[2019] UKUT 182 (TCC)

VALUE ADDED TAX – promotional offer of three food items for £10 "with free wine" – whether output tax on wine element – whether bespoke retail agreement applied to treat wine as supplied for nil consideration – appeal dismissed

UT/2018/0067

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

BETWEEN

MARKS AND SPENCER PLC **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE NUGEE

JUDGE GUY BRANNAN

Sitting in public at the Royal Courts of Justice, The Rolls Building, London on 2 and 3 May 2019

Nicola Shaw QC, instructed by Joseph Hage Aaronson LLP, for the Appellant

Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the correct VAT treatment of a promotional offer made by the appellant (**"M&S"**) called "Dine In for Two – £10 – with Free Wine" (**"the Promotion"**). The Promotion allowed a customer to choose three food dishes on payment of £10 and obtain a bottle of wine (or other non-alcoholic beverage) which was described as being provided "free".

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

3. The First-tier Tribunal (Judge Thomas Scott) (**"the FTT"**), in a decision released on 10 April 2018, decided that the £10 should be apportioned between the food and wine. M&S, with the permission of this Tribunal, now appeals that decision.

4. If we decide that the wine was supplied free of charge, a second issue arises. M&S contends that, in these circumstances, the supply of "free" wine falls within the terms of a Bespoke Retail Scheme Agreement (**"BRSA"**) entered into between M&S and HMRC. The BRSA is an agreement entered into pursuant to Regulations 67 and 68 of the Value Added Tax Regulations 1995. If, however, we decide that the £10 should be apportioned between food and wine, it was common ground that the BRSA issue does not arise.

5. The parties asked us to decide these matters in principle, leaving the calculation of the exact VAT liabilities which would flow from our decision to be determined between them.

6. For the reasons given later in this decision, we have decided that the £10 should be apportioned between the food and wine. We therefore uphold the decision of the FTT and dismiss this appeal.

7. For simplicity, decisions of the Court of Justice of the European Union and, prior to 2009, Court of Justice of the European Communities are referred to as decisions of the "CJEU".

THE FACTS

8. The following summary of the facts is taken from [21]-[46] of the FTT's decision and references in square brackets are references to the relevant paragraphs in that decision.

9. In March 2014 M&S first informed HMRC of its plan to change its existing promotional offer 'Dine In for £10'. Under the new offer (the Promotion) the customer would be entitled to buy three specified items – a main course, side dish and dessert – for £10, and would be entitled to a "free" bottle of wine or alternative beverage. (FTT [27])

10. Under the previous "Dine In" promotion, M&S offered customers three food items and a bottle of wine for £10. (FTT [34])

11. The Promotion was introduced in May 2014 and was offered for limited periods of time in subsequent periods. It was not available online. It was described in marketing and promotional material, both in-store and on M&S's website, as "Dine In for £10 with Free Wine". Instead of wine, customers could choose certain non-alcoholic beverages available under the Promotion. (FTT [36])

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

"Online Terms and Conditions

> Offer runs Thursday 1st May to Tuesday 6th May 2014 in selected stores in the UK. Subject to availability. Serving suggestions shown. Selected products only. Excludes Channel Islands, overseas' stores, M&S Outlet stores and Simply Food stores…See in store for details. Selected Main, Side and Dessert available for £10. Free wine only available to customers over 18 and in conjunction with the £10 meal for 2. Non-alcoholic alternative available. In the unlikely event that the free wine (as opposed to the non-alcoholic alternative) is not available or required, an alternative product or discount is not available, although the food selection in the "Dine in for £10" promotion can still be purchased. For the avoidance of doubt, as the value attributed to the free wine in this deal is £0.00, if returned, no refund will be due." (FTT [37])

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

14. The three food items in the Promotion could be purchased by a customer for £10 and tills in the stores were programmed to recognise a unique product code for that combination of items. The same code would recognise a bottle of wine being offered in the promotion and include it within the £10 charged to the customer. All the items – namely the three food items or the three food items plus the wine – would have to be bought in a single till transaction to attract the £10 price, although the customer's basket of goods could include any number of other goods outside the Promotion. (FTT [39])

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

16. The policy relating to refunds under the Promotion was somewhat unclear, but the FTT made the following findings. If a customer returned any of the three food items he or she had bought in the promotion, he or she would be given a full £10 refund. If the customer sought to return the wine he or she might, at the discretion of the store, be given a replacement bottle, but in no circumstances would the customer be refunded any cash amount or given any future credit. (FTT [41])

17. All of the items in the Promotion, including the wine, were offered subject to availability. In practice, stores had a limited measure of discretion in offering equivalent replacement items, within the terms of the Promotion. If an item was not available, in no circumstances was any cash alternative or discount offered to the customer. Although the online terms and conditions (see paragraph 12 above) might have implied that this policy did not apply to the non-alcoholic beverage in the promotion, this was not the case. (FTT [42])

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

19. On average, the "free" wine would be the most valuable single item in the promotion in terms of its shelf price. (FTT [44])

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

21. In February 2014 M&S and HMRC entered into the BRSA. (FTT [26])

22. A BRSA is mandatory for retailers whose turnover, excluding VAT, exceeds £130 million. As explained in HMRC Notice 727/2 at paragraph 2.1:

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

23. Section 1 of the BRSA is headed 'Legal Framework' and contains the following provisions:

> "3.2 Both parties enter into this agreement on the basis of a full disclosure of the relevant facts.
>
> …
>
> 5. Disputes and omissions
>
> 5.1 In the event of a disagreement about the meaning or effect of the terms of the scheme, the normal VAT treatment will determine the meaning or effect of the term.
>
> …
>
> 7. Legal Framework
>
> 7.1 The terms of this agreement do not amend the normal provisions of VAT law except to the extent necessary to simplify the valuation of output tax on retail supplies." (FTT [117])

24. Appendix 5 of the BRSA (**"Appendix 5"**), headed "System Configuration", contained the following passage:

> "**I. Business Promotions**
>
> The Article/Departmental Output Tax reports referred to above provide details of net sales i.e. after any promotional discounts have been applied. Generally speaking, the VAT is automatically calculated based on the discounted amount and the purpose of this section is to outline how these are dealt with by the IPOS system [M&S's point of sale/till system] by using common examples. Please note that this list is not designed to be exhaustive.
>
> *Buy one get one free promotions – items with same VAT rate*
>
> Under this type of promotion the "free" item is the same as the original item. Both sales are recorded and the value of the "free" item is automatically deducted from departmental sales values and a further DGT adjustment is not required.

