APPROVED **[2024] IEHC 732**

THE HIGH COURT

Record No.: 2023/122R

BETWEEN:

KILLARNEY CONSORTIUM C

Appellant/Respondent

-and-

THE REVENUE COMMISSIONERS

Respondent/Appellant

<u>**JUDGMENT of Mr Justice Rory Mulcahy delivered on 20 December 2024**</u>

Introduction

1. In determining the tax appeal the subject matter of this case stated in favour of the taxpayer, the Tax Appeals Commissioner took the unusual step of disapplying the relevant provision of Irish law on the basis of his conclusion that it was contrary to EU law. The main issue in these proceedings is whether he was correct in so concluding.

2. Killarney Consortium C ("**the Consortium**"), had appealed to the Tax Appeals Commission regarding a Notice of Assessment to VAT ("**the Assessment**") issued by the Revenue Commissioners ("**Revenue**") on 22 October 2020 for the period 1 September 2017 to 31 December 2017 in the following circumstances.

3. The Consortium had purchased a property in December 2004 for the purpose of developing it and making it available to let ("**the Property**"). The leasing and letting of

immovable property is generally exempt from VAT. However, a taxpayer can opt to waive this right to exemption from taxation. This is referred to in the case stated as an "option to tax" and is the term which I will use in this judgment.

4. There is something, perhaps, jarring about the concept of a person "waiving an exemption from tax" or "opting to tax", but it reflects a fundamental feature of the EU common VAT system and does not suggest any increased liability for tax. As will be seen below, the VAT system, and in particular the system of deduction, operates such that taxable persons are relieved of the burden of VAT payable or paid in the course of that person's taxable transactions.

5. In this case, the Consortium exercised the option to tax and in 2006 it reclaimed €717,750 of VAT paid on the purchase of the Property. The Property remained unlet through significant periods thereafter and the Consortium paid total VAT on rents of just €41,384. It also reclaimed further VAT payments of €6,820.

6. The Consortium sold the Property in September 2017 for €750,000, a very significant loss. VAT of €89,207 was paid on the sale of the Property.

7. Revenue issued the Assessment claiming a sum of €593,979. It is agreed that this sum represents the difference between the total amount of VAT reclaimed or deducted by the Consortium and the total amount of VAT paid. It is, in effect, a balancing payment calculated to ensure that the amount of VAT deducted does not exceed the amount of VAT paid. It is referred to in the legislation as a cancellation payment, *i.e.*, the cancellation of the waiver of exemption.

8. The Consortium appealed the Assessment to the Tax Appeals Commission ("**the TAC**") pursuant to section 119 of the Value Added Tax Consolidation Act 2010 ("**VATCA 2010**") VATCA 2010. The appeal was heard before an Appeal Commissioner ("**the Commissioner**") on 17 November 2022. The Commissioner issued his determination on 5 January 2023. He ruled that the provisions of section 96(12) of the VATCA 2010 should be disapplied as being in breach of EU law and that, accordingly, the Assessment should be reduced to zero.

Case Stated

9. At the request of Revenue, the Commissioner agreed to state a case for the opinion of the High Court pursuant to section 949AQ of the Taxes Consolidation Act 1997, as amended ("**the TCA 1997**"). Section 949AP provides that a party who is dissatisfied with the determination of a Tax Appeals Commissioner on a point of law may request the Commissioner to state and sign a case for the opinion of the High Court.

10. The following are the questions of law for the opinion of the High Court:

1. Did the Commissioner err in concluding that the provisions of section 96(12) of the VATCA 2010 should be disapplied and the assessment to VAT for the period 1 September 2017 to 31 December 2017 raised on 22 October 2020, be reduced to zero?
2. Did the Commissioner err in the applications of the principles of fiscal neutrality to section 96(12) of the VATCA 2010?
3. Did the Commissioner err in concluding that section 96(12) of the VATCA 2010 operated to place an unlawful restriction on the right to deduct VAT?
4. Did the Commissioner err in concluding that section 96(12) concerned the consequences of exercising the right to opt for taxation, rather than the scope of the right?
5. Did the Commissioner err in failing to consider adequately or at all that section 96(12) could be concerned with the details of use of an option to tax?
6. Did the Commissioner err in his analysis of how section 96(12) drew a distinction between successful and unsuccessful taxpayers who exercised the option to tax?
7. Did the Commissioner err in failing to take account of equal treatment as between those taxpayers who did, and did not, exercise the option to tax respectively?
8. Did the Commissioner err in failing to take sufficient account of the fact that the leasing and letting of immovable property are supplies that are prima facie

exempt, without any right to deduct VAT, and that the exercise of an option to tax is a choice with foreseeable consequences, rather than an obligation?

11. The parties are agreed that the sum claimed in the Assessment is due in accordance with Irish law and, in particular, the provisions of section 96(3) and (12) of the VATCA 2010. However, the Consortium argues that those provisions are contrary to EU law and that, in accordance with well-established principles of EU law, Revenue has no entitlement to "claw back" any VAT payments lawfully deducted, irrespective of the amount of VAT subsequently paid. It claims that the provision breaches a fundamental feature of the common VAT system, the right to deduct. The arguments advanced before the Commissioner overlap, to a significant degree, with those advanced before this court. In the circumstances, it is not necessary to rehearse the arguments advanced before the Commissioner here.

12. It is important to note that Revenue has not contended that the Tax Appeals Commissioner did not have jurisdiction to disapply national law where it is in conflict with directly effective EU law. This jurisdiction has been expressly recognised by the Court of Appeal (Murray J) in *Lee v Revenue Commissioners* [2021] IECA 18, albeit that it was in the context of addressing a different issue:

> "*74. Finally, in the course of his submissions counsel for the plaintiff submitted that since the decision of the CJEU in C-378/17* Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission *[ECLI:EU:C:2018:979], the Appeal Commissioners may be invited to disapply domestic legislation which they determine to be incompatible with European law. The principle is only engaged where the Appeal Commissioners are dealing with an issue within their remit, whether in an appeal against an assessment to tax or otherwise. It was suggested that this in some sense implied a broadening of their jurisdiction as a matter of national law. This does not at all follow. The* Workplace Relations Commission *decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or*

otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law."

13. No argument was advanced before the Commissioner or this Court that the TAC did not have jurisdiction to disapply national law in this case if it was found to be inconsistent with the provision of EU law relied on by the Consortium, the right to deduct. That right has long since been recognised as directly effective (see, in this regard, Case C-62/93, *BP Soupergaz Anonimos v Greek State*). The issue of jurisdiction does not, therefore, need to be addressed further.

14. The hearing of the case stated took place on 19 and 20 November 2024. There was a further brief hearing on 18 December 2024, at the request of the court, in order to clarify certain issues.

15. Before addressing the arguments at the hearing, I propose, first, to set out the relevant provisions of EU and national law.

Applicable law – EU law

16. At the date that the Consortium exercised its right to waive its exemption from VAT, the applicable EU law provisions governing such exemptions were contained in Directive 77/388/EC ("**the Sixth VAT Directive**"). Some of the case law relied on by the parties was decided by reference to this Directive. This provided, at Article 13, that:

B. Other exemptions
Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse.

(b) the leasing or letting of immovable property ...

C. Options

Member States may allow taxpayers a right of option for taxation in cases of:

(a) Letting and leasing of immovable property…

Member States may restrict the scope of this right of option and shall fix the details of its use.

17. Article 17 provides:

Origin and scope of the right to deduct
1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.
2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:
(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person;

18. The Sixth VAT Directive was replaced by Directive 2006/112/EC ("**the Principal VAT Directive**"), which is the Directive by reference to which many of the cases relied on have been decided. It is not in dispute that the relevant provisions of the Sixth VAT Directive are now reflected in the Principal VAT Directive, in particular in Title IX, Exemptions, and Title X, Deductions. Accordingly, the parties' arguments were advanced by reference to the terms of the latter Directive.

19. Articles 135 and 137, contained within Title IX, Exemptions, provide as follows:

Article 135

1. *Member States shall exempt the following transactions:*

   …

(l) the leasing or letting of immovable property

Article 137

1. *Member States may allow taxable persons a right of option for taxation in respect of the following*

...

