TC03256

Appeal number: TC/2012/02292

VAT – retailer vouchers – delivery to customers as part of newspaper sales promotional scheme – whether articles 3 and 5 of the Value Added Tax (Supply of Services) Order 1993 apply to impose an output tax liability by reference to the cost of the vouchers – whether the vouchers were used for a purpose other than a purpose of the business of the Appellant – held no – preliminary issue decided in favour of the Appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASSOCIATED NEWSPAPERS LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
HARVEY ADAMS FCA

Sitting in public in 45 Bedford Square, London on 17 April 2013 with subsequent written submissions

John Walters QC, instructed by Smith & Williamson, for the Appellant

Michael Jones of 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 a particular aspect of a sales promotional scheme devised by the Appellant with a view to increasing its readership.

2. As part of the scheme, it obtained retail vouchers from well known retailers and sent them to its customers who participated in the scheme.

3. This appeal, as notified to the Tribunal, was concerned with the correctness of a particular decision issued by HMRC to the effect that the Appellant was required to account for output VAT, when it sent the vouchers to its customers, based on its own cost of acquiring the vouchers.

4. In preparing for the hearing, however, it became apparent to the Tribunal that there were some wider issues concerning the structure of the sales promotion scheme as a whole and the historical treatment of certain aspects of it for VAT purposes that were likely to have a bearing on the comparatively narrow point at issue before it.

5. In particular, it appeared to the Tribunal that the Appellant might have been incorrectly charged VAT on its purchase of the retail vouchers. The Tribunal wished to establish whether this was correct and whether there were any resulting implications for the issue which it was being asked to decide. The parties were not in a position to assist the Tribunal at the hearing on that matter and the Tribunal therefore sought further written submissions from the parties on a number of questions designed to assist it in considering the wider issues.

The facts

6. We received a bundle of documents and heard oral evidence from Neil Jagger, the former Circulation Director of the Appellant. The facts, so far as they emerged from that evidence, were not disputed.

7. The Appellant publishes the Daily Mail and the Mail on Sunday newspapers.

8. 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). There were minor variations, but the basic structure of the SPICE promotions was as follows.

9. 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 Sainsburys, 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 papers, 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 thoughout the promotional period).

10. The Appellant's research showed this particular promotion to be far more successful than earlier promotion schemes such as free CDs or DVDs available with the papers. Essentially the underlying idea was that if a customer could be persuaded to take the titles for 12 or 13 weeks, that was long enough to establish the habit and therefore reduce the likelihood of cancellation once the initial promotional period expired. This has proved to be the case, with retention rates 6 months after the expiry of the promotional period running at roughly double what had been achieved from other promotional schemes. As a result, the Daily Mail's market share grew from 19.2% in 2006 to 21.7% in late 2012, and the Mail on Sunday's share grew from 17.6% to 20% over the same period. In addition, the SPICE promotions have enabled the Appellant to build a very valuable customer database.

11. This appeal is concerned only with the VAT treatment of the retailer vouchers which were sent to the customers and newsagents at the end of the promotional period.

12. We were informed that the Marks & Spencer vouchers were the most popular and therefore the argument was focused around those vouchers (though the principles should apply equally to vouchers sourced from the other retailers involved).

13. The vouchers were issued direct to the Appellant by Marks & Spencer. The Appellant was actually able to negotiate a purchase price for the vouchers which represented a discount to the face value.

14. It appears that Marks & Spencer charged VAT to the Appellant on its issue of the vouchers. At the hearing in response to the Tribunal's question, neither party was able to explain why this should be, given the terms of paragraph 4(2) of Schedule 10A Value Added Tax Act 1994 ("VATA94"), which at all material times has provided as follows:

> "(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."

15. The parties are agreed that the Marks & Spencer voucher is a "retailer voucher" for these purposes.

16. The rate at which Marks & Spencer charged VAT was, we were informed, less than the standard rate. At the hearing, no justification could be provided for the rate charged. The reason for the reduced rate does not matter for the purposes of this decision, though we infer it can be explained as an average output VAT rate charged by Marks & Spencer on all its sales (reflecting the mix of standard and zero-rated supplies that it makes).

17. The Appellant wrote to HMRC 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 (which is not relevant for the purposes of this decision) and sought HMRC's confirmation that they agreed with it.

