Servicios de restauración y catering, con posibilidad de excluir la entrega de bebidas (alcohólicas o no)";

(2) the Portuguese text provided for "Serviços de restauração e de catering, sendo possível excluir o fornecimento de bebidas (alcoólicas e/ou não alcoólicas)";

(3) the Polish text provided for "usługi restauracyjne i cateringowe, z możliwością wykluczenia dostawy napojów (alkoholowych lub bezalkoholowych)"; and

(4) the Italian text provided for "servizi di ristorazione e catering, con la possibilità di escludere la fornitura di bevande (alcoliche e/o non alcoliche)".

187. The language used in those texts was important because the authorities showed that the need for uniformity across the EU meant that one language version could not be the sole basis for interpreting an EU measure – see, for example, *Maria Julia Zurita Garcia and Aurelio*

Choque Cabrera v Delegado del Gobierno en la Región de Murcia (Joint cases C –261/08 and C – 348/08) at paragraphs [54] and [55].

188. Finally, Mr Schofield said that:

(1) there were other examples in the UK VAT legislation of circumstances where the UK had chosen to apply the reduced rate to a narrower category of supplies than the one permitted by the terms of the applicable paragraph in Annex III. For instance:

(a) paragraph (5) of Annex III allowed a Member State to apply the reduced rate to the "transport of passengers and their accompanying luggage" and the UK had chosen to limit the reduced rate in question in Group 13 of Schedule 7A to the VATA 1994 to the "transport of passengers by means of a cable-suspended chair, bar, gondola or similar vehicle designed or adapted to carry not more than 9 passengers", subject to certain specified exceptions;

(b) paragraph (3) of Annex III allowed a Member State to apply the reduced rate to "pharmaceutical products of a kind normally used for health care, prevention of illnesses and as treatment for medical and veterinary purposes, including products used for contraception and sanitary protection" and the UK had chosen to limit the reduced rate in question (insofar as it applied to women's sanitary products) in Group 4 of Schedule 7A to the VATA 1994 so that it included, for example, panty liners (other than panty liners designed primarily for use as incontinence products) and excluded protective briefs and other forms of clothing; and

(c) paragraph (10) of Annex III allowed a Member State to apply the reduced rate to the "provision, construction, renovation and alteration of housing, as part of a social policy" and the UK had chosen to limit the reduced rate in question (insofar as it applied to insulation) in Group 2 of Schedule 7A to the VATA 1994 so that it included "insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings" and thus did not include insulated roof panels – see *Greenspace* at paragraphs [45] and [46]; and

(2) in *Pro Med*, Germany had chosen to apply the reduced rate permitted by paragraph (5) of Annex III to certain specified journeys by rail, trolleybus, licensed motor vehicle, taxi and ferry – see *Pro Med* at paragraph [11] – notwithstanding the broad terms of paragraph (5) itself, as noted in paragraph 188(1)(a) above.

189. Although the Respondents had said that their point in relation to the First Condition was specifically confined to the language used in paragraph (12a) itself and that they accepted the general proposition that a Member State was entitled to limit the scope of the national legislation conferring a reduced rate in choosing to enact national legislation pursuant to one of the other paragraphs in Annex III, the key point was that, in none of the examples set out in paragraph 188 above was the boundary chosen by the relevant Member State in adopting the reduced rate in question in its national legislation pre–figured in the drafting of the applicable paragraph of Annex III. There was no need to do that because it was simply understood that each Member State could choose for policy reasons to adopt a particular boundary as long as the examples of supplies which fell within that boundary were concrete and specific and setting the boundary in that way did not infringe the principle of fiscal neutrality.

Conclusion

190. In relation to this question, we should start by saying that, although the parties appeared to be in agreement that the issue between them pertained to the First Condition – which is to say whether cider was a concrete and specific example of the category of supplies set out in paragraph (12a) – we are not at all sure from their respective submissions that that was actually

the point on which they were at odds. After all, neither party seemed to be in any doubt about how supplies of cider were to be identified. There was nothing about those supplies which lacked concreteness or specificity. They were no less concrete or specific than the supplies of taxi services in *Pro Med* or the transportation of bodies by approved service providers in *France*. Following the phraseology of the CJEU in *Pro Med* at paragraph [47], they were easily "identifiable separately from the other services in [paragraph (12a)]".

191. Instead, we think that the issue between them was not whether supplies of cider were a concrete and specific example of the general category of supplies falling within paragraph (12a) but rather whether the terms of paragraph (12a) could properly be construed as permitting a Member State to omit cider from the general exclusion of alcoholic beverages from the reduced rate.

192. This may be a distinction without a meaningful difference but we do think that the two issues are slightly different. Whilst we agree that we need to consider whether the omission of cider from the definition of "alcoholic beverage" in Group 14 was compliant with paragraph (12a), we do not think that that is quite the same question as asking whether cider was a concrete and specific example of the general category of supplies described in paragraph (12a). In our view, the latter question must plainly be answered in the affirmative. There can be no doubt that supplies of cider were easily identifiable and distinguishable from the other supplies which are mentioned in paragraph (12a) and we did not understand either party to be disagreeing with that proposition.

193. Turning then to the quite different, but nevertheless important, question of whether the inclusion of cider within the scope of the reduced rate when other alcoholic beverages were excluded was permitted by the terms of paragraph (12a), we are in agreement with the Respondents that it was not. In our view, the better construction of the language used in paragraph (12a) itself, particularly when it is read alongside the terms of recital (3) in the Reduced Rate Directive, which uses the term "alcoholic and/or non–alcoholic beverages" twice, is that a Member State which chose to make use of the derogation in paragraph (12a) was entitled to exclude from the reduced rate either:

(1) all beverages; or

(2) all alcoholic beverages; or

(3) all non–alcoholic beverages.

It was not entitled to exclude some but not all of the types of beverage falling in a particular class whilst leaving other beverages in that class within the reduced rate.

194. We say that because of the parenthetical phrase "(alcoholic and/or non–alcoholic)" which appears in brackets immediately before the word "beverages". If the Appellant's construction were to be correct, there would have been no need for that phrase to be included at all. The paragraph would simply have said "it being possible to exclude the supply of beverages" or "it being possible to exclude the supply of any beverage".

195. There is also the practical consideration that, were a Member State to be allowed to pick and choose between beverages within a particular class as to which should be subject to the reduced rate and which should remain subject to the standard rate, the application of the VAT regime to supplies of beverages in the course of restaurant and catering services within that Member State would be incredibly complicated. It would be difficult for taxpayers to operate and for the tax authority of that Member State to enforce.

196. We accept that the language used in the versions of the Reduced Rate Directive mentioned by Mr Schofield – the Spanish, Portuguese, Polish and Italian versions – do not

make this interpretation as clear as does the English version. However, even in those cases, the relevant version in each case refers to "beverages" and then adds the parenthetical "alcoholic or non–alcoholic". If the intention had been that a Member State could apply the reduced rate to any particular beverage it wished, without extending the reduced rate to other beverages in the same class, there would have been no need to add the parenthetical phrase. The relevant directive would simply have referred to "beverages" or "any beverage". Accordingly, when those versions of the Reduced Rate Directive are read in tandem with the English version – and we agree that each language version is required to carry the same meaning – we think that the same interpretation applies.

