Neutral Citation: **[2022] UKUT 00326 (TCC**

Case Number: UT/2021/000156

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London EC4A 1NL

VALUE ADDED TAX – off-street car parking provided by local authority – effect of parking tariffs set by order of the local authority – whether overpayments are consideration for a taxable supply – yes – appeal dismissed

Heard on: 11 October 2022
Judgment date: 06 December 2022

Before

MR JUSTICE MILES

JUDGE ASHLEY GREENBANK

Between

THE BOROUGH COUNCIL OF KING'S LYNN AND WEST NORFOLK
Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Natasha Barnes, Counsel, instructed by PSTAX Limited

For the Respondents: Brendan McGurk, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by the appellant, the Borough Council of King's Lynn and West Norfolk (the "Council"), against a decision of the First-tier Tribunal (the "FTT") dated 18 January 2021 and reported at [2021] UKFTT 10 (TC) (the "FTT Decision") dismissing a claim by the Council for repayment of VAT overpaid. The respondents are the Commissioners for His Majesty's Revenue and Customs ("HMRC").

2. The appeal concerns the VAT treatment of off-street parking provided by local authorities where charges for parking are collected by a machine which does not offer change. In particular, it concerns the VAT treatment of "overpayments" made by customers who tender an amount which exceeds the advertised tariff.

3. The VAT treatment of off-street car parking has come before the courts and tribunals in several previous cases in the context of supplies made by both local authorities and private sector providers. In a previous appeal by the Council, which is reported as *Borough Council of King's Lynn and West Norfolk v HMRC* [2012] UKFTT 671 (TC) ("*King's Lynn No.1*"), the FTT decided that an overpayment was not part of the consideration for a supply made by a local authority, such as the Council. However, in *National Car Parks Limited v HMRC* [2019] EWCA Civ 854 ("*NCP CA*"), the Court of Appeal held that, in similar circumstances, an overpayment was part of the consideration for a supply of off-street car parking by a private sector provider. The Upper Tribunal, in that case, had reached a similar conclusion and, in doing so, had expressed the view that *King's Lynn No.1* was wrongly decided (see *National Car Parks Limited v HMRC* [2017] UKUT 247 (TCC) ("*NCP UT*") at [44]). However, having not heard argument on the specific considerations that might apply to the provision of off-street car parking by local authorities, the Court of Appeal declined to take a view on the correctness of the FTT's decision in *King's Lynn No.1* (*NCP CA* [23]).

4. The question before the tribunal in this case is essentially whether the conclusion of the Court of Appeal in *NCP CA* applies equally to the provision of car parking services by local authorities (and accordingly whether *King's Lynn No.1* was rightly decided). The FTT (Judge Brooks) decided that an overpayment was part of the consideration for a supply of off-street parking by the Council. It is therefore implicit in Judge Brooks's decision that, in his view, the FTT's decision in *King's Lynn No.1* was wrong. The Council appeals against the FTT Decision with the permission of the FTT.

FACTS

5. The facts are not disputed. They are set out in the FTT Decision (at [13]), and were taken from the decision of the FTT in *King's Lynn No.1* where the FTT stated (at [6]-[8]):

> 6. The [Council] operates car parks with ticket dispensing machines. The machines display sliding scale hourly parking charges car park information, opening times and payment instructions. The machines indicate that no change is given and overpayments are accepted.
>
> 7. Where a member of the public puts money into the machine they obtain a parking sticker which can be fixed to the windscreen of their vehicle. It shows the day, month and year, the amount paid and the period of validity of the ticket. ….
>
> 8. The machine accepts a variety of coins including 5p, 10p, 20p, 50p, £1 and £2. The parking facilities are available on a twenty-four hour, seven day a week basis and tickets are purchased for daily parking between the periods 8.00am and 6.00pm and overnight parking at a fixed rate. The first hour is

> charged at £1.40. The first three hours at £2.10 and the first five hours at £4.10. The scale of charges for the charging periods are fixed by Order.

6. In its decision in this case, the FTT (FTT Decision [1]) referred to an example of a person, who only has a pound coin and a 50p piece, who wishes to park their car for one hour, for which the advertised tariff is £1.40, and who puts £1.50 into a ticket machine that does not provide change. The same example was used by counsel in their submissions before us and we will also refer to it in this decision notice.

THE LAW

7. It will help our explanation if we set out some of the relevant statutory provisions and case law background at this stage.

