

Neutral Citation Number: [2009] EWHC 162 (Ch)

Case No: CH/2008/APP/0647

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2009

Before :

MR JUSTICE MORGAN

Between :

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

- and -

DAVID BAXENDALE LIMITED

Appellants

Respondent

Nicola Shaw (instructed by **H M Revenue and Customs**) for the **Appellants**

Alun James (instructed by **Charles Russell LLP**) for the **Respondent**

Hearing dates: 22 and 23 January 2009

MR JUSTICE MORGAN :

INTRODUCTION

1. This is an appeal and cross-appeal against the decision of the VAT and Duties Tribunal released on 30th July 2008. The Appellant is Her Majesty's Revenue and Customs ("HMRC") and the Respondent is David Baxendale Limited ("the Taxpayer").
2. The Taxpayer is one of a number of persons who operate under a form of licence from LighterLife Limited. The appeal and cross-appeal relate to the correct VAT treatment of the supply (or supplies) made by the Taxpayer to persons who participate in the LighterLife weight loss programme.
3. The Tribunal recorded that there were some 300 other taxpayers in similar factual circumstances to those of the Taxpayer and the VAT position in relation to those others would effectively be determined by the outcome of these proceedings.
4. Ms Nicola Shaw appeared for HMRC both before the Tribunal and on this appeal to the court. Mr Alun James appeared for the Taxpayer both before the Tribunal and again on this appeal. I am grateful to both counsel for their assistance.
5. The Tribunal gave an outline of the LighterLife programme in the following 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."
6. There were four questions argued before the Tribunal. Those questions were set out in the decision of the Tribunal as follows:

"The questions this appeal raises are these:-

 - (i) does a participant give consideration for the provision of the support services: when he pays for the food packs is that payment also consideration for the support services, or are they provided free?
 - (ii) if consideration is given for the support services, is the Appellant making two separate supplies, one of support services and the other of food, between which the consideration should be apportioned, or one single composite supply?
 - (iii) if the Appellant is making a single composite supply is that supply zero-rated (as a supply of food) or standard rated?
 - (iv) if the Appellant is making multiple supplies for consideration, how should the consideration be split between the supplies?"
7. On the first of the questions before the Tribunal, the Taxpayer argued that the participant did not give consideration for the provision of the support services. HMRC

argued to the contrary. The Tribunal accepted the argument for HMRC. There is no appeal by the Taxpayer against this decision.

8. On the second of these questions, the Taxpayer argued that there was one supply. This was on the basis that the supply of support services was ancillary to the supply of food. HMRC also argued that there was one supply. However, HMRC's argument was on a different basis, namely, that the supply of food and the supply of support services constituted the supply of two elements, neither of which was ancillary to the other, but so that the two elements together constituted a single composite supply which it was artificial (and therefore wrong) to split into two supplies. The Tribunal held that there were two supplies, one of food and the other of support services. HMRC has appealed that decision, contending as before for a single composite supply. The Taxpayer has not cross-appealed the Tribunal's finding that there were two supplies.
9. In view of the Tribunal's decision on the second question before it, it held that the third question posed above did not arise. However, the Tribunal indicated that if that third question had arisen, i.e. if the correct analysis were that there was a single composite supply, the Tribunal would have held that such a supply would be a standard rated supply and, in particular, it could not be described as a supply of food. HMRC supports that view of the Tribunal. The Taxpayer contends that if the court on this appeal holds that there was a single composite supply, then such a supply would be a supply of food and therefore zero rated.
10. On the fourth question posed by the Tribunal, it held that the consideration should be apportioned between food and services in the proportion of 2 to 1. HMRC had contended for a 60/40 split but does not now seek to disturb the apportionment of the Tribunal (in the event of the court upholding the Tribunal on there being two supplies). The Taxpayer had contended before the Tribunal for a 91/9 split and that contention is repeated in this court by way of a cross-appeal.

THE QUESTIONS FOR THE COURT

11. There are three questions which have been argued on this appeal and cross appeal.
12. The first question is whether the Tribunal was right to hold that there were two supplies or whether HMRC is right that there was a single composite supply: ("the first question")
13. The second question arises if HMRC is right on the first question. The second question is whether such a single composite supply is a standard rated supply or whether it is a supply of food and therefore zero rated: ("the second question")
14. The third question arises if HMRC is wrong on the first question. The third question is as to the correct apportionment of the consideration between the supply of food and the separate supply of support services: ("the third question")

THE FIRST QUESTION

The Tribunal's findings of fact

15. The Tribunal made detailed findings of fact. The appeal to this court is only available on a point of law. Accordingly, both parties accept the Tribunal's findings of primary fact.
16. Despite their length it is necessary to set out the findings of fact which relate to the first question before the court, as follows:

"31. We had before us a wealth of documentary evidence relating to the LighterLife programme. This included advertising material, material given to participants, the DVDs which were shown at group sessions, LighterLife's manuals for its counsellors and documents relating to the relationship between LighterLife and the counsellors. We also had samples of the food packs.

