Neutral Citation: [2023] UKFTT 00976 (TC)

Case Number: TC08995

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2021/11339

VALUE ADDED TAX – whether successful referrals by referrers of an energy supplier as part of the supplier's "refer a friend" scheme amounted to the provision of non-monetary consideration by those referrers for energy supplied to them – yes – appeal dismissed

Heard on: 11-12 July, 2023
Judgment date: 17 November 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

SIMPLE ENERGY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Amanda Brown KC, of counsel, instructed by KPMG LLP

For the Respondents: Isabel McArdle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Bulb Energy Limited ("Bulb") supplied energy to business and retail customers in the UK. It operated a "refer a friend" ("RAF") scheme. When a new customer joined Bulb, the company would provide that customer with a personalised electronic referral link which the customer could send to anyone. When the recipient clicked on the link, that person was taken to a webpage where, should they wish, they too could sign up to become a Bulb customer. If that person was accepted as a customer of Bulb, having used one of these links and switched their energy supply to Bulb, both the referrer and the new customer (a "recruit") received a credit against their energy charges.

2. Value added tax ("VAT") is, as a general rule, charged on the value of the consideration given for a supply. The question we are concerned with is whether a successful referral by an existing customer (a "referrer") as part of Bulb's RAF scheme amounted to the provision of a service to Bulb by the referrer, such service constituting non-monetary consideration for the supply of energy by Bulb (as the Respondents ("HMRC") contend), or whether those referrals were no more than the performance of a contingency which resulted in a discount that reduced the value of the energy supplies made by Bulb to the referrer and no more (as the Appellant contends).

3. During the assessment period the Appellant was the parent company of Bulb and the representative member of the VAT group of which Bulb was a member. After the Notice of Appeal was lodged, the Appellant entered administration and this appeal is being continued by its administrators. Bulb itself is in 'special administration' under the Energy Act 2011.

4. This appeal is made under section 83(1)(p) of the Value Added Tax Act 1994 ("VATA"). The Appellant appeals against a decision of HMRC in a letter dated 1 April 2021, the consequent Notice of Assessment issued on 23 July 2021 and a review decision of HMRC dated 3 September 2021. The Appellant's Notice of Appeal was lodged in time on 1 October 2021.

THE RAF SCHEME

5. Bulb began trading in 2015 and introduced the RAF scheme in May 2016 as a means of accessing a wider customer base through existing customers. The basic operation of the RAF scheme is set out in [1] above. The RAF credit was £50 if the recruit switched both their gas and electricity supply, although this was temporarily increased to £75 for part of 2019 and 2020. If a recruit only signed up to switch one type of energy supply, then the credit would be £25. The RAF credit was not applied to the referrer's account if the recruit cancelled their application before receiving energy from Bulb, which was usually around three weeks after sign up, or if the referrer cancelled their account before the RAF credit had been applied.

6. During the assessment period all customers, whether residential or business, were signed up to the same Terms and Conditions. These would be received by a recruit by email and were available on the Bulb website. They would be updated from time to time. The December 2019 version of the Terms and Conditions was taken as representative. Relevant provisions are as follows:

> (1) Paragraph 1.3 stated that: 'you agree that you have entered into this Agreement with Bulb in your personal capacity or on behalf of your business via one of the following routes: the bulb.co.uk website, a price comparison website, a Bulb sales team (for example telephone, door to door or events sales team) or an approved broker if you're a business member, and you have not entered into this Agreement with Bulb via any other third-party agent'

(2) Paragraph 3 set out the payment terms, the following of which are relevant: -

(a) Paragraph 3.2 provided that charges were determined by reference to kWh of energy used, either by estimates or actual usage from meter readings

(b) Paragraph 3.8 provided that customers were to pay monthly by direct debit

(c) Paragraph 3.14 stated that any debit or credit balance would be carried forward from each monthly bill

(d) Paragraph 3.16 provided that the customer must pay in advance for the supply

(e) Paragraph 3.17 set out that the monthly payments would be based on the anticipated cost of energy split into 12 equal payments which were reviewed twice a year and adjusted as appropriate.

(f) Paragraph 3.18 provided for a twice-yearly review of the balance on the account and changes to the monthly payments as appropriate

(g) Paragraph 3.21 provided for a refund of a credit balance exceeding expected monthly usage.

(3) Clause 16.5 of the December 2019 Terms and Conditions was an entire agreement clause and provided: 'This Agreement, any other Agreements you receive from us, and any documents explicitly referred to in this Agreement, are the entire agreement between you and us.' 'Agreement' was defined as: 'All the bits and pieces that together form the basis for us working together to supply your energy. These include this Agreement and the tariff information set out in the 'Energy Supply Agreement' section of the Welcome Pack. You'll receive the Welcome Pack by email'.

(4) Paragraph 17 concerned the terms for the referral credit.

(a) Paragraph 17.1.6 defined the credit as a 'reward'.

(b) Paragraph 17.2.9 described the RAF credit as a 'credit' to be added to the customer's account once the relevant requirements have been met.

(c) Paragraph 17.2.1 provided that the referrer and the recruit would receive a reward when the recruit successfully switches their energy supply to Bulb.

(d) Paragraph 17.2.5 provided that the recruit must use the referrer's unique link to switch energy supply to Bulb on bulb.co.uk. Retrospective claims were ineligible and would not be rewarded.

(e) Paragraph 17.27 provided that rewards would be cancelled if the recruit cancelled their agreement with Bulb before the switch date.

(f) Paragraph 17.2.10 confirmed that users could offer additional rewards to recruits as long as they made it clear that this was the responsibility of the users not Bulb.

(g) Paragraph 17.2.11 provided that rewards would be redeemed when they were credited to a referrer's account.

(h) Paragraph 17.5 provided for Bulb to determine whether the conditions for credit were met, and Bulb's decision was final and binding.

(i) Paragraph 17.3 provided restrictions on the manner of distribution of the unique link:

> 17.3.5 If a referrer provided a unique link to a recruit in any format (electronic or otherwise), the provision of that link must be distributed in a personal manner that was appropriate and customary for communications with friends, colleagues, employees, customers and family members.
>
> 17.3.7 Bulk distribution, distribution to strangers, posting unique links on online marketplaces such as Amazon or Ebay or any other promotion of a unique link in a manner that would constitute or appear to constitute unsolicited proliferation of a link or "spam" was expressly prohibited.

7. In addition to the Terms and Conditions, we were taken through some of Bulb's marketing/customer material. An email sent to customers on joining says "Great work going green. You can do even more by helping your friends go green too. On average, people who switch to Bulb save 1,900 kilograms of CO2 per year. That's the weight of an elephant seal! … Plus, we'll give you both £50 each to say thanks for going green. They just need to sign up through your personalised link – [LINK] Share your link, and let's turn the world green!"

8. A further email sent three weeks later repeated the message and suggested downloading the Bulb app to keep the link handy. After 100 days customers received a similar email encouraging them to tell their friends about Bulb (including sharing on Twitter and Facebook) and reminding them that "If they join Bulb through your referral link we'll give you each £50 to say thanks."

9. A website page says "Calling all Bulbites! We've made it easier and more rewarding to share the Bulb love with your friends, family, interns, colleagues and anyone you see on the street with your own personalised referral link. We've also set the rewards HIGH. Right now if you refer a friend you get £50 and they get £50. So, if you refer about 15 people that could be free energy for a year. Result."

10. Blog posts reminded customers of the RAF scheme. One dated 22 April 2020 is headed "How to refer friends and influence people" and begins "A great way to save money on your energy bills is to refer a friend – Bulb members get up to £50 when someone switches through their link. Here's a refresher on referrals if someone you know would be better off with Bulb." Elsewhere it was said "We know gas and electricity aren't traditional conversation starters, so we have built a bank of Bulby GIFs and templates to make referring on social media more fun." Ideas were given about adding "GIFs to your Instagram stories to make them stand out".

11. We heard from Mr Daniel Ong. Mr Ong is a Chartered Accountant and he was Financial Controller, later Director of Finance, at Bulb. Mr Ong was a straightforward witness and I have no hesitation in accepting his evidence.

