[2018] UKFTT 393(TC)

TC06595

Appeal number: TC/2015/06747

VALUE ADDED TAX – food and labour supplied to University – whether a single and composite supply in the course of catering; yes – food supplied under wholesale arrangement for procurement purposes – whether a separate supply of food; yes – whether catering staff wages concession applies – Tribunal has no jurisdiction to direct exercise of such discretion – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

OLIVE GARDEN CATERING COMPANY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MR IAN MALCOLM

Sitting in public at the Tribunal Centre, George House, 126 George Street, Edinburgh on 29 November 2016, and 18 August 2017

Mr Philip Simpson QC, instructed by Maclay Murray & Spens LLP, for the Appellant

Mrs Sharon Spence, Officer of HMRC, for the Respondents

DECISION

1. Olive Garden Catering Company Limited (henceforth 'Olive Garden' or 'OGC') was a food supplier to the University of Aberdeen ('UOA'). This decision concerns two appeals brought by Olive Garden in relation to the VAT status of the supplies it had made to the university.

Matters under appeal

2. The appeals were lodged against the following decisions by the respondents ('HMRC') pursuant to provisions under the Value Added Tax Act 1994 ('VATA'):

(1) The first appeal (TC/2015/06747) was against an assessment to output VAT found by HMRC to be payable on supplies made in the periods 09/10 to 06/12. The review conclusion upholding the assessment was by letter dated 14 October 2015, ('the VAT assessment').

(2) The second appeal (TC/2015/06748) was against HMRC's decision in refusing a VAT repayment claim in relation to periods 09/11 to 09/12 for output VAT purported to have been incorrectly charged by the appellant to UOA; an error correction claim by voluntary disclosure was made. The review conclusion letter refusing the claim was dated 20 October 2015, ('the refusal decision').

3. The first appeal concerns food orders placed by UOA with the appellant's wholesalers. The appellant paid the wholesalers for the orders placed by UOA, and recharged UOA at cost as zero-rated supply. HMRC assessed the appellant to VAT.

4. The second appeal concerns the supply of food by OGC and served at UOA premises, which the appellant claimed it had incorrectly charged output VAT. Further, that output VAT was not due on the appellant's staff costs because 'catering staff wages concession' should apply to allow the labour to be supplied without VAT.

5. The appeals are consolidated, with the second appeal being consolidated into the first appeal under the single reference of TC/2015/06474 for these proceedings.

6. The total amount of VAT at stake in these appeals is £233,614, and comprises:

(1) The VAT assessment of £171,951 raised under s 73 of VATA, (a 'best judgment' assessment); there is no dispute as to the quantum of the assessment.

(2) The VAT repayment claim under s 80 of VATA in the sum of £61,663, of which £23,175.87 is in relation to food supply, and £38,484.56 is in relation to staff costs. (The figures for the split between food and labour do not add up precisely to the total due to various rounding effects.)

Post-hearing submissions and a second day of hearing

7. The first day of hearing on 29 November 2016 was taken up largely by the evidence session of Mr Derek Smith, the only witness called by the appellant. The motion of listing the case for a further half-day to hear the parties' submissions was

resisted by Mrs Spence, who is based in Belfast. Despite sitting till 5.20 in the afternoon, issues were not fully addressed by the parties.

8. The Tribunal issued Directions on 10 February 2017 for written submissions specifically on the point of 'agency' in relation to the supplies made under the VAT assessment. Neither party had made any submissions as regards the capacity in which Olive Garden made its supplies to UOA hitherto.

9. Both parties complied with the Directions in time, and furnished written submissions of 8 and 10 pages each. Given the length of the supplemental submissions from each party, the appellant's representative applied for an oral hearing to address the additional points raised. The application was granted and the appeal was set down for a half-day hearing on 18 August 2017.

The issues

10. The central issue for determination, as put forward by the parties, is whether the supply of food and staff by the appellant to UOA was a single supply of catering services at the standard-rate for VAT purposes (the respondents' case), or that the main supply was for food at the zero-rate, with the supply of staff being a separate supply and eligible for staff wages concession (the appellant's case).

11. Over the course of hearing the appeal, the arguments raised by the parties have evolved, but remained focused on the central issue as to whether there was a supply of catering services or separate supplies of food and labour.

12. The VAT assessment covers the periods from 9/10 to 6/12, and the refusal decision covers the periods from 9/11 to 9/12. In our judgment, the factual matrix pertinent to each original appeal are not identical, nor are the points at issue the same. In determining the appeal as consolidated, we have considered the following issues:

(1) Whether the food and labour supplied by OGC was a single and composite supply in the course of catering;

(2) Whether the food supplied by OGC under the wholesale arrangement was a separate supply of food;

(3) Whether the staff wages concession applied to the periods in question.

The onus and standard of proof

13. In relation to the VAT assessment of £171,951, the onus of proof is on the appellant to show that the assessment is not to best judgement.

14. As regards the refusal of repayment claim, the burden rests with the appellant to establish its entitlement to reclaim the VAT in the amount of £61,663 by applying (a) the zero rate to the relevant food supplies; (b) the catering staff wages concession.

15. The standard of proof is the ordinary civil standard of the balance of probabilities.

Evidence

16. We are provided with a joint bundle of documents in two arch-lever binders, consisting of the key contracts in 2005 and 2009 between OGC and UOA, samples of the invoices rendered to UOA between 2008 and 2011, menus, product lists, order forms and the course of correspondence from 2008 to 2015 between HMRC and the appellant's various advisers in relation to the VAT treatments of the supplies to UOA.

17. The appellant called the evidence of Mr Derek Smith, who was Food Production Manager with UOA from March 1997 to 2011.

18. Mr Smith now works as an offshore Marine Chef Manager for Entier Limited ('Entier'), managing a team of six catering staff on board a supply vessel operating in the North Sea. While Mr Smith gave evidence in relation to the time when he was employed by UOA, we note that he now works for Entier, which took over the business of OGC.

19. Mr Smith's witness statement of 17 pages is thorough, detailed and well-structured. It is accompanied by appendices with flowchart diagrams, and probably drafted with assistance. The witness statement is dated 17 July 2016, and the evidence was called on 29 November 2016. Mr Smith's evidence was to recount the operational aspects of the catering requirements at UOA before and after the contract, which commenced on 2 February 2005. Mr Smith left his employment with UOA in February 2011.

20. There was no issue as to the credibility of Mr Smith. However, we find that Mr Smith's account and recall of events was influenced by his opinions or understandings of the contractual arrangements between the appellant and UOA.

21. For example, Mr Smith's witness statement contains comments such as: 'I remember University management being nervous about bringing in a private company' (at para 13); 'We [ie UOA] weren't looking to outsource catering' (at para 14); 'I don't believe the University was ever committed to it being a long-term arrangement' (at para 14); 'As before, the food was then supplied direct to the University by the wholesalers' (para 22); or 'Olive Garden did not provide a catering service to the University in any sense I would recognise' (para 29.1).

22. We accept aspects of Mr Smith's evidence as to matters of facts, where we are satisfied that the account was not modulated by his opinions or understandings.

The relevant legislation

23. The VAT assessment was raised under s 73 of VATA, which provides:

> '**73 Failure to make returns etc**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete

or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

[...]

(6) An assessment under subsection (1), ... above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be after the alter of the following –

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), ... above, another assessment may be made under that subsection, in addition to any earlier assessment.'

24. The repayment claim was made by the appellant under s 80 VATA, of which the relevant parts are as follows:

'**80 Credit for, or repayment of, overstated or overpaid VAT**

(1) Where a person –

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whatever ended); and

(b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount,

the Commissioners shall be liable to credit the person with that amount.

(1A) Where the Commissioners –

(a) have assessed a person to VAT for a prescribed accounting period (whatever ended); and

(b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount,

they shall be liable to credit the person with that amount.

[...]

(3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.'

25. Schedule 8 of VATA Part II Group 1 provides as follows:

'**GROUP 1 – FOOD**

The supply of anything comprised in the general items set out below, except –

(a) a supply in the course of catering; and

(b) a supply of anything comprised in any of the excepted items set out below, unless it is also comprised in any of the items overriding the exceptions set out below which relates to that excepted item.'

26. The Notes to Schedule 8, Part II (Group 1) state as follows:

'(1) "Food" includes drink.

(2) [...]

(3) A supply of anything in the course of catering includes –

(a) any supply of it for consumption on the premises on which it is supplied; and

(b) any supply of hot food for consumption off those premises; ...

[...]

(3B) "*Hot food*" means food which (or any part of which) is hot at the time it is provided to the customer and –

(a) has been heated for the purposes of enabling it to be consumed hot,

(b)has been heated to order,

(c) has been kept hot after being heated,

[...]'

Case law

27. The authorities referred to in this decision are listed in the alphabetical order of their short case names:

(1) *Adecco UK Limited and Others v HMRC* [2017] UKUT 113 (TCC) ('*Adecco*')

(2) *Beynon and Partners v Customs and Excise Commissioners* [2004] UKHL 53 ('*Beynon*')

(3) *Colaingrove Ltd v Commissioners for HMRC* [2017] EWCA Civ 332 ('*Colaingrove*')

(4) *Customs and Excise Commissioners v British Telecommunications plc* [1999] UKHL 3 ('*British Telecom*')

(5) *Card Protection Plan Limited v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ('*Card Protection Plan' or* '*CPP*')

(6) *College of Estate Management v Customs and Excise Commissioners* [2005] UKHL 62 ('*College of Estate Management*')

(7) *Revenue and Customs Commissioners v Compass Contract Services UK Ltd* [2006] EWCA Civ 730 ('*Compass*')

(8) *Levob Verzekeringen BV and another v Staatssecretaris van Financien* (Case C-41/04) [2006] STC 766 ('*Levob*')

(9) *Revenue and Customs Commissioners v Loyalty Management UK Ltd* (Case C-53/09) [2010] STC 2651 ('*Loyalty Management*' or '*LMUK*')

(10) *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* [2013] UKSC 15 ('*LMUK*')

(11) *Revenue and Customs Commissioners v Newey (Trading as Ocean Finance)* (Case C-653/11) [2013] STC 2432 ('*Newey* (CJEU)')

(12) *Newey (Trading as Ocean Finance) v Revenue and Customs Commissioners* [2015] UKUT 300 (TCC) ('*Newey* (UT)')

(13) *Customs and Excise Commissioners v Redrow Group plc* [1999] UKHL 4 ('*Redrow*')

(14) *Rusholme and Bolton and Roberts Hadfield Limited v S G Read and Co (London) Limited* [1955] 1 All ER 180 ('*Rusholme*')

(15) *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16 ('*Secret Hotels2* (SC)')

(16) *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2011] UKUT 308 (TCC) ('*Secret Hotels2* (UT)')

(17) *Snook v London and West Riding Investments Limited* [1967] 2 QB 786 ('*Snook*')

(18) *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24 ('*WHA Ltd*')

VAT Notice 709/1: catering and take-away food

28. The current version of the Notice was published on 7 October 2013 after the duration of the contracts in question. Parties have referred to the Notice in relation to what constitutes a catering service and the relevant paragraphs are as follows:

> '**2.1 What is the ordinary meaning of catering?**
>
> Catering in its ordinary meaning includes the supply of prepared food and drink. It is characterised by a supply involving a significant element of service. Obvious examples of supplies in the course of catering include:
>
> - supplies made in restaurants, cafes, canteens and similar establishments (except supplies of cold take-away food)
> - third party supplies of catering for events and functions, such as wedding receptions, parties or conferences
> - a supply of cooking and/or preparation of food provided to a customer at the customer's home, for example for a dinner party
> - delivery of cooked ready-to-eat food or meals (with or without crockery or cutlery)
>
> Examples of supplies that are NOT in the course of catering:
>
> - retail supplies of cold take-away food

- retail supplies of groceries
- supplies of food that require significant further preparation by the customer (see 2.2.1)

2.2 Catering contracts

Any supply of food and/or drink as part of a contract for catering is standard-rated.

