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Interpretation of VAT and excise legislation

Response by the Chartered Institute of Taxation

1 Executive Summary

1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.

1.2 We set out below our comments on the proposed 'Interpretation of VAT and excise legislation' draft Finance Bill measures, which are intended to clarify how VAT and excise legislation should be interpreted in light of the changes made by the European Union (Withdrawal) Act 2018 ('EUWA 2018'), and the amendments made to that Act by the Retained EU Law (Revocation and Reform) Act 2023 ('REULA 2023').

1.3 The CIOT has submitted feedback on the draft Finance Bill measures as part of its membership of and engagement with the Joint VAT Consultative Committee ('JVCC'); our responses to the JVCC are embedded within this submission.

1.4 The consistent message received from our members who provided feedback is that interpreting the draft legislation is a complex task. Difficulty with interpretation impacts certainty, reducing confidence for businesses in the ability to plan ahead.

1.5 We would be happy to attend a further meeting with HMRC and/or HMT to discuss any of the points about the draft legislation raised in our submission.

2 About us

2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Introduction

3.1 Our stated objectives for the tax system include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

3.2 We agree with the consultation's 'Summary of Impacts' statement that it is not anticipated that there will be impacts on those in groups sharing protected characteristics by this measure.

3.3 The consultation documents are silent on the net zero impacts of this measure, though our position is that we do not anticipate any impact. The CIOT would like to see a statement on net zero in its own section heading in all TIINS so that it is clear to readers that the topic has been considered by the government.

4 General points on the draft Finance Bill measures

4.1 As part of the CIOT's JVCC representation, on 3 October 2023 we attended a roundtable meeting focused on this draft legislation, and engaged further with the JVCC both in person at JVCC meetings and by email with written feedback, embedded in this response. Examples of commercial uncertainty in respect of the draft legislation are listed in Appendix 1.

4.2 We understand the draft legislation to be preserving general principles (as they existed on 31/12/20) as an aid to construing legislation going forward when determining a conforming interpretation is possible and they are not intended to override UK legislation, as a conforming interpretation is not possible after 31/12/23.

4.3 Member feedback has indicated that it is a complex exercise to determine the effectiveness of the draft legislation. This in part is due to references to other legislation where one would require editorial footnotes indicating where the effect of a provision is subject to non-textual amendment(s). In the field covered by the

draft legislation, the use of non-textual amendments and application/disapplication/modification by reference to purpose makes the task of considering the effectiveness of the draft extremely difficult.

4.4 The draft legislation makes a distinction between disapplication and quashing on the one hand and interpretation on the other hand. However, in practice, the distinction might, without more, be insufficient to achieve the desired result. In order to be effective, in future if Parliament wishes to derogate from VAT and excise REUL, it will need to do so expressly and clearly in order to avoid an argument limiting the effect of the new provision by reason of interpretation. A potential problem with the distinction is that past decisions may not have always made it clear whether the Court was deciding a case on one basis or another so the distinction will generate uncertainty going forward for that reason, hence we consider that s.4 should continue to apply more generally.

4.5 Another reflection for possible consideration is that the limited role given to general principle as an aid to construction when undertaking a conforming interpretation presumably extends to the abuse principle; the implications of this are possibly not entirely clear, ie the proposed ss7 states that the new section is to be read with s 42 TCBTA, which preserves the abuse principle, however the drafting is not the clearest; we would recommend that the draft legislation makes it clearer that it includes the preservation of the abuse principle.

5 Interaction with direct effect

5.1 The UK legislation that transposes EU Directives does not always match or use the same wording as the EU law being implemented. Indeed, UK legislation sometimes elaborates, uses alternative language, overlays UK principles or policy and qualifies definitions. In some cases, this would mean that the UK legislation was adequate and went above-and-beyond the EU language. There are instances however, where the UK did not transpose EU Directives fully, leading to legal gaps between UK and EU law.

