[2018] UKFTT 0238 (TC)

TC06471

Appeal number: TC/2016/01515

VALUE ADDED TAX — promotional offer of three food items for £10 "with free wine" - whether output tax on wine element - yes - whether bespoke retail agreement applied to treat wine as supplied for nil consideration - no - whether deemed supply - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARKS AND SPENCER PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at Taylor House, Rosebery Avenue, London on 13,14,15 and 16 November 2017

Roderick Cordara QC for the Appellant

Andrew Macnab, 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 promotional offer by Marks and Spencer plc ('M&S'). The offer is described as "Dine In for £10 with Free Wine", under which customers may buy three specified food items for £10 and receive a "free" bottle of wine.

2. If sold separately food items are zero rated for VAT while wine is standard rated. The issue in the appeal is whether the £10 should be apportioned between the food and wine or whether, as M&S contend, the wine is supplied free of charge for VAT purposes.

The appeal

3. The appeal is a consolidated appeal against the following:

(1) An HMRC decision letter dated 11 November 2015.

(2) An assessment dated 25 November 2015 for £6,501,617 of output tax for the period 23 February 2014 to 23 May 2015.

(3) An assessment dated 7 January 2016 for £1,783,609 of output tax for the period 24 May 2015 to 22 August 2015.

(4) An HMRC decision letter dated 23 December 2015.

(5) HMRC's decision on review dated 17 March 2016 to uphold an assessment to output tax of £1,659.481 for the period 02/16.

(6) HMRC's decision on review dated 30 June 2016 to uphold an assessment to output tax of £2,026,041 for the period 05/16.

The issues

4. The arguments raised by the parties have evolved in the course of making and hearing the appeal. I heard detailed argument on the following issues:

(1) The correct VAT treatment of the wine element of the promotion.

(2) The effect of the Bespoke Retail Scheme Agreement entered into between M&S and HMRC.

(3) The effect of the deemed supply rules.

(4) The recovery of input tax by M&S on wine purchased by it and disposed of under the promotion.

5. Prior to the hearing, two other lines of argument had been pursued. The first, raised by HMRC, related to minimum alcohol pricing for legal purposes. The second,

raised by M&S, related to an earlier settlement reached between M&S and HMRC regarding another promotional offer. It became apparent during the hearing that neither issue was being pursued as a separate argument, but I consider both points in discussing the four issues referred to above.

Evidence

6. I considered four ring binders of documents, consisting primarily of correspondence, including in relation to the retail scheme, and materials relating to the offer in the appeal and previous offers. I also heard evidence from Robert Taylor for HMRC, and from Stuart Forder (Director of Food Trading), Stewart Nisbet (Head of Food, Clothing & Retail) and Abdul Nabi (Group Head of Tax) for M&S.

7. Mr Macnab sought to cast some doubt on the openness of Mr Nisbet and Mr Nabi. I do not agree. I found all four witnesses to be credible and reliable. I deal with their evidence below in my findings of fact.

Legislation

EU Legislation

8. Article 1 of Council Directive 2006/112/EC on the common system of value added tax (the 'PVD') establishes the tax, and Article 2 provides:

> "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…"

9. Article 14 provides:

> "1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."

10. Article 16 provides:

> "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."

11. The UK's retail scheme provisions are permitted by Article 395 which provides as follows:

> "1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special

measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance.

Measures intended to simplify the procedure for collecting VAT may not, except to a negligible extent, affect the overall amount of the tax revenue of the Member State collected at the stage of final consumption."

UK Legislation

12. References below are to the Value Added Tax Act 1994 ('VATA 1994'), and to the statutory provisions so far as relevant.

13. Section 4 provides:

"4. **Scope of VAT on taxable supplies.**

(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."

14. Section 5 provides:

"5. **Meaning of supply: alteration by Treasury order.**

(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."

15. Section 19 provides:

"19. **Determination of value**

(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.

…

(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."

16. Schedule 4 defines the transactions that are or are to be treated as supplies of goods or services for VAT purposes. Schedule 4 paragraph 5 provides:

> "(1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.
>
> (2) Sub-paragraph (1) above does not apply where the transfer or disposal is—
>
> (a) a business gift the cost of which, together with the cost of any other business gifts made to the same person in the same year, was not more than £50;
>
> (b) the provision to a person, otherwise than for a consideration, of a sample of goods.
>
> (2ZA) In sub-paragraph (2) above—
>
> "business gift" means a gift of goods that is made in the course or furtherance of the business in question:
>
> "cost", in relation to a gift of goods, means the cost to the donor of acquiring or, as the case may be, producing the goods;
>
> "the same year", in relation to a gift, means any period of twelve months that includes the day on which the gift is made."

17. Schedule 6 paragraph 6 provides:

> "(1) Where there is a supply of goods by virtue of—
>
> …
>
> (b) paragraph 5(1) or 6 of Schedule 4 (but otherwise than for a consideration)
>
> …
>
> then except where the person making the supply opts under paragraph A1(3) above for valuation on the flat-rate basis or paragraph 10 below applies, the value of the supply shall be determined as follows.
>
> (2) The value of the supply shall be taken to be—
>
> (a) such consideration in money as would be payable by the person making the supply if he were, at the time of the supply, to purchase goods identical in every respect (including age and condition) to the goods concerned: or
>
> (b) where the value cannot be ascertained in accordance with paragraph (a) above, such consideration in money as would be payable by that person if he were, at that time, to purchase goods similar to, and of the same age and condition as, the goods concerned: or
>
> (c) where the value can be ascertained in accordance with neither paragraph (a) nor paragraph (b) above, the cost of producing the goods concerned if they were produced at that time.

(3) For the purposes of sub-paragraph (2) above the amount of consideration in money that would be payable by any person if he were to purchase any goods shall be taken to be the amount that would be so payable after the deduction of any amount included in the purchase price in respect of VAT on the supply of the goods to that person."

