The Chartered Institute of Taxation

Advanced Technical

Domestic Indirect Taxation

November 2023

Suggested solutions

ANSWER 1

Since the current Lease has several distinct features, at the outset the question arises as to whether they represent several principal supplies or a single economic supply. Under established caselaw, there is a single supply where one or more elements:

1) constitute a principal supply and another element (or elements) represents an ancillary supply(ies) which shares the tax treatment of the principal supply. A supply is ancillary to a principal supply if, from the perspective of the customer, it does not constitute an aim in itself but rather a means of better enjoying the principal supply (see *Card Protection Plan Case C-349/96*). Given that the Club is an unincorporated body, the "customer" this context is the typical Club member. On the facts, the principal/ancillary supply scenario does not arise here; or,

2) are so closely linked that they form, objectively, a single indivisible economic supply that would be artificial to split (see *Levob Verzekeringen Case C41-04)*. In the context of the sport of sailing, access to land to provide Club facilities in conjunction with the right of members to sail on the adjacent Lake, are inexorably linked. From the perspective of the typical Club member, both elements represent a single indivisible economic supply. The fact that some of the elements could be the subject of separate supplies is irrelevant. While the consideration relating to the elements is separately identified and quantified may be indicative of independent supplies, it is not decisive.

Having concluded that the rights granted under the Lease represent a single supply, to establish its VAT status, it is necessary to identify its predominant element, having regard to the qualitative and not merely quantitative importance of the various elements (see *Faaborg-Geklting Case C-231/94*). Given the principal objective of the Club and the rationale for membership, objectively the Lease aims to secure long term facilities for members and invitees to participate in the sports of sailing yachts and kiteboards.

VAT exemption extends to a supply made by an "eligible body" to an individual of services closely linked with and essential to sport or physical recreation in which the individual takes part. Unlike the exemption relating to the grant of sports' facilities for a period exceeding 24 hours or a series of ten or more lets, exclusivity of occupation by the hirer is not required under the sports' exemption.

While the sports' VAT exemption makes no reference to the letting of sports facilities, the relief extends to such supplies (see *Bridport and West Dorset Golf Club Limited Case C-495/12*). Although the Foundation's supply relates to land which has not been especially adapted for sport or physical recreation, that does not preclude exemption here - in the context of sailing, a body of water suffices, added to which users are required to comply with the rules laid down by water sports' national governing bodies.

Although the Foundation's supply is to the Club, the exemption applies given that the beneficiaries of the supply are individuals participating in sport or physical recreation –*Canterbury Hockey Club Case C253/07*.

Both yachting and kiteboarding are recognised sports; should there be any doubt in relation to kiteboarding, participation represents physical recreation.

Exemption is restricted to supplies made by an eligible body. On the face of it, the Foundation meets the criteria of an eligible body given that it is non-profit making body whose charitable objects are exclusively sports related.

Should HMRC conclude that the Foundation is not making a single supply of sports or physical recreational services, but instead two discrete supplies: firstly, services relating to sport and secondly, the lease or letting of land, then both supplies are exempt from VAT, with the latter so qualifying for the following reasons:

1) the Lease relates to a defined area,
2) the Club has the right to occupy the 1.5 acres of land adjacent to the Lake as owner with an entitlement to exclude others,

3) its right of occupation is for an agreed duration,
4) payment covers the period of occupation,
5) from the perspective of the Foundation, the Lease is essentially a passive activity which does not generate significant added value, and
6) the Foundation has not opted to tax the land.

On this analysis, the Club has overpaid VAT. Since the Foundation has erroneously issued VAT invoices and accounted to HMRC for the tax collected, the primary responsibility rests with it to recover from HMRC tax overpaid in accordance with the procedure set out in HMRC's guidance in Notice 700/45. Given that the Club has borne the burden of VAT incorrectly charged, HMRC will not refund VAT incorrectly paid if, as here, the Foundation will be unjustly enriched. To avoid this, the Foundation must provide HMRC with a written undertaking that it will reimburse the Club in full, without deduction for its costs within 90 days, etc.