However, a contract that merely entitles a food retailer to occupy a set of premises from which they make their supplies does not automatically determine that a supply is one of catering. In these instances it is important to consider all of the activities being carried out.

2.2.1 Food for customer preparation

If you supply food that your customer must prepare themselves before it can be consumed, this is not a supply in the course of catering. This will apply whether the food is delivered, or collected by, your customers. [...]

For these purposes, 'preparation' includes:

- thawing frozen food
- cooking food
- reheating pre-cooked food and
- arranging food on serving plates'

Findings of fact

Background

29. The appellant's VAT registration started on 1 October 2004 and was cancelled with effect from 1 October 2013 when the appellant notified HMRC that it had ceased trading on 30 September 2013.

30. The business activities described on the VAT registration document was the 'provision of catering' with the registration address being at Arnhall Business Park, Westhill, Aberdeenshire.

31. While Olive Garden ceased trading, its business was taken over by an entity called Entier Limited ('Entier'), and the appeals are brought by Entier, though the appellant's name continued to be that of Olive Garden.

Mr Smith's evidence

32. Mr Smith is a trained chef and had worked in hotels before taking up the post of Food Production Manager with UOA in March 1997. He rose to be the head of Campus Services and oversaw the overall catering functions required by UOA. In February 2011, he left his employment with UOA after nearly 14 years, to work in the catering sector for the Oil and Gas industry as a Marine Chef Manager for Entier.

33. Mr Smith gave an account of the catering functions in operation at UOA before the contract with OGC commenced in 2005, and of the reasons for the change in the mode of operation. His evidence afforded his version of the operational aspects of the contract between OGC and UOA.

(a) The catering operation at UOA before the 2005 Contract

34. The catering requirements fell into four main areas:

(1) serving breakfast and evening meals to 400 to 500 catered students;

(2) providing lunch-time food options to staff and students across the campus from a 900-seat food court and a 70 seat *al la carte* restaurant called Zeste;

(3) delivering catering for events such as weddings and other functions, and conferences held at UOA throughout the week; and

(4) providing 'on the go' food and drink to staff and students at 9 satellite outlets across campus.

35. All the hot food was produced on-site at the Central Production Unit ('CPU'), which was a large professional kitchen with different corners producing bakery, main courses, soups and sauces etc. The kitchen staff team of around 14 employees of UOA comprised chefs, cooks and kitchen porters.

36. Cook chill food was an important part of UOA's strategy to feed hundreds of students at sites across the campus on a daily basis. The cook chill food was produced by the CPU. Food was batch prepared in a factory setting and chilled rapidly in large gastronome trays. The chilling process needs to be managed carefully to prevent bacterial growth so that food can be stored and safely consumed for up to 5 days. The cook chill food was then delivered to sites across the campus and stored in chilling facilities until required.

37. Before service, the cook chill food would be re-heated (known as 'regeneration') in the kitchens attached to the sites and served to students along with freshly cooked side dishes, fresh fruit and vegetables, frozen desserts and other items.

38. Examples of items of cook chill food include: chilli, lasagne, beef stew, lamb casserole, cottage pie, and hot sweets. Soups were included and delivered to the satellite outlets to be reheated by UOA staff for lunch time meals.

39. CPU also produced buffet food for one-off events like weddings and conferences. This included platters of finger and fork food and sandwiches.

40. The chefs at the CPU worked on shifts and on the evening shift, would heat the cook chill food at the halls of residence and cook side dishes such as chips and vegetables, etc. On Sundays, CPU chefs would go to the halls of residence to cook the hot breakfast options like bacon and sausages for the brunch service.

41. For purchasing supplies, UOA was a member of TUCO (The University Catering Officers) and its purchasing arm SNUPI (Scottish and Northern Universities

Purchasing Initiative). Membership of these consortiums increased the University's purchasing power and ability to secure better prices from suppliers. UOA sourced food items from wholesale suppliers through the consortiums.

42. Food items sourced via the consortiums included: the raw ingredients for the cook chill food produced in the CPU; pre-packaged snacks and sandwiches; fresh fruit and vegetables; dairy; meats; frozen food.

(b) Closure of the University's CPU

43. In March 2005 UOA closed the Central Refectory, which was redeveloped into what is now known as the Hub to provide a central space on campus for students and staff to eat, drink, shop and socialise. The CPU, which formed part of the Old Central Refectory, was to be shut down to create more space for the Hub.

44. The closure of the CPU had two important consequences: (i) UOA lost its on-site cooking facilities; (ii) redundancies resulted in the loss of skilled chefs and other kitchen staff who were involved in producing cook chill food and regenerating the food for evening meals, in cooking breakfast and brunch and at the restaurant Zeste, producing buffet and assisting at high-end events like weddings.

45. Mr Smith described the closure of the CPU as creating 'gaps in the University's operation'. UOA still had the set-up in place to regenerate cook chill food, and Mr Smith identified the gaps as: 'someone who could take over producing cook chill food', and 'staff to replace the chefs and other kitchen workers lost by the closure'.

46. Mr Smith referred to bringing in a private company to solve 'an immediate problem' presented by the closure of the CPU but with the view of UOA being 'in a position to again do everything in-house further down the line'.

47. Mr Smith was not involved in the tendering process. His comments on OGC being awarded the contract included: the company was 'local' and had 'recently acquired the use of a cook chill facility'; that 'their expansion into cook chill was new', and being 'relatively small' OGC were willing to be 'flexible and fit in with [UOA's] specific needs'. He believed the UOA contract was one of OGC's first big cook chill food contracts.

48. Mr Smith made observations on the 2005 Contract, and below are some of the representative observations:

> (1) Para 25: '... the contract didn't properly explain how things with Olive Garden worked, particularly after the issue with the ... consortiums. Really it was just a case of me keeping the parts of the contract which were relevant, putting the rest in a drawer and getting on with things.'
>
> (2) Para 26.3: 'The reference to "Food Costs" in the contract is a good example of the people who drafted the contract not understanding how things were going to work. The contract explains "Food Costs" to be provisions

ordered by Olive Garden on behalf of, and on the instruction of, the University. ... the University ordered foodstuffs from suppliers direct.'

(3) Para 26.8: 'In Schedule Part 1 the contract states Olive Garden will purchase all food provisions on behalf of the University and arrange direct deliveries to appropriate delivery points. This is not accurate. Olive Garden only purchased the ingredients it required to produce cook chill food, finger food platters etc. at its CPU and the food it produced at Zeste or for weddings. After the issue arose with TUCO and SNIPI, the University also purchased some food supplies under contracts Olive Garden had with certain suppliers. But the University continued to make the orders and take the deliveries.'

(c) UOA and Olive Garden's respective involvement in catering functions

49. **Breakfast and Brunch** – continental breakfast at halls of residence Monday to Saturday, cooked brunch at the Hub on a Sunday:

(1) UOA staff: (a) planned menu, purchased foods from suppliers by deciding what and how much to buy, managed the stock, prepared the continental breakfast service each day, (b) served hot food cooked by OGC staff at brunch service; the hot food was placed in a hot holding cupboard which separated the kitchen from the serving area; prepared food for the brunch service by buttering rolls, cutting up meat and cheese and taking bacon and sausages from fridges for cooking so as to decide the quantity of food to be prepared.

(2) OGC staff: (a) limited to their kitchen staff occasionally cutting up meat, fruit, cheese during the evening meal service to assist UOA staff with the continental breakfast service the next day; (b) replaced the CPU shift staff at brunch service by cooking the hot brunch options at UOA kitchens under the direction and control of UOA staff, who gave specific instructions on what to cook and how much to cook.

50. **Lunch-time catering** at the Hub and the satellite units –

(1) The Hub contains a food court with 5 food outlets including Chinese, Italian, traditional food and 'Grab & Go': (a) UOA staff ordered the ingredients, prepared and served the meals available at all the outlets; (b) OGC staff had no involvement in the operation of any of the food outlets at the Hub.

(2) The satellite units across the campus serving sandwiches, soup and baked potatoes: (a) OGC produced the cook chill food e.g. soup and chilli for a baked potato; (b) UOA staff regenerated the cook chill food; cooked and served things like baked potatoes; pre-packaged sandwiches were purchased by UOA from local suppliers.

51. **Zeste** is a table service, *al a carte* restaurant on campus, and the level of food being prepared at Zeste was higher and needed skilled chefs in the kitchen.

(1) UOA staff designed the menu; created detailed food specifications (ie comprehensive breakdown of what was to go into each dish together with a picture showing what it should look like on the plate; waiting staff were UOA

employees; Restaurant Manger controlled the day-to-day running; supplied all cutlery and tableware and condiments and beverages including wine.

(2) OGC sourced the raw ingredients; produced dishes in the Zeste kitchen strictly to UOA specifications; e.g. salmon *en croute* would be produced to UOA's version as given in the specifications.

52. **Evening meals** were provided to catered students at the halls of residence and latterly also at the Hub from Monday to Saturday.

(1) UOA (Mr Smith in this case) designed the menus on a term by term basis rotating on a 4-week cycle; created detailed specifications for the cook chill food; Halls Managers ordered the quantities of cook chill food from OGC according to weekly menus and expected student numbers; checked and took delivery of cook chill food and took to UOA chillers for storage until needed; decided on the quantity to take out of chillers for regeneration each day; transport food from chillers to halls of residence or Hub kitchens; served up the meals in the evening; cleared the tables and cleaning.

(2) OGC produced cook chill food at their CPU to UOA specifications, and stored there until required by UOA; delivered of the orders placed by Halls Manager a day before it was required; delivery in large gastronome trays loaded in stackers; regenerated the cook chill food under the supervision of UOA staff; prepared side dishes such as vegetables for salads, boiled potatoes, chips, portioned frozen desserts; cleaned the kitchen after each evening meal service.

53. **Events, functions and conferences** were hosted across the campus on most days, in which customers could order platters of finger food and fork food.

(1) UOA (Mr Smith in this case) designed the platters; sent specifications and photographs to OGC for production; customers ordered platters and finger food in advance on UOA's website; UOA then sent orders to OGC; sandwiches made fresh on-site or purchased direct from suppliers; platters checked on delivery from OGC (usually 2 hours before the start of event) and taken to chillers for storage until required; service of the platters, beverages, tea/coffee at the event; provided all beverages and condiments; clearance during and after the event.

(2) OGC made platters to orders placed by UOA; delivered either to the venues or to the Hub for onward delivery to venue by UOA porters.

54. **Weddings** came under the 'events office' with a dedicated Operations Manager being in charge to design the wedding package with the wedding couple. The package would include the catering arrangements.

(1) UOA designed the menu and evening food options (if required); house staff in charge of room decorations, table arrangements and service of food.

(2) OGC chefs cooked the menus in UOA kitchens to the specifications in the same way as dishes on the Zeste menu were designed by UOA and cooked to the specifications by OGC chefs.

55. **Satellite units** are the 'Tiki' branded coffee units across the campus which sell drinks, pre-packaged fair trade snacks, confectionary and pre-packaged sandwiches, with some basic hot food offerings in the form of baked potatoes and soup.

(1) UOA staff manned and manged the units; ordered the cook chill food (soup, chilli etc) from OGC and managed volumes; delivery to the Hub and taken to units by porters; reheated cook chill food for serving by UOA staff.

(2) OGC produced the cook chill food to specifications and despatched according to orders.

Fall out with the Consortiums and wholesale arrangement with OGC

56. Except for the raw ingredients required for the cook chill food and Zeste restaurant, all other food supplies continued to be ordered direct by UOA with wholesalers through the consortiums until the autumn of 2005.

57. The food items purchased through the consortiums fell into two categories:

(1) Basic foodstuffs - fruit, vegetables, bakery, diary, frozen food and desserts forming part of the everyday meals served on campus; meats for brunch.