18. Pursuant to section 58, paragraph 2(6) of Schedule 11 enables retail schemes and provides:

"Regulations under this paragraph may make special provision for such taxable supplies by retailers of any goods or of any description of goods or of services or any description of services as may be determined by or under the regulations and, in particular—

(a) for permitting the value which is to be taken as the value of the supplies in any prescribed accounting period or part thereof to be determined, subject to any limitations or restrictions, by such method or one of such methods as may have been described in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice or as may be agreed with the Commissioners; and

(b) for determining the proportion of the value of the supplies which is to be attributed to any description of supplies; and

(c) for adjusting that value and proportion for periods comprising two or more prescribed accounting periods or parts thereof."

19. The relevant regulations are Regulations 67 and 68 of the Value Added Tax Regulations 1995 (SI 1995/2518) ("Regulations 67 and 68") which provide as follows:

"Retail schemes

67.—

(1) The Commissioners may permit the value which is to be taken as the value, in any prescribed accounting period or part thereof, of supplies by a retailer which are taxable at other than the zero rate to be determined by a method agreed with that retailer or by any method described in a notice published by the Commissioners for that purpose; and they may publish any notice accordingly.

(2) The Commissioners may vary the terms of any method by—

(a) publishing a fresh notice,

(b) publishing a notice which amends an existing notice, or

(c) adapting any method by agreement with any retailer.

68. The Commissioners may refuse to permit the value of any taxable supplies to be determined in accordance with a scheme if it appears to them—

(a) that the use of any particular scheme does not produce a fair and reasonable valuation during any period,

(b) that it is necessary to do so for the protection of the revenue, or

> (c) that the retailer could reasonably be expected to account for VAT in accordance with regulations made under paragraph 2(1) of Schedule 11 to the Act."

20. The appeals have been brought under the following parts of section 83 VATA 1994:

> "(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters–
>
> (b) the VAT chargeable on the supply of any goods or services…
>
> …
>
> (q) the amount of any penalty, interest or surcharge specified in an assessment under section 76…"

Findings of fact

21. Taking into account the documentary evidence and the evidence of the witnesses I make the following findings of fact. My findings in relation to the bespoke retail agreement are set out in the discussion of that issue, at [102] onwards.

Background

22. Like many retailers M&S has and does run various promotions designed to improve its financial performance. A number of those promotions are based on the proposition that a customer who buys certain products from M&S will receive something "free".

23. Following a disagreement with HMRC, in March 2010 M&S entered into a settlement agreement with HMRC under section 85 VATA 1994 covering two such promotions, namely the "cool bag" promotion and the "food festival" promotion (the 'section 85 Agreement').

24. The section 85 Agreement included the following statement at paragraph 1.3:

> "The Parties agree that the Appellant [M&S] is not required to account for VAT on specified reward goods supplied for no additional consideration as part of a promotional scheme, where on a minimum spend a customer gains a free specified item (such as a bottle of wine), and where a customer who purchases a specified number of items gets a free specified item (such as a cool bag)."

25. Following the execution of the section 85 Agreement, M&S continued not to account for output tax on what it regarded as "specified reward goods" on other promotions it considered to fall within the wording in paragraph 1.3.

26. In February 2014 M&S and HMRC entered into a bespoke retail agreement. I deal with this below.

27. In March 2014 M&S first informed HMRC of their plan to change their existing promotional offer 'Dine In for £10'. Under the new offer, described as 'Dine In for £10 with Free Wine', the customer would be entitled to buy three specified items—a main course, side dish and dessert—for £10, and to a "free" bottle of wine or alternative beverage.

28. The parties were unable to agree the VAT treatment of the wine/beverage element of the promotion and following discussions HMRC issued the assessments which are the subject of this appeal.

The Dine In promotion

29. I refer below to the offer which is the subject of this appeal as "the Dine In Promotion".

30. Promotions such as the Dine In Promotion are seen by retailers as providing a number of potential benefits to their business. In effect, each promotion involves the retailer taking a calculated risk. The retailer reaches a decision to lower its aggregate profit margin on the items comprised in the offer compared to their retail sales price, in the expectation that this will be more than compensated for by changes in customer behaviour as a result of the promotion.

31. The anticipated benefits could arise in a number of ways. Sales of the items included in the promotion might increase, which would improve turnover and put the retailer in a stronger negotiating position with its suppliers of those items. More "casual" customers might take up the promotion, increasing footfall. In doing so, they and other customers might take the opportunity to add other items to their shopping basket (the "halo effect"). In a less tangible sense, the retailer's brand might be enhanced.

32. I am satisfied on the facts that such factors led to M&S's decision to introduce the Dine In Promotion.

33. I also find that in structuring and marketing the Dine In Promotion M&S took into account both commercial and VAT issues. In commercial terms, the aim was to refresh the company's primary existing offering, the Dine In for £10 promotion which had been in place since 2008. The evidence from Mr Forder and Mr Nisbet, which I accept, was that the company anticipated benefits simply from replacing an "old" offer with a "new" one. M&S also took a commercial decision to invest more in improving the range and quality of the food items available in the promotion. This in turn increased the discount which a customer could obtain by buying the three food items in the offer rather than separately.

34. The previous Dine In for £10 promotion had comprised three food items and a bottle of wine for £10. I find that M&S's decision to structure the Dine In Promotion as an offer "with free wine" took into account both commercial and VAT issues. I accept the evidence from Mr Forder and Mr Nisbet that in marketing terms describing

an item as "free" is considered to be particularly attractive to customers. This was a significant and material element in the decision to describe the wine as "free".

35. The decision also took into account the tax advice communicated by M&S's Tax department to those within M&S charged with structuring and marketing the promotion. Mr Nabi, Head of Group Tax at M&S since February 2009, explained that his group would be in regular contact with business colleagues and would seek to contribute to business decisions where appropriate. I asked Mr Nabi whether the Tax group advised on the optimum way to structure and present the Dine In Promotion from a VAT perspective. Mr Nabi confirmed that this was indeed the case, and that the advice would have taken as its reference points the section 85 Agreement and the draft bespoke retail agreement. He emphasised that his commercial colleagues would always have had the final say.

36. The Dine In Promotion was introduced in stores in May 2014. It was not available online. It was described in marketing and promotional material, both in-store and on M&S's website, as "Dine In for £10 with Free Wine". In this judgment, except as stated otherwise references to "wine" include the non-alcoholic beverages available under the promotion. The promotion was offered in stores for limited periods only and was not available outside those periods.

