[2025] UKSC 34
On appeal from: [2024] EWCA Civ 300

JUDGMENT

The Prudential Assurance Company Ltd (Appellant) *v* Commissioners for His Majesty's Revenue and Customs (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Stephens
Lady Rose
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
11 September 2025

Heard on 19 and 20 March 2025

Appellant
Zizhen Yang
(Instructed by Baker & McKenzie LLP (London))

Respondent
Peter Mantle
(Instructed by HMRC Legal Group (Salford))

LADY ROSE AND LADY SIMLER (with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Stephens and Lord Richards agree):

1. Introduction

1. This appeal concerns the relationship between section 43 of the Value Added Tax Act 1994, which lays down rules in respect of value added tax ("VAT") groups, and the provisions (both domestic and European) that deal with the time at which certain supplies of services are to be treated as supplied for VAT purposes. Section 43 explains that any supply by one member of a VAT group to another is to be "disregarded" and that "any business carried on by a member of the group shall be treated as carried on by the representative member". The question is whether this means that no VAT is chargeable on an intra-group supply regardless of whether the supplier has left the group by the time consideration for the supply is the subject of a VAT invoice and paid; or whether there are circumstances where the disregard in section 43 is inapplicable, because the consideration is invoiced and received only after the supplier is no longer a member of the VAT group, pursuant to "time of supply" provisions which treat the services as supplied at the time of the invoice or payment.

2. In this case a company called Silverfleet Capital Limited ("Silverfleet") supplied investment fund management services to the appellant ("Prudential") when they were both members of the same VAT group. Consequently, there is no dispute that at the time the services were actually performed and when Prudential paid the quarterly management fees contractually due to Silverfleet, the supplies were treated as having been made by Prudential (as the representative member of the group) and disregarded for VAT purposes. However, many years after Silverfleet had stopped managing the funds for Prudential and left the VAT group, when the value of the funds exceeded a threshold fixed in the services supply contract, a success fee was triggered. The issue raised by this appeal is whether in these circumstances VAT is payable on the success fee because at the time Silverfleet invoiced Prudential for the success fee they were no longer in the same group or whether because the fee arose out of the services that were all performed whilst they were in the group, it is not subject to VAT.

3. Ms Zizhen Yang, who argued Prudential's case with impressive skill, thoroughness and clarity, said that the correct analysis of the issues in this appeal is not as complicated as has been presented in the judgments below. Rather, she submitted that the conclusion that no VAT is chargeable follows readily from a straightforward interpretation of the relevant legislative provisions. As will become clear, we do not consider the position to be as straightforward as Prudential suggests and share the view of the courts below that the issues raised are not easy to resolve.

4. The appeal requires a detailed analysis of several earlier decisions of the House of Lords and of judgments of the Court of Justice of the European Union ("CJEU"). Ms Yang's primary submission as regards the former was that the domestic cases on which HMRC rely are distinguishable from the present case. But if they are not, then she submits that this court should depart from those judgments. For that reason, the panel hearing the appeal comprised seven Justices. As regards the decisions of the CJEU, it is common ground that all the facts giving rise to the appeal occurred before the end of the implementation period following Brexit, and neither side urged us to depart from any pre-Brexit decisions of the CJEU pursuant to section 6(4) of the European Union (Withdrawal) Act 2018.

2. The facts

5. These are uncontroversial and can be summarised shortly.

6. Silverfleet provided investment services to a with-profits fund known as "the Funds Fund" pursuant to two consecutive agreements between Prudential and Silverfleet effective between 1 January 2002 to 31 December 2003 and then from 1 January 2004 to 8 November 2007. The consideration Silverfleet received for its services comprised two main elements. First, it received a quarterly management fee calculated by reference to the amount of investment made in the Funds Fund and accruing on a daily basis over the period during which the investment management services were provided. This fee was to cover the cost of running the portfolio. No VAT question arises in relation to this quarterly management fee.

7. Secondly, there were success fees payable to Silverfleet in respect of certain sub-funds in the event that the performance of these sub-funds exceeded a set benchmark rate of return.

8. On 8 November 2007 there was a management buy-out of Silverfleet and, as a result, Silverfleet ceased to be a member of Prudential's VAT group. Silverfleet also stopped providing investment management services to Prudential for the Funds Fund at that time, and the role of investment manager of the Funds Fund was taken over by another company. Since Silverfleet had no role in the management of the Funds Fund after 8 November 2007, it had no right to management fees after this date.

9. During 2014 and 2015, the hurdle rate set under the investment management agreement was passed. As a result, Silverfleet invoiced Prudential on various successive dates between 16 January 2015 and 11 July 2016 for success fees totalling £9,330,805.92. Silverfleet's invoices showed VAT payable on those fees at 20 per cent.

10. Prudential queried the addition of VAT in those invoices by a non-statutory application made to HMRC. In response, HMRC decided that Silverfleet was liable to pay and account for VAT on the success fees so that VAT had properly been added to the invoices. Following a statutory review, HMRC maintained this decision on 12 October 2018.

11. Prudential appealed HMRC's decision to the First-tier Tribunal (Tax Chamber) which allowed the appeal, holding that no VAT was payable, in a judgment released on 26 February 2021: *Prudential Assurance Co Ltd* v *Revenue and Customs Commissioners* [2021] UKFTT 50 (TC); [2021] SFTD 717.

12. HMRC appealed and by a judgment released on 6 March 2023 the Upper Tribunal allowed the appeal and decided that VAT was payable: *Revenue and Customs Commissioners* v *Prudential Assurance Co Ltd* [2023] UKUT 54 (TCC); [2023] STC 629.

13. On Prudential's appeal, the Court of Appeal, by a majority, dismissed Prudential's appeal in a judgment dated 26 March 2024: *Prudential Assurance Co Ltd* v *Revenue and Customs Commissioners* [2024] EWCA Civ 300; [2024] 1 WLR 3457; [2024] STC 682. The Court of Appeal therefore held that the success fees were subject to VAT.

3. The EU and domestic legislative framework

14. The period relevant to the issues in this appeal was covered partly by the Sixth Council Directive 77/388/EEC of 17 May 1977 (OJ L 145 13.6.1977, p 1) ("the Sixth VAT Directive") and partly by the Principal VAT Directive, Council Directive 2006/112/EC of 28 November 2006 (OJ L 347 11.12.2006 p 1) ("the PVD"). It was common ground that there was no relevant difference between the provisions in the two Directives as they apply to this appeal. We will refer primarily to the provisions of the PVD though as some of the case law cited below refers to the provisions of the Sixth VAT Directive, it is important to have those in mind as well. Similarly, some of the domestic case law refers to the implementing provisions in the Value Added Tax Act 1983 ("VATA 1983") and the regulations made under that Act, namely the Value Added Tax (General) Regulation 1985 (SI 1985/886) ("the 1985 VAT Regulations") as amended over the years. The currently applicable provisions are found in the Value Added Tax Act 1994 ("VATA 1994") and the regulations made under that Act, namely the Value Added Tax Regulations 1995 (SI 1995/2518) ("the 1995 VAT Regulations"). We have therefore set out the earlier provisions in an Annex explaining how they compare with the current provisions.

(a) The charge to tax and the time of supply rules

15. Article 2 of the PVD sets out what transactions are subject to VAT. It provides in para 1(a) and (c) that the supply of goods and services for consideration within the territory of a Member State by a taxable person acting as such shall be subject to VAT. This provision is implemented domestically by sections 1 and 4 of the VATA 1994 which provide for the charge to VAT on taxable supplies. Section 4 states that VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him and where it is not an exempt supply.

16. In Title VI of the PVD under the heading "Chargeable event and chargeability of VAT", articles 62 to 67 set out what are referred to as the Time of Supply Rules. We refer to these rules as the "TOSR". They provide as follows:

"***General provisions***

Article 62

For the purposes of this Directive:

(1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

Supply of goods or services

Article 63

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

Article 64

1. Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.

2. Member States may provide that, in certain cases, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year.

Article 65

Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

Article 66

By way of derogation from articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

Article 67

1. Where, in accordance with the conditions laid down in article 138, goods dispatched or transported to a Member State other than that in which dispatch or transport of the goods begins are supplied VAT-exempt or where goods are

> transferred VAT-exempt to another Member State by a taxable person for the purposes of his business, VAT shall become chargeable on the 15th day of the month following that in which the chargeable event occurs.
>
> 2. By way of derogation from paragraph 1, VAT shall become chargeable on issue of the invoice provided for in article 220, if that invoice is issued before the 15th day of the month following that in which the chargeable event occurs."

17. The corresponding articles in the Sixth VAT Directive were as follows:

(a) The charge to tax now found in article 2 of the PVD was found in article 2 of the Sixth VAT Directive.

(b) The provisions that are now divided up among articles 62, 63, 64, 65 and 66 of the PVD were set out together in article 10(1) and (2) of the Sixth VAT Directive.

(b) TOSR in domestic legislation

18. The Directives' TOSR are implemented in part by the VATA 1994 and in part by regulation 90 of the 1995 VAT Regulations. By section 1(2) of the VATA 1994, VAT on any supply of goods or services becomes due "at the time of supply". Section 6(1) then explains that the provisions of the section apply for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

19. Section 6 of the VATA 1994 (as amended) provides so far as material:

> "(1) The provisions of this section shall apply, subject to sections 18, 18B and 18C, for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.
>
> (2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place—
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> (a) if the goods are to be removed, at the time of the removal;

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

(c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

…

(14) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding subsections (2) to (8) and (11) to (13) above or section 55(4)) a supply is to be treated as taking place in cases where—

(a) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period, or

…

and for any such case as is mentioned in this subsection the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals."

20. It follows that the general rule in relation to a supply of services is that the supply is "treated as taking place at the time when the services are performed": section 6(3). That rule is subject to the following subsections of section 6. Significantly for our purposes, it is subject to regulations made under section 6(14) which "may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals" where the supply is "for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period".

21. Regulations pursuant to section 6(14) were included in Part XI of the 1995 VAT Regulations headed "Time of Supply and Time of Acquisition". The regulations in that Part deal with, amongst other things, the time at which supplies of water, gas and any form of power are treated as having taken place (regulation 86). The sole regulation on which both parties base their submissions in this appeal is regulation 90. Regulation 90 provides so far as material:

> "**90.—**(1) Subject to paragraph (2) below, where services, except those to which regulation 93 applies, are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times—
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> (a) each time that a payment in respect of the supplies is received by the supplier, or
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> (b) each time that the supplier issues a VAT invoice relating to the supplies.
>
> (2) Where separate and successive supplies of services as described in paragraph (1) above are made under an agreement which provides for successive payments, and the supplier at or about the beginning of any period not exceeding one year, issues a VAT invoice containing, in addition to the particulars specified in regulation 14, the following particulars—
>
> (a) the dates on which payments under the agreement are to become due in the period,
>
> (b) the amount payable (excluding VAT) on each such date, and

(c) the rate of VAT in force at the time of issue of the VAT invoice and the amount of VAT chargeable in accordance with that rate on each of such payments,

services shall be treated as separately and successively supplied each time that a payment in respect of them becomes due or is received by the supplier, whichever is the earlier.

(3) Where, on or before any of the dates that a payment is due as stated on an invoice issued as described in paragraph (2) above, there is a change in the VAT chargeable on supplies of the description to which the invoice relates, that invoice shall cease to be treated as a VAT invoice in respect of any such supplies for which payments are due after the change (and not received before the change).

