[2013] UKPC 4
Privy Council Appeal No 0012 of 2012

JUDGMENT

Director General, Mauritius Revenue Authority (Appellant) *v* Central Water Authority (Respondent)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Kerr
Lord Wilson
Lord Sumption
Lord Reed

JUDGMENT DELIVERED BY

LORD MANCE

ON

7 February 2013

Heard on 22 November 2012

Appellant
Philip Baker QC
Rajeshsharma Ramloll
Aparna Nathan

(Instructed by Carrington & Associates)

Respondent
Rishi Pursem SC
Nadeem Lallmamode

(Instructed by Simons Muirhead & Burton)

LORD MANCE:

Introduction

1. The issue on this appeal is whether the Central Water Authority ("CWA") is entitled to credit in its VAT returns for periods from 7th September 1998 to May 2000 for the input VAT which it incurred when acquiring water meters to fit in customers' properties and undertaking infrastructure works to construct or maintain the connection between such meters and its water mains.

2. The CWA is the sole undertaker for the supply of water for domestic, commercial and industrial purposes in Mauritius. It provides meters and arranges with contractors for infrastructure works to be undertaken for customers wishing a water supply. Meters cost the CWA 400 rupees, and infrastructure works cost it unspecified and no doubt variable sums. The CWA charges customers an initial connection fee, a "symbolic" rent for meters of 10 rupees a month, no specific sum for subsequent maintenance and statutorily fixed charges for the water actually supplied.

3. VAT is levied in accordance with the provisions of the Value Added Tax Act 1998 ("the VAT Act 1998"), as amended from time to time. Under the VAT Act 1998, the supply of water is (save for the first 15 cubic metres of water per month supplied by the CWA to any customer for domestic purposes) subject to VAT at the standard rate. The present issue arises from an amendment, introduced by ministerial regulations, stating that "the renting out of a meter and the carrying out of infrastructure works by the Authority" were to be exempt goods or services for VAT purposes. The Revenue submits that it follows that the input tax incurred in respect of the acquisition of a meter and carrying out of works is not allowable. The CWA submits that it makes only one relevant supply to its customers, water, and that its input tax in respect of the necessary prerequisites - meters and working connections - is and remains allowable against the VAT received on its taxable supplies of water (in a proportion corresponding, more or less precisely as will appear, to the proportion of taxable supplies of water to total water turnover).

4. The CWA succeeded before the Assessment Review Committee which on 26th June 2007 stated a case for the opinion of the Supreme Court, which upheld the Committee's view in its judgment of 19th July 2011. The VAT Act 1998 is framed, on a significantly condensed basis, on the general model of the United Kingdom Value Added Tax Act 1994, which in turn gives effect to European Union requirements, initially under the Sixth Council Directive of 17 May 1977 (77/388/EC) and, since 1st January 2007 under Council Directive 2006/112/EC. The CWA thus relied below upon case-law of both United Kingdom courts and the European Court of Justice in support

of its analysis of its supplies to its customers. The general value of such case law was not disputed in relation to the issues on this appeal, although care may need to be taken in other cases before supposing that the effect of Mauritian and United Kingdom and European Union legislation will always coincide, bearing in mind in particular the differences in their working at a detailed level.

5. The matter now comes before the Board, where it has been argued with reference to further case-law and principles established in the European Court of Justice which, although not identified in the courts below, have proved in very large measure uncontroversial.

The VAT Act 1998

6. Section 2 (Interpretation) of the VAT Act 1998 includes definitions as follows:

> ""exempt supply" means a supply of such goods or services exempted from the payment of VAT as are specified in the First Schedule; …
>
> "input tax", in relation to a taxable person, means -
>
> (a) VAT charged on the supply to him of any goods or services; and
>
> (b) VAT paid by him on the importation of any goods, being goods or services used or to be used in the course or furtherance of his business; …
>
> "output tax", in relation to a taxable person, means VAT on the taxable supplies he makes in the course or furtherance of his business; …
>
> "taxable supply" means a supply of goods in Mauritius, or a supply of services performed or utilised in Mauritius; and
>
> (a) includes a supply which is zero-rated; but
>
> (b) does not include an exempt supply, made by a taxable person in the course or furtherance of his business; …"

7. Section 4 provides a further definition of supply:

"(1) Subject to the other provisions of this Act, "supply" means

(a) in the case of goods, the transfer for a consideration of the right to dispose of the goods as the owner; or

(b) in the case of services, the performance of services for a consideration.