37. The detailed terms and conditions of the promotion were not available in stores. On the M&S website, typical terms and conditions were stated as follows:

> "Online Terms and Conditions
>
> Offer runs Thursday 1st May to Tuesday 6th May 2014 in selected stores in the UK. Subject to availability. Serving suggestions shown. Selected products only. Excludes Channel Islands, overseas' stores, M&S Outlet stores and Simply Food stores…See in store for details. Selected Main, Side and Dessert available for £10. Free wine only available to customers over 18 and in conjunction with the £10 meal for 2. Non-alcoholic alternative available. In the unlikely event that the free wine (as opposed to the non-alcoholic alternative) is not available or required, an alternative product or discount is not available, although the food selection in the "Dine in for £10" promotion can still be purchased. For the avoidance of doubt, as the value attributed to the free wine in this deal is £0.00, if returned, no refund will be due."

38. The promotion was advertised in stores with two displays, often adjacent. The first stated "Dine In for Two £10 with Free Wine" and in small print "Selected products only. See individual tickets for details. Subject to availability. Please drink responsibly. Free wine only available to over 18s with the £10 meal." The second stated "Main course + Side dish + Dessert All for £10", and underneath that "With Free Wine or non-alcoholic alternative."

39. The three food items in the Dine In Promotion could be purchased by a customer for £10, and tills in the stores were programmed to recognise a unique product code for that combination of items. The same code would recognise a bottle of wine being offered in the promotion and include it within the £10 charged to the

customer. All the items—namely the three food items or the three food items plus the wine—would have to be bought in a single till transaction to attract the £10 price, although the customer's basket of goods could include any number of other goods outside the promotion.

40. The till receipt for the promotion would show each of the items, both food and wine, at their full prices, and then the total of those items as "Balance before Saving". The receipt would then show as a deduction the saving on the food items, against the entry "Dine In Meal for £10", and the saving on the wine against the entry "Free Wine or Non Alc." The receipt would conclude "Items:4 Balance to Pay £10" and state "You Have Saved £x on Our Promotions Today."

41. The policy relating to refunds under the Dine In Promotion was somewhat unclear, but I find that it was as follows. If a customer returned any of the three food items he had bought in the promotion, he would be given a full £10 refund. If he sought to return the wine he might, at the discretion of the store, be given a replacement bottle, but in no circumstances would he be refunded any cash amount or given any future credit.

42. All of the items in the Dine In Promotion, including the wine, were offered subject to availability. In practice, stores had a limited measure of discretion in offering equivalent replacement items, within the terms of the promotion. If an item was not available, in no circumstances was any cash alternative or discount offered to the customer. Although the online terms and conditions (see [37]) might have implied that this policy did not apply to the non-alcoholic beverage in the promotion, this was not the case.

43. The aggregate shelf price of the three food items in the Dine In Promotion if bought separately varied considerably but would always have been at least £10, and in most cases more.

44. On average, the "free" wine would be the most valuable single item in the promotion in terms of its shelf price.

45. Although the customer did not need to take the wine in order to benefit from the £10 offer, in practice over 99% of customers did so.

46. M&S made a profit on each Dine In Promotion package sold. This was the case even if VAT was charged on the wine element.

VAT consequences of the Dine In Promotion

47. The central issue in this appeal is whether the £10 paid for each unit sold in the Dine In Promotion should be apportioned across the food and wine elements, or whether, as M&S contend, the wine is supplied free for VAT purposes. I begin by summarising the arguments of each party.

HMRC's arguments

48. HMRC's basic position is, as Mr Macnab expressed it, that the Dine In Promotion "is a purchase of four items for £10. There is no gift element." It is a single promotional deal and is not a sale of food items for £10 plus a supply of wine for nil consideration.

49. In support of this analysis HMRC made the following submissions.

50. First, the proposition that the wine is free for VAT purposes runs contrary to the fundamental principles on which the VAT system is based. It is, in Mr Macnab's words, "heretical". M&S claims to be under no duty to account for output tax at the standard rate on supplies of wine where it has deducted the input tax on purchasing the wine and its onward supplies are not exempt or zero rated. That is antithetical to the basic principles of VAT. The duty to account for output tax and the right to deduct input tax form an "inseparable whole". M&S's position, if correct, would result in a failure to impose a charge to tax on the ultimate consumer, and untaxed (or, in effect, zero rated) consumption of standard rated goods. That militates very strongly against M&S's position.

51. Secondly, in analysing the Dine In Promotion the economic and commercial reality of the transaction must be considered. The language of the promotional material and the perspective of the customer are relevant but not determinative. Ultimately the analysis must be determined by the objective characteristics of the particular transaction. In support of this proposition HMRC cite the Supreme Court decision in *Revenue and Customs Comrs v LMUK Ltd* [2013] UKSC 784; *Secret Hotels 2 v Revenue and Customs Comrs* [2014] UKSC 16; *Airtours Holidays Transport Ltd v Revenue and Customs Comrs* [2016] STC 1509, and *ING Intermediate Holdings Ltd v Revenue and Customs Comrs* [2017] STC 320.

52. Thirdly, Mr Macnab submitted that this was a case where the terms and conditions of the transaction were not governed by a written contract so that the Tribunal's determination of the economic reality would not be confined to construction of a contract. The correct analytical approach, both as regards the relevance of "economic reality" and whether the goods were supplied "for consideration" was that set out in *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651.

53. Fourthly, the Dine In Promotion was to be distinguished from the promotional schemes in *LMUK* and *Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs* (Case C-48/97) [1999] STC 488. In the Dine In Promotion the supply of all four items was both simultaneous and part of the same retail transaction.

54. Fifthly, HMRC submitted that a number of factors identified by M&S as supporting its analysis were of no material relevance to the VAT analysis. These included:

(1) The fact that the wine was described in marketing and promotional material as "free".

(2) The purported absence on the part of M&S of a binding legal obligation to provide the wine.

(3) The fact that the wine was "subject to availability".

(4) The fact that a customer did not need to take the wine in order to benefit from the £10 offer.

(5) The refund policy applying to the wine.

