[2020] UKFTT 499 (TC)

VAT - Article 9a Council Implementing Regulation (EU) No. 282/2011 - Application for reference to CJEU under art 267 TFEU – Validity of European Commission Implementing Regulation - test to be applied – Order for referral – Interpretation of Council Implementing Regulation – test to be applied – application for reference refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/02481

BETWEEN

FENIX INTERNATIONAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

The hearing took place on 22 October 2020. The hearing was in public using the Tribunal video platform. A face to face hearing was not held because of the difficulties caused by Covid-19.

Having heard Valentina Sloane, QC and Max Schofield of Counsel, instructed by BDO LLP, for the Appellant

Andrew Macnab of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HMRC

DECISION

INTRODUCTION

1. This was a preliminary hearing to consider three applications made by the appellant.

2. The first application was to extend the time to lodge an appeal against the respondents' ("**HMRC's**") Notice of VAT assessments dated 22 April 2020.

3. The second application ("**the Application**") is for the Tribunal to make a reference to the Court of Justice of the European Union ("**CJEU**") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("**TFEU**") on the validity and interpretation of Article 9a of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 ("**the 2011 IR**") as amended by Article 1(1)(c) of Council Implementing Regulation (EU) No. 1042/2013 of 7 October 2013 (**"the 2013 IR**") (together "**Article 9a**").

4. The third application was for all three applications to be heard as a matter of urgency given the imminence of the UK's departure from the EU. This is an expedited hearing so the third application is no longer relevant.

The first application

5. It is not disputed that the appeal was lodged out of time but the appeal was lodged within the three month extension provided for by HMRC in response to the Covid-19 pandemic and HMRC do not oppose the application. In those circumstances, having had due regard to section 83G Value Added Tax Act 1994 ("**VATA**"), *Martland v HMRC*[1] and Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("**the Rules**") I extend the time for lodging the appeal against the Notice of VAT assessment dated 22 April 2020.

The Application

6. The sole question for this Tribunal is whether, in all the circumstances, it is appropriate to make a reference to the CJEU requesting it to make a preliminary ruling pursuant to Article 267 TFEU on the validity and/or interpretation of Article 9(a).

7. In the appellant's Skeleton Argument the appellant proposed two questions for referral, one of which dealt with validity and the second with interpretation in the event that Article 9a were to be found to be valid.

Background

8. On 22 April 2020, HMRC sent the appellant assessments for VAT due for the periods from 07/17 to 01/20 in the sum of £8,222,566. On 15 July 2020, HMRC issued a further assessment for VAT due for the period 04/20 in the sum of £3,015,912.

9. HMRC's view was, and is, that the legal basis for the assessments was that the appellant should be deemed to be acting in its own name by virtue of the legislation at Section 47(4) and (5) VATA which brings into UK law the EU provisions in Article 9a.

10. On 27 July 2020, the appellant filed an appeal disputing the legal basis for the assessments and also the quantum.

[1] [2018] UKUT 178 (TCC)

11. The argument on the legal basis for the assessments was that Article 9a is invalid and does not apply; further, or alternatively, the appellant falls outside of and/or rebuts the presumption in Article 9a.

12. The current status of this appeal is that HMRC have not yet served the Statement of Case, the requirement to do so having been "suspended until further order" by the Tribunal's Directions dated 27 August 2020.

13. I had a Hearing Bundle and a Supplemental Bundle extending to a total of 689 pages. The Joint Authorities Bundles extended to 1049 pages. To the extent that I was referred to the Authorities they are referenced herein. I also had the Application, HMRC's precursor outline response and their Notice of Objection ("**the Objection**") and both parties' extensive Skeleton Arguments.

14. HMRC argue that the Application falls into two discrete parts, namely validity and interpretation. The appellant argues that the validity of Article 9a is inextricably intertwined with the interpretation of its provisions.

The FTT's jurisdiction for making a preliminary reference

15. HMRC accurately stated that the initial threshold is that to be found in Article 267 TFEU, namely whether the Tribunal considers that a decision on the validity (and/or interpretation) of Article 9a is "necessary to enable it to give judgment".

16. Article 267 of the TFEU states:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
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> […]
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

17. There is no remedy under domestic law in terms of validity because in *R (on the application of International Air Transport Association) v Department for Transport*[2] the CJEU stated:-

> "27. It is settled case-law that national courts do not have the power to declare acts of the Community institutions invalid …
>
> 30….where such a court considers that one or more arguments for invalidity … are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary hearing of the act's validity."

That settled case law includes, for example, *Foto-Frost v Hauptzollamt Lübeck-Ost*[3] at paragraph 20 which states that national courts have no jurisdiction themselves to declare that acts of EU institutions are invalid.

18. The situation will change after IP Completion Day (23:00 GMT on 31 December 2020)[4].

[2] Case C-344/04
[3] C-314/85 at [20]

19. The system of preliminary references established by the EU has put in place a set of remedies and procedures designed to ensure judicial review of the legality of acts of the institutions and ensure respect for the right to effective judicial protection.[5]

20. The FTT's jurisdiction to make a reference to the CJEU remains as set out and circumscribed in the CJEU's "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings" ("**the CJEU Recommendations**").[6] Those will be well known to readers of this decision but a key point, at paragraph 7, is that:

> "When it has doubts about the validity of such an act, a court or tribunal of a Member State must therefore refer the matter to the Court, stating the reasons why it has such doubts."

Accordingly if I have any doubts about the validity of Article 9a then I must refer the matter.

21. As far as questions of interpretation are concerned, the Tribunal has discretion as to whether or not to refer and, if referring then, as to when to do so.

22. If this Tribunal does decide to refer any question(s), then given the UK's exit from the EU, any Order for reference would have to be registered at the CJEU registry before IP Completion Day.

23. In *R (on the application of Telefonica and Others) v Secretary of State for Business, Enterprise and Regulatory Reform*[7] ("**Telefonica**"), Mr Justice Mitting set out clearly the law in the context of challenging the validity of EU Regulations. At paragraph 3, as Ms Sloane pointed out, he stated very clearly that if a challenge was unfounded then there could be no reference but if it was arguable then it must be referred. At paragraph 4 he put it succinctly:

> "There is no doubt that it [the validity] has a significant direct and indirect affect (sic) on the business activities of the claimants. If satisfied that the challenge to its validity is reasonably arguable or, put negatively, not unfounded, I should refer the issue….".

24. At paragraph 5 he set out the facts found in very short compass. It is clear from the decision that he did not hear full argument and at paragraphs 10-12 he also set out the submissions for the parties in abbreviated form.

25. At paragraph 14 he stated: "The arguments of Mr Turner [Secretary of State] and of Mr Fordham are formidable arguments which may eventually prevail but they do not in my judgment achieve a **knock out blow** against the claimant's case." (My emphasis.)

26. At paragraph 15, he made the following points, which resonate with this case, namely that the economic importance of the case to the claimants and to consumers generally was a relevant factor in making a referral as was the fact that it was a question of Community law that had not hitherto been directly addressed by the Court.

27. The appellant argued that the threshold is simply that the argument is not unfounded, or is well founded or leads to doubts. The fact that there may be strong arguments to the contrary is not enough as those would have to deliver a knock out blow against the appellant's argument.

28. As can be seen from paragraph 121 below, HMRC reserved their position in regard to their argument that the relevant standard of review when looking to refer is that there is a *manifest error*. However, given that it is referred to in the case law which was cited to me and reference was made thereto in HMRC's Skeleton Argument, it is appropriate that I

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[4] Section 6(1)(b) EUWA 2018 read with Section 26(1) EUWAA 2020
[5] Unión de Pequeños Agricultores C-50/00 P at [38]-[41]
[6] 2019/C 380/01
[7] [2007] EWHC 2420 (Admin)

consider the matter. HMRC had relied on *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others*[8] where at paragraph 34 (admittedly in a very different context) the court stated:

> "34. According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts of the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion …".

29. HMRC went on to argue that *RPO*[9] suggests that the same intensity of review is applicable to tax measures adopted by the EU legislature and relied on the Court at paragraph 54 where it stated:

> "54. In that respect, it is understood that, when the EU legislature adopts a tax measure, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should in that context, be accorded a broad discretion, so that judicial review of compliance with the conditions set out in the previous paragraph of this judgment must be limited to review as to manifest error …".

30. The appellant correctly points out that neither case related to implementing acts but rather that the former looked at decisions of national authorities and the latter at choices made by the EU legislature rather than the Commission or Council.

31. *Telefonica* has been referred to in some recent FTT cases which are not binding but are of interest and with which I agree. In *Amoena (UK) Ltd v HMRC*[10] ("**Amoena**") Judge Thomas stated in his conclusion that:

> "32. There is, I agree with the appellant, a low threshold to surmount to show that an argument is well founded. This follows from *Telefonica*. In my judgment the appellant's argument on manifest error is well founded and surmounts that threshold. In particular *Goldstar* and *France*, cases on the CN and CIRs, are powerful support for the view that it is clearly arguable that the Commission, in adopting the opinion of the CCC, or the CCC itself went beyond the limits of their role in interpreting the CN. It is certainly also arguable that they didn't, as the [HMRC] have demonstrated. But it is not my task to decide who is right.
>
> 33. I also agree, but with somewhat less conviction, that the appellant's point on sincere co-operation is arguable. If left to decide this issue on its merits I would be inclined to prefer HMRC's arguments, but that is by no means to say that the appellant's point is fanciful, and of course there would be much fuller argument in that event".