197. As for the other submissions which were made by Mr Schofield on this question:

(1) we are not persuaded that the changes which were made to the draft of what became the Reduced Rate Directive between the publication of that draft and the publication of the final version of the directive shed any light on this issue.

The fact that the EU Council decided to allow Member States to extend the reduced rate to alcoholic beverages when it had previously decided that paragraph (12a) should follow paragraph (1) in precluding alcoholic beverages from qualifying for the reduced rate says nothing about whether, in doing so, the EU Council intended the scope of that relaxation to be limited in its application to all alcoholic beverages or only some of them.

Similarly, the fact that the EU Council moved from a mooted regime under which there could be no exclusion from the reduced rate for non–alcoholic beverages to one where there could be sheds no light on whether the EU Council, in so doing, wished to make provision for all non–alcoholic beverages to be capable of being excluded from the regime or for some but not all non–alcoholic beverages to be capable of being excluded from the regime.

Finally, we were not provided with detailed submissions as to whether the terms of paragraph (1) of Annex III, with its reference to "beverages but excluding alcoholic beverages" mean that a Member State is free to apply the reduced rate to one non–alcoholic beverage but not others when beverages are supplied outside the course of restaurant and catering services but, even if they do, it is clear that:

(a) paragraph (1) is dealing with quite different circumstances from those in paragraph (12a); and

(b) it is common ground that, in the context of alcoholic beverages, there is a clear difference between the two paragraphs.

We would add that, if Mr Schofield is correct in saying that the phrase "beverages but excluding alcoholic beverages" used in paragraph (1) enables a Member State to apply the reduced rate to some non–alcoholic beverages but not others in cases where beverages are supplied other than in the course of restaurant and catering services, that tends to support the conclusion we have reached in paragraphs 193 to 196 above, to the effect that the parenthetical "alcoholic and/or non–alcoholic" before (or after) the word "beverages" in paragraph (12a) was intended to limit the scope of the derogation so that it applied on an all–or–nothing basis to each category of beverages or to all beverages;

(2) the fact that Poland and Bulgaria have chosen to implement paragraph (12a) in the way they have is ultimately not determinative of this question. It is perfectly possible – and, on the basis of the conclusion set out above, we would say that it is in fact the case – that those two Member States have acted outside the scope of paragraph (12a) in the manner in which they have transposed the paragraph into their national law. We should add that the validity of Polish law in this respect was not at issue in the proceedings in

JK. That case related to the unrelated question of whether ready–to–eat meals fell within the scope of "restaurant and catering services". It therefore cannot be said that the decision demonstrates the CJEU's endorsement of the manner in which Poland had dealt with the present issue; and

(3) the examples of circumstances within the UK and German legislation in which the relevant Member State has chosen to give effect to a paragraph of Annex III other than paragraph (12a) by including within the scope of the reduced rate only particular types of supply falling within the relevant category and not others is nothing to the point.

It is common ground that a Member State is permitted to apply a paragraph of Annex III by limiting the scope of the reduced rate in its jurisdiction to particular types of supply falling within the relevant paragraph provided that it satisfies each of the First Condition and the Second Condition in so doing. That much is clear from the case law described above. But, in each case, the Member State needs to comply with the terms of the relevant paragraph in enacting its national legislation and, in this case, paragraph (12a) makes it apparent on its face that, in specifying how the reduced rate permitted by paragraph (12a) is to be applied in its jurisdiction, a Member State cannot draw a distinction between beverages which fall within the same category.

198. Finally, we do not think that it is relevant to our determination of the question that low alcohol beverages were also not included in the definition of "alcoholic beverage" in Group 14 despite the fact that they contained alcohol. In the first place, we are minded to accept Mr Elliott's submission in relation to low alcohol beverages, which is that, in the absence of any definition of the term "alcoholic beverage" in the PVD, it is reasonable to use the threshold of an ABV of 1.2% to determine when a beverage is to be regarded as being alcoholic in nature given that the same threshold has consistently been used in both EU and UK domestic legislation to distinguish between alcoholic and non–alcoholic beverages. In the second place, even if that is incorrect, and no such distinction can be drawn, the effect would simply be that the inclusion of low alcohol beverages within the reduced rate whilst excluding other alcoholic beverages was also contrary to paragraph (12a), with the result that the UK would be in breach of the PVD in that respect as well. It would not change the answer to the question of whether the failure to include cider within the definition of "alcoholic beverage" in Group 14 gave rise to a breach of the PVD.

199. For the reasons set out above, we have concluded that the omission of cider from the definition of "alcoholic beverage" in Group 14, with the result that the reduced rate applied to cider but not other alcoholic beverages, was not in accordance with the PVD. It follows that, regardless of whether one describes it as a failure to meet the First Condition or describes it as a failure to comply with the terms of the PVD, Group 14, with the omission of cider from the definition of "alcoholic beverage", did not comply with EU Law.

200. That means that, even before considering the potential application of the Second Condition, the doctrine of conforming interpretation is in point in the present case and it is necessary to consider how it should apply – which is Question (4) – and Questions (2) and (3) are otiose. However, since the parties have made submissions on those two questions, we set out below those submissions and our conclusions in relation to them. We do so on the assumption that, in this case, contrary to the conclusion set out above, the terms of Group 14 with the omission of cider from the definition of "alcoholic beverage" both satisfied the First Condition and was in compliance with the terms of paragraph (12a).

Question (2) – the Second Condition – no infringement of the principle of fiscal neutrality – burden of proof

The submissions of the parties

The Respondents' submissions

201. As regards the Second Condition, Mr Elliott said that the burden of proving that applying the reduced rate of VAT to cider and not other alcoholic beverages did not infringe the principle of fiscal neutrality was on the Appellant.

202. Although the VAT legislation did not contain the equivalent of Section 50(6) of the Taxes Management Act 1970, which, by its language, expressly placed on the taxpayer the onus of challenging an assessment to income tax, it was clear that the same principle of law applied in the context of VAT – see the Court of Appeal in *Grunwick Processing Laboratories Ltd v The Commissioners of Customs and Excise* [1987] STC 357 at 359j to 361e and *Khan (trading as Greyhound Cleaners) v The Commissioners for Her Majesty's Customs and Excise* [2006] STC 1167 at paragraphs [69] to [74].

203. There were limited exceptions to the rule that, in a tax appeal, the burden of proof lay with the taxpayer – for example, where the Respondents were alleging fraud or that the relevant transaction was a sham or where the assessment under appeal was a penalty.

204. Another such exception arose in the case of *Massey (trading as Hilden Park Partnership v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 405 (TCC) ("*Massey*"). In *Massey,* the Upper Tribunal concluded at paragraphs [58] to [60] that, where the matter in issue was the EU law concept of an abuse of law, then the burden of proof was on the Respondents because that was a situation where, in the absence of abuse, the taxpayer's appeal would succeed. Accordingly, it was for the Respondents to establish that there was an abuse.