32. We heard oral evidence from David Baxendale, a director of the Appellant, who ran the business of the Appellant, and from Octavia Morley the chief executive officer of LighterLife UK Ltd. We also heard the evidence of two people who had participated in the LighterLife programme through providers other than the Appellant: they were Sara Anne Jamison, the current marketing director of LighterLife UK Ltd, and Susan Elizabeth Smith an officer of HMRC. All of the witnesses provided witness statements. From that evidence we find the facts as follows.

(1) The LighterLife Programme

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 (*sic*) 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.

(5) Statements in the documents

62. It seems to us that the documentary evidence is relevant only in so far as it sheds light on the objective determination of what was agreed; whether a typical participant would view a particular element as an aim in itself; and the practical benefits or usefulness of particular elements. We set out below examples of those elements of the documentation which seemed particularly relevant to those factors. We do not believe every participant reads every document. But the following quotations provide a flavour which we believe was communicated to the typical participant, and which informed and illuminates our decisions in relation to those factors.

An advert:

... The LighterLife Programme is the only national weight loss and weight management plan that looks beyond food to examine lifestyle and emotions in order to help clients to understand, address and overcome their relationship with food.

- Holding Booklet

Free of charge”

Your First Week:

“Four Food packs a day help the fat go away.”

“... during weeks 2-14 your counsellor will:

Weigh you ...

Check your ketone level ...

Collect your payment and give you enough food packs ...

Show you that week’s ... DVD

Introduce you to Cognitive Behaviour Therapy and
Analysis ...”

Men’s Customer Charter:

“ Before starting Foundation and taking total Balance Food packs you must ...

“Weekly meetings:-

You will need to pay for and collect your weekly supply of products at your weekly meeting ...”

(6) Other Matters

61. The food packs provide a Very Low Calorie Diet. We understand that the lack of calorific content in the food packs and their purpose mean that their composition, marketing and labelling has to comply with the provisions of particular European Directives and domestic regulation. Some medical checking is effectively required before such products may be sold.

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.

65. Susan Smith told us that it was important for her to be able to go to one provider for everything, and that it had been important to participate in groups where everyone was in the same situation. Sara Jamison said that if she had bought food packs from another supplier, some group support would have been useful.

66. Focus Groups

Ms Morley told us that the clients understand that they were buying the food packs and that the counselling is a free service. She said “The clients understand that they can attend the groups for free or visit their counsellor without paying”. She told us that her understanding of the clients perception was drawn from focus groups of clients who had attended the LighterLife sessions. We accept that this impression was gained by Ms Morley but we doubt whether the investigation of this understanding was a substantial aim of the focus groups and do not accept that it reflects the understanding of all clients.

(7) Inferences drawn from the facts

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.”

17. I have set out verbatim the above extract from the Tribunal’s decision notwithstanding that the decision omits paragraph numbers in a few places.

The Tribunal’s reasoning

18. The Tribunal’s reasoning is detailed. It is appropriate to summarise parts of that reasoning but in relation to other parts, I will quote the Tribunal’s own words.

19. In paragraphs 6 to 17 of its decision, the Tribunal set out the legal principles relevant to the question whether the support services were provided free or for a consideration.

20. In paragraphs 18 to 30 of its decision, the Tribunal set out its understanding of the legal principles on what is the first question on this appeal. The Tribunal provided its own summary of the relevant principles which was largely based on the judgment of Briggs J in Tumble Tots (UK) Ltd v Revenue and Customs Commissioners [2007] STC 1171 at [11]. I will not set out that summary in this judgment. HMRC accepted that the summary was accurate save for one matter which HMRC said was a misdirection of law. The matter to which HMRC drew attention is that in its summary, the Tribunal included this statement:

“even if elements are not ancillary to a principal supply there may be a single supply if non ancillary parts are so closely linked from an economic (or physical see *Talacre* per the Advocate General at his paragraph 44) perspective as to constitute a single supply ...”

21. The Tribunal added what it called “two footnotes” to its summary of the legal principles. The first “footnote” was a lengthy passage which occupied paragraphs 19 to

29 of the decision and discussed the possible relevance of the decision of the ECJ in Talacre Beach Caravan Sites v Customs and Excise Commissioners [2006] STC 1671. That case had not been cited by either party to the Tribunal in the present case. The Tribunal considered what the position might be if it held that there were a single supply because the support services were ancillary to the supply of food or if there were a single composite supply which had the character of a supply of food. The Tribunal did not in the event reach either of those conclusions. However, it indicated that if it were to reach the first, and possibly also the second, of those conclusions it would be necessary to split the consideration between food and support services because the provisions of the VAT legislation which zero rated a supply of food would only apply to the food part of the single supply. After some discussion before me, neither party supported this approach of the Tribunal and it seems to me that such an approach is not required by the decision of the ECJ in Talacre and is not appropriate; see also International Masters Publishers Ltd v Revenue and Customs Commissioners [2007] STC 153 at [14] commenting on Talacre.