In relation to the new lease, in the interest of flexibility, the Foundation should agree not to opt to tax the land. Although it is considered that the current Lease provides for a single economic supply of sports services, it is notoriously difficult to so conclude with certainty. It is also exceedingly difficult to secure from HMRC an unambiguous clearance. Accordingly, it is recommended that the parties separate the services into a lease covering the 1.5 acres, with access to the Lake's waters covered in a separate agreement. In both documents, the Foundation should reserve to itself the right to charge VAT and, where relevant, recover from the Club VAT due, plus interest and penalties should HMRC take a contrary view.

MARKING GUIDE

TOPIC	MARKS	
Does the Foundation's supply(ies) under the Lease represent a single composite supply or multiple supplies, based on the following criteria: (a) Attributes of a single supply - (i) principal/ancillary elements (*CPP*) or (ii) elements so closely linked that they form a single, indivisible supply (*Levob Verzekeringen*). (b) Every transaction should be regarded as distinct and independent. (c) A single supply from an economic point of view should not be artificially split. (d) The essential features of the transaction should be identified from the perspective of the typical member. (e) No absolute rule applies. (f) The fact that, in other circumstances, the different elements could be supplied separately is immaterial. (g) Separate invoicing and pricing is relevant, but not decisive. (h) A single supply consisting of several elements is not automatically similar to a supply of those elements separately. Maximum mark based on the above mentioned criteria. *[Examiner's note: candidates who reach a different conclusion from the suggested solution will not be penalised and will be credited with marks based on the quality of their answers and analysis].*	2 ½ ½ ½ ½ ½ ½ ½	4
Conclusion on single/multiple supply under Lease *(Examiner will be flexible in awarding marks based on a candidate's analysis)*		2
VAT status of supply based on predominant element (Faaborg-Geklting) and conclusion *(Examiner will be flexible in awarding marks based on a candidate's analysis)*		2
Scope VAT exemption on sports and physical recreational services: (a) Letting of sports facilities		2
(b) Provision to an individual		1
(c) Foundation an eligible body		1
(d) Sailing and kiteboarding recognised sports (in the alternative, kiteboarding represents physical recreation)		1
Scope of exemption in relation the letting of land (½ mark for each of the following items, capped at 2 marks): (a) the lease relates to a defined area, (b) the Club has the right to occupy the 1.5 acres of land adjacent to the lake as owner with the right to exclude others, (c) Club's right of occupation for an agreed duration, (d) payment covers the period of occupation. (e) from the perspective of the Foundation, lease is essentially a passive activity which does not generate significant added value, and (f) the Foundation has not opted to tax the land.		2
Recovery of output tax overpaid, unjust enrichment and conclusion		3
Advice in relation to structure of new lease		2
TOTAL		**20**

ANSWER 2

The letting by the University of the upgraded student rooms will be exempt from VAT, with input tax incurred on the Hall's refurbishment irrecoverable. Exceptionally, the first grant of a freehold interest or a lease for a term exceeding 21 years by a person constructing a building to be used as student accommodation is zero rated, with associated input tax deductible in full.

In *Link Housing Association [1992] STC 718,* the Tribunal rejected HMRC's assertion that "constructing" limited zero rating to the first grant of a recently constructed qualifying residential building which had not been occupied, concluding that grammatically "constructing" extended to "a person who has constructed "the building". Since the early 1990s, HMRC has adopted this interpretation.

Accordingly, the University may proceed on the basis that it has person constructing status in relation to Hermitage Hall, and recover VAT incurred on its refurbishment as attributable to the zero-rated major interest supply.

Should HMRC not seek to reverse the ruling in *Link Housing*, they could potentially deny the University credit for input tax incurred on the works on the basis that the proposed arrangement represents an abuse of VAT law, reasoning:

1) Zero rating must be interpreted strictly. The relief is directed at relieving from VAT the provision of new housing, not the maintenance and refurbishment of existing property.

2) The grant of a 25 lease to AJU Enterprises Ltd is contrived to secure full recovery of input tax incurred in upgrading a 50-year-old building constructed by the University before the introduction of VAT. Deduction of such input tax goes beyond the rationale envisaged by the VAT Act 1994 in relation to zero-rating.

In *Halifax plc [2006] STC 919,* the EU abuse of law principle was extended to VAT law, subject to both of the following limbs being met:

1) the transaction results in the accrual of a tax advantage, the grant of which is contrary to the purpose of the VAT Act. This limb will not be met where a taxpayer has adopted and implemented an arrangement with the intention of minimising VAT and it results in less VAT payable than another route to the same result. The arrangement must be contrary to the essential purposes of the legislation.

