Appeal number: TC/2013/01246

Value Added Tax – exemption – medical care – analysis of medical samples – service supplied to medical institution or practitioner, not to patient – whether exempt

FIRST-TIER TRIBUNAL
TAX CHAMBER

GSTS PATHOLOGY SERVICES LLP **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC
JULIAN SIMS FCA CTA

Sitting in public at 45 Bedford Square, London WC1 on 31 July and 1 and 2 August 2013

Philippa Whipple QC and Andrea Lindsay Strugo, Counsel, instructed by KPMG LLP, for the Appellant

Alison Foster QC and Peter Mant, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. It is with reluctance that we find ourselves forced to dismiss this appeal. Our decision produces unsatisfactory consequences: our conclusion that the appellant's supplies are to a large extent exempt from VAT means that it is to that extent unable to recover input tax, of which it incurs a substantial amount; whilst treatment of the supplies in issue as taxable would require output tax to be charged, the supplies are principally made to entities in the healthcare sector that can recover VAT paid out by them pursuant to s 41 of the Value Added Tax Act 1994. The effect of our decision will be to make the supplies more costly to the recipients, as the charges will have to incorporate irrecoverable input VAT.

2. Moreover, the appellant ('GSTS') was structured as it is in reliance on a ruling from HMRC that its supplies would be standard-rated, a ruling which HMRC have subsequently retracted. In judicial review proceedings Leggatt J has held that GSTS is entitled as a matter of administrative law to maintenance of the *status quo* in the period leading up to the release of our decision and for a reasonable period following it.

The issues in outline

3. GSTS supplies services to three NHS Trusts and some other clients. We are only concerned with its supplies to the Trusts. These are to a large extent, though not exclusively, supplies of pathology services – testing samples of body fluid, tissue, etc. and communicating the results to the Trusts for the purposes of the supply of services of medical care by the Trusts or other health professionals to patients. The first issue is whether the supplies of pathology services are exempt from VAT as themselves constituting 'medical care' as that expression has been construed by the European Court of Justice ('CJEU'); HMRC initially ruled that the supplies were not of exempt medical care but later decided that they were, with the disadvantageous consequences that we have just mentioned. Philippa Whipple QC and Andrea Lindsay Strugo contend on behalf of GSTS that the supplies are not of medical care, but rather of information, and/or that GSTS is not a 'recognised' body operating under 'comparable social conditions' for the purposes of the exemption.

4. The second issue is whether, even if the supplies are of medical care by a recognised body, HMRC are (as GSTS contends) under an EU law obligation to achieve the result that the supplies are not exempt, either by applying conditions which article 133 of Directive 2006/112 allows Member States to impose and GSTS does not satisfy or by declining to recognise GSTS as a medical establishment for the purposes of the Directive. The basis of the argument is (a) that in the particular circumstances prevailing in the United Kingdom, where s 41 of the Act enables NHS Trusts to reclaim VAT paid out by them for laboratory services, treatment of GSTS as taxable would reduce the overall tax burden by enabling GSTS to recover its input VAT and (b) that the purpose of these exemptions, to which HMRC are under a duty to give effect, is to reduce the VAT burden on medical care; in the circumstances at issue, that is achieved by withholding exemption. Our conclusions on this are that the

discretion which the Directive leaves to Member States has been exercised in the United Kingdom in the framing of the relevant provisions of the VAT Act 1994, which HMRC have no residual discretion to over-ride, and that EU law does not in any event impose a duty on Member States to make exemption unavailable to a taxpayer on the grounds that standard-rated treatment would be more advantageous for it.

The history

5. GSTS is a limited liability partnership between Guys and St Thomas' NHS Foundation Trust ("Guy's"), King's College Hospital NHS Trust ("King's") and Serco Limited. The background to its formation is two reports to the Secretary of State for Health by a panel chaired by Lord Carter of Coles on the first and second phases of their review of pathology services in England. Among the panel's recommendations were that, in order to achieve economies of scale, pathology services should cease to be performed separately within each NHS hospital but instead be consolidated into "reconfigured networks", and that there should be greater involvement of the private sector. In 2007, Guy's sought bids from private sector providers to enter into partnership with it in order to provide pathology services. Serco were the successful bidder and in late 2008 a members' agreement to govern the parties' relationship was entered into, along with a pathology services agreement to govern the supply of pathology and certain other services by GSTS to Guy's. GSTS commenced operations in February 2009.

6. Before those things were done, in May 2008 KPMG LLP wrote to HMRC on behalf of Guy's to seek clarification of the VAT treatment of the proposed venture. The letter explained that the Trust had undertaken an internal review of its pathology services in consequence of the Carter review and had concluded that the most appropriate model was a joint venture and that the best legal form was that of a limited liability partnership. Existing Guy's pathology staff would either be transferred to the LLP's employment or would remain employed by Guy's and be permanently seconded to the LLP under an arrangement favoured by Unison and known as "retention of employment", or RoE. The writer understood that the secondment of those staff would, in the particular circumstances of the joint venture, be a taxable supply by Guy's to the LLP and said that one of the key questions was whether the LLP's supplies of pathology services would themselves be taxable, adding that "the project timeline dictates that [Guy's] needs certainty of the VAT treatment before it enters into firm contractual arrangements with Serco. The Trust has therefore requested that we obtain a ruling by HMRC by the end of May which can be sufficiently relied on to take forward the venture with VAT certainty".

7. The letter referred to Case C-106/05 *LuP GmbH v Finanzamt Bochum-Mitte* [2006] ECR I-5139, [2008] STC 1742, describing it as having held that pathology services might be exempt under Directive 2006/112 but that Member States could lay down rules on the matter. In that context the writer drew attention to conditions for exemption set out in VAT Notice 701/31 on Health Institutions, one of which was the existence of direct contact between the provider and beneficiary of the service, and said that there would not be such direct contact; on that basis the letter suggested that

the service would be standard-rated. It also suggested that NHS Trusts would be able to recover VAT paid by it to the LLP pursuant to s 41(3) of the Act.

8. HMRC's response of 28 May 2008 was concise. It said:

> **Transfer of staff under TUPE/Retention of Employment (RoE)**
>
> The transfer of staff by the Trust to the LLP under TUPE will not be a supply or VAT purposes.
> However, staff transferred ("seconded") under RoE is subject to VAT at the standard rate. Accordingly the Trust will have to charge and account for VAT on this supply.
>
> **Provision of Pathology Services by the JVLLP**
>
> It is accepted that the pathology services undertaken by the JVLLP are not for the primary purpose of protection, maintenance or restoration of the health of the person concerned but to provide a third party with a necessary element for taking a decision.
> Accordingly the supply of pathology services by the LLP is taxable at the standard rate.
>
> **VAT Recoverability by NHS Trust Customers of the JVLLP**
>
> The VAT incurred by NHS Bodies on the services provided by the JVLLP will be recoverable under Heading 31 "Laboratory Services" of the Contracted Out Services Provisions.
> This recovery being subject to any restrictions that may be necessary to reflect any exempt business use by that NHS body.

9. GSTS entered into the pathology services agreement with Guy's that we have mentioned in December 2008, and into a similar agreement with Bedford Hospital NHS Trust in November 2009; that Trust is not a partner in the LLP but simply a client for pathology and other services. In 2010, both GSTS and King's College Hospital NHS Trust separately asked HMRC for confirmation that the same tax treatment as described in HMRC's May 2008 letter would apply as between GSTS and King's in the event that King's became a partner in and customer of the LLP. In April 2010 HMRC wrote separate letters to GSTS and to King's, advising that the VAT liabilities relating to the intended arrangements with King's were the same as had been stated in the letter of May 2008. King's became a member and customer of the LLP with effect from 1 October 2010.

10. In July 2012 HMRC wrote to the Trust informing it that HMRC were commencing enquiries into supplies of pathology services by GSTS to the Trust. The Trust replied giving extensive factual information and referring to the previous rulings. Following an examination of the material supplied, HMRC wrote to GSTS in January 2013 giving a "definitive view of the liability of the pathology supplies in question". Contradicting their previous ruling, HMRC then concluded (referring to some case-law which we discuss below) that

> ... analysing samples relating to specific patients using a variety of health professionals is a far more complex service than just providing information. This analysis provides an essential part, indeed it is often the crucial part, needed to make a diagnosis. Therefore these services do constitute health care.
>
> The ECJ cases of LuP and Commission v France both demonstrate that lab services can amount to medical care. HMRC believe that GSTS's supplies can be distinguished from those in the In Health Group tribunal case, in which the provision was very clearly that of the machinery and mechanical technical support, rather than the provision of the services of health professionals.
>
> .....
>
> In HMRC's view it would seem to be clear that pathology services play a vital role in "the protection, maintenance or restoration of the health", meaning that they would qualify for exempt medical care.

11. The letter went on to accept that GSTS should be given time to alter its arrangements. The new ruling was to apply from 1 May 2013.

12. On 15 February 2013 GSTS initiated the present appeal. On 22 March it and its partners brought proceedings in the Administrative Court for judicial review of HMRC's decision on the grounds that it was in breach of GSTS's legitimate expectation of being taxed in accordance with the ruling on which the parties had relied in structuring GSTS in its current form. At the same time, GSTS applied for an interim injunction restraining HMRC from applying the new tax treatment until three months after our decision.

13. Leggatt J granted that application in April 2013: see *R (GSTS Pathology LLP and others) v Revenue and Customs Commissioners* [2013] EWHC 1801 (Admin). Given that the injunction he was being asked to grant would have irreversible effects as regards the tax position in the period it was in force, he did not merely ask himself whether the claimants had an arguable case of legitimate expectation but whether they had a case that would succeed at final trial. He found that they had. He attached significance to the fact that there had been no change in the legislation or developments in the case-law between the earlier rulings and the 2013 decision, regarding this as a case of a different view being taken by a later decision-maker.

14. At paragraphs 91 to 93 of his judgment Leggatt J listed six features of the case that made it unreasonable to expect the claimants to restructure GSTS "before the true legal position has been established by a decision of a tribunal" and entitled them to a further reasonable period in which to restructure in the event of an adverse tribunal decision. He provisionally fixed that further period as three months, giving the parties permission to apply for it to be varied if necessary. He was not directly concerned with the strength of GSTS's case before us – the questions of legitimate expectation mainly arising on the footing that the new decision was correct as a matter of VAT law – though it is apparent that he was attracted by it: see for example paragraphs 24-34 and 45.

The services supplied by GSTS under the pathology services agreements

15. We were provided with relevant documentation and with witness statements of Kathryn Dean, Divisional Manager of Critical Care, Theatre and Diagnostics at King's College Hospital and Anthony Hodgson, Head of Legal and Company Secretary at GSTS, who were not cross-examined, and of Jonathan Edgeworth, Medical Director of GSTS and also a Consultant Microbiologist at Guy's, who also gave oral evidence. We were also provided with the witness statements lodged in the judicial review proceedings. Those mainly dealt with the practical consequences for GSTS of HMRC's change of stance; the evidence prepared for this appeal, understandably and from our point of view very helpfully, contains a fuller description of GSTS's activities than needed to be provided to Leggatt J. We review the evidence and make the following findings of fact.

16. GSTS supplies pathology services to three NHS Trusts and to certain other clients. Some of those supplies are agreed to be standard-rated as not involving medical care; an example is the analysis of blood samples to detect the presence of a substance indicating continuing excessive alcohol consumption, done in order to inform a decision by the Driver and Vehicle Licensing Agency whether the driving licence of a driver disqualified for drink-driving is to be restored. Others relate to drug trials or medical research unrelated to the treatment of any particular patient. The details of some of the fiscally non-controversial supplies are commercially sensitive and we say no more about them, save to note that Mr Hodgson stressed the similarity of the pathology work done under such agreements to the work done in connection with the supplies that are in dispute in this appeal. The parties are agreed in asking us to determine only the VAT liability of GSTS's supplies to NHS Trusts.

17. As well as pathology services, GSTS supplies the NHS Trusts with what Mr Hodgson described as "ancillary services". These are: the storage of samples; pathology connected with post mortem examinations carried out by pathology consultants within the Trust; maintaining "point of care" testing of equipment (such as a blood glucose meter used by a nurse on a hospital patient or on a home visit) and providing training in its use; making its staff and resources available to the Trusts in connection with research and development activities being undertaken by Trust consultants; and training of its own staff and of clinical trainees. We were not addressed specifically on the tax treatment of the ancillary supplies; if the parties cannot agree on it, we shall hear further argument.

