[2015] UKFTT 0409 (TC)

TC04586

Appeal number: TC/2014/06561
TC/2015/00081
TC/2015/02402
TC/2015/02967
TC/2015/03546

VAT – Retailer Vouchers – Schedule 10A VATA – purchase by appellant both direct from retailers and from intermediate supplier – whether any input VAT arising on purchases direct from retailers – whether input VAT (either on direct or intermediary purchases) recoverable by appellant – appeal allowed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASSOCIATED NEWSPAPERS LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in public in The Royal Courts of Justice, London on 7, 8 & 9 July 2015

John Walters QC, instructed by KPMG LLP for the Appellant

Kieron Beal QC and Simon Pritchard of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is closely related to an earlier appeal between the same parties, in respect of which a decision of this Tribunal was issued on 24 January 2014 under reference [2014] UKFTT 116 (TC).

2. Both appeals concern the VAT treatment of certain retailer vouchers distributed by the appellant as part of its sales promotion efforts for its newspapers. The earlier appeal ("*ANL(1)*") was concerned with the output tax liability of the appellant in respect of its distribution of the vouchers to its customers. This appeal is concerned with its recovery of input tax on its purchase of the vouchers.

The facts

3. I received witness statements from James Welsh, Finance and Operations Director of DMG Media Limited (of which the appellant is a subsidiary) and Philip Ross, Indirect Tax Compliance Manager of the appellant. Both also gave live evidence to supplement their witness statements.

4. The parties had also agreed a "Statement of Facts not in Dispute" as follows:

> "1. The Appellant publishes the Daily Mail and the Mail on Sunday newspapers.
>
> 2. During the period from 2007 to 2010, it ran a series of promotions under an initiative which it called "SPICE" (Sales Performance Improvement by Circulation Excellence).
>
> 3. Through mailshots to addresses where it was believed the occupiers already took home delivery of competitor newspapers (and later through other methods), the Appellant made a special introductory offer of its own titles. The basic offer involved a 50% reduction on the cover price of the Daily Mail and the Mail on Sunday if the customer took them by newsagent daily delivery for a period of 12 or 13 weeks. The customer was supplied with half price coupons which were redeemable at the newsagent. The customer thus paid the newsagent in cash for the other 50% of the price of the newspapers and also paid the delivery charge in full. At the end of the 12 or 13 week promotional period, the customer was legally entitled, if he had continued to take the newspapers throughout that period, to a voucher from a high street retailer (typically Marks & Spencer, ASDA or Sainsbury's, at the customer's election) to a set value. At different times, the value of the voucher offered was various amounts between £10 and £100. The customer was contractually entitled to the voucher if he fulfilled his commitment to purchase the paper, seven days a week, by home delivery for the length of the promotional period. In addition, the participating newsagents were also provided with a similar voucher (typically £5 for each customer who continued throughout the promotional period).

4. The vouchers had to be claimed within one month of the offer letter. There was no separate or additional payment for the retailer vouchers.

5. Under the SPICE promotion as it operated in the period from 2007 to 2010, the vouchers were issued direct to the Appellant by Marks & Spencer and other retailers ("Retailers"). The Appellant was actually able to negotiate a purchase price for the vouchers which represented a discount to the face value. Subsequently, the Appellant has also purchased vouchers from an intermediary supplier of vouchers called Hut com Limited, trading as The Hut.

6. The Retailers charged what purported to be VAT to the Appellant on its issue of the vouchers. The intermediate supplier Hut com Limited has charged VAT on the sale of vouchers to the Appellant. In the case of supplies from Hut com Limited, the Respondents do not dispute that the Appellant has incurred input tax on the purchase of the voucher.

7. The Appellant wrote to the Respondents on 7 August 2007 with respect to the VAT treatment of the vouchers. After setting out the background and a summary of the promotions under the SPICE initiative, it explained that it was reclaiming the input VAT charged to it by Marks & Spencer and it was not accounting for any output VAT on the delivery of vouchers to its customers. It gave a justification for this approach and sought the Respondents' confirmation that they agreed with it.

8. By letter dated 5 November 2007, the Respondents replied. Their letter included the following text:

> *"I have been advised by our Policy team that the VAT charged on the purchase of face value vouchers can be recovered as if it were input tax subject to the normal rules, in line with the VAT Information Sheet 12/03. We will not apply the Supply of Services Order to these transactions and there is therefore no output tax due."*

9. In addition, the letter made it clear that this ruling was only temporary as the whole area was under review. The outcome was expected by the end of 2007.

10. On 27 July 2009 the Respondents wrote again to the Appellant, stating that they were now revising their earlier ruling. From that date on, they said, the "published policy" would apply. They quoted that policy as follows (by reference to paragraph 14 of VAT Information Sheet 12/2003):

> *"Where face value vouchers are purchased by businesses for the purpose of giving them away for no consideration (e.g. to employees as 'perks' or under a promotion scheme) the VAT incurred is claimable as input tax subject to the normal rules. Output tax is due under the Value Added Tax (Supply of Services)*

Order 1993. Therefore all vouchers given away for no consideration will be liable to output tax to the extent of the input tax claimed."

11. In consequence of this, they went on to require the Appellant to "account for output tax on all face value vouchers given away for no consideration to the extent that you have incurred input tax."

12. The Appellant immediately wrote to the Respondents on 10 August 2009 to object to the change of treatment. They pointed out that nothing had changed since the 2007 ruling, so they could not see why the Respondents' view should have changed.

13. This resulted in further activity (both correspondence and meetings) over the next 2 years, before the Respondents wrote a formal decision letter dated 18 October 2011.

14. In that decision letter, after explaining why they rejected any suggestion that (a) the vouchers amounted to a retrospective discount for the sale of the newspapers or (b) the customers had given consideration for the vouchers (neither of which arguments has been persisted with by the Appellant), they went on to say:

"I believe that the vouchers should be treated as supplied for free in line with VAT Act 1994, Schedule 10A, para 7(b). As such output tax is due to the extent that input tax has been claimed as per the VAT (Supply of Services) Order 1993.

HMRC decision

I consider that the customer does not pay anything extra for the provision of the M&S vouchers. On that basis there is no monetary or non-monetary amount that it could be said that the customer pays to receive the voucher. They do have to purchase the paper and they pay a discounted amount for that, but that amount is the consideration for the supply of the newspaper, not the voucher. ANL also pay M&S a discounted amount for the vouchers, but that is for the supply of the vouchers between those two parties, the amounts that ANL pay to M&S cannot also represent consideration for the supply of the voucher by ANL to the customer. As the vouchers are provided for no consideration they cannot be considered to be part of the supply of a zero rated newspaper. The provision of the vouchers for no consideration is deemed to be a supply of services under the terms of the SoSO, and Sched 10, para 2.

In giving away these vouchers for no consideration, ANL are deemed to be making a supply of services for VAT purposes under the terms of the Supply of Services Order 1993. Under para 5 of that Order, they are also required to account for output tax on the basis of the cost to them of the M&S vouchers.

> *I consider that ANL is required to account for output tax to the extent that they incur input tax on the supply of these vouchers to them."*

15. Following a statutory review, the Respondents' decision was confirmed in a letter dated 15 December 2011.

16. An appeal against that decision was brought by the Appellant before the First-tier Tribunal ('the Output tax appeal'). In its decision in *Associated Newspapers Ltd v. HMRC* [2014] (TC), the First-tier Tribunal allowed the appeal. That decision is presently subject to an appeal to the Upper Tribunal, due to be heard in October 2015.

17. From 27 July 2009, the Appellant ceased claiming recovery as input tax of the VAT charged to it by Marks & Spencer and the other suppliers of vouchers. It resumed claiming recovery of input tax with effect from VAT period 09/14.

