Neutral Citation: [2024] UKFTT 00638 (TC)

Case Number: TC09243

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2018/01780; TC/2020/01696

VALUE ADDED TAX – decision in principle in relation to whether value added tax was chargeable on the supply of a plan bundle at the time when the plan bundle was sold and by reference to the whole of the consideration that was paid for the plan bundle or whether value added tax was instead chargeable only when, and only to the extent that, the allowances in the plan bundle were actually used and, for a plan bundle sold prior to 1 November 2017, not effectively used and enjoyed in a country outside the European Union – consideration of the legislation and authorities relating to the nature and time of supplies for value added tax purposes and to the legislation and authorities relating to vouchers – held that value added tax was chargeable on the supply of a plan bundle at the time when the plan bundle was sold and by reference to the whole of the consideration that was paid for the plan bundle but that, for a plan bundle sold prior to 1 November 2017, a repayment of value added tax should be made to the extent that the allowances in the plan bundle were effectively used and enjoyed in a country outside the European Union – held also that the plan bundles were not vouchers for VAT purposes, either under the rules in force prior to 1 January 2019 or under the rules in force on and after that date – appeals remitted to the parties to agree, in the light of the above decision in principle, on the quantum of the assessments and, in relation to some of the assessments, whether or not the relevant assessments were made to the best judgment of the Respondents, with permission to return for a further hearing on those aspects should the parties fail to reach agreement

Heard on: 20, 21, 22, 23 and 24 May 2024
Judgment date: 18 July 2024

Before

TRIBUNAL JUDGE TONY BEARE
MS SONIA GABLE

Between

LYCAMOBILE UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr James Rivett KC and Mr Michael Ripley, of counsel, instructed by Bryan Cave Leighton Paisner LLP

For the Respondents: Ms Eleni Mitrophanous KC, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to the treatment for value added tax ("VAT") purposes of plan bundles (the "Plan Bundles") which were sold by the Appellant to its customers in the United Kingdom (the "UK") over a period comprising VAT periods ending 07/12 to 08/19 (both inclusive).

2. The Plan Bundles comprised rights to future telecommunication services – which is to say, telephone calls, text messages and data (together, "Allowances" and each an "Allowance") – in some cases along with the right to access other types of services which are described in further detail below. There were hundreds of different Plan Bundles sold by the Appellant within the relevant VAT periods and the precise composition of those Plan Bundles varied, as described in further detail below.

3. As regards the VAT treatment of the Plan Bundles, the Appellant considers that the services contained within each Plan Bundle were supplied only as and when the services were used. In contrast, the Respondents consider that those services were supplied when the relevant Plan Bundle was sold. This is not simply a difference of timing. If the Appellant is right, then the consideration which the Appellant received for each Plan Bundle would be taken into account for VAT purposes only to the extent that the relevant Plan Bundle was actually used and only to the extent that its use involved a standard-rated supply for VAT purposes. Conversely, if the Respondents are right, then the consideration received for each Plan Bundle would be taken into account for VAT purposes in full regardless of usage albeit, in some cases, subject to a subsequent adjustment to the extent that the usage did not involve a standard-rated supply.

4. The Appellant accounted for VAT in respect of the relevant VAT periods on the basis of its view of the law. The Respondents' view of the law is reflected in the three VAT assessments which are the subject of the two appeals to which this decision relates. Those are as follows:

   (1) assessments dated 6 April 2017 in the amount of £6,319,980 for the VAT periods 07/12 to 02/15;

   (2) assessments dated 3 November 2017 in the amount of £19,116,953 for the VAT periods 03/15 to 02/17; and

   (3) assessments dated 19 November 2019 in the amount of £26,386,932 (subsequently amended to £25,707,095 by a letter dated 12 March 2020) for the VAT periods 03/17 to 08/19.

5. The assessments referred to in paragraphs 4(1) and 4(2) above were confirmed by the Respondents in a review conclusion letter dated 15 February 2018 and the Appellant appealed against the review conclusions in a notice of appeal dated 9 March 2018.

6. The assessments referred to in paragraph 4(3) above were confirmed by the Respondents in a review conclusion letter dated 7 April 2020 and the Appellant appealed against the review conclusions in a notice of appeal dated 6 May 2020.

7. In the appeal referred to in paragraph 5 above, the Appellant advanced four grounds of appeal. Those were that:

   (1) the Plan Bundles were face-value vouchers that were retailer vouchers and not single-purpose vouchers;

(2) the Plan Bundles should be treated as such in order to comply with general principles of European Union ("EU") law which bound the Respondents;

(3) activating a Plan Bundle was not chargeable to VAT because, at that time, it was not possible to identify the nature and extent of the services which were to be supplied under the Plan Bundle with sufficient particularity; and

(4) from the perspective of the consumer, there was functionally no difference between a Plan Bundle and the top-up credit which customers of the Appellant were able to use to receive telecommunication services, as described further below. The Respondents accepted that such top-up credits were treated for VAT purposes as face-value vouchers and the general EU principles of fiscal neutrality and non-discrimination required that Plan Bundles were treated in the same way.

8. In the appeal referred to in paragraph 6 above, the Appellant repeated the grounds of appeal set out in paragraph 7 above and added a fifth ground, which is that it reserved the right to argue in due course that the assessments to which the notice of appeal related were not made to the best judgment of the Respondents.

9. The aggregate amount of VAT that is in dispute between the parties pursuant to the assessments which are the subject of this decision is approximately £51 million. However, the parties have agreed that, in this decision, we should not deal with the question of whether or not any of the assessments were made to the best judgment of the Respondents or with any questions of quantum. Instead, we should simply set out our conclusions in relation to issues of liability in principle, leaving the questions of best judgment and quantum to be determined by the parties by mutual agreement or, if necessary, by us at a subsequent date.

THE FACTS

Introduction

10. For the purposes of the hearing, we were provided with various documents. Those documents included:

(1) leaflets referring to Plan Bundles which were left with the retailers who were selling the Appellant's products by the Appellant's sales representatives from time to time;

(2) posters advertising the Appellant's products;

(3) various pages from the Appellant's website;

(4) terms and conditions setting out the contractual position between the Appellant and its customers; and

(5) correspondence between the Respondents and KPMG LLP, the adviser to the Appellant ("KPMG") in 2016 and then again in 2017.

11. We were also provided with the evidence of two witnesses. They were:

(1) Mr Elanggho Arulprakasam, Global Head of Products at the Appellant ("EA"); and

(2) Mr Satkunanathan Jogaratnam, Chief of Products and Pricing at the Appellant ("SJ").

12. Regrettably, we were unable to accept the witness evidence in its entirety. EA's evidence in particular was, on occasion, contradictory and, in certain respects, implausible and inconsistent with the written evidence, as we will explain in further detail in due course. We do not think that this was attributable to a desire to mislead us. On the contrary, we

believe that both SJ and EA were honest and eager to assist us. However, there were good reasons why, despite those intentions, their evidence might not have been entirely accurate.

13. First, the VAT periods which were the subject of the proceedings had extended over a lengthy period – some seven years in total. In addition, the earliest of the relevant VAT periods had commenced almost 12 years before the hearing and the most recent of the relevant VAT periods had commenced almost five years before the hearing. A considerable period of time had therefore passed between the events in question and the hearing. In the context of a business involving the sale of a multiplicity of Plan Bundles which were changing in response to the demands of the market both during the period which was relevant to the proceedings and after that period, it was inevitable that the witnesses' recollection of the terms of particular products at any time might not be entirely accurate.

14. Secondly, the witnesses were able to speak with authority only in relation to the areas of the business of which they had knowledge. For example, EA's role as Global Head of Products meant that he was responsible for turning the feedback received from the Appellant's sales representatives as to the demands of the market into products which met those needs. Once he and his team had created a product which met those needs, the product was handed over to others in the organization for marketing and promotion and for determining the legal terms and conditions attaching to the product. EA therefore had no responsibility for either the promotional material relating to the product or the legal terms and conditions attaching to the product. This meant that his understanding of the way in which a product worked when the product was created might well have differed from the way in which the product was described to the market in the promotional material relating to the product and from the legal terms and conditions attaching to the product. EA also had no legal qualifications, which meant that he could shed no light on whether the legal terms and conditions in the documents which we were shown were consistent with his understanding of the product to which they related.

15. EA also had no responsibility for determining the success of the product once it was being offered – the level of take-up of particular aspects of the product or the profitability or otherwise of the product. This meant that he could not comment meaningfully on the figures with which we had been provided showing the take-up of the various value-added services attaching to the Plan Bundles or the extent to which the Allowances in the Plan Bundles were used.

Facts which were not in dispute

16. We will expand on the deficiencies in the witness evidence when we set out our findings in relation to those facts in the appeals which are in dispute. However, many of those facts are not in dispute and we will start by setting them out. They are as follows:

(1) the Appellant is part of an association of connected companies which together operate as the world's largest international mobile virtual network operator (an "MVNO") and one of the largest MVNOs in the UK;

(2) the Appellant is a supplier of telecommunication services in its own name using the infrastructure of a mobile network operator (an "MNO") such as Vodafone, O2 or EE. The Appellant is a "full service" MVNO in the sense that, other than physical telecommunication towers, it has the infrastructure required to provide telecommunication services. Its competitors are MNOs and other MVNOs;

(3) during the period which is relevant to the appeals, a customer of the Appellant would acquire a SIM card either through the Appellant's network of partner retailers or through the Appellant's website or by way of downloading the Appellant's app.

Usually, the SIM card was purchased with credits equal to the amount paid for it but occasionally there might be a promotion in which the customer received more credits on the SIM card than he or she had paid for;

(4) the credits could be used by the customer in one of two ways as follows:

(a) first, they could be used by the customer to acquire telecommunication services (such as making telephone calls, sending text messages or accessing data) and a range of other services, in each case at the then prevailing price for the relevant service at the time of use. (There was no charge for receiving telephone calls or text messages in the UK). This was known in the industry as "Pay As You Go" or "PAYG" and we will refer to it hereafter in this decision as "PAYG"; or

(b) secondly, they could be used by the customer to acquire Plan Bundles;

(5) as an alternative to using his or her PAYG credits to acquire Plan Bundles, a customer could also acquire Plan Bundles by way of purchase using a credit or debit card;

(6) Plan Bundles lasted for a specified period of time – generally 30 days from the point of activation but sometimes seven or 14 days after that date – and entitled the customer to specified Allowances, which is to say specified volumes of telephone call minutes, text messages and/or data. However, some Plan Bundles entitled the customer to unlimited Allowances of telephone calls, text messages and/or data (subject to fair usage regulations and conditions);

(7) at the end of the specified period, any unused Allowances in a Plan Bundle were lost. This was different from PAYG credits, which continued indefinitely as long as the customer received a telephone call or text message, used his PAYG credits for any purpose or topped up his or her PAYG credits within a specified period;

(8) from the customer's perspective, Plan Bundles were generally a potentially cheaper alternative to PAYG although, in some cases, where the customer's usage was low, PAYG was the cheaper option;

(9) a customer could elect for a Plan Bundle to renew automatically once the previous Plan Bundle expired;

(10) there were significant variations in the composition of Plan Bundles. For example, a Plan Bundle might:

(a) limit the telephone call minutes to calls from the UK to other numbers in the UK; or

(b) entitle the customer to a specified number of international calls or text messages from the UK; or

(c) limit the customer to only one or two of the three types of Allowances – for example, data only;

(11) a customer who exhausted any or all of the Allowances within a Plan Bundle could access the relevant service or services only by using his or her PAYG credits or by acquiring a new Plan Bundle;

(12) during the period which is relevant to the appeals, more than 60 different types of Plan Bundles were available at any one time;

(13) some of the Plan Bundles that were sold during the period to which this decision relates were comprised solely of the right to use Allowances. In the rest of this decision, we will refer to those Plan Bundles as "Type 1 Bundles";

(14) some of the Plan Bundles that were sold during the period to which this decision relates included the right to use one or more of the Allowances within the relevant Plan Bundle to access certain specified additional services (the "value added services" or "VAS") unless the customer chose to opt out. In the rest of this decision, we will refer to those Plan Bundles as "Type 2 Bundles";

(15) the VAS were as follows:

(a) the right to make telephone calls to a specified number in order to obtain a recording of sports information and news (the "sports update VAS");

(b) the right to make telephone calls when travelling in non-EU countries for no extra charge (the "non-EU Roaming Calls VAS"); and

(c) the right to make an "international airtime transfer" of some or all of the customer's PAYG credits from his or her own account to another customer of the Appellant located in another country (the "IAT VAS"),

and they were promoted under the strap-line "Get more from bundles";

(16) the precise terms on which each of the VAS was made available are slightly opaque in that:

(a) none of the terms and conditions with which we have been provided referred to the existence of the VAS; and

(b) the evidence of EA on that subject was not consistent with the material which we were shown from the website;

(17) however, whilst it is relevant to our decision that none of the terms and conditions referred to the VAS – for reasons which we will explain in due course – we do not think that the specific details on which the VAS were made available are material in terms of the questions which we need to decide. It is merely necessary to record that:

(a) accessing a VAS consumed part of the relevant customer's data Allowances (unless the relevant Plan Bundle did not include data Allowances, in which case it consumed part of the relevant customer's telephone call Allowances). In addition, the sports update VAS consumed part of the relevant customer's telephone call Allowances;

(b) in addition, the use of a VAS of one particular kind had an impact on the relevant customer's ability to use the other kinds of VAS under the Plan Bundle; and

(c) the amount by which the data Allowances were reduced in each case depended on the total data Allowances in the relevant Plan Bundle. In the case of a Plan Bundle with unlimited data Allowances, the Appellant would calculate the relevant reduction by ascribing a fixed notional value to the data Allowances;

(18) customers who did not have a Plan Bundle could access the sports update VAS in return for a fee. They could also access the IAT VAS although there was a disagreement between the parties as to whether such customers were required to pay a fee in order to do so. In either case, the relevant customer could use his or her PAYG credit balance to pay any fee required to access the VAS in question. The non-EU Roaming Calls VAS was not available to customers without a Plan Bundle;

(19) at certain points in the relevant period, a customer had the ability to subscribe for one or both of two other services offered by the Appellant (the "Subscription Services") in return for a fee which was separate and distinct from the amount paid for his or her Plan Bundle and then use the Allowances within the Plan Bundle to access those Subscription Services. The two Subscription Services were:

(a) the right to send a text message to a specified number and receive a return text message containing that day's horoscope or a joke (the "horoscope/joke Subscription Service"); and

(b) the right to make a telephone call to a virtual doctor service for a consultation, including potentially obtaining a prescription or a referral (the "vDoc Subscription Service");

(20) if a customer chose to pay a fee to subscribe for the horoscope/joke Subscription Service, then any text message which he or she sent to the specified number consumed part of the relevant customer's text message Allowances. If a customer chose to pay a fee to subscribe for the vDoc Subscription Service, then any telephone call which he or she made to the medical service consumed part of the relevant customer's telephone call Allowances. (In his witness statement, EA said that a telephone call to the medical service in accessing the vDoc Subscription Service consumed both part of the relevant customer's telephone call Allowances and part of the relevant customer's data Allowances but, at the hearing, his evidence was that it consumed only part of the former type of Allowances;)

(21) there was a key difference between the VAS and the Subscription Services. In circumstances where a Plan Bundle included the right to use one or more of the Allowances within the relevant Plan Bundle to access a VAS, that right was part of the package of rights which were included within the Plan Bundle itself and therefore the ability to access the relevant VAS was part of what the relevant customer was receiving from the Appellant in return for the consideration which he or she paid for the Plan Bundle. In contrast, no part of the consideration which was paid by a customer in return for a Plan Bundle was attributable to either of the Subscription Services because a separate subscription price was payable for the Subscription Service in question by a customer who wished to use the relevant Subscription Service. It was merely the case that a customer who chose to subscribe for a Subscription Service separately from acquiring his or her Plan Bundle was able to use part of his or her Allowances under the Plan Bundle in order to access the relevant Subscription Service;

(22) the contractual position between the Appellant and customers who purchased Plan Bundles was based primarily on:

(a) general terms and conditions, which applied to all customers, whether or not they held a Plan Bundle; and

(b) "bundle specific" terms and conditions, which set out the terms applicable to the particular category of Plan Bundle which the customer was acquiring.

Not all of the terms and conditions described above were provided to us but we were provided with examples of both categories of terms and conditions;

(23) the examples of the general terms and conditions with which we were provided did not refer to either the Allowances or the VAS in the context of the Plan Bundles. Instead, they merely referred generically to the "products" which the Appellant offered. (There was a paragraph headed "Allowance" in clause 10 of some of the examples of the general terms and conditions with which we were provided but EA testified that that

clause related to "semi-post-paid" or "pay-monthly" plans which were outside the scope of the proceedings;)

(24) the examples of the "bundle specific" terms and conditions with which we were provided described the terms of the Allowances within the relevant Plan Bundle but did not refer to the VAS;

(25) for every SIM card, the Appellant maintained an account within its billing system which recorded the relevant customer's entitlement to, and usage of, the Allowances within a Plan Bundle. The customer was able to view his or her account in various ways including:

(a) logging in to the Appellant's website;

(b) sending a text message to a specified number;

(c) calling the Appellant's customer services team; or

(d) (with effect from May 2018) using the Appellant's app.

