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Case Notes

News Corp UK & Ireland Ltd v HMRC: digital newspapers

Introduction

Former chairman of the New York Times Company, Arthur Sulzberger Jr said: “Newspapers cannot be defined by the second word—paper. They’ve got to be defined by the first word—news.”¹ But how important is the second word—paper—in VAT law?

News Corp UK & Ireland Ltd (News Corp) is the representative member of a VAT group that publishes *The Times* and *The Sunday Times*²; two newspapers that have been in circulation since 1785 and 1821, respectively. They function independently with different editorial teams but share management and printing resources.³

Following the release of the iPad in early 2010, News Corp developed a digital tablet edition of the printed newspapers intended to replicate the “feel” of the print edition. As such, it would mirror the hardcopy version as much as possible with the same format, features, and adverts, as well as a page-turn feature from swiping, rather than vertical scrolling. There was some additional content as the puzzles were interactive and there were a small number of videos in each edition. The additional content was seldom used by readers and was a minor aspect of the digital editions.⁴

There were also smartphone editions and website editions with minor differences to the tablet and print versions but they were broadly equivalent. All were essentially curated “periodic edition-based publications”⁵ and “fundamentally the same or very similar”⁶ to the print version. They were not “rolling news” applications which are updated on a continuous basis.

Dispute

The question in the *News Corp UK* line of cases⁷ was whether the digital versions of the newspapers were zero-rated as “newspapers, journals and periodicals” pursuant to Schedule 8, Group 3, Item 2 to the Value Added Tax Act 1994 (VATA 1994).

The First-tier Tribunal’s decision

The case was heard before First-tier Tribunal (FTT) Judge Brannan and a decision was given in HMRC’s favour on 8 March 2018. The FTT concluded that the digital versions were not

¹ Quoted in M. Deegan and K. Sutherland, *Transferred Illusions: Digital Technology and the Forms of Print* (Routledge, 2016), 51.

² As well as *The Sun* and *The Sun on Sunday* which had only a peripheral role in the dispute.

³ *News Corp UK & Ireland Ltd v HMRC (News Corp UK (FTT))* [2018] UKFTT 129 (TC) at [20].

⁴ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [155].

⁵ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [152].

⁶ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [153].

⁷ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC); *News Corp UK & Ireland Ltd v HMRC (News Corp UK (UT))* [2019] UKUT 404 (TCC).

“newspapers” within the meaning of Item 2 but were (electronically supplied) services.⁸ The FTT held that Group 3 consisted solely of goods in physical form and was therefore confined to goods.⁹ This was “fatal to News [Corp]’s argument”.¹⁰

Article 110 of the Principal VAT Directive 2006/112/EC (PVD)¹¹ which permitted extant exemptions¹² was a standstill clause intended to prevent the immediate abolition of exemptions during the transitional period.¹³ As a jurisprudential principle, exemptions to the base must be construed strictly. Therefore, the zero-rating provisions ought not to be extended beyond their 1991 limits and the “always speaking” doctrine of statutory interpretation cannot extend the scope of the zero-rating to apply to the digital versions.¹⁴

The FTT also held that the fiscal neutrality challenge had to fail as it could not operate to extend the scope of a zero-rating.¹⁵

News Corp appealed and permission was granted on 7 June 2018.

The arguments on appeal

As argued in the FTT, News Corp contended that the digital versions fell within Item 2 or could do so by application of the “always speaking” doctrine, and that fiscal neutrality required zero-rating in any event.¹⁶ HMRC also raised some arguments in their Respondents Notice concerning recent EU legislative amendments.¹⁷

The Upper Tribunal’s decision

The appeal was heard before Upper Tribunal (UT) Tax and Chancery Chamber President, Mr Justice Zacaroli, and FTT Tax Chamber President, Judge Greg Sinfield.

Goods and services

Unlike the FTT, the UT found that Group 3 was not limited to goods. Only physical versions of the Items existed in 1972 so there was no contemplation of digital products. The most one could say is that the Items were goods in 1972 but this did not mean that Group 3 was intended to exclude services. This was supported by the wording of section 30 VATA 1994 which authorises a zero rate for goods *and* services. Furthermore, the use of the words “printed, duplicated or manuscript” after “Music” in Item 4 did not mean that all the Items should be read as physical

⁸ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [181].