(2) Without prejudice to the provisions of the Third Schedule and to any regulations made under subsection (4) –

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

(3) The Third Schedule shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(4) Without prejudice to section 72(1)(b), the Minister may, by regulations, amend the Third Schedule to provide, with respect to any transaction, whether –

(a) it is to be treated as a supply of goods and not as a supply of services;

(b) it is to be treated as a supply of services and not as a supply of goods; or

(c) it is to be treated as neither a supply of goods nor a supply of services.

(5) (a) A supply of goods incidental to the supply of services is part of the supply of the services.

(b) A supply of services incidental to the importation of goods is part of the importation of the goods.

(c) A supply of services incidental to the supply of goods is part of the supply of the goods. …"

8. Section 10 provides for VAT to be charged at the rate specified in the Fourth Schedule on any taxable supply by reference to the value of the supply as determined under section 12. Section 11 provides for zero-rating of goods or services specified in the Fifth Schedule. Section 12 provides, inter alia, that the value of any taxable supply is equal to such amount as with VAT is equal to the consideration for it, and that, where the consideration covers other matters, the value is "such part of the considerations as is properly attributable to it".

9. Part IV of the Act (Return, Payment and Repayment of Tax) then commences with section 21 (Credit for input tax against output tax), which reads:

"(1) Subject to the other provisions of this section, any person may, if he is a taxable person, take ….as a credit against his output tax in any taxable period, the amount of input tax allowable to him during that period.

(2) No input tax shall be allowed as a credit under this section in respect of –

(a) goods or services used or consumed to produce an exempt supply; …

(3) Where goods or services are used partly for taxable supplies and partly for exempt supplies, the credit shall be allowed in such proportion as is specified in the Seventh Schedule."

With effect from 1st September 1999, section 21(2)(a) was amended to read so as to read simply "goods or services used to make an exempt supply", and section 21(3) was replaced by the following:

"(b) ... where goods or services are used to make both taxable supplies and exempt supplies, the credit in respect of those goods or services shall be allowed in the proportion of the value of taxable supplies to total turnover on the basis of -

(i) in the case of a new business, the estimated figures for the current accounting year; or

(ii) in any other case, the actual figures for the previous accounting year."

10. Section 72(1) (Regulations) reads:

"(1) The Minister may -

(a) make such regulations as he thinks fit for the purposes of this Act;

(b) by regulations -

(i) prescribe any matter which may or is required to be prescribed under this Act; or

(ii) amend the First Schedule, the Second Schedule and the Third Schedule."

11. As originally enacted, the First Schedule (Goods or services exempted) included as item 29:

"The first 15 cubic meters of water per month supplied by the Central Water Authority for domestic purposes."

The Value Added Tax (Amendment of Schedule) Regulations (CN No. 160 of 1998) made by the Minister under section 72 on 22nd September 1998 provided, by regulation 3(k), that there should be added immediately after the words "domestic purposes", the words,

"and the renting out of a meter and the carrying out of infrastructure works by the Authority";

The Regulations were expressed to be "deemed to have come into operation on 7 September 1998" (regulation 4). To complete the history, with effect from 2nd October

2000, the VAT Act 1998 was amended by the VAT (Amendment) Act 2000, so as to delete item 29 from the First Schedule and to add into the Fifth Schedule (as a zero-rated supply) an item 7, reading "Water supplied by the Central Water Authority and the renting out of a meter and the carrying out of infrastructure works by the Authority". From that date, therefore, input tax in respect of the acquisition of meters and arranging of infrastructure works, as well as in respect of the supply of all water, became on any view a legitimate credit against output tax.

The parties' cases in more detail

12. The Revenue submits that the VAT incurred by the CWA in acquiring meters and contracting for infrastructure works falls within the scope of section 21(2)(a), as "input tax... in respect of ... goods and or services" which was, assuming the amending Regulations to be valid, "used to make an exempt supply" consisting of the meters fitted at customers' premises and the connections constructed and maintained between those meters and the CWA mains. The CWA submits that it made only one supply, which was of water, and that the meters provided and infrastructure works undertaken in order to enable that supply to occur were either submerged in that water supply or, if still capable of being identified at all, entirely incidental to it.