In the case of a Plan Bundle, the information which was accessible by the customer showed from time to time the amount of Allowances within the Plan Bundle that had been used as at that time and the amount of Allowances within the Plan Bundle that remained unused as at that time but the customer did not have access to information about his or her remaining entitlements to, or prior usage of, VAS at any time. The latter information was recorded on the Appellant's billing system but the customer did not have access to it;

(26) according to figures produced by the Appellant for the purposes of the hearing, broadly only around five per cent. to ten per cent. of the Allowances in a Plan Bundle were actually used. Of course, the position would have varied from customer to customer and Plan Bundle to Plan Bundle but that range was the average of the usage figures; and

(27) finally, for the sake of completeness, we should record the evidence of EA to the effect that a customer who had used up his or her Allowances within a Plan Bundle was entitled to purchase rights to additional Allowances which he called "Bolt-ons" or "Add-ons". Each of a Bolt-on and an Add-on would add a specified amount of Allowances to the customer's existing Plan Bundle but a Bolt-on would expire when the existing Plan Bundle expired, whereas an Add-on would expire 30 days after its purchase irrespective of when the existing Plan Bundle expired. Bolt-ons and Add-ons are not part of the appeals.

Facts which were in dispute

17. We now turn to the matters of fact which were in dispute between the parties.

The significance of the VAS to customers

18. One of the main areas in dispute at the hearing was the extent to which the VAS were important to customers acquiring Type 2 Bundles. The evidence of both SJ and EA was that the VAS were important to those customers and were included within the Type 2 Bundles for that reason. They said that the VAS were a significant part of the Appellant's strategy to increase its customer retention rate (which they referred to as "stickiness'). They testified that the VAS were chosen in response to feedback from the Appellant's network of sales representatives in order to match the offering of competitors.

19. To that end, SJ and EA explained that:

(1) the Appellant's primary market was the ethnic and migrant communities with friends and families living abroad and this was reflected in the way in which it carried on its business;

(2) marketing campaigns were largely focused on brand awareness and on promoting favourable rates for telephone calls or text messages to particular countries. The Appellant also participated in many ethnic events to explain and promote new products to target communities;

(3) the business depended on the sale of its products through retailers situated within each community. Those retailers were from the same ethnic background as the target customers and would provide advice to the target customers in relation to which MVNO to use for their telecommunication needs. A significant proportion of the customers were unable to read English and tended to communicate within the community in their native language. They were happy to rely on the retailer for that advice and communications between them and the relevant retailer would normally be in their native language and not English;

(4) the retailers were kept informed of the Appellant's products because the Appellant sent its sales representatives out to see them on a regular basis. Sales representatives visited around 20 shops a day and at least 400 shops each month. The Appellant made sure that each sales representative came from the same ethnic background as the relevant retailer as that helped to establish a connection between them;

(5) at each visit, the relevant sales representative would provide information to the relevant retailer as to the Appellant's offering at the relevant time and would also provide leaflets to the retailer describing that offering;

(6) the aim of the Appellant was to ensure that its offering was always at least as good, if not better, than its competitors. As such, the Appellant would respond to the changing market conditions from time to time by reducing its prices for particular Allowances and offering various value-added services and subscription services such as the VAS and the Subscription Services in this case; and

(7) the model described above meant that the written promotional material with which we had been provided was not indicative of the significance which customers placed on the VAS.

20. Whilst we have no reason to doubt the veracity of the business model described in paragraph 19 above in general, or to consider that the VAS were an artificial construct designed to secure any particular VAT outcome, we have concluded that we cannot accept the Appellant's contention to the effect that customers acquiring Type 2 Bundles attributed meaningful value to the inclusion of the VAS within the Type 2 Bundles and we therefore make a finding of fact to that effect.

21. We have reached that conclusion for the following reasons:

(1) first, in the course of the hearing, we were shown a number of leaflets and posters advertising the Appellant's services. Whilst that material dealt extensively with the Allowances to which a customer acquiring a Plan Bundle would become entitled, none of them mentioned the availability of the VAS. EA sought to explain this absence by pointing out that the leaflets and posters were almost exclusively in English so that many of the Appellant's customers were unable to understand them. He added that, in each case, the relevant sales representative would have ensured that the relevant retailer was made aware of the VAS so that he or she could inform the customers of them. SJ

concurred, saying that the retailers were made aware of the availability of the VAS by the sales representatives. We found that explanation to be wholly implausible for various reasons as follows:

(a) one is that the terms on which the VAS were made available were extremely complicated and would not easily have been absorbed and retained by the retailers. Indeed, in the course of his four witness statements and subsequent oral evidence at the hearing, EA himself had cause to admit to errors in his earlier descriptions of the precise terms on which the VAS were being offered. It is inconceivable that a retailer with no personal link to the Appellant, his or her own business to run and the products of other suppliers of telecommunication services to sell in addition to the Appellant's products, would have been willing or able to memorise the precise terms on which the VAS were being offered;

(b) there is also the fact that local retailers were not the only sellers of the Plan Bundles. It is clear from the evidence that the Plan Bundles were also sold by major retailers such as Tesco, Sainsbury's, WH Smith and ASDA. It is implausible that anyone working for organisations of that size would have had the details of the VAS at their fingertips;

(c) the Appellant is said to be one of the largest MVNOs in the UK. It is therefore inconceivable that it did not have a significant English-speaking customer base in addition to its ethnic and migrant customer base; and

(d) finally, the leaflets and posters in question were clearly produced with the intention of securing customers. There was no other reason for producing them. The fact that they contained comparisons between the effective rate for making telephone calls to a particular country using a Plan Bundle as opposed to making telephone calls to the same country using PAYG credits emphasises that they were aimed at enticing customers to use Plan Bundles. If the VAS were as important to customers as the witnesses were suggesting, then one would have expected at least some reference to the VAS in one or two of the examples which we were shown. Moreover, the material with which we were presented at the hearing was presented in English and we therefore infer that it must have been directed at prospective customers who could read English;

(2) secondly, neither the examples of the general terms and conditions which applied from time to time to all of the Appellant's customers – both those who were solely PAYG customers and those who had Plan Bundles in addition to PAYG – with which we were provided at the hearing nor the examples of the "plan specific" terms and conditions with which we were provided at the hearing made any mention of the VAS. Whilst we were provided with an example of a page from the Appellant's website which described the terms on which the VAS were being made available, and we accept the general proposition that the website terms were potentially capable of affecting the contractual relationship between the Appellant and its customers, those terms were wholly inconsistent with EA's explanation at the hearing of how the VAS actually worked. In addition, even if those website terms did affect the contractual relationship between the Appellant and its customer, we consider it meaningful that they were not included in either the general terms and conditions or the "bundle specific" terms and conditions. Had they been as important to the contractual relationship as the Appellant's witnesses alleged them to be, we think that the "bundle specific" terms and conditions would have referred to them. In particular, we are not persuaded by the submission by the Appellant's witnesses to the effect that, because most of the

Appellant's customers could not read English, they never looked at the terms and conditions. The terms and conditions were there for a reason and we consider that, had the VAS been considered important, those terms and conditions would have included a reference to the VAS;

(3) thirdly, each customer's outstanding VAS entitlement from time to time was not shown in the account which was visible to the customer from time to time whereas the customer did have access to the information setting out his or her outstanding Allowances from time to time – see paragraph 16(25) above; and

(4) finally, in correspondence between the Respondents and KPMG, the adviser to the Appellant, in 2016, KPMG confirmed that it had been advised by the Appellant that around 25 to 30 customers per month made use of the VAS as a whole and, in correspondence between the Respondents and KPMG in 2017, KPMG confirmed that, at that time, around 35 to 40 customers made use of the IAT VAS but that "marketing [was] being increased to get more customers to first try the service and then become regular users. Airtime transfers and money transfer services [were] hoped to be large growth areas for the business".

There are two observations which we would make on this.

The first is that, in the context of a business in which well over 1 million Plan Bundles were being sold by the Appellant in each of the years throughout the relevant period – as described by EA in his first witness statement at paragraphs 6.12 to 6.31 – these figures are derisory. We accept that usage in and of itself is not necessarily indicative of the importance which customers would have attached to the fact that the VAS were available. In theory at least, it is perfectly possible that customers might have ascribed considerable importance to the fact that the VAS were available even though the vast majority of them chose not to avail themselves of the VAS. However, when taken together with the other points which we have made in this paragraph 21, we think that the low usage figures in this case are more likely to reflect the fact that the availability of the VAS was considered by customers to be insignificant.

The second is that the statements made by KPMG in the 2017 correspondence are inconsistent with the proposition that the IAT VAS was introduced in response to demand from customers. They suggest instead that its introduction was led by the Appellant and that the Appellant hoped to interest more customers in the service in due course.

Roam Like Home

22. Although there was some inconsistency in his evidence, EA's testimony was ultimately that, for some part of the period which is the subject of this decision, between 2014 or 2015 and 2017, all customers with Plan Bundles were able to use each category of the Allowances set out in their Plan Bundles (apart from the Allowances contained in a Bolt-on or Add-on) and to receive telephone calls and text messages in any of 17 or 18 countries (including non-EU jurisdictions such as Australia, Hong Kong and the USA). EA said that this feature, which was referred to internally by the Appellant as "Roam Like Home", was distinguishable from the non-EU Roaming Calls VAS in that:

(1) it did not form part of the services included within a Plan Bundle, as such, but was simply an additional service offered to customers with a Plan Bundle; and

(2) whereas:

(a) the non-EU Roaming Calls VAS related only to telephone call Allowances and not text messages or data Allowances;

(b) the non-EU Roaming Calls VAS could be used in any non-EU country; and

(c) use of the non-EU Roaming Calls VAS both reduced the data Allowances within the relevant Plan Bundle and had an impact on the customer's ability to use other VAS within the relevant Plan Bundle,

Roam Like Home simply allowed the customer to use his or her telephone call minutes, text messages and data Allowances from within the specified non-EU countries as if the customer was located in the UK at the relevant time.

23. EA added that, during the period in which it was operating, Roam Like Home took precedence over the non-EU Roaming Calls VAS in the jurisdictions in which Roam Like Home was available.

24. Ms Mitrophanous, who was appearing for the Respondents, said that she did not accept that the Allowances within the Plan Bundles could ever be used by way of Roam Like Home. She said that, instead, the position was simply that, during the period when Roam Like Home was operating, a customer who had a Plan Bundle to which Roam Like Home applied could use his or her PAYG credits in the specified non-EU countries without incurring roaming charges. In support of that proposition, Ms Mitrophanous made the following points:

(1) a number of posters and leaflets advertising Plan Bundles also contained advertisements for Roam Like Home. Whilst the legal rubric at the bottom of these posters and leaflets was slightly different in each case, each of them:

(a) said that the availability of Roam Like Home was dependent on buying a Plan Bundle or topping up the customer's PAYG credits; and

(b) then went on to say that Allowances were for telephone calls and text messages from the UK to standard UK landlines and other UK mobile numbers and for mobile internet usage in the UK and that "other usage will be charged at standard rates";

(2) the fact that Roam Like Home was available either if a customer bought a Plan Bundle or topped up his or her PAYG credits was consistent with the proposition that, in either case, Roam Like Home applied only to the use of PAYG credits in the relevant countries and not to the use of Allowances within a Plan Bundle in the relevant countries;

(3) in its letter of 22 August 2016, responding to various questions from the Respondents, KPMG had replied to a question about whether roaming could be done only by way of PAYG credits or by using the Allowances in a Plan Bundle by describing the operation of the non-EU Roaming Calls VAS in some detail but without mentioning the availability of Roam Like Home. Ms Mitrophanous observed that this response from KPMG was being written within the middle of the period in which EA had testified that Roam Like Home was available and she considered that, had a customer been able to use the Allowances within his or her Plan Bundles within Roam Like Home, KPMG would have mentioned that in its response;

(4) none of the general or "bundle specific" terms and conditions which had been provided by the Appellant referred to the availability of Roam Like Home;

(5) the argument that the Allowances within a Plan Bundle could be used under Roam Like Home had not been raised specifically by the Appellant until EA's second witness statement, executed on 22 March 2024, a short time before the hearing. If a customer had been able to use the Allowances within his or her Plan Bundles within Roam Like Home, it was surprising that this had not been mentioned specifically before

that point, either in the grounds of appeal or in one of the earlier witness statements of EA or SJ;

(6) a table produced by EA with his third witness statement which contained information about roaming use must clearly have related to the roaming use of PAYG credits and not the roaming use of Allowances within Plan Bundles because, for example, it showed the use of each of telephone calls, text messages and data Allowances while roaming in 2013 and:

(a) text messages and data Allowances were not included in the non-EU Roaming Calls VAS; and

(b) 2013 preceded the period in which Roam Like Home was available, according to EA's evidence; and

(7) the evidence of EA on this subject had been:

(a) contradictory – for instance, he had started off saying that Roam Like Home was available only on selected Plan Bundles and then moved to saying that it was available on all Plan Bundles apart from Bolt-ons and Add-ons; and

(b) inconsistent with the documentary evidence, as outlined above.

25. We have found it difficult to reach a conclusion on whether to accept the evidence of EA on this question. On the one hand, we can see the force in each of the points set out in paragraph 24 above. On the other hand, although we agree that EA's evidence was provided at a late stage in proceedings and was at times contradictory, we do have that testimony to the contrary. There are also the following points:

(1) first, during the re-examination of EA at the hearing, we were taken to a leaflet referring to Roam Like Home that contained somewhat lengthier legal rubric than the examples referred to in paragraph 24(1) above. Although the relevant rubric included the language described in paragraph 24(1) above, it also included the following:

"Customers are allowed to use their existing minutes & SMS of the plan's allowance in any of the 18 Lycamobile countries without any additional charge. There is a limit of 1,000 minutes and/or texts for bundle usage abroad".

Ms Mitrophanous sought to persuade us that, in view of the fact that the rubric in which the above language appeared also included the language described in paragraph 24(1) above, the first sentence in the above extract was not dealing with roaming charges on the use of Allowances but rather other additional charges and that the limit referred to in the second sentence in the above extract was referring to a limit on the use of PAYG credits without incurring roaming charges – and not the use of Allowances within Plan Bundles without incurring roaming charges. However, we consider those explanations to be improbable in the context of a leaflet which had afforded such prominence to the availability of Roam Like Home. We think that a more compelling explanation of the language used in those two sentences is that the "additional charge" referred to in the first sentence was a roaming charge and that the sentence which followed was referring to the use of Allowances under a Plan Bundle.

A similar point can be made about a number of other leaflets which, whilst including the language described in paragraph 24(1) above, also contained a statement to the effect that "Customers must buy a specific data bundle for no roaming costs on data". It seems unlikely to us that, by this wording, customers were being encouraged to buy one of the specific Plan Bundles containing data only to have to use PAYG credits instead of the data Allowances within the purchased Plan Bundle to access data in the

non-EU countries in question. A much more likely explanation is that a customer who bought one of the specified Plan Bundles containing data would be able to use the data in the relevant Plan Bundle for roaming;

(2) secondly, it is possible to interpret the legal language mentioned in paragraph 24(1) above as referring to the basic rules of the Plan Bundles which were being offered in the promotion that would operate before taking into account Roam Like Home. After all, the rubric is also inconsistent with the non-EU Roaming Calls VAS and could simply be seen as making it clear how Plan Bundles operated in general;

(3) thirdly, as regards the point made in paragraph 24(6) above, we consider that an alternative interpretation of the table in question is that the figures set out in it included all roaming use – which is to say both roaming using PAYG credits and roaming using the Allowances in the Plan Bundles. That would explain the anomalies mentioned in paragraph 24(6) above and would effectively mean that the table was neutral in relation to this question. That is the conclusion which we have ultimately reached in relation to that table;

(4) fourthly, if Ms Mitrophanous's contention were to be correct, then the promotional material which we were shown at the hearing would have been highly misleading. Anyone reading that material would have been left with the clear impression that they would be able to use the Allowances in the Plan Bundle which they had acquired in order to avail themselves of the offer in the countries mentioned in the offer and not that, by buying the Plan Bundle, they would be able to use their PAYG credits in that way; and

(5) finally, it makes very little sense for someone to buy a Plan Bundle and then have to use PAYG credits instead of the Allowances contained within that Plan Bundle when roaming in the specified countries. If that was the position, then one would expect that position to have been made clearer than it was.

26. On balance, taking all of the points mentioned in paragraphs 22 to 25 above into account, we have reached the view that we accept EA's evidence to the effect that, during the period in which Roam Like Home was operating, the Allowances in at least some of the Plan Bundles could be used from the non-EU countries which were mentioned in that promotion and we therefore make a finding of fact to that effect. We confess that we reach that conclusion with some misgivings because of the contradictory evidence which was presented to us and, in particular, the inconsistent testimony of EA. In the rest of this decision, we will refer to those Plan Bundles as "Type 3 Bundles".

27. At the end of her written submissions in relation to Roam Like Home following the hearing, Ms Mitrophanous said that, if we were minded to find that any of the Plan Bundles were Type 3 Bundles, then it would assist the parties if we were to identify which of the Plan Bundles fell within that category. We decline to do that at this stage as, in our view, that process properly falls to be carried out only at the point where the detailed findings of fact relevant to best judgment and quantum are required to be made. It is perfectly possible that the proceedings never reach that point because the parties are able to reach agreement on those matters without further recourse to the First-tier Tribunal (the "FTT"). Should the identification of which of the Plan Bundles amount to Type 3 Bundles be one of the areas of disagreement between the parties that prevents them from resolving the issues of best judgment and quantum without further recourse to the FTT, then we will address this question at that stage although we will almost certainly require considerably more evidence and detailed submissions on that subject in order to do so. For present purposes, we will say

only that, for the reasons set out in paragraph 26 above, we have reached the conclusion that at least one of the Plan Bundles was a Type 3 Bundle.

