[2018] UKFTT 0241 (TC)

TC06474

Appeal number: TC/2016/04972

VAT – goods despatched from warehouse in Netherlands delivered to UK customers – whether under a contract with the supplier of the goods, or under a contract with separate company – Article 33 of the PVD – whether goods despatched or transported "by or on behalf of the supplier" – whether reference should be made to the CJEU – held: separate contract for some but not all the supplies – where no separate contract, appeal dismissed – where separate contract, reference to CJEU

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEALTHSPAN LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery St, London on 19 and 20 February 2018

Ms Nicola Shaw QC instructed by PricewaterhouseCoopers LLP for the Appellant

Mr Sarabjit Singh of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. Healthspan Limited ("Healthspan") sells non-prescription health products to retail customers, who place their orders using the internet, phone and mail order. Between 1 April 2012 and 31 January 2016 ("the relevant period"), the overwhelming majority of Healthspan's products were despatched from a warehouse in the Netherlands and delivered to customers in the UK. This decision concerns only those products ("the goods"). Most of the goods were delivered by post but some were delivered by courier.

2. On 24 May 2016, HM Revenue & Customs ("HMRC") issued a decision ("HMRC's Decision") by which they decided:

(1) that during the relevant period the goods had been delivered "by or on behalf of the supplier" and so came within Article 33 of the Principal VAT Directive ("the PVD"), implemented in the UK by Value Added Tax Act 1994 ("VATA"), s 7(4), and that the goods had therefore been supplied in the UK; and

(2) to register Healthspan for VAT retrospectively, with effect from 1 April 2012.

3. The Decision was upheld on review. Healthspan appealed to the Tribunal on the basis that its customers had contracted with a separate company for delivery of the goods. That company was "Wial Computer and Data Services" ("Wial CDS"), trading as "PostDirect"; it was a subsidiary of a Netherlands company called Wial BV ("Wial").

4. On 16 January 2017, HMRC issued Healthspan with a Notice of Assessment; this was followed on 25 January 2017 by a detailed assessment for £27,399,190, subsequently reduced to £27,303,658 (together, "the Assessment"). Healthspan appealed to the Tribunal against the Assessment. On 3 March 2017 the Tribunal consolidated the two appeals.

5. On 17 July 2017, HMRC applied to the Tribunal, asking that it make a reference to the Court of Justice of the European Union ("the CJEU") to obtain a ruling on the meaning of the phrase "by or on behalf of the supplier" in Article 33; Healthspan opposed HMRC's application. HMRC also asked that the Tribunal make that reference before the substantive hearing of the appeal. The application was heard on 17 November 2017 before Judge Mosedale. On 18 December 2017 she issued her decision, declining to make a reference to the CJEU, and directing that the hearing go ahead as listed.

6. At the substantive hearing HMRC reiterated that a reference to the CJEU was required, but submitted in the alternative that HMRC's Decision and the Assessment should be upheld. Healthspan's position was that no reference to the CJEU was necessary, because the law was "*acte clair*" in its favour. Instead, the Tribunal should allow Healthspan's appeal and set aside HMRC's Decision and the Assessment.

7. For the reasons set out at §108ff, §149 and §168-169, I decided that goods ordered by phone ("phone sales"), and those delivered by courier, were delivered "on behalf of" Healthspan, so that Article 33 applies.

8. In relation to goods supplied to internet and mail order customers by post, I have decided to make a reference. A draft was sent to the parties at the same time as this decision. The CJEU guidance on making a reference states that:

> "In so far as it is able to do so, the referring court or tribunal should also briefly state its view on the answer to be given to the questions referred for a preliminary ruling"

9. The draft reference includes the Tribunal's view that the internet and mail order supplies supplied by post come within Article 33 because as a matter of economic reality they were delivered on behalf of Healthspan, see §276.

Judge Mosedale's decision on the application for a reference

10. As already mentioned, HMRC had previously applied to the Tribunal asking that it make a reference to the CJEU, and that application was heard by Judge Mosedale.

11. Article 267 of the Treaty on the Functioning of the European Union allows a tribunal to refer a question to the CJEU if "it considers that a decision on the question is necessary to enable it to give judgment". As discussed further at Part 8 of this decision, a tribunal which considers that a ruling is "necessary" also has a discretion not to refer.

12. Judge Mosedale's decision was issued as [2017] UKFTT 876 (TC). She considered that it would be "necessary" to obtain a ruling from the CJEU on the meaning of Article 33, but decided not to exercise her discretion. This was largely because there were disputes as to the facts. She concluded:

> "I consider that it will be best for the substantive hearing to proceed as listed, and for the Tribunal hearing that appeal, having made the findings of fact, to determine the precise terms of the reference (assuming, as I consider very likely, that a reference is made)...The hearing will take place as listed. It will be for the hearing judge to determine whether to make an reference and if so on what terms"

13. After the application hearing, HMRC accepted the witness evidence. Mr Singh invited the Tribunal to make a reference to the CJEU, on the basis that the factual disputes had been resolved. Miss Shaw disagreed, submitting that Judge Mosedale would have taken a different view of the need for a reference, had she been aware of subsequent legal developments.

14. There was however no dispute that it was for this Tribunal to decide whether to make a reference and if so on what terms. While respecting Judge Mosedale's view as to the need for a reference, I have come to my own conclusions, having considered the evidence, found the facts, considered the parties' submissions and applied the relevant law.

The law on distance selling, and the issue in dispute

15. Article 32 of the PVD provides that a supply takes place where the goods are located at the time of despatch. It reads:

> "Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins."

16. Article 33 provides an exception to that rule. So far as relevant to this decision , it reads (emphasis added):

> "By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:
>
> (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;…"

17. It was common ground that each of Healthspan's customers was a "non-taxable legal person", so that condition (a) was met.

18. Article 34 provides that Article 33 does not apply if certain other conditions are met. Essentially, these provide *de minimis* exceptions to the application of Article 33. It was common ground that Article 34 was not relevant.

19. VATA s 7 reads, again so far as relevant to this decision:

> "(1) This section shall apply…for determining, for the purposes of this Act, whether goods are supplied in the United Kingdom.
>
> (2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.
>
> (3) …
>
> (4) Goods whose place of supply is not determined under any of the preceding provisions of this section shall be treated as supplied in the United Kingdom where–
>
> (a) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them;
>
> (b) the supply is a transaction in pursuance of which the goods are acquired in the United Kingdom from another member State by a person who is not a taxable person;

(c) the supplier–

(i) is liable to be registered under Schedule 2; or

(ii) would be so liable if he were not already registered under this Act or liable to be registered under Schedule 1 or 1A;…"

20. In relation to the UK provisions, the only question was whether the supply of goods by Healthspan fell within s 7(2) as being "supplied outside the United Kingdom", or whether it fell within s 7(4)(a) because "the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them".

21. It was initially argued on behalf of Healthspan that, as a member state could not rely on the direct effect of a Directive, only VATA s 2 and s 7(4)(a) were in issue, and not Article 33. However, by the time of the hearing, Healthspan had accepted that (i) domestic provisions must be interpreted consistently with the PVD, where this is possible, and (ii) it was possible to interpret VATA s 7(4)(a) consistently with Article 33. Thus, the parties were agreed that the question for the Tribunal was the meaning and application of that Article.

22. HMRC's Decision referred to the goods having been "delivered" by or on behalf of Healthspan. The parties have taken this as shorthand for "despatched or transported" and I have adopted the same approach.

23. HMRC confirmed at the hearing that it was not seeking to argue that the arrangements entered into by Healthspan constituted an "abusive practice", see *Halifax v C&E Commrs* (C-255/02) [2006] STC 919.

The parties' submissions in outline

24. Healthspan's position was that:

(1) Article 33 only applied where (a) the supplier undertakes to transport the goods, and (b) that transport is subsequently carried out by a third party as the supplier's proxy or agent;

(2) Article 33 would therefore only have applied to Healthspan had PostDirect had been acting as its agent. However, PostDirect delivered the goods as agent for Healthspan's customers, not as agent for Healthspan;

(3) there was no need for the meaning of "on behalf of" to be referred to the CJEU, because the position was "*acte clair*". The Tribunal should therefore decide the case, and allow Healthspan's appeal;

(4) however, if the Tribunal nevertheless decided to make a reference, it should be delayed and joined to a reference in *SportsDirect.com Retail v HMRC; SDI (Brooks EU) v HMRC* ("*SportsDirect*"), see further §268ff.

25. HMRC's primary position was that (a) it was necessary to make a reference because the meaning of "on behalf of" was unclear, and (b) that reference should be made after this hearing rather than being joined to a reference in *SportsDirect*.

HMRC's secondary position was that the goods were supplied "on behalf of" Healthspan and so came within Article 33.

The evidence

26. The Bundles were prepared for the hearing by PwC on behalf of Healthspan, and included:

(1) the correspondence between the parties, and between the parties and the Tribunal;

(2) a contract dated 28 March 2012 entitled "Collection of Payment Agreement" between Healthspan, PostDirect and Alpé BV ("the Payment Agreement");

(3) a contract entitled "Warehouse Agreement" between the same three parties, also dated 28 March 2012 ("the Warehouse Agreement");

(4) an "Addendum" dated 3 April 2014 and effective from 1 April 2014, changing the delivery charges and signed on behalf of Healthspan and PostDirect;

(5) a document headed "PostDirect terms and conditions" (PostDirect T&Cs");

(6) a list of questions and answers used by Healthspan call centre staff, dated 29 March 2012;

(7) correspondence between Deloitte Belastingadviseurs BV ("Deloitte") and the Dutch VAT authorities, together with English translations of that correspondence;

(8) a group structure chart for Healthspan; and

(9) various "screenprints" from Healthspan's website, and various mailshots sent out by Healthspan.

27. In addition, the following witness evidence was provided:

(1) a witness statement dated 26 May 2017 and a supplementary witness statement dated 5 January 2018, from Mr Michael Lawther, both with attached exhibits. Mr Lawther has been Healthspan's Group Finance Director since 2002;

(2) a witness statement from Mr Chris Jackson, dated 30 May 2017, together with exhibits. Mr Jackson has been Healthspan's Operations Director since 2000;

(3) a witness statement from Mr Gustaaf Raaymakers, dated 30 May 2017, with exhibits. Mr Raaymakers is currently the Operations Director at Wial; he was previously its Finance Director. He has worked for Wial since 2000; and

(4) a witness statement from Ms Rhian Whitchurch, dated 31 May 2017. Ms Whitchurch is the Head of Direct Marketing at Healthspan, and has been in that role since March 2015. Attached to her witness statement were 13 exhibits, which included:

(a) screenprints from Healthspan's website, headed "delivery details"; "delivery information. Questions and Answers"; "Confirm and Pay"; and "Payment Details";

(b) a Healthspan call centre training script, headed "Call Structure"; and

(c) examples of mail order forms for direct mail customers.

28. As already indicated above, between 23 January 2018 and 1 February 2018 the parties' representatives corresponded by email about whether HMRC required the witnesses to attend for cross-examination. HMRC asked PwC a number of questions, and having received answers, accepted the witness evidence and said there would be no cross-examination. It follows that the evidence in the witness statements is uncontested.

Versions of the Healthspan terms and conditions

29. Under the heading "contractual documents", the Bundle Index listed three copies of a document headed "Healthspan Limited Terms of Use" ("the Terms of Use"), and three copies of Healthspan's terms and conditions ("Healthspan T&Cs"). The Terms of Use summarised Healthspan's terms and conditions as between it and the customer, and explicitly do not replace the Healthspan T&Cs. I have therefore relied only on the latter in making the findings of fact in this decision.

30. In relation to these three copies of the Healthspan T&Cs:

(1) the Bundle Index states that one was issued on 28 November 2013 ("the 2013 version"), but there is no date on the document itself;

(2) the Bundle Index states that the second was issued on 23 January 2014. That date has been typed onto the front page of the document, but from visual inspection it appears to have been added later; and

(3) the Bundle Index states that the third was issued on 26 October 2015 ("the 2015 version"). That date is shown as a footer, incorporated in the document.

31. Miss Shaw took me to the 2013 version during the hearing. I asked both parties' representatives whether there were any differences between the versions in the Bundle and was told they were the same. That appears to be true of the version dated 23 January 2014: as far as I was able to tell, it is identical to the 2013 version.

32. However, I subsequently noted that Mr Lawther's witness statement exhibited a further copy of the Healthspan T&Cs. This was internally dated 4 September 2014 ("the 2014 version"). Despite the parties' assurances, it is different from the 2013 version in two key respects: (a) provisions relating to delivery of the goods, and (b) provisions relating to the transfer of title in the goods to the customer. The 2015 version further amended those key terms.

33. I considered whether to accept all four versions. The 2014 version is clearly reliable, because it was exhibited as part of Mr Lawther's sworn evidence; the date is also embedded within the document. The 2013 version was not exhibited, and can be

dated only by relying on the Bundle Index. The textual additions to the 2015 version use a very tiny font size, and so are barely legible.

34. Unlike the Civil Procedure Rules, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") do not require all documents to be exhibited before they can be accepted as evidence. The 2013 version was frequently cited by Miss Shaw during the hearing and was not challenged by Mr Singh as being unreliable. I have therefore accepted that it was in force at the beginning of the relevant period, but was replaced on or before 4 September 2014 by the 2014 version. The 2015 version is internally dated and I have accepted that it replaced the 2014 version on 26 October 2015. The differences between the versions are discussed later in this decision. I have ignored that dated 23 January 2014 as it appears to be identical to the 2013 version.

35. I also considered whether to ask the parties for post-hearing submissions on the various changes to Healthspan's T&Cs. However, those T&Cs were not relevant to the two issues on which I have made final decisions, the phone sales and the DHL deliveries. As regards the internet and mail order sales, I made findings of fact on the basis of the evidence provided, and those findings are matter for the Tribunal, not the parties. The matters of law which arise on those sales have been referred to the CJEU. I therefore decided it was not in the interests of justice to delay this decision in order to seek post-hearing submissions.

English contract law

36. As already noted, Healthspan and PostDirect concluded two contracts, the Payment Agreement and the Warehouse Agreement. Both are explicitly stated to be subject to the law of the Netherlands.

37. This decision also considers the Healthspan T&Cs and the PostDirect T&Cs. Clause 20 of the Healthspan T&Cs provide that "contracts for the purchase of products through our site will be governed by English law". Clause 15.2 of the PostDirect T&Cs reads "save as provided by any applicable convention, disputes arising from or related to this contract shall be subject to the laws and the courts of the Netherlands".

38. Neither party put forward any evidence as to the Netherlands law of contract, or suggested that it was different from English law. In the absence of satisfactory evidence of foreign law, UK courts and tribunals apply English law, see Dicey & Morris, *The Conflict of Laws* (15th Ed) at Rule 25(2).