I agree with Judge Thomas that it is not my task to decide which of the parties' arguments is correct. Regardless of the strength of HMRC's arguments it follows from *Telefonica* that I shall have to refer if I find that the appellant's argument is well founded or not unfounded. I observe that in *Amoena* the appellant did argue that there was manifest error.

32. However, in *Pfizer Consumer Healthcare Limited v HMRC*[11] ("**Pfizer**") at paragraph 27 Judge Poole, with whom I agree for the reasons set out in that Decision, he having reviewed the case law on manifest error, stated:

> "…We note also that, from the more recent decisions of the CJEU about the validity of implementing regulations to which Ms Sloane referred us (see [19] above), the question of 'manifestness' no longer

[8] C-120/97
[9] C-390/15
[10] [2018] UKFTT 505 (TC)
[11] [2019] UKFTT 93

> appears to feature as an explicit consideration in its deliberations. To the extent this represents a shift of emphasis in the CJEU's view of the relevant law, it is a shift which ought to be taken into account when considering the UK courts' and tribunals' previous decisions on the requirements to be met before ordering a reference to the CJEU."

33. At paragraph 30, Judge Poole considered that the threshold test was that argued by Ms Sloane which was that it was strongly arguable that the contested Regulation was invalid (paragraph 12). At paragraph 32, Judge Poole found that the test was whether it was reasonably arguable that the contested regulation was invalid and that it was. He found that manifest error did not have to be established albeit he considered that it was reasonably arguable that it was manifestly so. Like Judge Poole, for the reasons set out below, if I am wrong in my views on manifest error, it does not affect my decision.

34. Lastly, Judge Brown in *JCM Europe (UK) Ltd v HMRC*[12] reviewed a number of authorities including *Pfizer* and pointed out the finding that manifest error was not a requisite (paragraph 45(3)). She decided that the relevant test was whether it was strongly arguable that the disputed regulation was invalid (paragraph 46). Her conclusion (at paragraph 70) was that the contention that the regulation was invalid was not unfounded and reasonably arguable and that, referencing *Pfizer,* it was strongly arguable.

35. In summary, I find that the threshold test on validity is that argued by the appellant and that if I find in favour of the appellant then the appeal must be stayed and the reference made.

36. The appellant recognises that it is unusual to seek a reference at such a very early stage in the proceedings but relies on Mr Justice Davis in *R(ABNA Ltd) v Secretary of State for Health*[13] where he stated:

> "Only the European Court can definitively rule on the validity of a Council directive: see case C-314/85 Foto-Frost 1987 ECR 4199. Rule 68.2 of the Civil Procedure Rules empowers me to direct a reference 'at any stage of the proceedings'. Although it may be a little unusual to direct a reference at so early a stage as an application for permission in a judicial review claim, in the particular circumstances of this case there is no reason for deferring a reference and every reason for ordering a reference here and now."

37. HMRC accept that the cases of *Capernwray Missionary Fellowship of Torchbearers v RCC*[14] ("**Capernwray**") and *Coal Staff Superannuation Scheme Trustees Ltd v RCC*[15] ("**Coal**") are not applicable to a reference on validity grounds but correctly argue that they are in regard to interpretation. The appellant relies on paragraph 5 of *Capernwray* where Judge Berner said:

> "It may be possible, in an appropriate case, for the court or tribunal to determine at an early stage, and before the substantive case is considered, that the circumstances are such that a question should be referred to the CJEU"

arguing that this is such a case particularly given the imminence of IP Completion Day.

38. I agree with HMRC that IP Completion Day is irrelevant to the question of whether the FTT should refer as Mrs Justice Rose (as she then was) pointed out at paragraphs 26 to 30 of *Coal*.

39. In that case she also cited with approval Judge Berner in *Capernwray* at paragraph 15 where, in relation to a discretionary decision to refer, he stated "…for a reference to be made at this stage [before the substantive hearing] I need to be satisfied that this tribunal *will not* be able to resolve the

[12] [2019] UKFTT 0547 (TC)
[13] [2003] EWHC 2420 (Admin) at [20]
[14] 2015 UKUT 368 (TCC)
[15] 2017 UKUT 137 (TCC)

relevant issues with complete confidence." That is the question that I must address in relation to interpretation.

The Facts

40. In their Skeleton Argument, HMRC acknowledge that the extent to which facts need to be found before the FTT can/should make a reference will, or may, depend on whether the question concerns the validity of the measure (where a basic outline may be appropriate) or its interpretation in the context of the facts of the case (where they argue that detailed findings of fact are appropriate).

41. The Application states that "The relevant facts are short and not in dispute." However, HMRC do not agree. Both in the Objection and in their Skeleton Argument, HMRC stated that they were prepared to accept a brief outline of the facts as a neutral statement without prejudice to either party's arguments as to the legal consequences.

42. The appellant's Skeleton Argument responded to that by expanding on what they described as the essential facts that were undisputed by adding references to the appellant's Terms of Service which had been lodged in evidence by HMRC and also HMRC's statements in the Objection.

43. HMRC argue that the appellant's choice of quotations from the materials that HMRC had obtained from public sources and annexed to the Objection was selective. They were unsupported by any witness evidence and in terms of Section 83 VATA the burden of proof lies with the appellant.

44. In their Skeleton Argument, HMRC having stated that "It is not appropriate or possible to resolve issues of fact at the hearing" set out, on a without prejudice basis in relation to the burden of proof, their current "understanding" of the factual position.

45. In oral argument, Mr Macnab said that not even an outline of the facts had been agreed. He stated that the propositions that they had outlined in the Objection and the Skeleton Argument were simply a neutral statement without prejudice to legal argument.

46. In *Edwards v HMRC*[16] the Upper Tribunal stated at paragraph 49 *et seq* that they had been referred to *Qureshi v HMRC*[17].

> "50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> 'In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.'
>
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
>
> '14. ….
>
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
>
> 16. …."'.

[16] [2019] UKUT 131 (TCC)
[17] [2018] UKFTT 0115 (TC),

47. I have read all of the documentation which has been furnished to me and find the following facts. These are neither intended to be comprehensive nor exhaustive but rather are intended to "set the scene" and provide a relevant factual framework for the Application.

48. The appellant operates a pay-to-view social media website known as OnlyFans at www.onlyfans.com ("**the Platform**") and has sole and exclusive control of the Platform.

49. The Platform is offered to "Users" from around the world. These Users are broken down into "Creators" and "Fans". Creators have profiles and upload and post content such as photographs and videos to their respective profiles. They can also stream live video webcam and send private messages to Fans who subscribe to them. The Creator determines the monthly subscription fee, although the appellant sets the minimum amount both for subscriptions and for tips.

50. Fans can access uploaded content by making *ad hoc* payments or paying a monthly subscription in respect of each Creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay tips or donations known as "Fundraising" for which no content is supplied in return.

51. Therefore, Creators charge and earn money from content and Fans pay money for content.

52. The appellant provides not only the Platform but also the facility whereby Fans make payments and Creators receive payment. The appellant is responsible for collecting and distributing the payments, utilising a third-party payment service provider. The appellant charges the Creator 20% for services by way of a deduction ("**the Charge**") from the consideration paid by the Fan; if a Creator charges a notional £100 for a subscription, the appellant receives £100 from the Fan, retains £20 and pays the Creator £80.

53. Both payments from a Fan and payments to a Creator will appear on the relevant User's bank statement as a payment made to or from the appellant.

54. At all material times, the appellant charged and accounted for VAT at a rate of 20% on the Charge.

55. Use of the Platform has at all material times been governed by the appellant's Terms of Service ("**T&Cs**"). There are various versions of the T&Cs over the period covered by the assessment. There are also various versions of the Privacy Policy.

56. HMRC have not made any decision as to, as a matter of English law, the capacity in which the appellant acted in respect of the Platform. Their decision to assess the appellant to VAT under section 73 VATA was taken by reference to Article 9a alone.

57. On 19 March 2020, HMRC wrote to the appellant's agent stating:

> "… but for the sake of clarity, the question of whether Fenix are acting as agent or principal under normal agency rules is not relevant to the dispute; Article 9a of the Implementing Regulations essentially deems taxable people making qualifying supplies to fall within Article 28 of the Principal VAT Directive, regardless of what their position would be normally."

58. It was conceded by Mr Macnab that Article 28 *per se* had not been considered in relation to the Application. Only Article 9a has been considered to date.

