

Neutral Citation Number: [2009] EWCA Civ 831

Case No: A3/2009/0379

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**MR JUSTICE MORGAN**  
**CH/2008/APP/0647**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31<sup>st</sup> July 2009

**Before :**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE GOLDRING**  
and  
**LORD JUSTICE PATTEN**

**Between :**

**DAVID BAXENDALE LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**Mr K.P.E. Lasok QC and Mr A. James** (instructed by Charles Russell LLP) for the Appellant

**Mr D. Goy QC and Miss N. Shaw** (instructed by The Solicitor to HM Revenue & Customs) for the Respondents

Hearing date : 20<sup>th</sup> July 2009

## **Lord Justice Patten :**

### Introduction

1. This is an appeal by David Baxendale Limited against a decision of Morgan J dated 5<sup>th</sup> February 2009 ([2009] EWHC 162 (Ch)). It concerns the correct tax treatment to be applied to the sale to members of the public of what is described as the LighterLife weight loss programme. This was described in the decision of the VAT and Duties Tribunal (released on 30<sup>th</sup> July 2008) in these terms:

“In bald outline the LighterLife programme is a programme for rapid weight loss for those who are seriously overweight. It enables them to lose about one stone a month, and aims to enable them not to put that weight back on again. The physical aspect of the programme is the total replacement (in the initial months) of normal food with LighterLife food packs; this is accompanied by counselling and advice in weekly group sessions run by the Appellant. The participants pay the Appellant for the special food packs but make no specific payment for the support services provided at the Group sessions.”

2. The Appellant is one of about 300 taxpayers who market the programme under a licence from LighterLife Limited and who will be affected by the outcome of this appeal. Before the Tribunal it contended that, for VAT purposes, the programme consisted of the supply of zero-rated food packs, to which the counselling services supplied at the weekly meetings were ancillary. The company also argued that the only charge made was for the food packs themselves and that these therefore constituted the only taxable supply.
3. HMRC (who had previously accepted that the programme only involved the making of a zero-rated supply) submitted to the Tribunal that the taxpayer was making a supply of services in the form of the weight loss programme of which the provision of the food packs was but one element. Although not ancillary to each other, the two elements constituted a single composite supply which was economically indivisible. As a supply of services, it was subject to VAT at the standard rate.
4. The Tribunal held that although no specific payment was made for the counselling services, the amount paid for the food packs also provided consideration for those services. There was therefore more than one supply and accordingly it became necessary to decide whether the support services and the food packs constituted separate supplies for VAT purposes or a single composite supply. The Tribunal held that they were separate supplies and that the consideration should be apportioned between the food packs and the support services on a 2:1 basis.
5. There was no appeal to Morgan J against the finding that consideration had been given for the support services. But HMRC challenged the Tribunal’s decision that there were separate supplies and repeated its argument that the correct analysis was that of a single composite supply of services. The taxpayer sought to uphold the Tribunal’s decision that there were two supplies but argued that the 2:1 apportionment of the consideration was wrong. It contended for a 91:9 apportionment calculated on the basis of relevant profit margins. But it also argued in the alternative that if the

correct conclusion was that there was only a single composite supply then this, properly analysed, was a zero-rated supply of food.

6. Morgan J allowed the appeal by HMRC and held that there was a single supply of standard rated services. The issue about the correct method of apportioning the consideration did not therefore arise but the Judge expressed the view that the 2:1 apportionment was consistent with the general findings of fact made by the Tribunal as opposed to the 91:9 split which he described as extreme.
7. The taxpayer now appeals with the permission of Stanley Burnton LJ to this court. It submits that the Tribunal was right to find that it made separate supplies of food and support services but still contends for the 91:9 apportionment if it succeeds on this appeal. It no longer relies on its alternative argument that if there is a single composite supply in this case it is a zero-rated supply of food. HMRC have filed a Respondents' Notice supporting the Judge's decision both for the reasons which he gave and on other grounds. These are alternative formulations of the test for determining whether there was a single or separate supplies which I will come to later in this judgment.
8. Although this is in form an appeal against the decision of Morgan J, most of the argument has inevitably focused on whether the Tribunal was correct in its decision that there were separate supplies of food and services in this case. The question whether a contract involves the provision of one or more supplies for VAT purposes is a question of law: see *Dr Beynon and Partners v Customs and Excise Commissioners* [2005] STC 55 at paragraph 26. On an appeal the court is concerned to decide what are the correct VAT consequences of the contractual arrangements which the parties have entered into having regard to such of the background facts as are material for that purpose. The Tribunal's findings of fact are therefore relevant to this exercise but any challenge to their conclusions on the law is not limited to *Edwards v Bairstow* principles. The appeal court must decide what is the correct legal outcome by applying to those facts the relevant principles of European law in relation to Article 2 of the Sixth Directive. It is not required to find that the Tribunal has misdirected itself.
9. In this case the taxpayer submitted to the Judge that there had been no misdirection of law by the Tribunal and that he should therefore show a degree of circumspection before substituting his own decision for that of the Tribunal. This submission was based on the same passage from the speech of Lord Hoffmann in the *Dr Beynon* case (at paragraph 27) where he said this:

“27. In my opinion the weight of authority supports the view of the Court of Appeal on this point. The courts have not treated VAT classification in the same way as some questions of classification (for example, whether a contract is of service or for services) which, notwithstanding that there are no facts in dispute, are deemed to be questions of fact so as to exclude on appeal on a question of law: see the discussion in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929, 1935, paras 22-25. On the other hand, as Lord Hope of Craighead said in the *British Telecommunications* case ([1999] 1 WLR 1376, 1386) the question is one of fact and degree, taking account of all the circumstances. In such cases it is customary for an appellate court to show some circumspection before interfering

with the decision of the tribunal merely because it would have put the case on the other side of the line.”