(2) Items sold at retail and satellite units – prepacked confectionary, crisps, chocolates, cans and cartons of drink, fruit.

58. According to Mr Smith, about six months into the contract with OGC, UOA was removed from TUCO and SNUPI purchasing consortiums. Mr Smith believed that this was due to UOA involving a private company in its catering arrangements, and the consortiums were not happy with the idea of the greatly reduced supplier prices being shared with the private sector. He referred to it as a 'fall out' and that he 'remember[ed] the move coming as a shock to the University' (para 19).

59. According to Mr Smith, losing the bulk buying benefit through the consortiums was a real problem. UOA approached OGC to negotiate with UOA's key suppliers for the best prices on the basis of the combined purchasing power of Olive Garden and the University.

60. The University managed to keep some of the suppliers like the fair-trade supplier to continue to supply at the same rates as under the consortiums.

61. The wholesale arrangement with OGC worked as follows: UOA continued to contact the same suppliers to place orders with them direct; wholesalers delivered direct to UOA; received and checked by UOA staff and distributed across the campus by UOA storeman or a porter; decisions regarding what and how much to purchase made by UOA staff, who managed the stock levels and waste.

62. As to the payment for the supplies, in the words of Mr Smith (at para 23):

> 'Our suppliers billed Olive Garden for supplies purchased under its contracts. Olive Garden in turn billed the University. Otherwise things worked like they did before.'

63. During 2010, Olive Garden became a member of the Full Range consortium and UOA benefitted from the preferred rates secured by that consortium.

The invoicing arrangements

64. Food was supplied by Olive Garden at cost; the contract made provision for a fixed profit which was spread over twelve months and invoiced monthly. Annual fees for management and administration were invoiced monthly.

65. 'CPU Food Costs' were costs associated with Oliver Garden producing the cook chill meals at its CPU, were invoiced monthly, and separating the costs between the Hub and the halls of residence.

66. 'Food costs' were food provisions (chips, frozen vegetables, bakery, confectionary, crisps etc) ordered from suppliers by UOA, and at para 31.2:

> 'If this was done under a contract the supplier had with Olive Garden, the supplier would first send the invoices to the University for checking. The University would then send the approved invoices on to Olive Garden for payment. The Olive Garden would then pay the suppliers and render an invoice to the University every month.'

67. Separate invoices would be rendered by Olive Garden for the raw ingredients used to produce the dishes served in Zeste restaurant.

68. 'Function costs' were additional costs for food and labour in relation to special events and functions.

69. 'Labour charge' and 'CPU labour' were based on a 'Labour Schedule' which was agreed annually with OGC. Invoices were rendered monthly to cover costs of Olive Garden's staff: (a) at OGC's CPU producing the cook chill food, and (b) working on UOA premises at: (i) Sunday brunch; (ii) evening meals at the halls of residence; and (iii) Zeste restaurant kitchen.

70. 'Additional labour' covered an additional chef not included in the Labour Schedule.

71. Labour and food costs were invoiced separately so that the University could manage its cost centres and budgets properly.

End of contract with OGC

72. Mr Smith left his employment with UOA in February 2011. He understood that the contract with Olive Garden carried on running the same way after he left until it ended in 2012.

73. He understood UOA has since built its own cook chill facility at the Hub and 'once again does everything in-house'.

The terms in the 2005 Contract

74. The title page of the 'Agreement' between the OGC and UOA to commence on 2 February 2005 has the heading of 'Provision of Catering Services'. In the contract, UOA is referred to as 'the Client', and the preamble to the Agreement is as follows:

> 'WHEREAS
>
> (A) The Client currently operates a Central Production Unit ("the Client's CPU") in respect of food required in various premises, and
>
> (B) The Olive Garden is capable of providing those services currently provided by the Client's CPU and is willing to do so on the terms and conditions set out herein.'

75. Clause 1 of the agreement sets out 'Definition and Interpretation', and the following definitions are relevant to present purposes:

> (1) 'Costs of Provisions' – the CPU Food Costs and the Food Costs as the case may be;
>
> (2) 'CPU Food Costs' – the costs of provisions supplied by the Olive Garden from the CPU for the purposes of providing the Services, such as costs calculated in accordance with the rates set out at Parts 5 and 6 of the Schedule for the First Contract Year (which shall be the cost price to the Olive Garden for subsequent reimbursement by the Client) and thereafter as may be agreed by the Parties;
>
> (3) 'Food Costs' – the costs of provision supplied *direct to the Client and ordered by the Olive Garden on behalf of, and upon specific instruction by the Client,* at the rates set out at Part 4 of the Schedule for the First Contract Year (which shall be the cost price to the Olive Garden for subsequent reimbursement by the Client) and thereafter being such as may be agreed by the Parties. (emphasis added)
>
> (4) 'Management Fee' – the agreed annual cost for non-food and other sundry items required to deliver the Services, such costs as set out at Part 3 of the Schedule and thereafter being such as may be agreed by the Parties.
>
> (5) 'Olive Garden Fixed Profit' – the agreed figure of £50,000 receivable by the Olive Garden from the Client in the First Contract Year, and thereafter may be agreed by the Parties.

76. Clause 5 is headed as 'Charges' and 'Charges' and the material clauses are:

> '5.1 Subject to clause 5.5 below, the Olive Garden will issue separate monthly invoices to the Client in respect of (i) the Service Fees, (ii) the Food Costs, (iii) the CPU Food Costs.
>
> 5.2 The monthly Service Fees invoice shall comprise three elements, being: –
>
> 5.2.1 the Labour Establishment calculated as a monthly cost;
>
> 5.2.2 the Management Fee calculated as a monthly cost; and
>
> 5.2.3 the Olive Garden Fixed Profit calculated as a monthly cost to the Client.

5.3 The monthly Food Costs invoice shall contain a full breakdown of the Food Costs for that month, which costs shall further be broken down by location.

5.4 The monthly CPU Food Costs invoice shall contain a full breakdown of the CPU Food Costs, which costs shall further be broken down by location.

5.5 Where the Olive Garden caters for special events such as (without limitation) weddings and dinner dances ("Special Events"), the Olive Garden shall be entitled to invoice the Client for a profit element in respect of each Special Event, which profit shall be calculated as 20% of the total costs (exclusive of VAT) of provision of the Services for such Special Event. If it is proposed to depart from any of the dishes or menus set out at Part 6 of the Schedule in catering for a Special Event, the Parties shall prior to such Special Event agree the cost thereof.'

77. Clause 10 has its heading as 'Policies/Legislation':

'10.1 The Client undertakes to make available to the Olive Garden the latest Work Policies.

10.2 The Olive Garden undertakes to the Client to ensure that all employees of the Olive Garden are made aware of, consent to and comply with:

10.2.1 the Work Policies, and

10.2.2 all relevant legislation relating to their employment or to the provision of the Services, including without limitation all health and safety regulations.

10.3 The Olive Garden further undertakes to the Client as follows:-

10.3.1 to install a Heathy Eating programme developed and run in conjunction with Scottish Health at Work, and to increase awareness of healthier food options;

10.3.2 to set up a series of safety awareness campaigns in conjunction with Peninsula Business Group (or such similar organisation) to highlight safety within the catering areas of the Client's Premises;

10.3.3 to introduce monthly themed safety talks with all on-site staff, and to implement, audit and control all safety policies and procedures on-site at the Client's Premises;

10.3.4 to develop and fully integrate HACCP system between the CPU and the Client, co-operating with Commercial Microbiology Ltd to produce a fully documented, audited and controlled food safety procedure;

10.3.5 to produce an operations manual for the catering sites on the Client's Premises, detailing all quality systems and procedures; and

10.3.6 *in the first quarter of 2005, to complete a purchasing tender process and evaluation and valuation for all food provisions with a view to maximising volume purchasing power, and securing overall savings to the Client.* (emphasis added)

For the avoidance of doubt, these undertakings shall form part of the Services and accordingly shall not result in any further cost to the Client.'

78. Clause 11 is on 'Insurance', of which:

'11.2 The Olive Garden will at its expense effect and maintain throughout the duration of this Agreement a policy of insurance in an amount of not less than £5,000,000 in respect of its obligations under clause 12 and its liability to third parties for personal injury, including food poisoning and damage to or loss of property and procure that the Client's interest is noted on such policy.'

79. Clause 12 is on 'Indemnity', of which:

'12.1 The Olive Garden undertakes to indemnify and hold harmless the Client and the Client's employees from and against all claims, losses, damages, costs, expenses and liabilities in respect of: –

12.1.1. loss of or damage to property belonging to the Olive Garden or for which the Olive Garden is responsible;

12.1.2 property belong to the Olive Garden's employees or for which such employees are responsible; and

12.1.3 personal injury to and death of any such employees

arising from or relating to the provision of the Services irrespective of any negligence, breach of duty (statutory or otherwise) or fault on the part of the Client or its employees.

12.2 The Olive Garden undertakes to indemnify and hold the Client harmless from and against all loss, damage or injury caused by negligence or breach of duty (statutory or otherwise) on the part of the Olive Garden, its employees or agents.

12.3 The Client shall have no liability to the Olive Garden in respect of loss of revenue, profit or anticipated profit or any other similar consequential loss.'

80. Schedule Part 1 to the Contract entitled 'The Services' states as follows:

'The Olive Garden shall be responsible for all food production and related activities to ensure the delivery of the following core catering services: [followed by tabulation of the services]'

[The first column of the table is for 'service': Breakfast, Mid-Morning, Luncheon, PM, Evening Meal, Conferences, Internal/Eternal Functions, Zeste (for breakfast, snacks, lunches, light meals); the second column is 'availability' being the time for the service to be provided, e.g. luncheon is 11.45 to 14.15; the third column is 'Method' being: (a) 'assisted and self-help via service counter; (b) as required (for conferences, functions); (c) purchase of food provisions as required (for Zeste).]

The Olive Garden shall prepare all cook-chill foods at the CPU or such other premises as it shall consider fit. Whereas there shall be no central production facility on the Client's Premises, the Olive Garden shall have the use of a fully-equipped reheating/regeneration area (the

maintenance of which shall remain the responsibility of the Client). For the avoidance of doubt, it shall be the responsibility of the Olive Garden to ensure that such areas are kept clean.

The Olive Garden shall purchase *all food provisions on behalf of the Client and arrange for direct deliveries to appropriate delivery points*. This shall include items required for the production of cook-chill and cook-to-order meals pursuant to delivery of the above services (Parts 5 and 6 of the Schedule) as well as other consumables and snacks such as confectionery and soft drinks (as further detailed in Part 4 of the Schedule).' (emphasis added)

81. Part 2 of the Schedule is headed 'Labour Establishment', and is presented as a table listing some 14 job titles. Two Chef/Cook, one Driver, two Kitchen Porters were designated as 'TUPE' on the Schedule, which suggests that these five staff members were transferred from UOA to OGC and they were all full-time.

82. Part 4 of the Schedule is headed 'Food Costs', and consists of a list of items with a unit price; items include bacon roll at £0.54, sausage roll at £0.48, egg roll at £0.35, full breakfast (bacon, sausages, egg, beans, tomatoes, mushrooms & toast) at £1.30; ... canned/bottled beverages, yoghurts.

83. Part 5 of the Schedule is headed 'CPU Food Costs', and consists of a list of items for cook chill foods, followed by Dinner Menu 1 to 6, buffet options – hot, carved, finger, cold fork, canape menus (meat, fish or vegetarian) and their unit price.

84. Part 6 of the Schedule is headed 'Special Events' and consists a list of menu options from finger buffets to a three-course fare.

The 2008 ruling by HMRC Policy Unit

85. By letter dated 14 August 2008, the appellant made a voluntary disclosure of an error correction claim that it had over declared output VAT on supplies of foods under a contract held with UOA. The 3-year retrospective claim totalled £221,456.