22. The Tribunal's second "footnote" was in paragraph 30 of its decision. The Tribunal referred to paragraphs 21 to 26 of my decision in HMRC v Weight Watchers (UK) Ltd [2008] STC 301, where I had referred to a number of earlier cases which discussed when it is artificial to split a supply into its various non-ancillary elements. The Tribunal picked out two passages which appeared in the report of Levob Verzekeringen BV v Staatssecretaris van Financien [2006] STC 766. The first was from paragraph 69 of the Opinion of the Advocate General and the second was from paragraph 24 of the decision of the ECJ. These passages are further considered below.
23. The Tribunal then set out its findings of fact and discussed the question whether there was consideration for the supply of support services. I need not set out the detail of the Tribunal's reasoning on that point. The Tribunal's essential finding was that what was sold to the customer was a package of food packs and support and that the payment was directly linked to both elements.
24. The Tribunal then considered whether the relevant supply was a single supply or two separate supplies. The Tribunal had first to consider the argument put forward by the Taxpayer that there was a single supply because the supply of support services was ancillary to the supply of food. I will attempt to summarise the Tribunal's reasoning on this point, rather than set it out verbatim. The relevant reasoning is in paragraphs 82 to 88 of the Tribunal's decision and will be relevant when I deal with the second question later in this judgment. The Tribunal considered that the typical customer was someone who was obese and who wished to lose weight and to retain that weight loss. Such a person wanted assistance in the form of food replacements and support sessions over a period of time. The Tribunal discussed the aims or objects of the typical customer and held that the customer had two objects, namely, to lose weight immediately and to maintain that lower weight and that those two objects were expressed in the two elements of the supply, namely, (1) the food packs together with the support services and (2) longer term counselling. Neither object and neither element was an aim in itself. There was a large part of the counselling which was not about food packs or their consumption but was about outlook and behaviour. The Tribunal then stated at paragraph 87:

We therefore conclude that the forward looking counselling support is not ancillary to the food packs. Neither party suggested to us that the support services should be split

into different elements each of which with different VAT categorisations. The physical intertwining of the elements of the counselling makes such a course awkward and possibly artificial. The forward looking counselling was in our view too important a part of the support to treat it as ancillary to the food packs. We are therefore of the view that the whole of the support should not be treated as ancillary.

25. The Tribunal also held that the supply of food packs was not ancillary to the supply of support services.
26. The Tribunal next set out the submissions of the parties as to whether it was artificial to split the supply of the non-ancillary elements into separate supplies. I note that counsel for HMRC specifically referred to that part of the Opinion of the Advocate General in Levob which referred to the question whether one element was “of no use” without the other element. Counsel for HMRC also referred to a passage in my decision in the Weight Watchers case where I had (in relation to the second meeting in that case) referred to the strength of the link between the various elements in support of my finding that it was artificial to split the supply in question.
27. The Tribunal’s essential reasoning on the “artificial to split” question was expressed as follows:

“94. We have found that a package is supplied for a single consideration. The question is whether that package is properly to be split into its component parts. We take into account the following:-

(i) a single supply from an economic point of view should not be split so as to distort the functioning of the VAT system, (*CPP*). In *Talacre*, at paragraph 41, the Advocate General regards the “functioning of the VAT system” as a practical concern: it was there apparent that “separate indications of the relevant components of the price and the application of different rates of VAT” would not “present significant difficulties”. And we note the approach of the ECJ in *Centralan Property v Customs and Excise Commissioners* [2006] STC 1542 at paragraph 80: there, although a particular approved approach gave rise to practical difficulties, it did not lead to “insurmountable difficulties capable of affecting the application of the VAT system”;

It seems to us that if it is necessary to split the consideration between the food packs and the support that may create some difficulties but not serious or significant difficulties in the practical operation of the VAT system. This is a world apart from the dissection of the elements of a restaurant meal;

(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.

95. We conclude that the support services are not so closely linked to the food packs as to constitute with them a single indissociable supply."

28. The Tribunal then considered whether it would be appropriate to split the various elements of the support services into separate supplies and stated:

"97. ... we considered whether the support service should be treated as comprising separate elements: some of which were ancillary to, or indissociable from, the food packs, and some of which were neither ancillary to nor indissociable from them. Into the former category might come weighing, medical checks and support in

sticking with the food packs; and into the second the support services related to keeping the weight off in the future. We concluded that the elements of the support services were indissociable : they were closely physically linked to each other and even though different parts achieved different aims it would be artificial to split them.”

29. The Tribunal then considered whether its decision on splitting the supply of food from the supply of services was in any way incompatible with its decision that the single price for food and services included consideration for the supply of services and held that there was no such incompatibility.
30. Finally, on this question, the Tribunal stated the fact that the customer was buying what could be called a “programme” did not necessarily mean that the programme involved a single supply.