18. By letter dated 5 November 2007, HMRC 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."

19. 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.

20. In fact it was on 27 July 2009 that HMRC 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."

21. 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."

22. The Appellant immediately wrote to HMRC 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 HMRC's view should have changed.

23. This resulted in further activity (both correspondence and meetings, we were not supplied with detail) over the next two years, before HMRC wrote a formal decision letter dated 18 October 2011.

24. 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 amount 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."

25. Following a statutory review, HMRC's decision was confirmed in a letter dated 15 December 2011.

26. That letter crossed with a further submission from the Appellant, in which it raised the argument which was subsequently deployed before the Tribunal. That argument could be summarised as being that paragraph 3 of the Value Added Tax (Supply of Services) Order 1993 ("SoSU") only applies where a business makes available bought-in services to a third party "for a purpose other than a purpose of the business"; in this case, the vouchers were made available to customers as an integral

part of the promotion scheme and they were therefore made available to customers wholly for the purposes of the Appellant's business.

27. HMRC's response to this argument was set out in a further letter dated 6 January 2012, in which they said:

> "There is a fundamental link between consideration and supply and the law provides for certain deemed supplies to occur (and hence a liability to output tax) without consideration. The free provision of bought in services gives rise to a VAT liability. In general terms, where services have been the subject of an input tax credit subsequent private or non-business use will subject the business to a deemed supply and an output tax liability on the basis of the cost of provision."

28. In a letter dated 27 January 2012, the Appellant developed its earlier arguments in more detail, but on 1 February 2012 HMRC replied:

> "I have explained in my conclusion letter of 20 December 2011 HMRC policy have been consulted in this case; the policy is, where face value vouchers are purchased by businesses for the purposes of giving them away for no consideration (e.g. 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 (Supplies of Services) Order 1993 (SI 1993/1507). Therefore all vouchers given away for no consideration will be liable to output tax to the extent of the input tax claimed."

29. It is notable that this wording reproduces, almost verbatim, the text of paragraph 14 of HMRC's VAT Information Sheet 12/03, issued August 2003. It did not even purport to address the arguments actually put forward in the Appellant's letter dated 27 January 2012.

30. The Appellant now appeals against the decision issued on 18 October 2011 (and subsequently upheld on review), as amplified and explained in the subsequent correspondence.

31. 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. We presume however that it has put HMRC on notice of its intention to recover such input VAT from that date if it wins this appeal.

The law

EC Directives and UK legislation

32. Article 2 of Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ("the PVD") subjects to VAT, inter alia, "the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

33. Article 16 of the PVD provides 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."

34. Article 26 of the PVD provides as follows:

> 1. Each of the following transactions shall be treated as a supply of services for 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.
>
> 2. Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition."

35. We should mention in passing that whilst this appeal is not directly concerned with disposals of goods, the parties were agreed that the contrast between the provisions of Article 16 and Article 26 was instructive and relevant. These provisions closely follow similar provisions contained in Articles 5(6) and 6(2) of the predecessor 6th VAT Directive (77/388/EEC).

36. Under the terms of the PVD, therefore, "the supply of services carried out free of charge by a taxable person…. for purposes other than those of his business" is to be treated as a supply of services for a consideration, and accordingly subject to VAT.

37. It is common ground between the parties that the delivery by the Appellant of the vouchers to its customers pursuant to the SPICE campaign amounted to a supply of services by it. There had been some suggestion that the Appellant might argue that the supply was not "free of charge", but that line of argument has been dropped. The only question, in terms of the PVD, is therefore whether the supply is made by the Appellant "for purposes other than those of [its] business".

38. The parties referred us to no provisions in the PVD dealing expressly with vouchers. It is left to domestic legislation to grapple with this area.

39. In the UK, Schedule 10A VATA94 (headed "Face-Value Vouchers") attempts to cover much of it. Schedule 10A is concerned (as its heading implies) with "face-value vouchers", which it defines (in paragraph 1) as "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", and the "face value" is the amount so stated. It is common ground that we are concerned with face-value vouchers in this appeal.

40. Paragraph 2 of schedule 10A makes it clear that both the issue and any subsequent supply of a face-value voucher is a supply of services for the purposes of VAT.

41. There are various different types of face-value vouchers, and the type we are concerned with in this appeal is a "retailer voucher", as defined in paragraph 4(1) of schedule 10A. This is:

> "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."

