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VAT GROUPS IN THE UNITED KINGDOM

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1 Introduction

The EC Sixth Council Directive Article 4.4 provides that, subject to certain consultations: "each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links." The UK has taken advantage of this authorisation by enacting what is now the Value Added Tax Act 1994 ("VATA") section 43 which, for certain purposes, treats companies within a VAT group as the same person. It is set out in the Appendix to this article.

The interpretation of section 43, and its predecessors, has given rise to a certain amount of very interesting case law, largely as to the extent to which the statutory fiction introduced by section 43 can be pressed. Some of the cases concern blatant VAT avoidance schemes, designed to exploit the group rules. The *Thorn Materials* case was decided by the House of Lords recently and the *Svenska* case by the Court of Appeal the year before. There are two relatively recent tribunal decisions: *Canary Wharf* and *J P Morgan*.

A complicating factor is that Finance Act 1996 conferred additional powers on the Commissioners of Customs and Excise to deal with VAT avoidance through the exploitation of section 43. A further interesting feature, beyond the scope of this article, is the extent to which the *Ramsay* doctrine, which defeats tax avoidance in certain situations, or some related EC doctrine, can be relied upon by the Customs to defeat such schemes.

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The UK Grouping Provisions are currently under review. It is hoped that this article may be of interest to other Member States, if only as an illustration of how not to avail oneself of the power conferred by Article 4.4.

2 The Effect of Companies Being Grouped

Where two or more companies form part of a group, certain consequences follow, in accordance with the Value Added Tax Act 1994 section 43(1):

> any business carried on by a member of the group falls to be treated as carried on by the representative member;
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> any supply of goods or services by a member of the group to another member of the group is to be disregarded;
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> any VAT paid or payable by a member of the group on the acquisition of goods from another Member State or the importation of goods from a place outside the Member States is treated as paid or payable by the representative member and the goods are treated for certain purposes as acquired or imported by the representative member; and
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> all members of the group are liable jointly and severally for any VAT due from the representative member.

3 Who Qualifies to Join a Group?

Only a "body corporate" can be a member of a group. Although a body corporate need not necessarily be a company incorporated under the Companies Acts, it does need to be a corporation in the strict sense. Section 43(1). Two or more bodies corporate are eligible to be treated as members of a group if:

> "(a) one of them controls each of the others; or
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> (b) one person (whether a body corporate or an individual) controls all of them; or
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> (c) two or more individuals carrying on the business in partnership control all of them."

The test of "control" is not that found in either section 416 or section 840 of the Taxes Act 1988, or the very similar test found in the Taxation of Chargeable Gains

Act 1992. The basic rule is that one company controls another if the former is the "holding company" of the latter within the test laid down by Companies Act 1985 section 736. In applying this test to the case where an individual or individuals may or may not have control, one assumes them to be a company. A body corporate which is empowered by statue to control the activities of another body corporate also has control of it: section 43(8).

4 Residence or Presence in the UK

4.1 The Statute

A body corporate is only eligible to be treated as a member of a group if it is "resident or has an established place of business in the United Kingdom". This expression has been given an unusual interpretation by the Customs. On their view, a company can be "resident" in the United Kingdom for value added tax purposes even if it would not be so resident for other purposes, e.g. corporation tax.

4.2 *Shamrock Leasing*

This view has been recently rejected by the Value Added Tax and Duties Tribunal in *Shamrock Leasing Ltd v Commissioners of Customs & Excise*.[2] The argument of the Commissioner was that "because a director is resident in the UK, a company is "established" in the UK notwithstanding that it has no established place of business here. They did not, however, produce any authority to establish the proposition that a company can be established or resident in a country merely because a director who regularly attends board meetings is resident in that country. The Tribunal noted there is no provision to this effect in the Sixth Directive or the UK Value Added Tax Act. The Tribunal considered that a company can only be grouped if it is established in the UK within the meaning of Article 4.4 of the Sixth Directive and if section 43 of the UK Value Added Tax Act is capable of being interpreted accordingly. It rejected the argument that the concept of being "established in the territory" in Article 4.4 has a wider meaning than the words "established his business" in Article 9.

