Neutral Citation Number: [2021] EWCA Civ 91

Case No: A3/2020/0449

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (TAX & CHANCERY CHAMBER)
MR JUSTICE ZACAROLI & UPPER TRIBUNAL JUDGE GREG SINFIELD
UT/2018/0065

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE ROSE
and
LADY JUSTICE SIMLER

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and -	
NEWS CORP UK & IRELAND LIMITED	**Respondent**

- -
- -

Mr Nigel Pleming QC and Ms Eleni Mitrophanous QC (instructed by **Ms Philippa Harvey of HMRC Solicitors**) for the **Appellant**
Mr Jonathan Peacock QC and Mr Edward Brown (instructed by **Mr Glen Harling of Deloitte LLP**) for the **Respondent**

Hearing dates: 1 & 2 December 2020

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Approved Judgment

In accordance with the Covid-19 protocol for handing down judgments, I attach the judgment in this case by way of hand-down, which will be deemed to have occurred at 10.30 am on 28 January2021

Lady Justice Simler:

Introduction

1. Supplies of (printed) newspapers are zero-rated for value added tax ("VAT") pursuant to section 30 and Item 2, Group 3 of Schedule 8 to the Value Added Tax Act 1994 ("the VAT Act"). The question that arises on this appeal is whether the word used to describe this zero-rated item, "newspapers", can be properly interpreted (applying the relevant canons of construction including the "always speaking" principle) for VAT purposes in the period from September 2010 to December 2016, to apply also to what I have termed "the digital news services" in the form of digital editions of certain newspaper titles (*The Times*, *The Sunday Times* and *The Sun*, including *The Sun on Sunday*[1]), published and supplied by News Corp UK & Ireland Limited (referred to below as "News UK"). Although the appeal is confined to "newspapers" the logic of the reasoning may also extend to other items in Group 3, and elsewhere – in particular to "books", "journals" and "periodicals".

2. By a judgment dated 8 March 2018, the First-tier Tribunal (Tax) (Judge Brannan) ("the FTT") held that the digital news services are not "newspapers" for VAT purposes. That decision was challenged on appeal by News UK. By a judgment dated 24 December 2019, the Upper Tribunal (Tax and Chancery Chamber) (Zacaroli J and UT Judge Greg Sinfield) ("the UT") reversed the FTT decision, holding, on the basis of the FTT's findings of fact, that these items are indeed "newspapers" and liable to zero-rate VAT.

3. In fact, since this appeal was heard by the UT, by the Budget Statement dated 11 March 2020, the Government has announced the extension of zero-rating for (printed) newspapers to all electronic newspaper publications with effect from 1 May 2020. However, this announcement does not affect the issues on this appeal which, as indicated, relate back to the VAT periods September 2010 to June 2014 and 28 January 2013 to 4 December 2016.

4. On this appeal, the Commissioners for Her Majesty's Revenue and Customs ("HMRC") challenge the conclusion reached by the UT as wrong in law because the UT misapplied the "always speaking" principle of statutory interpretation (ground 1) and/or misapplied the relevant principles of EU law that govern zero-rating in this field (ground 2). Their essential case is that the word "newspapers" in Item 2 of Group 3, Schedule 8 to the VAT Act, properly interpreted, is limited to tangible goods and does not extend to cover the digital news services. The interpretation of this term by the UT as covering such services is an impermissible extension of the zero-rating regime and therefore contrary to both domestic and EU law. HMRC rely on the requirement that zero-rating provisions are strictly construed, and the effect of article 110 as a 'standstill' provision, which requires even greater care to avoid an extension of the zero-rate regime.

5. News UK's case is that Item 2 of Group 3 can apply to "newspapers" in digital form, and that the digital news services share the necessary characteristics (per the findings of fact of the FTT and the decision of the UT) of a newspaper, the two being

[1]Whether in e-reader (pdf), tablet, smartphone or website format.

fundamentally the same as the FTT found. News UK contend that the UT's treatment of the "always speaking" principle was also correct, and there was no error of law in its analysis as suggested by HMRC or at all. Should it be necessary to do so, News UK also rely on the principle of "fiscal neutrality", namely that goods and services that are "similar" should be treated in the same way for VAT purposes: see *Rank Group plc v Commissioners for Her Majesty's Revenue and Customs* (Cases C-259/10 and C-260/10) [2011] ECR I-10947, [2012] STC 23. News UK contend that the FTT's decision to the contrary on this point is wrong in law.

6. The following issues arise for determination accordingly: first, whether there was an error of law by the UT in its application of the "always speaking" principle of statutory construction and/or the relevant principles of EU law (including the requirement for a strict interpretation of the zero-rate provision); and secondly, if so, whether the principle of fiscal neutrality was properly applied by the FTT.

7. HMRC have been represented on this appeal, as below, by Mr Nigel Pleming QC who appeared with Ms Eleni Mitrophanous QC. For News UK, Mr Jonathan Peacock QC and Mr Edward Brown appeared, again as they did below. I am grateful to all counsel and those instructing them, for the clarity and care with which their cases were presented.

The EU context

8. The ability to zero-rate certain supplies for VAT purposes originated in EC Council Directive 67/228 ('the Second Directive'). It was introduced, notwithstanding the recognition in the fifth recital that the introduction of zero-rates of tax gave rise to difficulties and it was highly desirable to limit strictly the number of such exemptions, but as part of a process initiated in 1967 directed at the harmonisation of VAT legislation. The last indent of article 17 of the Second Directive permitted member states discretion, on what was described as a transitional basis, to "provide for reduced rates or even exemptions with refund, if appropriate, of the tax paid at the preceding stage, where the total incidence of such measures does not exceed that of the reliefs applied under the present system". These measures were authorised only where two cumulative conditions were met: the measure must have been adopted for clearly defined social reasons and for the benefit of the final consumer. The UK's zero-rating regime does not, in domestic terms, operate as an exemption, but it operates as an exemption with a right of refund in EU law and derogates from the general principle that all supplies of goods and services should be subject to VAT.

9. The UK took advantage of the authorisation conferred by article 17 of the Second Directive to preserve the tax-free treatment of newspapers (in place since 1940 under the Purchase Tax regime which levied an indirect tax on the wholesale price of goods but exempted newspapers and books) by enacting section 12 of the Finance Act 1972 before joining the European Economic Community on 1 January 1973. Section 12 provided for the zero-rating of supplies listed in Group 3 of Schedule 4 to the 1972 Act as follows:

> **"GROUP 3 – BOOKS, ETC**
>
> Item No.

> 1. Books, booklets, brochures, pamphlets and leaflets.
>
> 2. Newspapers, journals and periodicals.
>
> 3. Children's picture books and painting books.
>
> 4. Music (printed, duplicated or manuscript).
>
> 5. Maps, charts and topographical plans.
>
> 6. Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for.
>
> Note: This Group does not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes."

10. The Sixth Council Directive 77/388 ("the Sixth Directive") adopted ten years later, continued the standstill provision in materially the same terms as that found in article 17. By article 28(2) the Sixth Directive permitted member states to retain, (still on a purportedly transitional basis) the reduced rates and exemptions (with refund) that were in force on 31 December 1975 and that satisfied the cumulative conditions set out in the last indent of article 17 of the Second Directive.

11. The Sixth Directive was recast by Council Directive 2006/112/EC on the common system of value added tax ("the Principal VAT Directive"). Its objective was to harmonise legislation on turnover taxes by means of a system of VAT that would eliminate, so far as possible, factors which may distort competition whether at national or community level. Thus Title VIII Rates, set out, at Chapter 2 (headed "Structure and level of rates") article 96, the requirement on member states to apply "a standard rate of VAT … as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services" although the actual rates fixed may differ. Article 97 provided for a minimum standard rate of 15%. Article 98 permitted member states to apply either one or two reduced rates but only to supplies of goods or services in the categories set out in Annex III; and article 99 provided for a floor of no less than 5% for any such reduced rates.