⁹ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [183] and [190], even though it appreciated that VATA 1994 s.30 applies the zero rate to goods and services, if specified in Sch.8.

¹⁰ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [181].

¹¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

¹² With deductions, that is zero-rating.

¹³ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [195]–[197] quoting *Talacre Beach Caravan Sales v CC&E (C-251/05)* [2006] STC 1671.

¹⁴ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [198].

¹⁵ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [230].

¹⁶ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC).

¹⁷ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC): HMRC asked whether the FTT was wrong in concluding as fact that digital editions were similar to the print versions, and whether News Corp’s case was inconsistent with PVD 2006/112/EC.

goods, as HMRC suggested. On the contrary, the express limitation on Item 4 highlights the absence of limitation on the other Items.¹⁸ The UT held that the relevant factor was inclusion in Schedule 8 VATA 1994, not its characterisation as a good.¹⁹

“Newspaper”

In light of this, the UT turned to News Corp’s arguments that either: 1. the digital versions fell within Item 2 as it stands (or stood in 1972 when the zero-rating provisions were enacted²⁰); and in the alternative 2. the “always speaking” doctrine would permit the digital versions to fall within Item 2 and it was not prohibited by the rule of strict interpretation. The UT found this bifurcated approach to be incorrect and said it should address the interpretation of “newspapers” in Item 2 generally, applying any applicable rules of construction in the process.²¹

The UT set out a number of passages on the “always speaking” doctrine which permits the courts to apply a “construction that continuously updates its wording to allow for changes since the Act was initially framed”²² “to give effect to Parliament’s purpose”.²³

The test was set out in two ways. First, citing Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security (Royal College of Nursing of the UK)*,²⁴ the digital editions could be construed as “newspapers” if they “fall within the same genus of facts as those to which the expressed policy has been formulated”.²⁵ The UT noted that the FTT had found as a fact that the digital versions were essentially the same as the printed editions.²⁶ The UT found support in an Australian case which found it necessary to look at the product’s “dominant purpose”.²⁷

Secondly, the question was whether the digital versions fulfil the legislative purpose of the statutory provision and shared essential characteristics with “newspapers”. The purpose of the zero-rating for Group 3 was “to promote literacy, the dissemination of knowledge and democratic accountability”.²⁸

The UT found that there was no relevant distinction between the print and digital versions and it was difficult to discern any legislative purpose for excluding the digital edition.²⁹

¹⁸ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [58].

¹⁹ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [60].

²⁰ FA 1972 Sch.4.

²¹ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [54].

²² *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [42] quoting O. Jones and F.A.R. Bennion, *Bennion on Statutory Interpretation*, 6th edn (LexisNexis, 2013), 798.

²³ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [43] quoting *R. (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 All ER 113 (HL).

²⁴ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 (HL).

²⁵ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [51] quoting *Royal College of Nursing of the UK*, above fn.24, [1981] AC 800 at 822.

²⁶ HMRC sought to challenge the findings that the digital versions were not rolling news and that the digital versions were similar even considering the additional features, but both arguments failed: *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [64]–[79].

²⁷ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [83] quoting *Downland Publications Ltd v Deputy Commissioner of Taxation* [1982] FLR 216 (Supreme Court of Victoria).

²⁸ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [85]; *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [17].

²⁹ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [87].

Furthermore, the invention of a digital newspaper was described as “precisely the type of technological development...that the ‘always speaking’ doctrine is intended to address”.³⁰

Therefore: under the first iteration, the digital version (for example the e-reader version which is an exact facsimile online) falls within the same “genus of facts”; and under the second, the legislative purpose is neutral as to the manner in which a newspaper is supplied, and the digital and print versions are sufficiently similar to comply with the legislative purpose.³¹

Strict interpretation

Lord Wilberforce’s quote in *Royal College of Nursing of the UK*, as stated above, continues:

“The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive.”³²

The UT did not think that the principle of strict interpretation of exemptions precluded the “always speaking” doctrine. Strict interpretation of an exemption, the UT claimed, is not the same as saying that the provision was intended to be restrictive.³³ Similarly, Article 110 PVD was held not to preclude the operation of the doctrine as the UT did not consider there to be an extension of the scope of Item 2. Instead it was a recognition that Item 2’s scope included the digital versions.³⁴

Conclusion

It was not necessary to address the argument on fiscal neutrality as the UT concluded that the digital versions fell within the interpretation of Item 2. The appeal was allowed.