10. In *College of Estate Management v Revenue and Customs Commissioners* [2005] UKHL 62 Lord Walker of Gestingthorpe (at paragraph 36) likened the characterisation of supplies for VAT purposes to the question of obviousness in patent cases which involve “applying an abstract categorisation to a sometimes disparate aggregation of primary facts”. The task of an appellate tribunal is not therefore without its difficulties but the characterisation of the question of what supplies have been made as one of law means that the Judge was entitled to come to a different conclusion on this issue from the Tribunal even if no criticism can be made of them in respect of the legal test which they applied. The question for him (as it is for us) was what is the correct result of the application of those principles to the facts of this case.

### The legal principles

11. Article 2(1) of EC Council Directive 77/388 (“the Sixth Directive”) which was in force at the material time provides that:

“The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;”

12. “Supply of goods” was defined in Article 5 to mean the transfer of the right to dispose of tangible property as owner. “Supply of services” means any transaction which does not constitute a supply of goods: see Article 6(1). For VAT purposes a chargeable event occurs when the goods are delivered or the services are performed: see Article 10(2) and VATA 1994 s.6.
13. Although the Sixth Directive draws an obvious distinction between supplies of goods and services, it contains no specific guidance as to how the taxpayer should account for the inclusion of different supplies within a single transaction. Where those supplies (as here) include items which, if taken alone, would be either zero-rated or subject to a reduced rate of tax, it is obviously necessary to identify whether the transaction for VAT purposes constitutes one or more supplies and, if so, what those supplies consist of. The obvious starting point in the present case is to distinguish between the supply of the food packs and those of the support services. Each is a readily identifiable and distinct supply of a different kind. But the Court of Justice has also recognised the countervailing principle that the proper functioning of the VAT system requires that single transactions should not be artificially split into separate supplies where to do so would not reflect the economic reality of the transaction. The principles of fiscal neutrality which underlie the system require that comparable transactions should be taxed on the same basis.
14. There have therefore been a series of cases in which the ECJ has set out the principles to be applied in order to determine whether any given transaction should be regarded as a single composite supply notwithstanding the inclusion within it of components which are capable of identification as separate supplies. In *Card Protection Plan Ltd v CCE* [1999] STC 270 the card plan provided by the taxpayer for a single fee included both insurance cover against financial loss due to the loss or theft of the consumer’s credit card together with other services such as the maintenance of a

computerised record of customers' credit cards; a 24-hour telephone system for reporting lost or stolen cards and notifying the loss of the card to the credit card companies; and assistance in obtaining replacement cards. The taxpayer contended that these additional services were separate from the insurance of the cards which ought to be treated as an exempt supply in its own right. On a reference by the House of Lords, the ECJ answered the question whether these were separate supplies as follows:

“26. By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.

27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.

28. However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411–2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.

29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).

31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers

consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paras 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin* (at 1208, paras 45 and 46)).

32. The answer to the first two questions must therefore be that it is for the national court to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply.”

15. On this appeal neither side contends that either the provision of the food packs or the supply of the support services can properly be regarded merely as ancillary to one or other. But the attribution to them of a less dependent status does not exclude the possibility that they still constitute a single supply. This was recognised by the House of Lords in *College of Estate Management v Revenue and Customs Commissioners* (supra) which concerned a college that provided long-distance learning courses. The question was whether the printed material supplied to students should be treated as a separate zero-rated supply from the other educational services it provided or whether (as the Revenue contended) the college made a single exempt supply of educational services to each student who enrolled on the course. After referring to the decision of the ECJ in *Card Protection Plan*, Lord Rodger of Earlsferry (at paragraphs 12 to 13) said this:

“[12] But the mere fact that the supply of the printed materials cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes. One has still to decide whether, as a matter of statutory interpretation, the College should properly be regarded as making a separate supply of the printed materials or, rather, a single supply of education, of which the provision of the printed materials is merely one element. Only in the latter event is there a single exempt supply, to which s 31(1) of the Act applies and s 30(1) does not apply. The answer to that question is not to be found simply by looking at what the taxable person actually did since ex hypothesi, in any case where this kind of question arises, on the physical plane the taxable person will have made a number of supplies. The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some overarching single supply. According to the Court of Justice in *Card Protection* (at para 29), for the purposes of the directive the criterion to be applied is whether there is a single supply 'from an economic point of view'. If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the VAT system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is

operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.

[13] In the present case the tribunal, having taken into account all the factors, concluded that the College made one supply, the provision of education. In my view, the tribunal were entitled to reach that conclusion on the basis of the findings which they made—especially their finding that the students took the courses in order to obtain the relevant qualification offered by the College. The transaction was therefore one which gave the students the opportunity, by successfully studying the printed materials and completing the other necessary steps, to obtain a valuable qualification. That was what the students were purchasing. For the reasons given by Lord Walker, I am accordingly satisfied that the Court of Appeal ([2004] EWCA Civ 1086, [2004] STC 1471) erred in disturbing the tribunal's conclusion. On that basis the College made no zero-rated supply of books in terms of s 30(1) of the Act. The appeal should accordingly be allowed.”

16. This approach has been affirmed by the ECJ in *Levob Verzekeringen BV and another v Staatssecretaris van Financiën* [2006] STC 766. Levob contracted with Financial Data Planning Corporation (“FDP”), a US company, to be supplied with software for the management of insurance policies. The software supplier was a standard system developed for use in the USA which, under the terms of the contract, was customised by FDP to meet the particular requirements of Levob that had been identified in a joint study. The contract (whilst providing for both) broke down the price into a sum payable for the basic software and the cost of customising it to Levob’s specification. The issue was whether Levob had received separate supplies of the basic software and the customisation services or a single supply. The ECJ held that there was a single supply which, in the light of the degree and importance of the customisation process, had to be classified as a supply of services.
17. Its reasoning is set out in the following paragraphs of the judgment. It is common ground that the reference to “transaction” in the second line of paragraph 20 has been mis-translated and should read “supply”:

“20. Taking into account, firstly, that it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *CPP*, paragraph 29).