12. However, the discretion previously permitted to member states by the Second and Sixth Directives, as an exception to the harmonised arrangements, was preserved by the Principal VAT Directive. Chapter 4 (headed "Special provisions applying until the adoption of definitive arrangements") created a series of special exceptions to the harmonised system "pending introduction of the definitive arrangements referred to in article 402", the intention being that the special provisions were intended to be temporary, and to be replaced in due course by definitive (or harmonised) arrangements but this has not yet occurred and there has, as yet, not been the universal harmonisation anticipated.

13. Article 110 was one of the exceptions contained within Chapter 4 and permitted those member states which had exercised domestic social policy choices to operate a zero-rating and/or a reduced rating regime lower than that permitted by article 99, as at 1

January 1991, to continue to do so by preserving the concept of "exemptions with deductibility" which existed as at that "standstill" date. Article 110 provides as follows:

> "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.
>
> The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

Accordingly, all member states operating zero-rating or reduced rating as at 1 January 1991 as a matter of domestic law, were permitted to continue to do so subject to compliance with the conditions set out in the second paragraph of article 110.

14. I did not understand HMRC to dispute the fact that the requirement in the second paragraph of article 110 that the "exemptions and reduced rates" must be in accordance with "Community law" (a phrase not defined elsewhere), must be taken to mean the general principles of law that form part of the order of the European Union (for example principles of legal certainty, proportionality and fiscal neutrality derived from the Treaties and jurisprudence of the CJEU) and not, for example, other provisions of the Principal VAT Directive dealing with particular rates of VAT or matters of that kind. That must be correct because, were it otherwise, a zero-rate provision which did not satisfy the standard or minimum rate of 15% rate (contained in articles 96 and 97) or the reduced rates (referred to in articles 98 and 99) would automatically infringe the second paragraph of article 110 and would render it meaningless.

15. It is also not in dispute that the general principles of Community (or EU) law specifically engaged by this appeal are first, the principle that derogations from the harmonised system of VAT (of which the UK's zero-rating is one) should be construed strictly; and secondly, the principle of fiscal neutrality. HMRC also rely on the principle of legal certainty as being relevant in this regard, although its application here was not really pressed.

16. HMRC also rely, as part of the EU legislative context in which the exercise of statutory construction in this case is to be conducted, on the way in which the Chapter 2 provisions of the Principal VAT Directive referred to above (as amended in 2009 by Council Directive 2009/47/EC, and then in 2011 as set out below) distinguish between those categories of goods and services to which reduced rates can apply (those listed in Annex III) and those to which reduced rates *shall not* apply ("electronically supplied services, such as those referred to in Annex II", Article 56(1)(k) of the Principal VAT Directive). Thus Annex III (as amended in 2009 and as in force throughout the relevant period in this case) permitted reduced rates for:

> "(6) supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising."

By contrast, items excluded by Annex II were "electronically supplied services" such as the "supply of images, text and information and making available of databases".

17. It is to be noted that the availability of a reduced rate of VAT for "books" (in other words, printed books) as provided for by article 98 and point 6 of Annex III to the Principal VAT Directive in its original version, was extended in 2009 (see Annex III point 6 as set out above) to supplies of "*books on all physical means of support*", in other words, transactions consisting of the supply of a book on a physical medium (such as a cd rom). Although to read an electronic book, some physical means of support such as a computer is required, the computer (or tablet) is not included in the supply of an electronic book. Point 6 was not therefore interpreted as extending to include the supply of electronic books within its scope, and electronic books did not accordingly fall within Annex III of the Principal VAT Directive for reduced rate purposes: see *European Commission v Luxembourg* (Case C – 502/13) [2015] STC 1714.

18. The meaning of "electronically supplied services" was clarified by article 7 of Council Implementing Regulation (EU) No 282/2011, designed to ensure uniform application of the VAT system by laying down rules implementing the Principal VAT Directive. Article 7(1) provided that "electronically supplied services" as referred to in the Principal VAT Directive:

> "shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology…."

but not "*printed matter such as books, newsletters, newspapers or journals*" (Article 7(3)(e)). It also clarified the list of items excluded for reduced rating purposes by Article 98(2) and Annex II to the Principal VAT Directive by adding the following exclusions: "(*c) the digitised content of books and other electronic publications; (d) subscription to online newspapers and journals; (f) online news …*".

19. It was not until 2018 and Directive 2018/1713 that the possibility arose for all member states as part of the harmonized VAT arrangements, to apply a reduced VAT rate to the supply of books, newspapers and periodicals irrespective of whether they are supplied on physical means of support or electronically; and in the case of member states then applying VAT at rates lower than the minimum laid down in article 99 or granting exemptions with deductibility of the VAT paid at the preceding stage in respect of books, newspapers or periodicals supplied on physical means of support, to apply the same VAT treatment to such books, newspapers or periodicals when supplied electronically.

20. Mr Pleming QC on behalf of HMRC, accepted that these provisions are not directly relevant to the issues raised by this appeal but contended that their relevance in terms of the legislative history is to show that EU law distinguished between printed books and newspapers on the one hand and electronic supplies on the other, and has grappled with this distinction, making limited changes, first for electronic services on physical means of support and only very recently, for electronically supplied services such as the digital news services at issue here. This is said to provide a strong contextual basis for considering that the word "newspapers" could not properly be interpreted to include the digital news services in Item 2, Group 3 of Schedule 8.

21. News UK dispute that these provisions (articles 98, 99, Annex III together with the amendments referred to above) have any relevance at all. For News UK, Mr Peacock QC submitted that the whole point of article 110 is to preserve domestic zero-rating as a carve-out from the harmonised VAT system that existed as at January 1991. Article 110 recognises and respects the national choices made by member states to maintain prior tax treatment provided that this is done within the limits of what article 110 permits. If a member state applies zero-rating which is not consistent with the second paragraph of article 110 it would be open to infraction proceedings: see for example *Commission of the EC v United Kingdom (Case 416/85)* [1988] ECR 3127, [1990] 2 QB 130, ECJ where the Commission took the view that certain zero-rating provisions were not adopted for "clearly defined social reasons and for the benefit of the final consumer" and took infraction proceedings in relation to a number of zero-rating provisions adopted by the UK. Mr Peacock submitted that in this case the requirement that the particular zero-rating is for clearly defined social reasons and for the benefit of the consumer is met, and HMRC do not contend otherwise. Moreover, the zero-rating provision as interpreted by the UT is in accordance with the general principles of EU law referred to above. The EU legislative material relied upon by HMRC has no relevance otherwise to the issues raised by this appeal.

22. It seems to me that there is some force in both sides' arguments on this aspect. On the one hand, I accept the submissions made on behalf of News UK that the provision made by articles 98 and 99 for applying reduced rates to certain categories of supplies of goods and services but not others, has no direct relevance to any of the issues on this appeal given that I am concerned with a domestic exception to the EU's harmonised VAT framework that is respected by the EU.