(d) the leasing or letting of immovable property.

2. *Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.*

Member States may restrict the scope of that right of option.

20. Articles 167 and 168, contained within Title X, Deductions, provide, in relevant part, as follows:

Article 167

A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

21. It is of note that Title X of the Principal VAT Directive includes a Chapter headed "Adjustment of Deductions". Article 184 provides that the initial deduction of VAT may be

adjusted where it is higher or lower than that to which the taxable person was entitled. Article 185 makes clear that an adjustment can be made when a change occurs after the time that a return is made which affects the basis upon which the deduction was made. The examples referenced in Article 185(1) are where purchases are cancelled or price reductions given. However, as appears from the following articles and the relevant case law, an adjustment may be made where a deduction was made in relation to goods intended to be used for the purpose of taxable transactions, but which are in fact used for exempted transactions. Article 186 provides that Member States shall lay down the detailed rules for applying Articles 184 and 185.

22. Examples of this type of adjustment can be seen in the case law examined below. Importantly, Revenue does not contend that the requirement to pay a cancellation sum can be justified by reference to the adjustment provisions. Rather, it claims that the obligation is not an adjustment of a deduction at all. However, it remains helpful to be aware of how the adjustment mechanisms are framed. For instance, Article 187 addresses adjustments of deductions in relation to capital goods:

Article 187

1. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured.

Member States may, however, base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.

2. The annual adjustment shall be made only in respect of one-fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof.

The adjustment referred to in the first subparagraph shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactured or, where applicable, used for the first time.

23. Notably, Article 192 affords Member States flexibility when setting the detailed rules regarding the application of adjustments in order to avoid unfairness:

Article 192

Where a taxable person transfers from being taxed in the normal way to a special scheme or vice versa, Member States may take all measures necessary to ensure that the taxable person does not enjoy unjustified advantage or sustain unjustified harm.

Applicable law – National law

24. As with EU law, the provisions of national law which were in force at the time that the Consortium acquired the Property with the intention of using it for the purpose of leasing or letting, section 7 of the Value Added Tax Act 1972 ("**the 1972 Act**"), have since been repealed and replaced with, what the parties are agreed, are equivalent provisions in the VATCA 2010. The parties' arguments were all advanced by reference to the provisions of section 96 of that Act.

25. In relevant part, section 96 of the VATCA 2010 provides as follows:

(1) In this section "waiver" means a waiver of exemption from tax under section 7(1) of the repealed enactment.

(2) A waiver shall cease to have effect at the end of the taxable period during which it is cancelled in accordance with subsection (3).

(3) Provision may be made by regulations for the cancellation, at the request of a person or in accordance with subsection (8) or (12), of a waiver by the person and for the payment by that person to the Revenue Commissioners as a condition of cancellation of such sum (if any) as when added to the total amount of tax (if any) due by him or her in accordance with Chapter 3 of Part 9 in relation to the supply of services by him or her to which the waiver applied is equal to the total of—

(a) the amount of tax deducted by the person in accordance with Chapter 1 of Part 8 in respect of tax borne or paid in relation to the supply of such services,

(b) the amount of tax deducted by the person in accordance with section 12 of the repealed enactment, prior to the commencement of the letting of the immovable goods to which the waiver relates, in respect of or in relation to his or her acquisition of his or her interest in, or his or her development of, those immovable goods,

(c) the amount of tax that would have been deductible by the person in accordance with section 12 of the repealed enactment if tax had been chargeable on the transfer of ownership of goods to him or her in respect of which section 20(2)(c) was applied, and those goods were used by him or her in the supply of such services, and

(d) the amount of tax that would have been deductible by that person in accordance with section 12 of the repealed enactment if—

(i) tax had been chargeable on the supply to that person of goods or services in respect of which paragraph 7(7) of Schedule 2 was applied, and

(ii) those goods or services were used, in relation to the supply of services to which the waiver applied, by the person.

(4) Where there is a waiver in respect of the supply of a service, tax shall be charged in relation to the person making the waiver during the period for which the waiver has effect as if the service to which the waiver applies was not specified in Schedule 1.

…

(12) (a) In this subsection "relevant immovable goods" means immovable goods the tax chargeable on the acquisition or development of which a landlord would be obliged to take into account in accordance with subsection (3) in relation to the cancellation of that landlord's waiver.

(b) This subsection applies where—

(i) on or after 3 June 2009, a landlord has an interest in relevant immovable goods,

(ii) the landlord ceases, whether as a result of disposing of such goods or otherwise, to have an interest in any such goods, and

(iii) on the date when that landlord ceases to have any such interest, that landlord's waiver has not been cancelled in accordance with subsection (3).

(c) Where this subsection applies—

(i) the landlord's waiver of exemption shall be treated as if it were cancelled on the date referred to in paragraph (b)(iii), and

(ii) that landlord shall pay an amount, being the amount payable in accordance with subsection (3) in respect of the cancellation of that waiver, as if it were tax due by that landlord for the taxable period in which the waiver of exemption is so treated as cancelled.

26. A feature of section 96 which bears highlighting is that it is, in effect, a transitional provision, applicable only to those persons who had exercised their right to waive the exemption from VAT pursuant to section 7. As explained by the parties, the provisions applicable after the coming into force of the VATCA 2010 are the capital goods scheme contained in sections 63 and 64 of the VATCA 2010. The provisions detailing this scheme were not addressed by the Commissioner and the parties were agreed that it was not necessary for the court to engage with them in any detail for the purpose of addressing the issues raised in the case stated.

Effect of national law provisions

27. It is helpful to consider what the Irish legislative provisions necessitate. Where a person exercises an option to tax in respect of the letting of immovable goods, that person will be entitled to deduct any VAT paid on goods or services intended to be used for the purpose of the supply of that service. This includes any VAT paid on the acquisition of property intended to be used for letting purposes.

28. Irrespective of how much VAT is deducted or returned during the course of supply of those services, the taxpayer is entitled to deduct any VAT paid in full.

29. Where the person who has opted to tax, or waive their exemption, sells the property used for letting purposes, that sale must also be subject to VAT, and the person must return that VAT to Revenue. *In addition*, however, a calculation must be made of the total VAT deducted and the total returned during the period in which the person was providing services in relation to the letting of property. Where the total deducted exceeds the total returned, the taxpayer must pay that difference to Revenue, a so-called cancellation sum, being the cancellation of the waiver of its exemption from tax. Where the total VAT returned exceeds the total VAT deducted, there is no corresponding balancing payment.

30. It is agreed that this is what Irish law provides and that Revenue correctly applied national law in raising the Assessment. The only question is whether national law is compatible with EU law.

31. Before summarising the arguments and issues in dispute, it is necessary to try and explain a concept which is at the heart of the EU's common system of VAT, the principle of fiscal neutrality.

Fiscal neutrality

32. The principle of fiscal neutrality relied on by both parties, has two components. It refers to the following passage from *De Voil Indirect Tax Services* (V1.230B):

> "*The principle of fiscal neutrality is not, in practice, a single principle, but two or more related, but distinct ones. No complete definition of the principle has ever, it appears, been attempted; Lindsey J got closer than most when he said:*
>
> > 'The ECJ does little to help by failing to refer to some locus classicus as to that principle. I may be alone in finding references to it as varying in emphasis depending upon its context; sometimes it seems to direct one to the way in which VAT is intended to be passed on, by way of deductibility, supplier to supplier, until it is finally irrecoverably borne by the ultimate consumer - recipient. Another aspect of the principle is that a person who, within the EU, provides services which are exempt for VAT purposes cannot recover the input

tax attributable to those services – *WHA Ltd & Another v Revenue and Customs Commissioners* [2007] STC 1695 at para 16. Sometimes the principal seems to refer to a sort of fiscal parity, as between one supplier and others, so that it can be said, so far as concerns VAT, that they are competing with one another on the mythical level playing field. Sometimes it may refer to the fact that VAT advantages open to one supplier using a particular mode of supply are to be of a kind neutral between suppliers in the sense that, whether or not other traders have sought to obtain the VAT advantages under consideration, it would at least be open to them to arrange their business so as to seek it.'