VAT

8. We will begin with the relevant VAT legislation and case law.

9. Article 2(1)(c) of Council Directive 2006/112/EC (the "Principal VAT Directive" or "PVD") provides that transactions that are subject to VAT include:

> the supply of services for consideration within the territory of a Member State by a taxable person acting as such.

10. Article 73 PVD determines the taxable amount of any supply. It provides so far as relevant:

> In respect of the supply of goods or services… 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…

11. The provisions of the Principal VAT Directive have been implemented in UK law by the Value Added Tax Act 1994 ("VATA"). Neither party suggested that the provisions of the Principal VAT Directive had not been properly implemented. The equivalent domestic law provisions are found in sections 5 and 19 VATA. Section 5(2)(a) VATA defines "supply" to include:

> all forms of supply but not anything done otherwise than for a consideration.

Section 19 VATA sets out the value of a supply for VAT purposes in the following terms:

> **19. Value of supply of goods or services.**
>
> (1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.
>
> (3) If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.
>
> (4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.
>
> (5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in

> money as would be payable by a person standing in no such relationship with any person as would affect that consideration. 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.

12. As can be seen from the extracts that we have set out above, the value of a supply on which VAT is charged is the amount of the "consideration". We were referred by the parties to various decisions of the Court of Justice of the European Union ("CJEU")[1] on the meaning of "consideration" for VAT purposes and, in particular, in Articles 2(1)(c) and 73 PVD. The same principles apply to the meaning of "consideration" in sections 5(2)(a) and 19 VATA.

13. The cases to which we were referred included: Case 154/80 *Staatssecretaris Van Financiën v Cooperatiëve Vereniging Cooperatiëve Aardappelenbewaarplaats GA* [1981] 3 CMLR 337 (the "*Dutch potato* case"), Case 102/86 *Apple & Pear Development Council v Customs and Excise Commissioners* [1988] STC 221 ("*Apple & Pear*"), Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 ("*Tolsma*"), Case C-37/16 *Minister Finansów v Stowarzyszenie Artystów Wykonawców Utworów Muzycznych i Slowno-Muzycznych SAWP* ("*SAWP*").

14. The key principles that we extract from our review of those cases are as follows:

(1) The term "consideration" is "part of a provision of [EU] law which does not refer to law of the Member State for the purpose of determining its meaning and scope" (the *Dutch potato* case [9]). It therefore has an autonomous EU-wide meaning. It does not have the same meaning for VAT purposes as the meaning that it might be given for the purposes of domestic contract law.

(2) If an amount is to be taken into account as part of the consideration for a supply, there must be "a direct link between the service provided and the consideration received" (the *Dutch potato* case [12], *Apple & Pear* [12]). That will be the case where 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 (*Tolsma* [14], *SAWP* [25]-[26]).

(3) The taxable amount is everything which makes up the consideration for the supply (the *Dutch potato* case [12], Article 73 PVD).

(4) The consideration is the value actually given by the customer (or a third party) and received by the supplier in return for the service supplied, and not a value assessed according to objective criteria (the *Dutch potato case* [13]).

We did not understand the parties to disagree with these basic principles.

15. It was also common ground between the parties that, in determining the nature of any transaction for VAT purposes – including the nature of any supply made pursuant to it and the consideration for that supply – the starting point is the contractual relationship between the parties. The tribunal should only go behind the contract and have regard to the economic reality if the contract does not reflect the true agreement between the parties. In this respect, we were referred in particular to the judgment of Arden LJ in *ING Intermediate Holdings Limited v HMRC* [2017] EWCA Civ 2111 ("*ING*"), where she said (at [37]):

> 37. I accept that, when determining the nature of a transaction for VAT purposes, the court must look at the economic purpose of the transaction.

[1] In this decision, we have referred to both the Court of Justice of the European Union and its predecessor the European Court of Justice as the "CJEU".

> However, the starting point is to determine what the parties have agreed. In my judgment, the correct reading of [*HMRC v Newey (t/a Ocean Finance)* (C-653/11), [2013] STC 2432 and *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v HMRC* [2014] UKSC 16] is that the court only goes behind the contract if the contract does not reflect the true agreement between the parties.

The statutory provisions governing the provision of off-street parking by the Council

16. The Council's case in this appeal turns on the scope of the powers of the Council to provide car parking places and charge for their use. We have summarized the key provisions in the paragraphs below.