55. Finally, HMRC argued that in all material respects other than the labels attached by M&S the Dine In Promotion was substantially the same as the Dine In for £10 promotion and should be apportioned in the same way for VAT purposes.

56. At one stage, HMRC sought to argue that a supply of free wine by M&S might breach the Licensing Act 2003 (Mandatory Conditions Order) 2014 (SI 2014 1252). In fact, the relevant Home Office Guidance on the Order, which prohibits the sale of alcohol below the cost of duty plus VAT, deals with "multibuy" offers such as the Dine In Promotion in terms which make it clear that no breach arose. HMRC continued to refer, with some diffidence, to this point as supporting the HMRC analysis that the wine was not free. In my judgment, that argument is nothing to the point; the issue in this appeal is the correct VAT treatment.

M&S's arguments

57. For M&S, Mr Cordara argued that the VAT analysis must respect the structure chosen in an arm's length transaction such as the Dine In Promotion. The deal cannot be rewritten, and this is a case where "free means free".

58. In support of this proposition Mr Cordara made the following submissions.

59. First, it is a "classic VAT principle" that the VAT system will respect the terms of whatever arm's length commercial deal is reached between customer and supplier. It is not permissible to ignore or rewrite the actual terms of an arm's length deal. In support he cited in particular the decisions in *Lex Services plc* v *Customs and Excise Comrs* [2004] STC 73 and *Hartwell plc v Customs and Excise Comrs* [2003] STC 396.

60. Secondly, the Dine In Promotion is in fact two promotions. The first is an offer of three food items for £10. The second, conditional on the first, is an offer of free wine. The former offer makes commercial sense both for M&S and the customer on its own terms. The food offer is complete in its own right, like the petrol in *Kuwait Petroleum*, and the supply of wine for no consideration is a separate transaction, like the free gift in *Kuwait Petroleum*.

61. Thirdly, this is a multiple supply. The Dine In Promotion results in three or four separate supplies for VAT purposes, namely the three food items and, if taken, the wine. This is not a case of what would otherwise be a single supply being artificially

broken down. There are separate transactions, entitled to be valued separately for VAT.

62. Fourthly, a number of external factors support the proposition that the wine is free, namely:

(1) The absence of any cash alternative or alternative product in the event of non-availability of the wine.

(2) The fact that the customer does not need to take the wine in order to benefit from the £10 food offer.

(3) The fact that in no circumstances can a customer obtain a cash refund if he returns the wine for any reason.

(4) The absence of any legal right or entitlement to the free wine on the part of the customer.

(5) The fact that M&S's till systems recognise the wine as free, and record it as such on till receipts.

(6) The marketing of the wine as free.

63. Fifthly, the Dine In Promotion "differs fundamentally" from other promotions offered by M&S. In the other promotions, the wine or beverage is not free and is not advertised as such, but instead is part of a single deal for which the consideration is paid. The other deals comprise inseparable elements, each of which must be purchased in order to trigger the discount.

64. Finally, Mr Cordara submitted that there is no separate or allocable consideration for the wine element of the Dine In Promotion. The free wine is an inducement, and is conditional on the food offer, but does not generate any separate identifiable consideration for VAT purposes. He relied in this respect on *Hartwell*, *Kuwait Petroleum* and *Tesco plc v Customs and Excise Comrs* [2002] STC 1332 and [2003] STC 1561.

Discussion

65. Neither the decided cases concerning "free" goods or services nor HMRC's practice in that area provide a coherent and consistent set of principles which can be applied to determine the VAT position in any particular case. In a masterpiece of understatement, Mr Nabi observed during his cross-examination that "the concept of free items has a chequered history".

66. I therefore emphasise at the outset that this judgment does not lay down or attempt to lay down and principles of wider application to the VAT treatment of "free" goods. Many of the authorities cited by each Counsel are of limited assistance in this appeal, given the numerous differences in the facts and issues.

67. I echo the statement of the Upper Tribunal in *Adecco Ltd v HMRC* [2017] UKUT 113 (TCC), at [52]:

> "We hope that our decision is clear but we doubt that we have provided guidance- except at a very high level- that will enable the VAT liability of other employment businesses to be determined without a thorough analysis of the economic reality of the particular transactions. The liability in any particular case depends on the construction of the contractual provisions and the interpretation of the facts. Such matters are always open to debate and as Lord Reed said in paragraph 26 of [*WHA Ltd v Revenue and Customs Comrs* [2013] STC 943]:
>
> "…decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to the other.""

68. Mr Cordara relied extensively on *Hartwell* and *Lex*, so I begin my analysis with a consideration of those decisions.

69. In *Hartwell*, H plc sold new and used cars. It was common practice in the motor trade for dealers to offer a part exchange price which was higher than the market value of the customer's existing car in order to make a sale. H plc, however, attributed market value to customers' existing cars. In many cases, the balance of the purchase price was provided through a finance company. H plc issued two types of voucher when it sold a car, one of which was a "purchase plus" discount note which customers received. In purchases involving finance the amount of the purchase plus note was accepted by H plc as part payment of the 10% deposit against the purchase price which finance companies usually required. Where no finance was taken, the note was credited against the purchase price together with the agreed value of the car which was taken in part exchange.

70. The parties in *Hartwell* had made it clear that the value they had attributed to the existing car was the trade or market value. The purpose of the voucher was to make it clear that there was no overvaluation of the part exchange car. The voucher itself had no monetary value. In the Court of Appeal, having posed the question "what monetary equivalent is to be ascribed to the part exchange car?", Chadwick LJ said (at [26]):

> "That question is answered by identifying the value which the parties to the relevant transaction (in this context, the supply of the replacement car) have given to the part exchange car, not by reference to the way in which the finance company has treated the voucher for the purposes of its borrowing ratios. The judge [in the High Court] was right to describe [the VAT Tribunal's] approach as a 're-writing' of the transaction; and right to hold that that approach was impermissible and wrong."

71. In *Lex Services*, there was no voucher as there was in *Hartwell*. The customer's existing car was traded in for a stated part exchange price, of which an amount was described as "additional allowance", representing the difference between the highest trade offer and the figure the customer had successfully bargained for. The part exchange price less the allowance appeared on a form headed "Part Exchange Details & Declaration" as "true value".