18. In their Grounds of Appeal to the Upper Tribunal, the Respondents in the present appeal relied, inter alia, on Ground 3 which states:

> *"Alternatively, any input tax incurred directly and immediately in respect of the supplies of the retailer vouchers cannot be reclaimed"*.

19. The Appellant subsequently wrote to the Respondents on 1 August 2014 seeking a determination regarding protective claims for input tax that the Appellant had been submitting pending the final determination of the Output Tax Appeal.

20. The Respondents rejected the input tax claims on 12 November 2014. The Appellant appealed against the decision on 5 December 2014. This appeal was given the reference TC/2014/06561.

21. The Respondents subsequently rejected further input tax claims. The Appellant appealed against each rejection to the First-tier Tribunal. These subsequent appeals were given the references TC/2015/00081, TC/2015/02402 and TC/2015/_____.

22. The latter two of the above appeals related to input tax incurred on vouchers supplied to customers under the Mail Rewards promotion which was the successor to SPICE. The Mail Rewards promotion will be the subject of evidence before the Tribunal."

5. I heard evidence about the "Mail Rewards" promotion referred to at paragraph [22] of the above statement, as well as another promotion known as the "Subscription Promotion".

6. The Subscription Promotion was a variant on the SPICE programme, and only ran for a short time. Instead of approaching customers through newsagents, the appellant approached them direct. A customer who agreed to participate would be

sent coupons through the post which he could use to "pay" for the newspapers. He might have them delivered by a newsagent, or he might simply buy them from a shop. At the end of a set subscription period, the customer became entitled to receive retailer vouchers in the same way as in the SPICE campaign.

7. The Mail Rewards promotion was the main successor to SPICE. It started in the summer of 2011. It was the subject of a contract with The Hut.com Limited ("the Hut") dated 25 May 2011 which had been included in the bundle before the Tribunal in *ANL(1)* but was not in the bundle for this appeal though it was produced to me during the course of the hearing.

8. The basic structure of the Mail Rewards scheme was as follows. Members of the public could register an account with the appellant (usually done online, but it could be done by telephone). When they bought copies of the Daily Mail or the Mail on Sunday, there were unique reference numbers printed on them, which they could register with their account (again, either online or by telephone) and the system automatically credited their account with "points". Papers bought from Monday to Friday earned 20 points each, the Saturday paper earned 75 points and the Sunday paper earned 100 points. If a customer bought all the papers in a whole week, a bonus of 50 points was also added.

9. The points could be redeemed for various rewards, including some goods but also retailer vouchers (which were easily the most popular rewards claimed).

10. The website, the underlying computer system and the management of the Mail Rewards promotion was managed by the Hut, for which it was paid a fee (which was subject to VAT on the normal basis, there being no dispute about the appellant's entitlement to deduct that VAT as input tax). As Mr Welsh described it, the Hut "fulfilled" the promotion on behalf of the appellant.

11. As to the sourcing of the retailer vouchers, the Hut generally purchased them in batches and invoiced them on to the appellant at cost, though the appellant actually negotiated the discounted prices direct with the retailers. There were some exceptions to this. In relation to Tesco, for example, the relationship was such that the appellant continued throughout to buy the required vouchers direct; and over time the appellant took back in-house the voucher purchase process in many cases, buying direct rather than through the Hut – for reasons which were not explored in any detail before me, but do not appear relevant in any event.

12. It can readily be seen that although the detail of the Mail Rewards promotion is substantially different, it contains the same key elements as SPICE, in that the appellant's customers become contractually entitled to receive the retailer vouchers from the appellant as a result of their participation and the appellant sources those vouchers at a discount to face value – though the new element in the Mail Rewards promotion is that some vouchers are acquired by purchase from the Hut rather than directly from the retailers.

13. The precise basis on which the Hut buys and on-sells the vouchers (i.e. whether it acts as principal or as agent) was not explored in detail before me, but Mr Beal did not indicate that HMRC wished to revisit their previous acceptance that such vouchers were the subject of sequential supplies for VAT purposes (the first by the retailer to the Hut and the second by the Hut to the appellant). The contract with the Hut appeared to contemplate that the appellant would purchase the vouchers and have them delivered to the Hut for onward delivery to customers, but in practice it appears that vouchers were actually obtained from a number of retailers by the Hut and then recharged (and re-invoiced) at cost to the appellant.

The law

The EU Directive

14. Article 1(2) of Council Directive 2006/112/EC on the Common System of Value Added Tax ("the PVD") sets out the key principle behind the VAT system as follows:

> "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.
>
> On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.
>
> The common system of VAT shall be applied up to and including the retail trade stage."

15. Article 2(1)(c) of the PVD provides that "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" is to be subject to VAT; and Article 24 provides that a "supply of services" means "any transaction which does not constitute a supply of goods."

16. Article 9(1) provides that a "taxable person" for this purpose is "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

17. Article 16 deals with private use, etc., of goods of a taxable person as follows:

> "The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

> However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration."

18. Article 26 (which was the subject of detailed consideration in *ANL(1)*) deals with certain transactions which are to be treated as a supply of services for a consideration:

> "(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;
>
> (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business."

19. Article 62(2) provides that:

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

20. Finally, Articles 167 and 168 provide (in material part) that:

> "**Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.
>
> **Article 168**
>
> Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

The UK legislation

21. The provisions of Schedule 10A (Face-value Vouchers) of Value Added Tax Act 1994 ("VATA") are set out in Appendix 1 to this decision.

The case law on vouchers

22. For reasons which are touched on below, I do not consider it necessary or appropriate to summarise the voluminous case law to which I was referred on the

question of the deductibility of the appellant's input tax incurred in connection with its purchases of vouchers.

23. I do consider it appropriate however to summarise the key cases to which I was referred in relation to the VAT issues arising in respect of vouchers.

24. First, there was the ECJ decision in *Argos Distsributors Limited v Customs & Excise Commissioners* (ECJ) [1996] STC 1359. This case was concerned with establishing the correct taxable amount received by Argos on its supplies of goods which were partly or wholly paid for by retailer vouchers which Argos had itself previously issued at a discount to their face value. The ECJ held that "the consideration represented by the voucher is the sum actually received by the supplier upon the sale of the voucher" and not its (higher) face value, even if the customer who presented the voucher had no knowledge of the original issue price of the voucher. This case therefore has nothing to say about the VAT treatment of supplies of the vouchers themselves.

25. The next case I was referred to was the ECJ case of *Elida Gibbs Limited v Customs & Excise Commissioners* (ECJ) [1996] STC 1389. Again, the case was concerned with the taxable amount for which a supplier of goods was accountable. Elida Gibbs was a manufacturer of toiletries, some sold direct to retailers and some to wholesalers. Elida Gibbs operated two promotion schemes involving coupons or vouchers. In the first, it distributed "money off" coupons via newspapers and magazines; customers were entitled to deliver these to retailers in part payment for the company's products and Elida Gibbs reimbursed the discount direct to the retailers. In the second, it printed "cash back" coupons or vouchers on product packaging, which entitled ultimate consumers to obtain a price rebate direct from Elida Gibbs. It claimed to deduct the payments it made under both schemes in calculating the taxable amount for which it was liable on its sales of the toiletries. The ECJ held it was entitled to do so, on the basis that "… it would not… be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer as a taxable person, to exceed the sum finally received by him."

26. It was pointed out that this might "upset the functioning of the VAT machinery" because it would potentially require every supplier in the chain, retroactively, to adjust the price paid (and corresponding VAT amount). The ECJ disagreed, saying (at [33]) that:

> "there is no need to readjust the taxable amount for the intermediate transactions. On the contrary, that amount remains unchanged, since, for those transactions, observance of the principle of neutrality is ensured by application of the conditions for deduction set out in Title XI of the Sixth Directive. Under those conditions, the intermediate links in the distribution chains, such as wholesalers and retailers, may deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser."

