[2013] UKFTT 488 (TC)

TC02872

Appeal number: MAN/2006/0120

VAT – pre-1 January 1978 supplies - agents' commissions in respect of third party purchases – whether directly applicable right under article 8(a) of the Second Directive to retrospective reduction in taxable value of goods supplied by mail order company to agents - effect of judgment of the CJEU in Grattan plc v Revenue and Customs Commissioners (Case C-310/11) – whether the principle of fiscal neutrality in its neutral tax burden sense was or was not a rule of primary law which enabled on its own the basis of assessment within the meaning of article 8(a) of the Second Directive to be determined – held it was not – appeal on pre–1978 supplies issue dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRATTAN PLC **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
JULIAN STAFFORD

Sitting in public at 45 Bedford Square, London WC1 on 17 July 2013

Dr Paul Lasok QC, instructed by KPMG LLP, for the Appellant

Peter Mantle and Philip Woolfe, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. At a hearing of this appeal in December 2010 we heard argument on two issues. One of those (the compound interest issue) was whether there existed an EU right to compound interest, and if so whether such a right could be enforced in this tribunal under the statutory scheme in the Value Added Tax Act 1994 ("VATA"). The other (the pre-1978 supplies issue), to which we now return in this decision, was whether commission earned by mail order agents in respect of purchases by third party customers (referred to as "3PP commission"), which was credited to the agents' accounts with mail order companies in the Grattan group, and received by the agents in cash or by way of credit against a debit balance in the account, gave rise to a retrospective reduction in the value of the supplies made by the mail order companies prior to 1 January 1978, the date from which the Sixth VAT Directive superseded the Second Directive.

2. We released our decision on 12 January 2011; [2011] UKFTT 31 (TC). We found that under domestic law – s 10(2) of the Finance Act 1972 – the consideration for the mail order supplies could not be reduced by the 3PP commission taken in cash. That issue therefore depended on the existence of a directly-applicable EU right. We could not with complete confidence determine that there was such a right, and accordingly we referred that question to the Court of Justice of the European Union ("CJEU").

Our reference to the CJEU

3. In consequence of our decision, we released directions on 26 May 2011 for the transmission to the CJEU of a request for a preliminary ruling. The question referred was as follows:

> "In relation to the period before 1 January 1978, does a taxable person have a directly effective right under Article 8(a) of the Second Council Directive of 11 April 1967 (67/228/EEC), and/or the principles of fiscal neutrality and of equal treatment, to treat the basis of assessment of a supply of goods as retrospectively reduced where, after the time of that supply of goods, the recipient of the supply received a credit from the supplier which the recipient then elected either to take as a payment of money, or as a credit against amounts owed to the supplier in respect of supplies of goods to the recipient that had already taken place."

4. After describing the way in which commission (or credits) could arise both in respect of an agent's own purchases ("AOP") and in respect of purchases made by third party customers through the agent ("3PP"), and that the dispute concerned only the 3PP commission, the reference went on to refer to the dispute as concerning whether the commissions paid or credited reduced the taxable amount of the supplies of goods by the mail order companies to the agents. There is a clear theme running through the reference, including in the submissions of the parties recorded in the reference, that although the commission arose as a result of both AOP and 3PP

purchases, what is in issue is the value of supplies made by the mail order companies to the agent, and not supplies made by the mail order companies to the third party customer.

The CJEU's judgment

5. In the CJEU, the case (C-310/11; [2013] STC 502) was one in which the Court had the assistance of an opinion of the Advocate-General (Kokott) issued on 13 September 2012. The judgment of the Court was released on 19 December 2012.

6. In its judgment, the Court referred to the question referred to it by this tribunal. At [19] the Court described the essence of that question in the following way:

> "By its question, the referring tribunal asks, in essence, whether art 8(a) of the Second Directive must be interpreted as conferring upon a taxable person the right to treat the basis of assessment of a supply of goods as retrospectively reduced where, after the time of that supply of goods, an agent received a credit from the supplier which the agent elected to take either as a payment of money or as a credit against amounts owed to the supplier in respect of supplies of goods that had already taken place."