72. The House of Lords in *Lex Services* rejected the argument, based on the principle of fiscal neutrality, that it was absurd that Lex Services should be accorded a different VAT treatment to H plc in *Hartwell* in identical transactions. Lord Walker pointed out that the transactions were not identical, because H plc's transaction explicitly made a different attribution of value to the part exchange car to that in *Lex Services*. In considering the need for VAT consideration to be a "subjective value", Lord Walker said (at [18]):

> "…[The VAT system] is a system which is intended to be self-policing in the sense of operating automatically on the economic activities of registered taxpayers and final consumers, with the least possible need for VAT authorities to undertake independent investigation of the facts. In a straightforward case the 'subjective vale' of non-monetary consideration means the value overtly agreed and adopted by the parties to the transaction in question, just as the price overtly agreed and adopted by the parties is (in most cases) conclusive as to the quantum of monetary consideration…"

73. Lord Walker concluded, at [31]:

> "…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 intentions clear, especially in the context of a part-exchange transaction. *Hartwell* shows that it is possible, with appropriate documentation."

74. Mr Cordara argued that the decisions in *Hartwell* and *Lex* made my task in this appeal straightforward. M&S had (not unlike Hartwell) reached a commercially-based arm's length decision to offer the wine for free in the Dine In Promotion. The need for legal certainty in the VAT system precluded any rewriting of that transaction. Further, the fact that M&S could have achieved the same broad economic effect by structuring the transaction in the same way as the previous Dine In for £10 promotion was irrelevant.

75. In my judgment *Hartwell* and *Lex* do support the following propositions which are helpful to M&S's case. First, the fact that in previous promotions M&S had chosen to deliver to customers three food items and a bottle of wine for £10 in a way which (if M&S were correct) had a different VAT effect did not breach the principle of fiscal neutrality given the importance of legal certainty. Secondly, it is the value given by the parties to the transaction which is relevant, not the value which a third party might ascribe. Thirdly, it is possible for a supplier to offer a discount if his intentions are clear and there is appropriate documentation.

76. However, *Hartwell* and *Lex* do not resolve the central problem in this appeal, which is the correct VAT analysis of the Dine In Promotion. What the Tribunal must determine is whether free does mean free. In *Lex Services*, the passage from Lord Walker's judgment set out at [72] is explicitly dealing with "a straightforward case" in which the price overtly agreed by the parties is "in most cases" conclusive. This appeal is not a straightforward case and it is not typical of most cases. It is very

different on its facts from the clear and explicit contractual basis on which the relevant transactions in *Lex* and *Hartwell* fell to be determined.

77. The Tribunal's task is to analyse and determine the nature of the agreement between M&S and the customer, starting with the words of the promotion and assessing whether that accords with commercial and economic reality. That exercise must be undertaken on the basis of the approach set out in decisions such as *Secret Hotels 2, LMUK* in the European Court of Justice, and *Airtours*.

78. *Hartwell* and *Lex* do not form a category of exception from this approach. Both decisions illustrate the importance of paying particular attention to the contractual terms of a transaction, as do *Secret Hotels 2, LMUK* and *Airtours*. Those terms will, in most cases, be consistent with the economic and commercial reality of the transaction, and the VAT analysis will follow. But where, as in this appeal, the question is just what the agreement between the parties was and whether that consistency is present, *Hartwell* and *Lex* are not authority that the *Airtours* analysis is inappropriate or unnecessary.

79. In *Airtours* Lord Neuberger summarised the relevant principles on contractual analysis and economic reality as follows:

> "47. This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at para 27, Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.
>
> 48. The same approach was adopted by the Court of Justice in *Revenue and Customs Comrs v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651, paras 39 and 40, where they stated, citing previous judgments, that "consideration of economic realities is a fundamental criterion for the application of the common system of VAT", and added that that issue involved consideration of "the nature of the transactions carried out" in the particular case. To much the same effect, in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, para 14, the Court of Justice said that 'a supply of services is effected 'for consideration' … only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is

> reciprocal performance', which it explained as meaning "the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". In the context of the supply of goods, the Court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [2001] 1 WLR 1693, para 25, where it described 'the determining factor' as 'the existence of an agreement between the parties for reciprocal performance, the payment received by the one, being the real and effective counter-value for the goods furnished to the other'.
>
> 49. In *Revenue and Customs Comrs v Newey* (Case C-653/11) [2013] STC 2432, para 40, the Court of Justice again emphasised that 'that a supply of services is effected 'for consideration', within the meaning of article 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'. In para 41, the court went on to explain that 'the supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person'. The court then observed in paras 42-43 that 'consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT' and that 'the contractual position normally reflects the economic and commercial reality of the transactions'. An exception to the normal rule that the contractual relationship is central was then identified by the court as being where 'those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions' (para 45)."

80. I have also been guided by Lord Neuberger's formulation of the correct approach in domestic law set out at paragraphs 31 and 32 of *Secret Hotels 2* as follows:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as a whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight…"

81. Turning to the terms and conditions of the Dine In Promotion, the first point to note is that it is an offer by M&S, completed when the customer pays for his goods at the till.

82. The terms and conditions were sparse. They were not available in stores. The terms and conditions available online are set out at [37] above. Within stores, the promotion was simply advertised as "Dine In for Two £10 with Free Wine", or on a display reading "Main Course + Side dish + Dessert All for £10" and underneath that wording "With Free Wine or non-alcoholic alternative".

83. The till configuration and till receipts in respect of the promotion are set out at [39] and [40] above.

84. The customer did not have to take the wine in order to obtain the three food items but in practice over 99% of customers did so.

85. In my judgment the proper construction of the promotion based on the available terms was that it was an offer with a conditional element. Under that offer the consideration would always be precisely £10. The wine was offered conditionally; a customer could obtain it only by satisfying the condition that he had paid £10 and taken the food items.