The statement of agreed facts

39. On 17 July 2017 the parties agreed what Judge Mosedale described as "a basic statement of agreed facts" ("the SOAF"). Miss Shaw began her submissions by making oral amendments to the SOAF, to reflect HMRC's acceptance of the witness evidence. She made these amendments by referring to paragraph numbers from the "factual background" section of her skeleton argument and identifying where they should be inserted into the SOAF. Mr Singh did not object to that process, or to those amendments.

40. Although tribunals may rely on statements of facts agreed between the parties, finding the facts is a matter for the tribunal. As Lewison LJ said in *Fage v Chobani* [2014] EWCA Civ 5 at [115]:

> "the primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way."

41. I decided not to adopt the SOAF, but to make my own factual findings, for three reasons:

(1) it was clear from a perusal of the Bundle that the evidence raised a number of important factual points which were not included in SOAF. On the second day of the hearing I made it clear to the parties that I would be carefully examining the witness statements, exhibits and other evidence in making my findings of fact, and I drew some particular evidential points to their attention;

(2) the SOAF referenced only the 2013 version of Healthspan's T&Cs, not the 2014 or 2015 versions, with their different terms; and

(3) some of the oral amendments to the SOAF made by Miss Shaw did not fully reflect the evidence. For example, paras 15, 18, 20, 21, 23 and 24 of Mr Lawther's witness statement state that the VAT rate was a key consideration when Healthspan was considering restructuring its business. He continued at para 25 (my emphasis):

> "As far as the relocation of the business was concerned, <u>in addition to those set out above</u>, various factors were considered by the business when deciding which jurisdiction would be most appropriate [factors then listed]".

Para 5(h) of Miss Shaw's skeleton argument, which she inserted into the SOAF, begins "in terms of relocating the business, the primary drivers were (ML para 25)"; it then lists only the additional factors set out by Mr Lawther at para 25 of his witness evidence. I have instead found as a fact, based on the totality of the evidence, that VAT was the primary driver for the relocation of the business, see §46.

Findings of fact

42. The findings of fact in this decision are made in reliance on the evidence provided. I first set out general facts which are relevant to all the supplies, and make further findings of fact later in this decision. Unless otherwise stated, the facts apply throughout the relevant period.

PART 1: GENERAL FACTS RELATING TO THE ARRANGEMENTS

Organising the arrangements

43. Healthspan is a Guernsey registered company founded in 1996 by a resident of that island. It sells vitamins and health food supplements to retail customers, 97% of whom are in the UK, via orders made using the internet, phone and mail order.

44. Prior to 1 April 2012, Healthspan sold its goods from the Channel Islands under the Low Value Consignment Relief ("LVCR") provisions, as a result of which no VAT was due on importation to the UK as long as the value of each consignment was below a prescribed limit. During that period, Healthspan not only sold the goods, but warehoused and despatched them; they were supplied to customers without any delivery charge being added to the order.

45. In June 2011, the UK Government announced that it was reviewing the LVCR. Healthspan decided to look into reorganising and relocating its business, because, in the words of Mr Jackson:

> "if LVCR were to be withdrawn, the impact of VAT being applied to Healthspan products and an increase in the overall price of Healthspan products had the potential to be hugely detrimental to sales."

46. The evidence is unequivocal: reducing the cost of VAT was the main reason for the reorganisation. Other subsidiary factors entered into the decision-making, including regulatory rules, geography, language, stability, warehouse costs and ease of access to customers.

47. On 7 October 2011, Deloitte wrote to the Dutch VAT authorities stating that Healthspan was planning to purchase a Dutch company in order to warehouse goods in the Netherlands. It said that customers who purchased Healthspan's products would contract separately with a Dutch company for delivery of those goods, and asked for confirmation that the VAT distance selling rules would not apply. In relation to phone sales, the letter said:

> "As part of the ordering process, they [the customers] will be asked expressly if they wish to collect the goods in person and, if they do not, the customer services assistant will explain to them that Healthspan only sells the goods, and that they [the customers] are being offered a separate contract for delivery services by the Dutch company. The customer will need to indicate verbally that they understand this and agree to it. If they do not agree, their order will not be processed."

48. On October 27 2011, Herr van Ettinger of the Dutch VAT authority replied, saying that in his opinion the VAT distance selling rules were not applicable, and Dutch VAT would be due on the goods. Appendix 1 to the Warehouse Agreement shows that the rate of Dutch VAT charged on the majority of the goods was 6%, with a 19% rate on the balance.

49. In November 2011, the UK Government announced that LVCR would be withdrawn in relation to goods supplied from the Channel Islands. Healthspan accelerated the process of considering the relocation and reorganisation of its business. Taking into account advice received from Deloitte and from G3 Worldwide Mail NV, an international delivery and logistics provider and broker trading as "Spring", Healthspan decided that the Netherlands was the best relocation option. It also decided not to purchase a Dutch company but to work with an existing fulfilment house.

50. Spring was tasked with identifying potential third parties, and five companies were shortlisted. As part of the selection process, Deloitte devised a template setting out the proposed arrangements ("the Briefing Paper"); this was issued to each of five fulfilment houses. The words "fulfilment house" is used throughout the Briefing Paper in square brackets; those words were replaced by the name of each shortlisted company before being sent out.

51. Although drafted by Deloitte, the Briefing Paper was explicitly sent out "by Healthspan". It begins:

> "This is a briefing paper prepared to explain to [fulfilment house] the details of the contractual and commercial arrangements relating to the delivery of Healthspan's goods to its UK and European customers via the Healthspan website. This document has been provided by Healthspan for information purposes only."

52. Under the heading "Proposed Changes", the Briefing Paper includes the following:

(1) the customer would contract with Healthspan for the goods, and would contract with the fulfilment house for delivery of those goods;

(2) Healthspan's website, mail order forms and telephone scripts would be changed "to make it clear to the customer that there are two separate contracts". Healthspan would be able to assist the fulfilment house if, in consequence, wording changes were required to the fulfilment house's contracts;

(3) Healthspan would collect the delivery charge from the customer and pay it to the fulfilment house;

(4) the services agreement between Healthspan and the fulfilment house would include a tariff of prices which the fulfilment house would charge to Healthspan's customers, depending on location, weight, size etc, and the tariff should take account of the route of delivery, ie whether directly from the Netherlands to the UK or via a third country. The price which the fulfilment house is to charge to the customer "will be in accordance with" the pricing structure agreed between Healthspan and the fulfilment house;

(5) Healthspan and the fulfilment house should also agree terms relating to the standards of delivery the fulfilment house would provide.

53. Under the main heading "Impact" the Briefing Paper considers the financial consequences, the need for technical changes to websites and customer documentation, and to contracts. Under the subheading "Financial" the text reads:

> "[fulfilment house] will be in the same position financially as if it had entered into a contract with Healthspan. Payment will flow from Healthspan but Healthspan will be acting in its capacity as collection agent. The only difference is contractual: fulfilment house is contracting directly with the customers of Healthspan, and the customers are legally obliged to pay the delivery charge due."

54. Under the subheading "technical", the text reads:

> "The main issue will be to ensure that it is clear to the customer that he/she is contracting with [fulfilment house] for delivery services as well as with Healthspan for the purchase of the product. This will require amendments to Healthspan's website/mail order forms/telephone sales script so that:
>
> - The customer confirms he/she is contracting with [fulfilment house] for delivery. That he/she has read [fulfilment house]'s terms and conditions, etc.
> - Healthspan states expressly that it is simply acting as [fulfilment house]'s collection agent in respect of delivery payments in accordance with [fulfilment house]'s terms and conditions…"

55. Under the subheading "legal – the contracts" the Briefing Paper begins by saying that "the services agreement between Healthspan and [fulfilment house] will need to take account of the following (this is a list of sample issues but there may of course be other ones to consider". One of those sample issues relates to returned goods. The Briefing Paper says that customers will send these to Healthspan's UK call centre address, which will be printed on the packaging. If a new item is required to replace the returned goods, that will be sent as normal by the fulfilment house. It ends by saying "Healthspan is seeking [fulfilment house]'s agreement in principle to the above proposed changes".

56. Wial was provided with the Briefing Paper "by way of an overview as to what was required" and it formed the basis for further discussion and negotiation. When Wial was selected by Healthspan, it set up a subsidiary, Wial Computer en Data Service BV, to carry out the contract. The subsidiary was given the trading name "PostDirect" to make it more user-friendly for UK customers.

57. During the discussions which preceded the agreement, Wial made clear to Healthspan that the delivery charge to customers would be calculated – as Mr Jackson put it – "taking into account the costs incurred by PostDirect and with the intention of PostDirect remaining at a profit level of 6%, a margin which was agreed in advance with Healthspan".

58. On 28 March 2012, PostDirect and Alpé signed two contracts with Healthspan, the Payment Agreement and the Warehouse Agreement. Alpé was a shareholder in Wial, and by signing these contracts agreed to guarantee and be liable for Wial's obligations under both agreements. No evidence was provided, or submissions made, about Alpé's role and I say no more about it.

The Payment Agreement

59. The Recitals to the Payment Agreement read:

> "(A) The Fulfilment House (trading under the name PostDirect) offers a transport of goods service ('vervoersdienst') to buyers of products sold by Healthspan. Healthspan does not offer a transport of goods service to buyers of its products (the 'Products');

(B) when contracting with Healthspan for the purchase of Products, a buyer ('the Buyer') is also offered the option of contracting with the Fulfilment House for transport of those products;

(C) if the Buyer enters into a transport of Products agreement…with the Fulfilment House (the 'Transport of Products Agreement') then the Fulfilment House wishes Healthspan to act on behalf of the Fulfilment House in collecting from the Buyer the payment for the transport of products by the Fulfilment House…"

60. The Payment Agreement includes the following terms:

1.1 The Fulfilment House provides to the Buyer the option of having Products ordered by the Buyer transported to the address indicated by the Buyer using a carrier appointed by the Fulfilment House.

1.2 If the Buyer wishes to arrange with the Fulfilment House for the transport of Products then the Buyer and the Fulfilment House shall enter into a Transport of Products Agreement.

1.3 If the Buyer enters into a Transport of Products Agreement, a Transport of Products Charge (the "Transport of Products Charge") will be payable by the Buyer to the Fulfilment House for the transport of Products service provided by the Fulfilment House.

1.4 The Fulfilment House shall notify Healthspan of the Transport of Products Charge payable by the Buyer as well as of any amendment thereof.

1.5 Healthspan shall collect the Transport of Products Charge from the Buyer on behalf of the Fulfilment House.

2.1 Healthspan shall forward the Transport of Products Charge collected from the Buyer within 5 working days after the end of the month in which Healthspan collects the Transport of Products Charge from the Buyer.

61. Clause 2.2 deals with refunds where the customer has returned the goods. This is covered separately at §193ff.

62. Under the heading "Consideration", Clause 4.1 provided that Healthspan shall charge the Fulfilment House for the services under the Agreement an amount of EUR 30,000 per year, indexed annually according to the Dutch consumer price index.

The Warehouse Agreement

63. Clause 1.1 of the Warehouse Agreement reads:

"The Fulfilment House shall provide certain services to Healthspan under the Agreement, including without limitation receipt, putting away, storage, order selection, picking, packing, labelling, administrative functions, granting access to the Warehouse, maintaining Equipment and having and maintaining insurance (collectively, the 'Services')."

64. By Clause 4 Healthspan leased a Sorting Machine to PostDirect, along with other specified equipment. PostDirect was required to carry out daily and weekly

maintenance of the Sorting Machine at its own expense, but it was Healthspan's responsibility to pay for a third party to carry out a quarterly check and maintenance of that machine. If the Sorting Machine broke down, it was to be replaced at PostDirect's cost, but reasonable extra costs incurred because of any malfunction of the machine were for the account of Healthspan. Clause 21.7 provided that if the Agreement was terminated, the Sorting Machine was to be returned to Healthspan "in the same condition as it has received it".

65. The Sorting Machine sorted the products by UK post codes to comply with Royal Mail requirements for delivery of products into the UK. Healthspan had previously used a sorting machine in Guernsey, and I have inferred that this was the machine leased to PostDirect.

66. Clause 5.10 to 5.16 of the Warehouse Agreement read:

> "5.10 Healthspan shall provide the Fulfilment House on a daily basis with the orders of Buyers received by Healthspan (the 'Order').
>
> 5.11 The Fulfilment House shall pick the Orders daily on a 'first in first out basis' and shall label the Products in accordance with Healthspan's instructions as set out in Schedule 4.
>
> 5.12. Title to a Product transfers from Healthspan to the Buyer after labelling of that Product in the case of manual labelling or after placing the product in the Sorting Machine in case of automated labelling.
>
> 5.13. If the Buyer orders the Fulfilment House to transport the Product, the labelled Products shall be sorted by the Fulfilment House using the Sorting Machine and released to the carrier in the same good condition as it has received the Product. This will be a separate agreement between Fulfilment House and Buyer to which Healthspan is not a party. Healthspan shall be responsible for ensuring that the Buyer pays for the Products and the transport thereof.
>
> 5.14. If the Buyer wants to use its own carrier or wants to collect the Product itself, the Fulfilment House shall release the Product to that carrier in the same good condition as it has received the Product. The Fulfilment House shall ensure that it makes the Product available to the Buyer or the carrier of the Buyer.
>
> 5.15 The process described in clause 5.10 to 5.14 (from receiving the Order till making the Products available to the carrier or the Buyer) shall not require more the 24 hours at most, unless this period includes a Saturday, Sunday or an official holiday…
>
> 5.16 If the Buyer orders the Fulfilment House to transport the Product, the Fulfilment House shall ensure that the Product is transported to the Buyer within 96 hours after the end of the term mentioned in clause 5.15. In order that the costs payable by the Buyer for transport shall be known to the Buyer in advance they will be set out on Healthspan's website and will be at the prices set out in Schedule 5 per Product, which costs shall be reviewed four months prior to the end of the yearly term of the Agreement."

67. Schedule 4, referred to in Clause 5.11 above, is entitled "Labelling"; examples of labels are attached. The Schedule provides:

> "All labels required to specify customers [sic] name and address
>
> All labels required to detail contents and part number
>
> All labels are required to specify and split out charge for delivery from the charge for the products (pack value)
>
> All labels required to state 'inclusive of VAT where applicable'
>
> All labels required to specify an undelivered return address in the UK (the address of Healthspan's UK subsidiary, QualityCall Ltd, in Gosport)
>
> All labels required to state date posted and postage company being used."

68. Schedule 5, referred to at Clause 5.16, is headed "Postal Charges" and provides:

Post Direct [sic] Delivery Charges	
Post Zone	*Delivery Charge*
United Kingdom	£1.95
Europe	£3.95
Rest of the World	£5.95
DHL Express Delivery Charges	
Post Zone	*Delivery Charge*
United Kingdom	£19.95
Europe	£19.95
Rest of the World	£39.95

69. On 1 April 2014, the parties signed a document entitled "Addendum to the Collection of Payment Agreement". This referred to Schedule 5 and stated that PostDirect's delivery charges were increased, with the amount now payable for UK deliveries being £2.60. I infer that the parties intended that Addendum to amend Schedule 5 to the Warehouse Agreement, and that the incorrect title has been used.