The Tribunal then went on to consider the use of the word "resident" in section 43(3), after noting that: "It is trite law the domestic legislation must if possible be interpreted consistently with the Directive". Given that in the UK value added tax legislation there is no definition of residence - the only reference to residence is in

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2 Case Reference LON/98/184, Decision number 15719, June 28th 1998, Theodore Wallace Chairman.

section 43(3) - the Tribunal concluded that in the absence of such a definition it was necessary to consider the test of residence of a company used by UK law in other contexts, in particular the income tax test, laid down by the House of Lords in *De Beers Consolidated Mines Ltd v Howe*:[3]

> "... a company resides, for the purpose of income tax, where its real business is carried on ... and the real business is carried on where central management and control actually resides."

The Tribunal reasoned that, if control and management is the test of residence, a resident company is arguably also "established" in the UK and there is no incompatibility. It went on to find that there was "nothing in the agreed facts in the present case to suggest that any control or management of [the company in question] was exercised in the United Kingdom. It was specifically agreed that it has no establishment here. In our judgment [the company] is not on the agreed facts resident in the UK within section 43(3). Our conclusion as to this would be the same even if section 43(3) did not fall to be interpreted to conform with Article 4.4."

This is a not altogether satisfactory decision. The Tribunal was absolutely right to reject the submissions of the Commissioners of Customs & Excise. Yet they appear to equate the establishment of a corporation within a territory with its residence in that territory. If one interprets section 43(3) ignoring Article 4.4, the result of the decision is clearly correct. The real problem is whether one can give section 43(3) an interpretation "sympathetic" to Article 4.4. If one cannot, then again the Tribunal reached the correct result.

Article 9 of the Sixth Directive (Supply of Services) draws a distinction between the place "where the supplier has established his business or has a fixed establishment from which the service is supplied" and "the place where he has his permanent address or usually abides". It presupposes that a person may have no "place of business or a fixed establishment" yet still have "a place where he has his permanent address or usually abides". In my view, Article 4.4 would permit Company A, which is resident only in Bermuda, but which carries on business through a fixed establishment in the UK from which it makes taxable supplies, to be grouped with Company B which is clearly resident in the UK. On the Tribunal's view this would apparently not be possible.

3 [1906] AC 455, (1906) 5 TC 108.

4.3 Double Taxation Conventions

There is no rule that a company which is deemed to be resident in the United Kingdom for corporation tax purposes, e.g. because it is incorporated in the United Kingdom and is not protected by a relevant double taxation treaty, is similarly deemed to be resident here for value added tax purposes.

5 Involuntary Grouping and De-Grouping

Until the introduction of anti-avoidance provisions, into VATA schedule 9A by Finance Act 1996, it was basically a matter for taxpayers whether or not two or more companies should form a VAT group. The Customs have for some time had a discretion to refuse an application to be treated as members of a group but only if "it appears to them necessary to do so for the protection of the revenue": VATA section 43(4). The *prima facie* rule is that a further eligible body can be added to the group, a company can be excluded from the group, the "representative member" of the group can be changed or the group can be disbanded, all on the application of the taxpayers: section 43(5).

Where, however, it appears to the Customs "necessary to do so for the protection of the revenue" they can refuse an application for a new company to join the group or for the representative member to be changed. They can also refuse an application that a company leave the group or that the group be disbanded. The only exception is that where a body corporate was treated as a member of a group by virtue of its being controlled by a person and it has ceased to be so controlled, then they are in any event obliged to terminate its inclusion within the group.

6 Finance Act 1996 Anti-Avoidance Powers

As mentioned, Finance Act 1996 schedule 9A introduced anti-avoidance provisions. The Customs may give a direction under the schedule provided, in general, that a "relevant event" has occurred, a relevant condition is satisfied and the condition would not be fulfilled apart from the occurrence of the event. "Relevant event" is widely defined to include the event which occurs when a company begins to be, or ceases to be, treated as a member of a group. It also includes an event which occurs when a company enters into any "transaction".