86. In relation to the contractual analysis, M&S's Notice of Appeal and Skeleton Argument placed considerable emphasis on the argument that the Dine In Promotion was two separate promotions. As stated in their Skeleton Argument:

> "In essence, there are two promotions involving food and wine/beverage respectively; the first (and free standing) proposal made to the public by M&S is that they are offered a menu of three food items (main course, side dish and dessert) for the price of £10. These food items are themselves sold for a monetary consideration which has been discounted (i.e. they are sold, collectively, via the offering at a lower price than had they been bought separately). That promotion has intrinsic value, and can be enjoyed on its own, and will attract customers *per se*. As a second, follow-up promotion, there is then an opportunity offered to participants in that offering, if the customer wishes to take a free bottle of wine. In other words, the beverage is offered free to customers who have participated in the Dine In with Free Wine deal."

87. The witness statements of Mr Forder and Mr Nisbet were meticulous in describing the Dine In Promotion as two promotions. In examination they asserted that this was significant and helpful in marketing terms, but could not explain to me any basis for that assertion.

88. As the hearing progressed Mr Cordara placed considerably less emphasis on this argument, describing it in his closing submissions as "not analytically critical to our case" and "beside the point". He was wise to do so. While it might be thought to have assisted M&S in its desired VAT analysis, the existence of two promotions as submitted in the Skeleton Argument is not borne out by the terms of the offer or the

promotional material. Nor is it supported by the fact that over 99% of customers took all four items. The Dine In Promotion is just that—a promotion, not two promotions.

89. In practice, a business may provide goods or services which are free in the normal (non-marketing) sense of the word, namely provided unconditionally and with no strings attached. A retailer such as M&S might provide free samples of food or beverages in-store. A business might give away promotional materials, such as branded pens, mugs or bags. In terms of the VAT consequences, a decision such as *Kuwait Petroleum* shows that it is possible that goods or services might be provided for nil consideration.

90. In this appeal, however, we are not concerned with "reward" goods or services or with vouchers. The Dine In Promotion is a single offer, with all four items supplied simultaneously and in the same till transaction for consumption on the payment of £10. Receipt of the wine is conditional on payment of the £10 and the purchase of the food items.

91. Even before turning to the commercial and economic reality, in my judgment the construction of the agreement between the parties does not support the conclusion that the wine is being supplied for no consideration, as with an in-store sample or promotional merchandise. The wine is an integral element of the promotion, usually the single most valuable element in terms of separate retail shelf price. The wine can only be obtained as part of that promotion: as the in-store display made plain: "[F]ree wine only available to over 18s with the £10 meal".

92. The overt terms of the offer made by M&S to its customers are to be established by reference to all the circumstances, but the clear wording of the offer and the stated terms and conditions cannot be overridden by factors such as the till receipt or refund policy.

93. In determining the VAT liability to be attached to the wine in the Dine In Promotion the position of the tiny minority of customers who do not take the wine is immaterial. What matters is not that a customer may choose to take only the food items for his £10 but that he cannot acquire the wine without paying £10 and taking the food items.

94. The assertion by Mr Cordara that the food items alone "make commercial sense for M&S and the customer" has no bearing on the construction of the agreement. It is also a weak point on the facts given that certain combinations from the food items available would equal rather than exceed £10, which is scarcely an attractive proposition for the customer. The issue to be determined is not the VAT treatment of customers who only take the food items but the vast majority who also take the wine. It is the Dine In Promotion which must be construed, not the Dine In Promotion minus the wine.

95. The argument that there can be no VAT on the wine because there is no separate or allocable consideration for it is scarcely mentioned in M&S's Notice of Appeal or Skeleton Argument. However, it was emphasised by Mr Cordara in his closing

submissions. In my judgment, the argument stands or falls by M&S's central argument, which is that because the food is sold for £10 and always has a shelf price sold separately of at least £10, the wine must be free. I agree that if the wine is free no separate consideration attaches to it, but I have determined that, notwithstanding the label attached to it by M&S, it is not free. If the appeal fails, then I do not understand there to be any dispute between the parties as to the allocation of the £10 across the four items for VAT purposes. Indeed, the figures supplied to the Tribunal by M&S show that the VAT at stake in the appeal averages approximately 70p per £10 unit.

96. I conclude that on a proper analysis of the terms and conditions of the Dine In Promotion the customer pays £10 in order to receive the three food items and the wine, so the price must be allocated across the four items for VAT purposes.

97. In my judgment this conclusion becomes even clearer when account is taken of the economic and commercial reality of the transaction.

98. Adopting the approach set out by Lord Neuberger in *Secret Hotels 2* (quoted at [80]) and looking beyond the labels attached by M&S, the wine was not being supplied as a gift or for nil consideration. Applying what Lord Neuberger termed "commercial common sense" the term "free" was clearly being used in a marketing sense, as in a "buy two get one free" promotion. The economic and commercial reality was that M&S was offering a package of items—dine in for two for £10 with free wine—at an attractive discount to their aggregate shelf price if bought separately.

99. As acknowledged at [89], it is possible in principle for the economic and commercial reality of a transaction to accord with a contractual term describing it as free or as a gift. For a retailer, in-store samples of food or beverage might fall into this category. But a customer who walked into an M&S store during a Dine In Promotion and simply asked for his "free" bottle of wine would have been given short shrift.

100. The fact that the wine would usually be the most expensive item in the promotion in terms of separate shelf price reinforces this analysis of the economic and commercial reality.

101. I have reached my conclusion without reference to any "fundamental principle" of the VAT system of the sort proposed by Mr Macnab. However, I observe that the correctness of that conclusion is supported by the consequence that it avoids untaxed consumption of wine on which M&S has claimed input tax.

The Bespoke Retail Scheme Agreement

102. The second ground of appeal raised by M&S is that the terms of the bespoke retail agreement between M&S and HMRC had the effect that there was no VAT on the wine element of the Dine In promotion.

103. Before considering this issue, I will deal briefly with the point raised by M&S regarding the section 85 Agreement summarised at [23].

104. In its Notice of Appeal M&S submitted that the wine in the Dine In Promotion was in all material respects the same as the promotions described in the paragraph of the section 85 Agreement set out at [24]. In its Skeleton Argument, it asserted that "the principle established and acknowledged in the section 85 agreement covers the current case".

