[2018] UKFTT 353 (TC)

TC06567

Appeal number: TC/2015/01949

VAT – Article 90 of Principle VAT Directive – Cancellation – single supply of delivered goods rather than multiple supply – return of goods and refund – retained delivery charge – consideration for supply – liability to VAT – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASOS PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Taylor House, London on 12-13 June 2018

Andrew Hitchmough QC and Quinlan Windle, counsel instructed by PWC LLP for the Appellant

Andrew MacNab, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. ASOS ("the Appellant"), appeals under section 83(1)(b) and (t) of the Value Added Tax Act 1994 ("VATA") against HMRC's decision notified by letter dated 15 July 2014 and confirmed by review letter dated 19 January 2015. HMRC's decision was not to pay the Appellant the sum of £740,287 claimed by way of a voluntary disclosure made in a letter dated 27 June 2014 in respect of the VAT return periods ending beginning on 1 April 2010 and ending on 31 March 2014.

2. The voluntary disclosure claimed repayment under section 80 of VATA of what the Appellant asserted was over-declared output tax. The claim was said to represent VAT over-declared on delivery charges that the Appellant, an online retailer, had "retained" (*i.e.* not refunded to the customer) following the return of "full" orders (*i.e.* the customer had returned all the goods purchased).

The Issue

3. The issue is whether delivery charges retained by the Appellant ('the Retained Amounts') are subject to VAT in circumstances where, following the sale and special delivery of (standard rated) goods, the customer returned those goods under the terms of the Appellant's Extended Returns Policy and the Appellant refunded the purchase price but not the special delivery charge.

4. The Appellant contends that the delivery charge is not subject to VAT and that, in effect, it is entitled to repayment from HMRC of VAT accounted for and paid to HMRC on those charges.

5. The Appellant contended in its skeleton argument that there were three questions that, when answered in the affirmative, result in the delivery charge being outside the scope of VAT:

(1) Is ASOS making a single supply of delivered goods or two supplies: one of goods and the other of delivery?

(2) Is it possible, in principle for a supply of goods to be cancelled after the supply has been made, in particular, in circumstances where the supply involves ancillary service elements?

(3) If ASOS is making a single supply of delivered goods and it is possible to cancel such a supply, is this what has happened when customers returned goods to ASOS in accordance with the Returns Policy?

6. The Appellant argues that the effect of cancellation is that the taxable consequences of the original supply are "*discharged*" (*Brunel Motor Company Ltd (in administrative receivership) v HMRC* [2009] STC 1146 (CA) at [34]) or "*reversed*" (*Brunel* [2013] UKUT 006 (UT) at [54]), meaning that for VAT purposes the Appellant has no longer made a supply. The economic and commercial reality is that the Retained Amount restores the Appellant to its pre-contractual bargaining position (analogous to the contract allowing for the retention of the deposit in Case C- 277/05

Société thermale d'Eugénie-les-Bains [2008] STC 2470 ("*Société thermale"*). The Appellant submits that the Retained Amount cannot be consideration for VAT purposes because there is no long a supply in respect of which it can be consideration.

7. HMRC contends that the delivery charge is and remains subject to VAT. The delivery charge is consideration for a standard rated supply (however that supply is characterised for VAT purposes); it remains consideration for a standard rated supply notwithstanding the return of the goods and the refund of the purchase price of those goods; and nothing is repayable by HMRC to ASOS.

8. HMRC refer to the Retained Amount (*i.e.* not refunded) by the Appellant as the "delivery charge" because that is the term used in the documentary evidence. HMRC also use the term as a shorthand description of the amount / element of the total consideration representing the delivery charge which was paid by the customer but which was not refunded by the Appellant to the customer when goods were returned.

The Facts

9. The facts in the case were not in dispute and were agreed between the parties. The relevant factual background was set out in the witness statement and exhibits of Andy Hewitt, Head of Tax, at the Appellant. No oral evidence was heard.

10. The Tribunal finds the following facts on the balance of probabilities as are set out in the parties' skeleton arguments.

11. The Appellant carries on business as an online-only fashion retailer. The current process by which customers order goods from it is said to be broadly the same as that in place during the relevant period (2010 to 2014).

12. A customer visits the Appellant's website, where they can search for and select products they wish to purchase. Once a customer has selected the product or products they wish to buy, they are given a number of delivery options. These are set out on a separate webpage, together with links to details of the Appellant's returns policy. A charge is levied for some of the delivery options, with the amount depending on the value of the goods ordered and the speed of delivery.

13. The customer then enters their details, including payment information, and clicks to place their order. When customers place an order, they are required to confirm their agreement to ASOS's standard terms and conditions of sale. Customers with an ASOS account also confirm their agreement to the terms and conditions when they sign up. There have been several versions of the terms and conditions during period under appeal. They have, however, operated in materially the same way. The standard terms and conditions dated 5 March 2014 were included in the hearing bundle before the Tribunal.

14. Once the contract is concluded, the goods are despatched from the Appellant's warehouse and are delivered according to the customer's selected delivery option.

15. The Appellant offers a number of delivery / shipping options. Except for Standard Delivery, which was free during the periods covered by the appeal, all delivery options incurred an extra, separately identified charge. The delivery charge reflected the speed and/or preciseness of the delivery option (by comparison to standard delivery): the faster the delivery and the narrower the delivery slot, the higher the charge. In ascending order of price, the delivery options are/were:

a. Standard Delivery (free of charge).
b. Next Day Delivery (UK Mainland), (Northern Ireland) and (Channel Islands and Isle of Wight).
c. Precise Delivery.
d. Evening Next Day Delivery.
e. ASOS Instant (same day delivery, available Monday to Friday).
f. Premier Delivery (unlimited next-day or nominated-day delivery for a flat annual fee).

16. In this decision, any reference to "special delivery" is a general reference to any delivery option other than Standard Delivery.

17. The customer selected the delivery option at the online checkout. In all cases where a special delivery option was chosen, the delivery charge was applied to the customer's order as a separately identified charge.

18. The customer was required to pay for the goods and any delivery charge at that point, by means of debit or credit card or PayPal. Pursuant to the Appellant's standard terms and conditions (below), no contract was concluded until the customer's payment (in full) had been approved by the Appellant and it had debited the customer's credit or debit card (or PayPal account).

19. Following conclusion of the contract, the goods were despatched from the Appellant's warehouse and delivered in accordance with the customer's selected delivery option.

The Appellant's standard terms and conditions of sale

20. At or before the point of placing the order, the customer was required to confirm his/her agreement to the Appellant's standard terms and conditions of sale: The standard terms and conditions dated 5 March 2014 include the following (emphasis added):

> **1. In General**
> Access to and use of this Website and the products and services available through this Website (collectively, the "Services") are subject to the following terms, conditions and notices (the "Terms of Service"). By using the Services, you are agreeing to all of the Terms of Service, as may be updated by us from time to time. You should check this page regularly to take notice of any changes we may have made to the Terms of Service

Access to this Website is permitted on a temporary basis, and we reserve the right to withdraw or amend the Services without notice. We will not be liable if for any reason this Website is unavailable at any time or for any period. From time to time, we may restrict access to some parts or all of this Website

…

6. Terms of Sale

By placing an order you are offering to purchase a product on and subject to the following terms and conditions. All orders are subject to availability and confirmation of the order price.
Dispatch times may vary according to availability and any guarantees or representations made as to delivery times are subject to any delays resulting from postal delays or force majeure for which we will not be responsible. Please see our Delivery Charges notice for further information.