Free items

It has been agreed with HMRC that where an item or items are given away "free" on the purchase of a specified product or products or products to a specified value, no VAT is due on the "free" item (e.g. (i) food festival promotion (spend £35 and receive a free specified item); (ii) buy six deli items and get a free cool bag; (iii) buy a salad and receive a free bottle of water and (iv) buy a meal for two and receive a free bottle of wine (e.g. "Weekend In")). The IPOS system has been configured to automatically do this and as such no adjustment to DGT is required.

3 For 2

Under this type of promotion, the customer will receive a discount equal to the value of one of the products in the bundle. If the products are sold with differing VAT rates then the discount is apportioned across all products and an average VAT rate across all these products is therefore applied.

This might be the third product rung through the till or the cheapest. In either case, the IPOS system will automatically adjust the sales and VAT values for this product and as such no adjustment is required to DGT. Note, the products offered under these promotions tend to be similar and are likely to be [subject] to VAT at the same rate.

Dine In and Other Meal Deals

From an IPOS perspective, the Dine In promotion apportions the discount across all items in the bundle and VAT is calculated automatically on the discounted amount by UPC. Meal Deals such as the lunchtime sandwich deal work in the same way. As such, no adjustment is required to DGT for this." (FTT [111])

THE FTT'S DECISION

The correct VAT treatment of the Promotion

25. The FTT considered (FTT [75]) that the decisions in *Lex Services plc* v *Customs and Excise Comrs* [2004] STC 73 and *Hartwell plc v Customs and Excise Comrs* [2003] STC 396 supported the following propositions which were helpful to M&S:

(1) The fact that in previous promotions M&S had chosen to deliver to customers three food items and a bottle of wine for £10 in a way which (if M&S were correct) had a different VAT effect did not breach the principle of fiscal neutrality given the importance of legal certainty.

(2) It is the value given by the parties to the transaction which is relevant, not the value which a third party might ascribe.

(3) The fact that M&S could have achieved the same broad economic effect by structuring the transaction in the same way as the previous Dine In for £10 promotion was irrelevant.

26. However, *Hartwell* and *Lex Services* did not answer the central issue, viz the correct VAT analysis of the Promotion. (FTT [76])

27. The FTT's task was to analyse and determine the nature of the agreement between M&S and the customer, starting with the words of the promotion and assessing whether that accorded with commercial and economic reality. (FTT [77])

28. The FTT referred to the judgments of Lord Neuberger in *Airtours Holidays Transport Ltd v Revenue and Customs Comrs* [2016] STC 1509 at [47]-[49] and *Secret Hotels 2 v Revenue and Customs Comrs* [2014] UKSC 16 at [31]-[32]. (FTT [79]-[80])

29. The FTT described (FTT [81]) the Promotion as an offer by M&S, completed when the customer paid for his or her goods at the till. The terms and conditions were "sparse" and were not available in stores. Within stores, the promotion was simply advertised as "Dine In for Two £10 with Free Wine", or on a display reading "Main Course + Side dish + Dessert All for £10" and underneath that wording "With Free Wine or non-alcoholic alternative". (FTT [82])

30. The FTT noted that the customer did not have to take the wine in order to obtain the three food items but in practice over 99% of customers did so. (FTT [84])

31. The key passage in the FTT's reasoning was (FTT [85]):

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

32. Next, the FTT rejected (FTT [86]-[88]) the proposition that there were two promotions: the first being an offer of three food items for the price of £10 and the second being an offer to participants in the first offer to take a free bottle of wine.

33. It was possible for a business to provide goods or services which were free, viz provided unconditionally and with no strings attached: for example, free samples of food or beverages in-store. Similarly, a business may give away promotional materials, such as branded pens, mugs or bags. The decision in *Kuwait Petroleum (GB) Ltd v Customs and Excise Comrs* (Case C-48/97) [1999] STC 488 showed that it was possible that goods or services might be provided for nil consideration. (FTT [89])

34. The present appeal, however, did not concern "reward" goods or goods supplied with vouchers. The FTT said (FTT [90]-[91]):

> "90. [The Promotion] is a single offer, with all four items supplied simultaneously and in the same till transaction for consumption on the payment of £10. Receipt of the wine is conditional on payment of the £10 and the purchase of the food items.
>
> 91. Even before turning to the commercial and economic reality, in my judgment the construction of the agreement between the parties does not support the conclusion that the wine is being supplied for no consideration, as with an in-store sample or promotional merchandise. The wine is an integral element of the promotion, usually the single most valuable element in terms of separate retail shelf price. The wine can only be obtained as part of that promotion: as the in-store display made plain: "[F]ree wine only available to over 18s with the £10 meal"."