5.2 Historically, taxpayers had no need to be concerned by these gaps, as taxpayers could always rely on the direct effect of EU law. In VAT, this was the wording of the Principal VAT Directive, being Council Directive 2006/112/EC ('PVD').

5.3 There are many case law examples of taxpayers relying on their directly effective rights from PVD. Section 4 of EUWA 2018 retained these directly effective rights within UK law. However, those rights must have been recognised by a UK court in a case either decided or commenced before the end of the transition period.

5.4 However, section 2 of REUL repeals section 4 of EUWA 2018. Therefore, taxpayers can no longer rely on directly effective rights if such rights have not already been implemented into UK law. Consequently, UK taxpayers cannot rely on PVD in instances where there is a gap in the UK legislation, or there is divergence, unless supporting UK case law exists.

Section 1(2) of the Draft Amendments states that:

> 'Section 4 of EUWA 2018 (retained EU rights, powers, liabilities etc) continues to have effect (despite the provision made by section 2 of REULA 2023) for the purpose of interpreting VAT and excise law…' (our emphasis).

The Marleasing principle of consistent interpretation effectively continues to apply therefore for the purpose of interpreting VAT and excise legislation.

5.5 The Draft Amendments do not, however, appear to assist us in addressing gaps in the UK legislation. Consistent with the position in practice to date, it is not possible to 'interpret' UK law where there is no UK

law to interpret. So, in those instances where there is also no UK case law to assist and, being unable to rely on PVD, this leaves a lacuna for issues to arise that had previously not been considered before.

5.6 An example of such a challenge is in relation to the existing VAT exemption within the PVD for transactions including negotiation in relation to deposit accounts, savings accounts etc. This exemption has been omitted from the UK VAT legislation and no UK case law exists on this matter to support. To date, taxpayers have been relying on their directly effective EU rights for the application of this VAT exemption.

5.7 Section 1(5) of the Draft Amendments also do not assist. This seeks to preserve retained general principles of EU law. Such principles do not include direct effect, but are concerned with eg legal certainty, equal treatment, proportionality, etc.

6 Interaction with case law

6.1 The draft legislation does not make it clear how far higher courts are intended to be bound by prior CJEU case law, which indicates a possible defect in the drafting. The draft explicitly states that s.6 of the EUWA 2018 Act, as amended, applies to issues relating to general principles and that section as amended states that prior CJEU case law is no longer binding on higher courts. However, the clause is otherwise silent. This creates uncertainty for business and advisers. We would like to see the clause generally state to what extent s.6 as amended is intended to apply. The application of s.6(4)(ba) (as inserted by the 2023 Act) could be viewed as too extreme in this context in so far as it states that a higher court is in no way bound by CJEU case law.

6.2 The purpose of the bespoke legislation is to preserve case law, which is not achieved if higher courts are completely free to depart from it. However, in principle, it may be appropriate to give higher courts a discretion to depart from CJEU case law is the circumstances in s6(5)(b) apply or in the extreme circumstances when they were not bound before the 2023 changes. The current failure to make a reference to s.6 except in relation to general principles makes the position unclear. This is very significant because in most cases the section is concerned with issues of conforming interpretation of the directive which in many cases may be uninfluenced by any issues related to general principles. So, the failure to state how far s.6 of the EUWA 2018, as amended in 2023, is intended to apply more generally is very significant.

6.3 The draft makes it clear that the principle of disapplication is no longer intended to apply; as this will create considerable uncertainty, it is not a desirable change.

7 Comments on particular areas of the draft Finance Bill measures

7.1 Subsection 2 of the draft states that s.4 EUWA 2018 continues to apply for the purposes of interpreting VAT law. However, s.4 is not an interpretative provision it is instead a freestanding provision that gives individuals rights under directives or the Treaty and those rights can potentially override UK legislation, which is presumably not intended. However, taxpayers may be in a better position with the provision than without it. We consider that the section ought to be making a reference to s.2 of EUWA 2018 since, along with s.5, this is probably one of the two sections that currently preserves obligations of conforming interpretation that the draft clause is intending to preserve. The failure to refer to it is therefore a lacuna.