Similarly, in Zimmerman, the court held:

> '… it should be borne in mind that, in the field of VAT, the concept of neutrality is used in different senses. On the one hand recalling that the deduction mechanism provided for under the Sixth Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, the Court has held that the common system of VAT seeks to ensure neutrality of taxation of all economic activities, provided that those activities are themselves subject in principle to VAT… On the other hand, according to settled case-law, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes.'

These references can, perhaps, be reduced to the following two main principles:

(1) that VAT is a tax on consumption, and as such the deduction system is designed to relieve businesses of the burden to the tax, while taxing the final consumer – 'the First Directive Principle'.

(2) that similar businesses should be treated similarly for tax purposes – 'the Parity Principle'."

33. As indicated in the above passage, the principle is invoked in a number of different contexts. In the course of oral submissions, counsel for Revenue referred to the decision of the CJEU in Case C-260/10, *Revenue and Customs v The Rank Group plc* ("***Rank***"), a case which concerned the fact that different types of gaming machines were treated differently for the purpose of exemption from VAT (because, it seems, the operators were licensed under

different licensing regimes) even though the machines were, in effect, identical from the consumer's point of view. It was argued that this breached the principle of fiscal neutrality:

> "*32 According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98* Commission v France *[2001] ECR I-3369, paragraph 22; Case C-498/03* Kingscrest Associates and Montecello *[2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06* Marks & Spencer *[2008] ECR I-2283, paragraph 47, and Case C-41/09* Commission v Netherlands *[2011] ECR I-0000, paragraph 66).*
>
> *33 According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.*
>
> ….
>
> *36 Having regard to the foregoing considerations, the answer to Question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.*

Arguments

34. Up to the point of the 'triggering' of the requirement to pay the cancellation sum, the parties are agreed, both as to how the relevant legislative provisions operated and that they operated in accordance with EU law.

35. The parties are agreed that the Consortium was a taxable person, a person who independently carries out economic activity, within the meaning of the VATCA 2010 (and

the Directive), and that it acquired the Property with the intention of letting it, *i.e.*, the letting of immovable property.

36. It is also agreed that such a service is, *prima facie*, exempt from the requirement to pay or charge VAT. There is, however, an entitlement to waive that exemption. There is no dispute but that the Consortium waived the exemption in accordance with the provisions of national law and that it was, therefore, entitled to and did deduct the VAT paid on its acquisition of the Property.

37. It continued to deduct VAT on goods and services acquired for use in connection with the letting of the Property. It also charged VAT on any lettings of the Property and returned that VAT to Revenue.

38. The sole dispute concerns what the Irish legislation provided for upon the sale of the Property, *i.e.*, the requirement to pay the cancellation sum. The taxpayer claims that it was entitled to claim all the deductions that it did and that the requirement to pay the cancellation sum is an attempt to claw back a deduction lawfully claimed. It contends that this is wholly impermissible as made clear in the case law of the CJEU. Insofar, therefore, as the provisions of national law permit such a clawback, those provisions must be disapplied in accordance with Case C-387/17, *Minister for Justice v Workplace Relations Commission*. The Commissioner was, it contends, correct in so doing.

39. Revenue's position is that the Commissioner erred in law in failing to have regard to the discretion afforded to Member States when providing an option to tax. Furthermore, it contends that the Commissioner failed to have regard to the principle of fiscal neutrality.

40. Insofar as Revenue relies on a Member State's discretion, it refers to Article 137(2) of the Principal VAT Directive which expressly provides that, where a Member State introduces a right of option – which is a matter entirely within its discretion – it may restrict the scope of that right of option. It contends that the legislation is a restriction on the scope of the right of option within the meaning of Article 137(2).

41. On this point, the Consortium accepts that the State was entitled to restrict the scope of the right of option, but contends that once an option to tax is afforded to a taxpayer, and the

taxpayer exercises the option in accordance with the provisions of national law, it is impermissible to restrict the right of deduction, as this would be contrary to Articles 167 and 168 of the Principal VAT Directive. Put otherwise, the taxpayer says it is permissible for the State to impose conditions or restrictions on the gateway by which a taxpayer may opt to tax, but once through that gateway, the State has no discretion in relation to how the VAT rules, and in particular, the right to deduct, are applied. That is the first dispute between the parties.

42. In relation to fiscal neutrality, Revenue acknowledges that that concept encompasses two distinct principles. It focuses on one of those concepts, the requirement for fiscal parity, which it contends the Irish legislation respects, insofar as those who opt to tax do not gain an advantage over those who do not so opt. It argues that in order to determine whether a legislative scheme respects the principle of fiscal parity, it is necessary to compare the positions of similar entities under the scheme. In this case, it contends that the appropriate comparator is between a person who opts to tax and one who does not. It says that a person who does not opt to tax is "*treated equitably (and not disadvantaged)*" compared to one who waived its exemption. In its submissions it writes that far "*from undermining the principle of neutrality of VAT, s. 96 thus, effectuates it*." It contends that, absent a requirement to pay the cancellation fee, the Consortium in this case would obtain a "*windfall*", undermining the VAT system's integrity.

43. The Consortium places emphasis on another aspect of the principle of fiscal neutrality, the concept that the deduction system is designed to relieve businesses *entirely* of the burden of VAT, while taxing the final consumer. It argues that if required to pay the cancellation sum, it will face a very significant VAT burden, in breach of this principle. This is the second dispute between the parties.

44. Although not expressly addressed as such by the parties, it seems to me that there is a third significant issue between them, which concerns how the legislative provisions should be characterised. Revenue places emphasis on the fact that the statutory scheme involves a person waiving its exemption from taxation and then, in certain circumstances, cancelling that waiver. The relevant circumstance in this case was that provided for in section 96(12), cancellation by sale of the property used for letting. In effect, Revenue says, any restriction

on a right of deduction ceased to apply once the waiver was cancelled because the Consortium was no longer engaged in the economic activity for which it opted to tax.

45. The Consortium, by contrast, looks to the substantive effect of the statutory provisions. On its case, once it opted to tax, it was entitled to make the deductions that it did because the goods and services in respect of which it made deductions were being used for the purpose of taxed transactions. It argues that an obligation to pay a cancellation sum once the Property was sold, however described, is, in substance, an interference with the right of deduction. On the Consortium's analysis, the requirement to pay the cancellation sum is simply a device by which the State seeks to restrict the entitlement to deduct.

46. Those seem to be the main issues between the parties. Understandably both parties placed emphasis on different features of the relevant rules, both before the Commissioner and this court, which is reflected in the multiplicity of questions posed in the case stated. Insofar as it is necessary to do so, I will address those matters below when addressing the parties' arguments.

47. Both parties place significant emphasis on the case law of the CJEU. The Consortium contends that the Commissioner correctly identified *and applied* the relevant principles from that case law. Revenue does not greatly dispute the principles but argues that the Commissioner erred in failing to recognise the material distinctions between the cases he relied on, in particular, Case C-672/16, *Imofloresmira* ("**Imofloresmira**"), and the position in Irish law.

Case law

48. The Commissioner considered that none of the decisions of the CJEU were precisely on point. However, he considered that the principles were sufficiently well identified and established to be capable of application in this case.

49. The Consortium argues that the case law establishes, beyond doubt, certain principles which make clear that the relevant provisions of the VATCA 2010 are inconsistent with EU law. Revenue, by contrast, argues that when properly analysed, the case law supports its

contention that Member States enjoy a wide discretion where they elect to provide an option to waive an exemption from VAT. Although many of the cases involve findings by the CJEU that the provisions of various member states' VAT systems infringe the principle of fiscal neutrality and unlawfully restrict the right to deduct, Revenue argues that those cases are addressed to entirely different legislative regimes and, therefore, can be distinguished.

