[2019] UKUT 298 (TCC)

VALUE ADDED TAX – time of supply – issue of voucher – single purpose voucher – application of s6 Value Added Tax Act 1994 – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal number: UT/2018/0052

BETWEEN

LUNAR MISSIONS LIMITED **Appellant**

-and-

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

TRIBUNAL: SIR GERALD BARLING
JUDGE ASHLEY GREENBANK

Sitting in public at Royal Courts of Justice, The Rolls Building, London on 26 March 2019 and following further written representations by the parties

Nigel Gibbon, of Nigel Gibbon & Co, for the Appellant

Richard Chapman QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the correct VAT treatment of rewards offered by the appellant, Lunar Missions Limited ("Lunar"), to supporters who pledged funds through a crowd-funding platform, known as "Kickstarter" to fund a project to send an unmanned spacecraft to the moon to undertake scientific research. The respondents are the Commissioners for Her Majesty's Revenue & Customs ("HMRC").

2. A supporter who pledged funds to support the project was offered rewards in the form of digital and/or physical space in a capsule that would be buried on the moon by the unmanned spacecraft. HMRC decided, in a decision dated 25 May 2016, that Lunar made a supply to its supporters at the time at which the pledges made by supporters became unconditional and Lunar received payment. The effect of this decision, if correct, was that Lunar should have been registered for VAT on or before 16 December 2014. Lunar was not registered for VAT by this date.

3. Lunar appealed against this decision to the First-tier Tribunal ("FTT"). The question before the FTT concerned the timing for VAT purposes of any supply that was made by Lunar to its supporters. We will discuss the decision of the FTT (the "FTT Decision") in more detail below, but, in summary, the FTT (Judge Jonathan Cannan and Mrs Mary Ainsworth) dismissed Lunar's appeal on the grounds that the rights offered to supporters constituted "single purpose vouchers" within paragraph 7A of Schedule 10A to the Value Added Tax Act 1994 ("VATA") and that any supply made to Lunar's supporters was made when the vouchers were issued (FTT Decision [5] and [81]).

4. Lunar now appeals, with the permission of the FTT, to this Tribunal.

RELEVANT LEGISLATION

5. This appeal concerns the interaction of the rules which determine the time at which a supply is made for VAT purposes and the special provisions which apply to supplies which involve the issue of vouchers.

6. The rules which govern the time of a supply are set out in s6 VATA. The relevant provisions in the case of a supply of services are in sub-sections (3) and (4). They provide, so far as relevant, 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.

7. At the time of the transactions which are the subject of this appeal, there were no specific provisions in EU law governing the VAT treatment of supplies of goods or services involving the provision of vouchers. In particular, Council Directive 2006/112/EC (the "Principal VAT Directive") contained no specific rules. EU member states were entitled to make their own provisions regarding the VAT treatment of vouchers provided that they were consistent with EU law.

8. UK legislation included specific provisions which applied to determine the VAT treatment of certain types of vouchers (referred to as "face-value vouchers"). These provisions were contained in Schedule 10A VATA.

9. Paragraph 1 Schedule 10A VATA contained a definition of "face-value voucher":

> **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.

10. Paragraph 2 provided that the issue of a face-value voucher was to be treated as a supply of services. It was in the following terms:

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

11. Schedule 10A VATA proceeded to set out specific rules for different types of face-value voucher. Paragraph 4 dealt with the treatment of face-value vouchers issued by a person from whom goods or services could be obtained by the use of the voucher. These vouchers are referred to as "retailer vouchers". Paragraph 4 provided as follows:

> **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.
>
> (3) Sub-paragraph (2) above does not apply if—
>
> (a) the voucher is used to obtain goods or services from a person other than the issuer, and
>
> (b) that person fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them.
>
> (4) Any supply of a retailer voucher subsequent to the issue of it shall be treated in the same way as the supply of a voucher to which paragraph 6 below applies.

12. Following the decision of the Court of Justice of the European Union ("CJEU") in *Lebara Limited v. Revenue and Customs Commissioners* Case C-520/10 [2012] STC 1536 ("*Lebara*"), to which we refer later in this decision notice, Schedule 10A was amended by s201 Finance Act 2012 to include a new paragraph 7A.

13. Paragraph 7A provided that certain provisions of Schedule 10A would not apply to certain face-value vouchers, which are commonly referred to as "single purpose vouchers". It was in the following form:

> **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.

Paragraph 7A therefore excluded single purpose vouchers from most of the operative provisions of Schedule 10A, with the exception of paragraph 5, which relates to postage stamps and is not relevant to this appeal.