8 Tax Adviser

8.1 Our members have written articles providing analysis and commentary on this topic in the CIOT and ATT's magazine, Tax Adviser.

8.2 The articles *'Our changed approach to EU law: the impact on VAT'*, and *'The Retained EU Law (Revocation and Reform) Act 2023: a significant diminishment'* are attached at appendices 2 and 3 for reference.

9 Acknowledgement of submission

9.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

20 November 2023

Appendix 1 – Examples of difficulties in interpreting the draft legislation when applied to commercial scenarios

The following are commercial examples that demonstrate difficulty when interpreting the draft legislation, discussed by a CIOT representative at the JVCC meeting on 13 October 2023, and later followed up in writing by email to the JVCC on 17 October 2023.

We have identified a few examples where we are concerned that the REUL Act 2023 could alter the interpretation and application of VAT with effect from 1 January 2024. In the discussion, we agreed to share an email outlining these examples as we are keen to understand whether the VAT and excise draft finance bill measures would resolve the uncertainty.

1. **Intermediation of deposit accounts, bank accounts, cash ISAs etc**

   The REUL Act 2023 raises a specific issue in relation to the availability of the financial intermediary exemption in relation to item 8 of group 5, schedule 9 – ie bank accounts, savings accounts etc. The way in which the intermediary exemption is currently drafted in UK law does not cover these types of products, this is acknowledged in HMRC's guidance which states however, that the exemption can apply in line with the Principal VAT Directive. It would appear that the REUL Act would have the effect that this VAT exemption would no longer exist from 1 January 2024 as the VAT exemptions must be construed narrowly and this exemption does not exist within group 5, schedule 9 of the VAT Act 1994.

   If this were to be the case, it would impact deposit takers and ISA providers that incur charges from third parties (eg financial advisers, investment platforms and similar operators) in relation to the introduction of new customers for UK bank accounts, cash ISAs and similar products.

   We are keen to understand whether the draft finance bill measures for VAT and excise would be sufficient to resolve this issue or whether a legislative change is required to allow the intermediary exemption under item 5 to apply to services falling within item 8 of group 5, schedule 9 of the VAT Act 1994?

   In the interests of transparency, this issue has been raised with HMRC's FS VAT policy team and with FS VAT policy at HMT. An initial call was held last on 13 October 2023, during which the working assumption from HMRC and HMT was that a legislative response would be required and that interested parties (including UK Finance) should make representations to the minister on this.

2. **Management of a Special Investment Fund ('SIF')**

   A further area where it would be helpful to understand the practical implications of the draft finance bill measures for VAT and excise relates to the EU VAT concept of a Special Investment Fund (as referred to in Article 135(1)(g) of the Principal VAT Directive and developed through both UK and CJEU jurisprudence).

   We appreciate that work has been ongoing over the last c. 12 months on the consultation on the review of the VAT exemption for fund management services. A key area of consideration in this review has been whether a definition of a SIF needs to be introduced into UK legislation. Members understand from recent discussions with HMRC's FS VAT policy team that the review of the consultation responses and consideration of next steps by HMRC and HMT is now nearing conclusion, and the outcome currently favoured is not to incorporate a principles-based definition of a SIF into group 5, schedule 9 of the VAT Act 1994 at this time (current position outlined below for ease of reference). One member is aware of, and have been involved in, discussions on this with the HMRC FS VAT policy team which have taken place with the IA, PIMFA and others. The question in this email however, is more focused on understanding the impact of the REUL Act and the draft finance bill measures on the fund management VAT exemption so we can build a clear understanding of the legal position after 31 December 2023.