27. In other words, as the intermediaries all accounted for net VAT on the basis of their profit margin and that margin was in each case unaffected as a result of the adjustment to Elida Gibbs' taxable amount, no VAT adjustments were required in the chain of supply.

28. The next case to which I was referred was the ECJ case of *Kuwait Petroleum (GB) Limited v Customs and Excise Commissioners* (ECJ) Case C-48/97; [1999] All ER (EC) 450. This case was concerned with the taxpayer's output VAT liabilities in connection with a business promotion scheme. Customers who bought its fuel (whether from the taxpayer direct or from participating retailers) were offered vouchers, issued by the taxpayer, which they could exchange with the taxpayer for goods. The taxpayer deducted input tax on its purchase of the redemption goods (which was not questioned). The court held that the redemption goods were not being supplied at a "rebate" or "discount" and accordingly it could not be said that the taxable amount it received for them was (as a result of such rebate or discount) nil. The crucial question was whether the taxpayer made a "disposal… free of charge" of the redemption goods, thus triggering an output tax liability by virtue of what was then Article 5(6) of the Sixth VAT Directive (now Article 16 PVD). The Court held that it did, and it was immaterial that it was doing so for business purposes. In reaching this conclusion, it effectively dismissed the taxpayer's argument that the goods were disposed of for a consideration (rather than free of charge), that consideration being an identifiable fraction of the price paid when the original fuel was purchased. The Court held that goods were only supplied "for a consideration" in this sense "if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied." This was a matter for the domestic courts to resolve, but it appeared unlikely in that case, because (a) the goods were described as "gifts" and (b) the price paid for the fuel by the customer was the same, whether or not he took the offered vouchers.

29. The next case to which I was referred was *Revenue & Customs Commissioners v IDT Card Services Ireland Limited* (Court of Appeal) [2006] EWCA Civ 29; [2006] STC 1252. As a preliminary point, it is important to note that this case concerned "credit vouchers" and not "retailer vouchers". The UK provisions governing the two situations are similar, but not exactly parallel in some important respects.

30. In that case, the Court of Appeal was considering a situation in which multifunction phone cards were issued by an Irish company to distributors and retailers in the UK. The cards entitled the ultimate users to access telecommunications services provided by another Irish company. Under Irish VAT law, the supply of such cards within Ireland was subject to VAT and their subsequent use to obtain telecommunications services was outside the scope of Irish VAT. Where the cards were supplied to UK users or distributors, no Irish VAT was charged on either the supply of the card or of the telecommunications services on its redemption. Under UK law, the cards were treated as credit vouchers, and in principle the consideration given for such supplies was disregarded for VAT purposes under paragraph 3(2) of Schedule 10A (see Appendix 1); when the cards were redeemed, in principle the resulting supply of telecommunications services was

subject to VAT. However, where (as in that case) the telecommunications services were supplied from Ireland to UK consumers by an Irish VAT registered trader, the place of supply of the telecommunications services was fixed under Article 9 of the Sixth VAT Directive as being in Ireland, and therefore falling outside the scope of UK VAT. The result was that no VAT was charged, either in Ireland or in the UK, on the issue or distribution of cards or their subsequent use by UK consumers.

31. HMRC sought to get around this loophole by seeking to apply paragraph 3(3) of Schedule 10A to recover what they considered to be the unpaid UK VAT from the UK suppliers of the cards by arguing that the telecommunications supplier in Ireland had "fail[ed] to account for… the VAT due on the supply" of telecommunications services when the cards were used. The difficulty facing them was that under Irish VAT law, no VAT was due on that supply, for the reasons summarised above.

32. Applying the *Marleasing* rule of interpretation, however (see the ECJ case of *Marleasing SA v la Commercial Internacional de Alimentacion SA* [1990] C-106/89), the Court of Appeal had no difficulty in finding that it was "under an obligation to interpret para 3 [of Schedule 10A] as far as possible in the light of the wording and purpose of the Sixth Directive and specifically to prevent the non-taxation of the supplies to the UK distributors of ICSIL's phonecards, or other taxpayers in the same position" (para [121]).

33. The appropriate interpretation of paragraph 3 of Schedule 10A was, in the circumstances:

> "… to read in words to widen the disapplication in para 3(3) of the disregard in para 3(2) so that the disapplication applies where the disregard would result in the non-taxation, contrary to the objectives of the Sixth Directive…, of a taxable supply of goods or services in the United Kingdom".

34. Whilst the case said a great deal about the application of the *Marleasing* principle, it said much less about the general scheme of taxation of vouchers. Arden LJ did however observe that Schedule 10A had been introduced in response to the *Argos* decision, and represented a choice from the various policy options available in response to that decision. She also observed, in passing (at [13]) that:

> "Schedule 10A also makes provision for the treatment for VAT purposes of the issue of non-credit vouchers. The scheme of the charging provisions is on the face of it similar, but it is only the first issue and not the subsequent supply of the voucher that is disregarded for the purposes of the application of VATA 1994 (and then only to the same extent as credit vouchers under para 3(3) of Sch 10A). If the phone cards issued by ICSIL were non-credit vouchers, no question could have arisen of the supply of phonecards by United Kingdom distributors to members of the public in the UK without charging VAT."

35. She did not explore the implications of this brief statement (which was, obviously, *obiter*) in any way which casts light on its relevance to the facts arising in this case.

36. The next case to which I was referred with direct relevance to vouchers was *Astra Zeneca UK Limited v Revenue & Customs Commissioners* (ECJ) [2010] STC 2298. That case involved a taxpayer which bought retailer vouchers and offered them to its employees in part satisfaction of their remuneration. When an employee elected to take a voucher (typically to a face value of slightly more than the remuneration foregone), the employer was making a supply of services (i.e. a supply of the voucher and not of the goods or services for which it could be redeemed) and that supply was being made for a consideration, namely the amount of remuneration foregone by the employee. The employer was therefore chargeable to output VAT on the consideration it received (and was also entitled to deduct the input VAT it had incurred on acquiring the vouchers in the first place).

37. The case casts little wider light on the issue, though the Court noted (with approval) that the effect of its ruling was that the employee, as consumer, ended up bearing the cost of the VAT on the goods or services ultimately supplied on redemption of the voucher.

38. Finally, I was referred to the case of *Lebara Limited v Revenue and Customs Commissioners* [2012] STC 1536. That case was again concerned with sales of phone cards (followed by the use of such cards to obtain international telecommunications services). The cards themselves contained "all the information necessary for making international telephone calls". The question referred to the ECJ in that case was, broadly, whether this amounted to two separate supplies by the telecommunications service operator (first a supply of the card to its distributors and subsequently a separate supply of telecommunications services to the end user of the card) or just a single supply. The ECJ's answer was that in this case there was just a single supply of telecommunications services to the distributors and no second supply of those services by the operator on use of the card. Effectively, as the nature and extent of the ultimate supply could be identified with clarity from the outset, and the operator entered into no contractual relationship with the end user of the telecommunications services, it was making just a single supply of telecommunications services to the distributor (and the distributor would therefore have been making a subsequent supply of such services to the end user).

39. Whilst *Lebara* is not directly relevant to the present appeal (as there is obviously no clarity, at the time of issue of the retailer vouchers in this appeal, what goods or services they will be redeemed for), it is instructive to note that the ECJ explicitly relied upon some of the basic principles of VAT in reaching its conclusion, including that "VAT is intended to tax only the final consumer and to be completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation…" and that "it is supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies".