70. Clause 10.1 of the Warehouse Agreement is headed "Reservation of Title/Rights" and reads:

> "All Products transported to the Fulfilment House, shall remain Healthspan's property (i) until the Products have been labelled with the addresses indicated by the Buyers in case of manual labelling by the Fulfilment House or (ii) until the Products have been placed in the Sorting Machine for labelling with the addresses indicated by the Buyers in case of automated labelling by the Fulfilment House."

71. Clause 12 is headed "Price and payment" and reads:

12.1 The Fulfilment House shall charge Healthspan an amount of EUR 20,917 per month plus an amount of EUR 0.0999 per Product labelled in case of manual labelling or placed in the Sorting Machine in the case of automated labelling…

12.2 The price includes all associated costs and expenses which may be incurred by the Fulfilment House in providing the services…except for the costs and expenses of maintaining adequate insurance…

12.3 …

12.4 The Fulfilment House shall pay Healthspan a fixed rent for the Sorting Machine of EUR 18,000 per year…"

Picking and labelling: the witness evidence and the Warehouse Agreement

72. From the witness evidence I find that Healthspan used a system called Elucid for managing its orders; all orders made by customers were entered on that system. Until November 2015, these orders were transferred every 20 minutes to a separate Microsoft AX system to which PostDirect staff had access. From that date the system changed, and PostDirect's employees accessed the Elucid system directly.

73. It was clear from the Warehouse Agreement and from the witness evidence that PostDirect was responsible for all warehousing and selection ("picking") of the ordered goods. In addition, Mr Raaymakers said that:

> "The [Elucid] system would also produce the correct number of individual address labels required to complete the entire picking list for that product. Staff would then take the labels to the location of the product, double check that the correct product had been selected and then affix the labels to the stock."

74. That is therefore evidence that the labels are fixed to the goods by the staff. However, Mr Jackson's evidence was that:

> "PostDirect would then pick the relevant amounts of each product and put them into the sorting machine. The machine would sort the products into the different orders and produce and affix the appropriate labels to them."

75. It was not easy to reconcile that evidence. As already noted at §70, Clause 10.1 of the Warehouse Agreement stated that title to the goods passes to the customer when the goods were labelled, so determining when that labelling took place is relevant.

76. I considered whether Mr Raaymakers was describing manual labelling, and Mr Jackson automated labelling. But that seemed unlikely given that (a) Mr Raaymakers described labelling by the warehouse staff as the normal process, and (b) all goods sent to the UK by post have to be processed via the Sorting Machine. Because of these evidential difficulties, I make only the following limited findings:

(1) labelling of the goods was carried out in accordance with instructions given by Healthspan (Clause 5.11 and Schedule 4 of the Warehouse Agreement); and

(2) the goods were labelled either by PostDirect staff before they reached the Sorting Machine, or by the Sorting Machine itself (the witness evidence).

The FAQs

77. On 29 March 2012, the day after the Payment Agreement and Warehouse Agreement were signed, Healthspan provided its sales staff with a list of Frequently Asked Questions ("FAQs"). I find that these were used by sales staff during the relevant period. Under the heading "Postage Questions", the first question asks "how much will I get charged for Postage". The answer says:

Standard Delivery via Post Direct	£1.95
Express Delivery via DHL	£19.95
European Delivery	£3.95
Rest of the World Delivery	£5.95

78. Question 3 asks "why are you charging for delivery/postage costs?" The reply is that Healthspan is "no longer able to cover your postage costs". Question 6 asks "why is the checkout/order process different". The reply is:

> "Checkout process is slightly different. Now we offer 2 delivery options for you to choose from. Lowest cost delivery is provided by Post Direct. Express Delivery option is provided by DHL."

79. Under the heading "Delivery Questions", Question 4 reads "who are Post Direct". The answer says "Post Direct are a delivery company offering you a standard postal service to your home at the low cost of £1.95". Question 5 reads "who are DHL?" and the answer says "DHL are an international delivery company offering you express delivery at a cost of £19.95". Part of the answer to Question 9 reads "orders are usually despatched by your selected delivery supplier within 24 hours…" Question 12 reads "why have you moved dispatch from Guernsey to Europe?" The reply reads:

> "our recent growth means we have now relocated our fulfilment centre to a European location, you may notice a few small changes to how your order is processed; this will not affect your current delivery times…"

80. Under the heading "General Questions", customers are told that "all orders will be despatched within 24 hours by your selected delivery supplier", and if a customer wishes to change his delivery address, he is told to contact Healthspan's call centre.

81. Miss Shaw accepted, in answer to a question from the Tribunal, that none of the answers explicitly state that customers were required to enter into a separate contract for delivery with PostDirect; she suggested that this might be because call centre staff "may not have a firm grasp of the contractual basis". I return to the contractual basis later in this decision.

The delivery charge for postage and the discount

82. This section of the decision relates only to goods delivered to customers by post. The position with regard to DHL is set out separately, later in this decision.

PostDirect's position

83. Customers were initially charged £1.95 for standard delivery in accordance with Schedule 5 to the Warehouse Agreement. PostDirect tracked the actual costs. From Mr Lawther's witness evidence I find that Healthspan was "privy to the financial status of PostDirect and the aim of keeping PostDirect operating at a 6% profit margin" and if that margin was not achieved in a given period "this would have resulted in PostDirect renegotiating the future amount of the delivery charge" so as to ensure that the 6% margin was achieved overall.

84. From 1 April 2014, the delivery charge increased to £2.60. It was subsequently reduced to £2.25 but the Tribunal was not told the date of this change or provided with a further Addendum (see §27(4)). However, the 2014 version of Healthspan's T&Cs show the delivery charge as being £2.25 at that time.

85. It follows that PostDirect did not bear any risk as the result of changes to the delivery charge because the fixed 6% profit margin had been agreed between it and Healthspan. As a result, increases in postage costs were recovered by adjustments to the delivery charge.

Healthspan's position

86. The market for the products sold by Healthspan is highly competitive and extremely price-sensitive. When Healthspan had previously trialled a £1 delivery charge in 2006, it caused sales to reduce and was immediately discontinued. From April 2012, the customer was faced not only with VAT (when there had been no VAT under the LVCR) but also a delivery charge. The witnesses gave consistent evidence on the steps taken by Healthspan to resolve this problem. In Mr Lawther's words:

> "without remedial action, the events looked set to dramatically increase the total price payable by customers. To avoid such a result, and with a view to maintaining market share, Healthspan decided to apply a single digit increase to the product price but apply a customer discount. The key aim was to ensure that the prices of Healthspan's products remained aligned to the general market prices for similar products and that the overall cost to the customer did not increase in a way which would negatively impact demand and sales."

87. I find as a fact that Healthspan's main aim in introducing and managing the discount was to prevent the delivery charge from having any impact on its market share.

88. The discount was £2 from 1 April 2012 to 31 March 2014; it increased to £2.60 from 1 August 2016 to 31 August 2014, when it reduced to £2.25. The discount applied to each order, not to each item purchased. It was therefore 5 pence more than the delivery charge until 31 March 2014; from that date the two were identical.

89. In other words, any adjustments to the delivery charge were then reflected in changes to the discount, so as to ensure that the two offset each other. Moreover, the delivery charge and the discount were commonly juxtaposed on marketing and selling material, thereby emphasising that the delivery charge was covered by the discount. It follows that the response to Q3 of the FAQs was incorrect: it is not the case that Healthspan was charging for delivery because it was "no longer able to cover" the customer's postal costs; in fact it reimbursed the same amount by way of discount.

Other findings of fact about the arrangements

90. In reliance on the witness evidence I make the following further findings of fact about the way in which the arrangements operated.

91. PostDirect's employees were trained on Healthspan's computer system by Mr Jackson. He also visited the warehouse every couple of months to provide further training on any changes to that system.

92. Delivery of the products was not carried out by PostDirect but by third party transport providers, who were selected not by PostDirect itself, but by Spring – the company which previously advised Healthspan about its relocation to the Netherlands. Mr Raaymaker describes Spring as "an intermediary" between PostDirect and these third parties.

93. PostDirect did not invoice Healthspan for the postal charges. Instead, after the end of each month, Healthspan produced a statement setting out the amounts due to PostDirect. This included the amounts collected from customers, and a further amount added by Healthspan to cover the postage costs where goods had been resent as replacements to customers, see further Part 5. A sample monthly statement was exhibited to Mr Raaymaker's evidence.

94. If customers wished to return a product because it was unsatisfactory, they sent it back to Healthspan's customer service office at Gosport. Healthspan told customers that if they had any problem with delivery they were to use the Healthspan email address or call its Gosport office; if customers had any complaint about delivery, they invariably contacted Healthspan, not PostDirect

95. Healthspan held monthly management meetings to discuss competitor pressures. The exhibits to Ms Whitchurch's witness statement include a slide deck for a Healthspan management meeting held in May 2015. One of the slides compared that company with a competitor called "Simply Supplements". The comment section of the slide reads (emphasis added):

> "Simply Supplements have improved their service quality proposition with the introduction of a new postal service. With the problems we have been having with <u>our own delivery service</u>, and the ridiculous price we quote for express delivery, the free service offered by our competitors should be seen as a competitive threat."

96. Included in the Bundle was a "screengrab" from Healthspan's "website landing page" which begins (again, emphasis added):

> "we are the UK's no.1 direct supplier of vitamins and supplements. From our sustainable sources to arriving at your door, we're there at every stage of the journey to ensure that product you receive is of the highest quality."

97. HMRC submitted that the emphasised words in the screengrab showed that Healthspan had "indicated to the customer that it bore responsibility for the supply/ delivery to the customer of the goods". Miss Shaw invited the Tribunal to find that it was simply "advertising puff", and could not displace the contractual realities.

98. I agree with Miss Shaw that marketing material cannot displace the contracts, but also find as a fact that Healthspan was holding itself out as being responsible for ensuring that the goods arrived with the customer.

Sales by channel

99. The sales by channel were as set out below ("the Table"):

	2012		2016	
	Total £k	%	Total £k	%
Telephone	£987	45%	£645	31%
Internet	£814	37%	£674	33%
Mail	£245	11%	£137	7%
Subscription	£120	5%	£585	28%
Shop in Jersey	£25	1%	£20	1%

100. As can be seen from the Table, in 2012 the most popular channel was phone sales. By 2016, the most popular channel was internet sales. The Bundle contained no evidence about the subscription channel, but Miss Shaw, having taken instructions, said that it was made up of repeat sales, which could have been made by phone or by direct mail. Sales from the shop in Jersey were not delivered, but taken away by the customers in person; PostDirect was not involved in those sales and they are not considered further in this decision.

101. A customer could also collect the goods in person from PostDirect's warehouse in the Netherlands if a collection time was arranged by phone or by email. However, this had never happened.

The VAT Committee and afterwards

102. The EU VAT Committee was set up pursuant to Article 29 of the Sixth Directive, now rewritten as Article 398 of the PVD. It is made up of representatives of the Member States and of the European Commission. Member States can submit questions for consideration by the Committee.

103. On 5 May 2015, questions were put to the VAT Committee by the UK and Belgian representatives; these formed the basis for Working Paper 855 ("the Working Paper"). Attached to the Working Paper was an "example of an actual arrangement resulting in avoidance of the distance selling provisions in Articles 33 and 34 of Directive 2006/112". Mr Singh confirmed that the example was based on Healthspan's position. On 4-5 June 2015 the VAT Committee met; it subsequently published guidelines ("the Guidelines") which agreed with the UK's position in relation to the questions asked, either unanimously or almost unanimously. I return to the Working Paper and the Guidelines at §215 and §219 respectively.

104. On 15 January 2016, the Dutch VAT authorities wrote to Deloitte, saying that:

(1) in the light of the Working Paper and the Guidelines, they had changed their position, and now considered that Healthspan's activities "should be regarded as distance sales" from 1 April 2016; and

(2) as regards the past, the VAT paid to the Netherlands could be refunded to Healthspan, if the UK levied VAT in respect of the same supplies.

105. From 1 February 2016, Healthspan reorganised its business; and warehousing and despatch were moved to the UK under Healthspan's direct control. All references to PostDirect were removed from Healthspan's website and from its printed matter. UK customers received their goods from Healthspan without a delivery charge, and Healthspan accounted for UK VAT on its sales to UK customers.

106. On 24 May 2016, HMRC decided (a) that supplies of goods made by Healthspan to UK customers during the relevant period were within Article 33 as made "by or on behalf of the supplier" and (b) to register Healthspan for VAT with effect from 1 April 2012. Healthspan appealed to the Tribunal. The appeal was allocated to the complex category.

107. On 16 January 2017, HMRC issued a Notice of Assessment, which was followed on 25 January 2017 by the detailed assessment for £27,399,190 plus interest of £487,056.53. Healthspan appealed the Assessment to the Tribunal, and the two appeals were consolidated.

PART 2: PHONE SALES

Findings of fact about phone sales

108. One of the exhibits to Ms Whitchurch's evidence is "an example script used in training Healthspan's call centre operators" for customers ordering by phone. The script is as set out below. I have shown the instructions from Healthspan to the sales staff in italics and the words they are to use with the customer in normal print. The underlining is in the original.

> "Are you ordering from a brochure or advert today? *If yes* – please quote the code located on the bottom right hand corner of order form or letter that is highlighted in yellow. *If no* – please confirm where you saw our phone number today.
>
> What would you like to order today?

> *On completion of the order entry line [on Healthspan's relevant web page], you will then go to the 'Postal selection/Charge' field. If the customer wishes to have the order delivered to a different delivery address this will have to be set up at this point so the new postal charge can be applied (see below).*
>
> *It is imperative that we then advise the customer of the following statement:*
>
> "Please confirm if you would like this order to be sent to your home address. That's a total of £XX.XX. Your goods will be despatched/ delivered to you by PostDirect at a charge of £1.95 (for Europe/Worldwide the system will adjust the price accordingly). Alternatively, for an additional cost you can choose an express courier service.
>
> *If the customer decides to accept the £1.95 postal charge, continue with the order.*"

109. The next section of the script is headed, in bold "Choosing an alternative courier delivery service (DHL express)" and reads:

> "If the customer decides to accept the £1.95 postal charge, continue with the order; if the customer chooses to have their items shipped by courier (DHL) then…highlight the carrier [on the screen] and press ok. The postage charge will be recalculated. All relevant discounts will be applied.
>
> *A discount of £2.00 off your products has been awarded for your customer loyalty…*"

110. The script then says "*on completion of all the details the 'Sales Order Entry' screen will look like this*" followed by a picture of that screen. The salesperson is then instructed to say: "*the call close to be given to the customer is to be advised as follows:* 'Thank you for your order, your goods will arrive within 10 days'". Finally, the salesperson is instructed to save the order on the computer.