205. Similarly, it was apparent that another exception arose in those cases such as *Northumbria* – see paragraphs [39] and [138] – and *Isle of Wight Council and others v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 1303 ("*Isle of Wight CA*") – see paragraph [23] – where a public authority was entitled to an exemption for its supplies unless that exemption would lead to a significant distortion of competition. This was because, in such cases, once the taxpayer had established that it was a public authority, it was entitled to the exemption unless the Respondents established that that would lead to the distortion of competition.

206. However, those examples were different from the present case because the absence of any infringement of the principle of fiscal neutrality was simply one of two conditions which needed to be satisfied before the reduced rate could apply to the relevant supplies. As such, it was for the Appellant to establish that both conditions were satisfied. It was not as if, having established that the First Condition was satisfied, the Appellant could simply say that it was entitled to assume that the reduced rate should apply to the relevant supplies unless the Respondents could prove that that would give rise to a breach of the principle of fiscal neutrality.

207. The present situation was analogous to the one pertaining in *Fareham College v The Commissioners for Her Majesty's Revenue and Customs* [2023] UKFTT 214 (TC) ("*Fareham*"), where the question in issue was whether the supplies in respect of which exemption was being sought were being made in competition with commercial operators. The FTT in *Fareham* at paragraphs [105] to [110] had concluded that the requirement that the supplies had not been made in competition with commercial operators was one of the conditions that the taxpayer needed to satisfy in order to establish that the exemption applied.

Accordingly, the situation was distinguishable from the circumstances pertaining in *Massey*, *Northumbria* and *Isle of Wight CA* and therefore the burden of proving that that was the case lay with the taxpayer.

208. In short, the current situation was one where the usual rule applicable in a tax case was in point and the onus was on the Appellant to establish that applying the reduced rate to its supplies of cider would not involve a breach of the principle of fiscal neutrality. That would be consistent with the conclusion drawn by the FTT in *Fareham*.

The Appellant's submissions

209. In response, Mr Schofield said, since the Respondents were the party pleading that there would be a breach of the principle of fiscal neutrality by virtue of the inclusion of cider within the reduced rate, it was for the Respondents to prove that that was the case. The present situation was on all fours with that of the public authority in *Northumbria*, where the Court of Appeal had proceeded on the basis that the burden of demonstrating that the exemption would lead to a significant distortion of competition was on the Respondents – see paragraph 205 above. In short, the onus on this point was on the Respondents and not the Appellant.

Conclusion

210. As regards the second question, for the reasons given by Mr Elliott in paragraphs 201 to 208 above, we consider that, in this case, the normal rule in tax cases applies and it is for the Appellant to prove that the application of the reduced rate to cider and not to other alcoholic beverages did not infringe the principle of fiscal neutrality.

211. In this regard, we agree entirely with the reasoning adopted by the FTT in *Fareham* at paragraphs [101] to [109].

212. In our view, in relation to the burden of proof, there is a significant difference between:

> (1) legislation (or the judicial application of legislation) to the effect that the satisfaction of each of condition A and condition B will give rise to outcome C; and
>
> (2) legislation (or the judicial application of legislation) to the effect that the satisfaction of condition A will give rise to outcome C unless exclusion B applies.

213. In the former case, the usual rule to the effect that it is for the taxpayer to establish on the balance of probabilities that outcome C has arisen is in point. Accordingly, the burden is on the taxpayer to establish that each of condition A and condition B has been met. In contrast, in the latter case, the usual rule applies only in relation to condition A because the satisfaction of condition A leads automatically to outcome C unless exclusion B applies. The burden is then on the Respondents to establish that exclusion B does apply so that, despite the fact that condition A is satisfied, outcome C has not arisen.

214. The difference described above explains why, in each of *Northumbria* and *Isle of Wight CA*, the burden of establishing that exempting the supplies made by the appellant would lead to a significant distortion of competition lay with the Respondents. Once the appellant had established that it was a public authority and fell within the first sub–paragraph of Article 13(1) of the PVD (condition A), it was entitled to an exemption for its supplies (outcome C) unless that would lead to a significant distortion of competition (exclusion B). Similarly, in *Massey*, once the taxpayer had established that, on a purely formal application of the legislation (condition A), the desired outcome (outcome C) arose, it was for the Respondents to establish that there had been an abuse of law (exclusion B) so that outcome C did not arise. Another example of this type of case was *Slattery v Mance* [1962] 1 QB 676, as mentioned by Mustill LJ in *Brady v Group Lotus Car Companies plc* [1987] STC 635 at 643.

215. In contrast, this is an example of the former case where the appellant is required to satisfy two conditions (each of condition A and condition B) in order to establish that the terms of Group 14 comply with EU law and the general principles of EU law (outcome C).

216. We would add that the conclusion we have reached above is supported by the Upper Tribunal decision in *The Rank Group plc, Done Brothers (Cash Betting) Limited, Tote (Successor) Company Limited and Tote Bookmakers Limited Done v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 0406 (TC) ("*Rank UT*"), where the Upper Tribunal, having noted the approach of the FTT at the hearing relating to three of the appellants in that case to the effect that the burden of proving that the supplies which were relevant in that case were similar was on the taxpayer – see paragraph [52] of the FTT decision in that case – went on to say that it considered the FTT's approach to the determination of similarity to be correct in principle – see *Rank UT* at paragraphs [32] and [45].

Question (3) – the Second Condition – no infringement of the principle of fiscal neutrality

The submissions of the parties

The Respondents' submissions

217. Turning to the substantive question, Mr Elliott said that the point which the Appellant would need to establish on the balance of probabilities was that no infringement of the principle of fiscal neutrality had arisen because a typical consumer would not consider cider to be similar to other alcoholic beverages. In establishing that that was the case, the Appellant would need to apply the tests outlined in the authorities, including *YD* at paragraphs [39] to [55] and *Rank* at paragraphs [43] to [51].

218. Those tests showed that, in determining whether a typical consumer would consider cider to be similar to other alcoholic beverages, account would need to be taken of:

(1) the ingredients, consistency, taste, smell and external appearance of cider relative to the ingredients, consistency, taste, smell and external appearance of other alcoholic beverages;

(2) the temperature at which cider was served relative to the temperature at which other alcoholic beverages were served;

(3) whether cider satisfied the same consumption needs as other alcoholic beverages;

(4) the characteristics and use of cider relative to the characteristics and use of other alcoholic beverages; and

(5) the context in which cider was served relative to the context in which other alcoholic beverages were served.

219. The Appellant had provided no evidence to the effect that, on the basis of the matters described in paragraph 218 above, a typical consumer would consider cider to be different from other alcoholic beverages.

220. In particular, given the strict requirements of the ALDA in relation to cider, there were a number of alcoholic beverages which resembled cider but were in fact subject to excise duty as made–wine and therefore excluded from the application of the reduced rate. These included:

(1) beverages which would have qualified as cider but for the addition of an alcoholic liquor;

(2) beverages which would have qualified as cider but for the addition of an alcoholic liquor or substance which communicated colour or flavour, in each case other than such as the Respondents allowed as appearing to them to be necessary to make the beverage;

(3) high alcohol ciders; and

(4) beverages which would have qualified as a cider but for being "up–labelled" to an ABV of 8.5% or more.

