[2017] UKUT 256 (TCC)

Appeal number: UT/2016/0235

VALUE ADDED TAX – self-service kiosks at supermarkets – exchanging coins for a voucher redeemable at the supermarket – whether exempt supply of financial services within Group 5 Schedule 9 Value Added Tax Act 1994 – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERYCHAMBER

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

- and –

COINSTAR LIMITED **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JUDGE GUY BRANNAN

Sitting in public at the Royal Courts of Justice, Strand, London on 9 May 2017

Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

David Scorey QC, instructed by Baker & McKenzie LLP, for the Respondent

DECISION

Introduction

1. The appellant ("HMRC") appeals against the decision of the First-tier Tribunal (Judge Thomas and Ms Bridge) ("the FTT") released on 2 September 2016 which held that the services supplied by the respondent ("Coinstar") to its customers were exempt supplies within Item 1 Group 5 Schedule 9 Value Added Tax Act 1994 ("VATA"), thereby allowing Coinstar's appeal.

2. Coinstar operates kiosks in major supermarkets. Customers can put their loose change into the kiosk, which counts their coins, and then issues a voucher which the customer can exchange at the supermarket for cash or have it set off against their supermarket bill.

3. The appeal before the FTT was brought as a result of a decision of HMRC made on 24 July 2015 informing Coinstar that HMRC now considered Coinstar's services to its customers to fall outside the exemption for financial services referred to above and, instead, considered those services to be fully taxable for VAT purposes. This was a change of view on the part of HMRC which had previously (in letters sent to Coinstar in December 2000 and June 2001) considered that Coinstar's services were exempt financial services. Essentially, HMRC now took the view that Coinstar was supplying taxable coin counting services.

4. For the reasons given below, we affirm the decision of the FTT and dismiss HMRC's appeal.

The facts

5. The primary facts found by the FTT were not, save as noted below, in dispute. The following summary of the facts is taken from the FTT's decision at [5](1) -(11) and [6]- [13].

6. Coinstar operates "self-service coin kiosks", of which approximately 2000 are located in major supermarkets.

7. Each kiosk is connected to a computer via a telephone line.

8. When a customer wishes to use a kiosk, there is a display screen which asks whether the customer wants to receive a cash voucher or make a donation to charity. The display then indicates that the cash voucher option is subject to a service fee (this does not apply in the case of a donation to charity).[1]

9. Once the customer has selected the cash voucher option the screen displays the 9.9% fee charged by Coinstar. At [5(3)] the FTT described the commission to be

[1] There seemed to be some contradiction in the evidence. The witness statement of Mr Harris indicated that a reduced processing fee was charged in the case of a donation to charity but the exhibits to his witness statement (in particular the facsimiles of what a customer saw on the screen of the kiosk) indicated that the entire value of the coins inserted into the kiosk went to charity.

charged as "9.9% for a cash voucher", but the wording contained on the screen was: "Coin counting fee: 9.9 pence for every pound's worth of coins counted."

10. If the customer accepts the terms and conditions, the customer then feeds the coins into the kiosk which counts them as they pass through sensors which determine whether the coin is a valid UK coin or not. Invalid coins or objects are rejected and may be retrieved by the customer from a tray in the machine.

11. The kiosk retains the valid UK coins inserted by the customer. The customer cannot retrieve the coins so inserted, which become the property of Coinstar or the supermarket. In any event, the customer transfers its ownership of the coins to Coinstar or the supermarket once the coins have been inserted into the kiosk.

12. As the coins pass through the sensors in the kiosk the display screen shows the tally of the numbers of coins of each denomination that have been detected and the total value of the coins.

13. A cash voucher is then printed and the display screen informs the customer that the voucher should be taken to a cashier in the supermarket and that it must be redeemed "today". The voucher shows the tally of coins that was shown on the screen, the fee retained by Coinstar and the net value of the voucher.

14. The voucher is printed on paper with security features to discourage forgery. The voucher does not contain the name of the customer and is effectively a bearer instrument.

15. When the voucher is presented to the supermarket's cashier, the supermarket is obliged, under the terms of its agreement with Coinstar, to validate it. The supermarket must either pay the face value of the voucher in cash or accept the voucher as reducing the customer's checkout bill by the amount shown on the voucher. Approximately 65% of vouchers presented are used to pay bills in the supermarket.

16. Under its separate agreement with the supermarket, Coinstar is obliged to pay the supermarket the face value of the vouchers presented to it. Coinstar also pays a "revenue share" of its commission to the supermarkets.

17. The coins inserted into Coinstar's kiosks are collected by third parties who reconcile the amounts with Coinstar's internal accounts and deposit the coins into Coinstar's bank accounts.

18. If the customer has elected to make a donation to charity, the customer receives a receipt from the charity showing the tally of coins. This receipt includes a Gift Aid declaration with a space for the entry of the details of the donor.

19. The FTT at [10] referred to Coinstar's agreements with Sainsbury's and Morrisons. In particular, the FTT set out in some detail certain passages from the Morrisons' contract dated 1 November 2013. The passages were as follows:

> (1) At Background B: "We [Morrisons] have agreed to grant you a licence to install and operate certain coin counting machines …".