40. It was in response to the *Lebara* decision that paragraph 7A of Schedule 10A was introduced (taking "single purpose vouchers" outside the special voucher rules altogether, thus resulting in immediate taxation of the goods or services intended to be paid for by the voucher in accordance with the *Lebara* decision).

Submissions

Introduction

41. In an attempt to assist the parties by issuing this decision quickly so that it may be possible for the expected appeal against it to be heard at the same time as the pending appeal against the Tribunal's decision in *ANL(1)*, I set out below only an outline summary of the arguments put to me.

42. Both parties structured their submissions around what they considered to be two key issues:

> (1) Whether or not the appellant is correctly to be treated as incurring no input VAT on its purchase of vouchers direct from retailers by virtue of paragraph 4(2) of Schedule 10A; and
>
> (2) If the appellant does in fact incur input VAT on such purchases, whether it is entitled to set that input VAT (and the input VAT which HMRC accept it has incurred on purchases of vouchers from the intermediary) against its output tax liabilities.

43. In developing their submissions on these points, they unavoidably moved on to a consideration of the wider VAT treatment of the supply of vouchers, mainly to demonstrate the overall coherence of their preferred answers to these questions when set in the wider context.

44. Both parties agreed that the PVD is silent on the treatment of vouchers and therefore it is necessary to pick one's way through the ECJ and UK jurisprudence on such treatment which has built up piecemeal, issue by issue. In addition, they both agreed that the UK legislation as it stood did not provide a coherent overall code which provided a wholly satisfactory answer to the questions arising in this appeal (or indeed to the taxation of vouchers generally). The differences between them essentially arose around the issue of how the existing UK legislation needed to be either supplemented, re-interpreted (by which I mean interpreted differently from the conventional interpretation prevailing hitherto) or overridden in order to provide an answer to the questions arising on this appeal which would be consistent with the general principles of EU law as emerging from the decided ECJ cases. This process is made all the more difficult because the EU itself clearly acknowledges the legislative framework in the PVD (even after the ECJ's interpretation in the decided cases) is deficient – hence the draft amending Directive that was issued by the Commission in May 2012, for which its covering press release included the following bald statement:

> "Currently there are no EU VAT rules on how transactions involving vouchers should be dealt with. In the absence of common rules,

> Member States have developed their own practices. These are not coordinated and frequently cause problems for businesses and VAT collection."

45. In essence, Mr Beal argued that there was nothing in the existing UK legislation, when interpreted and supplemented by concession as HMRC did, that was inconsistent with the PVD and the case law. In contrast, Mr Walters argued that there were certain crucial aspects of HMRC's interpretation and operation of the legislation which flew directly in the face of various fundamental principles of VAT and accordingly the UK legislation either needed to be re-interpreted to conform with those principles under the *Marleasing* approach or, if that were not possible, it needed to be overridden altogether by allowing the appellant to rely directly on the right to deduct input tax enshrined in the PVD.

The historical VAT treatment of the vouchers acquired by ANL

46. Before summarising the arguments advanced by the parties, it is appropriate to summarise the historical VAT treatment of retailer vouchers as operated in accordance with HMRC's published guidance (VAT Notice 700/7), which forms the background to this appeal:

(1) HMRC do not require the retailer to account for VAT on the issue of vouchers, relying on paragraph 4(2) of Schedule 10A.

(2) If a retailer voucher is bought from the retailer by a private consumer who then uses it to buy goods or services from the retailer, the only VAT issue that arises is that the retailer ultimately has to account for VAT (at the appropriate rate) on the supply of goods or services which it makes on redemption, the value of that supply calculated on the basis of the amount the retailer originally received on issue of the voucher (and not on its "face value", which would typically be greater) – in accordance with *Argos*.

(3) Complications only arise if vouchers are issued to someone who is not a private consumer – an "intermediary", in their terminology. A private consumer who buys a voucher and uses it to obtain goods or services is indifferent as to whether or not he is suffering a VAT charge on his purchase of the voucher, as all VAT liabilities will "stick" with him anyway. But where an intermediary (who is assumed to be a taxable person) buys a voucher from a retailer and then sells it on (perhaps at a profit), HMRC say the total consideration on that onward sale ought properly to be charged to VAT under general principles. However, if the intermediary accounts for output tax on the total sale price, it will suffer inappropriate taxation unless it is also allowed to claim input tax on its purchase of the voucher.

(4) In order to square this circle, HMRC allow the intermediary "by concession" to deduct some notional input tax on its purchase of the voucher. There is agreed to be no direct authority for this in the legislation, beyond HMRC's general "care and management" powers.

(5) In practice, the notional input tax which they allow it to deduct is calculated at a rate equal to the rate at which the issuing retailer is expected to have to account for the supplies of goods or services it ultimately makes on redemption of the voucher ("redemption supplies").

(6) Where (as is the case for most retailers whose vouchers are involved in this appeal) the retailer is in the business of making various supplies which are taxable at different rates, the retailer's "blended rate" of somewhere between 0% and 20% is typically used.[1] It is "suggested" by HMRC's guidance that the retailer should make the following statement on its invoice to an intermediary: "The issuer of the voucher will account for output tax under the face value voucher provisions in Schedule 10A VT Act 1994", but there is no requirement to state the relevant rate or amount of notional input VAT which the intermediary can reclaim (though in practice the retailers in fact do so – or at least they have done so on all the invoices which were before me in evidence). The rate so stated becomes the rate of VAT applicable to all supplies of the same voucher, by virtue of paragraph 6(5) of Schedule 10A.

(7) Thus the intermediary is essentially put back in a position of neutrality in terms of its input and output VAT, except to the extent of any profit it makes on the onward supply. HMRC accept that any such profit will therefore effectively be subject to VAT at the retailer's blended rate, rather than the standard rate.

(8) When the voucher is ultimately presented and redeemed by a supply of goods or services, the retailer will in fact account for output tax on the consideration attributable to the voucher (in the amount originally received for it, not its face value) at the rate appropriate to the relevant supply. Thus conformity with the *Argos* decision is achieved so far as the retailer is concerned; and so far as the intermediaries are concerned, apparently by concession HMRC do not require (though they would permit) any recalculation of the VAT inputs and outputs, as any such recalculations would largely cancel each other out in any event.[2]

47. HMRC maintain that this somewhat elaborate process conforms as closely as possible to the legislation which Parliament has seen fit to enact, whilst also complying with all the general principles of VAT. An example of its working, using basic numbers, is set out at Appendix 2 to this decision. It is acknowledged that this

[1] Clearly at this point it is not known what supplies will be made in exchange for the redemption of the voucher, accordingly this can only represent an attempted approximation to the true rate.

[2] It will be noted that if a voucher with an inherent "blended rate" of, say 5% is in fact used to buy standard rated goods or services, any profit in the chain of supply of the voucher will remain taxed only at the 5% rate, the other 15% of tax on that profit therefore being foregone by concession. This point does not appear to have been considered by the ECJ when it made the comments at [26] above in the *Elida Gibbs* case.

represents an imperfect approach, but it is submitted that it achieves a fair and reasonable result through practical means.

48. The existing structure may have been sufficiently fair and workable in practice (in spite of its obvious technical flaws) to avoid any challenge up to now from retailers, intermediaries or private consumers. However, questions about its technical robustness are brought into sharp focus when (as here) a taxable person buys retailer vouchers and claims to be using them in the course of its taxable business.