12. Mr Ong explained that a significant contributor to Bulb's growth was its success in attracting recruits and the RAF scheme was one of the ways Bulb achieved this. Bulb also used several other channels to attract recruits such as price comparison websites, outbound call centres, field agents, TV and billboard adverts and advertising space with Google, Facebook and others.

13. Mr Ong exhibited an investor presentation that was created in 2021 when Bulb was seeking new investment. The slide deck was prepared by management and Bulb's financial advisors. It illustrates how effective the RAF scheme was with referrals initially accounting for 8% of sign-ups in FY17, rising to 26% in FY18, 20% in FY19, 33% in FY20, 28% in FY21 and increasing to 32% of sign-ups in FY22. It was, he said, also one of the most reliable methods of attracting recruits as a "good" existing customer typically had friends who would also be "good" Bulb customers.

14. Mr Ong exhibited a document which was produced in 2017, approximately one year after the RAF scheme started, which sought to analyse the value of the scheme to the business. The analysis in that document suggests that customers who were referred by friends were less likely to change their supplier and would remain loyal Bulb customers. Existing customers also appreciated the RAF scheme as it reduced the cost of their energy supply, which in turn helped with retention. The RAF scheme was effectively both a tool to attract new customers and a tool to retain existing ones.

15. Mr Ong said that the vast majority of customers treated the referral credit as a discount on the value of energy that they would receive. Only about 10% of all RAF credit was taken in cash. As far as the number of credits per Bulb customer was concerned, in one sample year (2019), over 95% of customers received up to 3 credits. Just over 4% of customers received 4-10 credits. A tiny minority (less than 1%) of customers received credits which likely went beyond the amount of energy that they would be able to consume. These customers would ask for their RAF credits to be paid in cash (by transfer to their bank account). Bulb allowed this even though such customers would likely have breached the Terms and Conditions regarding the use of the referral link (by reference to clauses 17.3.5 and 17.3.7). Mr Ong said that the 2019 figures were generally representative of the position across the assessment period.

16. In Mr Ong's view, one of the reasons Bulb's RAF scheme worked so well, was because Bulb made it extremely easy to make a referral. All customers needed to do was send their referral link and that was it. The effort involved by a referrer was extremely low, and so people were more likely to do it. Once the referrer had sent their unique link to someone, whether they received a credit was entirely outside their control. It was contingent on the actions taken by the potential recruit, in particular whether the potential recruit went on to sign-up using the referrer's link. Mr Ong described the RAF scheme as "viral", by which he meant that once it got started it spread like a virus as customers referred their friends, who joined up and referred their friends and so on.

17. Mr Ong explained that energy statements were issued monthly to all residential customers. The statement included details of their electricity and gas usage and cost for the month as well as the customer's previous account balance, recent payments, referral rewards (if any), other credits (if any) and new account balance. The energy statements treated reward credits as reducing the ongoing liability for payment for energy subsequently consumed.

18. Bulb had two categories of customers, those who 'Pay As You Go' ("PAYG") and those who were credit customers. During the assessment period, approximately 90% of Bulb's customers were credit customers and over 90% of credit customers paid for their energy usage by monthly Direct Debit. PAYG customers were required to purchase top ups in advance of being able to receive energy supplies and were never permitted to have a debit on their account. The amount of the monthly Direct Debit payment for credit customers was based on one twelfth of the customer's estimated annual energy usage which was adjusted by reference to whether the account was persistently in debit or credit. If a significant credit balance built up on the customer's account, the customer was entitled to request a refund of the credit balance.

19. In respect of residential customers, Bulb declared output tax to HMRC by reference to payments received. All such payments received were treated as being inclusive of VAT at the rate applicable to the supply of energy to the customer, which for the relevant periods was 5%. Bulb treated the RAF credit as a reduction in the value of the supply of energy to a customer. Bulb did not recognise the value of the RAF credit as consideration in determining the output tax due to HMRC. Some residential customers asked for payment of credit

balances in cash. Where such payments were made the credit did not reduce the amounts due on future supplies of energy and the Appellant accounted for VAT on the full value of such future supplies (i.e., not reduced on account of the RAF credit) as and when payments were received.

20. This appeal concerns only the treatment of the credits taken as a reduction in the value of energy supplied to residential customers.

THE LAW

21. So far as EU legislation is concerned, Article 2 of Directive 2006/112/EC ("the PVD") provides that:

> "1. The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such: …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;"

22. Article 73 of the PVD states:

> "In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."

23. Article 79 of the PVD provides:

> "The taxable amount shall not include the following factors: …
>
> (b) price discounts and rebates granted to the customer and obtained by him at the time of supply … "

24. Article 90 of the PVD provides:

> … Where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member State.

25. Turning to UK legislation, section 4 VATA provides as follows:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

26. Section 5 VATA provides:

> "(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.
>
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

27. Section 19 VATA provides:

> "(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.
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> (3) If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.
>
> (4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.
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> (5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration."

28. Paragraph 3 of Schedule 4 to VATA provides that the supplies of energy are a supply of goods and regulation 86 of the Value Added Tax Regulations 1995 provides that there is a separate supply of goods every time consideration for a supply of energy is received by the supplier or a VAT invoice is issued.

29. As indicated at the outset, the question for me is whether referrals by referrers amount to the provision of non-monetary consideration to Bulb, so that the value of that service is treated as additional consideration given by them for the energy supplied to them by Bulb. It is common ground that, if that is the case, the value of that non-monetary consideration is equal to the RAF credit given by Bulb.

30. The distinction between "simple" discounts and discounts given for non-monetary consideration (which are not really discounts at all, as the supplier still receives the full amount of consideration, just not entirely in monetary form) has been considered in a number of cases and it will be necessary to analyse these cases as well as some cases which explain what is meant by consideration/taxable amount, and it is to those cases that I turn first of all.

31. In *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (C-154/80) a cooperative association ran a potato storage depot. The members of the association had the right (and were subject to an obligation) to put 1,000 kilograms of potatoes in store for each share certificate they held in return for a storage charge fixed each year by the association. The association did not charge a fee in 1975 and 1976. The Dutch tax authorities took the view that the cooperative had nevertheless charged its members something, because of the reduction in value of their shares on account of the non-collection of their storage charges, and assessed VAT on the basis of the charges normally levied. Holding that no VAT was due the ECJ observed (at [12]-[14]) that:

> "[A] provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received which does not occur in a case where the consideration consists of an unascertained reduction in the

> value of the shares possessed by the members of the cooperative and such a loss of value may not be regarded as a payment received by the cooperative providing the services.
>
> What is more it follows from the use of the expressions "against payment" and "everything received in return" first that the consideration for the provision of a service must be capable of being expressed in money…; secondly that such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria.
>
> Consequently a provision of services for which no definite subjective consideration is received does not constitute a provision of services "against payment" and is therefore not taxable within the meaning of the Second Directive."

32. *Apple and Pear Development Council v Customs and Excise Commissioners* (C-102/86) concerned a body established by statutory instrument whose functions related to advertising and the promotion and improvement of the quality of apples and pears grown in England and Wales. Under a statutory instrument the Council imposed on growers a mandatory annual charge in order to finance its activities. The ECJ held that this charge did not constitute consideration for a supply. It observed:

> "[12] It must therefore be stated that the concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received.
>
> [15] Moreover, no relationship exists between the level of the benefits which individual growers obtain from the services provided by the Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the Council, whether or not a given service of the Council confers a benefit upon him.
>
> [16] It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive."