42. Paragraph 4(2) goes on to say (subject to an exception in paragraph 4(3) that will only apply in somewhat unusual circumstances):

> "(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."

43. Finally, paragraph 4(4) of schedule 10A provides that "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". Paragraph 6 is broadly concerned with ensuring that the rate of VAT payable on any relevant supply of the voucher conforms with the rate of VAT applicable to the goods or services which it ultimately "pays" for. The obvious difficulty (i.e. what rate should be applied when the VAT rate applicable to the ultimate goods or services is not known at a time when the voucher is supplied) is addressed by saying that in such circumstances, the rate is effectively to be determined "on a just and reasonable basis".

44. The overall scheme in Schedule 10A is therefore that, in general terms, the original issue by a retailer of a face-value voucher carries no VAT, but any subsequent dealing with it does (and the rate of VAT applicable is to be the same as the rate applicable to the goods or services which the voucher buys). This overall scheme gives rise to a great many questions, some of which are touched on below.

45. Turning to the main focus of this appeal, the output tax position of the Appellant, the above provisions of the PVD are implemented in UK law in the Value

Added Tax (Supply of Services) Order 1993 ("SoSO"). Article 3 of SoSO provides (so far as relevant) as follows:

> "3. Subject to articles 6… and 7 below, where a person carrying on a business puts services which have been supplied to him to any private use or uses them, or makes them available to any person for use, for purposes other than a purpose of the business he shall be treated for the purposes of the Act as supplying those services in the course or furtherance of the business except for the purposes of determining whether tax on the supply of the services to him is input tax of his under section 24 of the Act.
>
> ….
>
> 5. The value of a supply which a person is treated as making by virtue of this Order shall be taken to be that part of the value of the supply of the services to him as fairly and reasonably represents the cost to him of providing the services.
>
> 6. This Order shall not apply in respect of any services –
>
> (a) which are used, or made available for use, for a consideration;
>
> (b) except those in respect of which the person carrying on the business has or will become entitled under section 25 and 26 of the Act to credit for the whole or any part of the tax on their supply to him;
>
> ….
>
> 7. Nothing in this Order shall be construed as making any person liable for any tax which, taken together with any tax for which he was liable as a result of a previous supply of the same services which he was treated as making by virtue of this Order, would exceed the amount of input tax for which he has or will become entitled to credit under sections 25 and 26 of the Act in respect of the services used, or made available for use, by him; and, where the tax chargeable would otherwise exceed the amount of that credit –
>
> (a) he shall not be treated as making a supply of the services where the amount of that credit has already been equalled or exceeded; and
>
> (b) in any other case, the value of the supply shall be reduced accordingly."

46. In summary, therefore, the general effect of SoSO is that if a taxable person acquires services and "uses them, or makes them available to any person for use, for purposes other than a purpose of the business", he is treated as making a supply of those services. The value of the supply is the cost to him of providing the supply (which will generally be his acquisition cost), and he will become liable to output tax accordingly; however, the output tax liability will not exceed his allowable input tax.

ECJ case law

47. There had been some jurisprudence on the interpretation of the phrase "for purposes other than those of his business" in Article 6(2)(b) of the Sixth Directive (now Article 26 of the PVD). The two key cases cited to us by the parties were *Julius Fillibeck Söhne GmbH & Co KG v Finanzamt Neustadt* [1998] STC 513 and *Danfoss A/S and another v Skatteministeriet* [2009] STC 701.

48. *Fillibeck* was concerned with the provision of free transport to and from work by a building company. Normally, the Court acknowledged that transport to and from work was a private matter for the individual employee, and therefore the free provision of such transport by the employer would generally be regarded as serving the employees' private purposes and such provision would therefore be for "purposes other than those of the business". In the circumstances of that case, however, it emphasised that it was possible (because of the terms of the Federal Collective Framework Agreement for the Building Industry, which required such transport to be provided in certain circumstances) that the requirements of the business made it necessary for the employer to provide the transport (a matter that would fall to be decided by the national court). If that were the case, then the transport services were not supplied "for purposes other than those of the business".