86. The appellant's then advisers Scott-Moncrieff submitted the claim based on their interpretation of HMRC's Public Notice 7090/1 on 'Catering & Takeaway Food' as applied to OGC's contract with UOA. It was argued that OGC's 'unique approach to the food provision allows it to be takeaway and not "supplies in the course of catering"' given that 'the food in question is prepared offsite at [Olive Garden'] CPU and not in the place it is eventually heated and served.'

87. HMRC and the appellant met in October to discuss the claim and further information such as the 2005 Contract was provided.

88. By letter dated 9 December 2008, HMRC refused the claim on the basis that the appellant's role was far wider than merely supplying food; that the appellant was working in partnership with UOA to improve and raise standards and the appellant was making a supply in the course of catering, which should be standard rated under

Group 1(a) Schedule 8 of VATA. The ruling was confirmed in writing by letter dated 21 January 2009.

The 2009 Contract

89. The title page of the agreement bears the university crest of UOA and the heading of: 'Contract for the purchase and supply of Catering and Management Service between the University of Aberdeen and Olive Garden Catering Company February 2009'. Unlike the 2005 Contract, which was drafted by a firm of solicitors in Aberdeen, the 2009 Contract was drafted by UOA, and Olive Garden was 'the Contractor' in the 2009 agreement, and UOA was referred to as 'the University'.

90. The contract starts by setting out the University's approach to catering, and Olive Garden's involvement therein. Under the heading of 'Exceptions', it is stated:

> 'Currently, Tiki Coffee Stations, Source, McRobert, Johnston, Hub Tiki and Breakfast & Lunch operations in Hubgrub, are not part of the catering contract and are operated by Campus Services directly. Service provision will develop and change according to trends and customer demands. As such, any one part or all of the units noted here as well as any additional units developed in the future, may well be required to become part of this agreement.'

91. The 'Scope of service' on page 9 of the Contract includes:

> '2. The contractor will purchase all agreed food provisions on behalf of the University and arrange for direct deliveries to appropriate delivery points. This will include items required for the production of cook-chill and cook-to-order meals (which are to be incorporated, priced and returned in your tender document as Schedule 2). This appendix is to be completed as price schedules for the items detailed, and tenderers are to enter current net prices (excluding VAT) at which these would be supplied to the University ... Assistance with the compilation of monthly closing stock reports will also be required.
>
> [...]
>
> 4. The reheating and preparation on-site of some cook-to-order foods will be a service provided by the contractor. ...
>
> 5. The cleaning of the kitchen area used for reheating/re-gen and preparation of foods on University premises will be the responsibility of the contractor.'

92. The Contract had an annual value of £463,258, made up by four components:

(1) Net Food Costs at £126,453;
(2) Labour Charges at £235,031;
(3) Management Fee at £39,274; and
(4) Expected Profit Margin at £52,500.

93. The 'Net Food Costs' was a reference to the CPU food costs only in the contract value, and the price proposed in the contract of £126,453.13 was nearly £9,000 lower than the actual costs of £135,243 in the year 2007-08 (October to September).

94. The 2009 Contract included a schedule summarising the actual food costs invoiced by Olive Garden in 2007-08 in relation to supplies to UOA:

(a) CPU costs at £135,243.99,
(b) Functions at £114,349.07, and
(c) Procurement at £804,674.78.

95. The 'Labour Charges' were for costing: (a) on-site labour, (b) CPU labour, and (c) function labour charge out rates. The contract value takes the on-site labour at £148,324 and CPU labour at £86,707 elements to reach the total of £235,031. (The function labour was not costed.)

96. 'Management Fee' proposed costs of £39,273 were the combined total of costs under: (1) Field support services: HR functions, HSE Support, Compliance Assurance in Food Safety Audits (4 per year) of £5,100 in total; (2) Transport costs of £11,014 for vehicle lease, fuel, insurance, servicing; (3) contribution to Olive Garden's CPU kitchens of £17,487; (4) Senior management time of £3,692.

97. 'Administration Labour Charge' was proposed at an annual total of £27,276.47, and represented the annual wages for a Purchase Ledger Assistant working 37.5 hours a week, and a Sales Ledger Accounts Assistant working 8 hours a week.

98. 'Administration Charge' proposed was £8,415.85 per annum and consisted of 'IT Costs' (accounting software and annual licence, payroll software, optimum control catering software for recipe costing, IT support from a firm), and 'Other Admin Charges (contribution to office space in rent, rates, electricity and phones, stationery, and payroll processing charges).

Sample invoices rendered on 28 February 2009

99. Two invoices dated 28 February 2009 were rendered according to terms concluded in the 2009 Contract. The first invoice was for 'CPU Food Costs' of £13,737.09 for which VAT was charged at 15% in the sum of £2,060.56.

100. The second invoice was for the following items:

(1) *Supplier invoices being recharged for February 2009* of £69,363.75 for which VAT totalling £406.02 was charged at 15% on certain items only, with the rest of the supplies being zero-rated.

(2) *Procurement Administration* of £2,273.04; being one-twelfth of the contract annual total for 'Administration Labour charge' of £27,276.47 per contract; VAT at 15%.

(3) *Annual Charge* of £701.32 as the monthly charge of the annual £8,415 for 'Administration charge' per contract, VAT at 15%.

(4) *Annual Charge* of £1,250 being the monthly charge of £15,000 (unclear with which item in the contract this correlated), VAT at 15%.

The Quarterly Review of 29 September 2009 prepared by Olive Garden

101. This document was prepared by the Executive Development Chef at (by then) 'Entier Olive Garden' for UOA Campus Services, and reviewed the performance by Olive Garden under the contract. It would seem to be a process that happened quarterly, though only this review has been included in the bundle. We note the following excerpts:

(1) Under 'Executive Summary'–

> 'A key area of concern raised by the Hall Managers was that chefs on Halls of Residence duty did not take ownership of the food they were producing. This has been addressed with the introduction of end of shift check lists which are signed off by the Duty Manager and returned to the CPU for review. ...'
>
> 'The introduction of the Full Range Purchasing Group has resulted in joint benefits. The reduction of suppliers and the streamlining of product lists has ensured savings and reduced the opportunity to order by personal preference.'

(2) Under 'Training and Development'–

> 'Food Quality: Training courses are to be arranged over the next quarter for all university based chefs at the Central Production Unit. ... and will focus on consistency, flavour and the regeneration of dishes.'

(3) Under 'HSEQ' (ie. Health, Safety, Environmental, Quality)

> 'A full HSEQ audit was carried out at the CPU ... All Actions have been closed out. A further Audit of Zeste Kitchen was carried out by ... and again all actions have been closed out.'

(4) Under 'People' –

> 'Uniforms: All Olive Garden employees have been issued with branded uniforms. This enables our staff to be easily identified whilst on campus and contributes to the level of professionalism that we are striving to achieve.'

(5) Under 'Operations' –

> 'Halls of Residence: Small changes have been made to the menu and the Regeneration Handbook has been distributed to both sides. ... the need for Olive Garden chefs to take ownership and responsibility of the food that they are serving and the way the conduct themselves.'
>
> 'Delivered Services: New menus were implemented earlier this year and these appear to have been more successful than the previous ones, as there had been issues with some of the Finger Buffet items.'

The undated letter in early 2012 by Manging Director of OGC

102. The 2009 Contract was coming to an end on 1 March 2012. The content of an undated letter by Peter Bruce, Managing Director of Olive Garden around the time reflects the commercial reality of the contract. Inferring from the letter, the two sides had met to discuss the possibility of extending the contract. Mr Bruce wrote to

express his disappointment that the contract was not to be extended by two 12-month extensions as per previous verbal agreement.

103. Mr Bruce's disappointment was expressed in the context of the significant saving that had been achieved by Olive Garden under the 2009 Contract:

> 'The annual saving of £138,520 initiated by the Olive Garden Catering Company was in addition to the agreed annual reduction in contract rates of £50,692.31 from 1.2.09 and the return of over £35,000 from our purchasing initiative on behalf of the University. In total this equates to a saving of **£429,485 over the initial contract period** – all initiated by ourselves and the full value, without any financial penalty, going directly to the University.' (emphasis original)

104. The 2009 Contract was eventually extended by seven months and ended in September 2012, as confirmed by the voluntary disclosure claim.

VAT assessment of 21 July 2014

105. On 26 September 2013, HMRC visited the appellant's business and established that some supplies in relation to the contract with UOA which HMRC had previously ruled to be standard-rated were being zero-rated.

106. On 10 March 2014, HMRC wrote to seek clarification as to why invoices rendered to UOA had been zero-rated when HMRC had ruled all supplies within the contract were to be standard-rated.

107. By email dated 19 May 2014, HMRC requested that a copy of the contract between the appellant and UOA be provided and sought confirmation as to whether any amendments had taken place since HMRC's 2008 ruling. (The 2005 Contract upon which HMRC had based their 2008 ruling was renewed in 2009.)

108. By email dated 4 June 2014, the appellant confirmed there had been no change to the contract previously examined by HMRC when it provided its initial ruling in 2008.

109. On 21 July 2014, HMRC notified the appellant of their intention to issue an assessment in the sum of £171,951 in relation to the invoices that should have been subject to VAT at the standard rate, in accordance with the formal ruling issued by HMRC in the letters of 9 December 2008 and 21 January 2009 on the basis that the supply by the appellant to UOA represented a single supply of catering services.

110. The Notice of assessment was dated 8 August 2014 for a total of £171,951, to charge VAT on what OGC classified as 'supplies of wholesale food' during the VAT periods from 09/10 to 06/12 when the contract ended.

Correspondence following the VAT assessment

111. By letter dated 18 August 2014, PricewaterhouseCoopers ('PwC') wrote to HMRC on behalf of the appellant in respect of the VAT assessment, and stated their

view that the appellant 'had been engaged under one contract to provide multiple services' which 'can be separated into discreet categories' as comprising:

(1) The supplies of (i) management services, (ii) staff, (iii) food excepted from zero-rating, (iv) food which will be further prepared by OGC; (v) food from Central Production Unit ('CPU') are standard-rated.

(2) The facility for UOA to order food directly from OGC's suppliers was disbursements and outside the scope of the contract.

112. The notion of disbursements was a reference to section 5 of the 2005 Contract, where the terms for 'Charges' in respect of (i) the Service Fees, (ii) the Food Costs, (iii) the CPU Food Costs are separately defined in section 1 of the 2005 Contract.

113. Further correspondence between HMRC and PwC followed in respect of the VAT assessment where the appellant's contentions were related and further information was exchanged as respects invoices to UOA from the appellant, the 2008 ruling from HMRC Policy Unit, and how the Contract worked in practice.

114. The contract, according to PwC's letter dated 24 April 2015, 'was agreed on the basis that the only profit to OGC was the Fixed Profit Contribution and all other charges were passed on at cost or anticipated cost with no additional mark up'.

VAT repayment claim by error correction re-opened

115. By letter dated 14 July 2015, PwC re-opened the matter of HMRC's rejection back in 2008 of the repayment claim made by Scott-Moncrieff on OGC's behalf. PwC highlighted that there did not seem to have been an appealable decision to that matter in 2008, and to put forward new arguments to support the repayment claim.

116. HMRC's 2008 ruling stated that the 'general approach' is 'where a number of elements are provided under arrangements there is normally likely to be a single supply.' PwC challenged the ruling on two bases:

(1) HMRC guidance VFOOD5220 states: 'A supply in the course of catering is, for VAT purposes, to be taken as a supply to the final consumer or to a person receiving it on behalf of the final consumer.' PwC contended that the final consumer purchasing the food from the various outlets on campus is purchasing food from UOA and not OGC.

(2) VFOOD5220 also states: 'Where a trader supplies prepared cold food and drink to a customer who then sells it in the course of catering, the first supply is not regarded as being made in the course of catering.' Examples: bulk supplies of sandwiches, salads and prepared meals requiring cooking or re-heating. OGC supplied food to UOA as the customer who then sold it in the course of catering.