(4) …

(5) In this regulation and in regulations 90A and 90B below, *'relevant services'* means services within the description contained in paragraph 7A of Schedule 5 to the Act which are treated as supplied in the United Kingdom by virtue of article 18 of the Value Added Tax (Place of Supply of Services) Order 1992."

(c) VAT grouping in EU legislation

22. The ability for Member States to provide in their domestic legislation for VAT grouping is set out in article 11 of the PVD:

Article 11

"After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

23. The predecessor provision in the Sixth VAT Directive was the second subparagraph of article 4(4).

24. In *Commission of the European Union v Ireland* (Case C-85/11) [2013] STC 2336, the CJEU explained the aims of the VAT grouping provisions as follows (para 47):

> "it is apparent from the explanatory memorandum to the proposal which resulted in the adoption of the Sixth Directive (COM(73) 950) that, by adopting the second subparagraph of article 4(4) of the Sixth Directive, which was replaced by article 11 of the [PVD], the European Union legislature intended, either in the interests of simplifying administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that member states would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality."

25. In the same case, Advocate General Jääskinen explained at paras 47-49 that: "Membership of a VAT group can be beneficial, for example, in a situation in which the member making a purchase subject to VAT had, because of the VAT exempt nature of its activities, no right to deduct VAT at all, or no full VAT deduction right. If such a member purchases from a supplier outside the VAT group, VAT would be incurred. If, however, it makes the purchase from another member of the group, no VAT is incurred. … VAT grouping supports fiscal neutrality by enabling appropriate business structures without negative consequences in terms of VAT liability. Moreover, the possibility of including non-taxable persons as members of a VAT group places corporate structures that include such persons in the same position as other corporate structures. An example is found in such company groups where a holding company possesses majority holdings in all other companies of the group."

(d) VAT grouping in domestic legislation

26. The option conferred by article 11 of the PVD has been exercised in section 43 of the VATA 1994. Section 43 (as amended) provides as follows:

> "43 Groups of companies

(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—

(i) in the case of goods acquired from another member State, for the purposes of section 73(7); and

(ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,

as acquired or, as the case may be, imported by the representative member;

and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

27. The predecessor domestic provision dealing with VAT grouping was section 29 of the VATA 1983 in very similar terms. We refer to the provision in section 29 of the VATA 1983 and section 43 of the VATA 1994 as the "VAT Group Disregard".

28. Section 43 of the VATA 1994 was considered in detail in *Lloyds Banking Group plc v Revenue and Customs Commissioners* [2019] EWCA Civ 485; [2020] 1 All ER 1045; [2019] STC 1134. The Court of Appeal there rejected the contention that section 43 failed properly to implement article 11 of the PVD: see para 126. In the present appeal no party has claimed that the domestic VAT grouping provisions go beyond the derogation permitted by article 11.

4. The principal domestic decisions

29. There are three decisions of the House of Lords relevant to the issues raised by this appeal. In addition to those cases there is a Court of Appeal authority on which Prudential relies. The difficulty of applying the VAT provisions is perhaps demonstrated by the fact that in arriving at the decisions described, the courts could not reach a unanimous result.

(a) B J Rice

30. *B J Rice & Associates v Customs and Excise Commissioners* [1996] STC 581 concerned a tax consultancy business run by Mr Rice, which made continuous supplies of services within the meaning of regulation 23 of the 1985 VAT Regulations (now regulation 90 of the 1995 VAT Regulations). Before becoming registered for VAT, Mr Rice invoiced a customer for services he had carried out before registration and therefore without charging VAT. The customer did not pay Mr Rice for those services until after the business became registered. The pre-registration invoice was not a tax invoice, so the Commissioners treated the services as having been supplied when payment was made. Since that was after the firm became registered, they contended that VAT should have been charged.

31. The Court of Appeal held by a majority (Sir Ralph Gibson dissenting) that no VAT was payable. Staughton LJ summarised the parties' opposing submissions at p 585. The Commissioners argued that the TOSR determine conclusively and for all purposes when a supply is to be treated as taking place. Mr Rice maintained that "one must first determine on the actual facts, and without deeming anything, whether a charge to tax has arisen". If any of the four requirements in section 2 of the VATA 1983 was absent, no charge to tax would arise; only if all four requirements are met so that there is a charge to tax does one proceed to inquire what was the actual or deemed time of supply for the remaining purposes of the VATA 1983. Staughton LJ recognised that Mr Rice's arguments did not operate properly as regards exemptions for certain supplies because those provisions assumed that the question whether goods or services were exempt was decided at the time of deemed supply under section 5 and not at the time of the actual performance. But he dismissed that as a special provision derogating from section 2 so that "in all other respects the existence of a chargeable transaction has to be determined at a time when the supply is actually made": p 585h.

32. Ward LJ held that regulation 23 did not arise because sections 4 and 5 applied only for determining the time at which a supply of services was treated as taking place for the purposes of the charge to tax. Those sections were, he said, "obvious bookkeeping sections": p 590. For continuous supplies of services "it is by definition necessary to have an accounting device to fix a point in time in the continuum". He went on to say that the fictions for determining the time of supply for accounting purposes do not govern the ordinary meaning of the language in sections 1 and 2 of the VATA 1983 which make a supply by a taxable person a prerequisite of liability.

33. Sir Ralph Gibson dissented, agreeing with the reasoning of the VAT tribunal that sections 4 and 5 applied to determine when a supply is to be treated as taking place, and section 5(9) of the VATA 1983 and regulation 23 of the 1985 VAT Regulations identified the time of supply as the time of receipt of payment. At that point the firm was subject to VAT and the supplies were therefore taxable. He rejected the argument that sections 4 and 5 were only about accounting and payment.

(b) Thorn

34. The first House of Lords appeal to discuss is *Customs and Excise Commissioners v Thorn Materials Supply Ltd* [1998] 1 WLR 1106 ("*Thorn*"). *Thorn* concerned supplies of components, office equipment and cars by two subsidiaries of Thorn EMI plc to a third subsidiary in the Thorn corporate group. At the time when the sale contracts were made, the vendors and the purchaser were all members of the same VAT group. The contracts provided for 90% of the purchase price to be payable at the date of the contract and the final 10% on delivery of the goods. Between the conclusion of the contract and the delivery of the goods, the vendors left the VAT group. The question was whether VAT was chargeable only on the 10% invoiced as the final payment for the goods (and not on the 90% paid when they were in the same VAT group) or whether, as the Commissioners contended, VAT was chargeable on 100% of the purchase price. Lord Nolan noted at p 1109 that there was no commercial purpose to the complicated arrangements which preceded these contracts; their only purpose was to avoid paying VAT.

35. Thorn argued that the advance payments of 90% were covered by what is now section 6(4) of the VATA 1994. This provides that where there is a pre-payment for the supply of goods, the supply is to be treated as taking place at the time when the invoice is issued or the payment received. Since at that time both vendors and purchaser were part of the same group, the VAT grouping provision (now in section 43 of the VATA 1994) required that the supply to the extent of that payment be disregarded. The Commissioners argued that there was no relevant supply because the pre-payment must be disregarded. The only relevant supply of goods for the purpose of applying the VAT grouping provisions was therefore the supply which took place when property was transferred in the goods. By that time, the group relationship between the parties to the contract no

longer existed. The value of the supply was the whole of the consideration paid, that is 100% of the purchase price.

36. Lord Nolan gave the leading speech with which Lord Browne-Wilkinson and Lord Lloyd of Berwick agreed. He held in favour of the Commissioners. Lord Clyde gave a short concurring speech and Lord Hoffmann dissented.

37. We consider first those passages in the speeches that deal with the application of the TOSR. The panel were agreed that the TOSR applied to determine how the VAT Group Disregard applied when considering whether and if so when a supply between members of the same group took place. As Lord Nolan put it: "It is essential to apply the time of supply rules in order to determine whether the supply took place while the group relationship still existed. Unless a supply during the period of the relationship is identified as having taken place there is nothing upon which section [43(1)(a)] can bite. One can hardly disregard something which did not happen." (p 1113).

38. Lord Hoffmann fully accepted at p 1118H that there was no way to identify which supply took place within the group except by application of the TOSR. Where they differed was in how the TOSR applied in conjunction with the VAT Group Disregard. Lord Nolan held that the disregard did not mean that the supply of the goods, to the extent of 90%, was "permanently excluded from the charge to VAT". The timing provisions may have had the effect of deferring the charge to tax on the added value of goods until they were the subject of a supply outside the group, but it did not prevent that charge. He held that after the vendors left the group, the delivery of the goods by them to the purchaser undoubtedly constituted a transfer of the property in the goods (see p 1113F-G). In so far as the TOSR required the supply to be treated as having taken place in part when the vendors were in the group because that was when the invoice was issued, that was to be disregarded under section 29. It followed that the whole value of the goods fell fairly and squarely within the charging provisions.

39. Lord Clyde noted that under section 5(1) of the VATA 1983 (p 1121E-F):

> "… a supply may be treated as taking place at more than one time, but nevertheless it remains a single supply. It is 'the' supply which is to be so treated. The Act does not deem the creation of two or more supplies. Accordingly it would not seem to me correct to talk of a supply taking place at the time of the prepayment and another supply taking place at the time of the removal of the goods."

40. In his dissenting speech, Lord Hoffmann noted (at p 1115) that article 10(1) of the Sixth VAT Directive drew a distinction between the chargeable event and the time at

which the tax becomes chargeable which may or may not coincide with the chargeable event. The UK legislation on the other hand provided in general terms that tax "becomes due at the time of supply" and then provided for the time when the supply is treated as having taken place. However, he thought that nothing turned on these differences in formulation.

41. Lord Hoffmann said that in order to apply the VAT Group Disregard it was first necessary to identify a supply of goods which took place between members of the same group. Applying the TOSR showed that a supply to the extent of 90% was treated as having taken place when the vendors and purchaser were members of the same VAT group. That was therefore to be disregarded. Applying the same TOSR showed that a supply to the extent of 10% took place after the vendors had left the group. That was not to be disregarded and that was the extent of the liability to VAT.

42. To summarise the effect of *Thorn*:

(a) The House of Lords was unanimous in holding that the TOSR now found in section 6 of the VATA 1994 and regulation 90 applied to identify whether the "supply of goods" referred to in the VAT Group Disregard in section 43(1)(a) took place while the group relationship existed. Ordinarily, the TOSR applied to treat a pre-payment for goods (as occurred in *Thorn*) as subject to VAT before the goods are delivered. That is an exception to the general rule that the supply of goods is treated for VAT purposes as taking place at the time the goods are removed or made available: see the general rule now in section 6(2) and the pre-payment exception now in section 6(4) of the VATA 1994.

(b) The majority held that since the goods were delivered and therefore title was transferred only after the suppliers had left the Thorn VAT group it followed that VAT was then payable on the full consideration.

(c) The facts in *Thorn* differed from the facts in the present case because:

(i) The case was not concerned with or treated as one where there had been a continuous supply. The case turned simply on the interrelation between the pre-payment rule now in section 6(4) and the VAT Group Disregard.

(ii) There was therefore no doubt that the 10% paid once the vendors had left the VAT group was an instalment of the single purchase price payable for particular goods. In the present case, by contrast, the quarterly management charges were paid in full whilst Prudential and Silverfleet

were in the same VAT group. Significantly however, the success fees were uncertain both as to whether they would fall due at all and as to their amount if they became payable.

(iii) The House of Lords did not address the point that Prudential principally rely on here; namely the distinction between the chargeable event and the time when the tax becomes chargeable. This was addressed briefly by Lord Hoffmann alone, who assumed that the distinction did not matter for the purposes of what is now regulation 90.