Article 28 and Article 9a

59. Both parties agree that the starting point is Article 113 TFEU which empowers the Council, with the approval of the EU Parliament and the Economic and Social Committee, after consultation, to harmonise VAT; hence the Principal VAT Directive[18] ("**PVD**").

60. Article 397 of the PVD permits implementing measures in relation to the PVD:-

> "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

and, as can be seen from paragraph 2 above, we are here concerned with the 2011 IR as amended by the 2013 IR, together Article 9a, which implements Article 28 of the PVD.

61. Article 28 reads:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

62. On 18 December 2012, the European Commission ("**the Commission**") published the final version of their proposal for a Council Regulation amending the 2011 IR[19].

63. Under the heading Impact assessment it stated:

> "The measures concerned are of a purely technical nature and are merely setting out the application of provisions already adopted by the Council. Hence there is no need for an impact assessment."

64. It then explained the proposal for Article 9a in the following terms:-

> "Article 9a clarifies the treatment of broadcasting and electronic services when supplied through the telecommunications network or via an interface or a portal such as a marketplace for applications belonging to an intermediary (or a third party intervening in the supply). The presumption is that in supplying those services the intermediary acts on behalf of the supplier but in its own name. Unless stated otherwise, the intermediary will be deemed to have received and supplied those services. Where supply is made to a non-taxable person, the intermediary then has to account for VAT in the Member State of its customer."

65. It then sets out the proposed Implementing Regulation in respect of Article 9a which reads as follows:

> *"Article 9a*
> Where the broadcasting or electronic services of a service provider are supplied through the telecommunications network, an interface or a portal such as a marketplace for applications belonging to an intermediary or a third party intervening in the supply, the intermediary or the third party shall, for the application of Article 28 of Directive 2006/112/EC, be presumed to be acting in their own name but on behalf of the service provider unless, in relation to the final consumer, the service provider is explicitly indicated as the supplier."

66. It concluded stating that it would apply from 1 January 2015. The Non-Legislative Procedure states, without explanation, that it was completed as Adopted act: 32013R1042 having been adopted by the Council on 7 October 2013.

67. The text of Article 9a in the 2013 IR is radically different from the proposal and far more extensive. It reads as follows:-

> "1. For the application of Article 28 of Directive 2006/122/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.

[18] 2006/112/EC
[19] 2012/0354 (NLE)

In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

(a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;

(b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.

2. Paragraph 1 shall also apply where telephone services provided through the internet, including voice over internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.

3. This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the internet, including voice over internal Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services."

68. On 3 April 2014, in the period between adoption by the Council and coming into force on 1 January 2015 of the 2013 IR, the Commission's Directorate-General Taxation and Customs Union ("**DG TCU**") published Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 [the 2013 IR].

69. In the preamble the Explanatory Notes state clearly:-

"The Explanatory Notes aim at providing a better understanding of the EU VAT Legislation. They were prepared by the Commission Services and as indicated in the disclaimer on the first page they are not legally binding.

These Explanatory Notes are not exhaustive …".

70. On that first page it goes on to state:

"**These explanatory notes are not legally binding.** The notes are practical and informal guidance about how EU law is to be applied on the basis of views of DG TAXUD... They do not represent the views of the Commission nor is the Commission bound by any of the views expressed therein …

The explanatory notes do not replace the VAT Committee guidelines which have their own role in the legislative process. Furthermore the VAT Committee may in future issue guidelines in this field.

Over time, it is expected that case law, VAT Committee guidelines and practice will complement the views given in the notes…

The notes are not comprehensive:…

They are a work in progress:…".

71. The Explanatory notes are described as clarification of the rules on place of supply and that is set out at some length in section 3. Paragraph 3.4.1 of the Explanatory notes explains as follows:-

"The first subparagraph of Article 9a(1) introduces the rebuttable presumption that a taxable person who takes part in the supply of electronic or internet telephone services is acting in his own name but on behalf of the provider of these services. This provision reflects the legal situation laid down in Article 28 of the VAT Directive when the following three requirements are fulfilled: (i) participation of a taxable person in the supply of service, (ii) acting in his known name, (iii) but on behalf of another person."

72. Paragraph 3.4.2 points out that the conditions for rebuttal are listed at the end of the first subparagraph of Article 9a.

73. Paragraph 3.4.6 describes when the presumption cannot be rebutted. In particular it states that if any one of these three conditions is met the presumption cannot be rebutted. The conditions are:

"Authorisation of the charge to the customer

The phrase 'authorises the charge to the customer' is not the same as taking payment or collecting payment. It refers to the situation where the taxable person can influence whether, at what time, or under which preconditions the customer pays. A taxable person authorises payment when he decides that the customer's account, credit or bank card, or similar, can be debited/charged as payment for the service. In practice, the person who authorises payment is likely to be the person who controls the technical platform (e.g. app store, portal) over which the services are offered or provided.

Authorisation of the delivery of the services

The phrase 'authorises … the delivery of the services' is a broader concept than making the delivery. It refers to the situation where the taxable person can influence whether, at what time, or under which preconditions the delivery is made. A taxable person authorises the delivery when he either sends approval to commence the delivery of the service, delivers the service himself or instructs a third party to make the delivery. In practice, the person who authorises delivery is likely to be the person who controls the technical platform (e.g. app store, portal) over which the services are provided.

Setting the general terms and conditions of the supply

In the context of application of Article 9a the phrase 'the general terms and conditions of the supply' covers any general terms and conditions that are set by a taxable person taking part in the supply and with which a final customer has to agree before purchasing the service. For example it includes the terms and conditions set by market places and similar platforms requiring users to agree to general terms and conditions for using that website or platform (that could be to maintain an account) as well as the general terms and conditions (including license agreement) which the final customer has to agree to before receiving any access to a (*sic*) app or content."

74. On 9 October 2015, the DG TCU published the VAT Committee Working Paper No 885 ("**the Working Paper**") entitled "Matters concerning the implementation of recently adopted EU VAT provisions" referencing Article 9a and the subject matter was "Harmonised application of the presumption". The paper was produced to seek representations "…on the position presented by Commission Services with a view to establishing VAT Committee guidelines". It made it clear that the position had moved on from that articulated in the Explanatory notes and that:

"It is important to recognise that in the interest of simplicity the presumption from Article 9a of the VAT Implementing Regulation should be applied as widely as possible and as a rule be valid for all taxable persons taking part in the supply. Therefore in practice only suppliers of payment services are excluded from the application of the presumption. The presumption from Article 9a of the VAT Implementing Regulation should normally apply to all suppliers participating in the supply chain with the exception only of those who fulfil all the conditions to rebut the presumption introduced by that provision and those who only provide for processing of payments".

75. On 1 December 2016, in the Commission's Proposal for a Council Directive[20] in relation to Modernising VAT for cross-border B2C e-commerce, ("**the Proposal**") the Commission referenced what were described as the "2015 changes to the place of supply rules"[21] and went on to say under the headings "Subsidiarity" and "Proportionality" that the Proposal was required to amend the VAT Directive[22]. Under the heading Choice of the instrument it stated "The proposal requires amending four legal acts.". Those acts included the 2011 IR.

[20] COM (2016) 757 (final)
[21] Page 2
[22] Page 3

76. The Commission went on to state[23] that it had used the analysis carried out by Deloitte for the Study "VAT aspects of cross-border e-commerce – Options for modernisation"[24] ("**the Deloitte Report**"). The Commission also referenced two meetings with experts, the main purpose of one of which was "… to assess the 2015 place of supply rules …". Under the heading "Regulatory fitness and simplification" the Commission commented that the Proposal is "… an assessment of the implementation of the 2015 changes to the place of supply rules for electronic services and the implementation of the MOSS system for these services … The assessment of the MOSS has also been very useful in ensuring that the new initiative recognises the positives and addresses any shortcomings of the 2015 changes."

77. Article 1, as proposed, read:-

> "*Article 1*
>
> *Amendments to Directive 2006/112/EC with effect from 1 January 2018*
>
> With effect from 1 January 2018, Directive 2006/112/EC is amended as follows:-
>
> (1) Article 28 is replaced by the following:
>
> *Article 28*
>
> Where a taxable person acting in his own name but on behalf of another person takes part in the supply of services, including cases where a telecommunications network, an interface or a portal is used for that purpose, he shall be deemed to have received and supplied those services himself."

78. Under the heading Detailed explanation of the specific provisions of the proposal the following explanation was given:

> "Article 1 – amendments to the VAT Directive – provisions with effect from 1 January 2018
>
> Point 1 of Article 1 proposes a clarification to Article 28 of the VAT Directive, reflecting discussions in the VAT Committee. The words 'including cases where a telecommunications network, an interface or a portal is used for that purpose' are added to the provision, so as to clarify that this Article also applies where an electronic service is provided through an intermediary or a third party who is acting in his own name but on behalf of another person and who is using an electronic interface to make the supply."