There were also some arguments proffered by HMRC in relation to EU legislative changes which were rejected by the UT. These are discussed in detail below.

Analysis

American jurist Roscoe Pound once said “the law must be stable, and yet it cannot stand still”.³⁵ This quote encapsulates the spirit of the UT’s approach to interpretation of the zero-rating provisions: the exemptions must not be altered, but cannot be shackled to the circumstances of the past. However, with competing principles of interpretation of exemptions from the tax base, one must question whether stability and progress can co-exist.

³⁰ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [88].

³¹ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [88].

³² *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [44] quoting *Royal College of Nursing of the UK*, above fn.24, [1981] AC 800 at 822; see above fn.25.

³³ Group 3 did not qualify as “liberal or permissive” either but fell somewhere “between the two extremes”: *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [89].

³⁴ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [90].

³⁵ R. Pound, *Interpretations of Legal History* (New York: The Macmillan Company, 1923). This quote is written in large gold lettering behind the bench of the Cornell Law School Moot Court Room.

VAT: interpretive methods

The principle of strict interpretation was developed by the CJEU as a general guideline of construction for VAT in the face of a growing number of references.³⁶ Traditionally, this interpretive principle topped the hierarchy; VAT was first and foremost a general tax on consumption and the existence of derogations was the risk to neutrality. Strict interpretation had the advantage of legal certainty and a broader tax base.³⁷

In the UK, the “always speaking” doctrine appears to have commenced as a rule concerning the use of tenses in statutory wording.³⁸ However, as early as 1902, it was applied as a general rule of interpretation, finding a historical meaning and deciding whether it could apply to current usage.³⁹

The balance between the two methods differed between the FTT and the UT. The quote from Lord Wilberforce, upon which the UT drafted its tests for the “always speaking” doctrine, stated that the courts “should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed”.⁴⁰ Although the UT found that *the Act* itself was not restrictive,⁴¹ an older tribunal case, namely *Forexia (UK) Ltd v CC&E (Forexia)*⁴² decided that *the principles* of interpretation of the Act were restrictive. Although neither the FTT nor the UT decision referred to the case, it also asked whether Group 3 was limited to just goods, and highlighted the tension between technological advances and the need for strict interpretation of the zero rate.

In *Forexia* in 1999, the taxpayer published and distributed a regular news digest commenting on the foreign exchange market. There was no dispute that the physical document fell within Group 3, either as Item 1 or Item 2. However, when the supply was made by fax, email or via the website, HMRC contended that what was supplied was not a leaflet or periodical but a standard-rated service: information, which the recipient could transform into a leaflet or periodical using their own equipment (printer/fax).

The VAT Tribunal held “with the greatest reluctance” that HRMC were correct and it was a supply of services. It stated:

“Exemptions and zero-ratings must be strictly construed; taking Group 3 as a whole, it clearly refers to goods.”⁴³

³⁶ R. de la Feria, “EU VAT Principles as Interpretative Aids to EU VAT Rules” in M. Lang, et al. (eds), *CJEU: Recent Developments in Value Added Tax 2015* (Linde, 2016); also available at: <http://eureka.sbs.ox.ac.uk/7301/1/WP1603.pdf> [Accessed 21 July 2020], 8.

³⁷ de la Feria, above fn.36, 25.

³⁸ See: N. Goldfarb, “‘Always Speaking’? Interpreting the present tense in statutes” (2013) 58(1) *Canadian Journal of Linguistics* 63; and Interpretation Act (Northern Ireland) 1954 s.31.

³⁹ *R. v Ireland* [1998] AC 147 (HL), citing with approval Lord Thring, *Practical Legislation* (London: John Murray, 1902).

⁴⁰ *News Corp UK (UT)*, above fn.7 [2019] UKUT 404 (TCC) at [44] quoting *Royal College of Nursing of the UK*, above fn.24, [1981] AC 800 at 822; see above fn.32: this does not say that the meaning will never be extended under the doctrine if the act is restrictive, just that the courts should be less willing to do so.

⁴¹ And the courts have said that strict is not the same as restrictive: the courts will apply a fair interpretation of the words rather than seek the most restrictive meaning. See *The Expert Witness Institute v CC&E* [2001] EWCA Civ 1882 at [17].