18. We focus on pathology services provided in connection with the treatment of patients. These are governed by Pathology Service Agreements: with Guy's dated 22 December 2008, with Bedford Hospital NHS Trust dated 24 November 2009 and with King's dated 20 September 2010. "Pathology Services" are defined in all three agreements as "the provision of analytical tests on blood, fluids and other tissue to support diagnosis, treatment and/or monitoring of disease". Ms Whipple placed emphasis on the existence in all three agreements of wording to the effect that "For the avoidance of doubt, the Supplier's obligations in relation to the provision of Services shall under no circumstances involve or necessitate the direction of treatment and/or treatment for a patient". (This is subject to the minor exceptions (a) that, at

Guy's and St Thomas's Hospitals, but not elsewhere, GSTS staff take blood samples from certain patients and (b) that the taking of cell samples may be done by GSTS cytologists as well as by clinicians; this is not in our view relevant to the proper VAT classification of pathology testing.)

19. The patients fall into two categories: patients of the Hospitals themselves and patients of other healthcare professionals, such as GPs and community clinics, with whom the NHS Trusts already had contracts to provide pathology services at the time those Trusts entered into their pathology services agreements with GSTS. The work for those "third party customers", as Mr Hodgson called them, is in effect subcontracted to GSTS.

20. Both of the medical witnesses testified to the vital importance of pathology services to their respective hospitals, Ms Dean saying that pathology services are used by almost every department at King's in respect of almost every in-patient. She described GSTS as providing information, in the form of pathology test results, which was used to inform clinical decisions both by way of diagnosis and of prognosis, the specialist pathology consultants within King's being accountable for the interpretation of GSTS's test results. GSTS, she said, was responsible for the accuracy of the test results but did not carry out any form of diagnosis of the patient; that was done by the clinician on the basis of not only the test results but also other information such as medical history.

21. Mr Edgeworth distinguished between tests commissioned in order to inform a diagnosis and those (numerically the majority) commissioned in order to check that the patient's organs and physiological processes are functioning within normal limits – for example, to check that a patient is fit to undergo an operation. In the case of tests commissioned to inform a diagnosis he, like Ms Dean, distinguished between diagnosis – the process of identifying the presence or cause of a disease – and the performance of the laboratory tests undertaken by GSTS. To inform a diagnosis, he told us (and we accept), a clinician will gather information from many different sources, possibly including radiology, clinical examination and medical history as well as pathology, and will bear in mind that some tests can show false positive or negative results; the clinician could not treat a pathology test result as equivalent to a diagnosis but rather as a piece of information to be viewed critically.

22. GSTS has laboratories at each of the four hospitals run by the three Trusts. Apart from administrative staff and managers, they are staffed by: laboratory assistants performing manual functions; biomedical scientists (usually biomedical science graduates) who perform more complex tasks and quality control; and clinical scientists (usually with a PhD degree in a specific area of medical science) who are involved in the development of test procedures, in the interpretation of test results and in discussing the significance of particular test results with consultant pathologists or with the clinician who has commissioned the test. The majority of GSTS staff are not clinical scientists and are not involved in such interpretation or discussions. Indeed, the majority of tests performed, possibly 80% by number, are largely automated.

23. GSTS also uses the services of consultant pathologists who are employed as consultants in the Hospital on whose site the relevant GSTS laboratory is situated and also seconded to GSTS. They are only involved in the more serious cases. In the case of a particular patient the consultant may switch from performing an interpretative role on behalf of GSTS to performing a clinical role in his or her Hospital capacity. We give examples of this below.

24. Tests are commissioned by clinical staff at the Hospital or third party customer, who may commission one or more tests depending on the patient's circumstances. The testing process begins with the taking of a blood, tissue, cell or other sample from the patient. At some of the Hospitals, the taking of a blood sample (phlebotomy) may be carried out by a member of GSTS technical staff; the taking of a cell sample involves extracting fluid from, say, a tumour, which is done either by a GSTS cytologist or the patient's clinician. GSTS operates a phlebotomy service at Guy's and St Thomas's Hospitals, employing GSTS phlebotomists, to which a clinician may send a patient, together with a test request form. The phlebotomist studies the request form and takes the appropriate sample. The taking of samples as described in this paragraph is the only extent to which GSTS staff have any interaction with the patient. Other samples may be taken by clinicians, for example by surgeons in the course of surgical procedures.

25. The sample is delivered to the relevant department within the GSTS laboratory; it will either be accompanied by a services request form identifying the particular type or types of test being requested, or the services request will be communicated electronically. We were shown an example of a form used at King's. It contains a space for recording the patient's name and contact details, though Mr Edgeworth told us that this is not always filled in.

26. By way of examples, Mr Edgeworth described the procedures for haematology (blood testing), microbiology (identifying bacteria or other micro-organisms) and histopathology (examining tissue for the presence, usually, of cancer cells).

27. Blood testing is done within a GSTS haematology laboratory and is a largely automated process; a GSTS scientist loads the samples into a testing machine capable of performing 15 to 20 different tests and of either sending the results to the clinician electronically or generating a paper results sheet. We were provided with an example of a paper results sheet. The results are expressed as a numerical value in an appropriate unit of measurement. Where a result is outside the normal range it is 'flagged' by an asterisk. If the results are within the normal range, they are sent out without any human intervention, as are abnormal results that are within an agreed non-life-threatening range.

28. Other abnormal results are referred to a biomedical or clinical scientist. If they are not life-threatening and are consistent with any clinical information supplied, they may be sent out with a comment such as "low haemoglobin". The results of the commissioned test may prompt the scientist to carry out a further test, such as examination under a microscope. In that event, the results sheet will set out the additional test and its results and may include an interpretation, such as "consistent

with low iron", or a suggestion, such as "send sample for vitamin analysis". The examples of results sheets shown to us included narrative such as: a statement (probably standard wording in such cases) that the particular test was not suitable for identifying cardiovascular risk; a suggestion that a further sample be tested for a particular antibody; a request for a repeat sample to confirm a test result; a warning that a particular result was twice the normal maximum; a warning that a test could give false positive or false negative results in particular circumstances; and, in a particularly serious case, a report that a microscopic examination had been performed and its results summarised in 40-50 words ending with the suggestions "acute leukaemia" and "please refer for assessment".

29. In a case such as the last one mentioned, the results are likely to have been seen by a consultant pathologist specialising in haematology. A more junior hospital doctor is likely to have been called into the laboratory to look at the results with the laboratory scientist; that doctor will have contacted a consultant pathologist, specialising in haematology, who will have come into the laboratory to finalise the report. Mr Edgeworth views the consultant pathologist as acting for GSTS in examining the results and adding interpretative comments to the report.

30. The consultant may also contact the patent's hospital doctor or GP to advise on the next appropriate step by way of diagnosis or treatment, or even take over the treatment of the patient; in an acute case the patient might be contacted and advised to come to hospital immediately. Mr Edgeworth views those things as performance of the consultant pathologist's role as a Hospital consultant, because it involves advice or decisions as to the diagnosis or treatment of a particular patient based on the information provided by GSTS; he told us that the Hospital will not have intended to outsource to GSTS responsibility for diagnosis or advising on treatment.

31. We accept that that is so as a matter of the agreed allocation of tasks between GSTS and the Trusts; whilst accepting also that these interventions will occur in a small minority of cases, we cannot avoid noting the close relationship between pathology and diagnosis that they evidence. The examples of reports that we have reviewed in paragraph 28 above likewise demonstrate the fineness of the line that is drawn between interpretation of results and diagnosis.

32. Indeed, the patient whose test results suggested acute leukaemia was a patient of a GP practice that had commissioned the test as a third party customer of the relevant Trust. This indicates that, if GSTS were correct in its contention that 'bare' pathology services do not amount to medical care, a distinction would have to be drawn, in the case of third party customers, between cases in which bare test results were supplied and cases in which there was intervention by the Hospital consultant in his rôle as such. The former would appear to be, on GSTS's case, instances of standard-rated supplies while the latter would seem to have crossed the line into diagnosis or advice on treatment amounting to exempt medical care.

33. Microbiology can involve samples of body tissue, fluids or waste products, which are cultured in an incubator to enable bacteria or other micro-organisms to grow. Some tests are commissioned to test for only one form of bacteria. In other

cases, a GSTS scientist will study the clinical information provided on the request form in order to decide how best to culture the sample to identify the one or more different bacteria that could be the cause of the suspected condition.

34. If the test result indicates the presence of MRSA (meticillin-resistant staphylococcus aureusis), the laboratory scientist will both communicate the result to the referring clinician and alert a member of the Hospital's infection control team and its department of infectious diseases, who will contact the clinical team to discuss clinical decisions, such as isolation, and treatment. If the results indicate the presence of other bacteria that are of concern, or are highly resistant to treatment, the laboratory scientist may involve a consultant pathologist specialising in microbiology, who will check the adequacy of the tests and the compatibility of the results with the clinical information supplied. The consultant pathologist may add a comment such as "note highly resistant bacteria" or "contact infectious diseases doctor if treatment is clinically indicated" and will indicate the antibiotics that are active against the bacteria identified, both of which would appear to us to cross the line between interpretation and advice on treatment. The consultant will also check that the infection control team or infectious diseases department have been notified where appropriate.

35. In the case of histopathology, the tissue samples range from small biopsy samples to whole organs and may be either preserved in formalin or freshly removed. Particularly in the case of larger samples, the removal will involve, or be carried out in the course of, an invasive procedure that will only have been undertaken once the clinician has collected information suggesting a serious condition such as cancer. Samples will be accompanied by clinical information, such as the site of the tissue within the body and a suspected diagnosis; the information is important because it can influence the decision (taken by a consultant pathologist specialising in histopathology) as to the tests to be carried out, the interpretation of the results and the urgency of the case. The sample is first dissected by the consultant pathologist, who studies the clinical information supplied, looks at the sample to identify areas of visible abnormality and removes blocks of tissue from those areas. These are cut into sections by laboratory staff, who place the sections on microscope slides for viewing by the consultant pathologist.

36. The consultant pathologist prepares a report based on his or her examination of the slides, possibly suggesting further tests. We were not shown an example of a report in a histopathology case and Mr Edgeworth did not give a description of such a report beyond describing it as "based on what he or she sees looking down the microscope".

37. The report is followed by a multi-disciplinary team meeting involving the consultant pathologist together with others such as the patient's clinician, oncologists, radiologists, transplant surgeons and other front-line doctors to discuss the patient's case, with images of the microscope slides projected onto a screen. Radiologists will present their radiological findings and the referring clinician will present the clinical case. The decision as to diagnosis and treatment will be made by the referring clinician on the basis of the information provided at the team meeting and other

available information. The consultant pathologist's participation in the meeting is in his or her capacity as a Hospital consultant, but the fact of it gives rise to similar observations to those we made in paragraph 31 above.

The legislative provisions

38. Article 132 of Directive 2006/112 requires Member States to give exemption from VAT in respect of a number of "activities in the public interest". Article 132(1) provides, so far as material:

> 1. Member States shall exempt the following transactions:
>
> .....
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions, comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;
>
> .....
>
> (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing.

39. Article 132 is the successor to article 13A(1) of the Sixth Directive, to which the case-law refers. The subparagraphs are almost entirely identical as between the two Directives; for convenience we refer to them simply as 'subparagraph (b)', etc. It is subparagraph (b) that is in issue in this appeal, but the case-law shown to us includes case-law on subparagraphs (c) and (g). The only difference of wording is in subparagraph (g): the predecessor provision in article 13A(1)(g) of the Sixth Directive referred to establishments 'recognised as charitable'. The current wording reflects the meaning of the subparagraph as interpreted by the CJEU in Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-04427, the English text of article 13A(1)(g) having been out of line with the other language versions.

40. Article 133 provides so far as material that:

> Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g) ... of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> (a) the bodies in question must not aim systematically to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.

.....

Ms Whipple observed that GSTS would not satisfy the conditions of article 133(a), (b) or (c).