(3) OGC used staff solely to serve UOA, OGC should qualify for the 'catering staff wages concession' under guidance VTAXPER64200: 'Provided the contractor pays the wages of its own staff who are employed solely to serve that particular client and clearly identifies their wages in the profit and loss accounts and/or invoices to the client, the staff wages element may, under the terms of

the "catering staff wages concessions", be charged to the client without the addition of VAT.'

117. Based on these publications, PwC made an error correction claim in relation to what was considered to be VAT over-declared on 'prepared food and staff wages' in periods which were then still open for adjustment, namely from 09/11 to the end of the contract in 09/12.

118. By letter dated 20 October 2015, HMRC refused the voluntary disclosure claim for £61,663 on the basis that the catering contract was a single supply and the catering staff wages concession does not apply.

The appellant's case

119. The grounds of appeal as stated on the Notices of Appeal dated 13 November 2015 for both the first and the second appeals are identical, and are as follows:

(1) Although the supplies were the subject of a single, framework contract, it is clear that they were in reality separate supplies.

(2) Food was supplied to UOA at premises other than those at which it was to be served to consumers (students and staff). It was not supplied ready to be served, and required to be prepare before serving to consumers.

(3) The staff supplied were involved in preparation from premises other than to those to which food was delivered, and using equipment provided by UOA and worked under supervision of UOA staff. They did not prepare all the food that the appellant delivered to UOA; neither was all the food delivered by the appellant prepared by the staff so supplied.

(4) The charges for food and staff were calculated and invoiced separately.

Counsel's submissions

120. For the appellant, Mr Simpson submitted that the proper approach to ascertaining the nature of a supply is to consider what is being supplied from an economic point of view (*Card Protection* and *Levob*).

121. Specifically, it is necessary to consider the issue at the level of generality that corresponds to social and economic reality (*Beynon*). The exercise is best carried out from the point of the recipient of the supply (*Redrow*), as in *College of Estate Management*, which held the supply to be education as that was 'what the students were purchasing' (at [13]).

122. What UOA was purchasing was specific supplies to fill the gaps that emerged in its catering function after the loss of it CPU and certain staff; that UOA was not purchasing a catering service.

123. Taking all the circumstances of the supply into account (*British Telecom* at 1386), the circumstances include the fact that the supplies were provided under a single contract. However, the contracts were drafted on the UOA side by the finance

function, and the individuals involved did not fully understand the supplies being purchased: 'the contracts do not reflect what happened in practice'.

124. It is submitted that 'the terms of the contract ought to be ignored to the extent that they set out a supply different from what actually happened'; that 'it may be said (without implying any disapprobation) that the contracts were "shams" in the sense that the parties to them had the common intention that they should not create the rights and obligations they appeared to create' (*Snook* per Lord Diplock at 802).

125. What is more important is the economic and commercial reality (*ScretHotels2* at [55]). The jurisprudence of the European Court of Justice has held that 'contractual terms should be ignored if they do not reflect the "economic and commercial reality" of a transaction' (*Newey* at ECJ and Upper Tribunal on the return of the case).

126. While there was a single document between UOA and the appellant governing all supplies made by the latter to the former, this cannot outweigh what actually happened in terms of the factual provision of those supplies.

127. There was no supply by the appellant 'in the course of catering' (*Compass*); that the supplies by the appellant consisted of separate supplies of (i) food and (ii) staff, and fell to be treated as separate categories for VAT purposes. The fact that separate invoices were issued for food and staff costs does not in itself mean that the supplies were separate supplies, but it remains a factor supporting the appellant's case.

Supplemental submissions on the wholesale arrangement

128. The food was ordered directly by UOA from wholesalers; the appellant paid the wholesalers and UOA then paid the appellant. For VAT purposes, the supplies involved were (i) a supply of food by the wholesalers to the appellant, and (ii) a further supply of the same food by the appellant to UOA.

129. The procedure for ordering food from wholesalers is outside both the 2005 and 2009 Contracts. Mr Simpson is emphatic that the wholesale food supplies were outside the contractual agreements and were in no way covered by the contracts.

130. As to the contractual obligation that governed the procedure, 'the fact that the appellant paid the wholesalers and re-charged the UOA for that expense is a clear indication that the primary liability for the price of the food supplied was on the appellant, and that if the UOA had any direct liability to the wholesalers for the price it was merely a secondary liability'. The fact that the wholesalers looked first to the appellant, and that the appellant paid, shows that the appellant was liable for the price before the UOA was.

131. The appellant's primary liability to pay the price for food ordered directly by UOA means that UOA must have been authorised by the appellant to enter contracts to purchase the food in question on the appellant's behalf, most likely by express statement to the wholesalers. In the alternative, authority may have been given by implication or by ratification by dint of the subsequent payments by the appellant.

132. Inferring from the framework contract the appellant had with the wholesalers, it is submitted that there was an implied contract between the appellant and UOA in terms of which (i) the appellant authorised UOA to order food from wholesalers on the appellant's behalf, for delivery directly to UOA, (ii) the appellant would pay the wholesalers the price, and (iii) the UOA would pay the appellant the price of the food.

133. There is no basis for a conclusion that the appellant acted as agent on behalf of the UOA. In particular, it is clear that the appellant was not involved in concluding any specific contracts for the supply of food, and it is unnecessary to consider whether the appellant was the *del credere* agent of UOA.

134. So far as UOA acted as agent for the appellant, no consideration was paid by the appellant for this. It may have been that UOA was *del credere* agent of the appellant, or had personal liability for the price (*Rusholme* at 150): the extent of the agent's liability depends on 'the nature and terms of the contract and the surrounding circumstances'. But the extent of UOA's liability towards the wholesalers does not change the VAT analysis given that the appellant was primarily liable for the price.

135. In identifying the supplies made in this ordering procedure, the approach is to have regard to the commercial and economic reality. In the present context, there are two contracts in terms of private law for the supply of food, one between the wholesalers and the appellant, and one between the appellant and UOA.

136. Under this ordering arrangement, 'the supplies that took place for VAT purposes were congruent with the private law position': (i) the wholesalers made supplies of food to the appellant, and (ii) the appellant made supplies of (the same) food to UOA. The fact that orders were made directly by UOA to the wholesalers, and deliveries were likewise made directly, does not lead to a different conclusion.

HMRC's case

137. The legal agreement between the appellant and UOA is a contract for the supply of catering services, and the appellant provides its services under that contract. Consequently, the supply of food by the appellant to UOA falls under Schedule 8, Group 1(a) and is excepted from the zero-rating.

138. The appellant cannot dissect the contract and cherry pick the various supplies made by it under the contract, thereby contend that they are separate supplies of food and staff in order to lessen its VAT liability.

139. The respondents submit that a single supply of catering took place and the appellant and UOA were working together to deliver catering services to the students therefore the supplies are standard-rated under Group 1(a), Schedule 8 of VATA.

140. The supplies for VAT purposes are to be identified by reference to the terms of the contracts in place between the appellant and UOA.

141. In *Card Protection Plan* ('*CPP*'), the ECJ established that 'a supply which comprises a single service from an economic point of view should not be artificially

split' has been cited in cases where one supply could not be regarded as subsidiary or ancillary to another.

142. In *Levob*, it was held that where two or more elements or acts supplied by a taxable person to a customer, being a typical customer, were so closely linked that they formed, objectively, a single, indivisible economic supply, which would be artificial to split (at [22]).

143. In the present case, it is submitted that the supplies of food and staff made under contract constitute a single indivisible economic supply which would be artificial to split. The VAT assessment has been made to charge VAT on the food supplies in the course of catering, and was made on the basis of best judgment and issued within the legislative time limits.

144. The VAT repayment claim by the appellant under s 80 VATA is not due since the supplies constituted a single supply of catering services, and the catering staff wages concession does not apply either. VAT is correctly due on the total consideration received by the appellant.

Supplemental submissions on the wholesale arrangement

145. The appellant is obliged, under the contract with UOA, to provide all of the food used in the provision of its services to UOA. In the fulfilment of those obligations, the respondents understand the appellant ordered much of the food itself from its wholesalers, and via the wholesale arrangement, UOA was also able to order food supplies directly from the appellant's wholesalers.

146. The supplies at issue were a supply of food incorporated in the supply of catering, under the catering contract, by the appellant to UOA and standard-rated.

147. The wholesale arrangement was part of the legal contracts between the appellant and UOA which were headed as 'Provision of Catering Services' (2005 Contract), and 'Supply of Catering & Management Service (2009 Contract). All supplies made by the appellant to UOA were provided under those contracts, including supplies under the wholesale arrangement.

148. Contrary to the appellant's contentions, the wholesale arrangement appears to be covered by the catering contracts:

> (1) The 2005 Contract states: 'The Olive Garden shall purchase all food provisions on behalf of the Client and arrange for direct deliveries to appropriate delivery points. This shall include items required for the production of cook-chill and cook-to-order meals ...'.
>
> (2) The 2009 Contract states under the heading of 'Scope of Services': 'The contractor will purchase all agreed food provisions on behalf of the University and arrange for direct deliveries to appropriate delivery points. This will include items required for the production of cook-chill and cook-to-order meals.'

149. It is clear from the contracts that the appellant was to provide all food and this was what happened in practice. It was mutually beneficial to the parties and simplified the food ordering process to use 'the wholesale arrangement' – rather than the appellant taking charge of all food ordering – a scenario which would require extra liaison between the parties and thus extra cost and effort.

150. The wholesale arrangement facilitated the supply of food to UOA by the appellant. There was a contractual obligation on the appellant to pay for the food ordered by UOA – just as there would be if the appellant had ordered it. There was also an obligation for UOA to pay the appellant for any such supplies made under the catering contract. The fact that the appellant chose to split the invoicing between 'service fees' and 'food costs' does not turn the appellant's supply of catering into multiple supplies for VAT purposes.

151. Regardless of the fact that food obtained via the wholesale arrangement was ordered by and delivered direct to UOA, the appellant bought the food and supplied it alongside its staff services to fulfil its catering obligations to UOA under the contract.

152. The definition of 'management fee' under the 2005 Contract refers to delivering the 'Services'. The ordinary meaning of 'catering' contained in HMRC Notice 709/1 at para 2.1 is 'the supply of prepared food and drink ... characterised by a supply involving a significant element of service'. The appellant's supplies involved a significant element of service.

153. The respondents submit that the appellant was contracted to provide all food, and that was the economic and commercial reality. The appellant worked in close co-operation with UOA and was involved in all aspects of the supply of catering to the students. The appellant provided a Purchase Ledger service which involved the appellant purchasing/ordering wholesale foodstuffs required throughout UOA for various purposes, and was a service which the appellant charged VAT on.

154. It is apparent that the appellant was working with UOA to deliver the principal aim, which was to provide food for consumption on the premises on which it was supplied, with the integral services being the procuring of food ingredients, the preparation/cooking/heating of food and the provision of staff. The *CPP* principle is that a transaction comprising two (or more) items is treated as a single composite supply with a single VAT treatment where one item is the principal component to which the others are ancillary. Consequently, all supplies under the catering contract constitute a standard-rated single supply in the course of catering.

155. The Court of Appeal decision in *Colaingrove* confirms that the *CPP* principle prevails unless there is specific wording in the national legislation dual-rating a single composite supply which includes an ancillary component that is 'reduced-rated'. In *Colaingrove* the supply of electricity for domestic use was found to be part of the commercial package, with the main service being the provision of accommodation. The *CPP* principle likewise prevails here, and the appellant's supplies of both food and staff are made as part of the same catering package.

Discussion

The relevance of the 2005 and 2009 Contracts

156. For the appellant, Mr Simpson has emphasised the 'economic and commercial realities' should be the starting point, and to that extent we agree. 'It must be recalled that consideration of economic realities is a fundamental criterion for the application of the common system of VAT' (*Loyalty Management* at [39]). However, Mr Simpson went much further and invited the Tribunal to consider that 'the contracts were "shams" in the sense that the parties to them had the common intention that they should not create the rights and obligations they appeared to create'.