The "relevant condition" is that there has been, or will or may be, a taxable supply on which VAT has been, or will or may be, charged otherwise than by reference to the supply's full value, there is at least a part of the supply which is not or, as the case may be, would not be zero rated; and the charging of VAT on the supply otherwise than by reference to its full value gives rise or, as the case may be, would give rise to a tax advantage.

The Commissioners cannot give a direction under the schedule if they are satisfied that the change in the treatment of the body corporate or the transaction in question had as its main purpose, or, as the case may be, as each of its main purposes, a genuine commercial purpose unconnected with the fulfilment of the relevant condition.

The Customs have power to direct that a supply of goods or services made intra-group does not fall to be disregarded by section 43, so that it potentially becomes taxable.

Additionally, the Customs can direct that for a designated period a company is excluded from or included in a group.

While schedule 9A does not apply automatically, a direction can be given retrospectively for up to six years. Although arguably the schedule does not empower the Customs to nullify every tax advantage obtained through the grouping provisions, even when it is an artificial one, it is clearly a very important weapon in their armoury.

7 *Custom & Excise Commissioners v Kingfisher Plc*

A vital question which has arisen is the extent to which section 43 deems all the companies in the group to be one and the same company for value added tax purposes. In *Custom & Excise Commissioners v Kingfisher Plc* [1994] STC 93, Kingfisher plc was the holding company of a group consisting mainly of retail companies. There was also a finance company in the group, Time Retail Finance Ltd, which provided a consumer credit service in the form of credit cards for use in the retail outlets of the group. The Commissioners of Customs and Excise raised assessments on Kingfisher plc as the representative member of the group on the basis that the daily gross takings of retail members should properly include all payments made by customers using the Time credit card as if the retailer had received cash for the full amount payable. Kingfisher appealed to a value added tax tribunal contending that as the representative member of the group it was entitled to be treated as carrying on both the Time credit business and the retail businesses and therefore that the credit sales should be treated as self-financed to be accounted for as and when payments were received from the customer by Time in accordance with the standard method allowed by the Commissioners.

The Tribunal chairman, Mr D C Potter QC, had concluded that the purpose of what is now section 43, which he detected from the wording, was "to treat the group as a single entity, taxable through its representative member". He found that the effect of what is now section 43 was to cause a group to be taxed in just the same way as if a single body corporate had carried on all its business activities through separate trading departments. He took this deeming provision to its logical conclusion: "Kingfisher is deemed to carry on the retail business of members of its group and also the quoted business of Time. Its deemed retail sales are financed by its deemed credit business; they are "self-finance credit sales".".

DC Potter QC, had been followed by an equally authoritative Tribunal chairman, Stephen Oliver QC, in *Midland Bank Plc v Customs & Excise Commissioners* [1991] VATTR 525, who said of what is now section 43:

> "As well as requiring inter-VAT group transactions to be disregarded, section [43] provides, as a statutory hypothesis, the necessary replacements for VAT purposes. It reconstructs the relevant transaction by consolidating all the businesses of the members of the VAT group into the hands of the "representative member" and by treating all supplies to and from "outsiders" as supplies by or to the representative member ... In reaching this conclusion this tribunal is fortified by and adopts the explanation and construction of section [43] in the decision in *Kingfisher plc v Customs and Excise Comrs* [1991] VATTR 47."

When Kingfisher reached Popplewell J in the High Court, the Customs argued that section 43 did no more than to provide a simplified account of the method whereby supplies of goods and services are disregarded for VAT purposes between members of a group but that it does not create nor was intended to create a single taxable person for the purpose of VAT. Popplewell J referred to the EC Council Directives and fully concurred with the views expressed by Charles Potter, QC.