41. Section 31 of the Value Added Tax Act provides that a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 to that Act. Group 7 in Schedule 9 of the Act specifies, *inter alia*:

1. The supply of services consisting of the provision of medical care by a person registered or enrolled in any of the following –

(a) the register of medical practitioners ;

.....

(c) the register kept under the Health and Social Work Professions Order 2001....

4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution.

42. It is item (4) that transposes article 132(1)(b) of the Directive. Ms Whipple relies *inter alia* on the omission from it of any reference to the "closely related activities" included in article 132(1)(b).

43. Note 8 to the Group provides so far as material that

(8) In this Group *"state-regulated"* means approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas.

44. Ms Whipple's second argument relies on the existence of provisions for the refunding of VAT paid by certain public bodies. We were shown a Guide to VAT in

the NHS which told us that the predecessor provisions had been introduced into the VAT Act 1983 in 1984, against a background of the then government's desire to encourage government departments and NHS bodies to contract out to the private sector the provision of services that had traditionally been provided in-house, where it was more economical to do so. The provisions relieve them of the burden of VAT on such supplies. Currently, s 41(3) and (6) of the Act provide that

> (3) Where VAT is chargeable on the supply of goods or services to a Government department ... and the supply ... is not for the purpose—
>
> (a) of any business carried on by the department, or
>
> (b) of a supply by the department ...
>
> then, if and to the extent that the Treasury so direct ..., the Commissioners shall, on a claim made by the department at such time and in such form and manner as the Commissioners may determine, refund to it the amount of the VAT so chargeable.
>
> (6) In this section "*Government department*" includes ... any body of persons exercising functions on behalf of a Minister of the Crown ... designated for the purposes of this subsection by a direction of the Treasury.

45. The Treasury have made a direction pursuant to section 41(6). The version supplied to us (which may not be the latest) provides so far as material that any body listed in the direction may claim a refund of VAT charged on the supply to it of services listed in the direction, provided that they are not supplied for the purpose of a business carried on by it. The eligible bodies include NHS Trusts and Foundation Trusts, Primary Care Trusts and various Health Authorities; the eligible services (of which there are 76) include "Laboratory Services".

46. We were told that seven other Member States operate similar arrangements. In the present case the direction produces the result that the Trusts can reclaim any VAT that GSTS charges them; the rulings obtained from HMRC confirmed that, as well as confirming that GSTS's pathology supplies to them would be standard-rated. We were not told whether, in the days of Primary Care Trusts, supplies of pathology to GP practices would have been obtained by those Trusts so as to enable any VAT charged on the supply to be recovered under the direction, nor what the position is under the current system of clinical commissioning groups.

47. Finally in this section we mention something to which Leggatt J understandably attached significance. In the form still extant at the time he gave judgment, paragraph 3.1 of HMRC's Notice 701/31 *Health Institutions*, entitled "Goods and services supplied on the premises of a qualifying institution", specified five conditions that must be met before supplies made on hospital premises by outside businesses could be exempt, in addition to a requirement that the supply be of care or medical or surgical treatment. Two of them were that the supply must not take place on the premises of the institution for reasons of geographical convenience only and that it must involve direct contact between the provider and the patient.

Case-law

48. We were shown a number of decisions of the CJEU and one of the VAT and Duties Tribunal. There is extensive CJEU case-law on the scope of what are now subparagraphs (b) and (c) of article 132(1), the two relevant lines of authority dealing (i) with the meaning of 'medical care' in both subparagraphs and the concept of 'closely related activities' in subparagraph (b) and (ii) with the concept of a 'duly recognised establishment' in subparagraph (b).

The relationship between the subparagraphs

49. In Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* [2002] ECR I-6833 the Court summarised the relationship between the two subparagraphs as follows:

> 35. ... the Court has already held, in Case 353/85 *Commission* v *United Kingdom* [1988] ECR 817, at paragraphs 32 and 33, that, in contrast to Article 13(A)(1)(b) of the Sixth Directive which concerns services encompassing a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes such as the protection of human health, Article 13(A)(1)(c) applies to services provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is normally established in the consulting room of that person.
>
> 36. It follows that Article 13(A)(1)(b) and (c) of the Sixth Directive, which have separate fields of application, are intended to regulate all exemptions of medical services in the strict sense. Article 13(A)(1)(b) exempts all services supplied in a hospital environment while Article 13(A)(1)(c) is designed to exempt medical services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place.

50. In addition, it is to be noted, subparagraph (b) extends exemption to closely related activities, while subparagraph (c) does not. Also, despite differences between the wording used to render the expression 'medical care' in subparagraph (b) and subparagraph (c) in some language versions – something to which earlier judgments of the CJEU seemed to attach significance – more recent case-law holds that the substantive scope of the care exempted by both subparagraphs is the same: see in particular the passage cited at paragraph 62 below.

The scope of 'medical care' and 'closely related activities'

51. The first CJEU decision to establish that not everything done by a health professional in their professional capacity is exempted by the Directive was Case C-384/98 *D v W* [2000] ECR I-6795. It concerned a doctor acting as a court-appointed expert to conduct genetic testing and to give an opinion on the paternity of a claimant who was seeking a declaration of paternity against the defendant. The doctor had

included VAT in her fee; this was challenged by the Austrian Treasury and the court referred to the CJEU the question whether the doctor's service fell within subparagraph (c).

52. On the basis of a comparison of the different language versions of the provision the Court held that the concept of provision of medical care "does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders" and that "services not having such a therapeutic aim" fell outside the exemption. In this regard the Court agreed with Mr Advocate General Saggio, who had said at paragraph 16 of his Opinion, after referring to some other language versions of subparagraph (c), that "if one considers the reasons why the provision of medical care is exempt from VAT, the references to care of the person which feature in the provision at issue make it fairly clear that the exemption is justified by the need to reduce medical costs and thus to promote access to health-care". He reasoned that this rationale did not justify exempting the service provided by the doctor in that case, which was no different from that of expert witnesses in other disciplines.

53. Case C-76/99 *Commission v France* [2001] ECR I-249 concerned subparagraph (b) and specifically the concept of 'closely related activities'. French health law specified two different procedures for the analysis of medical samples, depending on how specialised the testing was. Less specialised testing was done under an arrangement between the patient and the laboratory that took the sample, pursuant to which the patient paid that laboratory a fee which was exempt from VAT. That laboratory might use the services of another laboratory under a 'collaboration contract'; if so, it would pay the other laboratory a fee which was also exempt from VAT. More specialised testing was reserved by law to a small number of specialist laboratories, but for the convenience of patients the medical sample could be taken by a local non-specialist laboratory or a nurse and despatched to the specialist laboratory. The sample-taker would invoice the patient for the taking of the sample. The specialist laboratory would invoice the patient for the analysis and would pay the sample-taker a fee fixed by law for arranging the delivery to it of the sample. That fee was not exempt. The Commission contended that this infringed the Sixth Directive since the transport of the sample was 'closely related' to medical care within the meaning of subparagraph (b).

54. According to the Opinion of Mr Advocate General Fennelly (paragraph 20) the parties agreed that the analysis of a sample was itself 'closely related' to medical care and that the taking of it was either medical care (in France's view) or closely related to it (in the Commission's view). He concluded that the transmission of the sample was also closely related to medical care and that France was wrong to tax it.

55. The Court agreed with that conclusion. It described the Commission's argument (which it accepted) as being that the transmission of the sample was "ancillary and closely linked" to the analysis of it and "must be regarded as constituting an activity closely related to medical care". The core of its reasoning is, first, in paragraphs 22 to 24 of the judgment, where it held:

22. It must be pointed out, second, that Article 13(A)(1)(b) of the Sixth Directive does not include any definition of the concept of activities 'closely related' to hospital and medical care.

23. As the Advocate General noted in point 23 of his Opinion, that concept does not, however, call for an especially narrow interpretation since the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT.

24. For the purpose of any possible exemption from VAT for the act of transmitting medical samples, it is appropriate to have regard to the purpose for which those samples are taken. Thus, where a duly authorised health-care worker orders, for the purpose of making his diagnosis and with a therapeutic aim, that his patient should undergo an analysis, the transmission of the sample, which logically takes place between the taking of the sample and the analysis itself, must be regarded as closely related to the analysis and must therefore be exempt from VAT (see, as regards services which, since they do not have a therapeutic aim, must be subject to VAT, Case C-384/98 *D* v *W* [2000] ECR I-6795, paragraph 19).

56. The Court went on to reject an argument by France that the transport was economically separate from the sample-taking and the analysis and should receive different tax treatment on *Card Protection Plan* principles (Case C-349/96 [1999] ECR I-973). It held that the transmission was in *Card Protection Plan* terms ancillary to the analysis and that the fact that it was a distinct act did not preclude it from being closely related to the analysis. It expressed its conclusion as follows:

29. Moreover, the fact that, according to the French Government, the transmission of the sample constitutes a distinct act does not preclude it from being regarded as closely related to the analysis for the purpose of the Sixth Directive.

30. In those circumstances, the taking of the sample and the transmission of the sample to a specialised laboratory constitute services which are closely related to the analysis, so that they must be treated in the same way as the analysis for fiscal purposes and, accordingly, must not be subject to VAT.

31. It must therefore be concluded that, by levying VAT on fixed allowances for the transmission of samples for the purpose of medical analysis, the French Republic has failed to fulfil its obligations under Article 13(A)(1)(b) of the Sixth Directive.

57. Ms Whipple relied on *Commission v France* as authority that the analysis of medical samples is, for the purposes of article 132, closely related to medical care, rather than constituting medical care itself. We note that the Court did not expressly say that, but consider that, if the Court had been unanimously of the view that the analysis of medical samples was medical care, paragraph 30 of the judgment would

have been worded more straightforwardly. The paragraph is at best ambiguous as to whether the analysis of the sample was medical care to which the transmission of the sample was closely related or whether the analysis was an activity closely related to medical care, to which activity the transmission of the sample was closely related, making the transmission also closely related to the medical care. The ambiguity may (we speculate) reflect a divergence of approach among the members of the Court.

58. The Court's next relevant decision, *Kügler* (referred to in paragraph 49 above), dealt both with the concept of medical care and that of 'organisations recognised as charitable' in the former article 13A(1)(g) of the Sixth Directive. At this stage we discuss what the judgment says about medical care. Kügler was a benevolent organisation that supplied a combination of home nursing and domestic help to disabled people. The German tax authority had held that Kügler's charges were not exempt under the German provision implementing article 13A(1)(c) on the grounds that the provision did not cover supplies by corporate entities, nor under the provision implementing article 13A(1)(g) because it did not satisfy the condition, imposed by German law, that two thirds of its clients be paid for by social security or social welfare authorities.

59. As regards subparagraph (c), the Court held that the subparagraph applied to medical care supplied by corporate bodies, provided that it was performed by members of a health profession, but – following *D v W* – that it only applied to services of a therapeutic nature, to the exclusion of general domestic help. On the first of those points it said among other things that:

> 29 Exemption of medical services supplied by legal persons is consistent with the objective of reducing the cost of medical care (see, to that effect, Case C-76/99 *Commission v France* [2001] ECR I-249, paragraph 23), and with the principle of fiscal neutrality, inherent in the common system of VAT, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied (see, in particular, Case C-216/97 *Gregg* [1999] ECR I-4947, paragraph 19).

60. On the second point, the Court reasoned that:

> 34. In order to provide the national court with a useful answer, it is necessary to consider ... the type of services which are covered by that provision.
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> …..
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> 37. With regard to determination of the type of care falling within the concept of the provision of medical care used in Article 13(A)(1)(c) of the Sixth Directive, as noted in paragraph 28 of this judgment the terms employed to specify the exemptions envisaged in Article 13 of the Sixth Directive are to be interpreted strictly (see, in particular, *Stichting Uitvoering Financiële Acties*, cited above, paragraph 13).
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> 38. The Court has already held, in Case C-384/98 *D.* [2000] ECR I-6795, at paragraph 18, that the concept of 'provision of medical care' does not lend itself

to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.

39. Accordingly, services not having such a therapeutic aim must, having regard to the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13(A)(1)(c) of the Sixth Directive (*D.*, cited above, paragraph 19).