The submissions for HMRC

31. HMRC submitted that the first question raises a question of law and that the Tribunal misdirected itself in law. It was submitted that the relevant legal principles are those stated by the Court of Appeal in the Weight Watchers case: [2008] EWCA Civ 715, [2008] STC 2313. This decision was reached after the decision of the Tribunal in the present case and the Tribunal did not have the advantage of considering how matters were described by the Court of Appeal. One matter which was explained by the Court of Appeal was that the relevant test is not to be found in paragraphs 69 to 73 of the Opinion of the Advocate General in Levob.
32. HMRC submitted that the Tribunal misdirected itself in two specific respects. The first was that the Tribunal wrongly thought that the presence or absence of a physical link between the goods and the services was relevant. HMRC referred to the Tribunal’s use of the word “physical” in that part of their reasoning which I have quoted at paragraph 20 above. HMRC also pointed to the Tribunal’s discussion of whether there was a link in time or space in paragraph 94(iv) of its decision.
33. Secondly, HMRC submitted that the Tribunal was wrong to consider, and/or to give much weight to, the question whether the food packs were practically useful without the provision of support services. The Tribunal, it was said, erroneously relied on paragraph 69 of the Opinion of the Advocate General in Levob but the Court of Appeal in the Weight Watchers case had now explained the correct approach by reference to the decision of the ECJ in Levob and not by reference to the statements made by the Advocate General. It was said that this error in particular affected the Tribunal’s reasoning in sub-paragraphs (ii), (iii), (vi) and (vii) of paragraph 94 of its decision.
34. HMRC finally submitted that if one applied the correct legal test as stated by the Court of Appeal in the Weight Watchers case, the correct legal answer was that the supply in the present case was a single composite supply of food packs and support services.

The submissions for the Taxpayer

35. The Taxpayer submitted that the Tribunal had correctly directed itself in law as to the first question and had reached the correct legal answer to that question. Although the Taxpayer had argued before the Tribunal that the supply of support services was ancillary to the supply of food, and although the Taxpayer referred me to those submissions in connection with the second question argued before me, the Taxpayer did not seek to disturb the Tribunal's findings on the first question that there were separate supplies of two non-ancillary elements, namely, food and support services.
36. The Taxpayer in particular submitted that the Tribunal had correctly identified the relevant legal principles based on the summary in Tumble Tots. As to the passage quoted in paragraph 20 above, the reference to a "physical" perspective turned out to be irrelevant. The Tribunal did not hold that the supply was a single composite supply as a result of applying a physical perspective. That meant that the Tribunal had to consider whether the supply was a single composite supply from an economic perspective. That was the correct legal test.
37. The Taxpayer further submitted that although the Tribunal referred to paragraph 69 in the Opinion of the Advocate General in Levob, it also referred to the decision of the ECJ in the same case and the passage quoted from the decision of the ECJ referred to the fact in that case that one element was of no use without the other element. There was no difference between the views of the Advocate General and the views of the ECJ on that point. It was not an error of law to refer to the comment made by the Advocate General in addition to the comment made by the ECJ, as they were essentially the same comments.
38. The Taxpayer analysed the decision of the Court of Appeal in Weight Watchers and the reasons why the Court of Appeal had reversed the Tribunal decision in that case. He submitted that there was nothing in the decision of the Tribunal in the present case which departed from the statements of legal principle in Weight Watchers. The facts of that case were quite different from the facts of the present case and, properly understood, the decision in that case was of no real assistance as to the outcome of applying the correct legal principles to the facts of the present case.
39. The Taxpayer also contended that the decision of the Tribunal, referring to physical links or links in space and time between the food packs and the support services, correctly treated those matters as relevant factors which were to be considered together with all other relevant factors. It was also submitted that the question as to the practical utility of one element without the other was another relevant factor which the Tribunal correctly took into account and assessed together with the other relevant factors. In this way, the Tribunal had correctly applied the law and had not misdirected themselves.
40. The Taxpayer argued that the approach of HMRC was both irrational and unfair. It involved the contention that a customer who buys a week's supply of food packs is actually buying a supply of services for VAT purposes. He also submitted that HMRC were arguing for a result which turned a zero rated supply of food packs by LighterLife to the counsellor for £40, with no attendant input tax, into a standard rated supply of services for £66 which included output tax accountable to HMRC. This distorted the VAT system as it prejudiced its intended neutrality. It was wrong to group separate supplies artificially together when it distorted the VAT system.

41. The Taxpayer therefore argued that the Tribunal was guilty of no misdirection of law. Further, its conclusion on this question was the only reasonable conclusion it could have reached. In a case where the Tribunal had not misdirected itself in law, even though the ultimate question was a question of law and not of fact, the court should show some circumspection before interfering with the decision of the Tribunal, merely because the court would have put the case on the other side of the line: see Dr Beynon v Customs and Excise Commissioners [2005] STC 55 at [27] per Lord Hoffmann.