21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax

treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-'34/99 *Primback* [2001] ECR I-'3833, paragraph 45).

22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

23. In the context of the cooperation required by Article 234 EC, it is indeed for the national courts to determine whether such is the situation in a particular case and to make all definitive findings of fact in that regard. Nevertheless, it is for the Court to provide the national courts with all the guidance as to the interpretation of Community law which may be of assistance in adjudicating on the case pending before them.

24. With regard to the dispute in the main proceedings, it is apparent, as held by the *Gerechtshof te Amsterdam* whose decision was the subject of the appeal in cassation pending before the referring court, that the economic purpose of a transaction such as that which took place between FDP and Levob is the supply, by a taxable person to a consumer, of functional software specifically customised to that consumer's requirements. In that regard, and as the Netherlands Government has correctly pointed out, it is not possible, without entering the realms of the artificial, to take the view that such a consumer has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it.

25. The fact, highlighted in the question, that separate prices were contractually stipulated for the supply of the basic software, on the one hand, and for its customisation, on the other, is not of itself decisive. Such a fact cannot affect the objective close link which has just been shown with regard to that supply and that customisation nor the fact that they form part of a single economic transaction (see, to that effect, *CPP*, paragraph 31).

26. It follows that Article 2 of the Sixth Directive must be interpreted as meaning that such supply and such subsequent customisation of software are, in principle, to be regarded as forming a single supply for VAT purposes."

18. The Court of Appeal applied this guidance in *Commissioners for HMRC v Weight Watchers (UK) Ltd* [2008] EWCA Civ 715 which also concerned the tax treatment of a weight loss course known as "Switch". To enrol on the course it was necessary to attend a meeting at which a fee was paid for registration and a separate fee for the meeting. On being enrolled the member received a leaflet and other printed material giving guidance on what types of food he or she should or should not eat. The types of food that were not on a permitted list were allocated points and the member was required to record on a form the number of points he or she had accumulated based on what they had eaten. The literature emphasised the importance of group therapy provided at weekly meetings. The members were therefore encouraged to attend further meetings for which a further fee was payable. The Commissioners assessed

the taxpayer to VAT on the basis that it was making a single standard rated supply of services. The taxpayer successfully appealed to the Tribunal on the basis that it made separate supplies of services and printed material. Morgan J upheld the decision of the Tribunal in respect of the first meeting but held that the fees paid at subsequent meetings were for a single supply of weight loss services. The Court of Appeal held that there was a single supply of services at all of the meetings. Its conclusions are set out in the judgment of the Chancellor at paragraphs 45 to 46:

“[45] For all these reasons I consider that the judge was entitled and bound to correct the errors of law to which I have referred and was wrong not himself to have applied the correct legal test to the facts as found by the tribunal. That task now falls to this court. In my view the correct legal test points clearly to the conclusions that there was a single supply at meetings of each description in accordance with the original ruling of HMRC (referred to at [2] above).

[46] I reach that conclusion for the following reasons. First, the typical consumer, as described by the judge, at [52] of his judgment, is or is about to become a member of WW. Second, the purpose of such a consumer in being or becoming a member is to obtain the benefit of the weight loss programme marketed by WW under the title 'Switch'. Third, one of the cardinal features of that programme for a member entitled to attend meetings, unlike At Home or Online members, is the reinforcing combination of the diets as taught in the *Handbook* and the group therapy to be derived from the meetings. Fourth, if it is the combination which the meeting member is buying, then it makes no sense from an economic point of view to pay (be charged) separately for the meetings and the publications. Fifth, there is no difference between one meeting and another except in the case of a customer who is enrolling for the first time or enrolling again so as to attend the meeting without paying for missed meetings since the last enrolment. He or she is not a typical consumer, as described, but a subset of that class, and is only paying the higher price in order to obtain or continue to obtain the benefit of the combination I have mentioned. Sixth, it follows that the events of the first meeting, from the point of view of the enrolling member, are merely a necessary preliminary to obtaining the benefits of the programme as a whole at that and any subsequent meeting that member attends.”

19. The ECJ has recently considered the question of whether the taxpayer provided a single or separate supplies of services in a case involving the cleaning of the common parts of a block of flats. In *RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem* [2009] EU ECJ C-572/07 (11<sup>th</sup> June 2009) a court in the Czech Republic sought a ruling from the ECJ as to whether such cleaning services provided by the landlord but invoiced and paid for by the tenants separately from their rent was to be treated as part of the letting of the property which was an exempt supply or as a separate standard rated supply of services. The landlord contended that the letting and the cleaning services were economically indivisible. The response of the Czech government was that the tenants were not required to have cleaning services provided by the landlord. They could organise the cleaning of common parts through a third party unconnected to the landlord who would invoice them direct for the services provided. It was not therefore right to treat the provision of the services as part of the

letting and therefore within that exempt supply even where they were provided by the landlord.

20. The ECJ held that the cleaning services were provided as a separate supply from the letting of the flats:

“14. By its first question, the referring court asks, for the purposes of applying Article 13B(b) of the Sixth Directive, what is the relationship between the letting of property and the service for cleaning the common parts of an apartment block. In particular, it asks whether the charges relating to that cleaning service fall within the concept of letting for the purposes of that article and therefore share the tax treatment of the letting of property, which is exempt from VAT by virtue of Article 13 B(b) of the Sixth Directive.

15. In that respect, it should first be recalled that, according to consistent case-law, the exemptions under Article 13 of the Sixth Directive have their own independent meaning in Community law and must therefore be given a Community definition (Case C-174/06 *CO.GE.P* [2007] ECR I-9359, paragraph 26 and case-law cited).