23. On the other hand, I see the force of Mr Pleming's submission that the legislative history provides important context. The different treatment in EU law of printed publications (extended to include books on physical means of support, such as cd rom) on the one hand and digital publications that are electronically supplied on the other, is plainly not explained by the mere fact that the supply of a physical publication was a supply of goods whereas the supply of a digital publication electronically was a supply of services: the VAT rules are intended in principle to tax supplies of goods and services in the same way. The reason for the distinction in treatment between these supplies (as set out in article 98 and its predecessor provisions) is explained at least in part by the added complexity to which electronic supplies give rise, in terms particularly of the place of supply, which is likely to be different depending on whether goods or services are being supplied; a significant, complicating difference. This distinction was considered by Advocate General Kokott in *Rzecznik Praw Obywatelskich (RPO)* (Case C – 390/15) at paragraphs 66 to 71. In short, until 2015 when there was a fundamental change to the EU rules on "place of supply" so that electronic services were always to be taxed in the member state of the relevant consumer (and not, as previously, in some cases where the supplier was based) the difference in treatment was directed at simplifying the tax obligations of taxable persons established outside the EU and also preventing harmful tax competition between member states (given that until then, suppliers could take advantage of being located in a member state with the lowest VAT rates). Once the rules changed with effect from 1 January 2015, the difference was solely to simplify tax obligations, but for the whole electronic services market.

The domestic statutory framework

24. As noted above, the UK took advantage of the authorisation originally given by article 17 of the Second Directive to list certain supplies, including newspapers, to be zero-rated by section 12, Group 3 of Schedule 4 to the Finance Act 1972. The present position (and that relevant to the claim periods) is set out in section 30(2) of the VAT Act which provides:

> "30(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

25. Group 3 of Schedule 8 provides for the zero-rating of the identical items as those previously listed in the 1972 Act (see above at paragraph 9). The Notes to the Group 3 items have, however, changed since 1972. The Finance Act 1972 contained a single note to Group 3 which provided, "This Group does not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes."

26. The VAT (Consolidation) Order 1978 deleted the original note and replaced it with the following:

> "Items 1 to 6: –
>
> (a) do not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes;
>
> (b) include the supply of services, in respect of goods comprised in the items, described in paragraph 1 (1) of Schedule 6 to this Act."

27. There were further immaterial changes when the VAT Act 1994 was enacted (the order of the notes was changed and the reference in Note 1(b) was changed so that it referred to paragraph 1(1) Schedule 4 rather than Schedule 6) but no material changes were made. The reference to Schedule 4 paragraph 1(1) of the VAT Act in Note (1)(b) is a reference to the following, under the heading "Matters to be treated as supply of goods or services":

> "1(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer –
>
> (a) of any undivided share of the property, or
>
> (b) of the possession of goods,
>
> is a supply of services."

28. The Finance Act 2011 introduced a renumbering of the Note to Group 3 as Note 1, and the addition of Notes 2 and 3 so that, as at 2011, Group 3, Schedule 8 read as follows:

> "**Group 3 – Books, etc**
>
> **Item No**
>
> 1. Books, booklets, brochures, pamphlets and leaflets.

2. Newspapers, journals and periodicals.

3. Children's picture books and painting books

4. Music (printed, duplicated or manuscript).

5. Maps, charts and topographical plans.

6. Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for.

Notes

(1) Items 1 to 6 –

(a) do not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes; but

(b) include the supply of the services described in paragraph 1(1) of Schedule 4 in respect of goods comprised in the items.

(2) Items 1 to 6 do not include goods in circumstances where –

(a) the supply of the goods is connected with a supply of services and

(b) those connected supplies are made by different suppliers.

(3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier –

(a) they would have been treated as a single supply of services, and

(b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."

29. There are detailed provisions contained in Group 4 of Schedule 8 dealing with the zero-rating of "Talking books for the blind" including for example, the following:

"1. The supply to the Royal National Institute for the Blind, the National Listening Library or other similar charities of—

(a) magnetic tape specially adapted for the recording and reproduction of speech for the blind or severely handicapped;

(b) apparatus designed or specially adapted for the making on a magnetic tape, by way of the transfer of recorded speech from another magnetic tape, of a recording described in paragraph (f) below;

(c) apparatus designed or specially adapted for transfer to magnetic tapes of a recording made by apparatus described in paragraph (b) above;

(d) apparatus for re-winding magnetic tape described in paragraph (f) below;

(e) apparatus designed or specially adapted for the reproduction from recorded magnetic tape of speech for the blind or severely handicapped which is not available for use otherwise than by the blind or severely handicapped;

(f) magnetic tape upon which has been recorded speech for the blind or severely handicapped, such recording being suitable for reproduction only in the apparatus mentioned in paragraph (e) above;

(g) apparatus solely for the making on a magnetic tape of a sound recording which is for use by the blind or severely handicapped;

(h) parts and accessories (other than a magnetic tape for use with apparatus described in paragraph (g) above) for goods comprised in paragraphs (a) to (g) above;

(i) the supply of a service of repair or maintenance of any goods comprised in paragraphs (a) to (h) above."

30. Finally, paragraph 9 Schedule 4A to the VAT Act, added by the Finance Act 2009 with effect from 1 January 2010, introduced special rules in respect of the place of supply, and so far as concerned electronically supplied services provides as follows:

"Electronically-supplied services

9 (1) Where—

(a) a supply of services consisting of the provision of electronically supplied services to a relevant business person would otherwise be treated as made in the United Kingdom, and

(b) the services are to any extent effectively used and enjoyed in a country which is not a member State,

the supply is to be treated to that extent as made in that country.

(2) Where—

(a) a supply of services consisting of the provision of electronically supplied services to a relevant business person would otherwise be treated as made in a country which is not a member State, and

(b) the services are to any extent effectively used and enjoyed in the United Kingdom,

the supply is to be treated to that extent as made in the United Kingdom.

(3) Examples of what are electronically supplied services for the purposes of this Schedule include—

(a) website supply, web-hosting and distance maintenance of programmes and equipment,

(b) the supply of software and the updating of software,

(c) the supply of images, text and information, and the making available of databases,

(d) the supply of music, films and games (including games of chance and gambling games),

(e) the supply of political, cultural, artistic, sporting, scientific, educational or entertainment broadcasts (including broadcasts of events), and

(f) the supply of distance teaching.

(4) But where the supplier of a service and the supplier's customer communicate via electronic mail, this does not of itself mean that the service provided is an electronically supplied service for the purposes of this Schedule."

The FTT judgment

31. The FTT conducted a careful review of the print and digital editions for the relevant newspapers including undertaking a site visit of *The Times* newsroom, having heard evidence from three senior staff members of the various newspapers on behalf of News UK, and from officers within HMRC's Large Business teams. The FTT set out a comprehensive description of the various digital versions of the relevant newspapers, including how the content was gathered and displayed, the additional features offered by the digital versions and a comparison with the printed versions. At paragraphs 147 to 159 the FTT set out its findings of fact. These are not repeated. Instead, a high-level summary of the relevant facts is set out below.

32. The FTT found, by reference to extracts from Hansard in October 1984, that the social policy required by article 110 which lay behind the UK's decision to zero-rate newspapers (and books, journals etc.) was the promotion of literacy, the dissemination of knowledge and democratic accountability by having informed public debate. This was not controversial between the parties.

33. The FTT accepted that the digital news services in issue (with one exception) had similar characteristics to those of the newsprint editions, it being common ground that one of the characteristics of a "newspaper" was that it should be published in a periodical edition rather than, by contrast, being a "rolling news" service (i.e. a news service with news and other current affairs articles updated on a continuous basis). The FTT concluded that all the digital news services (with the one exception) were periodic, edition based publications; and all were curated.

34. In terms of the "content of the digital and newsprint editions" this was "fundamentally the same or very similar". That conclusion as to the similarity of content was not altered by the "additional content" (videos etc.) contained on the tablet, website and smartphone editions, which was only very lightly used by subscribers and was a relatively minor aspect of those digital news services. Accordingly, the FTT found the

content of the digital news services and newsprint editions was essentially the same or very similar.