The relevant legal principles

42. There was no real dispute between the parties as to the relevant legal principles which are to be applied in order to answer the first question. Both parties relied on the decision of the Court of Appeal (Sir Andrew Morritt C, Hooper and Lloyd LJ) in Revenue and Customs Commissioners v Weight Watchers (UK) Ltd [2008] EWCA Civ 715, [2008] STC 2313. In that case, the Court of Appeal considered the principal authorities which are relevant to the first question which is now before the court. The Chancellor delivered the only judgment, with which the other two members of the court agreed.
43. The Chancellor summarised the relevant legal principles in paragraphs [11] to [17] of his judgment, as follows:

[11] As is well known, art 2(1) of EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes-- Common system of value added tax: uniform basis of assessment ('the Sixth Directive') requires member states to subject to VAT:

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

Neither the Sixth Directive nor the Value Added Tax Act 1994 give any guidance as to how to identify a single supply consisting of a number of elements or the recognition of several distinct supplies in a single transaction. That guidance has been provided by the Court of Justice of the European Communities ('the European Court of Justice'). It is common ground that the test relevant to the issues in this case is that enunciated by the European Court of Justice in *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433 ('*Levob*'), para 22 of its judgment in the following terms:

'22. The same [sc there is a single supply] 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.'

In its ruling the European Court of Justice stated (see para 30 of the judgment):

'30. ...

--Article 2(1) of Sixth Directive must be interpreted as meaning that where two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT ...'

The principle originated in the judgment of the European Court of Justice in *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] 2 AC 601 ('*Card Protection Plan*').

[12] In that case, for a single fee, Card Protection Plan ('CPP') provided a credit card protection plan which was intended to protect the card holder from financial loss caused by the loss or theft of their credit cards. The plan consisted of a number of elements including the benefit of insurance cover under a block policy taken out by CPP. Customs and Excise claimed VAT on the basis that there was a single supply of the package of services available under the plan. CPP contended that there was a separate supply of insurance services which was exempt from VAT. The House of Lords (see [2001] UKHL 4, [2001] STC 174, [2002] 1 AC 202) referred a number of questions to the European Court of Justice for a preliminary ruling. They asked (see [2001] STC 174 at [16], [2002] 1 AC 202 at [16]):

'[16] ... what is the proper test to be applied in deciding whether a transaction consists for VAT purposes of a single composite supply or of two or more independent supplies?'

[13] This question was answered by the European Court of Justice (see [1999] STC 270, [1999] 2 AC 601, paras 26 to 32 of its judgment). It pointed out in para 27 that owing to the diversity of commercial operations it was not possible to give exhaustive guidance on how to approach the question in all cases. It emphasised the need to have regard to all the circumstances in which the transaction had taken place and continued (see [1999] STC 270, [1999] 2 AC 601, paras 29-32 of the judgment):

'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 94/97) [1998] STC 1189, 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.'

[14] It is common ground that the principles enunciated in para 30 of the European Court of Justice's judgment in *CPP* do not apply to this case. But it is, I think, clear that the general principle set out in para 29 of the judgment and elsewhere in the passages I have quoted is what the European Court of Justice reaffirmed in *Levob*. But, in the meantime, Lord Rodger of Earlsferry had suggested in *College of Estate Management* (see [2005] STC 1597 at [8] et seq, [2005] 1 WLR 3351 at [8] et seq) that the version of the European Court of Justice's judgment in English lacked clarity.

[15] In that case the college provided distance learning courses for the training of property and construction professionals consisting of printed materials, face-to-face teaching sessions and the material on its website. The college claimed that it provided separate, zero-rated, supplies of written materials and exempt supplies of the rest of its educational services so that it might reclaim VAT paid in relation to the zero-rated supplies. That contention was upheld by the Court of Appeal (see [2004] EWCA Civ 1086, [2004] STC 1471). In the House of Lords (see [2005] STC 1597, [2005] 1 WLR 3351) Lord Rodger of Earlsferry referred to the judgment of the European Court of Justice in *Card Protection Plan* and the problems with the English version. He said (see [2005] STC 1597 at [12], [2005] 1 WLR 3351 at [12]):

'[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 over-arching 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.'

[16] The decision of the House of Lords in *College of Estate Management* was given five days before the judgment of the European Court of Justice in *Levob*. In *Levob* the question was whether two or more separate transactions, the supply of consumer software and its customisation, should be regarded as a single supply. The Court of Justice formulated the principle which I have already quoted. In doing so they did not

adopt the formulation put forward by the Advocate-General (see [2006] STC 766, [2005] ECR I-9433, paras 69 to 73 of her opinion) of an inseparable link or connection between the several elements or services constituting the single supply.