16. The terms used to specify the exemptions under Article 13 of the Sixth Directive are to be interpreted strictly, since these exemptions constitute exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person acting as such (see, in particular, Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 25, and Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 21 and case-law cited).

17. Secondly, it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent (Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 50 and case-law cited).

18. Moreover, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent. Such is the case for example, where, in the course of a purely objective analysis, it is found that there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (*Part Service*, paragraphs 51 and 52 and case-law cited).

19. It can also be held that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Part Service*, paragraph 53).

20. It should be remembered at the outset that the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive essentially consists in the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, Case C-326/99 *Goed Wonen* [2001] ECR I-6831, paragraph 55; Case C-409/98 *Mirror Group* [2001] ECR I-7175, paragraph 31; Case C-269/00 *Seeling* [2003] ECR I-4101, paragraph 49; and Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 19).

21. Thus, even if the cleaning services of the common parts of an apartment block accompany the use of the property let, they do not necessarily fall within the concept of letting for the purposes of Article 13(B)(b) of the Sixth Directive.

22. It is, moreover, undisputed that the cleaning services of the common parts of an apartment block can be supplied in various ways, such as, for example, a third party invoicing the cost of the service direct to the tenants or by the landlord employing his own staff for the purpose or using a cleaning company.

23. It should be noted that, in this case, RLRE Tellmer Property invoices the cleaning services to the tenants separately from the rent.

24. Also, since the letting of apartments and the cleaning of the common parts of an apartment block can, in circumstances such as those at issue in the main proceedings, be separated from each other, such letting and such cleaning cannot be regarded as constituting a single transaction within the meaning of the case-law of the Court.

25. Having regard to the whole of the above considerations, the answer to the first question must be that, for the purposes of applying Article 13B(b) of the Sixth Directive, the letting of immovable property and the cleaning service of the common parts of the latter must, in circumstances such as those at issue in the main proceedings, be regarded as independent, mutually divisible operations, so that the said service does not fall within that provision.”

21. Before turning to the facts of the present case it may be useful to make one or two general points about the ECJ decisions. All these cases including *Tellmer* are simply applications of a now well-established principle to the transaction in issue in the particular case. Where the transaction under consideration prima facie involves more than one identifiable supply neither of which can be regarded merely as ancillary to the other the correct tax treatment will still depend on whether, from an objective view, they form a single indivisible economic supply which it would be artificial to split.
22. The determination of this question will depend upon a global assessment of all facts relevant to the transaction under which the supply or supplies took place. That is the taxable event. This will obviously include a consideration of the terms upon which the supply or supplies were made; how they were invoiced for; and what the consumer in fact acquired under the contract. Mr Lasok QC submitted that as part of

this process it may be relevant to consider whether the different component elements could have been supplied separately or in a different way from other sources. It would have been possible, he said, in the present case for a consumer to have purchased similar food packs separately and to have obtained counselling from another source.

23. Whether this was a factual possibility depends, for the purposes of this appeal, upon the findings of the Tribunal which I will come to but I think that the submission is wrong in principle. The decisions of the ECJ which I have referred to recognise in terms that the characterisation of a particular transaction as a single supply necessarily involves giving, to what would otherwise be separate supplies, a tax treatment which is different from that which they would enjoy if treated as separate. This is a feature of almost every one of these cases. The issue of whether to treat the transaction as the making of a single or separate supplies will determine the availability of zero-rating or even exemption and so alter the incidence of taxation. The point was put very clearly in the judgment of the ECJ in *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] STC 3132:

“48. Nevertheless, when a transaction involves the supply of a number of services, the question arises whether it should be considered to be a single transaction or as several individual and independent supplies of services requiring separate assessment.

49. That question is of particular importance, for VAT purposes, for applying the rate of tax or the exemption provisions in the Sixth Directive (see *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] 2 AC 601, para 27 and *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433, para 18).

50. In that regard it follows from art 2 of the Sixth Directive that every [supply] must normally be regarded as distinct and independent (see *CPP* (para 29) and *Levob Verzerkeringen and OV Bank* (para 20)).

51. However, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single [supply] when they are not independent.”

24. What also emerges from this analysis is that the court’s inquiry as to whether a composite transaction is a single indivisible economic supply must be both fact and transaction specific. The fact that the same or similar goods or services could be provided separately from different sources is irrelevant in my view to the question whether, in the particular transaction under consideration, their combination produced a different economic result.
25. Mr Lasok’s argument on this point is largely based on *Tellmer*. But the reference in paragraph 22 of the judgment in that case to the alternative methods of providing the cleaning services was to take account of the reference of the national court which was not limited to the particular letting in question but asked for guidance in general terms about the meaning and scope of Articles 6 and 13 of the Sixth Directive. The court

was asked to take into account the overall position in the Czech Republic and the different possible scenarios about the cleaning of common parts of demised premises. The Czech government introduced evidence of current practice in the Czech Republic under which such cleaning can be undertaken other than through the landlord. The European Commission proposed that the exemption from VAT for lettings should be restricted to the economic activity of the letting unless the cleaning was included in the letting agreement as an ancillary supply: see paragraph 22 of the Advocate General's Opinion.

26. The ECJ therefore considered the question of economic divisibility in relation to lettings in general terms which included cases where the lease did not oblige the landlord to carry out the cleaning and the tenant to pay for it. The comments in paragraphs 21 to 22 of the judgment have to be read in this context and I think explain why the court felt able to conclude that letting and cleaning could not be regarded as economically indivisible given the absence of any necessary contractual link between the letting and the cleaning arrangements. I do not regard the reasoning of the court as going any further than that.

### The facts

27. The Tribunal's principal findings of fact are set out in the following paragraphs from its decision:

“33. The LighterLife Programme is a weight management programme for those who have a body mass index over 29 and in particular for those who have failed to lose weight by other means. It is a combination of nutritionally complete food packs and specialised counselling techniques. The Programme has three main stages:

(i) Foundation. This stage lasts 14 weeks for women, and 8 weeks for men. Participants adhering to the programme abstain from normal food completely during the period, eat only the food in the food packs, and attend weekly meetings with a LighterLife Counsellor such as Mr Baxendale. During this stage participants should lose some 3 stone.