(2) At clause 3.2 it refers to the appellant "performing coin counting services in the Stores…", but goes on to say that Morrisons will not permit any other person to "process coins".

(3) Part 3 of the Schedule refers to "… provid[ing] self service coin counting to store customers …"

(4) Part 7 says that "The Equipment is designed to count loose sterling change for customers".

20. The Sainsbury's agreement is dated 2016, after the VAT periods relevant in this case. The relevant passages of the contract cited by the FTT [12] were:

"(1) Background section at (A) provides that "Coinstar is engaged in the business of operating automated coin collection and exchange kiosks. These kiosks are capable of collecting a customer's coins and exchanging them for a printed voucher …"

(2) At 3.1 it states that "… Coinstar shall install and operate the Units …" ("Units" being defined as "the coin collection and exchange kiosks as described in more detail in Schedule 5". Schedule 5 merely consists of a photograph of a kiosk."

21. The FTT found no reference in the Sainsbury's agreement to the counting of coins.

22. In addition, the FTT at [6] referred to advertising and promotional material either on the kiosks themselves or in handouts made available to Coinstar's customers. This material included the following:

"Cash your coins here"

"Full coin jar at home? Coins in. Spending money out. It's quick and easy! 1. Press the start button. 2. Pour your coins into the tray. 3 Collect your voucher to use in-store or exchange for cash at customer service."

"Turn your coins into spending money at Coinstar!

…. Coinstar will count your coins for you. You won't even have to sort them. Our tried and tested machines count up to 10 coins a second, so you can get back to shopping in just a few minutes.

Redeem your voucher. After your coins are counted take your printed voucher and you're ready to go.

A small service fee is charged at all our Coinstar machines."

The FTT's decision

23. FTT at [21] set out the principles governing its decision as follows:

(1) The contract between the parties was a most useful starting point.

(2) In determining the nature of a supply, regard must be had to the "economic reality".

(3) The assessment of the nature of the supply should be made from the perspective of the customer, as a typical consumer, not the supplier.

(4) There must be a direct and immediate link between the service provided and the consideration received.

(5) Exemptions from VAT are to be construed strictly, but not restrictively so as to deprive an exemption of its intended effect.

24. Before us there was little or no disagreement between the parties as to these principles.

25. After summarising the arguments of the parties, the FTT found that Coinstar made a single overarching supply ("the Transaction") which was exempt from VAT. It gave the following reasons for its decision:

(1) The Transaction was not a coin counting service, but a service of exchanging a less convenient means of exchange into a more convenient one [35]. Coinstar provided in return for the 9.9% fee a facility for customers to exchange sterling coins for a more convenient, more usable form of money [36].

(2) A coin counting service, argued for by the Commissioners, would simply count the coins and, having counted those coins, would return them to the customer, possibly after sorting them into denominations. It was impossible for Coinstar to provide its service without counting the coins, but the coins were not returned [37–38].

(3) The 9.9% fee was more than a customer would pay simply to have the coins counted and therefore the economic reality was that the 9.9% fee was far more than a true coin counting service could bear [38].

(4) Counting coins for its own sake was not something that a typical customer of the Coinstar machines (or the supermarket) wants [39].

(5) It was not relevant that there was marketing or advertising material available to customers which suggested that Coinstar will count their coins, not least because there was other material available which stressed the convenience of the Transaction which necessarily involves counting the coins [40].

(6) Even if some customers thought that the kiosks would simply count their coins and return them, they would discover before using the machines that this was not so. In any event, it was a fact that the machines did not simply count, and did not count and return them [40].

(7) The nature of a transaction should not be determined by how it was advertised or promoted [41].

(8) The separate contracts between Coinstar and the supermarkets were not relevant. Those contracts gave rise to separate supplies that were not in dispute and of which a typical customer would not have (or indeed want) knowledge [42].

(9) Where a customer elected to make a payment to charity, that service was one of arranging for a payment to charity. In any event, a charity transaction did not constitute a coin counting service for the reasons given in relation to voucher transactions [43] and [44].

(10) Two elements made up the Transaction, the valuation of the coins (involving counting the coins and expressing their value and type on screen) and the issue of a cash voucher [47].

(11) The Transaction was a single service. The essential feature of the Transaction — from the point of view of the typical customer — was that he/she was changing inconveniently large numbers of coins into a more convenient cash voucher. This was a single, overarching supply of that exchange [52].

(12) Obtaining the voucher could be regarded as an 'aim in itself' because that is what the customer wished to obtain and use. The voucher was not merely ancillary to the coin counting [54].

(13) Coin counting was not an aim in itself or a principal service to which the voucher was ancillary [55].

(14) Relying on [53] of the CJEU's judgment in *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] EUECJ C-2/95 (5 June 1997) ("*SDC*"), there was a change in the legal and financial situation of the parties when a customer put their coins in the machine: the customer lost ownership of the coins which became the property of Coinstar. The customer became, instead, the owner of a voucher which was a promissory note/security for money which could be redeemed for cash (in larger denominations than the coins) or used to pay the supermarket's bill [75].