8 *Canary Wharf*

The decision of the VAT Tribunal in *Canary Wharf Limited* was given by Mr. Stephen Oliver, QC on the 24th September 1996. The appellant was the landlord of premises in Canary Wharf which were subleased to occupational tenants such as Barclays Bank. The leases provided that a management company should render certain services, building services, estate services and car park services, and should be paid a fee by the tenant. The Customs' first argument, which was bound to founder, was that these services were really being rendered to the tenants, such as Barclays Bank, not by the management company which in fact rendered them and was paid by Barclays Bank, but by the landlord. If that were correct, then the supplies would not be standard rated but would be exempt as forming part and parcel, and as being ancillary to, the exempt supply made by the landlord in granting twenty five year leases to the occupational tenants. The Tribunal, not surprisingly, rejected that. The Customs' next argument was that as in certain cases the landlord and the management company were part of the same group, then that group should be treated as making only one supply, namely an exempt supply consisting of the grant of an underlease of twenty five years, of which the various services formed part. This argument was a much more serious one. They sought to build upon what had been said in *Kingfisher* and *Midland Bank* and argued that section 43 applied so as to deem there to be one company for all purposes. Stephen Oliver, QC rejected this argument. He said, at paragraph 50 of the Decision:

> "The section does not go so far as to lay down as a statutory hypothesis that the character of any supply to a non-member of the VAT group is to be determined as if it were part of a single supply by the representative member; the statutory hypothesis is limited to "any business" carried on by a member of the group. Nor do the statutory consequences have any bearing on the *character* of the supply; they proceed on the basis that the supplies, characterised on ordinary principles, have taken place and, for example, direct that inter group supplies are disregarded for tax purposes. We agree with the conclusion of Mr Theodore Wallace in Thorn EMI Plc and Granada Plc v Commissioners of Customs and Excise [1993] VATTR 94 at 108b where he says of the predecessor of section 43:
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> > "While section 29 has the effect of excluding supplies within the group from the charged tax, it cannot have the effect of altering the character of a supply made to a person outside the group.""

He went on to point out the anomalies which would result from the Customs' contention:

> "If this is correct, it follows that the character of the representative member, if different from that of the individual member making the supply, could completely transform the taxability of a supply made to a third party. This proviso may be illustrated by three simple examples.
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> Item 1(b) of Group 7 of Schedule 9 to the VAT Act 1994 applies to exempt from VAT, "the supply of services by a person registered or enrolled in ... either of the Registers of Ophthalmic Opticians or the Registrar of Dispensing Opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies

> corporate carrying on business as Ophthalmic Opticians or as Dispensing Opticians.
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> Imagine a VAT group with 5 members who are all Opticians; all are bodies corporate. Only the representative member is registered under Section 9 of the Opticians Act 1989. If the Commissioners be correct, a supply by any member of the group is nevertheless exempt from VAT (and vice versa if the representative member is not registered but all the other group members are)"..."

9 *J P Morgan*

The VAT Tribunal decision in *J.P. Morgan Trading & Finance* was given by a Tribunal of which the legally qualified chairman was Mr. Theodore Wallis, on 28th January 1998. In essence, Morgan Guaranty Trust Company of New York Inc ("MGT") required new premises in London. Arrangements were made for a fifteen year lease to be granted by an unconnected party to the appellant, a dormant subsidiary of MGT. That company incurred very substantial expenditure on the refurbishment of the premises. It was in the same VAT group as MGT. While it was still in the group, it granted a sublease to MGT for just under fifteen years for a premium of £36,500,000 and an annual rent of £36,000. After the premium was paid, the appellant left the VAT group.

It claimed that it had incurred all input expenditure for the purpose of making taxable supplies, namely the periodic supplies related to each payment of rent. It claimed that the supply related to the payment of the premium fell to be disregarded for all value added tax purposes by virtue of what is now section 43. In effect, it was arguing that the consequence that "any supply of goods or services by a member of one group to another member of the group shall be disregarded" should be construed very widely indeed. Not only should it not amount to a supply for value added tax purposes but one should pretend that it did not exist. The reality of the situation, of course, was that the subsidiary had incurred the expenditure almost entirely for a purpose which did not involve making a supply at all to MGT, namely granting it a lease at a very substantial premium, and only as to the balance for the purpose of making taxable supplies. The Tribunal appears to have no hesitation in agreeing that this was also the result in law. The reasoning is interesting.