2) Objective factors point to the essential aim of the transaction as securing a tax advantage. The "essential aim" of the transaction" is a high threshold, with the Court of Appeal in *WHA Ltd [2013] UKSC 24* considering that it represents the "sole" aim of obtaining a tax advantage, but incidental commercial justification is not enough to preclude abuse.

In considering the second limb, the Courts are concerned with establishing the real substance and significance of the transaction(s) concerned, taking account of its purely artificial nature, as well as links of a legal, economic and/or personal nature between the participants, with the stated intentions of the parties discounted. Where a taxpayer chooses one of two transactions, it is not required to select the one which involves paying the highest amount of VAT; it is entitled to structure its business to limit its tax liability (*Halifax plc, RBS Deutschland Holdings GmbH Case C-277/09*).

Where abusive practice is established, a penalty should not be imposed (*Halifax plc)*, but rather the transaction be redefined to establish the situation that would have prevailed. Thus, here the input tax incurred should be recharacterised as exempt input tax, with the University repaying HMRC input tax overclaimed.

Although the principle is based on EU law, *Halifax plc* is part of UK VAT law and remains so despite Brexit. Importantly, where HMRC rely upon abuse of law, the onus rests with them to establish both limbs of the test.

In relation to the proposal, the first limb in *Halifax plc* will not be met provided that the lease granted to AJU Enterprises Ltd reflects economic and commercial reality and is fully implemented in accordance with its terms. The grant of a major interest lease is clearly contemplated by the Act; the arrangement contemplated does not represent an artificial step contrary to the underlying purpose of the VAT Act. Under the *Halifax plc* principle, the University is fully entitled to adopt the most beneficial option.

Based on this analysis, strictly there is need to deal with the second limb. Were that necessary, if the arrangement is followed through fully, with the consideration due under the lease objectively based on market value and, to the extent that the University funds the subsidiary's operations, it is at arms-length, it is doubtful that the second limb would be met.

MARKING GUIDE

TOPIC	**MARKS**
Scope of person constructing status:	
Identification of zero-rating on the grant of a major interest by constructor	1
Scope of person constructing as considered by *Link Housing Association*	1
HMRC's practice in relation to person constructing	1
Right of deduction and conclusion	1
Abuse of law:	
Summary of *Halifax plc* test (1 mark for each limb identified)	2
Citation of additional supporting cases, other than Halifax (½ mark for each relevant case, subject to maximum of 2 marks)	2
Recharacterisation of transaction where abuse established and how it may apply to the University	2
Penalties	1
General relevant observations (½ mark for each relevant point, subject to maximum of one mark, for example; onus on HMRC to meet both limbs, abuse should only be applied in exceptional circumstances but HMRC see it as an important weapon to be deployed in its campaign against avoidance, etc)	1
Conclusions:	
(a) Proposed transaction contrary to purpose of VAT Act? (b) Essential aim avoidance of tax?	2 1
TOTAL	**15**

ANSWER 3

The SDLT assessment is concerned with two inter-rated issues: firstly, does the transaction relate exclusively to residential property and secondly, is the higher rate precluded from relief?

The SDLT rates distinguish between land which is exclusively "residential property" and mixed use property, with the rate of tax applicable to the latter appreciably lower

Residential property encompasses a dwelling and land which forms part of its garden or grounds. The garden and grounds are not restricted to that required for the reasonable enjoyment of the dwelling having regard to its size and nature.

HMRC's assessment is premised on the parkland being part of Foggy End's grounds. In so concluding, it matters not that the parkland was conveyed with the house, nor that the property is registered under a single land registry title. "Garden" and "grounds" are not defined, so they should be given their ordinary meaning, taking account of all relevant factors. The law refers to the garden or grounds of a dwelling; that suggests a connection between them and the dwelling. Where the grounds surround a large country house, then "grounds" may be construed widely. The position and layout of the land is relevant, particularly where it is suitable for the day-to-day domestic enjoyment of the dwelling's occupants, with adjoining parkland adding to the dwelling's aspect. The use of the land is highly relevant, with a Tax Tribunal concluding that land used for a commercial purpose cannot constitute "grounds", but rather premises on which a business is conducted.

