Neutral Citation: [2024] UKFTT 00745 (TC)

Case Number: TC09263

FIRST-TIER TRIBUNAL
TAX CHAMBER

At Taylor House, London

Appeal references: TC/2021/02310
TC/2021/02440
TC/2021/11455

VAT – vouchers – London Passes – assessments raised on basis that Appellant making standard rated supply of "sightseeing packages" – whether Passes outside the scope of VAT as multi-purpose vouchers or whether "functioning as a ticket" – held, within voucher rules – whether in any event outside the scope on similar basis to taxpayers in MacDonald Resorts and Findmypast – held, yes – in relation to two assessments, whether it had "appeared to the Commissioners that the Appellant's VAT returns were incorrect" – held, no – those assessments out of time – whether output tax wrongly calculated – no – appeal allowed

Heard 30 April to 3 May 2024
further submissions 23 May and 6 June 2024
Judgment date: 14 August 2024

Before

TRIBUNAL JUDGE ANNE REDSTON
MS JANE SHILLAKER

Between

GO CITY LIMITED
(formerly the LEISURE PASS GROUP LIMITED)

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kieron Beale KC, instructed by PriceWaterhouseCoopers LLP

For the Respondents: Mr Peter Mantle of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. The Appellant was originally known as the Leisure Pass Group Ltd ("LPG"); in 2021 it changed its name to "Go City Limited. The Appellant sells two types of Pass, the London Pass ("LP") and the London Explorer Pass ("LEP"), both of which entitle the purchaser to enter various attractions and use certain forms of transport in London without further payment. The LP and the LEP are priced at a discount compared to the gate prices of the Attractions. In this decision, we have used the term "Attraction" to include all the options made available to Passholders by the Appellant, including admission to buildings, access to transport, and other benefits such as discounts on books.

2. The Appellant launched the Pass in 1999, and HMRC originally accepted it was a "face value voucher" under Value Added Taxes Act 1994 ("VATA"), Sch 10A, but later changed its view. The Appellant appealed, and in 2007 lost at the VAT Tribunal and the High Court. The Appellant then amended the terms of the Pass, but HMRC still did not accept it was a voucher. The Appellant appealed again, and in 2009 the VAT Tribunal ruled in the Appellant's favour, finding that the Pass was a voucher and so outside the scope of VAT.

3. In 2016, the Voucher Directive amended the Principal VAT Directive ("PVD"). Its purpose was to "clarify" the VAT treatment of vouchers; Recital 5 to the Voucher Directive said it "should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar".

4. In October 2018, the Appellant was told by HMRC that the Pass would not fall within the new definition because it was a "ticket". With effect from 1 January 2019, the Voucher Directive was implemented in the UK by Sch 10B; this said that "instruments which functioned as a ticket" were not vouchers.

5. The Appellant wanted to avoid the disruption of further litigation, and restructured its arrangements from 3 January 2019; it understood that the changes would mean that the Pass remained out of scope for VAT purposes. HMRC asked for further information about the Appellant's VAT returns and subsequently issued the following assessments:

   (1) On 17 March 2021, for £1,570,122 in relation to VAT period 03/19 ("the First Assessment").

   (2) On 22 June 2021, for £2,068,328 in relation to VAT period 06/19 ("the Second Assessment").

   (3) On 27 September 2021, for £1,835,607 in relation to VAT period 09/19 ("the Third Assessment"); and

   (4) On the same day, for £3,835,897 in relation to VAT periods 01/20 to 12/20 ("the Fourth Assessment").

6. The Assessments issued on 27 September 2021 were accompanied by a decision setting out HMRC's view as to the basis for the Assessments ("the Liability Decision"). The Appellant made in-time appeals against all the Assessments and against the Liability Decision. It subsequently made a further appeal, under reference TC/2023/7800, which has been stayed behind these appeals.

7. The parties agreed that there were four Issues in dispute. We have taken the Issues in a different order from those in the submissions, as follows:

   (1) Whether the First and Second Assessments were out of time because, when they were issued, it did not appear to HMRC that the Appellant's VAT returns were incorrect, and as a result, the related condition in VATA s 73(1) was not satisfied.

(2) Whether the supply of Passes was outside the scope of VAT because they were Multi-Purpose Vouchers ("MPVs") under the Voucher Directive and VATA Sch 10B which implemented that Directive, or whether (as HMRC contended) they were not MPVs because they were "instruments functioning as tickets".

(3) Whether the supply of the Passes was outside the scope of VAT as a result of the Appellant's new contractual arrangements.

(4) Where a Pass expired without having been used up, whether the entirety of the money received by the Appellant from customers should have been allocated as consideration for its supplies.

8. We decided those Issues as follows:

(1) The First and Second Assessments were issued to "protect HMRC's position" shortly before the expiry of the two year time limit in VATA s 73(6). At the time those Assessments were made, the assessing Officer did not have a view that the Appellant's returns were incorrect, and neither did any other person within HMRC. We made those factual findings in part on the basis of documentary evidence which was only disclosed during the hearing. We decided both Assessments were invalid as being out of time.

(2) The Passes were not "instruments functioning as tickets". Instead, they were MPVs as defined by the Voucher Directive and Sch 10B. The supply of the Passes was therefore outside the scope of VAT.

(3) The Passes were also outside the scope of VAT because of the Appellant's new contractual arrangements.

(4) HMRC's submission that 100% of the purchase price of the Passes should be allocated as consideration for the Appellant's supplies, was inconsistent with the legislation and the case law, and we rejected it.

9. It follows that we allow the Appellant's appeal on all grounds and set aside the Assessments and the Liability Decision.

10. We are grateful to Mr Kieron Beale KC, who represented the Appellant, and to Mr Peter Mantle, who represented HMRC, for their helpful submissions. We considered each point they made, although we have not found it necessary to include them all in this judgment.

THE EVIDENCE

11. The Tribunal was provided with witness evidence and documents.

The witness evidence

12. The Tribunal heard three witnesses, Mr Neville Doe, the Appellant's Group Chief Financial Officer; Officer Penny Martin, who issued the Assessments, and Officer Philip Levy, who worked with Officer Martin as the "technical lead".

13. Mr Doe provided two witness statements, gave evidence-in-chief led by Mr Beale, was cross-examined by Mr Mantle and re-examined by Mr Beale. We found him to be an entirely honest and straightforward witness.

14. Officer Martin provided a witness statement and was cross-examined by Mr Beale. In the course of that cross-examination, she referred to the "Technical Advice Request" or "the TAR", which she had sent to HMRC's Policy team on 21 January 2021. As explained at §26, the TAR was then disclosed to the Appellant. Officer Martin's cross-examination

resumed the following day, following which she was re-examined by Mr Mantle. We found her evidence on a key issue to lack credibility, as we explain at §156 to §166.

Officer Levy

15. Officer Levy also provided a witness statement and was cross-examined by Mr Beale. He was not an entirely straightforward witness because he gave evidence with one eye on the case HMRC were seeking to make. For example, his witness statement included this passage:

> "In my experience, the practice of making assessments in advance of a governance board decision, in order to protect HMRC's position in relation to assessment time limits, including the 2 year period under s 73(6)(a) VATA, is not at all unusual and not contrary to HMRC's governance requirements."

16. In cross-examination he was taken by Mr Beale to an email from Mr Keenan of HMRC's Anti-Avoidance Board ("AAB") to the Deputy Director of Counter-Avoidance, copied to Officer Levy, in which Mr Keenan had asked:

> "I can't recall any previous cases where this situation has arisen, and it isn't covered in the AHP [Avoidance Handling Process] manual, so can you provide a steer on whether the protective assessment can be issued in advance of submission of the Gateway 2 settlement strategy to AAB?"

17. Officer Levy then amended his evidence. Instead of his earlier testimony that the procedure was "not at all unusual", he said he could "recall situations" where it had been adopted.

18. During cross-examination, Officer Levy also referred to several documents which had not been disclosed to the Appellant. As we explain further at §27, HMRC initially resisted their disclosure, and they were only produced following Mr Beale's successful application for disclosure. By that stage, Officer Levy had left the witness box. We considered whether it was in the interests of justice for him to be recalled to give oral evidence on those documents, given their potential significance in the context of Issue One. However, we decided not to do so, for the following reasons:

(1) Neither party made an application to that effect.

(2) Officer Levy was the author or co-author of some of the disclosed documents, and the recipient of the remainder, so was aware of their content. He had had the opportunity to give related evidence both in his witness statement and from the witness box.

(3) The hearing had been listed for four days, but significant time had already been lost dealing with the disclosure issues, including the hearing of a contested related application. There is more about the disclosure issues at §23ff.

(4) The Assessments were made in 2021; the Appellant filed its appeals against the First and Second Assessments in June and July 2021, around three years previously, and its appeal against the other two Assessments and the Liability Decision was filed in October 2021.

(5) The Appellant wanted the case resolved without further delay. The sum charged by the Assessments totalled well over £10m (once interest had been factored in), and it was important to the Appellant to know whether or not this sum was due to HMRC, particularly as its business had been badly damaged by the Covid lockdowns.

(6) Had Officer Levy been recalled, it was likely that we would have had to adjourn and relist the hearing for later in the year.

19. Taking all those factors into account, we decided it was not in the interests of justice to recall Officer Levy to give evidence on the documents belatedly disclosed by HMRC. We subsequently noted that in his post-hearing submission, Mr Mantle said that "HMRC's position remains that they [the disclosed documents] have no relevance".

20. We set out our findings about Officer Levy's evidence relating to Issue One at §167 to §175, where we also explain our reasons for not accepting part of that evidence.

The documents in the Bundle

21. The Appellant provided a bundle of documents running to 1902 pages, which included:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) contractual documents relating to the Passes;

(3) extracts from the Appellant's website;

(4) screenprints and similar from HMRC's system about the Assessments;

(5) internal HMRC communications about the Appellant;

(6) a copy of page VAEC6520 from HMRC's VAT Assessments and Error Correction Manual as at 18 April 2019.

22. Mr Mantle also handed up a further copy of VAEC6520 as at December 2021. In this judgment, we have also referred to other pages of that Manual which explain HMRC's procedures; we understand none of the content of those pages to be in dispute.

23. Three of HMRC's internal email exchanges had been filed and served in redacted form, and Mr Beale challenged the basis for these redactions. HMRC belatedly accepted that the redacted text in two of the documents was relevant to the issues in dispute and that there was no basis for refusing disclosure. Unredacted copies of those two documents were provided at the end of the first hearing day. Mr Beale accepted that the redaction in the third document related to a matter which was not relevant to the Appellant, and withdrew the challenge. This matter was therefore resolved between the parties and no application was made to the Tribunal for disclosure.

The Technical Advice Request

24. VATA s 73(1) provides that "where it appears to the Commissioners" that a person's VAT return is "incomplete or incorrect", they may "assess the amount of VAT due from him to the best of their judgment and notify it to him".

25. It was part of the Appellant's case that this condition had not been met in relation to the First and Second Assessments, because (in its submission) it had not appeared to any HMRC officer that the Appellant had made an incomplete or incorrect return. Whether or not that was the position was thus a key matter in dispute.

26. During her oral evidence, Officer Martin said that in January 2021 she and Officer Levy "were of the view that insufficient VAT had been paid" by the Appellant, and that their reasoning had been included in the TAR. However, no copy of that document had been filed or served. Mr Mantle accepted that the TAR was relevant to the proceedings, and HMRC provided Mr Beale and the Tribunal with a copy at the end of the second hearing day.

The disclosure application

27. The existence of other possibly relevant documents emerged during Officer Levy's oral evidence:

(1) In the course of cross-examination, he said that HMRC's Customer Compliance Group Dispute Resolution Board ("CCG DRB" or "DRB") had decided in May 2021 that the Appellant had underpaid VAT, and had come to that conclusion on the basis of "the case team setting out our position and that of the taxpayer". He also said that he and Officer Martin had made a written submission to the DRB, and that the outcome of the meeting at which the Appellant was discussed had been recorded in a formal minute.

(2) Officer Martin and Officer Levy's witness evidence was that the Appellant's position had been considered by the Anti-Avoidance Board ("AAB") on 21 September 2021. Under cross-examination, Officer Levy said that the outcome of that meeting had also been recorded in a formal minute.

28. At the end of the second hearing day, Mr Beale asked HMRC to disclose the submission made to the DRB; the minute recording the outcome of that meeting, and the minute recording the outcome of the AAB meeting.

29. Having taken instructions, Mr Mantle said that HMRC would consider the application overnight, and that if possible contact would be made with the AAB secretariat. The following morning, Mr Mantle said HMRC objected to the disclosure application.

30. Mr Beale applied to the Tribunal to direct disclosure, on the basis that the documents were relevant to Issue One. He pointed out that Officer Martin's oral evidence about the TAR had turned out to be inconsistent with its content, and submitted that it was important for the Appellant and the Tribunal to see the documents referred to by Officer Levy, and not simply rely on what he said about them.

31. Mr Mantle responded by saying that:

(1) none of the documents was relevant, because Mr Beale was wrong about the meaning and effect of s 73;

(2) the Appellant should have inferred from Officer Levy's witness statement that further documents existed, and in consequence had had over a year to request disclosure; and

(3) a short passage in one of the documents was privileged.

32. Mr Beale said that redaction of the identified passage was acceptable to the Appellant, and the Tribunal took time for consideration. We decided to allow the application and directed that the documents be disclosed, for the following reasons:

(1) They were relevant to Issue One. Whichever party was correct as to the scope and effect of s 73, the Tribunal would need to make findings about when HMRC had come to a view that the Appellant's VAT returns for periods 03/19 and 06/19 were "incomplete or incorrect".

(2) Officer Levy had said in his witness statement that "the CCG DRB had discussed the case at its meeting on 5 May 2021, agreeing with the case team that the Appellant's position should be rejected and the assessment [for period 03/19] defended". However, under cross-examination he expanded that evidence, saying that the DRB had decided the Appellant had underpaid tax. This was new information. We therefore rejected Mr Mantle's "lateness" challenge in relation to the DRB documents.

(3) We agreed with Mr Mantle that it would have been possible for the Appellant to infer from Officer Levy's witness statement that a formal document recording the AAB decision was likely to exist. However, it was not until the end of the second hearing day that the Appellant had become aware of the inconsistency between Officer Martin's oral evidence and the information in the TAR. We decided that it was in the interests of justice for the AAB submission and related formal minute to be disclosed, so the Appellant and the Tribunal could consider those contemporaneous documents as well as the witness evidence given by Officers Martin and Levy.

The schedule

33. At 11.45 on Friday, the final day of this four day hearing, Mr Mantle asked permission to hand up a schedule he had produced, which he said had been derived from information in the Bundle. The Tribunal invited Mr Beale to consider the schedule over the short adjournment. When we reconvened, Mr Beale objected to the schedule being admitted into evidence. For the reasons given by Mr Beale, and for additional reasons, we refused Mr Mantle's application. Those reasons are as follows:

(1) There was no good reason why the schedule had been produced so late. It was derived from information in the Bundle, which had been available to HMRC long before the hearing.

(2) Mr Beale was unable to say without further work whether the schedule was correct; he had also shown the schedule to Mr Doe, and he too was unable to say whether or not it was accurate, without taking time to review it. As the schedule had been handed up on the morning of the final hearing day, it was far too late for the Appellant to check the schedule.

(3) The position might have been different had Mr Mantle produced the schedule the day before Mr Doe gave evidence; he could then have considered it and been cross-examined on its content.

THE VOUCHER LEGISLATION AND EU CASE LAW

34. We first set out relevant provisions of EU law and UK law; we then summarise a related EU judgment.

EU law

35. At all relevant times, Article 73 of Council Directive 2006/112/EC ("the PVD") read:

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

36. In 2016, the PVD was amended by Council Directive 2016/0165 in relation to "the treatment of vouchers" ("the Voucher Directive"), which included the following Recitals:

> "(1) Council Directive 2006/112/EC (3) sets out rules on the time and place of supply of goods and services, the taxable amount, the chargeability of value added tax (VAT) and the entitlement to deduction. Those rules are, however, not sufficiently clear or comprehensive to ensure consistency in the tax treatment of transactions involving vouchers, to an extent which has undesirable consequences for the proper functioning of the internal market.
>
> (2) To ensure certain and uniform treatment, to be consistent with the principles of a general tax on consumption exactly proportional to the price of goods and services, to avoid inconsistencies, distortion of competition,

double or non-taxation and to reduce the risk of tax avoidance, there is a need for specific rules applying to the VAT treatment of vouchers.

(3) In view of the new rules on the place of supply for telecommunications, broadcasting and electronically supplied services which are applicable since 1 January 2015, a common solution for vouchers is necessary in order to ensure that mismatches do not occur in respect of vouchers supplied between Member States. To this end, it is vital to put in place rules to clarify the VAT treatment of vouchers.

(4) Only vouchers which can be used for redemption against goods or services should be targeted by these rules. However, instruments entitling the holder to a discount upon purchase of goods or services but carrying no right to receive such goods or services should not be targeted by these rules.

(5) The provisions regarding vouchers should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar.

(6) So as to identify clearly what constitutes a voucher for the purposes of VAT and to distinguish vouchers from payment instruments, it is necessary to define vouchers, which can have physical or electronic forms, recognising their essential attributes, in particular the nature of the entitlement attached to a voucher and the obligation to accept it as consideration for the supply of goods or services.

(7) The VAT treatment of the transactions associated with vouchers is dependent upon the specific characteristics of the voucher. It is therefore necessary to distinguish between various types of vouchers and the distinctions need to be set out in Union legislation.

(8) …For multipurpose vouchers, it is necessary to clarify that VAT should be charged when the goods or services to which the voucher relates are supplied. Against this background, any prior transfer of multi-purpose vouchers should not be subject to VAT.

(9)-(10) …

(11) In the case of multi-purpose vouchers, to ensure that the amount of VAT paid in respect of multi-purpose vouchers where VAT on the underlying supply of goods or services is charged only upon redemption is accurate, without prejudice to Article 73 of Directive 2006/112/EC, the supplier of the goods or services should account for the VAT based on the consideration paid for the multi-purpose voucher. In the absence of such information the taxable amount should be equal to the monetary value indicated on the multi-purpose voucher itself or in the related documentation, less the amount of VAT relating to the goods or services supplied. Where a multi-purpose voucher is used partially in respect of the supply of goods or services, the taxable amount should be equal to the corresponding part of the consideration or the monetary value, less the amount of VAT relating to the goods or services supplied.