(iv) It was clear that the arrangement in *Thorn* was a tax avoidance measure. That is plainly not the case here.

(c) Svenska

43. A few months after the decision in *Thorn* was handed down in June 1998, the House of Lords heard another important appeal about VAT groups in *Svenska International plc v Customs and Excise Commissioners* [1999] 1 WLR 769 ("*Svenska*"). Lord Lloyd and Lord Clyde who sat on the panel in *Thorn* were also on the panel in *Svenska*. The taxpayer, Svenska, was a subsidiary of a Swedish bank and from 1987 it provided on-going office services to the London branch of its parent company. It did not issue any invoices and was not paid anything by the London branch for those services. But Svenska was VAT registered, and it recovered the input tax on the supplies it bought in to use in providing the services to the London branch. Svenska asserted that it was entitled to recover that input tax on the basis that the inputs were intended to be used in taxable supplies by it to the London branch.

44. As from 1 August 1991, the London branch became registered for VAT and joined a VAT group with Svenska. Svenska was the representative member of the group. Svenska continued to provide office services to the London branch until the end of December 1991. In October 1991 the Commissioners issued two notices of assessment seeking recovery of the input tax that Svenska had claimed up to 30 June 1991, that is the inputs Svenska had claimed during the time when it was not in fact charging the London branch any consideration for the services it was performing.

45. In June 1992, Svenska issued an invoice to the London branch for £45.3 million in respect of all the services it had provided during the years when they were separate entities for VAT purposes and for the short period between August and December 1991 after the London branch joined the VAT group and before Svenska's supply of office services ceased. Svenska did not add output VAT to the invoice given that the two were members of the same VAT group at the date of the invoice. The London branch duly paid that invoice.

46. The Commissioners did not challenge the failure to charge output tax on that invoice. Rather they sought to recover the input tax Svenska had deducted during the years it was supplying management services to the London branch before it joined the VAT group. The problem for Svenska was that the London branch's business mainly comprised supplying exempt services to its customers. The Commissioners' argument was that following the formation of the VAT group, the London branch's business comprising the making of exempt supplies was now attributed to Svenska in its role as representative member of the VAT group. To the extent, therefore, that the supplies of office services made by Svenska to which the June 1992 invoice related were made for the purpose of exempt outward supplies to London branch's customers (now to be treated as Svenska's customers), the input tax incurred in providing the management services was not deductible.

47. The *Svenska* appeal turned on whether the time of the supply of the office services covered by the June 1992 invoice was fixed by the TOSR as the time when that invoice was issued. If so, then the whole supply took place when Svenska and the London branch were in the same VAT group and therefore when some of Svenska's output supply (that is the proportion comprising the London branch's supplies now attributed to Svenska as representative member of the group) was exempt. In that case, some of the input tax incurred by Svenska in supplying the office services over the whole period would be non-deductible, and therefore recoverable by the Commissioners, because it was incurred for the making of exempt supplies. If, however, the time at which the management services were supplied was the time when the services were *actually* performed by Svenska, then most of the period during which they were performed fell at a time when Svenska was not in the same group and hence at a time when its own business wholly comprised taxable supplies so that all the input tax was deductible.

48. Svenska therefore sought to take advantage of the fact that the payment for all the services had been invoiced at a time when it was in the same group as the London branch (so that it did not need to add VAT to its invoice) but also of the fact that the services had actually been performed at a time when it was outside the group (so that its input VAT was incurred in respect of its own taxable supplies and hence deductible), before the London branch's exempt supplies were attributed to it as the group representative member. The Commissioners accepted that the first of those advantages accrued but asserted that Svenska could not then treat the supply as having happened at the earlier time when the services were actually performed.

49. Lord Hutton and Lord Hope of Craighead gave speeches in favour of the Commissioners. Lord Slynn of Hadley and Lord Clyde agreed with Lord Hutton. Lord Lloyd dissented.

50. Svenska asserted that since no payment had been received and no invoice issued before June 1992, the TOSR meant that the time for the tax becoming chargeable occurred

only when the invoice was issued or payment received. That was why it was right not to add VAT to its invoice. But, it argued, that did not alter the fact that the supply of services had actually taken place at the earlier time. Svenska relied on article 10(1) of the Sixth Directive (now article 62 of the PVD) and the distinction it drew between the "chargeable event" and the time when tax becomes "chargeable". Svenska also relied on *Thorn* as establishing that: "when the time of 'supply' provisions fixed a supply to take place at a time when the two parties were in a group, that 'supply' should be ignored, but that it did not follow that the delivery of goods or the supply of services which took place between the parties was not a 'taxable supply' chargeable to tax" (p 783B).

51. Lord Hutton rejected Svenska's submissions. He noted that it was common ground between the parties that regulation 23 of the 1985 VAT Regulations applied. That corresponds to what is now regulation 90 of the 1995 VAT Regulations and provided that where there is a continuous supply of services and the consideration for the services is determined or payable periodically or from time to time, then the services are treated as separately and successively supplied at the earlier of payment or invoice.

52. He held that the continuous supply rule made clear that where there is a continuous supply of services, no supply shall be treated as having been made until there has been a payment or the issue of a tax invoice. At the time of the invoice and payment, Svenska and the London branch were in the same group and the London branch's exempt outward supplies were attributed to Svenska so that the inputs incurred years before were not deductible.

53. Lord Hutton did not regard *Thorn* as helpful to Svenska. The supply of goods in *Thorn* had taken place in the normal way at the time of the delivery of the goods. That supply was not to be disregarded because it took place when the vendors and purchaser were outside the VAT group. In Svenska's case by contrast, the "supply" of the services was fixed by the TOSR as occurring only when the invoice was issued or payment made. Accordingly, he said, at p 784: "the present case has to be approached on the basis that, no matter that in fact Svenska supplied services to the London branch prior to 1 August 1991, as a matter of the law governing VAT no supplies were made during the period 1987 to 1 August 1991".

54. Lord Hutton commented that the approach was based on artificial concepts but that the VATA 1983 and the 1985 VAT Regulations required tribunals and courts to apply artificial concepts. The continuous supply rule (now in regulation 90) meant that services which, in the real world of commerce, had actually been supplied to and used by another person were not to be treated as supplied until a payment had been received or a tax invoice had been issued. That in turn meant that the services covered by the June 1992 invoice were used by it partly to make exempt supplies to the customers of the London branch.

55. Lord Lloyd, dissenting, also recognised that the TOSR in relation to the continuous supply of services "requires one to depart from the real world and enter the make-believe world of VAT": p 775D. But he was only willing to depart from the real world to the extent required by the regulation. He also referred to *Thorn* where he said the facts were the other way round from the facts in *Svenska*. He thought that Svenska could have argued that just as the deemed supply in *Thorn* (when the pre-payment for the goods was made within the VAT group) fell to be disregarded, leaving the actual supply (when the goods were delivered outside the VAT group) in place, so the deemed supply by Svenska to the London branch at the date of the invoice in June 1992 could be disregarded leaving the actual supplies between 1987 and 1991 in place. However, he recorded, at p 776, that counsel for Svenska was not attracted to that argument and that counsel for the Commissioners "regarded it as heretical".

56. To summarise the effect of *Svenska*:

(a) All members of the panel applied the TOSR to identify the supply of services and when it was to be treated as taking place for the purposes of then applying the VAT Group Disregard.

(b) The majority rejected the argument put forward by Svenska that the distinction drawn in the PVD between the occurrence of the chargeable event and the time when the VAT becomes chargeable allows or requires the court to recognise that in the real world, the services were performed at a time earlier than the issue of the invoice. However artificial this was, it followed logically from the TOSR treating the time of the invoice as also being the time when the services were performed.

(c) The panel did not regard this result as inconsistent with *Thorn*.

(d) One difference between the present case and *Svenska* was that there had been no payments made to Svenska during the period when it was outside the group and the services were actually supplied. The invoice issued in June 1992 covered all the services supplied across the whole period. The House of Lords did not have therefore to grapple with the issue that arises in the present appeal where the management fees for the services performed were all paid when Silverfleet and Prudential were in the same VAT group and the success fee paid when they were not.

(d) Royal & Sun Alliance

57. The final decision in this line of cases is *Royal & Sun Alliance Insurance Group plc v Customs and Excise Commissioners* [2003] UKHL 29; [2003] 1 WLR 1387 ("*RSA*"). Though concerned with the timing of supplies, it did not involve a VAT group. RSA sought to recover input tax it paid as tenant to its landlord on rent and service charges due under leases when RSA had not yet rented out those premises to its own tenants under sub-leases. The reason why the taxable or non-taxable nature of the supplies turned on when those supplies were treated as having taken place was because of RSA's later election to treat rental for premises it sub-let as a taxable supply rather than as exempt (pursuant to section 51 of the VATA 1994). In other words, RSA waived the VAT exemption on the rent it charged on the sub-leases in order to be able to claim credit for the input tax that it had paid on its own rent due to its landlord. The landlord had waived the exemption on its own lease to RSA and so had added VAT to the rent and service charges it charged RSA.

58. The appeal turned, therefore, on which of two analyses were correct. The first was that the grant of a lease in return for periodic rental payments was a single supply at the time of grant. In that case there could be a change of intention by RSA as to the use of the inputs in making taxable rather than exempt supplies. The second possible analysis was that the lease involved a series of separate and successive supplies of goods or services, some of which took place before the election to tax and some of which took place after that election. In that case there was no change of intention relating to each successive supply. Lord Hoffmann with whom Lord Walker of Gestingthorpe and Lord Steyn agreed (on the issues similar to those raised by the present appeal) held that the second analysis was correct. Lord Woolf and Lord Clyde dissented.

59. Lord Hoffmann said at para 36 that he found "the notion of the same goods or services being supplied over and over again too hard to grasp". But he thought that the plain effect of the regulations was to treat each successive supply as different from the one before. Lord Hoffmann distinguished *Thorn* because section 5(1) of the VATA 1983 dealing with pre-payment for goods (now section 6(4) of the VATA 1994) referred to a single "supply" being treated as taking place on more than one occasion whereas regulation 90 of the 1995 VAT Regulations provides that services shall be treated as "separately and successively supplied" on the dates of the invoices or payments: paras 37 to 39.

60. Lord Hoffmann also discussed the decision in *Svenska*. He said, at para 50, that that decision had turned on "the special effect of the grouping provisions" which made it necessary to treat the inputs to Svenska as having been inputs to the group and used by the group to make exempt supplies at the time that the London branch so used them. Lord Hoffmann said:

> "51. Thus the effect of section 29 of the 1983 Act [now section 43 of the VATA 1994] was that Svenska was treated as never having carried on the economic activity of making supplies of services. It was the group which was treated as having acquired the input services supplied to Svenska and the group which was treated as having used them for the economic activity of making exempt services supplied by Branch. The case is not authority for the proposition that … one can retrospectively form a new intention about the use of goods or services which have already been used, like the right to occupy premises for a period which has expired."

61. Lord Walker agreed with Lord Hoffmann's conclusion that the lease under which RSA paid rent to its landlord was a series of separate and successive supplies for the purposes of VAT. Lord Woolf and Lord Clyde also agreed with that analysis of the supplies: see paras 17 and 62. They dissented in the result because of their analysis of the provision for electing whether inputs are attributable to taxable or exempt supplies.