35. The FTT also found that "readers were more concerned about the content than in the medium by which it was conveyed…" and "…from the point of view of the subscribers, it was the content rather than the medium of its delivery to which most value was attached, although subscribers also valued the additional convenience of the digital platform." The fact that readers tended to access the digital versions at the same time of day as readers would read the print editions suggested a close similarity between the digital news services and print editions from the point of view of the subscriber.

36. Notwithstanding those findings of fact, the FTT concluded that Item 2 of Group 3 Schedule 8 dealt only with supplies of goods in physical form. As the FTT explained, the 1972 drafter plainly did not contemplate newspapers in the form of the digital news services. Further, the text of Items 1-5 and the Notes, strongly supported the conclusion that the articles referred to in Items 1-5 of Group 3 (except as otherwise provided for in the Notes) were confined to supplies of tangible goods and did not include the supply of services.

37. The FTT considered the application of the "always speaking" principle of statutory construction in the context of this particular case and whether, as News UK contended, the word "newspaper" in Item 2 as enacted in 1972 had to be interpreted in a way which kept pace with technological developments since then so that it should be interpreted as including the digital news services. The FTT was minded to accept that the digital news services of the titles served the same general purposes of promoting literacy and informed public debate as the newsprint editions, but concluded that that did not permit the word "newspapers" in Item 2 of Group 3, all items of which were physical goods and not services, to be interpreted as including the digital news services. The FTT held that Item 2 should be strictly construed because zero-rating was a derogation from the general principle that all supplies of goods and services should be subject to VAT and, since article 110 contained a "standstill" date of 1 January 1991 as regards zero-rating by member states, the scope of zero-rating provisions could not be extended beyond their 1991 limits and must be interpreted strictly.

38. At paragraph 98, the FTT held,

> "to extend Item 2 Group 3 beyond the supply of goods… to cover the supply of services… would be an impermissible expansion of the zero rating provisions. It is clear that the provisions of Item 2 Group 3 should be construed strictly and that this therefore, prohibits the application of the "always speaking" doctrine to extend the scope of zero rating to apply to digital editions of the titles."

39. The FTT also held in any event, that the same "standstill" argument that was fatal to the taxpayer's case in in *Talacre Beach Caravan Sales v Customs and Excise Comrs* (C-251/05) [2006] ECR I-6269, [2006] STC 1671, ECJ, was fatal to News UK's expansive construction of the word "newspapers" based on the principle of purposive interpretation. *Talacre Beach* concerned provisions of UK domestic law which zero-rated caravans, but which excluded from zero-rating the contents of caravans. The taxpayer contended that since the sale of a caravan and its contents constituted a single supply, the contents of the caravans should follow the zero-rating treatment for caravans. This was rejected by the CJEU, which held that national exceptions under

article 28(2) of the Sixth Directive which lay outside the harmonised framework, had to be interpreted strictly and particular care had to be taken to ensure their scope was not extended beyond the limits set in January 1991. Likewise, the FTT held that the word "newspapers" in Item 2 of Group 3 was to be interpreted strictly and in a way which did not extend its boundaries beyond those existing in 1991. A purposive interpretation could not change that result.

40. Finally, at paragraphs 224 to 232 the FTT rejected News UK's argument based on fiscal neutrality. News UK had argued that VAT should not be imposed differentially so as to distort competition between supplies which are objectively similar from the viewpoint of consumers. The similarities between the print and digital editions of the newspapers (viewed from the perspective of consumers) required them to receive the same VAT treatment. Despite the FTT's acceptance that the digital news services were similar to the newsprint editions from the viewpoint of the consumer, the FTT did not consider that the principle of fiscal neutrality could operate to extend the scope of zero-rating from its original application to goods (newsprint) to services (the digital news services). The FTT continued:

> "231. The zero rating in respect of "newspapers" in 1991 applied only to printed matter. That "exemption with refund" complied with Community law because in 1991 "newspapers" could only have meant printed matter. There was no disparity in treatment between printed newspapers and digital editions because the latter did not exist (and neither party suggested that they did)… The zero rating provisions of Item 2 Group 3 Schedule 8 applied only to the supply of goods i.e. to printed newspapers. The scope of the zero rating provision was effectively "frozen" at 1991 (see the "standstill" references in *Talacre Beach*: Advocate General at [16] and the Court at [22]). By analogy, in that case the EU law principles concerning single supplies could not be used to expand the scope of a national law zero-rating statute. In my view it follows that the scope of the zero rating provision cannot be extended from the supply of goods to the supply services after 1991.
>
> 232. Effectively, this appeal involves a "black letter" boundary contained in Item 2 Group 3, to use McCombe LJ's terminology, which cannot be extended. This is not a case, like *Sub One*, where there was different treatment between traders supplying goods within the same exemption category. The digital editions of the titles, which constitute a supply of services, are simply not within the zero rating provisions and the scope of those provisions cannot be enlarged by the application of a principle of interpretation, such as that of fiscal neutrality. To expand the meaning of Item 2 Group 3 Schedule 8 to cover the digital editions would be an impermissible extension of those provisions."

The UT decision

41. The UT allowed News UK's appeal and concluded that, on the basis of the FTT's findings of fact, the digital news services were "newspapers" for the purpose of the VAT Act. The UT did not need to address the fiscal neutrality argument, and accordingly did not do so.

42. The core reasoning of the UT was as follows. The UT referred to the approach to construing zero-rating provisions set out by Lord Kitchin JSC in *SAE Education Ltd v Revenue and Customs Commissioners* [2019] UKSC 14, [2019] 1 WLR 2219:

> "38. In accordance with well-established principles, the terms used in articles 131 to 133 to specify exemptions from VAT must be construed strictly. Nevertheless, they must also be construed in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effects."

43. It adopted the FTT's finding that the legislative purpose of Item 2 is to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate and held that this amounted to "clearly defined social reasons" within article 110 of the Principal VAT Directive, so as to justify the preservation of the zero-rating of newspapers upon the United Kingdom's accession to the EU.

44. The UT held that the FTT had erred in concluding that the draftsperson intended for Group 3 only to include physical items. Although the items were in fact all physical goods at the time of enactment, nothing in the statutory wording suggested that the draftsperson intended to exclude items that were not in the form of goods. Accordingly, the fact that the digital news services were services was not in itself sufficient to exclude them from Item 2.

45. The UT also held that the "always speaking" principle is not excluded by the fact that zero-rating is designed to be restrictive and accordingly, the FTT's conclusion to the contrary was wrong, as was its reliance on the decision in *Talacre Beach* (which was distinguishable because in that case, there was an express domestic exclusion for the contents of caravans from the zero-rating in respect of the caravans themselves so that a conclusion that the contents were to be zero-rated would necessarily have involved an extension beyond the terms of the domestic legislation and would fall foul of article 110; whereas here, there is no express provision excluding digital newspapers from zero-rating).

46. Instead, the UT held that the correct question is whether, as a matter of the UK principles of statutory interpretation (which include the "always speaking" principle) the term "newspapers" is to be construed as including the digital versions that have come into existence since 1991. At paragraph 51, the UT held that it "*will be so construed if it is 'within the same genus of facts as those to which the expressed policy [of the relevant legislation] has been formulated*"' (Lord Wilberforce in *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800).

47. The UT said that the essential question in applying the "always speaking" doctrine was whether the digital versions, with the characteristics found by the FTT, fulfil the legislative purpose of the statutory provision. On that approach, the UT found no relevant distinction in the legislative purpose of the print and digital editions and no legislative purpose for excluding the digital news services. Further, the two essential characteristics of a newspaper (being edition based and containing curated news) were as much characteristics of the digital news services as the newsprint editions; and the innovation (being a digital news service) was precisely the sort of technological innovation that the "always speaking" principle was intended to address.