49. *Danfoss* was concerned with the provision of free lunches at work. The lunches in question were provided for business meetings involving members of staff and (in some cases) business contacts. The fact that eating is primarily a private and not a business activity clearly underpinned the Court's thinking. As Advocate General Sharpston put it:

> ".. it is not normally part of an employer's business activity to provide employees with free food and drink. Food and drink normally serve the employee's private purposes. In eating and drinking, they will usually be able to exercise a degree of choice comparable to that as to the clothing they wear or the means by which they travel between home and work."

50. Against that background, however, the Court went on to hold that the provision of food and drink could still, in the right circumstances, be something which a taxpayer did for the purposes of its business. It went on to hold that Article 6(2) of the Sixth Directive (now Article 26 of the PVD):

> "… does not cover the provision, free of charge, of meals in company canteens to business contacts in the course of meetings held on the company premises where objective evidence indicates – this being a matter for the referring court to determine – that those meals are provided for strictly business-related purposes. On the other hand, art 6(2) applies in principle to the provision, free of charge, of meals by a company to its staff on its premises, unless – this likewise being a matter for the referring court to determine – the needs of the company, such as the need to ensure that work meetings are run smoothly and without interruptions, require the employer to ensure that meals are provided."

Submissions

Appellant's submissions

51. The Appellant had initially reserved its position before the Tribunal in relation to two potential arguments:

(1) whether the vouchers were supplied to the customers for a consideration, thus taking them outside the terms of the SoSO (presumably by virtue of Article 6(a)); and

(2) whether the vouchers should be regarded as a retrospective discount from the taxable amount of its supplies of newspapers.

52. Having initially sought to reserve the right to pursue these arguments at a higher level if the matter should go on appeal, Mr Walters confirmed at the hearing that the Appellant was dropping these lines of argument altogether.

53. The key dispute between the parties was therefore whether the Appellant's supplies of the vouchers were made "for a purpose other than a purpose of the business".

54. It was important to note that there were slightly different regimes applicable to what could be broadly called the private use of business goods and the private use of business services. In summary terms, Article 16 of the PVD characterises each of the following three things as a "supply of goods for consideration" for VAT purposes where an input tax deduction was available in relation to the goods in question:

(1) the application of goods that were business assets for private use of the taxpayer or his staff;

(2) the disposal of goods that were business assets free of charge; and

(3) the application of goods that were business assets for purposes other than purposes of the business.

55. In contrast, Article 26 of the PVD characterises each of the following four things as a "supply of services for a consideration":

(1) the private use (as contrasted with "application") of goods referred to at [54(1)] above by the taxpayer or his staff;

(2) the use (as contrasted with "application") of goods referred to at [54(3)] above for purposes other than those of the business;

(3) the provision of services free of charge by a taxable person for his own (or his staff's) private use; and

(4) the provision of services free of charge for any purposes "other than those of his business".

56. It could readily be seen that there was no equivalent, for services acquired by a business and then disposed of by it free of charge, to the provision referred to at [54(2)] above. For such services acquired for business purposes, the only charge that could arise under the PVD (except where the beneficiary was the taxpayer or a member of his staff) was if it could be said that the onward supply was made by the taxpayer "for purposes other than those of his business".

57. This distinction had been highlighted by Advocate General Fennelly in his opinion in *Kuwait Petroleum (GB) Limited v Customs & Excise Commissioners* [1999]STC 488 at [25]. Indeed, in that paragraph, the Advocate General said:

> "… it is difficult to avoid the conclusion that the contrasting treatment of services by art 6(2)(b) *[now Article 26 of the PVD]* of the Sixth Directive is deliberate……(It should be noted that, in so far as some of the gifts supplied by Kuwait Petroleum took the form of holiday vouchers, they may be subject not to art 5(6) *[now Article 16 of the PVD]* but, as a supply of intangible property rights, constitute a provision of services for the purposes of art 6(1) and, pursuant to art 6(2)(b), be subject to no additional charge to VAT."

58. So far as *Fillibeck* and *Danfoss* were concerned, he submitted that what they required the Tribunal to do was to examine the requirements of the Appellant's business and determine objectively whether the purpose of distributing the vouchers was to be found in those requirements. He accepted that a "specific and direct" connection between the Appellant's business purposes and the distribution of the vouchers needed to be found. He submitted that such a connection clearly existed. He referred to the degree of "organisation, practicality, efficiency and exercise of control" that would be required to imprint a business purpose on a free lunch, and submitted that these features were all present in the Appellant's operation of its SPICE campaign.