In order to contract with ASOS you must be over 18 years of age and possess a valid credit or debit card issued by a bank acceptable to us. ASOS retains the right to refuse any request made by you. If your order is accepted we will inform you by email and we will confirm the identity of the party which you have contracted with. This will usually be ASOS or may in some cases be a third party. Where a contract is made with a third party ASOS is not acting as either agent or principal and the contract is made between yourself and that third party and will be subject to the terms of sale which they supply you. When placing an order you undertake that all details you provide to us are true and accurate, that you are an authorised user of the credit or debit card used to place your order and that there are sufficient funds to cover the cost of the goods. The cost of foreign products and services may fluctuate. All prices advertised are subject to such changes.

0. Our Contract

When you place an order, you will receive an acknowledgement email confirming receipt of your order. This email will only be an acknowledgement and will not constitute acceptance of your order. A contract between us for the purchase of the goods will not be formed until your payment has been approved by us and we have debited your credit or debit card.

1. Pricing and Availability

Whilst we try and ensure that all details, descriptions and prices which appear on this Website are accurate, errors may occur. If we discover an error in the price of any goods which you have ordered we will inform you of this as soon as possible and give you the option of reconfirming your order at the correct price or cancelling

it. If we are unable to contact you we will treat the order as cancelled. If you cancel and you have already paid for the goods, you will receive a full refund. Where applicable, prices are inclusive of VAT. Delivery costs will be charged in addition; such additional charges are clearly displayed where applicable and included in the 'Total Cost'.

The Service may contain typographical errors or other errors or inaccuracies and may not be complete or current. We therefore reserve the right to correct any errors, inaccuracies or omissions and to change or update information at any time without prior notice. We reserve the right to refuse to fill any orders that you may place based on information on the Service that may contain errors or inaccuracies, including, without limitation, errors, inaccuracies or out-of-date information regarding pricing, shipping, payment terms, or return policies.

2. Payment

Upon receiving your order we carry out a standard pre-authorisation check on your payment card to ensure there are sufficient funds to fulfil the transaction. Goods will not be dispatched until this preauthorisation check has been completed. Your card will be debited once the order has been accepted.

…

16. Entire Agreement

The above Terms of Service constitute the entire agreement of the parties and supersede any and all preceding and contemporaneous agreements between you and ASOS. Any waiver of any provision of the Terms of Service will be effective only if in writing and signed by a Director of ASOS

Return of goods – the Appellant's returns policy

21. The standard terms and conditions of sale make no provision for return of purchased and delivered goods (whether defective or non-defective). A customer could, however, return goods in certain circumstances:

a. Under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, which were the Distance Selling Regulations in force at all material times, the customer had a statutory right to cancel the contract within 7 days and to receive a full refund (including delivery charge).

b. Under the Sale of Goods Act 1979, as modified by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, the customer had the statutory right to reject the goods if not of satisfactory quality (or if the Appellant was otherwise in breach of other terms implied by the Act).

22. Customers could also return the goods in accordance with the Appellant's returns policy. The customer could return the goods for an exchange or a refund within 28 days of delivery. According to Mr Hewitt, "*in practice, ASOS would grant*

a refund to customers after the 28 day period", but this makes no difference to the VAT analysis.

23. In cases where the (non-defective) goods were returned outside the statutory cancellation period (*i.e.* within 28 days from the receipt of the goods but more than 7 days after their receipt), the Appellant refunded the value of the goods, but retained the delivery charge.

24. The Tribunal was given the current "Returns & Refunds" document and the Returns and Refunds FAQs and answers which post-date the appeal period but nothing turns on any differences or subsequent amendments - they remain relevant for the purposes of the appeal. They contain the following:

What is your Returns Policy for orders sent to the UK?
If you're looking to return a faulty or incorrect item, please get in touch so we can get this sorted for you. Do you want to return something? No problem! Returns are FREE.
• You can return any item for a refund within 28 days of receiving your original order.
…
• We'll refund the price you purchased your item at - this includes sale items. If you'd like a refund for your goods but you can't return them to us for any reason, then a refund for those goods will be at our discretion.
…
• The goods are your responsibility until they reach our warehouse, so make sure it's packed up properly and can't get damaged on the way!
• We are not responsible for any items that are returned to us by mistake.
• We try hard to accept all returns and they don't need to be in the original box or bag, as long as they're securely packed. Where possible, returned items should include tags and any packaging e.g. shoes should be returned with the original shoe box.
• In the unlikely event that an item is returned to us in an unsuitable condition, we may have to send it back to you.
• Returns are free for UK customers. For more info on how to return your order, just click here.
• We recommend you obtain proof of postage. Our returns address is: ASOS, Barlby Road, Selby, YO8 5BL UK.
…
What should I do if my refund is incorrect?
http://www.asos.com/customer-service/customer-care/helpuk/?help=/app/answers/detail/a_id/7152
We're really sorry if we've made a mistake with your refund!
If this is the case please contact our Customer Care Team and we'll try and sort it out for you as soon as possible.
The following may affect the amount you have been refunded:

- The delivery charge, which is only refunded for cancelled orders under the Consumer Contracts Regulations (2013) or if the goods are faulty.
- Any discounts that were applied at the time of sale, which may not now be applicable.

How can I cancel my order – Consumer Contracts Regulations 2013

http://www.asos.com/customer-service/customercare/helpuk/?help=/app/answers/detail/a_id/7142

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (UK) advise you have fourteen calendar days to cancel the contract for your order with us and we will issue you with a full refund for the items you have purchased and the cost of standard delivery if you've paid for shipping.

- The fourteen calendar days start from the day after you receive your order.
- If you're returning your whole order and you've paid for delivery we'll refund the cost of Standard Delivery to your country even if you've used one of our quicker delivery options. For example, if you pay £5 for a Next Day Delivery service but the cost of Standard Delivery is £3 then we will refund you £3. The extra £2 is not covered under these regulations. If only part of your order is returned, any delivery charge you paid won't be refunded.
- We need written confirmation of cancellation from you, so you'll need to get in touch using any of our available contact options to let us know you'd like to cancel your order under the Consumer Contracts Regulations 2013. Alternatively, you can complete the Withdrawal Form attachment and send it back to us. You'll find details on how to send this back to us on the Withdrawal Form.
- If you have already received your order, you will need to return to us the items from your order that you wish to cancel. Once you let us know you'd like to cancel we receive your completed Withdrawal Form, we will write and let you know how to do this.
- The items you return must be unworn and in their original condition and will be inspected once we have received them.
- We try hard to accept all returns. Returns to us need to have the original tags still on them but need not be returned to us in the same packaging in which they were delivered to you. However it is your responsibility to ensure that the returned items are packaged well enough that they won't be damaged on the way back to us. In the unlikely event that an item is returned to us in an unsuitable condition, we may have to send it back to you. In this case we will not refund you. If we do not receive the cancelled order back, we may arrange to have it collected at your

cost.

Do you refund delivery charges if I return something?

Your delivery charge will be refunded in some circumstances, for example if your entire order was faulty or incorrect, or if your order has been cancelled under the Consumer Contracts Regulations...

25. Mr Hewitt exhibited an example of the operation of the extended refund policy in a case where (non-faulty) goods (three pairs of shoes) were returned after the statutory cancellation period and the costs of the goods (£139) was refunded but not the £3 delivery charge.