48. The UT did not consider the requirement for a strict construction precluded the operation of the "always speaking" doctrine in this case. Although zero-rating is an exception to the general rule of standard rating and so attracts a strict interpretation that did not mean the provision was intended to be "restrictive or circumscribed". Instead the UT regarded the provision as falling between the two extremes identified by Lord Wilberforce in the *Royal College of Nursing* case, "restrictive or circumscribed" on the one hand and "liberal or permissive" on the other. Similarly, the UT did not consider that article 110 precluded the operation of the doctrine on the facts of this case because there was no extension in the scope of Item 2 but rather a recognition that Item 2 includes within its scope the digital news services in question.

49. In light of those conclusions as to the proper interpretation of Item 2, the UT concluded it was not necessary to address the alternative argument advanced by News UK based on fiscal neutrality.

50. Against that background I turn to consider the issues raised by this appeal.

The Appeal

51. The issues raised by the two grounds of appeal advanced by HMRC overlap to a considerable extent and I will therefore consider them together.

52. HMRC's case on the appeal is that the FTT was correct for the reasons it gave to conclude that the term "newspapers" in Item 2 of Group 3 of Schedule 8 does not extend to cover the digital news services supplied by News UK. Mr Pleming's essential arguments can be summarised as follows:

    i) When the zero-rate for newspapers was enacted in 1972 it could only have been intended to cover printed newspapers since digital news services did not then exist and were not even contemplated. So much is accepted by News UK, and it is also accepted that the categories of zero-rating cannot be expanded. To interpret the word "newspapers" as covering digital news services when all categories in Group 3 of Schedule 8 could only have referred to goods as originally enacted is accordingly an impermissible expansion of the category.

    ii) In reaching the contrary conclusion, the UT misinterpreted or misapplied the "always speaking" principle by wrongly concluding that the term "newspapers" *will* be construed as including the digital news services if they are within the same genus of facts; by failing to apply a strict interpretation of the zero-rating provision; and by failing to have regard to the relevant EU and domestic law context of the statutory provision in question.

    iii) HMRC support the conclusions reached by the FTT that the items in Group 3 are limited to tangible goods and do not include services; and maintain that the digital news services are not in the same genus of facts in any event.

    iv) Further or alternatively, the UT was wrong to reject the argument advanced by HMRC that the requirement for a strict interpretation and the standstill nature of article 110 prevent the inclusion of the digital news services within Group 3. In addition to the arguments summarised above, HMRC contend that the correct interpretation of Item 2 is not purely a matter of domestic law. The zero-rating

provision is required by article 110 to be "in accordance with Community law". The important principle that member states cannot unilaterally extend their zero-rating provisions, accepted both by News UK and the UT, is wholly undermined if the interpretation, and potentially the liberal and expansive interpretation, of these provisions is only a matter for domestic law. HMRC do not contend that the "always speaking" principle cannot apply to zero-rates. Rather they contend that it can only apply within the constraints of the EU context which provides that article 110 is a standstill provision and that zero-rates must be strictly construed.

v) Further, the EU context includes consideration of whether the zero-rating of the digital news services would have been permitted as being in accordance with EU law when electronically supplied services were specifically excluded from the reduced rate. Article 98 of the Principal VAT Directive permits a reduced rate of VAT to be applied to certain supplies, but throughout the claim period, excluded electronically supplied services from the application of reduced rates. The list of zero-rated goods in Group 3 reflects the items to which a reduced rate could be applied under article 98. The clear distinction between printed matter such as books and newspapers and electronically supplied services is also reflected in the distinctions drawn by article 7 of Regulation 282/2011 (set out at paragraph 18 above). These aspects of EU law together with the fact that article 110 acts as a standstill clause in relation to reduced rates and to zero-rates, support the view that article 110 cannot properly be understood to permit the zero-rating of the digital news services. The UT was wrong to ignore this context and to consider that the position under articles 98 and 99 of the Principal VAT Directive (in its original form and as amended in 2009 and 2011), as well as Directive 2018/713, were all irrelevant.

53. Unsurprisingly Mr Peacock maintained that the UT, and not the FTT, was correct. He challenged each of the three propositions on which HMRC's case is said to rest, namely (1) that the "always speaking" principle has no application to zero-rating legislation at all (or, at least, to this zero-rating provision); (2) that Parliament intended Group 3 to be limited to physical goods; and (3) that the standstill provision precludes an interpretation of "newspapers" that would extend to the digital news services. In essential summary Mr Peacock contended:

i) There is no exclusion of the "always speaking" principle in the context of VAT or of EU (or EU-derived) law. Rather, in the context of zero-rating provisions, the principle is applied alongside the EU law derived principle, summarised in *SAE Education Ltd v Revenue and Customs Commissioners*, that the statutory provision be interpreted "strictly" but also in a manner which is consistent with its underlying objectives and not in such a way as to deprive it of its intended effects. The obligation to apply a "strict" construction does not require a restricted or the most restrictive construction. Instead, the court should give the relevant words "a meaning which they can fairly and properly bear in the context in which they are used" (*Expert Witness Institute v Customs & Excise* [2002] STC 42, CA at [17]-[19]) so as to give the exemption in question its intended effect (*HMRC v Axa UK plc* (C-175/09) [2010] STC 2825, CJEU at [25]).

ii) Although the drafter did not contemplate the digital news services in 1972 because they did not exist, Parliament contemplated that future courts would

apply the provision to modern day forms of newspaper that may not have existed in 1972, providing always that the zero-rating of such publications fell within the legislative intent/social policy regarding a "newspaper".

iii) As a matter of statutory construction, there is nothing in the drafting of Group 3 Schedule 8 that indicates Parliament intended only to include goods. The correct approach, adopted by the UT, was to determine whether, absent any express exclusion of services, a legislative intention to exclude such services could properly be discerned. The UT was correct (for the reasons it gave) to hold that there is no basis in the statutory language used in Group 3 to justify a conclusion that it cannot apply to supplies of services provided that the services fall within the meaning of the terms used by Parliament in Group 3, and to conclude that no such exclusion could be identified.

iv) The UT did not hold that the digital news services *will* constitute newspapers solely if they are within the same genus of facts. Rather the UT correctly held that the digital news services would constitute newspapers if within the same genus of facts *and* having regard to the intention of Parliament as properly ascertained.

v) Nor did the UT fail to apply a strict construction. It expressly directed itself to apply a strict construction (paragraph 89). It identified the legislative purpose of the statute, directed itself to the necessary test and applied that test to the facts found. The UT's ultimate conclusion cannot be impugned.

vi) It is not open to HMRC to seek to resurrect arguments on similarity (as between printed newspapers and the digital news services). In any event, the FTT found as a fact that the digital news services were fundamentally the same as the print editions such that the former are in the same genus of facts as the latter and HMRC cannot now contend otherwise.

vii) The standstill provided for in article 110 does not preclude the application of the "always speaking" principle. Rather, the updating construction applies irrespective of the standstill: in 1972 Parliament intended that the word newspaper should bear its ordinary meaning from time to time and so, when read today, the word includes the digital news services as much as a news print edition. That interpretation gives effect to the original purpose of Parliament in accordance with the law and the standstill does not preclude that result. While it is accepted that the standstill means that the categories of zero-rating cannot be expanded, it does not mean that the categorisation of new products as falling within the original categories should cease. In this regard, the UT was correct to distinguish *Talacre Beach* for the reasons it did.

viii) Article 110 is the only (relevant) provision of EU law concerned with zero-rating, as the UT observed. It preserves domestic legislation in this regard, which is not part of the harmonised EU law VAT regime, and has not changed in any material respect since 1972. The EU legislative material (articles 98 and 99 of the Principal VAT Directive) relied on by HMRC below (and in this court) is of no relevance to the issues raised by this appeal (as the UT correctly held). That material concerns harmonised reduced (or zero) rates of VAT and is not the "Community law" referred to in the second paragraph of article 110. The

relevant principles of construction in this case are the requirement for a strict interpretation of an exception to the general rule as to standard rating and the "always speaking" principle. Beyond fiscal neutrality, no other relevant interpretive principles or principles of EU law are engaged.