The Tribunal agreed that it was clear from *Kingfisher* that the grouping provision not only has the effect that intra-group supplies are disregarded and that supplies by all group companies are treated as being by a single taxable entity but that the group is to be treated as making self-financed credit sales for the purposes of notice 727. It next considered the *Thorn Materials* case, as reported in the Court of Appeal, which has since been overtaken by the House of Lords' decision. It also considered the *Svenska* case in the Court of Appeal. Both of these are discussed below. The Tribunal reached the conclusion that "section 43(1)(a) does not have the effect that a transaction within a group which is disregarded as a supply is necessarily treated as non-existent or irrelevant for all other purposes." They relied upon Article 16.2 of the Sixth Directive, which gives a right to deduct only "insofar as the goods or services are used for the purposes of [the taxpayer's] taxable transactions." They examined the French text and pointed out that it was quite unreal to say that the entire amount of VAT attributable to the supply made by the contractor was borne directly by the cost components of the taxable transaction treated as occurring when the rental payments were received by the appellant.

They considered Article 4.4 of the Sixth Directive, referred to at the beginning of this article and took the view that the construction of section 43(1)(a) for which the appellant contended went well beyond the intendment of the Directive. The Tribunal agreed that on a first reading the natural and ordinary meaning of the words supported the appellant's contention. They relied, however, on the decision of the Court of Appeal in *Marshall v Kerr*, upheld on this point by the House of Lords and pointed out that construing the words as the appellant contended would be contrary to the purposes of the Directive and would lead to an absurd result. In that case, one does not apply the words of a deeming provision literally.

10 *Thorn*

Commissioner of Customs & Excise v Thorn Materials Supply Limited [1998] STC 725 was decided by the House of Lords on June 18th. The facts, as stated by Lord Clyde, were that Thorn Materials Supply Ltd (Materials) and Thorn EMI Home Electronics (UK) Ltd (Home) were wholly-owned subsidiaries of Thorn EMI plc (Thorn). For purposes of value added tax (VAT) they were both members of the VAT group of which Thorn was the representative member within the provisions of what is now Value Added Tax Act 1994 section 43. By a written contract dated 29 November 1993 Materials agreed to sell certain goods to Home. Ninety per cent of the price was payable immediately and was paid. On 6th December 1993 Materials ceased to be a member of the Thorn EMI plc VAT group. Thereafter Materials acquired the goods in question, delivered them to Home and Home paid Materials the 10% balance of the purchase price. It was common ground that on the event of the delivery a chargeable event occurred. The dispute was whether for the purposes of Materials' output tax the supply was of 10% or of 100% of the goods. By virtue of what is now VATA 1994 section 6(3), if before the time at which a supply of goods would otherwise occur (e.g. on their delivery) the person making the supply receives a payment in respect of it, the supply is treated, to the extent covered by the payment, as taking place at the time the payment is received. The argument of

Thorn was thus that there were two supplies, one as to 90% of the payment, which fell to be ignored on account of what is now section 43, and the other as to 10%, which was admittedly taxable.

Materials had been inserted into the buying chain purely to obtain a VAT advantage. In my view, the Customs should have argued, as they did in *Morgan*, that the scheme failed because the *input* tax incurred by Materials was not wholly deductible, as the goods were acquired largely for purposes other than making a taxable supply. They could then cheerfully have accepted that the taxable supply made by Materials was one made when it was outside the group for 10% of the total price actually paid.

As the Customs failed to take that point, the result was that four out of five of their Lordships had to engage in some tortuous and not entirely convincing reasoning. Lord Nolan delivered a speech in which a majority of the Appellate Committee concurred. He accepted that the statement in section 41(1)(a) that "a supply of goods or services by a member of the group to another member of the group shall be disregarded" "does not mean that the separate existence of the appellants and Home is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place. What it does mean is that the 90% supply to which these facts gave rise must be disregarded or, as Mummery LJ put it, ignored, for tax purposes." That is a subtle distinction.