HMRC's submissions

59. Where Mr Jones parted company from Mr Walters was mainly on the question of the business "necessity" of the Appellant issuing the free vouchers. He referred to numerous passages in the *Fillibeck* and *Danfoss* decisions where the ECJ emphasised that, to avoid output tax liability, it would have to be shown that the services were supplied for "strictly business-related purposes", that the taxpayer's "needs" and "requirements" were being satisfied by the relevant supply of services free of charge, that such supply was "necessary", and so on.

60. He pointed out that "it is not simply a question of whether the provision [of services] has a commercial rationale" (which he appeared to accept that, in this case, it did). In his submission, more was required. He referred to the examples given in *Danfoss* of two different types of free meal – the first (a canteen lunch or a tray of sandwiches provided during, or in a short break from, a long business meeting) and

the second (a free lunch, as an alternative to a meal at the participant's own expense in a nearby restaurant, once the meeting is over). In his submission, both could be seen to have a commercial rationale (the first to make the meeting run smoothly, the second to generate goodwill) but it was clear from *Danfoss* that this was not enough. In his submission, to avoid a charge under Article 26 of the PVD and SoSO, the Appellant would have to demonstrate that the requirements of its business made it *necessary* that it distribute the vouchers.

61. He also contrasted the "clear and direct connection" between the taxpayers' businesses and the relevant supplies of free services in *Danfoss* and *Fillibeck* with the lack of any such connection in the present case between the Appellant's business activities and the private consumption of its customers which was funded by the vouchers.

Post hearing submissions

(a) Introduction

62. After the hearing and as we considered matters in more detail, we became concerned that we were being invited by both parties to focus at an almost microscopic level on a very particular question, when we had some grave concerns that there was a much wider picture which ought to be taken into account and might well affect the outcome. It appeared to us to be important to produce a decision which not only answered the question to which we were being directed, but was also consistent with the coherent operation of the VAT system as a whole.

63. We were concerned particularly with what appeared to be a conflict between the UK legislation and the way in which HMRC appeared to require it to be operated, and we were also concerned that any decision we gave might not take due account of the position of vouchers which the Appellant had subsequently started to purchase through an intermediary (which we called "Purchased Vouchers", to differentiate them from vouchers bought direct from the retailers, which we called "Directly-issued Vouchers")

(b) Further questions addressed to the parties

64. We therefore invited written submissions from the parties on the following questions:

> 1. Are the Directly-issued vouchers "retailer vouchers" within the meaning of paragraph 4(1) Schedule 10A Value Added Tax Act 1994 ("VATA 94")?
>
> 2. If the answer to 1 above is yes, and bearing in mind the undisputed evidence that the Appellant acquired the Directly-issued Vouchers at a discount to their face value, were the retailers correct to charge VAT on the supply of the Directly-issued Vouchers to the Appellant (and if so, on what basis) specifically in the light of paragraph 4(2) Schedule 10A VATA 94?

3. If the answer to 2 above is no, what are the implications of that answer, in terms of (a) the Appellant's ability to recover VAT purportedly charged to it by the retailers on the issue to it of the Directly-issued Vouchers and (b) the existence or amount of any obligation of the Appellant to account for output tax (whether under the Supply of Services Order 1993 or otherwise) on delivery of vouchers to its customers?

4. In *Astra Zeneca UK Limited v HMRC* [2010] STC 2298, the Commission suggested in its representations to the ECJ that the UK's treatment of vouchers for VAT purposes highlighted in that case (i.e. applying a reasonably "appropriate" rate to deal with the situation in which vouchers may be redeemed against goods bearing different rates of VAT) may not comply with the principles applicable to VAT. The Advocate-General felt able to sidestep that issue in that case and the full Court did not address it at all. In the light of the above questions, is that an issue that can properly also be sidestepped in this appeal and if so, why?

5. To what extent would the Purchased Vouchers (compared to the Directly-issued Vouchers) have a different VAT treatment on their acquisition by the Appellant and their transfer to its customers, how can any such difference be explained and justified and what are the implications of any such difference for the issues in this appeal in the light of general principles such as the principle of neutrality and the requirement for coherence in the VAT system as a whole?"