(ii) Development. This stage is for those participants who have more than 3 stone to lose. Participants adhering to the programme in this stage continue to abstain from normal food and eat food packs only and attend weekly sessions.

(iii) Route to Management. This is the stage at which conventional food is gradually re-introduced. This stage lasts some 12 weeks. Participants adhering to the programme gradually reduce the number of food packs they eat each day and begin to eat conventional food. They attend weekly sessions.

In addition there are programmes for the lapsed and the continuing clients:

(i) Management : four week courses with food packs for those who have completed the earlier stages but wish to rebalance their diets or who wish for further support;

(ii) Refreshers : for the lapsed who wish to rejoin the programme;  
and

(iii) Holding : for those who have not managed to stay on the diet. Participants in Holding Sessions do not purchase food packs; they may attend to be weighed or receive advice. Not all LighterLife consultants ran Holding Programmes : the Appellant is one such.

Of some 24,000 current participants approximately 13,000 are in Foundation and Development, 8,000 in Management in some form, and 3,000 are in Refreshers.

34. Overall the LighterLife Programme appeared to us to achieve for many participants what its advertising material claimed for it:

"It uses a powerful combination of nutritionally complete meal replacements, which enable fast and effective weight loss, along with group counselling sessions with a qualified LighterLife Counsellor, to help clients make lasting changes and achieve long term results."

Some clients gave up along the way. Not all completed Foundation, Development or Route to Management. Some returned to old habits, but many achieved initial weight loss and did not return to their previous weight.

## (2) How the Programme Works

35. The physical side of the early stages of the LighterLife Programme works by reducing the calorie intake of the participants to 500 calories per day. The lack of energy intake causes the metabolism of body fats. This process is called ketosis. One side effect of the process is that the participant no longer feels acute hunger after it has started and no longer therefore feels a physical need to eat.

36. The mental side of the programme, at a basic level, consists in the provision of a set food regime which means the participant no longer needs to think about food; and at a more complex level in group support and detailed well developed behavioural counselling techniques which help the participant change the way he or she approaches eating.

37. The food packs contain food which, whilst nutritionally adequate, is not especially appetising. LighterLife found that if the food packs were too tasty some participants over indulged.

## (3) What happens

### *The Initial Approach*

38. Participants very often come to hear of LighterLife through the experiences of friends and acquaintances particularly those who have been successful with weight loss through LighterLife Programmes. LighterLife also advertise and have a website.

39. From recommendation or from the website a potential participant will approach a LighterLife Counsellor such as Mr Baxendale. There will then be a telephone call or short meeting with the counsellor who will provide some written material and forms for the participant to take to his or her doctor.

40. The participants are required to obtain clearance from a doctor before starting the programme. Either before or after such clearance is obtained the participant will attend an introductory session.

41. At that session there will generally be other potential participants. They are all weighed and measured. The extreme nature of the diet is explained, an introductory DVD is played and questions are answered. It is explained that the programme is a mixture of group meetings and total food replacement through the food packs. Questions are answered and booklets provided. No payment is made and no food packs are provided.

42. At this point we note that it is at the end of the stage that the framework for what happens thereafter in Foundation is determined. The information obtained up to this point shows objectively what a participant is going to get from the counsellor.

#### *The Foundation Sessions*

43. The weekly group meetings comprise a group of women or of men. After the first couple of meetings in the Foundation Stage women's groups are closed and no new members join.

44. The first meeting differs slightly from the other 13 meetings. There are introductions and photographs and printed material is given out. Participants sample the food packs and place their orders. Then they are measured and weighed privately. There are then group discussions and a DVD followed by more discussions, and the receipt of the 28 food packs for the coming week and payment. Payment is made in exchange for the food packs at the end of the session. The session lasts about 2 to 2½ hours.

45. At later sessions participants are again weighed. Since by this time they will have been almost fasting for at least a week the ketosis process should have started. A urine test is used to check its progress and other checks on the participants' health are made. The participant orders the food packs for the coming week, and then there follow discussions, a DVD, more discussions or group exercises, and then the collection of the food packs and payment. 28 food packs are purchased.

46. At the first session the participant will also complete an undertaking (we make no finding as to whether or not this was an enforceable contractual commitment):

- to remain abstinent from normal food for the time on the programme
- to purchase 28 food packs each week

- to drink at least 4 litres of water a day
- to attend all weekly meetings
- to keep information confidential and
- to be responsible for their participation in the programme.

47. At this point we note that this undertaking shows a nexus between what the participant is going to get and what he is going to pay. The undertaking is to "purchase food packs" but that purchase is linked to the support sessions.

48. The food packs consist of flavoured bars, and powdered soups and drinks to which water must be added. There are a selection of flavours. The participants choose the flavours for a set of 28 packs (4 meals on each of 7 days). The price is the same whichever flavours are selected.

49. The charge made is a recommended retail price set by LighterLife and is thus the same at each counsellor. It is somewhat more than the cost of the ingredients for meals for one person for a week but considerably less than the cost of meals for one person eating out for every meal.

50. The topics covered in the support sessions and videos change as the programme progresses. In the very early Foundation Stages they relate to a larger extent to getting used to eating only the food packs but also cover subjects such as exercise, posture, clothing, reasons for eating behaviour and ways to modify it. After the early sessions the emphasis shifts to the latter subjects – those relating to keeping the weight off.

51. The counsellors also make themselves available for short pop-in sessions.

52. The men's sessions are slightly different in style. There is no DVD, and they last about 1½ hours.

53. If a participant could not make a session he or she could arrange to get the food packs for the next week either in advance or by going to see the counsellor. The price paid for the food packs was the same as if he or she had attended.

