[2011] UKPC 40
Privy Council Appeal No 0098 of 2010

JUDGMENT

Total Mauritius Limited (Appellants) *v* Mauritius Revenue Authority (Respondents)

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Brown
Lord Mance
Lord Wilson
Sir Stephen Sedley

JUDGMENT DELIVERED BY LORD PHILLIPS AND LORD MANCE ON

25 October 2011

Heard on 19 July 2011

Appellant	*Respondent*
Sir Hamid Moollan QC Iqbal Moollan (Instructed by Streathers Solicitors LLP)	Philip Baker QC Rajesh Ramloll (Instructed by Royds Solicitors)

LORD PHILLIPS AND LORD MANCE:

1. The appellants, are suppliers of liquefied petroleum gas to customers in Mauritius. They have succeeded to the rights and liabilities of a company in the Elf group with which they have merged. The Board will use the name Total to describe both the appellants and their predecessors. Most of their domestic customers purchase their gas in portable 6 kg metal bottles. When one bottle is empty the customer exchanges it for a full one, at a retail outlet, paying for the gas. The bottles at all times remain the property of Total. Commercial customers will typically keep on their premises a larger gas container, equally owned by Total. Gas that these customers purchase is delivered to them by a gas tanker. All customers are required to pay to Total deposits in respect of the bottles or containers in which their gas is stored. The issue raised by this appeal is the impact that the receipt of these deposits has on Total's liability to pay value added tax ("VAT") and income tax. Total contend that they give rise to no liability at all. The respondent ("the Revenue") contends that they give rise to a liability to both types of tax.

The contracts

2. Total sell their gas in Mauritius under two standard form contracts setting out their General Conditions of Sale, which are in the French language. Form C is for those who use the larger containers. Form D is for those who purchase their gas in the smaller bottles. Sir Hamid Moollan QC, who appeared for Total, explained to the Board that these forms were designed for the French market. The supplier in the version of Form C that has been supplied to us is named as Elf Antargaz and the supplier in Form D as Elf Gas (Maurice) Ltd. The Board was provided with English translations of these forms.

3. The relevant provisions of Form C, in translation, read as follows:

> "CLAUSE 2. - Deposit – Delivery to a user of a liquefied gas unit shall take place solely for and on behalf of elf antargaz against payment of a guarantee deposit at the rate in force on the day of the delivery.
>
> Deposit slips are essentially personal and nominative and non-assignable. Bottles delivered to users shall always remain the property of elf antargaz. They shall not be given, or sold, or exchanged, or lent by the holder of this slip, on pain of proceedings, or seized by the latter's creditors.

CLAUSE 5. – D uration of use - Th e user may ask at any tim e for the equipment on deposit to be taken back from him/her/it.

At the time when it is put to the use of th e elf antargaz unit by either party, th e equipment is returned by t he user, while the guarantee deposit is repaid to the latter according to the procedures laid down in Clause 6.

CLAUSE 6. –Cancellation of supply agreement – The amount of the guarantee deposit shall be returned to the user on the request he/s he/it shall make to any elf antargaz distributor subject to delivery to the latter:

1 of the equipment in deposit

2 of the deposit slip

After verification, the amount of the guarantee deposit shall be repaid directly by our com pany (where appropriate by delegation of powers, through our network of regional concessionaries or of distributors), after deduction:

1 - Of the accrued annual maintenance ch arges, as they are authorised by the Public Authorities payable from the date of supply of the elf antargaz unit until its return, any year that has been commenced being due in full.

2 – Where appropriate of t he costs of making good the eq uipment that are provided for in Clause 3."

The reference to maintenance charges as authorised "by the Public Authorities", while meaningful in France, has no sensible application in Mauritius.

4. The relevant provisions of Form D, in translation, read as follows:

"Clause 2 – PRICES OF TH E GAS AND DEPOSITS ON T HE BOTTLES…

- Reservation of title. ELF Gaz (Maurice) Ltd shall remain the owner of the LPGs contained in the bottles until the date of payment in full for them. The delivery notes or deposit slips (signed or not by the Customer) shall be good evidence between the parties of the quantities delivered that are referred to by this clause. The Customer shall however be solely responsible for the gas delivered whether it belongs to it or not and it shall make its concern the insurance of the risks relating to such.