(15) The Transaction was not the mere physical dealing in money as a commodity as was the case in *Williams & Glyn's Bank* [1974] VATTR 262 (VTD 118) [77].

(16) The differences between the Transaction and services offered by an ATM, such as the operation of a bank account, were not material for the purpose of applying the finance exemption: both are exempt [80].

(17) Similarly, there was no relevant difference between the Transaction and foreign exchange transactions [81]. Likewise, a transaction involving an exchange of one currency for the same currency is not excluded for that reason alone from the finance exemption [86].

(18) It was not relevant (to the question of whether a transaction falls within the finance exemption) whether the exchange allows access to global markets [89].

(19) The exclusion of same currency exchanges from the finance exemption could, on its face, be a breach of fiscal neutrality and equal treatment [90].

(20) The decisions of the CJEU, citing [23]- [25] the decision of the CJEU in *Velvet & Steel Immobilien (Taxation)* [2007] EUECJ C-455/05 (19 April 2007) ("*Velvet & Steel*"), involved transactions which were found to have failed to qualify for the exemption on the basis that they were not financial transactions within the wording of the relevant exemption.

26. For these reasons the FTT held that the Transaction was an exempt financial supply within Item 1 Group 5 Schedule 9 VATA.

Grounds of appeal

27. It was common ground, as a result of the FTT's decision, that the Transaction constituted a single overarching supply. HMRC disagreed, however, with the FTT's conclusion that the Transaction should be regarded as falling within the finance exemption.

28. HMRC put forward two grounds of appeal.

29. First, HMRC contended that the FTT erred in law by ignoring the contractual position between the customer and Coinstar, along with other objective evidence of the typical customer's economic reason or purpose for using Coinstar's services.

30. Secondly, having correctly found that there was a single overarching supply comprised of a number of elements, the FTT erred in law by mis-characterising that supply as a supply of exempt financial services.

The law

Relevant legislation

31. Article 135(1) of the Principal VAT Directive (the "PVD") provides that Member States shall exempt, so far as is relevant for present purposes:

> "(c) the negotiation of or any dealings in… any other security for money…;
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring…;
>
> (e) transactions… concerning currency, bank notes and coins used as legal tender…"

This has been enacted into domestic law by Item 1 of Group 5 of Sch.9 to VATA 1994, which provides exemption for:

> "The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money."

32. We should add that it was common ground that the coins inserted and counted by Coinstar kiosks and in respect of which vouchers were issued were "legal tender" and constituted "money" for these purposes.

Relevant authorities

33. The relevant legal principles were largely common ground.

The importance of the contract

34. The Supreme Court has held that the contract is the starting point in determining the nature of a supply and the legal rights and obligations between the parties. This is

because the contractual position normally reflects the economic and commercial reality of the transactions.

35. Thus, in *HMRC v Secret Hotels2 Ltd* [2013] STC 784 ("*Secret Hotels2*"), Lord Neuberger stated at [31]- [33]:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J. said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> "33. The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."

28. The interpretation of a contract is a question of law, not a question of fact: see *Bahamas International Trust Co. Ltd and Anr v Threadgold* [1974] 1 WLR 1514 at 1525, per Lord Diplock.

Economic reality

29. In determining the nature of a supply, regard must also be had to the economic reality (see (Case C-53/09) *R&CC v Loyalty Management UK Ltd* [2010] STC 2651 ("***LMUK CJEU***") at [39] where the CJEU stated:

> "… consideration of economic realities is a fundamental criterion for the application of the common system of VAT").

36. This was applied by the Supreme Court in *R&CC v Aimia Coalition Loyalty UK Ltd (formerly known as Loyalty Management UK Ltd)* [2013] UKSC 15 ("LMUK SCt"). At [38] Lord Reid noted that:

> "when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place".

37. In determining the nature of a supply, one must look for the essential features and purpose (objectively assessed) of a transaction and examine the commercial reality. Regard must always be had to the circumstances in which the transaction took place (*College of Estate Management v C&EC* [2005] STC 1597 ("*College of Estate Management*") at [29] and [30]). The mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents must be exempt ((Case C-2/95) *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] STC 932 ("*SDC*"), ECJ at [65]).

Financial services exemption

38. Exemptions from VAT are to be strictly construed since they constitute exceptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person. Only supplies which fall within the objective or aim of the exemption can qualify (see (Case C-348/87) *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737 at [12] and [13] ("***Stichting Uitvoering***")). That is not to say that the Court should adopt a restricted or the most restrictive construction, simply that "the task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used" (see *Expert Witness Institute v C&EC* [2002] STC 42 CA at [17]- [19]).

39. The purpose of the exemption for financial transactions was explained by the CJEU in Case C-455/05 *Velvet & Steel Immobilien* ("*Velvet & Steel*") at [24] as being:

> "… to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit."