111. Ms Whitchurch expressly stated in the main body of her witness statement that the paragraph beginning "please confirm" was used when speaking to phone customers. I find as a fact, in reliance on her witness evidence, that Healthspan's sales staff used this script when dealing with phone customers. Miss Shaw did not suggest otherwise.

The parties' submissions

112. Mr Singh referred back to (a) the Briefing Paper (see §52), which had stated that the telephone script would be amended, to "make it clear to the customer that he/she is contracting with [fulfilment house] for delivery services as well as with Healthspan for the purchase of the product", and (b) the letter to the Dutch VAT authorities (see §47), which said that customers would be told they were being offered a separate contract for delivery services by the Dutch company and that "the customer will need to indicate verbally that they understand this and agree to it. If they do not agree, their order will not be processed".

113. Mr Singh pointed out that the phone script was significantly different from those documents, because:

(1) phone customers were not told they were separately contracting with PostDirect for delivery;

(2) they were not told that if they failed to accept that separate contract, the order would not be processed; and

(3) the customer service operator instead simply informed the customer that the goods would be delivered by PostDirect.

114. Mr Singh submitted, on the basis of that evidence, that phone customers had not made a separate contract with PostDirect for delivery.

115. Miss Shaw said that it was only when Mr Singh filed and served his skeleton argument that Healthspan became aware that HMRC were taking this position in relation to phone customers. Until then, HMRC's case had rested on there being a contract between all customers and PostDirect, with Healthspan being involved only "indirectly" in the delivery of the goods. She said HMRC's new position was fundamentally different, and amounted to a submission that the supplies had been made "by" Healthspan, not "on behalf of" Healthspan. She submitted that HMRC should have changed their Statement of Case so as to put Healthspan on notice of this new argument, and its failure to do so barred HMRC from putting it forward at the Tribunal. She also pointed out that the witness statements had been filed and served at the end of May 2017, so HMRC had had plenty of time to amend their Statement of Case. Instead, HMRC had waited until their skeleton argument was filed and served, some two weeks before this hearing.

116. Mr Singh's response was that when the Statement of Case was filed, HMRC had understood from its correspondence with Healthspan's representatives that all customers were (a) required to enter into a separate contract with PostDirect and (b) had done so, and the Statement of Case had been based on that understanding. It was only when Ms Whitchurch filed her evidence and related exhibits that HMRC had been made aware that the position was different for phone customers. He submitted that HMRC was not precluded from making submissions on that evidence, or from inviting the Tribunal to make consequential findings.

117. Miss Shaw also drew the Tribunal's attention to the opening words of the phone script, where the customer was asked whether he was ordering from a brochure or advert. She said that customers did not cold-call the Healthspan number (although in making this statement, she did not refer to any evidence in the Bundle), but were responding to marketing materials; which make it clear that PostDirect was responsible for delivery pursuant to its T&Cs.

Discussion and conclusion on phone sales

118. Although Miss Shaw did not refer to any authorities in making her submissions, I have assumed that the extracts set out below encapsulate the principles to which she referred. In *Prudential v HMRC* [2016] EWCA Civ 376 the Court of Appeal said at [20]:

> "Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case."

119. At [21] the Court said:

> "Where a new issue arises which is not foreshadowed in a statement of case, a party needs the court's permission to advance it. The court is then faced with a discretionary case management decision, to be exercised in accordance with the overriding objective."

120. Miss Shaw submitted that those principles were breached, because (a) HMRC was now putting forward a new point of fact (that phone customers were not invited to contract with PostDirect, and did not do so) and (b) a new point of law (that the supplies were "by" Healthspan and not "on behalf of" Healthspan).

121. I have taken those points in reverse order. It is clear on the facts that PostDirect (not Healthspan) delivered the goods by post, albeit via third parties. But as customers had made a single contract with Healthspan which included both the goods and their delivery, Healthspan was legally obliged to deliver those goods. PostDirect was therefore acting "on behalf of" Healthspan. It follows that Mr Singh was not submitting that the goods were delivered to phone customers "by" Healthspan, and there is no new point of law.

122. I turn next to the facts. In *Sadovska v SSHD* [2017] UKSC 54 at [14], Lady Hale said that "one of the most basic rules of litigation" is the principle that "he who asserts must prove". Healthspan has stated throughout this dispute that customers (a) were told they had to enter into a separate contract with Healthspan, and (b) had done so. In summary:

(1) HMRC's Decision contains a section headed "Summary of the relevant facts as I understand them". It begins:

> "I have set out our detailed understanding of your arrangements at the Appendix to this letter, but also provided a brief summary below. If you believe there are any material errors in my understanding of the arrangements and the facts, then please let me know."

(2) Paragraphs 20-21 of that Appendix read:

> "customers ordering…by telephone are invited to contract with Wial for a low cost delivery service into the UK or to use the more expensive but quicker courier option…the vast majority of UK customers use the low cost delivery option"

(3) Having received HMRC's Decision, Healthspan did not inform HMRC that there was a material error in its understanding of the facts so far as phone sales were concerned.

(4) Ground 1 of Healthspan's Notice of Appeal, filed on 1 February 2017, was that delivery services "were provided, upon the customer's request, by way of a separate contract between the customer and PostDirect". Reference was then made to the PostDirect T&Cs on Healthspan's website. Healthspan's grounds of appeal therefore do not state that the position was any different for phone sales.

(5) HMRC's Statement of Case was based on the facts which Healthspan had said were true.

(6) When the telephone script was filed and served as an exhibit to Ms Whitchurch's witness statement in May 2017, Healthspan did not change its grounds of appeal to reflect her evidence. Although the Notice of Appeal was amended on 6 December 2017, the opportunity was not taken to make any change in relation to phone sales.

123. It was for Healthspan to provide the evidence to support the factual assertions made in its pleadings. Where a factual assertion in a party's pleading is contradicted by the evidence of a witness put forward by that same party, HMRC cannot be barred from inviting the Tribunal to draw relevant conclusions.

124. The Tribunal's task is to find the facts from the evidence. On this point the evidence is clear: the wording used by the sales staff was fundamentally different from that in the Briefing Note and the letter to the Dutch VAT authorities. Phone customers were not told they were required to contract with PostDirect. Instead, they were simply informed (a) of the standard delivery charge; (b) that the goods would be delivered by PostDirect; and (c) that they had the option of sending the goods by courier.

125. Miss Shaw suggested that I infer from the opening words of the phone script that the customer was agreeing to the contract with PostDirect. I do not accept that this is a reasonable inference, for the following reasons:

(1) if the customer answered "yes" to the question about ordering from a brochure or advert, he was then told "please quote the code located in the bottom right hand corner". He was not informed of any requirement that he enter into a separate contract with PostDirect;

(2) the small print of the brochures/adverts in the Bundle state (my emphasis) "by completing this form you are agreeing to PostDirect's terms and conditions of delivery" (see §162). It is not possible to infer from that wording that a customer who had merely read a brochure/advert and subsequently ordered goods by phone had agreed to the PostDirect T&Cs;

(3) Miss Shaw's statement about cold-calling was not evidence in the case;

(4) even had there been such evidence, it is inherently unlikely that all customers had seen a brochure/advert which included the relevant paragraph

about PostDirect's T&Cs. Customers could have been recommended to Healthspan by a friend; they could have previously purchased a Healthspan product years before, and not read recent brochures or adverts; or they could have used the same product for a long time, and called Healthspan to re-order it; and

(5) it is also reasonable to infer from the question itself that some customers will have answered "no" to that question; in other words, not all customers had seen a brochure or advert.

126. Furthermore, after customers had selected their delivery options (PostDirect or DHL), the sales staff used the "call close" sentence: "Thank you for your order, your goods will arrive within 10 days". In other words, Healthspan closed the sale after a customer had placed a single order which included delivery.

127. On the basis of the facts and analysis set out above, I find as a fact that phone customers were not asked to make a separate contract with PostDirect for delivery, and I find as a matter of law that customers did not make such a contract. Instead, the goods were delivered by PostDirect, acting on behalf of Healthspan.

128. For VAT purposes, Healthspan made a composite supply of goods to customers, which included delivery. Article 78 of the PVD is also relevant: it reads:

> "The taxable amount shall include the following factors:
>
> (a) …;
>
> (b) incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer..."

129. Here, delivery was incidental to the delivery of the goods and was included in the same single supply of goods. As those goods were delivered to customers by PostDirect on behalf of Healthspan, Article 33 applies.

PART 3: ONLINE SALES

Findings of fact

Healthspan's webpages

130. Healthspan's webpages show that a customer purchasing online first selected the product(s) he wanted to buy from the selection on the website. The "customer loyalty discount" was applied to the price and the customer was then asked to "proceed to checkout". The following webpage is headed "Delivery details", and it offers the following two delivery options:

> "Lowest Cost Delivery option – provided to you by PostDirect 1.95
>
> Courier Delivery – provided to you by PostDirect 19.95"

131. Underneath each option, in smaller print, are the words "by selecting this option you are agreeing to the PostDirect terms and conditions". At the bottom of the page, also in the same small print, is written "visit our Delivery Information page for more information".

132. The linked webpage is headed "Delivery Information. Questions and Answers". It says there were four "delivery options" set out as below:

Post zone for delivery	Cost	Target delivery times
UK standard via PostDirect	£1.95	Up to 10 days*
UK courier via PostDirect	£19.95	Approx 3-4 days
Rest of Europe	£3.95	Up to 21 days*
Rest of World	£5.95	Up to 28 days*

*delivery is provided by PostDirect. By selecting this option you are agreeing to the PostDirect terms and conditions.

133. As that table shows, three options link through to PostDirect's T&Cs via the asterisk. Although the courier option states it is provided "via PostDirect", there is no asterisk and no link to PostDirect's T&Cs. The page also gives the "target" delivery times for "UK standard delivery via PostDirect" as being "up to 10 days" and for "UK courier delivery via PostDirect" as "approx 3-4 days".

134. The next page is "confirm and pay". It gives the cost of the item(s), the discount, and the PostDirect delivery charge. Before the order was formally placed, the customer had to click a box which began "I confirm and accept the Terms and Conditions of this order and of delivery to you [sic] by PostDirect". The underlined words linked respectively to Healthspan's T&Cs, and to PostDirect's T&Cs.

135. The page also asked "who are PostDirect" and answered that question by saying "PostDirect are a delivery company offering you a standard postal service to your home. Costs are detailed in the table. Healthspan collect this charge from you on behalf of PostDirect". At the bottom of the page, under the heading "where is my order", the text reads:

> "In the unforeseen event that your order hasn't arrived within the delivery times…please contact our UK based customer service team on [number]. Alternatively you can email us at ….@healthspan.co.uk and we will arrange for a replacement to be delivered to you as soon as possible."

Healthspan's T&Cs

136. As noted at the beginning of this decision (see §29ff), the Bundle contained four versions of Healthspan's T&Cs. The Clauses referred to in this paragraph were unchanged as between all versions. Clause 1 says "we do not offer delivery of our Products. Delivery services…are provided to you by PostDirect". Clause 6.1 says "we do not deliver Products, but when you place an order for Products you will be offered Delivery services from PostDirect. Clause 6.2 says "where you have contracted with PostDirect for Delivery services, that delivery company will deliver your Products in accordance with its terms and conditions which are available on the following link [link provided]".

PostDirect's T&Cs

137. The other relevant document is PostDirect's T&Cs. The word "Delivery" is defined by Clause 1 to "mean and include the whole of the operations and services undertaken by us in connection with the transportation of the Products to you". Clauses 1 and 2 establish that the parties are PostDirect and the customer. By Clause 2, PostDirect are allowed to "subcontract the whole or any part of the contract of Delivery on any terms and conditions we decide".

138. Clause 3 is headed "your acceptance of our terms and conditions" and begins:

> "by giving us your order for Delivery of Products you accept our terms and conditions set out in the consignment note and/or these terms and conditions irrespective of whether you have signed the front of our consignment note or not."

139. The term "consignment note" is defined in Clause 1 to mean "information provided by you or Healthspan on your behalf in paper or electronic form concerning the shipment to you".

140. Clause 4 provides that the parties are entering into "a contract of carriage". Clause 8 is headed "Calculation of transit times and routing of shipments". It begins "The route and the method by which we transport your shipment shall be at our sole discretion". This table then follows:

Post Zone	Target standard delivery times
UK	Up to 7 days
Rest of Europe	Up to 21 days
Rest of World	Up to 28 days

141. Clauses 9 and 10 state that PostDirect has the right to levy extra delivery charges to customers in addition to the standard charges. However, taking into account the following evidence, I find as a fact that no extra delivery charges were levied under either Clause 9 or Clause 10:

(1) Clause 5.16 of the Payment Agreement (see §66) provided that "in order that the costs payable by the Buyer for transport shall be known to the Buyer in advance they will be set out on Healthspan's website and will be at the prices set out in Schedule 5 per Product";

(2) there is no reference in the prices set out on Healthspan's website, or in Schedule 5, to any extra delivery charges; and

(3) the witness evidence stated that customers were charged for delivery in accordance with the prices on Healthspan's website.

142. Clause 12 listed PostDirect's exclusions from liability, including (at 12.2.2) where the customer breached the warranties "set out at Clause 12". However, Clause 12 did not contain any warranties.

143. Clause 14 is headed "Rates and Payment" and Clause 14.4 reads "our charges are calculated in accordance with the rates applicable to your shipment as set out in our Schedule of charges". That Schedule is as follows:

Post Zone	Standard delivery charge
UK	£1.95
Rest of Europe	£3.95
Rest of World	£5.95

144. Clause 14.3 reads "you waive all your rights to challenge our invoices if you do not contest our invoice in writing within 7 days from the date of the invoice". However, Mr Raaymaker's evidence was that PostDirect never sent invoices to customers. His evidence is unchallenged and I accept it.

145. The Clauses relating to refunds are discussed at §182ff.

Is there a contract between PostDirect and online customers for postal delivery?

146. PostDirect's T&Cs state that it is a contract of carriage. Its terms include the prices for standard delivery and target delivery times. Clause 3 states that the contract is made by "giving us your order for Delivery of Products". The Healthspan webpage requires customers to accept PostDirect's T&Cs by clicking on the link before the order can be processed. On the basis of those facts, I find that PostDirect offered to provide delivery by post, and the customer accepted that offer.

147. As indicated in the findings of fact, there were a number of anomalies in the PostDirect T&Cs:

(1) they contained references to customer warranties and invoices, neither of which existed;

(2) the reference in Clause 3 to consignment notes was unrealistic: it stated (emphasis added) that consignment notes included terms and conditions imposed by PostDirect on the customer. But as the term "consignment notes" is defined as information provided by the customer or Healthspan to PostDirect, it cannot therefore have included conditions imposed by PostDirect on the customer.

148. Nevertheless, those terms are not so fundamental as to vitiate the contract. I therefore find that a contract for delivery came into being between PostDirect and online customers who had opted for standard delivery by post. HMRC accepted this was the position. I go on to consider the position for courier deliveries.

Is there a contract between PostDirect and online customers for courier delivery?