(c) Answers to question 1

65. In reply, both parties agreed that the answer to question 1 was that yes, the Directly-issued Vouchers were retailer vouchers within paragraph 4(1) of Schedule 10A VATA94

(d) Answers to question 2

66. In reply to question 2, HMRC replied that "In the circumstances, the Commissioners submit that the retailer would have been incorrect to have charged VAT, or to show VAT on the invoice to the Appellant, and the Appellant would have been incorrect to recover input tax in respect of the vouchers."

67. In reply to the same question, in contrast, the Appellant submitted that because paragraph 4(2) of Schedule 10A VATA94 was incompatible with the PVD (which has direct effect), retailers were correct to charge VAT on the issue of vouchers to the Appellant.

(e) Answers to question 3

68. In reply to question 3, because the Appellant's reply to question 2 was as above, they did not need to reply.

69. In reply to the same question, HMRC replied broadly as follows. In the absence of any input tax for the Appellant on its purchase of the Directly-issued Vouchers, its obligation to account for output tax under the SoSO was effectively academic (as the SoSO limited the output tax liability to the amount of input tax deductible). Whilst this answer may have raised a metaphorical eyebrow, it did at least appear to be logically and legally consistent with what had gone before. It would appear to be heading towards an argument that the Appellant cannot recover the "input tax" purportedly charged to it by the retailers, which was not argued in this appeal (indeed such an argument would appear to be inconsistent with HMRC's past guidance and the general structure which they say applies to the scheme of retailer vouchers generally, as set out in, amongst other places, their Business Brief 04/03 and their VAT Information Sheet 12/03). However, HMRC went on to expand on their answer as follows:

> "Where the Appellant does not incur input tax, however, it would only be liable to account for output tax if the delivery of the vouchers to its customers took place by way of resale (in these circumstances, i.e. where the voucher is on-sold, the Appellant would be entitled to the notional input tax credit described in paragraph 5 below.)"

The import of this sentence appears to be that HMRC say that the Appellant has the benefit of input tax (albeit "notional") for some purposes but not for others. This does not seem to us to contribute to the coherence of the VAT system as a whole.

(f) Answers to question 4

70. In reply to question 4, the Appellant submitted that the comments in *Astra Zeneca* supported its contention that paragraph 4 of Schedule 10A VATA94 is incompatible with the PVD (being part of the overall "system" which the UK had put in place to deal with vouchers). It noted that HMRC were not claiming that a derogation existed for the scheme which the UK has adopted, but a derogation may well be required to align the rate of VAT charged on the supply of vouchers with the rate chargeable on the ultimate supplies of goods and services which they "buy", and to regulate the time at which the various supplies take place.

71. In reply to the same question, HMRC asserted that as the PVD was silent on the question of vouchers, the UK was at liberty to implement the system it had, which complied with the general requirements of "proportionality, fiscal neutrality and the avoidance of double taxation, non-taxation and the distortion of competition". Moreover, neither the Commission nor the Appellants in this appeal had challenged that system.

(g) Answers to question 5

72. In reply to question 5, the Appellant submitted that if it was accepted that paragraph 4(2) of Schedule 10A was incompatible with the PVD so that VAT was chargeable on the issue of retailer vouchers, then all issues of fiscal neutrality disappeared. Effectively, we are left with a completely standard chain of inputs and outputs.

73. HMRC's answer was somewhat more complex. They recognised that a fiscal neutrality issue would arise if they strictly enforced the provisions of paragraph 4(2) of Schedule 10A VATA 94, and to address that problem they allowed a "notional input tax credit in the hands of the first intermediate supplier to avoid this anomaly." They went on to enlarge on their answer as follows:

> "Effectively, where the retailer issues vouchers to an intermediate supplier who sells the vouchers on, the retailer may *[sic]* issue an invoice showing a notional input tax credit that ensures fiscal neutrality within the supply chain. This treatment ensures that the UK's treatment of vouchers remains consistent with the fundamental principles of the Directive.
>
> The upshot, as regards the application of the Supply of Services Order 1993, of the treatment of the Purchased Vouchers just described is as per that put forward by the Commissioners in argument in the appeal, namely that the Appellant would be obliged to account for output tax on the delivery of the vouchers free of charge to its customers (under article 3 of the 1993 Order)."