⁴² *Forexia (UK) Ltd v CC&E* [1999] (LON/98/879), Decision Number 16041; [1999] BVC 2266.

⁴³ *Forexia*, above fn.42, (LON/98/879), Decision Number 16041; [1999] BVC 2266 at [6].

And:

“[I]t would be stretching the language of the statute beyond reasonable limits to say that the Appellant is ‘supplying a leaflet or periodical’.”⁴⁴

It was decided “with the greatest reluctance” because the Tribunal felt that the 1972 provisions were not keeping up with the pace of technological change. Despite this, similar to the FTT’s decision in *News Corp UK (FTT)*,⁴⁵ Group 3 had to be strictly construed pursuant to the interpretative rule.

Unfortunately, the decision in *Forexia* is very short and lacks any real analysis of why Group 3 “clearly” refers to goods. The Tribunal also appears not to have been directed to consider the “always speaking” doctrine. What the decision does reveal is the difficulty in applying strict interpretation to novel products and technological advantages. In *Forexia*, strict interpretation was the correct principle of construction, if only marginally so, even in the face of technological change. In all the circumstances, the Act was restricted.

In *News Corp UK (UT)*, the UT held the principal of strict interpretation did not restrict the application of another means of interpretation. It decided that it remained necessary to assess the “objectives which underpin it”.⁴⁶ The UT therefore asked: 1. whether the electronic newspapers satisfied the legislative objective; and 2. whether the service shared the essential characteristics with the print version.⁴⁷

Interestingly, this looks remarkably like the fiscal neutrality test but with a foundation in modernisation rather than competition.⁴⁸ Crucially, it lacks the higher threshold of having to prove that the supplies are in competition or meet the same needs of the consumers,⁴⁹ and instead requires only that the product satisfies the broader legislative purpose. Cases often fail on this hurdle⁵⁰ and it is the reason why the fiscal neutrality argument from *News Corp* failed in the FTT.⁵¹ In addition, the fiscal neutrality authorities have repeatedly caveated that fiscal neutrality cannot operate to extend the scope of the zero-rating. Such a caveat has not been expressed in the application of the “always speaking” doctrine, as a non-VAT-specific canon.

Conclusion

There has long been a “dialectical struggle” between the application of fiscal neutrality and strict interpretation.⁵² Fiscal neutrality has been described as a principle of interpretation, to be applied

⁴⁴ *Forexia*, above fn.42, (LON/98/879), Decision Number 16041; [1999] BVC 2266 at [8].

⁴⁵ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC).

⁴⁶ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [89].

⁴⁷ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [86].

⁴⁸ The test is essentially: 1. similar goods; 2. which are in competition with each other.

⁴⁹ *HMRC v Rank Group plc* (Joined Cases C-259/10 and C-260/10) EU:C:2011:719; [2012] STC 23.

⁵⁰ See for example: *Mainpay Ltd v HMRC* [2020] UKFTT 204 (TC); *Nestle UK Ltd v HMRC* [2016] UKFTT 158 (TC); and *Corte Diletto UK Ltd v HMRC* [2020] UKFTT 75 (TC).

⁵¹ *News Corp UK (FTT)*, above fn.3, [2018] UKFTT 129 (TC) at [230] although the decision also does not address the requirement to prove the products were in competition.

⁵² *de la Feria*, above fn.36, 1.

concurrently with the principle of strict interpretation of exemptions⁵³ but often the two are incompatible. One affords primacy to the general tax on consumption, the other to the avoidance of distortions.

With the introduction of a third rule—one which is not specific to VAT—the hierarchy is further muddled. The UT mentioned that its interpretation of “newspapers” did not expand the scope of Item 2. This is carefully phrased to fit with the wording of the CJEU which said “[fiscal neutrality] cannot extend the scope of *an* exemption”.⁵⁴ It may not have expanded the scope of the category “newspapers”, but it did expand the zero rate to new products. Thus, as a method that permits, rather than restricts, a broader application of the exemptions, the “always speaking” doctrine is difficult to align with strict interpretation.