In concluding that the parkland formed part of the Foggy End's grounds, HMRC appear to have been unduly influenced by the parkland adding to the ambience of the House. Critically HMRC have failed to give sufficient weight to part of the parkland let under a grazing licence. It represents part of the business activity(ies) of the landowners, so the transaction should be viewed as mixed use property.

Foggy End is undoubtedly a higher threshold interest dwelling subject to SDLT at 15%, plus a 2% surcharge in the case of a non-UK resident purchaser. However, the higher rate does not apply where the interest is acquired exclusively for one or more of the purposes detailed in FA 2003, Schedule 4A, paragraph 5. The company's lawyers claimed the relief contained in paragraph 5(1)(ab) i.e., the house, garden and grounds were to be used as part of a trading operation with a view to securing a profit. On the effective date, there was no intention that the property (or part of it) would be occupied by any person connected with the company. Instead HMRC has chosen to deny the relief under an unrelated heading; its decision to do so is misconceived. The company never relied on the relief set out in paragraphs 5D and 5E; it is sufficient that the exemption allowed for in paragraph 5(1)(ad) applied at the effective date. If, on completion of its review, HMRC reaffirm their decision, Sabi Investments Ltd ("SIL") should proceed with its appeal.

In relation to the penalty notice, HMRC have concluded that SIL was careless when it filed the return. If the assessment to SDLT is set aside, the penalty falls away. But in the event of a finding that the company understated its tax liability, independently SIL will be excused the penalty on a finding that it exercised reasonable care. Reliance on another person will not constitute reasonable excuse.

In *MAS Fabrics Hong Kong Ltd [2021] UKFTT 116,* in assessing whether a non-resident company should be excused for an error attributable to its UK professional advisers, the Tax Tribunal concluded that it is insufficient appoint a reputable professional practitioner; a non-resident must go further and adopt an enquiring mind into the advice that it receives, and the basis of the reliefs claimed. However, there is no need for it to carry out its own research nor seek HMRC guidance.

Based upon the limited information available, it is evident that the company's lawyers communicated to it the basis of the reliefs claimed. This evidence should be supplied to HMRC in support of the review.

Finally, HMRC has the discretion to suspend a penalty. It is unclear whether HMRC has exercised that discretion; in the absence of evidence that it has, it should be highlighted in the review submission. A decision by HMRC not to suspend the penalty is an appealable matter to a Tax Tribunal.

MARKING GUIDE

TOPIC	MARKS
Statutory scope of "residential" and "non-residential" property	2
Scope of garden and grounds	2
Analysis and conclusion on parkland	2
Identify charge to higher rate of 15%, plus surcharge	1
Consideration of scope of exemptions from the charge	2
Conclusion on HMRC's decision	1
Scope of penalty regime and careless behaviour	1
Scope of reasonable excuse	1
Can the company's action in relying on its lawyers be excused? (supporting case law not required to secure the marks)	2
Absence of HMRC's suspension of penalty	1
TOTAL	**15**

ANSWER 4

The effect of the Real Estate Election (REE) by Lahn Developments Ltd's ("LDL") is that all non-residential properties which it acquires after making the election are automatically opted for tax (subject to the operation of anti-avoidance rules contained in para. 12, Sch. 10, VATA 1994), without the need for a separate election in individual cases: para 21, Sch 10, VATA 1994. Accordingly, the site will be regarded as opted.

Alpha Insurance Ltd ("Alpha") - Lease Surrender

The property currently occupied by Alpha is not opted and the REE has no effect in relation to it. LDL wants to pay Alpha to surrender its present lease. The surrender of a lease is a supply of land. Reverse surrenders occur where the landlord pays the tenant to surrender its lease. A reverse surrender constitutes a change in the contractual relationship; accordingly, LDL's payment to Alpha is exempt from VAT given that Alpha has not opted to tax the property

However, on an alternative analysis, LDL could be regarded as making an incentive payment to Alpha to take a lease and become anchor tenant in the new data centre to encourage other insurance companies to take leases. HMRC take the view that most reverse premium payments do not constitute consideration for supplies since they are no more than inducements to tenants to take leases and to observe their obligations. Only where such a payment is directly linked to benefits that a tenant provides outside normal lease terms will there be a taxable supply. Accordingly, unless Alpha is doing something above and beyond in taking on the lease, the payment is likely to be outside the scope of VAT.