40. In Cases C-231/07 and C-232/07 *Tierce Ladbroke SA and Derby SA v Belgian State* ("*Tierce Ladbroke*"), the CJEU suggested at [24] that the availability of the exemption would be in doubt in situations where such difficulties were absent because VAT could be applied to the remuneration received by the supplier.

Discussion

First ground of appeal

41. As already noted, Ms McCarthy accepted (and this was common ground) that the FTT had correctly concluded that Coinstar made a single overarching taxable supply which comprised the following elements:

(1) accurately counting unsorted coins: and

(2) issuing the customer with a voucher which could be redeemed for cash or goods in the supermarket in which the kiosk was located.

42. Ms McCarthy submitted, first, that the agreement between Coinstar and its customers was for a coin counting service. It was for this service that the customer expressly agreed to pay by reference to the kiosk display screen: "Coin Counting fee: 9.9 pence for every pound's worth of coins counted." The customer was then invited to "agree" on the screen. Once a customer had inserted his/her coins into the machine, Coinstar then fulfilled its obligation by counting the coins, displaying the number of coins of each denomination and the total value of the coins thus counted on the screen. Miss McCarthy then described the process as culminating in the issue of a "receipt" by the kiosk.

43. The FTT had, according to Ms McCarthy, failed to consider the above contractual analysis in its decision. Instead, the FTT wrongly recorded the display as showing "9.9% for a cash voucher" – this was simply wrong. The FTT's failure to consider the agreement between Coinstar and the customer was an error of law.

44. Mr Scorey submitted that the FTT did not ignore or fail properly to take into account the contract between Coinstar and its customers. Instead, the FTT took account of the contractual position and concluded at [36] that as a matter of economic reality:

> "what [Coinstar] provides in return for the 9.9% fee it retains is a facility for customers to exchange sterling coins for a more convenient, more usable form of money."

45. Moreover, Mr Scorey observed that the wording on which HMRC relied was expressly quoted at [31] by the FTT. Mr Scorey also noted that the FTT had expressly observed [21(1)] that the contract between the parties was "a most useful starting point" for determining the nature of the supply. Moreover, HMRC's contention that the FTT ignored the text displayed on the kiosk screen to which the customer agreed ("Coin Counting fee: 9.9 pence for every pound's worth of coins counted") was incorrect. Those words were expressly quoted at [31] by the FTT.

46. In our judgment, the FTT did not fail to take account of the contractual arrangements between Coinstar and its customers. It is clear from the FTT's decision that it had the contract between Coinstar and its customers firmly in mind: see [21(1)].

47. Furthermore, we consider HMRC's description of the contractual arrangement between Coinstar and its customers to be incomplete. When a customer uses the kiosk, the initial question asked by the display screen was whether the customer wanted a cash voucher or to donate to charity. In other words, Coinstar is asking its customer at the outset to select the desired outcome of the transaction i.e. a voucher or a charitable donation. It is only when that antecedent question has been answered that the kiosk screen noted (for those customers electing to receive a voucher): "Coin Counting fee: 9.9 pence for every pound's worth of coins counted." Therefore, it is clear to us that (when these two screens were read together) the customer, electing to receive a voucher, was contracting with Coinstar to receive a voucher in consideration for a payment of 9.9 pence for every Pound of coins inserted. We do not think that the mere label "Coin Counting fee" can be definitive or change the objective nature of the overall transaction – which is that the customer has agreed to receive a voucher in consideration for a 9.9% fee based on the value of coins inserted (and thus counted). HMRC's argument ignores the choice which Coinstar required its customers to make

on the first screen – a choice which was every bit as much part of the contract as the agreement to the terms recorded on the second screen.

48. In this context, we also reject Ms McCarthy's submission that the voucher was simply a "receipt". Certainly, the voucher was evidence of the fact that the customer had inserted coins to a certain value and of the fee charged by Coinstar. It was, however, under the terms of the contract between the customer and Coinstar effectively a bearer document enabling the holder to obtain value in cash or in kind (the discharge of liability incurred at the supermarket checkout).

49. For these reasons, we reject HMRC's submission that the FTT did not consider either adequately or at all the contractual position between Coinstar and its customers.

50. Ms McCarthy further submitted that the FTT had no evidence before it to support its finding that the 9.9% charge was more than a true coin counting service could bear.

51. Mr Scorey contended that this finding formed part of the FTT's reasoning at [38] for concluding that, as a matter of economic reality, coin counting was not the service for which customers had contracted that Coinstar should provide. Instead, their contract entitled customers to the issue of a more convenient and functional form of money i.e. the voucher. Counting the coins was necessary to calculate Coinstar's commission and the amount of the voucher but the very fact that the customers' payment of the commission entitle them to a voucher was evidence of the FTT's proposition that a customer would not pay a 9.9% commission [38] "just to have [their coins] counted and returned." This was, therefore, a conclusion which was open to the FTT on the evidence.