The dispute

26. Before the current dispute, in cases where the "value of the goods" was refunded to the customer but the delivery charge was not, the Appellant adjusted/reduced its output VAT by reference to the amount refunded and made no adjustment to the VAT accounted for in respect of the delivery charge.

27. In HMRC's submission, that treatment was (and is) correct.

28. By its letter dated 27 June 2014 the Appellant sought a refund of overpaid output tax in respect of the retained delivery charges. ASOS asserted that the retained delivery charges fell outside the scope of VAT, as they were a form of penalty charge and that, as there had been a return of the goods, no supply of goods had taken place. HMRC rejected this claim in their letter dated 15 July 2014 confirmed on review by letter dated 19 January 2015.

29. The Appellant notified its appeal to the Tribunal by notice of appeal dated 17 February 2015.

The Law

EU legislation

30. Article 2 of the Principal VAT Directive (Council Directive 2006/112/EC of 28 November 2006, the "**PVD**") relevantly 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;

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…"

31. Article 14(1) PVD provides:

"'Supply of goods' shall mean the transfer of the right to dispose of tangible property by a taxable person acting as such."

32. Article 24(1) PVD provides:

"'Supply of services' shall mean any transaction which does not constitute a supply of goods."

33. Article 90 PVD provides:

"1. In the case of cancellation, refusal or total or partial non-payment, or 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 States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1."

Domestic legislation

34. Section 4 VATA 1994 provides:

"(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."

35. Section 5(2) VATA 1994 relevantly provides:

"(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."

36. There are no provisions in the domestic legislation addressing the cancellation of a supply.

Authorities on single supply or multiple supplies

37. At [26]-[32] of their judgment in *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] EUECJ C-349/96 (25 February 1999) [1999] 2 AC 601 the Court of Justice of the European Communities addressed the issue of how to decide whether a single or multiple supply had taken place for VAT purposes:

"Questions 1 and 2

26. By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.

27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.

28. However, as the Court held in Case C-231/94 *Faaborg-Gelting Linien* v *FinanzamtFlensburg* [1996] ECR I-2395, paragraphs 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.

29.In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97*Commissioners of Customs and Excise* v *Madgett and Baldwin* [1998] ECR I-0000,paragraph 24).

31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paragraphs 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin*, paragraphs 45 and 46).

32.The answer to the first two questions must therefore be that it is for the national court to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply."

38. In *Customs and Excise Commissioners v British Telecommunications Plc* [1999] 1 WLR 1376 ("**BT**"), BT purchased cars that were delivered to its premises or at its direction, with charges for delivery stated separately in the contract. The question for the House of Lords was whether this constituted a single supply of delivered cars or two supplies: a supply of cars and a supply of delivery. Lord Slynn (with whom their Lordships agreed) considered *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] STC 270 and concluded:

"Card Protection Plan was concerned with the supply of two services whereas in the present case B.T. supplied goods (a car) and a service (delivery by a third party). The question is thus in my opinion whether the delivery is ancillary or incidental to the supply of the car or is it a distinct supply. It may be that "the physically and economically dissociable" test comes to the same thing but the ancillary test avoids the more difficult question as to whether something which is physically separate and economically separate (e.g. because a separate charge is identified) is thereby necessarily "dissociable.

……

In my view here if the transaction is looked at as a matter of commercial reality there was one contract for a delivered car: it is artificial to split the various parts of the transaction into different supplies for VAT purposes. What B.T. wanted was a delivered car; the delivery was incidental or ancillary to the supply of the car and it was only on or after delivery that property in the car passed. The fact that delivery could have been arranged differently under a separate contract between B.T. and the transporter or by B.T. collecting the car itself does not mean that when there is a contract for a delivered car the two supplies must be kept separate. Of course B.T. had the option to make other arrangements as is argued but the fact is that B.T. did it this way as part of one contract and in my view as part of one supply. The fact that individuals buying a car or small companies buying a few cars cannot have the same arrangement which B.T. has and may have to buy from a dealer does not make the arrangement with B.T. so different that the supply must, like the provision of long distance pickup in the *Madgett and Baldwin* case [1998] STC 1189 be regarded as not ancillary but as a distinct supply." (p 1384B-E)

39. The European Court returned to the issue in its judgment in *Levob Verzekeringen & OV Bank* (Taxation) [2005] EUECJ C-41/04 (27 October 2005) at paragraphs 17-21:

"Question 1(a) and (b)

17 By Question 1(a) and (b), which should be dealt with together, the national court seeks to ascertain whether, for the purposes of collecting VAT, the provision of standard software developed, put on the market and recorded on a carrier by the supplier and the subsequent customisation thereof by the supplier to the purchaser's requirements, in consideration of the payment of separate prices, in circumstances such as those at issue in the main proceedings, are to be regarded as two distinct supplies or as one single supply and, in the latter case, whether that single supply is to be classified as a supply of services.

18 As a preliminary point, it must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the taxable transactions take place and for applying the rate of tax or, where

appropriate, the exemption provisions in the Sixth Directive (Case C-'349/96 *CPP* [1999] ECR I-'973, paragraph 27).

19 According to the Court's case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, Case C-'231/94 *Faaborg-'Gelting Linien* [1996] ECR I-'2395, paragraphs 12 to 14, and *CPP*, paragraphs 28 and 29).

20 Taking into account, firstly, that it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *CPP*, paragraph 29).

21 In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-'34/99 *Primback* [2001] ECR I-'3833, paragraph 45)."

40. The key principles for determining whether a particular transaction should be regarded as a single composite supply or as separate supplies are summarised by the Upper Tribunal in the following way in *Honourable Society of Middle Temple v RCC* [2013] STC 1998 at [60] and are set out here for convenience:

"[60] The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:

(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

Authorities on cancelling supplies of goods

40. In *Brunel Motor Company Ltd (in administrative receivership) v HMRC* [2009] STC 1146 ("***Brunel (CA)***"), cars were supplied to Brunel by Ford on an agreed basis where Ford delivered the cars to Brunel and invoiced at the time of delivery but the obligation to pay and the transfer of title were deferred. Brunel went into administrative receivership and Ford took steps to reverse the VAT consequences of the initial supply (including repossessing the cars and issuing credit notes). The Court of Appeal identified that the relevant issue was whether the steps taken by Ford were effective to alter the VAT consequences of the initial supply.

41. Sir Andrew Morritt C (with whom Richards and Hallett LJJ agreed) stated at [30] to [38]:

"[30]In my view the problems in this case have arisen from the fact that neither the Tribunal nor the judge clearly identified the issue that had to be determined. Given that the original sales under the terms of the Supply Agreement on the dealer sold basis constituted taxable supplies of goods by one registered person to another they necessarily gave rise to an output tax to be paid and an input tax to be brought into account. Those consequences could only be altered after the event under some statutory authority. The relevant authorities in this case are Article 11 C 1 of the Sixth Directive (77/388/EEC) and Regulation 38 VAT Regulations 1995 SI 1995/2518.

[31] Article 11C(1) [*of the Sixth VAT Directive, now Article 90 PVD*] is applicable to 'cancellation' or cases where 'the price is reduced after the supply takes place'. It seems to me to be axiomatic that such cancellation or reduction be pursuant to some legal entitlement whether arising from or conferred by the original contract of supply or subsequently; otherwise VAT would be a voluntary tax in every sense of the word. The legal entitlement might take the form of a remedy, such as rescission for mistake or misrepresentation, a right under the original contract to return the goods in certain specified events or a subsequent agreement discharging the original contract.