The significance of Roam Like Home to customers

28. There was no debate between the parties at the hearing in relation to the importance of Roam Like Home to customers who acquired Type 3 Bundles. The Respondents' main challenges in relation to the Type 3 Bundles were:

(1) whether or not the Type 3 Bundles existed at all (by which we are referring to Ms Mitrophanous's contention discussed in paragraphs 22 to 27 above that only PAYG credits and not the Allowances within the Plan Bundles were within the scope of Roam like Home); and

(2) the procedural point discussed in paragraphs 34 to 44 below.

29. However, our view, given our conclusion that at least 1 Type 3 Bundle existed, is that, based on the fact that we were provided at the hearing with numerous posters and leaflets which featured Roam Like Home prominently on their face, Roam Like Home was of importance to customers who acquired Type 3 Bundles.

Rights to refunds

30. EA testified that a customer had a legal entitlement to a refund of the price paid for a Plan Bundle if he or she had not used the Plan Bundle within 24 or possibly 48 hours of its being purchased and both SJ and EA testified that the Appellant had a policy of offering refunds after that time albeit that no customer had a legal entitlement to that effect. However, no mention of either category of refund was mentioned in the terms and conditions. (The possibility of a refund within 24 hours of purchase in respect of an unused plan bundle was mentioned in paragraph 10.12 of the general terms and conditions but the heading to the section of the general terms and conditions in which that paragraph appears, along with EA's testimony, made it clear that the paragraph applied only to "semi-post-paid" or "pay-monthly" plan bundles and those are outside the scope of the appeals.) We have therefore concluded that any refund which was provided to a customer who purchased a Plan Bundle was provided solely as a matter of enhancing customer goodwill and that there was no legal obligation to that effect on the part of the Appellant.

THE ISSUES

31. Given that this is solely a decision in principle and is not dealing with the issues of best judgment and quantum, there are two issues which we need to determine.

32. The first ("Issue One") is to address the question of what service the Appellant supplied when it sold a Plan Bundle to one of its customers and when that service was supplied. Mr Rivett, who was appearing with Mr Ripley for the Appellant, contended that no service was supplied unless and until the customer used the Allowances within the Plan Bundle and that therefore the Appellant should not be required to account for VAT on the part of the consideration received for the Plan Bundle which was attributable to the portion of the Allowances within the Plan Bundle that was never utilised. In contrast, Ms Mitrophanous said that the sale of the Plan Bundle was the relevant supply and that the subsequent use of the Allowances within the Plan Bundle was not. As such, Ms Mitrophanous said that the Appellant was required to account for VAT on the entire consideration received for the Plan Bundle – whether or not the Allowances within the Plan Bundle were used – although she accepted that, for reasons which we will address in due course, there needed to be an adjustment to the VAT liability in certain cases to reflect any effective use and enjoyment of the Allowances within certain Plan Bundles outside the EU.

33. The second issue ("Issue Two") arises only if we decide Issue One in favour of the Respondents and it is to address the question of whether a Plan Bundle was a face-value voucher falling within provisions of the legislation which provided that no VAT was chargeable on the issue of the voucher and that VAT was chargeable only if and to the extent that the voucher was used. There was a change in the applicable voucher legislation within the period to which this decision relates and therefore we need to address Issue Two in the context of both sets of legislative provisions.

PROCEDURAL ISSUE

Introduction

34. Before addressing those issues, there is one procedural point which we need to address. That is the question of whether:

> (1) the use of Allowances in the course of using either of the Subscription Services; and
>
> (2) the Type 3 Bundles

were properly within the scope of the hearing to which this decision relates.

35. This is because, at the hearing, Ms Mitrophanous pointed out that no mention of the Subscription Services or the Type 3 Bundles had been made in the Appellant's grounds of appeal or in the original witness statements for the hearing and that the first time that either of those had been mentioned by the Appellant was in EA's second witness statement executed shortly before the hearing. She added that:

> (1) the Appellant's position in relation to the Type 3 Bundles had also shifted since first being mentioned in EA's second witness statement. At that stage, EA had said that Roam Like Home applied only to certain selected Plan Bundles during the period that Roam Like Home was available whereas, at the hearing, EA had said that Roam Like Home applied to all Plan Bundles during the relevant period apart from Bolt-ons or Add-ons; and
>
> (2) the Appellant had not provided any specific example of a Plan Bundle to which Roam Like Home applied so that it had been left to her to try to identify one and she had no fixed anchor on which to found her case.

36. In our view, these criticisms are well-founded. It has undoubtedly made the task of the Respondents in these proceedings more onerous and is regrettable. However, that does not necessarily mean that the Subscription Services and Roam Like Home ought to be excluded from the ambit of the appeals. That would be the case only if the failure to include any reference to them in the grounds of appeal offends against the procedural principle to the effect that each party to litigation is entitled to know, in advance of the hearing, the case which the other party to the hearing is advancing.

37. In that regard, whilst it is necessary for each party in its pleadings to mark out the parameters of the case that it is advancing, there is no need for a party to plead facts or evidence. In *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 ("*McPhilemy*") (at 792J to 793A), Lord Woolf MR noted that pleadings are "critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader". We have therefore considered whether each of the Subscription Services and Roam Like Home can properly be said to fall within the general nature of the Appellant's case as that case was advanced in the grounds of appeal.

38. In answering that question, we would start by observing that it will have been apparent to the Respondents from the grounds of appeal that the subject matter of the dispute was

whether VAT was chargeable on the sale of a Plan Bundle by reference to the entirety of the consideration paid for that Plan Bundle even though the Allowances contained within the Plan Bundle might never be used or might be used in a variety of ways (including from within a non-EU country). That was the general nature of the Appellant's case and the Respondents have been aware of it from the start of the proceedings.

The Subscription Services

39. If we then turn to the Subscription Services, no part of the consideration which was paid for any Plan Bundle was attributable to either of those services. Instead, a customer wishing to access either of those services was required to pay a separate consideration in order to do so. It is common ground that that separate consideration is outside the scope of the present proceedings. Nevertheless, once a customer chose to subscribe for one of those services, he or she became entitled to use the Allowances contained within his or her Plan Bundle to access the relevant Subscription Service. The customer's use of Allowances within the Plan Bundle in that way was no different from the customer's use of Allowances within the Plan Bundle to contact family and friends. Each of them involved the use of telecommunication services when the Allowances were being used. The content of the relevant Subscription Service itself was being supplied in return for the quite separate subscription fee. As such, we consider that the use of the Allowances in accessing the Subscription Services clearly falls within the general nature of the Appellant's case as it has always been understood.

Roam Like Home

40. The position is slightly less clear in relation to Roam Like Home.

41. On the one hand, it might fairly be said that:

(1) it is apparent from the grounds of appeal that one of the ways in which the Allowances within certain Plan Bundles could be used was in a non-EU country pursuant to the non-EU Roaming Calls VAS; and

(2) the customer's use of Allowances within a Plan Bundle in a non-EU country under Roam Like Home is no different in principle from that usage. Instead, it is merely a difference in degree to be covered in the facts and evidence at the hearing.

On that analysis, use of the Allowances within a Plan Bundle under Roam Like Home also falls within the general nature of the Appellant's case as it has always been understood.

42. On the other hand, it might fairly be said that the difference in degree between the customer's use of Allowances within a Plan Bundle in a non-EU country under Roam Like Home and the customer's use of Allowances within a Plan Bundle in a non-EU country under the non-EU Roaming Calls VAS is so substantial that the former does not fall within the general nature of the Appellant's case as it has always been understood.

43. After reflecting on these respective positions, we have decided, on balance, that the approach described in paragraph 41 above is to be preferred. We say that because, whilst the facts and evidence in relation to the use of Allowances within a Plan Bundle under Roam Like Home might well be different from the facts and evidence in relation to the use of Allowances within a Plan Bundle under the non-EU Roaming Calls VAS, that difference is ultimately still only a matter of facts and evidence. It does not go to the question of whether the general nature of the relevant pleadings is insufficiently unclear.

44. We have therefore concluded that the use of Allowances within a Plan Bundle under Roam Like Home (and, hence, the Type 3 Bundles) should be included within the scope of the appeals.

45. We now turn to address Issue One.

The relevant legislation

46. It is common ground in these proceedings that, as all of the relevant VAT periods ended before the UK left the EU:

(1) any question as to the validity, meaning or effect of the provisions of UK domestic law which apply in the present case are to be interpreted in accordance with the principles laid down, and any decisions made, by the Court of Justice of the EU (the "CJEU") prior to 11.00pm on 31 December 2020 (the "IP completion day"); and

(2) we are not bound by anything done by the CJEU on or after IP completion day although we "may have regard" to it.

The above is as a result of Sections 2 and 6 of the European Union (Withdrawal) Act 2018, as amended.

47. In the EU context, the relevant legislation was in Council Directive 2006/112/EC (the "PVD"), whilst the provisions which were enacted to reflect that legislation in the UK domestic context were set out in the Value Added Tax Act 1994 (the "VATA").

48. The legislation in relation to Issue One is set out in greater detail in the Appendix. For present purposes, it suffices to summarise the effect of the relevant provisions during the period to which this decision relates as follows:

(1) VAT was chargeable on, inter alia, a supply of services;

(2) a chargeable event for VAT purposes arose when the legal conditions necessary for VAT to become chargeable were fulfilled;

(3) as regards the time of supply, the basic rule was that VAT became chargeable when the services in question were supplied but this basic rule was subject to the caveat that, inter alia, where a payment was made on account before the services were supplied, VAT became chargeable on the receipt of the payment and on the amount received; and

(4) as regards the place of supply, given that both the supplier (the Appellant) and the customer belonged in the UK, the effect of the legislation was that supplies by the Appellant to the customer were to be regarded as being made in the UK except that, during the period prior to 1 November 2017, supplies of telecommunication services which were effectively used and enjoyed in a country outside the EU were to be treated as being made in that country.

The relevant case law

Introduction

49. For the purposes of the hearing, we were referred to a number of authorities in relation to Issue One.

50. For convenience, we have grouped those authorities into two categories, as follows:

(1) cases dealing with the nature and/or timing of supplies; and

(2) cases dealing with composite or multiple supplies.

The nature and/or timing of supplies

51. We were referred to the following authorities in which the question of what amounts to a supply for VAT purposes and/or in which the time of supply were considered.

52. In *Lebara Limited v The Commissioners for Her Majesty's Revenue and Customs* (Case C-520/10) ("*Lebara*"), the taxpayer sold telephone cards to distributors, who then on-sold those cards to users in Member States. Each card was limited, first, to the face value shown on the card and, secondly, to a fixed period and represented the right to receive telecommunication services from the taxpayer. The CJEU held that the supply of a phone card to a distributor was the supply of a telecommunication service by the taxpayer to the distributor because the card contained all the information necessary for making calls using the taxpayer's infrastructure and the definition of "telecommunications service" included "not only the transmission of signals or sounds as such, but also all services 'relating to' the transmission, and the related transfer of the right to use capacity for such transmission". There was not a separate supply by the taxpayer to the user of the card – see *Lebara* at paragraphs [31] to [43].

53. In *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C -174/00) ("*Kennemer*"), one of the questions before the CJEU was whether there was a direct link between the subscription fees charged by a golf club to its members and the facilities provided by the golf club. It was held that such a direct link did exist and that therefore those subscription fees were consideration for the services provided by the golf club in making the facilities available to the members even though some of the members paying those fees did not use, or regularly use, the relevant facilities – see *Kennemer* at paragraphs [36] to [42]. In particular, the CJEU rejected the argument of the Netherlands government to the effect that the fact that certain members did not avail themselves of the facilities meant that that there was no direct link between the subscription fees and the services provided by the golf club.

54. In *The Commissioners for Her Majesty's Revenue and Customs v Esporta Limited* [2014] EWCA Civ 155 ("*Esporta*"), a member of a health and fitness club for a fixed period of at least 12 months who defaulted on his or her monthly membership payments was denied access to the club while the default continued. The club did not terminate the defaulting member's membership but sought to recover the defaulting member's outstanding fees for the remainder of the membership period. The Court of Appeal, applying *Kennemer*, held that the arrears in payments remained consideration for the member's rights of access during the fixed commitment period and were not damages or compensation for breach of contract. Accordingly, the arrears were consideration for the supply of membership services – see *Esporta* at paragraphs [26] to [30].

55. In *MEO – Serviços de Cominicaçöes e Multimédia SA v Autoridade Tributária e Aduaneira* (Case C -295/17) ("*MEO*"), the taxpayer agreed to supply its customers with telecommunication services at a lower rate as long as the relevant customer agreed to subscribe for a minimum commitment period. If the relevant customer chose to terminate the subscription early, he or she was obliged to make a termination payment which was equal to the aggregate subscription payments that he or she would have been obliged to make had early termination not occurred. The CJEU held that any such termination payment was not damages or compensation for early termination but was rather consideration for the supply of telecommunication services under the contract. There was a direct link between the termination payment and the services agreed to be supplied even though the relevant customer was not receiving the services following termination – see *MEO* at paragraphs [38] to [48]. The supply was made when the taxpayer put the customer in a position to benefit from the supply even if the customer did not avail himself or herself of that right.

56. In *Vodafone Portugal – Cominicaçöes Pessoais SA v Autoridade Tributária e Aduaneira* (Case C – 43/19) ("*Vodafone*"), the facts were similar to those in MEO except that the termination payment in each case was not simply an amount equal to the aggregate subscription payments that would have been due from the terminating customer in the absence of termination but was instead a different amount. It was held that this made no

difference. There was still a direct link between the termination amount and the services which the taxpayer had agreed to supply – see *Vodafone* at paragraphs [35] to [44].

57. In *BUPA Hospitals Limited and another v The Commissioners for Her Majesty's Customs and Excise* (Case C – 419/02) "*BUPA*"), the taxpayer attempted to pre-empt the withdrawal of zero-rating on its supplies by entering into a prepayment arrangement. Under the arrangement, the taxpayer contracted to buy goods for delivery in a later accounting period and paid in advance so that it might be able to recover the VAT input tax on the supply in the accounting period of prepayment. Under the contract, the goods to be supplied were listed in a schedule which could be amended by agreement until the prepayment was exhausted. The CJEU held that the arrangement did not achieve its objective because the prepayment rule in what is now Article 65 of the PVD was a derogation from the general rule that a supply of goods was made only when the goods were actually supplied and therefore had to be construed strictly. In order to fall within the ambit of the provision, all of the relevant information concerning the chargeable event, namely the future delivery and future performance, had to be known at the time of the prepayment. Thus, a payment for goods or services which had not yet been precisely identified at the time of payment could not be subject to VAT – see *BUPA* at paragraphs [44] to [51].

58. In *Air France – KLM and another v Ministère des Finances et des Comptes publics* (C-250/14 and C – 289/14) ("*Air France*"), the CJEU addressed the VAT treatment of consideration paid for non-refundable air tickets which were no longer valid as a result of customer "no shows" and invalid exchangeable tickets which had not been used during the period of their validity. The CJEU held that the taxpayer was required to account for VAT on the consideration because there was a legal relationship between the taxpayer and the relevant customer and a direct link between the consideration paid by the customer and the service supplied in the context of that legal relationship. The customer did not have the right to benefit from the performance of the taxpayer's obligations until the time of boarding and the taxpayer fulfilled its obligations by putting the customer in position to benefit from the services.

59. *MacDonald Resorts Limited v The Commissioners for Her Majesty's Revenue and Customs* (C-270/09) [2011] STC 412 ("*MRL*") related to an arrangement in which customers of a hotel group acquired contractual rights ("Points Rights") which they could then use to book accommodation in one of a number of properties that were subject to the arrangement or to obtain other services. In paragraph [15] of its decision in *MRL*, the CJEU noted that one of the questions which had been raised by the national court required it to provide guidance on the classification of supplies of services such as those at issue in the proceedings.

60. In approaching that question, the CJEU started by identifying the "ultimate intention" of a customer in providing consideration for the Points Rights, which was to convert the Points Rights into the services offered by the arrangement and not simply to obtain the Points Rights themselves. The CJEU pointed out that the acquisition of Points Rights was not an aim in and of itself for the customer. Instead, it was to be regarded as a preliminary transaction in order to be able to exercise the right to receive the ultimate services. Thus, it was only when the customer received the accommodation or other services following the exercise of the Points Rights that he or she could be said to receive the consideration for his or her initial payments and the service was fully supplied.

61. The CJEU added that, as regards the arrangement in question:

"29 …it must [be] stated that, when 'Points Rights' are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. Moreover, it is MRL which determines the points

classification of the available accommodation and services, so that the customer's choice is limited from the outset to accommodation or services which are accessible to him with the number of points he has available.

30 In those circumstances, the factors necessary for VAT to become chargeable are not established when rights such as 'Points Rights' are initially acquired, which excludes the application of [Article 65 of the PVD].

31 As follows from the judgment in Case C-419/02 BUPA Hospitals and Goldsborough Developments [2006] ECR I-1685, in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT (BUPA Hospitals and Goldsborough Developments, paragraph 50)."

62. It followed that, since the real service was obtained only when the Points Rights were converted into the use of accommodation or another service, that was when the chargeable event occurred and it was only then that it was possible to determine the treatment for VAT purposes of the supply according to the type of service which was supplied and the place of supply.

63. The principle set out above applied even if its application gave rise to practical problems (see *MRL* at paragraphs [34] to [40]).

64. In *Direktor na Direktsia 'Obzhalvane I upravlenie na izpalnenieto' – grad Burgas pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite v Orfey Balgaria EOOD* (Case C – 549/11) ("*Orfey*"), the taxpayer was granted a right to construct a building on land owned by four private individuals and become the sole owner of certain of the property built on the land. As consideration for that right, the taxpayer undertook to design and construct certain of the property built on that land within a specified time frame and for no additional payment by the individuals. The CJEU held that the consideration received by the taxpayer for the construction services it supplied – which is to say the right mentioned above – could give rise to VAT provided that, at the time when the right was established, all the relevant information concerning the future supply of services was already known and precisely identified and the value of the right could be expressed in monetary terms – see *Orfey* at paragraphs [25] to [40].