[17] In summary, therefore, the court must have regard to all the circumstances. It must apply the relevant test on an objective basis. There are various formulations of what the relevant test is in *Card Protection Plan* (para 29) and *Levob* (para 22 and ruling 1). Common to all of them are the requirements that the court must look at the transactions from the view point of the typical consumer rather than the supplier. The extent of the linkage between the relevant transactions must be considered from an economic point of view, rather than, say, a physical, temporal or other standpoint. So regarded the question then is whether it would be artificial to split them into separate supplies. The fact that the supplier has charged a single price for the aggregate of the transactions is a relevant circumstance but is not conclusive because that price may be apportioned.

44. It can be seen that, in paragraph [17] of his judgment, the Chancellor summarised the test to be applied in relation to this first question.
45. The Weight Watchers case concerned a weight loss programme. The programme had two elements; one was the supply of printed material and the other was the supply of services. Neither element was said to be ancillary to the other. On the facts, distinctions could be made between the position at a first meeting and at subsequent meetings. The question was whether there was a single composite supply of services which would be standard rated or separate supplies of zero rated printed material and standard rated services. The Tribunal had held that at both the first meeting and at the second meeting there were separate supplies. HMRC appealed to the High Court and the appeal came before me. I held that the Tribunal was wrong about the subsequent meetings and that the correct legal answer was that there was a single supply at subsequent meetings. I regarded the arguments as evenly balanced as to the first meeting and, applying a degree of circumspection, I did not reverse the Tribunal as to the first meeting.
46. In Weight Watchers, the Court of Appeal held that the Tribunal had misdirected itself in law. The principal misdirections were that the Tribunal had not adopted an economic point of view when considering whether it was artificial to split the transaction into separate supplies and had not considered the matter from the standpoint of the typical consumer. The Court of Appeal accepted the submission from HMRC that the Tribunal had approached the question of divisibility of supplies by reference to the physical circumstances, rather than adopting an economic analysis. The Court also rejected the submission of the taxpayer in that case (relying on paragraphs 69-73 of the Opinion of the Advocate General in Levob) that because the printed material was useful on its own, without the services at the meeting, it must follow that the supply of the printed material should be regarded as a separate supply. The Court of Appeal therefore itself decided the issues arising and held that the clear conclusion was that it was artificial to split the supply into separate supplies either at the first or at subsequent meetings. At paragraph [46] of his judgment, the Chancellor referred to the supply being of a programme, that one of the cardinal features of the programme was the reinforcing combination of the diets taught by the printed materials and the group therapy at the meetings, that the consumer in that case was buying the combination and that it made

no sense from an economic point of view to pay (or be charged) separately for the meetings and the printed material.

Discussion and conclusions on the first question

47. There are essentially two aspects to the requisite analysis. The first requires me to examine the directions which the Tribunal gave itself as to the legal principles to be applied. If I find that the Tribunal misdirected itself, then I must reach my own conclusion as to the correct legal answer, applying the correct legal principles. The second aspect arises if there is no misdirection of law. Then I still need to ask whether the Tribunal reached the correct legal answer on what is a question of law and not of fact. However, if this second aspect is to be examined, the authorities direct that I should show some circumspection before reversing the decision of the Tribunal and should not reverse it merely because I would put the case on the other side of line from the Tribunal.
48. HMRC says that the first misdirection is that the Tribunal focussed on the physical divisibility of the food packs and the support services rather than adopting an economic perspective as to whether it was artificial to split the transaction into separate supplies.
49. In the passage quoted at paragraph 20 above, the Tribunal directed itself that it was appropriate to analyse a transaction as a single supply in a case where there was a close link from an economic perspective or from a physical perspective. That seems to mean that if there were not a close link from an economic perspective, but there were a close link from a physical perspective, then the answer would be that it would be artificial to split the transaction into two or more supplies. It is clear from the authorities, particularly from the test as stated in paragraph [17] of the judgment of the Chancellor in Weight Watchers, that this passage involved a misdirection. The only relevant perspective is the economic perspective.
50. The Taxpayer has argued that this misdirection is not a material one. It is accepted that the Tribunal referred to the possibility of a finding that the transaction involved a single supply judged from a physical perspective. If the Tribunal had held that the transaction was a single supply judged from a physical perspective, then the Taxpayer would have been able to complain of a misdirection. But the Tribunal has held that the transaction did not involve a single supply from a physical perspective and then went on to hold that the transaction did not involve a single supply from an economic perspective either. Thus, it is argued, the Tribunal has answered the correct question which is whether there is a single supply from an economic perspective. In answering the correct question, the fact that the Tribunal separately asked a further wrong question is nothing to the point.
51. In relation to the passage in the decision which I have quoted in paragraph 20 above, the Taxpayer's argument has logical force. However, the way the Tribunal approached the matter in that paragraph suggests, at least, the possibility that when the Tribunal was assessing divisibility, it considered that it could consider divisibility from either an economic perspective or a physical perspective and that suggests the further possibility that the Tribunal thought that if the elements were clearly physically separate then it would not be inappropriate to split the transaction into those elements as separate

supplies. Thus, although I do see the logical force of the Taxpayer's argument that the misdirection was not material, the misdirection related to an all important question and it leaves me with a real suspicion that the Tribunal was not addressing the matter from the only permissible perspective, which is the economic perspective.