(12) This Directive does not target the situations where a multi-purpose voucher is not redeemed by the final consumer during its validity period, and the consideration received for such voucher is kept by the seller."

37. Article 1(1) of the Voucher Directive inserted a new Article 30a and 30b into the PVD. Article 30a read:

"(1) 'Voucher' means an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and

where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument

(2) 'single-purpose voucher' means a voucher where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher;

(3) 'multi-purpose voucher' means a voucher, other than a single-purpose voucher."

38. Article 30b read:

"1. Each transfer of a single-purpose voucher made by a taxable person acting in his own name shall be regarded as a supply of the goods or services to which the voucher relates. The actual handing over of the goods or the actual provision of the services in return for a single-purpose voucher accepted as consideration or part consideration by the supplier shall not be regarded as an independent transaction.

Where a transfer of a single-purpose voucher is made by a taxable person acting in the name of another taxable person, that transfer shall be regarded as a supply of the goods or services to which the voucher relates made by the other taxable person in whose name the taxable person is acting.

Where the supplier of goods or services is not the taxable person who, acting in his own name, issued the single purpose voucher, that supplier shall however be deemed to have made the supply of the goods or services related to that voucher to that taxable person.

2. The actual handing over of the goods or the actual provision of the services in return for a multi-purpose voucher accepted as consideration or part consideration by the supplier shall be subject to VAT pursuant to Article 2, whereas each preceding transfer of that multi-purpose voucher shall not be subject to VAT.

Where a transfer of a multi-purpose voucher is made by a taxable person other than the taxable person carrying out the transaction subject to VAT pursuant to the first subparagraph, any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT."

39. Article 1(2) of the Voucher Directive inserted Article 73b into the Directive, which read:

"Without prejudice to Article 73, the taxable amount of the supply of goods or services provided in respect of a multi-purpose voucher shall be equal to the consideration paid for the voucher or, in the absence of information on that consideration, the monetary value indicated on the multi-purpose voucher itself or in the related documentation, less the amount of VAT relating to the goods or services supplied."

40. Article 2 of the Voucher Directive provided that:

"Member States shall adopt and publish, by 31 December 2018 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive…They shall apply those provisions from 1 January 2019."

UK legislation

41. In the period before the UK implemented the Voucher Directive, the position of vouchers was dealt with by VATA Sch 10A, which was headed "face value vouchers" and read:

> "1(1) In this Schedule "face-value voucher" means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> (2) References in this Schedule to the "face value" of a voucher are to the amount referred to in sub-paragraph (1) above.
>
> 2. The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.
>
> 3. (1) This paragraph applies to a face-value voucher issued by a person who—
>
> (a) is not a person from whom goods or services may be obtained by the use of the voucher, and
>
> (b) undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained.
>
> Such a voucher is referred to in this Schedule as a "credit voucher".
>
> (2) The consideration for any supply of a credit voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.
>
> (3) Sub-paragraph (2) above does not apply if any of the persons from whom goods or services are obtained by the use of the voucher fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them…".

42. The effect of Sch 10A was summarised in *Leisure Pass Group Ltd v HMRC* (2007) VAT Decision 3340 (as to which, see §68 below) as follows:

> "The consideration for the voucher is disregarded (except to the extent to which it exceeds the face value) (para 3(2)), in which case tax is charged on the goods or services for which the voucher is redeemed according to their VAT categorisation. Not only is the time of supply deferred until the voucher is redeemed but the fact that the issue of the voucher is a separate taxable supply of a right is also effectively disregarded in favour of the VAT categorisation of the ultimate supply made on redemption of the voucher."

43. The Voucher Directive was implemented by Finance Act 2017. Section 52 of that Act provided that "Schedule 17 makes provision about the VAT treatment of vouchers". Schedule 17(1), (2) and (4) amended VATA s 51B, so that Sch 10A did not have effect "with respect to a face value voucher (within the meaning of that Schedule) issued on or after 1 January 2019", and Sch 17(3) inserted a new Schedule 10B into VATA.

44. Schedule 10B, para 1 is headed "Meaning of voucher" and reads:

> "(1) In this Schedule "voucher" means an instrument (in physical or electronic form) in relation to which the following conditions are met.
>
> (2) The first condition is that one or more persons are under an obligation to accept the instrument as consideration for the provision of goods or services.
>
> (3) The second condition is that either or both of—

(a) the goods and services for the provision of which the instrument may be accepted as consideration, and

(b) the persons who are under the obligation to accept the instrument as consideration for the provision of goods or services,

are limited and are stated on or recorded in the instrument or the terms and conditions governing the use of the instrument.

(4) The third condition is that the instrument is transferable by gift (whether or not it is transferable for consideration).

(5) The following are not vouchers—

(a) an instrument entitling a person to a reduction in the consideration for the provision of goods or services;

(b) an instrument functioning as a ticket, for example for travel or for admission to a venue or event;

(c) postage stamps."

45. Para 2 reads:

"(1) This paragraph gives the meaning of other expressions used in this Schedule.

(2) 'Relevant goods or services', in relation to a voucher, are any goods or services for the provision of which the voucher may be accepted as consideration.

(3) References in this Schedule to the transfer of a voucher do not include the voucher being offered and accepted as consideration for the provision of relevant goods or services.

(4) References in this Schedule to a voucher being offered or accepted as consideration for the provision of relevant goods or services include references to the voucher being offered or accepted as part consideration for the provision of relevant goods or services."

46. Para 3 reads:

"(1) The issue, and any subsequent transfer, of a voucher is to be treated for the purposes of this Act as a supply of relevant goods or services.

(2) References in this Schedule to the 'paragraph 3 supply', in relation to the issue or transfer of a voucher, are to the supply of relevant goods or services treated by this paragraph as having been made on the issue or transfer of the voucher."

47. Para 4 reads

"(1) A voucher is a single purpose voucher if, at the time it is issued, the following are known—

(a) the place of supply of the relevant goods or services, and

(b) that any supply of relevant goods or services falls into a single supply category (and what that supply category is).

(2) The supply categories are—

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

(b) supplies chargeable at the rate in force under section 29A (reduced rate),

(c) zero-rated supplies, and

(d) exempt supplies and other supplies that are not taxable supplies.

(3) For the purposes of this paragraph, assume that the supply of relevant goods or services is the provision of relevant goods or services for which the voucher may be accepted as consideration (rather than the supply of relevant goods or services treated as made on the issue or transfer of the voucher)."

48. Para 5 reads:

"(1) This paragraph applies where a single purpose voucher is accepted as consideration for the provision of relevant goods or services.

(2) The provision of the relevant goods or services is not a supply of goods or services for the purposes of this Act.

(3) But where the person who provides the relevant goods or services (the "provider") is not the person who issued the voucher (the "issuer"), for the purposes of this Act the provider is to be treated as having made a supply of those goods or services to the issuer."

49. The next three paragraphs come under the heading "multi-purpose vouchers – special rules" and read:

"6. A voucher is a multi-purpose voucher if it is not a single purpose voucher.

7. (1) Any consideration for the issue or subsequent transfer of a multi-purpose voucher is to be disregarded for the purposes of this Act.

(2) The paragraph 3 supply made on the issue or subsequent transfer of a multi-purpose voucher is to be treated as not being a supply within section 26(2).

8. (1) Where a multi-purpose voucher is accepted as consideration for the provision of relevant goods or services, for the purposes of this Act—

(a) the provision of the relevant goods or services is to be treated as a supply, and

(b) the value of the supply treated as having been made by paragraph (a) is determined as follows.

(2) If the consideration for the most recent transfer of the voucher for consideration is known to the supplier, the value of the supply is such amount as, with the addition of the VAT chargeable on the supply, is equal to that consideration.

(3) If the consideration for the most recent transfer of the voucher for consideration is not known to the supplier, the value of the supply is such amount as, with the addition of the VAT chargeable on the supply, is equal to the face value of the voucher.

(4) The 'face value' of a voucher is the monetary value stated on or recorded in—

(a) the voucher, or

(b) the terms and conditions governing the use of the voucher."

DSAB

50. On 24 February 2022, Advocate General ("AG") Capeta gave her Opinion in the case of *DSAB Destination Stockholm AB v Skatteverket* Case C-637/20 ("*DSAB*"). The CJEU issued its judgment on 28 April.

The facts

51. The facts of the case were set out by the CJEU as follows:

> "9. DSAB is the company which sells the card at issue in the main proceedings to tourists visiting the city of Stockholm (Sweden).
>
> 10. That card gives a cardholder the right to be admitted to around 60 attractions, such as sights and museums, for a limited period of time and up to a certain value. It also gives a cardholder access to around 10 passenger transport services, such as tours provided by DSAB's own 'Hop-on-Hop-off' buses and boats, as well as sightseeing tours with other organisers. Some of those services are subject to VAT at rates ranging from 6% to 25%, while others are tax exempt. The cardholder uses the card at issue in the main proceedings as a means of payment for admission to or use of a service and does not pay any supplement, since that card is simply presented to a special card-reader. Under a contract concluded with DSAB, the supplier of services then receives from the latter, in respect of each admission or use, consideration equal to a percentage of the normal price of admission or use. The supplier of services is not obliged to grant the cardholder access to its services more than once. DSAB does not guarantee any minimum number of visitors. If the value limit of the card is reached, it can no longer be used by the cardholder.
>
> 11. The card at issue in the main proceedings exists in several versions, with different validity periods and value limits. Thus, a card for an adult with a 24-hour validity period costs 669 kronor (SEK) (approximately EUR 65). During that validity period, the cardholder may use that card as a means of payment amounting to SEK 1 800 (approximately EUR 176). That validity period starts to run when the card is used for the first time. That card must be used within one year of purchase."

52. The Swedish tax authority (the Skatteverket) had decided DSAB's card was not an MPV within the meaning of the Voucher Directive, DSAB appealed and the court made a reference to the CJEU.

The AG's Opinion

53. AG Capeta summarised the dispute between the parties as follows:

> "19. The parties primarily disagree as to whether the city card is to be considered a voucher at all. On the one hand, the Tax Agency is of the opinion that the card at issue is not a voucher, because it has a high value limit and a short validity period, which makes it certain that the average consumer will not make full use of the card.
>
> 20. On the other hand, DSAB Destination Stockholm takes the view that the card is a voucher because suppliers are obliged to accept it as consideration."

54. She continued by rejecting the Skatteverket's argument that "the city card cannot be classified as a voucher because, owing to its limited period of use, it is impossible for the average consumer to use all the services covered by the card", saying at [57]:

> "…there is nothing in the definition of 'voucher' that requires that all the relevant services (or goods) have to be redeemed, for an instrument to be considered a voucher. Instruments which allow all listed goods and services to be redeemed (for example, retail outlet vouchers) are indeed vouchers if they are to be accepted as consideration. However, the requirement that all goods and services be redeemed is not a condition which makes an instrument a voucher. Quite the opposite, as explained above: part of the definition of 'voucher', stating that it includes the right to the provision of listed goods and services, was not included in the final version of the 2016 Directive. That is an additional argument in favour of the interpretation that the legislature rejected a condition that all services must be exhausted for the instrument to be treated as a voucher. Therefore, the fact that the short duration of city cards usually does not enable cardholders to use all the services listed does not alter the finding that, for VAT purposes, a city card is a voucher."

55. At [59], the AG considered it necessary to "assess the influence" of Recital 5 to the Voucher Directive, which stated that "the provisions regarding vouchers should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar". She then said at [60]:

> "The purpose of that recital is, to my mind, to make it clear that the possibility of acquiring tickets, postage stamps or similar by means of a voucher should not alter the VAT rate applicable to such tickets, some of which are exempted while others benefit from reduced rates. Vouchers only create a possibility to acquire a ticket and create the obligation for the supplier of such a ticket to accept vouchers as consideration. It does not in any way alter the VAT scheme applicable to such tickets. If a ticket is VAT exempt, VAT will not be charged, irrespective of whether the supplier accepted money, other payment instruments or a voucher as consideration."

The CJEU judgment

56. The CJEU considered "in the first place", the "circumstances in which an instrument may be classified as a voucher" in the light of the wording of the Voucher Directive, which had defined it as:

> "an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument."

57. The Court then said:

> "22. In the present case, it is apparent from the order for reference that those two conditions would appear to be satisfied, which is, however, a matter for the referring court to ascertain.
>
> 23. In so far as concerns the argument, put forward by the tax authorities, that the card at issue in the main proceedings cannot constitute a 'voucher', within the meaning of Article 30a(1) of the VAT Directive, on the ground that it is impossible for an average consumer to take advantage of all the services offered, having regard to the limited validity period of that card, it must be held that such an argument cannot be accepted.
>
> 24. As the Advocate General observes, in essence, in point 57 of her Opinion, it is not apparent from the definition of 'voucher' set out in Article 30a(1) of the VAT Directive that the validity period of the card concerned or

> the possibility of taking advantage of all the services covered by that card are relevant elements for the purposes of classifying that card as a 'voucher' within the meaning of that provision.
>
> 25 Furthermore, contrary to what the Italian Government submits in its written observations, the issuance of an instrument such as the card at issue in the main proceedings cannot be classified as a 'single provision of services', in the light of the diversity of the services offered and of third-party economic operators acting as suppliers of services.
>
> 26. Such a classification would, moreover, be contrary to the objective expressed in recital 5 of Directive 2016/1065, since it would result in the imposition of a single rate of tax on services such as transport or museum admissions, which are subject to different rates of VAT or which are exempt from that tax. Such a classification could also lead to double taxation of the services concerned, even though the purpose of Directive 2016/1065 was, inter alia, to prevent such double taxation, as is clear from recital 2 of the latter directive.
>
> 27. In those circumstances, and subject to the verification referred to in paragraph 22 of the present judgment, it appears to be possible to classify the card at issue in the main proceedings as a 'voucher' within the meaning of Article 30a(1) of the VAT Directive."

58. The Court then said the card was an MPV because it met the conditions to be a voucher, but was not an SPV, and ruled as follows:

> "Article 30a of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2016/1065 of 27 June 2016, must be interpreted as meaning that an instrument which gives the bearer thereof the right to benefit from various services at a given place, for a limited period and up to a certain amount, may constitute a 'voucher' within the meaning of Article 30a(1) of that directive, even if, on account of the limited validity period of that instrument, an average consumer cannot benefit from all the services offered. That instrument constitutes a 'multi-purpose voucher' within the meaning of Article 30a(3) of that directive, since the value added tax due on those services is not known at the time of issuance of that instrument."

THE FACTS

59. On the basis of the evidence summarised earlier in this judgment, we make the following findings of fact. There are further findings of fact about the making of First and Second Assessments later in this decision, and about the method used by the Appellant in completing its VAT returns at §278ff.

The Appellant

60. The Appellant was incorporated in January 1998 under the name "Arrival Marketing Limited", but changed its name to "The Leisure Pass Group Limited" in 2001. In 2017, the Appellant merged with a US company. On 9 July 2021 the Appellant's name was changed again to "Go City Limited".

61. The Appellant is now part of a global group which sells sightseeing passes in various cities around the world. It has sold its operating system to other city pass operators, including DSAB, the appellant in the CJEU case summarised above.

The Passes

62. The Appellant launched the London Pass ("LP") in 1999. Purchase of the LP allows entry to various attractions ("Attractions") across London from a wide range of options. LPs are available for a specific number of days, beginning from the date of first use. For example, a six day Pass allows the customer to enter any of the available attractions within the six days from the day it is first used.

63. In or around 2017, the Appellant developed the London Explorer Pass ("LEP"). This requires the customer to choose in advance how many Attractions are to be visited; these can be accessed over a longer period than the LP. For example, a five choice LEP allows the customer to access up to five Attractions within the sixty days after first use. Both "London Pass" and "London Explorer Pass" are registered trade marks.

64. Passes are priced at a discount compared to the gate prices of the Attractions, and both the LP and the LEP expire after a year from purchase; this was extended to two years during Covid. The Appellant reviews the Attractions regularly, adding some and withdrawing others; some of those changes impact on the prices charged for the Passes and/or how much of the Pass has been used up by accessing a particular Attraction.

65. At the relevant time, the Attractions included royal palaces, museums, churches, the Shard, the "Hop-on, Hop-off London Bus Tour", the Thames River Boat and a day trip to Bicester Village. On arrival at a selected Attraction, the Passholder scans the Pass into a special reader in order to be allowed access. Passholders are able to skip the ticket queue in some Attractions, and once granted entry, can also access discounts on souvenirs, books and meals as part of the terms of their entry. No Attraction can be visited more than once. Passholders have flexibility and can amend their plans depending on the weather, energy levels and other factors.

66. It is only when the customer uses the Pass that the Appellant knows the amount it has to pay and to which Attraction. This is because, until that point, the Appellant does not know which Attractions will be visited, and because the amount payable by the Appellant for entry may have changed since the Pass was issued.

The earlier arrangements

67. HMRC originally accepted that the LP was a "face value voucher" as defined by VATA, Sch 10A, but on 16 August 2006 issued a ruling that it did not fall within that definition. The Appellant appealed to the VAT and Duties Tribunal.

68. In a decision published as *Leisure Pass Group Ltd v HMRC* (2007) VAT Decision 3340 ("*Leisure Pass 2007*"), the Tribunal (Dr Avery Jones and Ms Wong Chong) decided that although the LP met most elements of the statutory definition, it failed to satisfy the requirement that the value of the services supplied were "stated on" or "recorded in" the Pass. The Tribunal therefore refused the appeal, and its decision was upheld by the High Court in a judgment issued under reference [2008] EWHC 2158 (Ch).

69. With effect from 26 November 2007, the Appellant altered the design and configuration of the LP, so that it operated as follows:

(1) The Passholder could choose the validity period of between one and six days.

(2) The LP had a set value shown on its face and recorded in it (the "Maximum Value").

(3) Once the Passholder had activated the LP, he could gained entry to Attractions until the Maximum Value has been exhausted.

(4) The Maximum Value of the LP varied in accordance with its duration period.

(5) Each of the Attractions was equipped with a small terminal (owned by the Appellant) which confirmed the validity of the LP and recorded the LP's details, including the date and time of the visit.

(6) The gate value of each Attraction visited was deducted from the face value of the LP on entry.

(7) The LP remained valid for the stipulated number of days after it was first used, or until the Maximum Value reduced to nil.

(8) The Appellant made payment to the Attractions at a negotiated discounted rate, which was between 20 and 40 per cent below the gate price.