- Price of the gas. The price of the gas delivered, would conform to the price in force to the public, on the date of delivery and determined according to the sale price scale and/or to the price mentioned in the Special Conditions.

- Deposit on the bottles. The bottles necessary to ensure a sufficient autonomy of functioning shall have a deposit placed on them at the rate in force on the day of supply and in accordance with the general conditions of sale of ELF Gaz (Maurice) Ltd.

Clause 9 – OWNERSHIP OF THE CONTAINERS

All the containers made available to the user shall remain the inalienable and non-seizable property of ELF Gaz (Maurice) Ltd. In the event of cessation of commercial relations an *inter partes* inventory shall be carried out, before return of the containers. Shortfalls that may be established shall be billed in cash at the replacement value. In this case, ELF Gaz (Maurice) Ltd shall take back the gas of which it has remained the owner pursuant to Clause 2. The deposit shall be repaid after deduction of a charge for maintenance of the containers accounting to 5% of the rate of deposit for each year of use. "

The facts

5. This summary of the relevant facts is taken from evidence given to the Mauritian tax Assessment Review Committee ("ARC"), which forms part of the Record. Total began supplying gas in Mauritius in 1986. The total of the deposits paid and not yet reimbursed has grown steadily as Total's business has expanded from Rs 53.55m at 31 December 1996 to over Rs 72.12 m at 31 December 2003. One would not expect reimbursement to be claimed until the customer in question ceases to rely on liquid petroleum gas. Evidence shows that some reimbursements have been made but that claims for reimbursement are uncommon. Total have not been able to provide a comprehensive picture of the reimbursements that have been made.

6. It does not appear that Total have ever made deductions from refunds in respect of the annual maintenance charge under clause 9 of Form D. Mr Jhumka, Total's Finance Director, who joined the company in 1993, had no recollection of a deduction ever being made and stated "In fact we waived that clause". This evidence was not challenged in cross-examination.

7. For many years Total paid no income tax or VAT on the deposits which they received and then held or used in their business in one way or another. However in or about June 2004 Total received the following assessments for tax, together with penalties, on the basis that Total had been wrong in failing to pay income tax and VAT: Rs 5,668, 560 for VAT for the period May 1999 to March 2004 and Rs 9,667, 812 for income tax for the tax years 2000- 2001, 2001-2002, 2002-3 and 2003-4. This appeal arises out of Total's challenge to those assessments.

Accounts

8. Total's annual accounts were prepared by KPMG, audited by Ernst & Young and regularly submitted to the Registrar of Companies. In such audited accounts, deposits received did not appear as profit in the profit and loss accounts; instead, the total of all deposits held at the end of each year was included in their balance sheets as "deposit on cylinders", on the basis of Total's liability to refund them as and when their customers returned the bottles and containers in question. Total also did not include deposits received as consideration for supplies in their VAT returns. The Revenue's assessments for income tax and VAT were calculated by reference to the net increase in each year of total deposits shown in Total's accounts; the net increase consisted necessarily of the total new deposits received, less the (unknown) total of any deposits refunded.

9. Section 4(1) of the Income Tax Act requires tax to be paid on income derived during the relevant year, and section 5(2)(a) deems income to be derived by a person when (a) it has been earned or has accrued; or (b) it has been dealt with in his interest or on his behalf, whether or not it has become due and receivable. It is the (a) which is here relevant, since there is no suggestion that (b) applies. More specifically, section 10 provides that gross income shall include "(b) any gross income derived from any business", which is defined to include"any sum or benefit, in money or money's worth, derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit …..". The basic question remains, whether the receipt is a trading receipt or profit, falling properly to be entered in a company's profit and loss account. The authorities relevant to this appeal on this point relate to United Kingdom taxation. This does not appear, however, to differ in principle from that imposed in Mauritius. There is an abundance of authority that, when considering how income and expenditure should be treated for tax purposes, the court should normally apply correct principles of commercial accounting. It suffices to

cite the following statement from the judgment of Sir Thomas Bingham MR in *Threlfall v Jones; Gallagher v Jones* [1994] Ch 107*:*