5. The issues in the appeal

62. Prudential's case is that no VAT is chargeable on the success fees because the supply of services by Silverfleet to Prudential in managing the Funds Fund took place entirely during the period when the two were members of the same VAT group. As such, these transactions are disregarded under section 43(1)(a) of the VATA 1994 for VAT purposes and fall entirely outside the scope of VAT regardless of when invoices were issued or payments made. Prudential advanced three arguments to support that conclusion. First, it follows from a straightforward construction of section 43(1)(a) of the VATA 1994, read in light of the object and purpose of this provision (and article 11 of the PVD). Ms Yang argued that regulation 90 of the 1995 VAT Regulations has no application where the real-world supply took place at a time when the parties to it belonged to the same VAT group. As a result of the VAT Group Disregard, there is no "supply" to which section 6 of the VATA 1994 or regulation 90 can apply. This construction involves interpreting any supply within section 43(1)(a) as an actual or real-world supply to which the TOSR in section 6 of the VATA 1994 and regulation 90 of the 1995 VAT Regulations do not apply.

63. Alternatively, Ms Yang submitted that the same conclusion follows from the decision of the Court of Appeal in *B J Rice*, the ratio of which has not been doubted or overturned by subsequent case law.

64. The third argument is new and was not argued or addressed below. In short, it is that the TOSR in regulation 90(1) of the 1995 VAT Regulations can and must be

construed as only capable of modifying the time when VAT becomes chargeable and not the time when a chargeable event occurs. That must be the case since regulation 90 was made under subsection 6(14) of the VATA 1994 and was drafted to implement the predecessor of article 66 of the PVD (that is the third para of article 10(2) of the Sixth Directive). Prudential argues that HMRC's case depends on interpreting regulation 90 as modifying the chargeable event as well but this is incompatible with the PVD and the consistent jurisprudence of the CJEU. The consequence is that all chargeable events occurred when the fund management services were actually performed by Silverfleet for Prudential. They all fall to be disregarded because they occurred when Silverfleet was part of the VAT group. No chargeable event took place in 2015 and 2016 when invoices for the success fees were issued or payments made because Silverfleet had by that time long since stopped providing any actual services to Prudential.

65. If and to the extent that regulation 90 purports to change the timing of the chargeable event to the time when the invoice is issued, Prudential says that is incompatible with the PVD. In that case, Ms Yang submitted that the wording must be construed to be EU law-compliant unless this would involve a departure from a fundamental feature of the legislation: see *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29; [2006] STC 1252, para 90. Construed in that way, she submitted that all relevant chargeable events occurred (that is to say, all the services were actually performed) when Silverfleet and Prudential were in the same VAT group.

66. HMRC's essential answer to Prudential's case is that the TOSR in regulation 90 can and must apply to section 43(1)(a) of the VATA 1994 to identify the relevant supply and determine when that supply takes place and hence whether it is to be disregarded. As a matter of domestic law, the TOSR undoubtedly modify the time when the supply is treated as taking place as well as the time when VAT becomes chargeable; one cannot read section 43(1)(a) by itself. There is no basis for importing a new and different time of supply rule into section 43(1)(a) by reference to the "real world" in which Silverfleet actually performed the services for Prudential.

67. As to *B J Rice*, HMRC contended that the reasoning in *BJ Rice* cannot stand in light of the subsequent cases in the House of Lords discussed above. Nonetheless, though its reasoning is inconsistent, it has not been overruled. Its reasoning must therefore be narrowly confined to its own particular facts.

68. In response to Prudential's third argument, Peter Mantle for HMRC submits that the wording of regulation 90(1) plainly covers the facts of this case. The fund management services were supplied "for a period". The success fees are part of the consideration for those services and reflect amounts "determined … from time to time" as and when the success of the fund was measured and the contractual hurdle rate applied. Each success fee invoice was a VAT invoice relating to the supply of those services.

Since, according to regulation 90(1)(b) "each time" a supplier issues an invoice, the services must be "treated as separately and successively supplied", the fund management services are treated as supplied when each success fee invoice was issued, that is, in 2015 and 2016. Since Silverfleet was not then within the VAT group, VAT is payable on the success fees.

69. Mr Mantle denied that such a construction of regulation 90 is incompatible with the provisions of articles 63 to 66 of the PVD. Regulation 90 was made under section 6(14) of the VATA 1994 and implements both articles 64(1) and 66 (not just article 66 as Prudential contended in its written case). He submitted that article 64(1) of the PVD expressly allows for modification of the timing of the chargeable event in specified cases including where successive statements of account or payments are rendered. Here the services performed by Silverfleet when it was in the VAT group have given rise to a successive payment, namely the success fees. That means that the completion of the supply of those services is treated as having occurred at the end of the period to which payment relates. Mr Mantle submitted that that is what regulation 90 has achieved.

70. If that is wrong, he contended that the derogation permitted to Member States by article 66 of the PVD extends to changing the time when the chargeable event occurs. Regulation 90 does not, therefore, go further than is permitted by article 66; it provides not only that the charge to VAT arises when the invoice for the performance is issued but also that the chargeable event to which the success fees relate occurs when the invoice is issued. That in turn reads across to the VAT Group Disregard in section 43(1)(a). The effect of this is that the time of supply for the purposes of applying the disregard is also the time at which the invoices are issued; in this case after Silverfleet left the VAT group. The supply is not disregarded to that extent.

71. Finally, if contrary to HMRC's case, the court were to conclude that regulation 90 cannot be read compatibly with the PVD without revising its wording, Mr Mantle submitted that the revisions required to achieve a compatible reading would be too extensive to be achieved by interpretation alone. Legislation would be necessary.

72. The issues arising from the grounds of appeal are therefore:

(i) **Issue 1** On the proper construction of section 43(1), is the time of any supply of goods or services identified by applying the TOSR in regulation 90 so that those TOSR determine whether the supplier of the services was in the same VAT group as the recipient at the time of supply in order then to decide whether it is to be disregarded pursuant to section 43(1)(a)?

(ii) **Issue 2** Is *B J Rice* authority for the proposition that the supply of a service which is, for whatever reason, non-taxable at the time or during the period when it

actually takes place, cannot be rendered taxable by later changes in the VAT status of the supplier and, if so, how does that apply in the present circumstances?

(iii) **Issue 3** If the TOSR rules do apply to section 43(1)(a), how does regulation 90 apply to the circumstances of this case and is the regulation compliant with the TOSR in the PVD, as interpreted by the CJEU?

6. Issue 1: are the TOSR relevant to the proper construction of section 43(1)(a)?

73. To recap, section 43(1)(a) provides that where companies form a VAT group, "any supply of goods or services by a member of the group to another member of the group shall be disregarded". The question is how to decide whether the "supply" of services referred to in that provision took place at a time when the provider and the recipient were members of the same VAT group.

74. Ms Yang argued that it is wrong to construe the word "supply" in section 43(1)(a) as being a supply identified by the application of the TOSR in regulation 90. On the contrary, "supply" refers to the real-world performance of the services even if the VAT in respect of payment for those services only becomes chargeable at a later date. She relied on the purpose of the VAT grouping provisions (to achieve fiscal neutrality as between a corporate group which divides its businesses into separate legal entities and a single corporation which divides its businesses into branches within the same company) and submitted that if Silverfleet had simply been a branch of Prudential when the services were performed and the success fee had then become payable after that branch had been spun out into an independent corporate entity, no one would suggest that the success fee should be subject to VAT. The TOSR in regulation 90 therefore have no application to the question which arises in this appeal, namely whether the supply or supplies to which the success fee invoices and payments related took place when Prudential and Silverfleet were members of the same VAT group.

75. We can dispose of this argument briefly since we consider that the Court of Appeal was right to reject it for the reasons it gave. As Newey LJ said at paras 60 onwards of his judgment, section 6 of the VATA 1994 deals on its face with time of supply. There is nothing in either that Act or the 1995 VAT Regulations which indicates that section 6 or the regulations made under it are not to be applied when deciding whether companies were members of the same VAT group at the time of a supply. Further, there is no indication that "supply" as used in section 43 has a different meaning from "supply" as used in section 6 or in regulation 90 of the 1995 VAT Regulations.

76. Section 43 is not a complete code and nor is article 11 of the PVD. Neither contains a rule for determining the time of supplies. The purpose behind the VAT group provisions is, as Ms Yang submitted, to promote organisational fiscal neutrality as between corporate

groups comprising a number of legally separate entities and corporations divided into different branches within the same legal entity: see *European Commission v Ireland* (Case C-85/11) (referred to above) and *Finanzamt T v S* (Case C-184/23) EU:C:2024:599, [2024] STC 1391 per Advocate General Rantos, paras 81 to 86. For that reason, the supplies between the members of the same group are disregarded if the corporate entity so chooses and if the member state has implemented the article 11 option. But in our judgment that does not dictate that the TOSR should not apply. There is no basis in the "single taxable person" concept or the objectives of article 11 of the PVD for inferring a rule that depends on when the services were actually performed or implying such a rule into article 11. We agree with Mr Mantle that neither a literal nor a teleological construction of article 11 leads to the conclusion that the VAT group provisions have some separate, built-in time of supply rule that would be needed to fill the gap if the TOSR which govern the rest of the VAT regime do not apply.

77. The Court of Appeal majority was accordingly correct to apply regulation 90(1) to determine when the supplies took place for the purpose of deciding whether they took place whilst Silverfleet was inside or outside the VAT group.

78. This conclusion is clearly supported by the reasoning of the House of Lords in *Thorn* and *Svenska*. It is true, as Ms Yang stressed in argument, that it was common ground in *Svenska* that the TOSR had to be applied to determine whether, and if so when, a supply between members of the same VAT group took place. Nevertheless, in our judgment Lord Nolan's reasoning in *Thorn* (at p 1113) strongly suggests that the TOSR must be applied, for the purpose of section 43(1)(a) of the VATA 1994, to determine whether a supply is made when the supplier and recipient are members of the same VAT group.

79. Although Lord Hoffmann dissented in *Thorn* on the implications of what had to be disregarded, he held that the TOSR must be applied to determine whether a supply had been made when the supplier and the recipient were members of the same VAT group. At pp 1118-1119 he said:

> "… the question of whether a supply is taxable often depends upon the time at which it is treated as having taken place. Thus the question of taxability must be determined by applying the time of supply rules. The only alternative is to use some kind of meta-rules, derived from fairness, common sense and other such concepts lodged in the judicial bosom. … The time of supply rules are in my view the only criteria for deciding whether the transaction is to be treated as having occurred at a time when it was taxable."

80. Ms Yang submitted that the application of the TOSR in this context could lead to taxpayers manipulating the system to avoid tax by delaying the provision of an invoice or the making of a payment, particularly if they thought that the exempt/taxable status of the supply might be about to change. However, as Mr Mantle pointed out, this presupposes that the provider would be prepared to postpone payment for goods or services already supplied - something which is commercially unlikely. Ms Yang referred to the example given in *Thorn* (where the facts would have been the other way round from the facts in *Thorn*), namely that the buyer paid 90 per cent of the price for the goods in advance when it and the vendor were not in the same VAT group and the goods were delivered and the final 10 per cent paid only after they were part of the same VAT group. Lord Nolan records at p 1112 that counsel for the Commissioners accepted that in those circumstances, because the transfer of the goods would fall to be disregarded, the VAT treatment would be the same as if the goods had failed to materialise so the VAT would have to be refunded. Ms Yang relied on that concession as indicating the strength of the VAT Group Disregard. On that point, we share the scepticism of Lord Hoffmann as to whether that would in fact be the correct result – a result which he described as an "extraordinary anomaly" (p 1118E). Similarly, we do not share Ms Yang's assumption that a success fee for completed services invoiced once the branch has subsequently become an independent taxable person would necessarily not bear VAT. The correct VAT treatment of that situation will have to be addressed if and when it arises.