35. The overt terms of the offer made by M&S to its customers were to be established by reference to all the circumstances, but the clear wording of the offer and the stated terms and conditions could not be overridden by factors such as the till receipt or refund policy. (FTT [92])

36. The position of the tiny minority of customers who did not take the wine was immaterial. What mattered was not that a customer might choose to take only the food items for his £10 but that he could not acquire the wine without paying £10 and taking the food items. (FTT [93])

37. M&S's argument that the food items alone "make commercial sense for M&S and the customer" had no bearing on the construction of the agreement. Similarly it was unpersuasive

that certain combinations from the food items available would equal rather than exceed £10, which the FTT described as "scarcely an attractive proposition for the customer." The issue to be determined was not the VAT treatment of customers who only take the food items but the vast majority who also take the wine. (FTT [94])

38. The FTT considered M&S's central argument: because the food was sold for £10 and always has a shelf price sold separately of at least £10, the wine must be free. The FTT agreed that if the wine was free no separate consideration attached to it, but the FTT had determined that, notwithstanding the label attached to it by M&S, the wine was not free. The FTT understood that there was no dispute between the parties as to the allocation of the £10 across the three food items and the wine in the event that M&S's appeal failed. The VAT at stake averaged approximately 70p per £10 unit. (FTT [95])

39. Accordingly, the FTT concluded that on a proper analysis of the terms and conditions of the Promotion the customer paid £10 in order to receive the three food items and the wine, so that the price must be allocated across the four items for VAT purposes. (FTT [96])

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

41. Where a retailer provided in-store samples of food or beverages free of charge, the economic and commercial reality accorded with such samples being correctly described as "free". A customer, however, who walked into an M&S store during the Promotion and simply asked for a "free" bottle of wine would have been given short shrift. (FTT [99])

42. The fact that the wine would usually be the most expensive item in the Promotion in terms of separate shelf prices reinforced the FTT's analysis of the economic and commercial reality. (FTT [100])

43. The FTT considered that the correctness of its conclusion was supported by the consequence that it avoided untaxed consumption of wine on which M&S had claimed input tax. (FTT [101])

The Bespoke Retail Scheme Agreement

44. The FTT concluded that the BRSA did not bear the construction suggested by M&S for three reasons.

45. First, each promotion had to be analysed on its own particular terms. The significance of relatively minor differences in labelling and structure was evidenced by the similarities between the different examples (and different VAT treatments) in Appendix 5. The Promotion had not been introduced by M&S at the time when the BRSA was signed, and it was not raised with HMRC by M&S until almost 2 months after it was signed. Although Appendix 5 referred to "common examples" and was stated not to be exclusive, without explicit wording it could not bind HMRC to treat future unspecified promotions in a certain way. (FTT [120])

46. Secondly, the examples in Appendix 5 overlapped considerably and the FTT considered it was "wholly unclear" in which category the Promotion could be said to fit. M&S asserted that the Promotion fell in and only in the "Free items" paragraph, but the FTT

considered that the "Dine In" paragraph was at least as apt, and, if anything, more so. (FTT [121])

47. Thirdly, it was clear that HMRC did not agree with M&S as to the effect of the disputed example in the "Free items" paragraph. In that situation, the FTT considered that Clause 5.1 of the BRSA was engaged: this set out the agreement of the parties that "the normal VAT treatment" would determine the meaning or effect of the disputed term in the BRSA. The FTT read that phrase as a reference to the VAT treatment absent the retail agreement. Because the FTT had found that the correct treatment of the Promotion was that the £10 must be apportioned across the food and wine items, Clause 5.1 had the effect that that treatment applied. (FTT [122])

48. Accordingly, the FTT concluded that the BRSA did not operate to prevent output tax from being charged on the wine element in the Promotion. (FTT [123])

THE RELEVANT LEGISLATION

49. It was common ground that the relevant statutory provisions were compatible with the provisions of EU law and that, therefore, reference need only be made to domestic UK legislation. Nonetheless, we think it is helpful to refer to the principal relevant EU law provision. Article 2(1)(c) of Council Directive 2006/112/EC (the **"PVD"**) provides that supplies of services for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT. Article 73 of the PVD provides:

> "In respect of the supply of goods or services, other than as referred to in Articles 74 to 77 [which are not relevant to this appeal], 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."

50. References below, except as otherwise stated, are to the Value Added Tax Act 1994 (**"VATA 1994"**) so far as relevant.

51. Section 4 provides:

> "4. Scope of VAT on taxable supplies.
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

52. Section 5 provides:

> "5. Meaning of supply: alteration by Treasury order.
>
> (1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.
>
> (2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—
>
> (a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

53. Section 19 provides:

"19. Determination of value

(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.

…

(4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it."

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

"(1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.

(2) Sub-paragraph (1) above does not apply where the transfer or disposal is—

(a) a business gift the cost of which, together with the cost of any other business gifts made to the same person in the same year, was not more than £50;

(b) the provision to a person, otherwise than for a consideration, of a sample of goods.

(2ZA) In sub-paragraph (2) above—

"business gift" means a gift of goods that is made in the course or furtherance of the business in question:

"cost", in relation to a gift of goods, means the cost to the donor of acquiring or, as the case may be, producing the goods;

"the same year", in relation to a gift, means any period of twelve months that includes the day on which the gift is made."

55. Schedule 6 paragraph 6 provides:

"(1) Where there is a supply of goods by virtue of—

…

(b) paragraph 5(1) or 6 of Schedule 4 (but otherwise than for a consideration)

…

then except where the person making the supply opts under paragraph A1(3) above for valuation on the flat-rate basis or paragraph 10 below applies, the value of the supply shall be determined as follows.

(2) The value of the supply shall be taken to be—

(a) such consideration in money as would be payable by the person making the supply if he were, at the time of the supply, to purchase goods identical in every respect (including age and condition) to the goods concerned: or

(b) where the value cannot be ascertained in accordance with paragraph (a) above, such consideration in money as would be payable by that person if he

were, at that time, to purchase goods similar to, and of the same age and condition as, the goods concerned: or

(c) where the value can be ascertained in accordance with neither paragraph (a) nor paragraph (b) above, the cost of producing the goods concerned if they were produced at that time.

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

56. Pursuant to section 58, paragraph 2(6) of Schedule 11 provides for retail schemes as follows:

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

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

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

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

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

"Retail schemes

67.—

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

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

(a) publishing a fresh notice,

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

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

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

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

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

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

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

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

GROUNDS OF APPEAL

59. M&S appeals against the FTT's decision on the following grounds.

Correct VAT treatment of the wine element of the Promotion – first ground of appeal

60. First, M&S contended that the FTT erred in law by deciding that the wine was not supplied free of charge and that the £10 consideration should be allocated across all four items.