221. This meant that there were a number of very similar beverages which fell to be treated differently for VAT purposes. For example:

(1) a cider with an ABV of 8.49% was subject to the reduced rate whereas a high alcohol cider with an ABV of 8.5% was subject to the standard rate;

(2) a cider with an ABV of 8.49% was subject to the reduced rate whereas a beverage with an ABV of 8.49% which would have been cider but for being "up–labelled" to an ABV of 8.5% was subject to the standard rate;

(3) a cider without any addition of alcoholic liquor was subject to the reduced rate whereas a beverage which would have been cider but for the addition of an alcoholic liquor (other than such as the Respondents allowed as appearing to them to be necessary to make the beverage), no matter how small, was subject to the standard rate; and

(4) a cider without any addition of a liquor or substance communicating colour or flavour was subject to the reduced rate whereas a beverage which would have been cider but for the addition of a liquor or substance communicating colour and/or flavour, in each case other than such as the Respondents allowed as appearing to them to be necessary to make the beverage, no matter how small, was subject to the standard rate.

222. In each of these cases, the differing VAT treatments for such similar beverages gave rise to a breach of the principle of fiscal neutrality.

223. Finally, Mr Elliott said that:

(1) the fact that:

(a) for EU excise duty purposes, cider fell within the residual category of alcoholic beverages – entitled "other fermented beverages" with a commodity code beginning 2206 – which was the same category as made–wine; and

(b) the Appellant had submitted the original ECN on the mistaken basis that the reduced rate applied to some items that were labelled cider but were in reality made–wine (because of the added colouring or flavouring) and had had to correct that in the amended ECN

were indications, without being decisive in themselves, that a typical consumer might consider that cider was similar to made–wine;

(2) it had been made clear in *Pro Med* at paragraph [56] that differences in the legal regime or regulatory framework governing the supplies which were being compared "may create a distinction in the eyes of the consumer" but only "in certain exceptional cases". *R (TNT Post UK Limited) v The Commissioners for Her Majesty's Revenue and Customs* (C – 357/07) [2009] ECR I – 3025 ("*TNT*") was such an exceptional case – see *TNT* at paragraphs [12], [37] to [40] and [45] – but differences in the legal regime or regulatory framework governing the supplies did not invariably create such a distinction. It had not done so in *Rank* – see *Rank* at paragraphs [45] to [51] – and this was also not such a case; and

(3) the fact that, were cider to be subject to the standard rate, similar arguments to those set out in paragraph 221 above could be made in relation to cider as compared to low alcohol cider was nothing to the point. Some line needed to be drawn between alcoholic and non–alcoholic beverages in the context of the PVD, because the PVD itself contained

no definition of the term "alcoholic beverage" and, given the presence of small amounts of naturally–occurring alcohol in many beverages, it made sense to use a de minimis threshold for that purpose. The threshold of an ABV of 1.2% had consistently been used in both EU and UK domestic legislation to distinguish between alcoholic and non–alcoholic beverages. Accordingly, no breach of the principle of fiscal neutrality could arise from this distinction. The same was not true of the distinction between beverages with an ABV of less than 8.5% and beverages with an ABV of 8.5% or more.

The Appellant's submissions

224. Mr Schofield said that he did not disagree that the tests described in paragraph 218 above were the relevant tests in this case. However, when the tests in question were applied in the present case, they revealed that applying the reduced rate of VAT to cider but not to other alcoholic beverages did not breach the principle of fiscal neutrality.

225. Mr Schofield expanded on that submission as follows:

(1) each category of alcoholic beverage was clearly distinct in the eyes of the average consumer. If the average consumer were to attend a beer festival or wine tasting and be served cider, he or she would consider it to be unacceptable. It was not the case that the average consumer simply saw each distinct type of alcoholic beverage as part of a single global category of "alcoholic beverages" so that each type of alcoholic beverage was similar to each other type and thus indistinguishable from them. The typical consumer would have clear preferences as between alcoholic beverages which were based on the differences between those beverages;

(2) turning to the various tests outlined in paragraph 218 above:

(a) cider was treated differently (and always had been treated differently) from other alcoholic beverages for excise duty purposes. It was distinguishable from other alcoholic beverages under the Structures Directive and the rates of excise duty applicable to it were very different and generally much lower than the rates of excise duty applicable to other alcoholic beverages. In *Pro Med* at paragraph [56], the CJEU had noted that differences in the legal regime or regulatory framework governing the supplies in question might create a distinction between the supplies in the eyes of the consumer, in terms of satisfying his or her own needs. That had been the case in *TNT* and it was also the case here;

(b) cider tasted different from other alcoholic beverages.

In *Nestlé UK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 158 (TC) ("*Nestlé FTT*") at paragraph [202], despite its finding that strawberry and banana flavoured Nesquik:

(i) had similar characteristics to chocolate Nesquik – as each of them was a powder designed to be added to milk for consumption as a milk drink;

(ii) was highly comparable to chocolate flavoured Nesquik in meeting the needs of the consumer;

(iii) had similar formulations to chocolate flavoured Nesquik leaving aside their flavouring and some differences in nutrients;

(iv) were packaged in the same way as chocolate flavoured Nesquik; and

(v) were sold in the same way as chocolate flavoured Nesquik through retailers with the same pricing and advertising and with exactly the same ultimate market in mind,

the FTT had agreed with the Respondents in that case that "flavour is likely to be key to the consumer in deciding which powder to buy and that many consumers would view a chocolate product as different to a fruit flavoured one". Consequently, the FTT in that case had held that treating strawberry and banana flavoured Nesquik as standard–rated and chocolate flavoured Nesquik as zero–rated did not breach the principle of fiscal neutrality.

Similarly, in *YD* at paragraph [50], the CJEU had mentioned similarities or differences in the taste, consistency, smell and temperature of the products being compared as a factor to be taken into account in determining whether the products had similar characteristics and met the same needs of the average consumer;

(c) the ingredients in cider were different from the ingredients in other alcoholic beverages and cider was manufactured differently from those other alcoholic beverages. In particular, the material set out in paragraph 41 above demonstrated that:

(i) cider was very different from beer in that it was gluten–free and consequently more appealing to health–conscious consumers; and

(ii) cider differed from a made–wine which was marketed as a fruit cider in that it was subject to stringent tests as regards its ingredients and was not permitted to have any additives or flavourings.