52. We agree with Mr Scorey's submissions. At [38] the tribunal was considering the economic reality of the transaction between Coinstar and its customer. The FTT correctly observed that the kiosk did not return the coins that it had counted and considered that the economic reality was a customer would not pay 9.9% of the value of the coins just to have them counted and returned. In effect, the FTT was concluding that the economic reality of the transaction was that it was not simply limited to a coin counting exercise and that the 9.9% fee paid was consistent with that analysis. We consider that the FTT was entitled to reach the conclusion that it did.

53. Next, Miss McCarthy argued that the FTT was wrong to disregard the advertising material in coming to its conclusion as to what a typical customer wanted.

54. Mr Scorey contended that HMRC's submission was misconceived. The FTT did not disregard the advertising material but found, instead, that the existence of *some* advertising material which suggested that Coinstar would count customers' coins was not indicative of the character of the service which Coinstar supplied because [40] "[t]here is other material available which stresses the convenience of the Coinstar service", namely the issue of a voucher or the payment of a donation to charity.

55. The FTT had referred to the different types of promotional material at [6]- [9]. Mr Scorey submitted that it was open to the FTT to conclude at [40]- [41] that:

(1) the promotional materials, viewed in the round, did not support HMRC's case that customers were contracting for a coin counting service rather than a service of exchange of coins for vouchers;

(2) if there were customers who thought, on the basis of the promotional materials that the kiosks would simply count their coins and return them, they would discover before using the machines that this was not so; and

(3) in any event, the true nature of transaction should not be determined by the nature of advertising or promotional material.

56. Again, we agree with Mr Scorey's arguments. The FTT plainly took account of the different types of promotional material and reached its conclusion on the basis of the evidence before it. In our view, the FTT was entitled to reach its conclusion and we see no reason to disturb its decision on this point.

57. Miss McCarthy also argued that the FTT's finding, that the service provided by Coinstar was not a coin counting service, was irrelevant. This was because the FTT then concluded that it considered a coin counting service to be one that involved not just the counting of coins but also the return to the customer of the same coins. It was common ground that that did not occur. Accordingly, this finding was immaterial to the VAT analysis and was simply a label adopted by the FTT.

58. On this point, Mr Scorey argued that FTT had come to the natural conclusion that a coin counting service would necessarily involve the return of coins to the customer. On the facts of this case, the coins were retained and were not returned to the customer. The FTT were correct to conclude that this undermined HMRC's contention that the service provided by Coinstar was that of coin counting.

59. We reject HMRC's submissions on this issue. We consider that the FTT was correct to consider that if the service had simply or predominantly been one of coin counting, some or all of the coins would have been returned to the customer or, at least, the customer would have been given a choice to have coins returned.

60. We should add that, although we accept that the FTT was entitled to reach this conclusion on the evidence, we consider that its conclusion that the service provided by Coinstar was not simply that of coin counting was not "a finding of fact", but rather a characterisation of the nature of the supply based on the evidence and, as such, a question of law. Nonetheless, we see no reason to disturb the FTT's conclusion.

61. In any event, we agree with Mr Scorey's further submission that the mere fact that the service provided by Coinstar, as the FTT recognised at [38], included the counting of coins does not mean that the overarching supply was therefore one of coin counting. It is of course true that any cash transaction involves cash being counted but that does not mean that all cash transactions are "cash counting" transactions or, for that matter, exempt financial transactions.

62. Ms McCarthy further submitted that the agreement between Coinstar and the customer was consistent with the economic and commercial reality. Viewed from the customer's perspective, the customer's intention in using the service was not to put

money into a machine merely to acquire a voucher worth less money than the coins inserted – this would be commercially pointless.

63. Stated in this way, there might seem to be some force in Ms McCarthy's argument. This, however, ignores the fact that at the beginning of the transaction the customer had a collection of inconvenient loose change and at the end of the transaction had a more convenient monetary instrument: that does not seem to us to be a commercially pointless transaction.

64. For these reasons, we reject HMRC's first ground of appeal.

Second ground of appeal

65. Ms McCarthy contended that the FTT had incorrectly concluded that the Transaction fell within the terms of the finance exemption. The characterisation of the supply was a question of law and the FTT had erred in mis-characterising the supply.

66. Although HMRC accepted that the issue of a voucher could be characterised as the issue of a "security for money" within the meaning of Item 1, Group 5, Schedule 9 VATA, Ms McCarthy submitted that this was not sufficient for the overall supply to come within the finance exemption (e.g. *Wiltonpark v HMRC* [2016] EWCA Civ 1294). The voucher was, she said, nothing more than a proof of payment which the customer exchanged for goods or cash with the supermarket shortly thereafter. The voucher was, therefore, a means of better enjoying the principal service supplied (coin counting) and the FTT had erred in finding otherwise.

67. Ms McCarthy also noted that in the case of the agreement between Coinstar and Sainsbury's, the coins deposited belonged to Sainsbury's. The voucher was, in effect, verification (both to the customer and to Sainsbury's) of the amount of money that the customer had pre-paid to Sainsbury's. The position was different under the contract between Morrisons and Coinstar where it appeared that the coins inserted into the kiosk became the property of Coinstar.

68. The relevant supply (for the 9.9 % fee) was, according to Miss McCarthy, one comprising a number of interwoven elements – the overarching supply was that of counting unsorted coins.