61. Secondly, M&S argued that contrary to the FTT's conclusion (FTT [98]), the description of the wine as "free" was not simply a label being used in a marketing sense, which failed to reflect either "commercial common sense" or economic reality.

62. Thirdly, the true position was that the £10 was consideration for the supply of the three food items and not for the wine.

Effect of the BRSA – second ground of appeal

63. M&S argued that the FTT erred in law in concluding that the BRSA did not bind HMRC to treat the Promotion in a way that resulted in the £10 being allocated to the three food items and the wine being supplied for no consideration.

64. Under this heading, M&S contended that the fact that the Promotion was not expressly named within the listed items set out under the 'Free items' category of the BRSA was irrelevant. The purpose of the BRSA was to establish the agreed method of accounting for VAT in respect of a variety of different transactions and the agreement was stated to have effect for a period of five years.

65. Secondly, the Promotion did not fall within the example of 'Dine In and Other Meal Deals'. This example concerned promotions in which the discount was apportioned across all items in the bundle.

66. Thirdly, there was no disagreement between the parties as to the meaning or effect of the terms of the BRSA. The disagreement between the parties was as to whether the Promotion fell within the terms of 'Free items'.

Effect of the deemed supply rules – third ground of appeal

67. It was common ground between the parties that, if M&S failed on its first or second grounds of appeal, its third ground of appeal (relating to the FTT's decision (FTT [134]-[135]) concerning the application of paragraph 5 Schedule 4 VATA 1994) was no longer relevant and, accordingly, this third ground of appeal was not pursued at the hearing. Essentially, M&S accepted that it could not satisfy the conditions specified in paragraph 5 Schedule 4 VATA 1994.

THE RELEVANT AUTHORITIES

68. The decisions of the CJEU establish that a supply of goods or services "for consideration" requires the existence of a direct link between the goods or services provided and the consideration received: Case 154/80 *Staatssecretaris van Financiën v Association Coöperatieve Aardappelenbewaarplaats GA* [1981] ECR 445 (**"the *Dutch Potato* case"**) at [12], Joined Cases C-53/09 and C-55/09 *HMRC v Loyalty Management UK Ltd* [2010] STC 2651 at [51] and Case 102/86 *Apple and Pear Development Council* [1988] STC 221 at [12] (***"Apple and Pear"***).

69. The *Dutch Potato* case concerned a farmers' co-operative which owned a potato store. For two years the co-operative considered it unnecessary to levy the usual storage charges on its members. The Dutch tax authorities argued that there was nevertheless consideration for the farmers' use of the store in the form of a reduction in the value of their shares in the co-operative. The CJEU rejected the tax authority's argument. The CJEU set out principles which have been followed and applied in later cases. Importantly, at [9], the CJEU stated that the interpretation of 'consideration' was a matter of Community law. The Court said:

> "It should be noted in the first place that the expression ["consideration"] in issue is part of a provision of community law which does not refer to the law of the member states for the determining of its meaning and its scope; it follows that the interpretation, in general terms, of the expression may not be left to the discretion of each member state."

70. At [12] the CJEU set out the requirement for a "direct link" between the goods or services[1] provided and the payment made:

> "A provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received …"

71. Finally, at [13], the CJEU described some of the characteristics of consideration:

> "… the consideration for the provision of a service must be capable of being expressed in money … such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria."

72. Thus, the consideration for a supply is the actual ("subjective") consideration received and not some objective amount, based on e.g. market value of the supply.

73. The concept of a 'direct link' was subsequently considered by the CJEU in *Apple and Pear*. The Apple and Pear Development Council was a statutory body the main object of which was to promote the sale of apples and pears in England and Wales. All commercial growers with two hectares or more and fifty or more trees had to register with the Council and pay a mandatory annual charge (based on the area of their land) to fund its running expenses. The issue before the CJEU was whether the Council carried on a business for VAT purposes and this turned on whether it involved the making of taxable supplies for consideration. The CJEU focussed on the meaning of 'direct link'. At [15], the CJEU stated:

> "Moreover, no relationship exists between the level of benefits which individual growers obtain from the services provided by the Council and the

[1] Although the *Dutch Potato* case involved the supply of services, the CJEU has confirmed in Case C-34/99 *Primback Ltd v CCE* [2001] STC 803 at [25] that the same principles apply to supplies of goods.

> amount of the mandatory charges which they are obliged to pay under the 1980 Order."

Consequently, the CJEU decided that the mandatory charges did not constitute consideration having a direct link with the benefits accruing to the individual growers as a result of the Council's activities.

74. The next case to consider the issue of "direct link" was Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leuwarden* [1994] STC 509 (**"*Tolsma*"**). In that case Mr Tolsma played a barrel organ on the public highway in the Netherlands. During his performance he solicited donations from passers-by using a collecting tin; he also knocked on the doors of houses and shops to ask for donations, but without being able to claim any legal right to remuneration or contributions. The Dutch tax authority claimed that Mr Tolsma should account for VAT on the amounts collected from the passers-by. At [14], the CJEU stated:

> "… a supply of services is effected 'for consideration' … and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

75. The CJEU noted, at [17], that there was no agreement between Mr Tolsma and the passers-by, and that there was therefore no "necessary link" between the musical service he provided and the payments to which it gave rise. At [19] the CJEU said:

> "The payments are entirely voluntary and uncertain and the amount is practically impossible to determine."

76. As this Tribunal, commenting on *Tolsma*, said in *National Car Parks Ltd v HMRC* [2017] UKUT 247 (TCC), [2017] STC 1859 (Rose J and Judge Sinfield) **("*NCP*")** at [26]:

> "It is clear from *Tolsma* that there is a taxable transaction only if a direct link exists between the services supplied and the consideration received. The direct link means that there must be a legal relationship between the supplier and the customer pursuant to which the supplier receives remuneration in return for the services supplied to the customer which is the value actually given by the customer in return for the service."