Special Investment Funds	
VAT Directive - Article 135(g)	**VATA 94, Schedule 9, Group 5, Items 9 & 10**
the management of special investment funds as defined by Member States;	Item 9 The management of: (a)an authorised open-ended investment company; or (aa)an authorised contractual scheme; or] (b)an authorised unit trust scheme; or (c)a Gibraltar collective investment scheme that is not an umbrella scheme; or (d)a sub-fund of any other Gibraltar collective investment scheme; or (e)an individually recognised overseas scheme that is not an umbrella scheme; or (f)a sub-fund of any other individually recognised overseas scheme; or … (k)a qualifying pension fund. Item 10 The management of a closed-ended collective investment undertaking

In the context of the above, we would be keen to understand the implications of the draft finance bill measures and whether this would mean that the concept of a SIF (as defined in CJEU jurisprudence and as referred to by the Upper Tier Tribunal in *BlackRock*) continues to exist when it can only reference the exemption within the VAT Directive, in addition to the fund types currently identified in items 9 and 10 of group 5, schedule 9 of the VAT Act 1994.

We are also interested to understand if the exemption within the VAT Directive is to be maintained post 31 December 2023, whether the existence of the fund types listed under items 9 & 10 create any degree of conflict and ordering priority that would need to be rectified.

3. **HMRC VAT grouping policy and *Skandia***

Finally, HMRC's policy on VAT groups and the circumstances in which a supply will be generated on transactions within a legal entity where that entity has a fixed establishment within an overseas VAT group seeks to implement the CJEU judgment in *Skandia*. This policy is implemented through HMRC Briefs (RCB 2/2015, RCB 18/2015, and RCB 23/2015) – no change was made to section 43 of the VAT Act 1994 or to the UK's form of VAT grouping (ie whole entity VAT grouping).

Please could you confirm whether the draft finance bill measures are intended to preserve the policy position as set out in the HMRC Briefs? Members have fed back that this is their understanding of how the draft finance bill is intended to work in practice.

As a separate point, we understand that there are still UK legislative measures that refer directly to European law. For example, in Climate Change Levy, the exemption from taxation for mineralogical and metallurgical processes refers directly to Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006. It appears that this has been revoked by The UK Statistics (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/489), but it is unclear as to whether it has been replaced and, if so, by what. We appreciate that this may not be within the scope of this exercise, but CIOT members have had questions raised concerning whether a

more dynamic approach will be adopted to the activities covered by this exemption – particularly with regard to innovations such as 3D metal printing that would allow metallic components to be produced efficiently in the UK.

Appendix 2 – Tax Adviser article: The Retained EU Law (Revocation and Reform) Act 2023: a significant diminishment

Author: Jeremy Woolf

The Retained EU Law (Revocation and Reform) Act 2023, which has just been enacted, will significantly diminish the relevance of EU law.

In February 2021, I wrote a *Tax Adviser* article, 'EU withdrawal a half-hearted separation' (see tinyurl.com/2jzktd8y), which sought to analyse the impact of the partial snapshot of EU law enacted by the European Union (Withdrawal) Act 2018 ('the 2018 Act'). Since then, there have been court decisions that have clarified some of the consequences of the 2018 Act. Even more significantly, the Retained EU Law (Revocation and Reform) Act 2023 ('the 2023 Act') has just been enacted.

The 2023 Act

The 2023 Act will significantly diminish the relevance of EU law.

Under the 2018 Act, section 4 preserves the ability to rely on EU Treaty rights and rights arising from directives, provided they are of a 'kind recognised by the European Court or any court of tribunal of the United Kingdom' on 31 December 2000. However, as a result of section 2 of the 2023 Act, this will cease to apply after 31 December 2023. Section 3 of the 2023 Act also abolishes the principle of the supremacy of EU law and section 4 abolishes the general principles of EU law from 31 December 2023.

Paragraphs 87-90 of the Explanatory Notes to the Bill in the House of Lords indicate that these charges are also intended to abolish requirements to adopt a muscular conforming interpretation, which in the past has resulted in legislation being construed in a conforming manner even when this did not accord with a natural reading of the UK legislation.

So, the European Union origins of legislation will just be relevant as a contextual and purposive aid to construction.