(h) Final points arising from the questions

74. Finally, HMRC pointed out that the decision under appeal was a decision that the Appellant should account for output tax under SoSO to the extent that it incurs input tax on the supply of vouchers to it. They went on to say that "the issue to be resolved on the appeal is whether that decision is correct: the extent to which it applies on the facts is, it is submitted, a separate matter." This somewhat unexpected statement, in the context of the replies to the five questions actually given by HMRC, implies that they accept the appeal should be allowed on the basis that no SoSO output liability can arise, because there is no related input VAT.

75. The Appellant has picked up this point in its reply to HMRC's written submissions. It has also applied for permission to widen the scope of its submissions and adduce new evidence as necessary to address the larger picture which has emerged as a result of the questions raised by the Tribunal.

76. After careful consideration, we have decided not to delay any further in issuing a decision in this appeal by entertaining the Appellant's application. We consider however that in the light of the wider picture, our decision in this appeal should be regarded as limited in scope to the particular issues which were argued before us and therefore should be regarded as being in the nature of a decision on a preliminary issue. The parties may consider that sufficient to enable them to resolve matters at a practical level, without becoming further ensnared in what are likely to become extremely broad arguments about the true legal consequences of the legislative and practical arrangements which have hitherto been in place to deal with retailer vouchers.

77. Furthermore, both parties appear to agree that in any event, our decision on this appeal, even if so limited, will certainly be relevant to the fact pattern which is

not actually involved in it, namely the Appellant's purchase of retailer vouchers from an intermediary and subsequent delivery of those vouchers to its customers as part of the SPICE campaign in periods after those with which this appeal is concerned. Hopefully to that extent at least, this decision has more than academic value.

Discussion and conclusion

Preliminary points

78. As discussed above, therefore, we consider it appropriate to limit this decision to the preliminary question of whether, in principle, an output tax liability is potentially capable of arising under SoSO by reason of the Appellant's supply of retailer vouchers to its customers pursuant to the SPICE arrangements.

79. This means that we are limiting our decision to the question of whether the Appellant's supply of the vouchers to its customers should be regarded as having been made "for purposes other than a purpose of the [Appellant's] business".

80. First, we wish to address and shortly dispose of a small, but slightly troublesome, point of interpretation on Article 3 of SoSO.

81. In this appeal, it is clear that the "services" supplied to the Appellant are the vouchers (or the intangible rights which they evidence). As set out at [45] above, the relevant wording in Article 3 of SoSO says that a taxpayer is treated as making a supply of services received by him if he "uses them, or makes them available to any person for use, for purposes other than a purpose of the business". This leads to the suggestion that if any such services are made available to customers for their personal use, then by definition the taxpayer will have made those services available to the customer for use for non-business purposes (the non-business purposes of the customers).

82. When the wording of Article 26 of the PVD is considered, however, it is clear that this is not the intention. The way Article 26 is worded makes it clear that the "purposes" with which we are concerned are the purposes of the taxpayer in making the services available to the third party, not the purposes of the third party in ultimately making use of the services supplied to him.

83. HMRC did not argue otherwise, and we find accordingly.

Were the vouchers distributed for purposes other than a purpose of the business?

84. Bearing that point in mind, we turn to consider whether the Appellant's supply of the vouchers was for purposes other than those of its business, in the light of the ECJ decisions to which we were referred on the interpretation of that phrase.

85. Mr Jones relied heavily on the various statements in the *Danfoss* and *Fillibeck* cases to the effect that some element of "necessity", "obligation" or "requirement of the business" should be present in order to pass the "business purposes" test in Article 26 of the PVD. He argued, essentially, that there was no such necessity, obligation or

requirement for the Appellant to structure its SPICE campaign in a way that required the delivery of free retailer vouchers to its customers; it followed that, because it had made a free commercial choice to do so rather than acted under some kind of necessity, its supply was "for purposes other than those of [its] business", notwithstanding the clear admitted business rationale and motive for doing so.

86. When considering the true import of the *Fillibeck* and *Danfoss* decisions, we consider it is important to bear in mind the nature of the services with which they were concerned. They were mainly considering situations in which employers were providing free meals and "home to work" transport to their own employees, matters which would generally be the personal concern of the employees in their private capacity. In that context, it can be readily understood that the ECJ wished to make it clear that a charge would potentially arise if an employer decided to make free meals or transport available to its staff without very good reason. To take a more relaxed approach would be to open the door to widespread reclaims of VAT on costs of essentially personal consumption by individuals closely related to the taxpayer (its employees).