77. In *NCP*, this Tribunal considered the correct VAT treatment of over-payments for car parking charges. NCP operated "pay and display" car parks. A customer who parked his or her car in an NCP car park was required to display a ticket, obtained from a ticket machine in the car park, which allowed the car to be parked for a specified time. The amount payable depended on how long the car was to be parked and the terms were displayed on notice boards in the car park. Where customers did not have the correct change to pay the exact amount they had to, if they wished to park, put into the ticket machines more than the amount due because the ticket machines did not provide change. NCP claimed a repayment of overpaid VAT in respect of these overpayments by customers.

78. This Tribunal dismissed NCP's appeal. It held:

> "41. It is clear from *Tolsma* that there is a supply of services for VAT purposes where there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. Article 73 of the PVD states that the taxable amount is everything which constitutes consideration obtained or to be obtained by the supplier from the customer or a third party in return for the supply, including subsidies (which are irrelevant in this case). In the hypothetical example, the customer paid

> £1.50 to obtain a ticket which allowed him or her to park for up to an hour. The customer could have obtained the same right in return for a payment of £1.40. When determining the taxable amount, the question posed by Article 73 is not: could the customer have obtained the same service for less? Article 73 requires the Tribunal to ask what was consideration received or to be received by the supplier from the customer (there was no third party in this case) in return for the supply.
>
> 42. Consideration for the purposes of VAT does not bear the same meaning as it does for the purposes of English contract law and an analysis based on domestic law would not necessarily produce the correct result for VAT purposes - see paragraph 9 of the *Dutch Potato* case. There is accordingly no need to analyse the supplies using English contract law concepts of offer and acceptance or consideration. It follows that what is shown on the machine or written on the ticket is of only limited relevance.
>
> 43. The meaning of consideration for VAT purposes is clear from the *Dutch Potato* case and *Campsa*: it is the value actually given by the customer (or a third party) in return for the service supplied and actually received by the supplier and not a value assessed according to objective criteria. The service and the value given or to be given in return for it may be ascertained from the legal relationship between the supplier and the customer. Under the contract between NCP and the customer which is formed when the customer inserts money into the ticket machine at the car park and receives a ticket, NCP grants the customer the right to park his or her car for one hour in return for inserting not less than £1.40. If the customer wishes to park for up to three hours then he or she must pay not less than £2.10. It follows that NCP agrees to grant a customer the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. If a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to one hour. Accordingly, that is the taxable amount for VAT purposes."

79. The decision of this Tribunal in *NCP* was appealed to the Court of Appeal, and it was known that it was in fact being argued before the Court of Appeal on the same day as the first day of the hearing before us. The Court of Appeal handed down their judgment on 20 May 2019, the neutral citation of which is [2019] EWCA Civ 854. It upheld the decision of this Tribunal. Newey LJ (who gave the only reasoned judgment) undertook an analysis of the contractual position, holding that the contract was brought into being when the customer, having inserted coins of at least the value of £1.40, pressed the green button, thereby accepting NCP's offer to provide an hour's parking in return for the coins which the customer had inserted (at [18]). Newey LJ said that that analysis might be slightly different from that of this Tribunal but not in any way that made a practical difference (at [20]). It followed that the price paid by customers would vary, some paying £1.40 for an hour's parking, others £1.50 or £2 (at [21]). He concluded:

> "22. In the circumstances, I agree with the UT and FTT that, in the hypothetical example, the consideration and taxable amount was £1.50. Like the UT, I consider that, "[i]f a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to an hour." That means that NCP's present appeal should be dismissed."

We are grateful to counsel, who sent us the decision of the Court of Appeal with brief submissions. We do not think the decision changes the analysis and we have not thought it necessary to invite any further submissions.

80. The analysis adopted in *NCP* therefore was that the £1.50 was in fact the price payable under the contract. It is clear, however, that a legal relationship can exist even if there is no legally enforceable contract. The authority for this proposition is the decision of the CJEU in *Town and County Factors Ltd v Customs and Excise Commissioners* (Case C-498/99) [2002] STC 1263 (**"*Town and County*"**). That case involved a "spot-the-ball" competition the rules of which provided that the obligations of the competition promoters (as set out in the rules) were binding "in honour only" and were not legally enforceable. Despite that provision, the organisers never refused to provide the prizes specified by the rules. The CJEU held at [17]-[24] that the fact that the rules of the competition were not legally enforceable did not preclude the existence of a legal relationship. To do otherwise, the Court said, would compromise the effectiveness of the VAT regime: first, it would mean that transactions falling within the regime could vary from Member State to Member State as a result of differences between the various legal systems and, secondly, it would enable suppliers to escape the incidence of VAT by simply including a non-enforceability provision in their contracts. In any event, it could not validly be maintained that no legal relationship existed between the parties on the basis that the obligation on the provider of the service was not enforceable in circumstances where the impossibility of seeking enforcement derived from an agreement between the supplier and the recipient of the service because that agreement in itself was the very expression of a legal relationship.

81. M&S relied on the decision of the CJEU in *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* (Case C-48/97) [1999] STC 488 (**"*Kuwait Petroleum*"**). In that case Kuwait Petroleum or the independent retailer offered to supply both petrol and vouchers in return for payment; the vouchers were exchangeable later for "free" gifts. The CJEU held that it was for the national court to determine whether, at the time of purchasing the fuel, the parties had agreed that part of the price paid would constitute the value given in return for the vouchers (or, later, the redemption goods). However, the Court indicated at [30] and [31] that there were two factors which made it difficult for Kuwait Petroleum to maintain that the vouchers were not supplied free of charge. The first factor was that the redemption goods were described as gifts. The second factor was that it was not contested that the retail price of the fuel was the same whether or not the purchaser accepted the vouchers, and that this was the only price referred to on the invoice. Furthermore, the Court noted at [28], with apparent approval, that the Advocate General had observed[2] that the supply of fuel and the exchange of goods for vouchers were two separate transactions. As we read that decision, the significance of there being two separate transactions was that it was an indication that there was a lack of reciprocal performance – a requirement referred to in the preceding paragraph [27] of the Court's judgment.