54. The Development Stage sessions are run in the same way so far as is material to the issues in this appeal.

#### *Route to Management*

55. These sessions last about 1½ hours and do not have a DVD viewing. Participants are weighed and there are group exercises and discussions. The participants acquire fewer and fewer food packs and pay proportionally less and less. The group will not generally be closed: members will join and leave. The content of the sessions now includes support on the path back to eating normal food.

56. Whereas during the Foundation Stage participants will have committed to buy, and will purchase, 28 food packs a week, there is no commitment at the route to management stage to buy any number of food packs. On occasions fewer than 28 will be bought perhaps because the participant has some left over from previous weeks.

#### *Management*

57. The management stage is the stage where the participant is managing his or her ordinary eating. No dedicated sessions are run for such participants but they may attend Route to Management sessions and purchase up to four weeks' food packs if they wish to adjust their diet. The only payment such persons make is that made when they acquire food packs.

#### *Refreshers*

58. Those joining refresher courses commit to acquiring 28 food packs a week for 4 weeks. The session format is similar to Foundation.

#### *Holding*

59. Those attending these courses acquired no food packs and make no payments.

#### *Attendance*

60. We find that the typical customer committed to attend all the support sessions and, during the time he or she adhered to the programme attended almost all the support sessions, and at the end of each support session picked up the relevant food packs and made payment.

#### (4) The relationship between LighterLife and the Counsellors

61. LighterLife licences its trademarks to counsellors such as the Appellant. It sells the food packs to the Appellant at a price below the price charged for their sale by the Appellant. The counsellors are trained by LighterLife before they are licensed. LighterLife provides printed material and other items to the counsellors for them to sell or provide to the participants and also detailed course manuals setting and the way the programmes are to be provided to participants. Counsellors are expected to follow LighterLife practices and policies.”

28. The Tribunal went on to quote from various booklets and promotional literature but these add nothing significant in my view to the findings which I have set out. It then dealt with the availability of other types of diet foods and counselling services:

“62. The diet foods one might obtain in high street shops are not comparable to Very Low Calorie Diets. But other Very Low Calorie Diets which, like the LighterLife food packs, are a total replacement for conventional food are marketed to the public. Two are available for purchase via the internet. One of these is advertised for a price comparable to that attributed to the LighterLife foodpacks. Its provider requires purchasers to submit certain medical information before a purchase is permitted. It provides some online support to purchasers if they require it, but no regular counselling support in any way comparable with that provided by LighterLife. The other is fairly new to the market but appears to operate in a similar way to the first.

63. LighterLife food packs have also been offered for sale on E-bay at prices above those charged by LighterLife.

64. We heard no evidence as to whether the type of regular counselling and support which LighterLife counsellors provided would be available from any other provider to someone who had acquired LighterLife or other Very Low Calorie Diet food packs separately. It was clear that LighterLife counsellors would not provide such counselling in relation to the Foundation stage; but it was possible that they might unknowingly provide it at other stages, if a client had purchased alternative products.”

29. From these primary facts they reached the following conclusions:

“It was clear to us that:

- (a) a typical participant would wish to receive and be expected to receive both counselling support and food packs;
- (b) a typical participant would be required to pay at the time of receiving the food packs;
- (c) a typical participant would be expected to benefit both from the food packs and from the counselling; both would be of material use from the perspective of such a customer;

We also find that a large part or even the majority of the counselling support was forward looking. A minority related to adherence to the food packs.”

#### Single or multiple supplies?

30. The Tribunal reached the conclusion that there were separate supplies made of the food packs and the support services. They accepted that the typical customer or consumer was someone who was obese and wished both to lose weight and to retain that weight loss.

“That person wanted assistance in losing weight and keeping slimmer, and recognised that such assistance would come in the form of food replacements and support sessions over a period of time.”

31. They rejected the submission (no longer made) that the support services were merely ancillary to the food packs but also rejected the argument put to them by Ms Shaw on behalf of HMRC that what the typical customer wanted and was buying was a programme not its separate elements. This submission was bolstered by an argument (based on the Advocate-General's approach in *Levob*) that, given the needs of the typical customer, neither the food packs nor the support services had any utility on their own. The Tribunal dealt with this as follows:

“94.....(ii) it is important to consider whether the supplies are so closely linked that in isolation for the average customer they do not have the necessary practical benefit. (*Levob* : Advocate General paragraph 69). In *Levob* the customer could not use the software without customisation and whilst customisation could have been provided by a third party, legal, technical and practical difficulties would arise from such a course. The Advocate General thought that pointed to inseparability (paragraph 72-75 of his opinion);

In this case there is, in our view, not the same degree of need for the two elements of the supply to come together. That a customer may prefer getting the two elements together from the same supplier may indicate that they are of *more* use when received together, but it does not indicate that they are of no practical use when received separately. The customisation in *Levob* was no use without the software itself; here the forward looking support is of separate use;

The ECJ in *Levob* characterised the economic purpose of the supply at issue in that case as the supply of functional software specifically customised to that customer's requirements: the uncustomised software was of no use for the purposes of the customer's economic activity. In this case the food packs could be used on their own. Similar very low calorie food packs could be separately obtained and separately used by a typical customer. That customer might want something else as well, but the lack of the counselling would not preclude the separate use of the food packs. The fact that LighterLife counsellors would not provide the counselling unless the food packs were also purchased does not affect the separate usefulness to the average customer of the separate elements of the supply. Likewise in our view the counselling would be of use even if food packs were acquired elsewhere;

In our view, a normal customer would not regard one element of the supply without the other as 'largely useless' (paragraph 45 Advocate General *Talacre*).