14. By virtue of Council Directive 2016/1065, the Principal VAT Directive was amended to require EU member states to include provisions in their domestic laws regarding the treatment of vouchers with effect from 1 January 2019. The Directive was implemented in the UK legislation in Finance Act 2019 by provisions contained in what is now Schedule 10B VATA. Schedule 10B applies to transactions after 1 January 2019. It is not relevant to the transactions which are the subject of this appeal.

FACTS

15. The FTT's findings of fact are set out at [8] to [20] of the FTT Decision. Our summary is set out below. Our summary also includes the FTT's findings on the contractual relationship between Lunar and supporters who pledged funds as part of the crowd-funding programme, which are discussed at [48] to [56] of the FTT Decision.

16. As noted above, Lunar raised funds for the project through a crowd-funding platform called "Kickstarter". On the platform, the creator of a project, such as Lunar, would seek supporters for its project. The creator might also offer rewards to supporters who pledged funds for the project.

17. The creator would set a funding target for the project. It was only if the funding target was reached that a supporter who had pledged funds to the project would be charged and the creator would become liable to provide the rewards (FTT Decision [9]).

18. Lunar's project was to send an unmanned robotic landing module to the South Pole of the moon. The plan was for the module to drill into the surface of the moon and conduct experiments to analyse its geological composition. It was also proposed that the module would place a "time capsule" in a borehole on the moon which would include a "digital memory box". The digital memory box would contain information about life on earth (FTT Decision [10]).

19. In due course, Lunar intended to raise funds for the mission by selling space in the digital memory box to customers who would be able to upload digital information to it. During the crowd-funding phase, Lunar offered supporters a range of "rewards" for pledges made to support the project, which included the right to space in the digital memory box, if the project was successfully completed. The rewards increased incrementally with the amount pledged by the supporter (FTT Decision [13]).

20. For the purposes of the appeal (and before the FTT), the parties agreed that the Tribunal should proceed on the basis of a supply of a voucher for space in the digital memory box, which required a pledge of at least £60. The amount of digital space that a supporter would obtain for a pledge of £60 could not be ascertained at the time of the crowd-funding exercise. It would be determined as other funds were raised for the project and as costs became more certain (FTT Decision [14]).

21. A supporter who pledged funds for the project could download a certificate or voucher which confirmed the amount that the supporter had pledged and that the supporter was entitled to a reward (FTT Decision [16]). It was not, however, necessary for a person to hold a printed copy of the voucher to obtain a reward. The entitlement of the voucher holder to a reward depended only on payment of the amount pledged and was recorded in Lunar's own records (FTT Decision [54]).

22. There were references on the Kickstarter website which suggested that a voucher might also be redeemed for physical space in the capsule in which, for example, a supporter may be entitled to include a strand of hair. Although the wording on the website was equivocal, the FTT found that the effect of these statements was that supporters who pledged at least £60 would be entitled to, and Lunar would be bound to provide, digital and/or physical space to a value of £60 (FTT Decision [55] and [56]).

23. Pledges to the project and the rights to rewards were transferable (FTT Decision [10]).

24. Lunar set a funding target of £600,000 for the crowd-funding exercise. The campaign was successful. Lunar obtained 7,297 supporters who pledged a total of £672,447 on or before 17 December 2014 (FTT Decision [12]). At that point, supporters became contractually obliged to pay the amount pledged and, once paid, Lunar became obliged to provide the rewards, subject to the conditions set out on the website (FTT Decision [9] and [49]).

THE FTT DECISION

25. Lunar accepted that it made a taxable supply of the rewards to supporters as part of the crowd-funding programme. Although the FTT expressed the matter before it in different terms (FTT Decision [3]), the principal issue before the FTT concerned the timing of any supply for VAT purposes.

26. Having analysed the services to which a supporter was entitled, the FTT approached the matter by addressing the following issues:

> (1) whether the sums received by Lunar pursuant to the crowd-funding programme represented prepayments of the consideration for a supply of the digital or physical space in the capsule within s6(4) VATA;
>
> (2) whether the sums received by Lunar pursuant to the crowd-funding programme represented consideration for the supply of "face-value vouchers" within paragraph 1 Schedule 10A VATA;
>
> (3) if so, whether the vouchers were "single purpose vouchers" within paragraph 7A Schedule 10A VATA.

27. On the first issue (prepayments), the FTT agreed with Lunar that the sums received by Lunar through the crowd-funding programme were not prepayments of consideration for supplies of digital or physical space in the capsule. The FTT reached this conclusion by applying the principles set out by the Court of Session in *Findmypast Ltd v. Revenue and Customs Commissioners* [2017] CSIH 59 ("*Findmypast*") at [46], [47] and [51]. In the FTT's view, there were considerable uncertainties regarding the supply of digital or physical space at the time the payments were made. The services that were to be supplied by Lunar in consideration for the payments were not precisely identified (as required by s6(4) VATA) and so the payments made by the supporters could not treated as prepayments of the consideration for a supply of digital or physical space on the capsule (FTT Decision [62], [63]).