7. In reaching its conclusion on this question the Court focused on the issue of whether any adjustment could be retrospective. It found that there was nothing in the Second Directive that provided for the chargeable event, that is the event giving rise to the tax, to be set at a subsequent time or otherwise deferred. Nor did the directive provide for the alteration of a tax debt that had already arisen. Accordingly, as the Advocate-General had observed in her opinion, a taxable person's debt arose in an amount derived from the basis of assessment, a basis that was to be determined at the time of delivery (judgment, [24] to [26]).

8. The conclusion, stated at [27] was as follows:

> "Therefore, neither art 8(a) nor any other article of the Second Directive could be interpreted as meaning that regularisation of the basis of assessment, or of the output tax, after delivery—which is when the chargeable event took place—had to be permitted."

9. Were the argument to have been confined to the effect of article 8(a) of the Second Directive, there would be no remaining dispute. For supplies prior to 1 January 1978, the commissions paid in cash could not have resulted in an adjustment to the value of taxable supplies that had already been made. But the question referred had also asked whether the principles of fiscal neutrality and/or equal treatment would, either in conjunction with article 8(a) or on their own, require such an adjustment to be made. That question was dealt with by the Court, at [28] to [31], as follows:

> "28. As regards, next, the principle of fiscal neutrality, it is to be noted that this principle, which constitutes a fundamental principle of the common system of VAT, is the reflection in the field of VAT of the principle of equal treatment (see, to this effect, *Marks & Spencer plc v*

> *Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283, para 47). One of the consequences of this principle is that taxable persons must not be treated differently in respect of similar supplies which are in competition with each other (see, to this effect, *Solleveld v Staatssecretaris van Financien* (Cases C-443/04 and C-444/04) [2007] STC 71, [2006] ECR I-3617, para 39 and the case law cited).
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> 29. The principle of fiscal neutrality is not a rule of primary law which enables on its own the basis of assessment within the meaning of art 8(a) of the Second Directive to be determined (see, to this effect, *Finanzamt Steglitz v Zimmermann* (Case C-174/11) (15 November 2012, unreported), para 50 and the case law cited). Nor can it make up for the fact that the Second Directive does not include any provision comparable to art 11C(1) of the Sixth Directive.
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> 30. Under the same principle in its other sense, the amount of VAT to be collected by the tax authority must correspond exactly to the amount of VAT declared on the invoice and paid by the final consumer to the taxable person (*Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën* (Case C-484/06) [2009] STC 45, [2008] ECR I-5097, para 36 and the case law cited).
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> 31. It is clear from the documents submitted to the court that, in the main proceedings, sub-customers, as the final consumers of the goods, had to pay the catalogue price for the goods which they purchased and did not receive any commission from the company. The commission was in fact required to be paid back to the agent and not to the sub-customer. In those circumstances, and by virtue of the principles recalled in the preceding paragraph, it must be held that the consideration for the supply corresponded to the full unreduced catalogue price and that the basis of assessment was therefore that price."

10. Finally, the Court addressed an argument submitted by Grattan that having regard to the continuity of the VAT system there should be no distinction between the positions before and after 1 January 1978. This argument was dismissed on the basis that the degree of harmonisation under the Second and Sixth Directives was not comparable, the Sixth Directive having harmonised the concepts of chargeable event, chargeability to tax and taxable amount. It was under the Sixth Directive that the EU legislature had adopted art 11C(1), which introduced the conditions under which the taxable amount will be reduced retrospectively. There was no equivalent provision in the Second Directive (judgment, [32] to [36]).

11. The ruling of the CJEU was expressed in the following terms:

> "Article 8(a) of EC Council Directive 67/228 of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes—structure and procedures for application of the common system of value added tax must be interpreted as not conferring upon a taxable person the right to treat the basis of assessment of a supply of goods as retrospectively reduced where, after the time of that supply of goods, an agent received a credit from the supplier which the agent elected to

> take either as a payment of money or as a credit against amounts owed to the supplier in respect of supplies of goods that had already taken place."

Fiscal neutrality

12. Grattan accepts that the CJEU has decided that it cannot rely on the Second Directive. It also accepts that the reasoning in the judgment disposes of Grattan's arguments concerning the continuity of the VAT system.