17. The statutory provisions enabling the Council to provide car parking places and charge for them are contained in the Road Traffic Regulation Act 1984 ("RTRA"), and the Local Authority Traffic Orders (Procedure) (England and Wales) Regulations 1996 (the "Parking Regulations").

18. Section 32(1) RTRA permits a local authority to provide off-street parking places:

> [w]here for the purpose of relieving or preventing congestion of traffic it appears to a local authority to be necessary to provide within their area suitable parking places for vehicles.

19. Section 35(1) RTRA contains the statutory authority for a local authority to make orders specifying the terms for the use of car parking places provided under section 32 and charges for their use. It provides, so far as relevant:

> (1) As respects any parking place—
>
> (a) provided by a local authority under section 32 of this Act, or
>
> (b) …
>
> the local authority, subject to Parts I to III of Schedule 9 to this Act, may by order make provision as to—
>
> (i) the use of the parking place, and in particular the vehicles or class of vehicles which may be entitled to use it,
>
> (ii) the conditions on which it may be used,
>
> (iii) the charges to be paid in connection with its use (where it is an off-street one), and
>
> (iv) …

20. Section 35(3) RTRA allows such orders to provide for the use of ticket machines:

> (3) An order under subsection (1) above may provide for a specified apparatus or device to be used—
>
> (a) as a means to indicate—
>
> (i) the time at which a vehicle arrived at, and the time at which it ought to leave, a parking place, or one or other of those times, or
>
> (ii) the charges paid or payable in respect of a vehicle in an off-street parking place; or
>
> (b) as a means to collect any such charges,
>
> and may make provision regulating the use of any such apparatus or device.

21. Under section 35C(1), a local authority may vary charges imposed by an order under section 35(1)(iii) by notice given under that section.

22. The Parking Regulations contain the procedures that local authorities must follow when making orders imposing new car parking charges or giving notices varying existing charges. Those procedures include:

(1) before making an order or giving any notice, a local authority must publish a notice in a newspaper that circulates in the area in which the relevant parking place is situated providing a statement of the parking places to which it relates and the charges that it intends to apply (regulation 7(1)(a), regulation 25 and Parts I and II of Schedule 1 to the Parking Regulations);

(2) the local authority must also take "such other steps as it may consider appropriate for ensuring that adequate publicity about the order is given to persons likely to be affected by its provisions" (regulation 7(1)(c));

(3) individuals must be given at least 21 days from the publication of the notice to register objections in writing (regulation 8).

23. The relevant charges for the purpose of this appeal were made by the Council under The Borough Council of King's Lynn and West Norfolk (Off-street Parking Places) (No. 2) Order 2015 (the "2015 Order"). The 2015 Order has subsequently been amended by The Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Amendment Order 2018. The 2015 Order is expressed to be made by the Council "in exercise of their powers under sections 32, 35, 38 and …39 of the [RTRA]".

24. Article 6(1) of the 2015 Order provides that:

> (1) The driver of a vehicle using a Pay and Display Parking Place shall, on leaving the vehicle wholly within a Parking Bay (where marked in the Parking Place) and prior to leaving the Parking Place pay the appropriate Parking Charge in accordance with the scale of charges specified in column 6 of Schedules 1 to 3 to this Order.

25. The "Parking Charge" is defined in paragraph 2 of the 2015 Order as "the sum of money specified in Column 6 of Schedules 1 to 3 of this Order". By way of example, the FTT set out an extract from Schedule 1 of the 2015 Order (FTT Decision [11]). It was in the following form:

SCHEDULE 1

1	2	3	4	5	6
Name and Location of Parking Place	Classes of Vehicles	Position in which Vehicles may wait	Days of Operation of Parking Place	Charging Periods at Parking Place	Scale of Charges within that Charging
1 Albert Street King's Lynn	Motor car, motor cycle and disabled persons vehicle displaying a disabled persons badge	Wholly within parking bays where marked at the parking place	Monday to Sunday (including Bank Holidays except Christmas Day)	Monday to Sunday 0800 hrs to 1800 hrs 1800 hrs to 0800 hrs	£1.40 for up to 1 hour £2.10 for up to 3 hours £4.10 for up to a maximum permitted stay of 5 hours £1.00 standard charge

1A Albert Street Car Park, King's Lynn (4 Voucher Parking Bays – south western side	Motor car, motor cycle and disabled persons vehicle displaying a disabled persons badge	Wholly within parking bay marked for 20 minute time limited parking	Monday to Sunday (including Bank Holidays except Christmas Day)	Monday to Sunday at All Times	Waiting Limited to 20 minutes with no return within 3 hours No Charge

26. Article 6(3) states that:

> The Parking Charge referred to in Article 6(1) will be payable by:-
>
> (i) the insertion of an appropriate coin or coins into a ticket machine. The driver having paid the Parking Charge will be issued with a ticket via the ticket machine: or
>
> (ii) other means as authorised by the Council and prominently displayed on a board at the Parking Place'.