69. We do not agree with these submissions. In our view, the FTT's analysis was correct, viz that the coin counting aspect was merely the necessary pre-condition to the issue of the voucher (which was the main aim of the transaction). The counting of coins was not an aim in itself. It is of course true, as we have said, that every transaction in which goods and services are supplied in return for a cash payment involves the cash being counted. In this case, it is clear to us that the typical customer was seeking to exchange inconvenient loose change for a more convenient voucher and that the counting of the change was necessary to ensure that a voucher in the correct amount (after deducting the 9.9% fee) was issued. The FTT's conclusion to this effect was entirely consistent with the evidence and we see no grounds for disturbing its conclusion.

70. Furthermore, in our judgment, the ultimate ownership of the coins deposited in the kiosks, arising from Coinstar's contracts with the supermarkets, was simply not relevant. Whether the coins inserted into the kiosk became the property of the supermarket or Coinstar was not a matter known to the customer. Therefore, the customer, from his or her point of view, cannot be regarded as having received the voucher as a receipt from the supermarket. In any event, the fact that coins became the property of the supermarket was only a feature of kiosks in the Sainsbury's stores. The subsequent ownership of the coins was simply not material to the antecedent question of the nature of the service provided by Coinstar to its customers. Moreover, it was common ground that the customer did not have its coins counted and returned – the customer lost title in the coins deposited and, in return, received a more convenient medium of exchange i.e. the voucher.

71. Next, Miss McCarthy challenged the FTT's conclusion that there was no relevant difference between Coinstar's transaction and a foreign exchange transaction [81]. There was no true analogy, in Ms McCarthy's submission, and the FTT was wrong to hold that there was no relevant difference. A foreign exchange transaction allowed a customer access to the global market for trading currencies, where the customer can buy and sell on the basis of an exchange rate. These transactions were precisely the kind of supplies to which the finance exemption was intended to apply since the foreign exchange dealer made their profit from the difference between the bid and offer rates (and, sometimes, from a separate commission). Thus, the "consideration" on which VAT should be charged in the context of a forex transaction was inherently difficult to calculate. In contrast, Coinstar's supplies did not involve an exchange of different currencies and its customers were not seeking to take advantage of different rates in using Coinstar's services.

72. Mr Scorey submitted that an exchange between different currencies was not essential for an exempt transaction. The conversion of sterling travellers' cheques into cash of the same currency fell within the finance exemption and this supported the FTT's conclusion. Furthermore, HMRC's submission that the finance exemption extended only to currency exchange between foreign or different currencies was contrary to the express view of Advocate General Kokott in Case C – 264/14 *Skatteverket v Hedqvist* [2016] STC 372("*Hedqvist*").

73. In our view, the FTT was correct to consider [81] that there was no relevant difference between a foreign exchange transaction and the supply made by Coinstar. We see no reason why the exchange of one currency for another should be treated differently from the exchange of one type of sterling (coins) for another type of sterling (notes). On this basis, we do not consider that there is a material difference from a foreign exchange transaction and Coinstar's supply of a sterling voucher in exchange for coins (less a fee). We note that in *Wilton Park Ltd and others v Revenue and Customs Commissioners* [2015] UKUT 0343 (TCC) (Rose J) the Upper Tribunal did not consider that the exchange of cash for a voucher (which was exchangeable for the services of a table dancer) was prevented from being an exempt financial transaction on the basis that both the cash and the voucher were denominated in sterling. We also agree that the result for which Ms McCarthy contended would be contrary to Advocate General's views in *Hedqvist*. That case concerned whether the exchange of "bitcoin" for conventional currencies (and vice-versa) fell within the

exemption contained in Article 135 (1) (c) and (d). Advocate General Kokott said [25]:

> "The first condition for exemption is a connection to means of payment, whether in cash or non-cash form. As is moreover shown by the English version of art 135(1)(e) of the VAT Directive, which refers to 'currency, bank notes and coins', the scope of this provision covers any currency in general and not—as suggested by use of the term 'Devisen' in the German version—only foreign currencies."

74. Ms McCarthy observed that, typically, if a customer sorted out his/her loose change, counted the coins, bagged them up and took them to a bank to exchange for a larger denomination, the individual would pay no fee. There would, therefore, be no consideration for the supply of the service. The customer was, however, willing to pay Coinstar a fee in order to avoid the inconvenience of these steps. That service did not, in Ms McCarthy's submission, qualify for the finance exemption. In response to our question, however, Miss McCarthy submitted that if a bank charged a fee to its customers for exchanging coins for notes, this would be a taxable transaction rather than an exempt supply.

75. It is not necessary for us to decide whether the exchange of coins for notes at a bank would be a taxable or exempt supply if the bank charged its customer a fee. Nonetheless, we have considerable doubts as to the correctness of Miss McCarthy's submission on this and were it necessary to decide the point we would be minded to hold that an exchange in these circumstances would be an exempt supply within Article 135 (1)(e).