82. In relation to the analysis of a contract and whether the contractual terms reflected economic reality, the CJEU addressed this issue in (Case C-653/11) *HMRC v Newey (trading as Ocean Finance)* [2013] STC 2432 (**"*Newey*"**). In that case, a loan broker established in the

[2] At [43] of his opinion, Advocate General Fennelly said: "In reality, it is not possible to treat as a single economic transaction a series of events consisting of two distinct transactions; sale of fuel coupled with the supply of stamps and the subsequent supply of redemption goods for those stamps. This applies a fortiori when, in addition to the above events, the sale of fuel to an independent dealer and the latter's participation in the sails scheme must also be considered. Although it may sometimes be necessary to determine whether a number of distinct transactions may, for VAT purposes, be treated as constituting one single transaction (see, in this respect, my opinion of 11 June 1998 in *Card Protection Plan v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270 at 286, para 42), I agree with the United Kingdom that the approach in cases like *Skatteministeriet v Henriksen* (Case 173/88) [1990] STC 768, [1989] ECR 2763 is not of general application. In the present case, as Kuwait Petroleum accepted at the hearing, a number of transactions are involved. At a minimum, the sale of fuel and the supply of the redemption goods were separable not only in time but as to subject matter. Where the [promotion] is operated by a dealer, yet another transaction occurs."

United Kingdom set up a Jersey company which concluded loan contracts with lenders. The Jersey company commissioned advertising services, which were not subject to VAT under Jersey law. HMRC argued that in reality the advertising services were supplied directly to the broker in the United Kingdom and thus subject to VAT. The issue before the Court was whether the contractual terms were decisive for identifying the supplier and the recipient of a supply of services. The CJEU held:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, *Revenue and Customs Comrs v Loyalty Management UK Ltd, Baxi Group Ltd v Revenue and Customs Comrs* (Joined cases C-53/09 and C-55/09) [2010] STC 2651, [2010] ECR I-9187, paras 39 and 40 and the case law cited).
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of arts 2(1) and 6(1) of the Sixth Directive have to be identified.
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> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
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> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.
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> 46. The court has held on various occasions that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see *Halifax*, para 71 and the case law cited) and that the effect of the principle that the abuse of rights is prohibited is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage (see *Ampliscientifica Srl v Ministero dell'Economia e delle Finanze* (Case C-162/07) [2011] STC 566, [2008] ECR I-4019, para 28; *Tanoarch sro v Tax Directorate of the Slovak Republic* (Case C-504/10) [2012] STC 410, para 51; and *JJ Komen en Zonen Beheer Heerhugowaard BV v Staatssecretaris van Financiën* (Case C-326/11) [2012] STC 2415, para 35).
>
> …
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> 49. It is for the referring court, by means of an analysis of all the circumstances of the dispute in the main proceedings, to ascertain whether the contractual terms do not genuinely reflect economic reality and whether it is Mr Newey, and not Alabaster, who was actually the supplier of the loan broking services at issue and the recipient of the supplies of advertising services provided by Wallace Barnaby."

83. As regards the analysis of the contractual position the Supreme Court, in *Airtours Holidays Transport Ltd v Revenue and Customs Comrs* [2016] STC 1509, was faced with the question of identifying the correct recipient of services for the purposes of claiming input tax. In that case Airtours was in financial trouble and its creditors instructed accountants to prepare a report on the company's financial position. Airtours paid the cost of the preparation of that report and claimed a deduction for input tax. This was disallowed on the basis that the

accountants' services were supplied to the creditors rather than to Airtours. The Supreme Court upheld the disallowance and Lord Neuberger summarised the applicable principles relating to contractual analysis and VAT:

> "47. This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at para 27, Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.
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> 48. The same approach was adopted by the Court of Justice in *Revenue and Customs Comrs v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651, paras 39 and 40, where they stated, citing previous judgments, that "consideration of economic realities is a fundamental criterion for the application of the common system of VAT", and added that that issue involved consideration of "the nature of the transactions carried out" in the particular case. To much the same effect, in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, para 14, the Court of Justice said that "a supply of services is effected 'for consideration' … only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance", which it explained as meaning "the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". In the context of the supply of goods, the Court made the same point in *Primback Ltd v Customs and Excise Comrs* (Case C-34/99) [2001] 1 WLR 1693, para 25, where it described "the determining factor" as "the existence of an agreement between the parties for reciprocal performance, the payment received by the one, being the real and effective counter-value for the goods furnished to the other"."

84. In *Secret Hotels2 v Revenue and Customs Comrs* [2014] UKSC 16 the Supreme Court had to decide whether a travel agent fell within a VAT margin scheme which only applied to travel agents acting in their own name and not as intermediaries. Lord Neuberger said:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the

> parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.""

SUBMISSIONS AND DISCUSSION

First ground of appeal

Submissions in outline

85. Mr Macnab, appearing for HMRC, submitted that when a customer was supplied with the three food items and the wine pursuant to the Promotion, that was a single transaction comprising three separate zero-rated supplies (of food) and a separate standard-rated supply of wine.[3] Mr Macnab further submitted that those supplies were made for a consideration. When a customer paid £10 the customer received the three food items and the wine. Unless the customer paid £10 he or she would not receive a bottle of wine. There was, therefore, a direct link between the goods provided and the consideration received – there was a causal relationship between the payment of £10 and the four items received by the customer.

86. Mr Macnab noted that there was a legal relationship, as required by the decision of the CJEU in *Tolsma*, between the customer and M&S. There was, therefore, reciprocal performance – the £10 received by M&S constituted the value given in return for the goods supplied to the customer. The payment of £10 was the actual (subjective) value actually given by the customer in return for the goods (the three food items and the wine).

87. The above analysis, Mr Macnab argued, did not need to take account of the label attached by M&S when describing the bottle of wine as "free". Furthermore, in order for the wine to be supplied for a consideration, it was not necessary that the parties must have specifically agreed that an identified part of the £10 was to be apportioned to the wine element of the four goods supplied; all that was required was a direct link, a legal relationship and reciprocal performance.

88. Ms Shaw QC, appearing for M&S, argued that no part of the £10 paid to M&S constituted consideration of value given for the provision of the wine.