70. On 1 May 2008, HMRC issued a ruling that the Pass (as now revised) still did not fall within Sch 10A. The Appellant appealed to the Tribunal, and the case was again heard by Dr Avery Jones, this time sitting with Ms Salisbury.

71. The Tribunal allowed the appeal, see *Leisure Pass Group Ltd v HMRC* (2009) VAT Decision 20910 ("*Leisure Pass 2009*"), holding that the Maximum Value was a real limit, and that the LP therefore represented "a right to receive goods or services to the value of an amount stated on it", as required by Sch 10A.

The meeting in 2018

72. On 6 July 2018, the UK government announced that the Voucher Directive would be implemented with effect from 1 January 2019. The Appellant and its then advisers, KPMG, considered that the Pass would be within the new legislation, but in the absence of any HMRC guidance, were concerned that the practicalities were unclear.

73. The Appellant asked for a meeting with HMRC and HM Treasury ("HMT") to discuss the changes, and this took place on 22 October 2018. The Appellant was represented by Mr Doe and by KPMG, while HMRC was represented by Mr Peter Bennett, HMRC's lead on vouchers.

74. The HMRC and HMT participants in the meeting told the Appellant that the Passes would not fall within the UK implementing legislation, because they were "tickets", and the new provisions excluded "tickets", and as a result, receipts from sale of the Pass would be a standard-rated supply rather than being "effectively disregarded". The Appellant and KPMG did not agree, but HMRC/HMT were not open to discussion.

Reconfigured arrangements

75. The Appellant wanted to avoid further litigation, which Mr Doe described as "hugely disruptive to our business". It reconfigured the Pass with effect from 3 January 2019, in a way which it thought would be acceptable to HMRC. New contracts were signed with the Attractions; the information on the Appellant's website changed to reflect the new arrangements, and there were also changes to the published terms and conditions for the Appellant's customers.

76. Instead of the Attractions granting admission to the Passholder on presentation of the Pass, as happened previously, the new arrangements were designed to work as follows:

(1) When the Passholder presents the Pass at the Attraction, the relevant computer terminal contacts the Appellant, which purchases the right to admission from the Attraction.

(2) The Appellant on-supplies that right to the Passholder.

(3) It is thus the Appellant and not the Attraction which grants the Passholder the right of access to the Attraction.

The new contractual terms with the Attractions

77. The Tribunal was provided with multiple contracts between the Appellant and the Attractions, but both Counsel referred only to that with the Imperial War Museum ("IWM"). Neither party suggested that the key terms were different in any of the other contracts, and we have taken this to be the position.

78. A key clause in the IWM agreement reads (where "Owner" is the IWM, the "Facility" is the Museum, "LPG" is the Appellant and "the Bearer" is the Passholder):

> "Owner agrees that, on each and every occasion on which a valid London Pass (or mobile confirmation) is presented at the Facility, Owner will grant the right of admission to the Facility to LPG, to enable LPG to transfer such a right in its own name, to the Bearer."

79. The contract also set out terms of payment, as follows:

> "LPG will pay the Owner the Contracted Admission Fee, as set out in Schedule 2 hereto, in respect of each right of admission granted on the occasion of a presentation of a valid Pass…"

80. Schedule 2 was not included in the Bundle, but it was common ground that the fee paid by the Appellant for each entry to an Attraction was less than the gate price.

The credits packages

81. The other main change to the arrangements was that, instead of simply selling Passes which gave customers the right to access the Attractions, the Appellant sells a "credits package", with one credit being equal to £1 in the case of the LPs; for the LEPs, one credit equals a single entry into an Attraction.

82. Although the number and value of credits has varied over time, the approach has remained the same. By way of example, a one day adult LP currently has 165 credits, and so can be used to enter Attractions with a total gate price of up to £165. Each time the LP is used to enter an Attraction, the amount of available credits reduces. If, on presentation of the LP, there are insufficient credits remaining, entry is declined. At the end of the LP's validity period, any remaining credits expire. The LP's retail price is determined taking into account the entry price negotiated between each Attraction and the Appellant.

The website

83. The Appellant amended its website to describe the LP as "the ultimate sightseer credits package" stating that "your sightseer credits package grants access to 80+ attractions, tours and museums.

84. It described the LEP as operating as follows: "if you purchase a 5 choice pass, you will get 5 credits to redeem. Each attraction visit = 1 visit, it's that simple".

85. The Appellant also included a new FAQ for the LP, which read "What is the credits value", to which the answer was:

> "Each London Pass is subject to a credits value based on the duration of the Pass. The credits value is a maximum amount you're able to use based on the standard gate price for each attraction. For example, with a 6 day adult London Pass (Price: £154) you can visit attractions up to the total attraction cost of £605…if you want to check your remaining credits value, you can call our Customer Service team on [number]."

86. The FAQs gave the credits value for the 1 day, 2 day, 3 day and 10 day LP.

87. The version of the web pages for the LP included in the Bundle was dated 3 March 2019, and the pages describing the LEP were dated 25 April 2019; these were obtained using the "Wayback" machine because the Appellant had been unable to locate earlier versions. However, we accepted Mr Doe's evidence that the website had been changed on 3 January 2019: he said it was an "absolute key focus" for the Appellant to make sure that the credit package was "very clear on the website".

88. There was initially no equivalent FAQ for the LEP because it was so easy to understand. After Covid, a new FAQ was added, which read "what is a credit package", to which the response was "It's simple – a credits package is your London Explorer pass and the credits value is the amount of credits you can actually use". This was followed by a list, beginning "A 2 Choice Pass allows you to visit 2 attractions = 2 credits".

The Terms and Conditions

89. The Appellant's website also includes Terms and Conditions ("T&C") relating to the purchase of the Passes. As with the other web pages, the earliest LP version included in the Bundle was dated 3 March 2019, but we accept Mr Doe's evidence that this version was in place on 3 January 2019.

90. It was headed "Terms and conditions of purchase of the pass", and Clause 2.3 said that the Appellant "acts as principal on its own account and not as agent for you or for any Attraction or Special Offer provider". Clause 4.1 read:

> "The Pass entitles the holder to admission to listed attractions and services ("Attractions") upon presentation without further payment, together with other offers and discounts where appropriate ("Special Offers" and/or "Pass Holder Offers"). Admission to Attractions is subject to the credits package being valid and to there being sufficient value remaining. All Attractions are required to accept admission as outlined in the attraction offer for the product purchased, subject to their normal admission criteria."

91. The T&C were updated on or around 22 September 2020, during the short return to normal life after lockdown in March of that year. By the update, the validity of the Passes was extended from one year to two. This version also included a definition of "the credits package" as being "the pre-paid digital credits package which is purchased via the app or our website". Clause 2.3 of the T&C repeated the sentence that the Appellant was acting as principal, and Clause 4.1 was amended to replace the word "the Pass" in the first sentence by "credits package".

92. On 21 April 2021, the T&C were amended again. Clause 4.3 read:

> "Each pass is subject to a maximum credits value and you are unable to exceed this. 1 credit is worth £1 and your credits are redeemed when you enter attractions, reducing by the amount of the standard gate price of the attraction you enter."

93. That was followed by the maximum credits value for each type of Pass, so a 1 day adult pass had a maximum of 215 credits. The T&C were amended once more on 30 July 2021, reorganising the material but not making any changes relevant to this appeal.

94. Taking into account the T&C together with the material on the website, we find that the mechanics by which the various credits would be depleted on use was well publicised and well understood by customers, and that this was the position throughout the relevant period.

Use of the Passes

95. It is up to the Passholder which Attractions to visit, and how many. It was not in dispute that around 75% of Passholders use some form of transport (such as the "Hop-on, Hop-off Big Bus" or the Thames River Cruise) as these are part of the experience which tourists want when they visit London. Mr Doe's evidence, which we accepted, was that many of those Passholders who did not end up using the transport parts of the LP, nevertheless wanted that option to be available and took it into account when purchasing the Pass.

96. The Appellant's website provides sample itineraries for each type of Pass, together with the gate prices. For example, the sample for the three day LP was as follows:

(1) Tower of London (gate price £28).

(2) Hop-on, Hop-off Bus Tour (gate price £34).

(3) Westminster Abbey (gate price £23).

(4) The Shard (gate price £34).

97. The total gate prices for those sample Attractions during the three days was thus £261.85. As the LP cost £127, the saving for a Passholder who selected those Attractions would be £134.85. We were also provided with a sample for the 10 day LP; the total gate price of these Attractions was £481.35 compared to the £201 cost of the LP, a saving of £280.35.

98. Mr Mantle submitted that those sample itineraries were representative of how a typical Passholder would use the LP, but we disagree. Instead, we accepted Mr Doe's evidence that their purpose was to market the LP, and that Passholders selected from a huge range of different Attractions to make numerous different combinations. There were other reasons why these samples were not a reliable basis for the conclusion Mr Mantle asked us to draw: the 10 day sample included one Attraction twice (which was not permitted by the T&C) so could not have been representative of a Passholder's use, and Day 9 contained no Attractions, which was improbable and likely to be a marketing error.

99. As already indicated, the credit value of the Passes is worked out using the gate prices of the Attractions, which vary considerably. If the total credit value of a Pass was too low, Passholders would be disappointed because they would be unable to visit key Attractions within the validity period.

100. Some Passholders use all the credits on their Passes, so they expire before the end of the validity period. However, most do not. If a Passholder has insufficient credits when the Pass is tendered at a particular Attraction, entry is refused. Any remaining credits will be lost, unless before the expiry of the Pass, the Passholder subsequently visits another Attraction with a gate price exactly equal to the remaining credits.

101. A Passholder who wants to know how many credits remain on the Pass can call the Appellant's customer service desk; the Appellant has not as yet managed to develop and implement the technology necessary for Passholders to see the declining credits value on their mobile phones or computer apps.

102. On 9 September 2020, Officer Martin asked the Appellant how many Passes were "completely exhausted". PwC replied:

(1) In relation to the LEP, there were 37,466 "three choice adult" Passes used, of which 80% were exhausted; there were 9,299 "three choice child" Passes used, and again 80% were exhausted. There were fewer "four choice", "five choice" and "seven

choice" adult Passes, and the numbers which were exhausted were lower. Of the "seven choice child" Passes, 25% were exhausted, compared to 48% of adult Passes.

(2) In relation to the LP, there were 39,043 "one day adult" Passes sold, of which 101 were exhausted; there were 97,106 two day adult" Passes, of which eleven were exhausted, and there were 159,424 "three day adult" passes, of which five were exhausted. None of the other LPs were exhausted.

103. As the LP credit values were derived from the gate prices of the different Attractions, it was mathematically difficult to exhaust a Pass: this would require the Passholder to identify an exact combination of Attractions so as to hit the maximum, and leave no unspent credits. Much more commonly, Passholders could not use the last remaining credits on the Pass, either because there was no Attraction which required exactly that number of credits, or the Attraction(s) could not be conveniently visited within the Pass's remaining validity period.

104. In reliance on the sample itineraries and PwC's response to HMRC's question about the number of Passes which were "completely exhausted", Mr Mantle submitted that the maximum credit limit had "no practical impact or only a *de minimis* one". However:

(1) as we have already found, the sample itineraries do not provide the necessary evidential basis for such a finding; and

(2) neither do the figures for the number of Passes which were "completely exhausted", because it would be very difficult to use up exactly the number of credits available to the Passholders.

105. Although most Passholders did not reach the maximum credit limit, it was a real limit which (as Mr Mantle accepted in closing) protected the Appellant from "heavy users". We note that this finding, based on the evidence before us, is consistent with that of the VAT Tribunal in *Leisure Pass 2009*.

The Appellant's VAT returns

106. The Appellant submitted its return for period 03/19 by the due date. HMRC asked for details of the workings underpinning the return; these were provided on 7 June 2019. The Appellant's VAT return for period 06/19 and 09/19 were also submitted by the due dates. We make further findings as to way the Appellant completed its VAT returns later in this judgment, see §278.

107. On 25 November 2019, Mr Doe and PwC met with Officer Gibson and two other HMRC Officers, and explained the changes to the Appellant's business operations. On 28 November 2019, the Appellant sent HMRC the detailed workings underpinning its 09/19 return, together with copies of purchase invoices from some of the Attractions. On 12 December 2019, Officer Gibson asked for further information, and this was provided on 31 January 2020.

108. On 15 April 2020, Officer Gibson paused the enquiry because of Covid. At or around the same time, Officer Martin took responsibility for the case, with Officer Levy as the technical lead. On 18 June 2020, Officer Martin wrote to Mr Doe, saying:

> "we do have unresolved concerns about the VAT treatment of transactions involving the London Pass (and the London Explorer Pass – see below) and we have to make sure that no tax would be lost due to the expiry of VAT assessment time limits…While our concerns remain unresolved, we might find it necessary to make assessments in order to protect our position as and when we approach the relevant VAT assessment time limits. From the information we have, this might become necessary early in 2021."

109. Before asking a series of questions, she said:

> "You will appreciate that I need to fully understand the reasoning behind the VAT treatment which you appear to have adopted, before I can come to a view as to whether or not it is correct."

110. PwC responded on 13 July 2020. On 9 September 2020, Officer Martin replied, saying she had "some additional queries regarding the arrangements surrounding the supply and use of the London Pass and London Explorer Pass". PwC responded on 28 September 2020.

The TAR

111. On 21 January 2021, Officer Martin sent the TAR to HMRC's Policy team; it was countersigned by Officer Levy. The main part of the form begins by asking "What is your question…make it clear what you want policy advice on".

112. Officer Martin responded as follows:

> "What is the proper characterisation of the sale of the London Pass and the London Explorer Pass for VAT purposes? Is the sale of the pass outside the scope of VAT as the business contends, or is it a multi-purpose voucher (for Schedule 10B purposes) or alternatively is it taxable at the standard rate at point of sale?"

113. Having summarised the facts as she understood them, Officer Martin then set out "a number of high-level principles" which she said "would seem to be relevant". Having cited from *Macdonald Resorts Ltd v HMRC* (Case C-270/09) ("*Macdonald Resorts*")[1] she said that in relation to the Appellant's case, the cited passage "begs the question" of "what is the real service provided to purchasers of LPG passes? Is it the pass or admission to the attractions?"

114. She continued by saying that if the "real service" was the "grant of individual and separate admissions to attractions" then "the argument in favour of LPG's VAT treatment looks irresistible".

115. In relation to the alternative – that the "real service" was the provision of the Pass, she noted that HMRC had lost a similar argument in *Findmypast Ltd v HMRC* [2017] STC 2335, CSIH ("*Findmypast*"), and asked "is this case distinguishable in this regard?".

116. She also considered the Voucher Directive and the implementing legislation, and summarised the position as follows:

> "Our analysis suggests that the formal terms of the LP and LEP, the formal contractual arrangements with the attractions, and the case law referred to below, all arguably support the VAT treatment applied by LPG, such that a challenge would not necessarily be easy to mount.
>
> Additionally, there are respectable arguments for treating the LP and LEP as multi-purpose vouchers for the purposes of Schedule 10B (which would achieve the same VAT effect as the treatment currently applied), notwithstanding the fact that LPG currently disavows any reliance on Schedule 10B.
>
> On the other hand, the effect of that VAT treatment produces a significant divergence between the amounts of consideration paid by consumers for passes, and the far lesser amounts *treated as* consideration for taxable supplies of admission to attractions. This is because for the typical user of the LP at least, the credits value limit is never reached. In theory an even higher credits value limit could be set without any significant impact on redemptions, and increasing the limit would further reduce the amounts

[1] We consider both *MacDonald Resorts* and *Findmypast* later in this judgment

> treated as consideration for admissions. It does appear that LPG have set the credits value limit for the LP as high as possible to ensure that while it still remains theoretically possible for a particularly energetic tourist to exhaust it, it does not in practice limit the usage of the pass for the vast majority of pass holders (hence the reference to 'unlimited access' on the website home page).
>
> Therefore, it is hard not to see the VAT outcome as distortive and contrary to the general principle of VAT as a tax on final consumption, proportionate to the price actually paid by the final consumer."

117. Under the heading "HMRC arguments advanced so far or being contemplated", Officer Martin said that no arguments had been put to the Appellant or to PwC, but "a number of options [are] being contemplated"; these were as follows (we have italicised the options):

(1) *The Pass was outside the scope of VAT*, *with the Appellant making supplies of admission to the Attractions*. She noted that this was the Appellant's position.

(2) *The Pass was outside the scope of VAT, with the Attractions making supplies of admission*. Officer Martin said "we do not find this option at all attractive from a practical point of view. It would involve a lot of difficult arguments requiring clear contractual terms to be overlooked, and requiring recognition of third party consideration in the face of adverse UK case law…"

(3) *The sale of the Pass was a taxable supply*. Officer Martin said "this would be our preferred approach", and continued "even though we may have doubts about the prospect of success in such a challenge" the position taken by the Skatterverket in *DSAB* should be noted. She observed that the similarities were unsurprising, as the Appellant had provided DSAB with its operating system, and noted that although the CJEU judgment would not be binding "it may have persuasive value" and concluded this section by saying: "we could consider taking a position which aligns with that of the Swedish tax authority, pending the outcome".

118. Under the heading "Your opinion – tell us what you think and explain why", Officer Martin said "we think the tax outcome achieved by LPG's VAT treatment of their Passes (in particular the London Pass) is undesirable and goes beyond the degree of tax leakage (ie non-redemption) experienced with most kinds of voucher which are supplied for consideration". However she then said:

> "The difficulty for us is that case law such as *Macdonald Resorts* and *FindMyPast* provides a seemingly solid basis for the tax treatment applied by LPG. However, the recent reference in *DSAB Destination Stockholm* could be taken as a signal for us to challenge LPG and assess for under-declared output tax (even if only on a protective basis).
>
> We would respectfully propose that a legal opinion be sought from SOLS B Advisory. Whatever position we decide to take will be subject to AAB governance, and also most likely to CCG DRB governance (due to the amount of tax at risk). Those panels are likely to take an interest in SOLS legal opinion."

119. At the end of the TAR, Officer Levy said he supported Officer Martin's submission, adding:

> "The tax outcome argued for by the taxpayer is clearly unpalatable to HMRC, but it may not be easy to challenge under existing law…

> The recent Swedish reference to the CJEU in *DSAB Destination Stockholm* is timely, and it could lend legitimacy to a challenge, even if we consider our prospects of success are poor.
>
> I strongly recommend seeking advice on the matter from SOLS Advisory, not only because of the legal difficulty of the case but because AAB will have to endorse whatever approach we decide we want to recommend."