Lord Nolan went on to accept the Customs' contention that Sixth Directive Article 4(4) and what is now VATA 1994 section 43 were "not designed to confer exemption or relief from tax. They are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them all with non-members." He therefore concluded that it was "entirely consistent with this approach that the 90% supplies effected by Materials and Resources to Home should be disregarded for the purposes of the [Value Added Tax] Act, because Materials and Home were not to be treated as carrying on their own businesses at that time. Popplewell J was in my judgment correct in holding, in the Kingfisher case, that the purpose of section [43](1) was to enable a group to be treated as if it were a single taxable entity, even though it is not expressed in those terms."

Thorn Materials leaves the precise scope of section 43 in some doubt. Would their Lordships approve the decision in *Canary Wharf*? Logically, they could go either way. In this context, one should note that some of the concerns in the *Canary Wharf* case have now been addressed by statute. VATA 1994 section 43(1AA) was added by FA 1997. It in effect provides that in determining whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description, one suspends the deeming and looks not to the description of the representative member but the description of the body which in fact made that supply.

11 *Svenska*

Customs and Excise Commissioners v Svenska International plc [1997] STC 958, a Court of Appeal decision, was in some ways the mirror image of the scheme in Thorn. Whereas in Thorn the goods were in fact supplied after the supplier and the recipient, its Swedish parent, were no longer companies in the same group, in Svenska, supplies of management services were in fact made (from December 1987) by the appellant ("S") while the companies were not members of the same group but were not paid for (or any invoice issued in respect of them) until June 1992. They had become members of the same group only in August 1991. Before then, S was registered for VAT purposes in the United Kingdom but the branch was not. The management services were, pursuant to reg 23 of the VAT (General) Regulations 1985, SI 1985/886, continuous supplies of services treated as made when the supplier received payment or issued a tax invoice. It was agreed that the effect of the parent becoming a member of S's VAT group was that transactions between them were to be disregarded for VAT, and the supplies made by the parent, which were substantially exempt from VAT, were henceforth to be treated as made by S. Accordingly, when S issued an invoice on 26th June 1992 in respect of services supplied to the parent up to December 1991, it did not include a charge for VAT.

S had been credited with input tax in respect of supplies during the period up to and including 31st July 1991 which, in the absence of any taxable supplies of management services to the parent, had been attributed to *intended* taxable supplies of such services. In July 1993 the Customs decided that, as S had not made any taxable supplies to the parent before 1st August 1991 (since it had not received payment for or issued an invoice before that date in respect of supplies to the parent), and since S could not make taxable supplies to the parent once they were in the same VAT group, S had to be regarded as "using or appropriating for use" the supplies, in respect of which it had been credited with input tax, in making the parent's partially exempt supplies to third parties outside the group. On that basis S had to account under reg 34a of the 1985 regulations for such proportion of the input tax credited as was attributable to those exempt supplies, and the commissioners issued assessments accordingly.

Carnwath J, allowing S's appeal, held that S had done nothing which could be regarded as a use or appropriation for use of the supplies related to the input tax credit within reg 34 after the entry of the parent into S's VAT group, since in the real world those supplies had already been fully used and S had no need to re-use them. The Court of Appeal took a more robust line. They held that regulation 34 had to be construed in the light of the whole scheme for the payment of VAT, including reg 23 dealing with when continuous supplies were to be treated as being made, and s 29 (now VATA section 43) which treated what were separate entities as one taxable group. S had been credited with input tax in respect of inward supplies, which in consequence of reg 23 had been attributed to an intended taxable supply to the parent within reg 34(1)(a), which could never take place as supplies between S and the parent had to be disregarded once the parent had joined S's VAT group. It followed that for VAT accounting purposes, under s 29, S was to be treated as having used or at least appropriated for use the intended supplies to make the parent's partly exempt supplies to third parties within reg 34(1)(b). S was therefore accountable under reg 34 for such proportion of the input tax credited as was attributable to the exempt supplies.