13. On the CWA's case, there should be allowed, in respect of the input tax incurred on the acquisition of meters and undertaking of infrastructure works, a credit against output tax in the proportion specified in the Seventh Schedule or, with effect from 1st September 1999, in the proportion which supplies made to customers above 15 cubic metres per customer per month bore to the total water turnover. Those results follow from section 21(3) in its form as originally enacted and as amended in 1999. On the Revenue's case, no credit at all is allowable in respect of such input tax, and the CWA is, in effect, in the position of an end user or consumer of the meters it acquired and the infrastructure works it undertook between the meters and the mains.

14. Before the Committee and the Supreme Court, this was as far as the main arguments went, although there was a subsidiary suggestion (which the Committee rejected and the Supreme Court did not explicitly address) that the amending Regulations were ultra vires because inconsistent with primary provisions of the VAT Act 1998. Before the Board, CWA added to this a complaint based on their retrospectivity.

The relevant principles

15. The basic principle on which the CWA relies can usefully be taken from the Court of Justice's judgment in *Card Protection Plan Ltd v Commissioners of Customs and Excise* (Case C-349/96) [1999] 2 AC 601. The Court was there asked to identify "the appropriate criteria … for deciding, for VAT purposes, whether a transaction

which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately" (para 26). It noted that "the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or … the exemption provisions ….", but added the (prophetic) rider (para 27) that

> "having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases."

16. In para 28 the Court said that "regard must first be had to all the circumstances in which [the] transaction takes place", and then, in two further important paragraphs it gave the general guidance on which the CWA particularly relies:

> "29. In this respect, taking into account, first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied..."

17. The *Card Protection Plan* (or *CPP*) principle has been applied to reach a conclusion that there was only one single transaction for VAT purposes in relation to, for example in-flight catering supplied during a flight by air (*British Airways plc v Customs and Excise Commissioners* [1990] STC 643), a limousine service to and from the airport offered at no extra charge (save beyond a certain geographical area) (*Virgin Atlantic Airways Ltd v Customs and Excise Commissioners* [1995] STC 341), free transportation offered by parking companies between off-airport parking lots and the airport (*Purple Parking Ltd v Commissioners for Her Majesty's Revenue and Customs* (Case C-117/11) 19 January 2012) and the provision of a portfolio of management services (*Finanzamt Frankfurt am Mai V-Hochst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951). On the other hand it has apparently been held, in the United

Kingdom, that care and treatment by a private hospital may be distinguished as a separate supply from that of medication prescribed by a consultant to the patient while in hospital (*Customs and Excise Commissioners v Wellington Private Hospital Ltd* [1997] STC 445), although it is unnecessary for the Board to consider or express any view on that decision on particular facts which have no parallel here.

18. Before the Committee and Supreme Court, the Revenue confronted the *CPP* principle head on, contending that the effect of the amending Regulations was, nonetheless, to require a different analysis, precluding the rental of water meters and rendering of infrastructure services from being services ancillary to its supply of water, and requiring them to be seen as self-standing services. There is an obvious factual incongruity about such a legal analysis. Before the Board, Mr Philip Baker QC who did not appear for the Revenue below, did not formally abandon the approach taken below. But he preferred as his primary case the more nuanced approach, that it is irrelevant whether the situation should be analysed in terms of separate supplies; what matters is that it was open to the legislator (here the Minister by the amending Regulations) to identify a "concrete and specific aspect" of an overall supply such as that of water made by the CWA, and to give that aspect a different VAT status, whether by making it exempt, by making it zero-rated or by attaching to it a different rate of VAT.

19. In support of this approach, Mr Baker referred to a line of European Court of Justice case-law not cited below: *European Commission v France* (Case C-384/01) [2003] ECR I-4395, *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (Case C-251/05) [2006] STC 1671, [2006] ECR I-6269, *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* (Case C-442/05) [2009] STC 1, [2008] ECR I-1817 and *European Commission v France* (Case C-94/09) [2012] STC 573, [2010] ECR I-4261. The starting point of the first three cases was article 12(3)(a) of the Sixth Directive 77/388/EEC. Under article 12(3)(a) Member States were to fix a standard rate of VAT for the supply of goods and services. However, article 12(3)(a) permitted them to apply either one or two reduced rates "only to supplies of the categories of goods and services specified in Annex H". Further, article 12(3)(b) permitted them to "apply a reduced rate to supplies of natural gas [and] electricity" and article 28(2) permitted them to maintain certain prior exemptions. Public authorities and bodies were not subject to the VAT régime, save in relation to activities specified in Annex D, which included "the supply of water". The fourth case was decided under Council Directive 2006/112/EC, which replaced the Sixth Directive with effect from 1st January 2007.