[32] So the task of the Tribunal and the judge was to ascertain whether Brunel had a legal right to the discharge of the original supply. It was not provided by Clause 12. There was no vitiating factor in the conclusion of the original contracts of supply. It could only have arisen

under some other provision of the original contract or by reason of some subsequent agreement.

……..

[34] It follows that the taxable consequences of the original supplies of vehicles by Ford to Brunel can only be discharged by some subsequent contractual rescission or novation which is evidenced by the credit notes. It does not appear to me that the Tribunal reached any such conclusion. They concluded at paragraph [14] that the issue of credit notes in respect of repossessed vehicles which have not been paid for was standard practice of Ford. They returned to this question later when they concluded at paragraph [38] that the credit notes served to confirm the cap upon the contractual liability of Brunel which would have been anticipated by the contracting parties as likely to result if the Supply Agreement was operated in accordance with its terms. Paragraphs [39] to [41] dealt with the absence of any bad debt relief being available to Ford. The conclusion in paragraph [42] repeated that the credit notes had been volunteered by Ford in recognition of its inability to obtain payment from Brunel of the price of the vehicles repossessed. In dismissing the appeal the Tribunal was accepting the original view of HMRC that it could not ignore the consequences of the credit notes. In my view they were wrong to have done so.

……..

[38] In my view, therefore, the appeal should be allowed. But it does not follow, as counsel for Brunel accepted, that we should reach the converse conclusion to the effect that the credit notes did not evidence a right of Brunel to the contractual discharge of the original contract of supply and were ineffective for all legal purposes including VAT. It appears to me that the Tribunal never asked themselves the right question. They never considered the facts from the correct perspective. Had they done so they might, not would, have concluded that the original contracts of supply had been discharged by subsequent agreement of the parties, to be inferred at least in part from their conduct, of which the credit notes were evidence…..."

42. The Chancellor of the High Court concluded that there was nothing in the original agreement that gave Ford a right to cancel the supply, but that it was possible that the parties agreed a subsequent contractual rescission and the Value Added Tax and Duties Tribunal had never asked itself the right question (at [30]-[34]). The case was remitted to the First Tier Tribunal FTT (which had by then replaced the Value Added Tax and Duties Tribunal).

43. The FTT concluded that there was no agreement between Ford and Brunel for the rescission of the original contract for the supply of cars. Henderson J dismissed Ford and HMRC's appeal to the UT ([2013] UKUT 006 (TCC) ("***Brunel (UT)***"). Relating to cancellation, Henderson J stated at [24] & [54]:

"[24] The relevant underlying principles of law are not in dispute between the parties. It is common ground that, as a matter of law, the terms of a contract can be rescinded or varied only by a subsequent agreement supported by valid consideration or under seal: see, for example, *Stamp Duties Comr v Bone* [1976] STC 145 at 151, [1977] AC 511 at 519 per Lord Russell of Killowen, delivering the opinion of the Privy Council ('A debt can only be truly released and extinguished by agreement for valuable consideration or under seal.') It follows that the mere unilateral issue of the credit notes by Ford could not, by itself, extinguish the indebtedness under the original contracts of supply.

……

[54] In considering these submissions, I begin with the point, which Mr Milne rightly put at the forefront of his oral argument, that what has to be found in order to reverse the VAT consequences of the original supply of cars is a discharge by subsequent agreement of the contract for that original supply. Nothing less will do; and the mere fact that the receivers entered into a subsequent agreement with Ford for the re-supply of the cars, after they had been repossessed, does not of itself entail that the previous contract must have been cancelled."

44. In *Almos Agrarkulkereskedelmi Kft v Nemzeti Ado-es Vamhivatal Kozep-magyarorszagi Regionalis Ado Foigazgatosaga* (Case C-337/13) ("***Almos***") the CJEU said:

"[25] It must be noted in that regard that, if the total or partial non-payment of the purchase price occurs without there being cancellation or refusal of the contract, the purchaser remains liable for the agreed price and the seller, even though no longer proprietor of the goods, in principle continues to have the right to receive payment, which he can rely on in court. Since it cannot be excluded, however, that such a debt will become definitively irrecoverable, the European Union legislature intended to leave it to each Member State to determine whether the situation of non-payment of the purchase price, which, of itself, unlike cancellation or refusal of the contract, does not restore the parties to their original situation, leads to an entitlement to have the taxable amount reduced accordingly under conditions it determines, or whether such a reduction is not allowed in that situation."

45. The importance of the contractual arrangements is demonstrated by the judgment in *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie* Case C-277/05; [2008] STC 2470 ("***Société Thermale***") where the CJEU recognised that contracting parties may wish to provide the cancellation of a supply will not require the supplier to refund all money paid by its customer:

"The question referred for a preliminary ruling

[16] By its question, the national court is asking, in essence, whether a sum paid as a deposit by a client to a hotelier is, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, to be regarded as consideration for the supply of a reservation service, which is subject to VAT, or as fixed compensation for cancellation, which is not subject to VAT.

……

[18] In the present case, the situation to be examined is that in which the party who has paid a deposit is free to go back on his undertaking, thereby forfeiting that deposit, while the other party may exercise the same option, whereupon it must return double the amount of the deposit. There is no need to examine the rights which may be relied upon by either of those parties if the other exercises that option.

…….

[22] In that regard, it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced

after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not charge an amount of VAT exceeding the tax paid by the taxable person (see, to that effect, Case C-588/10 *Kraft Foods Polska* EU:C:2012:40, paragraphs 26 and 27).

……..

[26] Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received (*Apple and Pear Development Council*, paragraphs 11 and 12, *Tolsma*, paragraph 13, and *Kennemer Golf*, paragraph 39). The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service.

[27] Since the deposit does not constitute the consideration for the supply of an independent and identifiable service, it must be examined, in order to reply to the referring Court, whether the deposit constitutes a cancellation charge paid as compensation for the loss suffered as a result of the client's cancellation.

[28] In that regard, it should be noted that the contracting parties are at liberty subject to the mandatory rules of public policy to define the terms of their legal relationship, including the consequences of a cancellation or breach of their obligations. Instead of defining their obligations in detail, they may nevertheless refer to the various instruments of civil law.

[29] Thus the parties may make contractual provision applicable in the event of non-performance for compensation or a penalty for delay, for the lodging of security or a deposit. Although such mechanisms are all intended to strengthen the contractual obligations of the parties and although some of their functions are identical, they each have their own particular characteristics.

[32] Whereas, in situations where performance of the contract follows its normal course, the deposit is applied towards the price of the services supplied by the hotelier and is therefore subject to VAT, the retention of the deposit at issue in the main proceedings is, by contrast, triggered by the client's exercise of the cancellation option made available to him and serves to compensate the hotelier following the cancellation. Such compensation does not constitute the fee for a service and forms no part of the taxable amount for VAT purposes (see, to that effect, as regards interest applied on account of late payment, Case 222/81 *BAZ Bausystem* [1982] ECR 2527, paragraphs 8 to 11).

….

[35] Since, on the one hand, the deposit paid does not constitute the fee collected by a hotelier by way of genuine consideration for the supply of an independent and identifiable service to his client and, on the other hand, the retention of that deposit, following the client's cancellation, is intended to offset the consequences of the non-performance of the contract, it must be held that neither the payment of the deposit, nor the retention of that deposit, nor the return of double its amount is covered by Article 2(1) of the Sixth Directive.