> "Subject to any express or implied statutory rule, of which there is none here, the ordinary way to ascertain the profits or losses of a business is to apply accepted principles of commercial accountancy. That is the very purpose for which such principles are formulated. As has often been pointed out, such principles are not static: they may be modified, refined and elaborated over time as circumstances change and accounting insights sharpen. But so long as such principles remain current and generally accepted they provide the surest answer to the question which the legislation requires to be answered."

10. Section 214 of the Companies Act 2001 requires that the financial statements of a group shall, in the case of public companies, be prepared with and comply with the International Accounting Standards. It appears that auditors in Mauritius are also expected to confirm that accounts comply with the auditing standards adopted by the International Auditing and Assurance Standards Board – see the Financial Reporting Act 2004: section 73. The Revenue's case requires this Board to find that the deposits have been inappropriately treated in Total's audited accounts. The onus must lie on the Revenue to show that this is indeed the case.

The issues

11. Liability to pay VAT is imposed by the Value Added Tax Act 1998. Under sections 9 and 10 in Part III of that Act Total were liable to pay to the Commissioner VAT on the value of the supply of goods or services in Mauritius. Section 4(2)(b) of that Act provides that

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

> The Third Schedule to the Act provides:

> "11. The leasing of, or other grant of the right to use, goods is a supply of services."

12. Having regard to these provisions, the Board concludes that the supply of gas bottles or containers by Total is a service supplied by Total, albeit an ancillary service

of minor significance compared to the supply of the gas itself. The VAT issue relates to the value of that service. It is the Revenue's case that this is simply assessed. It is the amount of the deposit. Section 12 (2) of the 1998 Act provides:

> "If the supply is for a consideration in money, its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration."

The deposit is the consideration given by the customer for the supply of that service. It is a charge made to cover the loan of the bottles or containers and the cost of their maintenance. Total say that this analysis is fallacious. The deposit is not exacted as consideration for the supply of the bottles or containers. It is a refundable sum deposited in an attempt to ensure that the customers return the bottles or containers when they no longer use them – in effect when they cease to look to Total for the supply of gas.

13. Total's liability to pay income tax is imposed by the Income Tax Act 1995. Income Tax is payable on the net income of a company, which is its gross income less deductions. Section 10(2)(a) of the 1995 Act in the Consolidated Version as at 20 August 2002, defined gross income as including:

> "any sum or benefit, in money or money's worth, derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit…"

It was common ground that this definition could properly be summarised, by way of shorthand, as "trading receipts".

The income tax issue is whether or not the deposits were trading receipts. This issue is closely linked with the VAT issue. If, as the Revenue contends, the deposits were paid as consideration for the supply of the gas bottles and containers provided by Total, then they plainly constituted trading receipts. Total argue, however, that the benefit of the deposits was offset and extinguished by the liability to reimburse them to the customers. They were in effect the property of the customers, not the property of Total, albeit that they were not kept in a separate account, or they were at all events not trading receipts or profit, since they were refundable.

The findings of the Assessment Review Committee

14. The ARC found that the provision of cylinders did not constitute a supply of services and that the deposits paid in relation to the cylinders were not charges for their supply; thus no VAT was payable. The reasoning of the ARC was as follows:

> "The question that arises at this stage is whether when the Applicant sells the LPG contained in the cylinders, it is making a supply of service as well as a supply of goods. The Committee is of the view that when the Applicant is selling gas contained in cylinders to customers, it is not performing a service for a consideration, inasmuch as the customer would not be using the cylinder but only the gas. The cylinders cannot be dissociated from the supply of the LPG, but they would have no use on their own, that is, without the gas inside. The Committee is of the view that the money paid by a customer to the Applicant is not a charge but a refundable security deposit."