79. During the legislative consultation, the Committee on Economic and Monetary affairs of the European Parliament reported on the Proposal on 16 October 2017[25]:

> "The rapporteur welcomes the amendment of article 28 proposed by the Commission which provides that online platforms are held liable for the collection of VAT in supplies of services …".[26]

80. It is not known why the Proposal was not implemented in the final Council Directive 2017/2455 of 5 December 2017.

Overview of the arguments in the Application

81. The concept of a "taxable person acting in his own name" applies to undisclosed agents.

82. Article 28 does not apply to a situation where an agent acts on behalf of a disclosed principal and there is therefore a single supply between the agent's principal and the other party. Where there is an undisclosed agent (or the principal is not disclosed) Article 28 creates a "legal fiction" of two identical supplies of services provided consecutively and it does that by inserting that agent into the supply chain (ie the agent is treated as both receiving and making the supply in question).

[23] Page 5
[24] Final Report – Lot 3 November 2016
[25] A8-0307/2017
[26] Page 15/18

83. It is not in dispute that Article 9a concerns the application of Article 28 of the PVD and applies specifically to electronically supplied services supplied through an interface or portal. It creates a rebuttable presumption that the interface or portal is acting in its own name.

84. Article 9a changes the application of Article 28 in two fundamental respects:

(a) Firstly, it introduces a presumption that a digital platform which takes part in a supply of certain electronic services is acting in its own name and on behalf of the provider. In other words it is deemed to have purchased and onward supplied those services itself, and consequently has to account for VAT. That presumption is rebuttable if certain conditions are fulfilled, such as where the agent's principal is explicitly indicated as the supplier by the agent and that is reflected in the contractual arrangements between the parties.

(b) Secondly, even if the identity of an agent's principal is disclosed it prevents the presumption from being rebutted where the digital platform:

(i) authorises the charge to the customer, or

(ii) authorises the delivery of the services, or

(iii) sets the general terms and conditions of the supply.

85. In summary, even where the fact of agency is clear and the identity of the principal is known, Article 9a provides that the agent is treated as making and receiving a supply. That fundamentally changes the approach to the liability of agents for their actions in the realm of VAT. It deprives parties of contractual autonomy and goes far further than Article 28.

86. This significant change to the liability of an agent amounts to amending and/or supplementing Article 28 by adding new rules. Article 9a goes far further than the implementation of Article 28 as permitted by Article 397. It is not simply clarification of Article 28. Article 9a amounts to a policy decision to shift both the liability and the burden of taxation to any internet platform since, whilst the presumption is technically rebuttable it is, in practice, almost impossible to rebut given the width of the provisions.

87. The words "sets the general terms and conditions of the supply" if interpreted, as HMRC have done by strict application of the wording in the Explanatory notes, means that all platforms for electronically supplied services fall within the scope of Article 28, irrespective of the contractual terms and the economic and commercial reality unless they have no terms and condition for the Platform. That is an extreme consequence.

88. There is uncertainty about Article 9a's legality and application across the EU and that militates against the principle of uniformity.

89. There have not been any previous CJEU judgments on Article 9a and the validity of the instrument is not so clear as to leave no scope for any reasonable doubt.

90. As far as authorising charges and delivery are concerned, the Explanatory notes are abnormally wide by using the word "influence" as an example of "authorise".

91. At its lowest, there is a reasonably arguable case that requires consideration by the CJEU.

Overview of HMRC's arguments

92. HMRC oppose the application in its entirety. The supplies made by the appellant are clearly covered by Article 9a. Both the interpretation and application of Article 9a are obvious.

93. The appellant's challenge to the validity of Article 9a does not meet the threshold test, however the test is formulated. It is not necessary for a reference in order to enable the FTT to give judgment.

94. The appellant's arguments are fanciful, unfounded and not reasonably arguable.

95. Article 28 is very wide in its terms.

96. Article 9a simply clarifies Article 28. It is not an amendment. It does not derogate from Article 28.

97. It would be unreasonable for the Tribunal to consider that the CJEU would effectively disregard section 3 of the Explanatory notes and decide that Article 9a was invalid.

98. If Article 9a is valid it is obvious that it applies to the appellant and its activities and the appellant cannot rebut the presumption introduced by Article 9a, regardless of any question of agency. That being the case the FTT could resolve the appeal without a reference on interpretation.

99. The relevant facts have not been agreed.

Discussion

100. The starting point is to look at Article 28 since Article 9a is meant to implement that. The only authority that was cited to me on Article 28 was *Belgium v Henfling & Others*[27] ("**Henfling**") where the Court considered Article 6(4) of the Sixth Directive, the predecessor provision for Article 28.

101. In the Application, the appellant argued the concept of a taxable person acting in his own name applies to undisclosed agents and that *Henfling* was authority for the proposition that Article 28 creates a legal fiction (see paragraph 82 above). I agree that it does explain the impact of Article 28 because paragraph 35 reads:

> "35. Accordingly, that provision creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom its acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purpose of VAT."

102. I will revert to the concept of undisclosed agency but I observe that paragraph 36 goes on to say:

> "36. …Article 6(4) of the Sixth Directive comes under Title V of that directive, headed 'Taxable transactions', and is couched in general terms, without containing restrictions as to its scope or its extent …"

so as can be seen, *Henfling* also supports HMRC's argument that Article 28 is couched in very wide terms.

103. As far as undisclosed agency is concerned, the appellant, *inter alia*, relies on the following excerpt from *De Voil*[28] and, of course, HMRC rightly state that that is simply a commentary. It reads:

[27] C-464/10

[28] De Voil Indirect Tax Service V3.221

> **"TREATMENT OF AGENTS ACTING IN THEIR OWN NAME (UNDISCLOSED AGENCY)**
> The expression 'agent who acts in his own name' was considered in the case of *Express Medicare v C & E Comrs*. Whilst the expression lacked precision, it clearly covered the situation where the third party does not know that the agent is acting for someone else and possibly also the situation where, although the fact of agency is apparent, the identity of the principal is not disclosed. Where, however, the identity of the principal is disclosed, the agent is not acting in his own name, but on behalf of named principals, with the effect that there is no deemed supply to and by the agent, but only a single supply between principals."

104. However, HMRC argue that *Henfling* makes it clear that Article 28 is not limited, as the appellants contend, to undisclosed agency and that the position described in paragraph 33 of *Henfling* is analogous to that in this appeal. That reads:-

> "33. Such involvement in his own name means that… a legal relationship is brought about not directly between the better and the undertaking on behalf of which the operator involved acts, but between that operator and the better, on the one hand, and between that operator and that undertaking, on the other."

105. Whilst I understand why Mr Macnab takes that stance, nevertheless I do not think that it is as clear as that. Firstly, paragraphs 40 and 42 read as follows:-

> "40. In the procedure referred to in Article 267 TFEU, it is for the national court hearing a dispute concerning the application of Article 6(4) of the Sixth Directive to inquire, having regard to all the details of the case, and in particular the nature of the contractual obligations of the trader concerned towards its customers, whether or not that condition is met (see, to that effect, in relation to Article 26 of the Sixth Directive, Case C-163/91 *Van Ginkel* [1992] ECR I-5723, paragraph 21, and Case C-200/04 *ISt* [2005] ECR I-8691, paragraphs 19 and 20.
>
> 42. As regards the activity of the "buralistes" at issue in the main proceedings, it must be noted that although the condition that the taxable person must act in his own name but on behalf of another, in Article 6(4) of the Sixth Directive, must be interpreted on the basis of the contractual relationship at issue, as follows from paragraph 40 of this judgment, the proper working of the common VAT system established by that directive none the less requires the referring court to check specifically so as to establish whether, in the light of all the facts in the case, those "buralistes" were in fact acting, when collecting bets, in their own name."

106. Although the factual matrix is set out in the judgment, paragraph 39 reads:

> "39. As regards the question whether the 'buralistes' concerned in the main proceedings act, in fact, when collecting bets, in their own name within the meaning of Article 6(4) of the Sixth Directive, a question raised by the Belgian Government, it must be noted that the question referred, which reproduces the wording of Article 6(4), is based on the premiss that those 'buralistes' fall within the scope of Article 6(4)."

It appears very likely that the meaning of "trading in his own name" was not canvassed or argued in those proceedings. I do not accept HMRC's argument.

107. Although *De Voil* is indeed a commentary and therefore only persuasive at best, I agree with the principles enunciated.

108. Lastly, in this context on *Henfling*, I agree with Ms Sloane that when the Court says at paragraph 43:

> " ….By contrast, the possible existence of a national provision on VAT extending the legal fiction under Article 6(4) of the Sixth Directive beyond the criteria laid down by that paragraph cannot be taken into consideration in determining whether or not the 'buralistes' acted in their own name."

that that implies that if a Member State cannot extend the fiction in Article 28 then nor can a Community institution.