(iii) the food packs and the support have different uses. The first is predominantly to get the weight off – to permit fasting; the second is predominantly to keep it off. Those are the essential characteristics of each element of the supply. Although the average customer wishes to achieve both objects each element principally serves one object only;

(iv) the elements of what is supplied do not need to be enjoyed at the same time. A restaurant customer needs both the food and the service together and in the same place; a patient receiving an injection requires the vaccine and the doctor's service at the same time and

place: the elements are associated in time and space. The same is not true of the food packs and support. There is no closeness in time or space;

(v) the separate costs to the supplier of each element of the supply do not point clearly to either a single supply or multiple supplies;

(vi) there are clearly links between the two elements of the supply by the Appellant. The counselling, particularly in the early stages, "strengthens the commitment and staying power of the" participant. The weighing and medical checks are closely linked to the *fasting*. But that commitment is as much to abstinence from normal food as it is adherence to the food packs. The ability safely to fast is linked to the use of the food packs, but we do not see a resultant very strong or close link between the medical checks and the food packs. Further, in contrast to *Weight Watchers*, the predominant part of the support is looking to future management rather than sticking to the diet. There is a link, but in our view it is not a strong link;

(vii) we accept that what is obtained can be described as a "programme"; but we believe that programme has two distinct elements. There are links between those elements but overall they are not very strong or very close links. The closest is that between the food packs and that element of the counselling which helps the participant to stick with the food packs and to abstain from normal food. But in our view even that element displays as close a link to fasting as it does to eating the food packs."

32. Their conclusions are contained in the following paragraph of their Decision:

"100. The link between the consideration of the two principles in this case exists principally in the idea that the participants were buying "a programme". Because they were buying a programme it might therefore be said that they were giving consideration for all its elements, and that it was a single composite supply. But it seems to us that to start from the description of the supply as "a programme" is to beg both questions: the use of the word suggests a single supply for a single consideration. Whilst the word "programme" was used in some of the literature and information given to participants and that is suggestive of a single supply, its description as such does not compel the conclusion that there was one single composite supply."

33. As the Chancellor made clear in the *Weight Watchers* case, the test based on utility which features in the Attorney-General's opinion in *Levob* (although understandable in the context of that case) was not adopted in the judgment of the ECJ. The test remains that of economic indivisibility based on an objective view of the transaction from the consumer's perspective. Morgan J recognised this in his own judgment. He thought that the Tribunal may have been overly influenced by what they saw as the lack of a sufficient physical connection between the food packs and the counselling ("no closeness in time or space") as set out in the reasoning contained in paragraph 94 (iii) to (vii) quoted above and gave inadequate weight to the economic purpose of the supply. But he also rejected the submission by HMRC that the physical relationship between the food packs and the support services or their individual utility were irrelevant:

“56. In my judgment, the question of separate utility is a circumstance which is to be assessed with all other relevant circumstances and from an economic perspective. The Tribunal plainly regarded this question as being of the first importance. It considered the point at length in paragraph 94(ii) of its decision but it does not appear to have based its conclusion on that point alone.

57. It follows from the above discussion that whilst I can see the real possibility that the Tribunal did approach the matter from a perspective which gave undue prominence to physical divisibility and to separate practical use, I am hesitant about finding that HMRC has established a clear misdirection of law.”

34. This led the Judge to consider for himself whether there was a single supply or multiple supplies. His conclusions are set out in the following paragraphs of his judgment:

“60. The Tribunal's own conclusions are contained in paragraph 94 of its decision, which I have set out above. There is no criticism of paragraph 94(i). Paragraph 94(ii) relates to the question of separate utility and I have already made some comments on that subparagraph. I should add at this point that the Tribunal's assessment of that matter, when it refers to the attitude of a normal customer, appears to lose sight of the clear findings of fact which the Tribunal made, at a number of stages in the course of its findings of fact (and in its analysis of the issue as to consideration for the support services and of the further issue as to whether the support services were ancillary to the supply of food packs) when the Tribunal found that what the customer wanted was the combination of the food packs and the support services.

61. As regards the finding in paragraph 94(iii), this seems to me to be contrary to the primary facts found by the Tribunal. I have read and re-read the Tribunal's findings of fact before reaching this conclusion. I have also examined the documents and the witness statements which were before the Tribunal to make sure that I have not misunderstood what the Tribunal meant to say when setting out its findings of fact. I have already set out the findings of fact in full, earlier in this judgment. I do not think that the findings of primary fact justify the conclusion that there is a clear demarcation between the purpose behind the food packs and the purpose behind the combination of the various support services. The Tribunal had held in clear terms that it was not possible to split the various support services into two groups. As I read the findings of fact, the object of achieving initial weight loss was to be achieved by the use of the food packs and the support services in combination. The support services were not only for the purpose of keeping weight off after the initial weight loss.

62. As to paragraph 94(iv), I have already commented that there is a closeness in time and space between the supply of food packs and the supply of support services. I do not however regard that matter as being of particular importance when assessing the matter from an economic perspective. Similarly, I do not attach much

weight to the fact that the food packs are consumed at a different time and place from the time and place of the counselling sessions.

63. Paragraph 94(v) is right as far as it goes. However, it focuses on the standpoint of the supplier and not of the typical consumer. The consumer pays a single price for the food packs and the support services, as the Tribunal held. It is clear from the authorities that the fact that a single price is charged is relevant, yet the Tribunal does not mention that matter in its assessment of the question whether it is artificial to split the transaction into separate supplies.

64. I regard some of the findings in paragraph 94(vi) as contrary to the Tribunal's own findings of fact. Those findings stressed the fact that the food packs worked in combination with the support services and that the typical consumer wanted the combination and valued the support services as part of the combination.

65. Again, I regard the statement in paragraph 94(vii) as contrary to the Tribunal's own findings of fact as to the links between the food packs and the support services.