46. In *Lombard Ingatlan Lizing* (VAT - Taxable amount : Judgment) [2017] EUECJ C-404/16 (12 October 2017) the CJEU considered *Almos* and stated at [20]-[26]:

"20 It should be recalled that Article 90(1) of the VAT Directive provides for the reduction of the taxable amount in the event of cancellation, refusal, total or partial non-payment, or where the price is reduced after the supply takes place.

21 In that regard, the Court has consistently held that provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 17 May 2017, *ERGO Poist'ovňa*, C-48/16, EU:C:2017:377, paragraph 37).

22 With regard to the terms 'cancellation' and 'refusal', it should be noted that most language versions of that provision, including the German and the French versions, refer to three possible situations, whereas other language versions, such as the English and the Hungarian versions, refer to two situations only.

23 As observed by the European Commission, the intent to include cancellation with retroactive (*ex tunc*) as well as with prospective (*ex nunc*) effect may explain the use in Article 90(1) of the VAT Directive of three terms, inter alia, in the German and the French versions.

24 The terms 'elállás' and 'teljesítés meghiúsulása' in the Hungarian version of that article do not preclude that interpretation in that they refer, respectively, to the retroactive refusal of an agreement and to a failed transaction.

25 That interpretation of Article 90(1) of the VAT Directive corresponds, in any event, to the general scheme and the purpose of that provision.

26 According to the case-law of the Court, in the situations covered by that provision, Article 90(1) of the VAT Directive requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (see, to that effect, judgment of 15 May 2014, *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 22)."

The Appellant's submissions

47. Mr Hitchmough QC for the Appellant addressed the three questions set out at paragraph 5 above. He submitted that they were all to be answered in the affirmative and the effect was that the retained amounts or delivery charges were not subject to VAT. Therefore the overpaid amount of output tax in respect of the VAT periods in question should be returned to the Appellant. He submitted that the fact that there were contractual terms allowing the Appellant to retain the delivery charges on

cancellation of the supply did not give rise to a liability to VAT on those sums - the VATable supplies of goods had been cancelled.

(1)Is ASOS making a single supply of delivered goods or two supplies: one of goods and the other of delivery?

48. Mr Hitchmough QC for the Appellant submitted that HMRC agreed that the Appellant was making a single supply of delivered goods. This was unsurprising in light of the decision in *Customs and Excise Commissioners v British Telecommunications Plc* [1999] 1 WLR 1376 ("***BT***").

49. He submitted that the sale of clothing made by ASOS to its customers involves two elements: the sale of the clothing, and the delivery of that clothing. The delivery does not constitute for customers an aim in itself and is clearly subordinate to their purchase of the clothing. Further, ASOS has no physical shops meaning that the only way customers can obtain the clothing they purchase is by having it delivered. Therefore, delivery of the clothing is ancillary to the supply of the clothing. The two elements constitute a single supply from an economic point of view of which the clothing (goods) is the principle element. As was the case in *BT*, the fact that the delivery charge is identified separately does not alter the conclusion that as a matter of economic and commercial reality the customer is paying for a single supply of delivered clothing.

(2) Is it possible, in principle for a supply of goods to be cancelled after the supply has been made, in particular, in circumstances where the supply involves ancillary service elements?

50. The second submission Mr Hitchmough QC relied upon was that the cancellation of the supply of goods after supply was effective.

51. He made three points on cancelling supplies of goods.

52. First, authority demonstrated that it is certainly possible to cancel a supply of goods after it has been made. Second, the contractual arrangements between the parties are crucial: they determine whether it is open to one party to cancel the supply unilaterally, whether a supply has been cancelled and the terms on which cancellation takes place. Third, supplies of services cannot usually be cancelled after they have been made; this is to be expected, unlike supplies of goods it will not usually be possible to restore parties to their original positions.

(a)The possibility of cancelling a supply of goods after it is made

53. Mr Hitchmough QC submitted that this was the precise issue that arose in *Brunel Motor Company Ltd (in administrative receivership) v HMRC* [2009] STC 1146 ("***Brunel (CA)***"). He submitted that the Chancellor had concluded that there was nothing in the original agreement that gave Ford a right to cancel the supply, but that it was possible that the parties agreed a subsequent contractual rescission and the Value Added Tax and Duties Tribunal had never asked itself the right question (at

[33]-[34]). He further submitted that Henderson J dismissed Ford and HMRC's appeal to the UT ([2013] UKUT 006 (TCC) ("***Brunel (UT)***").

54. He relied on paragraph 34 of the Court of Appeal judgment and paragraph 54 of Henderson J's judgment in the Upper Tribunal in submitting that, in this case, the VAT consequences had been 'discharged' or 'reversed' by the Appellant's agreeing a contractual right for the customer to cancel the supply and the Appellant to retain the delivery charge. He submitted that the decisions in *Brunel* demonstrate clearly that had Ford and Brunel agreed, either in the original contract or subsequently, conditions under which the supply of cars would be cancelled then this would have been effective to cancel the supply and "*to reverse [its] VAT consequences*". This was despite Ford also having responsibility to deliver the cars and possession in the cars having passed to Brunel.

55. Mr Hitchmough QC submitted that HMRC's primary argument appeared to be that a supply of goods once made can never be cancelled, and that this applies *a fortiori* where the supply of goods also involves ancillary service elements that cannot be returned. The decisions of the Court of Appeal and Upper Tribunal in *Brunel* demonstrated that this argument is misconceived. It is also fundamentally inconsistent with the long-standing position in English law that contracts for the transfer of goods can be rescinded following execution (a situation that most commonly comes before the courts in cases of misrepresentation).

(b)The importance of the contractual arrangements

56. Mr Hitchmough QC submitted that HMRC also appear to assert (relying on *HMRC v Robertson's Electrical Ltd* [2007] STC 612) that cancellation of the supply for VAT purposes means something different from cancellation of the contract in English contract law; HMRC cite no authority in support of this (*Robertson's Electrical Ltd* does not support it). The authorities clearly demonstrate that this is false: cancellation for VAT purposes and cancellation of the contract are treated as synonymous by the Court of Appeal and Henderson J in the UT in *Brunel*, and the CJEU's judgment in *Almos* (at [25]) refers to cancellation in the Article 90(1) sense as cancellation of the contract.

57. He submitted that, as *Brunel* makes clear, the contractual arrangements are a crucial part of the analysis on cancellation. The same point is demonstrated by *Re Liverpool Commercial Vehicles Ltd* [1984] BCLC 587 ("***LCV***") a case relied on by HMRC, in their published guidance on cancellation. HMRC draw attention to Vinelott J's statement that:

> "I can see no ground on which a delivery of goods pursuant to a contract which contains a title retention clause and which constitutes a supply in respect of which VAT has become due within the clear terms of the legislation can later be said not to constitute a supply because the goods are repossessed by the vendor."

58. He submitted that the important proviso in Vinelott J's conclusion is "*because the goods are repossessed by the vendor*". As is stated in *Brunel (CA)* in which *LCV* was cited, unilateral repossession is not sufficient to cancel a contract (unless the

contract provides that it will); cancellation must be effected either by the exercise of a right created by the original contract (or by statute), or by agreement between the parties subsequent to the original contract. Indeed, such a possibility is expressly considered by Vinelott J in *LCV*, who also said:

"A return or assessment may have to be adjusted if in the light of later events it transpires to have been incorrect and it may be that an adjustment falls to be made if it transpires that a supply was made under a contract which is later found to be void or which is rectified or rescinded."