7. Issue 2: *B J Rice*

81. As we have indicated, HMRC did not contend that *B J Rice* was wrongly decided on its facts. Mr Mantle submitted that the Court of Appeal's reasoning, as Ward LJ put it, at p 590E, that the TOSR determined "when, but not whether, the tax is to be charged" is inconsistent with later cases. But, he explained (fairly) that HMRC have not regarded *B J Rice* as having been overruled by *Svenska* in the sense that HMRC do not investigate newly VAT registered traders in order to recover VAT from them on services provided or invoiced prior to their registration.

82. In our judgment, the ratio of *B J Rice*, in so far as it extends beyond the position of someone who is not registered for VAT because their income falls below the threshold for registration, is undermined by the critical reasoning in the subsequent decisions of the House of Lords referred to above. Put another way, its ratio must be confined to its own facts.

83. Accordingly, we reject Ms Yang's submission that the ratio in *B J Rice* should be applied in this case and that there is no material factual distinction between that case and the facts of this appeal.

8. Issue 3: the scope and application of reg 90

84. It may be helpful to set out a summary of our conclusions in respect of the different arguments advanced on this issue. For ease of exposition, we have focused on the payment of the success fees made by Prudential to Silverfleet rather than on the invoices sent; and hence also on that payment when considering the application of articles 63 to 66 rather than the "statement of account". We are not thereby drawing any distinction between payments and statements of account since both occurred after Silverfleet had left the VAT group.

85. First, we are satisfied that the wording of regulation 90, construed without reference to the PVD, is apt to apply to the facts of the present case. On this basis, regulation 90 has the effect that the time of the supply of Silverfleet's services to Prudential is modified by the payment of consideration (the success fees) so that the services are deemed to have been supplied at the time of that payment. The payment of the success fees is one of the "each times" referred to in regulation 90(1)(a) as being a time at which they are supplied. At that time, the two companies were no longer in the same VAT group.

86. Secondly and turning to the PVD provisions, we accept Ms Yang's basic contention that there is an important distinction drawn in the PVD between the chargeable event and the time when VAT becomes chargeable, in other words the time when VAT can be collected. That much was common ground. We also agree with Prudential that the derogation permitted by article 66 of the PVD entitles the Member State to change the time at which the VAT is collected but does not permit the Member State to change the time of the chargeable event to which the supply of goods and services gives rise. We therefore reject Mr Mantle's submission to the contrary.

87. We also accept Prudential's submission that the VAT Group Disregard in section 43 is overridden only if the chargeable event took place after Silverfleet had left the VAT group. The VAT Group Disregard is not overridden merely because VAT becomes chargeable at the later date.

88. Thirdly, unlike article 66, article 64 does require and permit member states to modify the moment at which the chargeable event creating the charge to VAT occurs in the case of goods or services which give rise to successive payments. Where article 64 applies, the chargeable event for those supplies occurs at the end of the period to which the payment relates. Further, the literal wording of article 64(1) is apt to cover the present case. The payment of the success fee by Prudential to Silverfleet was a "successive payment" within the meaning of article 64. It related to a period which expired either at the time when the performance of the services was completed or at a time when the thresholds which triggered the success fees were met. If the latter, then clearly that date

was a date on which Prudential and Silverfleet were no longer in the same VAT group. Even if the former, the VAT Group Disregard does not override article 64 by requiring the Member State to ignore a provision of services which actually took place even though within the same VAT group if the effect of a "successive payment" changes the timing of the chargeable event. In such circumstances, HMRC are not required to treat the success fees as, in effect, a gratuitous payment because the parties were within the same VAT group at the time the services were performed.

89. Fourthly, the CJEU has construed article 64 restrictively so that parties cannot postpone the chargeable event arising from the supply of services simply by postponing the receipt of payment for the services. That is unsurprising given the obvious scope for abuse, particularly in Member States which have chosen not to implement the derogation in article 66 in their domestic law. If parties to a contract could postpone the chargeable event arising in accordance with article 64 simply by postponing the receipt of payment, that would in effect bypass that choice by precluding the member state from collecting the output VAT before payment is invoiced or received.

90. The CJEU's jurisprudence has not, in any event, limited the application of article 64 so that it *only* applies where the payment is made whilst the performance of the services is ongoing at the moment of payment. Rather, it has held that article 64 applies where the payment relates to "supplies the nature of which justify payment in instalments". A situation where services are performed repeatedly or continuously over a certain period is one circumstance in which the nature of the supplies justifies payment in instalments. That is the circumstance that has been addressed in much of the case law of the CJEU. However, another situation in which the nature of the services justifies payment in instalments is where the contractual consideration comprises an element which is uncertain or contingent at the time the performance of the services is completed and where the "successive payment" comprises that element of the consideration. This conclusion is supported by the CJEU's decision in *Finanzamt Goslar v baumgarten sports & more GmbH* (Case C-548/17) EU:C:2018:970 ("*baumgarten*") (discussed below) and not ruled out by any of the other cases to which we were referred by Ms Yang.

91. The case law of the CJEU does not, in our judgment, preclude such an interpretation of article 64. That is not because, as HMRC argued, the services in some way retain their character of being a "continuous supply of … services over a period of time" even once they have clearly come to an end. It is because the payment is a successive payment which relates to the earlier supply so that the supply is only regarded as being completed at the end of the period to which the payment relates.

92. Having set out a summary of our conclusions, we will now set out our analysis of the issues raised by Ms Yang's submissions on issue 3.

(a) The wording of regulation 90

93. Ms Yang's first argument was that the wording of regulation 90, construed by applying the domestic TOSR without reference to the PVD, leads one to the conclusion that it has no application to a situation like the present case, where the supply of goods or services had been completed by the time the invoice is issued. Section 43(1) refers to "supply" of "services". Even if the court rejects (as we have) her argument that the TOSR have no application to section 43(1), she submitted that the first reference to "supplied" in regulation 90(1) comes before the description in the rest of that regulation of the special rule deeming separate and successive payments as relating to separate and successive supplies. That word in regulation 90 cannot of itself import the special TOSR rule into section 43.

94. We do not accept that argument. In our judgment, on an ordinary reading of section 6(14) and regulation 90, the TOSR in regulation 90(1) has substantive effect in relation to the supplies made by Silverfleet in this case. It splits, for VAT purposes, supplies that are ongoing or that attract successive payments into a series of separate, successive supplies and each successive supply is treated as different in time from the one before (see for example *RSA*). We recognise that the notion that the same services can be supplied over and over again was a notion described by Lord Hoffmann (in *RSA* para 36) as "too hard to grasp". But that is the notion on which regulation 90 depends, for services albeit not for goods. Read as a matter of pure domestic law, regulation 90(1) applies to determine whether a supply was made when the supplier and the recipient were both members of the same VAT group. Applied here it leads to the conclusion that the relevant supplies to which the success fees relate were made when Silverfleet was no longer a member of the VAT group.

95. Ms Yang also referred to the predecessor provisions to regulation 90. As the VATA 1994 is a consolidating Act, she submitted that it is permissible to look at the predecessor provisions if the current provisions are ambiguous. The earliest iteration of section 6(14) was section 7(8)(b) of the Finance Act 1972. That empowered the Commissioners to make regulations in cases where consideration for goods or services is paid either periodically or "at the end of any period" and said that such regulations may provide for treating services "supplied for any period as being successively supplied for successive parts <u>of that period</u>". The regulation enacted was regulation 18 of the Value Added Tax (General) Regulations 1972 (SI 1972/1147), which was a more simple, more concise version of what is now regulation 90. This implemented article 6(4) of Council Directive 67/228/EEC of 11 April 1967 ("the Second VAT Directive") which is itself a shorter version of what is now articles 63 to 66 of the PVD. Her argument was that it was clearer from those provisions that they did not apply where the supply of services, albeit continuous in nature over some earlier period, had in fact clearly come to an end before the payment. Given that the predecessor domestic provisions were designed to implement article 6(4) of the Second VAT Directive, they cannot have been intended to go further than was allowed by that article and the fact that section 7(8) of the 1972 Act only allowed

an alteration to the basic timing provisions by reference to "the end of any period", suggests the same applies to the current provisions which refer instead to supplies "for a period".

96. Having studied these earlier provisions carefully, we do not accept that they help resolve the current issues. It is not at all clear that the provisions in the Second VAT Directive had precisely the same effect as the much fuller provisions made in the PVD. On the contrary, in *Ufficio IVA di Trapani v Italittica SpA* (Case C-144/94) EU:C:1995:355, [1995] STC 1059 ("*Italittica*") both Advocate General Jacobs and the Court described the Community legislature, when enacting article 10(2) of the Sixth VAT Directive as having "substantially extended the scope of the permitted derogations" as compared with the Second VAT Directive provisions, suggesting "that it intended to allow the member states a wide margin of discretion": see para 15 of the CJEU's judgment, paraphrasing para 22 of the Advocate General's opinion.

97. In our judgment, therefore, the application of regulation 90 of the 1995 VAT Regulations, read literally, applies in the present case. Even if one regards the first use of "supplied" in regulation 90(1) as referring to the actual supply, one must still go on to identify for the purposes of regulation 90 whether the services are to be treated in whole or in part as being made for a consideration which is determined and payable periodically and hence whether the services are deemed to have been separately and successively supplied each time a payment is received. There is nothing in section 43 or regulation 90 that stipulates that the VAT Group Disregard means that there are no services "supplied" for the purposes of regulation 90(1). The court must apply the rest of that regulation.

98. Given that conclusion we must go on to consider whether regulation 90 as so applied is a permissible implementation of either article 64 or 66 of the PVD.

(b) Article 66 of the PVD as the basis for regulation 90

99. HMRC submitted that regulation 90 – at the least - implements article 66 and that is sufficient for their purposes. That is either because:

(a) article 66 allows a Member State to change not only the chargeability of VAT to the later date of invoice or payment but also the chargeable event; or

(b) if that is wrong and article 66 only allows a Member State to change the chargeability of VAT, that is enough for the purposes of the VAT Group Disregard.

Given that the UK has indeed implemented article 66, that has a consequence for the application of the VAT Group Disregard in postponing also the time of supply within the meaning of section 43.

100. Ms Yang disagreed. She submitted that articles 63 to 66 of the PVD require regulation 90(1) to be construed so as to recognise the distinction between a chargeable event and when the VAT becomes chargeable. Further, the derogation permitted by article 66 does not extend to enabling Member States to postpone the time that the chargeable event occurs. All it permits is for the Member State to enact a self-denying ordinance that it will refrain from collecting the tax arising from the chargeable event until the invoice is issued or the amount paid, provided that there is a back stop date. The consequence, she contended, is that the chargeable event cannot by virtue of implementing article 66 be treated as occurring after the time when the services have been fully performed. That is not enough to affect the time of supply for the purposes of the VAT Group Disregard.

