Sizing up the competition - The Upper Tribunal considers the public authority VAT exemption in *Northumbria Healthcare NHS Foundation Trust v Revenue and Customs* [2022] UKUT 267 (TCC)

1. The Upper Tribunal has ruled that an NHS Trust did not provide car parking under a "special legal regime" such that its supplies would be zero-rated. The case is important because (i) it sets a limit on what can be considered a "special legal regime" for the purposes of Article 13 of the Principal VAT Directive and section 41A of the Value Added Tax Act 1994, and (ii) it confirms that detailed factual and expert evidence is not required for a Tribunal to find that treating a public authority as a non-taxable person would lead to significant distortions of competition.

2. **Issue 1 – "special legal regime".** The Trust argued before the Upper Tribunal that guidance documents from the NHS and Department of Health created a "special legal regime". The Upper Tribunal analysed the case law and rejected the Trust's arguments that (i) the relevant test was whether the public authority was governed only by the ordinary rules of private law in respect of the activity, and (ii) where a public authority is bound by its own guidance or bound to take into account external guidance that does not apply to private traders that creates a "special legal regime". The Upper Tribunal ruled that it is not sufficient that the public authority is subject to a generic public law obligation to follow guidance. Rather, it is necessary to identify with precision the specific provisions of national law that give rise to the "special legal regime", and if the Trust was correct then all or almost all the activities of a public authority would be carried on pursuant to a special legal regime, and the requirement in Article 13(1) for the public authority to be acting as a public authority would be deprived of any meaningful effect. This sets an important limit on what can amount to a "special legal regime."

3. **Issue 2 – "significant distortion of competition".** The Upper Tribunal confirmed that (i) the relevant question is whether the different treatment of the activity for VAT purposes would lead to a significant distortion of competition, including a distortion of potential competition provided that there is a real and not hypothetical possibility of market entry by

a private operator, (ii) the ability of a public body to make a greater profit from the relevant activity by comparison with the competing private operator, as a result of differential fiscal treatment, will in principle produce a distortion of competition, (iii) the test does not require an assessment of the effect of non-taxation on the pricing decisions of the public bodies in question, (iv) detailed factual and expert evidence is not always required to determine the existence of a distortion of competition, and (v) the starting point is that if the two activities are identical or similar from the point of view of the consumer and meet the same needs of the consumer then they are in competition with each other. If, further, the two activities are treated differently for the purposes of VAT then, as a general rule, that will be regarded as giving rise to a distortion of competition

4. This decision has the potential to significantly reduce the evidential burden on HMRC in proving "significant distortion of competition" where two activities are identical or similar from the point of view of the consumer, and also shows that the general approach to fiscal neutrality in terms of competition also applies to questions of public authority VAT exemption.