59. The further importance of the contractual arrangements is shown by *Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie* Case C-277/05; [2008] STC 2470 ("***Société Thermale***") where the CJEU recognised that contracting parties may wish to provide the cancellation of a supply will not require the supplier to refund all money paid by its customer:

"[28] In that regard, it should be noted that the contracting parties are at liberty – subject to the mandatory rules of public policy – to define the terms of their legal relationship, including the consequences of a cancellation or breach of their obligations. Instead of defining their obligations in detail, they may nevertheless refer to the various instruments of civil law."

Cancelling supplies of services

60. Mr Hitchmough QC submitted that HMRC attempted to draw principles about cancellation from cases on the supply of services. The cases were largely irrelevant to cancellation of supplies of goods.

61. He submitted that in *Customs and Excise Commissioners v Bass plc* [1993] STC 42 ("***Bass***") customers could make guaranteed hotel reservations where Bass, the hotelier, promised to make the room available, and on cancellation the customer was charged the price of one night's stay. Popplewell J concluded that the customer received the right to use a room for the night, whether or not they did so. Therefore, a supply of services had been made.

62. The Appellant did not contend, and it was not necessary for its case, that supplies of services, once performed can be cancelled. It is uncontroversial that the parties cannot usually be returned to substantially their original position once services have been supplied; however, as the Court of Appeal clearly accepted in *Brunel*, the situation is different where the supply is of goods including delivered goods.

63. He submitted that HMRC's reliance on *Société Thermale* is misconceived for the same reason: to cancel a contract parties must be returned to substantially their original positions, for supplies of goods this is possible even after the supply has occurred, whereas for supplies of services it is not. It is instructive to note that the same analysis applies in relation to rescission as a remedy for misrepresentation.

(3) If the Appellant is making a single supply of delivered goods and it is possible to cancel such a supply, is this what has happened when customers returned goods to ASOS in accordance with the Returns Policy?

64. Mr Hitchmough QC submitted that when a customer elects to return the goods to the Appellant, they cancel the supply and the parties are returned to their original positions. The Appellant's view is that the customer is exercising a right granted to them under the initial sale contract. Even if this not the case, the cancellation of the contract would be the result of a bilateral agreement between the Appellant and the customer, the Appellant having made an offer in the Returns Policy, which the customer accepts by attempting to make a return. As the Court of Appeal made clear in *Brunel*, either course is sufficient to cancel a contract for the supply of delivered goods.

65. The effect of cancellation is that the taxable consequences of the original supply are "*discharged*" (*Brunel (CA)* at [34]) or "*reversed*" (*Brunel (UT)* at [54]), meaning that for VAT purposes the Appellant has no longer made a supply. The economic and commercial reality is that the Retained Amount restores the Appellant to its pre-contractual bargaining position (analogous to the contract allowing for the retention of the deposit in *Société Thermale*). The Retained Amount cannot be consideration for VAT purposes because there is no long a supply in respect of which it can be consideration.

66. He submitted that the commercial reality of the Appellant's agreement with its customers is that a customer can cancel a supply on condition that the Appellant retains the Retained Amount to restore it to its pre-contractual bargaining position. Such a possibility was expressly recognised in *Société Thermale*.

HMRC's submissions

67. Mr MacNab on behalf of HMRC took issue with each step in the Appellant's reasoning.

68. He submitted that the Appellant's arguments were inconsistent with the actual transaction(s) between it and the customer and with the economic and commercial reality of the transaction(s).

69. He submitted that the basic flaw in the Appellant's argument is that it misapplies the *CPP/Levob* principles on single/multiple supplies and either applies those principles to a question to which they are not applicable, or fails to carry those principles to their logical conclusion. The Appellant's case confuses the question of whether there has been a taxable "supply" or "supplies" (and the effect of subsequent events on that supply or supplies), with the question of how that supply is (or those supplies are) to be characterised for VAT purposes. The *CPP/Levob* principles are relevant only to the characterisation of the supply for VAT purposes.

70. Mr MacNab submitted that those principles are not relevant to ascertaining the terms of the actual transaction itself or the VAT consequences of events subsequent to the initial supply. ASOS's argument ignores the fact that the original transaction between ASOS and customer comprised a bundle of features or elements, namely the sale of the goods and the special (non-standard) delivery of those goods, for which the customer paid a consideration comprising the price of the goods and the delivery

charge; but that only one of those features or elements has been "reversed" (by return of the goods by the customer and the refund of the price by the Appellant) – or, put another way, one of those features has not been reversed, since the Appellant has not refunded the delivery charge.

71. He submitted that the sale of the goods and the supply of the special delivery service would, if considered separately, be taxable supplies. The return of the goods and refund of the purchase price could have no effect on the VAT treatment of the delivery and delivery charge. It makes no difference to the analysis in this case that the two elements were together treated as a single, composite supply of goods.

72. In that regard, it is common ground that the transaction between the Appellant and customer was to be characterised for VAT purposes as a single, taxable supply of (delivered) goods, in accordance with standard *CPP/Levob* principles, as applied in *CEC v British Telecommunications Plc* [1999] 1 WLR 1376 ("*BT*") and reflected in §2.2 of VAT Notice 700/24. Those standard principles are summarised in *Honourable Society of Middle Temple v RCC* [2013] STC 1998 at [60].

73. Mr MacNab accepted that in this case the ancillary delivery element shared the VAT treatment of the principal goods element. However, and as already noted above, *CPP/Levob* is relevant only to the VAT characterisation of the supply. The Appellant cannot seek to use that characterisation for VAT purposes to "reconfigure" the underlying commercial transaction: *cf.* Case C-8/17 *Biosafe*, per AG Kokott at AGO [51], ECLI:EU:C:2017:927; and compare also *Secret Hotels2 Ltd* [2014] STC 937 at [29]-[35] (Lord Neuberger P); *Airtours Holidays Transport Ltd* [2016] STC 1509 at [42]-[58], esp. [45]-[49] (Lord Neuberger P); *ING Intermediate Holdings Ltd* [2017] STC 320, UT, at [35]-[39].

74. He submitted that the delivery element remains a feature of the overall transaction(s) and of the overall single, composite supply and cannot be ignored. For VAT purposes, it either remains part of a single composite supply of goods for a consideration, or a separate supply of services for a consideration. Either way, it remains something that has been done, or part of something that has been done, by the Appellant for a consideration and remains a taxable supply or part of a taxable supply, regardless of how the supply is characterised for VAT purposes.

75. Mr MacNab submitted that the delivery element has not been "reversed" or "cancelled", either because it cannot be (having been performed) or because the parties have not purported to do so by refund of the delivery charge. Put another way, the Appellant's argument to the effect that there can no longer be any (taxable) supply to the customer, because the original supply was properly characterised as a supply of goods and because the goods have been returned and their price refunded, ignores the fact that the goods were themselves (only) one element of the bundle features comprising the single composite supply; and that it is only that element that has been reversed.

76. In conclusion he submitted that there were either two supplies (goods, special delivery), only one which has (arguably) been "cancelled"; or more likely, and his

primary case that there was one composite supply (goods & special delivery), the consideration for which (price + delivery charge) has been reduced (by the amount of the price), to become the amount of the delivery charge.