Impact on direct taxes

As a result of these changes, EU law is unlikely to have any material significance in direct tax after 31 December 2023. This probably extends to the transfer of asset provisions, where Income Tax Act 2007 s 742A provides an explicit statutory EU defence. Despite this statutory recognition, it is difficult to see how, after the 2023 changes come into force, there can be a 'contravention of a relevant treaty provision', which is a condition to this EU defence. The UK will no longer be a party to the relevant treaties and there will then be no legislation, in the form of section 4 of the 2018 Act, seeking to maintain the relevant rights as a matter of domestic law.

Unless fresh legislative action is taken, it will also impact on stamp duty reserve tax and the ability to rely on *HSBC v HMRC* (Case C-569/07) to contend that charges on issue are contrary to EU law.

Impact on indirect taxes

The repeal of section 4 of the 2018 Act means that it will no longer be possible to rely on the VAT directives to override provisions of UK legislation. However, the Value Added Tax Act (VATA) 1994 in its current form remains retained EU law or, as it will now be called, 'Assimilated Law'. The directive will therefore remain an aid to construction, although the Explanatory Notes suggest that the muscular principles of conforming interpretation will no longer apply.

Impact on UK courts

The 2023 Act clearly envisages that former judgments of the Court of Justice on the VAT directive may remain binding on lower courts. However, the general principles of EU law will no longer be part of UK law and the principles of conforming interpretation will cease to apply. This will bring into question whether past decisions that have relied on those principles remain binding on the tax tribunals.

An example of a case whose status may be brought into question is *HMRC v Axa UK plc* [2012] STC 754. In that case, the Court of Appeal considered that a conforming construction of Item 1 of Group 5 Schedule 9 VATA 1994 meant that the Group 1 should be subject to an implied exclusion for debt collection services. It must be very moot whether this will remain good law after 31 December 2023.

The 2023 Act also seeks to give higher UK courts a greater discretion to depart from decisions of the Court of Justice. Section 6 of the 2023 Act amends section 6 of the 2018 Act to make it clear that 'a relevant court of appeal is not bound by any retained EU case law' except when there is binding domestic case law.
The new section 6(5) of the 2018 Act, as inserted by the 2023 Act, also makes it clear that, when deciding whether to apply EU case law, regard is to be paid to 'any changes of circumstances which are relevant to the retained EU law' and also 'the extent to which the retained EU case law restricts the proper development of domestic law'. A court is likely to consider that these considerations are, in any event, relevant when deciding whether to follow decisions of the Court of Justice under section 6 of the 2018 Act prior to its amendment by the 2023 Act.
An example of a case where changed circumstances may mean that it is not appropriate to follow a judgment of the Court of Justice is provided by *Danske Bank v Skatteverket* (Case C-812/19), concerned with the VAT grouping. The court made comments suggesting that it is only fixed establishments within a member state that can form part of a VAT group. The court, at paragraph 33, considered that any national VAT groupings of a member state should 'where appropriate' be recognised by other member states. However, similar policy considerations no longer apply in the United Kingdom because Brexit means that there is no need to recognise VAT groupings in other countries. So different policy considerations now apply in the United Kingdom, where there is no similar need to adopt the restrictive approach applied by the Court of Justice – which, in any event, is not consistent with VATA 1994 s 43(2A), which clearly assumes that non-UK fixed establishments of a group member also form part of a UK VAT group.

Impact on HMRC
These changes will also impact upon HMRC. HMRC will equally be unable to rely on a muscular conforming interpretation of the VATA 1994.

When it was pointed out that the provisions of the 2018 Act might impact on HMRC's ability to rely on the principles of abuse of rights, specific provisions were enacted in Taxation (Cross-border Trade) Act 2018 s 42(4) and s 42(4A) confirming the continued application of the abuse principle. However, it must be doubtful whether those provisions will continue to have any effect when the 2023 Act comes into force, since the 2023 Act is later legislation that explicitly states that 'no general principle of EU law is part of domestic law'.