33. *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) concerned the taxation of the turnover of the operator of a barrel organ. The question for determination was whether the donations paid voluntarily to Mr Tolsma represented consideration paid for his services. The Court held that the basis of assessment of VAT on taxable supplies (in that case services) was everything that made up the consideration and for which there was a direct link between the services provided and the consideration received. At [14] it commented:

> "It follows that a supply of services is effected "for consideration" within the meaning of art 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

34. *South African Tourist Board v Revenue and Customs Commissioners*, [2014] UKUT 280 (TCC), concerned the South African Tourist Board ('SATB'), which was a statutory

body established by South African legislation with the objective of promoting tourism in South Africa. It had a branch in the United Kingdom and incurred UK VAT on supplies to it. To a large extent SATB was funded by the South African government, and it was obliged to use those funds to promote South Africa as a tourist destination. SATB had considerable independence from the South African government. Each year, SATB entered into a performance agreement with the South African government. The performance agreement set out SATB's objectives, targets and deliverables, and recorded the funding that the government was committed in principle to provide. Payments were expressed to be subject to SATB satisfactorily meeting those objectives. HMRC decided that 85% of the VAT incurred on supplies to SATB was irrecoverable as input tax on the basis that its activities were not business activities. HMRC contended that SATB was not making taxable supplies to the South African government, it was a statutory body carrying out its statutory objectives and duties. There was no direct link between SATB's activities and the funding provided by the government; the funding was not consideration for the services provided by SATB. When deciding how to approach the question whether SATB was making supplies for consideration, the Upper Tribunal referred to the opinion of Advocate General Lenz in *Tolsma*:

> "[47] In his opinion in *Tolsma*, Advocate General Lenz set out, at para 14, a helpful summary of certain criteria that have been developed in the case law around the principle of 'contractual exchange' required to establish the element of 'consideration':
>
> > 'Certain criteria have been developed in the case law to define this principle more closely: there must be a direct link between the service supplied (which in this case would be the music provided) and the consideration received (in this case the payments by passers-by) (see the judgments in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats* (Case 154/80) [1981] ECR 445 at 454, para 12, *Apple and Pear Development Council v Customs and Excise Comrs* (Case 102/86) [1988] STC 221 at 237, [1988] ECR 1443 at 1468, para 11, and *Naturally Yours Cosmetics Ltd v Customs and Excise* Comrs (Case 230/87) [1988] STC 879 at 894, [1988] ECR 6365 at 6389, para 11). The link must be such that a relationship can be established between the level of the benefits which the recipients obtain from the services provided and the amount of the consideration (see the *Apple and Pear Development Council* judgment [1988] STC 221 at 238, [1988] ECR 1443 at 1468, para 15). The consideration must be capable of being expressed in money (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, para 13), and the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 894, [1988] ECR 6365 at 6390, para 16). It must be a subjective value (see para 23 below), since the taxable amount is the consideration actually received and not a value estimated according to objective criteria. A service for which no subjective consideration is received is consequently not a service "for consideration" (see the *Coöperatieve Aardappelenbewaarplaats* judgment (at 454, paras 10, 11), the *Naturally Yours Cosmetics* judgment [1988] STC 879 at 886, [1988] ECR 6365 at 6390, para 16).'
>
> [48] These are the principles that fall to be applied to the facts of any particular case. It is, as we have described, a question of analysis of the entire circumstances of the case, weighing the various competing factors."

35. Having reviewed the performance agreement, the Upper Tribunal concluded:

> "[56] In our judgment, on its own the performance agreement falls far short of demonstrating the degree and nature of reciprocity required to constitute the payments made by the department to SATB as consideration for supplies by SATB. There is a link between the funding and the performance by SATB of its functions in accordance with the agreed business plan and objectives, but that is consistent with an arrangement of negotiated funding. There is nothing in the agreement to deflect away from that analysis towards a transaction of supply. The linkage is not one of mutual exchange of supply and consideration for that supply.
>
> [57] The economic and commercial context supports that analysis. It starts with the Tourism Act, and its high-level provision for the objectives and purpose of SATB. It provides for the means of funding of SATB, including the appropriation of moneys by the South African Parliament. There is a statutory obligation of SATB to expend those moneys in performance of its objectives."

36. This case reminds us of two important points. The first is the need for (and meaning of) contractual reciprocity and the second is how to go about deciding whether the required level of reciprocity is present in any particular case.

37. *Elida Gibbs Ltd v Customs and Excise Commissioners* (C-317/94), tells us that the taxable amount used to calculate VAT on a supply cannot exceed the sum in fact paid by the final consumer. In that case the taxpayer operated a sales promotion scheme entitling customers who purchased and returned three of its toothpaste cartons to a £1 refund. Elida claimed a repayment of output tax previously paid arguing that the reimbursement of the money to the customer constituted a retrospective discount which reduced the consideration for its supplies. The case was referred to the ECJ which held that the 'taxable amount' within Article 11A(1)(a) of the EC Sixth Directive (now Article 73 PVD) could not exceed the amount and so amounts refunded by the manufacturer had to be deducted from the original selling price in computing the taxable amount; this was so despite the fact that the manufacturer's output tax had been declared in connection with its supply to a wholesaler/retailer and not on a supply direct to the final consumer.

38. *Naturally Yours Cosmetics Ltd v Customs and Excise Commissioners* (C-230/87) is an example of a case where there was a direct link between something done and (non-monetary) consideration. The case concerned a business which sold cosmetic products for resale by beauty consultants, who approached friends and acquaintances (hostesses) with a view to them organising private parties at which the products were offered for sale. To reward a hostess, the beauty consultant would provide them with a pot of cream as a 'gift'. Naturally Yours supplied the inducement to the beauty consultant for £1.50 instead of the normal price of £10.14. HMRC sought to collect VAT on the supply by reference to the normal price of £10.14. The Court identified the need to ascertain a 'direct link' between the supply and the consideration received. It was accepted that such a link existed, on the basis that, if the beauty consultant failed to organise a party, then they were required to return the inducement or pay the regular wholesale price. The Court accepted the arguments of HMRC that the inducement was supplied to the beauty consultant in return for both monetary consideration and non-monetary consideration (in the form of the undertaking by the beauty consultant to apply the inducement in procuring the hostess to arrange, or in rewarding the hostess for arranging, the party).

39. Two other cases, which were concerned with the valuation of non-monetary consideration, provide further examples of cases where there was a direct link between

something done and non-monetary consideration. *Empire Stores Ltd v Customs and Excise Commissioners* (C-33/93) was concerned with the question whether there was separately identifiable consideration for the supply of "free goods" supplied following the introduction of a recruit (either by way of self-introduction or introduction of a third party, a "refer a friend" scheme) where the provision of the "free goods" only followed a subsequent order of goods. In connection with the refer a friend scheme the introducer and the recruit completed the referral form together and the introducer sent it to Empire. The introducer received "free goods" if the person they introduced was approved as a customer and bought goods. Empire Stores accounted for VAT on the cost price of the goods given away. The VAT Tribunal ([1992] VATTR 271) held that both the self-referral and introduce a friend schemes involved the giving of non-monetary consideration. The VAT Tribunal summarised the introduce a friend scheme as a wholly contractual arrangement under which Empire Stores undertook to supply an article chosen by the introducer from the range of goods Empire Stores offered, if the introducer found and introduced to Empire Stores a person who supplied information about themselves with a view to becoming a customer of Empire, was approved as a customer by Empire and went on to order and pay for goods. The consideration for the article was described by the Tribunal, in the case of the self-referral scheme, as giving general information concerning a person and the giving of the further information that the person wished to become an Empire customer. In the case of the refer-a-friend scheme, the consideration was procuring the giving of that information. The Tribunal said that "in each case the consideration can be described compendiously as an introduction".

40. The CJEU described the supply of the article (at [13]) as being made "in consideration of the introduction of a potential customer". That finding was "not invalidated by the fact that the article is supplied only if the recruit is approved by Empire Stores and places and pays for an order"; see [15]. The CJEU approved the Advocate General's comment that the fact that the supply of the article is dependent on additional conditions does not detract from its being consideration for the services received by Empire Stores".

41. In *CCE v Westmorland Motorway Services Ltd*, [1998] STC 431, the non-monetary consideration was a coach driver bringing a coach with 20 or more passengers to a service station and staying for at least 30 minutes. The value of the driver's services was the menu price of the food he was given without charge in return for doing this.

42. An example of case where there was no such link is *Customs v Excise Commissioners v Littlewoods Organisation plc* [2001] EWCA Civ 1542. Littlewoods sold goods by mail order through agents. Commission was awarded to agents on payments received from them. The agent's commission account was credited with 10% of the value of all payments received whether such payments related to goods supplied to the agent herself for her own use or to third parties. The Commission could be redeemed in one of 3 ways: as a payment for goods already supplied, in cash, or against future purchases. In the first two scenarios the commission was valued at 10% and in the third it was valued at 12.5%. A dispute arose between Littlewoods and Customs and Excise as to the VAT treatment of the commission in goods. Initially HMRC contended that, as the agent provided services to Littlewoods in the form of finding customers, encouraging them to make purchases and then acting as a payment collection agent, the commission represented consideration for that service. HMRC then conceded that, where the commission was taken in cash or used as part payment for supplies already received (the 10% scenarios), these payments represented a discount against supplies already made. Customs also accepted that when the 10% commission was used against future supplies it represented a discount but contended that the additional 2.5% was not a discount but consideration for a supply of services by the agent, at least when it was earned on payments in respect of sales to third parties.