52. HMRC submit that the Tribunal's wrong approach to the physical divisibility of food packs and support services is also revealed in paragraph 94(iv) of its decision. That refers to the absence of a link in time or space between the food packs and the support services. That comment (if it were correct) would relate to a physical perspective or analysis rather than an economic one. However, I have some hesitation in fully accepting the submission by HMRC that this sub-paragraph proves that there was a misdirection in law. My reason is that I do not see it as irrelevant to an economic analysis to describe the physical circumstances of the various elements of a transaction and to have regard to those circumstances when considering all matters which are relevant. I find it difficult to tell from my reading of this part of the decision whether the Tribunal was misdirecting itself or whether it was referring to the physical circumstances as a relevant matter to be taken into account when asking the ultimate question whether it was artificial to split the transaction from an economic perspective. Nonetheless, I have formed the view that the Tribunal's comment about time and space is not really correct. The supply of food packs and the supply of support services were linked in time and space. The food packs were supplied at the meetings when support services were provided. It is true that the food packs were consumed at a different time and in a different place but that fact does not justify the Tribunal's more general statement in paragraph 94(iv) of its decision.
53. HMRC says that the second misdirection related to the way it approached the issue of the practical utility of the food packs and the support services, considered separately from each other.
54. If the Tribunal did misdirect itself on this question of separate utility of the different elements, then it seems that HMRC may have contributed to that misdirection. At paragraph 91 of the decision, the Tribunal refers to the submission by HMRC that it was artificial to split the transaction because the food packs on their own and the support services on their own were not of any use to a consumer. Further, the Tribunal did not have the benefit of the decision of the Court of Appeal in Weight Watchers which stated that the way in which the matter was described in paragraph 69 of the Opinion of the Advocate General in Levob was not a statement of the relevant test.
55. Whatever HMRC submitted to the Tribunal, they submitted to me that the question of separate utility was not even a relevant factor in assessing the matter from an economic perspective. I do not think that can be correct. Further, the Court of Appeal in Weight Watchers did not go that far. The Court of Appeal stated that the question of separate utility was not the test and rejected the submission of the taxpayer in that case that, because the printed materials were useable separately from the services, that necessarily meant that the transaction should be considered as two separate supplies.
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.
58. In these circumstances, I will proceed to the second aspect of the matter and ask myself whether the Tribunal reached the correct answer to the first question, which is a question of law.
59. I direct myself in accordance with the test as summarised in paragraph [17] of the judgment of the Chancellor in Weight Watchers and I will attempt to apply that test to the Tribunal's findings of fact.
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.
67. I have considered whether this is a borderline case. I do not believe that the answer is so near the borderline that I should decline to give effect to my own conclusion. Further, I am the more encouraged to give effect to my own conclusion in a case where the Tribunal did not have the benefit of the decision of the Court of Appeal in Weight Watchers and where there are indications that the Tribunal might have been over influenced by physical factors, rather than an economic analysis, and where the Tribunal might have been over influenced by an assessment which emphasised the question of the separate practical utility of the various elements in the supply.
68. Accordingly, my conclusion on the first question is that the Tribunal was wrong in law in holding that there were two separate supplies. The correct legal answer is that the transaction involved a single supply for VAT purposes.

THE SECOND QUESTION

The second question arises for determination

69. In view of my conclusion on the first question, the second question arises for determination by the court. The second question is: is the single composite supply in this case a standard rated supply of services or a supply of food and therefore zero rated.

The Tribunal's views

70. In view of its decision on the first question, the Tribunal was not required to answer this second question. However, the point was fully argued before it and it very helpfully expressed its views on the question.

71. The Tribunal first directed itself as to the relevant legal principles and referred to Customs and Excise Commissioners v FDR Ltd [2000] STC 672 at [53] and Byrom (t/a Salon 24) v HMRC [2006] STC 992 at [46] – [48], [51] and [70]. The Tribunal did not make any separate findings of fact on this question but relied on its overall findings of fact. At paragraph 101 of its decision, the Tribunal expressed its view that neither the element of food packs nor the element of support services predominated and the single supply (if it had found there was a single supply) was not properly covered by any head of exemption or zero rating and, in particular, it could not be described as a supply of food. Therefore a single supply would be a standard rated supply.