15. The ARC further found that the deposits were not trading receipts and thus that they were not liable to income tax. In so finding they were influenced by the fact that the cylinders in respect of which the deposits were paid appeared as fixed assets in Total's accounts and were treated as such for the purpose of capital allowances. ARC also interpreted Total's accounts as evidencing substantial refunds of deposits. This was a misreading of the accounts – as already stated refunds of deposits were uncommon. What they thought were refunds appear to have been no more than the replacement of one (empty) container by another (full) container.

The findings of the Supreme Court

16. The Supreme Court allowed an appeal by the Revenue, holding that the deposits were chargeable for VAT and constituted trading receipts on which income tax fell to be paid. Their reasoning in respect of VAT appears in the following passage of the judgment of Matadeen SPJ:

> "We agree that the issue whether the deposits for the cylinders are subject to VAT is largely to be determined by the terms and conditions of the agreement. True it is that according to the agreement, the company remains the owner of the cylinders and is responsible for their maintenance especially as regards ensuring safety norms. It is also a fact that refunds of deposits are made to customers who return the cylinders. However, the deposits are not taken as security only i.e. to ensure the safe return of the cylinders. They include charges for the

> maintenance of the cylinders. In fact, article 9 even provides for the charges up to 5% of deposit per year of use, which means that the whole or the greater part of a deposit, depending on the number of years of use, may not be refunded to a customer. We take the view that the deposits are in actual fact charges for the supply of services viz the hire, loan and maintenance of the cylinders and are subject to VAT under section 9(1) of the Act."

17. So far as concerns liability to income tax, the Supreme Court was influenced by the fact that the deposits were mixed with Total's other funds and used as working capital, concluding from this that they fell to be treated as trading receipts and thus taxable income.

Discussion: VAT

18. The Supreme Court was particularly influenced by the contractual provisions in contracts subject to Form D for deducting 5% per annum from the deposit to cover maintenance of the cylinders. Had effect been given to those provisions they would undoubtedly have been material to Total's liability to VAT, albeit that it does not follow that they would have rendered the entirety of the deposits chargeable as representing the value of the supply of services. The evidence was, however, that the provisions in respect of charges for maintenance were never enforced in Mauritius but were "waived". In the light of this evidence, and of the fact that maintenance payments did not feature either in Total's accounts, or in past tax assessments, the ARC held that "the question of 5% is no more in issue". Was this approach correct?

19. The Board has concluded that it was. As a matter of law, and having regard to the perfunctory evidence that was given on this point, it is not easy to reach a firm conclusion as to whether, and if so how, Total waived the right to make the deductions from deposits for which their standard form contracts in Form D made provision. If however, it was Total's practice not to enforce the 5% provision, this was something that was likely to be made known to their customers in circumstances that could well amount to a waiver. But this is not really the point. So far as VAT and income tax are concerned, the question is whether the deposit was consideration for and evidenced the value of the supply of services, viz the supply and maintenance of cylinders. Had Total been resorting to the deposits to cover maintenance of the cylinders, this would have pointed towards an affirmative answer to this question – the answer given by the Supreme Court. In fact, however, Total paid no regard to the contractual provisions in relation to maintenance; it neither made nor included in its profit and loss account any income in respect of maintenance; and the Revenue has never sought to identify those contracts in Form D under the literal terms of which a charge for maintenance might have been made or to levy tax on a charge to maintenance which was never in fact made. The ARC were justified in disregarding the 5% provision.

20. Requiring payment of a deposit to secure some aspect of contractual performance is commonplace and it is no surprise that there are decided cases dealing with the tax implications of this practice. The Board was referred to a number of these, together with some further relevant authorities. Most of these authorities are concerned with liability for income or corporation tax, rather than VAT. They are however relevant to both issues before the Board, because in each case there was focus on the question whether the payment in question constituted consideration for the supply of goods or services with which the contract was concerned. The Board will review the authorities that bear on both issues at this point, but will initially discuss them in the context of liability to VAT.