Discussion and Decision

77. Despite Mr Hitchmough QC's very skilful and attractive advocacy, the Tribunal accepts the submissions and analysis of Mr MacNab on behalf of HMRC as set out above. In giving reasons for dismissing this appeal, the Tribunal adopts HMRC's submissions and analysis as set out below.

78. The contractual and VAT positions of the Appellant are straightforward.

79. As a matter of contract (and as a matter of economic and commercial reality) the Appellant agreed to sell and deliver, and sold and delivered, goods to the customer. The customer paid the Appellant the contract price for the goods and paid a separate delivery charge for the special delivery of the goods.

80. A further feature or element of that transaction was the right of the customer to return the goods after they had been supplied (and after the contract had been performed on both sides) during the extended returns period, in return for which the customer would a refund of the price of the goods, but not of any delivery charge paid for the original special delivery. In that regard, the customer had no right to return goods, and the Appellant had no corresponding duty to accept their return, in the absence of an express term or separate agreement to that effect.

81. Both parties fully performed their obligations under that contract. Indeed, under the ASOS terms and conditions, the customer had to perform his obligations in full before any contract came into existence; the making of the contract and full performance by the customer were simultaneous.

82. In the circumstances at issue, and by whatever means it was achieved and however it is described, that contract *may* (arguably) be analysed as having been discharged by agreement (despite the fact that the contract was fully executed by both parties and that there were no outstanding contractual obligations from the performance of which either party had to discharged), on terms that the customer returned the goods and that the Appellant refunded the price of the goods, but not the delivery charge.

83. What is relevant is that the original contract was not rescinded (or otherwise avoided) *ab initio* for some extraneous vitiating factor (*e.g.* misrepresentation); and that the parties have not been purportedly restored to the position as if the contract had never been made.

84. The basic position remains that the customer has furnished (monetary) consideration to the Appellant in return for something done by the Appellant.

85. As a matter of VAT analysis:

(a) ASOS made a single, composite taxable supply for VAT purposes, comprising the sale of goods and the special delivery of those goods, for a monetary consideration comprising the price of the goods and the delivery charge. (Again, one of the features was the right to return the goods after the supply was completed).

(b) That single, composite taxable supply was properly characterised for VAT as a supply of goods.

(c) The taxable amount for which the Appellant was required to account on that taxable supply was the full monetary consideration comprising the price of the goods and the delivery charge.

(d) Subsequently, the transaction was (arguably) "cancelled" –in part, but not in full (and any "cancellation" was in those circumstances prospective rather than retroactive): see Case C- 404/16 *Lombard* ECLI:EI:C:2017:759) – and the consideration for the single composite supply was reduced after the supply took place.

(e) However analysed, the Appellant had received and retained the delivery charge paid by the customer. Accordingly, the taxable amount fell to be "reduced accordingly": see Article 90 PVD.

(f) Having regard to all the circumstances, the reduction in the taxable amount was represented by the price of the goods refunded, and not the retained delivery charge, since the total consideration received for the single composite supply was reduced only by the amount of the refund.

86. Therefore, however described, and however the bundle and series of transactions is analysed, the basic position remains that the customer paid the Appellant for the supply of something. The sums paid by the customer, not refunded by the Appellant are, and remain, consideration for a taxable supply by it to the customer, however that supply is characterised. That position follows from basic principles of VAT, as set out in the provisions of the PVD and VATA set out above.

87. Further, or alternatively, the Appellant's argument involves a logical flaw. Its argument runs as follows: its original supply to the customer was to be characterised as a supply of goods. Because the goods were returned and the price of the goods was refunded, there can therefore be no "supply of goods".

88. The argument is flawed for three main reasons. First, and as submitted above, it ignores the fact that the supply was a single composite supply, comprising more than feature or element, and that one or more of those features has not been reversed. In essence, the Appellant is seeking to use the VAT characterisation of the original transactions (as a single composite supply of goods) to reformulate the actual transaction. Second, and also as submitted above, it seeks to apply *CPP/Levob* principles to questions to which they are not relevant, namely the VAT consequences of events subsequent to the supply. Third, the Appellant relies on one subsequent event (return of the goods and refund of price) while ignoring other (non-refund of

delivery charge). As matter of logic, however, the Appellant cannot have it both ways.

89. It is incorrect as a matter of fact and law, but in any event inappropriate, to seek characterise the events that occurred as involving a "rescission" or "cancellation" or "reversal" of the contract (or of the supply) in its entirety, *i.e.* in the sense that the contract between the Appellant and customer is deemed never to have existed or taken place. The Appellant kept the delivery charge paid by the customer. That, however, is not the same as the Appellant's contention, namely that the contract has effectively been annulled for all purposes and must effectively be treated as never having existed.

90. In a "simple" case – where there had been no partial "reversal" or "unwinding" of the arrangements between the Appellant and its customer – there is no doubt, and no dispute, that the transaction was correctly characterised for VAT purposes as a single supply of delivered goods. The goods and delivery service are supplied at the same time and would properly be regarded as a single supply of delivered goods, the delivery service being ancillary to the supply of goods.

91. This case, however, is not that "simple" case of characterising a supply for VAT purposes. This case concerns the VAT effect of events subsequent to the supply (as characterised). The customer has returned the delivered goods and the Appellant has refunded the price of the goods but not the delivery charge. The VAT analysis must follow the facts. The Appellant's analysis, by contrast, seeks to start from the VAT "analysis" and seeks to (re)formulate the actual transaction from that supposed VAT analysis.

92. However the events are analysed, the correct position is that when the goods were sold and delivered by special delivery, and the goods were later returned (and the price refunded), but the delivery charge was retained, an element of the single, composite supply (delivery) had been performed and remained "performed", both because it could not be "unperformed" and because the Appellant did not refund the delivery charge. The delivery charge was and remains part of the consideration for a taxable supply, regardless of the return of the goods and refund of the price.

93. Further, and having regard to the original notice of appeal, the nonrefunded delivery charge is not a "penalty", nor a deposit paid to encourage future performance, nor a compensation for breach of contract; and does not fall outside the scope of VAT by analogy to *Société thermale*.

94. By contrast to *Société thermale*, where the customer never stayed in the hotel room or paid the full sum to stay, the customer in the present circumstances had performed, in paying for goods and delivery in full; and the Appellant had performed its obligations to the customer in delivering the goods. There was no failure of performance and no breach of contract; and no question of the customer being required to compensate the Appellant for breach of contract.

Consideration of the Appellant's three submissions

"Issue 1 – single or multiple supply"

95. As noted above, it is common ground that –for VAT purposes – the Appellant made a single supply of (delivered) goods, having regard to *CPP/Levob* principles, summarised in *Middle Temple* at [60]. This is not an "issue": nor does the VAT characterisation of the supply lead to the conclusion for which the Appellant contends.

"Issue 2 – cancelling supplies of goods"

96. The Appellant's submissions do not address the issue in this appeal, namely the consequences of "cancellation" of part but not all of a single composite supply (*i.e.* where one element, the goods, are returned and the price of those goods is refunded; but where another element (special delivery) is not undone and the delivery charge is not refunded). Thus, it is irrelevant whether it is possible to cancel a supply of goods after it has been made.

97. The Tribunal agrees that the contractual arrangements between the parties are crucial. In this appeal, the contractual arrangements lead only to the conclusion that the supply to the customer has not been "cancelled" in the sense in which the Appellant seeks to use it, namely complete unwinding of the transaction(s) and the restoration of the parties to their pre-contract positions. That is precisely because the Appellant retains part of the consideration paid by the customer for that supply.