The Customs could not argue, as they successfully did in *Thorn*, that the payment which had been made while the companies were both members of the same group should be disregarded and thus the supplies should be treated as having been made when the companies were not in the same group. Nor would it avail them to argue that the payment should somehow be disregarded. For that would not leave a taxable transaction.

One's initial reaction might be to ask why the Customs did not take the line they later took in *Morgan*. It appears to have been conceded that the input tax was credited to Svenska "correctly at the time", as "tax incurred on goods and services which were to be used in providing management services to the [parent]". While one cannot judge the wisdom of the concession, what is clear is that if at the time the services were in fact rendered there was no plan to group the companies and then pay for the services only while they were grouped, then S would indeed have had the relevant intention and the Customs inevitably would have had to rely on some express provision, such as regulation 34, which enabled them to claw back the input tax. Conversely, had the whole arrangement been a scheme to avoid VAT, the concession should not have been made and the result, in my opinion, would have been the same as in *Morgan*.

The wording of regulation 34 was clearly defective. Carnwath J played it straight in his judgment. The Court of Appeal, without mentioning *McGuckian*, adopted a purposive approach, i.e. they persuaded themselves that the law said what it ought to have said. This approach would be more commendable if it were adopted when taxpayers are complaining of poor drafting resulting in unfair taxation.

12 Conclusion

While the implications of group registration are still being worked out, authorities decided in the last two years have made the position much clearer. It now appears that some schemes which relied on exploiting the group relief provisions were ineffective. The moral is that if a difficult point of law arises in the context of a tax avoidance scheme it is rather more likely to be decided adversely to the taxpayer than if it arises in some other context. That is something we should all constantly bear in mind.

APPENDIX

UK VALUE ADDED TAX ACT 1994

Section 43. Groups of companies

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

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

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

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

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

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

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

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

(1AA) Where:

(a) it is material, for the purposes of any provision made by or under this Act ('the relevant provision'), whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description,

(b) paragraph (b) or (c) of subsection (1) above applies to any supply, acquisition or importation, and

(a) there is a difference that would be material for the purposes of the relevant provision between:

(i) the description applicable to the representative member, and

(ii) the description applicable to the body which (apart from this section) would be regarded for the purposes of this Act as making the supply, acquisition or importation or, as the case may be, as being the person to whom the supply is made,

the relevant provision shall have effect in relation to that supply, acquisition or importation as if the only description applicable to the representative member were the description in fact applicable to that body.

(1AB) Subsection (1AA) above does not apply to the extent that what is material for the purposes of the relevant provision is whether a person is a taxable person.

(2) An order under section 5(5) or (6) may make provision for securing that any goods or services which, if all the members of the group were one person, would fall to be treated under that section as supplied to and by that person, are treated as supplied to and by the representative member and may provide for that purpose that the representative member is to be treated as a person of such description as may be determined under the order.

(2A) A supply made by a member of a group ('the supplier') to another member of the group ('the UK member') shall not be disregarded under subsection (l)(a) above if:

(a) it would (if there were no group) be a supply of services falling within Schedule 5 to a person belonging in the United Kingdom;

(b) those services are not within any of the descriptions specified in Schedule 9;

(c) the supplier has been supplied (whether or not by a person belonging in the United Kingdom) with any services falling within paragraphs 1 to 8 of Schedule 5 which do not fall within any of the descriptions specified in Schedule 9;

(d) the supplier belonged outside the United Kingdom when it was supplied with the services mentioned in paragraph (c) above; and

(e) the services so mentioned have been used by the supplier for making the supply to the UK member.

(2B) Subject to subsection (2C) below, where a supply is excluded by virtue of subsection (2A) above from the supplies that are disregarded in pursuance of subsection (1)(a) above, all the same consequences shall follow under this Act as if that supply:

(a) were a taxable supply in the United Kingdom by the representative member to itself, and

(b) without prejudice to that, were made by the representative member in the course or furtherance of its business.