101. On this point we agree with Ms Yang. The wording of article 66 is clear that it only affects the time at which VAT can be collected and not the time at which the chargeable event occurs. This is also clear, in our view, from the judgment of the CJEU in *Italittica*. In that case Italy had enacted the derogation then in article 10(2) of the Sixth VAT Directive, now in article 66 of the PVD, to postpone the chargeability of VAT for all kinds of services. The question referred by the Italian court was whether the reference to "certain transactions" and "certain categories of taxable person" in article 10(2) precluded a Member State from enacting a generally applicable postponement for all kinds of services for all taxpayers. The European Commission argued before the CJEU that the derogation should be construed narrowly because it was important to adhere strictly to the principle that the tax becomes chargeable on performance of services and few exceptions should be allowed. Further, the Commission argued that "the Italian legislation fails to distinguish expressly between the chargeable event and the moment when the tax becomes chargeable and that such a failure means that the legislation makes a rule out of the exception": see para 24 of Advocate General Jacobs' opinion. Advocate General Jacobs disagreed, saying that the distinction between the chargeable event and the moment at which the tax becomes chargeable is not relevant to the exercise of the option. Reference to the chargeable event becomes redundant where the Member State exercises the option and "it is therefore unnecessary for it to make an express distinction in its legislation between the chargeable event and the moment when tax becomes chargeable": para 24. The Court did not refer expressly to the distinction between the chargeable event and the chargeability of the tax but referred to the issue as one as to when the VAT becomes chargeable: see for example paras 17, 18 and 19. There was no suggestion there that the use of the derogation could change the timing of the chargeable event.

102. We also accept Prudential's argument that in order for the supply of services by Silverfleet not to be covered by the VAT Group Disregard, HMRC must show that the chargeable event created by the supply occurred at a time after Silverfleet had left the

group. The disregard is not overridden merely because payment was made after Silverfleet had left the group. There is no indication in the PVD that the derogation in article 66 was intended to have the profound effect in conjunction with the option to provide for VAT grouping in article 11 contended for by HMRC.

103. The effect of our conclusions so far is therefore that VAT is only payable on the success fees if the effect of regulation 90 is to change the timing of the chargeable event to the time of payment and if that change is permitted by article 64 of the PVD. We have already held in our earlier discussion that regulation 90 purports to make that change. We now turn to whether that is permitted by article 64 of the PVD.

(c) Article 64 of the PVD and the case law of the CJEU

104. The nub of the appeal is whether the modification that regulation 90 makes to the time at which the chargeable event occurs (such that it occurs each time a payment is made in respect of services for which the consideration is payable from time to time) is a permissible implementation of article 64.

105. Prudential's argument proceeded as follows. The apparently wide wording of article 64(1) has been cut down by the case law of the CJEU. The wording in isolation reads as if the adjective "successive" applies only to the payments and not to the goods or services supplied. If that were the correct reading, then any contract under which goods or services were paid for in instalments would be supplies of goods or services giving rise to successive payments. They would then be regarded as completed not when they are supplied in accordance with article 63 but at the expiry of the period to which the payment relates. This would make a rule out of the exception.

106. Ms Yang contended that there is clear authority for the proposition that it is not open to the parties to a transaction to postpone the chargeable event arising from the supply of services simply by providing for payment by instalments. The lead provision is article 63 and that is the main harmonising provision. Once the services have clearly been completed, they are no longer to be regarded as giving rise to successive payments because they are not a continuing supply; article 64 has no application and article 63 applies. As currently construed by the CJEU, therefore, article 64 applies only where there is an ambiguity in the period for which the goods or services are supplied. Here there is no such ambiguity so article 64 is not relevant.

107. Mr Mantle submitted that article 64 is wider than Ms Yang asserts. It is true that the CJEU has decided that parties cannot simply postpone the chargeable event by splitting an agreed fee into a series of instalments. That would in effect allow the parties to achieve by contract what the Member State had decided not to enact by deciding not to take advantage of the derogation in article 66.

108. Mr Mantle put HMRC's case in two ways. First, whether payments relate to a continuous supply of services falling within article 64 or relate instead to a one-off supply falling within article 63 is determined once and for all by looking at the way services are performed when they are performed in the real world. Here there is no doubt that when Silverfleet performed the services for Prudential that was a continuous supply of services, as reflected in the quarterly payment of the management fees due over time. That determines that these services were "a continuous supply" so that, even though the services are not in fact continuing at the time the success fees are paid, the subsequent payment for those services still falls within the ambit of article 64. The success fees are therefore treated as one of the successive payments for those continuous services.

109. HMRC's alternative argument is that article 64 applies not only where the performance of services is ongoing at the date of a successive payment but where, as in the present case, the parties to the contract do not know at the date when the services are performed (or when the continuous performance of services comes to an end) whether any further payment will ever become due or, in what amount. In the circumstances of this case, it only became clear that success fees were payable when the contractual hurdle rate was crossed. That was after Silverfleet left the VAT group.

110. We consider that the second argument is the correct one.

111. It is important to bear in mind that the scope of article 64 is relevant outside the context of the existence of a VAT group. If Silverfleet and Prudential had never been in the same VAT group, the successive payments of the quarterly management fee payable by Prudential for the fund management services supplied by Silverfleet between January 2002 and 8 November 2007 would have fallen within article 64(1) because they would have been treated as continuing over the period covered by those successive payments. The occurrence of the chargeable event would undoubtedly have been modified by the application of article 64 so that it occurred at the end of the period to which each such quarterly management fee related.

112. Again, if there was no VAT group complication, when the success fees were invoiced and paid in 2015 and 2016, the same question would then have arisen as arises now. That question would have been: when did the chargeable event giving rise to the payment of the success fees occur – at the time the fund management services stopped in 2007 or at some later date when the success fees were triggered, invoiced or paid? But outside the VAT group context, that question would not need to be answered. The United Kingdom has implemented the derogation permitted in article 66. Regulation 90 provides, pursuant to article 66, that the VAT on the success fees only becomes chargeable when it is invoiced or paid. In most circumstances that is all that the parties need to know, and it does not matter whether the chargeable event is postponed or not. It matters here because it is necessary to identify the timing of the chargeable event in order to determine whether

it occurred when Silverfleet was inside or outside the VAT group for the purpose of applying the VAT Group Disregard.

113. So far as the PVD is concerned, articles 63 and 64 have been described by the CJEU in the case law we discuss below as intrinsically linked. The CJEU has repeatedly said that article 64 must be read in light of article 63 because article 63 states the general rule that the chargeable event for VAT occurs and VAT becomes chargeable when the goods or services are supplied. Since the intention of the VAT legislation at EU level was to achieve maximum harmonisation as to the time at which VAT becomes chargeable in all Member States in order to ensure uniform collection of VAT, the CJEU has emphasised that the chargeable event and chargeability of VAT are not governed freely by the parties to the contract.

114. Nonetheless, article 64(1) does modify the timing of the chargeable event in certain circumstances. Focusing first on its actual wording, that wording is broad. It makes no reference to the nature of the supply; and there is no express requirement for the supply to be continuous – that concept is only introduced in article 64(2) allowing Member States to introduce a backstop of one year. In our view, the wording of article 64(1) is wide enough on its face to cover what has happened here. In other words, the payment of the success fees is a "successive payment" made in respect of the supply by Silverfleet of its services to Prudential and so the supply of those services must be treated as "being completed" at the end of the period to which that payment relates. That was at some time after the actual performance of the services and was at a time after Silverfleet left the VAT group.

115. However, as Prudential contended, we must consider the case law of the CJEU, particularly given that article 63 is a harmonising measure, and article 64 must be read with it.

116. We agree with Ms Yang that the jurisprudence of the CJEU suggests that article 64(1) is to be construed more narrowly than appears on its face. There is no doubt that the effect of the CJEU jurisprudence has been to recast the wording of article 64(1) and narrow its effect. The question is whether it has been narrowed to the extent contended for by Prudential so that the chargeable event cannot arise after the continuous supply of the services has actually and undoubtedly come to an end.

117. The first case in time is *baumgarten* a judgment of the Sixth Chamber dated 29 November 2018 (see para 90 above for citation).

118. Since Prudential and HMRC disagreed about the background facts in *baumgarten*, it is necessary to consider them in some detail. The facts are described in the judgment (paras 11 to 13) as follows: "The company provides agency business services in the

professional football sector. When the company successfully places a player with a football club, it receives commission from that club, provided that the player subsequently signs an employment contract and holds a licence issued by the Deutsche Fußball Liga GmbH (German Football League). That commission is paid to the company in instalments every six months for as long as the player remains under a contract with that club and holds a German Football League licence."

119. The company taxpayer relied on para 13(1)(a) of the relevant German law that said that the tax became chargeable on supplies of services "upon expiry of the tax period in which the supplies of goods or services were made." In 2015 the tax authority asserted that as from 2012, the company should have paid VAT on commission payments which in fact fell due in 2015. It issued an adjusted tax notice to that effect. The company argued that "the commission payments at issue were not certain and the VAT payable on them was chargeable only when they were actually received": para 16.

120. The dispute led the German Federal Finance Court to refer several questions to the CJEU. Although it made no reference in its questions to article 64, the questions were interpreted by the Court as asking whether article 63, read with article 64(1) (para 25):

> "must be interpreted as precluding the chargeable event and chargeability of a tax on the supply of agency services for professional football players by an agent, such as that at issue in the main proceedings, paid in conditional instalments over several years further to the placement, from being regarded as occurring or taking effect when the player is placed."

121. The referring court had doubts about whether article 63 of the PVD could be interpreted restrictively "in order, in essence, to regard the service as not yet supplied when remuneration for that service is not due or is conditional, as is the case in the main proceedings" (para 18).

122. The problem envisaged by the referring court was made clear in the second and third questions it referred: if article 63 is construed to mean that all remuneration for the services is chargeable to VAT at the time the services are supplied, how does that work if the taxpayer is not able to receive part of the remuneration until two years after the taxable event has occurred? Does that mean that the taxpayer is obliged to "pre-finance" the VAT for those two years, subject only to a later adjustment? (see para 21).

123. The CJEU noted, at para 30, that the service "entails negotiating the placement of a player for a certain number of seasons with a club … [which was] remunerated by means of conditional payments in instalments over several years, further to the placement". The CJEU said that it appeared to fall within article 64(1) and this meant, subject to the

findings of the domestic court, that the chargeable event and chargeability of a tax on the supply of this service "must be regarded as occurring or taking effect not when the player is placed, but on expiry of the periods to which the payments made by the club relate" (para 31).

124. The questions were therefore answered in favour of the taxpayer because the CJEU held that the agency did not become liable for the VAT on the fees in 2012 – the VAT only arose when the conditions for the later payments were satisfied. In the light of that, the CJEU did not need to address the second and third questions because there was no pre-financing of the later payments required by articles 63 and 64.

125. Accordingly, the CJEU answered the questions referred as follows: "Article 63 of the VAT Directive, read in conjunction with article 64(1) thereof, must be interpreted as precluding the chargeable event and chargeability of a tax on the supply of agency services for professional football players by an agent, such as that at issue in the main proceedings, paid in conditional instalments over several years further to the placement, from being regarded as occurring or taking effect when the player is placed" (see para 32 and the dispositif, emphasis added).

126. The same provisions of German law came before the CJEU again in 2021 in *Finanzamt B v X-Beteiligungsgesellschaft mbH* (Case C-324/20) EU:C:2021:880 ("*XB*"). XB supplied mediation services to "T" for the purposes of the latter's sale of a plot of land to a third party in 2012. That this was an abusive scheme is highlighted by the fact that the fee agreement between XB and T (dated 7 November 2012) made clear that XB had already complied with its contractual obligations by that date. However, the parties agreed that the fee of €1m plus VAT for the services would be paid in five equal annual instalments, together with VAT on each instalment, with the first instalment payable on 30 June 2013. At each due date XB issued an invoice for the instalment and paid tax corresponding to the sum received. The German tax authority concluded that VAT on the whole sum should have been paid in 2012, and litigation followed.