89. The correct starting point, in Ms Shaw's submission, was to look at the terms of the agreement between the customer and M&S. The signs in the store, the terms displayed online and the in-store till receipts were consistent with the proposition that the £10 was paid solely for the three food items and that no part of that amount was attributable to the wine, which was provided free of charge.

[3] Essentially, all four items had to be in the same basket when brought to the till. It was not possible to buy three food items and then come back later in the day or the following day and claim a free bottle of wine.

90. Furthermore, Ms Shaw noted that the three food items were always worth at least £10 and in some instances more. They were consistently treated as costing £10 e.g. on the till receipt. Similarly, the wine was consistently described as being free. If no wine was available, the three food items could still be purchased for £10 but no discount was given for the unavailability of the wine.

91. In those circumstances, Ms Shaw submitted that there was reciprocal performance between the payment of £10 and the provision of the three food items but there was no such reciprocal performance in relation to the wine. None of the £10 constituted value given in return for the wine.

92. Ms Shaw relied heavily on *Kuwait Petroleum*. In that case the price of the fuel was the same whether or not the customer took the vouchers (although 79% of customers did). As the CJEU observed at [27] it was for the national court to determine whether part of the price paid for the fuel would constitute value given for the vouchers or the redemption goods.

93. In *Kuwait Petroleum*, there was nothing to suggest that the parties had agreed that part of the fuel price should be attributed to the vouchers. With the Promotion the same was true – there was nothing to suggest that any part of the £10 constituted value given for the wine. Similarly, the Court in *Kuwait Petroleum* emphasised that the redemption goods were described as "free" – that was the same as regards wine in the Promotion.

94. Thus, Ms Shaw submitted that absent an agreement to attribute part of the £10 to the wine (in the absence of the suggestion that the agreement between the parties was a sham or somehow incorrectly represented the substance of their agreement) none of the £10 could be attributed to the wine and the agreement of the parties should be respected.

95. The FTT had, said Ms Shaw, wrongly held against M&S because the provision of free wine was conditional upon the customer purchasing three food items for £10. But in *Kuwait Petroleum* the provision of vouchers and redemption goods were conditional on fuel having been purchased.

96. The distinction between the Promotion and *Kuwait Petroleum* was simply one of timing. With the Promotion, the condition was satisfied at the time the customer paid for the goods at the till. In *Kuwait Petroleum* the redemption goods were provided later when the customer produced the necessary vouchers. That, in Ms Shaw's submission, could not be a material ground of distinction.

97. Moreover, M&S's position was supported by the economic reality of the Promotion. Ordinarily, the agreement between the parties would reflect economic reality (*Newey* at [43]). The value of the three food items would always be at least £10. At no point was any part of the £10 attributed to the wine and no discount was given on the three food items if, unusually, the wine was not available.

Discussion

98. Essentially, the question is whether the £10 paid by the customer for the Promotion should be allocated only to the three food items or to the three food items and the wine.

99. There was in fact little disagreement about the correct legal test to apply in this case. Both parties accepted that a supply was effected for a consideration only if there was a "direct link between the [goods or] service provided and the consideration received" (*Tolsma* [13]). There had to be a "legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (*Tolsma* [14]).

100. Similarly, it was not disputed that "consideration" for VAT purposes has a specific EU law meaning and does not bear its usual English law meaning: *NCP* at [42] (this Tribunal) and [8] (Court of Appeal) and the *Dutch Potato* case at [9].

101. In our view, the payment of £10 constituted consideration both for the three food items and also for the wine. There was a direct link between the provision of the wine and the payment of the £10. The wine would not be provided unless the customer paid £10 at the till. Furthermore, there was reciprocal performance between the customer and M&S. In a single simultaneous transaction, the customer paid £10 and M&S supplied the three food items and supplied the wine. This was not a case like *Kuwait Petroleum* where there were effectively two separate transactions which destroyed the reciprocity of performance between the parties (i.e. between the payment for the fuel and the supply of the reward goods): see paragraph 81 above. Indeed it was not possible for the customer to separate the transaction into two: he or she could not buy the three food items first, and then return later that day or the next day to claim the wine (see footnote 3 above).

102. We consider that the FTT was broadly correct at [85] in its construction of the contract between M&S and its customers. Strictly, although the FTT describes M&S as making an offer to its customers, it was in fact making a conditional invitation to treat as a matter of English contract law. The customer made an offer to buy the food and the wine on payment of £10 at the till. That offer was accepted by M&S when it accepted payment of £10 for the four items. The wine, as the FTT observed at [91] and [93], was an integral element of the Promotion and it was not possible for a customer to acquire the wine without paying £10; in practice over 99% of customers did acquire the wine.

103. We also agree with the FTT at [98] that the economic and commercial reality was that M&S was offering a package of four items and that the word "free" was being used in a marketing or promotional sense in the same way that an offer might be described as "buy two get one free". The wine would only be provided if the customer paid £10.

104. The analysis is not affected by the fact that a customer would have had to pay £10 for the food items even if the wine was not supplied (either through customer choice or lack of availability). We see no reason why the supply of the four items should be treated differently simply because in a small minority of cases only three items were supplied for £10. As we have said, in over 99% of cases the customer was supplied with wine, which suggests that for the vast majority of customers the wine was a significant element of the transaction; in other words, the economic reality is that most customers saw the promotion as a four item deal.

105. In the end however we do not think the proportion of customers opting to take the wine is of any legal significance. The customer has a choice whether to take just the three food items, or the three food items and the wine (or non-alcoholic drink). For those who only take the food, they pay £10 and receive the food items; for those who take the wine, they pay £10 and receive the food items and the wine. The question is what the £10 is consideration for in the latter case, and it does not matter whether this happens in a minority of cases or (as is in fact the case) the vast majority of them.