In *YD* at paragraph [49], the CJEU had mentioned similarities in the ingredients of the products which were being compared as a factor to be taken into account in determining whether those products had similar characteristics and met the same needs of the average consumer. It followed that differences in those ingredients were a relevant factor to take into account in determining that question;

(3) it was unclear why there was any difference between, on the one hand, the comparison between low alcohol beverages and other alcoholic beverages and, on the other hand, the comparison between cider and other alcoholic beverages. The Respondents had given no reason why the exclusion of low alcohol beverages from the definition of "alcoholic beverage" did not amount to a breach of the principle of fiscal neutrality whereas the exclusion of cider from the definition did;

(4) as regards the relationship between cider and high alcohol cider:

(a) it was apparent from the exclusion of low alcohol beverages from the definition of "alcoholic beverage" that the Respondents accepted that distinguishing between alcoholic beverages on the basis of their respective ABVs did not involve breaching the principle of fiscal neutrality. It must follow that distinguishing between high alcohol cider and cider on the basis of their respective ABVs could also not involve a breach of the principle of fiscal neutrality;

(b) the burden was on the Respondents to show that cider and high alcohol cider were similar. The Respondents had produced no evidence in relation to the existence of high alcohol cider during the Relevant Period or how high alcohol cider was sold during that period. It was possible that high alcohol cider was sold under the label of "apple wine" or "apple brandy", which would mark it out as distinct from cider in the eyes of the typical consumer;

(c) high alcohol cider was created by the addition of sugar to produce higher fermentation and was therefore manufactured in a different way from cider and tasted different from cider; and

(d) debates in Parliament in relation to the different rate of excise duty applicable to high alcohol cider as compared to cider had repeatedly emphasised the differences between the two types of beverage – see the extracts from Hansard mentioned in paragraphs 41(7) and 41(10) above; and

(5) a court should not be too astute in finding breaches of the principle of fiscal neutrality where, despite a degree of overlap (and thus to some extent competition) between the supplies which were being compared, there were also some differences between them. As Advocate General Sharpston had put it in *Finanzamt Frankfurt am Main V–Höchst v Deutsche Bank AG* (Case C – 44/11) at paragraph [60]:

"[If] all activities partly in competition with each other had to receive the same VAT treatment, the final result would be – since practically every activity overlaps to some extent with another – to eliminate all differences in VAT treatment entirely. That would (presumably) lead to the elimination of all exemptions, since the VAT system exists only to tax transactions."

In other words, the tendency for breaches of the principle of fiscal neutrality to propagate could ultimately lead to the consequence that one supply fell to be taxed in the same way as another supply even though the two supplies were quite unalike.

As the FTT put in *Pulsin Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 775 (TC) ("*Pulsin*") at paragraph [71]:

"However, where the differences between the supplies in question justify different treatment the principle of fiscal neutrality will not require an elision in the VAT treatment. It is not simply a question of comparison of supply A to supply B and having concluded that B must be taxed in the same way as supply A to then move on to supply C and assess it against supply B. Using fiscal neutrality in this way would have the consequence that supply C, D or E may end up being taxed by reference to supply A when the supply is not in fact similar to A at all."

It was therefore important that the principle should not be applied in circumstances where the differences between the supplies were not "artificial distinctions based on insignificant differences" – see *Rank* at paragraph [43], referring to *Commission v Germany* (Case C – 109/02) [2003] ECR I – 12691 at paragraphs [22] to [23].

226. To the points set out above, Mr Nawbatt added that:

(1) it was apparent from the terms of the Structures Directive that the EU Council did not consider that the differing excise duty treatment of each category of alcoholic beverage permitted under that directive would give rise to distortions of competition. This was evident from the fact that the recitals to the directive had stated expressly that one of the purposes in enacting the directive was to ensure that, where Member States were permitted to apply reduced rates, those reduced rates did not give rise to distortions of competition. That suggested that differing rates of VAT for different types of alcoholic beverages would also not give rise to distortions of competition and hence not infringe the principle of fiscal neutrality; and

(2) there were countless examples within the UK VAT legislation of different VAT rates' applying to goods which shared many similar characteristics. For example:

(a) unshelled nuts were zero–rated whereas shelled and roasted nuts were standard–rated;

(b) shortbread covered in caramel and chocolate was zero–rated whereas shortbread covered in chocolate was standard–rated; and

(c) salt in packs of 12.5 kilograms or less was zero–rated whereas salt in packs of over 12.5 kilograms was standard–rated.

These examples and others showed that quite small differences in the nature of goods, their ingredients, the contexts in which they were sold and their intended use could lead to differences in VAT treatment which did not breach the principle of fiscal neutrality.

Conclusion

227. In relation to this question, we would note that:

(1) the answer to the question depends on whether a typical consumer would have considered cider to be similar to any of the other alcoholic beverages;

(2) in answering that question, we need to consider:

(a) whether they had similar characteristics and met the same needs from the typical consumer's viewpoint;

(b) whether their use was comparable; and

(c) the context in which they were supplied,

and we should ignore artificial distinctions based on insignificant differences, which is to say differences that did not have a significant influence on the decision of the typical consumer to purchase them;

(3) in considering the above, we need to take into account the various factors outlined in the authorities, including *YD* at paragraphs [39] to [55] and *Rank* at paragraphs [43] to [51], as set out in paragraph 218 above. Those include, in relation to cider, on the one hand, and other alcoholic beverages, on the other hand, similarities and differences in:

(a) the ingredients;

(b) the consistency;

(c) the taste;

(d) the smell;

(e) the external appearance;

(f) the temperature;

(g) the consumption need which it satisfied; and

(h) the context in which it was supplied;

(4) in considering this question, we are not obliged to have been presented with detailed evidence such as consumer surveys or expert reports in order to determine whether cider and any other alcoholic beverage were regarded as similar by consumers. Whilst detailed evidence of that nature is necessary in cases where the question in issue is the potential distortion of competition – see *Northumbria* at paragraphs [149] to [158] – it is not the same for the question of fiscal neutrality. As noted by the Upper Tribunal in *Rank UT* at paragraph [44], citing the Court of Appeal in *LIFE Limited v The Commissioners for Her Majesty's Revenue and Customs* [2020] EWCA Civ 452 at paragraph [70], we are entitled to make an assessment of the position using no more than our own experience of the world;

(5) as for whether the difference in the legal regime or regulatory framework governing cider as compared to the legal regime or regulatory framework governing other alcoholic beverages might have created a distinction between them in the eyes of the consumer, as it was found to do in *TNT* and *Pro Med* but not in *Rank*, we note that, in the words of the CJEU in *Pro Med* at paragraph [56], that will be only "in certain exceptional cases".

In our opinion, this is not one of those exceptional cases for the reason which follows.

In this case, the difference in the legal regime and regulatory framework governing cider as compared to the legal regime and regulatory framework governing other alcoholic beverages were the strict rules governing the definition of cider and the consequent differences in excise duty treatment resulting from cider's compliance with those rules. However, neither the rules, nor the consequent favourable excise duty treatment, in and of themselves, potentially created a distinction between cider and other alcoholic beverages in the eyes of the typical consumer. Instead, it was the differences in the various qualities of cider resulting from its compliance with the rules – such as taste, smell, external appearance and differing health consequences – which did so.

The point is that it was those differences in qualities, rather than the differences in the respective legal regimes and regulatory frameworks, which potentially gave rise to a distinction between cider and other alcoholic beverages in the eyes of the typical consumer.

Of course, we take those differences into account in the discussion below but we do not think that this is a case where the differences in the respective legal regimes or regulatory frameworks, in and of themselves, would have led the typical consumer to distinguish between cider and other alcoholic beverages.