65. In *Marcandi Limited (trading as 'Madbid') v The Commissioners for Her Majesty's Revenue and Customs* (Case C – 544/16) ("*Marcandi*"), the taxpayer sold goods in its online shop and also through online auctions. A customer wishing to participate in an auction was required to purchase credits from the taxpayer in order to bid. The credits could not be used for any other purpose. In particular, they could not be used to make purchases in the online shop, they could not be converted into cash and they were not credited towards the price of any goods which were purchased in the auction. The CJEU held that, taking those features into account, the issue of the credits could not be treated as a preliminary transaction to the supply of goods but was itself a supply of services that was entirely separate from the supply of goods which might take place pursuant to the auctions. *MRL* was distinguishable – see *Marcandi* at paragraphs [29] to [32] and [49].

66. In *The Commissioners for Her Majesty's Revenue and Customs v Findmypast Limited* [2017] ScotCS CSIH 59 ("*FMP*"), the taxpayer, through its website, provided access to records on genealogical and ancestry websites. A person who wished to search the historical records on the website was able to do so without charge. However, if the person wished to

view or download most of the records on the website, he or she was required to pay. This could be done either by taking out a subscription for a fixed period or by using a system known as pay as you go in which, in return for a lump sum, the person received a number of credits which could then be used to view or download a record. The credits were valid only for a fixed period although unused credits could be revived if the person purchased further credits within two years.

67. Two of the issues which were addressed by the Court of Session (the "CS") in *FMP* were:

> (1) first, what was the nature of the supply made by the website to a person acquiring credits – ie the customer? Was that supply the supply of the records which were selected by the customer and then viewed or downloaded by the customer or was it instead the supply of a package of rights and services including the right to search the records on the various websites to which the customer had access and, if so desired, to download and print particular items from those websites? If the former was the case, the service was supplied only if and when a particular record was selected for viewing or downloading. If the latter was the case, the service included the general right to search which was exercisable as soon as the customer purchased his or her credits and therefore the service was supplied at that point; and
>
> (2) secondly, even if the relevant service was not supplied unless and until a record was selected for viewing or downloading, could the tax point for that supply be advanced to the date when the customer purchased his or her credits on the basis of its being a prepayment for the supply and therefore falling within Section 6(4) of the VATA?

68. As regards the first of those questions, the CS held that the existing case law had established the following principles:

> (1) transactions should always be considered in context, including their economic context;
>
> (2) each supply of a service would normally be regarded as independent but, if, as a matter of economic reality, what was provided was a single service, then it should not be artificially split;
>
> (3) on a proper analysis, in some cases it would be found that there was a principal service and a series of other services which were ancillary to it, in which case the ancillary services would share the tax treatment of the principal service;
>
> (4) in applying the above principles, an important question was whether a service was not an aim in itself but rather an enhancement of the principal service;
>
> (5) the approach taken by the CJEU involved the application of a practical test based on economic reality and having due regard to the factual and legal context in which a possible charge to tax arose. In that regard:
>
> > (a) a supply of services was taxable only if there was a legal relationship between the service provider and the recipient pursuant to which there was reciprocal performance – namely, remuneration received by the service provider in return for the provision of the service;
> >
> > (b) it was necessary to examine the whole of the relationship between the service provider and its customers and to do so in context, in order to discover the true nature of the supply; and

(c) finally, the terms used in the relevant contracts were potentially important, which was not surprising given that the relationship between the service provider and the recipient was inevitably contractual in nature

(see *FMP* at paragraphs [16] to [19]).

69. Applying those principles to the facts in that case, the CS noted that the taxpayer was providing two services – first, a general search function and, secondly, the viewing and downloading of documents. The first service was not an end in itself. Instead, it was merely a means towards the customer's ultimate end of receiving the second service. In addition, it was provided for free to members of the public regardless of whether or not they were customers. It followed that the consideration provided by a customer who acquired credits was provided solely for the second service and not the first (see *FMP* at paragraphs [26] to [33]).

70. Turning to the second question, the CS noted that:

(1) it was apparent from the terms of Sections 1(2) and 6(4) of the VATA – and the related provisions of the PVD (Articles 63 and 65) – that the general rule was that VAT was not due until the relevant service was actually supplied and that Section 6(4) of the VATA and Article 65 of the PVD were exceptional in providing for liability to arise at an earlier time. The provisions therefore needed to be construed strictly, as had been held in *BUPA* (see *FMP* at paragraphs [36] to [38]);

(2) the general approach taken by the CJEU in relation to prepayments in cases such as *BUPA* and *MRL* had three principal components as follows:

(a) first, in each case, the chargeable event was the supply of the goods or services in question and not the payment of the price for those goods or services;

(b) secondly, it followed that the normal rule was that VAT was payable when the supply was made; and

(c) thirdly, VAT might become chargeable before that date if the requirements of Section 6(4) of the VATA (Article 65 of the PVD) were satisfied but, in order for that to happen, all the relevant information concerning the chargeable event had already to be known at the time when the payment was made and therefore, at the time when the payment was made, the goods or services had to be precisely identified. This followed from the general rule that a supply for VAT purposes required consideration and there had to be a direct link between the consideration and the goods or services that were supplied

(see *FMP* at paragraph [46]); and

(3) the prepayment rule should be applied in a practical and pragmatic manner, having proper regard to the economic reality of the transaction under consideration and taking into account the overall context in which the transaction occurred (see *FMP* at paragraph [47]).

71. Applying those principles to the facts in the case:

(1) there were a number of uncertainties at the time when the customer made his or her payment for credits. Those uncertainties included:

(a) whether the chargeable event – the redemption of the credits by viewing or downloading a document – would ever occur;

(b) when the redemption of the credits would occur. By the time that redemption occurred, a number of the features of the service might have changed. For example, the items available for viewing or downloading or the amount of credits required to be given for them might have changed; and

(c) the applicable rate of VAT. That rate might have changed between the date when the payment was made and the date of redemption;

(2) whilst those uncertainties were different from the uncertainties applicable in *BUPA* and *MRL*, the same principle applied. The uncertainties were sufficiently important to exclude the application of the prepayment rule. They meant that there was an insufficiently direct link between the consideration given by the customer and the particular supply of services which the customer received upon redeeming his or her credits; and

(3) in addition, applying the prepayment rule in the present case would lead to practical problems because, at the point when the consideration was paid, it could not be known how many credits would be used for viewing or downloading a particular document. This meant that the extent of the supply could not be known at the point of prepayment and therefore treating the payment for credits as a prepayment made the system for accounting for VAT unworkable

(see *FMP* at paragraph [48] to [53]).

Composite or multiple supplies

72. We were referred to the following cases in which composite supplies were considered.

73. In *Card Protection Plan Limited v The Commissioners for Her Majesty's Customs and Excise* (Case C – 349/96) ("*CPP*"), the taxpayer provided a package of benefits to customers for a consideration. Customers were protected by insurance against financial loss if they lost their credit cards but the taxpayer also provided other benefits such as informing the credit card company of the loss, replacing locks and keys and other administrative benefits. The CJEU held that this gave rise to a single composite supply and not two or more independent supplies and that that single composite supply was a supply of exempt insurance services. It directed that, in a case such as *CPP*:

(1) "[each] element of the transaction should be ascertained so that, on a comparison, it can be seen whether one element is subordinate to or not dissociable from another";

(2) where a supply was made for a single price, it should be treated a single supply unless its constituent elements were clearly distinguishable in the price; and

(3) the character of that composite supply should be determined by reference to its predominant component

- see *CPP* at paragraphs [40] to [52].

74. In *Purple Parking Limited and Airport Services Limited v The Commissioners for Her Majesty's Revenue and Customs* (C – 117/11) ("*Purple Parking*"), the CJEU held that transport services provided by an airport parking provider to its customers and the parking service itself together formed a single complex supply in which the parking element was predominant. It noted that supplies of services for a single price, whilst not being decisive, might be an indication that the services together formed a single supply and that, on the facts in that case, the fact that the price charged by the taxpayer was calculated exclusively by reference to the time that the vehicle was parked and without reference to the extent of the

transport use was an indication that the parking element in the supply was predominant – see *Purple Parking* at paragraphs [26] to [37].

75. In *Město Žamberk v Finančni ředitelství v Hradci Králové* (Case C – 18/12) ("*Město*"), in return for an entrance fee, the taxpayer provided access to an aquatic park in which customers could undertake both sporting activities and other types of amusement or rest. The former type of activities was exempt in nature, whilst the latter type of activities was taxable. The CJEU held that it was necessary to determine whether the facilities in the aquatic park formed a whole so that access to the park constituted a single supply which it would be artificial to split and, if so, identify the predominant elements of that single supply – see *Město* at paragraphs [27] to [36].

H3G

76. Before leaving the authorities in relation to Issue One, we should refer to the decision of the FTT in *Hutchison 3G UK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 0289 (TC) ("*H3G*") because of the similarity between the facts in that case and the facts in the present case. Although the decision in *H3G* is not binding upon us, it is nevertheless of persuasive effect and therefore the reasoning adopted by the FTT in reaching its decision is potentially of some relevance to these proceedings.

77. *H3G* related to the VAT consequences of supplies of telecommunication allowances in return for monthly recurring charges. The taxpayer alleged that it was not required to account for VAT on the whole of the monthly recurring charges at the time when those charges were paid but should instead be required to account for VAT only on the portion of the charges which was attributable to those of the allowances that were actually used (at the time of such use) and even then only to the extent that such use did not involve the effective use and enjoyment of the allowances outside the EU. Thus, no VAT was payable to the extent that the monthly recurring charges related to allowances which were not used or to allowances which were effectively used and enjoyed outside the EU. The FTT rejected this proposition. It agreed with the Respondents that VAT was payable on the full amount of the monthly recurring charges at the time of payment, with a later repayment of VAT to reflect any use of the allowances outside the EU.

78. In *H3G*, as in these proceedings, the appellant relied on two alternative arguments – namely, that:

> (1) the payment of the monthly recurring charges did not trigger a charge to VAT because:
>
> > (a) not all of the relevant charging information was known at the time of payment and therefore the tax point for the supply could not arise; and/or
> >
> > (b) the monthly recurring charges were paid for units which were not converted into telecommunication services unless and until those units were actually used and it was only at that point that the relevant service was supplied; and
>
> (2) the contracts with the customers pursuant to which the monthly recurring charges were payable were vouchers and therefore no supply arose unless and until the vouchers were exchanged for services which were subject to VAT.

79. We will describe the FTT's view in relation to the second of those arguments when we address Issue Two below.

80. So far as the first argument is concerned, there were two limbs to it.

81. As regards the first limb, the FTT noted that:

(1) the Upper Tribunal decision in *R (on the application of Telefonica Europe plc) v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKUT 173 (TCC) (*"Telefonica"*) had made it clear that a service could be supplied before it was used and enjoyed (see *Telefonica* at paragraphs [52] and [53]). In that case, a person paying a monthly access charge was held to have received the service for which he or she had contracted even if he or she never utilised the allowances to which he or she was entitled;

(2) cases such as *BUPA* and *MRL* were not authority for the proposition that the time of supply could not occur at a time when there was a supply but the amount of VAT chargeable in respect of the supply was uncertain. Instead, they were dealing with circumstances where whether or not a supply would be made or the nature of that supply was uncertain. In both cases, there was payment for a possible supply at a future date which might not occur or the nature of which was uncertain; and

(3) accordingly, there was no authority for the proposition that uncertainty with respect to the place of supply should prevent the time of supply from occurring. Indeed, it was implicit in the decision in *Telefonica* that a tax point could arise before the place of supply was known and that a subsequent adjustment was appropriate where the effective use and enjoyment of the supply meant that what was originally considered to be the place of supply was not in fact the case

- see *H3G* at paragraphs [169] to [204].

82. As regards the second limb, the FTT held that:

(1) the economic reality in the case was that the customer acquired the rights to allowances which he or she could use and which were fixed at the outset. It was not the case that the customer acquired units which he or she could then redeem for accommodation or other services that were unknown at the time when the units were acquired and for an unknown redemption price like the customers in *MRL*;

(2) the mere fact that the allowances might not be used did not delay the charge to VAT by parity of reasoning with that adopted by the CS in *FMP*. The facts in *FMP* were distinguishable from those in *H3G*. The taxpayer in that case was entitled unilaterally to change both the documents which could be viewed or downloaded using the credits and the prices of the documents to which the credits could be applied;

(3) the CJEU decision in *Air France* showed that the mere fact that the recipient of a supply chose not to utilise a service for which he or she had paid did not prevent the service from having been supplied. Insofar as the CS in *FMP* had held that uncertainty as to whether or not a credit would be used should defer the time of supply, that was contrary to the decision in *Air France*;

(4) uncertainties which could prevent a time of supply from arising were those that existed in cases like *BUPA*, *MRL* and *FMP*. For example:

(a) uncertainty as to when the credit was required to be used;

(b) uncertainty as to the price to be paid using the credit; and

(c) uncertainty as the subject of the credit.

None of those uncertainties existed in *H3G*;

(5) in *H3G*, the relevant supply of services was the supply of the allowances. It was not a case like *MRL* or *FMP* where the customer received points or credits as a

preliminary step antecedent to the actual supply of services by virtue of the application of the points or credits;

(6) although there was no express provision within the PVD for adjusting the place of supply after the time of supply, the PVD should be read in that way because:

(a) it was the stated objective of Article 59a of the PVD (and the PVD in general) that non-taxation and distortion of competition were to be avoided. The taxpayer's approach to the legislation meant that a large part of the consideration for the allowances would not be taken into account for VAT purposes and also that the taxpayer would be placed at a significant advantage to its competitors who did not allow their customers to use their allowances outside the EU for no additional charge; and

(b) it was implicit in Article 59a that the place of supply could change after the time of supply because the time of supply occurred at the time of payment if it preceded actual effective use and enjoyment;

(7) it was also implicit in that article that a single supply could have more than one place of supply because allowances acquired by way of a single supply could be effectively used and enjoyed both inside and outside the EU;

(8) more generally, the very fact that payment could crystallise the time of supply meant that it was implicit in the PVD that the time of supply could arise before the place of supply was determined; and

(9) as was shown in *Telefonica*, the Respondents had the power to make reasonable directions to deal with retrospective adjustments to the VAT chargeable through their general powers to administer VAT

- see *H3G* at paragraphs [205] to [264].

The Appellant's submissions

83. Mr Rivett started his submissions by explaining that, in relation to the matter we were considering, there were two distinct lines of CJEU and domestic case law. The first – as exemplified by *Air France* – was authority for the principle that, when a right was supplied, the supply of the right was the consumption of a service and gave rise to VAT at that point. The second – as exemplified by *BUPA*, *MRL* and *FMP* – was authority for the principle that, when a right was supplied, no supply occurred unless and until the right in question was exercised.

84. There were two noteworthy and related features of the second line of cases.

85. The first was that, in order for there to be a supply of goods or services, all the relevant information as regards the chargeable event needed to be known. That was an underlying principle of the PVD – see, inter alia, *BUPA* and *Orfey*. It was the supply of goods or services which gave rise to VAT and not the payment made as consideration for that supply. Although *BUPA* and *Orfey* were both prepayment cases, the principle that they set out – to the effect that no supply could arise until all the relevant information in relation to that supply was known – was a basic building block of the VAT legislation and therefore applicable in all cases and not just in prepayment cases.

86. The second feature, which was related to the first, was that, in the second line of cases, the acquisition of the right was not the ultimate aim of the customer – see *MRL* and *FMP*. In *MRL*, the purchase of Points Rights was not an aim, in and of itself, for the customer. Instead, that acquisition was a preliminary transaction antecedent to the conversion of the Points Rights into the right to occupy specific accommodation. It was only at that latter point

that the customer received the consideration for his initial payment – see *MRL* at paragraph [24]. The same was true in *FMP* – see paragraph [31]. This was distinguishable from the facts in *Marcandi* where the credits which could be used to participate in the auction were an aim, in and of themselves.

87. The above principles were encapsulated in the Advocate General's opinion in *GE Aircraft Engine Services Limited v The Commissioners for Her Majesty's Revenue and Customs* (Case C – 607/20) at paragraphs [57] to [62]. In those paragraphs, the Advocate General was describing the two lines of authorities described in paragraph 83 above and distinguishing between the transfer of a right, as such – which was a complete supply of services, in and of itself – and the transfer of a right to a future supply of services – which did not give rise to a supply immediately because not all of the relevant information was known at that point in time.

88. Mr Rivett's case was that the present facts fell into the second line of cases and not the first. This was because:

> (1) at the time when a Plan Bundle was supplied, there were a number of uncertainties in relation to it, namely:
>
> > (a) uncertainty as to whether or not the rights contained in the Plan Bundle would ever be exercised before the Plan Bundle expired;
> >
> > (b) uncertainty as to the nature of the services to be supplied; and
> >
> > (c) uncertainty as to the VAT treatment of those services,
>
> and it was a principle of the PVD and the VATA that no VAT could arise unless and until those uncertainties were resolved; and
>
> (2) the acquisition of the Plan Bundle was not an end in and of itself. It was merely a preliminary transaction antecedent to obtaining the services for which the price paid for the Plan Bundle was consideration in the same way as the acquisition of PAYG credits was a preliminary transaction antecedent to obtaining the services for which the price paid for the PAYG credits was consideration.