13. That leaves the question of fiscal neutrality. In that connection, for Grattan, Dr Lasok submitted that, properly understood, the judgment meant that the principle of fiscal neutrality, in the sense described by the CJEU in [30], namely that the amount of VAT must correspond exactly to the amount of VAT declared on the invoice and paid by the final consumer to the taxable person, has the effect, independently of the Second Directive, of requiring a retrospective adjustment to the value of taxable supplies made by the mail order companies to the agents. Accordingly, Dr Lasok submits that the appeal in this respect should therefore be allowed.

14. It will be apparent from our summary of the CJEU's judgment, and this was common ground, that the CJEU referred to the principle of fiscal neutrality, firstly in the sense of the principle of equal treatment, and secondly in the sense of ensuring the neutrality of the tax burden. Where the parties essentially differ is in the interpretation of what the CJEU said at [29].

15. For Grattan, Dr Lasok says that the finding of the CJEU that the principle of fiscal neutrality is not a rule of primary law that by itself enables the basis of assessment to be determined, and that it cannot make up for the absence of specific provision in the Second Directive is confined to the first – equal treatment – sense of the principle of fiscal neutrality, and does not apply to that principle in its neutral tax burden sense.

16. Mr Mantle for HMRC submits, to the contrary, that it is clear that the CJEU has decided in its judgment that the principle of fiscal neutrality in all or any of its senses does not enable the basis of assessment to be addressed on its own. Accordingly, whether looking at equal treatment or neutral tax burden, the principle does not independently give any right to a retrospective reduction in the basis of assessment.

The structural argument

17. Dr Lasok argued that the structure and reasoning of the CJEU's judgment supported his reasoning. He submitted that if the Court had considered that the principle of fiscal neutrality in its neutral tax burden sense had been subject to what it had said in [29], the order of paragraphs [29] and [30] would have been reversed, and [31] would not have appeared in the judgment; the operation of the principle of fiscal neutrality in both senses would have been disposed of for the reason stated in [29]. There is, by contrast, no reference in [31] to the principle set out in [29].

18. Dr Lasok went on to submit that by necessary implication from the reasoning of the CJEU, the Court believed that the principle of fiscal neutrality, in the neutral tax burden sense, was indeed applicable (as the principle in the equal treatment sense was not), independently of the Second Directive. Otherwise, argued Mr Lasok, paragraph [31] of the judgment did not make any sense at all. If the principle in that sense, as well as in the equal treatment sense, had no independent effect, the matter would be settled by what the Court had said at [29], and [31] would be redundant.

19. We do not accept Dr Lasok's argument in this respect. In our view there is nothing in the structure of the judgment that would lead us to conclude that, where it stated at [29] that the principle of fiscal neutrality is not a rule of primary law that enables the basis of assessment to be determined, that must be understood as limited to the principle in its equal treatment sense. The Court does not confine its consideration in [29] to any particular aspect of the principle, and we do not consider that, if the Court had intended to draw the principled distinction between the effects of the two different senses of the principle of fiscal neutrality, it would have chosen to do so otherwise that by plain words.

20. Nor do we accept that, if paragraph [29] is to be construed in this way, paragraph [31] would make no sense or be redundant. The inclusion of an observation by the Court to the effect that the principle of fiscal neutrality in its neutral tax burden sense could not in any event have enabled there to be a reduction in the consideration for the supplies by the mail order companies to the third party "sub-customers" is, in our view, explicable in terms of the principle being an aid to interpretation of the Directive, and nothing more. In making this observation, the Court was doing no more than echoing the view adopted by the Advocate-General at [31] of her opinion, where, in considering whether the 3PP commissions could reduce the taxable consideration in respect of sales to the third party customers, the Advocate-General expressed the view that it is the full purchase price that forms the basis of assessment. That is an application of article 8(a) of the Second Directive, construed in accordance with the principle of fiscal neutrality in its neutral tax burden sense, which operates irrespective of the timing of the reduction in the value of the taxable supply; it is therefore addressing a different point to that already addressed at [29] which, in its reference to article 11C(1) of the Sixth Directive, is dealing with retrospective adjustments.