149. Mr Jackson's evidence was that "the vast majority" of customers used PostDirect's services; Ms Whitchurch's evidence was that those services were used by "the majority" of customers.

150. As noted at the beginning of this decision, HMRC informed PwC before the hearing that they would not need to cross-examine the witnesses, providing confirmation could be given on a number of points. Part of the exchange was as follows:

> "**HMRC**: [Can] the Appellant confirm…that…all UK customers used the PostDirect services…and not merely the "vast majority"…or "the majority".
>
> **PwC**: Where customers accepted both the T&Cs of Healthspan and of PostDirect, and completed their order, the Appellant can confirm that these customers always used PostDirect…
>
> **HMRC**: Could you please clarify in response to the first question that there were no UK customers during the relevant period who did not use PostDirect's delivery services, ie that there were none who collected the goods or who used a non-PostDirect delivery service."
>
> **PwC**: We can confirm that during the relevant period those UK customers who purchased goods from Healthspan used one of the delivery options provided by PostDirect. We make reference to Exhibit GR5 which sets out the numbers of customers adopting each delivery option (including delivery by courier) in January 2016."

151. Exhibit GR5 was the schedule attached to Mr Raaymaker's evidence listing the different charges paid by Healthspan to PostDirect for the month of January 2016. That schedule included 18 charges of £25; PwC confirmed to HMRC in a subsequent email that this was the DHL courier charge in January 2016.

152. HMRC had therefore been told by PwC that "those UK customers who purchased goods from Healthspan used one of the delivery options provided by PostDirect". In reliance on that email exchange, HMRC had understood the many references to DHL in the documents to be erroneous. However, Miss Shaw was instructed in the course of the hearing to correct that understanding, because the courier service was provided by DHL. I find as a fact that this was the position.

Did PostDirect offer to provide courier services?

153. For there to be a contract between a customer and PostDirect for the provision of courier services, there must be both offer and acceptance. If PostDirect did not make an offer to provide those services, there can be no contract.

154. PostDirect's T&Cs do not mention providing courier services, but neither do they say they provide postal services. Instead, they refer to "Delivery", defined as "the operations and services undertaken by us in connection with the transportation of the Products to you". That part of the contract is therefore neutral.

155. However, PostDirect's T&Cs do say what their service costs, and when they will provide that service. The cost is at Clause 14.4, as set out at §143. This refers only to the prices of postal delivery. There is no reference to the £19.95 price for courier delivery (later increased to £25). The delivery time is at Clause 8, where

PostDirect give their "target" as being "up to 7 days". The Healthspan website states that the "target" for UK courier delivery is 3-4 days.

156. From these terms I find that PostDirect did not offer to provide courier delivery services. Had it done so, the price of those services, and the target time of delivery, would have been set out in the contract. That this is the correct conclusion can also be seen from the following facts, found earlier in this decision:

(1) Healthspan's "confirm and pay" webpage page asks "who are PostDirect" and answered that question by saying (emphasis added) "PostDirect are a delivery company offering you a standard postal service to your home" (see §135).

(2) The Delivery Information page clearly differentiates postal deliveries provided by PostDirect and courier deliveries by DHL. The former are asterisked, and the customer is told in relation to those deliveries: "by selecting this option you are agreeing to the PostDirect terms and conditions". The courier option is not asterisked (see §132).

(3) Clause 5.16 of the Warehouse Agreement states that the prices charged to customers are those set out at Schedule 5, and that Schedule separates out the "Post Direct Delivery charges" from "DHL Express Delivery charges" (see §68).

(4) Healthspan sales staff used the FAQs to respond to customer questions about delivery, see §77ff. These FAQs distinguished "standard delivery via PostDirect" from "express delivery via DHL", explaining them as follows: "Now we offer 2 delivery options for you to choose from. Lowest cost delivery is provided by Post Direct. Express Delivery option is provided by DHL". The answer to the question "who are Post Direct" is given as "Post Direct are a delivery company offering you a standard postal service to your home at the low cost of £1.95". The answer to the question "who are DHL?" is given as "DHL are an international delivery company offering you express delivery at a cost of £19.95".

157. Miss Shaw acknowledged that PostDirect's T&Cs did not include any term covering courier services, and described the failure to mention this as "a blip". She invited the Tribunal to find that, as the customer had not contracted with DHL, the courier service must have been provided under a contract with PostDirect. Mr Singh responded by saying that simply telling customers that courier delivery would be by DHL did not carry with it any necessary inference that customers had entered into a contract with PostDirect.

Conclusion on DHL deliveries

158. PostDirect did not offer to provide courier services, so there can have been no contract between the customer and PostDirect for those services. Where the customer chose the DHL option, Healthspan therefore made a single composite supply of goods, together with an incidental supply of delivery services. Article 78 is again relevant.

159. I also considered the schedule attached to Mr Raaymaker's evidence, which shows that Healthspan transferred to PostDirect the charges it had collected for DHL's courier services. I infer that this was because PostDirect (and not Healthspan) which contracted with DHL, and I so find.

160. Both PostDirect and DHL were therefore acting "on behalf of" Healthspan, with PostDirect intermediating DHL's delivery service. Deliveries carried out by DHL therefore come within Article 33.

PART 4: MAIL ORDER SALES

Findings of fact

161. The Bundle contained a number of examples of mail order product lists and advertisements with mail order details. These all provide space for the customer to enter his name, address, telephone number and credit card details; the quantity of each product being purchased; the amount payable for each product, and the total cost of the goods. The next two lines show the customer discount and the "standard P&P provided to you by PostDirect", with the two figures being identical or almost identical (see §82ff). There is no space on the form for a customer to request that the goods be delivered by courier.

162. At the bottom of the mail order product list is this small print (emphasis added):

> "All Healthspan Ltd sales with standard delivery service are provided to you by PostDirect at a price of £1.95 incl VAT…by completing this form you are agreeing to PostDirect's terms and conditions of delivery. Express delivery services are provided to you by DHL at a cost of £19.95 inc VAT…Full details are contained in the terms and conditions at www.healthspan.co.uk."

163. The Bundle also contained an advert for glucosamine, with a tear off slip allowing that product to be purchased by mail order. This reads (again, emphasis added):

> "All Healthspan Ltd sales with standard delivery service are provided to you by PostDirect at a price of £2.25 incl VAT…by completing this form you are agreeing to PostDirect's terms and conditions of delivery. Express delivery services are provided to you by PostDirect at a cost of £25 inc VAT…Full details are contained in the terms and conditions at www.healthspan.co.uk."

164. The special offer product price referred to in that advert is stated to expire on 31 July 2015, so I have inferred that (a) the new wording was in place shortly before that date, and (b) the same wording was used in other adverts and mail order forms.

165. In the advert for glucosamine, and in one of the mail order forms, the print size of the passages set out above was extremely small.

Discussion

166. I drew to the parties' attention the extremely tiny font of the reference to the PostDirect T&Cs, and Miss Shaw and Mr Singh agreed it was difficult to read.

However, Mr Singh did not seek to argue that, as a result, the T&Cs had not been "fairly and reasonably" brought to the customers' notice, see *Interfoto Library v Stiletto* [1988] WLR 615 and *O'Brien v MGM Ltd* [2001] EWCA Civ 1279.

167. I therefore find that a contract for delivery came into being between PostDirect and the mail order customers in relation to postal sales, just as had been the position with online sales. HMRC accepted that this was the position.

168. In relation to DHL, I have already found that PostDirect did not offer courier delivery services. Moreover, there was no space on the mail order forms for customers to request courier delivery, and for most of the relevant period, the very small print on those forms referred to courier services as being provided by DHL and not by PostDirect.

169. I find that the mail order customers did not contract with PostDirect for the provision of courier services. Instead, any courier deliveries for direct mail customers were carried out by DHL, intermediated by PostDirect acting on behalf of Healthspan, in the same way as for online customers. Those supplies were therefore within Article 33.

PART 5: TITLE TO THE GOODS AND REFUNDS

170. This Part is relevant only to online and mail order sales where delivery was by post, under a contract with PostDirect. It considers:

(1) the position when the customer was refunded delivery fees, or delivery fees were waived; and

(2) the point at which title to the goods passed to the customer from Healthspan.

EU Directives on distance sales

171. A number of EU directives deal with distance sales; these contain provisions relating to delivery costs and the passage of title to customers

172. Directive 97/7/EC, entitled "on the protection of consumers in respect of distance contracts" was in force until 13 June 2014, when it was replaced by Directive 2011/83/EU. Both Directives give EU consumers a "right of withdrawal" from distance selling contracts.

173. Article 6(1) of Directive 97/7/EC provided that the consumer has the right to withdraw from a contract "without penalty and without giving any reason" and if the consumer exercises that right "the only charge that may be made…is the direct cost of returning the goods". Article 6(2) provided that:

> "…the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods."

174. Recital 46 of Directive 2011/83/EU provides:

> "In the event that the consumer withdraws from the contract, the trader should reimburse all payments received from the consumer, including those covering the expenses borne by the trader to deliver goods to the consumer."

175. Article 13 is headed "obligations on the trader in the event of withdrawal" and reads:

> "1. The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11.
>
> 2. Notwithstanding paragraph 1, the trader shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader."

176. Directive 2011/83/EU also refers to the passage of title. Recital 51 includes the following text:

> "The rules on delivery laid down in this Directive should include the possibility for the consumer to allow a third party to acquire on his behalf the physical possession or control of the goods. The consumer should be considered to have control of the goods where he or a third party indicated by the consumer has access to the goods to use them as an owner, or the ability to resell the goods (for example, when he has received the keys or possession of the ownership documents)…"

177. Recital 55 reads:

> "Where the goods are dispatched by the trader to the consumer, disputes may arise, in the event of loss or damage, as to the moment at which the transfer of risk takes place. Therefore this Directive should provide that the consumer be protected against any risk of loss of or damage to the goods occurring before he has acquired the physical possession of the goods. The consumer should be protected during a transport arranged or carried out by the trader, even where the consumer has chosen a particular delivery method from a range of options offered by the trader. However, that provision should not apply to contracts where it is up to the consumer to take delivery of the goods himself or to ask a carrier to take delivery. Regarding the moment of the transfer of the risk, a consumer should be considered to have acquired the physical possession of the goods when he has received them."

178. Article 20 is headed "Passing of risk" and reads:

> "In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier

> was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier."

Approach taken to these Directives

179. As noted at §37, contracts between the customers and Healthspan were governed by English law. As the UK is part of the EU, the Directives set out above would appear to apply to the supplies of the goods. That this was the position is also indicated by Clause 2.2 of the Payment Agreement, which began "if the Buyer (i) exercises his right of withdrawal as set out in Directive 97/7/EC and returns the Product(s) to Healthspan…". Furthermore, some Clauses in the Healthspan T&Cs were clearly drafted to echo the wording of the EU Directives which apply to delivery costs and to the passage of title.

180. However, neither party referred to these EU Directives. In the absence of any submissions, and given that Healthspan is based in Guernsey, I make no finding on whether it was bound by the provisions set out above. Instead, the analysis set out later in this Part is based only on the facts as found, and the contractual provisions.

Findings of fact about refunds and waivers of delivery charges

181. There are three different relevant contracts: the PostDirect T&Cs, the Healthspan T&Cs, and the Payment Agreement. There are also two different situations:

> (1) when there had been a problem with the original delivery, so that the related delivery costs were refunded to the customer ("the refund scenario"); and
>
> (2) when replacement goods were sent to the customer following a problem with the original goods and/or with the delivery of those goods, and the costs of sending those replacement goods was waived, and so not charged to the customer ("the replacement scenario").

The PostDirect T&Cs

182. Clause 11 of the PostDirect T&C was headed "extent of our liability for carriage". It provided that, if the goods were carried "solely or partly by air", PostDirect's liability for loss or damage was limited to "19 special drawing rights per kilo". If the goods were carried by road, PostDirect's liability for loss or damage was limited to "8.33 special drawing rights per kilo". Each special drawing right (SDR) is roughly equivalent to £1, although there is some movement about that figure. If the goods were transferred other than by air or by land, PostDirect's maximum liability for loss or damage was £15 per kilo. In the case of delayed delivery, the contract provided that PostDirect would refund the cost of delivery, but only if the customer could show he had suffered loss.

183. The order forms included in the Bundle show that almost all Healthspan's products cost more than £10 and weigh between 100mg and 1 gram. I find as a fact that the amounts a customer could claim from PostDirect in the refund scenario were significantly limited, being (a) less than the market value of damaged goods, and (b)

requiring proof of loss if the goods were delivered late. No clause required PostDirect to bear delivery costs in the replacement scenario.

The Healthspan T&Cs

184. In relation to the replacement scenario:

(1) Clause 9.1 says, in all versions of the Healthspan T&Cs:

> "we guarantee your satisfaction with our Products and if, for whatever reason, you are not satisfied with our Products, we offer a 'no quibble' refund or exchange policy".

(2) That term deals with the goods, not with the delivery costs, but it meant that Healthspan would invariably send replacement goods to dissatisfied customers.

(3) The 2013 and 2014 versions of the Healthspan T&Cs both contained the following term, although it was removed from the 2015 version:

> "Where we send you Products in exchange or as a replacement for Products for whatever reason, then we recognise that you will incur an additional delivery charge from PostDirect to have such exchange or replacement Products sent to you. Although we are not obliged to do so, as a gesture of goodwill we will meet your costs of standard delivery and so will pay PostDirect on your behalf that additional Delivery charge."

185. In relation to the refund scenario:

(1) the 2013 version of the Healthspan T&Cs said at Clause 9.3 "Products returned to us by you for any reason will be refunded in full…Delivery charges are non-refundable";

(2) the 2014 version was significantly different. Clause 9.3 repeated the "no quibble" guarantee on all products. A new Clause 9.4 reads (emphasis added) "the amount we will refund to you will be the price you paid for the Product(s). We will also refund any delivery costs you have paid to PostDirect". Clause 9.6 read "if you have returned the products to us because they are faulty or misdescribed, we will refund the price of the products in full together with any applicable delivery charges you have paid to PostDirect and any reasonable costs you incur in returning the items to us"; and

(3) the 2015 version retained Clause 9.3, but Clause 9.4 read "the amount we will refund to you will be the price you paid for the Product(s)". The promise to refund delivery costs paid to PostDirect has been removed. The more limited commitment to pay delivery charges if the goods were faulty or misdescribed was retained.

The Payment Agreement

186. Clause 2.2 of the Payment Agreement provided that:

> "If the Buyer (i) exercises his right of withdrawal as set out in Directive 97/7/EC and returns the Product(s) to Healthspan and/or (ii) exercises a right to withdrawal based on its agreement with Healthspan

> for the purchase of the Product(s) and/or its Transport of Products Agreement, Healthspan shall reimburse to the Buyer the Transport of Products Charge charged by the Fulfilment House. Healthspan is entitled to set off the amount of any such reimbursed costs against any amount due to the Fulfilment House under the Transport of Products Agreement under Clause 2.1."