89. The second of those points explained why the decisions in relation to composite supplies such as *CPP*, *Purple Parking* and *Město* were of no relevance in the present context. This was not a situation where multiple different supplies were being made at the same time and therefore one could treat them a single composite supply with the characteristics of the element within that single composite supply which was predominant. Instead, the customer was being given the choice to receive one or more of several different supplies at some point in the future. There was no authority for the proposition that, in that case, any of the possible future supplies could be treated as being ancillary to any of the other possible future supplies. Before the composite supply authorities could be engaged, there needed to be existing identifiable supplies of different natures to which the composite supply rules could be applied. The composite supply rules could not be used in order to conclude that the right to one of several possible future supplies of a different nature should be treated as being made at an earlier point than it otherwise would be on general principles.

90. Moreover, doing otherwise would also be inconsistent with the underlying basis on which the rules applicable to vouchers were established by Council Directive 2016/1065 (the "Voucher Directive"). The fact that those rules contemplated the existence of both single purpose and multi-purpose vouchers showed that the composite supply rules were not engaged at the point when the right to several possible future supplies was granted. Otherwise, it would be possible to disregard at the point when the voucher was issued those

of the possible future supplies envisaged by the voucher which might be said to be ancillary to other possible future supplies so envisaged.

91. In contrast to the second line of cases, cases within the first line (such as *Air France*) dealt with circumstances where the taxable person had done all that was within its power to perform a service but the customer didn't allow the service to be performed because, for example, he or she failed to turn up. The facts in the present case were very different from that. The present case fell firmly within the second line of cases.

92. Mr Rivett added that the existence of the "effective use and enjoyment" rule in paragraph 8 of Schedule 4A to the VATA for the period prior to 1 November 2017 supported the arguments set out above because it showed that the time of supply of a telecommunication service could not be earlier than the time when the service was effectively used and enjoyed. The consequence of the Respondents' approach was that a tax point would arise before that occurred and therefore before it was known whether or to what extent the services in question were within the territorial scope of VAT. Moreover, the Respondents' suggestion that the VAT payable in this case could be adjusted after the tax point to reflect effective use and enjoyment in a non-EU country was misconceived. There was no sound basis for proceeding on the assumption that the tax treatment of a supply could change after its tax point. This was because:

(1) there was no statutory mechanism within the PVD or the VATA for making an adjustment after the time of supply to the VAT treatment of that supply. Allowing the VAT liability to be revisited after the time of supply gave rise to a host of practical difficulties. It was also inconsistent with Section 7A(3) of the VATA, which required a right to a service to have the same place of supply as the service itself;

(2) in *Halifax v The Commissioners for Her Majesty's Revenue and Customs* (Case C – 255/02) ("*Halifax*") at paragraph [72], the CJEU had held that EU legislation needed to be certain in its application and with foreseeable consequences in order that those subject to it could know the extent of the obligations to which they were subject. There could be no such certainty if a supply were to be treated as being made at a time before the place of supply was ultimately determined;

(3) in *Muster Inns Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 563 (TC) ("*Muster Inns*") at paragraph [36], the FTT had interpreted the statement in *Halifax* to mean that the VAT treatment of a supply had to be capable of determination at the time the supply was made and therefore that events taking place after the time of a supply could not affect the answer to the question of where the supply was made; and

(4) moreover, there was no authority to support the proposition that a single supply could be treated as being made in more than one place and the consequence of the Respondents' position was that part of a single supply would fall to be treated as taking place within the UK and another part would not.

93. Mr Rivett said that *H3G* had been wrongly decided. In particular, the FTT in *H3G*:

(1) had adopted an unjustifiably prescriptive approach in identifying the uncertainties which could lead to a deferral in the time at which a supply was to be treated as being made. The FTT had been wrong to limit the scope of the uncertainties to those which had been mentioned in *FMP*. Any uncertainty was relevant in this context;

(2) had been wrong to conclude that the decision in *FMP* was inconsistent with the decision in *Air France*. In *Air France*, the number of customers who could avail themselves of a particular service was limited whereas, in *FMP*, there was no such

restriction in any meaningful sense. Thus, in *FMP*, there was no benefit to the customer or detriment to the supplier at the point when the credits were acquired whereas, in *Air France*, there was such benefit and detriment at the point when the ticket was sold because part of the taxpayer's obligations was not selling the same ticket to someone else; and

(3) had been wrong to dismiss the statement in *Muster Inns* mentioned in paragraph 92(3) above by saying that it had been made without regard to the "effective use and enjoyment" rule. That rule was part of the VAT system and therefore the rule applied as much as any other rule.

94. Mr Rivett acknowledged that the consequence of the Appellant's interpretation of the legislation was that a significant part of the consideration which the Appellant had received for Plan Bundles would have fallen out of account for VAT purposes. However, he said that that was simply the consequence of applying the authorities mentioned above and, in particular, *MRL*. Moreover, it was implicit in the fact that VAT was a tax on consumption and a not a tax on payments. A payment made for a service that was not consumed was not subject to VAT. Non-taxation for those reasons had been expressly endorsed by the CJEU in *MRL* at paragraph [34] and by the CS in *FMP* at paragraph [2] as a necessary and unobjectionable consequence of the application of the rules governing the time of supply. The same non-taxation potentially arose in the case of the issue of multi-purpose vouchers.

Discussion

Introduction

95. Our views on the above submissions are set out in the paragraphs which follow. We have not summarised the submissions made by Ms Mitrophanous in relation to Issue One for the simple reason that, except for the point which is covered in paragraphs 125 to 127 below, where we respectfully differ from her analysis, we agree with them and there is no point setting them out twice.

96. In setting out our views, we have found it helpful to address each of the three different types of Plan Bundle separately as each of them raises slightly different issues.

Type 1 Bundles

97. We start with the Type 1 Bundles as the analysis is simplest.

98. Under the PVD and the related provisions in the VATA, when goods or services are supplied, the basic rule is that VAT becomes chargeable at the point when the goods or services are supplied. However, there are exceptions to that basic rule, one of which is that, when there is payment in advance for the goods or services, VAT becomes chargeable at the point of that prepayment.

99. The case law of the CJEU shows that, as that is an exception to the basic rule, it needs to be strictly construed. In particular, the CJEU has held that a prepayment cannot accelerate the tax point for a supply of goods and services if all the information relating to the supply is not known at the point of prepayment. That was made clear in the *BUPA* case and it has been repeated in other CJEU cases since then.

100. The CJEU authorities show that there is another quite separate – and logically anterior – issue which needs to be determined when a supply of services is made and that is that, before the time of a supply can be determined, it is necessary to identify the services which are actually being supplied in return for the consideration paid. In other words, it is necessary to identify the nature of the service which the supplier is agreeing to perform in return for the consideration paid by the customer. That issue – identifying the true nature of the supply which is being made – is not the same as identifying how the prepayment exception to the

general rule as regards the tax point for the supply is to operate but it overlaps with it to some extent in the judgments. That is because the CJEU has sometimes supported its conclusion in relation to identifying the nature of the services which are being supplied by referring to the case law that prevents a prepayment from crystallising the tax point – see, for example, *MRL* at paragraphs [27] to [33].

101. By way of example, *MRL* was not a prepayment case. It was a case pertaining to the identification of the supply which was being made to the customer in return for the consideration paid by the customer. The conclusions drawn by the CJEU on that identification question were set out in *MRL* at paragraphs [27] and [28]. However, the CJEU then went on to support its conclusion in relation to the true nature of the supply by alluding to prepayment cases such as *BUPA* – see *MRL* at paragraphs [29] to [31]. In other words, instead of simply relying solely on its conclusion that the acquisition of Points Rights was a step that was preliminary to the real supply in that case, the CJEU supported its conclusion by setting out an analogy between that two-stage process and situations where prepayments were made. In making that comparison, it did not, in our view, set out any general principle to the effect that there can be no supply under the VAT legislation until all the relevant information in relation to the chargeable event is known.

102. In summary, we do not agree with Mr Rivett's submission that there is an overarching principle within the VAT legislation (supported by CJEU case law) to the effect that the tax point for a supply of services can never arise until all the relevant information in relation to the relevant supply is known. Of course, the fact that the courts have never confronted that particular issue directly is not at all surprising because the situation in question will rarely arise. In general, at the point when a service is actually supplied, as opposed to when a service that has yet to be supplied is paid for in advance, all of the relevant information in relation to the supply will be known.

103. The above conclusion also means that, in our view, any approach to the present case which involves identifying the uncertainties that existed at the time when a Type 1 Bundle was sold and then determining which of those uncertainties might be relevant in deferring the tax point for the supply comprising the sale of the Plan Bundle is not correct. The extent and nature of the uncertainties are not relevant. All that is required is to identify the real supply which is being made. We therefore differ in our views on that subject from the FTT in *H3G*.

104. It follows from the above that, in each case, before identifying the time when a supply of services was made, it is necessary first and foremost to identify the service which was being supplied in return for the consideration paid to the supplier. That is what the CJEU in *MRL* described at paragraph [32] as the "real service" for which the consideration was provided, as distinct from some preliminary step which was not, in and of itself, the purpose for providing that consideration. That process is not as straightforward as it might seem because there are circumstances where there are steps leading to a subsequent supply and it is necessary to determine whether those steps are merely preliminary to the eventual "real supply" or amount to a "real supply" in their own right.

105. Identifying that dividing line was the issue which was being addressed in each of *MRL* and *Marcandi* and the CJEU reached a different conclusion in relation to the issue on the facts of each of those cases. In *MRL*, the steps in question – the acquisition of Points Rights – were held to be merely preliminary to the eventual supply of accommodation that was the purpose of the customer in entering into the arrangement whereas, in *Marcandi*, the steps in question – the acquisition of credits – were held to be the supply itself.

106. The two-stage approach referred to above – namely, first identify the nature of the supply and only then identify the tax point for the supply either in the light of the general rule

or by reference to the prepayment exception to the general rule – was exactly the approach adopted by the CS in *FMP*. It concluded at paragraphs [12] to [33] that the nature of the real supply in that case was the ability to view and download documents by using the credits and not the acquisition of the credits themselves and it did that without relying on the fact that, at the time when the customer purchased its credits, some of the relevant information relating to the supply was unknown. Having identified the nature of the real supply, it then went on to consider at paragraphs [34] to [54] whether the prepayment exception to the general time of supply rule applied.

107. We therefore consider the decision in *FMP* to be entirely in line with the CJEU case law described above. It is not in any way authority for the proposition that it is a principle of the PVD that, where a service has actually been supplied, no VAT is chargeable if some of the relevant information concerning the chargeable event is unknown at the time of supply. In *FMP*, having adopted what we consider to be the correct approach, the CS concluded that the acquisition of credits did not amount to a supply in and of itself but was instead a preliminary step to the eventual acquisition of the service of being able to view and download documents. It then went on to conclude that the prepayment exception to the general time of supply rule did not apply because not all of the relevant information in relation to the real supply was known when the credits were acquired.

108. Turning then to the facts in the present case so far as they relate to the sale of the Type 1 Bundles and the ensuing use of the Allowances in the Type 1 Bundles, we need to determine the true nature of those transactions, based on the legal and economic context in which they occurred, the relationship of the Appellant with its customers and the purpose of the customers in paying their consideration to the Appellant. In particular, in the light of the decisions in *MRL* and *FMP*, we need to ask ourselves whether the sale of the Type 1 Bundles was the "real supply" for which the customers contracted in buying the Type 1 Bundles – which is to say, a supply of services in and of itself – or was merely a preliminary step to the "real supply" – which was the use of the Allowances contained within the Plan Bundles in due course.

109. Having carried out that process, we think that the question permits of only one answer, which is that it was the sale of the Type 1 Bundles that amounted to the "real supply" in this case. When the customer acquired a Type 1 Bundle, he or she received the Allowances and that receipt was the customer's purpose in purchasing the relevant bundle. At that point, the customer received a supply of telecommunication services in the same way as did the distributors in *Lebara*. The right in this case was not precisely the same as the right which was supplied in *Lebara* because, in *Lebara*, the right was simply the right to access the taxpayer's telecommunication network per se. In this case, the customer already had access to the telecommunication network through his or her SIM card. However, the Allowances conferred on the customer the right to use that network for a specified amount of telephone calls, text messages and/or data.

110. In this regard, it is worth noting in passing that the supply of that right to use the Allowances was a supply of telecommunication services in and of itself. It was not merely a right to a future supply of telecommunication services – see *Lebara* at paragraphs [34] and [35]. It follows that we do not think that Section 7A(3) of the VATA has any relevance in this context as it appears to be envisaging circumstances where the creation of the right to future services is not, in and of itself, the supply of a service.

111. At the point when the customer acquired the Type 1 Bundle, the number of telephone minutes, text messages and/or data to which he or she thereby became entitled was known and the extent to which the customer then chose to use the relevant Allowances was

irrelevant to the question of the VAT chargeable on that supply in the same way that, when a member of the golf club in *Kennemer* paid membership subscription fees, the facilities which he or she became entitled to use were known and the extent to which the member then chose to use those facilities in return for his or her membership subscription fees was irrelevant to the VAT which was chargeable in that case. The fact that the customer might then choose not to make use of some or all of the Allowances was irrelevant to the VAT analysis in the same way that the fact that the golf club member in *Kennemer* might have chosen not to use the facilities at all, or to use the facilities to a lesser extent than was available, was irrelevant.

112. On each occasion when a Type 1 Bundle was acquired, there was a legal relationship of reciprocity between the customer purchasing the Type 1 Bundle and the Appellant and a direct link between the consideration paid by the customer for the Type 1 Bundle and the right to telecommunication services in the form of the Allowances in the Type 1 Bundle. The supply was made at the point when the customer acquired the Allowances and the place of that supply was the UK, either because, prior to 1 January 2015, that was where the Appellant belonged or because, on and after 1 January 2015, that was where the customer belonged (see Articles 45 and 58 of the PVD and Section 7A(2) of, and paragraph 15 of Schedule 4A to, the VATA). Accordingly, VAT became chargeable at the point when the relevant Type 1 Bundle was sold and was chargeable on the consideration paid for the relevant supply. See also in this respect *Esporta* at paragraph [26], *MEO* at paragraphs [39] and [40] and *Vodafone* at paragraphs [31] and [32].

113. Despite the skilful advocacy of Mr Rivett, we do not see a parallel between the acquisition of the Allowances in the Type 1 Bundle and the acquisition of Points Rights in *MRL* or the acquisition of credits in *FMP*. In each of *MRL* and *FMP*, the intention of the customer in acquiring his Points Rights or credits was to use those Points Rights or credits at some future date to secure the service which was the customer's real purpose. In *MRL*, that purpose was the right to accommodation that could be secured by using the Points Rights and, in *FMP*, that purpose was the right for the customer to view and download documents which the customer had found using the free search facility. In the words of the CJEU in *MRL* at paragraph [32], that was the "real service". The Points Rights and the credits had no inherent value in and of themselves and their issue did not amount to a service in its own right. They were simply an intermediate preliminary step towards securing the ultimate desired end. That reality was reflected in features of both of those cases which are not present in this case and that is that:

> (1) the supplier was entitled unilaterally to change the accommodation or documents for which the Points Rights or credits could be exchanged before that exchange took place; and
>
> (2) the "price" for that exchange – which is to say the amount of Points Rights or credits required to be used by the customer in order to obtain the accommodation or view the document that was the ultimate purpose of the customer – could be changed unilaterally by the supplier prior to that exchange.

114. It is in that sense that each of *MRL* and *FMP* refer to the principle in *BUPA*. In each case, the reason why all the relevant information in relation to the chargeable event was not yet known was that the services which the customer wished to obtain using the Points Rights or credits had not yet been identified. In effect, at the initial stage, the customer had merely acquired a "currency" – whether it was Points Rights or credits – which he or she could then use to obtain the supply that was the desired end point. The "currency" itself was of no inherent value to the customer.

115. There is a significant difference between, on the one hand, the Points Rights in *MRL* and the credits in *FMP* and, on the other hand, the Allowances in the Type 1 Bundles. The Allowances in the Type 1 Bundles had an inherent value to the customer in and of themselves. It was what the customer wished to buy when he or she acquired the Type 1 Bundle and it was at that point that the relevant supply was made. The Allowances were not simply a "currency" to be used in securing future services the supply of which was the ultimate aim of the customer and the nature of which was unknown. The situation in this case was much closer to the facts in *Marcandi*, where the credits were the end, in and of themselves, and not part of a single indivisible economic supply leading to the sale of goods– see *Marcandi* at paragraphs [40] to [48].

116. In conclusion, in our view, the consideration payable for the Type 1 Bundles was chargeable to VAT at the point when the Type 1 Bundles were acquired and regardless of the extent to which the Allowances contained within the Type 1 Bundles were subsequently used.

117. There is one final point which we would make in relation to the Type 1 Bundles.

118. This is that the Allowances in a Type 1 Bundle are, in our view, completely different from the PAYG credits that are used as consideration for the Appellant's other supplies. The latter are, to all intents and purposes, the same as the Points Rights in *MRL* and the credits in *FMP*. They are effectively a "currency" to be used in acquiring services at some future point. As such, their use is subject to the same variables as are set out in paragraph 113 above. It follows that we are not surprised that the VAT analysis in relation to the issue and utilisation of PAYG credits is markedly different from the VAT analysis in relation to the sale and use of the Type 1 Bundles. It is for that reason that, in our view, the question of fiscal neutrality, which was briefly mentioned in this context at the hearing, is misconceived. The purchase of PAYG credits to be applied at a later time in acquiring telecommunication services is nothing like the purchase of an immediate right to telecommunication services contained in a Plan Bundle.