109. In the Objection, HMRC argued that the appellant has cited no relevant judicial authority to support its case on the invalidity of Article 9a. However, interestingly, in their Skeleton Argument HMRC cited *FS v RS and JS*[29] ("**RS**") at paragraphs 1 and 2 in response to the appellant's reliance in its Skeleton Argument on a quotation from Megarry J which is repeated in *RS.* Whilst I agree with HMRC when they state that that quotation has no direct relevance to the CJEU, the reference to either the full quotation from RS or that quotation was not expanded upon in oral argument, so I can only assume that HMRC were relying on the final sentence in paragraph 1 of the whole quotation from *RS.* The whole quotation reads:

> "1. This is a most unusual case. Indeed, so far as I am aware, and the very experienced counsel who appear before me do not dispute this, the case is unprecedented. Certainly, the researches of counsel have identified no decision directly in point. The applicant's own description is that his applications are "novel". I suspect that the initial reaction of most experienced family lawyers would be a robust disbelief that there is even arguable substance to any of it.
>
> 2. The cynic will recall the words of Diplock LJ in *Robson and another v Hallett* [1967] 2 QB 939, 953:
>
> 'The points are so simple that the combined researches of counsel have not revealed any authority upon them. There is no authority because no one has thought it plausible up till now to question them.'
>
> But if at the end of the day the answer is clear, as in my judgment it is, the points are not so simple as one might at first suppose. Equally in point, is the observation of Thorpe LJ in *Moses-Taiga v Taiga*[2005] EWCA Civ 1013, [2006] 1 FLR 1074, para 21, that:
>
> 'The absence of … authority … only illustrates the tendency for propositions of universal acceptance to be difficult to support by reference to authority.
>
> But is the universal assumption correct? I leave the last word to Megarry J, who in *Hampstead & Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, 259, said with grim humour:
>
> 'It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is.'"

110. I take the view that both cases are authority only for the fact that if there is no authority and there is a new or novel point, then it is a matter for the Judge dealing with the issue to decide. It does not mean that the point is unarguable.

111. The appellant had argued both in the Application and their Skeleton Argument that the judgment in the Hamburg Tax court in *Finanzgericht Hamburg, Urteill vom 25.2.2020*[30] *(*"**FG Hamburg**") was relevant. In fact, Article 9a was not in force for the tax years being considered in that appeal but the German Court considered both it and the Explanatory notes on the basis that, at least in theory, they should have been "interpretative" of Article 28.

112. The appellant relied on paragraph 32 which read:

> "Art. 9a of Implementing Regulation (EU) No. 282/2011 did not apply and it was doubtful whether this provision was compatible with Art. 28 of Directive 206/112/EC. Implementing Regulation (EU) No. 282/2011, according to the express intention of the legislature was only intended to interpret the provisions of the … Directive, not to make new laws. The provision in Article 28 of Directive 206/112/EC however for a service commission, always required acting in one's own name, even if acting on another's account. This regulation did not contain any 'fiction'".

113. The appellant also relied on paragraph 70 of the decision which stated:

> "70. All in all, it can remain open whether Art. 9a of Implementing Regulation (EU) No. 282/2011, which took effect on 1.1.2015, can be invoked for an interpretation of Art. 28 of Directive 2006/112/EC

[29] [2020] EWFC 63

[30] 25.2.2020 – 6 K 111/18 dated 25 February 2020.

and §3 para.11 uStg and whether doubts exist concerning the compatibility of Art. 9a of Implementing Regulation (EU) No. 282/2011 with Art.28 of Directive 2006/112/EC …".

114. The decision is currently under appeal. However, the key point to be taken from this decision, if any point is to be taken from it beyond the fact that it was argued that Article 9a might be invalid, is the statement, with which I agree, at paragraph 22 which reads:-

> "Art. 9a of Implementing Regulation (EU) No. 282/2011 consists of interpretative provision on Art. 28 Directive 2006/112/EC … It could not alter the legal position based on the Directive, but rather only refines the same."

115. What then is the scope of implementing measures? Sadly, to an extent the parties disagreed about the legislative origins of, and basis for, Article 9a, with HMRC arguing that references by the appellant to Articles 290 and 291 TFEU were inappropriate on the basis that the recitals to the various directives and regulations contain no reference to Article 291 (or its predecessor provision).

116. Article 290 reads:

> "1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.
>
> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
>
> 2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
>
> (a) the European Parliament or the Council may decide to revoke the delegation;
>
> (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
>
> For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.
>
> 3. The adjective 'delegated' shall be inserted in the title of delegated acts."

117. Article 291 reads:

> "1. Member States shall adopt all measures of national law necessary to implement legally binding Union Acts.
>
> 2. Where uniform conditions for implementing legally binding Union Acts are needed, those Acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
>
> 3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of Regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
>
> 4. The word 'implementing' shall be inserted in the title of implementing Acts".

118. The appellant disagreed with HMRC and is clear that Article 291 is of relevance to all implementing acts. The appellant had relied *inter alia* on the views of the Commission's VAT Expert Group[31] ("**the VEG**") where it set out, in Annex 2 of a report of a sub group, its views on the "Relationship between the VAT Implementing Regulation and the CJEU's case

[31] 13th Meeting – 2 May 2016

law" and cited a quotation. I take the view that a more full context should be given and so I have added the words in italics which were not included in the quotation by the appellant.

> "Since December 2009, implementing measures based on Art.397 VAT Directive therefore must respect the limits of implementing powers of the Union institutions that are now specified in Art.291(2) TFEU, in contrast to the broader concept of delegated powers pursuant to Art.290(1) TFEU. Consequently, the Commission itself have acknowledged in 2011 that 'by its very nature, this [implementing] procedure is limited in scope and may not be used to amend the VAT Directive. Since no power has been delegated to the Commission [within the meaning of Art.290 TFEU], all substantive changes therefore need to go to the normal legislative procedure, involving unanimous adoption by the Council.'[32]
>
> […]
>
> "*In the light of the foregoing, it would appear to be reasonable to assume that an implementing act can substitute the case law of the Court by a distinct, authoritative interpretation of the Union legislation in issue, which subsequently becomes binding, in principle also upon the Court. However*, it is still for the Court to ensure that the provisions of the implementing act do not overstep the boundaries of rule interpretation and that they do not in reality attain the character of an amendment to the basic legislation, *which is prohibited under the new concept of implementing powers enshrined in Art 291(2) TFEU, read together with Art. 290(1) TFEU. The Court may and must therefore exercise judicial scrutiny as to whether the definitions and clarifications of the implementing act stay within a reasonable margin of interpretation of the corresponding legislative act.*"[33]

119. HMRC's response was that, at its highest, that statement is to the effect that "…any implementing regulation made pursuant to Article 397 PVD must, by analogy respect the limits of implementing powers of the Commission and the Council under Article 291(2) TFEU".

120. However, as Ms Sloane pointed out, I do not need to consider the legislative origin of the 2013 IR since HMRC had also responded to the appellant's Skeleton Argument where it was argued that, as the Advocate General had explained in *Commission v Parliament and the Council*[34] ("**CPC**") implementing measures are very limited in scope, in contrast to the wider discretionary remit of delegated legislation. The cited paragraphs of the Opinion are:

> 62. The delegation empowers the Commission to adopt provisions of that kind and therefore to act within certain margins of discretion which it does not have when acting in an implementing capacity. Accordingly, the difference of principle between the powers exercised by the Commission in the case of a delegation by legislative act (Article 290 TFEU) and the powers conferred on it in the case of implementation under Article 291(2) TFEU ultimately lies in the fact that delegation allows a measure of discretion which is not mirrored in the case of implementation. Essentially, the legislature delegates to the Commission the ability to decide issues that, in principle, it should itself have decided, whereas implementation under Article 291 TFEU operates in relation to provisions the content of which has, as regards the substance, been defined by the legislature.
>
> 63. Lastly, on account of that difference, Article 291(2) TFEU relates only to the exercise of implementing powers, it being common ground that these include only what is necessary for the specific application of a fully formed and defined measure. For its part, Article 290 TFEU provides that the objectives to be pursued by the delegation must be defined, as must its content and scope, which clearly indicates that the Commission is expected to do something more than merely implement a provision in which all these elements are given. In my view, this 'something more' entails some room for 'creativity' or 'trenchancy' in the rule-making domain that is not possible in the case of mere implementation".

The appellant had then gone on to state that the CJEU had considered the limits on implementing legislation in terms of Article 291 TFEU in *European Parliament v European*

[32] Ibid 35/46
[33] Ibid 37/46
[34] C-427/12

Commission[35] ("**EURES**") which at paragraph 39 referenced the decision in *CPC*.

121. HMRC have conceded that, for the purposes of determining the Application, that approach applied "…by analogy (and with necessary modifications)" to Article 397 PVD and the 2013 IR. They reserved their position as to whether *EURES* implicitly recognises a margin of discretion and that the relevant standard of review is that of manifest error. In oral argument Mr Macnab agreed that, for the purposes of determining the Application, the test was that articulated in *EURES*.