228. Now that we have summarised the relevant principles, and before turning to the application of the relevant principles in the present case, we would note that there are three reasons why it is difficult for the Appellant to succeed on this question, as follows:

(1) first, as noted in answering Question (2), it is for the Appellant to show that no breach of the principle of fiscal neutrality would have arisen and not for the Respondents to show that a breach of that principle would have arisen;

(2) secondly, the way in which cider was defined in the ALDA at the relevant time meant that the dividing line between cider and other alcoholic beverages was clear and, in many cases, very fine. This meant that there were considerable similarities between some beverages that qualified as cider and some beverages that were other alcoholic beverages; and

(3) finally, it is implicit in the terms of this debate that it is not sufficient for the Appellant to establish that the typical consumer would not have considered cider to be similar to many, or indeed almost all, other alcoholic beverages. Instead, the Appellant needs to establish that the typical consumer would not have considered cider to be similar to any other alcoholic beverage. This is a very high bar to cross, especially in light of the point made in paragraph 228(2) above.

229. In the light of the above comments, we think that it is helpful to address this question by comparing cider to a range of other alcoholic beverages starting with those – for example, spirits and beer – that were very unlike cider and running up to those – for example, beverages which failed to qualify as cider solely on the basis of their ABV – which were very much like cider.

Type A

230. If we start by comparing cider with other alcoholic beverages like spirits and beer, we are not persuaded by the Respondents' arguments to the effect that the typical consumer would have considered cider to be similar to those other alcoholic beverages.

231. It is true that, in a very broad and general sense, both cider and the other alcoholic beverages in question were alcoholic in nature and were often served in a similar setting. There

is no doubt that cider would often have appeared alongside other alcoholic beverages on the menu at a restaurant.

232. However, we are not at all persuaded that the average consumer would have considered cider to be similar to those other alcoholic beverages in any way. The differences between cider and the other alcoholic beverages so far as concerns ingredients, taste and smell were marked. In addition, those differences informed the consumer need which was satisfied by each beverage. For example, cider was gluten–free and more attractive for that reason to health–conscious consumers than other alcoholic beverages of this kind. In addition, cider was often sold in contexts where other alcoholic beverages of this kind were not sold, and vice versa. For instance, cider was not sold at a beer festival or wine–tasting.

233. In short, the differences between cider and other alcoholic beverages of this kind are very much more than insignificant. In our view, those differences would have had a significant influence on consumer choice and we therefore consider that applying a different VAT rate to cider as compared to the other alcoholic beverages in question would not have given rise to a breach of the principle of fiscal neutrality.

Type B

234. A more difficult challenge arises in comparing cider to those beverages which did not qualify as cider solely because an alcoholic liquor and/or a liquor or substance communicating colour or flavour had been added, in each case other than such as the Respondents allowed as appearing to them to be necessary to make the beverage. A typical example of this would have been a fruit cider and we have used fruit ciders as the example in dealing with this kind of other alcoholic beverage.

235. The position in relation to a fruit cider is inevitably more finely–balanced than the position in relation to the first kind of other alcoholic beverage.

236. Many of the differences noted above between cider and that first category did not arise in the case of fruit cider. For instance, fruit cider was also gluten–free and was therefore no less attractive than cider on health grounds. It was also sold alongside cider and marketed as a type of cider – see, for example, the material mentioned in paragraph 41 above. One can easily see how a consumer might have considered a fruit cider to be indistinguishable from cider.

237. On the other hand, the key difference between fruit cider and cider was that the former had added flavourings and/or colourings which distinguished it from the latter. That difference was a meaningful one because it impacted on the taste and/or appearance of the relevant beverage, which were key factors in determining whether the typical consumer would have considered the beverages to be similar.

238. On balance, we have concluded that that difference means that the average consumer would not have considered beverages of this kind to be similar to cider just as, in *Nestlé FTT*, the FTT considered that chocolate Nesquik was not similar to strawberry or banana Nesquik.

Type C

239. Moving further along the spectrum of similarity, we come to high alcohol cider (and beverages which would have fallen within the definition of cider but for being "up–labelled"). It is by no means inevitable that similar differences in taste or appearance to those described in relation to Type B other alcoholic beverages would have arisen between cider and beverages of this kind.

240. That is not to say that those beverages would always have been seen as similar by the typical consumer. The submissions of the Appellant in this regard were well made. For instance:

(1) high alcohol ciders were in many cases targeted at a different type of consumer from those in the cider market, as the extracts from Hansard set out in paragraphs 41(7) and 41(11) reveal. It seems unlikely that a consumer who was attracted to craft, artisanal or small batch ciders would have mistaken them for high alcohol ciders sold in large volume bottles;

(2) similarly, high alcohol ciders were in some cases marketed as apple wine or apple brandy and served at a different temperature from ciders and in different settings. As the decision in *YD* shows, the temperature at which a beverage is served is a highly relevant factor in this context. Again, it seems unlikely that a typical consumer would have mistaken a high alcohol cider that was being marketed as apple wine or apple brandy with cider;

(3) another circumstance where the typical consumer would not have considered high alcohol cider to be similar to cider was where the alcohol level of the high alcohol cider caused by the addition of sugar to aid the fermentation process imparted a different taste to the high alcohol cider from the taste of cider. As is the case in relation to fruit ciders discussed above, we consider that that difference in taste would have caused the typical consumer to make a distinction between the high alcohol cider in question and cider; and

(4) finally, it is likely that, in some cases, depending on the level of ABV in the high alcohol cider, the typical consumer would have taken into account, in exercising his or her choice of beverage, the intoxicating effects of consuming the high alcohol cider as compared to the intoxicating effects of consuming cider and therefore have seen the two beverages as distinct.

241. In each of the examples set out in paragraph 240 above, we do not see how the application of the reduced rate to cider as compared to the application of the standard rate to the relevant other alcoholic beverage during the Relevant Period would have amounted to a breach of the principle of fiscal neutrality.

242. Having said that, we do not think that the Appellant has satisfied the burden of establishing, on the balance of probabilities, that there were no other alcoholic beverages of this kind which could have been regarded by the typical consumer as being similar to cider. For instance, it is possible that, at some time during the Relevant Period, there was a high alcohol cider with an ABV of 8.5%:

(1) which was marketed as a cider to consumers who were attracted to craft, artisanal or small batch ciders;

(2) which tasted very similar to a cider with an ABV of just under 8.5%; and

(3) the intoxicating effects of which would have been little different from the intoxicating effects of that cider.

243. The same point arises even more clearly in the case of a beverage with an ABV of under 8.5% which would have qualified as a cider but for being "up–labelled" to an ABV of 8.5%.

244. It follows that, in our view, the Appellant has not established that there were no circumstances in which the application of the reduced rate of VAT to cider would have given rise to a breach of the principle of fiscal neutrality.

245. The above conclusion, along with our conclusion in relation to Question (1), mean that it is necessary to address the issue of how the UK domestic legislation would need to be amended under the doctrine of conforming interpretation in order to comply with the terms of the PVD, when read in accordance with the principle of fiscal neutrality.

Question (4) – how should the doctrine of conforming interpretation be applied?

The submissions of the parties

The Respondents' submissions

246. Mr Elliott submitted that amending the definition of "alcoholic beverage" in Group 14 so that it included cider would obviously go "with the grain" of Group 14 and would not be inconsistent with a fundamental or cardinal feature of Group 14, as that group already contained an exclusion for alcoholic beverages. The words to be inserted into the definition of "alcoholic beverage" to achieve that result were essentially the same as the words which would be inserted into the definition pursuant to the *Inco* principle as a matter of UK domestic law. In short, an express reference to cider would be added to the definition.