21. On the other hand, it was, as we have described above, clear from the reference, and it was equally clear from the treatment of the question at [32] and [33] of the Advocate-General's opinion, where she expressed reservations as to whether 3PP commission could reduce the consideration for the agent's own purchase, that there was an issue in respect of the commissions being treated as reductions in the consideration for the agents' own purchases. Looking only at the structure of the judgment, it would seem unlikely, if the CJEU was placing independent reliance on the neutral tax burden sense of the principle of fiscal neutrality, and intended thereby to point out the significant difference between the position of supplies to sub-customers and supplies to agents, that it did not make that distinction entirely explicit.

22. Our own conclusion on the structure of the judgment is that paragraph [29] is to be regarded as a general statement of the nature of the principle of fiscal neutrality in both the senses of that principle described by the Court. The reference in [31] to the effect of the principle in its neutral tax burden sense in assessing the consideration for particular supplies made by the mail order companies to sub-customers, who do not receive the commissions, is explicable as a separate application of article 8(a) interpreted by reference to the principle of fiscal neutrality in its neutral tax burden sense and does not carry with it any implication that the principle could be applied, on a free-standing basis, so as to permit retrospective adjustments to the value of the taxable supplies made by the mail order companies to the agents.

Substance of the CJEU judgment

23. Mr Lasok's second argument in support of his submission that the principle of fiscal neutrality in its neutral tax burden sense was not confined by [29] of the judgment was that this followed from a consideration of the source of the principle in that sense.

24. Before turning to that, however, we consider it appropriate first to analyse the basis for what the CJEU said at [29]. In remarking that the principle of fiscal neutrality is not a rule of primary law that can make up for the absence of a relevant provision in a Directive, the Court referred to the judgment of the CJEU in *Finanzamt Steglitz v Ines Zimmerman* (Case C-174/11; 15 November 2012, unreported), referring in particular to [50] and the case law cited in that paragraph.

25. *Zimmerman* was a case concerning the exemption for goods and services closely linked to welfare and social security work under article 13(A)(1)(g) of the Sixth Directive. One of the issues considered by the CJEU was the application of the principle of fiscal neutrality in its equal treatment sense. The Court discussed the principle of fiscal neutrality in the following terms:

> "46. In relation to these points, it should be borne in mind that, in the field of VAT, the concept of neutrality is used in different senses.
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> 47. On the one hand, recalling that the deduction mechanism provided for under the sixth Directive is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, the Court has held that the common system of VAT seeks to ensure neutrality of taxation of all economic activities, provided that those activities are themselves subject to VAT (see inter alia, to that effect, Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 27, and Case C-277/09 *RBS Deutschland Holdings* [2010] ECR I-13805, paragraph 38).
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> 48. On the other hand, according to settled case-law, the principle of fiscal neutrality means that supplies of goods or services which are similar, and which are accordingly in competition with each other, may not be treated differently for VAT purposes (see, inter alia, Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraph 24, and Joined Cases C-259/10 and C-260/10 *Rank Group* [2011] ECR I-0000, paragraph 32 and the case-law cited).

> 49. It is in that latter sense that the concept of neutrality is relevant in the present case. As is clear from the case-law set out in paragraph 22 above, in the interpretation of the exemptions provided for under Article 13 of the sixth Directive, the principle of fiscal neutrality must be applied alongside the principle that those exemptions must be interpreted strictly (see also, to that effect, Case C-44/11, *Deutsche Bank* [2012] ECR I-0000, paragraph 45).
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> 50. From that viewpoint, it should be borne in mind that the principle of fiscal neutrality – a particular expression of the principle of equal treatment at the level of secondary EU law and in the specific area of taxation (see, to that effect, *NCC Construction Danmark*, paragraph 44) – is not a rule of primary law against which it is possible to test the validity of an exemption provided for under Article 13 of the sixth directive. Nor does the principle make it possible for the scope of such an exemption to be extended in the absence of an unequivocal provision to that effect (see, to that effect, *VDP Dental Laboratory*, paragraphs 35 to 37, and *Deutsche Bank*, paragraph 45)."

26. In *Zimmerman*, the Court referred to the case of *NCC Construction Danmark A/S v Skatteministeriet* (Case C-174/08) [2010] STC 532, both as authority for the existence of the principle of fiscal neutrality in its neutral tax burden sense, and also in relation to it being an expression of the principle of equal treatment at the level of secondary EU law.