The arguments for contending that there has been an implied repeal are probably reinforced by the fact that s 42(4) purports to apply as 'one of the consequences of' the 2018 Act and s 42(4A) also purports to apply 'accordingly', although the wording of s 42(4A) also refers to the principles applying to 'any matter relating to VAT' and the addition of that subsection probably only makes sense on the basis that it was intended to have a wider effect. However, the cessation of the abuse principle may be of limited comfort to tax avoiders if it makes the courts more receptive to challenges under the *Ramsa*y principle.

New reference procedures are also introduced by inserted sections 6A to 6C of the 2018 Act, so higher courts can more speedily determine whether prior EU decisions should be followed. A reference can be made under section 6A when the lower court is bound by retained case law and the issue is one of general public importance. However, in some cases, it could be contended that the first condition for a reference is not satisfied because the lower court is , in any event, no longer bound by a prior decision because the 2023 legislation has changed the legal context by removing any requirement for a conforming interpretation. It would be unfortunate if too literal a construction of the 2023 Act ousted a lower court's jurisdiction to make a reference for this reason.

The position under the 2018 Act
The 2018 Act will continue to largely govern the extent to which reliance can be placed on EU law until 31 December 2023. Since I wrote my earlier article, there have been cases that have shed further light on some of the issues arising from the 2018 Act.

Paragraph 39 of Schedule 8 of the 2018 Act suggests that some of the restrictions on the ability to rely on the general principles of EU law apply retrospectively. Paragraph 39(4) of Schedule 8 prevents any retrospectivity in relation to conduct giving rise 'to any criminal liability'. To ensure that this provision is construed in a manner that conforms to the European Convention on Human Rights, this exclusion probably extends to claims for civil penalties that are criminal for the purposes of that Convention. This may be significant with requirement to correct penalties, which may be contrary to EU law.

As anticipated in my earlier article, the significance of this point has also been significantly limited by Article 89 of the Withdrawal Agreement and section 7A of the 2018 Act. Article 89 of the Withdrawal Agreement provides for judgments of the European Court delivered prior to 31 December 2000 to have binding force. This is also extended to subsequent judgments of the court on references from the United Kingdom. Lord Lloyd-Jones, at para 8, in *Fratila v Secretary of State for Work and Pensions* [2021] UKSC 53, and Asplin LJ, at paras 63-66, in *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332 accepted that these provisions preserve the binding force of judgments of the Court of Justice during periods when the UK was in the Union and during the transitional period.
The extent to which paragraph 3 of Schedule 1 of the 2018 Act prevents UK legislation being disapplied because it is contrary to the general principles of EU law has also been considered in *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049, *Secretary of State for Work and Pensions v Beattie* [2022] EAT 163 and *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353. All three decisions accept that the effect of that paragraph may be to preclude claims based on general principles that were possible prior to 31 December 2020. However, Judge Keyser QC, in *Adferiad Recovery Ltd* at para 120, accepted that retained general principles remained relevant when interpreting retained EU law.
None of these cases focused on paragraph 39(6) of Schedule 8 of the 2018 Act, which states that paragraph 3(2) of Schedule 1 of the 2018 Act does not apply to the necessary consequences of any court decision given before 31 December 2020. That is clearly intended to give some continued effect to the direct consequences of prior decided cases. However, its impact is limited by the fact that it just overrides paragraph 3(2), which precludes the disapplication of legislation, and not paragraph 3(1), which precludes claims based on a failure to comply with EU law.