50. As emerges from an examination of the case law relied on by both parties, some cases are concerned with the right to opt to tax, whereas others concern transactions which are *prima facie* subject to tax but in which the right to deduct, contained in Articles 167 and 168 of the Principal VAT Directive, is said to have been infringed. Each party argues that it is necessary to consider the provisions impugned in each case in order to understand the principles being applied by the court. In addition, in circumstances where this court is called upon to determine whether the Commissioner was correct to disapply provisions of national law, the question of whether a reference to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the European Union ("**the TFEU**") naturally arises. Accordingly, in order to address the parties' arguments and in order to decide whether the question of EU law at issue in this case requires to be referred to the CJEU in order to enable the court to determine this case, it is necessary to consider in some detail the case law in which the relevant principles have already been established. I propose, therefore, to summarise the main cases relied on, before addressing the parties arguments in detail by reference to that case law. For convenience, I will simply address the cases in the order in which they were decided.

51. The first decision in time, relied on by both parties, is the judgment in Case C-831/97, *Belgocodex SA v Belgian State* ("***Belgocodex***"). That case concerned provisions of Belgian law which provided an option to tax, subject to implementing measures being adopted. Those implementing measures were never adopted, and the provision of Belgian law was subsequently repealed with retrospective effect. The taxpayer claimed deductions of VAT paid on the works involved in the renovation of a building which it was intended to let. Those deductions were disallowed. The taxpayer challenged this decision, arguing that, once introduced, the option to tax could not be withdrawn and that, in any event, it could not be withdrawn with retrospective effect.

52. The CJEU held that the provisions of the then applicable VAT Directive did not prevent a Member State revoking the option to tax.

53. Although the question of the retroactive effect of the provisions were determined to be a matter for the national court, the CJEU made clear that this was so only because a question arose as to whether the right to deduction had ever arisen on foot of the option to tax, in circumstances where implementing measures had not been introduced. The Court made clear (at para. 24) that:

> "*Since Article 17 of the Sixth Directive provides that the right to deduct is to arise at the time when the deductible tax becomes chargeable, it follows that a Member State cannot retroactively disregard the rules on the right of deduction once such a right has been made available.*"

54. The Court thus made clear that it is impermissible to interfere with a right to deduct which had been lawfully exercised.

55. The next case in time, Case C-269/03, *Luxembourg v VOK* ("***VOK***"), involved the provisions of the law of Luxembourg which imposed a condition on the exercise of the option to tax which required that any party exercising the option must submit a written declaration to that effect for approval and that approval must have been obtained prior to any transaction in respect of which the option was sought to be exercised. VOK let a building from 1 January 1993. It submitted a declaration of its option to tax for approval on 29 June 1993 and was granted approval the following day, with effect from 1 July 1993. When it claimed deductions in respect of payments for the first half of the year, *i.e.*, for the period prior to obtaining approval of its option, the deductions were refused because VOK had not complied with the conditions imposed in the legislation.

56. In its decision, the court noted:

> "*19. In that regard, it is appropriate to note that the right to deduct is a fundamental principle of the VAT system. It is important to scrutinise whether an approval process, such as that adopted by the Grand Duchy of Luxembourg, is an improper*

implementation of the right to opt for taxation provided for by the provisions of Article 13(C) of the Sixth Directive, in that it adversely affect that principle."

57. The court concluded that the relevant rule did not improperly undermine the right to deduct:

"*28. It thus appears that such approval process is not intended adversely to affect the right to deduct, but, on the contrary, enables that right to be fully exercised, subject to compliance with certain requirements, in particular, the submission of a declaration of option and the attaining of the approval within certain time-limits.*"

58. The provision in that case was, therefore, a permissible restriction on the exercise of the option to tax, not an impermissible restriction on those who have opted to tax. The same is true of the next case relied on, Case C-246/04, *Turn- and Sportunion Waldburg* ("***Sportunion***"). In *Sportunion*, the CJEU was asked to consider whether it was permissible to extend the option to tax only to particular types of transactions or groups of taxable persons. At issue was a sports club which sought to exercise an option to tax in respect of an annexe to the club which it had constructed with the intention of letting it as a café. However, under the relevant Austrian law, although an option to tax was available to some, sports clubs were not permitted such an option. The court held that this restriction was permissible:

"*29. It follows that the Member States have a wide discretion under Article 13(C) of the Sixth Directive. It is for them to assess whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time (see Case C-381/97* Belgocodex *[1998] ECR I-8153, paragraphs 16 and 17; Case C-12/98* Amengual Far *[2000] ECR I-527, paragraph 13; and Case C-326/99* 'Goed Wonen' *[2001] ECR I-6831, paragraph 45).*

30 Thus, in exercising their discretion with regard to the right of option, the Member States may also exclude certain transactions or certain categories of taxable persons from the scope of application of that right.

31 Nevertheless, as the Commission correctly points out, when the Member States use their ability to restrict the scope of the right of option and to determine the arrangements for its exercise, they are to observe the general objectives and principles of the Sixth Directive, in particular the principle of fiscal neutrality and the requirement for correct, straightforward and uniform application of the exemptions provided for (see, to that effect, Case C-283/95 Fischer *[1998] ECR I-3369, paragraph 27, and* 'Goed Wonen', *paragraph 56).*

32 The principle of fiscal neutrality, which is laid down in Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967(I), p. 14) and which is inherent in the common system of VAT, as the fourth and fifth recitals in the preamble to the Sixth Directive state, requires that all economic activities should be treated in the same way (Case C-155/94 Wellcome Trust *[1996] ECR I-3013, paragraph 38, and* Belgocodex*, paragraph 18). The same is true of economic operators carrying out the same activities (Case C-216/97* Gregg *[1999] ECR I-4947, paragraph 20).*"

59. Understandably, Revenue relies on the above cases as evidencing the discretion afforded to Member States in implementing an option to tax. The Consortium, on the other hand, stresses the fundamental nature of the right to deduct and the impermissibility of interfering with it once lawfully exercised.

60. The next decision relied on is the case which the Commissioner considered to be of the most assistance. Case C-672/16, *Imofloresmira* ("***Imofloresmira***") concerned provisions of Portuguese law which permitted a taxable person to opt to tax in relation to the letting of immovable property. However, where a deduction was made in respect of such property and the property was not used for its intended purpose for more than two consecutive years, even where this failure was outside the control of the taxpayer, *i.e.*, because it couldn't find a tenant, an adjustment was required to be made to that deduction. Imofloresmira, a company involved in selling, letting and managing property did not make adjustments in respect of certain properties it owned which it had been trying to let but which had been unlet for a period in excess of two years. The tax authority applied an adjustment and Imofloresmira challenged that adjustment. The referring court asked the CJEU to consider whether the

Portuguese law provisions were compatible with the Principal VAT Directive. The CJEU concluded that they were not:

> "*35. Under Article 167 of the VAT Directive, a right of deduction arises at the time the deductible tax becomes chargeable. Consequently, only the capacity in which a person is acting at that time can determine the existence of the right to deduct (see, to that effect, judgments of 11 July 1991,* Lennartz*, C-97/90, EU:C:1991:315, paragraph 8, and of 30 March 2006,* Uudenkaupungin kaupunki*, C-184/04, EU:C:2006:214, paragraph 38).*
>
> *36. It follows that, once the tax authority has accepted, on the basis of information provided by a business, that it should be accorded the status of a taxable person, that status cannot, in principle, subsequently be withdrawn retroactively on account of the fact that certain events have or have not occurred (see, to that effect, judgment of 29 February 1996,* INZO*, C-110/94, EU:C:1996:67, paragraph 21), save in cases of fraud or abuse.*
>
> *37. It should be remembered that, according to settled case-law, the right to deduct provided for in Article 167 to 172 of the VAT Directive is an integral part of the VAT scheme and, in principle, may not be limited. It is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (judgment of 15 December 2005,* Centralan Property*, C-63/04, EU:C:2005:773, paragraph 50 and the case-law cited).*
>
> *38. The deduction arrangement is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT therefore ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT (judgment of 15 December 2005,* Centralan Property*, C-63/04, EU:C:2005:773, paragraph 51 and the case-law cited).*
>
> *39. It is important to recall also that it is the acquisition of goods or services by a taxable person acting as such that gives rise to the application of the VAT system and therefore of the deduction mechanism. The use to which the goods or services are put, or intended to be put, merely determines the extent of the initial deduction to which the*

taxable person is entitled under Article 168 of the VAT Directive and the extent of any adjustments in the course of the following periods (see, to that effect, judgment of 11 July 1991, Lennartz*, C-97/90, EU:C:1991:315, paragraph 15).*

40. It follows therefore that the entitlement to a reduction is retained in principle, even if subsequently, by reason of circumstances beyond its control, the taxable person does not make use of those goods and services which gave rise to a deduction in the context of taxed transactions (see, to that effect, judgments of 29 February 1996, INZO*, C-110/94, EU:C:1996:67, paragraph 20, and of 15 January 1998,* Ghent Coal Terminal*, C-37/95, EU:C:1998:1, paragraphs 19 and 20).*

61. The court also considered the scope of the discretion afforded to Member States by Article 137(2):

47. Contrary to what the Portuguese Government maintains, to take the view that it is sufficient, in order to establish the existence of 'change' for the purposes of Article 185 of the VAT Directive, for a property to remain empty after the termination of the lease to which it was subject, due to circumstances outside the owner's control, even where it has been established that the owner still intends to use it for a taxed activity and undertakes the necessary steps to that end, would be tantamount to restricting the right of deduction through the provisions applicable to adjustments.