66. Subject to any possible question of circumspection before reversing the decision of the Tribunal, my own conclusion on the first question, applying the correct legal principles to the facts as found by the Tribunal, is that it is artificial to split the transaction in the present case into the separate elements of a supply of food packs and a supply of support services. On my reading of the primary facts found by the Tribunal, what the typical customer is buying is the combination of food packs and support services. The two elements reinforce each other. From an economic point of view, it does not make sense for the supplier to charge, or for the customer to pay, separately for the elements of food packs and support services. I do not reach this decision merely because the two elements have been placed in a single "package". The links between the two elements go well beyond mere packaging."

35. Mr Lasok made a number of criticisms of this reasoning. He says that the mere fact that the food packs and the support services are combined in a single transaction does not make it a single supply. All these cases involve a single transaction incorporating a number of different supplies. That does not of itself make the transaction economically indivisible. As the Tribunal said in paragraph 100 of its Decision, to describe the supply as a programme simply begs the question of what was in fact provided.
36. He also took issue with the Judge's reference to the food packs and the support services re-enforcing each other. There is no real explanation, he says, for the statement that the links between the two elements go well beyond mere packaging. In the earlier passages in his judgment (quoted above) Morgan J states that separate utility is a relevant factor but this consideration plays no part in his actual assessment of whether there are one or more supplies. Again, no real explanation is given for this.

37. I agree that the Judge's reasons as set out in paragraph 66 of his judgment are highly condensed and do not include a fully-reasoned assessment of the criteria which he himself held to be relevant to his determination of the primary question. But the real question for us is whether his conclusion is supportable. My view is that it is. The Tribunal's description of the LighterLife Programme indicates that it is aimed at and taken up by the obese or clinically overweight who wish both to reduce their weight over a relatively short period of time and to retain that position thereafter. Although part of the support services are prospective and not coterminous with the foundation and development stages, it is unrealistic in my view to regard them as other than part of a continuous programme of dieting and weight stabilisation designed to achieve the permanent reduction of the customer's weight. The inclusion of the support service in the price paid for the food packs, whilst not conclusive in itself, seems to me consistent with this being what the taxpayer offers and, more particularly, what the consumer wishes and intends to purchase and receive. The support services are integral to the achievement of the customer's needs. This is the finding which the Tribunal made.
38. Paragraph 94 of the Tribunal's Decision contains a list of features of the transaction which the Tribunal regarded as relevant but not conclusive of the supply issue. They were, I think, right in paragraph 94(ii) to regard the supplies in this case as not being as closely linked as in *Levob*. But *Levob* was a relatively clear case in that the only realistic conclusion was that the company wished to buy customised software and had no commercial use at all for the standard US package which formed the basic programme. It is not therefore difficult to see why the ECJ characterised the contract as a single economic supply.
39. Not all cases of a single supply require there to be that degree of proximity. The *College of Estate Management* and *Dr Beynon* are both examples of the taxpayer providing to its clients services which did have value and utility in their own right. But that is not the test. The question is whether the supplies are so closely linked in the transaction as to form what, objectively viewed, is a single and indivisible economic supply.
40. The Tribunal never properly addressed this question. As the Judge found, much of paragraph 94 is taken up with an assessment of the physical links between the food packs and the support services in terms of when they were provided and whether they were used in combination or alone. That discussion descended in paragraph 94(ii) into an analysis of whether similar low calorie food packs could be separately obtained and separately used by a typical customer. As mentioned earlier, this point was taken up by Mr Lasok in his own submissions on this appeal. But none of that is relevant to whether the taxpayer in this case should be treated as making a single supply or separate supplies. The LighterLife food packs are not sold other than as part of a package which includes the support services nor are they bought on any other basis by the typical customers of this taxpayer. The fact that other types of low calorie diets can be bought over the counter for personal use does not therefore assist the court in determining the correct tax treatment of the transaction in question.
41. The point made in paragraph 94(iv) about the food packs and the support services being used at separate times is also unhelpful. Although there will be cases where there is a close physical link between the supplies (*Levob* is a good example), this is not a determining factor in the assessment of economic divisibility in this case. The

correct focus ought to be on whether, from the customer's point of view, what is being purchased for a single consideration is a single supply of services. The food packs are ordered and paid for at the foundation sessions. Like the Judge, I can see little of significance in the fact that the food packs are actually consumed later in the customer's home. That seems to me to be no different from the dispensation of prescription drugs in the doctor's surgery in *Dr Beynon* which would also have been taken at home. The place and the circumstances of the purchase are what is important.

42. The only real consideration of the economic nature of the transaction is contained in paragraph 94(vii). But no explanation is given as to why the links between the food packs and the support services as part of a "programme" were considered not to be very strong or very close and, like the Judge, one is left with the impression that this view is also strongly influenced by the physical considerations of space and time discussed earlier. In paragraph 100 the Tribunal says that the use of the word "programme" in the promotional literature is suggestive of a single supply but does not compel that conclusion. Although it is clearly right that this is not conclusive, there is no clear statement of what other factors tipped the balance the other way. If (as one assumes) they were the considerations set out in paragraph 94 then they are unpersuasive.
43. I agree with the Judge that, on the facts found by the Tribunal, the proper conclusion is that what the typical customer purchases is a single package of food packs and support services which he wishes to use in combination with each other and which, in the context of the transaction, are not economically divisible. The Judge (borrowing the language of the Chancellor in *Weight Watchers*) described them as re-enforcing each other which is what they are intended to do. They are, so to speak, to be taken together and are purchased on that basis. The evidence is that the typical consumer regards them as complementing each other and values them both. The product is promoted on the basis that the customer will be supported in his or her slimming endeavours through the counselling services provided and, as mentioned earlier, these are an essential aid in re-enforcing the diet. In these circumstances it would, in my judgment, be artificial to split up what anyone wishing to use the programme would regard as a single economic supply.
44. I would therefore dismiss the appeal. In these circumstances, the second point about how to apportion the consideration does not arise.

**Lord Justice Goldring:**

45. I agree

**The Master of the Rolls:**

46. I also agree.