The Appellant's submissions

247. Mr Schofield said that it was somewhat unusual for a Member State to be adopting the position in litigation that its own legislation did not comply with EU law and EU general principles. That was generally the position adopted by the taxpayer in seeking to claim a more favourable VAT treatment such as a zero rate for standard–rated products which were similar or identical to products which the Member State in question recognised as zero–rated – see, for example, *Nestlé FTT* at paragraphs [187] to [208], *Pulsin* at paragraphs [69] to [72] and *Greenspace* at paragraphs [25] and [46].

248. He went to question why, if the scope of Group 14 with an exception for alcoholic beverages which did not include cider did not comply with the principle of fiscal neutrality, the solution to that issue should necessarily be the addition to the definition of "alcoholic beverage" of a reference to cider as opposed to the removal from Group 14 of the exception for alcoholic beverages altogether.

Conclusion

249. It can be seen from our conclusions in relation to Questions (1) and (3) that, in our view, by excluding cider from the definition of "alcoholic beverage" and thereby including cider within the reduced rate whilst excluding other alcoholic beverages from that rate, the UK has acted in breach of EU law in two distinct respects. First, it has legislated in a way that is not permitted by paragraph (12a) and, secondly, the terms of that legislation have given rise to breaches of the principle of fiscal neutrality as between cider and some other alcoholic beverages, albeit not all.

250. As regards how the doctrine of conforming interpretation can be applied in order to cure both of those problems, we agree with the Appellant that it is unusual, to say the least, for the tax collecting agency of a Member State to seek to rely on the fact that a provision in the legislation which that Member State has enacted in order to give effect to a derogation from the standard rate of VAT which is permitted by the PVD is both outside the scope of the permission contained in the relevant provision of the PVD and gives rise to a breach by that Member State of the principle of fiscal neutrality. In proceedings of that nature, it is customarily a taxpayer complaining that the national legislation has not properly implemented the relevant derogation from the standard rate and the Member State in question alleging the contrary. Examples of this are *Nestlé FTT*, *Pulsin* and *Greenspace*.

251. Leading on from that point, we agree with Mr Schofield that it does not inevitably follow that, if the application of the reduced rate to cider when excluding other alcoholic beverages from the reduced rate is outside the scope of the terms of paragraph (12a) and gives rise to a breach of the principle of fiscal neutrality, the conforming interpretation which is appropriate in order to remedy the relevant deficiencies is to exclude cider from the reduced rate. It is

possible that the appropriate conforming interpretation might instead be to apply the reduced rate to all other alcoholic beverages in addition to cider.

252. The answer to this question depends on what constitutes the "grain of the legislation" because the conforming interpretation which needs to be adopted needs to go with that grain. It must not conflict with a fundamental feature of the legislation. In this case, the legislation in question whose grain (and fundamental feature) needs to be identified is not Group 14 – the UK's enactment of paragraph (12a) – but rather paragraph (12a) itself.

253. The terms of paragraph (12a) permit a Member State to apply a reduced rate to a supply of "restaurant and catering services it being possible to exclude the supply of (alcoholic or non–alcoholic) beverages". As so stated, the grain of the legislation (and its fundamental feature) is quite clearly to permit a Member State to apply a reduced rate to every supply in the course of restaurant and catering services, but subject to an exception in the case of all or some selected beverages. So far, that is perfectly straightforward.

254. However, it is then necessary to determine how the permitted exception for all or some selected beverages impacts upon the grain of the provision. This takes us back to the discussion which is set out in paragraphs 190 to 199 above in the context of the First Condition as regards the proper construction of paragraph (12a).

255. Had we agreed with the Appellant's preferred construction of paragraph (12a), to the effect that the paragraph allows a Member State to make an exception for any beverage, whether alcoholic or not, our reasoning on this question would have proceeded as follows:

> (1) since any beverage can be excluded from the reduced rate without excluding other beverages, the grain of paragraph (12a) is that a Member State is permitted to apply the reduced rate to every supply in the course of restaurant and catering services, but subject to an exception in the case of any particular beverage which the Member State chooses to exclude, regardless of whether that beverage is alcoholic or non–alcoholic in nature. On this reading of paragraph (12a), the distinction between alcoholic beverages and non–alcoholic beverages in paragraph (12a) is of no moment in the context of the paragraph. In effect, as we noted in paragraphs 190 to 199 above, the phrase "(alcoholic and/or non–alcoholic)" is effectively being ignored;
>
> (2) that means that the distinction between alcoholic and non–alcoholic beverages is not part of the grain of paragraph (12a). Instead, that grain simply allows a Member State the freedom to exclude from the reduced rate such beverages as it pleases subject only to compliance with the principle of fiscal neutrality; and
>
> (3) it follows that:
>
> > (a) in enacting Group 14 on terms that cider was not excluded from the reduced rate whereas other alcoholic beverages were, the UK was acting in compliance with paragraph (12a) subject only to the requirement that its selection of which beverages to exclude from the reduced rate did not give rise to a breach of the principle of fiscal neutrality; and
> >
> > (b) if, as we have concluded in answering Question (3), such a breach does arise in the case of certain non–alcoholic beverages, then the appropriate conforming interpretation of Group 14 would be to bring those other alcoholic beverages within the reduced rate, rather than to remove cider from the reduced rate.

256. Having said that, for the reasons set out in paragraph 190 to 199 above, we have concluded that we prefer the Respondents' construction of paragraph (12a). As such, we

believe that paragraph (12a) permitted a Member State to exclude from the reduced rate only all alcoholic beverages, all non–alcoholic beverages or all beverages.

257. It follows that, since paragraph (12a) specifically mentions alcoholic beverages as a whole, as a generic category of beverages which a Member State is permitted to exclude from the reduced rate, the grain of the paragraph necessarily includes the ability of a Member State to exclude alcoholic beverages as a generic category from the reduced rate. That in turn means that, in circumstances where the national legislation enacted to give effect to the paragraph purports to exclude alcoholic beverages as a whole from the reduced rate but – in breach of the terms of the paragraph and, in the case of certain beverages, in breach of the principle of fiscal neutrality – omits from that exclusion one particular type of alcoholic beverage, the correct conforming interpretation is to add that omitted alcoholic beverage into the exclusion for alcoholic beverages as a whole.

258. Consequently, the appropriate conforming interpretation in this case is to add a reference to cider into the definition of "alcoholic beverage" in Group 14. In effect, the remedy is identical to the one which arises under the *Inco* principle as a matter of UK domestic law.

Conclusion

259. It follows from the conclusions we have drawn above that, in our view, the Respondents are entitled to succeed in relation to the EU Law Issue, with the result that, even if the Appellant had prevailed in relation to both of the UK Domestic Law Issues, the Respondents would still have been entitled to succeed on this preliminary issue.

DISPOSITION

260. For the reasons set out above:

(1) we agree with the Appellant in relation to Issue One; and

(2) we agree with the Respondents in relation to Issue Two and the EU Law Issue,

with the result that we find for the Respondents in relation to the preliminary issue and the Appellant's appeal fails.