87. This point is further highlighted by the slightly different approach which the ECJ adopted in *Danfoss* as between meals for staff and meals for business contacts. In relation to meals for staff, as mentioned at [50] above they decided (at [65]) that:

> "…art 6(2) applies in principle … unless – this… being a matter for the referring court to determine – the needs of the company, such as the need to ensure that work meetings are run smoothly and without interruptions, require the employer to ensure that meals are provided"

In relation to the meals for business contacts, however, their decision was slightly different:

> "… art 6(2)… does not cover the provision, free of charge, of meals… where the objective evidence indicates – this being a matter for the referring court to determine – that those meals are provided for strictly business-related purposes."

88. It is clear from both of the above extracts that (whilst it ultimately left the decision to the national court), the ECJ indicated that a finding of "business purpose" was in principle perfectly acceptable in either case, even though the result would be for VAT on private consumption to be recovered by the taxable business. It is nonetheless instructive to examine the slightly different approaches that the ECJ adopted to the two situations.

89. To summarise the difference, the ECJ determined that in relation to "staff" meals, there would be an output tax charge unless the business need for the meals could be shown, whereas in relation to "business contact" meals, there was no starting presumption of a tax charge, it was simply a matter of the referring court deciding whether there was objective evidence of "strictly business-related purposes". This indicates that the Court was well aware of the greater likelihood that free meals for staff would constitute an abuse of the VAT system than free meals for arms' length

business contacts and accordingly the "business purpose" test needed to be applied in a rather more discriminating manner where staff were concerned.

90. The situation in the present appeal, where the vouchers are being provided on an arms' length basis to bona fide customers, is more akin to the meals provided by *Danfoss* for business contacts than staff. We therefore take the view that the approach of the ECJ in the second of the extracts at [87] above is the appropriate one to follow.

91. The question then arises as to how we should assess whether the vouchers were supplied by the Appellant "for strictly business-related purposes".

92. Mr Jones in effect points out that the Appellant was under no obligation to set up the SPICE campaign on a basis that would require it to deliver free vouchers; that was a matter of free choice and therefore it could not be said that it was in any way necessary (in the way that, for example, the establishment of home to work transport arrangements was necessary in *Fillibeck* – the taxpayer would quite simply not have been able to carry on its business without making those arrangements).

93. That may be true, but we do not think it is relevant. Our reason for saying so is that it could equally be said that Danfoss was under no obligation to hold meetings with its business contacts that were so timed and formatted that it became reasonably necessary to provide meals to the participants. Yet the ECJ did not even mention that point. It gave no indication, for example, that the taxpayer must be able to demonstrate that it was "strictly necessary" to hold the relevant meetings at all, or to hold them in a format or at a time that made it necessary to provide meals during the course of the meeting. In short, the Court took it as read that Danfoss, like most businesses, generally arranged its affairs as it did for sound business reasons and it was no part of the Court's role to enter into a detailed examination of those reasons; all that was necessary was to establish whether the particular activity was conducted "strictly for business-related purposes".

94. No doubt if a ten minute business meeting had been arranged to coincide with a meal at an expensive restaurant, the "business purpose" of the meal would have been called into question, but that was not the situation.

95. Following the same approach, in the present appeal we do not think it appropriate to question whether there might have been other ways for the Appellant to achieve its objective of enhancing its circulation without giving away the vouchers. For perfectly sound commercial reasons it chose to structure the campaign in the way that it did and the only question for this Tribunal to address is whether, when the vouchers were distributed to customers, those distributions were strictly for business-related purposes.

96. It is perfectly clear to us that they were. The SPICE campaign was a highly effective business promotion campaign and the vouchers were distributed as a result of binding legal commitments to do so which the Appellant undertook on a fully commercial and arms' length basis as part of that campaign in the normal course of its business. It could not, in our view, properly be said that by distributing the vouchers

the Appellant has made them available to its customers for purposes other than a purpose of the business of the Appellant.

Conclusion

97. We therefore find that the arrangements were not such as to trigger an obligation to account for output tax under the SoSO and the PVD. We find in favour of the Appellant on this issue, which we have (for the reasons set out at [76] above) treated as a preliminary issue in the appeal.

98. The parties are at liberty to apply for further Directions in the event that they wish to pursue matters further.

99. 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: 24 January 2014