27. The relevant passage from the judgment in *NCC Construction* is that at [39] to [43] as follows:

> "39. First of all, it should be noted that the principle of fiscal neutrality resulting from the provisions of art 17(2) of the Sixth Directive implies that a taxable person may deduct all the VAT levied on goods and services acquired for the exercise of his taxable activities (see, to that effect, *Nordania Finans A/S v Skatteministeriet* (Case C-98/07) [2008] STC 3314, [2008] ECR I-1281, para 19).
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> 40. In that regard, it is necessary to add that, according to settled case law, the principle of fiscal neutrality, and, in particular, the right to deduct, as an integral part of the VAT scheme, is a fundamental principle underlying the common system of VAT established by the relevant Community legislation (see *Sosnowska v Dyrektor Izby Skarbowej we Wroclawiu Osrodek Zamiejscowy w Walbrzychu* (Case C-25/07) [2008] ECR I-5129, paras 14 and 15, and *PARAT Automotive Cabrio Textiltetoket Gyarto Kft v Ado – es Penzugyi Ellenorzesi Hivatal Hatosagi Foosztaly Eszak-magyarorszagi Kihelyezett Hatosagi Osztaly* (Case C-74/08) [2009] All ER (D) 215 (Apr), para 15).
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> 41. That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment (see, to that effect, *Marks & Spencer plc v Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283, para 49, and the case law cited).
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> 42. However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of

> fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law (see, by analogy, with regard to the protection of minority shareholders, *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* (Case C-101/08) [2009] All ER (D) 236 (Oct), para 63).
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> 43. The principle of fiscal neutrality may, consequently, be the subject, in such a legislative measure, of detailed rules, such as those, implemented in Danish law, resulting from the application of art 19(1) in conjunction with art 28(3)(b) of the Sixth Directive, and point 16 of Annex F to that directive, according to which a taxable person carrying out both taxable activities and exempt activities of selling real estate cannot deduct fully the VAT on its general costs."

28. We analyse the judgment of the Court in *NCC Construction* in the following way. At [39], the Court referred to the principle of fiscal neutrality in the neutral tax burden sense. At [40] it described the principle in that particular sense, and the right to deduct VAT levied on goods and services acquired by a taxable person for the exercise of his taxable activities, as a "fundamental principle underlying the common system of VAT established by the relevant Community legislation". Then, at [41], remarking on the principle in the sense in which it had described it at [40], the Court stated that the principle was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment. But it went on to say, at [42], that whilst the general principle of equal treatment, in common with the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law. That principle, by which in this context the Court is referring to the principle of fiscal neutrality in its neutral tax burden sense, may consequently be subject to detailed rules (see [43]).

29. From this passage it is clear that the Court, in referring to the principle of fiscal neutrality as a constitutional principle which is given effect only through the enactment of legislation, requiring secondary Community law, was considering the principle in its neutral tax burden sense. It is only later, at [44], that the Court in *NCC Construction* went on to refer to the principle in its equal treatment sense of precluding taxable persons from being treated differently in respect of similar supplies that are in competition with one another. Whilst member states must take into account the principles of equal treatment in implementing the applicable directive, *NCC Construction* makes it clear that the principle finds its expression through the directive, and not independently.

30. Dr Lasok argued that *NCC Construction* was a case concerning the principle of fiscal neutrality, not in its neutral tax burden sense, but in its equal treatment form. We accept that it was equal treatment that was directly in issue in *NCC Construction*, but in our view that cannot detract from the analysis undertaken by the Court on the status of the principle of fiscal neutrality generally. It is clear in our view from *NCC Construction*, and from the references in *Zimmerman* and *Grattan*, at [29], that in analysing the principle of fiscal neutrality as a constitutional principle, and not as a rule of primary law which by itself can determine the basis of assessment, the Court draws no distinction between the different expressions of that principle.

31. On the basis of the authorities referred to in [29] of *Grattan*, we find no support for Dr Lasok's argument. We turn then to consider the authorities cited by the Court at [30], the paragraph dealing specifically with the principle of fiscal neutrality in its neutral tax burden sense.