49. Matters came to something of a head on that issue in *ANL(1)*. Whilst that appeal was concerned with a decision about the appellant's liability to account for output tax on its delivery of the vouchers to its customers, there had been no indication from HMRC up to that time that they had any dispute with the appellant's ability to recover the input tax charged to it, whether it be the charge on purchases of vouchers from an intermediary or the "notional" input tax on the initial issue of vouchers directly by the retailers. It was only in response to the questions I raised after the hearing in *ANL(1)* that HMRC argued for the first time that the appellant should not be permitted to recover the output tax "noted" by retailers on their invoices to it for the directly issued vouchers, citing paragraph 4(2) of Schedule 10A. That is the position they take in this appeal, whilst accepting that no such objection applies in relation to input tax incurred on the purchase of vouchers from an intermediary (though they dispute, on other grounds, the recoverability of all input tax on the purchase of vouchers, whether direct from the retailer or from an intermediary).

50. Following the decision in *ANL(1)*, the appellant has sought to recover the input VAT supposedly charged to it on its purchases of retailer vouchers both from the retailers and from its intermediary. Having had their claim for output tax from the appellant rejected by the Tribunal in *ANL(1)*, HMRC (whilst appealing that decision) have sought to deny the appellant its input tax in case that rejection was correct.

HMRC's submissions

51. Mr Beal submitted that there was clear warrant in paragraph 4(2) of Schedule 10A for the denial of any input tax to the appellant in a situation where it bought vouchers direct from retailers which it intended to use in its own business. Under that paragraph, the taxable consideration for the supply to it was nil and therefore either (a) it was not a taxable supply at all (he referred to Article 2(1)(c) PVD and section 5(2)(b) VATA) or (b) if it was such a supply, its taxable amount (and therefore the appellant's input tax) was nil. In view of the appellant's intended use of the vouchers, it was entirely appropriate for HMRC to deny it the concessionary benefit of the notional input tax that would be allowed to a normal intermediary.

52. That disposed of any claim arising from the directly-issued vouchers.

53. So far as the vouchers purchased from the intermediary were concerned, it was correct that output tax liabilities arose on the supply of those vouchers to the appellant, and in the normal course it would have been entitled to a corresponding input tax credit. However, in a situation where the appellant's intended use of the

vouchers was to give them away free of charge to its customers, it was not correct to treat the input tax as recoverable; the purchase of the vouchers had a direct and immediate link with those transactions and therefore no right to deduction of input VAT arose. In their statement of case, HMRC characterised the appellant as being "effectively… the final consumer [of the vouchers], since it has not accounted for output tax on the supply of [them] to its customer".

Appellant's submissions

54. Mr Walters, on behalf of the appellant, submitted that in relation to paragraph 4(2) of Schedule 10A, it could be interpreted, pursuant to the *Marleasing* decision, as a provision "relieving Issuers from the obligation of accounting for the VAT included in the consideration for which FVV's are sold on issue, until such time as the FVV's are redeemed (when the actual amount of VAT which must be accounted for will be known)." As such, it did not prevent the VAT included in the consideration given on issue of the vouchers from counting as input tax in the hands of the persons to whom they were issued. This prevented distortions by eliminating inappropriate differences in the VAT treatment of supplies which were essentially the same (i.e. by original issuers and by intermediaries of the same vouchers).

55. In the alternative, he submitted that if paragraph 4(2) could not be interpreted in this way, it should be disregarded altogether as being inconsistent with Article 168 PVD, which gave directly-effective rights to deduct input tax on supplies made to it in these circumstances.

56. As to HMRC's wider argument about the ability to deduct any input tax incurred on the acquisition of vouchers, given their intended use, he submitted that there was a direct and immediate link between the appellant's purchase of the vouchers and its taxable activity of selling newspapers and advertising; the expenditure on the vouchers was simply part of the appellant's overall marketing budget, incurred purely in order to enhance its circulation. Any suggestion that it should lose its right to deduct simply because it did not charge for the vouchers was inconsistent with the clear position in the PVD (as accepted by HMRC up to the decision in *ANL(1)*) to the effect that any such dealings were dealt with as matters potentially giving rise to output tax, it being acknowledged that input tax deduction was available. In effect, it was an attempt by HMRC to re-litigate the issues that had already gone against them in *ANL(1)*.

An alternative approach – Pre-hearing note and the responses to it

57. I considered the papers at some length before the hearing, and asked the parties, in a pre-hearing note, to address their submissions at the hearing in part to a possible alternative approach to the disputed matters.

58. This alternative approach was premised on the hypothesis that paragraph 4(2) of Schedule 10A might be interpreted so as to take entirely out of account the consideration given on issue of the voucher when calculating the VAT due on any

supply of the voucher (i.e. including its issue and any subsequent supply, but not its redemption).

59. A summary of the effect of that approach is set out in Appendix 3. In broad terms, it can be seen that it results in the ultimate consumption of the goods or services being taxed at the rate appropriate to them (as in HMRC's structure set out in Appendix 2), and in any profit on the voucher as it passes through the hands of any intermediaries being taxed in full at the standard rate (as opposed to HMRC's structure, which taxes any such profit at the retailer's blended rate). It avoids artificial distinctions between the tax treatment of vouchers acquired directly from retailers and those acquired through intermediaries.

60. In broad terms, neither party was attracted to this approach.

61. Mr Beal's criticism of it was that although it appeared to achieve largely the same end result as HMRC's treatment as summarised at [46] above, it was conceptually wrong because it effectively amounted to applying a margin scheme to vouchers without any authority from the PVD to do so, and it was also not the way that Parliament had chosen to deal with vouchers (as paragraph 4(4) of Schedule 10A expressly provides that any "post-issue" supply of a retailer voucher should be treated in the same way as any other voucher, thus subjecting the full value of such supply to VAT).

62. Both of them submitted that VAT is meant to be a tax on turnover and whilst (in Mr Beal's submission) there was authority in paragraph 4(2) of Schedule 10A for disregarding the consideration given on issue of the vouchers, they both submitted there was no warrant for disregarding an important part of the underlying turnover represented by the value constituted in the vouchers.

Discussion and decision

63. For reasons which will become apparent, I propose to take the two issues identified by the parties in reverse order.

Whatever input tax exists for ANL, is it entitled to deduct it?

64. This was effectively "issue 2" referred to at [42(2)] above.

65. I can dispose of this point briefly, in spite of the voluminous authorities to which I was referred in relation to it (as listed in Appendix 4).

66. It seems to me that the thrust of Mr Beal's argument is inconsistent with the structure for dealing with such matters which has been adopted in the PVD (where the approach of both Article 16 (goods) and Article 26 (services) is to impose an output tax liability in the appropriate circumstances, rather than to deny input tax).

67. We are clearly involved here with a series of business promotion schemes structured along normal commercial lines. The appellant's clear purpose in all three schemes was to increase newspaper sales, and HMRC have not suggested otherwise.

Whilst the *Kuwait* case was concerned with supplies of promotional goods rather than vouchers (and therefore services), that distinction is, in my view, irrelevant for the purposes of considering the allowability of input tax. As was said by the ECJ in *Kuwait* at [19]:

> "The first point to note is that, in the present case, the exchange of goods for Q8 vouchers was effected for business purposes, since – as the national court found – the object of the promotion scheme was, both for Kuwait Petroleum and for the independent retailers taking part, to increase fuel sales. **For that reason, a taxable person in the same situation as Kuwait petroleum is authorised to deduct, in accordance with article 17 (2) (a) of the Sixth Directive, the amount of input VAT paid for the purchase of those goods**." *[emphasis added]*

68. If taken to its logical conclusion, Mr Beal's argument would deny input tax recovery on purchases of goods for business promotion schemes, in direct contravention of this clearly expressed view of the ECJ.

69. I also note that in *Astra Zeneca*, the ECJ focused solely on the output tax liability, it being taken for granted that if an output tax liability arose, the input tax incurred on acquisition of the vouchers would be available to set against it.