21. *Morley v Tattersall* [1938] 3 All ER 296 did not involve deposits made by customers, but monies owned by customers that had not been claimed by them. Tattersalls were auctioneers of horses. Having sold a horse they held the proceeds until these were claimed by the customer. Sometimes they were not claimed and, ultimately, were shared between the partners. The issue was whether these sums were, or became, trading receipts for purposes of income tax. The Court of Appeal held that they were not. They were and remained liabilities of the partnership. Sir Wilfrid Greene MR held at p 306:

> "This money – using a colloquial and business expression rather than a legal expression – was never the money of Messrs Tattersall. It was the customers' money. It remains the customers' money. The customers can call for it at any moment."

> Sir Wilfrid Greene also roundly rejected submissions (a) that an amount equal to the estimated value of proceeds received each year that would not ultimately be called for should be treated from the outset as a trading receipt, or (b) that at some later date an amount equal to the value of the receipts which had not been called for could become and fall to be treated as a trading receipt.

22. Precisely the same is true as in *Morley* of the deposits held by Total. Their customers have and retain the right to call for reimbursement of their deposits in full on return of the cylinders to which they relate. Ultimately, customers who return their cylinders without reclaiming reimbursement of their deposits will lose the right to do so by reason of the relevant statute of limitation. That fact cannot, however, convert the deposits into consideration for the supply of the cylinders in question, let alone result in deposits being treated as such consideration from the outset.

23. *Jays The Jewellers Ltd v Inland Revenue Commissioners* [1947] 2 All ER 762 raised the question of the tax treatment of surplus proceeds of sale of pledges realised by pawnbrokers. Under the relevant provisions of the Pawnbrokers Act 1872, where a

pledged article has not been redeemed, the pawnbroker can sell it and reimburse himself the loan plus interest due from the proceeds. He has to hold the balance for three years, during which the pledgor can claim it. After that it becomes his property. The Revenue claimed that these surpluses were trading receipts, received at the time of the sale of the pledged articles and taxable on that basis. Surpluses that were reimbursed were trading expenses. The Special Commissioners held that the surpluses were not trading receipts when they were created but only when they became the property of the pawnbroker. On a case stated, Atkinson J upheld this treatment. He held at p. 766:

> "The true accountancy view would, I think, demand that these sums should be treated as paid into a suspense account, and should so appear in the balance sheet. The surpluses should not be brought into the annual trading account as a receipt at the time they are received. Only time will show what their ultimate fate and character will be. After three years that fate is such, as to one class of surplus, that in so far as the suspense account has not been reduced by payments to clients, that part of it which is remaining becomes by operation of law a receipt of the company and ought to be transferred from the suspense account and appear in the profit and loss account for that year as a receipt and profit. That is what it in fact is. In that year the taxpayers become the richer by the amount which automatically becomes theirs, and that asset arises out of an ordinary trade transaction. It seems to me to be the common-sense way of dealing with these matters, and it is the way in which the Special Commissioners have dealt with them."

24. This decision is more relevant to the income tax issue than the VAT issue. However, if one treats the making of loans as if this was the supply of services, it is plain that the surpluses could not properly be considered as part of the consideration for the making of the loans. The difference between *Morley* and *Jays* in approach to the possibility that an item which was not originally a trading receipt might at some subsequent date become a trading receipt was explained by Atkinson J in *Jays* and by the Special Commissioner in *Anise Ltd v Hammond (Inspector of Taxes)* [2003] STC (SCD) 258, on the basis of the existence of the Pawnbrokers Act 1872 in *Jays*, which was capable of creating out of the previous receipt a new asset in the form of a trading receipt. The same might be said of the Limitation Act.

25. *Elson v Prices Tailors Ltd* [1963] 1 WLR 287 raised the question of the proper tax treatment of "deposits" that were demanded from customers of a bespoke tailor when ordering a garment. Where the garment was ultimately accepted by the customer, the deposit was treated as part payment of the price. Where the garment was rejected, or never collected, the tailor would, if reimbursement of the deposit was requested, accede to the request. Often, however, the customer never reclaimed the deposit. Ungoed-Thomas J held that, although the deposits were, in practice, repaid on

demand, the tailor was not legally obliged to repay them. They would be understood by the customer to be non-returnable. In these circumstances they were trading receipts, to be treated as such at the date of receipt. The income tax position would have been different if they had been given merely as part payment for suits not yet completed or delivered; they would then only have been earned as and when the suits were finished and accepted by the customer: see also Coopers & Lybrand Manual of Auditing (1998) (Accountancy Books) para 3.46 (payments in advance) and (2011) (CCH) para 9.57 et seq, (sale of goods, discussing the principles in IAS 18 on recognition of income to which standard Sir Hamid also referred).