28. On the second issue (face-value vouchers), the FTT once again agreed with Lunar that supporters were supplied with "face-value vouchers" within paragraph 1 Schedule 10A VATA.

The vouchers were substantially in electronic form, but represented a right to receive goods or services up to a given value (FTT Decision [68]).

29. On the third issue (single purpose vouchers), the FTT agreed with HMRC: the vouchers supplied to supporters were "single purpose vouchers" within paragraph 7A Schedule 10A VATA. The vouchers were redeemable for only one type of service – there being no relevant distinction between a supply of digital space and physical space on the capsule for this purpose – and the service was subject to a single rate of VAT, which could be identified at the time at which the voucher was issued (FTT Decision [80]-[82]). The time of supply of a single purpose voucher was the time at which the voucher was issued (FTT Decision [74], [78], [82]).

30. On the basis of its conclusion on the third issue, the FTT dismissed Lunar's appeal.

PERMISSION TO APPEAL AND THE REVIEW OF THE FTT DECISION

31. As can be seen from our summary of the FTT Decision, the reasoning of the FTT proceeded on the basis that Lunar could only succeed if it could show both that the funding that it received from the crowd-funding exercise was not a prepayment and that that funding was consideration for a supply of face-value vouchers which were not single purpose vouchers.

32. In the form in which it was initially sent to the parties, however, the FTT Decision contained the following statement (at paragraph [6]):

> "6. The burden is on the appellant to satisfy us that the Kickstarter funding was not a prepayment, alternatively that it was consideration for the supply of face-value vouchers which are not single purpose vouchers. If it satisfies us that either alternative is the case, then it was not liable to be registered for VAT as at 16 December 2014. If it does not, then HMRC will no doubt in due course issue an assessment for VAT in relation to the funds received."

33. Lunar sought permission to appeal against the FTT Decision on the grounds that the FTT's reasoning was internally inconsistent. The wording of the original paragraph [6] (as set out at [32] above) suggested that Lunar only had to show either (i) that the funding from the crowd-funding exercise was not a prepayment or (ii) that the funding was consideration for supplies of face-value vouchers which were not single purpose vouchers. The FTT had decided (FTT Decision [62] and [63]) that the payments were not prepayments and so, on the basis set out in the original paragraph [6], Lunar was entitled to succeed in its appeal. However, the FTT had gone on to dismiss the appeal on the grounds that the payments were consideration for face-value vouchers which were single purpose vouchers.

34. The FTT judge, Judge Cannan, convened an oral hearing on 24 April 2018. Following that hearing, Judge Cannan issued a decision notice to the parties in which the FTT decided:

> (1) to review the original decision pursuant to rule 40 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:
>
> (2) on that review, that there was an internal inconsistency in the original decision which amounted to an error of law;
>
> (3) to amend the original decision by replacing the original paragraph [6] with the following paragraph:
>
> > "6. The burden is on the appellant to satisfy us that the Kickstarter funding was not a prepayment, and if it was consideration for the supply of face-value vouchers that they are not single purpose vouchers. If it satisfies us that both are the case, then it was not liable to be registered for VAT as at 16 December 2014. If it does not, then HMRC will no doubt in due course issue an assessment for VAT in relation to the funds received."

(4) to grant permission to appeal on the grounds that the FTT, having found that the receipt of the proceeds of the crowd-funding exercise did not amount to a prepayment within section 6(4) VATA, ought to have dismissed the appeal.

THE PARTIES' SUBMISSIONS

35. Before this Tribunal, the parties accepted large parts of the FTT Decision. In particular:

(1) the parties accepted the FTT's findings of fact and did not seek to challenge the FTT's interpretation of the agreement between Lunar and supporters who had pledged funds;

(2) HMRC did not seek to challenge the FTT's finding that the payments which Lunar received as part of the crowd-funding exercise did not amount to a prepayment of consideration for a supply of digital or physical space in the capsule;

(3) Lunar did not challenge the FTT's conclusion that the vouchers provided by Lunar to supporters were single purpose vouchers within paragraph 7A Schedule 10A VATA; and

(4) the parties accepted the FTT's finding that the supply made by Lunar to supporters on the fulfilment of the rewards was a supply of digital and/or physical space in the capsule and that that supply was of one type for VAT purposes.