20. *European Commission v France* (Case C-384/01) concerned the permission to apply a reduced rate to supplies of natural gas and electricity. France applied a reduced rate of 5.5% to standing charges for such supply by public networks, but the standard rate to consumption. The Commission challenged the legitimacy of a reduced rate limited to only part of the supplies made. The Court rejected the challenge on the

ground that "since the reduced rate is the exception, the restriction of its application to concrete and specific aspects, such as the standing charge conferring entitlement to a minimum quantity of electricity on the account holders, is consistent with the principle that exceptions or derogations must be interpreted restrictively" (para 28).

21. *Talacre* concerned the power to zero-rate a supply of specified goods. The United Kingdom zero-rated caravans. Talacre operated caravan parks, selling or renting fitted caravans as well as pitches and other facilities. It claimed that the contents of its fitted caravans (bathroom suites, floor coverings, curtain rails, curtains, cupboards, fitted kitchens, beds and furniture generally) should attract zero-rating as part of a single supply of the caravan (although they had been identified separately as attracting VAT on the invoice by which Talacre had bought them from their own caravan suppliers). The *CPP* principle was relied on and *European Commission v France* cited. The Court rejected Talacre's claim. It again noted that exceptions to the general principle that VAT should be charged were to be "interpreted strictly" (para 23), and went on:

> "24. The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case law on the taxation of single supplies, relied on by Talacre …., does not relate to the exemptions with refund of the tax paid with which art 28 of the Sixth Directive is concerned. While it follows, admittedly, from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid.
>
> 25. In this connection, as the Advocate General rightly pointed out in paras 38 to 40 of her opinion, referring to para 27 of *CCP* [1999] STC 270, [1999] 2 AC 601, there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account. In the light of the wording and objective of art 28(2)(a) of the Sixth Directive, recalled above, a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the member state concerned, for social reasons and for the benefit of the final consumer. In the present case, the United Kingdom … has determined that only the supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans.
>
> 26. Lastly, there is nothing to support the conclusion that the

> application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system …"

22. *Zweckverband* concerned the power to maintain an exemption. The Zweckverband was responsible for water supplies and sewage disposal in the Torgau-Westelbien district. It laid mains connections at the request of its customers, in its case charging them with the cost. Without such a connection, the supply of water was impossible (para 34). The Court accordingly held, in answer to the first question referred to it, that the laying of mains connections was part of the supply of water within Annex D. But the second question referred required it to consider whether this meant that, if Germany chose to make the supply of water an exempt supply under article 12(3)(a) and Category 2 of Annex H to the Sixth Directive, it must do so on an all or nothing basis. The Court answered this question in the negative. A "selective" application of the reduced rate to "concrete and specific aspects of water supplies" could not be excluded (para 41 and 44). Moreover, in para 44, the Court took the reverse of the situation before it as an example, that is the application of a reduced rate to the laying of mains connections.

23. In *Commission v France* (Case C-94/09) [2012] STC 573, the Court reiterated the principles in *Commission v France* (Case C-384/01) and *Zweckverband*, and recognised as permissible France's decision to apply a reduced rate to transportation of a body by funeral undertakers, as a concrete and specific aspect of their overall services of managing funeral homes, organising funerals, embalming the body, providing a coffin, etc.

24. Mr Baker noted that the principles recognised in these cases had found wider informal recognition in article 9 of a draft law on VAT for the state of "Fantasia" prepared by the IMF.

Detailed analysis of the issues

25. Mr Rishi Pursem SC for the CWA did not take issue with the general principles stated in paragraphs 15 to 24 above, but submitted that they could not support the Revenue's case in the light of specific provisions of the VAT Act 1998. The Minister, he submitted, only had power under section 72 to amend the First Schedule so as to exempt something which amounted to a "supply" within the meaning of section 4 of the Act, and the provision of a meter and infrastructure for a customer was not a supply.