32. At [30] of the judgment in *Grattan*, as authority for the principle of fiscal neutrality in its neutral tax burden sense, the CJEU referred to *Fiscale eeinheid Koninklijke Ahold NV v Staatssecretaris van Financiën* (Case C-484/06) [2009] STC 45, at [36] and the case law cited in that paragraph. The *Ahold* case included the question whether the VAT directives entailed a specific obligation that member states must permit taxable persons to adopt a method of rounding down the VAT element of consideration for taxable supplies on an item by item basis. (The taxpayer was a supermarket chain which claimed it had overpaid VAT by instead using a system of rounding based on the till receipts of customers, comprising several items.) The Court in *Ahold* considered whether the principle of neutrality (and the principle of proportionality) could impose such an obligation on member states. At [36] the Court said:

> "One of the consequences of the principle of fiscal neutrality, which is the reflection in the field of VAT of the principle of equal treatment, is that taxable persons must not be treated differently, with regard to the method of rounding applied when VAT is calculated, in respect of similar services which are in competition with each other (see, to that effect, *Solleveld v Staatssecretaris van Financien* (Cases C-443/04 and C-444/04) [2007] STC 71, [2006] ECR I-3617, para 35 and case law there cited). By virtue of the same principle, the amount of VAT to be collected by the tax authority must correspond exactly to the amount of VAT declared on the invoice and paid by the final consumer to the taxable person (see, to that effect, *Elida Gibbs Ltd v Customs and Excise Comrs* (Case C–317/94) [1996] STC 1387, [1997] QB 499, para 24)."

33. Two questions were considered in *Ahold*. The first question was whether the issue was a matter solely of domestic law; the Court ruled that, in the absence of specific Community legislation, it was for the member states to decide on the rules and methods for rounding amounts of VAT, but that the states were bound, when making that decision, to observe the principles underpinning the common system of VAT, in particular those of fiscal neutrality and proportionality. At [36] the Court was considering the second question, namely whether, if the matter was one of Community law, member states were required by the VAT directives to permit item by item rounding.

34. It was in the context of its answer to the first question that the Court approached the second question. It found, at [37], that the principle of fiscal neutrality did not entail any requirement that a particular method of rounding be applied, in a case where the method chosen by the member state ensures that the amount of VAT to be collected by the tax authority corresponds exactly to the amount of VAT declared on the invoice and paid by the final consumer to the taxable person.

35. *Ahold* therefore is authority for the two emanations of the principle of fiscal neutrality; that of equal treatment and that of neutral tax burden, that are described in *Grattan*. But we do not accept Dr Lasok's description of [36] in *Ahold* as drawing a distinction between the two expressions of that principle; it does nothing more than describe them. Instead, the Court, at [37], goes on to refer to the principle in an undifferentiated form, which Mr Mantle argued supports the analysis that no such differentiation is to be inferred from the judgment in *Grattan*. With respect to the competing arguments, we do not consider that anything can be derived from *Ahold* that can assist us on the question whether *Grattan* is authority for a different approach being taken for the two ways in which the principle of fiscal neutrality may be expressed. That was not a question that was required to be addressed in *Ahold*, and we do not consider that the way in which the Court expressed itself in that case is any guide in this respect.

36. On the other hand, we do regard *Ahold* as providing some assistance in our consideration of the submission by Dr Lasok that [29] of the judgment in *Grattan* is confined to the equal treatment element of the principle of fiscal neutrality because equal treatment, being concerned with the treatment of a supply or a supplier by reference to another supply or supplier, does not enable the basis of assessment to be determined. The rounding methodology in *Ahold* was an element of the basis of assessment, and the Court (at [36]) regarded the principle of neutrality as relevant to that methodology. We do not therefore accept Dr Lasok's argument that the Court in Grattan, at [29], was intending to refer only to the principle of fiscal neutrality in its equal treatment sense. In both its equal treatment and neutral tax burden senses, that principle was capable, to the extent indicated by the case law, of bearing upon the question of the basis of assessment.

37. The case cited in [36] of *Ahold*, and to which therefore the Court in *Grattan* referred when identifying the principle of fiscal neutrality in its neutral tax burden sense, is *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387. In that case, the essential question was whether money refunded, in the case of "money-off" coupons by the manufacturer to the retailer, and in the case of "cash-back coupons" by the manufacturer to the consumer, constituted a retrospective discount reducing the manufacturer's price for the goods so that pursuant to article 11C(1) of the Sixth Directive the taxable amount should be reduced accordingly.