105. In the hearing Mr Cordara helpfully clarified that the point being made was that M&S perceived the section 85 Agreement and the bespoke retail agreement to be entirely consistent with their view of the Dine In Promotion. However, it was accepted that the section 85 Agreement could not operate to determine the VAT treatment of the Dine In promotion, and M&S was not seeking to run any argument as to issue estoppel in relation to the section 85 Agreement.

106. I turn now to the bespoke retail scheme agreement entered into between M&S and HMRC on 26 February 2014 ('the BRSA').

107. Mr Taylor gave evidence for HMRC as regards his involvement in the latter stages of negotiation of the BRSA. Mr Nabi also gave evidence in that respect, although he personally did not run the negotiations for M&S.

108. On the basis of that evidence and the extensive correspondence, I find as a fact that Mr Taylor did not appreciate that he had committed HMRC to the inclusion of the example in the BRSA discussed at [112]. For whatever reason, he made an error or overlooked the issue in agreeing to its inclusion.

109. However, HMRC did not seek to argue that any such mistake vitiated or rendered voidable the BRSA or any part of it. For that reason, I proceed on the basis that, notwithstanding Mr Taylor's admitted oversight, the BRSA is to be interpreted and applied on its stated terms.

110. The EU and domestic legislative framework permitting agreements such as the BRSA is set out at [11], [18] and [19]. A bespoke agreement is mandatory for retailers whose turnover excluding VAT exceeds £130 million. As explained in HMRC Notice 727/2 at paragraph 2.1:

> "A bespoke retail scheme is a method of determining output tax on retail sales made by large businesses which are:
>
> —ineligible to use the published retail schemes, and
>
> —unable to account normally.
>
> A bespoke scheme may be based to a greater or lesser extent on one of the published schemes, but will be tailored to meet your business needs."

111. Appendix 5 of the BRSA, headed "System Configuration", contained the following passage:

> "I. **Business Promotions**

> The Article/Departmental Output Tax reports referred to above provide details of net sales i.e. after any promotional discounts have been applied. Generally speaking, the VAT is automatically calculated based on the discounted amount and the purpose of this section is to outline how these are dealt with by the IPOS system [M&S's point of sale/till system] by using common examples. Please note that this list is not designed to be exhaustive.
>
> **Buy one get one free promotions – items with same VAT rate**
>
> Under this type of promotion the "free" item is the same as the original item. Both sales are recorded and the value of the "free" item is automatically deducted from departmental sales values and a further DGT adjustment is not required.
>
> **Free items**
>
> It has been agreed with HMRC that where an item or items are given away "free" on the purchase of a specified product or products or products to a specified value, no VAT is due on the "free" item (e.g. (i) food festival promotion (spend £35 and receive a free specified item); (ii) buy six deli items and get a free cool bag; (iii) buy a salad and receive a free bottle of water and (iv) buy a meal for two and receive a free bottle of wine (e.g. "Weekend In")). The IPOS system has been configured to automatically do this and as such no adjustment to DGT is required.
>
> **3 For 2**
>
> Under this type of promotion, the customer will receive a discount equal to the value of one of the products in the bundle. If the products are sold with differing VAT rates then the discount is apportioned across all products and an average VAT rate across all these products is therefore applied.
>
> This might be the third product rung through the till or the cheapest. In either case, the IPOS system will automatically adjust the sales and VAT values for this product and as such no adjustment is required to DGT. Note, the products offered under these promotions tend to be similar and are likely to be subjected to VAT at the same rate.
>
> **Dine In and Other Meal Deals**
>
> From an IPOS perspective, the Dine In promotion apportions the discount across all items in the bundle and VAT is calculated automatically on the discounted amount by UPC. Meal Deals such as the lunchtime sandwich deal work in the same way. As such, no adjustment is required to DGT for this."

112. Mr Cordara submitted that the Dine In Promotion was clearly covered by example (iv) in the paragraph headed "Free items". That paragraph records HMRC's agreement that no VAT is due on the "free" bottle of wine. The BRSA is a legally binding agreement and HMRC are precluded from applying a contrary treatment, meaning that the assessments in the appeal cannot stand.

113. In response Mr Macnab submitted as follows:

(1) Under the legislative framework including Regulations 67 and 68 the BRSA is and can only be an agreement about *how* consideration is to be apportioned, not the prior question of *whether* it can be apportioned. A bespoke agreement cannot alter the fundamental VAT treatment of supplies.

(2) The example relied on is contained in an Appendix headed "System Configuration" which is a technical schedule about how M&S's point of sale system should handle certain promotions. In context it was not intended to remove a substantive liability to output tax.

(3) The example relied on does not refer to the Dine In Promotion.

(4) The Dine In Promotion is in fact covered by the paragraph headed "Dine In and other Meal Deals".

(5) The BRSA provides (in Clause 5.1) that a disagreement on the effect of the bespoke scheme is resolved according to normal VAT treatment.

(6) The opening wording of the "Free items" paragraph is apt to refer only to prior promotions.

114. Mr Macnab's first argument was that there is no statutory *vires* for HMRC to agree in a BRSA that output tax would not be paid where it is due. Article 395 of the PVD (set out at [11]) is restricted only in so far as the relevant measures for derogation affect to a more than negligible extent the overall revenue of the Member State collected at the stage of final consumption. That does not answer the question of principle raised by Mr Macnab's submission. Schedule 11 VATA 1994 (set out at [18]) contains no explicit restriction, and nor do Regulations 67 or 68 (set out at [19]).

115. One argument not raised by Mr Macnab is that Regulation 68 could be applied by HMRC to an existing BRSA to withdraw approval of a permitted method. That argument, and the *vires* argument, were raised by HMRC in *Revenue and Customs Comrs v Boots* [2009] STC 1577, to which neither Counsel referred. The High Court, and subsequently the Court of Appeal, determined that case on other grounds and specifically declined to decide either argument: see [58] to [61], and in the Court of Appeal [2010] STC 637 at [36] and [37].

116. For the reasons given below, it has not been necessary for me to determine either the *vires* argument or the Regulation 68 argument, and I express no view on either point.