36. The parties' arguments focussed on the interaction of the general rules that govern the timing of a supply for VAT purposes, which are found in section 6 VATA, and the special rules which apply to the treatment of vouchers for VAT purposes, which at the time were found in Schedule 10A VATA. We will deal with the parties more detailed submissions in the context of our discussion of the issues below. However, it will assist our explanation if, at this stage, we briefly summarize the parties' main arguments.

Lunar's submissions

37. In summary, Mr Gibbon's argument on behalf of Lunar is that the original version of paragraph [6] of the FTT's decision was correct. He says:

(1) Section 6 VATA applies to determine the timing of all supplies for VAT purposes.

(2) Schedule 10A applies to most face-value vouchers (as defined in paragraph 1). Where it applies:

(a) the issue of the voucher itself is treated as a supply of services for VAT purposes (paragraph 2); but

(b) in the case of face-value vouchers issued by a person from whom the relevant goods or services can be obtained (i.e. retailer vouchers), the consideration for the issue of the vouchers is disregarded for the purposes of applying the time of supply rules in s6 VATA (paragraph 4).

This latter provision protects the consideration for the issue of retailer vouchers from the effect of the prepayment rules in s6(4).

(3) The rules in Schedule 10A do not apply to single purpose vouchers within paragraph 7A Schedule 10A VATA.

(4) The FTT decided that the vouchers in this case were single purpose vouchers. The issue of the vouchers was therefore not a supply (as paragraph 2 Schedule 10A VATA did not apply by virtue of paragraph 7A).

(5) The effect is that the general rules in s6 VATA apply to the provision of the rewards in this case without reference to the special rules in Schedule 10A.

(6) The FTT decided, in this case, that the payments made under the crowd-funding exercise were not prepayments for a supply (FTT Decision [62], [63]) because there was no precise identification of the services that were to be supplied (applying the principles in *Findmypast*). Section 6(4) cannot therefore apply and the services are treated as supplied when they are performed under s6(3) (i.e. when the digital or physical space in the capsule was actually provided).

HMRC's submissions

38. For HMRC, Mr Chapman submits that the time of supply is the time at which the voucher was issued.

(1) The supply in this case is the supply of the voucher itself rather than the services for which the voucher is subsequently exchanged.

(2) At the time of the issue of the voucher all of the elements for a supply were present. There was a direct link between the service supplied (the voucher) and a consideration received (the pledged payment). Mr Chapman relied on the decision of the CJEU in *Lebara* in support of his arguments on this point.

(3) Although paragraph 2 Schedule 10A VATA was disapplied by paragraph 7A, paragraph 2 was simply a confirmation of the position which would otherwise apply to a voucher which fell within the principles in *Lebara*, namely that the issue of the voucher was a supply.

DISCUSSION

The interaction of s6 and Schedule 10A VATA

39. The FTT approached the issues in this case by dealing separately with the questions as to whether the payments received from the crowd-funding exercise represented prepayments or whether they should be treated as payments for the supply of vouchers. As the FTT noted (at [47] FTT Decision), it did not hear any submissions from the parties as to the interaction of s6(4) VATA and Schedule 10A.

40. In contrast, the submissions of the parties before this Tribunal focussed on the interaction between the timing of supply rules in s6 VATA and the special rules governing the treatment of face-value vouchers in Schedule 10A. Mr Gibbon, in particular, submitted that the FTT made an error of law by failing to apply the time of supply rules in s6 VATA once it had decided that the vouchers in this case were single purpose vouchers within paragraph 7A Schedule 10A VATA (so that the operative provisions of Schedule 10A could not apply).

41. We did not understand Mr Chapman in his submissions to disagree with the basic proposition that the general rules in s6 VATA should apply to govern the timing of any supply made by Lunar without reference to Schedule 10A once it was decided that the vouchers were single purpose vouchers within paragraph 7A. His argument was essentially that the nature of the supply itself was such that the issue of the voucher was itself the supply or, perhaps more accurately, that the supply was made at the time at which the vouchers were issued.

42. We agree with the basic proposition. On the wording of the legislation, it seems to us self-evident that, if the vouchers fall within paragraph 7A, the operative provisions of Schedule 10A do not apply. If so the timing of any supply must be determined by reference to the general rules in s6 VATA without reference to Schedule 10A. The question is then, what is the effect of the application of those rules?

43. Having decided that the vouchers were single purpose vouchers within paragraph 7A, the FTT came to the conclusion that a supply took place when the vouchers were "issued" (FTT Decision [82]). The FTT did not set out in its decision the time at which it regarded a voucher

as having been "issued" for this purpose. However, the FTT Decision proceeds on the assumption that a voucher was issued at the time at which a supporter became contractually obliged to make the payment. In most cases, which are relevant to this appeal, that time was the time at which the funding target for the crowd-funding programme was met. The parties' arguments before this Tribunal were consistent with that approach. We have proceeded on the same basis for the purpose of this appeal.