In many cases, general principles are in substance relied upon as a defence to claims by HMRC, so it can hopefully be contended that paragraph 3(1) should not be in issue for that reason. A possible helpful analogy can be drawn with *King v Walden* [2001] STC 822, where Jacob J, at paras 57-71, accepted my arguments that tax appeals were instigated by HMRC for the purposes of the Human Right Act 1988 s 22(4).
HMRC is already contending that paragraph 3 of Schedule 1 of the 2018 Act precludes claims for restitution based exclusively on EU rights (see *Revenue and Customs Brief 4/2022*). In such cases, a taxpayer is clearly making a claim. However, the fact that paragraph 39(7) contains special rules for *Francovich* claims may possibly point to a distinction between 'claims' based on failures to comply with general principles and an entitlement to a remedy as a matter of EU law that arises as a result of a claim that arises for some other reason; for example, an overpayment of VAT. Even if such arguments are accepted, such claims will clearly be precluded by the 2023 Act changes.
In *R (o.a.o SS Consulting Services (UK) Ltd v HMRC* [2021] EWHC 3174 (Admin), Knowles J, at para 16, also accepted that s 42(4) and s 42(4A) of the Taxation (Cross-border Trade) Act 2018 preserved the abuse and *Halifax* principles. However, his comments do not appear to be central to his reasoning. While, as I have observed, s 42(4A) should almost certainly be construed more broadly, neither s 42(4) nor s 42(4A) are entirely clearly drafted because some of the wording suggests that they are merely declaratory of the consequences of the 2018 Act, which in fact limits the extent to which reliance can be placed on general principles of European law.

As I have observed above, the continued relevance of those sub-sections also becomes highly questionable when the 2023 Act comes into force.
Another possible area of uncertainty is how far s 4(2) of the 2018 Act enables individuals to continue to rely on the direct effect of the directive because it requires the rights to be of a 'kind recognised by the European Court or any court of tribunal of the United Kingdom' on 31 December 2020. This then raises questions as to how specific the recognition needs to be.

As far as I am aware, there have only been two related cases that have considered this issue: *Harris v The Environment Agency* [2022] EWHC 2264 (Admin) and *C G Fry & Son Limited v Secretary of State for Levelling Up Housing and Communities* [2023] EWHC 1622 (Admin). Both cases concerned the Habitat Directive. In the *Harris* case, Johnson J, at paragraph 91, helpfully observed that s 4(2) does not require a prior decision on the direct effect of the provision; instead, it 'only requires that it is 'of a kind' that has been held to have direct effect'. Despite the absence of any prior decision expressly stating that the relevant provisions had direct effect, both cases accepted that the provisions had direct effect.

Concluding comments

The idea of enacting a snapshot of EU law in the 2018 Act has a lot to commend it. Unfortunately, its half-hearted nature and, in particular, the way it limits the reliance that can be placed upon the general principles of EU law, creates some uncertainty. With VAT, that uncertainty will significantly increase when the 2023 Act comes into force. The comments made in this article are all subject to any changes that might be made by either future primary legislation or by regulations made pursuant to ss 11-16 of the 2023 Act.

Appendix 3 – Tax Adviser article: Our changed approach to EU law: the impact on VAT

Author: Dr Michael Taylor

Weblink: https://www.taxadvisermagazine.com/article/our-changed-approach-eu-law-impact-vat

What impact will the change in our approach to EU law really have on VAT?

The Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent on 29 June 2023. When the Bill was introduced to Parliament in September 2022, it promised 'to put the UK statute book on a more sustainable footing … by ending the special status of retained EU law'. Indeed, it was conceived as the last of a trilogy of pieces of legislation – following the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 – that would lead to the potential divergence of domestic law from EU law following the UK's departure from the EU.

Some of the proposals within the original Bill were startling. For instance, as initially drafted, it would have repealed from 31 December 2023 any and all retained EU legislation that was not otherwise saved by government ministers. And the government's retained EU Law Dashboard (see tinyurl.com/3ehrjvse) listed numerous key pieces of VAT legislation that would, in theory, have been repealed: the 1987 Order which governs the operations of the Tour Operators Margin Scheme; the 1992 Order which blocks the recovery of input tax on certain supplies; and even the VAT Regulations themselves.

What does it mean for VAT?

Having undergone significant amendment, however, the Act passed by Parliament is very different from that original draft. So what does it mean for VAT, for businesses and practitioners?