Type 2 Bundles

119. Turning then to the Type 2 Bundles, we do not see how the fact that a customer was able to use the Allowances within a Type 2 Bundle to access either of the Subscription Services changes the analysis from the one set out above. This is because, as we have already noted in discussing the procedural propriety of admitting the Subscription Services in these proceedings in paragraph 39 above, the use of Allowances to access a Subscription Service was no different from the use of Allowances in the ordinary course. The consideration paid by the customer in order to have the right to access the relevant service is outside the scope of the appeals. In essence, both customers without Plan Bundles and customers with Plan Bundles were able to subscribe for the relevant Subscription Service. The only difference between them was that, whereas a customer without a Plan Bundle would then have to use his or her PAYG credits to pay for access to the relevant service, a customer with a Plan Bundle could access the relevant service by using the Allowances within his or her Plan Bundle. The nature of the Subscription Service itself was nothing to the point.

120. However, the same is not true of the fact that a customer who acquired a Type 2 Bundle had the right to access one or more of the VAS. That right was part of what the customer obtained in return for the consideration which he or she provided for the relevant bundle. Consequently, the availability of the VAS potentially affects the applicability to the Type 2 Bundles of the analysis set out above in relation to the Type 1 Bundles.

121. We would start our consideration of this question by noting that:

(1) there was a single charge for each Type 2 Bundle and no separate charge was made for any or all of the VAS;

(2) no mention of the VAS was made in either the general terms and conditions or the "bundle specific" terms and conditions;

(3) no mention of the VAS was made in any of the posters or leaflets with which we have been provided;

(4) access to the VAS was always required to be carried out through the use of the Allowances comprising the telecommunication service;

(5) there is considerable confusion over the precise terms on which the VAS were in fact provided. We were shown a page from the website which purported to describe the terms on which the VAS were being made available to customers and the content of that page was at odds with the evidence provided by EA on the subject;

(6) the use of the VAS was miniscule, according to the correspondence between the Respondents and KPMG referred to in paragraph 21(4) above; and

(7) for the reasons set out in paragraphs 18 to 21 above, we have found as a fact that the availability of the VAS was not important to a customer who acquired a Type 2 Bundle.

122. On the basis of all those factors, we have concluded that, from the viewpoint of the typical customer of the Appellant, the sale of each Type 2 Bundle should be treated for VAT purposes as a single composite supply of which the Allowances were the principal element and the VAS were ancillary to it because they were not an end in and of themselves but merely a means of better enjoying the Allowances. In particular in this regard:

(1) we note the importance which was attached by the Court of Appeal in *Gray & Farrar International LLP v The Commissioners for Her Majesty's Customs and Excise* [2023] EWCA Civ 121 ("*Gray*") to the contractual terms in determining the nature of the relationship between the parties – see *Gray* at paragraphs [56] to [61]. In this case, we regard it as significant that neither the general terms and conditions nor the "bundle specific" terms and conditions included any reference to the VAS whereas the latter referred to the Allowances;

(2) access to the VAS was only by using the Allowances and thus the VAS were never separate from the supply of telecommunication services represented by the Allowances but were instead intimately and inextricably linked with that supply and ancillary to that supply; and

(3) the very fact that the VAS were advertised as enabling the customer to "get even more" from his or her Plan Bundle shows that they were intended to be a means of better enjoying the supply of telecommunication services which was the predominant feature of the package comprising the Type 2 Bundle and not an end in and of themselves. Indeed, the term used by the Appellant to describe the VAS in the course of the proceedings – which is to say, as "value added services" – reflects the same point.

123. For VAT purposes, the ancillary elements within a single composite supply share the same tax treatment as the principal element within that supply – see *CPP* at paragraph [30], *Purple Parking* at paragraphs [26] and [28] and *Město* at paragraph [28].

124. Consequently, at least so far as the sports update VAS and the IAT VAS are concerned, it is unnecessary to consider whether, had either of those two VAS been separate supplies,

they would have amounted to supplies which were not supplies of telecommunication services. That is not something which we need to consider because, even if that were to be the case, the inclusion of the relevant VAS in the Type 2 Bundle would fall to be disregarded for VAT purposes on the grounds that they were ancillary to the predominant supply of telecommunication services. The sports update VAS and the IAT VAS were not separate supplies in their own right but were merely ancillary elements in a single composite supply of telecommunication services.

125. However, the non-EU Roaming Calls VAS raises a slightly different question in that that service is generically no different from the telecommunication service comprising the telephone call Allowances which were to be used within the UK. As such, even though the non-EU Roaming Calls VAS was an ancillary service, we do not see how that fact can override the "effective use and enjoyment" place of supply rule which was in place prior to 1 November 2017 in relation to telecommunication services.

126. It is very different from disregarding an ancillary service which, had it been a service in its own right, would have fallen into a different charging category – for example, zero-rated or exempt – from the principal telecommunication service for VAT purposes or even a different type of service from the telecommunication service albeit in the same charging category. To all intents and purposes, when the customer was using the non-EU Roaming Calls VAS, he or she was enjoying precisely the same service as when he or she was making use of the Allowances in the UK. It is just that he or she was doing so in a different location.

127. Thus, we think that, for a Type 2 Bundle which included the non-EU Roaming Calls VAS, the VAT treatment of the relevant Type 2 Bundle should follow the treatment described below in relation to Type 3 Bundles. We appreciate that, in reaching this conclusion, we are departing from the submission made by Ms Mitrophanous to the contrary effect but we do not see any basis for disregarding the place of supply rules in relation to part of what is effectively a single supply of telecommunication services simply because that part of the single supply was minimal or of no importance to the customer and was therefore ancillary.

Type 3 Bundles

128. Finally in relation to Issue One, we turn to the Type 3 Bundles. These differed from the Type 2 Bundles which included the non-EU Roaming Calls VAS in that:

(1) the ability to use the Allowances within a Type 3 Bundle was not restricted to telephone calls but included text messages and data;

(2) use of the Allowances within a Type 3 Bundle was confined to specified non-EU countries; and

(3) Roam Like Home was promoted extensively in the Appellant's leaflets and posters and therefore we have found as a fact that its availability was important to customers who chose to acquire Type 3 Bundles.

129. The finding of fact mentioned in paragraph 128(3) above means that it is more difficult to regard Roam Like Home as being an ancillary element in a single complex supply than it is to regard the non-EU Roaming Calls VAS in that way. However, given the conclusion that we have reached in paragraphs 125 to 127 above, to the effect that, even if a right effectively to use and enjoy a telecommunication service in a country outside the EU is ancillary, the exercise of that right must still be taken into account for VAT purposes and cannot simply be treated for VAT purposes as being subsumed within the principal service, there is no need for us to consider whether Roam Like Home should be distinguished from the non-EU Roaming Calls VAS on the basis that it was an end in and of itself and not merely a means of better

enjoying the Allowances and therefore not ancillary. As we have said, regardless of whether or not the right effectively to use and enjoy a telecommunication service in a country outside the EU is ancillary, it is necessary to give effect to the exercise of that right in determining the VAT consequences of the relevant supply.

130. Proceeding on that basis, and turning to the supplies themselves, supplies of Type 3 Bundles made on or after 1 November 2017 should be treated in precisely the same manner as supplies of Type 1 Bundles because the use of Allowances within a non-EU country on and after that date did not change the place in which the supply comprising the sale of the relevant Type 3 Bundle was treated as being made. That place of supply was the UK for the reasons set out in relation to Type 1 Bundles in paragraph 112 above.

131. However, in relation to supplies of Type 3 Bundles made prior to 1 November 2017, the "effective use and enjoyment" rule in paragraph 8 of Schedule 4A to the VATA applied. The Upper Tribunal held in *Telefonica* at paragraphs [52] to [54] that a telecommunication customer had effective use and enjoyment of a telecommunication network for the purposes of paragraph 8 of Schedule 4A to the VATA only to the extent that he or she actually accessed the network to make or receive telephone calls or send or receive text messages or data and did not do so merely by having the ability to take advantage of that facility. (In that sense, the application of the "effective use and enjoyment" rule differs from the application of the general rules governing the time at which supplies are made, as discussed in the context of the Type 1 Bundles in paragraphs 97 to 118 above.) It means that the "effective use and enjoyment" rule would make no difference to the VAT treatment applicable to a Type 3 Bundle supplied prior to 1 November 2017 where the relevant customer did not actually use the Type 3 Bundle to make a telephone call, send a text message or access data from within a non-EU country.

132. However, it is necessary to consider how, in circumstances where a customer did actually use the Type 3 Bundle to access the network from within a relevant non-EU country prior to 1 November 2017, the "effective use and enjoyment" rule might change the analysis set out above in relation to the Type 1 Bundles. We have found this to be a difficult question but we have ultimately concluded that the Respondents are right in saying that not only does the very existence of the "effective use and enjoyment" rule shed no light on the general question as to the nature and timing of supply which we are addressing in relation to Issue One (as suggested by Mr Rivett (in paragraph 92 above)) but also that that rule did not prevent the whole of the consideration paid for a Type 3 Bundle from being subject to VAT in the same way as consideration paid for a Type 1 Bundle (because the supply of services comprising the sale of the Type 3 Bundle was made in the UK) but with a retrospective adjustment to that VAT to the extent (if any) that the Allowances within the Type 3 Bundle were effectively used and enjoyed within a relevant non-EU country.

133. We say that notwithstanding the objections raised to that conclusion by Mr Rivett as outlined in paragraph 92 above.

134. Before explaining the reasons why we have reached that conclusion, we should say that it was common ground before us that there was no legislative basis within either the PVD or the VATA for any of the VAT chargeable in respect of a supply of a telecommunication service to be repaid following the time of supply to reflect the effective use and enjoyment of that service in a non-EU country following its time of supply. We will therefore proceed on the assumption that was the case. However, we should record in passing that it is not immediately obvious to us why no such right to repayment would have arisen under Article 59a of the PVD and Section 80 of the VATA in those circumstances. That is because, in that case, the taxpayer would have accounted for VAT in respect of the relevant supply on the

basis that it was made in the UK because that is where the supplier or the customer (as the case may be) belonged and then subsequently discovered that, contrary to its initial assumption, the place of that supply was in fact outside the EU and that therefore no VAT was due in respect of the supply. We are not sure why that would not bring the terms of Article 59a of the PVD and Section 80(1) of the VATA into play retrospectively.

135. Be that as it may, in the rest of this section of our decision, we will proceed on the assumption that both parties are correct in this respect and that there was no express provision within either the PVD or the VATA entitling the Appellant to make a claim for repayment to reflect the effective use and enjoyment of the relevant telecommunication service following the time of supply.

136. We accept that, on the basis of that assumption, the absence of any such provision in the legislation for a retrospective adjustment might be taken to support the proposition that the time of supply of a telecommunication service could never be made until the relevant service was effectively used and enjoyed. We also recognise that:

(1) as noted by the CJEU in *Halifax* at paragraph [72], there is a general principle that VAT law should be certain and that its application should be foreseeable by those subject to it; and

(2) the FTT in *Muster Inns* interpreted that general principle to mean that the VAT treatment of a supply needed to be capable of final determination at the time of supply.

137. However, there are a number of reasons why we believe that, even if the legislation contained no express provision for an adjustment to be made following the time of supply, the conclusion we have set out in paragraph 132 above is the right one. Those are as follows:

(1) there are only two options in this case. Either the VAT chargeable in respect of the sale of each Type 3 Bundle needed to be deferred until all the services for which the Type 3 Bundle provided had either been effectively used and enjoyed or expired without being effectively used and enjoyed – which is the Appellant's proposed approach – or the approach which we believe to be correct needs to be followed;

(2) the Appellant's proposed approach would be contrary to our understanding of the legislation as a whole, as interpreted by the CJEU, as we have explained in paragraphs 97 to 118 above. In our view, the Appellant's proposed approach would be directly contrary to the CJEU's decisions in *MRL* and *Marcandi* because it is clear that:

(a) when a Type 3 Bundle was sold, that was a supply of telecommunication services (regardless of the extent to which the Type 3 Bundle was effectively used and enjoyed thereafter) and the time of that supply was when the Type 3 Bundle was sold; and

(b) as at the time when that supply was made, it was to be treated as being made in the UK because it had not yet been effectively used and enjoyed and had been made by a supplier who belonged in the UK to a customer who belonged in the UK;

(3) we can therefore see no basis in CJEU case law for following the Appellant's proposed approach. It would be contrary to the general principles described in paragraphs 97 to 118 above and would leave the portion of the consideration which was attributable to the unused services without a time of supply at all. In common with the FTT in *H3G* at paragraphs [240] to [262], we do not think that that can be the right outcome. Nor do we think that we have the authority in law to reach that conclusion. It would involve offending against the express provisions of the legislation (as interpreted

by the relevant CJEU case law) simply because the legislation contained no express provision for a subsequent adjustment to be made to the VAT chargeable in respect of the supply;

(4) the Appellant's approach would also lead to non-taxation of the portion of the consideration for the sale of the Type 3 Bundle that was attributable to services that were never effectively used and enjoyed. Leaving that portion of the consideration outside the scope of the charge would offend against the principle of non-taxation, which was expressly stated in the preamble to Article 59a of the PVD to be the purpose of introducing the "effective use and enjoyment" rule;

(5) moreover, we do not see how the approach which we believe to be correct offends against the principle of legal certainty as mentioned by the CJEU in *Halifax* at paragraph [72]. That approach would not mean that a taxpayer selling a telecommunication bundle would not know, at the time of supply, the basis in law on which the VAT which was attributable to the supply would need to be calculated. On the contrary, at that stage, the taxpayer would know the basis in law on which the final VAT liability was ultimately to be determined and would merely be unaware of the precise quantum of that liability. It would account for VAT in respect of the whole of the consideration for the bundle at the time of supply but would be aware at the stage when it was doing so that some of that VAT would be subject to being repaid to reflect the extent to which the effective use and enjoyment of the bundle took place in a non-EU country. We therefore do not see how that offends against the principle of legal certainty;

(6) we accept that the approach which we believe to be correct is contrary to the statement made in *Muster Inns* to the effect that the VAT treatment of a supply needs to be known at the time of supply. However, leaving aside the fact that *Muster Inns*, as another decision of the FTT, is not binding on us, we do not demur from that proposition in general. We merely note that the existence of the "effective use and enjoyment" rule in the context of telecommunication services was a very limited exception to that general rule. Indeed, one might say, as did the FTT in *H3G*, that that exception was implicit in the rule because, at the time when a telecommunication service was supplied, it would not invariably be known where that service would be effectively used and enjoyed;

(7) we would add that we think that it was also implicit in the "effective use and enjoyment" rule that a single supply of telecommunication services could be made in more than one place. It is clear from the language in Section 7A(5) of, and paragraph 8 of Schedule 4A to, the VATA that the general rules on place of supply applied to a supply of telecommunication services except "to the extent that" that supply was effectively used and enjoyed in a non-EU country and that, in any such case, the relevant supply should "to that extent" be treated as being made in that non-EU country. It is hard to see how that language could be construed in any other way than potentially to give rise to multiple places of supply for the same supply of telecommunication services. We recognise that the language used in the VATA is slightly different in this respect from the language used in the PVD – the PVD uses the word "if" and not "to the extent that" – but the word "if" can be construed in that context as meaning "to the extent that" and that is how it was construed when Parliament enacted the relevant legislation in the VATA in response to Article 59a of the PVD;

(8) although we are assuming for present purposes that there is no express provision within the legislation to the effect that a subsequent adjustment to the VAT chargeable in respect of a supply could be made, the PVD provides that the administration of VAT is (within certain limits) for each Member State to determine and it would have been within the general powers of care and management of the Respondents to make such an adjustment. Moreover, it is apparent from the facts in *Telefonica* that that is how the taxpayer's method of apportionment had been working in practice before the Respondents proposed the alternative method of apportionment which was the subject of that case; and

(9) finally, we think that an arguably analogous situation to this is the one described in *MRL* at paragraphs [34] to [41]. In that part of its decision, the CJEU considered the practical difficulties resulting from its conclusions in that case and noted that those difficulties could not justify an approach by the taxpayer that didn't accord with the law. We would say that the same is true of the difficulties arising from the assumed absence of any provision for retrospective adjustment in the relevant legislation in the present case. That absence cannot justify disregarding the legal principles as to the nature, time and place of a supply of services which were applicable to telecommunication services that were not effectively used and enjoyed in a non-EU country.

138. For the above reasons, we have concluded that the Respondents are correct in saying that the Type 3 Bundles should be treated for VAT purposes in the same way as the Type 1 Bundles save only for the retrospective adjustment to the VAT payable in relation to Type 3 Bundles sold before 1 November 2017 for effective use and enjoyment of the relevant Allowances in a relevant non-EU country.

139. For completeness, we would add that, contrary to what was suggested by the FTT in *H3G* at paragraph [256], we are not convinced that the decision in *Telefonica* sheds much light on this question. In the first place, the matter in dispute in that case was the lawfulness (or otherwise) of the methodology which the Respondents had suggested should apply in calculating the proportion of the taxpayer's line rental revenues that should not give rise to VAT because it could be attributed to the effective use and enjoyment of the taxpayer's services in non-EU countries by its customers. As such, the present question was not something which the Upper Tribunal in that case was directly considering.

140. Even more significantly, it is by no means clear from the facts in *Telefonica* that the Respondents' methodology which was in issue in that case did involve an adjustment made after the time that the relevant supplies were made to the VAT arising in respect of the relevant supplies. The Respondents' methodology which was in issue in the case related to the extent to which line rentals that were payable monthly in arrear should give rise to VAT and that methodology depended on the actual use of the network from non-EU countries over the month in question. Whilst reference was made in the decision to the fact that the methodology previously used by the taxpayer involved accounting for VAT on an estimated basis and then adjusting that amount in the following accounting period, we do not see that the same retrospectivity was necessarily a feature of the Respondents' methodology and it was that methodology which was in issue in the case.