48. Secondly, even if Article 137(2) of the VAT Directive leaves Member States a wide discretionary power to determine the rules governing the exercise of the right of option and even to withdraw it (see, to that effect, judgment of 12 January 2006, Turn- und Sportunion Waldburg*, C-246/04, EU:C:2006:22, paragraphs 27 to 30), the Member States could not use that power to infringe Articles 167 and 168 of that directive by revoking a right of deduction which has already been acquired.*

49. A limitation of VAT deductions connected with taxed operations, after the right of option has been exercised, would not concern the 'scope' of the right of option which Member States may restrict by virtue of Article 137(2) of the TVA Directive, but the consequences of exercising that right (see, to that effect, judgment of 30 March 2006, Uudenkaupungin kaupunki*, C-184/04, EU:C:2006:214, paragraph 46).*

62. *Imofloresmira* thus set out the basic principles upon which the Commissioner relied in determining that section 96 was incompatible with EU law – the discretion afforded to Member States in setting rules for the option to tax could not be relied on to impose rules which resulted in the revocation or limitation of a right of deduction already acquired. The court stressed that the use, or intended use, of the goods or services acquired determines the extent of the initial deduction, or subsequent adjustment and that this remained true even where the goods or services were not used as intended for reasons "beyond the control" of the taxpayer. Revenue places emphasis on this feature as a contrast to the present case, in particular, the fact that, although the failure to let the Property may have been beyond the Consortium's control, there was no suggestion that the sale of it was anything other than a deliberate decision by the Consortium.

63. Revenue places significant reliance on Case C-374/19, *HF v Finanzamt Bad Neuenahr-Ahrweiler* ("***HF***") which involved a company which operated a retirement home exempt from VAT. The company added a cafeteria in an annexe to the retirement home and indicated that it intended to make it accessible to visitors, *i.e.*, to use it for taxable transactions. On the assumption that residents of the retirement home would also use the cafeteria, it was therefore agreed with the tax authorities to assume tax exempt use of the cafeteria of 10%. However, following an audit it emerged that the cafeteria was no longer being used for taxable transactions at all, it was only being used by residents of the retirement home. The tax authorities made an adjustment to the deductions made in the years during which the cafeteria was no longer being used for taxable transactions.

64. The CJEU contrasted the position in *Imofloresmira* with that in *HF* on the basis that, in the latter case, the company had ceased any taxable transactions.

> "*32 Therefore, in accordance with the case-law referred to in paragraphs 20 and 21 above, in so far as the goods or services acquired by the applicant in the main proceedings for the purpose of constructing the cafeteria were used, from 2009 to 2012, exclusively for the purpose of its exempt transactions — which is nevertheless a matter for the referring court to determine — the transactions carried out at the earlier stage are no longer used to make taxed supplies and are therefore subject to the deduction adjustment mechanism. In such circumstances, the close and direct relationship*

between the right to deduct input VAT paid on the expenditure incurred and taxed activities subsequently carried out by the taxable person, even though it existed at an earlier stage, would now have been broken."

65. The court noted that this did not contravene the principle of fiscal neutrality:

"*34 Lastly, it should be stated that the principle of fiscal neutrality does not preclude such a conclusion. The situation of an undertaking which makes investments for the purpose of an economic activity giving rise to both taxed and exempt transactions and which continues to carry out exempt transactions is different from that of an undertaking which makes investments for the purpose of an economic activity giving rise to only taxed transactions without that activity ultimately resulting in such transactions.*

66. The next case to which reference was made was, Case C-248/20, *Skatteverket v Skelleftea Industrihus AB* ("***Skelleftea***"), was a decision by reasoned opinion, pursuant to Article 99 of the Rules of Procedure of the Court of Justice. The Consortium places reliance on this fact to assert that the principles applied in that case, and which it says are applicable in this case, are now so firmly established as to enable the CJEU to decide cases without the necessity for a judgment.

67. In that case, Skelleftea planned to construct a building to be used as offices which it intended to let out. It opted to tax under the relevant Swedish legislation and made deductions in relation to, for instance, the purchase of architectural services required for the planned building. However, with the loss of a potential future tenant, the project became unviable and was abandoned before construction commenced. Under the relevant Swedish law, all the deductions which had been made had to be repaid. The CJEU ruled that the Principal VAT Directive precluded such a law unless it could be shown that the adjustment of deductions fell within the provisions of Articles 184 – 187 of the Directive:

"*37. The Court has also repeatedly stated that the right of deduction, once it has arisen, is retained, in principle, even if, subsequently, the planned economic activity was not carried out and, therefore, did not give rise to taxed transactions … , or if, by*

reason of circumstances beyond his or her control, the taxable person did not make use of the goods and services which gave rise to a deduction in the context of taxed transactions …

38. Any other interpretation of the VAT Directive would be contrary to the principle that VAT should be neutral as regards the tax burden on a business. It would be liable to create, as regards the tax treatment of the same investment activities, unjustified differences between businesses already carrying out taxable transactions and other businesses seeking by investment to commence activities which will in future be a source of taxable transactions. Likewise, arbitrary differences would be established between the latter businesses, in that final acceptance of the deductions would depend on whether or not the investment resulted in taxed transactions (judgment of 12 November 2020, ITH Comercial Timişoara*, C-734/19, EU:C:2020:919, paragraph 36 and the case-law cited).*

39. It is also apparent from the case-law that, even though Article 137(2) of the VAT Directive gives the Member States a wide discretionary power to determine the rules governing the exercise of the right of option and even to withdraw it, the Member States may not use that power to infringe Articles 167 and 168 of that directive by revoking a right of deduction which has already been acquired (judgment of 28 February 2018, Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 48 and the case-law cited). A limitation of VAT deductions connected with taxed transactions, after the right of option has been exercised, would not concern the 'scope' of the right of option which Member States may restrict by virtue of Article 137(2) of the VAT Directive, but the consequences of exercising that right (judgment of 28 February 2018,* Imofloresmira – Investimentos Imobiliários*, C-672/16, EU:C:2018:134, paragraph 49 and the case-law cited).*

…

41 It follows that Article 137(2) of the VAT Directive must be interpreted as precluding a provision of national legislation, such as Chapter 9, Paragraph 11, of the Law on VAT, which provides, de facto, for the revocation of the right to deduct the input tax paid where that right has been granted to a taxable person in the course of the exercise, by that taxable person, of his or her right of option."

68. The court also made clear that, although it was impermissible to require repayment of all the VAT deducted, a national law which required an adjustment to be made in light of the fact that the planned project never went ahead would be permissible, in accordance with Articles 184 – 187 and 192 of the Directive.