From a policy perspective, this is not ideal as broadening the scope of the exemptions may hinder legal certainty causing further litigation⁵⁵ and lead to a potential reduction in revenue and in equity.⁵⁶ This writer’s scepticism is compounded by the fact that the “social policy” and “objective” of the exemption, on which the “always speaking” doctrine is based, is founded on an (often false) assumption of incidence, that is, that the reduced rate is reflected in the consumer price. If the price does not reflect the lack of VAT, the digital newspapers will not benefit the consumer or encourage reading of the news.⁵⁷

In the future, the increased flexibility afforded to Member States,⁵⁸ or obtained after Brexit,⁵⁹ might diminish the interpretative struggle of VAT legislation by moving problems such as modern technology, as in *News Corp UK*, out of the courts and into the legislature.⁶⁰ However, as long as exemptions exist, lines will need to be drawn and, with competing methods of interpretation, the landscape remains unstable.

New legislation and hindsight

Following on from the discussion of moving exemptions from the courts to the legislature, in December 2018, Council Directive (EU) 2018/1713⁶¹ came into force. That Council Directive amended the PVD, specifically, Articles 98, 99 and Annex III dealing with reduced rates. In summary, these amendments state that Member States which applied a zero rate to the supply

⁵³ Opinion of Advocate General Pikamäe in *BlackRock Investment Management (UK) Ltd v HMRC* (C-231/19) EU:C:2020:196 (delivered 11 March 2020); also in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG (Deutsche Bank AG)* (C-44/11) EU:C:2012:484; [2012] STC 1951 at [45].

⁵⁴ Opinion of Advocate General Sharpston in *Deutsche Bank AG* (C-44/11), above fn.53, EU:C:2012:276 at [60], approved in the Court’s Decision in *Deutsche Bank AG* (C-44/11), above fn.53, [2012] STC 1951 at [45].

⁵⁵ Commission of the European Communities, *Proposal for a Council Directive amending Directive 77/388/EEC as regards reduced rates of value added tax* (Brussels: 23 July 2003, COM(2003) 397 final): reduced rates and exemptions have been the number one source of referrals to the CJEU.

⁵⁶ R. de la Feria, lecture, *Do exclusions from the VAT base reduce inequality?* (University of Leeds: eanoVAT Conference, 6 September 2019).

⁵⁷ The requirement under PVD Art.110.

⁵⁸ See R. de la Feria and M. Schofield, “Towards an [unlawful] modernized EU VAT rate policy” (2017) 26(2) EC Tax Rev 89.

⁵⁹ See European Union (Withdrawal) Act 2018 s.6.

⁶⁰ The new legislation on e-books may be the first example of this trend.

⁶¹ Council Directive (EU) 2018/1713 of 6 November 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals [2018] OJ L286/20.

of goods in Point 6 of Annex III, may apply the same VAT treatment where that supply is made electronically. Point 6 of Annex III includes the supply of books, newspapers and periodicals.

In *News Corp UK (UT)*, HMRC raised these provisions before the UT and argued that as the amendments permitted Member States to zero-rate electronic newspapers, the implication was that the zero rate did not apply prior. They also highlighted the Recitals which clarified that under the PVD, electronically supplied publications *had* to be taxed at the standard rate.⁶²

The UT dismissed the arguments, opining that the Recitals related to reduced rates not the zero rate.⁶³ It held that “the EU has so far not legislated in respect of zero-rating, aside from the standstill provision in Article 110”.⁶⁴

No real attention is afforded to the wording of the Council Directive amendments. Instead, the UT appears to brush off the argument saying that

“the views of the Commission, or of the legislature in Europe, expressed in 2016 or 2018 are not a relevant aid to construction of UK domestic legislation dating from 1972”.⁶⁵

This is a curiously cursory denouement to a previously thorough decision. Stating that the EU has not legislated on zero-rating aside from Article 110 fails to take into account the amendments to Article 99 PVD as follows:

“...Member States which, on 1 January 2017, applied, in accordance with Union law, reduced rates lower than the minimum laid down in this Article or *granted exemptions with deductibility* of the VAT paid at the preceding stage *to the supply of certain goods* referred to in point (6) of Annex III, *may also apply the same VAT treatment where that supply is supplied electronically*, as referred to in point (6) of Annex III.”⁶⁶

This provision refers to the extant zero rate on the supply of certain goods, specifically books and newspapers as goods. And, under the amendment, Member States may now also zero-rate the supply of the same when supplied as an electronic service. One would not criticise HMRC, therefore, for inferring that the change in the law does indicate that the supply of electronic newspapers as services was not subject to the “same VAT treatment” before this amendment.