43. Conceptually, the Court explained the position like this:

> "[75] In the absence of any direct link between (a) the difference between the full catalogue price of the secondary goods supplied to the agent and the monetary amount (if any) which she pays for those goods and (b) services provided by her as agent in connection with the sale of primary goods to third parties, there is no basis for treating the provision of services as a non-monetary element in the consideration for the supply of the secondary goods; and no basis for taking a non-monetary element into account (at an appropriate value) under art 11A(l)(a) of the Sixth Directive when ascertaining the taxable amount to be attributed to that supply. In those circumstances the commission 'in goods' must be treated as a price discount or rebate allowed to the agent at the time of the supply of the secondary goods; and cannot be included in the taxable amount (see art 11A(3)(b))."

44. On the facts, the Court could find no such link. There was no basis for distinguishing between so much of the commission "taken in goods" as was equivalent to commission at the rate of 10% and so much of that commission as was equivalent to the additional 2.5%. The Court could also find no reason to distinguish between that part of the amount claimed as 'commission in goods' which was attributable to commission earned on payments made by the agent in respect of her own purchases and that part which was attributable to commission earned on payments in respect of third-party purchases. If the agent's services in respect of third-party sales explained the sale of goods at less than the catalogue price, it applied as much to the whole of the amount of 'commission in goods' as it did to the enhanced 2.5%. The Court considered that the agent's right to take commission 'in goods' at the rate of 12.5% arose from a combination of two factors: (a) her appointment as an agent and (b) payments made by her in respect of the supply of primary goods. There was no direct link between the right to take commission 'in goods' at the rate of 12.5% and any service which the agent had, or had not, provided in relation to a third-party sale. On that basis, the whole of the amount claimed as 'commission in goods' ought to be treated as a price discount or rebate.

45. *Boots Co plc v Customs and Excise Commissioners* (C-126/88) considered Article 11A(3)(b) of the Sixth Directive (now Article 79 PVD) and what constituted a discount given at the time of supply for VAT purposes. In that case the taxpayer launched two promotional schemes under which a customer who bought certain goods for the normal retail selling price obtained coupons free of charge entitling them to purchase other specified goods at their normal retail selling price less the nominal value indicated on the coupons. VAT was accounted for by Boots on the cash received under its retail scheme. The Commissioners of Customs and Excise assessed Boots to VAT on its gross takings including the value of the coupons surrendered. The question of what constituted a price discount and rebate for the purposes of Article 11(A)(3)(b) of the Sixth Directive (Article 79 PVD) was referred to the ECJ for a preliminary ruling. The UK government argued that the promotion scheme used by Boots should be distinguished from the typical case of a price discount or rebate since the reduction allowed to the purchaser was granted in exchange for the coupon which had a value. The European Court could not accept that view and found that the coupon was just a document incorporating the obligation assumed by Boots to give the bearer of the coupon, a reduction at the time of the purchase of redemption goods. The Court held that Article 11A(3)(b) of the Sixth Directive should be interpreted as meaning that the expression 'price discount and rebates allowed to the customer and accounted for at the time of the supply' covered the difference between the normal retail selling price of the goods supplied and the sum of money actually received by the retailer for those goods where the retailer accepts from the customer a coupon which he gave to the customer on a previous purchase made at the normal retail selling price. At [15] the court explained that the coupon could not be regarded as

consideration, and was therefore to be regarded as a discount, because it could not simultaneously be an obligation of the supplier and an advantage to the supplier:

> "There remains the question whether a coupon given on an earlier purchase may likewise be regarded as a price reduction certificate. The reduced price actually received by the supplier when the subsequent purchase is made on the surrender of the coupon then constitutes the taxable amount. The coupon, which – and because it – in the given circumstances constitutes an obligation on the part of the supplier, cannot be regarded as consideration, that is to say an advantage for the supplier capable of being expressed in money. It is therefore to be regarded as a price discount or rebate within the meaning of Article 11A(3)(b)."

46. The idea in this paragraph (that there must be an advantage to the supplier for something done to amount to consideration) finds an echo in two cases where a choice or course of action by the recipient of a supply was found not to give rise to something which constituted non-monetary consideration.

47. *Commissioners of Customs & Excise v Mirror Group Plc* (C-409/98) concerned an inducement paid to a tenant to induce them to enter a lease. The matter was referred to the ECJ which found that merely entering into a lease agreement was not sufficient to constitute a supply of services. Paragraphs 26 and 27 set out the ECJ's reasoning:

> "As to whether supply of services was made, it must be noted that a taxable person who only pays the consideration in cash due in respect of a supply of services, or who undertakes to do so, does not himself make a supply of services for the purposes of art 2(1) of the Sixth Directive. It follows that a tenant who undertakes, even in return for payment from the landlord, solely to become a tenant and to pay the rent does not, so far as that action is concerned, make a supply of services to the landlord.
>
> However, the future tenant would make a supply of services for consideration if the landlord, taking the view that the presence of an anchor tenant in the building containing the leased premises will attract other tenants, were to make a payment by way of consideration for the future tenant's undertaking to transfer its business to the building concerned. In those circumstances, the undertaking of such a tenant could be qualified, as the United Kingdom government in essence submits, as a taxable supply of advertising services."

48. This case supports the analysis that merely entering into an agreement to take a supply is not sufficient to constitute a supply of services, even where the counterparty is financially induced to do so by the supplier of services. Linking back to the point in [46], there must be an advantage to the supplier beyond the advantages which naturally flow from the transaction itself. In *Boots* there was an advantage to Boots in selling the secondary goods (at least if some of those sales would not have been made without the promotion), but there was no advantage (certainly not in the surrender of the "money off" coupon they had generated) beyond those sales. Similarly in *Mirror Group*, there was no advantage to the landlord beyond the tenant signing up to the lease. Tellingly, it was accepted that the position would have been different if the tenant acted as an "anchor tenant" (agreeing to transfer its business to the new site and effectively providing advertising services); something extra would be provided and that could count as consideration.

49. One case not referred to by either Ms McArdle or Mrs Brown reinforces the point that, where a party does something extra (beyond what would be expected of them as a party to the transaction for the principal supply), any discount received on the price of the principal supply can constitute consideration for the "something extra". That case is *Ridgeons Bulk*

Ltd v CCE, [1994] STC 427. The taxpayer took a 25-year lease of a sawmill at a rent of £140,000 per annum (subject to review every 5 years). The first three years of the lease were rent-free. It had been agreed that the taxpayer would carry out certain specified works costing £375,518 and the taxpayer had carried out these works before the lease was granted. Popplewell J held that there was clear evidence that the rent-free period was directly linked to the taxpayer's agreement to carry out the works and so the taxpayer was required to account for VAT on the supply it made. This case is looking at the VAT position from the standpoint of the recipient of the principal supply, because the tenant in this case was in business, but the point of principle is the same: a rent free period in a lease usually has no particular VAT implications, as it is just part of the pricing mechanism agreed between the landlord and the tenant, but this is not the case where the tenant is performing a particular additional service for the landlord beyond just taking the lease.

50. *Everest Ltd v HMRC*, [2010] UKFTT 621 (TC), is the second of the two cases I alluded to in [46], where a choice or course of action by the recipient of a supply was found not to give rise to something which constituted consideration. This case concerned the supply of home improvement products and services. Everest offered several discounts to purchasers, what the Tribunal described as a "flexible and wide-ranging discount structure", relating to factors such as quantity, immediate ordering, specific products and even a "manager's discretionary discount". The Tribunal found that the cashback discount it was analysing was regarded by Everest simply as one of the range of discounts it offered to customers and put at the disposal of its salesforce.