69. At issue in Case C-56/21, *UAB 'ARVI' ir ko* ("***Arvi***") was a provision in Lithuanian law which prevented the company in question claiming a VAT deduction in relation to a transaction which had occurred prior to it opting to tax. The CJEU considered that this was compatible with EU law and consistent with the requirement for fiscal neutrality:

> "*30 In the present case, it is not apparent either from the request for a preliminary ruling or from the observations submitted to the Court that the national legislation or practice at issue in the main proceedings establishes a difference in treatment between similar transactions that are in competition with each other. For the reasons set out in greater detail by the Advocate General in points 30 to 35 and 46 of her Opinion, the purpose of the right of option for taxation in respect of the supply of immovable property is to prevent the taxable person who makes the supply from being placed at a competitive disadvantage, which is intended precisely to implement the principle of fiscal neutrality, and the conditions governing the exercise of the right of option for taxation laid down by the national legislation at issue in the main proceedings are the same for all taxable persons, irrespective of their capacity or legal form, since that exercise depends solely on the registration of the purchaser for VAT purposes at the time of supply of the property.*"

70. The court also noted that there was no infringement of the principle of effectiveness:

> "*32 On the contrary, the conditions for exercising the right of option are known in advance and, as the Advocate General observed in point 53 of her Opinion, a taxable person such as Arvi has several means at its disposal to be able to comply with the conditions laid down at national level and thus actually to exercise its right of deduction.*"

71. Before this court, the Consortium also relied on cases which were decided following the Commissioner's determination, including Case C-341/22, *Feudi di San Gregorio Aziende Agricole SpA* ("***Feudi***") and Case C-127/22, *'Balgarska telekomunikatsionna kompania' EAD* ("***BTK***"), Case C-696/22, *C SPRL* ("***C SPRL***").

72. Feudi concerned provisions of Italian law which dealt with taxable persons who were deemed to be "non-operating". The court's judgment described the effect of the provisions and the question raised in the preliminary reference in the following way:

"*15. It is apparent from the request for a preliminary ruling that, under that provision, non-operating companies cannot be refunded a VAT credit set out on their declaration that arises in particular from an amount of deductible VAT that is higher than the VAT collected. Nor can that credit be offset or transferred. That credit can therefore be applied towards the VAT due in respect of subsequent tax periods. However, where, over three consecutive tax periods, a non-operating company does not carry out transactions for VAT purposes that are of an amount at least equal to the amount resulting from that income threshold, that credit can no longer be carried forward. That company accordingly loses the right to deduct VAT.*

16. In those circumstances, the referring court asks, in the first place, whether the status of taxable person and, consequently, the right to deduct input VAT paid may be denied to a company that carries out transactions subject to VAT while not reaching the income threshold provided for by the Italian legislation at issue, where that company does not demonstrate that objective circumstances rendered it impossible to achieve income higher than that threshold. In that regard, the referring court is uncertain whether such a practice is compatible with Article 9(1) of the VAT Directive from which it is apparent, in essence, that the status of taxable person derives from the exercise, by the entity which is relying on that status, of an economic activity."

73. The answer seemed straightforward for the court:

"*27. In that regard, it must be borne in mind that, in the first place, in accordance with the settled case-law of the Court, the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT*

which they are liable to pay is a fundamental principle of the common system of VAT. The right of deduction provided for in Article 167 et seq. of the VAT Directive is therefore an integral part of the VAT scheme and may not, in principle, be limited. That right is exercisable immediately in respect of all the VAT charged on input transactions. The deduction system is intended to relieve the taxable person entirely of the burden of the VAT due or paid in the course of all his or her economic activities. Thus, the common system of VAT ensures complete neutrality of taxation of all economic activities, whatever the purpose or results of those activities, provided that they are themselves subject in principle to VAT. In so far as the taxable person, acting as such at the time when he or she acquires goods or receives services, uses those goods or services for the purposes of his or her taxed transactions, he or she is entitled to deduct the VAT due or paid in respect of those goods or services (see, to that effect, judgments of 25 November 2021, Amper Metal*, C-334/20, EU:C:2021:961, paragraph 23 and the case-law cited, and of 25 May 2023,* Dyrektor Izby Administracji Skarbowej w Warszawie *(VAT – Fictitious acquisition), C-114/22, EU:C:2023:430, paragraphs 27 and 28 and the case-law cited).*

…

31. It follows from the foregoing considerations that no provision of the VAT Directive makes the right of deduction conditional on a requirement that the amount of output transactions subject to VAT, carried out by a taxable person during a given period, must reach a certain threshold. On the contrary, it follows from the case-law cited in paragraph 27 of the present judgment, that the right to deduct VAT is ensured, subject to satisfaction of the necessary conditions which it is for the referring court to ascertain, irrespective of the results of the economic activities of the taxable person concerned."

74. The decision in *BTK* concerned a company, BTK, which had acquired certain telecommunications goods with the intention of reselling them. Deductions were made in respect of the VAT paid on those acquisitions. BTK subsequently wrote off those goods, selling some as waste to taxable persons and destroying others. In accordance with Bulgarian law, BTK were, as a consequence, required to make an adjustment to the deduction made. The CJEU was asked whether the writing off of goods in this manner

constituted a change for the purpose of Article 185(1) of the Principal VAT Directive, thus triggering a requirement to make an adjustment. The court concluded that it was not:

"*29. Accordingly, the rules laid down by the VAT Directive in respect of adjustment are intended to enhance the precision of deductions so as to ensure the neutrality of VAT, with the result that transactions carried out at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies themselves subject to VAT. By those rules, that directive thus aims to maintain a close and direct relationship between the right to deduct input VAT and the use of the goods and services concerned for taxable output transactions (judgment of 10 October 2013,* Pactor Vastgoed*, C-622/11, EU:C:2013:649, paragraph 34 and the case-law cited).*

30. Finally, as regards the coming into existence of any obligation to make an adjustment of an input VAT deduction, Article 185(1) of the VAT Directive establishes the rule that such an adjustment must be made inter alia when changes to factors which were taken into consideration for the determination of the amount of that deduction occurred after the VAT return.

31. In the present case, it is apparent from the order for reference that the goods concerned were ultimately sold by the taxable person in the context of taxable transactions. It must therefore be held that the condition for the application and maintenance of the right to deduct is fulfilled, in accordance with the case-law referred to in paragraph 27 of the present judgment, namely that those goods were used in the course of economic activities subject to VAT. That application and that maintenance are, moreover, necessary in order to ensure fiscal neutrality, which is the objective pursued by the common system of VAT by means of the deduction system."

75. Finally, in *C SPRL*, the court was asked to consider, *inter alia*, the evidence necessary to establish a link between an input transaction and the output transactions giving the right to deduct. In other words, the evidence necessary to show that the transaction in respect of which a deduction is claimed is used or intended to be used for taxable transactions. In the course of its judgment, the court observed:

94. That finding is borne out by the case-law of the Court, from which it is apparent that Article 168(a) of Directive 2006/112 does not in any way make the exercise of the right to deduct subject to a criterion relating to the increase in the turnover of the taxable person or, more generally, to a criterion of the economic profitability of the input transaction. In particular, the absence of an increase in the turnover of the taxable person cannot affect the exercise of the right to deduct. As recalled in paragraph 85 above, the common system of VAT ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT. Therefore, the right to deduct, once it has arisen, is retained even if the intended economic activity was not carried out and, therefore, did not give rise to taxed transactions or if the taxable person was unable to use the goods or services which gave rise to a deduction in the context of taxable transactions by reason of circumstances beyond his or her control (see, to that effect, judgment of 25 November 2021, Amper Metal*, C-334/20, EU:C:2021:961, paragraphs 30 and 35).*

Discussion

76. As discussed above, there are three main issues in dispute between the parties. First, are the provisions of section 96 permissible in the exercise of the discretion afforded to the State by Article 137(2) of the Principal VAT Directive? Second, do the provisions of section 96 respect the principle of fiscal neutrality? And third, does the structure of section 96, which only imposes a requirement to make a balancing payment following cancellation of a waiver from exemption, have a bearing on the compatibility of the legislative scheme with EU law?

77. It is helpful to recall, in light of the case law, what EU law requires in relation to taxable transactions.

78. In accordance with Article 167 of the Principal VAT Directive, the entitlement to deduct VAT paid on goods or services supplied to a taxable person arises at the time the VAT becomes chargeable, *i.e.*, at the time of the transaction on which VAT was paid. VAT can be deducted where the goods and service are used or intended to be used for the purpose of the taxable transactions of the taxable person.