122. In *EURES* the Court found at paragraph 43:-

> "… it is important to note, first, that the implementing power conferred on the Commission is delimited by both Article 291(2) TFEU and … The Court has held that when an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States (judgment in *Commission v Parliament and Council*…)".

and at 44:-

> "44. Next, it is settled case-law that, within the framework of the Commission's implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that Act, provided that they are not contrary to it".

and at 45:-

> "Furthermore, it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may neither amend nor supplement the legislative Act, even as to its non-essential elements."

and at 46:-

> "46. Having regard to the foregoing, the Commission must be deemed to provide further detail in relation to the legislative act within the meaning of the case-law cited in paragraph 43 above, if the provisions of the implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act, and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it."

123. In summary, a provision purporting to implement a legislative act is lawful only if it meets the following three criteria:

(1) The contested provision must "comply with the essential general aims pursued by the legislative act" that it purports to implement.

(2) The contested provision must be "necessary or appropriate for the implementation" of the legislative act that it purports to implement.

(3) The contested provision "may neither amend nor supplement the legislative act, even as to its non-essential elements."

124. In essence the appellant argues that it is the wording in the final paragraph of Article 9a(1) which sets out the parameters of the presumption, which causes the 2013 IR to breach all of those criteria. In their view, that wording is a radical departure.

125. HMRC take the opposite view. HMRC also argue that the third criterion is reflected in recital (10) to Council Directive 2004/7/EC[36] which inserted Article 29a of the Sixth Directive, now Article 397 of the PFD, and which recites:

[35] C-65/13, 15 October 2014
[36] 20 January 2004

> "(10) However, the scope of each implementing measure should remain limited since, albeit designed to clarify a provision laid down in Directive 77/388/EEC, it could never derogate from such a provision."

That is not disputed.

126. It is not known why the original proposal for Article 9a in the 2013 IR was not progressed and the radically different current version was adopted. As can be seen from paragraph 63 above the original proposal was believed to be a purely technical measure setting out measures that had already been adopted and for that reason no impact assessment was completed.

127. The original version did introduce a presumption. However, as can be seen from the wording which is quoted at paragraph 65 above, that presumption applied "unless, in relation to the final consumer, the service provider is explicitly indicated as the supplier". That is consistent with the explanation in the proposal (quoted at paragraph 64 above) that the presumption would apply "Unless stated otherwise.".

128. Article 28 referred to a taxpayer acting in his own name but as the Working Paper makes explicit (paragraph 74 above) the introduction of the presumption in Article 9a meant that the presumption would as a rule "...be valid for all taxable persons…".

129. The Deloitte Report makes it clear that "The objective of article 9a to shift the liability for VAT to the intermediary appears to be desirable…there is a need for further clarification and a common and binding interpretation by Member States…" I note from the Explanatory notes and other documentation that that was indeed the objective.

130. I accept that there is a good argument that shifting liability is not merely a technical measure. It was also a change to the *status quo* which suggests that it is strongly arguable that it was amendment rather than simple clarification. I agree with the appellant that it is indeed a radical departure.

131. The latter part of the quotation from the Deloitte Report makes it explicit that not only is there a need for clarification but it points to the need for common and binding interpretation. I observed that in that context, it went on to point out that "…the explanatory notes offer a rather disputable interpretation".

132. I observe that paragraph 43 of *EURES* references paragraph 39 of *CPC* which reads:

> "39. By contrast, when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is **implemented under uniform** conditions in all Member States." (my emphasis).

133. I referred to Annex 2 of the VEG report at paragraph 118 above. Item 5 of that report makes it clear the objective of an Implementing Regulation is to ensure a more uniform application of the VAT system and that that Annex sets out analysis of the basis on which the realisation of that objective could be challenged.

134. The Deloitte Report makes it clear that in relation to the 2013 IR there has been far from uniform application, hence their recommendations which underpinned the Proposal.

135. HMRC argued that the Proposal for the amendment to Article 28 was simply a clarification and that that was clear from the detailed explanation which I have quoted at paragraph 78 above. By contrast the appellant's argument is that the Proposal was patently an amendment. Certainly the words "clarification" and "clarify" are used in the detailed explanation section of the Proposal but that has to be read in the context that it is made

abundantly clear that that clarification was to be done by way of amendment. In itself that alone suggests that there was some doubt.

136. HMRC argue that the fact that the proposed change was not included in the final Council Directive is because the most obvious reason for its non-inclusion was that the matter already fell within the scope of Article 28, and Article 28 had been clarified by Article 9a so further clarification by amendment was unnecessary. That may be right but there may be alternative arguments. I do not know. The issue for me is that I must refer to the CJEU if there is any doubt. The very fact that the Proposal reached the stage that it did and that the rapporteur agreed that the amendment was necessary (paragraph 79 above) confirms my view that there was doubt.

137. I have commented on *FG Hamburg* at paragraph 111 *et seq* above. Whilst it is interesting, it simply makes it clear that it is arguable that Article 9a might be invalid. It therefore supports the appellant's case that the argument is not unfounded and it might be strongly arguable. The appellant has listed a number of academic publications commenting on the possibility that Article 9a might not be compatible with Article 28[37]. I do not propose to rehearse their views here. Again they merely serve to indicate that the validity point may be arguable. HMRC argue in regard to both that none of these take matters further or are relevant Court decisions. True. However, they point to the arguability on validity.

138. In passing in that context, in fairness to HMRC, I observe that in her Opinion in *European Commission v United Kingdom*[38], Advocate General Kokott observed, in relation to the *Marks & Spencer* exception, that her view was shared by many. Her footnote stated "The Court has to date registered 142 academic publications which deal directly with the judgments mentioned." She was not upheld. That is not the point here, as I indicate at paragraph 31 above, my task is not to decide which party has advanced the stronger argument.

139. Lastly, on validity, the Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 TFEU[39] set the scene by stating that:

> "….Secondly, it should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale - the need for uniform conditions for implementation. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions."

140. It later stated:

> "The Commission believes that in order to determine whether a measure 'supplements' the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to 'supplement' the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures."

141. That is very clear language and raises some interesting points. The first is the comparison between delegated acts permitted under Article 290 TFEU which change the legal framework and where there is a margin of discretion and implementing acts under Article 291 TFEU which do not change the legal framework. That accords with the Advocate

[37] Dr Suse Martin former Presiding Judge at the Federal Fiscal Court, M Weidmann EC Tax Review 2015 at 113, M Testa's Master Thesis, Lund University 2017 and M Lang – Recent Developments in VAT 2016
[38] Case C-172/13 at paragraph 2
[39] COM (2009) 673 final, Brussels 9 December 2009

General's Opinion in *CPC* (see paragraph 120 above). It is clear that delegated acts allow for discretion and that is not mirrored for implementation.

142. The second and very important point is that I find that it is strongly arguable that the legal framework was changed, and significantly so, by the introduction of the presumption in the terms used in the final paragraph of Article 9a(1). By any standard that would be a manifest error in an implementing regulation. As can be seen at paragraphs 40 and 42 of *Henfling* (see paragraph 105 above) when looking at Article 28 the national court must look at the contractual relationships and all the details of the case, that is to say the economic and commercial realities with all that that entails. The presumption removes that.

143. As HMRC point out in the Objection, since the appealable decision is predicated entirely on Article 9a, it is "…unnecessary to spend time and costs undertaking the kind of exercise undertaken in e.g. *All Answers Ltd v RCC*"[40]. That case looked at the contractual terms first and then considered whether those terms reflected the commercial and economic reality. Whilst I understand that, given the approach on the presumption that HMRC have taken which is to adopt the provisions in the Explanatory notes set out at paragraph 73 above, I find HMRC's stance interesting. At paragraph 3.4.3 of the Explanatory notes, on which they rely, it states "To sum up, both facts and legal relations need to be taken into account in assessing whether a taxable person takes part in a supply."

144. I find that it is very strongly arguable that the introduction of the presumption in Article 9a is not a technical measure, it is a sea change.

Decision on Validity

145. Of course I have had due regard to the CJEU Recommendations. Firstly EU law most certainly applies to this appeal. Indeed HMRC concede that the appealable decision is predicated entirely on Article 9a. That being the case, it is necessary for me to refer a question on the validity of Article 9a to enable the Tribunal to give judgment in this matter. For the reasons given, I certainly entertain doubts as to the validity of Article 9a and therefore I must do so as soon as possible. The threshold is indeed low. Whilst it is entirely possible that HMRC are correct in stating that Article 9a simply clarifies Article 28, nevertheless in the words of Mr Justice Mitting, they have delivered no knock out blow to the arguments advanced by the appellant. The appellant's arguments are certainly not unfounded. Indeed, in regard to the introduction of the presumption it is strongly arguable that that is a manifest error.

146. The Tribunal therefore determines that it will make a reference to the CJEU to seek a preliminary ruling as to the validity of Article 9a.

Decision on Interpretation

147. The position is quite different in regard to interpretation. Whilst I understand the appellant's argument that if I refer on validity it would be convenient to do so on interpretation, that is certainly not the test and the imminent arrival of IP Completion Day is irrelevant.

148. I do not accept that the question of interpretation is so intertwined with validity that I must refer that issue also. I accept that there is an overlap since in part the Explanatory notes, in extending the concept of authorisation to influence, allegedly demonstrate the significance of the material change averred by the appellant. That may be true but it is not a reason to refer. The Explanatory notes are not binding.