The Submissions

72. The Taxpayer submitted that the Tribunal was wrong in its answer to this question. The Taxpayer submitted that the only reasonable conclusion was that the supply was a supply of food packs to which the support services were ancillary. In support of this submission, counsel for the Taxpayer relied on the skeleton argument he had prepared for the hearing before the Tribunal, where he developed the submission that the supply of support services was ancillary to the supply of food packs. It will be remembered that the Tribunal had considered that submission in detail and had rejected it. If the Tribunal had accepted that submission, it would have held that there was a single supply and the single supply was a supply of food packs. The Tribunal held that there were two supplies and that the consideration had to be apportioned. The Tribunal's apportionment was 2:1, food to services. The Taxpayer had cross-appealed the apportionment and contended for an apportionment of 91:9 but had not appealed the finding of separate supplies. If the court now held that the single supply was a supply of food and ancillary services and the character of the single supply was therefore the supply of food, then it would not be appropriate to apportion the consideration. In that case, all of the consideration would be in respect of a zero rated supply. Thus, at this stage in the argument, the Taxpayer was arguing for a result more favourable to it than its own cross appeal.
73. In putting forward its argument that the supply of support services was ancillary to the supply of food packs, the Taxpayer relied on the definition of "ancillary" in College of Estate Management as "subservient, subordinate and ministering to something else". It was said that the counselling was not an aim in itself.
74. On this appeal, HMRC relied on the detailed reasoning in paragraphs 82 to 88 of the decision of the Tribunal, when it rejected the Taxpayer's argument that the supply of services was ancillary to the supply of food packs. I have attempted to summarise that reasoning at paragraph 24 above.

Discussion and conclusion on the second question

75. I can deal with the ancillary argument shortly. In my judgment, the Tribunal did not misdirect itself in law on this point and I agree with the ultimate decision it reached on the ancillary argument although it may be that I would not adopt every part of the reasoning of the Tribunal. In my judgment, based on the Tribunal's findings of primary

fact, I do not think that the support services were subservient or subordinate or ministering to the food packs.

76. The Taxpayer's argument that the supply of services was ancillary to the supply of food packs was the only way in which the Taxpayer contended that the Tribunal's views were wrong on this second question. However, my attention was also drawn to the Byrom case and the later decision in Holland (t/a The Studio Hair Co) v HMRC [2008] EWHC2621 (Ch), which cases discuss the principles to be applied in determining the character of a single supply comprising two or more non-ancillary elements. Like the Tribunal, I will apply the approach in Byrom to the facts as found by the Tribunal. I was not asked to do otherwise, notwithstanding the contrary arguments which were addressed to the court in Holland. In my judgment, applying that approach, the correct legal answer is that the character of the single supply, which I have found to have been made in this case, is a supply of services and not a supply of food. It follows that the supply is standard rated and not zero rated.

THE THIRD QUESTION

The third question does not arise

77. In view of my conclusion on the first question, this is not a case of two separate supplies and it is not necessary to apportion the consideration between a supply of food and a supply of services.
78. I do not see that there will be any advantage to the parties or anyone else in any detailed discussion by me of the third question or, indeed, any formal ruling on this question. The Tribunal has made findings of the primary facts. The parties did not disagree as to the legal principles which fall to be applied to this question, so it is not necessary for me to resolve any dispute as to what those legal principles are. If this case goes further, and if this point then needs to be considered, it will be for a higher court to reach its own conclusions on the point.
79. I will however make a brief comment on the Tribunal's conclusion, and the Taxpayer's rival argument, on this question simply for the purpose of cross-checking whether there is anything in this issue which might throw light on the other matters I have considered.
80. The Tribunal held that if one apportioned the consideration between food and support services, the right apportionment was 2 to 1. That shows that, of the two elements in the single composite supply, the supply of food is more dominant than the other element. However, there is nothing in that conclusion which causes me to question my decision that this is a case of a single composite supply of two non-ancillary elements. Nor does it cause me to question my conclusion (in agreement with the Tribunal on this point) that if the supply is a single composite supply, it is not a supply of food but is a supply of services. As is pointed out in Byrom, in a case of a single composite supply of two or more non-ancillary elements, it may be appropriate to find that the character of the single supply is different from the character of any dominant element in the single supply.

81. I do not overlook the fact that the Taxpayer has challenged the apportionment of 2 to 1 and has contended for an apportionment of 91 to 9. Without deciding the third question, I think I am able to say that I regard this apportionment as somewhat extreme. Further, I do not regard the Taxpayer's method of arriving at this apportionment as persuasive and I am sure that I would not have determined this third question by holding that 91 to 9 was the correct result. Even if the Tribunal's method was open to criticism and even if the matter had to be remitted for a further calculation to be carried out, an apportionment of 2 to 1 strikes me as being in the right region and consistent with the more general findings of fact made by the Tribunal.

THE OVERALL RESULT

82. The overall result is that I allow the appeal by HMRC and dismiss the cross appeal by the Taxpayer. The supply in the present case was a single composite supply of two non-ancillary elements. The supply was a standard rated supply of services and was not a zero rated supply of food.