(2C) Except in so far as the Commissioners may by regulations otherwise provide a supply which is deemed by virtue of subsection (2B) above to be a supply by the representative member to itself:

(a) shall not be taken into account as a supply made by the representative member when determining any allowance of input tax under section 26(1) in the case of the representative member;

(b) shall be deemed for the purposes of paragraph 1 of Schedule 6 to be a supply in the case of which the person making the supply and the person supplied are connected within the meaning of section 839 of the Taxes Act (connected persons); and

(c) subject to paragraph (b) above, shall be taken to be a supply the value and time of which are determined as if it were a supply of services which is treated by virtue of section 8 as made by the person by whom the services are received.

(2D) For the purposes of subsection (2A) above where:

(a) there has been a supply of the assets of a business of a person ('the transferor') to a person to whom the whole or any part of that business was transferred as a going concern ('the transferee'),

(b) that supply is either:

(i) a supply falling to be treated, in accordance with an order under section 5(3), as being neither a supply of goods nor a supply of services, or

(ii) a supply that would have fallen to be so treated if it had taken place in the United Kingdom,
and

(c) the transferor was supplied with services falling within paragraphs 1 to 8 of Schedule 5 at a time before the transfer when the transferor belonged outside the United Kingdom,

those services, so far as they are used by the transferee for making any supply falling within that Schedule, shall be deemed to have been supplied to the transferee at a time when the transferee belonged outside the United Kingdom.

(2E) Where, in the case of a supply of assets falling within paragraphs (a) and (b) of subsection (2D) above:

(a) the transferor himself acquired any of the assets in question by way of a previous supply of assets falling within those paragraphs, and

(b) there are services falling within paragraphs 1 to 8 of Schedule 5 which, if used by the transferor for making supplies falling within that Schedule, would be deemed by virtue of that subsection to have been supplied to the transferor at a time when he belonged outside the United Kingdom,

that subsection shall have effect, notwithstanding that the services have not been so used by the transferor, as if the transferor were a person to whom those services were supplied and as if he were a person belonging outside the United Kingdom at the time of their deemed supply to him; and this subsection shall apply accordingly through any number of successive supplies of assets falling within paragraphs (a) and (b) of that subsection.

(3) Two or more bodies corporate are eligible to be treated as members of a group if each is resident or has an established place of business in the United Kingdom and:

(a) one of them controls each of the others; or

(b) one person (whether a body corporate or an individual) controls all of them; or

(c) two or more individuals carrying on a business in partnership control all of them.

(4) Where an application to that effect is made to the Commissioners with respect to two or more bodies corporate eligible to be treated as members of a group, then, from the beginning of a prescribed accounting period they shall be so treated, and one of them shall be the representative member, unless the Commissioners refuse the application; but they shall not refuse it unless it appears to them necessary to do so for the protection of the Revenue.

(5) Where any bodies corporate are treated as members of a group and an application to that effect is made to the Commissioners, then, from the beginning of a prescribed accounting period:

(a) a further body eligible to be so treated shall be included among the bodies so treated; or

(b) a body corporate shall be excluded from the bodies so treated; or

(c) another member of the group shall be substituted as the representative member; or

(d) the bodies corporate shall no longer be treated as members of a group,

unless the Commissioners refuse the application under subsection (5A) below.

(5A) If it appears to the Commissioners necessary to do so for the protection of the Revenue, they may:

(a) refuse any application made to the effect mentioned in paragraph (a) or (c) of subsection (5) above; or

(b) refuse any application made to the effect mentioned in paragraph (b) or (d) of that subsection in a case that does not appear to them to fall within subsection (6) below.

(6) Where a body corporate is treated as a member of a group as being controlled by any person and it appears to the Commissioners that it has ceased to be so controlled, they shall, by notice given to that person, terminate that treatment from such date as may be specified in the notice.

(7) An application under this section with respect to any bodies corporate must be made by one of those bodies or by the person controlling them and must be made not less than 90 days before the date from which it is to take effect, or at such later time as the Commissioners may allow.

(8) For the purposes of this section a body corporate shall be taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of section 736 of the Companies Act 1985; and an individual or individuals shall be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that Act.

(9) Schedule 9A (which makes provision for ensuring that this section is not used for tax avoidance) shall have effect.