187. This Clause therefore gave Healthspan the right to recover from PostDirect the postage costs it had reimbursed to a customer, by offsetting them against the other postal charges collected from customers, which it was required to pay over to PostDirect under Clause 2.1 (see §60).

188. The Clause refers only to "reimbursed costs". Where Healthspan sent replacement goods to customers, those customers had not paid for the delivery, so there were no costs to reimburse. Clause 2.2 therefore only allows Healthspan to recover the delivery charges it incurred in the refund scenario, not those in the replacement scenario.

189. In reliance on Mr Lawther's and Mr Raaymaker's witness evidence, I find that Clause 2.2 was not operated, other than for the first four months of the relevant period. During that initial phase there were a significant number of delivery complaints, relating to delayed service, lost items and incorrect labelling, and Mr Jackson liaised with PostDirect to sort out and resolve those issues. For those first four months, PostDirect bore 50% of the delivery costs relating to those errors, with Healthspan bearing the balance. Apart from that initial period, it was Healthspan who bore the delivery costs under the refund scenario as well as under the replacement scenario.

190. Mr Lawther said that Clause 2.2 was not operated because:

> "the proportion of delivery issues was very small in comparison to the volume of sales and the administrative hassle and cost to Healthspan of deducting or recouping the charges meant that it simply wasn't in Healthspan's commercial interests to do so."

191. Mr Lawther's evidence was unchallenged. However, I have also taken into account other evidence, being:

(1) the schedule of monthly payments exhibited to Mr Raaymaker's evidence (see §151). This separates the delivery charges paid by Healthspan from those collected from customers; and

(2) the existence of PostDirect's 6% fixed profit.

192. I find that it was not too much "administrative hassle and cost" to identify the costs, because these were separately identified and included on the monthly schedules. Instead, it was not worth the administrative hassle and cost to the parties, of seeking to agree between themselves that some or all of the delivery charges reimbursed to customers should reduce PostDirect's fixed 6% profit.

Refunds/waivers of delivery charges: discussion

193. As noted above, the customer's right to claim against PostDirect where there has been damage or loss of goods was subject to a very low cap, unrelated to the value of the goods. PostDirect also did not agree to meet the cost of redelivering replacement goods, even where the original goods had been lost or damaged as the result of problems during the delivery.

194. There is a striking contrast between those terms and the more generous provisions of the Healthspan T&Cs, which operated as set out below.

The replacement scenario

195. Healthspan was contractually bound to pay the delivery costs in the replacement scenario until 26 October 2015, three months before the end of the relevant period.

196. I come to that finding, despite the words "although we are not obliged to do so, as a gesture of goodwill" at the beginning of the relevant Clause, see §184. Those words simply mean that Healthspan did not have to make the promise. But once it had done so, the promise became a term of the contract.

197. At the very end of the relevant period, the 2015 version of Healthspan's T&Cs amended those delivery terms. However, the "no quibble guarantee" remained, and none of the witnesses stated that there was any relevant change to the company's practice. I therefore find as a fact that Healthspan continued to pay the delivery costs in the replacement scenario, even though it was no longer contractually bound to do so. Healthspan also bore those costs; they could not be passed to PostDirect under the Payment Agreement.

The refund scenario

198. The 2014 version of the T&C contains Healthspan's promise to "refund any delivery costs you have paid to PostDirect". As a matter of contractual analysis, that wide and unconditional promise displaces the more limited commitment at Clause 9.6 to refund only where the goods were "faulty or misdescribed. . In other words, under the 2014 version Healthspan had a clear contractual obligation to pay the customer's delivery costs in the refund scenario.

199. From 26 October 2015 only that more limited promise remained in the contract, and the 2013 version explicitly stated that "Delivery charges are non-refundable". However:

(1) Clause 2.2 of the Warehouse Agreement provided that, where goods were returned by customers "Healthspan shall reimburse to the Buyer the Transport of Products Charge charged by the Fulfilment House";

(2) the "no quibble guarantee" was in place throughout the relevant period; and

(3) none of the witnesses stated that there was any relevant change to the company's practice during the relevant period.

200. I find as a fact that it was therefore envisaged from inception that Healthspan would always refund delivery costs to dissatisfied customers in the refund scenario, even when it was not contractually bound to do so.

Conclusions on refunds/waivers

201. In summary, even though the customers had contracted with PostDirect to deliver the goods, Healthspan had significant legal obligations to customers relating to refunds of delivery charges and the delivery of replacement goods; it bore almost all the related costs, and it took responsibility throughout the relevant period for resolving delivery problems. This is consistent with its holding out in the marketing materials, see §96-98.

Title to the goods

202. Several different contractual provisions refer to the point at which title to the goods passed to the customer. I first consider those provisions, and make related findings of fact. I then set out my conclusions on the contractual position, taking into account those factual findings and English contract law.

Findings of fact about title to the goods

203. As previously noted (see §66), Clause 5.12 of the Warehouse Agreement provided that "Title to a Product transfers from Healthspan to the Buyer after labelling of that Product in the case of manual labelling or after placing the product in the Sorting Machine in case of automated labelling", and Clause 10.1 was headed "Reservation of Title/Rights" and read:

> "All Products transported to the Fulfilment House, shall remain Healthspan's property (i) until the Products have been labelled with the addresses indicated by the Buyers in case of manual labelling by the Fulfilment House or (ii) until the Products have been placed in the Sorting Machine for labelling with the addresses indicated by the Buyers in case of automated labelling by the Fulfilment House."

204. However, the customer was not party to that Agreement, and it was signed before any of the goods were sold to customers. And, as already indicated, there are some evidential difficulties as to when the labelling takes place, see §72ff.

205. The position becomes more complicated when the Warehouse Agreement is compared to the Healthspan T&Cs. All versions of that document include a section entitled "Risk and Title". The 2013 version has a single clause under that heading. In relation to goods delivered by PostDirect, it reads:

> "7.1 The Products will be at your risk…where you have contracted with PostDirect for Delivery services, from the time the Products are made available to PostDirect".

206. The 2014 and 2015 versions of the Healthspan T&Cs are different. In relation to PostDirect, they read:

> "7.1 Where you have contracted with PostDirect for delivery services, the Products will be at your risk when PostDirect takes physical

> possession of the Products as the person identified by you to take possession of the Products…
>
> 7.2 Title to the Products will pass to you when the goods are made available to PostDirect (or when your appointed third party provider collects them in person), provided we have received full payment of all sums due in respect of the Products by that time (if such payment has not been received at that time, title to the Products will only pass when we receive such payment)."

Discussion: title to the goods

207. The 2013 version of the Healthspan T&Cs says that title passes to the customer "from the time the Products are made available to PostDirect". However, PostDirect is managing the warehouse in which the goods are stored, so the goods are "available" to PostDirect before they have been ordered by a customer. As a matter of commercial common sense, title cannot have been intended to transfer to the customer any earlier than when they were ordered.

208. If it is assumed from Clause 7.1 that title transferred from Healthspan to the customer when the goods were ordered, a further problem arises: on what legal basis did Healthspan give PostDirect instructions about picking and packing the goods, given that they were owned by the customers?

209. The 2014 and 2015 versions are also problematic. Clause 7.1 says title passes "when PostDirect takes physical possession of the Products as the person identified by you to take possession of the Products". But the PostDirect T&Cs contain no provision under which the customer directs PostDirect to "take possession of" the goods at any particular point after they have been ordered.

210. Moreover, Clause 7.1 is followed by Clause 7.2, which retains the unsatisfactory earlier wording: "title to the Products will pass to you when the goods are made available to PostDirect". Although that phrase is now subject to the condition that the customer must have paid for the goods, that does not assist, because the customer pays for the goods as part of the online ordering process, see §134. The only commercially sensible reading of this Clause is that title passes when the goods are ordered/paid for. But that does not fit with Clauses 5.12 and 10.1 of the Warehouse Agreement (see §203), or indeed with the basic premise of that Agreement, which is that the goods are owned by Healthspan during the picking and packing process.

211. Drawing this together, I find that the Clauses on title in the Healthspan T&Cs cannot be construed in any commercially reasonable sense and that they are also inconsistent with the terms of the Warehouse Agreement.

PART 6: LEGAL DEVELOPMENTS AND ECONOMIC REALITY

212. This Part of the decision covers the Working Paper, the Guidelines and the New Directive; it also summarises the case law on "economic reality". Part 7 then considers the parties' submissions on whether Article 33 applied and my analysis of

the position. Part 8 discusses the reference. These three Parts are relevant only to the online sales and the direct mail sales delivered by post.

The Working Paper

213. The Working Paper set out the view of the EU Commission services on the questions referred by the UK and Belgium as to the meaning of "despatched or transported by or on behalf of the supplier" in Article 33. The EU Commission services said that the Article could be read in two ways. It called the first a "literal interpretation", and explained this as follows (emphasis in original):

> A literal interpretation would lead to strictly consider [sic] that the transport must be taken in charge by the supplier or on his behalf in order for taxation at destination to apply. If, therefore, the contract with the transport company is concluded by the client himself and the client in case of problems with the transport can only take action vis-à-vis the transporter (and not against the supplier), Articles 33 and 34 of the VAT Directive could not apply because the supplier is not responsible to the client for the goods arriving in a good state. Under this interpretation, it would be considered that it is not because the supplier has recommended the transporter to his client that the transport can be considered as having been made on his behalf.
>
> This option has the advantage of being very straightforward when looking strictly at the legal situation and at the contractual relationships but it also implies that it would be quite easy to circumvent taxation of the goods at the place of destination by arranging the contracts according to the desired result (taxation in the Member State of departure rather than in that of arrival of the goods)."

214. Under the alternative "broader interpretation", the Working Paper said that the Article would extend to situations in which the suppler was "indirectly associated with the transport of the goods to the customer". The basis for that broader interpretation was that "regard must be had to the economic reality and not only the contractual arrangements between the supplier, the transporter and the customer".

Case law on contractual terms and "economic reality"

215. The case law on "economic reality" is well known; some of the main authorities are set out below. In *HMRC v Newey* (Case C-653/11) [2013] STC 2432, the CJEU said:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Joined cases C-53/09 and C-55/09) [2010] STC 2651, [2010] ECR I-9187, paras 39 and 40 and the case law cited).
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the

> requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

216. In *Secret Hotels2 v HMRC* [2014] UKSC 16 ("*SH2*"), Lord Neuberger, giving the only judgment with which the rest of the Court agreed, first set out the above paragraphs from *Newey,* and then said at [30]:

> "Where the question at issue involves more than one contractual arrangement between different parties, this court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, 'regard must be had to all the circumstances in which the transaction or combination of transactions takes place' - per Lord Reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 All ER 719, para 38, [2013] STC 784. As he went on to explain, this requires the whole of the relationships between the various parties being considered."

217. He added at [32] that:

> "When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense."

218. In *U-Drive v HMRC* [2017] UKUT 112 (TCC) ("*U-Drive*") at [36] the Upper Tribunal (Proudman J and Judge Sinfield) also considered the same paragraphs of *Newey*, and then said:

> "as the use of the words 'in particular' by the CJEU in *Newey* show, artificiality is not the only test of economic reality".

The Guidelines

219. The VAT Committee discussed the Working Paper at its meeting on 4-5 June 2015, and subsequently issued the Guidelines. The first two Guidelines were as follows (emphases in original):

> "1. The VAT Committee **<u>almost unanimously</u>** agrees that, for the purposes of Article 33 of the VAT Directive, goods shall be considered to have been "dispatched or transported by or on behalf of the supplier" in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods.

> 2. The VAT Committee **unanimously** agrees that the supplier shall be regarded as having intervened indirectly in the transport or dispatch of the goods in any of the following cases:
>
> i) where the transport or dispatch of the goods is subcontracted by the supplier to a third party who delivers the goods to the customer;
>
> ii) where the dispatch or transport of the goods is provided by a third party but the supplier bears totally or partially the responsibility for the delivery of the goods to the customer;
>
> iii) where the supplier invoices and collects the transport fees from the customer and further remits them to a third party that will arrange the dispatch or transport of the goods.
>
> The VAT Committee further agrees **almost unanimously** that in other cases of intervention, in particular where the supplier actively promotes the delivery services of a third party to the customer, puts the customer and the third party in contact and provides to the third party the information needed for the delivery of the goods, he shall likewise be regarded as having intervened indirectly in the transport or dispatch of the goods."

220. The Guidelines are not binding on any member state. Guidelines are agreed "almost unanimously" if they had the support of between 24 and 27 of the 28 Member States.

The new Directive

221. On 1 December 2016, the EU Commission issued a Proposal for a Council Directive amending the Articles of the PVD which related to "certain value added tax obligations for supplies of services and to distance sales of goods" ("the Proposal"). The Proposal said that the new directive adds a new definition to the PVD and "clarifies Article 33(1) in line with the guidelines of the VAT Committee".

222. On 5 December 2017 the New Directive was issued. Recital 6 reads:

> "The realisation of the internal market, globalisation, and technological change have resulted in an explosive growth of electronic commerce and, hence, of distance sales of goods, both supplied from one Member State to another and from third territories or third countries to the Community. The relevant provisions of Directives 2006/112/EC [the PVD] and 2009/132/EC should be adapted to this evolution, taking into account the principle of taxation at destination, the need to protect Member States' tax revenue, to create a level playing field for the businesses concerned and to minimise burdens on them. The special scheme for telecommunications, broadcasting or electronically supplied services supplied by taxable persons established within the Community but not in the Member State of consumption should therefore be extended to intra-Community distance sales of goods...To clearly determine the scope of the measures applying to intra-Community distance sales of goods and distance sales of goods imported from third territories or third countries, those concepts should be defined."

223. Article 2 of the New Directive is effective from 1 January 2021. Paragraph (1) amends Article 14 of the PVD, by adding a new paragraph 4. This sets out new definitions, including the following:

> "(1) 'intra-Community distance sales of goods' means supplies of goods dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, from a Member State other than that in which dispatch or transport of the goods to the customer ends, where the following conditions are met:
>
> (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;…"

224. Paragraph 4 of Article 2 amends Article 33 of the PVD, so that it begins:

> "By way of derogation from Article 32:
>
> (a) the place of supply of intra-Community distance sales of goods shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends;…"

PART 7: SUBMISSIONS AND DISCUSSION

Submissions by Miss Shaw on behalf of Healthspan

225. Miss Shaw submitted that the words "on behalf of the supplier" in Article 33 meant that someone else must carry out the delivery as "a representative, agent or proxy of the supplier", and that PostDirect did not have that role in relation to Healthspan.

226. In an appendix to her skeleton argument, Miss Shaw listed the other occasions on which the phrase "on behalf of" is used in the PVD. She also submitted that in *Lebara v HMRC* (Case C-520/10) [2012] STC 1536 ("*Lebara*"), a case concerning pre-paid phone card, the CJEU had equated acting "on behalf of another" with acting as agent. From her researches, this was the only case in which the phrase had been considered by the CJEU in any of the contexts she had listed in her appendix.