26. On the facts of *Elson*, the deposits naturally fell to be treated as part of the consideration for the supply of the garments. The case is, however, clearly distinguishable from the present one, inasmuch as in the present case the terms of the contract unquestionably confer on customers the right to recover the deposits on return of the cylinders to which they relate.

27. *Calor Gas Ltd v The Commissioners* [1973] VATTR 205 is more relevant inasmuch as the issue in that case was the tax treatment of payments made to a gas supplier in respect of cylinders that contained liquid gas. The cylinders remained the property of the supplier. The customer, on buying his first cylinder of gas, paid £1 for the gas and £4, described as a Refill Authority Charge. The terms of his contract entitled the customer, "in consideration of the Refill Authority Charge", thereafter to obtain a filled cylinder in exchange for an empty cylinder on payment merely of the price of the gas. If the customer terminated the agreement within 7 years he was entitled to reimbursement of a proportion of the deposit. The amount of this depended upon how long the agreement had run. The maximum return was 45%, where the agreement was terminated within a year. The minimum was 20%, where the agreement had run for 4 years or more. After 7 years there was no refund. The issue was whether the deposit was consideration for the supply of the cylinders, which would be zero rated, or for the supply of services, which would be chargeable to VAT. The Commissioners, and the London Tribunal on appeal, held that it was the latter. The charge was paid for the right, as an authorised customer, to exchange empty cylinders for full ones, paying only for the gas. As such, it was a charge made for the supply of services, and subject to VAT.

28. This case also is distinguishable from the present one. The difference is that the charge was never refundable in full, there was never a right to a refund of more than 45% of the deposit, and this eroded rapidly over time. On analysis the charge could be identified as specific consideration for the use of the supplier's cylinders. Significantly the Tribunal commented at p213 that the charge could not "reasonably be treated as a 'deposit' in respect of the cylinder".

29. The final decision of relevance is that made by the Special Commissioner in *Gower Chemicals Ltd v Revenue and Customs Commissioners (Note)* [2008] STC (SCD) 1242. Gower supplied chemicals in returnable containers. The supply contract provided that the customer should pay a 'refundable deposit' in respect of the container, which remained the property of the supplier. This was stated to be refundable, only to the extent that the customer would receive a credit note that he could use when purchasing further chemicals within 12 months, after which it became void. In practice, however the credit notes would be redeemed for cash if this were requested. In about 20% of the cases, no such request was made. Unlike the present case, the supplier had in fact included credits unclaimed by customers in its profit and loss account (para 2(8)), but sought by an "error or mistake" claim to reverse this treatment, relying on the decision of the Special Commissioner in *Anise Ltd v Hammond (Inspector of Taxes)* [2003] STC (SCD) 258. The Special Commissioner held that, in these circumstances the deposits received constituted as to 100% trading receipts, against which an 80% provision could be made to reflect deposit which would have to be repaid. He held:

> "7. The issue for me turns primarily on the nature of the receipt of the deposit by the appellant. The appellant knows that about 20% of deposits will not have to be repaid. In my view this makes it impossible to say that the appellant is merely holding the deposit for the customer. The straightforward analysis is that the deposit is a trading receipt just as the payment for the goods is a trading receipt but with the difference that about 80% of the deposits will have to be repaid, for which it is right to make a provision."

30. The approach of the Special Commissioner is interesting in that he considered the way that the deposits were treated in practice, rather than the contractual provision in relation to them. This accords with the approach of the Board in the present case to Total's failure to make deductions from deposits in respect of maintenance charges. The Board questions, however, whether the Commissioner was right not to treat the payments as deposits held for the customers simply because 20% of customers failed to claim repayment. The Special Commissioner recognised the second point made by Sir Wilfrid Green MR in *Morley* summarised at (b) in para 21 and explained in para 24 above, But he did not address the first point summarised at (a) in para 21 above.