38. At [36] of *Ahold*, the specific reference is to [24] of the judgment in *Elida Gibbs*. At that paragraph the Court in *Ahold* summarised the position as being that the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer. To put this conclusion in context, however, it is necessary to consider the immediately preceding passage, commencing with [19], where the Court described the basic principle of the VAT system and how it operates:

> "19. The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed

the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.

20. Thus in *Staatssecretaris van Financiën v Hong Kong Trade Development Council* (Case 89/81) [1982] ECR 1277 at 1285, para 6 the court held that it was apparent from EC Council Directive 67/227 of 11 April 1967 on the harmonisation of the legislation of the member states concerning turnover tax (the First Directive) (JO 71 14.4.67 p 1301 (S Edn 1967 p 14)) that one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.

21. That basic principle clarifies the role and obligations of taxable persons within the machinery established for the collection of VAT.

22. It is not, in fact, the taxable persons who themselves bear the burden of VAT. The sole requirement imposed on them, when they take part in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, is that, at each stage of the process, they collect the tax on behalf of the tax authorities and account for it to them.

23. In order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT. As the court held in its judgment in *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* (Case 15/81) [1982] ECR 1409 at 1426, para 10, a basic feature of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the cost of the various price components of the goods and services. The procedure for deduction is so arranged that only taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods and services have already borne."

39. Dr Lasok submitted that the neutral tax burden embodiment of the principle of fiscal neutrality should be regarded as an independent principle, which operated therefore on its own, and which should therefore be applied as such to the facts of this case. He based this submission on an argument that the principal of neutrality in its neutral tax burden sense was derived from an obligation of primary legislation. The legislation in question was the First Directive, as referred to in [20] of *Ahold*, specifically in this context article 2 of that directive. On this footing he argued the principle of neutrality in its neutral tax burden sense should properly be regarded as a rule of primary EU law and accordingly that the ordinary and natural interpretation of the CJEU's judgment in *Grattan* is that paragraph [30] of that judgment must be applied unless, according to [31], the only transaction that is relevant to the supply is the supply to the sub-customer and the sub-customer is paying the full catalogue price.

40. We do not accept this analysis. In our judgment is it not supported by *Grattan* or by *Elida Gibbs*. It is clear from *Elida Gibbs*, at [23], that it is the directives that

give effect to the principles on which the VAT system is based. The directives are the means of giving effect to those principles, and the principles themselves do not have independent effect. It is not the case that it was article 2 of the First Directive that gave rise to the principle of fiscal neutrality in its neutral tax burden sense; it was that principle which was embodied, at that time to the limited extent of harmonisation determined by the member states, in article 2 of the First Directive and subsequently in Article 8(a) of the Second Directive and in the relevant provisions of the Sixth Directive and, currently, the Principal VAT Directive. Neither article 2 of the First Directive nor article 1 of that directive, which required member states to replace their present systems of turnover taxes by the common system of VAT defined in article 2, was the fountainhead of the principle. Article 2 of the First Directive was the means adopted at that stage, and at the level of harmonisation then applicable, to enable neutrality to be achieved. That article, in common with the corresponding provisions of subsequent directives, was the machinery adopted to reflect the principle of fiscal neutrality at the evolving stages of harmonisation; the principle on its own cannot provide any different or additional machinery.

41. That this is the correct analysis is confirmed by the way in which the Court in *Elida Gibbs* described its approach to the questions it had to address as to the effect on the taxable amount of the types of coupons it had been asked to consider. At [28] the Court referred to the need for conformity with the Sixth Directive in order to comply with the principle of neutrality, and at [30] to its interpretation of Article 11A(1)(a) of that directive being borne out by Article 11C(1). It is evident, as Mr Mantle submitted, that the approach of the Court in *Elida Gibbs* was by way of interpretation of the Sixth Directive by reference to the principle of fiscal neutrality and not by independent application of that principle in any of its elements, including that of neutral tax burden.

42. The analysis is also supported by the discussion by the Court in *Grattan*, at [33], of the lack of comparability of the degree of harmonisation under the Second and Sixth Directives, where the Court remarked on the fact that the First Directive did not at that stage include definitive rules in various respects, and in particular included no uniform basis of assessment.