227. Miss Shaw said, in reliance on *SH2*, that whether a person was acting "on behalf of" the supplier should be ascertained from the contractual arrangements, because they will normally represent the economic and commercial reality. Here, the customer had contracted with PostDirect for delivery of the goods, while Healthspan "does nothing other than introduce PostDirect to the customer". Miss Shaw also relied on *SH2* more generally, as providing a relevant analogy to the present case. I consider those submissions in more detail at §249ff below.

228. She also relied on *RBS Deutschland v HMRC* (Case C-277/09) [2011] STC 345, where the CJEU said:

> "[53] …taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most

> appropriate for their economic activities and for the purposes of limiting their tax burdens.
>
> [54] The court has held that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the neutral system of VAT (see *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2001] ECR I-7257, para 33). In that connection, the court has made clear that, where it is possible for the taxable person to choose from among a number of transactions, he may choose to structure his business in such a way as to limit his tax liability (see *Halifax* (para 73)).”

229. Miss Shaw also said that HMRC’s interpretation of Article 33 required a “reading in” of words, so that “dispatched or transported by or on behalf of the supplier” became “dispatched or transported by or on behalf of, *or with the direct or indirect intervention of* the supplier”. She submitted that this required “a wholesale disregard” of the words actually used, straining the language beyond any reasonable limits. In contrast, Healthspan’s reading of the provision was straightforward.

230. She reminded the Tribunal that the views of the VAT Committee were not binding, and made the following detailed submissions:

(1) in relation to (i) of the Guidance, which applied “transport…of the goods is subcontracted by the supplier to a third party who delivers the goods to the customer”, she said that the transport was not subcontracted by Healthspan to PostDirect; instead PostDirect contracted directly with the customers; and

(2) in relation to (ii), which applied where “transport of the goods is provided by a third party but the supplier bears totally or partially the responsibility for the delivery of the goods to the customer”, Healthspan did not bear any responsibility for the delivery of the goods to the customer; that responsibility rested with PostDirect;

(3) although Healthspan came within (iii), where “the supplier invoices and collects the transport fees from the customer and further remits them to [the] third party” because it collected the transport fees from the customer and remitted them to Healthspan, it was wrong to say that delivery had then taken place “on behalf of” Healthspan; and

(4) the final part of paragraph 3, which stated that Article 33 also applied where the supplier “actively promotes” the delivery services of a third party and “puts the customer and the third party in contact and provides to the third party the information needed for the delivery of the goods”, was, she said, “patently wrong” and also not the unanimous view of the VAT Committee.

231. Miss Shaw added that this “broader interpretation” conflicted with the principle that derogations were to be construed narrowly, relying on *BLV Wohn-und Gewerbebau GmbH v Finanzamt Lüdenscheid* (Case C-395/11) (“*Wohn*”). Article 33 was a derogation from the normal rule in Article 32 that supplies were subject to VAT at the place from which they were despatched.

232. Finally, Miss Shaw submitted that the New Directive had clearly changed the law, so that Article 33 will in the future includes situations where "the supplier intervenes indirectly in the transport or dispatch of the goods". However, that change does not take effect until 1 January 2021. Until that date, Article 33 has a more limited application. The New Directive had "adapted and extended" the previous law, and was not "clarificatory". This was clear from Recital 6, which had said there had been "an explosive growth of electronic commerce and, hence, of distance sales of goods" and Article 33 "should be adapted to this evolution." If HMRC's interpretation had been correct, Recital 6 would instead have said that the New Directive was restating the existing rules.

Submissions by Mr Singh on behalf of HMRC

233. Mr Singh submitted that the VAT Committee's "broader interpretation" of Article 33 was correct. As a result, "regard must be had to the economic reality and not only the contractual arrangements between the supplier, the transporter and the customer". In his submission, as a matter of economic reality, the goods were delivered "on behalf of" Healthspan.

234. Article 33 was, he said, always intended to cover direct and indirect intervention by the supplier in the delivery, and he referred to a statement in minutes agreed at the time of adoption of Directive 91/680/EEC, which introduced the distance selling rules into the PVD. In those minutes, the Council and the Commission had made clear that "the special arrangements for distance selling will apply in all cases where the goods are dispatched or transported, either indirectly or directly, by the supplier or on his behalf". Mr Singh accepted that, although those minutes had been cited in the Working Paper, they were not publicly available; for that reason they had not been provided to the Tribunal or to the other party.

235. He also submitted that the New Directive had not changed Article 33. The Proposal had stated that the draft version "clarifies Article 33(1) in line with the guidelines of the VAT Committee", and Recital 6 had said that the new definitional section had been included "to clearly determine the scope of the measures applying to intra-Community distance sales of goods".

236. Mr Singh referred to Miss Shaw's criticism of HMRC's reading of Article 33, saying that the Tribunal was not precluded from adding words into the PVD. He relied on *C&E Commrs v First Choice Holidays* (Case C149/01) [2003] STC 934, which considered was whether the phrase "the total amount to be paid by the traveller" in Article 26(2) of the Sixth Directive also included a top-up amount paid by the travel agent. The CJEU had concluded at [34] that:

> "…art 26(2) of the Sixth Directive must be interpreted as meaning that the 'total amount to be paid by the traveller' within the meaning of that provision includes the additional amount that a travel agent, acting as intermediary on behalf of a tour operator, must, in circumstances such as those described in the order for reference, pay to the tour operator on top of the price paid by the traveller and which corresponds in amount to the discount given by the travel agent to the traveller on the price of the holiday stated in the tour operator's brochure."

237. Miss Shaw responded by saying that the CJEU came to that conclusion in *First Choice* was so that Article 26(2) was consistent with Article 11A(1)(a) of the Sixth Directive, see [26] of the judgment. That was, she said, very different from HMRC's case in this appeal, which required "words plucked out of the air" to be read into the PVD.

Discussion

238. It is well established that where there is more than one contractual arrangement between different parties, regard must be had to "the whole of the relationships between the various parties" and "the surrounding circumstances in so far as they were known to both parties", see *SH2* at [30] and [32] cited at §216 and §217 above.

239. In this case there are four contracts: the Warehouse Agreement and the Payment Agreement, both of which were between Healthspan and PostDirect; Healthspan's T&Cs and PostDirect's T&Cs. Taking into account the information in those contracts, together with the further terms and other surrounding circumstances, Healthspan was closely involved with the delivery of the goods, and took responsibility for remedying problems which arose, as can be seen from the following:

(1) the customer had no control over the pricing of the delivery or its timing; these were both agreed in advance between Healthspan and PostDirect under a contract to which the customer was not a party;

(2) any changes to the delivery price were similarly agreed between Healthspan and PostDirect;

(3) the delivery charge (owed to PostDirect) was eliminated by the discount (granted by Healthspan), and the two juxtaposed, so that the customer was encouraged to view the total price of the delivered goods as being the same as if there had been no delivery charge;

(4) Healthspan was contractually responsible for ensuring that the customer paid the delivery charge, and for transferring that money to PostDirect;

(5) although PostDirect's T&Cs gave PostDirect the right to levy extra delivery charges:

(a) that provision conflicts with Clause 5.16 of the Payment Agreement, which provided that "In order that the costs payable by the Buyer for transport shall be known to the Buyer in advance they will be set out on Healthspan's website and will be at the prices set out in Schedule 5 per Product"; and

(b) no such further charges were levied;

(6) PostDirect had a fixed 6% profit, irrespective of delivery problems or market prices;

(7) customers were told that delivery times would be the same as when Healthspan delivered the goods;

(8) PostDirect was required to follow Healthspan's detailed requirements for labelling the goods;

(9) the key machine needed to sort the goods was rented to PostDirect by Healthspan and Healthspan continued to take responsibility for quarterly checks of that equipment;

(10) the customer had no direct contact with PostDirect – that company's T&Cs were made available on Healthspan's website; all complaints about delivery were made to Healthspan, not PostDirect; any goods damaged during delivery were returned by the customer to Healthspan's UK office and not to PostDirect in accordance with the instructions given to the customer on the packaging; and PostDirect was unaware that phone customers had not been referred to, and had not accepted, its T&C;

(11) where there was a problem with the original delivery, Healthspan always refunded the related delivery costs to the customer, and was contractually bound to do so under the 2014 version of its T&C;

(12) when replacement goods were sent out to customers, Healthspan was contractually obliged to bear the costs of the related postage until 26 October 2015, and continued to bear those costs after that date;

(13) PostDirect's T&Cs contained only minimal remedies for delivery problems, with contractual compensation being well below the value of goods lost or damaged. If goods were damaged during delivery, replacement goods were provided by Healthspan and the cost of those replacement goods was not recovered from PostDirect;

(14) the normal position is that when legal title to goods passed to the customer, he is then responsible for the goods. Here, the contractual provisions on when title passes are inconsistent and confused, see §202ff. But those terms were irrelevant, because Healthspan dealt with any problems arising up to the point the goods were received by the customer;

(15) that was consistent with its marketing material, in which Healthspan held itself out as responsible for ensuring that the goods arrived with the customer;

(16) PostDirect's T&Cs contain terms relating to invoices, signatures on consignment notes and warranties which, although they do not invalidate that contract, also do not reflect the reality of the transactions; and

(17) the only real delivery choices available to customers were those provided by PostDirect and DHL; the former was referred to by Healthspan in an internal sales document as "our own delivery service".

240. However, I am unsure whether it necessarily follows from those findings that PostDirect was acting "on behalf of" Healthspan when it delivered the goods? There are three difficulties with pressing ahead and deciding this case without a reference:

(1) the lack of any CJEU authority on the meaning of "on behalf of";

(2) the lack of any relevant UK authority; and

(3) whether the New Directive assists with the interpretation of Article 33.

241. I explain each of those difficulties in the next following paragraphs.

The lack of CJEU authority

242. There is no CJEU authority on the meaning of "on behalf of". Although Miss Shaw submitted, in reliance on *Lebara* that it meant "acting as agent", I was unconvinced.

243. The issue in *Lebara* concerned the meaning of Article 6(4) of the Sixth Directive. This read "Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself". Miss Shaw relied on the following passage from [14] of the CJEU's judgment (her emphasis):

> "As described in the order for reference, the distributors bought the phone cards from Lebara for an agreed price, lower than the face value of the cards, and then resold the cards under their own name or under a name chosen by them, or even under the Lebara brand. In any event, the distributors <u>were acting in their own name and on their own behalf and not as Lebara's agents</u>. The phone cards were sold almost exclusively to end users in the member state of the distributor, either directly by the distributor or by other taxable persons such as wholesalers or retailers established in that member state acting as intermediaries. Lebara neither knew nor controlled the resale price charged by the distributors or by the other intermediaries."

244. Miss Shaw contrasted that paragraph with Advocate General Jääskinen's Opinion in the same case, where a wider meaning had been given to "on behalf of". The AG said at [73]:

> "What is required in the present preliminary ruling case, however, is interpretation of the meaning of art 6(4) of the Sixth VAT Directive by reference to EU law, and not national laws on agency, or any other element of national civil law, or indeed domestic tax law. Moreover, art 6(4), as a tax law provision, may be vested with a meaning, which may not necessarily be the same as parallel concepts arising under any element of national civil law. In my opinion art 6(4) of the Sixth VAT Directive is not restricted to relations where there is an agency relationship, disclosed or otherwise, under the law of the member state in question, and in this case the United Kingdom."

245. AG Jääskinen went on to find at [75]-[76] that the distributors acted "economically on behalf of Lebara" because they paid no consideration unless the phone cards were activated, and they also acted on Lebara's behalf because they "take part in the supply of a right of access to telecommunications services from Lebara to the end user". Miss Shaw said that the CJEU had rejected that wider meaning, in favour of equating "on behalf of" with "acting as agent".

246. However, there appears to be some disconnect between the AG's Opinion and the CJEU judgment. Paragraph [14] of the judgment is prefaced by the words "As

described in the order for reference". It is therefore the Court's summary of the issue it has to consider. Paragraph [20] repeats the same summary, and [29] says (my emphasis) "According to the facts given in the order for reference, the distributor resells the phone cards in its own name and on its own behalf".

247. It follows that *Lebara* does not assist in resolving the issue before the Tribunal, and in particular, it is not an authority for the term "on behalf of" meaning "acting as agent". It therefore remains possible that the phrase "on behalf of" has a wider meaning, as suggested by AG Jääskinen.

248. I considered whether I could rely on *Lebara* for a different reason. The CJEU found that the distributors were not acting "on behalf of" Lebara because they were "acting in their own name and on their own behalf" and that this was shown by the fact that Lebara "neither knew nor controlled the resale price charged by the distributors or by the other intermediaries". Here, in contrast, Healthspan and PostDirect agree the delivery charge between them, taking into account not only the postal costs, but also the discount, with the overall aims of maintaining PostDirect's agreed fixed margin and ensuring that the total cost to the customer does not become uncompetitive. However, independent pricing was only one of the reasons for the CJEU's judgment in *Lebara*, and was not sufficient for me to decide this case with complete confidence.

The lack of UK authority

249. My second difficulty is that there is no relevant UK authority. Miss Shaw invited me to rely on parallels with *SH2*, but I was again unconvinced. In *SH2* the issue was whether the appellant (previously known as Med Hotels Ltd) was acting as agent or as principal when it found hotel accommodation for customers. HMRC argued that Med was acting as principal, in part because, if there was a problem with the accommodation, it was obliged under its terms and conditions to "try to provide alternative accommodation". Lord Neuberger said this was not a material factor in deciding the case, because the provision had been included in the contract "to protect Med's goodwill", see [40-41] and [44] of the judgment.

250. Miss Shaw relied on those passages to draw a parallel with the position of Healthspan and PostDirect, saying in her skeleton (my emphasis):

> "Although in practice the Appellant would refund dissatisfied customers under its 'no quibble' guarantee with the full amount (including delivery charges) this was simply a commercial measure designed to protect the Appellant's goodwill and does not affect the proper characterisation of the arrangements (see, by analogy, *Secret Hotels2*)" [Miss Shaw gave the relevant paragraph references in oral argument]"

251. I do not accept that this is a relevant parallel, because Healthspan was contractually obliged under the 2014 T&Cs to refund delivery charges when goods were returned by customers. For the period before that, Healthspan clearly intended to make refunds to customers, see Clause 2.2 of the Warehouse Agreement. Furthermore, until 26 October 2015, three months before the end of the relevant

period, Healthspan was contractually obliged to pay the delivery charges where customers were sent replacement goods;

252. In contrast, Med Hotels were contractually obliged only to "try to provide alternative accommodation". There is a difference between "trying" to do something – a best endeavours approach – and a contractual obligation to bear a cost or make a payment, which is Healthspan's position for a significant part of the relevant period.

253. I also disagree with Miss Shaw's submission that Healthspan's payment of these delivery charges "does not affect the proper characterisation of the arrangements". Healthspan had significant and extensive involvement in the delivery of the goods, as set out above, and can be contrasted with the position of Med. It is necessary to look at the arrangements in each particular case before deciding on their proper characterisation.