127. The German Federal Finance Court made a preliminary reference asking the CJEU (among other things) whether this case could be distinguished from *baumgarten*. The paragraphs in the judgment in *XB* describing the facts in the main proceedings record how the German referring court itself sought to distinguish the facts of *XB* from the facts in the earlier case:

> "21 That court also notes that the present case may be distinguished from that which gave rise to the judgment of 29 November 2018, *baumgarten sports & more* (C-548/17, EU:C:2018:970), which concerned supplies of the services of a sports agent, namely the placement of a player with a football

> club in so far as the agent's remuneration was tied to the player's placement within the club in question being continued. The case in the main proceedings concerns a situation in which the payment of the agreed remuneration in instalments is merely subject to certain timeframes rather than conditional on the long-term success of the agency service, which may be uncertain."

128. The German court was concerned that the same problem arose of the taxpayer being required to "pre-finance" the VAT on the whole amount at the outset even though it would only be paid in instalments. The German court asked whether the provisions relating to adjustments of taxable amounts under article 90 of the PVD applied so that this would be treated as a case where, as at the date of the contract, there had in effect been non-payment of later instalments of the price and an adjustment of the VAT due at the first date.

129. The CJEU expressed the clear view that the application of article 64 cannot be governed solely by the successive nature of the payment for the supply. In an important passage, the CJEU said the following as regards the scope of article 64 (para 37):

> "As for its interpretation, the wording 'supplies which give rise to successive payments' could be construed either as including one-time supplies for an agreed consideration paid in several instalments, or as concerning only supplies the nature of which justify payment in instalments, namely those which are not performed on a single occasion, but repeated or continuous over a certain period."

130. It held that the second interpretation was correct. The CJEU held further that article 64 is premised on a relationship between the nature of the services in question and the payment in instalments (para 39). That meant that article 64 did not apply to a one-off supply even where the consideration was payable in instalments. That interpretation was supported by the purpose of article 64 as it explained:

> "41 In that regard, it should be made clear that article 64(1) of the directive, read in conjunction with article 63 thereof, is intended to facilitate the collection of VAT and, in particular, the ascertaining of when the liability to tax arises.
>
> 42 In order to ascertain when the chargeable event occurs and the tax becomes chargeable, article 63 of [the PVD] requires that the actual supply of a service be determined. As the

Advocate General stated in point 41 of his Opinion, article 63 does not specify which event is to be regarded as the time of supply, so that it is for the competent national authorities and courts to ascertain the time at which it actually took place.

43 By contrast, under article 64(1) of [the PVD], the chargeable event and chargeability of VAT are tied to the expiry of the periods to which the payments for the services supplied relate. article 64(1) therefore sets out a legal rule from which the precise time of the chargeable event may be ascertained on the basis of a legal fiction, without needing to make the findings necessary for ascertaining when a service was actually supplied.

…

45 However, as a legal rule for determining the time from which a liability to tax arises, article 64(1) of the directive applies only to the extent that the date or dates of the actual completion of services are [not] unambiguous[1] and potentially give rise to different interpretations, which is the case where they are, on account of their continuous or recurrent nature, supplied during one or several specific periods.

46 By contrast, as the Advocate General observed, in essence, in point 44 of his Opinion, where the time at which the supply of services is completed is unambiguous, in particular, in the event of a one-time supply and of a precise point in time from which its completion can be ascertained on the basis of the contractual relationship between the parties to the transaction, article 64(1) of [the PVD] cannot apply without disregarding the clear wording of article 63 of that directive.

47 In addition, in accordance with the latter provision, read in the light of recital 24 of [the PVD], the chargeable event and chargeability of VAT are not governed freely by the parties to the contract. On the contrary, the EU legislature thereby intended maximum harmonisation of the date on which liability

[1] The English text of the judgment says "are unambiguous" but this is clearly a mistranslation given the sense of the comment as contrasted with what is said in the following para. The French version of para 45 makes this clear: "ne s'impose que pour autant que le ou les moments de réalisation effective des prestations ne sont pas univoques"

> to pay VAT arises in all the Member States in order to ensure the uniform collection of that tax (judgment of 2 May 2019, *Budimex*, C-224/18, EU:C:2019:347, paragraph 22 and the case-law cited)."

131. The CJEU also said:

> "50 Furthermore, it cannot be inferred from the case-law of the Court that article 64(1) of Directive 2006/112 may apply even to a one-time supply of services. The cases in which the Court upheld the applicability of that provision concerned services supplied during specified periods on the basis of contracts which provided for obligations of a continuous nature, whether it be the lease of a vehicle (judgment of 16 February 2012, *Eon Aset Menidjmunt*, C-118/11, EU:C:2012:97), consulting services of a legal, commercial or financial nature (judgments of 3 September 2015, *Asparuhovo Lake Investment Company*, C-463/14, EU:C:2015:542, and of 15 September 2016, *Barlis 06 – Investimentos Imobiliários e Turísticos,* C-516/14, EU:C:2016:690), or agency services for the placement of a player to and in a football club (judgment of 29 November 2018, *baumgarten sports & more*, C-548/17, EU:C:2018:970)."

132. The CJEU therefore concluded that article 64(1) must be interpreted as meaning that a service supplied on a single occasion remunerated by way of instalment payments does not fall within the scope of that provision.

133. That answer meant that, unlike in *baumgarten*, the CJEU did have to go on to address whether the taxpayer had to pre-finance the VAT. The Court went on to hold that article 90 was only applicable where the customer had failed to pay the debt in whole or in part. Article 90 could not assist XB by enabling an adjustment to be made to allow the VAT only to be charged on the value of the instalment that fell due on 30 June 2013.

134. Ms Yang understandably relied on the reference to *baumgarten* at the end of para 50 of the CJEU's judgment in *XB* as supporting her submission that *baumgarten* was a case where there was a continuous supply of services ongoing at the time when the agency's commission was paid. She also relied on Advocate General Szpunar's reference in para 48 of his opinion to *baumgarten* as indicating that the football agency in the earlier case must have continued to provide services to the club or the player and that the commission paid in later years was treated as relating to those services. The case was, on

that reading, an unexceptional application of article 64 because the performance of the services had not been completed at the time the later commission payments were made.

135. We disagree. The paragraphs in *baumgarten* to which the Advocate General cross-refers (paras 30 and 31) do not suggest that there was any continuing obligation on the football agency to do anything – the long-term nature of the contract was only the continuing payments contingent on the player staying with the club. On the contrary, it is difficult to see why the controversy would have arisen in the German referring court in *baumgarten* if there had been a continuing supply. The German law at issue (para 13(1) point 1.a of the Umsatzsteuergesetz 1990) set out at para 8 of the judgment in *baumgarten,* appears to provide that where "certain parts of an economically divisible supply are to be paid for separately" the tax is payable on expiry of the tax period in which the part supply is made. If the commission had in fact been in respect of ongoing services, the taxpayer would have been entitled to make payment only when the service was received. It seems that the controversy requiring the CJEU's preliminary ruling arose precisely because there were no economically divisible supplies which were being paid for separately. It appears to us that it was precisely because there was no more general postponement of the collection of the VAT in German domestic law that it was critical to identify when the chargeable event occurred. In our judgment, therefore, *baumgarten* provides a strong analogy with the facts of our case.

136. More recently the CJEU revisited this topic in *C SPRL v Administrația Județeană a Finanțelor Publice (AJFP) Cluj* (Case C-696/22) EU:C:2024:499 ("*SPRL*"). This case concerned a dispute between the taxpayer, referred to as C, and the taxing authorities in Romania. C provided taxable services to companies involved in insolvency proceedings. C was appointed by the insolvency court, its rate of renumeration was set by that court and, it appears, paid from public funds: see the Romanian law cited at para 19 of the judgment. C relied on article 134(8) of the Romanian Tax Code, which provided that in the case of "the continuous supply of services" (defined by a non-exhaustive list of services), the supply shall be deemed to have been made on the dates specified in the contract for payment for goods or services supplied or on the date of issue of an invoice, provided that the accounting period did not exceed one year. For example, C issued an invoice on 31 August 2011 covering services provided since the previous March. However, the taxing authority had a practice of defining the chargeable event and the chargeability of VAT as being at the time when the services were actually supplied so that C was obliged to issue invoices no later than the fifteenth day of the month following the month in which the chargeable event occurred, ie when the services were actually performed. The invoice issued by C on 3 October 2011 covered services provided since November 2010, the delay being because the payment of the invoice had been subject to a condition as to the liquidity of the recipient of the services.

137. The first question asked of the CJEU was whether that practice was precluded by articles 63, 64 and 66.

138. It was common ground that C provided services to undertakings which were the subject of insolvency proceedings continuously over a period and not on a single occasion. The CJEU noted at para 50 that Romania did not appear to have adopted the derogation in article 66. The CJEU recalled the link between articles 63 and 64 and referred to its judgment in *XB*. It repeated the statement from *XB* confirming that article 64 concerns only supplies the nature of which justify payment in instalments, "namely" those which are not performed on a single occasion, but repeatedly or continuously over a certain period. On the basis of the information provided to it by the referring court, the CJEU expressed the view that the payments did fall within article 64(1) because the supply of services gave rise to successive statements of account or successive payments.

139. As to the second question, the CJEU at para 74 interpreted this as asking whether if payment of remuneration for services falling within the scope of article 64(1) cannot take place because there are insufficient funds in the debtor's accounts, that provision permits the inference that VAT becomes chargeable only at the time when the remuneration is received. The CJEU held that it did not; the chargeable event and the chargeability to VAT were not conditional on the actual receipt of the remuneration due.

140. To summarise, these CJEU cases establish the following principles:

(a) Article 63 is the generally applicable rule for fixing when liability to VAT arises.

(b) Article 64 supplements and clarifies situations which would otherwise give rise to doubt if article 63 was simply applied. According to the CJEU's jurisprudence, it does so by clarifying the time when the supply of a continuous or other service that involves successive payments should be regarded as being completed. That time is deemed to be the expiry of the period or periods to which the invoice relates.

(c) In this way, article 64 has the effect of modifying the time of the chargeable event as well as the time of chargeability of VAT. That is entirely clear from the cases, particularly *SPRL*.

141. The issue that arises in the present appeal is, therefore, whether the CJEU's case law should be interpreted as meaning that the ***only*** situation in which article 64(1) operates to postpone the occurrence of the chargeable event to the expiry of the period to which the payment related rather than the date by which the services have been performed is the situation where an ambiguity in the timing of the chargeable event results from the fact that the services are performed on a continuous basis. Alternatively, can article 64(1) also operate in a case like the present, where there is no ambiguity about the completion of the performance of the services but where the ambiguity as to the liability to VAT arises from

the fact that the contractual remuneration is uncertain at that time because it is contingent on the happening of later events.

142. We recognise that there are passages in the CJEU's judgments in *XB* and *SPRL* where the Court says in terms that the ***only*** circumstance in which article 64(1) operates to postpone the chargeable event is where there is an ambiguity as to when the services are completed and that it does not apply when it is clear that the performance of the services has been completed. But we have concluded that that is not the correct understanding of those judgments or of article 64(1). In our judgment, article 64(1) also applies where the reason why the supply of services "gives rise" to a successive payment is because the value of the services is determined under the contract in whole or in part at a later date, after the performance of the services. We arrive at that conclusion for the following reasons.

143. First, we bear in mind that, as Lord Hoffmann stated in *Thorn*, VAT is a tax levied not on goods or services themselves but on their value (p 1116B). The tax in that case, which concerned the sale of goods, was not concerned to divide up the goods because it is not levied on the goods themselves but upon their value.