70. I therefore consider that, to the extent input tax actually arises on the appellant's purchases of vouchers for the purposes of the three promotion schemes, that tax is recoverable as input tax by the appellant, subject to the normal rules.

What input tax arises on ANL's purchases of vouchers?

71. This is effectively "issue 1" as referred to at [42(1)] above. In summary, HMRC accept that where the appellant has purchased the vouchers from an intermediary, input tax arises at the retailer's blended rate on the whole consideration paid by the appellant for the voucher; but where the appellant has purchased the vouchers direct from the retailers, they claim that no input tax arises, by virtue of paragraph 4(2) of Schedule 10A.

72. This difference of treatment, depending on the historical accident of whether the appellant sourced the vouchers itself or through its intermediary, appears (at the very least) odd. It also sits very uneasily with the principle of fiscal neutrality as propounded by the ECJ in *Rank Group plc v Revenue & Customs Commissioners* (ECJ) [2012] STC 23 (at [36])*:*

> "The principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle."

73. It is also integral to HMRC's argument that their allowance of input tax to an intermediary (on what is effectively a discretionary basis, outwith any express

statutory authority) when a retailer supplies vouchers to that intermediary (even though no corresponding output tax arises at that stage) is appropriate to preserve the integrity of the VAT system. It seems to me that, on the contrary, such an approach undermines rather than preserves its integrity. It interposes HMRC's discretion into a fundamental area which ought to be clearly governed by law and also appears to depend upon the state of mind of the recipient of the supply when it is made to him – i.e. whether or not he intends at that time to on-supply as an intermediary (and, as Mr Walters pointed out, there is no clarity about what amounts to an intermediary for these purposes).

74. Then again, HMRC's interpretation and operation of the provisions necessarily reflects a degree of uncertainty about the rate of VAT to be applied on any supply of vouchers issued by a "blended rate" retailer at their time of supply (as paragraph 6(5) of Schedule 10A provides that the applicable rate is only determined when the voucher is redeemed). This does not sit easily with the fundamental EU law principle of legal certainty, and it is a somewhat unattractive argument to say that this does not in practice matter because of the way in which HMRC require vouchers to be dealt with as a matter of mixed law and concession.

75. But if HMRC's position involves some difficulties, so does the appellant's. In particular, it requires either a very broad application of the *Marleasing* principle (which Mr Beal would criticise as going beyond interpretation and into the realm of judicial legislation) or a straightforward disapplication of apparently clear statutory words on the basis of direct applicability of the right to deduct input tax enshrined as a central feature of the PVD.

76. We are, to borrow the words of Lord Sumption at [23] in *Commissioners for Her Majesty's Revenue and Customs v Pendragon plc and others* [2015] UKSC 37, here dealing (as both parties acknowledge) with an "imperfect legislative scheme" and my view of the applicable law, in the light of my above comments, is as follows.

77. The right of a taxable person to deduct input VAT is a fundamental feature of the VAT system. It is what ensures that the ultimate burden of the tax falls entirely on the end consumer. Requiring a taxable person to account for output tax without giving him the right to deduct input tax will ultimately result in double taxation.

78. In legislating to fill the admitted lacuna on vouchers left by the PVD, it cannot be open to national legislatures to deny that core right.

79. When a retailer (or indeed any other taxable person) issues a voucher, *Lebara* tells us that if there is sufficient certainty about the goods or services which are to be supplied on redemption of the voucher, then the supply is a supply of those services (and taxed accordingly at the time of issue of the voucher).

80. However, where there is insufficient certainty about the redemption goods or services (as will generally be the case for retailer vouchers), the supply of a voucher (including on issue) is the creation or transfer of a bundle of intangible rights amounting to a supply of services entirely separate and distinct from any ultimate

supply that might be made on redemption – the UK legislation acknowledges that (see paragraph 2 of Schedule 10A) and it was confirmed in *Astra Zeneca* (at [26]).

81. Nothing in the PVD permits such a supply of services (whether on original issue of the voucher or subsequently) to be outside the scope of VAT, and it must therefore be a taxable supply. The buyer of the voucher has paid for it, and there is no basis in the PVD for allocating any other consideration to that supply than the subjective consideration received by the person making it. On the basis of the PVD as it currently stands, therefore[3], there is a taxable supply of the voucher by the retailer, for which the consideration received by the retailer is the taxable amount, including VAT.

82. But if a retailer has to account for output VAT on its supply of a voucher and is also subsequently required to account for output VAT on the supply of goods or services which it makes on redemption of the voucher, there will clearly be double taxation. This would be in breach of the general principles of VAT as set out in the PVD, and must be avoided.

83. There are different ways of doing so. The most obvious would be to exclude the consideration originally given for the voucher on issue in calculating the taxable amount on any supply of the voucher (including on its initial issue) but instead to bring that consideration into account when the voucher is redeemed, otherwise maintaining the strict position as set out above (i.e. effectively the structure mooted in my pre-hearing note). This would have the benefit of charging any profit on second and subsequent supplies of the voucher to VAT at the standard rate (reflecting the distinct character of the supply of services comprised in the "voucher rights" from the character of the ultimate redemption goods or services), irrespective of the rate properly applying to the ultimate redemption supply. It would leave the original issue consideration to be taxed at the rate appropriate to the redemption goods/services, in accordance with the *Argos* decision, when the voucher is redeemed. It would also reflect the economic reality that a voucher is essentially a means to enjoyment of potentially taxable goods and services, not an end in itself, and where vouchers are not redeemed it would avoid taxation of consumption which, in substance, never actually takes place.[4]

84. However, Parliament appears (on HMRC's interpretation) to have adopted what might charitably be called a "modified" version of this structure, by simply relieving the original issuer of any obligation to account for VAT on issue whilst leaving in place the requirement to charge VAT on all subsequent supplies of the voucher (and, by remaining silent on the point, requiring the original issuer to account for output VAT only when it redeems the voucher for goods or services). This gives

[3] It is relevant, but only in passing, to note that the European Commission has been grappling with the issue of VAT on vouchers since at least 2006, and in spite of recognising the need for amendments to the PVD to address the whole area, the proposed amending Directive issued in 2012 still remains in draft.

[4] It is worth noting, however, that the proposed amending Directive is based on a somewhat different structure.

rise to obvious double taxation in the hands of the first onward supplier of a newly-issued voucher (which will be required to account for output VAT without having any input VAT to set against it) and this defect is supposedly remedied by HMRC allowing that first onward supplier to claim an entirely notional (and, indeed, generally approximate) amount of VAT included in its purchase price of the voucher – except where they do not consider it appropriate to allow it.

85. In the light of the wording and purpose of the PVD, I do not consider this interpretation of Schedule 10A can be allowed to apply. But how should it be modified?

86. It would be tempting to adopt the approach set out in my pre-hearing note. However, I am persuaded by the arguments of both learned counsel that, whilst it might be an appropriate way of dealing with matters if one were starting with a clean sheet of paper unencumbered by Schedule 10A, there is a less radical approach which achieves the objectives of the PVD whilst respecting the underlying principles of the structure of Schedule 10A.

87. The "underlying thrust" or "grain" of Schedule 10A is, it seems to me, to resolve the potential double taxation problem by essentially treating the ultimate redemption supply of goods or services as the crucial taxable supply, applying the VAT rate proper to that supply as the VAT rate also applicable to any supply of the retailer voucher, and merging the retailer's supply of the voucher (when issued) with the ultimate redemption supply, thus effectively resulting in a single taxable supply (so far as the retailer is concerned) which is completed when the voucher is redeemed. At that point (to borrow the words of Advocate-General Mengozzi in *Astra Zeneca* at [46]), the retailer "'completes the circle' and pays over to tax authorities… the VAT collected in supplying the voucher to the intermediary."