It is arguable that in making a dilapidations payment to enable the landlord to restore the building effectively it is a re-imbursement of the cost of goods and services assumed by the landlord, so representing additional consideration for the lease. If the payment obligation was not there, the landlord would probably charge a higher rent to cover this cost. On the other hand, if the tenant had exceeded the wear and tear that might reasonably be expected during the period of the lease, or even undertaken unapproved alterations, the dilapidation payment represents rectification of damage rather than for use of the premises. Accordingly, it may be difficult to establish that the rent has been set with that in mind. Consequently, HMRC generally take the view not to treat dilapidation payments as further consideration for the supply of a lease, regarding them as outside the scope of VAT.

Beta Insurance Ltd ("Beta") - Lease

An Option To Tax ("OTT") will be disapplied where:

1) on the grant of an interest in the property, it is or will be within the scope of the Capital Goods Scheme.
2) the grantor, or a person financing the development, intend or expect that the property will be occupied by either of them, or by a connected person, for ineligible purposes. A development financier is widely construed (and will certainly cover Beta); and
3) the property will be used other than 'wholly' or 'substantially wholly' for eligible purposes. 'Substantially wholly' for eligible purposes are taxable activities exceeding 80%.

The disapplication of an OTT does not apply where a development financier occupies no more than 10% of the building. Here, since Beta will occupy 20% of the site, the exclusion will not apply. As a UK motor insurance company, Beta will be mainly using the land for exempt purposes. Accordingly, as it has provided development finance for the property, the OTT will be disapplied as far as it applies to the lease to Beta.

Supplies under the Lease Agreements

Under each lease LDL provides additional facilities, alongside the leasing and letting of immovable property. The question is whether it is making a composite supply of land, or separate supplies of an interest in land and various services associated with the land.

A single overall supply will be made if either:

1) There is a principal supply, to which other supplies are ancillary; or
2) There is a predominant supply which governs its whole VAT character:

There are three possible analyses:

1) There is a supply of an occupational right, with various add-ons. The charges under the lease agreement reflect a single/composite supply of land which will be exempt in the case of Beta and standard rated in all other cases by virtue of the REE.
2) There is a single supply of the various elements covered under the agreement which go beyond the characteristics of leasing or letting of land, so representing a standard rated supply of facilities.
3) There is a mixed supply. It is necessary to separate out individual items of the letting, such as the provision of parking and health club membership where separate consideration can be attributed to them.

For Alpha and other future tenants, the supplies will be standard rated either automatically because of their nature (analysis 2), or as a combination of the OTT (analysis 1) and their individual liability (analysis 3). For Beta, the question is important insofar as to whether the whole supply should be standard rated as a single supply of facilities or if elements should be carved out as standard rated.

While it could be argued that the supply goes beyond a passive supply of an interest in land with little added value, the overriding intention seems to be the provision of accommodation with the other elements representing no more than additional incentives to encourage take up; so it is considered that the predominant supply is that of land. While the supply of a restaurant and car-parking is not unusual in a leased commercial property, the provision of membership at a local gym is less so, and there would certainly seem to be a reasonable possibility of HMRC seeing this element as standard rated.

MARKING GUIDE

TOPIC	**MARKS**
Effect of REE	2
Alpha Insurance Lease Surrender:	
Reverse surrenders	2
Incentive payments/anchor tenants	2
VAT treatment of dilapidations	2
Beta Insurance Lease:	
Disapplication of option to tax	2
Effect of disapplication	2
Supplies under the Lease Agreements:	
Composite and mixed supplies	2
Analysis of nature of supply	2
Impact upon Beta Insurance only	2
Consideration of analysis and Reasoned Conclusion (NB – does not have to agree with model answer)	*2*
TOTAL	**20**

ANSWER 5

VAT Grouping Eligibility

Ms Ahmed and Mr Brownlow in partnership trading as Amlow Investments LLP ("Amlow"), along with Fabby Food Ltd ("Fabby") and Fhosst Catering Ltd ("Fhosst") are all resident in the UK. Amlow controls both Fabby and Fhosst (on account of Amlow being their holding company - as defined in s. 1159, Sch.6, Companies Act 2006 - were it a body corporate). In principle then, all three entities are eligible to be treated as members of a VAT group (see s.43A(5) & 6(b), as read with s.43AZA(4) & (5), VATA 1994). However, this is conditional on Fabby, as a "specified body" (as defined in art.3, VAT (Groups: eligibility) Order 2004 (SI 2004/1931) ("The Order"), meeting both the benefits and consolidated accounts conditions in articles 5 and 6 respectively of the Order.