43. It follows from this that we do not accept Dr Lasok's argument that to fail to give effect to the principle of fiscal neutrality in its neutral tax burden sense, independently of Article 8(a) of the Second Directive, is to accept that the First Directive and the Second Directive impose on member states mutually inconsistent obligations. The only obligations imposed on the member states were those contained in the directives. The interpretation of those directives, and the way in which they are implemented by the member states, must take into account the fundamental principles of the VAT system, including the principle of fiscal neutrality, both in the sense of equal treatment and that of neutral tax burden. But those principles are given effect only by the directives, as so interpreted and applied, and it is therefore according to the provisions of the directives that the basis of assessment falls to be determined. There is nothing in the authorities to cast any doubt on the clear meaning to be given to what the Court in *Grattan* said at [30], namely that the principle of fiscal neutrality, in every sense, is not a rule of primary law which enables on its own the basis of

assessment within the meaning of article 8(a) of the Second Directive to be determined.

44. We reach this conclusion on our own analysis of the relevant case law and without reference to the opinion of Advocate General Kokott in *Grattan* on this issue. But we can respectfully say that that opinion wholly supports our own conclusion. The Advocate General took the view, at [49] to [51] of her opinion, that the degree of harmonisation under the Second and Sixth Directives could not be compared, that it was only with the Sixth Directive that there was comprehensive harmonisation of the uniform basis of assessment and that consequently the Second Directive does not provide for a retrospective reduction of the basis of assessment. She addressed the principle of fiscal neutrality, in its neutral tax burden sense, in the following way (at [52] to 54]):

> "52. Furthermore, observance of the principle of fiscal neutrality does not lead to any other conclusion.
>
> 53. This principle is admittedly not [,] contrary to the United Kingdom government's submissions, merely a reflection of the principle of equality. In addition to this meaning, the court also uses the principle of neutrality in the sense of a neutral tax burden, which protects the taxable person, since the common system of VAT is intended to tax only the final consumer.[1]
>
> 54. In this variant of meaning, however, the principle of neutrality has no authority which transcends the legislation.[2] It may therefore be used as an aid to interpretation in case of doubt, but may not extend or restrict the provisions of the applicable VAT directive.[3] Thus, in particular it cannot compensate for the fact that the Second Directive does not contain any provision comparable to art 11C(1) of the Sixth Directive."

45. That, in our respectful view, is an accurate summary of the EU jurisprudence on this issue. Despite Dr Lasok's submissions to the contrary, we do not consider that there is any tension between what the Advocate General said in this regard and the judgment of the Court in *Grattan*. We have no doubt that if the Court had intended to adopt a different approach from that of the Advocate General, and had decided that the principle of fiscal neutrality in the neutral tax burden sense did indeed transcend the legislation in the form of article 8(a) of the Second Directive, it would have said as much in clear terms, particularly since such a finding would have been the direct opposite of the opinion expressed so clearly by the Advocate General. That the Court did not do so is explained, in our view, by the clear and consistent thread running through the cases that the principle of fiscal neutrality as a whole does not have

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[1] [A-G note] See, inter alia, *Elida Gibbs*, paras 19 and 23.

[2] [A-G note] See the opinion of Advocate General Bot in *NCC Construction Danmark A/S v Skatteministeriet* (Case C-174/08) [2010] STC 532, [2009] ECR I-10567, points 84 to 86.

[3] [A-G note] See *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951, para 45, with regard to the principle of neutrality in its manifestation as a principle of equal treatment.

independent effect, a thread that has been adopted and maintained by the judgment of the Court in *Grattan*.

Application to the facts

46. It was common ground that if we were to find that the CJEU in *Grattan* had decided that the principle of fiscal neutrality in its neutral tax burden sense had no independent application to the basis of assessment, the ruling of the Court that article 8(a) of the Second Directive did not allow the basis of assessment to be retrospectively reduced in the circumstances of the 3PP commissions in this case would be determinative, and that this part of Grattan's appeal would fall to be dismissed.

47. That is our finding. The parties agreed at the hearing that we would decide this issue of principle, and proceed to consider the application of the CJEU's judgment to the facts of this case only if we had reached the opposite conclusion. In view of our decision, we need take that exercise no further.

Decision

48. We dismiss Grattan's appeal on the pre-1978 supplies issue.

Application for permission to appeal

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 11 September 2013