98. The contention that "supplies of services cannot usually be cancelled after they have been made" may be debatable. In the present circumstances the Appellant has retained the service charge, *i.e.* the element of the consideration referable to the service element. In any event, however, it leads to the conclusion that the Appellant's overall supply to the customer has not been and cannot be "cancelled".

"The possibility of cancelling a supply of goods after it is made"

99. *Brunel (CA)*, *Brunel (UT)* and *Almos,* do not assist the Appellant in the present appeal as they are not on point. Broadly, all concern "cancellation" of a contract for non-performance by a party. That is not the case here, since both parties had performed: the customer had paid and the Appellant had delivered the goods.

100. None of paragraphs 30-34 of the Court of Appeal's Judgment in *Brunel* supports the Appellant in arriving at that the position where there is no taxable supply. Those paragraphs do emphasise, however, the importance of ascertaining whether there was a contract between the parties and what that terms of that agreement was. The VAT consequences follow the contract, not *vice versa*. There is no suggestion in *Brunel (CA)* that it concerned a situation like the present, or that the parties could themselves agree to "rescind" the taxable supply as opposed to the underlying contract giving rise to that supply.

101. Likewise, in the present case, there is no contract of the kind envisaged in *Brunel (UT)* (or *Brunel (CA)*) and no purported agreement to "unwind" the (original)

contract in its entirety. The only contract, however it is formulated or analysed, is that described above, whereby the Appellant retained the delivery charge.

102. *Almos* does not support ASOS's case. As appears from the paragraph cited, it concerns the situation of non-performance by a party, in the context of facts very different from the present. *Almos* at [22] does, however, undermine ASOS's case:

> In that regard, it must be noted that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not charge an amount of VAT exceeding the tax paid by the taxable person …

103. In the present case, the Tribunal accepts HMRC's submission on the "fundamental principle", namely that the Appellant is, and remains liable for, VAT on the "consideration actually received" for the taxable supply (and not refunded).

"The importance of the contractual arrangements"

104. The Tribunal accepts that "the contractual arrangements" are important to this case. HMRC's position in this appeal is itself based on the Appellant's "contractual arrangements" with the customer.

105. Contrary to the suggestion, the Court of Appeal in *Brunel (CA)* did not seek to draw any relevant distinction between "cancellation" of a contract and a situation where "'the price is reduced after the supply takes place": [31]. "Cancellation" was not thereafter used as a term of art, in either *Brunel (CA)* or *Brunel (UT).* Nor was it necessary to do so in that case, where the issue was whether what had been done had been done pursuant to a contract between the parties, rather than by way of unilateral act by Ford.

106. Further, having regard to the facts of the present case, it is not necessary in this case to decide whether the events that have occurred involve "cancellation" or a situation where "the price is reduced after the supply takes place" (*cf.* Article 90 PVD). For the avoidance of doubt, the Tribunal is satisfied that the present case involves the latter. There is no concept of "cancellation" of a contract in English (or contract law. The concept, however, is used in the Distance Selling Regulations.

107. Article 90 of the PVD itself is required to be interpreted and applied uniformly across the EU in the light of the general scheme and purpose of that provision: *Lombard* at [21]-[26], including a reference back to *Almos* [22], cited above.

108. The Appellant's submission based on *Société thermale* [28], namely that "*the CJEU recognised that contracting parties may wish to provide the cancellation of a supply* [sic] *will not require the supplier to refund all money paid by its customer*",

does not reflect what the CJEU said in *Société thermale* [28] itself or held in the remainder of the judgment. Again, in *Société thermale* at [21]-[36], especially in this context [27] & [28] the CJEU was not concerned with "*cancellation of a supply*", but with contracting parties' freedom of contract, including their freedom to "*define ... the consequences of a cancellation or breach of their obligations*" – in circumstances where the "cancellation or breach" meant that the contracted for supply of the hotel room did not take place.

109. *Société thermale* provides insufficient support for the Appellant's case overall. It is authority for the proposition that a deposit paid by a prospective customer to a hotel to reserve a room, and retained by the hotelier if the customer cancelled the reservation or failed to show up, was not consideration for the supply of a service by the hotel to the customer (separate from the intended "supply" of the hotel room which does not take place). The CJEU held it was rather in the nature of a penalty to encourage performance by the customer and compensation for the hotelier: see the judgment at [27]-[32].

110. *Société thermale* is distinguishable from present case. This is a case where both parties performed their obligations in full, and where there was no relevant failure or performance or breach of contract (or "*cancellation or breach of [the customer's] obligations*") capable of being "penalised". It is also notable that the Appellant does not now advance its original argument, based on *Société thermale*, to the effect that the delivery charge was a "penalty", which figured in the correspondence and in the Notice of Appeal.

"Cancelling supplies of services"

111. The Appellant seeks to draw a distinction between "cancellation of supplies of goods" and "cancellation of supplies of services". The distinction is not useful or relevant. As far as "cancellation" is relevant to anything, it is cancellation of contracts, rather than cancellation of "supplies". In the present case, it does not matter whether what has occurred is "cancellation" of the contract or a reduction in consideration, or whether "cancellation" is an appropriate description where both parties have performed under the contract. What is material is that part of the consideration for the supply was not refunded; and it remains consideration for that (single, composite) supply.

112. The Appellant's submission as to what is meant by to "cancel a contract", namely that "*the parties must be returned to substantially their original position*" cannot stand in light of *Lombard* [21]-[26], especially [23]. In any event, that submission is not describe the situation in the present appeal, given that the Appellant retains the delivery charge. Whatever "cancellation" means and whether it applies to the present appeal, it does not transform the delivery charge received and retained by the Appellant from being consideration for a taxable supply, and thus subject to VAT, into a payment that is, or is for something, that is outside the scope of VAT.

113. The example of rescission of a contract for misrepresentation is illuminating. If a contract is induced by misrepresentation, the representee is *prima facie* entitled to rescind the contract *ab initio* (subject to s.2(2) of the Misrepresentation Act 1967).

Applied to the present case, the Appellant would be required to repay both the price and the delivery charge. However, that is not the situation in the present case.

"Issue 3 – cancellation on these facts"

114. The submission of the Appellant, that "*when a customer elects to return the goods to ASOS, they cancel the supply and the parties are returned to their original positions"* is (1) assumes that which is to be proved and (2) factually incorrect since the parties are not "returned to their original positions". Whichever way one analyses the situation, the Appellant retains the delivery charge paid by the customer.

115. The "economic and commercial reality" is that the Appellant has retained the delivery charge, part of the consideration for the original (single composite) supply. It is not clear what is meant by the Appellant's "*precontractual bargaining position*". If it simply refers to the Appellant's pre-contract position, then even this does not apply to the facts of this case.

116. There is no determinative analogy to be drawn between this case and *Société thermale*, for the reasons above. Put one way, the retention of the delivery charge is payment for performance, not (as in *Société thermale*) payment (compensation) for non-performance.

Conclusion

117. HMRC acted lawfully in refusing the Appellant's claim under section 80 VATA for repayment of output tax on the retained amounts of the delivery charges for the four years 1 April 2010 to 31 March 2014. The retained amounts were subject to VAT. For the above reasons, this appeal is dismissed.

118. 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.

RUPERT JONES
TRIBUNAL JUDGE

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