ISSUE TWO – VOUCHERS

The relevant legislation

The position prior to 1 January 2019

141. No provision was made in the PVD in relation to vouchers issued prior to 1 January 2019.

142. However, as a matter of UK domestic law, Schedule 10A of the VATA ("Schedule 10A") contained the following relevant provisions in relation to vouchers issued prior to that date:

"Meaning of "face-value voucher" etc

1 (1) In this Schedule "face-value voucher" means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.

(2) References in this Schedule to the "face value" of a voucher are to the amount referred to in sub-paragraph (1) above.

2 The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of the Act..…

Treatment of retailer vouchers

4 (1) This paragraph applies to a face-value voucher issued by a person who—

(a) is a person from whom goods or services may be obtained by the use of the voucher, and

(b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a "retailer voucher".

(2) The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.…

Exclusion of single purpose vouchers

7A Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT.

Interpretation

8 (1)…

(2) For the purposes of this Schedule–

(a) the rate categories of supplies are–

(i) supplies chargeable at the rate in force under section 2(1) (standard rate),

…, and

(iv) exempt supplies and other supplies that are not taxable supplies.;

(b) the "non-standard rate categories" of supplies are those in sub-paragraphs …. (iv) of paragraph (a) above;

(c) goods or services are in a particular rate category if a supply of those goods or services falls in that category".

The position on and after 1 January 2019

143. In 2016, the Voucher Directive was enacted in order to ensure a consistency of treatment across the EU in relation to transactions involving vouchers. Amongst other things, it sought to identify what constituted vouchers (as distinct from payment instruments) for VAT purposes and to ensure that, in relation to multi-purpose vouchers, VAT should be charged only when the goods or services to which the voucher related were supplied and that consideration received for the issue of a voucher should not give rise to VAT to the extent that the voucher remained unused.

144. Article 2(1) of the Voucher Directive amended the PVD by inserting new Articles 30a, 30b and 73a in relation to vouchers issued on or after 1 January 2019.

145. Article 30a provided as follows:

"For the purposes of this Directive, the following definitions shall apply:

(1) 'voucher' means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument;

(2) 'single-purpose voucher' means a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher;

(3) 'multi-purpose voucher' means a voucher, other than a single-purpose voucher."

146. Article 30b provided as follows:

"1. Each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

Where a transfer of a single-purpose voucher is made by a taxable person acting in the name of another taxable person, that transfer shall be regarded as a supply of the goods or services to which the voucher relates made by the other taxable person in whose name the taxable person is acting.

Where the supplier of goods or services is not the taxable person who, acting in his own name, issued the single-purpose voucher, that supplier shall however be deemed to have made the supply of the goods or services related to that voucher to that taxable person.

2. The actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be

subject to VAT pursuant to Article 2, whereas each preceding transfer of that multi-purpose voucher shall not be subject to VAT.

Where a transfer of a multi-purpose voucher is made by a taxable person other than the taxable person carrying out the transaction subject to VAT pursuant to the first subparagraph, any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT."

147. Article 73a provided as follows:

"Without prejudice to Article 73, the taxable amount of the supply of goods or services provided in respect of a multi-purpose voucher shall be equal to the consideration paid for the voucher or, in the absence of information on that consideration, the monetary value indicated on the multi-purpose voucher itself or in the related documentation, less the amount of VAT relating to the goods or services supplied."

148. In order to reflect the amendments to the PVD which were made by the Voucher Directive, the VATA was amended by the introduction of Schedule 10B of the VATA ("Schedule 10B") in relation to vouchers issued on or after 1 January 2019. The relevant provisions of Schedule 10B are as follows:

(1) paragraph 1 provides that:

"(1) In this Schedule "voucher" means an instrument (in physical or electronic form) in relation to which the following conditions are met.

(2) The first condition is that one or more persons are under an obligation to accept the instrument as consideration for the provision of goods or services.

(3) The second condition is that either or both of—

(a) the goods and services for the provision of which the instrument may be accepted as consideration, and

(b) the persons who are under the obligation to accept the instrument as consideration for the provision of goods or services,

are limited and are stated on or recorded in the instrument or the terms and conditions governing the use of the instrument.

(4) The third condition is that the instrument is transferable by gift (whether or not it is transferable for consideration).

(5) The following are not vouchers—

(a) an instrument entitling a person to a reduction in the consideration for the provision of goods or services;

(b) an instrument functioning as a ticket, for example for travel or for admission to a venue or event;

(c) postage stamps";

(2) paragraph 2 provides that, inter alia:

(a) when used in the schedule, the phrase "relevant goods or services" means, in relation to a voucher, any goods or services for the provision of which the voucher may be accepted as consideration or part consideration; and

(b) references in the schedule to the transfer of a voucher do not include the voucher's being offered and accepted as consideration or part consideration for relevant goods or services;

(3) paragraph 3 provides that, inter alia, the issue and subsequent transfer of a voucher is to be treated for the purposes of the Act as a supply of relevant goods or services;

(4) paragraphs 4 and 5 set out the rules for single purpose vouchers, as follows:

"4 (1) A voucher is a single purpose voucher if, at the time it is issued, the following are known—

(a) the place of supply of the relevant goods or services, and

(b) that any supply of relevant goods or services falls into a single supply category (and what that supply category is).

(2) The supply categories are—

(a) supplies chargeable at the rate in force under section 2(1) (standard rate),

(b) supplies chargeable at the rate in force under section 29A (reduced rate),

(c) zero-rated supplies, and

(d) exempt supplies and other supplies that are not taxable supplies.

(3) For the purposes of this paragraph, assume that the supply of relevant goods or services is the provision of relevant goods or services for which the voucher may be accepted as consideration (rather than the supply of relevant goods or services treated as made on the issue or transfer of the voucher).

5 (1) This paragraph applies where a single purpose voucher is accepted as consideration for the provision of relevant goods or services.

(2) The provision of the relevant goods or services is not a supply of goods or services for the purposes of this Act.

(3) But where the person who provides the relevant goods or services (the "provider") is not the person who issued the voucher (the "issuer"), for the purposes of this Act the provider is to be treated as having made a supply of those goods or services to the issuer";

(5) paragraph 6 specifies that a voucher is a multi-purpose voucher if it is not a single purpose voucher;

(6) paragraph 7 provides that any consideration for the issue or subsequent transfer of a multi-purpose voucher is to be disregarded for the purposes of the Act and that the supply which is deemed by paragraph 3 to be made on the issue or subsequent transfer of the multi-purpose voucher is to be treated as not being a supply falling within Section 26(2) of the Act (which is to say, as not being a supply giving rise to a right of recovery for attributable VAT input tax);

(7) paragraph 8 provides for taxation on redemption as follows:

"(1) Where a multi-purpose voucher is accepted as consideration for the provision of relevant goods or services, for the purposes of this Act—

(a) the provision of the relevant goods or services is to be treated as a supply, and

(b) the value of the supply treated as having been made by paragraph (a) is determined as follows.

(2) If the consideration for the most recent transfer of the voucher for consideration is known to the supplier, the value of the supply is such amount as, with the addition of the VAT chargeable on the supply, is equal to that consideration.

(3) If the consideration for the most recent transfer of the voucher for consideration is not known to the supplier, the value of the supply is such amount as, with the addition of the VAT chargeable on the supply, is equal to the face value of the voucher.

(4) The "face value" of a voucher is the monetary value stated on or recorded in—

(a) the voucher, or

(b) the terms and conditions governing the use of the voucher."

The relevant case law

149. We were referred to a number of cases in relation to vouchers in the course of the hearing. Those are described briefly below.

150. In *Leisure Pass Group Limited v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWHC 2158 (Ch) ("*Leisure Pass 1*"), the taxpayer sold a pass which entitled the holder, during the period of the pass's validity, to enter without further payment a number of attractions in London. A particular attraction could be visited only once during the life of the pass. Sir Andrew Park held that the pass was not a face-value voucher for the purposes of Schedule 10A because it did not contain a monetary limit which could be exhausted by the use of the voucher. Although the pass was a voucher which represented the right to receive services, it did not do so "to the value of an amount recorded on it".

151. By the time of *Leisure Pass Group Limited (No 2) v The Commissioners for Her Majesty's Revenue and Customs* (2009) VAT Decision 20910 ("*Leisure Pass 2*"), the terms of the pass had been changed so that it contained a set value shown on the face of the pass itself. That value was then reduced on each occasion that the passholder gained entry to one of the attractions. The VAT Tribunal considered that, in that case, the pass did represent the right to receive services "to the value of an amount recorded on it" and therefore qualified as a face-value voucher for the purposes of Schedule 10A.

152. In *Skyview Ballooning v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 032 (TC) ("*Skyview Ballooning*"), the taxpayer provided hot air balloon rides. It also sold merchandise such as children's T-shirts, mugs and other souvenirs. The taxpayer sold vouchers which could be redeemed for a hot air balloon ride or any of the merchandise. The cash value of the voucher was not shown on the face of the voucher but the voucher did set out its expiry date and a code number and, at the bottom of the voucher, a note stated that the cash value of the voucher was individually recorded by the supplier and could be obtained by writing to the supplier's office. The FTT held that the vouchers satisfied the conditions in paragraph 1 of Schedule 10A and were not precluded from falling within the ambit of the schedule by being "single purpose vouchers". As regards the requirement that the amount of the voucher be stated on, or recorded in, the voucher, the FTT held that the fact that the voucher in that case set out a code which enabled the holder of the voucher to access the system on the supplier's computer in order to check on the balance on the voucher from time to time meant that the relevant language was satisfied. The FTT added that that was implicit from the fact that the legislation allowed for vouchers in electronic form – see *Skyview Ballooning* at paragraphs [22] to [25].

153. In *Skatteverket v DSAB Destination Stockholm AB* (Case C – 637/20) ("*Stockholm*"), the taxpayer sold a card granting admission to various attractions in Stockholm for a limited period of time and up to a certain value, together with unlimited access to transport services during the term of the card. The services included in the card were either subject to tax, at various rates, or exempt. The CJEU held that:

(1) the card in question satisfied the definition of a "voucher" in Article 30a of the PVD;

(2) the fact that the limited term of the card meant that it would be impossible for the average consumer to take advantage of all the services offered was not relevant to the question of whether or not the card satisfied the conditions necessary to be a voucher;

(3) the issuance of the card could not be classified as a single provision of services in the light of the diversity of the services offered and the third-party operators who provided the services; and

(4) the card was not a single purpose voucher because it allowed access to various types of supplies which were subject to different rates of VAT or were exempt and it was impossible to predict in advance which services would be selected by the cardholder. It was therefore a multi-purpose voucher.

154. In *FMP*, the CS considered the question of whether the credits purchased by customers were face-value vouchers falling within Schedule 10A although its observations on the subject were obiter because it had already found for the taxpayer that, on general VAT principles, there was no supply unless and until the credits were used in viewing or downloading documents.

155. On the facts in the case, the CS concluded that the credits acquired by a customer were not a token, stamp or voucher in electronic form representing a right to services, as required by paragraph 1 of Schedule 10A. This was because:

(1) they were merely credits which permitted the customer to view and download documents on the taxpayer's website through the operation of the taxpayer's accounting system. They were not representative of a right;

(2) they were not purchased for their own sake but merely as a preliminary step to the viewing or downloading of documents;

(3) if a customer wished to view or download documents, the only way of doing so was by using the credits. The credits could not be used, in the same way as a book token or other retailer voucher, in conjunction with the customer's own funds;

(4) although the credits could be the subject of a gift at the point of purchase, they could not be transferred thereafter; and

(5) consequently, the credits were not a token, stamp or voucher in electronic form and nor did they represent a right to services. Instead, they were no more than credits with the taxpayer which could be used to acquire services

- see *FMP* at paragraphs [59] and [60].

156. In addition:

(1) the credits did not satisfy the requirement in paragraph 1 of Schedule 10A of being "to the value of an amount" because the value of the credits could be changed unilaterally from time to time by the taxpayer prior to the point of use. The fluctuating price for the services in question meant that the value of the credits was uncertain until the time of redemption; and

(2) nor were the credits "stated on" or "recorded in" the voucher as required by paragraph 1 of Schedule 10A because the value of the credits was ascertainable only by reference to the taxpayer's own accounting records and not by reference to what was held by the customer. Moreover, it was only there that the value of the credits could be discovered "because that depends upon the prices currently charged for viewing or downloading particular documents on the website"

- see *FMP* at paragraphs [61] and [62].

157. Finally, the CS observed at paragraph [62] that the uncertainty in the ultimate value of the credits when they were going to be redeemed – which was an important factor in the CS's conclusion that the prepayment provisions of Section 6(4) of the VATA did not apply to the facts in that case – also had the effect of precluding the credits from satisfying the requirements in paragraph 1 of Schedule 10A, as noted in paragraph 156 above.

158. In *H3G*, the FTT held that:

(1) even if the various categories of allowances could be seen as different types of services as opposed to a single type of services, being telecommunication services – which the FTT doubted – those different categories were not interchangeable. The rights held by the customer did not entitle him or her to telephone calls or text messages or data, each in the alternative, but instead provided for a fixed allowance in each category. As such, if the rights held by the customer could be seen as a voucher, they would more accurately be seen as three separate vouchers, each for a single type of service, than a single voucher for three different types of service; and

(2) if there were vouchers, they were single purpose vouchers falling with paragraph 7A of Schedule 10A. This was because the allowances referred to were all subject to a single rate of VAT. The only uncertainty was whether the services were supplied in the UK. It did not relate to the rate of VAT

– see *H3G* at paragraphs [272] and [273].

159. Whilst that was sufficient to mean that the taxpayer failed on this point, there was another reason why the taxpayer could not rely on the voucher rules and that was that, if there were vouchers, they did not "represent… a right to receive …services to the value of an amount stated on [them] or recorded on [them]". This was because:

(1) the allowances in question were themselves the services which were the subject of the supply in the same way that theatre or airline tickets were rights which constituted the services supplied. They did not "represent" the right to receive services; and

(2) the reference to "the value of the amount stated on or recorded in" the voucher was indicative of the fact that, in order for the voucher rules to apply, the voucher needed to have a face value and there needed to be some uncertainty at the point when the voucher was acquired in what services would be selected and/or the price at which those services would be provided using the voucher. No such uncertainty existed on the facts in *H3G*. Instead, the price paid by the customer was not the face value of a voucher but was instead the price paid for the supply of allowances

- see *H3G* at paragraphs [274] to [303].

The Appellant's submissions

The position prior to 1 January 2019

160. As regards the position prior to 1 January 2019, Mr Rivett explained that paragraph 1 of Schedule 10A set out the following requirements for the Plan Bundles to constitute face-value vouchers for the purposes of that schedule:

(1) first, there needed to be a token, stamp or voucher, whether physical or electronic ("condition 1");

(2) secondly, that token, stamp or voucher needed to represent the right to receive goods or services ("condition 2");

(3) thirdly, that right to receive goods or services needed to be "to the value of an amount", which is to say, limited by a monetary value ("condition 3"); and

(4) finally, that monetary limit needed to be stated on the token, stamp or voucher or recorded in it ("condition 4").

161. He went on to explain how the Plan Bundles met each of the above conditions as follows:

(1) condition 1 was met because the entitlements under the Plan Bundles were recorded on the Appellant's system in the same way as PAYG credits. The Plan Bundles were therefore tokens in electronic form;

(2) condition 2 was met because the entitlements under the Plan Bundles represented the right to future services. By using the Plan Bundle, the customer's entitlement to future services was reduced and that reduction was recorded in the Appellant's system. Once the entitlements were used up, the customer would no longer be able to access the Appellant's network through the Plan Bundle (although would be able to use any PAYG credits he or she had to do so). Mr Rivett said that this meant that the entitlements under the Plan Bundles were no different from the PAYG credits which were also depleted by use;

(3) condition 3 was satisfied because, like a book token, which was often used in voucher cases to exemplify a typical face-value voucher, the Plan Bundle had a monetary value which was reduced through usage and could be exhausted – see *Leisure Pass 1* at paragraph [15]; and

(4) condition 4 was satisfied because the monetary limit – which was the cost of the Plan Bundle – was recorded on the Appellant's system and this was sufficient in the case of an electronic voucher – see *Skyview Ballooning* at paragraphs [22] and [23].

162. Since the Plan Bundles were face-value vouchers, it was then necessary to address what category of face-value vouchers they were. In this case, the Plan Bundles were "retailer vouchers" for the purposes of the schedule because they were issued by the person who was to provide the services to be obtained on the use of the Plan Bundles (see paragraph 4(1) of Schedule 10A). Accordingly, the consideration received for the Plan Bundles was to be disregarded except to the extent that it exceeded the face-value of the voucher (which it did not) (see paragraph 4(2) of Schedule 10A).

163. Paragraph 7A of Schedule 10A, which excluded single-purpose vouchers, did not apply to the Plan Bundles because the Plan Bundles represented the right to receive services of different types which were not subject to a single rate of VAT. In particular, the supply of a telecommunication service could either be standard-rated or not subject to VAT because the place of its supply was outside the UK (see paragraph 8 of Schedule 10A).