261. All that remains is to thank all four counsel for the clarity and helpfulness of their submissions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

262. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

APPENDIX 1

THE LEGISLATIVE HISTORY IN RELATION TO EXCISE DUTY AND VAT ON CIDER

Excise duty

1. Cider was first subject to excise duty by way of an Ordinance of Parliament of 17 July 1643. It remained subject to excise duty until 1830, when the duty on cider was suspended with a provision for revival that was never invoked.

2. Cider remained outside the scope of excise duty until the introduction of cider duty in 1916 – in the case of cider produced for sale, by the Finance (New Duties) Act 1916 and, in the case of imported cider, by the Finance (No 2) Act 1916. That duty was repealed by the Finance Act 1923.

3. Before the enactment of the Finance Act 1976 (the "FA 1976"), excise duty was charged on the production of beer, wine, spirits and "sweets" – which included "British wines, made wines, mead and metheglin" – and on cider with an ABV of 15% or more.

4. Section 2 of the FA 1976 imposed excise duty on the import or production of cider with an ABV of under 8.7% with effect from 6 September 1976.

5. When the ALDA was enacted, cider with an ABV of less than 8.7% was dutiable as an "alcoholic liquor" under Section 1 of the ALDA. The specific provisions relating to the charge were in Part V of the Act – the details relating to the charge on each of the alcoholic beverages specified in Section 1 of the ALDA were dealt with under a separate part of the Act.

6. The definition of dutiable cider under the ALDA was amended by the Finance Act 1984 and then the Finance Act 1995 so that only cider with a strength of more than 1.2% ABV and less than 8.5% ABV was included.

7. With effect from 1 August 2023, the charging provisions of the ALDA were replaced by a charge to alcohol duty under Part 2 of the F (No. 2) A 2023 on "alcoholic products" – which were defined in Section 44 of the F (No. 2) A 2023 as spirits, beer, cider, wine, and any other fermented product with an alcohol strength of more than 1.2%.

VAT

1. When purchase tax was introduced, cider was subject to purchase tax as a soft drink.

2. When VAT was introduced by the enactment of the FA 1972, on 27 July 1972, cider was not within Group 1 of Schedule 4 of the FA 1972 – the schedule providing for the zero–rating of specified supplies of goods and services in relation to food – as, although it did not fall within excepted item 3 in that group ("Beverages chargeable with any duty of customs or excise specifically charged on spirits, beer, wine or British wine and preparations thereof"), it was within excepted item 4 in that group ("Other manufactured beverages, including fruit juices and bottled waters, and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages").

3. However, Section 47 of the FA 1972 provided that VAT was not to become chargeable until 1 April 1973 and, on 6 March 1973, HMT, in the exercise of its powers to do so under Section 12(4) of the FA 1972, issued the Value Added Tax (Food) Order 1973 (the "1973 Order"). This amended Group 1 of Schedule 4 to the FA 1972 by, inter alia, removing excepted item 4 in that group. Consequently, when VAT first became chargeable on 1 April 1973, supplies of cider were zero–rated under Group 1 of Schedule 4 to the FA 1972.

4. On 26 March 1974, the Value Added Tax (General) (No. 1) Order 1974 revoked the 1973 Order with effect from 1 April 1974. As this served to reinstate excepted item 4 within Group 1 of Schedule 4 to the FA 1972, supplies of cider became subject to VAT at the standard rate with effect from that date.

5. When the FA 1972 was replaced by the VATA 1983, Group 1 of Schedule 5 to the VATA 1983 contained similar exceptions to those contained in the predecessor legislation. Accordingly, supplies of cider fell within the terms of excepted item 4 in that group.

6. With effect from 1 December 1993, the language in excepted item 4 was amended by the Value Added Tax (Beverages) Order 1993 to read "Other beverages (including fruit juices and bottled waters) and syrups, concentrates, essences, powders, crystals or other products for the preparation of beverages". Supplies of cider continued to fall within excepted item 4 in that group following this change.

7. When the VATA 1983 was replaced by the VATA 1994, Group 1 of Schedule 8 to the VATA 1994 contained similar exceptions to those contained in the predecessor legislation. Accordingly, supplies of cider fell within the terms of EI 4.

8. Upon the enactment of the F (No. 2) A 2023, paragraph 15(2) of Schedule 13 to the F (No. 2) A 2023 provided that, with effect from 1 August 2023, EI 3 was to read as follows:

"Beverages chargeable with alcohol duty under Part 2 of the Finance (No. 2) Act 2023 and preparations thereof".

9. Consequently, it is now beyond doubt that supplies of cider fall within EI 3.

APPENDIX 2

THE APPLICATION OF EU LAW AND THE PRINCIPLES OF EU LAW FOLLOWING BREXIT

Introduction

1. For the purposes of determining whether EU law and the principles of EU law are applicable in the present context, the Relevant Period needs to be divided into two smaller periods – the period from 15 July 2020 (which was the start of the Relevant Period) to 11.00pm on 31 December 2020 (the "First Period") and the period following 11.00pm on 31 December 2020 to 31 March 2022 (which was the end of the Relevant Period) (the "Second Period").

The First Period

2. Although the ECA 1972 was repealed by Section 1 of the EUWA 2018, the effect of Section 2 of the ECA 1972 was substantively replicated and preserved until 11.00 pm on 31 December 2020 ("IP completion day") by Section 1A of the EUWA 2018 – see Section 1A(6) of the EUWA 2018 and Section 39(1) of the European Union (Withdrawal Agreement) Act 2020).

3. As a result, EU law and the principles of EU law continued to apply throughout the First Period.

The Second Period

4. Section 2(1) of the EUWA 2018 provided that, following IP completion day, "EU–derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law". Section 1B(7) of the EUWA 2018 provided that "EU–derived domestic legislation" included any enactment made under Section 2(2) of the ECA 1972. It therefore included the VATA 1994. Consequently, the VATA 1994 (including Group 14) was "retained EU law" – see Section 6(7) of the EUWA 2018 and *News Corp* at paragraph [7].

5. As a result, Section 6(3) of the EUWA 2018 (as it then stood) applied to the interpretation of Group 14 for the Second Period. That provided that:

"(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it —

(a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences."

6. As a result, EU law and the principles of EU law continued to apply throughout the Second Period.

Conclusion

7. The effect of the above is that EU law and the principles of EU law – including the principle of conforming interpretation and the principle of fiscal neutrality – continued to apply to the interpretation of Group 14 throughout the Relevant Period notwithstanding the repeal of the ECA 1972 with effect from 11.00pm on 31 January 2020.

8. For the avoidance of doubt, this is not altered by the changes to Section 6(3) of the EUWA 2018 and the abolition of general principles of EU law under Section 4 of the Retained EU Law (Revocation and Reform) Act 2023 (the "REULA 2023"). These changes do not apply to anything occurring before the end of 2023 – see Section 2(1) and Section 22(5) of the

REULA 2023 – and do not in any event apply in relation to the interpretation of VAT legislation even after 2023 – see Section 28 Finance Act 2024.