88. It is inherent in this view of matters that the retailer does still make a taxable supply of the voucher when issued, and the true effect of paragraph 4(2) is simply to relieve the retailer of accounting for the tax on that supply on the basis that it will ultimately account for the correct amount of tax when the voucher is redeemed and the original supply of the voucher is effectively subsumed into the redemption supply (i.e. the supply of goods or services made in exchange for redemption of the voucher).

89. It follows that, in the light of the wording and purpose of the PVD, paragraph 4(2) should be interpreted as not preventing from arising the input tax which the PVD requires to arise for the original recipient of the voucher when issued. Whilst the rate of tax would, under normal rules, be the standard rate (absent any provision in the PVD permitting a lower rate), given the mechanism adopted in Schedule 10A for eliminating the potential double taxation – i.e. the effective subsuming of the voucher supply within the redemption supply (and given the comments in *Elida Gibbs* referred to at [26] above), it is appropriate for that rate to be the lower blended rate specified by the retailer which applies to the redemption supply.

90. It follows that I consider the appellant does incur input tax, at the rate inherent in the vouchers, on its acquisition of the vouchers, whether by direct purchase from the retailers or by purchase from an intermediate taxable supplier.

91. I have already found (see [70] above) that the appellant should be entitled to recover this input tax.

92. This does of course mean that the appellant is entitled to recover input VAT on what is, ultimately, private consumption of the redemption goods or services. This does not cast doubt on the conclusion I have reached, for the simple reason that that point is addressed in the context of the appellant's output tax liability (if any) under PVD Article 26 – with which *ANL(1)* is concerned. In short, as originally thought, that is (or should be) the crucial point of disagreement between the parties.

93. It follows that I allow the appeal in principle.

94. As I was informed this is a complex category case in which there has been no request to opt out of the costs shifting regime, the appellant is entitle in principle to its costs of this appeal. I direct, however, that no further steps need be taken to enforce that entitlement, pending resolution of the appeal in *ANL(1)* and any appeal in this case. Specifically, time for delivery of a formal application for costs and any associated schedule of costs claimed is extended generally until further order on the application of either party.

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

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 13 AUGUST 2015

Appendix 1

Schedule 10A VATA 94

FACE-VALUE VOUCHERS

Meaning of "face-value vouchers" etc

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

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

Nature of supply

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.

Treatment of credit vouchers

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

(a) is not a person from whom goods or services may be obtained by the use of the voucher, and

(b) undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained.

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

(2) The consideration for any supply of a credit 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 any of the persons from whom goods or services are obtained by the use of the voucher 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) The Treasury may by order specify other circumstances in which sub-paragraph (2) above does not apply.

Treatment of retailer vouchers

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

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

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

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

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

(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.

Treatment of postage stamps

5 The consideration for the supply of a face-value voucher that is a postage stamp shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the stamp.

Treatment of other kinds of face-value voucher

6 (1) This paragraph applies to a face-value voucher that is not a credit voucher, a retailer voucher or a postage stamp.

(2) A supply of such a voucher is chargeable at the rate in force under section 2(1) (standard rate) except where sub-paragraph (3), (4) or (5) below applies.

(3) Where the voucher is one that can only be used to obtain goods or services in one particular non-standard rate category, the supply of the voucher falls in that category.

(4) Where the voucher is used to obtain goods or services all of which fall in one particular non-standard rate category, the supply of the voucher falls in that category.

(5) Where the voucher is used to obtain goods or services in a number of different rate categories –

(a) the supply of the voucher shall be treated as that many different supplies, each falling in the category in question, and

(b) the value of each of those supplies shall be determined on a just and reasonable basis.

Vouchers supplied free with other goods or services

7 Where –

(a) a face-value voucher (other than a postage stamp) and other goods or services are supplied to the same person in a composite transaction, and

(b) the total consideration for the supplies is no different, or not significantly different, from what it would be if the voucher were not supplied,

the supply of the voucher shall be treated as being made for no consideration.

Exclusion of single purpose vouchers[5]

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

Interpretation

8 (1) In this Schedule –

"credit voucher" has the meaning given by paragraph 3(1) above;

"face value" has the meaning given by paragraph 1(2) above;

"face value voucher" has the meaning given by paragraph 1(1) above;

"retailer voucher" has the meaning given by paragraph 4(1) above.

(2) For the purposes of this Schedule –

(a) the "rate categories" of supplies are –

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

[5] this paragraph only applies in relation to supplies of face-value vouchers issued on or after 10 May 2012 (Finance Act 2012, s 201)

(ii) supplies chargeable at the rate in force under section 29A (reduce rate),

(iii) zero-rated supplies, and

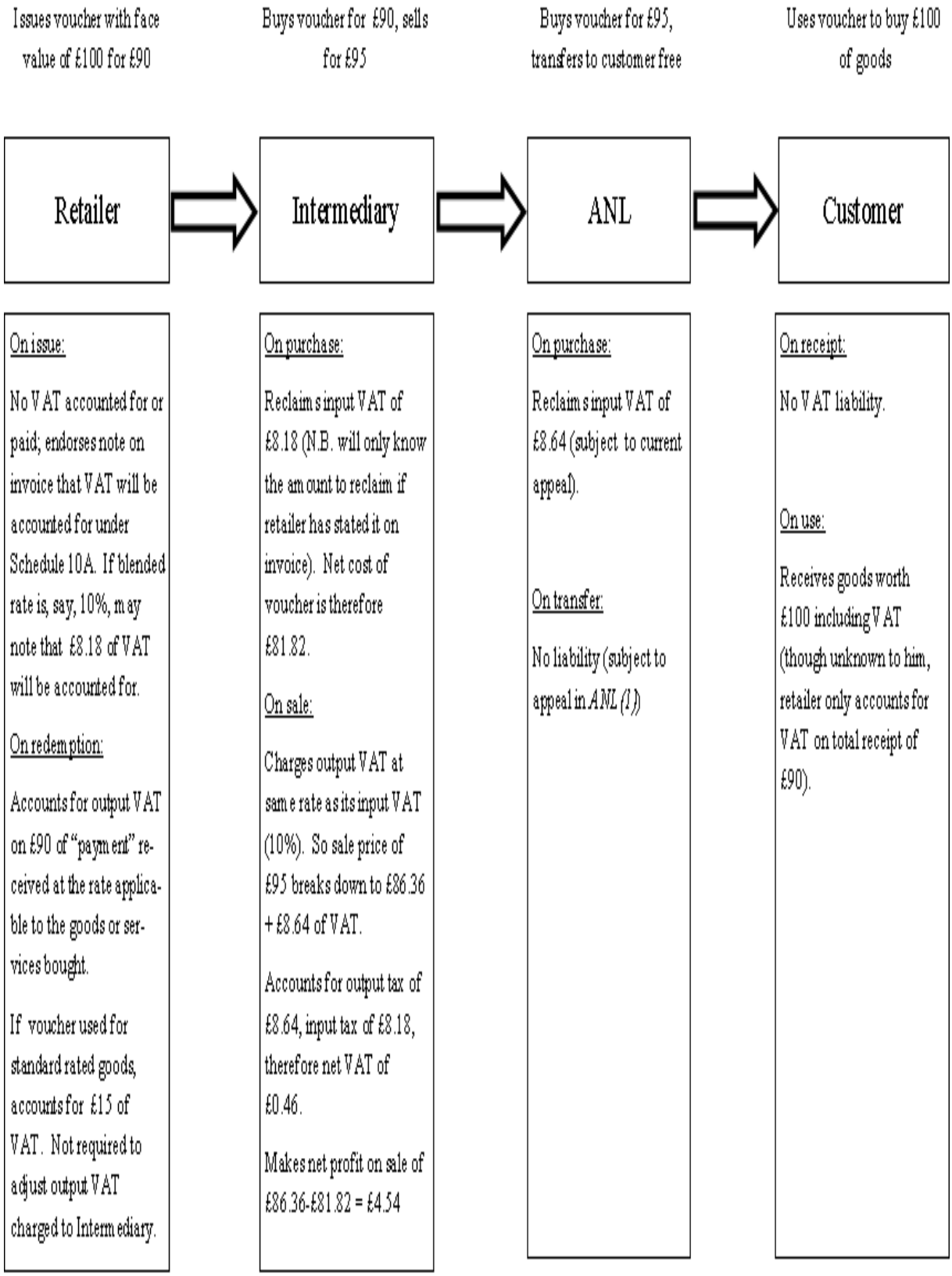
(iv) exempt supplies and other supplies that are not taxable supplies;