40. It follows that only medical care provided in the exercise of the medical and paramedical professions, outside a hospital setting, for the purpose of prevention, diagnosis or treatment qualifies for exemption under Article 13(A)(1)(c) of the Sixth Directive, to the exclusion of other activities relating to general care and domestic help.

41. The answer to the second question must therefore be that the exemption envisaged in Article 13(A)(1)(c) of the Sixth Directive applies to the provision of care of a therapeutic nature by a capital company running an out-patient service under which care, including home care, is provided by qualified nursing staff, to the exclusion of the provision of general care and domestic help.

61. Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Giessen* [2003] ECR I-12911 concerned a charitable foundation devoted to research into clinical psychology which maintained an outpatient facility at which psychotherapeutic treatment was administered by qualified psychologists employed by it who were not doctors but were licensed health practitioners under German healthcare law. The tax authority decided that the foundation's charges for that treatment were not exempt under German VAT law, which confined exemption to treatment supervised by doctors. The German court asked the CJEU whether the treatment qualified for exemption under subparagraph (b) as an activity 'closely related' to medical care and also about the scope of the expression 'duly recognised establishments of a similar nature' in the subparagraph. (It also asked the same question on the application of subparagraph (c) to supplies by corporate bodies as the Court had answered in *Kügler*; the Court repeated its answer.)

62. On subparagraph (b) the Court held that the treatment did not fall within the concept of 'closely related activities', which applied to activities that were ancillary to supplies of medical care rather than to self-standing forms of treatment; however, it went on to consider of its own motion whether the treatment might constitute medical care. Holding that it did, the Court reasoned:

43. It is apparent from the case-law that the objective of reducing the cost of medical care and making that care more accessible to individuals is common to both the exemption provided for in Article 13A(1)(b) of the Sixth Directive and that in letter (c) of the same provision (see *Commission* v *France*, cited above, paragraph 23; and *Kügler*, cited above, paragraph 29).

44. It must also be borne in mind that the principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (*Kügler*, cited above, paragraph 30).

45. As is clear from the answer given by the Court to the third question, the exemption provided for in Article 13A(1)(c) of the Sixth Directive applies to psychotherapeutic treatment given by qualified psychotherapists when that treatment is given outside bodies governed by public law and other establishments contemplated by Article 13A(1)(b).

46. As regards the question of whether psychotherapeutic treatment given by qualified psychologists in a hospital environment is covered by the term 'medical care' in Article 13A(1)(b) of the Sixth Directive, it is clear, first, that only some language versions of the Directive, including the German and French versions, seem to draw a distinction between the nature of the care exempted under that provision and that of the care exempted under letter (c) of the same provision.

47. Next, as correctly pointed out by the Advocate General in points 44 to 46 of her Opinion, the criterion for drawing a clear distinction between the two tax exemptions provided for in Article 13A(1)(b) and (c) is less the nature of the service than the place where it is provided ....

48. It should also be borne in mind that, given the objective of reducing health care costs, the term 'medical care' in Article 13A(1)(b) does not call for an especially narrow interpretation (see, to that effect, *Commission* v *France*, cited above, paragraph 23). However, the services covered by that term, like those covered by 'provision of medical care' in letter (c) of the same provision, must have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*D.*, cited above, paragraph 18; and *Kügler*, cited above, paragraph 38). It is not disputed that the treatment provided by qualified psychologists in a hospital environment fulfils the condition of having a therapeutic purpose.

49. Lastly, it must be pointed out that that interpretation of the term 'medical care' in Article 13A(1)(b) is in keeping with the principle of fiscal neutrality because paramedical services, such as treatment given by qualified psychologists, are exempt from VAT regardless of where they are provided.

50. It follows from the foregoing considerations that the term 'medical care' in Article 13A(1)(b) of the Sixth Directive must be interpreted as covering all provision of medical care envisaged in letter (c) of the same provision, including services provided by persons who are not doctors but who provide paramedical services, such as psychotherapeutic treatment given by qualified psychologists.

63. The Court gave judgment in Case C-212/01 *Unterpertinger v Pensionsversicherungsanstalt der Arbeiter* [2003] ECR I-13859 and Case C-307/01 *d'Ambrumenil v Comrs of Customs and Excise* [2003] ECR I-13989 on the same date. *Unterpertinger* was another case of a court-appointed expert, on this occasion engaged to report on the claimant's eligibility for a disability pension. The Court again held that the service was not exempt. Referring to its reasoning in *D v W* and *Kügler*, it observed that the therapeutic purpose of a service need not "be confined within an especially narrow compass" and that medical services of a prophylactic nature were included (referring in this connection to paragraph 40 of the judgment in *Kügler*, cited at paragraph 60 above) but continued:

> 41 On the other hand, medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not, according to that same case-law, benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Having regard to their purpose, to make those services subject to VAT is not contrary to the objective of reducing the cost of health care and of making it more accessible to individuals.

64. It went on to hold, adopting Mrs Advocate General Stix-Hackl's analysis, that the purpose of the doctor's service in that case was not the protection, maintenance or restoration of the claimant's health but rather to inform a 'decision having legal consequences'.

65. In *d'Ambrumenil* the VAT and Duties Tribunal had asked the Court whether subparagraph (c) applied to eight forms of activity involving medical skill engaged in by the appellant doctor. The Court adopted the same approach as in *Unterpertinger* and held that only three of the activities could amount to medical care "where those services are intended principally to protect the health of the person concerned"; two of those activities were conducting medical examinations and "the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers". The Court explained that

> 66. ... Where medical examinations and the taking of blood or other bodily samples are carried out with the aim of enabling an employer to take decisions on the recruitment of, or on the duties to be performed by, a worker or to enable an insurance company to fix the premium to be paid by an insured person, the services in question are intended principally to provide that employer or that insurance company with evidence on which to take its decision. Such services do not therefore come within the meaning of 'provision of medical care' exempted under Article 13A(1)(c).
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> 67. By contrast, regular medical checks at the behest of certain employers and certain insurance companies may satisfy the conditions for exemption under Article 13A(1)(c), provided that such checks are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons. The fact that such medical checks take place at a third party's request, and may also serve the employers' or insurance companies'

own interests, does not preclude health protection being regarded as the principal aim of such checks.

66. The next case to consider 'medical care' under subparagraphs (b) and (c) was Case C-106/05 *LuP GmbH v Finanzamt Bochum-Mitte* [2006] ECR I-5123, [2008] STC 1742, a case with very similar facts to the present appeal. LuP was a company owned by a qualified pathologist. It provided medical testing on a subcontracting basis to GPs and to other testing laboratories. The German tax authority refused to allow exemption of its charges because it failed to satisfy two conditions which applied under German VAT law to "activities closely linked with the operation of hospitals, diagnostic clinics and other bodies providing medical care, diagnoses or tests"; the VAT law required the services to be provided under medical supervision and at least 40% of them to relate to persons insured under the German social security scheme. The German court referred to the CJEU the question whether the Directive allowed Germany to make the exemption of laboratory tests ordered by a general practitioner subject to such conditions, given that the medical care provided by the GPs was in any event exempt. That court appears to have had in mind the issue of irrecoverable input tax in the hands of the GPs.

67. The answer was that the Directive permitted the 40% insured persons requirement but did not permit the medical supervision requirement. In reaching it, the Court largely followed the reasoning of Mr Advocate General Poiares Maduro, who had embarked on a fairly comprehensive review of the recent case-law on the two subparagraphs. He dealt first with the question whether pathology testing was 'medical care' within the meaning of the subparagraphs or a 'closely related activity'. He (and the Court) concluded that it was medical care.

68. His reasoning, in summary, was that the common aim of the subparagraphs was to reduce the cost of healthcare; that *Commission v France* showed that pathology testing was exempt under subparagraph (b); that *Commission v France* also showed that the purpose of an activity was crucial to whether it was exempt under the subparagraphs; that the required therapeutic purpose included prophylactic purposes (*Unterpertinger* and *d'Ambrumenil*); that the scope of 'medical care' in both subparagraphs was the same (*Dornier*); that prophylactic care involved observation rather than treatment; and that pathology testing was an integral part of such observation.

69. He concluded that such testing was "an integral part of medical care" within subparagraphs (b) and (c); which subparagraph applied depended on whether the testing was performed "outside hospitals and similar establishments and within the framework of a confidential relationship" (subparagraph (c)). Where that was not the case it fell within subparagraph (b); for those purposes an outside laboratory fell within the wording 'centres for medical or diagnosis and other duly recognised establishments of a similar nature' in subparagraph (b); he added that different tax treatment of pathology testing, depending on the circumstances in which it was performed would be incomprehensible from the viewpoint of reducing the cost of healthcare as well as incompatible with fiscal neutrality.

70. The Court's analysis was similar. Under the heading 'The nature of the services at issue' the Court noted that the German court's question referred to subparagraph (b) only, but nevertheless canvassed the possibility that LuP's supply might amount to 'medical care' under either that subparagraph or subparagraph (c). It continued:

> 25 As the Court has previously held, the exemptions provided for in Article 13A(1)(b) of the Sixth Directive and letter (c) of the same provision both have the objective of reducing the cost of health care (*Dornier*, paragraph 43; and Case C-307/01 *d'Ambrumenil and Dispute Resolution Services* [2003] ECR I-13989, paragraph 58).
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> 26 Regarding services of a medical nature, the case-law is to the effect that the term 'medical care' in Article 13A(1)(b) of the Sixth Directive must be interpreted as covering all provisions of medical care envisaged in letter (c) of the same provision (*Dornier*, paragraph 50), since those two provisions are intended to regulate all exemptions of medical services in the strict sense (*Kügler*, paragraph 36).
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> 27 It follows that the concept of 'medical care' in Article 13A(1)(b) of the Sixth Directive and that of 'the provision of medical care' in letter (c) of the same provision are both intended to cover services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see, to that effect, *Dornier*, paragraph 48).
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> 28 In the present case, the national court expresses doubts as to whether medical tests such as those at issue in the main proceedings do constitute such care, although it acknowledges that those tests assist in the diagnosis of diseases. The Commission maintains that, on a functional and teleological interpretation of the relevant provisions of the Sixth Directive, a laboratory carrying out such tests cannot be equated with a centre for diagnosis because those tests serve merely to establish the diagnosis and, on a systematic interpretation of those same provisions, those tests could be viewed as being medical care because they serve to establish the diagnosis and are an integral part thereof.
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> 29. It should be borne in mind that, whilst 'medical care' and 'the provision of medical care' must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass. The Court's case-law is to the effect that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of 'medical care' and 'the provision of medical care' is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph. Accordingly, medical services effected for the purpose of protecting, including maintaining or restoring, human health may benefit from the exemption under Article 13A(1)(b) and (c) of that directive

(see, to that effect, Case C-212/01 *Unterpertinger* [2003] ECR I-13859, paragraphs 40 and 41; and *d'Ambrumenil and Dispute Resolution Services*, paragraphs 58 and 59).

30 Moreover, medical tests which, as in the present case, are prescribed by general practitioners as part of the care they provide may contribute towards maintaining human health because, like any medical service effected for prophylactic purposes, they allow for the observation and examination of patients before it becomes necessary to diagnose, care for or heal a potential illness.

31 In those circumstances, as maintained by L.u.P. at the hearing, and as acknowledged as being possible by the national court and the Commission, the Court finds that, in the light of the objective of reducing health care costs pursued by the abovementioned exemptions, medical tests such as those at issue in the main proceedings, which have as their purpose the observation and examination of patients for prophylactic purposes, may constitute 'medical care' within the meaning of Article 13A(1)(b) of the Sixth Directive or 'the provision of medical care' within the meaning of letter (c) of the same paragraph (see, to that effect, *Commission* v *France*, paragraph 30).

32 This interpretation is, moreover, consistent with the principle of fiscal neutrality, which precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (Case C-109/02 *Commission v Germany* [2003] ECR I-12691, paragraph 20; and *Kingscrest Associates and Montecello*, paragraph 54). It would be contrary to that principle to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out when they are equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question (see, to that effect, *Dornier*, paragraph 49; and Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraphs 40 and 41).