157. In the preliminary ruling on questions referred to the Court of Justice of the European Union ('CJEU') in relation to *Newey*, certain principles are made clear as respects the circumstances when a national court should depart from the contractual position in determining the question of a supply of services for the purposes of VAT:

> '[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 ... 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.'

158. The *Newey* (CJEU) judgement continued by stating the occasions when the national court should depart from the contractual analysis for 'preventing possible tax evasion, avoidance and abuse' – circumstances in which to prohibit the abuse of rights 'is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage' (at [46]).

159. By Mr Simpson's own analysis, the contracts in question would seem to have set the appellant up to pay more VAT than it should have. To that extent, the contracts failed singularly in procuring a tax advantage for the appellant. For that reason, there is an inherent contradiction in Mr Simpson's submissions that the contracts should be regarded as shams: contracts which are wholly artificial set out to reduce or avoid tax, not to increase the tax exposure as it would seem to be the case here.

160. Similarly, in *WHA Ltd* Lord Reed said at [27]: '[t]he contractual position is not conclusive of the taxable supplies being as between the various participants in these arrangements, but it is the most useful starting point.' Similarly, Lord Neuberger reiterated the same point at [35] of *SecretHotels2* (SC): 'one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party'. The contractual agreement has to be the

starting point in our analysis, and our conclusion therefrom can only be disregarded if there are vitiating facts pointing to a different economic and commercial reality.

Applying basic principles in construing a written agreement to the facts of the case

161. In the Upper Tribunal decision of *Secret Hotels2*, endorsed by the Supreme Court judgment for the case, Morgan J gave a helpful summary of the basic principles which govern the way in which a court or a tribunal construes a written agreement:

> '[88] When construing a written agreement, the court has regard to all of the provisions of the contract. The court construes the agreement against the relevant background. The material which is admissible in relation to that background is everything which a reasonable man would regard as relevant and which would have affected the way in which a reasonable man would have understood the language used in the document: *Investors Compensation Scheme Ltd v West Bromwich B.S.* [1999] 1 WLR 896 at 912-913. The relevant material is restricted to the material which would have been available to the parties. At the risk of stating the obvious, this last proposition means that the court cannot be influenced, when construing a written agreement, by material which would not have been available to the parties when they entered into that agreement.'

162. Morgan J continued by setting out the extent that the commercial purpose of the agreement can be taken into account in construing the agreement:

> [89] The court may also be assisted by considering the commercial purpose of the agreement. In some cases, the ordinary literal meaning of the language used will be in accordance with the apparent commercial purpose of the agreement. If the ordinary meaning to the language appears to convey a meaning which does not make reasonable commercial sense, then a court will look more critically at the wording to see if the ordinary meaning is really what the parties must be taken to have intended. In a case where the ordinary meaning of the language is in serious conflict with commercial sense, then the court may conclude that the language has not been well chosen and may choose a possible meaning (even though it would not be the most likely meaning of the language in other circumstances) which fits better with commercial sense.
>
> [90] In some cases, the parties purport to state the legal effect of their agreement. They may, for example, state that the agreement is a licence in relation to land and not a tenancy. They may do this even where there is no question of the agreement being a sham. They may act in this way through a misunderstanding of what is involved in the legal concept to which they refer or for other reasons. Notwithstanding this, the court will examine the substance of the agreement to determine its legal effect ...'

163. The extent the court may take account of 'the behaviour' of the parties where the contractual arrangements are the subject of written agreements was a central issue as respects the fact-findings by the First-tier Tribunal ('FTT') in *Secret Hotels2*, and

ultimately the reason why the FTT decision was overturned by Morgan J, whose guidance on this is as follows:

> '[92] ... In principle, a course of dealing prior to the entry into a written agreement may be part of the relevant background. In the case of an oral agreement, evidence of conduct may be relevant to the determine the terms of the oral agreement; ... In the case of an agreement to be inferred from conduct, then (plainly) evidence of that conduct is relevant. If the contract is party in writing and party oral or party to be derived from conduct, then evidence as to conduct (including subsequent conduct) is relevant to the part of the contract which is not in writing. Further, if the contract was originally expressed in writing but it is contended that the written agreement was alter, varied or superseded, whether orally or by a course of dealing, then evidence as to conduct subsequent to the written agreement is relevant. ...
>
> [93] Subject to the above matters, it remains the law that the court may not have regard to the subsequent conduct of the parties to a written agreement as a suggested aid to the interpretation of that agreement ...'

164. Contrary to Mr Smith's evidence that certain aspects of the 'behaviour' of the contractual parties in reality departed from the contractual intentions, thereby consigned parts of the 2005 Contract 'to the drawer' to be ignored, we find that the express terms of the contracts gave rise to mutual understanding and provided the framework for the parties to carry out their respective obligations. From the scope of the services to be covered by the contracts (brunch, evening meals, Zeste, satellite units, functions and weddings), to the costing aspects of the contracts, from the delivery of the supplies from CPU food, to buffet platter, to foodstuffs from wholesalers, to the ancillary services rendered in ledger accounting and health and safety compliance, we observe close resemblance between the contractual intentions and the realisation of those intentions in practice. There was no incongruity between the terms of the contract and the conduct of the parties in any material sense to render the contracts a sham as Mr Simpson proposed.

165. We find therefore that the contracts, far from being a sham in the sense of a purely artificial arrangement, reflected the economic and commercial realities of the transactions between OGC and UOA. We find that the normal expectation that a contract would satisfy the requirements of legal certainty for the parties concerned was met. The fact that the 2005 Contract was renewed in 2009, and extended by a further seven months when it ended in February 2012, was a testimony of the parties having satisfaction that the contracts in question had met their respective requirements for legal certainty. To that end, the VAT treatment of the transactions in the present case is to be based upon an analysis of the economic reality of the transactions within the context of the contracts, not outside the contracts as Mr Simpson invited us to do.

166. Mr Smith spoke of the tendering process prior to the award of the 2005 Contract to OGC. The contracts were at the initiative of UOA; the terms were set by UOA for OGC's agreement. It is consistent to view UOA as the dominant party in these contracts, and the supplies for VAT purposes are accordingly analysed.

167. The supplementary schedules to the 2009 Contract stated the actual food costs invoiced to UOA in 2007-08 by OGC, where: (i) CPU costs at £135,243.99, (ii) Functions at £114,349.07, and (iii) Procurement at £804,674.78. These categories of food costs provide the convenient headings to analyse the actual supplies to UOA under each category.

Whether food supplied in the course of catering

The CPU Food Costs

168. The central component in the supplies required by UOA was the CPU facility to produce cook chill food to industry standards at a cost commensurate with in-house production. The preamble to the 2005 Contract made that clear: 'Olive Garden is capable of providing those services currently provided by the Client's CPU and is willing to do so on the terms and conditions set out herein'.

169. The main supply of the cook chill food was for the evening meals at the halls of residence, and also at the Hub by the time the 2009 Contract was drafted. The supply of very limited choices of cook chill food (soups and chilli fillings for baked potatoes) at the satellite units was marginal to the main supply.

170. The mere supply of cook chill food would fall within the meaning of a supply of food that requires 'significant further preparation by the customer'; hence not catering, and preparation is taken to include 'reheating pre-cooked food' as defined under Notice 709/1. If OGC's supply can be characterised as the mere supply of cook chill food produced at its CPU and delivery of the chill food to UOA, then that supply would fall outside the scope of catering.

171. Arguably, it was possible for UOA to employ its own staff in the regeneration process for the evening meals served at the halls of residence and the Hub, just as it continued to be done by UOA staff at the satellite units even after the contract was entered. Being the dominant party, it would have been possible for UOA to cut out OGC's involvement after taking delivery of the cook chill food. For example, it would have been possible for UOA to retain the two chef/cooks for regenerating the CPU food and cooking the side dishes for evening meals (instead of transferring them over to OGC under TUPE). But that was not what happened in reality.

172. While Mr Smith's evidence strove to establish that the involvement of OGC staff in regeneration was a mere coincidence on the staffing level, we consider the economic reality of involving OGC staff in the regeneration as integral to the supply of the cook chill food.

173. In our judgment, the economic reality was that UOA contracted with OGC to 'take ownership' of the cook chill food from production all the way to the food being made ready for consumption. The Quarterly Review of 29 September 2009 made this objective amply clear when it was noted that the Hall Managers had raised a 'key area of concern' that OGC chefs on halls of residence duty 'did not take ownership of the

food they were producing'; checklists were then implemented for sign-off by the Duty Manager to be returned to the CPU for review.

174. The food quality was clearly important, and was a term singled out in the quarterly review. To deliver food quality, training courses were run for 'all university based chefs' and focused on 'consistency, flavour and the regeneration of dishes'. It is obvious that the supply of the CPU food could not have been severed from the labour element, as the quality of the food was inextricably linked with the labour input under the auspices of OGC.

175. There was no ambiguity that the regeneration process itself was seen by OGC as fundamental to food quality control. If the regeneration of the food was done by UOA staff who did not produce the food, and if the overall quality of the food was substandard, there could be no clear demarcation as to whether it was the production at the CPU that was below par, or the regeneration of the food that was the issue.

176. Quality was one essential criterion of the supply; the other criterion must be timeliness. The halls of residence would have designated hours for the service of dinner, and the regenerated food had to be made ready by a certain time, every day of the week during term. The timing aspect of the delivery of regenerated food had to be another aspect of taking ownership.

177. Apart from delivery in terms of quality and timeliness, there was the safety aspect that Clause 11 of the 2005 Contract extensively covered. The insurance policy was for no less than £5 million in respect of indemnity under Clause 12, to cover 'liability to third parties for personal injury, including food poisoning'. While the option was open to UOA to cut out OGC in the regeneration process, the economic and commercial reality made that an unattractive and infeasible option.

178. In a scenario where UOA staff had regenerated the cook chill food produced by OGC and it resulted in food poisoning at a hall of residence, it would be difficult to fix the liability on either party, as the poisoning could have been due to the sourcing of ingredients, the cooking or the chilling process, or to the regeneration procedure. In our view, it was not only practical, but critical for UOA to be able to hold OGC accountable for the cook chill food, from the sourcing of the raw ingredients to the production at Olive Garden's CPU, through to the regeneration of the food at UOA's kitchens to be served for consumption.

179. It was for the same reason that OGC staff was held responsible for making sure that the cleanliness of the kitchen areas on UOA premises was the responsibility of OGC staff, since cleanliness is an integral part of health and safety in food production. We note specifically that the clearing and cleaning in the dining areas on the premises were done by UOA employees, but that '[t]he cleaning of the kitchen area used for reheating/re-gen and preparation of foods on University premises' was singled out as OGC's responsibility (see §91 'Scope of service' under point 5 in the 2009 Contract).

180. For that matter, OGC was also responsible for carrying out quarterly HSEQ audits at its CPU and at UOA's facilities for regeneration for compliance assurance

purposes. The insurance cover and the indemnity clause meant that these ancillary services, from daily cleanliness of the kitchen areas, to the HSEQ audits, were integrated into the supplies by OGC in the course of supplying food to UOA.

181. We reject the appellant's submissions that the CPU food costs represented stand-alone zero-rated supply of food, and that the labour costs in regeneration were merely incidental to the main supply of the cook chill food. The commercial and economic reality was that the regeneration service was an integral part of the supply of the cook chill food, to be taken together as a single supply in the course of catering.

182. We accept, as Mr Smith stated, that there was no involvement by OGC in healthy eating campaigns or promotions, but the absence of input in these areas does not detract from our main finding that the regeneration of the cook chill food by OGC staff was an integral part of the supply of the cook chill food. It has been also asserted that the invoicing arrangement was indicative of the supplies of food and labour being separate supplies, but we conclude that nothing turns on the invoicing arrangement in determining the economic and commercial reality of the supply.