27. The Council also has more general powers under the Local Government Act 1972 ("LGA") which are relevant. Section 111 LGA provides, so far as relevant:

> **111.— Subsidiary powers of local authorities**
>
> (1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
>
> (2) …
>
> (3) A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.
>
> …

THE FTT DECISION

28. As we have mentioned above, it is common ground between the parties that the starting point for any analysis of the transaction between the Council and a customer for VAT purposes is the contractual position. This was also the case before the FTT. However, the parties diverged on the correct analysis of the contractual position.

(1) Using the example to which we have referred above, Mr McGurk, who also appeared for HMRC before the FTT, argued that, although the Council made an offer to customers to park their vehicles for £1.40 for one hour through the advertised tariff, by making the overpayment of 10p, the customer was making a counter-offer to pay £1.50 to park for one hour, which was then accepted by the machine on behalf of the Council.

(2) Mr Garcia, of Mishcon de Reya LLP, who appeared for the Council before the FTT, argued that, on the basis of the legislation that we have just described and the decision of the House of Lords in *McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC* [1992] 2 AC 48 ("*McCarthy & Stone*"), it would have been be ultra vires for the Council either to vary its tariff from the tariff specified in the 2015 Order or to accept a counter-offer at a higher rate and so the overpayment (10p) was not consideration for any supply, but was recoverable by the customer.

29. The FTT addressed these submissions at [16]-[21] of the FTT Decision.

> 16. It is therefore necessary to consider the transaction between a driver parking his or her vehicle and the Council to determine its nature for VAT purposes. The starting point for this, as is clear from *Newey*, *Secret Hotels2* and *ING*, is to determine what was agreed between the parties. This was the approach adopted by the Court of Appeal in *NCP* and it is common ground that I should do so in the present case.
>
> 17. The parties agree that there is an offer by the Council to a driver to park his or her vehicle in the off-street car park at rate shown on tariff board, ie the £1.40, and that the contract was concluded the moment the money was put into the machine by the driver. As Lord Denning MR said in *Thornton v Shoe Lane Parking* [1971] 2 QB 163 at 169:
>
> > "The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot."
>
> 18. However, the parties differ in relation to the contractual analysis. Mr McGurk contends by putting £1.50 into the machine a driver is making a counter offer which, as it is clear that no change is given, is accepted by the machine whereas Mr Garcia, relying on *McCarthy & Stone*, argues that it would be ultra vires for the Council to either vary its offer upwards or accept a counter offer and, as such, the excess charge (10p) is not consideration and is recoverable by the driver.
>
> 19. I agree with Mr Garcia that it is clear from *McCarthy & Stone* that the Council cannot make any offer to provide off-street parking at a price other than as set out in the scale of charges contained in the Parking Order and shown on the tariff board. However, there is nothing within the Parking Order or any other statutory provision to prevent a driver from making a counter-offer in excess of parking charge or for the Council to accept such a counter-offer. Indeed, by doing so the Council is not seeking to unilaterally extend its power, contrary to the Parking Order or impose a higher charge, as it is the driver who, for his or her own reasons, such as not having the correct change, has offered to pay more than the tariff rate in order to park.
>
> 20. As such, adopting Mr McGurk's analysis of the contractual arrangement between the Council and driver (i.e. the acceptance of the driver's counter offer by the Council), it follows that, notwithstanding the £1.40 tariff, there is a direct link between the entire £1.50 and the supply of parking with the result that that 10p "overpayment" should be treated as consideration for the supply of parking services and therefore subject to VAT.
>
> 21. Having reached such a conclusion it is not necessary to consider whether I would have been bound to do so by the decision of the UT in *NCP*.