144. Secondly, it is clear, as we have concluded above, that the wording of article 64 itself is wide enough to cover the present situation. Here, there was no certainty as to when the periods in respect of which success fees might arise would expire. That was a problem that would also have arisen in *baumgarten* where the expiry of the periods to which the subsequent commission payments related would have been at the end of each season during which the player continued to play for the club. The CJEU appears to have been content in that case to treat that as the period to which the commission payments related for the purposes of article 64, even though the case proceeded on the basis that the placement was the date at which the services were actually (and completely) performed by the taxpayer agency. In the present appeal, the periods to which the success fees relate are the periods during which the funds' value triggered the fee.

145. Thirdly, the CJEU's jurisprudence should not be interpreted as cutting down the broad wording of article 64(1) further than it expressly cuts it down. The wording of the PVD is a source of law superior to the judgments of the CJEU. We consider that care must be taken to avoid eroding the wording of the PVD by giving an expansive interpretation to wording in judgments which may have been broadly expressed. Judgments are drafted in the context of the fact pattern that the CJEU was addressing. The CJEU has expressly cut article 64(1) down in *XB* but the fact that the CJEU has said that it "only" applies where there have been continuously supplied services was to contrast it with *baumgarten*. The supply in *XB* was certainly not a supply "the nature of which justif[ies] payment in instalments" to use the phrase from para 37 of *XB* and para 61 of *SPRL*.

146. The CJEU was not ruling out that there may be other circumstances in which the nature of the supply also justifies the making of successive payments. One such circumstance is where the value of the supply is uncertain at the time of performance because an additional amount of consideration may or may not become payable on the occurrence of a later event. The Advocate General in *XB* confirmed that an important factor distinguishing the facts in that case from the facts in *baumgarten* was that in *XB* the service provider was to be "unconditionally paid in full": para 48.

147. We consider that *baumgarten* is analogous with the facts of this case because the contract provided for agency services culminating in (or including) the placement of the footballer, and the consideration was in the form of remuneration payable in the year of placement with ongoing fees conditional on continued employment by the club of the footballer. That meant it was not possible to determine clearly when the supplies came to an end – was it in 2012 or did the continuing contractual relationship mean that there was a further supply ending at the end of the six-month period in 2015 when the conditional payment became due? The CJEU held it was the latter. It thereby recognised that one can in effect have two chargeable events arising out of the same supply, or alternatively, one can treat the initial supply as a partial supply that was not completed until the contractual consideration for it became due. The same analysis applies on either basis here.

148. If a narrower interpretation of article 64(1) were adopted it could lead to undesirable consequences, particularly in Member States which have not adopted article 66. It would raise the question that was referred to the CJEU in *baumgarten* and *XB* and which was addressed in *XB* and in *SPRL*. That question is how are suppliers supposed to charge VAT and account for VAT at the time the services are performed when they do not know whether or when the later remuneration will become payable or how much that will be. The CJEU in those two cases ruled out any reliance on article 90 to adjust the remuneration; that only applies where the customer defaults on the contractual payment.

149. We also bear in mind that article 64(1) (unlike regulation 90) applies to supplies of goods as well as services. There are many contracts for the supply of goods where the supply is continuous and invoiced periodically, such as the supply of electricity and water. Those will clearly fall within article 64(1). But there may also be contracts for the one-off supply of a particular item where the price is dependent on the successful use of an income-generating item by the customer, whether that is a racehorse, or a piece of software or an innovative piece of machinery. If the scope of article 64(1) is limited to the narrow circumstances in which the period of supply is ambiguous (as Prudential sought to do) by construing it as having no application where the date of actual performance is clear, the provision will apply unevenly as between goods and services. That is why in our judgment, the alternative basis on which HMRC put their case, namely that the characteristic of being a continuous supply of services is fixed at the time the services are performed even if they have unambiguously ended by the time of the later payment is less attractive.

150. As to the possibility of parties to transactions adapting their contracts to postpone the occurrence of the chargeable event, as we have explained, this really only arises where the Member State has not adopted the derogation under article 66. The CJEU in *Italittica* was sanguine about such a possibility:

> "20. Finally, with regard to the possibility of fraud, it must be borne in mind that even the rule that the tax is chargeable at the moment when the services are performed enables suppliers and recipients of services to select that moment to serve their own interests. In any event, the supplier's interest in receiving payment of the service provided and the fact that, according to article 17(1) of the [Sixth] Directive, the right to deduct the tax arises at the time when it becomes chargeable limits the cases in which payment is postponed in order to defer the moment the tax becomes chargeable."

9. Application in the VAT group context and conclusion

151. Having determined how article 64 applies outside the context of VAT groups we turn to how it applies in the VAT group context.

152. In our judgment, applying article 64(1) the result is that there is a chargeable event when there is a successive payment for the supply of services in a case where it was not certain at the time that the services were performed that the payment would be made or that it would be for the amount in fact paid. Here, the chargeable event which gave rise to the success fees occurred when the Funds Fund reached the hurdle rate set in the contract.

153. That in turn leads to the conclusion that regulation 90 is compatible with article 64 in so far as it changes not only the time at which VAT becomes chargeable but also the chargeable event to that extent.

154. Applying the TOSR in regulation 90 to section 43(1)(a) in order to determine whether the Silverfleet services were performed for VAT purposes at the time that Silverfleet was in the same group, the answer is "yes" so far as the management fees were concerned, because the chargeable event for those was when Prudential and Silverfleet were in the same VAT Group. HMRC have acknowledged that much by not seeking retrospectively to collect VAT on those management fees. But the answer is "no", so far as the success fees are concerned, because the chargeable event to which the payment or invoices for those fees relate was postponed to the extent of the value of the services reflected in the 2015 and 2016 invoices.

155. We regard that result as consistent with *Thorn* and *Svenska* and *RSA* even though they did not address this particular issue. With those judgments, as with the judgments of the CJEU, it is important not to pick out particular phrases and seek to apply them out of context to determine the result in a set of facts which is clearly distinguishable from the facts before the court.

156. In our judgment, therefore, Silverfleet was correct to add VAT to its invoices for the success fees earned several years after it had completed its performance of the investment fund management services to Prudential. Regulation 90 applies to determine when the supply of those services took place for the purposes of applying the VAT Group Disregard in section 43(1)(a). Applying regulation 90, the consideration payable for those services was determined "from time to time" so that those services were treated as separately and successively supplied at the time that invoices for the success fees were issued. At that time, Silverfleet and Prudential were no longer in the same VAT group so that supply or supplies did not fall to be disregarded. In so providing, regulation 90 does not go further than is permitted by the relevant provisions of the PVD. Applying article 64(1), the supply of services gave rise to a successive payment, namely the success fees, so that the services must be regarded as being completed on expiry of the period to which the payment relates. That construction of article 64 is strongly supported by the CJEU's decision in *baumgarten* and is not ruled out by its later decisions in *XB* or *SPRL*.

157. We would therefore dismiss the appeal.

Annex

Corresponding provisions in earlier legislation

(a) The EU Time of Supply Rules

The TOSR currently found in articles 62 to 66 of the PVD were found in article 10 of the Sixth VAT Directive:

Article 10

> 1. (a) 'Chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.
>
> (b) The tax becomes 'chargeable' when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.
>
> 2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire.
>
> However, where a payment is to be made on account before the goods are delivered or the services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.
>
> By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:
>
> — no later than the issue of the invoice or of the document serving as invoice, or
>
> — no later than receipt of the price, or
>
> — where an invoice or document serving as invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.

Comparing articles 62 – 66 of the PVD with article 10 of the Sixth VAT Directive:

a. The provision differentiating between the chargeable event and when the tax becomes chargeable now found in article 62 of the PVD was found in article 10(1)(a) and (b).

b. The basic provision that the chargeable event occurs and VAT becomes chargeable when goods are delivered or services are performed now found in article 63 of the PVD was found in the first sentence of article 10(2).

c. The provision dealing with supplies of services which give rise to successive statements of accounts or payments now found in article 64(1) of the PVD was found in the second sentence of the first subparagraph of article 10(2).

d. The exception that brings forward the chargeability of VAT where a payment is made in advance to the date of receipt of payment now found in article 65 of the PVD was found in the second subparagraph of article 10(2).

e. The potential derogation for Member States to postpone the time at which VAT becomes chargeable to when the invoice is issued or the payment received now found in article 66 of the PVD was found in the third subparagraph of article 10(2).

(b) TOSR in domestic legislation

The main time of supply provisions now in section 6 of the VATA were found in sections 4 and 5 of the VATA 1983.

"4. Time of supply

(1) The provisions of this section and section 5 below shall apply for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to tax.

(2) Subject to the provisions of section 5 below, a supply of goods shall be treated as taking place

(a) if the goods are to be removed, at the time of the removal;

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

(c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

(3) Subject to the provisions of section 5 below, a supply of services shall be treated as taking place at the time when the services are performed.

5 Further provisions relating to time of supply

(1) If, before the time applicable under subsection (2) or subsection (3) of section 4 above, the person making the supply issues a tax invoice in respect of it or if, before the time applicable under paragraph (a) or (b) of subsection (2) or subsection (3) of that section, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated, as taking place at the time the invoice is issued or the payment is received.

…

(9) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding section 4 above and subsections (1) to (3) and (6) to (8) above) a supply is to be treated as taking place in cases where it is a supply

(a) of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period; or

(b) of goods for a consideration the whole or part of which is determined at the time when the goods are appropriated for any purpose,

or where there is a supply of services by virtue of paragraph 5(3) of Schedule 2 to this Act or an order under section 3(4) above; and for any such case as is mentioned in this subsection the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals."

The power in section 5(9) of the VATA 1983 was used to make regulation 23 of the 1985 VAT Regulations:

"Continuous supplies of services

23.— (1) Subject to paragraph (2) of this regulation, where services are supplied for any period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as being successively supplied for successive parts of the period, and each of the successive supplies shall be treated as taking place when a payment is received, or a tax invoice relating to the supply is issued by the supplier, whichever is the earlier.

(2) Where such services are supplied under an agreement which provides for successive payments and the supplier, at or about the beginning of any period not exceeding 1 year, issues a tax invoice containing the following additional particulars:

(a) the date on which each payment is to become due in the period;

(b) the amount payable (excluding tax) on each date; and

(c) the rate of tax in force at the time of the issue of the tax invoice and the amount of tax chargeable in accordance with that rate on each payment,

they shall be treated as being successively supplied for successive parts of the period of the agreement, and each of the successive supplies shall be treated as taking place when a payment becomes due or is received, whichever is the earlier.

(3) Where, on or before any of the dates of payment specified on an invoice issued as described in paragraph (2) of this regulation, there is a change in the tax charged on the supply to which the invoice relates, that invoice shall cease to be treated as a tax invoice in respect of any payment due after the change."

(c) VAT grouping in EU legislation

The predecessor provision to article 11 of the PVD was the second indent of article 4(4) of the Sixth VAT Directive.

Article 4.4

…

"Subject to the consultations provided for in article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links."

(d) VAT grouping in domestic legislation

The predecessor domestic provision dealing with VAT grouping was section 29 of the VATA 1983.

"29 Groups of companies

(1) Where, under the following provisions of this section, any bodies corporate are treated as members of a group any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(b) any other supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(c) any tax paid or payable by a member of the group on the importation of any goods shall be treated as paid or payable by the representative member and the goods shall be treated for the purposes of section 25 above and paragraph 4(6) of Schedule 7 to this Act as imported by the representative member;

and all members of the group shall be liable jointly and severally for any tax due from the representative member."