71. Turning next to the question whether LuP was an establishment of a type falling within subparagraph (b), the Court held that, since what it provided was medical care, LuP must be an establishment similar to hospitals and centres for medical treatment or diagnosis within the meaning of the subparagraph. Before turning to the conditions for exemption, the Court stated the conclusion that:

39 It thus follows that medical tests carried out by a laboratory governed by private law, such as the one at issue in the main proceedings, which have as their purpose the observation and examination of patients for prophylactic purposes, may come within the exemption for medical care provided for in Article 13A(1)(b) of the Sixth Directive.

40 Accordingly, it is appropriate to consider the conditions which that provision may impose on such an exemption.

72. There was debate before us as to the import of the word 'may' in paragraph 31 (and similar debate is possible over paragraph 39). Ms Whipple submitted that *LuP* was only authority for supplies similar to those at issue in the case being within exemption if that would lead to the reductions of healthcare costs. It seems to us, however, that the import of the word 'may' in paragraph 31 is that the Court was canvassing the possible application either of subparagraph (b) or subparagraph (c) and the import of the word in paragraph 39 is explained by paragraph 40: pathology may be exempt as medical care under subparagraph (b) if the other conditions of subparagraph (b) are satisfied. We return to that aspect of *LuP* in the next section of this decision.

73. We were taken to the decision of the VAT and Duties Tribunal in *In Health Group SA Public Body and Hospital* (Decision Number 19593, Judge Shipwright and Professor Roy Spector MD PhD FRCP FRCPath) released on 25 May 2006 (after delivery of the Advocate General's Opinion in *LuP* but before the judgment of the ECJ), from which HMRC did not appeal. In Health provided an MRI scanning service to an NHS Trust; the issue was whether its services came within the scope of Group 7 of Schedule 9. Having considered CJEU authorities, including the Advocate-General's Opinion in *LuP*, the Tribunal concluded (paragraphs 53-54):

> 53 We have found that here the supply was the supply of data which, at the very most, was the provision of data potentially preparatory to diagnosis by someone else, if that person decided so to use it. The supply was not for, or of diagnosis, treatment or cure, but consisted of the supply of data for the Trust to use as it saw fit. We have also found that it does not of itself have a therapeutic purpose. We also find that when Lister made the supply it did not have a therapeutic purpose. It was the provision of data and not the supply of hospital or medical care.
>
> 54. We conclude that the supply was not a supply of medical care within that phrase's meaning for the purposes of Community Law. Accordingly, the supply could not fall within Article 13 this is because it is not a supply of medical care.

74. Ms Whipple submitted that the approach of the Tribunal was correct in law and that there is no material distinction between the purpose of In Health's supplies and those of GSTS.

75. In Case C-262/08 *CopyGene A/S v Skatteministeriet* [2010] ECR I-5053 CopyGene provided to parents the service of collecting umbilical cord blood at the time of the birth of a child with a view to storing stem cells for prospective use in the event that in later life the child developed a condition that could be treated with the use of stem cells. The issue was whether this was an activity closely related to the prospective medical care within the meaning of subparagraph (b), it not being contended that it amounted to medical care in itself. The Court repeated (paragraph 30) that services provided to healthy patients for prophylactic purposes fell within the exemption, but held that Copygene's service was not prophylactic since it did not 'avert, avoid or prevent' disease or health problems (paragraph 36) and was not 'closely related' to medical care in circumstances where the medical care to which the

activity potentially related had not been performed, commenced or yet envisaged (paragraph 52).

76. The case is more relevant to the present appeal for what it says about 'recognition' of establishments, and we return to it under that topic below. Ms Foster relies, however, on a passage in the Opinion of Ms Advocate General Sharpston dealing with a further argument that had been raised against the conclusion that the supplies were exempt; this was that exemption would not reduce healthcare costs because it was speculative whether there would ever be any medical treatment using the stem cells. The Advocate General disagreed with the point, observing that healthcare costs would have been reduced to the extent that the cells were used in future treatment. She added (paragraph 61) that "while the reduction of healthcare costs is indeed the aim of the exemption, exemption does not depend on achieving such a reduction in the case of each individual supply".

77. Case C-86/09 *Future Health Technologies v HMRC* [2010] ECR I-5215, decided on the same date, was similar to *CopyGene* except that the taxpayer did not collect the cord blood itself, instead supplying equipment to be used by a medical practitioner engaged by the parent. The questions referred included the question whether the service constituted medical care. The Court held that it did not, since no diagnosis or treatment of disease was involved in it; it was not closely related to prospective future medical care for the same reasons as given in *CopyGene*.

78. The last decided case in this line of authority is Case C-156/09 *Finanzamt Leverkusen v Verigen Transplantation Service International AG* [2010] ECR I-11733. Verigen received cartilage material taken from a patient by a clinician, multiplied the chondrocytes and returned the resulting cells to the clinician for reimplantation into the patient. Following Advocate General Sharpston, the Court held that this constituted medical care, reasoning as follows:

> 24 As regards the exemption referred to in Article 13(A)(1)(c) of the Sixth Directive, it follows from the case-law that the concept of 'provision of medical care' is intended to cover services which have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*CopyGene*, paragraph 28 and the case-law cited). Whilst the provision of medical care must have a therapeutic purpose, it does not necessarily follow, according to the case-law cited in the previous paragraph, that the therapeutic purpose of a service must be confined within a particularly narrow compass (see *CopyGene*, paragraph 29 and the case-law cited).
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> 25 Here, it is not disputed that the process consisting in the removal of cartilage material to extract cells which will then be multiplied for reimplantation in a patient has, overall, a therapeutic purpose.
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> 26 The specific services provided by VTSI form, admittedly, only part of that overall process. However, as the Advocate General observed at point 23 of her Opinion, they are an essential, inherent and inseparable part of the process, none of the stages of which can usefully be performed in isolation from the others.

27 It follows from the foregoing that the extraction of joint cartilage cells from cartilage material taken from a human and the subsequent multiplication of the cells for reimplantation for a therapeutic purpose falls within the concept of 'provision of medical care' referred to in Article 13(A)(1)(c) of the Sixth Directive. Such an interpretation is also consistent with the objective of reducing the cost of health care referred to in that provision (see Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 29).

28 The fact that the services are carried out by laboratory staff who are not qualified medical practitioners is irrelevant, inasmuch as it is not necessary for every aspect of therapeutic care to be provided by medical staff (see, to that effect, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 41, and *L.u.P.*, paragraph 39).

79. Since we heard the appeal, Advocate General Sharpston has given her Opinion in Case C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* (26.9.13). Both parties have made written submissions on it. *Klinikum Dortmund* concerned a hospital providing in-patient and out-patient care for cancer patients. It appears from paragraphs 12 to 14 of the Opinion that the treatment was provided in three ways. In-patients were treated by staff of the hospital. Out-patients were either treated by staff of the hospital or by independent doctors working on the hospital premises. The dispute related to that third situation; the issue was whether supplies of drugs by the hospital were exempt, the Sixth Directive containing no exemption for supplies of drugs as such, but for taxation at a reduced rate (implying that such supplies were, in their own right, taxable).

80. The doctors prescribed cytostatic drugs which were dispensed by the hospital pharmacy. A treatment schedule was drawn up under which the drugs were administered to the patient by healthcare staff, with the doctor supervising or at least being kept informed of progress and adjusting the prescription or treatment schedule as necessary. The Advocate General's analysis of the situation was that medical care, exempt under subparagraph (c), was supplied to the patient by the doctor and the cytostatic and other drugs were supplied to the patient by the hospital.

81. The Advocate General concluded that the supply of the drugs was not exempt. She concluded that a supply of goods could be a 'closely related activity' under subparagraph (b). She concluded, however, that a supply could only be exempt as a 'closely related activity' under subparagraph (b) if the supply to which it was closely related was also exempt under that subparagraph. Accordingly, a supply of treatment, including drugs, made entirely by a hospital was wholly exempt but a supply of drugs made by a hospital that was related to a supply of treatment made by an independent doctor (the treatment being exempt under subparagraph (c)) was not an exempt supply. It is apparent that the Advocate General was troubled by this from the point of view of fiscal neutrality and the consequent VAT burden on healthcare, but could see no way of avoiding the conclusion.

Duly recognised establishments

82. The question whether the taxpayer could claim to have been 'recognised as devoted to social wellbeing' for the purposes of subparagraph (g) arose in relation to the non-medical aspects of the care provided in *Kügler*. It and most of the other authorities we discuss here concerned the situation, opposite to that in they present case, of a taxpayer claiming entitlement to an exemption that the tax authorities had not accorded it. The Court dealt with the issue as follows (the English language version of the judgment using the inappropriate wording 'recognised as charitable' of article 13A(1)(g) of the Sixth Directive in the English language version):

> 54. Finally, with the (*sic*) regard to the concept of 'organisations recognised as charitable by the Member State concerned', it is correct, as the German Government has stated, that Article 13(A)(1)(g) of the Sixth Directive grants the Member States a discretion for the purpose of according certain organisations such recognition.
>
> 55. As long as the Member States observe the limits of the discretion which is accorded to them by Article 13(A)(1)(g) of the Sixth Directive, persons cannot rely on that provision in order to acquire the status of charitable organisation as against the Member State concerned.
>
> 56. Where a person seeks the status of charitable organisation, it is for the national courts to examine whether the competent authorities have observed those limits while applying Community principles, in particular the principle of equal treatment.
>
> 57. It will accordingly be for the national authorities, in accordance with Community law and subject to review by the national courts, to determine, in the light in particular of practice followed by the competent administrative body in analogous situations, which organisations should be recognised as charitable within the meaning of Article 13(A)(1)(g) of the Sixth Directive.
>
> 58. In the main proceedings, the national court will thus be able to take into account the existence of specific provisions, be they national or regional, legislative or administrative, or tax or social security provisions, the fact that associations carrying on the same activities as the claimant in the main proceedings are already entitled to a similar exemption, given the public interest inherent in those activities, and the fact that the costs of the services supplied by the claimant in the main proceedings may be largely met by statutory health funds or by social security bodies with which private operators such as the claimant in the main proceedings have contractual relations.

83. The Court added that the fact that the Member State might have imposed conditions that the body does not satisfy – either pursuant to the opening words of article 132 or pursuant to article 133 – is irrelevant to the direct effect of subparagraph (g) if the state has not in fact done so.

84. The Court applied a similar approach to the concept of a 'duly recognised establishment of a similar nature' in subparagraph (b) in *Dornier*. Germany relied on the requirement in its tax law for treatment to be provided under medical supervision (as to which see paragraph 61 above) as amounting to a refusal of recognition of bodies such as Dornier, but the Court repeated that that was an impermissible criterion given that the Directive included paramedical services within the exemption. Dornier had accepted that its activities did not require a licence under German healthcare legislation, but pointed to legislation allowing its fees to be partially reimbursed by the social security authorities. There was debate about whether the reimbursement was as full as in the case of other, exempted providers; this the Court resolved by saying (paragraph 75) that if other, exempted healthcare providers also only benefitted from partial reimbursement, the fact that Dornier's reimbursement was partial was irrelevant. Its general conclusion was

> 76. Accordingly, the second question must be answered to the effect that the recognition of an establishment for the purposes of Article 13A(1)(b) of the Sixth Directive does not presuppose a formal recognition procedure; nor must such recognition necessarily derive from national tax law provisions. Where the national rules pertaining to recognition contain restrictions which exceed the limits of the discretion allowed to Member States under that provision, it is for the national court to determine, in the light of all the relevant facts, whether a taxable person must none the less be regarded as an 'other duly recognised establishment of a similar nature' within the meaning of that provision.

85. In *LuP* the Court held (as we have noted at paragraphs 70 and 71 above) that LuP's pathology service was medical care and that LuP was of a similar nature to other establishments falling within subparagraph (b). The Court proceeded, under the heading 'The conditions for exemption', to consider the requirement to be 'duly recognised'. After referring to the Member State's discretion and to what is now article 133,, the Court held first that it was not in principle objectionable for the exemption under subparagraph (b) to be subject to conditions different from those attaching to the commissioning GPs' exemption under subparagraph (c), since it was implicit in the concept of a 'duly recognised establishment' in subparagraph (b), and in the power to attach the further conditions in what is now article 133 to exemption under that subparagraph, that the conditions of exemption under the two subparagraphs could be different.