Fabby is a specified body given that:

1) the value of the group's external supplies will exceed £10m in the forthcoming year.
2) it is partly owned by a third party due to Mr Turner's 40% shareholding.
3) it will provide management services to other group members of which Amlow, in the absence of group treatment, will be unable to recover in full VAT chargeable on such supplies. Given the quantum of the management services and the resources required to provide them, realistically they cannot be viewed as incidental but rather represent a discrete business activity.
4) it is not excepted from being a specified body (e.g., it doesn't control all of the other members or is a charity)

Turning to the benefits and consolidated accounts conditions, the benefits condition will be satisfied if no more than 50% of the benefits generated by the business activity accrue to third parties. With Fabby, 55% of the profits are distributed to Mr Turner and so this condition is not satisfied.

Consequently, it is not necessary to consider the consolidated accounts condition, as the membership criteria has not been satisfied in respect of Fabby. Accordingly, Fabby will not meet the eligibility test. Given however that Fabby makes monthly repayment returns, it will still be able to retain this benefit.

VAT Grouping - Fhosst and Amlow

Whilst the remaining entities may be VAT grouped; the question arises as to whether this would be favourable.

OUTPUTS	VAT Group (Fhosst and Amlow)
	£
SR turnover	14,300,000
ZR turnover	0
Residential rents	16,200,000
Total turnover	£30,500,000
INPUTS (all bearing 20% VAT)	
Directly attributable to taxable	1,100,000
Proposed Management services	500,000
Other Residual overheads	1,000,000
VAT Recovery Rate 14.3m/30.5m =	47%
VAT Recovery	
1.1m + (£0.5m+ £1m x 47%) =	1,805,000
Liability (SR turnover – deductible inputs)	12,495,000
VAT	2,499,000
If Fhosst and Amlow are separate registrations	
(2,189,016 + 276,098)	2,465,115
Benefit of retaining separate registrations	33,885

Consequently, from a financial point of view, it would be preferable to retain separate VAT registrations despite the benefits of VAT group treatment, for example, reduced administration in the number of returns to be submitted, potentially fewer VAT visits, etc

A benefit of keeping the registrations separate at present will be the adverse cashflow effect of having to pay VAT payments on account. The projected VAT liability of the proposed group would exceed the Payments On Account threshold of £2.3 million, requiring the group to pay part of its VAT liability in advance. The threshold would probably be exceeded in the November 2024 quarter based on the projections, with the annual cycle commencing in June 2025. The instalments would be 1/24th of the annual liability (£104,125), payable on the last working day of the second and third months of every VAT quarter. The 7-day extension for paying electronically does not apply to payments on account.

Mitigating VAT costs

If the registrations are to be kept separate, consider:

1. Avoiding VAT on management charges – possibly using joint contracts of employment.
2. If management charges are retained, consider alternative bases for allocating them between the entities which more directly reflects the use of the resources as opposed to a turnover based allocation. Possibly less time is required to manage the Amlow's property portfolio, so consider whether staff time allocation/ floor area of staff involved (etc) would be more appropriate methods of allocation,
3. The Standard Method Override – depends on the use of input tax but should be considered
4. In relation to Amlow, formulate and apply to HMRC for a special partial exemption method which mitigates irrecoverable VAT incurred on overhead expenses attributable to the residential portfolio.

MARKING GUIDE

TOPIC	**MARKS**
Requirement 1	
VAT Grouping Eligibility	
Eligibility for inclusion of Amlow in VAT group – does it control the corporate bodies?	1
Further Grouping Tests	
Is Fabby is a specified body?	1
Application to Fabby	2
Benefits test	2
Whether Grouping is beneficial	
VAT Grouping Calculation	2
Implications of separate registrations	1
Payments on Account Considerations	2
Requirement 2	
Mitigating VAT Losses	
Discussion of ways in which VAT costs may be mitigated – 1 mark per example	4
TOTAL	**15**

ANSWER 6

Assessments 1 and 2

The provision of the television services is standard rated. The supply of the magazine, if regarded as a separate supply, would be a zero-rated supply of a publication: Items 1 and 2, Group 3, Schedule 8, VATA 1994.