76. Ms McCarthy submitted that the FTT erred in determining that obtaining a voucher was an aim in itself. Before the FTT, HMRC had submitted that a customer with £1 would not deposit that £1 in a kiosk to receive a voucher for 91 pence. In that situation, the customer had no coins requiring counting and would not therefore use the service at all. This demonstrated that obtaining the voucher could not properly be said to be an aim in itself. The FTT, Ms McCarthy submitted, failed to consider this point. Only customers with coins of an unknown value would have an interest in using the service, demonstrating that the service was essentially one of coin counting. Customers with coins of unknown value could use them to pay the supermarket directly and/or easily deposit them in the bank for no charge.

77. Mr Scorey argued that the FTT had been correct in finding that "obtaining the voucher could be regarded as an "aim in itself"" at [54] and was not merely ancillary to the coin counting component of Coinstar's service. Coin counting was simply a necessary prior component to the overall service of issuing a voucher.

78. In any event, Mr Scorey noted that the FTT's conclusion that the issue of the voucher could be an aim in itself was an alternative to its primary conclusion, viz that the service supplied by Coinstar consisted of a single exempt supply, namely a supply of exchanging money or a substitute for money (from an inconvenient form into a convenient form, i.e. the voucher) [52]. It was therefore immaterial whether the FTT's conclusion was based on the FTT's primary or alternative view.

79. In our judgment, the FTT was right to conclude that obtaining the voucher could be regarded an aim in itself and not merely ancillary to the coin counting component of Coinstar's services. The counting of the loose change was simply a mechanical prerequisite to the customer's ultimate objective of obtaining a more convenient form of exchange (the voucher) in return for inconvenient coins.

80. Nor were we persuaded by Miss McCarthy's submission that a customer with £1 would not deposit that £1 coin in a Coinstar kiosk to receive a voucher for 91p. This submission, which appeared to be unsupported by evidence, may simply have reflected the fact that £1 coins were not the low value coins which customers exchanged for vouchers. Mr Harris's evidence referred to customers depositing high numbers of "low value coins" in Coinstar's kiosks and we believe that £1 coins were not "low value coins" for these purposes.

81. We therefore consider that the FTT was entitled to reach its primary conclusion at [52] and its alternative conclusion at [54].

82. The FTT made a further error of law, in Ms McCarthy's submission, in finding that there was a change in the legal and financial situation of the parties. There was no such change – the customer ended up with a voucher worth the same amount of money (less Coinstar's commission) that it had put into the kiosk. The debit of Coinstar's commission was not the type of "change in the legal and financial situation" to which the case-law referred. The CJEU in *HMRC v National Exhibition Centre Ltd* Case C-130/15 ("*NEC*") held that exempt transfers concerned changes in the nature of moving balances and debits and credits to accounts – nothing of that nature had occurred in the present case.

83. In our view, this submission is clearly wrong. As the FTT correctly observed, the requirement that there should be a "change in the legal and financial situation of the parties" derives originally from the decision of the CJEU in *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] EUECJ C-2/95 (5 June 1997). In this case the CJEU held at [53] in relation to sub- paragraphs 3 and 5 Article 13B(d) of the Sixth Council Directive 77/388/EEC [Article 135 (1) (c) and (d) PVD] that:

> "a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another. It is characterized in particular by the fact that it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks and, in some cases, between the banks."

84. At the outset of a transaction involving Coinstar and its customer, the customer owns coins which are legal tender. At the end of the transaction, the customer has a contractual right (embodied in the voucher) against Coinstar and/or the supermarket to receive value equal to 91.1% of the face value of the original coins and has, further, lost its ownership in the coins. It seems to us that the nature of the right embodied in the voucher is an entirely different form of property from the coins: it is a chose in action giving contractual rights against specific parties, albeit that it is in the nature of a bearer instrument. Moreover, the face value of the right contained in the voucher is 9.9% lower than the face value of the coins. For both these reasons we consider that

there was a change in the legal and financial situation of the parties within the meaning of the CJEU's case-law.

85. Ms McCarthy then contended that the supply made by Coinstar was a mere physical dealing in money as a commodity. We consider that the FTT was correct to reject this submission. The facts in the present appeal are entirely different from those of *Nationwide Anglia* [1994] VATTR 30 (VTD 11826), where Securicor restocked a building society's ATMs. The learned Chairman (Dr John Avery Jones CBE) held that the facts disclosed no dealing with money as money. The service performed by Securicor:

> "could just as well relate to any other goods which might be counted, packed, delivered, collected and reconciled. The money is not used as money; it remains Nationwide's money throughout."

86. On the facts of the present appeal, the customer's coins are used as money in order to acquire what is, effectively, a promissory note. The coins are not used as a commodity, as the bank notes were in *Nationwide Anglia*, and the service supplied by Coinstar could not, in our view, have related to other goods.

87. Furthermore, Miss McCarthy argued that services offered by an ATM were different in nature from the service provided by Coinstar because an ATM transaction involved the debiting and crediting of parties' bank accounts. Therefore, according to Ms McCarthy, FTT erred in deciding that there was no material difference.