86. Repeating that it was for national court to examine whether the Member State had observed the limits of its discretion and the principle of equal treatment, the Court proceeded to examine the conditions imposed by the German VAT law. It held that the requirement of supervision by a doctor was not permitted by the Directive, since medical care included paramedical services provided by health professionals who were not doctors, but the 40% insured persons requirement was permitted since the extent to which the cost of a service was met by social security health insurance was a legitimate criterion of recognition – in both respects applying *Dornier*. The Court nevertheless enjoined the national court to examine whether the legislation infringed fiscal neutrality by discriminating between providers of similar services (paragraph 50).

87. Though the Court's conclusion on the first question in *CopyGene* made the issue of recognition irrelevant, the Court discussed the issue at some length (paragraphs 53 to 79 of the judgment). In summary, the Court held that it was a matter for the national court whether CopyGene was of a similar nature to other subparagraph (b) establishments (paragraph 60). As regards recognition, it was for the national court to determine whether refusal of recognition complied with the case-law set out in paragraphs 63 to 65 of the judgment, and in particular with fiscal neutrality (paragraph 79). Paragraphs 63 to 65 read as follows:

> 63 It is thus, in principle, for the national law of each Member State to lay down the rules according to which such recognition may be granted to establishments which request it. The Member States enjoy a discretion in this regard (*Dornier*, paragraphs 64 and 81, and *L.u.P.*, paragraph 42).
>
> 64 Where a taxable person seeks the status of an establishment duly recognised for the purposes of Article 13A(1)(b) of the Sixth Directive, it is for the competent authorities to observe the limits of the discretion conferred upon them by the latter provision in applying the principles of European Union law, in particular the principle of equal treatment which, in the field of VAT, takes the form of the principle of fiscal neutrality (see, to that effect, *Dornier*, paragraph 69, and *L.u.P.*, paragraph 48).
>
> 65 In that regard, in order to determine which establishments should be 'recognised' under that provision, the national authorities should, in accordance with European Union law and subject to review by the national courts, take into consideration a number of factors, which include the public interest of the activities of the taxable person in question, the fact that other taxable persons carrying on the same activities already have similar recognition, and the fact that the costs incurred for the treatment in question may be largely met by health insurance schemes or other social security bodies (see, to that effect, *Kügler*, paragraphs 57 and 58; *Dornier*, paragraphs 72 and 73; and *L.u.P.*, paragraph 53).

88. The Advocate General's Opinion explains (paragraphs 77-78) that Denmark had not laid down any rules for applying subparagraph (b) to private bodies and that the Danish tax authorities had established an administrative practice of allowing the exemption in respect of supplies by medical personnel acting within the scope of their medical authorisation and of treatment reimbursed under the public health insurance scheme. The case was an appeal against a refusal of exempt treatment by the tax authority.

89. As regards the factors referred to by the referring court, the CJEU held that the fact that the services were provided by qualified medical personnel did not automatically entitle them to exemption (paragraph 68); the fact that the treatment was not covered by the public health insurance scheme was one that the authorities could take into consideration (paragraph 69), and was relevant also to whether *CopyGene* operated under 'comparable social conditions' to other subparagraph (b)

entities (paragraph 70). It should not lead automatically to refusal of exemption, particularly if applying the criterion led to unequal fiscal treatment (paragraph 71). The fact that Copygene was authorised to handle stem cells tended to support the argument that it was 'duly recognised' (paragraph 74) – but, again, was not conclusive (paragraph 75). The Court concluded that subparagraph (b) neither required nor prohibited refusal of exemption (paragraphs 77 and 78).

90. Paragraphs 81-86 of the Advocate General's Opinion, to which Ms Whipple drew our attention, discuss the requirement of 'comparable social conditions'. The Advocate General notes that there is no record in the travaux préparatoires of the reason for the introduction of that requirement into a later draft of the Sixth Directive, that the Commission had reported that the requirement was difficult to apply, and that in 1984 there had been a proposal to delete it. The Advocate General accepted that reimbursement of costs was a relevant factor, to be weighed in the balance, from which Ms Whipple drew the inference that the question whether recognition would reduce healthcare costs was also relevant.

91. After the hearing of this appeal the CJEU gave judgment in Case C-319/12 *Minister Finanzów v MDDP sp z o.o. Akademia Biznesu, sp. komanditova* (judgment of 28.11.13), concerning 'recognition' in the context of the exemption for education services. Ms Whipple asked us to consider a written submission on its relevance to the appeal. HMRC objected on the grounds that the case did not assist the arguments, and in the alternative asked us to consider a submission from them. We decided to consider Ms Whipple's submission and found it unnecessary to receive a submission from HMRC as we did not consider (for reasons we explain below) that the decision in *MDDP* assisted Ms Whipple's case.

92. Article 132(1)(i) requires Member States to exempt certain forms of education provided "by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects". Polish law exempted all 'educational services'. MDDP was a commercial provider of training courses in fields such as taxation and accountancy. Wishing to recover input tax, it appealed against the Finance Ministry's ruling that the Polish legislation complied with the Directive. The case reached the Supreme Administrative Court, which asked the CJEU whether the Directive precluded the exemption of private commercial education providers and, if so, whether the Directive entitled MDDP to recovery of input tax whilst national law exempted it from output tax.

93. Noting that the purpose of the exemption was to facilitate access to education by removing the burden of tax, the Court held that the Directive did not preclude the exemption of commercial providers of the services listed in article 132 unless it expressly so provided, which was not the case as regards education. The Polish law exemption was, however, too wide in not confining exemption to private providers pursuing similar objects to educational bodies governed by public law. As regards the consequences of this for MDDP, the Court referred to the Member States' discretion as to the recognition of such bodies and concluded that MDDP had an EU law right to taxable treatment if Poland had exceeded the limits of its discretion by including MDDP within the exemption. The question for the national court was whether, "even

taking account of the discretion granted to member States, that taxable person could not objectively be regarded as an organisation having objects similar to those of an educational body governed by public law".

The parties' submissions in more detail

'Medical care'

94. Ms Whipple accepted that GSTS's supplies to the Trusts were activities closely related to medical care. She pointed out, however, that Group 7 in Schedule 9 did not refer to closely related activities and submitted (correctly) that GSTS were entitled to be taxed in accordance with the Act even if its omission of a reference to closely related activities did not accord with the requirements of the Directive. She accepted that the term 'medical care' in the Act fell to be interpreted compatibly with the term in the Directive, but disputed that her clients' supplies were medical care within the meaning of the Directive.

95. As to that, she submitted that the supplies did not have the "purpose of protecting, including maintaining or restoring, human health" identified in, among other cases, *d'Ambrumenil*. They did not have as their purpose the diagnosis, treatment or cure of diseases but rather the provision of information to clinicians to assist them to perform a therapeutic rôle. *Commission v France* indicated that supplies of pathology were exempt, but was at best ambiguous as to whether they were exempt as medical care or as a closely related activity. She drew our attention to the remarks of Leggatt J at paragraphs 27 and 28 of his judgment in the judicial review, to which we return below.

96. *LuP*, she submitted, had departed from the 'therapeutic purpose' test purely in order to promote article 132's objective of reducing healthcare costs in a situation where no equivalent of section 41 of the VAT Act existed. It was apparent from the terms of the Advocate General's Opinion that he had been influenced by the consideration that exempting LuP's supply met the objective of reducing healthcare costs, given the absence in Germany of a counterpart to s 41 of the 1994 Act. His description (paragraph 28) of medical care as a process consisting of observation and examination followed by diagnosis and treatment, followed by a conclusion that medical tests ordered by a clinician were "in that sense ... medical-care services" betrayed a failure to analyse whether the tests were part of the medical care provided by the clinician (which they were not) or something closely related – which they were. He was also wrong to look at the purpose of the person commissioning the tests rather than the purpose of the tests themselves and to disagree with the Commission's view that the tests were not medical care.

97. Paragraph 31 of the Court's judgment was, Ms Whipple submitted, hard to understand, but in any event the Court had only said that pathology tests 'may' constitute medical care; this amounted to a permission, not a mandate. Nevertheless, the reasoning was unsatisfactory. The opening words of paragraph 31 ("In those circumstances") suggested a logical connection between paragraph 31 and the foregoing paragraphs which was absent. The concluding words treated *Commission v*

France as authority for a proposition that it did not state. Paragraph 35, holding that pathology laboratories were of necessity similar to hospitals and diagnostic centres, was a policy-driven extension of the concept of similarity, again driven by the objective of reducing healthcare costs.

98. In support of these submissions Ms Whipple relied on the Advocate General's Opinion in *Klinikum Dortmund* as sharing the view that *Commission v France* was a case about 'closely related activities' rather than medical care. Moreover, the Advocate General's analysis of the supply of the cytostatic drugs in *Klinikum Dortmund* – as being closely related to the medical treatment given in that case but logically separate from it – was, she submitted, applicable *a fortiori* to GSTS's pathology services: the personnel involved in supplying those had no direct contact with the patient and were often not healthcare professionals at all. Thirdly, the Advocate General's observation that it was not for judges to fill *lacunae* in the VAT legislation was "at odds with HMRC's interpretation of *LuP*".

99. Ms Whipple reminded us of the distinction, reiterated by the Supreme Court in *HMRC v Aimia Coalition Loyalty United Kingdom Ltd* [2013] UKSC 15, [2013] STC 784, between the CJEU's function of interpreting EU law and the national court's function of finding facts and applying the law to them. The facts of the present case were not identical to those of *LuP*; our task was to apply the Directive to the facts of the present case – in particular to decide upon the purpose of GSTS's tests and to take account of the fact that exemption in the present case would increase healthcare costs – and not to treat the Court's conclusion on the facts of *LuP* as determinative of the outcome here. Ms Whipple also drew our attention to the Advocate General's endorsement in *CopyGene* of the view (shared by the Court in *Future Health Technologies*) that CopyGene's collecting of stem cells was not medical care.

100. In response Ms Foster submitted that the distinction drawn in the case-law between therapeutic and other purposes was not a distinction between services that effect care and those that do not, but rather between those that pursue a therapeutic or prophylactic aim and those that do not. It was the ultimate purpose for which the service was provided that mattered. She described *LuP* as being consistent with that approach, explaining the use of the word 'may' in paragraph 31 of the judgment as an implicit reference to the other conditions within subparagraph (b) and/or the Member State's power to impose conditions under article 133; paragraph 35 of the judgment reinforced the conclusion that the Court was holding that pathology was medical care.

101. In relation to *Klinikum Dortmund* she submitted that nothing in the Advocate General's Opinion illuminated the issues in the present case. The issue in *Klinikum Dortmund* was whether the supplies of drugs – which could not be described as amounting in themselves to medical care – could in the circumstances of that case be exempt as 'closely related'. We were concerned with the different issue of whether GSTS's pathology services were medical care.

102.Ms Foster analysed medical care as a continuum or 'pathway' of investigation and analysis, whether or not of a scientific nature, with the direct purpose of preventing, diagnosing and palliating or curing illness. GSTS's services did have that

purpose, as emerged from the terms of its agreements with the Trusts and the evidence of the claimants' witnesses in the judicial review and before us. She submitted that GSTS's activities extend to diagnosis, as was evidenced by the evidence of Mr Edgeworth and the remarks on the results sheets that we have referred to at paragraph 28 above.

'State-regulated institution'

103. Ms Whipple did not dispute that GSTS is registered by an authority pursuant to an Act of Parliament: it is registered with the Care Quality Commission pursuant to the Health and Social Care Act 2008 in respect of two regulated activities: "diagnostic and screening procedures" and "management and supply of blood and blood-derived products". But, she submitted, the legislation has to be interpreted compatibly with the Directive; this registration did not amount to recognition of GSTS as a body similar to other subparagraph (b) bodies or operating under social conditions comparable to bodies governed by public law. A wide range of activities are registrable under the 2008 Act, defined without reference to the concept of 'medical care'.

104. Ms Foster accepted that it was for us to determine whether GSTS is a state-regulated institution, that term being understood in the light of the wording of subparagraph (b). In that connection she relied on the *LuP* judgment as showing that GSTS was similar to a hospital or centre for medical treatment and diagnosis (see paragraph 71 above). Moreover, GSTS did operate under comparable social conditions to a public body: from the perspective of the patient, treatment was received under the same social conditions – i.e. free of charge at the point of receipt – whether the hospital (or, it could be added, the GP in the case of a 'third party customer') received the fruits of an in-house pathology service or one outsourced in the manner of GSTS.