Discussion and analysis

54. I start with the correct approach to the question of statutory construction of the word "newspapers" in Item 2 of Group 3 of Schedule 8 to the VAT Act. The approach to statutory construction is unusual because the word "newspapers" as part of a domestic provision must be construed in accordance with English law principles but without contravening the principles of EU law that apply, notwithstanding that the latter do not, as they would usually, take priority over the former.

55. The court's task is to ascertain and give effect to the meaning of the words used by Parliament. As Lord Bingham of Cornhill explained in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at paragraph 8:

> "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. …. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem … The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

56. It is well established that zero-rating provisions must be given a strict interpretation because they derogate from the general principle that all supplies of goods and services should be subject to VAT. The meaning of the requirement for a strict interpretation was restated by the Supreme Court in *SAE Education Ltd v Revenue and Customs Commissioners* at paragraph 42:

> "In accordance with well-established principles, the terms used in arts 131 to 133 to specify exemptions from VAT must be construed strictly. Nevertheless, they must also be construed in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effects."

(See also *A&G Fahrschul-Akademie GmbH* (C-499/17) decided on 14 March 2019, at [19] to the same effect.)

57. The objective of article 110 is to recognise and respect the national choices made by member states to maintain prior tax treatment provided these are within the limits of what article 110 permits. As Advocate General Kokott explained in *Talacre Beach* (in the context of a domestic zero-rating provision regarding caravans but not their contents) such zero-rating provisions are a national exception permitted by EU legislation (here by article 28(2)(a) of the Sixth Directive, the forerunner to article 110 of the Principal VAT Directive) that should in principle be strictly observed, and not extended because article 28(2) was a "kind of stand-still clause". The national provision lay outside the harmonised VAT framework, was not directed at the same objectives as

exemptions provided for in the directive itself and differed in form from those exemptions, so that it was "necessary to take particular care that the exceptions are not extended." The CJEU endorsed that view, and also emphasised the established principle that exemptions to the general principle that VAT should be levied on all goods and services should be interpreted strictly.

58. The underlying social policy served by zero-rating the items included in Item 2, Group 3 of Schedule 8 was (as recorded by the FTT) to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate by reducing the cost of supplies of these items to consumers. But the objective of this group of provisions when enacted was also to take advantage of the limited permission granted by the EU to member states who prior to accession had made certain social choices in terms of the tax treatment of supplies, to retain domestic zero-rating on the basis prescribed by article 110. Moreover, the effect of the legislative history (both domestic and EU) to which I have referred, is that after accession, the UK was permitted to continue zero-rating "newspapers" on the basis that the zero-rate was already in force on 31 December 1975 (article 28 of the Sixth Directive) and then, by virtue of article 110 of the Principal VAT Directive, on the basis that the zero-rating was still being applied in January 1991. In other words, a category of supply that was not zero-rated by 31 December 1975, because it did not exist, could not later become zero-rated unless it could properly be viewed as falling within an existing category having regard to the statutory words used read in their proper context.

59. In *R (Quintavalle) v Secretary of State for Health* Lord Bingham referred to the "always speaking" principle of statutory construction as not being inconsistent with the rule that statutory language retains the meaning it had when Parliament used it:

> "9. …. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. …"

60. Lord Bingham described as authoritative the *guidance* (and I emphasise the word guidance here because at times the argument appeared to treat the words used as though part of a statute) given by Lord Wilberforce in his dissenting opinion in *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800 [1981] 1 All ER 545 at 822:

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

> liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, "What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?", attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

61. The most recent application of this principle is to be found in *Franked Investment Income Group Litigation and others v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369, where there was a challenge to the correctness of the decision in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, which recognised a cause of action for the recovery of money paid under a mistake of law, which could not have been foreseen at the time the relevant provisions in the Limitation Acts 1939 and 1980 were enacted because causes of action for the relief from mistakes were limited to mistakes of fact at those times. At paragraph 218 the majority judgment (Lords Reed PSC and Lord Hodge DPSC with whom Lords Lloyd-Jones and Hamblen JJSC agreed) described the "always speaking" principle as follows:

> "218. It is debatable, but ultimately does not matter, whether this question should be approached by focusing specifically on the "always speaking" principle, as counsel for the bank did in *Kleinwort Benson*. That somewhat vague expression is commonly used in connection with statutory terms which change in their connotations over time, such as "family" (*Fitzpatrick v Sterling Housing Association* Ltd [2001] 1 AC 27). The case of *R v Ireland* [1998] AC 147, cited by counsel in *Kleinwort Benson*, was of a similar kind. The question was whether the words "bodily harm", in the Offences Against the Person Act 1861, should be interpreted in the light of contemporary knowledge as applying to psychiatric injury. The "always speaking" principle is also invoked where the question arises whether a statutory expression should be interpreted as including a novel invention or activity which does not naturally fall within its meaning, and was not envisaged at the time of its enactment, but which may nevertheless fall within the scope of its original intention. Examples of the latter kind of case include *Victor Chandler International Ltd v Customs and Excise Comrs* [2000] 1 WLR 1296, which concerned the question whether a teletext fell within the scope of the statutory term "document", and *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, which concerned the question whether an embryo created by the novel technique of cloning, rather than by

> the traditional method of fertilisation, fell within the scope of the statutory expression "embryo where fertilisation is complete". …"
>
> 219. The question in the present case is not of precisely the same kind. The cause of action recognised in *Kleinwort Benson* undoubtedly falls within the scope of the language used in section 32(1)(c), if that language is given its ordinary meaning. A mistake of law was understood to be a "mistake" in 1939, and in 1980, just as much as it is today. Nevertheless, the decision taken in *Kleinwort Benson* to recognise a cause of action for the recovery of money paid under a mistake of law could not have been foreseen in 1939 or 1980. The question therefore arises whether section 32(1)(c) applies to those unforeseen circumstances: a question which ultimately boils down to the same issue as arises when considering the "always speaking" principle, and indeed in all cases concerned with statutory interpretation: what is the construction of the provision which best gives effect to the policy of the statute as enacted?"

62. There was no discernible difference in the approach of the minority (Lords Briggs and Sales JJSC) as to the scope of the "always speaking" principle:

> "269. The guidance regarding the ambit of the "always speaking" doctrine is in fact concerned with the fundamental underlying issue of whether Parliament can be taken to have intended by a statutory provision passed at one point in time, using language directed to the circumstances at that time, to cover a new set of circumstances which has come into existence since then. … The issue of how broadly one should construe the language of the statutory provision to cover new matters arising after its enactment necessarily involves consideration of what inferences can be drawn from the language used and the circumstances of the enactment as to Parliament's policy intention in promulgating the provision. If the inference can be drawn that Parliament's policy intention was broad and the new matters are aligned with that broad intention and are covered by it, a court will be justified in concluding that the provision applies; conversely, if there is not sufficient congruence between the policy issues raised by the new matters and Parliament's intention as expressed when it enacted the provision, the provision does not apply."