[40] [2020]UKUT 0236 (TCC)

149. As I indicate at paragraph 39 above, I should only refer a question on interpretation if I am satisfied that the Tribunal will not be able to resolve the issues in this appeal with complete confidence. Firstly, it can be seen from the Deloitte Report and other documentation that there is a wide spectrum of views on the Explanatory notes. I am not aware of any case in the UK relating thereto. Other Member States have disregarded the Explanatory notes.

150. The Tribunal, like any other Court, once it finds the relevant facts, which it has not done as yet, would be completely free to decide what its views on interpretation might be. For the avoidance of doubt I do not consider that the very limited facts that I have found for the purposes of a reference on validity come anywhere close to the facts required for any other reference. In the absence of those facts and detailed argument thereon it would be wholly premature to refer at this juncture.

151. I therefore decline to exercise my discretion to refer on interpretation.

Order for reference

152. The parties have agreed a draft Order which appears to be satisfactory in form. Accordingly I hereby make the Order set out in the Appendix.

153. The parties were unable to agree the proposed question or the totality of the Schedule. I had previously intimated that if agreement could not be reached then I would decide the matter on the basis of the parties' submissions. The Schedule, including the question to be determined, is as set out in the Appendix.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 15 December 2020

Appendix

ORDER

Before the First-tier Tribunal (Tax Chamber)

UPON the Appellant's applications by Notice of Application dated 30 July 2020;

AND UPON hearing Leading and Junior Counsel for the Appellant and Counsel for the Respondents on 22/10/20;

AND UPON finding that in order to enable the First-tier Tribunal to give judgment in this case, it is necessary to resolve a question concerning the validity of an Instrument of European Union Legislation, it is appropriate to request the Court of Justice of the European Union ("CJEU") to give a preliminary ruling thereon;

IT IS ORDERED THAT:

1. The time for lodging the Appellant's appeal is extended;

2. The question set out in the attached Schedule, concerning the validity of European Union law, be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union and Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community;

3. All further proceedings in this appeal be stayed until after the Court of Justice of the European Union has given its ruling on the questions referred to it or until further Order;

4. The First-tier Tribunal (Tax Chamber) Registrar shall send a copy of this Order and the Schedule to the Registrar of the Court of Justice of the European Union forthwith.

ANNE SCOTT
JUDGE OF THE FIRST-TIER TAX TRIBUNAL

15 December 2020

SCHEDULE

REQUEST FOR A PRELIMINARY RULING UNDER ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION BY THE FIRST-TIER TRIBUNAL (TAX CHAMBER) OF THE UNITED KINGDOM

A. INTRODUCTION

1. By this reference for a preliminary ruling, the Tax Chamber of the First-tier Tribunal in the United Kingdom ("the UK Tax Tribunal") asks the Court of Justice to rule on the validity of Article 9a of Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011, as amended by Article 1(1)(c) of Council Implementing Regulation (EU) No. 1042/2013 of 7 October 2013, laying down implementing measures for Directive 2006/112/EC on the common system of value added tax ("Article 9a").

2. The question on validity concerns whether the scope of Article 9a goes beyond what is authorised by Article 397 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the VAT Directive"), which provides "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

3. The reference has been made in the context of an appeal brought by Fenix International Limited ("Fenix"), which is registered for the purposes of value added tax ("VAT") in the United Kingdom, against an assessment to VAT made by the Commissioners for Her Majesty's Revenue and Customs ("HMRC").

B. THE APPELLANT

4. The Appellant ("Fenix") operates a social media website known as OnlyFans at www.onlyfans.com ("the Platform") and has sole and exclusive control of the Platform.

C. THE RESPONDENTS

5. The Respondents ("HMRC") are responsible for the collection and management of VAT in the United Kingdom.

D. SUMMARY OF THE FACTS IN THE CASE

6. The Platform is offered to "Users" from around the world. These Users are divided into "Creators" and "Fans". Creators have profiles and upload and post content such as photographs and videos to their respective profiles. They can also stream live video webcam and send private messages to Fans who subscribe to them. The Creator determines the monthly subscription fee, although Fenix sets the minimum amount both for subscriptions and for tips.

7. Fans can access uploaded content by making *ad hoc* payments or paying a monthly subscription in respect of each Creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay tips or donations known as "Fundraising" for which no content is supplied in return.

8. Therefore, Creators charge and earn money from content and Fans pay money for content.

9. Fenix provides not only the Platform but also the facility whereby Fans make payments and Creators receive payment. Fenix is responsible for collecting and distributing the payments, utilising a third-party payment service provider. Fenix charges the Creator 20% for services by way of a deduction ("the Charge") from the consideration paid by the Fan; if a Creator charges a notional £100 for a subscription, Fenix receives £100 from the Fan, retains £20 and pays the Creator £80.

10. Both payments from a Fan and payments to a Creator will appear on the relevant User's bank statement as a payment made to or from Fenix.

11. At all material times, Fenix charged and accounted for VAT at a rate of 20% on the Charge.

12. Use of the Platform has at all material times been governed by Fenix's Terms of Service ("T&Cs"). There are various versions of the T&Cs over the period covered by the assessment. There are also various versions of the Privacy Policy.

13. On 22 April 2020, HMRC sent Fenix assessments for VAT due for the periods from 07/17 to 01/20 in the sum of £8,222,566. On 15 July 2020, HMRC issued a further assessment for VAT due for the period 04/20 in the sum of £3,015,912.

14. HMRC's view was, and is, that the legal basis for the assessments was that Fenix should be deemed to be acting in its own name by virtue of Article 9a.

15. On 27 July 2020, Fenix filed an appeal disputing the legal basis for the assessment and also the quantum.

16. The argument on the legal basis was that Article 9a is invalid and does not apply; further, or alternatively, Fenix falls outside of and/or rebuts the presumption in Article 9a.

17. HMRC have not made any decision as to, as a matter of English law, the capacity in which Fenix acted in respect of the Platform (ie whether as agent or as principal). Their decision to assess Fenix to VAT was taken by reference to Article 9a alone. HMRC have not considered the application of Article 28 of the VAT Directive ("Article 28") *per se*, without reference to Article 9a (including, specifically, the final paragraph of Article 9a(1)).

E. THE LEGAL FRAMEWORK

EU Legislation

18. Article 113 of the Treaty on the Functioning of the European Union ("TFEU"), formerly Article 93 of the Treaty Establishing the European Community ("TEC "), provides:

> "The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such

harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

19. Article 291 TFEU provides:

> "1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
>
> 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
>
> 3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
>
> 4. The word 'implementing' shall be inserted in the title of implementing acts."

20. Pursuant to Article 113 TFEU and its predecessors, the Council has adopted the various VAT Directives, including the VAT Directive (OJ L 347, 11.12.2006, p. 1).

21. Article 28 of the VAT Directive provides:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

22. Article 397 of the VAT Directive provides:

> "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

23. Article 397 of the VAT Directive is the successor to Article 29a of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p.1) (the "Sixth Directive"). Article 29a of the Sixth Directive was inserted by Article 1(2) of Council Directive 2004/7/EC of 20 January 2004 amending Directive 77/388/EEC concerning the common system of value added tax, as regards conferment of implementing powers and the procedure for adopting derogations (OJ L 27, 30.1.2004).

24. Pursuant to Article 397, the Council adopted Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (OJ L 77, 23.3.2011, p. 1).

25. Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 was amended by Article 1(1)(c) of Council Implementing Regulation (EU) No. 1042/2013 of 7 October

2013 amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services (OJ L 284, 26.10.2013, p. 1), which inserted Article 9a, which provides:

> "1. For the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.
>
> In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:
>
> (a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;
>
> (b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.
>
> For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.
>
> 2. Paragraph 1 shall also apply where telephone services provided through the internet, including voice over internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.
>
> 3. This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the internet, including voice over internet Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services."

United Kingdom legislation

26. At all times, Implementing Regulation 282/2011/EU was directly applicable in the United Kingdom (and throughout the Union). The questions referred by the UK Tax Tribunal concern only the validity of Article 9a.

F. THE DISPUTE IN THE MAIN PROCEEDINGS

Summary of Fenix's arguments

27. Article 9a changes the application of Article 28 in two fundamental respects, namely:

(a) Firstly, it introduces a presumption that a platform which takes part in a supply of certain electronic services is acting in its own name and on behalf of the provider. In other words, it is deemed to have purchased and onward-supplied those services itself, and consequently has to account for VAT. That presumption is rebuttable only if certain conditions are fulfilled, such as where the agent's principal is explicitly indicated as the supplier by the agent and that is reflected in the contractual arrangements between the parties.

(b) Secondly, even if the identity of an agent's principal is disclosed it prevents the presumption from being rebutted where the digital platform:

(i) authorises the charge to the customer, or

(ii) authorises the delivery of the services, or

(iii) sets the general terms and conditions of the supply.