30. In summary, therefore, the FTT accepted the Council's submission that it did not have the capacity to impose a charge other than the tariff specified in the 2015 Order. However, in the FTT's view, that did not prevent the Council from accepting a counter-offer at a higher rate made by the customer. The FTT then adopted the contractual analysis put forward by HMRC – involving a counter-offer made by the customer – and found that the overpayment

was part of the "consideration" for a supply by the Council. On that basis, the FTT dismissed the appeal.

31. The FTT's conclusion is inconsistent with the decision of the FTT in *King's Lynn No.1* and, although it did not expressly say so in its decision, given the references in the FTT Decision to the decision in *King's Lynn No. 1*, we infer that the FTT concluded that the decision in *King's Lynn No.1* was wrong.

THE GROUNDS OF APPEAL

32. The FTT granted permission to appeal against its decision on the following ground:

> … the FTT applied a flawed contractual analysis that led it wrongly to conclude that the "overpayment" represented part of the consideration for the supply of parking services. In particular, the FTT erred in concluding that the Council entered into a contract with the driver to charge a larger amount (that included the overpayment) for the supply of parking services in circumstances where the Council had no statutory authority to enter into such a contract.

THE PARTIES' SUBMISSIONS

33. We will address the parties' detailed submissions as part of our discussion of the issues below. At this stage, we should record the key points arising from the parties' submissions.

34. As we have described, the parties did not disagree on the interpretation of the VAT legislation and the relevant principles that are to be derived from the VAT case law on the meaning of consideration for VAT purposes. As before the FTT, the parties agreed that the nature of the service and the value given in return for it can be ascertained from the legal relationship between the supplier and the customer and that, in this case, these issues turn on the correct construction of the contract between the Council and the customer as it represents the commercial and economic reality of the transaction between them.

35. The parties, however, diverge on the correct construction of that contract in cases where the customer makes an overpayment.

36. Ms Barnes, for the Council, makes the following submissions:

(1) The Council could only charge for off-street parking by exercising its powers within the statutory framework. The Council had no capacity to enter into a contract to provide parking at a fee that was different from that set out in the 2015 Order. An agreement at any other price was void (*McCarthy & Stone*). Section 111(1) LGA could not be relied upon to permit the Council to levy a higher charge.

(2) If there is more than one "realistic" construction of the contractual position, the court should prefer an alternative that makes a contract enforceable and effective over an alternative that would result in it being void (*Tillman v Egon Zehnder Ltd* [2019] UKSC 32 ("*Tillman*") per Lord Wilson at [41]-[42]).

(3) There is a realistic alternative construction to that put forward by the FTT (and HMRC). The appropriate construction was that the contract price was the price set out in the 2015 Order and the overpayment was a voluntary contribution by the customer to the Council. The overpayment was not part of the consideration for VAT purposes because there was no direct link with the supply.

37. Mr McGurk, for HMRC, makes the following submissions:

(1) The correct construction of the contract was either the construction adopted by the FTT (i.e. the acceptance of a customer's counter-offer by the Council (FTT

Decision [20])) or a construction under which the Council accepted the amount paid (including the overpayment) in discharge of the parking charge.

(2) In either case, there was nothing in the statutory framework which prevented the Council from entering into an agreement under which it collected the overpayment: the overpayment was received by the Council pursuant to the contract with the customer and was part of the consideration for VAT purposes.

(3) Even if there was no statutory authority under the RTRA, the Parking Regulations and the 2015 Order, the collection of the overpayments was "calculated to facilitate, or [was] conducive or incidental to", the discharge of other "functions" of the Council and so the Council had the requisite authority to collect the overpayments under section 111(1) LGA.

(4) HMRC's construction was consistent with the decision of the Court of Appeal in *NCP CA*. It was therefore to be preferred not least because the Council's interpretation would result in differential treatment between public sector and private sector providers of off-street parking and breach the principle of fiscal neutrality.

DISCUSSION

38. We shall begin our analysis with the construction of the contract that arises between the Council and a customer. We will start by setting out our views on the correct construction on the assumption that the statutory regime which governs the imposition of charges for off-street car parking provided by the Council does not prevent the Council from entering into a contract which contemplates that it will collect the overpayments. (This, of course, is HMRC's position.) We will then turn to whether or not the fact that the Council has to operate within that statutory regime can affect the interpretation of the contract and, if so, how.