Correspondence January to March 2021

120. On 22 January 2021. PwC sent HMRC a chaser email asking for an update, as they had heard nothing since their letter of 29 September 2020. Officer Martin responded on 25 January 2021, saying:

> "The matter was referred to the relevant Policy team for their consideration last Tuesday. HMRC's final position on the issue will also be subject to internal governance processes. I will update you on this in due course. We are also considering whether we might need to make assessments to protect HMRC's position in the interim, and we will be contacting you about this within the next few weeks."

121. On 8 February 2021, Officer Martin wrote again, saying that pending a response from her policy colleagues "I now need to consider protecting HMRC's position by making assessments for VAT Periods which are close to falling outside of the two-year capping rules". She asked for information for periods 03/19 to 12/20, and concluded:

> "Whilst I have asked for information covering two years, at present I only intend to raise assessments as and when necessary to prevent the periods going out of time."

122. On 17 February 2021 PwC responded, referring to legislation and HMRC guidance, and saying it was "a prerequisite" of raising an assessment under s 73(1) that the Officer in question has "already discovered a loss of tax", and it could be seen from the recent correspondence that "HMRC have yet to make a decision regarding whether the VAT returns are incorrect".

123. On 22 February 2021, Officer Martin advised PwC that "if and when I make any assessment in respect of the LP and the LEP, it will be made on the basis that I consider your client's VAT treatment of those products to have been incorrect, such that amounts can be assessed as due from your client under the provisions of Section 73, VATA 1994".

124. On 26 February 2021, PwC provided Officer Martin with the information she had requested, and also said:

> "LPG would like to reiterate its view that the VAT treatment applied to its supplies of credits packages is correct and in line with settled case law. As it appears that HMRC has yet to fully understand the way in which the credits packages operate, we would be happy to facilitate a discussion with you and/or HMRC's policy team eg by way of a video call, to enable HMRC to ask any questions it may have and reduce the need for further protracted correspondence."

125. On 26 February 2021, Officer Martin and Officer Levy were informed that the TAR had been referred to the Customer Strategy and Tax Design ("CS&TD") team.

Emails between 8 and 12 March 2021

126. On 8 March 2021, Officer Levy emailed Mr Andrew Heywood and Mr Peter Bennett of the CS&TD team, copying Officer Martin. His email set out three points, the first two of

which had been redacted in the Bundle copy, but as explained at §23, a clean version was provided at the end on the first hearing day.

(1) The first point was whether Mr Heywood and Mr Bennett had "any initial thoughts" on the TAR and particularly "whether the Swedish reference in *DSAB*... makes it more likely that we will seek to challenge these arrangements, at least until the outcome of the CJEU is known". That part of the text was emboldened.

(2) The second point set out the passage from the PwC letter of 26 February and then said "we think we do understand how the 'credits packages' operate, but we haven't ruled out accepting the invitation' and asking whether Mr Heywood and/or Mr Bennett would like to attend such a video call.

(3) The third point was as follows (emboldening in original)

> "…as the first affected VAT period was 03/19, and much of the information obtained about this matter came to our knowledge more than one year ago, we are considering making an assessment by the end of this month to protect HMRC's position, in respect of the 03/19 period. If you are content for us to do this, I will also obtain permission from the secretariats of the AAB and CCG DRB. Although any assessment that we do make will not be enforced until both governance boards have approved a challenge, there will be some sensitivity due to the fact that LPG's business has been catastrophically affected by the Covid-19 pandemic over the past year. **Are you therefore content for us to take protective assessment action in respect of period 03/19?"**

127. Mr Heywood responded to those three points on 11 March 2021 as follows (the first two of these responses were also originally redacted):

(1) He said "we are monitoring the *DSAB*...reference" and it "seems sensible" to wait for the outcome of the CJEU judgment "before going ahead (or not) before litigating here" as the judgment "should provide clear guidance for us as to how we should treat such tickets. (Nothing to be read into my use of the word ticket!)".

(2) He declined the invitation to attend a video call.

(3) He said "I am content for you to raise protective assessments in the meantime for periods that are going out of time".

128. On 12 March 2021, Officer Levy emailed the AAB and CCG DRB Secretariats, copying Officer Martin and others, saying it was "our intention" to make an assessment:

> "…in respect of VAT period 03/19, in order to protect HMRC from running out of time under the 2 year rule. The assessment will not be enforced pending completion of governance processes, and the customer's rights of review and appeal will be extended under s 83D, VATA 1994. If governance is still pending at the end of June, a similar assessment may need to be made in respect of VAT period 06/19."

129. Officer Levy continued that email by noting that the facts in the *DSAB* reference, were "essentially the same" as in LPG's case, but that this was unsurprising as LPG had provided DSAB with its operating system, and that "our proposed 'protective' assessment(s) will reflect the position taken by the Swedish tax authority in *DSAB*...". He asked for confirmation that the Secretariats were "content for us to proceed with making the assessments".

130. On 12 March 2021, the CCG DRB secretariat responded, copying Officer Martin and others, saying:

> "If you are issuing assessments to protect HMRC's position as time limits are approaching, and whilst further work continues to fully explore our position and to ensure that we fully understand the customer's, the issue does not need to be referred to the DRB at this point. This would change if the customer requests a review of the assessments or makes an appeal to the Tribunal."

131. Shortly afterwards on the same day, Officer Martin emailed PwC, accepting the offer of a video call. Her email said that this was "to ensure we fully understand how LPG's credit packages operate", and that she would circulate a document in advance "outlining HMRC's understanding of how the passes work". Her email ended by saying "there is still a need to protect HMRC's position and a protective assessment for 03/19 will be issued by the 31 March".

The First Assessment

132. On 17 March 2021, Officer Martin issued a "Notice of VAT assessment" for period 03/19 in the sum of £1,570,122; Officer Levy had "checked and commented on" its wording before it was finalised. The Assessment was completed manually, and not recorded on HMRC's ledger as having been issued to the Appellant, and no debt was generated.

133. Officer Martin said:

> "I believe you have not declared the correct amount of VAT due for the period shown on the enclosed schedule. This is because the sale of the London Pass and the London Explorer Pass have been treated as outside the scope of VAT. I have made this assessment on the basis that sales of the passes are subject to VAT at the standard rate.
>
> HMRC's final position on this matter has yet to be confirmed and is subject to an internal governance process.
>
> However, as we are now approaching the time limit for raising assessments under section 73(6) of the VAT ACT 1994, in order to protect HMRC's position, I have made an assessment of VAT due under section 73 of the VAT Act 1994. This letter is our notice of the assessment.
>
> Please note that this is not a fully considered decision on the VAT treatment of LPG's supplies as my enquiry is ongoing. My fully considered decision will be set out in a decision letter which will be issued to you in due course. The assessments referred to in this letter are made solely for administrative purposes. HMRC will not pursue collection of the tax due until such time that a reasoned decision has been made."

134. Officer Martin also gave LPG an extension of time to appeal and/or request a statutory review, saying:

> "your review/appeal rights are protected throughout the duration of the investigation…You will not be required to pay, and HMRC will not take action to enforce the assessment, until after the decision letter is issued."

April meeting, and the DRB submission

135. On 6 April 2021, PwC requested a statutory review, adding that the assessment was invalid as no final decision had been made.

136. On 23 April 2021, a video meeting was held via "Teams". Officer Martin and Officer Levy attended for HMRC, along with two others, and LPG was represented by Mr Doe and by Mr Burns and Mr Wilkinson from PwC. In the course of the meeting, Officer Levy said they were "unable to issue [a] full decision without [the] governance board".

137. On 26 April 2021, Officer Levy made a submission to the DRB. HMRC resisted disclosure of this document until directed to do so by the Tribunal on the third hearing day. The submission included the following:

(1) Officer Levy told the DRB that a response was required before the expiry of the statutory review period for the First Assessment, which was 21 May 2021.

(2) The first question Officer Levy asked the DRB to address was "does the DRB agree to reject the customer's position, on the basis of evidence and analysis to date, and defend the assessment issued".

(3) Under "further information" he said "assessment made to prevent earliest affected tax period going out of time".

(4) He noted that there were "respectable arguments to support the customer's position, or indeed that the passes are 'multi-purpose vouchers' within the meaning of Article 30a PVD and Schedule 10B VATA 1994", and also that there was "a clear logic to the customer's technical position" and its VAT returns as filed "represent a strongly arguable technical position".

(5) He said that the technical issue "appears to the case team to be finely balanced" but that the *DSAB* reference "means that it would be reasonable and prudent for HMRC to protect its position by making assessments", and that the assessment reflected the view taken by the Swedish tax authority in *DSAB* that "the pass is a sightseeing experience package, the sale of which should be subject to VAT".

(6) He pointed out that as a result of the Appellant's statutory review request "there is not time to receive legal advice at this point".

(7) In relation to the likely outcome in litigation, he said that "the case team consider, based on the information and analysis to date, that a decision supporting the basis of the assessment is one which a court could reasonably come to. The same is true of the customer's position. An alternative finding that the passes were multi purpose vouchers (an analysis which neither party currently adopts) would also be broadly in line with the customer's filed position".

138. This submission was on the agenda for the DRB meeting which took place on 5 May 2021; both Officer Martin and Officer Levy attended that meeting. The related minutes were again only disclosed on the third hearing day. They record that Officer Martin and Officer Levy "explained that assessments had been issued to protect periods from going out of time" and had said that "the position was complex" and that the treatment adopted by the Appellant "relies upon the basic principles of VAT which are currently governed by retained EU law".

139. The DRB observed that "the correct tax treatment was unclear but it seemed inappropriate to only pay VAT on a small amount of the consideration" and concluded that "the risk should be resolved in line with an agreed AAB settlement strategy and requested an update once AAB had formed a view". Immediately following that sentence is the DRB's "decision" that they "agreed the case team's recommendation to reject the customer's position and defend the assessments issued".

Statutory review, the Second Assessment and appeals

140. On 20 May 2021, Officer Lucas Ncube issued his statutory review of the 03/19 assessment, in which he concluded that "the decision is upheld". He distinguished between the "VAT assessment notified on 17 March 2021" and what he called "the principal decision", namely "HMRC's fully considered decision on the VAT treatment of your supplies", which has "not yet been notified as the enquiry was ongoing". He continued:

> "The VAT assessment was notified because legislation directs that VAT assessments are required to be made and notified within strict legal time limits.
> The VAT assessment is a separate appealable decision, so I am able to undertake a review of the VAT assessment, without reference to the principal decision."

141. Under "scope of the review" he said:

> "The principal decision has not yet been finalised, so is not under review. Consequently, the VAT assessment for output tax you are considered to have understated has been made and notified to protect HMRC's position before a fully considered decision has been made."

142. On 16 June 2021, the Appellant appealed to the Tribunal against the First Assessment. On 22 June 2021, Officer Martin issued a further "Notice of Assessment" for period 06/19 in the amount of £2,068,328; the wording was otherwise identical to that of the First Assessment other than the period and the amount; it too was completed manually, not recorded on HMRC's ledger as having been issued to the Appellant, and no debt was generated. On 1 July 2021, the Appellant appealed to the Tribunal against the Second Assessment.

The AAB, the Liability Decision and the other Assessments

143. At some point after the issuance of the Second Assessment, Officer Levy and HMRC's Policy team made a joint submission to the AAB. This was considered at a meeting on 21 September 2021, following which the AAB decided that "the customer/adviser's position should be rejected".

144. On 27 September 2021, Officer Martin sent the Appellant the Liability Decision, headed "Decision on the Proper VAT Treatment of the London Pass and London Explorer Pass". She said it set out her "fully reasoned decision as to the proper VAT treatment of the passes in question, which reflects the considered view of HMRC".

145. She went on to explain her decision in the following 52 paragraphs, and then said:

> "In summary, therefore, my decision is that the supply of the London Pass is a taxable supply of a sightseeing package, meaning that VAT is due on the full consideration paid at the time of purchase. The purchase of a pass enables the holder to obtain a choice of specified services within a specified period for a fixed price.
>
> I have also decided that the sale of the pass is the only supply which LPG makes to passholders, and that, as a matter of economic reality, LPG does not make subsequent supplies of admissions."

146. On the same day, Officer Martin issued a "Notice of VAT assessment" for period 09/21, in the amount of £1,835,607, and for periods 1/20 to 12/20, in the amount of £3,385,897. All the Assessments were subsequently input into HMRC's system and generated debts due to HMRC, see our further findings of fact at §198ff.

147. The Third and Fourth Assessments were appealed to the Tribunal on 15 October 2021.

ISSUE ONE: ARE THE FIRST TWO ASSESSMENTS INVALID

148. One of the Appellant's grounds of appeal against the First and Second Assessments was that they were invalid because:

> (1) an assessment can only be made under s 73(1) where "it appears to the Commissioners that such returns are incomplete or incorrect", and in the case of the

Appellant, that condition had not been met before the expiry of the two year time limit in VATA s 73(6)(a); and/or

(2) neither Assessment had been authorised, as required by HMRC's internal processes.

THE LEGISLATION

149. VATA s 73 is headed "failure to make returns" and so far as relevant, reads:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> (2)-(5) …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.
>
> (7)-(8) …
>
> (9) Where an amount has been assessed and notified to any person under subsection (1)…above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

150. In relation to s 73(1), HMRC did not seek to argue that the Appellant's VAT returns were "incomplete", and thus the relevant part of the provision was as follows:

> "Where…it appears to the Commissioners that [a person's] returns are… incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

Meaning of "appears to the Commissioners"

151. We first considered what was meant by "appears to the Commissioners" in s 73(1). We inferred from both parties' submissions that they considered the word "appears" meant "form a view", and we agree. In order to meet the statutory requirement, the Commissioners must first have formed a view that the taxpayer's VAT return was incorrect.

152. We also understood it to be common ground that "the Commissioners" meant the assessing officer. That reading is consistent with the rest of the section, because once "it appears to the Commissioners", the next step is the assessment:

> "where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him"

153. We noted, however, that the statute does not refer to "the officer", unlike for example FA 2008, Sch 36 or various income tax provisions, such as TMA s 28A. In the direct tax case of *Rogers and Shaw v HMRC* [2019] UKUT 0406 (TC) at [35], the UT said:

> "'the Commissioners' (or 'HMRC') and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax."

154. We find that the statutory phrase could therefore cover situations where one officer "forms the view" and is then replaced by a second officer, who issues the assessment. Thus, where it appears to HMRC (acting through one or more officers) that a person's VAT return is incorrect, that or those officers have the power to issue an assessment to their best judgement.

FINDINGS OF FACT

155. We next make findings about Officer Martin as the assessing officer and about Officer Levy; we also considered whether any other person at HMRC had formed the necessary view before the First and Second Assessments were issued.

Officer Martin

156. Under cross-examination, Officer Martin said that when she and Officer Levy submitted the TAR "we were of the view that insufficient VAT had been paid" by the Appellant; she also said they "had come to a view that tax had not been paid". When asked by Mr Beale if the TAR had set out her reasons for having come to that view, she answered "yes".

157. The TAR was subsequently disclosed, and as set out earlier in this judgment:

(1) Officer Martin said the question to which she wanted a reply from HMRC's policy team was "What is the proper characterisation of the sale of the London Pass and the London Explorer Pass for VAT purposes".

(2) She set out three possibilities for that "proper characterisation":

(a) The VAT treatment applied by the Appellant, namely that the Passes were outside the scope of VAT. She said the case law "provides a seemingly solid basis" for this tax treatment, and that if the "real service" was the "grant of individual and separate admissions to attractions" then "the argument in favour of LPG's VAT treatment looks irresistible".

(b) The Passes were outside the scope of VAT because they were MPVs. She added that there were "respectable arguments" to support this analysis.

(c) The sale of Passes was standard rated because the effect of LPG's VAT treatment was "distortive and contrary to the general principle of VAT".

(3) She and Officer Levy "preferred" the third of those options, but added "we may have doubts about the prospect of success in such a challenge".

(4) Her part of the TAR ended by saying (our emphasis):

> "We would respectfully propose that a legal opinion be sought from SOLS B Advisory. <u>Whatever position we decide to take</u> will be subject to AAB governance, and also most likely to DRB governance…"

(5) Officer Levy added (again, our emphasis)

> "The tax outcome argued for by the taxpayer is clearly unpalatable to HMRC, but it may not be easy to challenge under existing law…I strongly recommend seeking advice on the matter from SOLS Advisory, not only

> because of the legal difficulty of the case but because AAB will have to endorse whatever approach we decide we want to recommend."

158. When Officer Martin was recalled to the witness box, she accepted that the TAR did not contain any reasons for her decision to issue the First and Second Assessments. She also accepted that this admission directly contradicted the evidence she had given the previous day. Mr Beale submitted that this "plainly affects her credibility", and we agree. We find as a fact, in reliance on the TAR and Officer Martin's amended testimony, that as at 21 January 2021 she did not have a view as to whether the Appellant's returns were correct.

159. We next considered whether she had formed a view between the submission of the TAR and the issuance of the First Assessment. In her witness statement she said:

> "My view at the time the assessment was raised was that the Appellant's VAT return for 03/19 was incorrect and that output tax for this period had been understated."

160. The First Assessment similarly began by saying "I believe you have not declared the correct amount of VAT due", but it continued:

(1) "HMRC's final position on this matter has yet to be confirmed and is subject to an internal governance process";

(2) "this is not a fully considered decision on the VAT treatment of LPG's supplies as my enquiry is ongoing";

(3) no "reasoned decision" had yet been made; and

(4) the assessment was being issued "solely for administrative purposes".

161. In the witness box, Officer Martin accepted that she had issued the First Assessment because the two year time limit was due to expire at the end of March 2021. This is also explicit in the First Assessment itself, which says it was issued "in order to protect HMRC's position".

162. We considered whether Officer Martin had come to a view that the Appellant's VAT return for 03/19 was incorrect before she issued the First Assessment. We took into account the following:

(1) she had given evidence that she had come to that view before sending off the TAR, but she later changed that evidence;

(2) on 21 January 2021, Officer Martin had no view that the Appellant's returns were correct;

(3) since that date she had not received a response from HMRC's policy team or received any other new information; and

(4) the opening words of the First Assessment are contradicted by the statements later in the same letter.

163. We find as a fact that at the time she issued the First Assessment, Officer Martin had not formed a view as to whether the Appellant's return for period 03/19 was correct or incorrect; the reason the Assessment was raised was to stop that period going out of time.