Having referred to the case law including the *Royal College of Nursing* case as explaining this, the minority judgment continued:

> "270. … In certain contexts it may be improper to give an extended interpretation to a word or phrase to treat it as applying to something outside Parliament's contemplation at the time of enactment. As Lord Steyn pointed out in *R v Ireland* [1998] AC 147, 158 with reference to *The Longford* (1889) 14 PD 34,

> "[s]tatutes dealing with a particular grievance or problem may sometimes require to be historically interpreted."

63. As a matter of principle, in my judgment the requirement of strict interpretation does not exclude the "always speaking" principle from operation, but the two principles of interpretation must be applied concurrently because they condition one another, without elevating one over the other. The exercise of statutory construction is a single exercise conducted having regard to the nature of the enactment, the words used by the drafter read in their statutory context and all relevant principles of construction. Whether an interpretation covering unforeseen developments is appropriate inevitably involves consideration of the statutory language used, and the policy intention in enacting the provision to determine the extent to which a broad or permissive interpretation is justified or whether instead, a strict approach is required. As the Supreme Court has observed, if there is not sufficient congruence between the factual and/or policy issues raised by the new development and Parliament's intention as expressed when it enacted the provision, the court is not permitted to fill the gap.

64. Drawing the threads together, the construction process must be informed by the ordinary principles of statutory construction, the "always speaking" principle, the fact that article 110 is a standstill provision (see *Talacre Beach* at [22]) intended to preserve the status quo on accession, the EU principle of strict construction, and the fact that VAT zero-rating is to be construed restrictively. Adopting that approach, I will start by analysing the words used by Parliament in enacting Group 3 of Schedule 8, having regard to the full context, and informed by the matters to which I have just referred.

65. The wording of section 30(2) and Group 3 of Schedule 8 is precisely the same as the wording of section 12(2) and Group 3 of Schedule 4 to the Finance Act 1972, the original enactment. The Notes to Group 3 have, however, been added to since 1972 and I have set out their development at paragraphs 25 to 27 above.

66. Section 30(2) VAT Act authorised zero-rating for both goods and services "if the goods or services are of a description for the time being specified in Schedule 8…". I agree with the UT that the fact that zero-rating for both goods and services was authorised demonstrates that this characterisation in the abstract is not what mattered in determining whether an item should or should not be included in Schedule 8. However, the generic wording of this provision does not tell one anything about the nature of the items included in the particular groups or how the words used to identify items in the different groups are to be understood. Indeed, there is nothing in the wording of section 30 to suggest that Group 3 is not capable of being limited to tangible or physical items if that is what the drafter intended. What matters is the particular wording of the items within the particular Group of Schedule 8. It is these particular items that must be analysed carefully to determine the scope of the supplies for which zero-rating is provided in the particular Group.

67. There can be no doubt that the ordinary meaning of the words in Item 2 as understood at any time between 1972 and 1991 at least, would have been of a printed newspaper, journal or periodical. The digital news services would not naturally have fallen within the ordinary meaning of "newspapers" and were not envisaged at the time of the enactment of this provision (or by 31 December 1975). So the question is whether they nevertheless fall within the scope of Parliament's original intention as reflected in the words used to describe the items that were included.

68. I have come to the conclusion that the words used by Parliament do lead to the inference that the clear legislative intent was to include tangible or physical items only and to exclude from Group 3 (and in particular from Item 2) supplies that were not of tangible things. My reasons follow.

69. First, an analysis of the language used by Parliament in enacting the relevant provision supports this conclusion, and in my judgment, strong weight should be given to the actual words used. Group 3 is comprised of a group of similar items; the words used within each Item and in the Notes are to be read and interpreted together and enforce each other. There are four particular pointers in the language used by Parliament in enacting this group as follows:

    i) Item 6 refers to "Covers, cases and other articles supplied with Items 1 to 5 and not separately accounted for". As the FTT identified, this indicates that the articles referred to in Items 1-5 were all envisaged as consisting only of tangible things capable of being put into covers, cases and similar articles. The UT's contrary conclusion – that the drafter could only have contemplated the existence of physical items because digital versions of those items did not exist and were not contemplated in 1972 – does not alter the fact that Item 6 points towards the conclusion that Group 3 comprises tangible items only. To speculate on what might or might not have been contemplated does not assist in circumstances where there is nothing to indicate an intention to include intangible items or services in this particular group as well.

    ii) Item 4 refers to "Music (printed, duplicated or manuscript)" and envisages music in paper form rather than music provided in any other way, including in sound form by virtue of an audio recording. The qualification was necessary in the case of music because another form of transmission existed, namely an audio-recorded form. I do not accept the logic of the UT's conclusion that the absence of an express limitation in the other items means that there is no such limitation at all. To the contrary, the fact that non-printed music existed in 1972 meant that this format of music (like "talking books for the blind" in Group 4), could have been included by the drafter. However, a decision to exclude music in that format and to limit it to sheet or printed music was taken, making it necessary to make the limitation clear. No such limitation was necessary so far as newspapers were concerned, because only printed newspapers existed in 1972. But there is no reason to conclude that if non-printed newspapers existed in 1972 in some form, that the same exclusion would not have been made express in the same way.

    iii) So far as the Notes to Group 3 are concerned, I disagree with the UT's conclusion that they are an inadmissible aid to construction of the provision as enacted in 1972 merely because they postdate that provision. In many (perhaps most) cases later legislation is not a reliable guide to the construction of earlier legislation. However, the context of this particular statutory provision is important in determining whether that is so here. The standstill nature of this provision prohibited the expansion of the categories included within it that could be zero-rated, and meant that they could not be extended beyond their 1975 limit as continued in force as at January 1991. In those circumstances, the later Notes must be taken to articulate the original scope of items in this group (as at 1975), given the absence of any power to expand the categories of items that could be

zero-rated after 1975. Accordingly, in my judgment this is a case where the later Notes are a reliable guide to the construction of the words used by Parliament earlier, and can be relied on as an aid to construction.

iv) Note 1(b) expressly provides that Items 1 to 6 of Group 3 include the supply of services described in paragraph 1(1) of Schedule 4 "in respect of goods comprised in [Items 1 to 6]". This had the effect of making clear that supplies by way of lending in respect of the originally listed articles in Items 1 to 6 were included within this Group. Again, it demonstrates that the drafter of the note recognised that the possibility of a supply by way of library lending services in respect of the tangible items listed was always envisaged.

v) Note 2 was introduced in 2011 and is an anti-avoidance provision as the FTT explained. I agree with the FTT that its opening words "items 1 to 6 do not include goods in circumstances where…" assume that the scheme at which it was directed would involve zero-rating of supplies of tangible goods only and not of intangible items supplied as a service (which were by then in existence). As the FTT explained, the scheme involved a (standard rated or exempt) supply of services by a company and (so the taxpayer argued in that case) a zero-rated supply of books by an affiliated company but which was in a different VAT group. The idea was that there were two separately taxed supplies (one of which was intended to be zero-rated), albeit that, if the same taxable person had supplied both the goods and the services, the combined supply would have constituted a single standard rated supply. This anti-avoidance provision addressed only the supply of goods and is a clear indication that Group 3 was understood to be concerned only with the supply of tangible things. The same avoidance scheme could have been adapted so that, instead of a printed magazine, the customer received a digital edition of the magazine and if that were done, there is no rational reason why digital magazines that were zero-rated should have been seen as falling outside the anti-avoidance provision contained in Note 2. Again, the inference to be drawn is that the drafter understood Group 3 as extending to include only the supply of tangible or physical items.

70. Secondly, consistently with the fact that the provision in question is a zero-rating provision that derogates from the general rule that VAT is applied at the standard rate to all supplies, the language used to identify specific items and not others (as described above) and the circumstances of the enactment of Group 3 indicate a narrow or circumscribed Parliamentary intention, and not a broad, permissive one.