31. In the present case the Board finds it impossible to treat the deposits as being consideration for supply of the service of the loan of the cylinders, so as to attract VAT. The deposit was a one-off payment, regardless of the length of the period during which the customers made use of the cylinders. More pertinently, the deposits were repayable in full. The Board is satisfied that they were taken simply to provide an incentive to customers to return the cylinders owned by Total on ceasing to make use of them as containers for gas supplied by Total. The proper treatment of deposits for

the purpose of assessment of VAT is accurately stated in the 2nd ed of Tolley's Value Added Tax (2008) at 69.9:

> "*Security Deposits*. A deposit taken as security (e.g. against the safe return of goods on hire or loan) is not consideration for a supply. In the event of the deposit being forfeited, either wholly or in part, through the customer failing to fulfil his contractual obligations, the amount retained by the supplier does not represent additional consideration for the original supply or consideration for an additional supply of goods or services.
>
> *Returnable containers.* Where a charge is added to a supply of goods for the container until it is returned (e.g. the keg with beer), it is necessary to establish why the charge has been raised. If it has been raised to ensure the safe return of the container and the charge is to be refunded on its return, it can be treated in the same way as a security deposit (see above). If, however, the charge has been raised to cover the loan, hire or use of the container, then the charge represents consideration for a supply of services, even if it is refundable when the container is returned."

32. The deposits held by Total properly constitute security deposits. They are not consideration for the supply of goods or of services, and are not chargeable for VAT. The Board has expressed the view that the supply by Total of the use of their containers constitutes the supply of a service. The consideration for that service forms, however, part of the payment that is made for the gas that Total supplies to the customer.

Discussion: Income Tax

33. The income tax issue is more difficult that the VAT issue. Total receives the deposit when it commences to supply a customer with gas. The deposits are merged with the consideration that Total receives for the sale of the gas and help to provide working capital. The Revenue, in maintaining that the net annual increase in deposits should be treated as trading profit, argued that "it appears that the likelihood of claims for refunds from your clients are [sic] very remote" (letter dated 28 May 2004). On the limited information available, it does appear that few demands are made for repayment of deposits. To a large extent this must reflect the fact that most who have paid them are continuing to buy gas from Total. In some cases, however, customers are likely simply to have overlooked their right to claim reimbursement of the deposit on returning their last cylinder to Total, or its agent. But even then, the customer will

theoretically be entitled to a return of deposit until, ultimately, limitation cuts in to bar the remedy.

34. In these circumstances the Board does not consider that the Revenue has made good its case that the deposits received should be treated as trading receipts and their ultimate repayments as trading expenses. Every new deposit was received from the outset on the basis that it was refundable, as and when the customer returned, and did not replace, the bottles or containers used to hold gas. There is no identifiable point at which the legal nature of any particular receipt may be said to have changed to convert it into a trading profit. No attempt was made by the Revenue supported by any sort of expert evidence to show that the principles of commercial accounting that have been adopted in Total's annual audited accounts do not correspond with the International Accounting Standards, properly understood and applied, with which such accounts were required by the Companies Act 2001 to comply (para 10 above). The effect of the authorities is that sums received from, or for the benefit of, a customer that are to be held and ultimately paid to the customer without reduction fall to be treated as if they belong to the customer and are not trading receipts. The supplier has the use of the deposits and will be taxed on the profits earned by such use, but this does not make them trading receipts. Perhaps the best analogy with such a deposit is that of a loan. A loan is not taxed as a trading receipt, albeit that the borrower enjoys the use of it and it augments his working capital.

35. For these reasons the Board has concluded that the Supreme Court erred in holding that deposits were subject to income tax as trading receipts, just as it erred in holding that they were chargeable to VAT. This appeal is accordingly allowed. Written submissions on costs may be made within three weeks. Failing such submissions costs here and below will be paid by the Revenue.