First and foremost, the Act reversed the Bill's position on repealing retained EU law. Rather than automatically repealing all such legislation unless it is specifically saved, only the retained EU law that is specifically cited in Schedule 1 of the Act will be repealed from 31 December 2023.

Though 'relevant national authorities' (s 1(4)) may seek to save specific pieces of legislation until 31 October, Schedule 1 already lists numerous pieces of tax-related retained EU law that will be repealed at the end of the year.

The vast majority, however, concern the exchange of tax information with overseas British territories. Only two – regarding the taxation of motor fuel – appear to impinge upon indirect taxes. Even so, the Act has several other implications for the interaction of domestic law and EU law in the sphere of VAT.

Section 2, for instance, repeals the saving provisions enacted by the Withdrawal Act 2018, meaning that any and all EU law rights and liabilities that have not been recognised in domestic law will be extinguished at the end of the year. Given the four-year time limit which applies to so much of the administration of VAT, one might wonder whether this will affect businesses beyond eliminating the retained EU law rights that may have accrued during 2020 (at the end of which, the Brexit implementation period expired).

Sections 3 and 4 provide for the abolition of the supremacy of EU law and the general principles of EU law, respectively. And whilst this might appear to represent a drastic change when interpreting and applying the law as it pertains to VAT – the conforming constructions and the *Marleasing* principle! – the change will be less dramatic in practice.

This is because the principles of effectiveness, proportionality and subsidiarity, for instance, are concerned primarily with the interaction of domestic law with EU law, which has not been unambiguously supreme since 2020. Accordingly, the accounting periods in which EU law *was* supreme have been gradually falling out of time in any event.

The principle of fiscal neutrality – that is, the principle that supplies which are identical or sufficiently similar from the perspective of a consumer should be taxed in the same way – is more important; a cornerstone of the VAT

system. However, the Supreme Court has already recognised fiscal neutrality as underpinning 'domestic law jurisprudence in relation to VAT' (*DCM Optical Holdings* [2022] UKSC 26 at [34]). In this way, the Supreme Court has 'saved' fiscal neutrality from the abolitionist clauses of the Act.

As for the remaining general principles of EU law, such as legal certainty and the protection of legitimate expectation, English common law has long recognised comparable if not identical rights. The standard judgment on legitimate expectation, for instance, is that of the Court of Appeal in *R (oao Coughlan & Ors) v North & East Devon Health Authority* [1999] EWCA Civ 1871, as endorsed by the Supreme Court in *Finucane* [2019] UKSC 7.

Retained EU case law

Turning to the status of retained EU case law – and it should be noted that anything heretofore referred to as 'retained' will from 1 January 2024 be known instead as 'assimilated' law – the Act does not disturb the present practice, whereby the Court of Appeal in England and Wales may depart from retained EU case law (if, per the *Bristol Aeroplane* dictum, it has not already endorsed it) and the Supreme Court is not bound by any such retained EU case law.

It appears, however, that Section 6 of the Act has amended the tests that apply to decisions on whether to depart from retained EU case law. From 1 January 2024, the Court of Appeal will be obliged to consider: 'the fact that decisions of a foreign court are not (unless otherwise provided) binding'; 'any changes of circumstances which are relevant to the retained EU case law'; and 'the extent to which the retained EU case law restricts the proper development of domestic law'.

As for the Supreme Court, from 1 January 2024 it will be empowered to depart from its own retained domestic case law – ie previous Supreme Court and House of Lords judgments which applied EU law – if it considers it right to do so, having regard to 'the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart', 'any changes of circumstances which are relevant to the retained domestic case law', and 'the extent to which the retained domestic case law restricts the proper development of domestic law'.

It would appear, therefore, that the anticipated sunset of retained EU law, retained EU case law, and the general principles of EU law will be considerably less dramatic than the draft versions of this legislation had suggested, and that the VAT system should continue to operate much as it has done since the expiration of the Brexit implementation period. How all this plays out in practice, of course, remains to be seen.