HMRC's discretion

105. Ms Whipple points to the Member State's discretion as to the recognition of bodies for the purposes of subparagraph (b) – acknowledged in *LuP* and other CJEU authorities – as well as to its discretion to make exemption under subparagraph (b) conditional upon compliance with the conditions specified in article 133. She observed that GSTS would not satisfy the conditions in article 133(a), (b) or (c), if they were applied to it. HMRC, she submitted, had wrongly failed to exercise these discretions in this case, misdirecting themselves, in their decision letter and in Ms Foster's Skeleton argument, that exemption here was mandatory. The discretions had, moreover, to be exercised consistently with the limits imposed by EU law.

106. In that connection she submitted that HMRC's failure to exercise the discretions so as to leave GSTS standard-rated frustrated the Directive's aim of reducing healthcare costs, and was inconsistent with fiscal neutrality as between hospitals that kept their pathology services in-house and those that – as encouraged by Lord Carter – outsourced them to partnerships involving the private sector and competing in an internal NHS market for the supply of such services. Exempt treatment of outsourced

pathology distorted competition in that market. There was only one way in which the discretion could be exercised: so as to withhold exemption. Since it was for the national court to determine where the limits of the Member State's discretion lay, we as a tribunal could so hold.

107. Ms Whipple relied on the CJEU's reasoning in *MDDP* as having equal application to the present case. It showed that it was for us to consider whether the United Kingdom had exceeded its discretion by exempting supplies in any hospital 'or state-regulated institution': since almost everything in the healthcare sector is state-regulated, she submitted, the criterion is too broad and fails to restrict exemption to institutions of a 'similar nature' to hospitals, etc. Moreover, the United Kingdom could not legitimately regard GSTS as being of a similar nature to hospitals, etc, since (a) the result was to increase healthcare costs and (b) GSTS is not objectively similar to hospitals, etc, in having little or no contact with patients, no responsibility for care or treatment and objects different from those of a public healthcare body. She added that GSTS did not operate under 'comparable social conditions' to such bodies.

108. Ms Whipple further submitted that the Court's reasoning on similarity in *LuP* was driven by the policy imperative of reducing healthcare costs, which in the present case was furthered by treating GSTS as not similar to a public body and not operating under comparable social conditions; it was indeed a private partnership.

109. Ms Foster replied that no principle of EU required the United Kingdom to do more than to give effect to the Directive in domestic VAT legislation. That the United Kingdom had done: Group 7 specifies that medical care is exempt when provided by the bodies described in Note 8 to the Group; GSTS is such a body. The Member State's discretion had been exercised in the United Kingdom at the level of the legislation; interpreting 'medical care' in accordance with the CJEU's case-law, the legislation as a whole led to the result that GSTS's supplies to the Trusts were exempt. HMRC's responsibility for the collection and management of revenue (s 5 of the Commissioners for Revenue and Customs Act 2005) did not empower them to disapply the law set by Parliament: *R (Wilkinson) v Inland Revenue Comrs* [2005] UKHL 30, [2005] 1 WLR 1718. Relying on the Advocate General's observation in *CopyGene* (paragraph 76 above) she submitted that there was in any event no obligation to apply the Directive so as to reduce healthcare costs in every individual case.

110. Ms Whipple retorted, however, that the obligations of the United Kingdom as a Member State, to further the objectives of the Directive, fell upon all branches of the state, including HMRC and ourselves. In its application to GSTS the legislation infringed the Directive by not furthering the aim of reducing healthcare costs. HMRC had apparently decided in January 2013 that GSTS's supplies were exempt in accordance with the legislation without appreciating the need to exercise afresh the Member State's discretion as to recognition and the imposition of article 133 conditions. It was to be inferred that HMRC's misconception as to the United Kingdom's discretion extended to the legislature also. We should allow the appeal, since the discretion could only be exercised one way, or should call for clarification

from the Government as to whether the decision to exempt GSTS was made in exercise of the United Kingdom's discretion or wrongly thought to be mandatory.

Our decision

Medical care

111. We reject Ms Whipple's submission that GSTS's supplies do not have a 'therapeutic purpose' within the meaning of the case-law. On the contrary, we find that they do. The function of the 'therapeutic purpose' test enunciated in *D v W*, *Unterpertinger* and *d'Ambrumenil* is to distinguish between medical activities undertaken for the purpose of protecting, maintaining or restoring human health from those undertaken for a different purpose such as informing a judicial or other decision of a non-medical character. It is not a test aimed at distinguishing between 'medical care' and 'closely related activities'. Ms Whipple would be right to say that GSTS's activities do not in themselves have the *effect* of protecting, maintaining or restoring health – it is the use that clinicians make of them that does that – but they have that *purpose* since they are supplied in order to be used in that way. We appreciate that in this respect we are differing from the approach taken by the Tribunal in *In Health* at paragraph 53 of their Decision.

112. That leaves the question of whether pathology testing is, as a matter of EU law, 'medical care' or a 'closely related activity'. GSTS's difficulty here is that *LuP* holds that an 'upstream' supply of pathology testing is medical care – an argument to the contrary being specifically rejected at paragraph 37 of the judgment) – and *Verigen* holds that an upstream supply of cell culturing – another laboratory activity – is medical care as well. Ms Whipple submitted that a distinguishing feature of *Verigen* was that cells cultured by Verigen from the patient's cartilage were re-injected into the body of the patient, but we cannot see that that is a relevant distinction. In the present case material from the patient's body is used to produce not a physical substance of value in his treatment but information of value in his treatment. In both cases the connection of the activity with medical care is that it aids the clinician in that task.

113. Leggatt J found the *LuP* judgment unsatisfactory, and we can respectfully understand why. Paragraph 30 of the judgment describes the testing as being for prophylactic purposes, while nothing in the report of the case indicates that it was not also to aid a diagnosis; the Court may have misunderstood the point being made by the Advocate General, which was that, if medical examinations carried out for prophylactic purposes were medical care, then pathology testing was so *a fortiori*. Leggatt J criticised this reasoning for glossing over the distinction between making a clinical judgment about a patient's health and providing information to inform such a judgment, without explaining whether or why the distinction was relevant.

114. Secondly, paragraphs 32 and 39 are unclear as to when medical testing 'may' be exempt as constituting medical care. This prompted considerable debate at the hearing. Ms Whipple submitted, on the basis of the reference earlier in the paragraph to reducing healthcare costs, that testing amounts to medical care where the effect of

so regarding it is to reduce healthcare costs, which is not the case in the United Kingdom or other countries with arrangements similar to those under s 41 of the Act, but we cannot accept that the term 'medical care' has a different meaning in different Member States depending on whether they have such arrangements. That would be contrary to the fundamental principle that EU law is the same in all Member States, one which we cannot accept the Court was intending to depart from.

115. We have concluded that the explanation for the use of the word 'may' is as we said in paragraph 72 above. The Court is implicitly saying that pathology may be exempt under the subparagraphs, depending upon the satisfaction of the other conditions of either subparagraph.

116. Thirdly, paragraph 31 of *LuP* treats paragraph 30 of *Commission v France* (set out at paragraph 56 above) as authority for the proposition that pathology testing is medical care, which it does not say.

117. The *Verigen* judgment has similar difficulties. The CJEU there held that multiplication of cells in a laboratory was medical care within subparagraph (c), which applies to medical care "in the exercise of the medical and paramedical professions as defined by the Member State". There is no suggestion in the report that Verigen's staff were members of such a profession. The Court dealt with the point by saying (paragraph 28 of the judgment, set out at paragraph 78 above) that it is not necessary for every aspect of therapeutic care to be provided by medical staff, and citing as authority for this paragraph 41 of *Kügler* and paragraph 39 of *LuP*. However, paragraph 41 of *Kügler* (set out at paragraph 60 above) makes the point that Kügler's care was "provided by qualified nursing staff" who on the face of it were members of a medical or paramedical profession, and paragraph 39 of *LuP* (set out at paragraph 71 above) said nothing about that aspect of subparagraph (c); the conclusion was that the pathology fell under subparagraph (b), which does not contain any requirement about the exercise of a medical or paramedical profession.

118. It is certainly possible to construct an argument that the better view is that pathology and cell culturing provided as an 'upstream' supply to a clinician are activities closely related to the ensuing medical care rather than medical care in themselves. *Commission v France* indicates that such upstream activities are at least one of the things that the extension of the exemption to closely related activities was targeted at. However, such a conclusion would have the practical disadvantage that the supplies would not be exempt unless the other conditions of subparagraph (b) were fulfilled, raising issues such as whether the Verigen laboratory was similar to a hospital or centre for medical treatment, as well as the difficulty pointed up by the Advocate General's conclusion in *Klinikum Dortmund* that subparagraph (b) does not cover activities closely related to a supply under subparagraph (c).

119. But in any event, section 3(1) of the European Communities Act 1972 requires us to interpret the Directive "in accordance with the principles laid down by and any relevant decision of" the CJEU" unless we refer any question of its interpretation to the Court. It is abundantly clear to us that in *LuP* and *Verigen* the Court concluded, advisedly, that the activities undertaken in those cases amounted to 'medical care'

within the meaning of the Directive; in doing so the Court gave a decision on the scope of that term. Ms Whipple is right to submit that it is for us to find the facts in the present case and to apply the law to them, but it is plain to us that, if we were to give a decision that GSTS's supplies were not of medical care, we would not be deciding this appeal in accordance with the decision in *LuP* nor in accordance with a principle that we derive from both cases, to the effect that 'upstream' supplies to clinicians of goods or services that are, in the words used in *Verigen* an "essential, inherent and inseparable part" of a process amounting to medical care are themselves supplies of medical care.

120. This conclusion is not displaced by the fact that the treatment of earlier case-law in *LuP* and *Verigen* may be said to be unsatisfactory in the respects we have mentioned. As far as concerns the treatment of *Commission v France* in *LuP*, our analysis of *Commission v France* is that, while it definitely viewed the analysis of the samples in that case as exempt, it is (we have suggested, perhaps deliberately) ambiguous as to whether the analysis was exempt as constituting medical care or as a closely related activity. We cannot state confidently that the *LuP* judgment is erroneous in the view it takes of paragraph 30 of that judgment. Nor do we agree with Ms Whipple that Advocate General Sharpston reached the opposite interpretation of paragraph 30 in her Opinion in *Klinikum Dortmund*. The Advocate General in fact expressed no view upon how the earlier judgment viewed the analysis, but only upon what it had said about the transmission of the sample.

121. More fundamentally, there is no (as it were) hierarchy between judgments of the CJEU. The binding nature of the *LuP* and *Verigen* judgments is unaffected by whether passages in their reasoning draw conclusions from earlier case-law that might be debated.

122. The only remaining question arising in this part of the case is whether we should refer a question or questions to the CJEU in case the Court should decide to rethink its approach to upstream activities and reclassify them as closely related activities rather than medical care. We have decided not to do so for the following reasons.

123. First, the prospects of the Court finding it appropriate to overturn *LuP* and *Verigen* in this way are, to say the least, unpromising. To do so would reduce availability of exemption contrary to the Directive's objective – achieved by exemption in the majority of Member States where refund arrangements do not apply – of reducing the tax burden upon health care.

124. Secondly, having been helped to achieve a clearer understanding of what GSTS's supplies involve, we consider that we would have classified them as medical care under subparagraph (b) even if the *LuP* and *Verigen* decisions did not exist. We are confident that they are provided for a therapeutic purpose within the meaning of the case-law. Moreover, our findings about haematology at paragraphs 28 to 32, microbiology at paragraph 34 and histopathology at paragraphs 35 to 37 above indicate both that clinicians, acting in their capacity as such, are involved in providing

the 'interpretative' part of GSTS's service and that those clinicians' involvement in a case can extend to offering advice on diagnosis or treatment.

125. We accept that that only occurs in the minority of cases that are serious or problematic; that is not surprising. The possibility of a need for interpretation or advice exists – depending on what the analysis shows up – in every case. We also accept that, as a matter of agreed allocation of tasks between GSTS and the Trusts, the clinicians act for the Trusts when they give advice on diagnosis or treatment; however, when the clinician switches from his GSTS rôle to his Hospital rôle, he carries across into his clinical rôle all that he has learnt from his immediately preceding performance of his GSTS rôle; this is a point of distinction of the present case from *In Health*, where, according to the Tribunal's findings, all that passed from In Health to the Hospital was a sheet of MRI scan results.