254. Miss Shaw also sought to compare Healthspan's position on customer complaints with that in *SH2*, saying Med dealt with complaints from the customer about the accommodation, but the Supreme Court found this factor to be insignificant. However, that is not an entirely correct reading of Lord Neuberger's findings on complaints. These are at [46] of his judgment, where "Factor 3" refers to the fact that "Med dealt with matters of complaint and compensation in its own name and without reference to the hotelier":

> "Factor (3) is correct, and can be said to be contrary to one of the terms of the contractual documentation, which envisage a customer sorting out complaints with the hotelier. However, particularly given that (i) Med recovered from the hotelier any compensation which it negotiated and paid to a holiday-maker and (ii) Med's activities in this connection were not inherently inconsistent with its status as the hotelier's agent (albeit an agent in a strong bargaining position), the departure from the contractual terms was not of significance for present purposes."

255. There are two significant differences between the position in this appeal, and that in *SH2*:

(1) the contractual documentation at issue in *SH2* gave Med's customers a right to complain to the hotel. In contrast, there is no provision in the contractual documentation between the customer and PostDirect, or elsewhere, for complaints about delivery to be made to PostDirect. Healthspan was the *only* route for customer complaints; and

(2) Med2 recovered the compensation costs from the hotelier. Here, although Healthspan had a contractual right to recover reimbursed delivery costs from PostDirect, it did so only during the first four months, when it recovered only 50% of these costs. I have found as a fact that this was because recovering the costs would serve no purpose, as Healthspan had guaranteed that PostDirect would make a fixed 6% profit on its delivery services.

256. In short, the facts of *SH2* are very different from those in this case. While Lord Neuberger's general comments on the overall approach to contractual analysis are

binding, his more detailed findings about the terms of the contracts between the parties in that case are not a reliable guide to the approach to be taken in this appeal.

The New Directive

257. My third difficulty is with the New Directive, and its background. Both parties sought to rely on that Directive, with Mr Singh referring also to the Proposal. However, neither party put forward any case law authority on the extent to which a later Directive can be used to interpret its predecessor. This is not a straightforward matter of precedent: as Lord Diplock said in *R v Henn; R v Darby* [1980] 2 All ER 166 (*Henn*) at p 196:

> "The European court in contrast to English courts, applies teleological rather than historical methods to the interpretation of the treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the treaties as changing to match their growth."

258. It is also possible that relying on a later version of the Directive to decide this case would breach the principle of legal certainty. In *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, Arden LJ said at [110]:

> "I accept that under the principle of legal certainty the person affected by legislation must be able to foresee the manner in which it is to be applied and I would also accept that must particularly be so where the legislation has financial consequences for him such as flow from the imposition of the requirement to account for VAT. A taxpayer has a legitimate expectation that this principle will be observed."

259. I did not share Mr Singh's confidence that reliance could be placed on a minute agreed at the time of adoption of Directive 91/680/EEC. Although cited in the Working Paper, the whole document is unavailable, so that citation cannot be seen in its context. Mr Singh also did not cite any authority, either in the case law or statute, which says that a minute can be relied on to interpret a Directive.

260. I considered Miss Shaw's submission that Article 33, being a derogation, must be construed "narrowly". However, the position is not so clear cut. In *Wohn,* the judgment on which she relied, the CJEU said at [33] (my emphasis):

> "point (1) of Article 2 of Decision 2004/290, being a derogation from the general rule laid down in the first sentence of Article 21(1)(a) of the Sixth VAT Directive, must be narrowly construed. Although it is settled law that, in matters of VAT, provisions which are in the nature of exceptions to a principle must be narrowly construed, it is nonetheless appropriate to ensure that the exception is not deprived of its effectiveness (*Bog and Other*s, paragraph 84 and the case-law cited; see also, to that effect, Case C-540/09 *Skandinaviska Enskilda Banken* [2011] ECR I-0000, paragraph 20 and the case-law cited)."

261. HMRC's view, and that of the VAT Committee, was that the broader interpretation of Article 33 is needed "to ensure that the exception is not deprived of its effectiveness".

PART 8: REFERENCE TO THE CJEU

The law and its application

262. In *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226 ("*Bulmer*") Lord Denning gave the following guidelines as to whether a reference was "necessary": the point must be conclusive; there must be no previous CJEU ruling; the issue must not be "acte clair" and the facts must have been found.

263. If the "necessary" test is met, it is also clear that the Tribunal retains a discretion whether or not to make a reference. In *Bulmer* Lord Denning said that the following factors were relevant to the exercise of that discretion: the time taken to get the ruling; not overloading the CJEU; the difficulty and importance of the point; the expense to the parties and the wishes of the parties. Miss Shaw drew my attention in particular to the passage which reads:

> "If both parties want the point to be referred to the European court, the English court should have regard to their wishes, but it should not give them undue weight. The English court should hesitate before making a reference against the wishes of one of the parties, seeing the expense and delay which it involves."

264. I also take into account the guidance given by Sir Thomas Bingham in *R v International Stock Exchange ex p Else (1982) Ltd* [1993] 1 All ER 420 ("*Else*") at 426, which first considers whether a reference is "necessary", and then discusses the court's discretion to decide the case itself if it can do so "with complete confidence":

> "I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer…"

265. However, a court should not make a reference if the answer is "so plain as to leave no scope for reasonable doubt", see *CILFIT Srl v Ministry of Health* (Case C-283/81) [1982] ECR 3415 ("*CILFIT*"). And in *Trinity Mirror v C&E Commrs* [2001] EWCA Civ 635 at [52], Chadwick LJ, giving the judgment of the Court, cited with approval the words of AG Jacobs in *Wiener S.I. GmbH v Hauptzollamt Emmerich* (Case C-338/95) ("*Wiener*"):

> "the appropriateness of a reference can be assessed in the light of the object of Article 177 [of the Sixth Directive, now Article 267 of the PVD], which is to ensure that Community law is the same in all Member States. A reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case-law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Between those two extremes there is of course a wide spectrum of possibilities…"

266. Having considered the case law referred to above, I have concluded that obtaining a ruling from the CJEU on the meaning of "on behalf of" in Article 33 is necessary. It is "critical" to the issue to be decided, I have found the facts, and the other tests set out by Lord Denning in *Bulmer* are met:

(1) A ruling will be conclusive because the only point remaining to be decided is whether PostDirect was acting "on behalf of" Healthspan when postal deliveries were made to online and direct mail customers.

(2) There is no previous CJEU ruling. I have already rejected Miss Shaw's submissions on *Lebara*; no other authority has been cited to me, and I am unaware of any.

(3) The issue is not acte clair. I add that in *Henn* at p 197 Lord Diplock warned that courts and tribunals should exercise great caution in relying on that doctrine as a ground for declining to make a reference, in part because of possible language differences between the various language versions of the same provision.

267. I have also decided to exercise my discretion to request a ruling. I have taken the following points into account:

(1) The meaning of the words "on behalf of" has already been the subject of discussion at the VAT Committee, with the Commission services putting forward two possible meanings for the term. Although the New Directive has clarified the position for the future, the current position remains uncertain.

(2) The meaning of the phrase is relevant not only to the VAT position in Member States (such as the UK and Belgium) to which goods have been sent, but also to the countries from which they are sent, such as the Netherlands. The question is therefore "of general importance and [one] where the ruling is likely to promote the uniform application of the law throughout the European Union" *per* AG Jacobs in *Wiener*.

(3) In November 2016, the CJEU reissued its guidance on making a reference ("the CJEU Guidance"). Paragraph 5 says that a reference may be "particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU

law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts". That is the position here.

(4) Community law has its own terminology and its concepts may be different from those used in the UK. That is evident in the submissions made in this case, see in particular Miss Shaw's reliance on the meaning of "agent" under UK law.

(5) Mindful of the warning given by Lord Diplock in *Henn*, I am conscious that no foreign language version of Articles 32 and 33 has been put before the Tribunal. In contrast, the CJEU will have access to the equivalent words in the languages of all member states.

(6) I considered the views of the parties. Miss Shaw's reason for asking the Tribunal to refuse a reference was that the issue was acte clair in its favour, but I disagree. For their part, HMRC were strongly in favour of a reference being made.

(7) Given the uncertainty of the law and the amounts at stake, it is reasonable to assume that the losing party will seek permission to appeal, and also reasonable to assume that permission may be granted. Further upward appeals are then likely, meaning that Healthspan's case could progress through all levels of the English court system. That could take over five years (for example, it was almost six years between the first instance decision in *UBS AG v HMRC; Deutsche Bank v HMRC* [2010] UKFTT 366 (TC) and the Supreme Court judgment published under reference [2016] UKSC 13)). Obtaining a CJEU ruling now is likely to allow the issue to be decided more quickly. The costs position is similar: onward appeals within the UK are likely to exceed the cost of a CJEU hearing.

SportsDirect

268. Healthspan's position was that if a reference was be made, it should be delayed and joined to a later reference in *SportsDirect.* HMRC disagreed.

269. My understanding of the position in *SportsDirect* is taken from (a) the decision of this Tribunal (Judge Beare) dated 24 October 2016 under reference [2016] UKFTT 716 (TC), in which he refused to strike out the appellants' appeal, and (b) the Upper Tribunal ("UT") decision (Judges Berner and Herrington) under reference [2017] UKUT 0327 (TCC) issued on 11 August 2017, in which the UT upheld Judge Beare's decision, albeit for different reasons. Mr Singh represented HMRC in both those appeals and provide a summary of subsequent developments as part of his oral submissions in this appeal. I also spoke to the Tribunal clerk to establish the listing position for *SportsDirect*.

270. My understanding is as follows. It does not of course represent any finding of fact or law in relation to *SportsDirect.*

(1) SportsDirect supplied goods from the UK to customers in other EU countries. On 18 January 2010, SportsDirect asked HMRC to confirm that, since delivery of those goods was undertaken by a separate company, Etail

Services Limited ("Etail"), which was not part of SportsDirect's VAT group, the distance selling rules in Article 33 did not apply, and the goods were therefore supplied from the UK. On 11 March 2010, HMRC agreed that UK VAT continued to apply to the sale of the goods.

(2) SportsDirect's case is therefore concerned with outbound supplies from the UK, whereas Healthspan's case is concerned with inbound supplies to the UK.

(3) On 14 January 2016, HMRC informed SportsDirect that, having considered the Guidelines, they had decided Article 33 did apply, subject to the *de minimis* exceptions in Article 34. As a result, the goods were supplied in the destination state and not in the UK.

(4) SportsDirect appealed to the Tribunal. HMRC sought to strike out the appeal on the basis that the letter of 14 January 2016 was not an appealable decision. Both Judge Beare and the UT found that the letter was an appealable decision, and the case was remitted back to the Tribunal.

(5) Before the UT had given its decision on the strike out application, SportsDirect had asked that a reference be made to the CJEU, and had filed and served a draft order. HMRC had opposed the making of a reference. However, as explained earlier in this decision, a reference can only be made if the tribunal hearing the appeal decides that it is necessary. The UT were not hearing the appeal, but deciding a preliminary matter. When this was pointed out at the hearing, SportsDirect withdrew its application for a reference.

(6) HMRC and SportsDirect have subsequently attempted to agree a statement of facts, so far without success.

(7) The Tribunal is arranging a listing of the substantive hearing in order to determine the facts, but no hearing date has as yet been agreed. Witness evidence is being prepared.

271. Miss Shaw submitted that it was in the interests of justice for any reference in this appeal to be delayed and joined to that for SportsDirect, so that the CJEU could consider both the inbound and outbound position at the same time.

272. Mr Singh disagreed. He said that everything was in place for a reference to be made in Healthspan's case, but SportsDirect's appeal had not yet been listed. No facts had been found or agreed and the date of any final decision was unknown. It was not therefore in the interests of justice to delay the reference.

273. I agree with Mr Singh, for two reasons. First, Healthspan's position is much further advanced than that of SportsDirect, so waiting inevitably means delay, and the extent of that delay is unknown. There could be adjournments or directions hearings; there could be difficulties with agreeing a hearing date; and the decision itself, setting out the findings of fact, could take some time to be issued. It is also possible that the tribunal might, for whatever reason, decide not to make a reference.

274. Secondly, the CJEU does not need to consider both an outbound case and an inbound case in order to decide the issue. When it has ruled on the meaning of Article 33, that ruling will apply equally both to the recipient member state and the destination member state.

The Tribunal's view

275. The Annex to the CJEU Guidance said at para 6:

> "In so far as it is able to do so, the referring court or tribunal should also briefly state its view on the answer to be given to the questions referred for a preliminary ruling."

276. My own view, based on the analysis at §238-239, is that as a matter of economic reality PostDirect was acting "on behalf of Healthspan". Although there was a contract between the customer and PostDirect for delivery, it was clear from inception that this would not change the economic reality. The Briefing Paper said that PostDirect (the "fulfilment house"):

> "will be in the same position financially as if it had entered into a contract with Healthspan. Payment will flow from Healthspan but Healthspan will be acting in its capacity as collection agent. The only difference is contractual: [fulfilment house] is contracting directly with the customers of Healthspan, and the customers are legally obliged to pay the delivery charge due."

The terms of the reference

277. Although HMRC provided a draft reference to the Tribunal, the questions asked in that reference are essentially the same as those in the Working Paper. Mr Singh accepted that some of those questions are not raised by the facts of Healthspan's appeal. A reference should not include hypothetical questions (see *Rosneft v HM Treasury* (Case C-72/15) at [50] and the case law there cited). I have also made further and more detailed findings of fact than those in HMRC's draft reference. Healthspan declined to comment on HMRC's draft, pending this decision.

278. The questions to be referred are a matter for this Tribunal rather than the parties. However, I have sent a copy of my draft reference to the parties and invited them to provide their observations. I will consider these before finalising and submitting the reference.

DISPOSITION AND APPEAL RIGHTS

279. I have found that Healthspan's supplies of goods to phone customers, and all supplies of goods sent by courier, were made "on behalf of" Healthspan and so came within Article 33.

280. It follows that Healthspan was required to be registered in the UK. Healthspan's appeal against HMRC's Decision is therefore refused. For the same reason, Healthspan's appeal against the Assessment is refused in so far it relates to the phone customers and the DHL customers. Those are final decisions of this Tribunal.

281. In so far as the Assessment related to the deliveries by post to online and mail order customers, the final determination of Healthspan's appeal is stayed pending the decision of the CJEU on the reference.

282. Rule 39(2) of the Tribunal Rules provides that a party who wishes to appeal against a final decision has to do so within 56 days from the date on which that decision is issued. However, Rule 3(a) gives the Tribunal power to "extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit".

283. Since the CJEU's ruling may also be of assistance in the event of an appeal against the final decisions made in relation to the phone sales and the DHL sales, I hereby extend the time for complying with Rule 39(2). When all issues have been finally determined by this Tribunal, I will make further directions as to the time limit for seeking permission to appeal

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2018