71. Thirdly, nor is it possible in my judgment to detect a clear purpose in the legislation which can only be fulfilled if the word "newspapers" is interpreted in the way contended for by News UK. Although the digital news services may well serve the same social policy purpose as the newsprint editions (promoting literacy etc.) the statutory language adopted by Parliament displays a narrower, more circumscribed purpose than that more general underlying social policy. The same social policy purpose would be fulfilled by a "rolling news" service but nobody suggests that a rolling news service is a newspaper. In those circumstances it is not legitimate to seek to give effect, by means of a purposive construction, to a perceived wider policy than can properly be supported by the statutory language itself.

72. In these circumstances, and given also the need for a strict approach to be taken to the interpretation of zero-rating provisions not permitted to be extended beyond their 1975 and 1991 limits, I do not consider that the word "newspapers" in Item 2 of Group 3 can be read as including intangible digital news services. Although the content and social purpose of a printed newspaper and the digital news services may be the same, and the two are edition based and contain curated news, put shortly, digital news services are not the same, or in the same genus, as the tangible items expressly included within Item 2. It is an intrinsic part of the statutory definition of Item 2 that the items within it are tangible or physical articles. The digital news services are intangible and different in kind and in the dimension of their complexity for determining issues like the place of supply. Although not directly relevant, I note as part of the context that these differences have justified distinct and different treatment in EU law.

73. This approach does not begin to deprive Group 3 or Item 2 of their intended effects. Rather it gives the words used by Parliament in Group 3 and Item 2 a meaning which they fairly and properly bear in the context in which they are used. To read "newspapers" as including the digital news services would amount to an impermissible expansion of the zero-rating provision in Item 2.

74. It follows from those conclusions that, notwithstanding the obvious cogency of the UT's analysis, in my judgment the UT fell into error of law. First, it wrongly concluded that the words used by Parliament in enacting Item 2 and Group 3 of Schedule 8 did not lead to the conclusion that it was the legislative intent to exclude things that were not tangible from that Group, and in particular, Item 2. Section 30(2) of the VAT Act was not relevant in this regard, as I have explained. The critical point is that a defining characteristic of the items in Group 3 is that they involve supplies of tangible items only. Secondly, although the UT said that the interpretation of "newspapers" in Item 2 should be addressed having regard to all applicable rules of construction including both the requirement for strict interpretation of an exception to the general rule as to standard rating, and the "always speaking" principle, I do not consider that was the approach in fact applied. Rather, at paragraph 89, the UT treated the statutory provision as "falling between the two extremes" of a restrictive/circumscribed or liberal/permissive construction, when the legislative context and the requirement for a strict construction as a zero-rating provision indicated a restrictive or circumscribed interpretation was required. In doing so, the UT impermissibly elevated the "always speaking" principle above the requirement for a strict construction, and consequently did not conduct the exercise in the round. Further, having concluded that the two items are within the same genus of fact and fulfilled the same social purpose irrespective of their form, the UT in effect asked what Parliament would have done faced with the invention of a digital newspaper that was never in contemplation, and supplied the answer itself on the basis that it could discern no legislative purpose for excluding digital news services. That too was impermissible.

75. For all these reasons accordingly, I would allow HMRC's appeal and restore the FTT's conclusion on this issue, albeit for different reasons in some respects as I have set out above.

Fiscal neutrality

76. Both before this court and below, Mr Peacock submitted that the interpretation of the zero-rating provisions in Group 3 of Schedule 8 VAT Act is subject to the application

of principles of EU law and, in particular, the principle of fiscal neutrality, namely that goods and services that are "similar" should be treated in the same way for VAT purposes: see *Rank Group plc* v *HMRC* (cited at paragraph 5 above). Once it is accepted (as he submitted the FTT did) that the digital news services are similar to (or fundamentally the same as) the newsprint editions from the perspective of the consumer, then if the digital news services are standard rated while newsprint editions enjoy zero-rating, there is a breach of the EU principle of fiscal neutrality.

77. In summary, Mr Peacock submitted that the FTT was correct to state that the principle of fiscal neutrality cannot be relied on to undermine the "black letter line" in the Principal VAT Directive setting the boundaries of a VAT exemption found in the Principal VAT Directive (or, here, zero-rating which member states are permitted by the Principal VAT Directive to retain), and at the same time, the UK cannot discriminate between objectively similar supplies which are the same from the point of view of the typical consumer where those supplies fall within the same national exemption. However, the FTT was wrong to conclude that the principle of fiscal neutrality did not require the zero-rating of digital newspapers. The FTT's error was in concluding that this is a case of a "black letter" boundary of the sort referred to in *Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners* [2014] STC 2508 by McCombe LJ, which could not be extended and not a case where there was different treatment of items within the same exemption category; and that interpreting Group 3 to cover the digital news services would be an impermissible extension of the existing scope of Item 2 of Group 3.

78. I can deal with these submissions very shortly because Mr Peacock accepted in argument that if he lost the so-called same genus of fact argument, it would be very difficult for him to succeed on fiscal neutrality.

79. The case presented by News UK on fiscal neutrality is problematic for a number of reasons. The evidence and analysis before the FTT and the UT, as before us, focused entirely on a comparison between New UK's print editions and News UK's digital news services. The requirement for fiscal neutrality here has been described by the CJEU as intended to reflect, in matters relating to VAT, the general principle of equal treatment: see *Rank Group plc* v *HMRC* at [61]. It is aimed at preventing the distortion of competition that can arise where goods which are similar and thus in competition with each other are treated differently: see *Rank Group plc* v *HMRC* at [32]. The CJEU has noted that "infringement of the principle of fiscal neutrality may be envisaged only as between competing traders": see *Marks & Spencer plc v Commissioners of Customs and Excise* (Case C-309/06) [2008] ECR I-2283, [2008] STC 1408, ECJ at [49]. Although consumers may choose between the two formats supplied by News UK, those formats are not competing against each other in the same way as they may compete with the print or digital products supplied by News UK's rival publishers.

80. Further, the FTT's conclusions as to the similarity of content and the use that consumers make of the print and digital formats were directed at the question whether the word "newspapers" covered the digital format as well as the print editions. That is not necessarily the same assessment as would be needed to determine whether their use is "comparable" or whether "the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other", which is the test to be applied to establish whether there has been a breach of the principle of fiscal neutrality: see *Rank Group plc* v *HMRC* at [44].

81. In light of the conclusions I have reached in relation to the proper construction and scope of Item 2 of Group 3 as extending to include supplies of tangible or physical articles only, I do not need to consider those wider issues about the applicability of the principle to the present appeal. The digital news services are simply not within the zero-rating provisions and the scope of those provisions cannot be extended by the application of a principle of interpretation, such as fiscal neutrality: see *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2011] ECR I-1457, [2012] STC 1951 (at AG [60] and CJEU [45]). To expand the meaning of Item 2 of Group 3, Schedule 8 to cover the digital news services would be an impermissible extension of those provisions and not merely a recognition of their existing scope.

Conclusion

82. In conclusion, and for the reasons set out above, subject to the views of the other members of this court, I would allow the appeal. The word "newspapers" in Item 2 Group 3, when read in its full context cannot be given the expansive interpretation for which News UK contended. Nor can the principle of fiscal neutrality have the effect of extending the scope of the exemption from VAT beyond its expressed limits. The digital news services were not liable to zero-rating in the claim periods because they were not supplies of a description specified in Item 2 of Group 3, Schedule 8 to the VAT Act.

Lady Justice Rose:

83. I agree.

Sir Geoffrey Vos, Master of the Rolls:

84. I also agree.