The position on and after 1 January 2019

164. As regards the position on and after 1 January 2019, Mr Rivett explained that paragraph 1 of Schedule 10B set out the following requirements for the Plan Bundles to constitute vouchers for the purposes of that schedule:

(1) first, there needed to be "an instrument (in physical or electronic form)" (the "first condition");

(2) secondly, one or more persons must have been under an obligation to accept that instrument as consideration for the provision of goods or services (the "second condition");

(3) thirdly, either or both of the goods or services for the provision of which the instrument might be accepted as consideration and the persons who were under the obligation to accept the instrument as consideration for the provision of goods or services must have been limited and be stated on or recorded in the instrument or the terms and conditions governing the use of the instrument (the "third condition");

(4) fourthly, the instrument must have been transferable by gift (whether or not it was transferable for consideration) (the "fourth condition"); and

(5) fifthly, the instrument must not have been one of:

(a) an instrument entitling a person to a reduction in the consideration for the provision of goods or services;

(b) an instrument functioning as a ticket; or

(c) a postage stamp

(the "fifth condition").

165. He went on to explain how the Plan Bundles met each of the above conditions as follows:

(1) the entitlements under the Plan Bundles were, in effect, electronic tokens. It was clear from the European Commission's statement when the Voucher Directive was introduced that entitlements to telecommunication services were intended to fall within the term "instrument". In that statement, the European Commission had said as follows:

"The growth in the number of mobile devices reinforces the need for a clear distinction between prepaid telecommunications credits (which are vouchers) and mobile payment services more generally which are likely to leverage the prepaid billing system of the former."

Thus, the European Commission was distinguishing between PAYG credits (which were meant to qualify as "instruments") and e-money (which was not). The entitlements under the Plan Bundles were no different from PAYG credits and therefore the first condition was met;

(2) the Appellant was obliged to allow the customer to utilise his or her entitlements under the Plan Bundles and therefore the second condition was met;

(3) both the amount of the customer's entitlements and the identity of the supplier were apparent and stated on or recorded in the instrument and therefore the third condition was met;

(4) the entitlements were transferable by way of gift because the customer could always transfer his or her SIM card to another person and thereby transfer the entitlements and therefore the fourth condition was met; and

(5) the Plan Bundles clearly didn't fall within one of the categories of instrument set out in paragraph 164(5) above and therefore the fifth condition was met.

166. The only differences between the entitlements under the Plan Bundles and PAYG credits was that the latter were defined by reference to monetary amounts whereas the former were (at least primarily) defined by reference to the Allowances and that difference was irrelevant in the context of Article 30a of the PVD and Schedule 10B.

167. The Plan Bundles were not "single purpose vouchers" (within the meaning of paragraph 4 of Schedule 10B) for the purposes of the schedule because, at the time when a Plan Bundle was sold, the place of supply of the services to which the entitlements related was not known and the services to be supplied pursuant to those entitlements did not all fall within a single supply category. Accordingly, the Plan Bundles were "multi-purpose vouchers" (as defined in paragraph 6 of Schedule 10B) for the purposes of the schedule and therefore the sale of the Plan Bundles (which was the issue of the instrument) was not chargeable to VAT and no VAT arose until the services to which the entitlements related were supplied (pursuant to paragraphs 7 and 8 of Schedule 10B).

168. The Appellant recognised that a different analysis might apply to Plan Bundles which carried an entitlement to an unlimited amount of a particular category of Allowances. That was because such category of Allowances was not a fixed number of tokens but allowed for unlimited use within a specified period. In such a case, as long as there was some usage of the relevant category of Allowances, the whole amount paid for the Plan Bundle (or, if the Plan Bundle included more than one category of Allowances, the portion of the amount paid for the Plan Bundle which was attributable to the unlimited category of Allowances) should be treated as consideration for the services supplied and, if the services supplied fell into different VAT rates, then there would have to be an apportionment.

Discussion

Introduction

169. We will deal with the position in relation to the voucher legislation relatively briefly. Again, we have not set out the submissions of Ms Mitrophanous because we agree with her conclusion that the VAT analysis in the present case is not affected by the voucher legislation.

The position prior to 1 January 2019

170. In relation to the position prior to 1 January 2019, we should note as a starting point that it is unclear to us whether the Appellant was claiming that:

(1) each Plan Bundle amounted to a single voucher; or

(2) each category of Allowances to which each Plan Bundle entitled the relevant customer amounted to a single voucher; or

(3) each unit of entitlement to which each Plan Bundle entitled the relevant customer amounted to a single voucher.

171. The FTT in *H3G* had a similar difficulty in relation to the allowances in that case – see paragraph 158 above. However, we do not think that it ultimately makes any difference which of those it was because whichever of them is alleged to be the relevant voucher in this case suffers from the same defect in terms of Schedule 10A. That defect is that the entitlements under the Plan Bundles which were shown on the Appellant's system were not a

monetary amount to be used in purchasing future services but were instead entitlements to Allowances (which is to say something other than a monetary amount) that could be used from time to time while the Plan Bundle remained valid.

172. The critical part of Schedule 10A in this respect is condition 3 – the requirement in paragraph 1 of the schedule to the effect that the right to receive services represented by the voucher needed to be "to the value of an amount", which is to say, limited by reference to a monetary value. No such amount was recorded in the case of a Plan Bundle. Instead, the customer's entitlement to future services under the Plan Bundle was expressed in terms of remaining available Allowances. Thus, we do not agree with Mr Rivett's submission to the effect that each Plan Bundle had a monetary value which was reduced through usage and could be exhausted. On the contrary, the Plan Bundle may have been sold for a monetary amount at inception but thereafter it carried an entitlement to Allowances and it was those Allowances, and not a monetary amount, which were reduced through usage and could be exhausted. The position in this respect is wholly unlike the position in relation to PAYG credits, despite Mr Rivett's attempt to present the 2 situations as indistinguishable.

173. The mere fact that it might have been possible to do a calculation and convert the Allowances which remained from time to time into a monetary amount is insufficient – see Park J in *Leisure Pass 1* at paragraphs [15] to [18]. In this case, as in *Leisure Pass 1*, the limits on the use of the entitlements were not monetary limits and the mere fact that it might have been possible to express the entitlements which remained from time to time in monetary terms is insufficient. As Park J succinctly put it in *Leisure Pass 1* at paragraph [18], "[the] London Pass never expires because the holder has exhausted the monetary amount of it". Precisely the same can be said in this case about the entitlements under the Plan Bundles in this case.

174. In any event, even if it were possible to express the entitlements which remained from time to time in monetary terms, any monetary amount so calculated was not shown on the Appellant's system and therefore condition 4 was not satisfied, even after taking into account the extended meaning of the term "stated on it or recorded in it" applied by the FTT in *Skyview Ballooning*.

175. We would add that:

(1) in our view, the above points are the reason why the Appellant has found it hard to apply its voucher analysis in the case of Plan Bundles which included provision for one or more categories of Allowances to be unlimited. In order to make the voucher analysis work, the Appellant has to assume that any use of a category of Allowances which was unlimited, no matter how small, amounted to the usage in full (and exhaustion) of the voucher which that category of Allowances represented; and

(2) the points also highlight another difficulty for the Appellant in seeking to apply this legislation in the present context, which is that the Appellant apparently accepts that the use of PAYG credits to make telephone calls, send text messages and use data each amounted to the redemption of the voucher which those PAYG credits represented, thereby crystallising a tax point for VAT purposes, and yet does not accept that the same analysis necessarily applies when PAYG credits were used to purchase Plan Bundles.

176. The simple fact is that the entitlements under the Plan Bundles were not monetary amounts which could be used to acquire future services. Instead, they reflected the fact that services had already been supplied. For that reason, the entitlements did not represent the right to receive future services, as required by condition 2, but instead represented the product of services which had already been supplied.

177. For the reasons set out above, we have concluded that the entitlements under the Plan Bundles did not satisfy any of condition 2, condition 3 or condition 4 as described in paragraph 160 above and therefore that the Plan Bundles did not fall to be treated as vouchers for the purposes of Schedule 10A.

The position on and after 1 January 2019

178. A similar problem arises in the case of the legislation in Schedule 10B because both the second condition and the third condition in that legislation – and the equivalent language in the PVD – refer to an obligation on the part of the relevant supplier or suppliers to accept the instrument comprising the voucher as consideration for the provision of goods or services. It is difficult to see how the use of the entitlements contained within a Plan Bundle can properly be described as involving the acceptance by the Appellant of an instrument as consideration for services. That language is clearly directed at the classic example of a voucher such as a book token which is presented for payment when services or goods are being acquired with the voucher. In that case:

(1) there is an instrument containing a reference to a monetary amount;

(2) that instrument is accepted by the relevant supplier as payment or part payment for a specified service; and

(3) as a result, the monetary amount is reduced.

179. In our view, the use by a customer of entitlements which he or she has acquired on the purchase of a Plan Bundle cannot be said to involve an acceptance by the Appellant of the Plan Bundle as consideration for the services reflecting those entitlements without an unacceptable level of intellectual gymnastics. The entitlements under the Plan Bundle required the Appellant to provide services but to describe the exercise of those entitlements as involving the acceptance by the Appellant of the Plan Bundle as consideration for those services would be a misnomer.

180. We would add that we have some reservations too about the ability of the Plan Bundles to meet the first condition.

181. As regards that condition, we are not persuaded that a Plan Bundle can properly be described as an "instrument". It would not naturally fall within the meaning of that word and we were not persuaded that the European Commission's statement set out in paragraph 165(1) above advanced the Appellant's case on that front. The "prepaid telecommunications credits" to which the European Commission referred in that statement clearly related to pay as you go or top up credits such as the PAYG credits utilisable by customers of the Appellant who did not have Plan Bundles. There is a significant difference between a PAYG credit and an entitlement under a Plan Bundle in that the former was a monetary amount which could be used to acquire telecommunication services at the applicable rate at the time when they were used and were consequently reduced. It is not hard to see why the use of PAYG credits in that manner should be treated as the acceptance by the Appellant of an instrument as consideration for the provision of the telecommunication service in question. The use of the PAYG credits was not very different from the use of the visitor card in *Stockholm*. However, that is a far cry from the performance by the Appellant of its contractual obligation to enable the relevant customer to use the entitlements under the Plan Bundles which the customer had already acquired.

182. Finally, we would note that, even if we are wrong in relation to the above, and the Plan Bundles did constitute vouchers for the purposes of Schedule 10B, they would have been single purpose vouchers as defined in paragraph 4 of Schedule 10B. This is because, once the sports update VAS and the IAT VAS are disregarded by virtue of having been ancillary

elements in a single composite supply of telecommunication services, all of the services supplied pursuant to the Plan Bundles fell within the same supply category (telecommunication services) and all of those services were supplied in the UK (because, by 1 January 2019, the "effective use and enjoyment" rule was no longer applicable and therefore the fact that the customer belonged in the UK determined that the place of supply of those services was the UK).

183. For the reasons set out above, we have concluded that the Plan Bundles did not fall to be treated as vouchers for the purposes of Schedule 10B and that, even if they were, they would not have been multi-purpose vouchers.

CONCLUSION

184. In conclusion, our views on the matters of principle that have been raised with us are as follows:

(1) when a Type 1 Bundle was sold by the Appellant, VAT was chargeable on the full amount of consideration which was paid by the relevant customer in return for the Type 1 Bundle, regardless of the extent to which the customer subsequently exercised his or her entitlement to Allowances under the Type 1 Bundle;

(2) precisely the same conclusion applies to:

(a) a Type 2 Bundle which did not include the non-EU Roaming Calls VAS;

(b) a Type 2 Bundle which did include the non-EU Roaming Calls VAS and was issued on or after 1 November 2017; and

(c) a Type 3 Bundle which was issued on or after 1 November 2017;

(3) in relation to a Type 2 Bundle and a Type 3 Bundle other than one referred to in paragraph 184(2) above, VAT was chargeable on the full amount of consideration which was paid by the relevant customer in return for the Type 2 Bundle or the Type 3 Bundle, as the case may be, regardless of the extent to which the customer subsequently exercised his or her entitlement to Allowances under the relevant bundle, provided that a subsequent adjustment to the VAT chargeable should have been made to reflect the extent to which the non-EU Roaming Calls VAS (in the case of a Type 2 Bundle) or Roam Like Home (in the case of a Type 3 Bundle) was exercised in a non-EU country; and

(4) the VAT analysis set out in paragraphs 184(1) to 184(3) above was not affected by the voucher legislation in Schedule 10A or the voucher legislation in Schedule 10B.

185. It is now a matter for the parties to seek to agree on the other issues which are outstanding in the appeals – the question of best judgment and matters of quantum. Should they be unable to reach agreement on those matters in the light of this decision in principle, then a further hearing will be required in order to resolve them.

186. For completeness, we should say that we have, throughout this decision, proceeded on the basis that, in terms of the time of supply of a Plan Bundle, no distinction should be drawn between:

(1) on the one hand, the time when a Plan Bundle was made available to the customer and the consideration for that Plan Bundle was paid; and

(2) on the other hand, the time when that Plan Bundle was activated.

At the hearing, we did not understand either party to be concerned about the implications of any distinction to that effect and we were provided with no submissions on the point. The

Appellant quite naturally did not focus on the distinction given that, on the basis of its primary contention, the distinction was irrelevant, whilst the Respondents merely said in their skeleton argument that "[the] time of supply is when the Plan Bundle is activated and payment is made".

187. Our understanding is that, contrary to that statement, in at least some cases, a Plan Bundle may well have been made available to the customer, and payment for the Plan Bundle may well have been made, before the Plan Bundle was activated. However, insofar as that is the case, we propose to leave the implications of that difference to be resolved in the first instance by the parties when they seek to agree quantum. We will address it, if necessary, at any subsequent hearing.

188. Finally, it would be remiss of us not to conclude this decision by thanking Ms Mitrophanous and Mr Rivett (in the latter case ably assisted by Mr Ripley) for the clarity and helpfulness of their submissions throughout the hearing. The issues which we have been asked to address in this decision are complex and we are grateful for the help that they provided in enabling us to deal with them.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

189. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 18th JULY 2024

THE APPENDIX

1. During the period relevant to the appeals, the relevant legislation in relation to Issue One was as follows.

2. Article 2 of the PVD provided that "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" would be subject to VAT.

3. As regards the time at which a supply of services was made for VAT purposes, the position as a matter of EU law was governed by the following provisions of the PVD:

(1) Article 62 provided as follows:

"For the purposes of this Directive:

(1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred";

(2) Article 63 provided as follows:

"The chargeable event shall occur and VAT shall become chargeable when the goods or services are supplied"; and

(3) Article 65 provided as follows:

"Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received."

4. The above provisions were reflected in the following provisions of the VATA:

(1) Section 1(1) provided that:

"Value added tax shall be charged, in accordance with the provisions of this Act –

(a) on the supply of goods or services in the United Kingdom…

and references in this Act to VAT are references to value added tax";

(2) Section 1(2) provided as follows:

"VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply"; and

(3) Section 6 of the VATA, insofar as material, provided as follows:

"…

(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

(4) If, before the time applicable under subsection …(3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection …(3) above, he receives a payment in respect of it, the supply shall, to the

extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received…."

5. As regards the place at which a supply of telecommunication and electronically supplied services was made for VAT purposes, the position as a matter of EU law changed over time.

6. In the period prior to 1 January 2015, the position was governed by Articles 45 and 59a of the PVD. Article 45 of the PVD set out the general rule that a supply of services to a non-taxable person was the place where the supplier had established his business or, if the supplies were made from a fixed establishment of the supplier other than that establishment, from that fixed establishment and, in the absence of any place of establishment or fixed establishment, from the place where the supplier had his permanent address or usually resided. However, this was subject to Article 59a of the PVD, which, so far as relevant, provided that:

"In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Article….45 …:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community …".

7. From 1 January 2015, the position in relation to telecommunication services was governed by Articles 58 and 59a of the PVD.

8. Article 58 of the PVD provided as follows:

"The place of supply of the following services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides:

(a) telecommunications services…"

9. However, this was subject to the terms of Article 59a of the PVD, which, so far as relevant, provided as follows:

"In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Article….58 …:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community …".

10. As a matter of UK domestic law, Section 7A of the VATA provided that:

(1) as a general rule, a supply of services made to anyone other than a relevant business person after 1 January 2010 was the place where the supplier belonged (Section 7A(2)); and

(2) "[the] place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of services and an interest deriving from a right to services" (Section 7A(3)).

11. However, the rule in Section 7A(2) of the VATA was subject to the provisions of Schedule 4A to the VATA, which contained special rules in relation to certain types of services, including telecommunication services.

12. In the period prior to 1 January 2015, paragraph 8 of Schedule 4A to the VATA provided that, where a supply of telecommunication services would otherwise be treated as made in the UK and the services were to any extent effectively used and enjoyed in a country which was not in the EU, then the supply would be treated as being made to that extent in that country.

13. In the period on and after 1 January 2015 to but excluding 1 November 2017, paragraph 8 of Schedule 4A to the VATA continued to have the same effect but paragraph 15 of Schedule 4A to the VATA was amended to provide that, subject to the provisions of paragraph 8, a supply of telecommunication services to a person who was not a "relevant business person" was to be treated as being made in the country where the recipient belonged.

14. The effect of the legislation set out above was that, prior to 1 November 2017 a supply of telecommunication services by a supplier belonging in the UK (such as the Appellant) to a private individual belonging in the UK (such as the customers in the present case) were to be treated as being made in the UK except to the extent that the telecommunication services were effectively used and enjoyed outside the EU.

15. In the period on and after 1 November 2017, paragraph 8 to Schedule 4A to the VATA no longer extended to telecommunication services. Instead, paragraph 9E of Schedule 4A to the VATA set out similar "effective use and enjoyment" rules to those which had applied to supplies of telecommunication services in paragraph 8 but did so only in relation to supplies to a "relevant business person" and not supplies to a private person. Thus, supplies of telecommunication services to a private person on or after 1 November 2017 were treated by paragraph 15 of Schedule 4A to the VATA as being made in the country where the recipient belonged.