117. Before discussing the effect of the BRSA it is helpful to set out some other provisions of the Agreement. Section 1 is headed 'Legal Framework' and contains the following provisions:

> "3.2 Both parties enter into this agreement on the basis of a full disclosure of the relevant facts.
>
> …
>
> 5. Disputes and omissions

> 5.1 In the event of a disagreement about the meaning or effect of the terms of the scheme, the normal VAT treatment will determine the meaning or effect of the term.
>
> …
>
> 7. Legal Framework
>
> 7.1 The terms of this agreement do not amend the normal provisions of VAT law except to the extent necessary to simplify the valuation of output tax on retail supplies."

118. Mr Nabi explained that "Weekend In" in the example on which M&S rely was a prototype of sorts for the Dine In promotion and which ultimately was not pursued.

119. I have concluded that the BRSA does not bear the construction suggested by M&S, for three reasons.

120. First, each promotion must be analysed and assessed to VAT on its own particular terms. Indeed, Mr Cordara submitted that the Dine In Promotion was "fundamentally different" from other promotions implemented by M&S. The significance of relatively minor differences in labelling and structuring is evidenced by the similarities between the different examples (and different VAT treatments) in Appendix 5. The Dine In Promotion had not been introduced by M&S at the time when the BRSA was signed, and it was not raised with HMRC by M&S until almost two months after it was signed. Although Appendix 5 refers to "common examples" and is stated not to be exclusive, without explicit wording it cannot bind HMRC to treat future unspecified promotions in a certain way.

121. Secondly, the examples set out in Appendix 5 overlap considerably, and in my judgment it is wholly unclear in which category the Dine In Promotion could be said to fit. M&S assert it falls within the "Free items" paragraph. However, the paragraph headed "Dine In and Other Meal Deals", which mandates the VAT treatment reflected in the assessments in this appeal, refers specifically to the "Dine In" brand, and also refers to "meal deals". The Dine In Promotion is plainly a Dine In offer, and it is in commercial terms a meal deal. M&S's argument amounts to an assertion that it falls in and only in the Free items paragraph, but the Dine In paragraph is at least as apt, and, if anything, more so.

122. Thirdly, it is clear that HMRC do not agree with M&S as to the effect of the disputed example in the Free items paragraph. In that situation, Clause 5.1 of the BRSA is engaged, and this sets out the agreement of the parties that "the normal VAT treatment" will determine the meaning or effect of the disputed term in the BRSA. I read that phrase as a reference to the VAT treatment absent the retail agreement. I have found that the correct treatment of the Dine In promotion is that the £10 must be apportioned across the food and wine items, so Clause 5.1 has the effect that that treatment applies.

123. For these reasons I conclude that the BRSA does not operate to prevent output tax from being charged on the wine element in the Dine In Promotion.

Deemed supply

124. HMRC argued in the alternative that there was a deemed supply of wine in the Dine In Promotion which fell to be valued.

125. HMRC submitted that the deemed supply arose under paragraph 5(1) of Schedule 4 VATA (set out at [16]). The wine formed part of the assets of M&S's business and in a Dine In Promotion sale it was transferred or disposed of by M&S so as no longer to form part of those assets, "whether or not for a consideration".

126. By virtue of section 19, paragraph 6 of Schedule 6 (set out at [17]) would then apply in valuing that deemed supply.

127. M&S accepted that there would be a supply by virtue of paragraph 5(1) of Schedule 4. However, argued Mr Cordara, it did not follow that the supply thereby fell to be valued under Schedule 6. That was for two reasons. First, the BRSA applied to the exclusion of Schedule 6, and under the BRSA HMRC had agreed that the wine was supplied free for VAT purposes. Secondly, and in the alternative, paragraph 5(1) of Schedule 4 did not apply because the wine fell within the exclusion for small business gifts in paragraph 5(2).

128. As regards the BRSA argument, Mr Cordara submitted that section 19, and therefore Schedule 6, did not apply because section 19(1) is expressed to apply "except as otherwise provided by or under this Act". The retail scheme provisions were an example of such alternative provision, and the terms of the BRSA applied to the exclusion of section 19 and Schedule 6.

129. Mr Macnab accepted that in principle a retail agreement could apply in this way but, of course, disagreed entirely with M&S's analysis of the breadth and effect of the BRSA.

130. Since I have determined that the BRSA does not bear the construction put forward by M&S, this argument falls away.

131. Mr Cordara's secondary line of argument was not included in M&S's Notice of Appeal or in his Skeleton Argument. It was that the wine disposed of in the Dine In Promotion was not a deemed supply within paragraph 5 of Schedule 4 because it was "a business gift the cost of which, together with the cost of any other business gifts made to the same person in the same year, was not more than £50".

132. In relation to the £50 limit, M&S did not offer any evidence that they had satisfied this limb of the exclusion. Rather, Mr Cordara relied on certain passages in the decision of the European Court of Justice in *EMI Group plc v Revenue and Customs Comrs* (Case C-581/09) [2010] STC 2609 (and certain other authorities) as establishing that where the terms on which a Member State implemented the small gifts exemption made it impractical for a taxpayer to prove entitlement to the exemption, it must be interpreted in a way which did not deprive it of its effectiveness.

133. I am highly dubious as to Mr Cordara's argument that the £50 limit in paragraph 5(2) (which was held to be compatible in *EMI Group*) can in effect be loosely applied or put to one side because it is difficult to monitor.

134. In any event, Mr Cordara's argument does not reach that hurdle. The wine in the Dine In Promotion is not a gift at all, and so cannot be a business gift. It can only be acquired by paying £10 (and taking three selected food items). The business gift exemption cannot apply because it is not a gift.

135. I therefore conclude that, in event that I am wrong as to the central issue, the supply of wine in the Dine In Promotion is a deemed supply under paragraph 5(1) which falls by virtue of section 19 to be valued under Schedule 6.

Recovery of input tax

136. As an alternative and subsidiary argument, HMRC submitted that if no output tax was found to be due on the wine, then M&S should not be able to recover the input tax an acquiring it.

137. The assessments in this appeal relate solely to output tax. For that reason, and in view of my conclusions on the three preceding issues, it is unnecessary to consider this issue.

Disposition

138. The appeal is dismissed.

139. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 10 APRIL 2018