164. Our finding is supported by the way in which Officer Martin dealt with the First Assessment: it was raised manually; it was not entered into HMRC's system until September 2021, and it did not generate a debt until after that date. That last point is relevant because an amount assessed under s 73(1) is "deemed to be an amount of VAT due…and may be recovered accordingly", see s 73(9).

165. We next considered whether anything changed in the three months before the Second Assessment. There had still been no response from HMRC's policy team. The submission made by Officer Levy to the DRB repeated that there were three possibly valid technical analyses. The Second Assessment has the same wording as the First Assessment and was similarly not entered onto HMRC's system until September 2021. Under cross-examination, Officer Martin accepted that it was only in that month, when the Appellant's case was considered by the AAB, that she had come to a "definitive decision" that too little VAT had been paid. We therefore find as a fact that at the time of the Second Assessment, Officer Martin had not formed a view that the Appellant's return for 06/19 was incorrect.

166. In making the findings set out above, we have not ignored the opening words of both Assessments. However, they are contradicted by the text in the main body of the letters, by the TAR and the submission to the DRB; by Officer Martin's decision not to follow normal administrative processes to enter the Assessments on the system, and by her evidence when she entered the witness box for the second time, that it was only in September that a decision was made.

Officer Levy

167. Officer Levy was not the HMRC Officer who issued the First or Second Assessments, but was the "technical lead". In his witness statement, he said that before the TAR was completed:

> "I had by this time formed the view that the Appellant's position should be challenged on the basis that the sale of the Passes were standard-rated taxable supplies made in consideration for the total payment received from the purchaser, with a time of supply no later than the time of receipt of payment for the Pass. I had formed the view that the Appellant's VAT returns should not be regarded as correct."

168. Officer Levy gave oral evidence before HMRC had disclosed either the TAR or the DRB documents, and although we considered whether or not he should be recalled, we decided not do so for the reasons explained at §18.

169. Under cross-examination Officer Levy:

(1) accepted that the "sole purpose" of issuing the First and Second Assessments was to "stay within" the two year time limit;

(2) maintained that he had decided before the issuance of the First Assessment that the Appellant's treatment was incorrect; but

(3) said he hadn't written down his view anywhere.

170. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) considered the reliability of oral evidence. Having referred to research which showed that "memories are fluid and malleable, being constantly rewritten whenever they are retrieved", he then said:

> "[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs….
>
> [19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events…
>
> [20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial…The effect of this process

> is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> [21] …
>
> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

171. The recommendation at [22] above has been widely followed by Courts and Tribunals in subsequent cases, and has been applied not only to witnesses' recollections as to what was said in past meetings and conversations but also as to their belief at that time.

172. In relation to Issue One, the key passages from the contemporaneous evidence are as follows (with some emphases added):

(1) The TAR said there were three "options being contemplated". Officer Levy countersigned that document and said "I strongly recommend[ed] seeking advice on the matter from SOLS Advisory, not only because of the legal difficulty of the case but because AAB will have to endorse whatever approach we decide we want to recommend".

(2) In his email to Mr Heywood and Mr Bennett on 8 March 2021, Officer Levy:

(a) asked "whether the Swedish reference in *DSAB*…makes it more likely that we will seek to challenge these arrangements, at least until the outcome of the CJEU is known";

(b) said "we are considering making an assessment by the end of this month to protect HMRC's position, in respect of the 03/19 period"; and

(c) in relation to an invitation to a meeting from PwC, said "we think we do understand how the 'credits packages' operate".

(3) On 11 March 2021, Mr Heywood responded, saying that *DSAB* "should provide clear guidance for us" but was "content" for the case team" to raise protective assessments in the meantime for periods that are going out of time".

(4) On 12 March 2021, Officer Levy emailed the AAB and DRB Secretariats, saying it was his and Officer Martin's "intention" to make an assessment "in order to protect HMRC from running out of time under the 2 year rule" and that "if governance is still pending at the end of June, a similar assessment may need to be made in respect of VAT period 06/19".

(5) The DRB Secretariat responded the same day, saying they did not need to be involved "if you are issuing assessments to protect HMRC's position as time limits are approaching whilst further work continues to fully explore our position and to ensure that we fully understand the customer's".

(6) Officer Levy "checked and commented on" the First Assessment, including the statements that "HMRC's final position on this matter has yet to be confirmed and is subject to an internal governance process"; "this is not a fully considered decision on the VAT treatment of LPG's supplies" and no "reasoned decision" had yet been made.

(7) On 26 April 2021, after the First Assessment had been issued, Officer Levy made the submission to the DRB, in which he said:

(a) the First Assessment had been made to prevent it going out of time;

(b) the technical issue "appears to the case team to be finely balanced";

(c) there were "respectable arguments to support the customer's position, or indeed that the passes are 'multi-purpose vouchers' within the meaning of Article 30a PVD and Schedule 10B VATA 1994";

(d) there was "a clear logic to the customer's technical position";

(e) the Appellant's VAT returns as filed "represent a strongly arguable technical position"; and

(f) any of three options could succeed in litigation: that the assessment was correct; that the customer was correct, or that the Passes were vouchers.

(8) At the DRB meeting on 5 May 2021, he and Officer Martin "explained that assessments had been issued to protect periods from going out of time"; that "the position was complex" and that the Appellant's treatment "relies upon the basic principles of VAT which are currently governed by retained EU law".

(9) The DRB did not decide on the technical position, but said "the risk should be resolved in line with an agreed AAB settlement strategy and requested an update once AAB had formed a view". In short, there was nothing at this meeting which gave Officer Levy more information so as to form a view as which of the three options was correct.

173. We find as a fact, based on the contemporaneous evidence summarised above, that in the period before the Second Assessment was issued, Officer Levy had not formed a view that the Appellant's VAT returns were incorrect. Instead, he thought there were three possibilities, two of which would mean that the Appellant had correctly filed its returns. The reason he supported Officer Martin's decisions to issue the Assessments was because the two year time limit would shortly expire.

Others?

174. Neither party suggested that any other person within HMRC had formed a view, before the First or Second Assessments were issued, that the Appellant's returns were incorrect. We nevertheless considered the relevant evidence, as follows:

(1) Mr Heywood plainly did not have a view; he was waiting for the outcome of *DSAB*;

(2) the DRB Secretariat stated that "further work continues to fully explore our position and to ensure that we fully understand the customer's";

(3) the DRB itself observed that "the correct tax treatment was unclear" and said "the risk should be resolved in line with an agreed AAB settlement strategy" and requested an update "once AAB had formed a view";

(4) Office Ncube did not carry out a review of the rationale for the First Assessment, because HMRC's "fully considered decision…has not yet been finalised"; and

(5) it was not until September 2021 that the matter was considered and decided by the AAB.

175. We find as a fact that no other Officer (or other person) within HMRC had come to a view before the First and Second Assessments were issued that the Appellant's returns were incorrect.

VALIDITY OF FIRST AND SECOND ASSESSMENTS

176. Mr Beale submitted that the First and Second Assessments were invalid because, at the time of their issuance, it did not "appear to the Commissioners" that the Appellant's returns were incorrect. We agree, for the reasons set out below.

Findings of fact about Officer Martin and Officer Levy

177. We have found as facts that neither Officer Martin nor Officer Levy had formed a view, before First and Second Assessments were issued, that the Appellant's returns for 03/19 and 06/19 were incorrect.

178. Mr Mantle submitted in reliance on *Aria Technology v HMRC* [2020] EWCA Civ 182 ("*Aria*"), that the validity of an assessment did not depend on the subjective belief of an HMRC officer. However, the issue in *Aria* was whether two letters issued by the HMRC officer constituted an assessment. Singh LJ, giving the only judgment with which McCombe and Leggat LJJ both agreed, said at [45]:

> "The test is exclusively an objective one: how would the document or documents said to record an assessment be understood by the reasonable reader? It is essential to the fair administration of the tax system that a taxpayer should be able to know with certainty whether or not an assessment has been made of an amount of VAT due from him. There would be very considerable uncertainty if the question whether an assessment has been made were to depend on the subjective intentions and beliefs of individual officers of HMRC."

179. He continued at [47]:

> "the crucial question in the present appeal is what was the true meaning of the two letters of 6 and 7 October 2008: when objectively construed did they record the fact that an "assessment" had been made and notify the Appellant of that fact?"

180. The *ratio* of *Aria* is thus that the question as to whether a document constitutes an assessment must be determined objectively. The judgment says nothing about the statutory requirement that, before an assessment can be made under s 73(1), one of the conditions set out in that subsection must be met, namely that (a) a person has failed to keep returns or the related documents, or (b) it appears to the Commissioners that a person's submitted returns are incomplete or incorrect.

181. On the facts of this case, at the time of issuing the First and Second Assessments, neither Officer Martin nor Officer Levy had formed a view that the Appellant's returns were incorrect, and neither had any other person within HMRC.

The time limits

182. Section 73(6) provides that an assessment under s 73(1) "shall not be made after the later of (a) 2 years after the end of the prescribed accounting period; or (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge". Officer Martin and Officer Levy had accepted they had missed the second of those time limits, because the Appellant had provided detailed information in response to correspondence. It was no part of HMRC's case that the one year time limit could be relied upon.

183. The purpose of both time limits is to protect taxpayers from tardy assessments. If HMRC could issue an assessment just before the end of the two year period, simply in order to give it longer to decide whether the taxpayer's return was incorrect, that would entirely undermine the statutory purpose. .

No debt

184. Section 73(9) reads:

> "Where an amount has been assessed and notified to any person under subsection (1)…above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

185. Thus, a valid assessment creates a debt due from the taxpayer, which is recoverable by HMRC subject to rights of appeal. Neither Assessment created a debt until after September 2021, when the Assessments were input into HMRC's system. That outcome is consistent with HMRC recognising that the Assessments were not enforceable when they were made, because no decision had been taken as to the Appellant's liability. In other words, it was only in September that it "appear[ed] to the Commissioners that [the Appellant's] returns are… incorrect".

Protective assessments?

186. We did not overlook the fact that courts and tribunals have in the past accepted that HMRC can issue "protective assessments". In this appeal, HMRC took inconsistent positions on whether the First and Second Assessments were "protective assessments":

> (1) As noted above, on 8 March 2021, Officer Levy asked Mr Heywood if he was "content for [Officer Martin and Officer Levy] to take protective assessment action in respect of period 03/19", and Mr Heywood responded by saying "I am content for you to raise protective assessments in the meantime for periods that are going out of time". On 12 March 2021, Officer Martin similarly said "a protective assessment for 03/19 will be issued by the 31 March", and Mr Mantle said in his post-hearing submission that the "assessments were 'protective' and not intended to be enforced immediately".
>
> (2) However, in Office Ncube's statutory review of the First Assessment, he said "while this assessment has been issued to protect HMRC's position against the legal time limits for assessment, it is not a 'protective assessment'." The forms used to enter the First and Second Assessments into the HMRC system, completed on 11 October 2021, had a row of options, including "Officer assessment" and "Protective assessment", but only the former was ticked.

187. The VAT Assessments and Error Correction Manual at VAEC5520 says:

> "HMRC makes protective assessments to protect revenue at risk in ongoing litigation where the law is currently against us… You will need to consider a protective assessment when HMRC is contesting a court judgment."

188. The previous page, at VAEC5510, says:

> "An assessment raised solely because the time limit for assessing is imminent is not a protective assessment. Assessments raised in such circumstances are simply normal assessments and should be enforced in the normal way."

189. We agree with the distinction set out in the VAEC, and with Officer Ncube. When used in the case law, the term "protective assessment" refers to situations where HMRC are

litigating a particular point, and to the extent that other taxpayers are affected by the same issue, a "protective assessment" can be issued. By way of example, in *Courts plc v C&E Commrs*, [2004] EWCA Civ 1527 ("*Courts*"), assessments were raised because HMRC were litigating the same issue in the CJEU, see *C & E Commrs v Primback Ltd* (Case C34/99). Protective assessments were also issued during the long-running *Rank* litigation about betting terminals.

190. The First and Second Assessments were not "protective assessments": they were not raised because HMRC had come to a view that the Appellant's returns were incorrect, but the self-same issue was being litigated in another case. Instead, they were issued because the two year time limit for periods 03/19 and 06/19 was about to expire.

Floodgates?

191. Mr Mantle expressed concern that deciding Issue One in the Appellant's favour could lead to other taxpayers seeking to challenge the validity of assessments using similar arguments. In our view, this is unlikely. In the vast majority of cases involving s 73(1), the assessing officer (and HMRC more generally) are clear that the taxpayer's return is incorrect, and issue the assessment using their best judgement, based on the information they have. This is an entirely different and unusual situation, in which at the time the Assessments were issued it did not appear to the Commissioners that the Appellant's returns were incorrect.

Conclusion

192. We thus find that the First and Second Assessments were invalid because, at the time they were made, it did not "appear to the Commissioners" that the Appellant's VAT returns for 03/19 and/or 06/19 were "incorrect".

THE AUTHORISATION ISSUE

193. Mr Beale submitted that the Assessments were also invalid for a second reason. He said that where, as here, an assessment requires a counter-signature from another officer, the statutory time limits do not stop running until that signature has been procured.

The guidance

194. We first set out the HMRC guidance which applied at the time of the First and Second Assessments. VAEC6070 is headed "General assessment procedures: Definition of an assessment" and it includes the following text:

> "Although there is no legal definition of what 'an assessment has been made' means, the courts have interpreted the law to mean that an assessment is made once you have finished calculating the amount of tax due and a final decision to assess that amount has been taken.
>
> This is normally considered to be when the amount has been
>
> - quantified
> - documented
> - checked
> - signed and dated.
>
> The documentary evidence of having made an assessment may be, for example the signed and dated schedules.
>
> The raising of a form VAT641, the computer input document for the notification of an assessment, is the first stage in the notification process and is a consequence of the decision to assess, rather than the actual making of the assessment itself…

> The VAT641 should normally be raised on the same day as the assessment is raised or shortly after."

195. VAEC6510 reads:

> "The computer input form VAT641 (Adjustments Inputs Form) and continuation sheets are completed by the Assessing Officer to update the trader's record when an assessment is to be issued.
>
> Input of a VAT641 onto the VALID computer system automatically generates a VAT655 (Notice of Assessment(s) and/or Over-declaration) together with any other relevant documentation."

196. VAEC8650 is headed "How to assess and correct: Assessment procedures: Processing completed VAT641" and includes the following text:

> "Once you have completed the VAT641 and it has been checked, you should capture the form to the trader's folder in EF and forward (with a secure note attached) to the authorising officer.
>
> The authorising officer will then look at case details in the penalty toolkit in SEES (until NPS becomes available) and EF, authorise the VAT641, update the secure note and forward to the VALID team for input…
>
> The information which is keyed from this document will be transferred to the VAT Mainframe and processed overnight to update the trader's files."

197. VAEC6520 is headed "Countersigning forms VAT641, 642, 643 and 644", and begins:

> "The decision on whether or not a countersignature is required in the following circumstances is not delegated. Countersignatures are required to provide internal management assurance where:
>
> - There is a net over-declaration within an accounting period, or
> - There is a reduction or withdrawal of an assessment, or
> - The assessment is complex. Ensuring it has been checked by an independent check officer, should reduce the risk of error or challenge.
>
> It should be noted that countersignatures are an internal management assurance tool and do not form part of the making of an assessment. A countersignature is not required to make an assessment."

Findings of fact about the procedures followed when making the Assessments

198. The normal procedure, as set out in the VAEC, is that the assessing officer completes a VAT641, which is authorised if required, and then entered into HMRC's computer system and generates a debt due to HMRC.

The First Assessment

199. The First Assessment was dated 17 March 2021. On the same day, Officer Martin completed a VAT641 which names the "Authorising Officer" as Debbie Morrison. However, Officer Martin did not forward the form to Ms Morrison or otherwise enter the Assessment into the HMRC system. Instead, she completed the Assessment manually. It was not recorded on HMRC's ledger as having been issued to the Appellant, and no debt was generated.

200. Officer Martin forwarded the VAT641 to Ms Morrison on 28 September 2021, with a note saying:

> "Debbie Can you please countersign this V641, Assessment issued in March 2021, and already appealed. Thanks Penny."

201. Ms Morrison authorised the form the same day, and sent it to the HMRC system for input. It was rejected on 1 October 2021 for the following reasons:

> "This is now an ETMP Migrated trader, The VAT Services Keying Team are only able to key VAT292 forms to ETMP…Unfortunately, due to the processing time for VAT Services, the trader may have since been moved to ETMP from when you first submitted your form. Apologies, but we are therefore now unable to key this form. Thanks."

202. The abbreviation "ETMP" refers to "Enterprise Tax Management Platform", which is part of the "Making Tax Digital" reforms to HMRC's procedures.

203. On 6 October 2021, Ms Morrison resubmitted the form using that platform, and this generated a debt due from the Appellant to HMRC. On 11 October 2021, the Appellant received a Notice of Assessment of default interest under VATA s 76(1) of £85,018.39 for the period from 8 May 2019 to 16 March 2021 (the day before the date of the First Assessment).

204. On 5 November 2021, a different HMRC Officer, Ms Kirsty Owens, authorised the First Assessment; the system recorded that this was because Ms Morrison did not have "ETMP Managers functions".

The Second Assessment

205. The Second Assessment was dated 22 June 2021. The process followed was similar to that for the First Assessment in that:

(1) it was completed manually by Officer Martin;

(2) it was not entered into HMRC's system at that point;

(3) it was not recorded on HMRC's ledger as having been issued to the Appellant and no debt was generated;

(4) on 28 September 2021, Officer Martin forwarded the VAT641 to Ms Morrison, with the same message about the assessment already having been appealed;

(5) Ms Morrison authorised it the same day, but on 1 October 2021 was told that the form could not be processed;

(6) on 11 October 2021, the Assessment was entered onto HMRC's system;

(7) on 15 October 2021, the Appellant received a Notice of Assessment of default interest under VATA s 76(1) of £103,343 for the period from 8 August 2019 to 21 June 2021 (the day before the date of the Second Assessment); and

(8) on 2 November 2021, the Assessment was authorised by Ms Claire Downton, as Ms Morrison did not have the requisite authority.