44. The FTT Decision does not contain any detailed reasoning to support its conclusion. However, in our view, it is implicit in the FTT's decision that it reached its conclusion on the basis that, if the vouchers were single purpose vouchers, the supply was made at the time at which the vouchers were issued because the supply of services was performed at that time (within s6(3) VATA).

45. Having considered the detailed submissions of the parties, we agree with that conclusion and accordingly dismiss the appeal. Even if we had come to the view that the FTT had failed to give adequate reasons for its conclusion and that failure was an error of law, we would have remade the decision and reached the same conclusion. Our reasons are set out below.

The *Lebara* case

46. We will begin our explanation with the decision of the CJEU in *Lebara*. Both parties referred to this decision in argument and, as we have described, Schedule 10A was amended to include paragraph 7A (and exclude single purpose vouchers from the ambit of the operative provisions in Schedule 10A) following the decision of the CJEU in that case. It is therefore a useful point from which to examine the principles that should apply to the treatment of vouchers where Schedule 10A does not apply.

47. The *Lebara* case related to the VAT treatment of phone cards which entitled the holder to make telephone calls using the services provided by the company. The cards were regarded as "retailer vouchers" under the provisions of Schedule 10A as they stood at the time. In a typical case, the phone cards were sold by Lebara to various distributors. The cards were then on-sold by distributors, wholesalers and retailers before they were purchased by a consumer who would use the cards to obtain telecommunication services. The end user provided no further payment to Lebara for the use of the services.

48. The First-tier Tribunal referred the case to the CJEU. It asked two questions, but, in the final analysis, the CJEU decided the case by reference to the first question. That question was:

> "**1.** Where a taxable person ("Trader A") sells phone cards representing the right to receive telecommunication services from that person, is Article 2(1) of the Sixth VAT Directive to be interpreted so as to mean that Trader A makes two supplies for VAT purposes: one at the time of the initial sale of the phone card by Trader A to another taxable person ("Trader B") and one at the time of redemption (i.e. its use by a person – the "End User" – to make telephone calls)?"

49. The CJEU decided that Lebara made a supply of telecommunication services to the distributor when it issued the phone card to the distributor and that there was no further supply by Lebara to the end user who made telephone calls using the card. The CJEU's conclusion is set out at *Lebara* [43]:

> "**43.** Consequently, the answer to the first question is that point (1) of Article 2 of the Sixth Directive, must be interpreted as meaning that a telecommunication service operator which offers telecommunication services consisting in selling to a distributor phone cards which display all the information necessary for making international telephone calls by means of the infrastructure provided by that operator and which are resold by the

> distributor, in its own name and on its own behalf, to end users, either directly or through other taxable persons such as wholesalers or retailers, carries out a supply of telecommunication services for consideration to the distributor. On the other hand, the operator does not carry out a second supply of services for consideration, this time to the end user. Where that user, having purchased the phone card, exercises the right to make telephone calls using the information on the card."

50. The reasoning of the CJEU in *Lebara* is instructive. The key points that we take from its decision are as follows:

(1) The Court applied traditional principles in assessing whether or not Lebara made a supply to the distributor and/or to the end user. In particular, there must be a legal relationship between the service provider and the recipient pursuant to which there is reciprocal performance, the remuneration received by the service provider constituting the value actually given in return for the service supplied to the recipient. There must be a direct link between the service supplied and the consideration received. (*Lebara* [25]-[27]).

(2) The Court identified the following key features of the supply chain.

(a) The phone cards were for a single purpose. The Court said this at [28]:

> "As regards the special features of the marketing system at issue in the main proceedings, phone cards are for a single purpose and so far as they may be used only to make international telephone calls to destinations, and at rates, determined in advance. Accordingly, they allow access only to services of one type, the nature and quantity of which are determined in advance and which are subject to a single rate of tax."

(b) The distributor to whom Lebara sold the phone cards acquired the cards "in its own name and on its own behalf" (*Lebara* [29]).

(c) There was no link between the price paid by the distributor to acquire the cards from Lebara and the price paid by the end user (*Lebara* [30])

(3) Applying those principles to those features, there could only be one supply made by Lebara in the circumstances of the case. Lebara only received one payment in the course of supplying its telecommunication services, the payment from the distributor. (*Lebara* [31]-[32]).

(4) That supply was made by Lebara to the distributor to which it sold the phone cards because it was only between Lebara and the distributor that the requisite element of reciprocal performance existed.

(a) When it issued the phone cards to the distributor, Lebara provided the distributor with wherewithal to make telephone calls over the infrastructure provided by Lebara (*Lebara* [34]). That was a supply of telephone communication services by Lebara to the distributor (*Lebara* [35]).