183. As Lord Reed in *WHA Ltd* said at [26]:

> '... decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another.'

If the regeneration of the cook chill food had been carried out by UOA in-house staff instead of OGC staff, then the supply of cook chill food, of itself, would not have been a supply in the course of catering. It would have been the 'small modification of the facts' that led to a different conclusion. However, the commercial and economic reality required that OGC staff carried out the regeneration of the cook chill food, and that is the crucial factor which turned the supply of the CPU food into a supply in the course of catering.

184. We conclude that the supply of the CPU food cannot be separated from the supply of labour in the regeneration process as the appellant seeks to argue. The crucial fact that OGC staff were engaged in the process of regeneration of the cook chill food produced by the same company turned OGC's supply of the CPU food into 'hot food' as characterised under Notes (3B) to Schedule 8 of VATA, and as the 'delivery of cooked ready-to-eat food or meals' stated under 2.1 of Notice 7090/1.

185. Furthermore, we consider the package of the services to 'fill the gaps' (to use Mr Smith's phrase) as envisaged by UOA consisted of: (i) the production of the cook chill food at Olive Garden's CPU, (ii) the regeneration of the CPU food at UOA's premises ready for consumption, and (iii) ancillary and management services in relation to cleanliness and HSEQ audits for food safety. These components were to be taken together as a single composite supply for VAT purposes.

Food Costs for Functions and Zeste

186. The heading in the supplementary schedules to the 2009 Contract was 'Food Costs for Functions', which we take it to include Events, Conference and Weddings. While it is not clear if the cost heading for 'Functions' also included the food costs in relation to supplies at the Zeste restaurant, our view is that the food supplies at the restaurant were commercial in nature, and the VAT treatment for food supplies at Zeste was no different from Functions and Events.

187. The food costs for Functions did not form part of the contract value as evidenced by the schedules to the 2009 Contract. Parties were agreed that these occasions for catering supplies were to be designed and arranged as demands arose and not to be guaranteed in advance; there was a profit element to be agreed per 2005 Contract, which was then set at 20% on 'all recoverable costs' in the 2009 Contract.

188. In our judgment, the food supplied in connection with an occasion or event or at a restaurant is a supply 'in the course of catering', and that would have been the case even when the supply was made, from production to consumption, by UOA in-house staff. We cannot see any difference in the nature of the food supply in connection with functions and at Zeste after contracting with OGC to take the supply out of catering.

189. In the appellant's VAT repayment claim, it listed items such as 'Food Costs for The Hub and Zeste', or 'Uni Food for Functions', or 'Food supplied to Zeste by CPU'. The total output VAT sought to be repaid on food costs was £23,175.87.

190. It is plain that the supplies by OGC under this heading were made in the course of catering. The first two bullet points of what constitutes 'catering' under Notice 709/1 refer to supplies made in restaurants, and catering for events and functions. We cannot distinguish the food supplies made by OGC in these commercial contexts from a standard catering supply delivered by a contract caterer to take these supplies out of the scope for catering as prescribed by the Notice 709/1.

191. The appellant has not advanced specific arguments against the standard treatment of the food costs supplied at functions, events or restaurants as coming under catering and subject to VAT at the standard-rate.

192. The appellant's principal argument has been to separate the food so supplied at Functions and Zeste from the labour costs in connection with these supplies. We cannot find any satisfactory construction to separate the labour and the food supplies rendered at Functions, Events and Zeste. As Mr Smith said, the cooking standard for food served at Zeste needed to be higher and a qualified chef was required to deliver. The Quarterly Review referred to buffet foods not meeting the expected standards and the issue was addressed by OGC. For the same reasons as respects 'taking ownership' of the CPU foods by ensuring quality and consistency and standards, the sourcing of raw ingredients at Functions and Zeste was done by OGC, cooked by OGC staff, and the cleanliness of the related kitchen areas was also the responsibility of OGC. The supply of labour was integral to the supply of the food at Functions and Zeste, just as it was with the CPU foods.

193. The only distinction worth noting is the end consumers between the two categories of food supplies: (a) supplies delivered at the halls of residence (possibly also at the Hub if users were restricted to students), and (b) supplies at Functions and Zeste were not exclusive to students. For the avoidance of doubt, in either category we find that the food supplies were made in the course of catering. However, where the end consumers were UOA students to whom the food supplies could be classified as being made in the course of UOA making a supply of education, it is potentially arguable that the catering supplies delivered by a contractor in the capacity of an agent of the education provider could be exempt from VAT, provided that the catering contractor is also an eligible body. This point is further discussed later in the decision.

194. We conclude that the food supplies made by OGC to UOA were made in the course of catering, whether it was at the halls of residence, the Hub, or at Functions and Zeste. The labour costs therefore could not be separated from the food costs in what we have found to be a single, composite supply of catering services.

195. We confirm therefore the respondents' decision in refusing the s 80 VATA claim for output VAT on food costs of 23,175.87, and on labour costs of £38,484.56. The claim for the catering staff wages concession is addressed later in our decision.

Whether food supplied under the wholesale arrangement a separate supply

196. Clause 10 of the 2005 Contract covered policies and legislation, and under clause 10.3.6 (at §77), it was clear that OGC was to undertake and complete a 'purchasing tender process and evaluation and valuation for all food provisions', and the aims of the exercise were stated as 'maximising volume purchasing power' and 'securing overall savings' to UOA.

197. The contract was signed in February 2005 and clauses would have been in discussion for some time before its execution. There is no doubt that the management of UOA had contemplated switching to a new arrangement for food procurement as part of the package in contracting with a caterer.

198. This was in stark contrast to what Mr Smith told the Tribunal, which was to say that UOA was caught unawares by the fallout with the consortiums. The departure from the consortiums appeared to have been anticipated, if not planned. The new catering contractor was tasked to tender, to evaluate the best offers for all food provisions on behalf of UOA 'in the first quarter of 2005', with the view that the switch over could take place later in 2005. That was the economic reality. Far from it being the case that UOA was thrown out of the consortiums, it would seem that the University had actively managed, engineered, and contracted in advance for a new arrangement to meet its procurement requirements by autumn of 2005.

199. We find therefore that the procurement component of the contracts was not incidental to the main catering contract as Mr Smith tried to suggest. We find as a fact that it constituted a core component of the offer of the contract to OGC in 2005, which OGC executed to UOA's satisfaction right through the duration of the 2005 and 2009 Contracts. That being the case, it is submitted by the respondents that the

food supplies under the wholesale arrangement therefore formed part of the single supply of the catering contract and hence, subject to VAT at the standard rate.

200. The real point of disagreement in the present case is not dissimilar to that in *Compass* and the guidance given by Mummery LJ in *Compass* in a situation where a certain supply is made in the context of an overall contract is at [45]:

> 'The real point of disagreement is the impact of the terms of the overall contract "pursuant to which the supplies of food are made." It is difficult to give a more precise answer than that it depends on all the other circumstances.'

201. To address 'all the other circumstances', we ask the following questions in turn:

(1) Was the food supplied under the wholesale arrangement subsumed under the catering contract between OGC and UOA?

(2) Was the food supplied under the wholesale arrangement capable of being characterised as supplied in the course of catering?

202. The first question is to look at the contractual context in which the procurement supplies were made. The contract heading for procurement came with its administration costs in the form of wages for a full-time purchase ledger assistant and a part-time sales ledger clerk (8 hours a week). The Quarterly Review mentioned the introduction of the 'Full Range Purchasing Group' resulting in joint benefits. Mr Bruce in his undated letter to Campus Services cited the figure of saving being 'over £35,000 from our purchasing initiative on behalf of the University'. Procurement supplies represented £804,674 in value, compared to £135,244 for CPU food costs, and £114,349 for functions. All these indicators point towards the prominent role of procurement in construing the parties' intentions and contractual undertakings.

203. We accept Mr Smith's evidence that UOA did the procurement ordering; carried out stock control; took delivery direct from suppliers; checked the suppliers' invoices before authorising OGC for payment; and that UOA's authorisation in turn allowed OGC to recharge UOA for the supplies.

204. In terms of contractual capacity under the wholesale arrangement, we conclude that the food supplies (albeit with orders placed direct by UOA) were made by the wholesalers to Olive Garden, and then Olive Garden made identical supplies to UOA.

205. We conclude that the procurement agreement was a core part of the contract with OGC. However, for the following reasons we do not accept the respondents' submissions that the food supplies under the procurement agreement was subsumed under the catering contract.

(1) The procurement agreement was not incidental to the supply of catering services; the intention was there right from the beginning for such an agreement to come into place in addition to the supply of catering services.

(2) In the procurement agreement, OGC acted as the principal and UOA was the agent. In the supply of catering services, the roles were reversed with UOA being the principal and OGC being the agent (see also discussion below).

(3) The 2009 Contract value of £463,258 was itself an indicator that the contract value was referential to the CPU supplies for food and labour (see §92), with management fee being just under £40,000 and profit margin at £52,500.

(4) The procurement agreement gave rise to £804,674 being invoiced in 2007-08, and significantly exceeded the contract value for catering services. The quantum of that supply was of a magnitude that it was neither incidental nor ancillary to the supply of catering services.

(5) The procurement food costs did not form part of the contract value for OGC. There was no reason to do so since OGC made no direct profit via mark up on the food items supplied under the procurement agreement; OGC merely 're-supplied at cost on paper' to UOA what the wholesalers had supplied.

206. It is the respondents' position that the economic reality was that OGC would not have supplied the procurement food costs had it not been in the course of catering. We do not doubt that that the procurement agreement was an integral part in the offer of the contract by UOA. But that fact, of its own, did not preclude the food supplies made under the procurement agreement to be a separate supply from the catering components in the contract. The economic and commercial reality behind the procurement agreement was to maximise for *both* OGC and UOA their respective purchasing power by combining their volumes of purchase, thereby enhancing their collective power for procuring better terms from wholesalers.

207. The service provided by OGC to UOA under the procurement agreement was management and administrative in nature. The service provided by OGC to UOA consisted of the tendering of contracts and the negotiation of prices with a range of wholesalers, of being the front-end contractor with the wholesalers so that UOA could benefit from the terms of agreement as a secondary user of OGC's wholesalers. The service also included the provision of a full-time and a part-time ledger assistants to deal with UOA purchase orders and re-charging the food orders at cost to UOA. For the administrative services rendered in connection with the procurement agreement, OGC charged specifically the time of the ledger clerks, which was subject to VAT. At a general level, as Mr Simpson submitted, the appellant also 'charged a management fee and a fixed profit contribution covering all the supplies made by the appellant'.

208. For all these reasons, we conclude that the procurement food costs constituted a separate supply of service by OGC, separate by its size and was not subsumed under catering. We now turn to the second issue as regards the nature of the food supplied under the procurement agreement to determine its VAT treatment.

209. Food supplied in the course of catering is 'characterised by a supply involving a significant element of service' (para 2.1 of Notice 709/1). In our view, the food items supplied under the procurement agreement were distinguishable from the food supplied under the catering contract where preparation and service had been added. The food items had changed legal title under the wholesale arrangement, but Olive Garden had not, in any way, added an element of service to the items so supplied.

210. The facts in the present case have parallels with those in *Compass*, where the VAT and Duties Tribunal findings, as paraphrased by Mummery LJ, include:

> '[29] ... the relevant sales were of sandwiches and similar items packaged in precisely the same way as they are presented in high street shops and that Compass provided no element of service to distinguish the supplies made by Compass from those made by high street sandwich shops.
>
> [30] ... it is not sufficient, if a supply is to be regarded as one made in the course of catering, merely to supply food. The customer must receive "something else" together with the food. That might take various forms, such as an event of which the supply of food is part, or the service of presenting the food or of being supplied with some form of packaging including the supply of food, or some other element of service.'