The cases relied on by Mr Beale

206. In making this submission, Mr Beale relied on a number of VAT Tribunal decisions, and some subsequent case law.

207. In *Classicmoor Ltd v C&E Comrs* [1995] V&DR 1 ("*Classicmoor*"), the Tribunal was chaired by Stephen Oliver QC (as he then was). He said that the first question the Tribunal had to decide was "whether an assessment is 'made' when the assessment is notified to the taxpayer or whether the relevant time is an earlier date". Para [24] of his decision reads:

> "In my opinion therefore the assessment was 'made' when the Commissioners through their officers carried out their assessment functions. The power to assess is given to the Commissioners by, for example, sub-

> paragraph 4(1) and the actual procedure for assessing is left to them. It is usually exercised in the privacy of the LVO [Local Valuation Office]. The procedure involves the taking of the decision to assess, followed by the completion of the officer's assessment and concluding either with the signing by the assessing officer or, as here, with the countersigning by another officer. The act of assessment will have little effect, other than to satisfy the statutory time limits, until the taxpayer is notified in compliance with the concluding words of paragraph 4(1) and (2). Until notification the taxpayer is under no liability to pay; nor does the right of appeal arise. Once notification of the assessment is made the position entirely alters. The right of appeal arises and if it is not exercised the amount due becomes recoverable. I therefore find that the 1994 assessment was 'made' on 20 April 1994 when it was countersigned by the assistant collector."

208. In *Eyesave Ltd v C&E Commrs* (2000) VAT Decision 16756 ("*Eyesave*"), Lady Mitting said at [11]:

> "On 10 May, Mr Walsh prepared a form 641 (an officers assessment). He completed it by hand and incorporated his original figures produced to the Appellant on 10 March except for the revised figure for 5/96 and the resulting annual adjustment. Mr Walsh signed the form as "assessing officer" and dated it 10 May 1999. The form was then also signed and dated 10 May 1999 by a Mr Thomson as 'check officer'. Not all officers assessments need additionally to be countersigned by a senior officer but there are certain stipulated circumstances when they must be…The date of Mr Lambert's countersignature was a subject of dispute between the parties and as both parties agreed that the date of the counter-signature would be the date the assessment was raised it was clearly a matter of critical importance."

209. Having considered the evidence, Lady Mitting then said at [14] "I find as a fact that Mr Lambert countersigned the form on the 10th and the assessment was therefore raised on that day".

210. In *Babber v C&E Commrs* [1991] VATTR 268 ("*Babber*"), the Tribunal Chair was Mr Neil Elles. The Commissioners were represented by Mr Ewart, who submitted that "the date on which the assessment was made is when the Form 191 is countersigned and dated…" rather than the date of a second document which had notified the trader of the assessment. The Tribunal agreed with Mr Ewart.

211. Mr Beale submitted that the same conclusion had been reached in *Cheesman v C&E Commrs* [2000] STC 1119 ("*Cheesman*") and had been endorsed by the Court of Appeal in *Courts*.

The Tribunal's view

212. We carefully considered the VAT decisions, as well as *Cheesman* and *Courts.* However, we noted that:

(1) In *Classicmoor,* the issue in dispute was "whether an assessment is 'made' when the assessment is notified to the taxpayer or whether the relevant time is an earlier date". It was not whether (a) the assessment was "made" when the officer issued it, or (b) when it was authorised.

(2) In *Eyesave,* it was common ground that "the date of the counter-signature would be the date the assessment was raised", so there was no argument on that point.

(3) In *Babber,* it was the Commissioners' position that the assessment was "made" when countersigned, rather than when notified.

(4) In *Cheesman,* Collins J referred to those Tribunal decisions, but concluded his judgment at [31] by saying (our emphasis):

> "Assessment of VAT is an important step, and it is unsatisfactory that the process is not transparent, and not defined by legislation or even by clear administrative practice. But I do not, on the unusual facts of this case, have to decide on the mechanism by which an assessment becomes complete, as it might be necessary to decide in a case where a time limit falls in the course of completion of the Form 641 process and the generation of the notice of assessment."

(5) Although Mr Beale is correct that in *Courts* at [106], Parker LJ had cited *Cheesman,* he did so to emphasise the point made in that case that the Commissioners should standardise their process. He went on to say at [107]:

> "In my judgment, given that the making of an assessment is an internal matter for the Commissioners, in respect of which there is no prescribed statutory procedure, it is simply not possible to arrive at a formula which will determine in every case whether or not an assessment has been made. The Commissioners may, for example, decide to treat certain cases as special or exceptional cases, to which their normal internal processes should not apply."

213. It is clear from our summary above that it was not the *ratio* of any of these judgments that an assessment is "made" only when authorised. In *Classicmoor* the Tribunal said, "the power to assess is given to the Commissioners…and the actual procedure for assessing is left to them", and in *Courts* Parker LJ said that "the making of an assessment is an internal matter for the Commissioners, in respect of which there is no prescribed statutory procedure".

214. We agree with Mr Mantle that the position is the same today and that in March and June 2021 HMRC's internal procedures did not require a countersignature from a second officer for an assessment to be "made", because their guidance as set out at VAEC6520 said, at all relevant times:

> "It should be noted that countersignatures are an internal management assurance tool and do not form part of the making of an assessment. A countersignature is not required to make an assessment."

215. As a result, we reject the Appellant's case on the "authorisation" issue and instead agree with HMRC.

CONCLUSION ON ISSUE ONE

216. For the reasons set out above:

(1) We find that the First and Second Assessments were invalid, because, at the time of their issuance, it did not "appear to the Commissioners" that the Appellant's returns were incorrect.

(2) We reject Mr Beale's alternative argument that the First and Second Assessments were invalid because they were "made" on 5 November 2021 and 2 November 2021, when they were authorised.

ISSUE TWO: ARE THE PASSES VOUCHERS?

217. Issue Two is whether the Passes came within Sch 10B, so they are MPVs. We first set out the effect of Brexit, followed by the parties' submissions and our conclusion.

BREXIT

218. The UK left the EU on 31 December 2020 ("IP Completion Day"). The VAT periods under appeal predate IP Completion Day, but the Assessments under appeal were made in 2021, and *DSAB* was decided in 2022. The legal position was set out by Mr Beale[2] as follows (our emphasis):

> "…for the period prior to IP Completion Day ('IPCD'), the relevant domestic legislation must be read compatibly with EU law: see Case C-106/89 *Marleasing* [1990] ECR I-4135, CJEU.
>
> The Appellant's ability to rely on general principles of EU law to construe and (to the extent necessary) modify domestic law to meet EU law requirements is an accrued right which arose well before IPCD on 31 December 2020 (at 11pm). Those rights arose pursuant to sections 2(1) and 3(1) of the European Communities Act 1972 and were preserved by section 16(1) of the Interpretation Act 1978 in the absence of express words of abrogation in the European Union (Withdrawal) Act 2018 ("EUWA 2018").
>
> A taxpayer can rely on general principles of EU law to construe domestic law
> conformably with EU law in relation to matters occurring before IPCD: *Jersey Choice Limited v Her Majesty's Treasury* [2021] EWCA Civ 1941 at [23]-[24].
>
> Since there is nothing in the EUWA 2018 addressing entitlements or causes of action which have accrued prior to IPCD, section 16 IA 1978 operates in its familiar fashion to preserve those causes of action as they stood at IPCD. Those rights do not need to have been asserted, it is sufficient that they have accrued as an entitlement under domestic law: *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778, CA per Simon Brown LJ at p. 1787. That is confirmed by construing the provisions of EUWA 2018 in their context, including by reference to the wording of section 5A EUWA 2018: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, SC at [29]. It has also been confirmed by the terms of section 22(5) of the Retained EU Law (Revocation and Reform) Act 2023, which expressly envisages that general principles of EU law will continue to be applied to anything occurring prior to 1 January 2024…
>
> Section 28 of the Finance Act 2024 confirms that section 4 of EUWA 2018 remains in effect for the purposes of interpreting VAT law in the period following 1 January 2024."

219. Ater the hearing of the Appellant's appeal, the Supreme Court issued its judgment in *Lipton v BA Cityflier* [2024] UKSC 24. The Court considered two possible analyses of the legal position post-Brexit:

> (1) The "Interpretation Act analysis", under which EUWA 2018 transposed into domestic law certain rules of EU law with prospective effect but left undisturbed any cause of action that accrued under EU law prior to IP completion day, save where it expressly provided to the contrary. Such causes of action are saved by the application of section 16 of the Interpretation Act 1978, which provides that the repeal of an enactment does not affect any right accrued under that enactment, unless the contrary intention appears.
>
> (2) The "Complete Code analysis", under which EUWA 2018 dealt comprehensively with the application in the UK of EU law following IP completion day. Where a cause

[2] As set out in Mr Beale's skeleton, with some additional case law references and abbreviations removed

of action arose in relation to events that took place pre-IP completion day, that cause of action is brought forward as retained EU law by EUWA 2018.

220. The Court held by a majority that the Complete Code analysis was correct. As can be seen from the underlined passages in Mr Beale's summary, he followed the Interpretation Act analysis. However, all the Assessments under appeal were issued before Brexit, so the Complete Code analysis gives the same result as the Interpretation Act analysis. In brief, the Appellant can rely on the law as it was before Brexit.

221. Although Mr Mantle did not take issue with Mr Beale's summary, he said that as *DSAB* was issued after IP Completion Day, it was not binding and "should not be treated as of assistance". Mr Beale submitted that *DSAB* was "highly relevant", because it "serves to confirm the proper construction of Article 30a and 30b of the PVD". He also relied on *R (oao Gloucestershire Hospitals NHS Foundation Trust) v HMRC* [2023] UKUT 28 (TCC) ("*Gloucestershire Hospitals*"), a decision of Leech J and Judge Jones, which had considered *Frenetikexito – Unipessoal Lda v Autoridade Tributaria e Aduaneira* (Case C-581/19). The CJEU handed down their judgment after IP Completion Day, and the UT said (our emphasis):

> "[105]… By virtue of s 6(1)(a) of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act'), a court or tribunal is not bound by any principles laid down or any decisions made by the European Court on or after that date. We remind ourselves, therefore, that we are not bound by the judgment of the Court or the Advocate General's opinion in *Frenetikexito*.
>
> [106] …by virtue of s 6(2) of the Withdrawal Act we may have regard to the Court's judgment in *Frenetikexito* and <u>we consider it particularly useful to do so in circumstances where that judgment attempts to summarise principles from existing law by which we are bound</u>."

222. We agree with Mr Beale and with the UT in *Gloucestershire Hospitals,* and we find as follows:

(1) The Voucher Directive was issued long before IP Completion Day, and was implemented by Sch 10B for periods after 1 January 2019. The assessments under appeal are for periods after that date which end before IP Completion Day.

(2) Although we are not bound by *DSAB*, because it was issued after IP Completion Day, it provides helpful and relevant guidance as to the meaning of the Voucher Directive, and thus of Sch 10B. To borrow the words of the UT in *Gloucestershire Hospitals* in relation to *Frenetikexito*, the judgment in *DSAB* "attempts to summarise principles from existing law by which we are bound".

THE "TICKET" ARGUMENT

223. We first consider HMRC's main reason for deciding that the Passes were "instruments functioning as tickets" and so not MPVs.

Background

224. The background was not in dispute. As set out earlier in this judgment:

(1) The Tribunal decided in *Leisure Pass 2009* that the LP was a "face value voucher" under VAT law before its amendment by the Voucher Directive.

(2) Recital 3 said that the purpose of that Directive was to "clarify the VAT treatment of vouchers".

(3) Article 30a defined a "voucher" as:

> "an instrument where there is an obligation to accept it as consideration or part consideration for a supply of goods or services and where the goods or services to be supplied or the identities of their potential suppliers are either indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument."

(4) Recital 5 to the Voucher Directive said:

> "The provisions regarding vouchers should not trigger any change in the VAT treatment of transport tickets, admission tickets to cinemas and museums, postage stamps or similar".

(5) The Voucher Directive was implemented in the UK with effect from 1 January 2019. VATA Sch 10B para 1(5)(b) said that "an instrument functioning as a ticket, for example for travel or for admission to a venue or event" was not a voucher.

HMRC's submissions

225. As we have already found (see §72), HMRC and HMT met with the Appellant on 22 October 2018, shortly before the implementation of the Voucher Directive. At that meeting, the Appellant was told that HMRC and HMT's view was that the Passes would not fall within the UK implementing legislation, because they were "tickets"; that the new provisions excluded "tickets", and that as a result, the sale of the Pass would be a standard-rated supply.

226. In the Liability Decision, Officer Martin reiterated that stance, saying:

> "For the avoidance of doubt, it remains HMRC's position that the London Pass and London Explorer Pass are not 'vouchers' for the purposes of Schedule 10B, VATA 1994, because they are instruments functioning as tickets and thus expressly excluded by paragraph 1(5)(b) of that Schedule."

227. In oral evidence, Officer Levy said that a Pass was a ticket similar in type to a train or tube season ticket, and Mr Mantle's skeleton argument contained this passage:

> "…the Passes function as tickets for admission to the attractions and for travel. It is the case that the Passes do not have to be used to enter only one specific attraction or to make one specific journey. However, that does not mean that they do not function as a ticket."

The Appellant's position

228. Mr Beale submitted that:

(1) It was clear from Recital 5 that the Voucher Directive had not changed the position relating to "tickets". A Pass was a voucher under previous law, and was not now "a ticket".

(2) VATA Sch 10B implemented the Voucher Directive, and the phrase "instruments functioning as a ticket" was not found in the Voucher Directive, and should not be read as extending the normal meaning of the term.

(3) A Pass was not a "ticket" as that term is normally understood, and neither was it an "instrument functioning as a ticket".

(4) A ticket "connotes a specific and ascertainable journey or admission", whereas at the time of purchase, a Pass did not give the customer "a pre-determined specific entitlement". Purchasers of a Pass are given a ticket when they use a Pass to gain admission to a specific Attraction, but the Pass itself is not a ticket.

(5) Officer Levy's parallel with an annual tube pass should be rejected, because such a pass gives "an immediate entitlement to passenger transport on a defined network, on

specific terms and for a specified duration". In contrast, "none of those parameters are known at the time a Pass is supplied to a customer".

(6) Para [60] of the AG's Opinion had explained that "vouchers only create a possibility to acquire a ticket and create the obligation for the supplier of such a ticket to accept vouchers as consideration. [The Voucher Directive] does not in any way alter the VAT scheme applicable to such tickets".

(7) The CJEU had held that DSAB was issuing vouchers, specifically MPVs. The operating system used by DSAB had been sold to it by the Appellant, and (as Officer Martin had accepted in the TAR, and Officer Levy in his email of 12 March 2021) the facts of the Appellant's case were "essentially the same" as those in *DSAB*.

The Tribunal's view

229. We agree with Mr Beale for the reasons he gave, and add three additional points.

Dictionary definition

230. Neither party referred us to a dictionary definition of "ticket", a word in common usage. We considered for ourselves the Oxford English Dictionary ("OED") definition, which (among numerous outdated or inapposite usages) gives the following:

> "A slip, usually of paper or cardboard, bearing the evidence of the holder's title to some service or privilege, to which it admits him; as a theatre-ticket, railway or tramway ticket, insurance-ticket, lottery-ticket, lecture-ticket, platform-ticket, communion-ticket, member's ticket, luncheon-ticket, soup-ticket, etc."
>
> and
>
> "A writing in which something is certified or authorised; a certificate or voucher; a warrant, licence, permit".

231. Since in its statutory context, a "ticket" is contrasted with a "voucher", the second of the OED definitions does not assist, while the first supports the Appellant.

The purpose of the Voucher Directive

232. The Voucher Directive was introduced to remedy the lack of clarity as to the VAT treatment of vouchers, not to change the treatment of tickets; this is clear from Recital 5. Although Recitals do not have the same legally binding status as Articles, so cannot overrule an operative provision, they can help to determine the meaning of an ambiguous provision, see for example *Ziolkowski v Land Berlin*, Case C-424/10 and C-425/10, where at paragraphs 37, 42 and 43, the Court relied on Recitals to ascertain the purpose of the Citizenship Directive and the structured nature of the rights contained therein.

The Explanatory Notes

233. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 at [5], Lord Nicholls said "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction", and in *R (O) v SSHD* [2023] AC 255 at [30] Lord Hodge said that Explanatory Notes "may cast light on the meaning of particular statutory provisions".

234. When Sch 10B was enacted, there was no suggestion in the Explanatory Notes that Parliament intended to do more than implement the Voucher Directive. The relevant Note begins by saying that:

> "This clause and Schedule transposes Council Directive (EU) 2016/1065, which provides for the VAT treatment of vouchers… This will make the rules for the tax treatment of vouchers consistent, especially where they can be used either in the UK or more widely in the EU."

235. In relation to para 1, which contains the words "instrument functioning as ticket", the relevant Explanatory Note only says:

> "Paragraph 1 defines a 'voucher' for the purposes of Schedule 10B as an instrument in physical or electronic form in relation to which three conditions must be met. It also specifies that certain things are not vouchers."

236. The Explanatory Notes do not provide any support for HMRC's case that the words "instrument functioning as a ticket" are to be read as expanding the legislation beyond that in the Voucher Directive.

Conclusion

237. We therefore have no hesitation in agreeing with Mr Beale that the Passes are not tickets, or instruments functioning as tickets.

THE "MULTIPLE SUPPLIERS" POINT

238. In his skeleton argument, Mr Mantle relied in the alternative on the following passage from *DSAB* at [25]:

> "Furthermore, contrary to what the Italian Government submits in its written observations, the issuance of an instrument such as the card at issue in the main proceedings cannot be classified as a 'single provision of services', in the light of the diversity of the services offered and of third-party economic operators acting as suppliers of services."

239. He submitted that, given the Appellant's contractual arrangements, customers were now supplied with entry to the various Attractions by the Appellant, not by the entity providing the Attraction, and thus there was "a major distinction" between its position and that of DSAB. In other words, if the ruling given to the Appellant in October 2018 was wrong, because the original Passes would have come within the new voucher provisions, the Appellant had subsequently placed itself outside of those rules as the result of the steps it had taken as a consequence of HMRC's ruling.

240. We were unable to locate this alternative argument within HMRC's Statement of Case. but as Mr Beale did not take that point, we nevertheless considered whether Mr Mantle was right.

241. As we said during the hearing, it was an unattractive submission, because the Appellant had only changed its arrangements because of HMRC's incorrect view as to the scope and effect of the Voucher Directive and the implementing provisions. Nevertheless, we agreed with Mr Mantle that this was not a reason for rejecting the submission. As he said, it would have been open to the Appellant to challenge HMRC's ruling by continuing to file its VAT returns on the previous basis, and appealing to the Tribunal against any subsequent assessments. It was the Appellant's choice not to take that course of action, but instead to change its contractual arrangements.