26. In so far as this submission suggests that the only relevant or recognisable supply was or should be treated for all purposes as having been of water, because that was the aim of all of the CWA's activities, the Board cannot accept it. In speaking of a

"single service", the *CPP* principle does not mean that ancillary services or supplies entirely disappear. Rather, it treats them as ancillary services or supplies which share the tax treatment of the principal service. The European Court of Justice case-law discussed in paragraphs 19 to 24 above shows that it can be both permissible and relevant to identify the ancillary elements for particular purposes. The power to exempt or attach a lower VAT rate to what would otherwise fall to be treated as a single service can thus attach to a "concrete and specific aspect" of such a service. The Board sees no material difference in this respect between the language of the VAT Directives and that of the VAT Act 1998.

27. Apart from the actual water supply (and apart from a point on consideration to which the Board will come), a supply of meters on rental and the supply of the necessary infrastructure would in each case constitute a supply of services under section 4(1)(b). Taking into account the actual water supply, section 4(5)(c), while still recognising the supply of the meters and infrastructure as a supply of services, provided that such supply should be treated as part of the water supply. That reflects the *CPP* principle. But the purpose of section 4(5) is to characterise and distinguish between supplies of goods and services. It does not mean that, when it comes to specifying or amending exemptions in the First Schedule, the principles discussed in paragraphs 19 to 24 above are excluded. The Minister under section 72 was not only entitled to "make such regulations as he thinks fit for the purpose of [the] Act", but also specifically to amend the First as well as the Second and Third Schedules. The First Schedule, in its unamended form, itself distinguishes between different aspects (the first 15 cubic metres and the rest) of what would otherwise fall to be treated for VAT purposes as a single water supply to the customer.

28. The principles discussed in paragraphs 19 to 24 above apply as much where the incidental supplies are a mere means to the end (receiving water) as where they may have some value on their own. The incidental supplies were mere means in the first *Commission v France* case (standing charges which the Court of Justice appears to have accepted as conferring entitlement to a minimum quantity of gas and electricity: see paras 28-29 of its judgment) and in the *Zweckverband* case (laying at customers' request of mains connections to enable water supply). In the second *Commission v France* case, the transportation of bodies by funeral undertakers could also be described as a means to achieve burial, rather than an end in itself, but was a particular service provided by the undertakers as part of their overall service. Elements used in production which do not involve an incidental supply to a customer, or a concrete and specific element of an overall supply to a customer, would of course raise different considerations.

29. In a case such as the present, customers need to be supplied with a meter and a connection if they are to be connected to the mains and to receive water. That the supplying of a meter and connection are necessary pre-requisites to any supply of water to a customer is highly relevant to the *CPP* question whether either is an independent, as opposed to ancillary or incidental, supply, but this does not affect the

fact that they are very important, concrete and specific elements which any potential water customer seeks to have installed as soon as possible and maintained thereafter, and correspondingly capable of being recognised as such by the legislator and treated separately for VAT purposes.

30. In these circumstances, the Board sees no reason why the Minister should not amend the First Schedule, dealing with exempt goods or services, so as to supplement the distinction between supplies below and above 15 cubic metres per month with a further distinction between, on the one hand, the principal water supply and, on the other, the supplies of meter and infrastructure services incidental to that principal supply. Mr Pursem submitted at points that the power to amend under section 72 could not legitimately be used to deprive CWA of a benefit which it would otherwise have had under the VAT Act 1998 as originally enacted. That restriction would effectively emasculate section 72, which on any view expressly contemplates amendments to redefine what is, or is to be treated as, a supply of goods or of services under the Third Schedule or to add new categories of exempt goods and services under the First Schedule.

31. Mr Pursem further submitted that it was impossible for the CWA's provision to its customers of meter and infrastructure services to be, or to be treated as an exempt supply, under or for the purposes of the Act, because they were not provided for consideration. He relied upon the definition in section 4(2)(a) of "supply" to exclude "anything done otherwise than for a consideration". On the Committee's findings the meter rental was "symbolic", the only charge for infrastructure was a fee for initial connection and there was no charge for any subsequent works. The Board need not express any view whether a "symbolic" rental is in this context nonetheless valid consideration, as it is in other contractual contexts (vide, the traditional peppercorn). Further, the Board has no real information whether the infrastructure works in issue on the present appeal were in the main related to initial connection to the mains (as the Committee's case stated suggests, when recording Mr Pursem's submissions before it) or to subsequent maintenance works (as Mr Baker was inclined to think). There was plainly consideration for the overall package of services and water provided by the CWA.