However, the UT held that the zero rate was permitted to apply to the supply of goods and services in relation to newspapers as a matter of construction: digital versions were “newspapers” regardless of the format, so the amendment is a general addition but is not relevant.⁶⁷ At the time of the decision that explanation would hold water but, after the decision in *News Corp UK (UT)*, the Government transposed the Council Directive amendments into domestic law and HMRC’s inference can be brought back to the fore.

Applying from 1 May 2020, the Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc.) (Coronavirus) Order 2020⁶⁸ was rushed in during the global pandemic and

⁶² *News Corp UK (UT)*, above fn7, [2019] UKUT 404 (TCC) at [98]–[102].

⁶³ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [99].

⁶⁴ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [98].

⁶⁵ *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [102].

⁶⁶ PVD Art.99 as amended by Council Directive (EU) 2018/1713 Art.1(2). (Emphasis added by writer.)

⁶⁷ *News Corp UK (UT)*, above fn7, [2019] UKUT 404 (TCC) at [102].

⁶⁸ Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc.) (Coronavirus) Order 2020 (SI 2020/459).

specifically extended the zero-rating of publications in Group 3 to electronically supplied versions. Item 7 was inserted to add to the list of exemptions as follows: Items 1 to 3 when supplied electronically. The Explanatory Memorandum includes the following passages:

- “6.2 ...Where member States (including the UK during the Transition Period) have a reduced rate (or an equivalent zero rate) for supplies of printed publications, it allows them to extend that reduced or zero rate to supplies of electronic versions of those publications subject to certain exclusions. The *UK has decided to exercise this option* to extend its zero rate to supplies of some electronic publications.
- 6.3 This instrument also amends the Notes to Group 3 to reflect the fact that the *Group now includes electronically supplied publications* which are supplies of services, not goods.
- ...
7.1 The government announced at Budget, on 11 March 2020, that it would legislate to apply a zero rate of VAT to supplies of certain electronic publications (e-publications). *As a result, supplies of e-books, e-newspapers, e-magazines and academic e-journals would be entitled to the same VAT treatment as supplies of their physical counterparts...*”⁶⁹

Despite the UT deciding that Group 3 applied to both goods and services, the Memorandum states that the amendments reflect that Group 3 *now* includes electronically supplied publications. It is as *a result* of the amendments that e-newspapers would be entitled to the zero rate.

This legislative change came months after the decision was handed down by the UT but this wording casts some doubt on its conclusions in relation to the scope of Group 3 being limited to goods and as to its refusal to consider European legislation as an aid to the construction of domestic legislation.

Conclusion

The “always speaking” doctrine allows dynamic interpretation of historic text so that it retains its meaning but can have continuous application in light of relevant changes.⁷⁰ However, it is not a VAT-specific rule of interpretation. This means that in its current formulation it is unclear how it accounts for VAT issues such as strict interpretation, the derogations and standstill under the (then) transitional system, and the economics behind the exemptions. Fiscal neutrality and strict interpretation have been at odds for some decades and this additional canon will not assist legal certainty.

The recent legislation makes the News Corp dispute somewhat redundant as now the zero-rating of electronic newspapers is set out in legislation. However, the change in legislation after the decision has cast doubt on parts of the UT’s reasoning and its dismissal of the relevance of certain provisions of EU law. HMRC have been given permission to appeal to the Court of Appeal which will be necessary to protect their position in relation to protective claims covering the

⁶⁹ *Explanatory Memorandum to The Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc.) (Coronavirus) Order 2020*, paras 6.2, 6.3 and 7.1. (Emphasis added by writer.)

⁷⁰ In, for example, social conditions, the surrounding law, changes in meaning, and technology and medical science. See: *News Corp UK (UT)*, above fn.7, [2019] UKUT 404 (TCC) at [42].

past four years prior to the new legislation. We will have to wait for that judgment for another edition of the News Corp saga: EXTRA, EXTRA, READ ALL ABOUT IT! [Ⓒ]

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[Ⓒ] Electronic publishing; Fiscal neutrality; Newspapers; Statutory interpretation; VAT; Zero rating
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