79. Put simply, a person who is required to charge VAT on the provision of services (or goods) is entitled to deduct immediately, from the VAT they must return to the revenue authorities, any VAT they pay on goods and services used in the provision of that service. This is a fundamental principle of the common system of VAT (see, for instance, *Feudi*).

80. It is necessary that the input transactions on which VAT is sought to be deducted be closely connected with the output transactions on which VAT is charged, but it is not permissible to make the entitlement to deduct VAT on input transactions contingent on the amount of VAT charged on output transaction. It is not even required that there *be* any output transactions. This is clear from *Imofloresmira, Skelleftea* and *Feudi*.

81. It is permissible to apply one of the adjustment mechanisms set out in the Directive where there is a change in the basis upon which a deduction was made. This occurred in *HF*, where a deduction was made on the basis that a cafeteria would be used for a taxable supply of services, but this subsequently changed to it being used for exempt services only. Critically, Revenue does not contend that section 96 corresponds to an adjustment mechanism in accordance with Articles 184 – 192 of the Directive.

82. There is nothing in the Directive or the case law which indicates that different rules apply in respect of the provision of non-exempt goods or services and the provision of goods and services which are *prima facie* exempt, but in respect of which an option to tax is exercised, in accordance with the discretion provided by Article 137(2) of the Directive. There is no obligation on a Member State to introduce an option to tax. Where it does, it enjoys a wide discretion in setting conditions for the exercise of the option. However, once the option to tax is exercised and the right to deduct is engaged, it cannot be retrospectively withdrawn (see *Belgocodex*). That it is not permissible to introduce a limitation on deduction as a condition of exercising a right of option (see *Imofloresmira*) reflects the fact that once a taxpayer exercises the option to tax, it has the same entitlements as a person whose taxable transactions are automatically subject to VAT.

83. These principles are firmly established in EU law and are not disputed by either party.

84. In light of those principles, the Consortium's case is straightforward. The State has provided an option to tax. The Consortium exercised that option and made a deduction in

relation to the purchase of the Property. At all times it used, or intended to use, the Property for the purpose of taxable transactions. It accounted for VAT on inputs and outputs throughout its period of ownership of the Property. Ultimately, it sold the Property, itself a taxable transaction. As it happens, the total deductions it made over this period dramatically exceeded the VAT it returned, in circumstances where the Property proved difficult to let and its value decreased between purchase and sale.

85. The Consortium says that, as a matter of EU law, that is the end of the matter, unless an adjustment is required to be applied in accordance with the provisions of the Principal VAT Directive. No such adjustment was applied in this case and Revenue does not contend that the mechanism in section 96 is an adjustment mechanism permitted by the Directive. The fact that the deductions the Consortium made were less than the payments it made is, the Consortium argues, immaterial.

86. I accept the Consortium's characterisation of the requirement to pay a cancellation sum as *prima facie* an interference with deductions lawfully made, and therefore an interference with the right to deduct. Revenue's own submissions describe the requirement as a "*lookback/balancing exercise to ensure that VAT-deducted did not exceed VAT charged*." It was frequently referred to in submissions as a "*clawback*". The fact that the clawback only occurs after what the legislation treats as the cancellation of a waiver does not alter that conclusion. Insofar as the legislation permits Revenue to require payment of a cancellation sum calculated by reference to the difference between VAT deducted on input transactions and VAT paid on output transactions, that amounts to what was described in *Skelleftea* as a "*de facto revocation of the right to deduct*". The provisions of section 96 are, therefore, *prima facie* an interference with the taxpayer's right to deduct. Are they nonetheless compatible with EU law for any of the reasons that Revenue asserts?

87. The short answer to that question is no, they are not. None of the arguments advanced by Revenue address the fundamental difficulty with section 96 which is that it undermines the principle of fiscal neutrality and, in particular, the First Directive Principle that the deduction system is designed to relieve businesses of the burden of the tax, while taxing the final consumer. It is all too obvious that if required to pay the cancellation sum, the Consortium will face a substantial VAT burden notwithstanding that, by lawfully exercising its option to tax, it was at all material times engaged in taxable activity. As discussed below,

the fact that it was no longer engaged in taxable activity at the time that the requirement to pay the cancellation sum was applied, *i.e.*, after the Property was sold, does not alter this conclusion.

88. Turning to Revenue's first argument, that the imposition of the requirement to pay a cancellation sum is permissible within the exercise of the Member State's discretion, this is plainly not the case. The provisions of section 96 are not a restriction on the scope of the right of option, which *is* permitted by Article 137(2), rather they are a restriction on the right to deduct, which *is not* permitted, other than in accordance with the adjustment provisions which Revenue does not contend are engaged here.

89. Revenue places some emphasis on the fact that taxpayers knew in advance the conditions which would apply if they opted to tax. Of course, the fact that the provisions of legislation are known in advance could never be an answer to a claim that the legislation is contrary to EU law. Nor was it an answer in any of the cases referred to above. Indeed in a number of the cases, the taxpayer paid the sums claimed in accordance with the relevant national law provisions and only belatedly sought to challenge those provisions (see, for instance, *Skelleftea*, where the company in question repaid the VAT deducted but three years later requested that the deduction be accepted again).

90. Revenue's argument is more nuanced. Revenue seems to be suggesting that the fact that the conditions were known at the time of the decision to exercise the option to tax means that those conditions should be treated as a restriction on the scope of the right to option, because, it is suggested, they would be taken into consideration by any person considering whether or not to exercise that option. However, the argument that a limitation applied after the right to deduct has been exercised could be regarded as limiting the scope of the right of option was expressly rejected in *Imofloresmira* (see paragraphs 48 and 49 quoted above).

91. Thus, Revenue cannot rely on the wide discretion afforded by Article 137(2) to justify the measures contained in section 96.

92. Revenue's next argument, that the measures are necessary to respect the principle of fiscal neutrality must also be rejected. First, it clearly does not respect one aspect of that principle – the First Directive principle – for the reasons explained above; the Consortium was clearly faced with a significant VAT burden by the operation of section 96 and therefore

has not been relieved entirely of that burden. And second, even if that were not so, on no analysis do the provisions respect the other aspect of fiscal neutrality, the parity principle. It seems to me that Revenue's argument in this regard is based, at least in part, on a misconceived distinction between taxable persons who had opted to tax in respect of otherwise exempt transactions and taxable persons who are subject to the VAT rules automatically. The case law does not identify any basis for distinguishing between the two.

93. The parity principle requires that parties who, from the consumer's point of view, are involved in the supply of similar goods or services are treated alike for VAT purposes. But that principle must be seen in the context of an option to tax, in other words, an option to be treated *differently* from others involved in the supply of the same goods or services. In deciding whether or not to waive the exemption to tax, a person is deciding to be treated differently for VAT purposes from those who make the opposite decision. That is different from the legislature imposing different treatment on those taxpayers, as was the position in *Rank*. An option to tax which arbitrarily distinguished between those who provided similar goods or services, by permitting one to opt to tax while preventing another from so doing might offend the parity principle. Allowing taxpayers who opt to tax to be treated differently from those who do not is an inevitable consequence of choosing to provide that option and does not offend that principle. That distinguishing between those engaged in exempt and those engaged in non-exempt transactions does not contravene the principle of fiscal neutrality was recognised in *HF* (see paragraph 34, quoted above). Similarly, the principle of fiscal neutrality was found to be respected in *Arvi*, where those who opted to tax were treated in the same way and the conditions for exercising the option were known in advance and capable of being exercised by all parties. Fiscal neutrality does not require that the outcome for those who exercise a right of option has to be the same as for those who do not, only that all taxable persons have the same options available to them.