51. Under the cashback discount, a customer could choose to pay for the supply by paying a deposit and then taking out a loan with a finance company, subject to receiving credit approval. Everest received commission from the finance company, which was recoverable if the customer settled the loan within four months of opening the account. The finance company paid Everest the full price of the home improvement supply less the deposit. Everest told its customers that, if they opened a loan account and maintained it for a certain period after the loan was taken out, Everest would pay the customer 10% of the loan amount (the cashback). The purpose of the cashback arrangements was to increase Everest's sales of its home improvement goods and services. Everest treated the cashback payment as a discount on the price of the home improvement supply, such that the taxable consideration for the supply and consequently its liability to value added tax ('VAT') was reduced. HMRC considered the cashback was a separate payment in return for the customer purchasing the goods and services by entering into a loan agreement with the finance company and maintaining the account for a set period; it was not a retrospective rebate on the price paid for the supply and therefore Everest was not entitled to reduce the value of the supply by the value of the payments made to the customers under the cashback scheme.

52. The FTT found in favour of Everest. One important factor in its decision was the spectrum of discounts offered by Everest to potential customers. At [74]-[75] the Tribunal observed:

> "[74] A customer is induced to purchase home improvements from the appellant by means of a number of discounts from the advertised price. The appellant's promotional literature refers to the cashback in terms, but in a manner that is indistinguishable from other incentives by way of discount that might be offered to the customer. In the absence of conclusive contractual documentation, we consider that, viewed objectively, this is strongly indicative of the cashback being a retrospective reduction in the price. The cashback was, as Mr Cordara argued, part of the price negotiation with the customer as one of a suite of potential discounts on offer, which would be negotiated on an individual basis. The cashback differed from the

other discounts only in that it was a rebate of something that was already paid, and it was payable only if certain conditions were satisfied.

[75] Taking this promotional material together with the fact that the obligation on the part of the appellant to make the payment can only arise as part of a contract for the purchase of the home improvements and that the expression 'cashback', in that context can most readily be understood as the payment back to the customer of sums he has paid to the appellant and not any other person, we consider that the proper analysis of the cashback is that it is part of the pricing mechanism of the appellant. Accordingly we find that the cashback was in the nature of a discount and was a retrospective reduction in the price for the home improvements goods and services that the customer acquired."

53. Having analysed the nature of the payment in this way, the Tribunal went on to consider the nature of Everest's obligation. In that context the Tribunal considered that the mechanics of the arrangement (that it operated by way of rebate) did not matter. What did matter was the relationship between the payment and what the customer did to qualify for it. HMRC argued that the cashback was related to services that were distinct from Everest's supply to its customer, namely taking out the loan and maintaining it for the specified period. The Tribunal considered that a distinction must be drawn between the mere satisfaction of a contingency, and actions of a customer that amount to a service by a customer to the supplier. The key passage in their decision (at [78]-[79]) was this:

"[78] The dividing line is between those cases where a discount, including a retrospective discount or rebate, is given merely on satisfaction of a contingency, which can include a behavioural shift on the part of the customer, and those where the discount is given for a service provided by the customer. Around that dividing line there will be a spectrum of cases. At one end there are discounts offered for behaviour such as purchasing in bulk, or purchasing certain combinations of goods or services, either with a combined discounted price or with the first purchase being acknowledged by the obtaining of coupons entitling the holder to a discount on a second purchase, as in Boots. We do not consider that the ECJ would have arrived at a different conclusion in Boots if, instead of a coupon, the offer had been to give a discount, whether at that time or retrospectively, provided it could be shown that the customer had already purchased other eligible goods. The coupon in Boots was no more than the evidence that the contingency had been satisfied. A discount of the nature with which the ECJ was concerned in Boots was given because a contingency had been satisfied, and was a reduction in price and not consideration for any supply to Boots by way of satisfying the contingency.

[79] At the other end of the spectrum are those cases where the discount or payment is given for the performance of a service by the customer. For that to be the case, in our view, on the ECJ authorities, the customer must be carrying on something in the nature of an economic activity, whether it is in the nature of an obligation of the customer or not. There must, as in NYC, be a specific link between the payment and an economic activity of the customer. That direct link follows from discount given on the relevant goods (as in *NYC*, *Empire Stores* and *Peugeot*) being the consideration for something in the nature of a service by the customer. The same analysis must apply if the consideration is given by way of a cashback; we consider that we can properly infer that the result of *NYC* would have been the same if, instead of the pot of cream being supplied for a discounted monetary consideration, it had originally been supplied for full value, and a cashback payment had been made for the undertaking given by the beauty consultant."

54. The Tribunal went on to hold (at [83]) that the cashback payment that was made by Everest to its customer was a price reduction made solely on account of the customer satisfying a contingency, and not in return for the provision by the customer of anything in the nature of the making of a supply (of entering and maintaining the loan with the finance company) by the customer to Everest.

55. Before leaving *Everest*, it is worth noting the Tribunal's discussion (at [33]-[35]) of the approach to be taken in analysing the transactions. Although it was common ground between the parties that, in determining the taxable amount that is to be treated as provided for a given supply, the transaction should be examined as a whole, without being dissected artificially (*Customs and Excise Comrs v Pippa-Dee Parties Ltd* [1981] STC 495), the Tribunal observed that, "it is equally the case that the general scheme of the VAT legislation nevertheless proceeds on the basis of examining separately each transaction in a chain of transactions to ascertain objectively what output tax is payable and what input tax is deductible". The Tribunal determined that its approach should be to carry out an objective analysis (i.e. ignoring the parties' subjective intentions except to the extent they were reflected in the terms of the various transactions) considering all the surrounding circumstances but with the scheme documentation playing an important part. In essence, this is the same approach as that taken by the Upper Tribunal in the *South African Tourist Board* case (see [34] above).

56. The fine nature of the difference between a "pure" discount and non-monetary consideration can be seen in the different outcomes in *Lex Services plc v Customs and Excise Commissioners* [2003] UKHL 67 and *Hartwell plc v Customs and Excise Commissioners* [2003] EWCA Civ 130. Both cases involved the sale of new cars with a part exchange component. In *Hartwell* the difference between the true value of the part exchange car and the amount by which the price of the replacement car was to be reduced was reflected in a discount voucher. In *Lex* the dealer agreed a higher price for the part exchange car than they knew they would achieve when they came to resell it. The issue was whether the value agreed or the 'true value' of the car given in part exchange was the appropriate monetary equivalent of the part exchanged car for the purpose of ascertaining the taxable amount of the replacement car. Lex pointed to *Hartwell* and pleaded fiscal neutrality. The House of Lords decided that the taxable amount of the replacement car was to be determined by reference to the contractual agreement between the parties, which gave the subjective value of the car. As far as fiscal neutrality was concerned, Lord Walker observed that this concept had to co-exist with the objective of legal certainty. If a dealer wanted to give a discount, they should make that clear. This was particularly important in an area such as this, where the dividing line between services and discounts can be hard to find. He said this (at [31]):

> "I would however add that I would readily agree … that some of the 'services' performed in what I have loosely called the 'free gift' cases were almost illusory, and that the dividing line between such 'services' and the giving of a discount is correspondingly obscure (just as the dividing line between a contract and a conditional gift may be obscure). But in the VAT system legal certainty is important, as well as fiscal neutrality, and if a supplier wishes to give a discount it is up to him to make his intention clear, especially in the context of a part-exchange transaction. *Hartwell* shows that it is possible, with appropriate documentation."

57. I cite that passage not because I consider that anything turns on the terminology used by Bulb in this case, but because it is important to acknowledge Lord Walker's recognition of how modest some of the services which had counted as non-monetary consideration were, and in consequence how obscure and hard to find the dividing line between discounts and services/non-monetary consideration had become.

58. In *Kumon Educational UK Company Ltd v HMRC,* [2015] UKFTT 0084 (TC), the appellant franchised its teaching methods to tutors who paid a licence fee based primarily on a set amount per pupil. Kumon provided training, access to information, workbooks and support. In certain cases, reward payments were made to franchisees based on criteria such as the number of students taught and the instructor's own level of technical training. Kumon treated these payments as a reduction in the consideration paid by the franchisees for their services. HMRC argued that the rewards were consideration for a separate supply by the tutors to Kumon because they were not described as discounts.