106. The position is in some ways analogous (although the other side of the coin) to *NCP*. There some people pay £1.40 for an hour's parking; some pay £1.50; and some may even pay £2. What each motorist pays is up to them, and the coins they happen to have available; but the question of what the consideration is in the case of the motorist who pays £1.50 does not turn at all on how common or unusual it is to pay £1.50. In the case of those who do, the consideration for an hour's parking is £1.50, even though others have only paid £1.40. In other words the services supplied are the same but the consideration differs according to the particular transaction. In the present case, the consideration paid is always £10, but the

choice of goods supplied is up to the customer (and the availability of the wine). It does not matter how many or how few people do take the wine; the question is what the consideration is paid for in the case of those who do. In our view if the customer takes the wine as well as the food, the £10 is consideration for the wine as well as the food.

107. Accordingly, in our view, the FTT correctly decided that under the Promotion the customer paid £10 in order to receive the three food items and the wine with the result that the consideration must be allocated across the four items for VAT purposes. As the FTT observed (FTT [101]), this conclusion is supported by the consequence that it avoids untaxed consumption of wine on which M&S has claimed input tax.

108. We should add that M&S wished to adduce additional evidence in relation to the Promotion from the Advertising Standards Authority. We reviewed this additional material but did not consider that it added anything to the evidence already considered by the FTT. The additional material did not relate to VAT and did not bear directly on the relevant VAT tests.

Second ground of appeal

109. In the light of our conclusion on the first ground of appeal, it is strictly unnecessary for us to deal with the second ground of appeal, viz the application and effect of the BRSA. This is because M&S conceded that if part of the £10 was attributable to the wine under the Promotion, the wine could not be said to have been "free". Nonetheless, because the point was argued fully before us, we shall express our views briefly.

110. On this issue we would have reached a different conclusion from the FTT.

111. In our view, the clear terms of Appendix 5 of the BRSA, paragraph (iv) under the heading "Free items", seem to us applicable to the Promotion. The relevant part of the BRSA read as follows:

> "It has been agreed with HMRC that where an item or items are given away "free" on the purchase of a specified product or products or products to a specified value, no VAT is due on the "free" item (e.g. (i) food festival promotion (spend £35 and receive a free specified item); (ii) buy six deli items and get a free cool bag; (iii) buy a salad and receive a free bottle of water and (iv) *buy a meal for two and receive a free bottle of wine (e.g. "Weekend In"))*. The IPOS system has been configured to automatically do this and as such no adjustment to DGT is required." (Emphasis added)

112. "Weekend In" was a forerunner of the Promotion (FTT [118]). The substance of paragraph (iv) was that it referred to a promotional offer ("buy a meal for two and receive a free bottle of wine") which was identical to the Promotion. Furthermore, it is plain from the use of "*e.g.*" that this promotion was being used as an example of what would fall within the BRSA.

113. Similarly, we are unconvinced by the FTT's conclusion at [121] that it was "wholly unclear" into which category the Promotion fell. It seems to us that it fell fairly and squarely within paragraph (iv) of "Free items" and not within "Dine In and Other Meal Deals". The purpose of the examples given in that former section was to illustrate the types of deals that fell within "Free items" by reference to their terms and characteristics rather than by their "branding".

114. Moreover, we are not persuaded that the Promotion could not fall within the terms of the BRSA because it was introduced after the BRSA was signed. The BRSA was an agreement which was envisaged to last five years. In Appendix 5, under the heading "Business Promotions", it was stated that the purpose of the section:

> "…is to outline how these are dealt with by the IPOS system [M&S's electronic accounting system] *by using common examples*. Please note that *this list is not designed to be exhaustive*." (Emphasis added)

115. The BRSA was, therefore, intended to be illustrative and not exhaustive. It was not intended to apply only to promotions specified at the date that the BRSA was concluded.

116. In this context, it seems to us immaterial that the relevant HMRC official responsible for negotiating the BRSA did not realise that he was committing HMRC to the inclusion of the example in paragraph (iv). In short, subject to the issue of whether the taxpayer has provided inaccurate or misleading information, the relevant question is not why he agreed but what he agreed.

117. Finally, we respectfully disagree with the conclusion of the FTT at [122] that clause 5.1 had the effect that paragraph (iv) was replaced by "the normal VAT treatment". Section 1 of the BRSA is headed 'Legal Framework' and contains the following provisions:

> "3.2 Both parties enter into this agreement on the basis of a full disclosure of the relevant facts.
>
> …
>
> 5. Disputes and omissions
>
> 5.1 In the event of a disagreement about the meaning or effect of the terms of the scheme, the normal VAT treatment will determine the meaning or effect of the term.
>
> …
>
> 7. Legal Framework
>
> 7.1 The terms of this agreement do not amend the normal provisions of VAT law except to the extent necessary to simplify the valuation of output tax on retail supplies."

118. In our view, clause 5.1 should be construed narrowly. It was common ground that the BRSA was a legally binding agreement. It seems to us that where a transaction or promotion falls plainly within the terms of an agreed treatment, such as paragraph (iv) under the heading "Free items", it would make a nonsense of the agreement if one party could unilaterally declare itself to be in "disagreement" about the meaning or effect of the terms of the scheme and thereby effectively nullify its express provisions. Moreover it is to be noted that clause 5.1 does not simply provide that in the case of a disagreement, the normal VAT treatment shall apply as if the BRSA did not exist. What it provides is that the normal VAT treatment shall "determine the meaning or effect of the term." In our view, clause 5.1 was intended to operate in cases where the wording of the BRSA was genuinely ambiguous or unclear, and was intended to enable the BRSA in such a case to be given a meaning which accorded with the normal VAT treatment. In other words it is a provision which aids in the construction of a provision of the BRSA, not one which displaces it altogether.

119. For these reasons, had we reached a different conclusion on the first ground of appeal, we would have held that the BRSA did operate to prevent output tax being charged on the wine element of the Promotion.

Third ground of appeal

120. As we have indicated, the third ground of appeal was not pursued at the hearing.

CONCLUSION

121. We dismiss this appeal.

COSTS

Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE NUGEE **JUDGE GUY BRANNAN**

UPPER TRIBUNAL JUDGES

Release date: 27 June 2019