(b) The distributor paid the price agreed with Lebara for that supply (*Lebara* [36]).

(5) In contrast, Lebara did not make a supply to the end user. There was no element of reciprocal performance between Lebara and the end user. The amount that the end user paid (to the retailer or to the distributor) was not controlled by Lebara (*Lebara* [30], [38]). The payment made by the distributor could not be treated as consideration provided by the end user (*Lebara* [39]).

51. Following the decision in *Lebara*, it was apparent that UK law, as it stood at the time, was not consistent with EU law. HMRC published Revenue and Customs Brief 12/12 on 10 May 2012. The Revenue and Customs Brief set out the government's intention to change the law to give effect to the decision in *Lebara* with immediate effect. As we have described, legislation was included in Finance Act 2012 for that purpose. Section 201 Finance Act 2012 introduced paragraph 7A into Schedule 10A VATA. That change took effect retrospectively from 10 May 2012.

Application of the principles in *Lebara* to the present case

52. In this case, the FTT decided that the certificates issued by Lunar were face-value vouchers which fell within paragraph 7A Schedule 10A. The parties do not challenge that conclusion. The operative provisions of Schedule 10A do not therefore apply to the vouchers issued by Lunar. We must therefore, in much the same way as the CJEU in *Lebara*, apply the general principles of VAT without reference to the provisions of Schedule 10A to determine whether Lunar made a supply to the supporters through the crowd-funding exercise and, if so, the nature and timing of that supply.

Reciprocal performance

53. The starting point is to consider whether the crowd-funding exercise involves a supply of services for a consideration for the purposes of article 2(c) Principal VAT Directive. (This wording is reflected in UK tax legislation in s5(2) VATA.) In order to meet this requirement there must be a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the consideration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (see, for example, *Lebara* [27] and the other cases cited there).

54. In the present case, as the FTT found, a legal relationship was created between Lunar and its supporters through the crowd-funding exercise. Pursuant to that legal relationship, Lunar agreed to provide rights to digital and/or physical space in the capsule and supporters agreed to pay the price, on our assumed facts, of £60. Those rights were, as the FTT found, transferable to others.

55. There was reciprocal performance in these arrangements, but, as was the case in *Lebara*, that element of reciprocal performance only existed between Lunar and supporters who pledged funds; they were the only persons obliged to pay the consideration. If a supporter who had pledged funds chose to transfer a certificate to someone else who surrendered the certificate for digital or physical space in the capsule, there would be no supply by Lunar for VAT purposes to the transferee; the transferee had not provided consideration and the payment made by the supporter could not be treated as being made on his or her behalf.

The nature of the supply

56. This brings us to the subject matter of the supply.

57. In the *Lebara* case, the CJEU found that by issuing the phone cards to the distributor, Lebara had provided the distributor with "all the information necessary" for making telephone calls over the network operated by Lebara. The issue of the phone card to the distributor transferred the right to use the network to the distributor (*Lebara* [34]). That was a supply of telecommunications services for VAT purposes. Furthermore all the relevant elements for the taxation of the supply were present and could be identified. The supply was of one type, its nature and quantity could be determined in advance and the supply was subject to a single rate of VAT (*Lebara* [28]).

58. In this case, at the time of the issue of the vouchers, Lunar provided the supporter with the rights to digital and/or physical space in the capsule if the project was completed. As we

have mentioned above, the parties also agree that the vouchers issued by Lunar fall within paragraph 7A Schedule 10A. So the parties accept that the vouchers meet the requirements of both paragraph 1 Schedule 10A and paragraph 7A Schedule 10A; that is, they represent rights to receive services to the value of the relevant amount (on our assumption, £60) and that those services are of one type and subject to a single rate of VAT.

59. Mr Gibbon, for Lunar, submits that, at that point in time, no supply had been made. The FTT concluded, in its analysis of the prepayment issue, that the services provided by Lunar to its supporters through the crowd-funding exercise were not capable of precise identification at that time (FTT Decision [63]). It follows that there was no direct link between the service provided (the rewards) and the consideration given at the time. In those circumstances, the basic criteria for a supply are not met.

60. Mr Gibbon submits that, in most cases in which a single purpose voucher is issued (and so paragraph 7A applies and paragraph 10A does not apply), it will be possible to identify precisely the services which are to be provided pursuant to the fulfilment of the voucher at the time at which the voucher is issued and there will therefore be a direct link between the service supplied and the consideration. That was the case in *Lebara*. However, it does not preclude the possibility that, in a case where the services cannot be identified precisely, the supply will not be performed until a later date and the payment for the single purpose voucher would not be regarded as a prepayment within s6(4) VATA.