126. In short, pathology is an activity closely connected with a patient's health, provided – in the cases we are considering – for the purpose of maintaining or restoring the patient's health and characterised by at least the possibility of the exercise of medical skill and judgement in matters of interpretation. It certainly involves, in our view, more than the provision of information. We would not, we think, have had difficulty in characterising it as medical care.

127. Possible objections to that conclusion are that the VAT supply is to the referring clinician and not the patient – the task is in effect subcontracted – and that pathology does not characteristically involve contact with the patient. Neither of those objections seems to us to be sufficient. The route of the VAT supply cannot affect the intrinsic character of what is being done. Secondly, not all acts of medical care are done in contact with the patient. The important task of deciding upon a difficult diagnosis or course of treatment – for example in the multi-disciplinary meetings described in paragraph 37 above – can be carried out in the absence of the patient and we cannot see why the character of the task is affected by whether the participants have at some other time had contact with the patient. To take an example outside the facts of this case, a consultant to whom a more junior doctor referred a case for an opinion on the papers would in our view be providing medical care in giving it.

A 'state-regulated institution', reading that expression compatibly with the Directive

128. There is no doubt that GSTS is a 'state-regulated institution' within the meaning of Note 8 to Group 7 in Schedule 9. We find it beyond argument that Note 8 to Group 7 has 'recognised' GSTS for the purposes of subparagraph (b); we do not find that the question whether the Note has 'duly' recognised GSTS raises any further issues at this stage of our consideration. We accept that the legislation has to be read compatibly with the Directive, and that if the Directive did not permit the United Kingdom to treat GSTS as a subparagraph (b) establishment, we would be obliged to give effect to GSTS's right under the Directive not to be so treated. At this stage we are dealing not with issues of discretion but of the compatibility of the wording of the domestic legislation with the Directive. There are two issues here: (1) does GSTS, which is not a body governed by public law, undertake its activities 'under social conditions

comparable with' those applicable to public law bodies? and (2) is GSTS a hospital, a centre for medical treatment or diagnosis or an establishment of a similar nature?

129. As to the first of those issues, we consider that the word 'social' in the expression 'social conditions' has a meaning akin to its meaning in expressions such as 'social security' and 'social housing': it has to do with the basis upon which those in need (here, medical need) receive treatment. We therefore regard it as sufficient in order to satisfy the 'social conditions' requirement that patients of the Trusts and of third party customers receive the benefit of GSTS's services on the same terms as they would if the service were still provided in-house within the Trust Hospitals, which are undeniably public bodies.

130. Regarding the second issue, *LuP* requires us to hold that GSTS is similar to the other subparagraph (b) establishments: see paragraph 71 above. We would have concluded in any event that GSTS satisfies this part of the requirements of subparagraph (b). We would not have concluded that GSTS is a hospital. Without suggesting that it was, Ms Foster understandably drew our attention to the fact that its laboratories are still on hospital premises (the contracts require the Trusts' consent to any relocation by GSTS), sparking debate before us as to whether the GSTS laboratories needed to be on the hospital site. We find that GSTS occupies laboratories on hospital premises for a combination of the reasons that the laboratories already existed when GSTS was set up, making it convenient to continue to use them and that a pathology laboratory needs to be situated at least reasonably close to the hospital it serves; self-evidently, the closer it is, the more easily can samples be passed from the hospital to the laboratory (communication of results can nowadays be done electronically) and can hospital staff visit the laboratory. The necessary degree of proximity depends on the urgency of the case: some test results are required urgently. None of this really assists us with the present issue.

131. The words 'centre for medical treatment or diagnosis', on the other hand, are fairly wide. We consider that the draftsman intended to capture establishments where patients are diagnosed (or treated) even if they did not qualify for the label of a 'hospital'; the Directive had to cater for the diversity of forms of healthcare establishment across the Member States. The subparagraph then includes establishments 'similar' to those. We would have concluded that an establishment is similar to a centre for diagnosis if it is a centre for an activity similar to (even if not exactly equating to) diagnosis, and that GSTS meets this description.

The Member State's discretion

132. It is common ground that a Member State has a discretion – to be exercised within the confines imposed by the case-law – as to whether it recognises an establishment under subparagraph (b); it also has a discretion as to whether it imposes any of the article 133 conditions on supplies under subparagraph (b). Ms Whipple shouldered the burden of persuading us both (a) that HMRC retain a discretion to withhold recognition of GSTS under the subparagraph and/or to apply one or more article 133 conditions, irrespective of the terms of the 1994 Act, and (b) that EU law obliged them to use those powers in such a way as to deprive GSTS of exemption.

133. As regards the first of those points, we agree with Ms Foster that the United Kingdom's discretion as to recognition and as to the application or not of the article 133 criteria has been exercised in the framing of the legislation, leaving HMRC no discretion as a matter of domestic law. Ms Whipple is correct to say that, if EU law obliges the United Kingdom to achieve the result that GSTS's supplies are not exempt, HMRC as part of the state could not shelter behind the fact that the domestic legislation did not produce this result. She submits, in reliance upon the approach in *MDDP*, that the United Kingdom has gone outside the limits of its discretion under EU law. Her main ground for saying so is that the United Kingdom has not used its discretion in such a way as to reduce the burden of VAT on health care in this case.

134. Her difficulty here lies in establishing an EU obligation to do so. While the case-law is replete with statements, several of which we have quoted above, that the purpose of the exemptions is to reduce the cost of healthcare – self-evidently by reducing the burden of VAT – no case-law has been shown to us that says that a Member State is obliged to use its discretion in such a way as either to achieve exemption where doing so reduces the cost of healthcare or, conversely, to withhold exemption where that produces a lower VAT burden. On the contrary, the case-law is inconsistent with either of those positions being correct.

135. For example, the case-law – reviewed above – dealing with the EU law right to exemption of bodies not treated as exempt by the national tax authorities (or in MDDP, the converse) does not state a *test* of whether according exemption would reduce healthcare costs. Advocate General Sharpston made a slightly different but related point in her Opinion in *CopyGene* (paragraph 76 above) when she said that it was not a precondition for the power to exempt that there would be a cost saving in the particular case. The Court has similarly acknowledged the power of Member States to impose the article 133 conditions, but without suggesting that the power was circumscribed by a rule that use of it must not lead to increased healthcare costs. In the absence of authority for a rule that exemption must not be withheld where that would increase healthcare costs, it is hard to find room for a rule that exemption must not be accorded where that would increase healthcare costs.

136. That is particularly so where the suggested mechanism for withholding exemption is either withholding recognition where it would otherwise be conferred or imposing article 133 conditions where they would otherwise not be considered appropriate; that suggests using a power for purposes other than those for which it was conferred which, in the case of an EU act can be grounds for annulment for misuse of powers under article 263 TFEU.

137. As far as recognition is concerned, there are indications in the case-law that the task of the tax authority is to ascertain whether the body, or others with similar activities, has or have been 'recognised' by words (such as an authorisation to provide the service) or conduct (such as coverage of the costs social security) by the relevant healthcare or welfare authorities: see e.g. *Kügler* at paragraph 57 (paragraph 82 above), *Dornier* at paragraph 76 (recognition need not derive from tax law provisions, paragraph 84 above); those other national authorities would be expected to base their decisions on considerations of healthcare or welfare policy, and that case-law leaves

little room for the tax authority to adopt a different approach from them in order to achieve a particular fiscal outcome, whether or not desired by the taxpayer.

138. The Court's approach in *CopyGene* seems to take a slightly different approach, vesting in the tax authority the discretionary task of conferring or withholding recognition, rather than of deciding whether recognition had been conferred by other state authorities (or withheld inconsistently, in breach of fiscal neutrality). That seems to reflect the legislative position in Denmark, where the task of conferring or withholding recognition seems to have been left to the tax authority. Even in that situation, however, the behaviour of other authorities – in particular the social security authorities – remains a relevant matter.

139. We are dealing, however, with a situation where the question of recognition *has* been dealt with by Parliament in enacting Note 8 to Group 7. The approach that we should take to an argument that recognition has been conferred wrongly is laid down in *MDDP*, which we consider further below.

140. Invocation of the article 133 conditions (of which the ones not satisfied by GSTS are principally the non-profitmaking condition in article 133(a) and the voluntary management condition in article 133(b)), not on the grounds that making profit or professional management rendered a body unsuitable for exemption but with a view to achieving standard-rating for GSTS, could easily produce unwanted side-effects in the case of other providers; private hospitals (and possibly GPs; we are unsure about the availability of s 41 refunds to them) could find themselves burdened with irrecoverable input VAT on supplies of pathology to them. Selective application of the conditions would be likely, whether taxpayers wanted it or not, to infringe the requirements of equal treatment and fiscal neutrality. These considerations make it impossible to conclude that there is an EU obligation to apply article 133 in this way.

141. A final consideration is that refunding of VAT pursuant to s 41 is merely an internal accounting mechanism within government and the public sector; the same result could be achieved, more laboriously, by increasing a body's grant-in-aid to cover its VAT spending. It does not, technically, remove the burden of VAT but rather provides extra funds with which to pay it (and our understanding is that the EU's share of VAT refunded to public bodies is paid over nevertheless).

142. In the alternative, Ms Whipple submits that the device of recognising any 'state-regulated institution' (as defined) lies outside the United Kingdom's discretion since that definition is too broad and undiscriminating to capture bodies similar to hospitals etc. operating under social conditions similar to public bodies.

143. That is not in our view the question that *MDDP* requires us to answer. In *MDDP* the Polish legislation was found to be too broad and undiscriminating, but that did not of itself mean that the taxpayer's appeal succeeded. In the case of the exemption for education in that case, the issue for the national court was whether the Member State had exceeded its discretion by recognising the particular taxpayer as having similar objects to public educational bodies in circumstances where exemption

could not objectively be granted on that basis: see paragraphs 52 and 53 of the judgment and paragraph 2 of the Court's ruling on question 2.

144. The issue for us is not therefore the abstract one of whether the domestic exemption is too broad but the specific one of whether GSTS is a body that it was not within Parliament's discretion to exempt. In the case of subparagraph (b), the question is whether the United Kingdom has exceeded the limits of its discretion in recognising GSTS as a body similar to a hospital or centre for medical treatment or diagnosis operating under social conditions comparable with those applicable to bodies governed by public law.

145. We do not consider that the United Kingdom has exceeded the limits of its discretion in this way. We have already recorded our conclusions that GSTS is similar to a centre for diagnosis and that it operates under social conditions similar to a public body, and that the United Kingdom's discretion to recognise it is not circumscribed by any principle that the result must be to reduce health care costs. It must follow that the 'recognition' of GSTS was within the United Kingdom's discretion.

146. Finally, Ms Whipple submits that the legislation infringes fiscal neutrality on the grounds that hospitals that keep their pathology department in-house do not suffer the fiscal disadvantage that our interpretation of the law creates for GSTS. The difficulty with that submission is that any fiscal disadvantage does not stem, in the manner contemplated by the European Court, from inconsistency in awarding and withholding recognition as between entities performing similar functions. Both GSTS and hospitals with in-house pathology departments are 'recognised' in the legislation. The argument that the United Kingdom has infringed fiscal neutrality by affording the same treatment – recognition – in both cases is not one that we can accept.

147. Moreover, the fiscal disadvantage of which GSTS complains – inability to recover input tax – applies equally to an in-house pathology department. The fiscal disadvantage bears particularly heavily upon GSTS because it has structured itself in such a way as to incur VAT on staff costs. The fact that was done with HMRC's encouragement is a separate problem. As a matter of principle, fiscal neutrality cannot in our view require a Member State to afford different tax treatment to the same activity in order to alleviate for one taxpayer the consequences of the way it has structured its activities.

148. We began this Decision by expressing our regret at the consequences of our decision for GSTS, particularly given the circumstances in which its partners adopted the current structure. Unfortunately we cannot avoid applying the law as we find it to be.

149. 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.

NICHOLAS PAINES QC

TRIBUNAL JUDGE
RELEASE DATE: 19/02/14