28. In summary, even where the fact of agency is clear and the identity of the principal is known, Article 9a provides a new fiction that the agent is treated as making and receiving a supply. That fundamentally changes the approach to the liability of agents for their actions in the realm of VAT. It deprives parties of contractual autonomy and goes far further than Article 28.

29. This significant change to the liability of agents amounts to amending and/or supplementing Article 28 by adding new rules. Article 9a goes far further than the implementation of Article 28 as permitted by Article 397. It is not simply clarification of Article 28.

30. Article 9a amounts to a policy decision to shift both the liability and the burden of taxation to any internet platform since, whilst the presumption is technically rebuttable it is, in practice, almost impossible to rebut given the width of the provisions.

Summary of HMRC's arguments

31. Article 28 is in wide and general terms. Self-evidently, it has, and must be given, an independent meaning in EU law. Article 9a clarifies and/or provides "further detail" of that independent EU law meaning in the specific context of the application of Article 28 and provides further detail of - when a taxable person "*is acting in his own name but on behalf of another person*", when in that capacity the taxable person "*takes part in a supply of [the specified] services*" and, consequently, when the taxable person "*shall be deemed to have received and supplied those services himself*".

32. Article 9a simply clarifies Article 28. It is not an amendment. It does not derogate from Article 28.

33. If Article 9a is valid it is obvious that it applies to the appellant and its activities and the appellant cannot rebut the presumption introduced by Article 9a, regardless of any question of agency.

34. Article 9a

(i) complies with the essential general aims pursued by Article 28 and the VAT Directive as a whole; and

(ii) is necessary or appropriate for the implementation of Article 28 and the VAT Directive as a whole, without supplementing or amending it.

The Council must thus be deemed to have provided, by Article 9a, further detail in relation to Article 28 and the VAT Directive as a whole.

G. THE UK TAX TRIBUNAL'S REASONS FOR REFERRING A QUESTION TO THE COURT OF JUSTICE

35. The UK Tax Tribunal considers that a decision of the Court of Justice on the question below concerning the validity of Article 9a is necessary to enable it to give judgment. The UK Tax Tribunal has doubts about the validity of Article 9a and must therefore refer the matter to the Court of Justice. The UK Tax Tribunal's reasons why it has such doubts are set out in the following paragraphs.[1]

36. Article 9a is meant to implement Article 28 of the VAT Directive but it is strongly arguable that it goes beyond implementation.

37. As the Advocate General explained in C-427/12 *European Commission v European Parliament and the Council*, 19 December 2013, ECLI:EU:C:2013:871, ("CPC") implementing measures are very limited in scope, in contrast to the wider discretionary remit of delegated legislation.[2]

38. The CJEU considered the limits on implementing legislation in terms of Article 291 TFEU in C-65/13 *European Parliament v European Commission*, 15 October 2014, ECLI:EU:C:2014:2289, ("EURES"). In summary, a provision purporting to implement a legislative act is lawful only if it meets the following three criteria:

(1) The contested provision must "comply with the essential general aims pursued by the legislative act" that it purports to implement;

(2) The contested provision must be "necessary or appropriate for the implementation" of the legislative act that it purports to implement;

(3) The contested provision "may neither amend nor supplement the legislative act, even as to its non-essential elements."

[1] The UK Tax Tribunal has handed down a reasoned decision on Fenix's application, a copy of which is annexed to this Schedule and which is available at https://www.bailii.org/

[2] Paragraphs 62 and 63

39. The Commission's Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 TFEU stated:

> "….Secondly, it should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale - the need for uniform conditions for implementation. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions….
>
> The Commission believes that in order to determine whether a measure 'supplements' the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to 'supplement' the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures."[3]

40. That makes it clear that delegated acts permitted under Article 290 TFEU change the legal framework and there is a margin of discretion but implementing acts under Article 291 TFEU do not change the legal framework. That accords with the Advocate General's Opinion in *CPC* (see paragraph 37 above).

41. The Commission's Proposal for Article 9a stated that it was "…a purely technical measure… merely setting out the application of provisions already adopted…" and for that reason no impact assessment was completed.[4] The original version of Article 9a set out in the Proposal did introduce a presumption, however, that presumption applied "…unless, in relation to the final consumer, the service provider is explicitly indicated as the supplier".[5] That is consistent with the explanation in the Proposal that the presumption would apply "unless stated otherwise".[6]

42. The text of Article 9a, as enacted, is radically different and far more extensive than the text of the proposal. Article 28 refers to a taxpayer acting in his own name but as the Value Added Tax Committee Working Paper No. 885 makes explicit: the introduction of the presumption in Article 9a meant that the presumption should as a rule "...be valid for all taxable persons…".[7]

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[3] Communication from the Commission to the European Parliament and the Council on the Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, Brussels 9 December 2009, pages 3 & 4, (available here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0673:FIN:EN:PDF)

[4] Proposal for a Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services, COM(2012) 763 final, p3 (available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0763&from=EN)

[5] Ibid. p12

[6] Ibid. p5

[7] European Commission, Value Added Tax Committee Working Paper No. 885, Brussels, 9 October 2015, p.4/5 (available here: https://circabc.europa.eu/sd/a/ab683366-67b5-4fee-b0a8-9c3eab0e713d/885%20-%20VAT%202015%20-%20Harmonised%20application%20of%20the%20presumption.pdf)

43. The 2016 Deloitte Report, on which the Commission relied for the 2016 Commission Proposal to amend the VAT Directive[8] makes it clear that "The objective of article 9a to shift the liability for VAT to the intermediary appears to be desirable…there is a need for further clarification and a common and binding interpretation by Member States".[9]

44. There is a good argument that shifting liability is not merely a technical measure. It was also a change to the *status quo* which suggests that it is strongly arguable that it was amendment rather than simple clarification

45. Furthermore, although, the 2016 Commission Proposal did not ultimately lead to an amendment of Article 28, as proposed, nevertheless during the legislative consultation, the Committee on Economic and Monetary affairs of the European Parliament reported on the Proposal on 16 October 2017[10]:

> "The rapporteur welcomes the amendment of article 28 proposed by the Commission which provides that online platforms are held liable for the collection of VAT in supplies of services …".[11] (emphasis added)

46. Although it is not known why the 2016 Commission Proposal was not implemented the very fact that the Proposal reached the stage that it did and that the rapporteur agreed that the amendment was necessary supports the argument that there was doubt about the validity of Article 9a.

47. Lastly, in Case C-464/10 *État Belge v Pierre Henfling*, 14 July 2011, ECLI:EU:C:2011:489, ("Henfling") the Court of Justice stated that Article 6(4) of the Sixth Directive, the predecessor provision for Article 28:

> "…creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, firstly, received the services in question from the operator on behalf of whom its acts, who constitutes the principal, before providing, secondly, those services to the client himself. It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purpose of VAT."[12]

48. The Court went on to state that:

> "As regards the activity of the "buralistes" at issue in the main proceedings, it must be noted that although the condition that the taxable person must act in his own name but on behalf of another, in Article 6(4) of the Sixth Directive, **must be interpreted on the basis of the contractual relationship at issue,** as follows from paragraph 40 of this judgment, the proper working of the common VAT system established by that directive none the less requires **the referring court to check specifically so as to**

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[8] [8] European Commission, Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, COM(2016) 757 final, 1 December 2016, (available here: https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf)

[9] European Commission, VAT Aspects of cross-border e-commerce – Options for modernisation, Final Report – Lot 3, Deloitte, November 2016, p.203-204 (available here: https://ec.europa.eu/taxation_customs/sites/taxation/files/vat_aspects_cross-border_e-commerce_final_report_lot3.pdf)

[10] A8-0307/2017

[11] Page 15/18

[12] Paragraph 35

> **establish whether, in the light of all the facts in the case**, those "buralistes" were in fact acting, when collecting bets, in their own name.".[13] (emphasis added)

49. The presumption in Article 9a removes the requirement to look at the economic and commercial realities with all that that entails.

50. It is very strongly arguable that:

> (a) the introduction of the presumption in Article 9a is not a technical measure, it is a radical change; and
>
> (b) the legal framework was changed, and significantly so, by the introduction of the presumption in the terms used in the final paragraph of Article 9a. By any standard that would be a manifest error in an implementing regulation.

H. THE QUESTION REFERRED

51. The First-tier Tribunal accordingly refers the following question to the Court of Justice of the European Union for a preliminary ruling under Article 86(2) of the Withdrawal Agreement and Article 267 of the Treaty on the Functioning of the European Union:

> 1. Is Article 9a of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, inserted by Article 1(1)(c) of Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013, invalid on the basis that it goes beyond the implementing power or duty on the Council established by Article 397 of Council Directive 2006/112/EC of 28 November 2006 insofar as it supplements and/or amends Article 28 of Directive 2006/112/EC?"

15 December 2020

ANNEXE

The Annexe to the Schedule contains the following:

1. The Decision of the First-tier Tribunal (Tax Chamber) [2020] UKFTT 499 (TC), released on 15 December 2020: https://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07915.html.

[13] Paragraph 42