61. Mr Chapman, for HMRC, argues that there was a supply by Lunar through the provision of the rights to the rewards to supporters at the time of the issue of the vouchers. The rights to services must be of sufficient certainty to meet the criteria in paragraph 7A (which reflect the test in *Lebara*). If so, the provision of the rights to the services constitutes the supply. The prepayment provisions in s6(4) VATA are not in issue.

62. Mr Chapman points to the terms of Revenue and Customs Brief 12/12 in support of his interpretation. He notes that prior to the introduction of paragraph 7A, retailer vouchers were treated by Schedule 10A VATA as giving rise to two supplies: one at the time of issue of the voucher and one on redemption. The potential for double taxation was overcome by disregarding the consideration given for the issue of the voucher. The decision of the CJEU in *Lebara* showed that that treatment was not correct for vouchers which met the criteria specified in that case. Paragraph 7A was therefore introduced to disapply Schedule 10A in those circumstances.

63. Mr Chapman points in particular to paragraphs 1.4. and 1.5 of Revenue and Customs Brief 12/12, which state:

> **1.4 Affected vouchers**
>
> As a result of the changes announced today, single purpose face value vouchers will be taxed when they are issued. This will affect all single purpose vouchers, whether credit, retailer or other types of voucher.
>
> A single purpose face value voucher is one that carries the right to receive only one type of goods or services which are all subject to a single rate of VAT.
>
> For example, where a prepaid telephone card can only be redeemed for telecommunication services it will be a single purpose voucher. Similarly a voucher that can be redeemed only for electronically supplied services will be a single purpose voucher even if the electronic service can have slightly different forms (e.g. streamed movies, music or games).

A book token that can be redeemed for zero rated books or standard rated e-books, will not be a single purpose voucher as it can be redeemed for more than one type of supply and they have different rates.

Further examples are given below.

1.5 The new treatment of single purpose vouchers

As the announced changes remove single purpose vouchers from Schedule 10A, the special rules for face value vouchers will no longer apply.

Instead where a single purpose voucher is sold both initially and by retailers or distributors, it is treated as a supply of the goods or services for which it can be redeemed. This will apply whether the voucher is issued by the person from whom it can be redeemed or by a third party.

For example a telecommunications company produces vouchers that entitle the holder to £10 worth of telephone calls. It sells a voucher to a distributor for £8 and accounts for VAT on the £8. The distributor recovers the input tax and sells the voucher to a retailer for £9 and accounts for VAT on £9. The retailer recovers the input tax and sells the voucher to the final consumer for £10 and accounts for output tax on £10.

Example 1: Single Purpose Voucher

A UK provider of an online fantasy game sells face value vouchers that can be redeemed for game time or enhancements within the game (both standard rated electronic supplied services). The vouchers are sold to distributors in the UK, other Member States and non-EU countries who sell them on to consumers within their territory.

As the services for which the vouchers can be redeemed are of a single type and at the same rate of tax, they are single purpose vouchers. The supply by the game provider to the distributors is regarded as a supply of electronically supplied services and will be subject to UK VAT when supplied to UK distributors and outside of the scope when supplied to non-UK distributors.

Example 2: Single Purpose Voucher

A group discount provider sells face value vouchers to consumers which carry the right to specific services (for example, a manicure at a particular retailer). Even if contractually the provider is not the supplier of the services to the consumer, for VAT purposes there is a supply by the retailer to the provider and the provider to the consumer. VAT will be due from the provider when the voucher is issued, even if the voucher is never subsequently redeemed.

64. Mr Chapman submits that, as the paragraphs from Revenue and Customs Brief 12/12 demonstrate, it is only those face-value vouchers which meet the criteria in *Lebara* that fall within paragraph 7A and so fall outside Schedule 10A. Single purpose vouchers are always taxed at the time of issue; this is because by their nature, the supply is made at the time of their issue; there is no separate category of single purpose vouchers which do not give rise to a supply at the time at which the voucher is issued.

65. The extracts from Revenue and Customs Brief 12/12 to which Mr Chapman refers are, of course, only evidence of HMRC's views on this issue. However, on this issue, we do agree with Mr Chapman.

66. In our view, paragraph 7A is intended to apply only to the issue of those face-value vouchers which would fall within the principles in the *Lebara* case; that is, vouchers the delivery of which constitute the making of a supply to the recipient. The provision is designed

to extend to rights which are sufficiently certain to fall within the principles in that case and to apply only in circumstances where all the requisite elements for taxing that supply are present.

67. This is clear from the wording of paragraph 7A which closely follows elements of the wording of the decision of the CJEU in *Lebara*. The requirements in paragraph 7A for the vouchers to represent rights to obtain goods or services of one type to which a single rate of VAT are taken from the *Lebara* case.