242. We nevertheless do not accept Mr Mantle's alternative submission, for the following reasons:

(1) The CJEU decided that the instrument issued by DSAB was a MPV because the conditions in the Voucher Directive were satisfied, see [22] of the judgment, cited at §57 above.

(2) It rejected the submission of the Italian government that DSAB was making a "single provision of services" for the following reasons:

(a) because of (i) the diversity of the services offered and (ii) the diversity of the third-party suppliers of services;

(b) because it would result in "the imposition of a single rate of tax on services such as transport or museum admissions, which are subject to different rates of VAT or which are exempt from that tax", and so be contrary to the objective of the Voucher Directive as expressed in Recital 5; and

(c) because it could lead to double taxation of the services concerned, contrary to Recital 2 of the Voucher Directive.

(3) It is true that the contractual arrangements entered into by the Appellant mean that there is no longer a diversity of suppliers, but all the other elements are the same. The Appellant meets the two conditions in the Voucher Directive, and treating the Passes as a "single provision of services" would cause the imposition of a single rate of tax irrespective of the diverse services being supplied to the customer, and could lead to double taxation.

CONCLUSION ON ISSUE TWO

243. For the reasons set out above, we find that the Passes are MPVs within the meaning of VATA, Sch 10B, and their sale to customers is therefore outside the scope of VAT.

ISSUE THREE: THE CREDIT PACKAGES

244. The Appellant also contended that in any event the Passes were a supply of credits which were outside the scope of VAT.

THE STARTING POINT

245. It was common ground that our starting point was to consider the terms of the contracts between (a) the Appellant and the purchaser of a Pass, and (b) the Appellant and the Attractions, and decide whether those terms reflected the economic and commercial reality. This is clear from *Secret Hotels2 v HMRC* [2014] UKSC 16 ("*Secret Hotels2*") at [29]-[32]; *Airtours Holidays Transport Ltd v HMRC* [2016] UKSC 21 at [42] to [58] and *ING Intermediate Holdings Ltd v HMRC* [2017] EWCA Civ 2111 at [35]-[38].

246. When interpreting those contracts, as Lord Neuberger said in *Secret Hotels2* at [30], the Tribunal must have regard "to all the circumstances in which the transaction or combination of transactions takes place". He said at [32] that in addition regard must be had:

> "to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense."

247. The issue between the parties in this case was whether, as a matter of economic and commercial reality:

(1) the Appellant was right that it was supplying customers with a "credits package" which could be used to gain admission to Attractions or access to passenger transport, with the supplies taking place as and when the credits were used, and which was outside the scope of VAT; or

(2) as HMRC contended, the Appellant was making a single standard rated supply of a sightseeing package, supplied at the time the Appellant and the customer enter into a contract and the Appellant receives payment in respect of the Pass.

WHAT IS BEING SUPPLIED?

248. Mr Mantle did not suggest that the contracts entered into by the Appellant were shams. He instead submitted that the economic and commercial reality was that a customer had purchased a single sightseeing package, and could "exercise the rights of admission" contained within that package immediately on purchase". He described the term "credits package" as "a mere label" and said that the "maximum credit values" were essentially theoretical and did not change the substance of what had been purchased. He underlined those submissions by reference to the changes in the T&C, see §89ff, although he accepted that these should be read in conjunction with the other information provided on the website.

249. We have, however, already found as facts that:

(1) on 3 January 2019, the Appellant amended its website to describe the LP as "the ultimate sightseer credits package", and added a new FAQ explaining how the credit package worked, see §83ff;

(2) from the same date, Clause 4.1 of the T&C said that "Admission to Attractions is subject to the credits package being valid and to there being sufficient value remaining" see §90ff;

(3) throughout the relevant period, the specific mechanics by which the various credits would be depleted on use was well publicised and well understood by customers, see §94; and

(4) although most Passholders did not reach the maximum credit limit, it was a real limit which protected the Appellant from "heavy users", see §104 and the preceding paragraphs. If the Pass had no credits left to use, no further admission or passenger transport could be secured by the passholder. It follows from those findings that the credits were "used up" by the customer and the term "credits package" was not a "mere label".

250. Although Mr Mantle is right that a Passholder has the right to enter any one of the Attractions immediately on purchase, the Appellant does not know at the point of sale *which* Attractions will be visited: possibilities include palaces, museums, churches, the Shard, the "Hop-on, Hop-off London Bus Tour", the Thames River Boat and a day trip to Bicester Village, and give access discounts on souvenirs, books and meals, see §64.

251. The Appellant also does not know, either, when those visits will take place – the Passes are valid for a year (two during Covid); once an LEP is activated, any of the Attractions can be visited in any order during the time period of the Pass (which is from 1 day to 10 days). In addition, Passholders themselves do not necessarily know, at the time they buy a Pass, which Attractions they will visit, or in which order: they can amend their plans depending on weather, energy levels and other factors. Those factual findings are not consistent with customers purchasing "a single sightseeing package".

252. We therefore agree with Mr Beale that the Appellant has no meaningful control over the
Attractions which a passholder visits; it instead provides the right of admission once the passholder had chosen which particular Attraction to visit. As Mr Beale said:

> "It is quite wrong to suggest that the economic and commercial reality was that of providing sightseeing services. The use of such a label is simply descriptive of the pastime or activity which a typical passholder was engaged in, but that is not a meaningful basis upon which to classify the services provided by GCL to its customers for VAT purposes."

253. We also agree that both as a matter of contractual construction and as a matter of economic substance and reality, the Appellant was supplying a credits package whereby a customer could in due course convert credits into rights to enter specific Attractions (including buildings and passenger transport services). Each of these are distinct services, provided by the different and varied undertakings which make the supplies acquired by the Appellant and sold on to the Passholders.

THE CASE LAW

254. We turn next to the VAT consequences of those contractual arrangements. The Appellant relied in particular on two cases, *Macdonald Resorts Ltd v HMRC* (Case C-270/09) and ("*Macdonald Resorts*", with the appellant being "MRL") and *Findmypast Ltd v HMRC* [2017] STC 2335, CSIH ("*Findmypast*", with the appellant being "FMP"). We consider those two cases first, followed by some of the other authorities relied on by the parties.

Macdonald Resorts

255. The facts of this case were as set out in the headnote:

> "The taxpayer was a United Kingdom company...Its business, which was carried on in the United Kingdom and in Spain, consisted in selling timeshare usage rights in properties in holiday resorts situated in those two member states. In 2003 the taxpayer set up an options scheme to make better use of the unsold timeshare inventory, and to offer customers greater flexibility. Under the scheme, customers could acquire 'points rights' which could be redeemed for various benefits which included provision of temporary
> accommodation in holiday resorts provided by the taxpayer or hotel accommodation provided by third parties or other services. Points rights could either be purchased from the taxpayer or acquired in return for depositing with
> the trustee timeshare usage rights (acquired from the taxpayer) and payment of an 'enhancement fee'."

256. HMRC decided that the sale of points rights was to be treated as a taxable supply of benefits derived from membership of a club. The CJEU held as follows (emphases added):

> "[23] …it appears that 'points rights' under the options scheme are purchased with the intention of using those rights in order to convert them into services offered under the options scheme.
>
> [24] …the purchase of 'points rights' is not an aim in itself for the customer. The acquisition of such rights and the conversion of points must thus be regarded as preliminary transactions in order to be able to exercise the right to temporarily use a property, or to stay in a hotel or to use another service.
>
> [25] Therefore, it is at the final moment of that conversion that the purchaser of 'points rights' receives the consideration for his initial payment.
>
> [26] According to the case law of the court, the basis of assessment for a supply of services is everything which makes up the consideration for the service supplied and a supply of services is taxable only if there is a direct link between the service supplied and the consideration received by the supplier…
>
> [27] Therefore, it appears that, in a scheme such as the options scheme, the actual service for which 'points rights' are acquired is the making available to
> participants in that scheme of the various possible benefits which may be

obtained by virtue of the points deriving from those rights. The service is not fully supplied until those points are converted.

[28] It follows that, in cases where the service consists in providing hotel accommodation or a right to temporarily use a property, it is when the points are converted into specific services that the connection between the service supplied and the consideration paid by the customer is established, the consideration being constituted by points deriving from previously acquired rights.

[29] Furthermore, as regards a system such as that at issue in the main proceedings, it must [be] stated that, when 'points rights' are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. Moreover, it is MRL which determines the points classification of the available accommodation and services, so that the customer's choice is limited from the outset to accommodation or services
which are accessible to him with the number of points he has available.

[30] In those circumstances, the factors necessary for VAT to become chargeable are not established when rights such as 'points rights' are initially acquired, which excludes the application of the second subparagraph of art 10(2) of the Sixth Directive

[31] As follows from the judgment in *BUPA Hospitals Ltd v Customs and Excise Comrs* (Case C-419/02) [2006] STC 967, [2006] ECR I-1685, in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT.

[32] Since the real service is obtained only when the customer converts the points attaching to the 'points rights' that he has previously acquired, the chargeable event occurs and the tax becomes chargeable only at that moment,
in accordance with the first subparagraph of art 10(2) of the Sixth Directive.

[33] It follows that, under such a scheme, it is only when the points converts the points deriving from rights previously acquired into the temporary use of a property or hotel accommodation or another service that it is possible to determine the treatment for VAT purposes applicable to the transaction, according to the type of service supplied. Therefore, in particular, the place of
supply is the place where the property or hotel is situated in which the customer obtains the right to stay after conversion of those points.

[34] It is true, as the Advocate General points out in points 78 to 85 of her opinion, that problems may arise from the application of that principle, such as the need, with respect to each conversion of points, to convert the points redeemed by the customer into a monetary value corresponding to the value of the 'points rights', the problems related to the lack of clarity with respect to the rate of conversion for 'points rights' into points, the non-taxation of revenue over potentially long periods of time, the problems related to the variability of VAT rates between the acquisition of 'points rights' and the redemption of the corresponding points, and the possibility that the customer does not convert his points.

> [35] However, such difficulties cannot justify the adoption of an approach, such as that suggested by MRL, by which the place of the supply of the service
> is determined by the application of an aggregate method of apportionment based on the portfolio of accommodation available when the 'points rights' were acquired.
>
> [36] The application of such a method would also give rise to difficulties of several kinds and would also involve a risk of abuse…
>
> [37] Furthermore, such a method of apportionment has no express legal basis in the Sixth Directive. Its only justification would be to simplify the administrative tasks required of MRL in order to fulfil its obligations to the tax authorities."

257. Mr Beale emphasised the following similarities with the Appellant's position:

(1) The purchase of "points rights" was not an aim in itself for MRL's customer. The Appellant's customers similarly do not aim to acquire "credits". Instead, the acquisition of points and credits are both "preliminary transactions".

(2) The aim of MRL's customers was to exercise the rights conferred by the points so as to use a property temporarily, stay in a hotel or to utilise another service. The aim of the Appellant's customers is to use credits to access the Attractions.

(3) In MRL's case, the connection between the service supplied and the consideration paid by the customer was only established when the points were converted into specific services; the same is true of the Appellant's credit packages.

(4) MRL determined the points classification of the available accommodation and services, limiting the customer's choice from the outset, and the Appellant similarly determines the "slate" of available Attractions and the credit value of each.

(5) At the time an MRL customer acquires points, it is not known how they will be spent, for example, in which country they will be used, while the Appellant's customers have a wide choice of different Attractions, some zero-rated and some standard-rated. In both cases "all the relevant information concerning the chargeable event" and in particular, the services supplied, have not been "precisely identified" at the time the points/credits are acquired by the customers.

258. It followed, said Mr Beale, that the VAT consequences were also the same, namely that the real service is obtained only when the customer converts the credits in the "credits package"; it is then that the chargeable event occurs so that VAT is due. Similarly, it is only when the credits are used to enter an Attraction that "it is possible to determine the treatment for VAT purposes applicable to the transaction, according to the type of service supplied".

259. Mr Mantle sought to distinguish *McDonald Resorts* from the facts of the Appellant's case, saying that:

(1) The purchase of a Pass was not a "preliminary transaction" because the customer can use the Pass immediately to enter any listed Attraction.

(2) In *McDonald Resorts,* at the time they acquired the points customers did not know which properties would be available, whereas the Appellant's customers are given a list of Attractions on purchase of the Pass.

(3) The period of time over which a Pass can be used is much shorter than that during which MRL's customers could use their points.

(4) The Appellant's customer does not have to engage with the Appellant before using the Pass; he simply goes to the relevant Attraction, whereas MRL's customers redeem points via that company.

260. We agree with Mr Beale that the position of the Appellant is in all material respects the same as that of MRL, for the reasons he identified. We reject Mr Mantle's challenges for the reasons below (using the same numbering):

(1) A customer's purchase of the Pass containing credits is plainly "preliminary transaction". Customers do not want to acquire credits; their aim is to exercise those rights in order to enter an Attraction, in the same way as MRL's customers wanted to use their points to stay in timeshare accommodation.

(2) It is true that the Appellant's customers have a list of Attractions, while MRL's customers do not know "exactly which accommodation or other services are available in a given year", but that was not determinative. The key point in the CJEU judgment is that, at the time the points were acquired, it was not possible precisely to identify the goods or services which would be supplied to the customer. The same is true here.

(3) Although the points had a longer validity period than the Passes, the latter are valid for a year (increased to two during Covid), so they are far from ephemeral. Moreover, the CJEU did not place any weight on the time period in coming to its decision.

(4) The same is true of Mr Mantle's fourth point: the CJEU judgment does not mention the process by which points are exchanged for holidays. The AG Opinion records at (xi) that "the Constitution provides that MRL may make arrangements for members to exchange points for accommodation" and adds that in practice MRL will reserve accommodation for members in advance in exchange for points, with MRL subsequently MRL pays the hotel the accommodation cost. But none of those facts affected the *ratio* of the judgment.

Findmypast

261. *Findmypast* was a judgment of the Inner House of the Scottish Court of Session, but it was common ground that it was binding on us, see *HMRC v National Exhibition Centre Ltd* [201] UKUT0023 (TCC) at [30]-[34]. The background facts were set out in the first paragraph of the judgment:

> "The respondent taxpayer carries on the business of providing access to genealogical and ancestry websites which it owns or in respect of which it holds a licence. Customers who wish to search the historical records on the website may do so without charge. If a customer is to view or download most
> of the records on the website, however, he or she will require to pay the respondent. This may be done by taking out a subscription for a fixed period, which confers unlimited use of the records during that period. Alternatively, the customer may use a system known as Pay As You Go ('PAYG'). This involves the payment of a lump sum in return for which the customer receives
> a number of 'credits', sometimes referred to as 'units' or 'vouchers'. The credits may be used to view records on the website, and each time a record is viewed some of the credits are used up. The credits are only valid for a fixed period, but unused credits may be revived if the customer purchases further credits within two years; otherwise they are irrevocably lost."

262. The third paragraph reads:

> "The underlying question is whether value added tax should have been accounted for at the time when the vouchers were sold or subsequently, at the time when the vouchers were redeemed. It is in the latter event that the taxpayer would have a valid claim for repayment. That claim raises three distinct issues. The first of these is the nature of the supply made by the taxpayer to customers: whether it was the supply of genealogical records selected by the customer and viewed or downloaded by him, or whether the supply was a 'package' of rights and services, which conferred a right to search the records on the various websites to which the taxpayer's customers had access and, if so desired, to download and print particular items from those websites. If the former is correct, the supply only takes place if and when a particular record is viewed or downloaded; if the latter, the supply includes a general right to search which is exercisable as soon as the credits are purchased, with the result that the supply takes place at that point. The taxpayer contends for the former construction and HMRC for the latter."

263. The Court decided that issue in favour of the taxpayer, saying that "the consideration for the payments made by customers to obtain PAYG credits is the ability to view or download
particular items on the taxpayer's website, and does not extend to the general search facility that is available both to customers and to the public".

264. It then considered whether the payments made by PAYG customers were "prepayments" within the meaning of VATA s 6(4), and said at [48]:

> "When a customer acquires PAYG vouchers and makes a payment to the taxpayer, a number of matters are uncertain. First, and most importantly, it is uncertain whether the chargeable event—redemption of a credit by viewing or downloading a document—will ever occur. This possibility is not hypothetical; the present proceedings have arisen because in a substantial number of cases PAYG credits have not been redeemed. Secondly, it is not clear when redemption will occur, and by that time a number of features of the service might have changed. In particular, the items that are available for viewing and downloading on the taxpayer's website might have changed. The price in credits to view and download any particular document might have changed by then. It is also theoretically possible that the VAT rate might have changed. Of these factors, the possibility that the available documents might have changed appears to be a real one. In its contractual terms and conditions the taxpayer expressly reserves the right to make changes to the website, including the records and services that are offered. The terms and conditions also provide that the number of credits charged to view a record may be changed from time to time."

265. Having considered the CJEU case law, including *MRL*, the Court decided the issue in the taxpayer's favour. It said at [52]:

> "It is, moreover, significant that, as previously explained, credits are not purchased as an aim in themselves but in order to view and download particular documents. The search facility that precedes access to a particular document is available free, and is in any event at a very general level. Thus both the practical purpose of the credits and the background in which they occur, viewed as a matter of economic reality, lead to the conclusion that the service paid for by a customer is supplied when a document is viewed or downloaded, and not before that time."

266. The judgment continued at [53]:

> **"**…The supply is the viewing and downloading of documents, but it cannot be known at the time when the payment is made how many credits will actually be used and how many will remain unredeemed. That makes it impossible at that stage for the taxpayer to know how much VAT should be accounted for. It simply cannot be known in advance whether a credit will remain unused, especially as unused credits can be revived if more credits are
> purchased within a specified period…if the extent of that supply cannot be known at that point the system of accounting for VAT becomes unworkable."

267. The Court went on to consider whether the package of PAYG credits was a "face value voucher" as defined by Sch 10A. Those are not the provisions at issue in this appeal, and neither party suggested that any reliance be placed on this part of the judgment.

268. Mr Beale submitted that the parallels with the Appellant's case were obvious. It was not possible to know, when a customer buys a Pass, what Attractions would be selected or how many credits would be used. It was only when the credits are used that the classification of the supply can be known, and it is at that point that the chargeable event arises.