59. The FTT held that the form in which a payment was made should not affect its treatment for VAT purposes. It did not regard the fact that the reward payments were not deducted from the franchise fee but were paid as a separate credit to instructors was significant. Under the licence agreement Kumon was obliged to provide the right to use, and information about, its teaching methods to enable the instructors to take on students and pay Kumon a standard fee for each student they taught. It was part of that agreement that the instructors had obligations towards Kumon to promote the Kumon method and improve their own teaching skills. The Tribunal did not consider that these obligations could realistically be separated from the commercial bargain on which the franchise fee was based. Following *Everest*, the FTT held that, to identify a separate supply, it must be possible to identify a separate economic activity being carried out by the customer. The reward paid to the instructors was for enhancing the basic service, for which they paid a franchise fee to Kumon. They considered that this was best viewed as an enhancement of that basic service rather than a separate supply and as being closer to cases in which a discount is given for bulk purchases than to cases in which activities unconnected with the service being provided are undertaken by the customer.

BULB'S SUBMISSIONS

60. For Bulb, Mrs Brown makes the following key points:

(1) From a customer's point of view the marketing material confirmed that the credits represented a reduction in the price payable for energy. This is reinforced by the fact that the vast majority of customers were happy that the credit be offset against their ongoing consumption and was in line with the marketing of the scheme, which was sold as a way for customers to save money on their energy bills.

(2) Whether the reward was formally described as a "discount" does not affect that position, provided that the substance of the arrangements was that there was a price reduction given. The fact that the Terms and Conditions do not refer to the reward as a 'discount' does not mean that it should not be characterised as a discount against future supplies for VAT purposes. As Mrs Brown rather graphically put it, you could call a discount a frog, but it would still be a discount! In any event, the use of 'reward' connoted gratuity rather than reciprocity and was not inconsistent with the payment being a discount.

(3) The customer was never led to believe that there was an obligation to pay amounts exceeding the variable balance shown on their monthly statement. This, as Mr Ong explained, was not straightforward and took account of payments, credits and the tariff price of consumed energy. There could be a number of credits to a customer's account (e.g. the credit on joining and a credit to compensate for exit fees charged by a previous supplier), not just RAF scheme credits. Mrs Brown submits that all of these credits formed an inherent part of the pricing offer for the supply of energy with VAT being due only on the cash payments collected from the customer. Rather like *Boots*, there was an obligation (reflected in the link referrers passed on) to generate a credit

which reduced the price for energy where external contingencies were satisfied. There were conditions on the obligation (sharing the referral link and it being used) but Bulb fulfilling its own obligation cannot be something for which someone else gives consideration. The wider commercial purpose (driving up sales) is not relevant.

(4) For the activities of the referrer to be non-monetary consideration/payment for the supply of energy there must be (a) something done, furnished or served by the customer, (b) which is directly linked to the referral credit, (c) by way of reciprocal performance.

(a) As to (a), very little was done by a referrer. They were provided with a referral link to use when doing so. The referral link could be easily shared. Mrs Brown submits that the "activity" of referral was at best de minimis in terms of effort and was not sufficient to constitute a service of any sort, albeit that referrals carried potentially significant benefits for Bulb. To constitute consideration, the customer must provide a specific benefit or advantage to Bulb; a general benefit or advantage is not enough.

(b) There is certainly no direct and immediate link between the referral and the RAF credit. There are simply too many uncertainties between the sharing of the link and the giving of the reward.

(c) The referral scheme also provided no framework in which it can be contended that there is reciprocal performance. Cases such as *Naturally Yours Cosmetics* confirm that, to be non-monetary consideration, there must be an action done to the supplier (Bulb here). In *Naturally Yours Cosmetics* it was the undertaking and in *Empire Stores* it was the customer information. Here referrers did not give anything to Bulb. The act of passing on the referral link was not a service provided <u>to</u> Bulb. At most, it was an activity that triggered a chain of events which in due course result in someone becoming a Bulb customer. The value to Bulb was down the chain of people involved and so falls to be ignored; we are required to ignore everything outside what the immediate counterparty does. The value was the recruit signing up, not the sharing of the link.

(d) Bulb retained sufficient discretion in respect of the operation of the scheme, by reference to the restrictions on the way the code could be distributed, which would have made it excessively difficult for a referrer to enforce their rights had Bulb chosen not to credit the reward. The fact that effectiveness of the scheme would have significantly diminished had Bulb failed to credit does not provide a justified basis to contend that there was reciprocal performance.

(5) The situation here is very different from the cases where non-monetary consideration was found or accepted (*Naturally Yours Cosmetics*, *Empire Stores* and *Westmorland*) and much more like the position in cases which have been analysed as a true discount/price reduction. In *Littlewoods* the Court of Appeal considered that the activities of the agent were too remote to be directly linked to the supply of further items using the commission. In *Everest* the customer did not receive a cashback unless they signed up for finance and remained a finance customer for long enough for Everest to earn their intermediary commission, but because of the tripartite relationship there was no direct link and the cashback was a discount. This tripartite relationship is not dissimilar to that between Bulb, the referrer and the potential recruit in this case. In *Kumon* the customers did was what was expected of them, they performed their role to the best of their ability, and there was no direct link. Here the link between the sharing of the referral link and the RAF credit being given against future supplies of energy is

similarly too remote. There are also too many contingencies outside the control of the referrer for the link to be direct.

DISCUSSION

61. Dealing with the Mrs Brown's first point, I agree that the RAF credit not being referred to as a discount is not material. In *Lex* the House of Lords held that, if (as had been done in *Hartwell*) the dealer had discounted the price of the new car and taken the part exchange car for its true (rather than inflated) value, they would only have had to account for VAT on the discounted price of the new car. The point is that the dealer overstated the value they were prepared to ascribe to the part exchange car, and consequently sold the new car for a higher price, not that the dealer failed to use the word discount. VAT is charged on the subjective value of the consideration given and in *Lex* that took into account the inflated value ascribed by both parties to the part exchange car. It was ascribing a higher (subjective) value to the car, not the language used, that was the problem for the dealer. The FTT in *Kumon* also considered that nomenclature was not an important factor.

62. Mrs Brown stressed that the mechanism Bulb used to reward successful referrers was to factor the RAF credits into the calculation of amounts due from them in the future, but I do not consider that the way in which a supplier gives value to their counterparty is material in deciding whether the counterparty has given non-monetary consideration for the principal supply. We have seen that landlords can provide inducements to tenants by offering rent-free periods or paying a reverse premium. In *Everest* most of the smorgasbord of discounts were delivered as price reductions at the point of sale and only the "cashback discount" worked by Everest paying cash (repaying to the customer an amount equal to 10% of the amount of the loan), but the Tribunal held that this made no difference. At [78] it observed:

> "We do not consider that the ECJ would have arrived at a different conclusion in *Boots* if, instead of a coupon, the offer had been to give a discount, whether at that time or retrospectively, provided it could be shown that the customer had already purchased other eligible goods. The coupon in *Boots* was no more than the evidence that the contingency had been satisfied. A discount of the nature with which the ECJ was concerned in *Boots* was given because a contingency had been satisfied and was a reduction in price and not consideration for any supply to Boots by way of satisfying the contingency."

At [79], commenting on *Naturally Yours Cosmetics*, the Tribunal observed:

> "[W]e consider that we can properly infer that the result of *NYC* would have been the same if, instead of the pot of cream being supplied for a discounted monetary consideration, it had originally been supplied for full value, and a cashback payment had been made for the undertaking given by the beauty consultant."

63. Kumon rewarded franchisees with cash payments rather than reducing franchise fees, but this did not impact on the Tribunal's decision.

64. If, instead of reducing future charges, Bulb had made cash payments to all referring customers, the VAT result (assuming for a moment that the referrers were not providing non-monetary consideration) should have been the same. Relying on Article 90 of the PVD and *Elida Gibbs*, Bulb could have sought repayment of overpaid VAT on the basis that those payments constituted post-transaction rebates which reduced the taxable amount; as the Tribunal in *Everest* observed at [86], "in our view for a reduction in price not to be regarded as a reduction in the taxable amount it must be linked to something in the nature of a service by the customer to the supplier and not merely be for the satisfaction of a contingency" and, on this assumption, that would not be the case. Despite asking during the hearing, it was

never satisfactorily explained to me why Bulb did not do this in relation to the small number of customers who took their RAF credit in the form of cash payments. True it is that regulation 86 of the VAT Regulations provides that there is a supply of energy whenever consideration is received, but this should not prevent a true rebate reducing the taxable amount on *Elida Gibbs* principles.