68. Furthermore, this approach is consistent with other provisions of Schedule 10A. For example, in the case of retailer vouchers, paragraph 4(2) disregards a payment made for a multi-purpose voucher for the purpose of the VAT legislation. The effect of that provision is to prevent s6(4) operating to tax a supply at that stage and to defer any charge until the underlying supply of the relevant goods or services is made. Paragraph 4(2) is not required in the case of a single purpose voucher because the supply is made at the time of its issue.

69. In the present case, it is accepted by Lunar that the issue of the vouchers falls within paragraph 7A. In that case, it follows that when Lunar issued the vouchers to the supporters, it must be regarded as having provided them with all the information necessary to obtain the supply of the service; it provided the supporter who made the pledge – the only person with whom there was the requisite degree of reciprocal performance – with the wherewithal to obtain the digital or physical space on the capsule. At that point, it made the supply.

70. If we apply the timing rules in s6 VATA to that supply, the supply is treated as made when it is performed under s6(3), that is the time at which the voucher was issued. The supply is not treated as occurring at an earlier time under s6(4) as the issue of the voucher and the payment are contemporaneous and an invoice had not been issued before that time.

Lunar's other arguments

Arguments at the hearing

71. In his submissions at the hearing, Mr Gibbon referred to the uncertainties in the provision of the services to which the FTT referred in its analysis of the prepayment issue. We accept that that finding is difficult to reconcile with the separate conclusion that the vouchers fell within paragraph 7A Schedule 10A. However, the prepayment issue is not in issue before this Tribunal and the FTT's conclusion that the vouchers were single purpose vouchers is not being challenged either.

72. Mr Gibbon seeks to overcome that point by arguing that paragraph 7A is of potentially wider application and can encompass vouchers which represent rights which are insufficiently certain to amount to a supply of the underlying goods or services at the time of their issue. For the reasons that we have given above, we reject that submission.

73. Nor would we accept that the FTT was not entitled to come to that conclusion on the facts as it had found them. At the time of issue of many vouchers – including many which Mr Gibbon would accept should be treated as giving rise to a supply at the time of their issue under the principles in *Lebara* – there will be uncertainties as to whether or not the underlying supply will ultimately be made. This could be for many reasons – including whether or not the voucher will be redeemed and whether or not the supplier will be in a position to fulfil its obligations to provide the service at the time at which the holder of the voucher seeks to redeem. We do not regard the uncertainties in the present case as being of a fundamentally different nature.

Written submissions

74. In written submissions made following the hearing, Mr Gibbon raised a new but related argument.

75. Mr Gibbon referred the Tribunal to the decision of the First-tier Tribunal (Judge Barbara Mosedale) in *Hutchison 3G UK Limited v Revenue and Customs Commissioners* [2018] UKFTT 289 (TC) ("*Hutchison 3G*") and in particular to a passage in her decision (*Hutchison 3G* [265] to [295]) in which Judge Mosedale addressed the question as to whether or not the "pay monthly" contracts of a telecommunications operator with its customers could give rise to face-value vouchers within Schedule 10A.

76. Mr Gibbon alights on a passage in which Judge Mosedale expresses the view, based on *dicta* of Park J in *Leisure Pass Group Limited v Revenue and Customs Commissioners* [2008] EWHC 2158 (Ch), [2008] STC 3340 at [23], that "by the use of the word 'represents' [paragraph 1 of Schedule 10A VATA] must be understood as referring to something which can be exchanged for the right to receive goods or services, but it is not in fact the right to goods and services" (*Hutchison 3G* [286]).

77. Mr Gibbon extrapolates from this statement an argument that the issue of a single purpose voucher cannot itself be the supply of a right to receive services. Unlike other face-value vouchers, the issue of a single purpose voucher is not treated as a supply by paragraph 2 of Schedule 10A. The only supply that remains to be taxed is the supply of the underlying goods or services, which are taxed in accordance with the normal timing rules in s6 VATA.

78. We do not believe that these arguments advance Lunar's case. They simply seek to establish a further justification for an argument that the concept of single purpose vouchers can encompass cases in which the provision of the rights themselves in the form of the voucher do not constitute the performance of the supply. For the reasons that we have given, we do not accept that interpretation.

DECISION

79. For the reasons that we have given above, we dismiss this appeal.

COSTS

80. Any application for an order for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and, unless both parties agree that the costs should be the subject of detailed assessment, be accompanied by a schedule of the costs claimed sufficient to allow summary assessment of such costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 .

SIR GERALD BARLING **JUDGE ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES

Release date: 8 October 2019