94. Even if I am wrong about that, the mechanism in section 96 does not, in any event, respect the parity principle. What Revenue characterises as an impermissible difference in treatment arises as a consequence of relative economic success (or lack of success) of those who opt to tax and those who do not. In this case, Revenue's argument assumes that an equivalent taxpayer who did not waive its entitlement to an exemption gained no advantage from so doing, *i.e.*, from not having to apply VAT to any letting of their property and, as a

consequence, is at a disadvantage as compared to the taxpayer, like the Consortium, who opted to tax. There is no basis for such an assumption. But even if it were correct, the purported disadvantage only arises because the Consortium's investment was not successful. Had it been a success, *e.g.*, had the Property been let continuously and sold at a profit, the Consortium would likely have returned far more VAT than it deducted. Could it then argue that *it* was at a disadvantage and demand a balancing payment in its favour? Manifestly not, but this seems to be the implication of Revenue's argument.

95. Perhaps more fundamentally, any mechanism for addressing disadvantage or unfairness must be a mechanism permitted by the Directive. As is clear from the terms of the Directive, any potential for unfair advantage is intended to be addressed by the adjustment mechanisms provided for in the Directive. This is clear, in particular, from Article 192 of the Directive.

96. No argument was advanced by Revenue that section 96 was consistent with the adjustment provisions of the Directive and it is not, therefore, necessary to consider whether any purported unfairness identified by Revenue in this case could or would have been addressed had the adjustment provisions been applicable. What is clear, however, is that the Directive provides the only mechanism by which deductions may be adjusted for the purpose of addressing, *inter alia*, unfair advantage. It is not permissible to provide an *ad hoc* adjustment mechanism to address perceived unfairness. More specifically, there is no mechanism which permits adjustment by reference to the difference between VAT deducted on input transactions and VAT paid on output transactions, as, in effect, provided for in section 96. That this is impermissible has been made clear in *Feudi* and *C SPRL*.

97. Finally, on this point, I should say that I do not accept Revenue's characterisation of the outcome of the Commissioner's determination as the Consortium obtaining an unfair "windfall". Firstly, it should be observed that the fact the Consortium has deducted more VAT than it has returned is a direct consequence of the fact that its investment has been unsuccessful; it has made a significant loss. If, and this was not established in evidence, it has done "better" in terms of VAT than a landlord who did not opt to tax, it must be seen in this context. In any event, any purported benefit it derived was purely a function of the difficult economic circumstances it experienced following its acquisition of the Property. Had the investment been a success, *e.g.,* had the Consortium let the Property consistently and sold it at a profit, it would likely have returned more VAT than it deducted. It could not,

in those circumstances, be regarded as having "lost out". Likewise, there is no "windfall" accruing to it by reason of its deductions exceeding its returns where the investment has failed.

98. The final argument advanced by Revenue is that, in effect, the exemption has been cancelled and that there is a distinction to be drawn between a failure of supply and an ending of the relevant economic activity. In my view, this is a distinction without a difference and does not justify any departure from the principles established in the above case law.

99. At paragraph 6.4 of its submissions, Revenue argues that the effect of section 96 is that VAT is only recoverable to the extent that input VAT, that is, VAT on input transactions, is "*attributable to*" taxable output-supplies. This is "measured" by comparing VAT deducted at the outset to VAT subsequently charged on supplies of the property concerned. It says that this balancing assessment/calculation is not impermissible because the waiver period is at an end.

100. Although Revenue has correctly described the operation of section 96, this proposition is in the teeth of all the CJEU case law described above. As discussed above, input VAT is only deductible if "*attributable to*" output supply, but that only means that the input transaction must be used for that output supply. There is nothing in the Directive which requires or permits a deduction to be restricted by reference to the amount of output supply, or economic activity. This is clear from all of the decisions above, not just *Imofloresmira* where the tax authorities were not entitled to adjust a deduction by reference to the taxpayers inability to make a supply. In *Skelleftea* there was no supply at all – the project was abandoned before construction even commenced – but this was not a basis for limiting the right of deduction in respect of the acquisition of services used for the proposed project. And in *Feudi* and *C SPRL*, the Court made clear that the right to deduct cannot be restricted by reference to the amount of output transactions to which the input transactions are connected. In *BTK*, the company simply disposed of the goods it had acquired, the acquisition of which had given rise to its entitlement to deduct. Even that disposal did not justify imposing a limitation on its right to deduct.

101. Revenue, no doubt recognising that the weight of authority is against them, skilfully seeks to distinguish the cases in which the Court had found restrictions on a right of

deduction to be incompatible with EU law. In particular, it argues that in *Imofloresmira*, the impermissible interference with a deduction occurred during the course of the taxable person's economic activity, whereas in this case, because of the sale of the Property, the taxable activity had ceased. But in my view, that distinction does not reflect a difference in principle. Moreover, it does not provide a basis for distinguishing the position here with that at issue in, for instance, *Skelleftea*, where the taxable person *never* engaged in the economic activity which provided the basis for the deduction, or *BTK*, where the taxable person disposed of the relevant goods as waste. The mere fact that the Irish legislation provides that the sale of immovable property used for the purpose of letting triggers a "cancellation" of the waiver does not enable Revenue to argue that it is consistent with EU law to retrospectively recoup deductions lawfully made at a time when the taxpayer had opted to tax. The fact that the sale of the property was itself a taxable transaction merely serves to highlight the fallacy of this argument. Of course, when the Property was sold, the Consortium lost the right to make deductions connected with the use of the Property. But it does not lose the right to the deductions which had already been lawfully made.

102. Revenue places emphasis on *HF* to argue that it is permissible for the Member State to adjust the deductions, as occurred in that case, on the basis that the taxable activity in relation to which the deductions were made had ceased and draws an analogy with the present case. However, the situation in *HF* was entirely different. In that case, the deductions had been made at a time when there was no non-exempt activity, *i.e.*, there was no entitlement to the deductions when they were made, because the property in question was no longer being used for taxable transactions. It is obvious, therefore, that it was permissible for the revenue authorities to make an adjustment to those deductions. In this case, the deduction was made at a time when the Consortium intended to, and did, use the Property for taxable transactions.

103. In truth, it is not necessary to decide whether *HF* is distinguishable. At its height, the sale of the Property in a taxable transaction might be characterised as a change in the circumstance on which initial deduction was based. But if that is so, which I don't need to decide, the Directive provides a mechanism for addressing this. It is clear that section 96 is not such a mechanism, and to be fair to Revenue, it never argued that it was.

104. Finally, as adverted to above, I have considered whether for the purpose of answering the questions posed in the case stated, it is necessary to refer any question to the CJEU pursuant to Article 267 of the TFEU. I have concluded that it is not necessary. As appears from the outline of the relevant the case law above, there is a significant body of EU jurisprudence relevant to the issues in this case stated, but the main principles are firmly established and the questions posed in the case stated can be answered by reference to those principles.

105. I, therefore, consider that the Commissioner correctly applied the relevant principles of EU law and was correct in exercising his jurisdiction to disapply the provisions of section 96 in determining the appeal on the basis that they are incompatible with EU law. I will answer the questions posed in the case stated accordingly.

Conclusions

106. In light of the above, the answers to the questions posed in the case stated are as follows:

1. Did the Commissioner err in concluding that the provisions of section 96(12) of the VATCA 2010 should be disapplied and the assessment to VAT for the period 1 September 2017 to 31 December 2017 raised on 22 October 2020, be reduced to zero? **NO**
2. Did the Commissioner err in the applications of the principles of fiscal neutrality to section 96(12) of the VATCA 2010? **NO**
3. Did the Commissioner err in concluding that section 96(12) of the VATCA 2010 operated to place an unlawful restriction on the right to deduct VAT? **NO**
4. Did the Commissioner err in concluding that section 96(12) concerned the consequences of exercising the right to opt for taxation, rather than the scope of the right? **NO**
5. Did the Commissioner err in failing to consider adequately or at all that section 96(12) could be concerned with the details of use of an option to tax? **NO**

6. Did the Commissioner err in his analysis of how section 96(12) drew a distinction between successful and unsuccessful taxpayers who exercised the option to tax? **NO**
7. Did the Commissioner err in failing to take account of equal treatment as between those taxpayers who did, and did not, exercise the option to tax respectively? **NO**
8. Did the Commissioner err in failing to take sufficient account of the fact that the leasing and letting of immovable property are supplies that are prima facie exempt, without any right to deduct VAT, and that the exercise of an option to tax is a choice with foreseeable consequences, rather than an obligation? **NO**