65. *Ridgeons Bulk* tells us that a counterparty being rewarded by a price reduction (a rent-free period) does not conclusively determine the question whether the counterparty is making a supply to the person making the principal supply.

66. None of this should come as a surprise. The question we are addressing is whether referrers were providing non-monetary consideration, and it would be remarkable if the answer to that question turned on whether their behaviour was rewarded by a price discount rather than a rebate. For these reasons, I do not consider the fact that Bulb gave value referrers by reducing the price they paid for energy in the future to be determinative. What matters is whether referrers were giving non-monetary consideration for their energy supplies. Whether they were or not depends on whether their referral activity met the tests for consideration, regardless of how Bulb delivered its side of the bargain.

67. As to Mrs Brown's first point here, that very little needs to be done to effect a referral, Lord Walker identified the relatively modest, almost illusory, supplies in what he referred to as the "free gift" cases. *Empire Stores, Naturally Yours* and *Westmorland* all involved relatively modest acts being treated as non-monetary consideration. As we have already seen, VAT is charged on the subjective value of consideration. It does not matter that, looked at objectively, what is described as non-monetary consideration might be thought to have little or no value. What matters is that the parties to the transaction ascribed a value to it for the purposes of their transaction, just as the car dealer and their customer in *Lex* ascribed a higher value to the part exchange car than it objectively justified. Bulb chose to reward customers who effected successful introductions by reducing the amounts they were required to pay for their energy. Whether the referral activity was capable of being given an objective value or not (and, if so, what that value might be) is neither here nor there. If it was sufficiently substantial for the parties to put a subjective value on it for the purposes of their dealings with each other, then it was sufficiently substantial to be capable of constituting non-monetary consideration.

68. Mrs Brown next submitted that, for there to be the required reciprocity to constitute consideration, a specific benefit or advantage must be delivered <u>to</u> Bulb. She placed great stress on the fact that, in both *Naturally Yours* and *Empire Stores,* something was provided <u>to</u> the person who provided the "free gift". In *Naturally Yours* it was the undertaking given by the beauty consultant and in *Empire Stores* it was information about a potential customer.

69. "Arrow in - arrow out" was Mrs Brown's expression here, by which she meant that, for there to be non-monetary consideration, something must be provided <u>to</u> Bulb; if this is not the case, there is an arrow out (the provision of energy at a reduced price), but no arrow in.

70. To achieve a referral (or at least to claim credit for a successful referral), a referrer needed to share their referral link and the recruit needed to use it to sign up with Bulb. At the point of referral, in Mrs Brown's submission, nothing has been provided "to" Bulb. The referrer did not provide their referral link to Bulb; that would have been a completely pointless thing to do. They provided it to the potential recruit in the hope that they would use it to sign up with Bulb. If anything followed which benefited Bulb, it came from a third party, a recruit, but only if they decided to sign up. That would be a subsequent advantage but not consideration provided by the referrer.

71. I agree with Mrs Brown that, for there to be consideration, there must be a direct link, there must be reciprocity and the required reciprocity is not to be found in what someone else does, an advantage derived later (here by a third party signing up as a Bulb customer in due course), as the Advocate General observed in *Naturally Yours Cosmetics* at [24].

72. I need to pause here to consider a particular point raised by Mrs Brown in relation to *Empire Stores*. This is that the information Empire Stores received had some immediate commercial value to it, as Empire Stores could (and did) sell lists of its established customers (at a price of £65 per thousand names). As she put the point in argument, the trigger for the provision of the gift was the making of a purchase, but the supply was the information and that was valuable information provided to Empire Stores which could be immediately exploited by them.

73. The Advocate General described "the advantage, and hence the consideration, received by Empire Stores" as follows:

> "Under the 'self-introduction' scheme that advantage consists in two elements: (i) the obtaining of personal (and partly confidential) information concerning the customer introducing herself and the — at least implicit — permission to use the information in order to investigate credit-worthiness (which is essential in the case of credit sales), in relation to which the national court states that such information has an economic value having regard to the fact that Empire Stores could sell its lists of established customers for £65 per thousand names and addresses to third parties and did in fact do so; and (ii) the serious chance that the customer introducing herself, induced by the gift, will order catalogue goods from Empire Stores, thus enabling the latter to extend its clientele.
>
> In the case of the 'introduce-a-friend' scheme Empire Stores receives the same advantages, except that the information given and also the chance of catalogue goods being ordered concern the person introduced and that it is not the latter who receives the gift but the existing client as a reward for acting as an 'intermediary'."

74. He concluded that under both schemes there was consideration. There was a direct link between the consideration and the "gift" as "[t]he introduction and provision of information is under both schemes a *conditio sine qua non* for the supply of the gift." and " … it cannot be said that the value of the gift is unconnected with the economic value which the introduction has for Empire Stores. On that point this case differs considerably from the situations in the cases of *Coöperatieve Aardappelenbewaarplaats* and *Apple and Pear Development*, where the facts of the case clearly showed that there was no direct link, and is closer to the situation in *Naturally Yours Cosmetics*".

75. The ECJ described the service provided (at [13]) as "the introduction of a potential customer" and answered the question put to it (which was a valuation question) by reference just to the introduction service and without referring to the provision of information. This conclusion was not invalidated by the fact that the gift was only supplied if a recruit was approved and placed an order and the link between the supply of the gift and the introduction was a direct one because, if the service was not supplied, no free gift was due.

76. Mrs Brown says that the only way to reconcile *Empire Stores* with *Mirror Group*, so far as the self-referral scheme was concerned, is in the provision of personal information. Otherwise, post-*Mirror Group*, self-introduction without more would not count as consideration. I am not with her on this point. I cannot see how providing information necessary for an applicant to be approved as a customer can be separated from the process of becoming a counterparty to a supply transaction; in all but the most unusual cases (where an

undisclosed agent is involved) a counterparty will identify themself before entering a transaction. I also cannot take from *Empire Stores* the proposition that consideration requires the provision to the supplier of something of realisable economic value (in the way that each customer name had an economic value as it could be sold, along with 999 others, for £65). In *Naturally Yours Cosmetics* the service supplied by the consultants was described by the Court (at [17]) as "procuring hostesses to arrange sales parties" (or, at [18] "applying the inducement to procure the services of another person or in rewarding that person for those services"). That clearly had no objective, realisable value, nor did the service provided by the coach drivers in *Westmorland Motorway Services*. It seems to me to be wholly unrealistic to regard the outcome in *Empire Stores* as somehow turning on the tiny resale value of each name. Moreover, reaching such a conclusion would involve concluding that there was a supply because Empire Stores received something with a realisable (objective) value, whereas the cases make it abundantly clear that it is subjective value which is necessary and sufficient.

77. Returning to Mrs Brown's arrow illustration, I agree that we must be able to say that something had been done/provided to/for Bulb by referrers in order to say that there was reciprocity between that and the energy price reduction, but I can find nothing in the cases which limits what is sufficient to meet this requirement to cases where something can be seen to be done "to" the counterparty in the way that information could be seen to be given in *Empire Stores* (because it was written down on a form that was posted to Empire) or an undertaking was given in *Naturally Yours Cosmetics*. The PVD refers to "everything which constitutes consideration" and, as the Advocate General observed in *Naturally Yours Cosmetics* (at [16]), it follows that the (undefined) term "consideration" should be given the widest possible meaning to be consistent with the objectives of the VAT system, which he described as "a general system of tax on consumption, which is neutral as regards the structure of transactions". So, whilst it must be the case that consideration is confined to what the recipient themselves provides to the supplier (not including any subsequent advantage the supplier obtains), that concept must be wide enough to embrace any kind of "payment" by the recipient. Imposing additional formalistic requirements for something to count as consideration seems to me to run the risk of doing exactly what the Advocate General was worried about and thought to be wrong. We would be making a conscious decision not to be "neutral as regards the structure of transactions" and to have concluded that only certain types of payment should "count", which would potentially open the door to avoidance (which the Advocate General was also concerned by - see [19]). An approach which is more consistent with that of the Advocate General would be to say that anything which the recipient does which is referable to their bargain with the supplier has the potential to count as consideration. That would clearly and most obviously encompass anything of objective financial value given to the supplier as part of that bargain, but it would also include anything else done for or at the behest of the supplier as part of those arrangements.