32. The fact that concrete and specific aspects of a principal supply may be segregated for the purpose of exemption from VAT does not mean that there was no consideration for them. Nothing in the European Court of Justice case-law discussed in paragraphs 19 to 24 above requires a "concrete and specific aspect" of a principal supply or package to have its own consideration, and the price at which caravans were on-sold by Talacre in the *Talacre* case was evidently all-inclusive. The ability to attach a different VAT status to a concrete and specific aspect of a principal supply cannot vary according to whether the supplier allocates to that aspect a separately identifiable consideration (as in *Zweckverband*) or no, limited or symbolic consideration (as in the present case). Further, section 12 of the VAT Act 1998 provides, where necessary, for the allocation to a taxable supply of "such part of the consideration as is properly

attributable to it".

33. Finally, Mr Pursem questioned how the rental of meters and their connection and the maintenance of their connection to CWA's mains could be treated as exempt for the purposes of section 21(2(a), when it was common ground that the CWA was entitled to deduct input tax in respect of infrastructure works undertaken to construct and maintain the mains themselves. The answer to this given by Mr Baker was that the latter works could not be related to any supply, or any concrete and specific aspect of any supply, to any particular customer. Their costs represent general overheads of the CWA, outside the scope of section 21(2((a).

34. The Board accordingly considers that the CWA's acquisition of meters and undertaking of infrastructure works to connect or maintain the connection between its mains and the meters supplied to its customers were under section 21(2)(a) goods and services used to produce or make what was or falls to be treated as an exempt supply under the terms of the First Schedule as amended by the 1998 Regulations. The consequence, assuming the validity of that amendment, is that no input tax could be recoverable in respect of the acquisition of such meters and the undertaking of such works.

The vires of the amending Regulations

35. That leaves for consideration the vires of the amending Regulations. In so far as CWA has suggested below and before the Board that amending Regulations could not legitimately deprive CWA of any benefit provided by the original Act or make exempt an incidental service which would otherwise, under the *CPP* principle, attract the same VAT treatment as the principal supply to which it was incidental, the Board rejects the submission for reasons already given.

36. The other aspect of the amending Regulations which CWA has before the Board submitted lay outside the Minister's power relates to their retrospectivity. This does not appear to have been part of CWA's case before the Committee or in the Supreme Court, and there are no findings of fact about its implications. Mr Pursem accepted that the complaint could at best go only to the deduction of input tax in respect of meters acquired and infrastructure works undertaken in the period between 7th September and 3rd October 1998. There are no findings as to the precise circumstances in which the amending Regulations were passed, as to CWA's state of knowledge about them before they were passed, or as to whether any (and if so what) meters were acquired or works undertaken during the period between 7th September and 3rd October 1998. However, Mr Pursem accepted that, if any were, any input tax on them would in the overall context of this case be of marginal significance. In these circumstances, the Board does not regard the point as one which it ought to address at this stage of the proceedings.

37. The Board adds this. Before the Vat Act 1998 came into force on 7th September 1998, CWA wrote on 4th August 1998 enquiring whether meter rental and connection fees would be subject to VAT, and were informed by the Revenue by letter of 28th August 1998 that they would be treated as non-vatable. The amending Regulations of 22nd September 1998 were, on their face, designed to achieve that result. Although there are no findings on the subject, the amending Regulations may well therefore have come as no surprise to CWA.

38. Even a general power like that conferred by section 72 will not normally suffice to justify subordinate legislation with retrospective effect. But different considerations may arise if the subordinate legislation has been announced in advance and/or has caused no relevant prejudice. However, the Board did not hear any detailed submissions in this area, and need not consider it further. As it has already stated, the point appears to have been unexplored below, and in any event in the light of the shortness of the period involved and the lack of any findings making this relevant on the facts, the Board as stated does not consider that it should address it further.

Conclusion

39. In conclusion, the Board allows this appeal, and determines that the Central Water Authority was not entitled to credit in its VAT returns for periods from 7th September 1998 to May 2000 for the input VAT which it incurred in such periods when acquiring water meters to fit in customers' properties and undertaking infrastructure works to construct or maintain the connection between such meters and its water mains.

40. The Board invites any submissions on costs, to be made in writing within 21 days.