(b) the "non-standard rate categories" of supplies are those in sub-paragraphs (ii), (iii) and (iv) of paragraph (a) above;

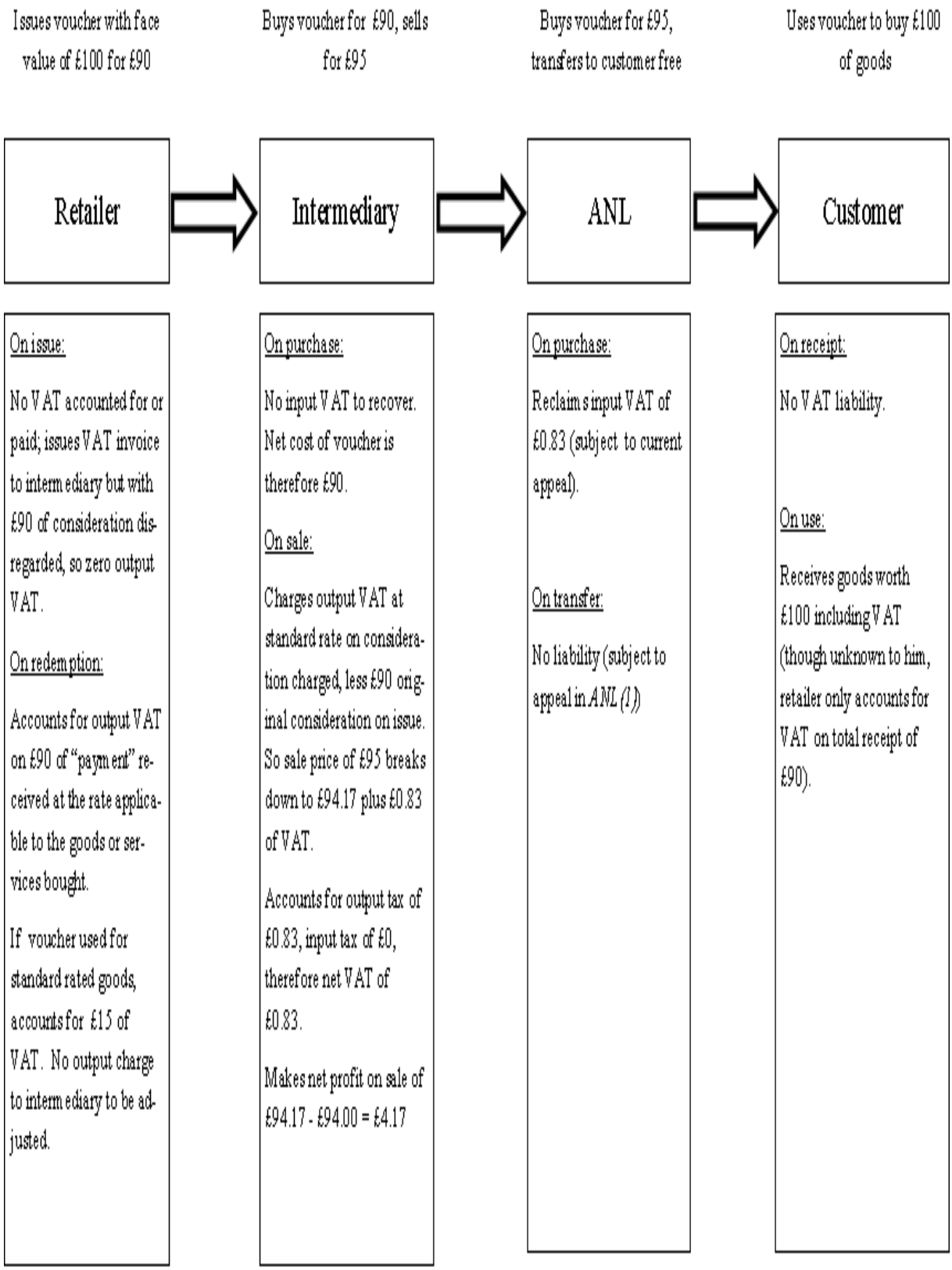
(c) goods or services are in a particular rate category if a supply of those goods or services falls in that category.

(3) A reference in this Schedule to a voucher being used to obtain goods or services includes a reference to the case where it is used as part-payment for those goods or services.

Appendix 2 - HMRC's operation of VAT



Appendix 3 - Alternative Scenario



Appendix 4

Main cases on deductibility of input tax cited in argument

B.L.P. Group PLC. v Customs & Excise Commissioners (ECJ) [1995] Case C-4/94; [1996] 1 W.L.R. 174

Midland Bank P.L.C. v Customs & Excise Commissioners (ECJ) [2000] Case C-98/98; [2000] 1 W.L.R. 2080

Abbey National plc v Customs & Excise Commissioners (ECJ) [2001] STC 297

Dial-a-Phone Limited v Customs & Excise Commissioners (Court of Appeal) [2004] EWCA Civ 603; [2004] STC 987

Kretztechnik AG v Finanzamt Linz (ECJ) [2005] STC 1118

Mayflower Theatre Trust Limited v Revenue & Customs Commissioners (Court of Appeal) [2006] EWCA Civ 116; [2007] STC 880

Investrand BV v Staatssecretaris van Financien (ECJ) [2008] STC 518

Securenta Gottinger Immobilienanlagen und Vermogensmanagement AG (as legal successor of Gottinger Vermogensanlagen AG) v Finanzamt Gottingen (ECJ) [2008] STC 3473

Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financen (ECJ) [2009] STC 935

Skatteverket v AB SKF (ECJ) [2010] STC 419

Bonik EOOD v Direktor na Kirektsia 'Obzhalvane I upravlenie na izpalnenieto' Varna pri Tsentralno upravlenie na Satsionalnata agentsia za prihodite (ECJ) [2013] STC 773

BAA Limited v Revenue & Customs Commissioners (Court of Appeal) [2013] EWCA Civ 112; [2013] STC 752

Finanzamt Saarlouis v Heinz Maalburg (ECJ) [2014] Case C-204/13

TLLC Limited v Revenue & Customs Commissioners (First-tier Tribunal) [2013] UKFTT 467 (TC); [2014] SFTD 438

Nagle & Kemsley T/A Simon Templar Business Centre v Revenue & Customs Commissioners [2014] UKFTT 131 (TC)

Chancellor, Masters and Scholars of the University of Cambridge v Revenue and Customs Commissioners (Upper Tribunal) [2015] UKUT 305 (TCC)

UAB Sveda v Valstybine mokesciu inspekcija prie Lietuvos Respublikos finansu ministerijos (ECJ – Advocate General's opinion only) [2015] Case C-126/14