78. Against that background, I turn to consider whether anything (and, if so, what) was given by referrers by way of consideration. As explained at [55] above, when doing this I should look objectively at all the surrounding circumstances, ignoring the parties' motivations but paying particular attention to the scheme documentation. When I do that, I see, from the non-contractual documentation, Bulb stressing the benefits of referrals both in environmental and financial terms and encouraging its customers to "get cracking" whilst the financial benefits of achieving successful referrals were in place. Bulb acknowledged that energy supply was not the most natural topic to discuss with friends, and so customers were given prompts to help them introduce Bulb as well as tools to help them share the Bulb good news on social media. Customers were, however, actively discouraged from sharing their referral link in a random way. Turning to the contractual documentation, we see the Terms

and Conditions putting in place the RAF scheme (offering financial rewards in return for successful referrals) and telling customers that the referral link should be shared "in a personal manner that is appropriate and customary for communications with friends, colleagues, employees, customers and family members". If they did that, and their link was used by a recruit to switch their energy supply to Bulb, they and the recruit would receive a reward. If they wanted to, they could offer additional rewards to potential recruits, but at their cost.

79. Putting all this together, existing customers were not simply being asked to share their referral link. Quite the opposite; they were told only to share their link "in a personal manner that is appropriate and customary for communications with friends, colleagues, employees, customers and family members" and they were given prompts to help them do this and expressly told that they could offer additional rewards to potential recruits at their own cost. They were being asked to introduce Bulb in an engaging/personal/appropriate way and share their referral link in the hope that the recipient would sign up to be a Bulk customer.

80. To claim credit for a successful referral and make it easy for their contacts to sign up, customers needed to share their referral link, but that was a means to an end. In *Empire Stores* catalogue users were told to complete the referral form with their friend and post it to Empire Stores. There was, of course, nothing to stop an existing customer putting her details on the form (indicating which gift she wanted) and then giving it to her friend to complete, sign (it was only required to be signed by the friend) and post. It does not seem to me that there is any material difference between forwarding a link to someone that they can use to sign up as a customer and filling in a form with someone and putting it in the post to the same end. Both are means to an end, which reflect their times. We would be artificially and unrealistically dissecting what Bulb customers were being asked to do, if we concluded either that all they were doing (or being asked to do) was sharing their referral link without more or that sharing their referral link was something they did to/for their contacts only and not for Bulb.

81. In my judgment, referrers doing what Bulb encouraged them to do by way of referring Bulb within the framework of the RAF scheme and sharing their referral link was sufficient to meet the requirement that something must be provided by way of consideration, even though at the point of referral nothing was done/provided "to" Bulb. We see the tests for 'contractual exchange' required to establish the element of 'consideration' met because:

> (1) There was a direct legal link between something done and something which counts as consideration in the contract between Bulb and referrers articulated in the Terms and Conditions. It created a clear, legal link between what was required of referrers who wanted to participate in the RAF scheme (they should introduce their friends and colleagues to Bulb in an appropriate, personalised way and pass on their referral link) and Bulb's "side of the bargain" (to reward customers who could show, because their referral link had been used, that they were the source of a recruit).
>
> (2) There was a direct link between those actions and the RAF credits as a referral was a *conditio sine qua non* for the RAF credit.
>
> (3) A relationship can be established between the level of the benefits which Bulb obtained from the services provided and the amount it was prepared to pay as consideration: it gave a RAF credit for each successful referral.
>
> (4) That price (a RAF credit for each successful referral) was the subjective value in money put by Bulb and its customers on the service performed by referrers.

82. That leads us on to the next point, which is whether there were simply far too many uncertainties between a referrer sharing the good news about Bulb with someone else and giving them their referral link and the referrer being in a position to claim their credit. Do these uncertainties and Bulb's willingness to pay only for successful referrals invalidate the conclusion at [81]? The position here is very similar to the position in *Empire Stores*. Just like here, there was a great deal of uncertainty and lots of things could go wrong. The customer might refer someone who failed credit checks and was not allowed to purchase goods from Empire Stores. Even if the individual passed the credit checks, the referrer was only rewarded when the recruit bought something, which they might not do. The presence of conditions which needed to be satisfied before the referrer was rewarded and the risk of a referral going unrewarded were expressly not regarded as problematic; see the summary of the Advocate-General's opinion and the ECJ's judgment on this point at [40] above.

83. Mrs Brown says that there is no logical basis for distinguishing between the credits given to a recruit when they sign up (both the simple credit for signing up and the additional credit if they suffered penalties for leaving their former supplier) and the RAF credit given to the referrer. They were both triggered by the same action (the recruit signing up using the referrer's referral link and switching their energy supply to Bulb) and *Littlewoods* indicates that credits/discounts/rebates triggered by the same act should all be treated in the same way unless there is a rational reason for not doing so. In my judgment, there is a rational reason for distinguishing between the credits given to existing and recruits, even though they are both occasioned by the recruit signing up.

84. When a recruit signed up, they were rewarded for signing up (by having their energy costs reduced just for signing up and potentially being compensated by a further reduction to address penalty costs of leaving their existing supplier). What they received is a discount in the true sense of that phrase. Rather like the tenant in *Mirror Group* or the householder in *Everest*, they were being rewarded through an adjustment to their energy pricing for signing up to receive energy from Bulb, even if that occasioned some personal financial cost. There was a behavioural shift (signing up with Bulb) but it was not "in the nature of a service by the customer to the supplier" (*Everest* at [86]).

85. The referring customer, on the other hand, received something entirely different. They received a reduction in their energy costs to reward them for doing something which was additional to what was required of them as customers of Bulb. They were like the hypothetical anchor tenant in *Mirror Group*, or the tenant carrying out the refurbishment work in *Ridgeons Bulk*, or the existing catalogue user introducing a potential new user in *Empire Stores*. Although there was a link between what they did and their position as customers of Bulb (only Bulb customers could participate in the RAF scheme), what they did was dissociable from that position. Their position in this regard was entirely different from the tenant in *Mirror Group* just signing up to a lease, or the householder in *Everest* deciding which discount to go for (and therefore how many products to buy, whether to buy straight away or how to finance their purchase), or the effective tutor in *Kumon* earning a rebate for doing what they were essentially already obliged to do but doing it in a way which met certain qualitative targets. If we need a check on that conclusion, we can see it in that it was not a requirement that Bulb customers should seek to sign up recruits and Bulb used other methods (not just the RAF scheme) to expand its customer base. What successful referrers did was dissociable from their position as consumers of energy supplied by Bulb. That is why that act can count as non-monetary consideration and why there is a rational distinction between the VAT treatment of their discount and the discount awarded to a recruit.

86. Mrs Brown's final point was that Bulb retained sufficient discretion in respect of the operation of the RAF scheme, in particular by reference to the restrictions on the manner in

which the code could be distributed, so that it would be excessively difficult for a referrer to enforce their RAF scheme rights had Bulb chosen not to credit the reward. We know (from Mr Ong's evidence about the customers with an enormous number of referrals) that Bulb did not enforce the relevant provisions of the Terms and Conditions, even in cases of flagrant non-compliance. That, taken with the commercial reality (that the RAF scheme would fail to achieve its objective if Bulb acquired a reputation for being churlish in its attitude to successful referrers) and the limits that cases such as *Braganza v BP Shipping Limited*, [2015] UKSC 17, indicate there are on the exercise of contractual discretions, leads me to conclude that there is not enough in this point to disturb my conclusion that there is a clear legal link between both sides of the bargain (that of the referrers and that of Bulb) sufficient to satisfy the *Tolsma* test for contractual reciprocity.

DISPOSITION

87. For the reasons set out above, I have concluded that the services provided to Bulb by referrers, when they successfully referred Bulb to recruits and so earned a RAF credit, amounted to non-monetary consideration. That consideration was part of the consideration given by those customers for energy supplied to them by Bulb.

88. This appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 17th NOVEMBER 2023