211. As the customer of OGC in the wholesale arrangement, what UOA received was the food purchases that it would have received if UOA had contracted directly with the wholesalers. The critical fact is that UOA did not receive 'something else' from OGC together with the food. By that 'something else', it had to be additional service done to the food items so supplied. It is not to say that UOA did not receive some form of service from OGC in the wholesale arrangement, but that service was not performed to the food items so procured by UOA.

212. We find as a fact that OGC as a supplier to UOA under the wholesale arrangement supplied no more than the same food the wholesalers had supplied to OGC. The 'something else' was absent from the food so supplied by OGC to render procurement food costs as food supplied in the course of catering. Without more, the food items from the wholesalers supplied by OGC to UOA were merely food within the scope of Schedule 8 to VATA.

213. A parallel can also be drawn with Mummery LJ's conclusions in *Compass*:

> '[48] In this context it should be borne in mind that the VAT in question is paid by the individuals to whom the supplies of sandwiches are made. In my view, it would be surprising if their ability to pay VAT was dictated by, or even much affected by, the overall LST/Compass/BBC catering contracts, especially when the individuals concerned can easily obtain zero rated supplies of very similar sandwiches ... from other nearby retail outlets, ...
>
> [49] I cannot think of a satisfactory reason why the liability of individuals to pay VAT should turn on whether the particular supply is from an outlet which is subject to an overall contract for the supply of catering series to another party. ... It makes little sense that they should be made liable to pay VAT in the one case, but not in the other.'

214. Mummery LJ's conclusions are in effect applying the EU principle of fiscal neutrality. Although neither party has made any submission on the application of this EU principle to the VAT treatment of the food supplied under the wholesale arrangement, we consider the principle of fiscal neutrality as equally applicable here.

215. The end consumers of the food purchased under the wholesale arrangement were the individuals that would have bought a bottled drink, a packet of crisps, a

snack bar from various vending outlets on UOA premises. Their liability to pay VAT should not be affected by the overall contract between OGC and UOA. The categories of food purchased through the wholesale arrangement included pre-packaged snacks and sandwiches, fresh fruit and vegetables, dairy, meats, frozen food, beverages and condiments and confectionery. Applying the principle of fiscal neutrality, where food items were eligible for supply at the zero-rate from the wholesalers to OGC, the items continued to be eligible for supply at the zero-rate by Olive Garden to UOA, and from UOA to the end consumers.

216. It follows that the VAT assessment in the sum of £171,951 to charge VAT at the standard-rate on food supplied under the wholesale arrangement cannot stand.

Whether the catering staff wages concession applied

217. The series of internal manuals published by HMRC in April 2016 (updated in July 2016) represent the memorandum of understanding on VAT practice that has been agreed between HMRC and the Contract Caterers Forum of the British Hospitality Association. The manuals are intended to guide decision makers within HMRC on the VAT treatment for supplies made in the contract catering industry.

218. While noting that these manuals post-date the relevant periods to which the VAT assessment and claim related, there has been no change in the law, and the guidance serves to systematise the approach that HMRC are likely to adopt.

219. The details of the catering staff wages concession are provided by manual VTAXPER64200, under the title: 'Catering contractors operating as an agent in non-commercial establishments', and the introduction states as follows:

> 'Some clients wish to maintain control over the catering facility, without necessarily being involved in the day-to-day operation. As a result a catering contractor may be appointed to provide the catering on behalf of the client.
>
> In such circumstances it is common for the agreement or invitation to tender to talk of the client "inviting the contractor on to the premises", or asking the contractor to "manage and administer the facilities" on their behalf. ...'

220. From the title and the introduction, it seems that there are two prerequisites before the concession can become relevant. First, the catering contractor is acting as an agent to the principal. Secondly, the catering supply is made to a non-commercial establishment.

221. Apart from the two prerequisites, the manual sets out the conditions for that need to be met in applying the catering staff wages concession:

> 'Contractors acting as agent of the client may use their own staff, in which case the set fee charged to the client will often by divided into staff wages and a management charge. Provided the contractor pays the wages of its own staff who are employed solely to serve that particular client and clearly identifies their wages in profit and loss accounts

> and/or invoices to the client, the staff wages element may, under the terms of the "catering staff wages concession", be charged to the client without the addition of VAT. ... This is a specific concession which applies only to catering contractors, and coverage only extends to restaurants, canteens, and similar dining outlets. Other activities, such as bars and house-keeping duties, do not qualify.'

222. The appellant's submission on the catering staff wages concession remains an assertion without being substantiating by relevant evidence to establish that the two prerequisites and the various conditions were met in this case. Furthermore, the operative words pertaining to OGC's staff members being 'employed s*olely*' to serve UOA, and that the concession '*only* extends to restaurants, canteens, and similar dining outlets' need to be interpreted and defined in assessing any evidence.

223. It seems to us whether the concession applied to OGC's supply of labour needs to be evidenced against an interpretation of the pre-requisites and the conditions. On the most basic level, the supply of labour needs to be made to a 'non-commercial establishment'. The appellant's claim includes 'Function Labour Charges', which were plainly supplies made in a commercial context and would not meet the prerequisite of a supply made to a 'non-commercial establishment'. The appellant's claim also includes CPU Labour Costs, which we understand to be the costs for the chefs and cooks working on site of the CPU at Olive Garden's premises. From the manual, it seems to us that the concession applies only to staff serving on the principal's premises, and does not extend to chefs cooking in catering contractor's premises. Location apart, it seems that the concession may also apply only to *serving* staff and not necessarily extend to staff doing the cooking.

224. Not only is the claim unsubstantiated by evidence, it seems to us that there is a fundamental flaw in the appellant's argument. The prerequisite for the concession to apply is that the labour costs are incurred in the context of a catering contract. The premise upon which the appellant stakes its case is to say that there was *no* catering contract; that the supply by OGC was one of food separate from its supply of labour. If there was no catering contract as the appellant sought to argue, then there could be no catering staff wages concession for the labour supply either. The appellant's case for a claim of the concession is simply incoherent.

225. Finally, even if there had been relevant evidence and cogent arguments supporting the claim, the Tribunal has no jurisdiction over a matter that falls firmly within the ambit of HMRC's discretionary powers. The staff wages concession is referenced to HMRC's manuals. It is well established that HMRC manuals have no force of law; the application of catering staff wages concession is by HMRC's discretion and is not a matter legislated by the statute with a right of appeal to the Tribunal. In other words, since there is no statutory basis for the claim of the catering staff wages concession, the Tribunal can make no determination in this respect, notwithstanding our finding that a catering contract between OGC and UOA existed.

Issues pertaining to agency capacity

226. Contractual relationship analysis referential to principal and agent capacity features prominently in HMRC's manuals VTAXPER64200, 64250, and 64300. Despite making a claim for the catering staff wages concession under manual 64200, the appellant's case has been run without any reference to the agent capacity of OGC. As related earlier, the appellant could not have run the agency argument since its case is predicated on there being no catering contract in the first place.

227. We have pointed out the inherent contradictions in making the wages concession claim in the context of arguing for separating the supply of food from labour. Nevertheless, having found that OGC supplied catering services to UOA in relation to all its food supplies outside the wholesale arrangement, we make some observations of the potential relevance of agency capacity in determining the VAT treatment as respects some of the catering supplies made by OGC to UOA.

228. The manual VTAXPER64300 sets out the general principles for determining the VAT treatments of supplies made pursuant to a catering contract, which in turn depend crucially in some situations on the capacity in which the caterer supplies its service, whether as principal or agent in the agreement. Of relevance to the present case are the following statements:

> (1) In general, it has been established practice that agency contracts are most often used in the education, health and financial sectors.
>
> (2) Under agency contracts for the provision of catering it is accepted that:
>
> - The client makes a taxable supply of catering to the consumer, or the catering is subsumed within an overall exempt supply eg of education;
> - VAT is not charged to the client on wages of the catering staff employed at the unit;
> - VAT is charged on any management fee plus taxable stock and other services;
> - Schools and hospitals may only exempt supplies which are closely related to the overall provision of education and health care respectively.
>
> (3) This contributes to fair competition with in-house providers, and the contract catering industry acknowledges the value of that.

229. As respects the contract for the supply of catering services, UOA was the principal and OGC was the agent by reference to the control exercised over menu specifications, over pricing, over the premises in which catering was carried out. The 2005 Contract contained the preamble that the terms were set by UOA, and the 2009 Contract was a document produced by UOA, and indicative of its status as the principal in the catering contract.

230. The catering contract between UOA and OGC would appear to be an agency contract with OGC acting as the agent. To that extent, the cook chill food produced by OGC's CPU and regenerated by its staff at UOA's halls of residence was potentially a

supply of food in the course of catering that can be subsumed within the overall exempt supply of education by UOA.

231. The relevance of exemption is necessarily restricted to those catering provisions to UOA students that can be defined as being 'subsumed within an overall exempt supply' of education. The catering supplies at events and functions and Zeste, for example, would fall outside this restricted category.

232. This interpretation of subsuming an agency contract for the restricted catering provisions to UOA students at the halls of residence under the exempt supply of education provided by UOA would seem to be in line with the principles set out in HMRC's manual. The legal basis for such an interpretation rests on the EU principle of fiscal neutrality by making the supplies by a contract caterer (in terms of costs) comparable with an in-house provider, and is referred to in the manual as contributing to 'fair competition' with in-house providers.

233. The respondents' supplemental submissions have made reference to the point of 'education exemption' at paragraph 14:

> 'Educational establishments, that hold eligible body status for the purpose of education exemption may, under VATA 1994, Schedule 9 Group 6 Item 4, also treat other closely related supplies they make to their qualifying students (eg catering) as exempt. This does not apply if the catering is supplied by another entity, unless that entity is also eligible (ie non profit-making) body. It is accepted that the Appellant is not an eligible body.'

234. The statutory reference to the agent being an eligible body is under VATA 1994 Schedule 9 Group 6 Item 4 (b): 'where the supply is to the eligible body making the principal supply, it is made by another eligible body'. However, it should be noted that the above submission by HMRC was not made in respect of the catering provisions at halls of residence, but in response to the Tribunal's invitation for submissions on agency capacity of the parties as respects the wholesale arrangement.

235. The guidance in the manual 64300 in relation to the agent adopting the exempt supply status of the principal therefore needs to be read in conjunction with Schedule 9 Group 6 provisions. While it is potentially arguable that the exempt status of UOA as the principal in the catering contract could have conferred its exempt status as an education provider on the catering supplies made by OGC to its students, this argument fails at the hurdle of OGC not being an eligible body.

236. HMRC have submitted that the supplies made under the wholesale arrangement were equally debarred from adopting the exempt status of UOA by virtue of OGC not being an eligible body. For clarification, we draw the distinction that in the wholesale arrangement, OGC was acting as the principal and not as an agent. The dual capacity of a contractor being an agent and a principal is not uncommon and is related in the manual 64300. Overall, OGC fitted into the category of contractors described under paragraph 6 of the manual:

> ‘2 (ii) contracts with the client to act as both an agent for the ultimate supply of the prepared meals, snacks etc to the consumer on behalf of the client, and a principal in buying from wholesalers and selling to the client all the food and drink stocks.’

237. It is not incompatible therefore for OGC to act as agent in the catering supplies, and as principal in the wholesale supplies. This is indeed a factor we have taken into account in distinguishing the food supplied under the wholesale arrangement from other supplies rendered by OGC within the same framework contract. Given that OGC was the principal in the wholesale arrangement, it is inappropriate to analyse the supplies under that arrangement with reference to Schedule 9 Group 6 provisions. For reasons we have set out, our determination of the VAT treatment of OGC’s supplies under the wholesale arrangement is not reliant on the exempt status of UOA as an education provider.

Decision

238. The VAT assessment of £171,951 raised under s 73 of VATA is cancelled; this part of the appeal is allowed.

239. The VAT repayment claim in the sum of £61,663 is refused; this part of the appeal is dismissed.

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

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2018