88. Mr Scorey submitted that the FTT had been right to detect no significant difference between Coinstar's service and an ATM transaction. In each case, the customer exchanged one form of money (with Coinstar, cash and coins; with an ATM, credit in their account) for another form of monetary value (with Coinstar, a voucher; with an ATM, cash in notes). That exchange and the change in the legal and financial circumstances described above, were the essential features which brought both transactions within the finance exemption. In the ATM transaction, as with Coinstar's service, a fee may be payable for the service to the operator of the machine.

89. We agree with Mr Scorey's analysis and reject HMRC's submission.

90. Lastly, Miss McCarthy submitted that the FTT had erred in its analysis of the decision of the CJEU in *Velvet and Steel* and, in particular, the Court's observations at [24], as repeated in subsequent decisions of the CJEU. At [96] the FTT observed that the transactions in those subsequent cases were held not to be regarded as a financial service. Ms McCarthy submitted that in those subsequent cases the question facing the Court concerned supplies which had a mix of taxable and exempt elements. The FTT should have concluded, Miss McCarthy argued, that the supply made by Coinstar was taxable because there was no difficulty in determining the tax base and that taxable elements were present (i.e. counting and valuing coins).

91. Mr Scorey, submitted that that the finance exemption was not confined to situations where the tax base was difficult to determine. Moreover, *Velvet and Steel* and *Tierce Ladbroke* were cases where the statements concerning the inability of identifying the tax base were made after a finding that the transactions entered into

were not financial transactions, whereas Coinstar's supplies did not fall at this first hurdle. Accordingly, the FTT had been correct [96]-[98] to hold that the cases following *Velvet and Steel* were irrelevant.

92. In *Velvet and Steel*, the vendors of a building assumed obligations to carry out repair works. The question for the ECJ was whether such obligations fell within what was then Article 13B(d)(2) of the Sixth VAT Directive (now Article 135(1)(c)). Having held [23] the transaction was not, by its nature, a financial transaction within the scope of Article 13 B(d), the CJEU stated [24]:

> "That interpretation is, moreover, supported by the purpose of the exemption for financial transactions, which, as the Commission of the European Communities explains in its written observations, is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit. Since subjecting the assumption of an obligation to renovate a property to VAT does not present such difficulties, that transaction cannot be exempted."

93. Furthermore, in *Tierce Ladbroke*, a case involving agencies collecting bets on behalf of bookmakers, the CJEU found that the transactions in dispute did not fall within the financial services exemption because the principal service supplied by the agencies consisted of the acceptance of bets on behalf of the principal and the collection of monies constituted a secondary service which was not an aim in itself. The CJEU then said at [24]:

> "Even on the supposition that the collection of monies constitutes the principal service, the transactions of the [agencies] do not have, having regard to the objectives of the exemptions provided for in Article 13 (B)(d)(3) of the Six Directive, any claim to be exempted. Allowing the exemption in these transactions is intended to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (judgment *Velvet & Steel*, cited above, paragraph 24). The absence of any such difficulties is obvious given that VAT is applied, in the cases in question in the main proceedings, on the remunerations received by the [agencies]."

94. We consider that the FTT did not err in its analysis of the reasoning in *Velvet & Steel*. We do not believe that the CJEU was intending to hold that a transaction, otherwise clearly within the terms of an exemption, should fall to be treated as a taxable transaction simply because the consideration for the service (and therefore the VAT thereon) was easily ascertainable. If this were so, all financial services supplied in consideration for an identifiable fee would fall outside the exemption.

95. That this cannot be the case is illustrated by the decision of the CJEU in *Skandinaviska Enskilda Banken (Taxation)* [2011] EUECJ C-540/09 (10 March 2011) ("*SEB*"). In this case the taxpayer (and another group company) supplied to a third company underwriting guarantees pursuant to which they undertook to acquire any shares in that company which were not subscribed at the end of the subscription period. In return, the taxpayer was paid a commission. The Court held that the services supplied (i.e. the underwriting guarantees) were exempt pursuant to Article

13B(d)(5) of the Sixth Directive. Although the CJEU cited [24] of *Velvet & Steel*, it clearly did not consider that a commission or fee-based remuneration disqualified the taxpayer from the application of the exemption even though there would have been no difficulty in that case of determining the tax base. It seems, therefore, that the reasoning in *Velvet & Steel* should be confined to borderline cases involving transactions which are not clearly within the relevant exemption.

96. Moreover, as the FTT pointed out, in most of the subsequent cases in which [24] of *Velvet & Steel* has been cited in relation to financial services, the services in question have been found, for other reasons, not to fall within the exemption. That is not, however, true in all cases e.g. *SEB* and *Hedqvist* [2015] EUECJ C-264/14 (22 October 2015). We therefore prefer to base our decision on the reasoning set out at [95] above.

97. For these reasons, we reject HMRC's second ground of appeal.

Disposition

98. For the reasons given above, we dismiss this appeal.

Costs

99. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

TIMOTHY HERRINGTON **GUY BRANNAN**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 22 June 2017