269. Mr Mantle sought to contrast the uncertainties identified by the CSIH with those in the Appellant's case. He said that there was little risk that the Attractions on offer would have changed as between the purchase of the Pass and its use, or that the number of credits which had to be used to enter a particular Attraction would have altered.

270. We again agree that Mr Beale is right to place reliance on this judgment. We reject Mr Mantle's submission, for two reasons:

(1) As we have already found, see §64, the Appellant reviews the Attractions regularly, adding some and withdrawing others; some of those changes impact on the prices charged for the Passes and/or the number of credits which are used on entry. It is therefore not factually correct that there are no parallels between the uncertainties identified in FMP and those in the Appellant's case.

(2) In any event, the particular uncertainties matter less than their nature and consequence, namely that it is not possible to identify the services supplied, until the customer uses the Pass.

Other case law

271. Mr Mantle sought to rely on a number of other authorities, including *HMRC v Esporta Ltd* [2014] EWCA Civ 155, which concerned fees paid for using a sports club. However, the situation there considered was significantly different from that of the Appellant, and we did not find the judgment to be of assistance.

272. He also referred to *Air France-KLM v Ministère des Finances et des Comptes publics* (Cases C-250/14 and C- 289/14). This concerned non-refundable tickets which were no longer valid because the passenger had been a "no show" at boarding. However, this judgement was considered and distinguished in *Findmypast*, with the Court saying that "with a non-refundable airline ticket, the supply is of a specific service that must be utilised at a particular time and place", in contrast to the uncertainties inherent in the credits sold by the taxpayer in *Findmypast.*

273. Mr Mantle also sought to draw a parallel with *Marcandi Ltd (t/a Madbid) v HMRC* (Case C-544/16) [2018] STC 1455 ('*Madbid*'), which involved "credits" which entitled the holder to place bids in auctions organised by Madbid; they were not put towards the purchase price of any goods purchased. The CJEU contrasted this situation with that in MRL, finding

at [31]-[32] that the credits were not a "preliminary transaction" but were "entirely separate from, and cannot be confused with, the supply of goods which may occur upon the conclusion of those actions. For the same reason, the facts in *Madbid* are clearly distinguishable from those in the Appellant's case.

CONCLUSION ON ISSUE THREE

274. We therefore conclude, for the reasons set out above, that the Passes are not only outside the scope of VAT because they are MPVs, but also because the supplies take place when the customer uses the Pass, and not when it is purchased. The position is essentially the same as in *MacDonald Resorts* and *Findmypast.*

ISSUE FOUR: THE CONSIDERATION

275. Mr Mantle submitted that even if HMRC lost on Issues Two and Three, the Appellant had underpaid VAT because it had used an incorrect methodology for apportioning consideration to the supplies. Mr Beale disagreed, saying that the Appellant's method was correct and appropriate.

THE STARTING POINT

276. The Appellant treated the sale of the Pass as outside the scope on the basis of the new contractual arrangements. We have found that the Pass was an MPV and outside the scope for that reason. Under either analysis, therefore, the supply of the Pass was outside the scope, and thus had the Appellant treated the Pass as an MPV, there would have been no difference in the way it apportioned the consideration.

277. Had the Appellant not entered into the new contractual arrangements, the sale of the Pass would have been outside the scope because it was an MPV, and the supplies would have been made by the Attractions, not by the Appellant. Its VAT returns would then have been very different. But that is not the situation we have to consider.

FINDINGS OF FACT ABOUT THE APPELLANT'S VAT RETURNS

278. The Appellant had treated the supply of the Passes as outside the scope of VAT on the basis that it was a "credits package" in reliance on the case law discussed under Issue Three. When a customer uses the Pass to enter an Attraction, the following occurs:

> (1) The Attraction supplies the Appellant with a right of entry charged at the rate agreed in the contract. The classification of the right for VAT purposes depends on the nature of the supply: some Attractions are making supplies under the cultural exemption, some are making zero-rated supplies of passenger transport, and the remainder are making standard rated supplies. The Appellant treats all these supplies as inputs on its VAT return, and claims the VAT on standard rated supplies as input tax.
>
> (2) The Appellant then on-supplies the right of entry to the customer. To work out the consideration paid by the customer for the right, the Appellant calculates a percentage of the sum paid for the Pass. Some of the Appellant's supplies are zero-rated passenger transport and the rest are standard rated; the Appellant is not entitled to use the cultural exemption. The output tax figure on its VAT return is calculated using the consideration allocated to the standard rated supplies.

279. Mr Doe gave the example of a three day Adult LP which cost £135 and allowed entry to Attractions which would have cost the customer £355 without a Pass. The maximum credits were thus 355. Using those figures:

> (1) The Passholder visits an Attraction with a gate price of £32.

(2) He has used 32 of the credits, so there are 323 remaining.

(3) This is 32/355 of the total value of the Pass, which is 9%.

(4) Consideration for the supply of entry to that Attraction is calculated as 9% of the £135 paid for the Pass, so £12.17.

(5) The customer can use the other 323 credits to visit other Attractions with gate prices up to £323. If he does so, he will have exhausted the Pass. All the money received by the Appellant for the sale of the Pass will have been allocated as consideration for the various separate supplies made to the customer.

(6) If he does not use all the remaining 323 credits, some of the money received by the Appellant for the sale of the Pass will not be allocated as consideration for any supply.

280. In practice, the Appellant does not carry out the calculation on a "customer by customer" basis, but uses information from the Attractions to obtain the same result, as explained below.

(1) The Appellant calculates the overall discount available to the customer. In the above example, the customer paid £135 for rights worth a total of £355. He thus received 38% discount of the total gate prices of the Attractions which could be visited.

(2) The Appellant is informed that in a VAT quarter, 100 Passholders visited the Attraction with a gate price of £32.

(3) The Appellant calculates the consideration for one of those supplies as 38% of its gate price (£32 x 38%), so £12.17.

(4) The Appellant calculates the total consideration for the 100 supplies as £12.17 x 100 = £1,217.

(5) Assuming the Attraction was standard rated, the related output tax is included on the Appellant's VAT return for that quarter

The unallocated amount

281. We have already found that many Passholders do not exhaust the maximum value of their Passes, see §103-§105. It follows that part of the price paid by those customers is not allocated as consideration for services supplied to them.

282. In his skeleton, Mr Mantle stated that over 50% of the money paid by customers was unallocated. However, we were not taken to any evidence or calculations to support that figure; neither Officer Martin nor Officer Levy gave related evidence, and it was not put to Mr Doe in cross-examination. We are therefore unable to make a finding as to how much of the amount paid for the Passes is not allocated as consideration.

THE PARTIES' POSITION IN OUTLINE

283. HMRC's case was that the total amount received by the Appellant for the Passes should be allocated across its supplies, so that no part of the payment received from customers for the Passes remains unallocated.

284. The Appellant's position was that its approach was correct, because if a customer had not used all the rights included in a Pass, part of the sum paid was not expended in return for the supply of a service.

DISCUSSION

285. We begin our discussion with the Voucher Directive, followed by *DSAB* and In *M-GbR v Finanzamt O* (Case C-68/23) ("*M-GbR*"), a CJEU judgment issued after the hearing about

which the parties provided further submissions. We then consider some basic principles of VAT law – the need for a "direct and immediate link", the apportionment provision at VATA s 19(4) and the time of supply rules at VATA s 4, and finally we discuss the parties' submissions on whether an amount could remain unallocated, and whether the Appellant's approach was "distortive".

The Voucher Directive

286. Article 1(2) of the Voucher Directive, set out earlier in this judgment, inserted new Article 73b into the PVD, which read:

> "Without prejudice to Article 73, the taxable amount of the supply of goods or services provided in respect of a multi-purpose voucher shall be equal to the consideration paid for the voucher or, in the absence of information on that consideration, the monetary value indicated on the multi-purpose voucher itself or in the related documentation, less the amount of VAT relating to the goods or services supplied."

287. That provision is easy to apply when the MPV is exchanged for a single supply of goods or services. The supplier treats the amount paid for the MPV as the consideration, but if the amount paid is unknown, uses "the monetary value indicated on the multi-purpose voucher itself or in the related documentation".

288. The issue is more problematic when the MPV is exchanged for more then one supply, as in this case. If the customer paid £135 for the Pass, and used it for 10 different Attractions, then (as Mr Mantle rightly accepted) the consideration plainly could not be £135 for *each* of those supplies, because this would result in significant over-taxation and be inconsistent with the fundamental principles of VAT.

289. Clarification is provided by Recital 11 to the Voucher Directive. This begins by reiterating that the value of the supply is the amount paid for the voucher (if known), but if not, the face value, and it continues:

> "Where a multi-purpose voucher is used partially in respect of the supply of goods or services, the taxable amount should be equal to the corresponding part of the consideration or the monetary value, less the amount of VAT relating to the goods or services supplied."

290. Thus, where an MPV is used "partially" in respect of supplies of goods or services, the "corresponding part" of the consideration paid by the customer is to be allocated to those goods or services.

291. It must therefore follow that where an MPV is not wholly used in exchange for supplies of goods or services, part of the consideration remains unallocated. In other words, part of the consideration is not taken into account for VAT purposes.

292. Recital 11 thus endorses the approach taken by the Appellant. Although, as we said at §232, Recitals do not have the same legally binding status as Articles, they can determine the meaning of an ambiguous provision*:* in this case, how Article 73b applies to an MPV which is used for multiple supplies.

DSAB

293. In para 73 of her Opinion in *DSAB*, AG Capeta said:

> "…if the value of all services redeemed in practice is lower than the price paid for the voucher, the difference must also be subject to VAT. That amount is recognised as consideration for the distribution or promotion of services, in accordance with Article 30b(2) of the VAT Directive, and VAT on that 'profit margin' must be accounted for by the issuer of the card."

294. Mr Mantle sought to rely on the first sentence of this paragraph, saying that it supported HMRC's case that any unallocated consideration must be subject to VAT. However, there are the following difficulties with that submission:

(1) As Mr Beale pointed out, the AG went on to say that the difference between the value of the services and the amount paid for the MPV "is recognised as consideration for the distribution or promotion of services". The Appellant supplied customers with the Pass, not with a distribution or promotion service, and no part of the consideration could be allocated to a non-existent service.

(2) This paragraph from the AG's Opinion was not adopted or included in the CJEU judgment.

(3) Instead, the Court ruled that the DSAB city card gave a purchaser the right to be admitted to "around 60 attractions…around 10 passenger transport services…as well as sightseeing tours with other organisers", but said nothing about (a) how the consideration paid for the city card should be allocated as between those attractions and tours, or (b) what happened to any remaining amount.

M-GbR

295. In *M-GbR*, the CJEU considered two issues, of which the second related to the meaning of Article 30b(2). This was set out earlier in this judgment but is repeated for ease of reference:

> "Where a transfer of a multi-purpose voucher is made by a taxable person other than the taxable person carrying out the transaction subject to VAT pursuant to the first subparagraph, any supply of services that can be identified, such as distribution or promotion services, shall be subject to VAT."

296. The Court summarised the second question for reference as follows:

> "…where a multi-purpose voucher is the subject of one or more transfers, in the context of a distribution chain extending over the territory of several Member States, prior to its redemption by the end consumer, the question arises as to whether the consideration received on each transfer of that voucher between taxable persons must be subject to VAT as consideration for a service independent of the redemption of that voucher for goods or services."

297. The Court answered that question at paragraph 62 of its judgment:

> "The second subparagraph of Article 30b(2) of the VAT Directive, read in conjunction with Article 73a thereof, is thus intended in particular to prevent the non-taxation of distribution or promotion services, in accordance with the objectives of the VAT Directive, by ensuring that VAT is charged on any profit margin (see, to that effect, Opinion of Advocate General Ćapeta in *DSAB Destination Stockholm*, C-637/20, EU:C:2022:131, paragraphs 71 to 75.)"

298. Mr Mantle submitted that the CJEU were here endorsing para 73 of AG Capeta's Opinion. Mr Beale said (his italics, but our additions of (a) and (b) for clarity):

> "The CJEU in M-GbR was *not* exploring the attribution of consideration between different supplies of services redeemed under a MPV which was capable of being partially redeemed over time. It was dealing with the possibility of output tax being due on a separate supply of services made by (a) a taxable person in the chain of transactions to (b) the taxable person who is actually supplying the goods or services redeemed by the final consumer."

299. We agree with Mr Beale. In *M-GbR,* the CJEU applied para 73 of AG Capeta's Opinion in the context of the need to prevent "the non-taxation of distribution or promotion services". The Appellant was not making any such services, and *M-GbR,* does not assist Mr Mantle.

Direct and immediate link?

300. It is well-established that the concept of a supply of services effected for consideration "presupposes the existence of a direct link between the service provided and the consideration received", see *Apple & Pear Development Council v C & E Commrs* (Case 102/86). Mr Mantle submitted that the whole of the price paid by the customer for the Pass was "directly linked" to the supplies made, and not linked to any unused rights.

301. Mr Beale's position was that there is no "direct and immediate link" between the customer's payment for the Pass and the particular separate supplies, because at the time that payment is made, it is not known what supplies will be made, and customers receive different mixtures of supplies.

302. We agree with Mr Beale, and find that there is no direct and immediate link between the payment for the Pass and the supplies made to the customer.

Apportionment

303. Mr Mantle submitted that the amount paid by the customer should be apportioned over the Attractions actually visited. He accepted that a necessary consequence of this approach would be that an identical supply (a visit to the Shard, say) would have a different allocated amount of consideration depending on the number of other Attractions visited by the customer. A person who visited another twenty Attractions would, in Mr Mantle's submission "simply get more in exchange for his payment, and so better value" than the customer who visited only four more Attractions.

304. However, VATA s 19(4) provides (our emphasis):

> "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."

305. HMRC's methodology would produce huge differences in the consideration attributed to an identical supply, depending on the number and value of the *other supplies* made to a customer. In our judgment, this would not meet the requirement that the apportioned consideration must be that which is "properly attributable" to a supply.

Time of supply

306. Under HMRC's approach, the amount paid by the customer for a Pass could only be apportioned when a particular Pass has expired, because the consideration for each supply could only be ascertained at that point in time. We have already found as facts that an LP expires 10 days after the first supply, and an LEP expires sixty days after the first supply.

307. VATA s 4 provides that services are supplied when they are performed. If HMRC were to be correct, it would be impossible:

(1) to know at the time of supply what consideration had been received for the services;

(2) to work out the related output tax; or

(3) to include the transaction in the VAT return.

308. In contrast, under the Appellant's approach, the value of the consideration is known at the time the service is supplied, because it is calculated based on the gate prices of the Attractions.

Unallocated amount

309. In submitting that the total amount received by the Appellant for the Passes should be allocated across the supplies made, Mr Mantle also relied on Article 73 and VATA s 19(2), which provide that VAT should be chargeable in respect of all of the consideration received for a supply.

310. Mr Beale responded by saying that, to the extent that a customer had not used all the rights purchased as part of his Pass, part of the sum paid had not been expended in return for the supply of a service. He relied on *MRL* and *Findmypast* as set out below (his emphases).

> (1) In *MRL* at [34] the CJEU had agreed with the AG that "convert[ing] the points redeemed by the customer into a monetary value corresponding to the value of the 'points rights'" could cause problems, including those which "related to the lack of clarity with respect to the rate of conversion for 'points rights' as well as "the possibility that the customer does not convert his points". The CJEU nevertheless went on to say that such difficulties could not justify valuing the points at the time they were acquired on the basis of the portfolio of accommodation available at that time, adding that "such a basis has no express legal basis in the Sixth Directive".
>
> (2) In *Findmypast* the Court noted some credits were never used, saying that at the time of purchase "it is uncertain whether the chargeable event—redemption of a credit by viewing or downloading a document—will ever occur" and that "it simply cannot be known in advance whether a credit will remain unused". The fact that the customer had paid for credits which were never utilised was a factor in favour of the taxpayer's submission that the true service is supplied at a later point. The Court made no finding that the unused credits should be taken into account when working out the consideration for the supplies actually made.

311. We again agree with Mr Beale. It is in our judgment clear that where a customer does not use all the available credits, part of the sum paid for the Pass was not expended on the supply of a service. As already noted, essentially the same point is made in Recital 11 to the Voucher Directive, which says that where a voucher is used "partially" in respect of supplies of goods or services, it is the "corresponding part" of the consideration which is to be allocated to those goods or services.

Distortive?

312. At the heart of HMRC's case was a submission that the Appellant's approach was "distortive". Officer Martin said in the TAR:

> "it is hard not to see the VAT outcome as distortive and contrary to the general principle of VAT as a tax on final consumption, proportionate to the price actually paid by the final consumer."

313. Under cross-examination she similarly said that HMRC were trying to find a solution to "an unacceptable rate of tax leakage". However, as noted at §282, we were unable to make any findings of fact as to the quantum of the unallocated amount, because we were not provided with any related evidence or calculations. Moreover, it was no part of HMRC's case that any of the Appellant's arrangements constituted an abusive practice within the meaning of *Halifax plc v HMRC* [2006] Case C-255/02.

CONCLUSION ON ISSUE 4

314. We have already found as facts that some Passholders do use all the credits on their Passes and that the "maximum credit limit" is a real limit which protected the Appellant from "heavy users", see §99 and §104. We now further find that:

(1) where a Passholder uses all the credits, the whole of the amount paid for the Pass is allocated to the particular supplies made;

(2) where a Passholder does not use all the credits, part of the payment made for the Pass is not consideration for a supply; and

(3) HMRC's proposed method of allocating 100% of the purchase price over the supplies made is inconsistent with the legislation and the case law.

315. We thus reject HMRC's challenge to the Appellant's methodology for allocating the consideration to the supplies of services..

OVERALL CONCLUSION

316. We have therefore found as follows:

(1) The First and Second Assessments are set aside as invalid because, at the time they were made, it did not appear to the Commissioners that the Appellant's returns were incorrect.

(2) The Third and Fourth Assessments and the Liability Decision are set aside because:

(a) the Passes were MPVs as defined by the PVD and VATA Sch 10B, and so outside the scope for VAT purposes; and

(b) we have rejected HMRC's challenge to the Appellant's calculation of the consideration.

317. If we were to be wrong in relation to the Voucher Directive, the Appellant would in any event have succeeded on the basis of its "credit package" approach. Were we to be wrong on Issue One, the First and Second Assessments are set aside for the same reasons as the other Assessments.

318. It follows that the Appellant's appeal is allowed in its entirety.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

319. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 14th AUGUST 2024