Telewest Communications plc v C & E Comrs [2005] STC 481 concluded that, in the absence of a sham or an abuse of law, there was no basis in law under which supplies received by subscribers for a magazine and television service under separate contracts with differing supplies could be merged to produce a single supply. While this has not been expressly overruled, notes (2) and (3), Group 3, Sch. 8, VATA 1994 were introduced to counteract it. They provide that where a taxable supply (other than zero rated) made by A is linked to a zero-rated supply made by B, and both supplies, if made by the same person, would have constituted a single supply, they shall assume the VAT character of the taxable supply.

Neisse's supplies are not exclusively connected with Oder's supply of the television service. It makes independent supplies, and Oder is simply one of its customers (albeit, its largest). In respect of the joint supplies under the tri-partite agreement, since the supplies originate from the same contract, it is difficult to argue they are not connected.

The next issue is whether, had they been made by a single person; they would have constituted a single supply? The VAT arrangements need to be evaluated from the point of view of the average consumer (Card Protection Plan (Case C-349/96) [1999] STC 340) ("CPP") which tends to be HMRC's starting point. Customers here make a single payment despite the fact they entered into a tri-partite agreement, so probably consider it single supply from that perspective. There is however the opt out facility which, while rarely exercised, demonstrates that the products can be delivered separately. So, the position is not clear.

The question is whether the elements combine as identified in CPP and *Levob Verzekeringen BV v Staatssecretar van Financien* (Case C-41/04) [2006] STC 766 ("Levob") to produce a single supply where:

1) as in CPP, one or more elements represent the principal supply with other elements ancillary thereto (in that they are not an aim in themselves but a better way of enjoying the principal supply), or
2) as in Levob, two or more elements are so closely linked as to form, from an objective point of view, 'a single, indivisible economic supply which it would be artificial to split.'

The television service is clearly the principal supply, with the magazine's listings and reviews a better way of enjoying the service. However, It is clear that there are magazine subscribers who are not television subscribers and to that extent at least, the magazine could be regarded as a distinct supply, and an aim in itself.

The Levob analysis (and *The Honourable Society of the Middle Temple v R & C Comrs [2013] STC 1998,* which followed it), are less convincing in this scenario. The elements can be and are divisible as a matter of fact by virtue of the opt out and the ability to purchase separately, and so it does not appear artificial that they may be split.

Consequently, there appears to be a reasonable argument that the supplies do not constitute a single supply, in which case the *Telewest* ruling will stand, with both assessments 1) and 2) failing.

Assessment 3

A payment made to a person is only consideration for a supply and so subject to VAT where it is pursuant to a legal relationship between supplier and customer, giving rise to reciprocity see - *Tolsma v Inspecteur der Omzetbelasting Leeuwarden (Case C-16/93) [1994] STC 509*
There is a legal, contractual relationship between Oder and Neisse for the supply of the magazines but not in respect of the deficit payments. For the payments to be taxable, Neisse must do something

in return for them. Neisse supplies the magazines to the subscribers, notwithstanding that their cost exceeds the sums received by it. However, Oder has no obligation to make these payments.
In the absence of reciprocity, the shortfall payments do not represent consideration for a supply, and accordingly are outside the scope of VAT – see, for example, *C & E Comrs* v *Church Schools Foundation Ltd* [2001] STC 661. Accordingly, the assessment would fail.

MARKING GUIDE

NB – full credit given for other relevant cases and/or reasoned conclusions

TOPIC	**MARKS**
Assessment 1 and 2	
Analysis of basic supplies	1
Application of Telewest	2
Statutory override of Telewest	1
Whether Oder and Neisse are connected	2
Whether a single supply	2
Consideration of CPP	1
Consideration of Levob	1
Assessment 3	
Tolsma considerations	1
Legal and contractual relationship	2
Whether reciprocity	2
TOTAL	**15**