HMRC's construction/the position if the statutory regime has no effect

39. In his skeleton argument, and by reference to the example to which we refer at [6] above, Mr McGurk submitted that the correct interpretation was that adopted by the FTT (FTT Decision [18], [20]) – and advanced by HMRC before the FTT – that, although the Council makes an offer to provide a parking place for an hour for £1.40, by putting £1.50 into the machine a customer is making a counter-offer which, as it is clear that no change is given, is accepted by the Council through the machine. Before this tribunal, he advanced the same construction. However, he also accepted that a construction more closely based on the Court of Appeal's analysis in *NCP CA* may also be an acceptable interpretation. In either case, however, in his submission, the result was the same: the overpayment (10p) was paid pursuant to the agreement between the parties, was part of the value given by the customer in return for the service and so was part of the consideration for VAT purposes.

40. In our view, the analysis of the contractual position by the Court of Appeal in *NCP CA* is instructive. In that case, Newey LJ (with whom the other members of the court agreed) analysed the transaction between the provider of car parking places and the customer in the following terms (*NCP CA* [15]-[21]):

> 15. What, then, is the correct contractual analysis? More specifically, was the contractual price in the hypothetical example £1.40 (as Mr Cordara argued) or £1.50 (as Mr McGurk suggested)?
>
> 16. A contract between NCP and the customer will, in the hypothetical example, have been concluded no later than the point at which the customer chose to press the green button to receive her ticket. As Mr Cordara pointed out, she could also have obtained a ticket for an hour's parking by paying 10p less (although without the right coins that was not a practical

possibility). The tariff board showed the price for an hour's parking as £1.40. That, Mr Cordara said, was also the contract price. That the 10p was not part of the price is confirmed, he submitted, by the reference to "overpayments" being accepted: it would not be appropriate to speak of the 10p as an "overpayment" if it formed part of the price.

17. On the other hand, the customer in fact obtained a ticket by inserting coins to the value of £1.50. The customer had, moreover, been warned that no change would be given. That being so, she ought reasonably to have appreciated that she was parting with her money on an out-and-out basis.

18. English law, of course, generally adopts an objective approach when deciding what has been agreed in a contractual context. Here, it seems to me that, taken together, the tariff board and the statement that "overpayments" were accepted and no change given indicated, looking at matters objectively, that NCP was willing to grant an hour's parking in exchange for coins worth at least £1.40. In the hypothetical example, the precise figure was settled when the customer inserted her pound coin and 50p piece into the machine and then elected to press the green button rather than cancelling the transaction. The best analysis would seem to be that the contract was brought into being when the green button was pressed. On that basis, the pressing of the green button would represent acceptance by the customer of an offer by NCP to provide an hour's parking in return for the coins that the customer had by then paid into the machine. At all events, there is no question of the customer having any right to repayment of 10p. The contract price was £1.50.

19. This is the contractual analysis in the hypothetical example where the customer has only a pound coin and a 50p piece, and therefore has no alternative but to pay £1.50 if she wishes to park in the car park. However, the analysis is the same even if it is possible for the customer to obtain the right coins, for example by obtaining change from another user of the car park. If the customer nevertheless chooses to insert £1.50 and presses the green button, it remains the case that she has accepted the offer to provide an hour's parking at that price.

20. This analysis may be slightly different from that of the UT, which referred to an offer by NCP to grant the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. In fact the offer made by NCP is more specific, to grant the right to park for an hour in return for the coins shown by the machine as having been inserted when the green light flashes. That is the offer which the customer accepts. However, if this is a difference of analysis, it makes no practical difference in the present case.

21. It follows that the price paid by customers for a set period of parking will vary somewhat. In the hypothetical example, some customers will pay just £1.40 for an hour's parking. In other instances, the price might be up to £2 (if, say, a customer had only two one pound coins and chose to insert those). There is no question of the price being uncertain in any individual case, however. It will be whatever sum, equal to or in excess of £1.40, that the customer has paid into the machine.

41. Newey LJ's analysis does not involve any counter-offer being made by the customer. Rather, his analysis is that the board showing the advertised tariff and the statement that overpayments were accepted and no change given together comprised an offer to provide one hour's parking in exchange for coins worth at least £1.40, which is accepted when the customer, having inserted the coins, presses the button on the machine.

42. We prefer that analysis to the counter-offer analysis put forward by the FTT and advanced by Mr McGurk in his skeleton argument. We acknowledge that the counter-offer analysis was put forward by HMRC (and adopted by the FTT) to address the argument put forward by the Council. However, the counter-offer analysis strikes us as artificial. The customer does not in any real sense formulate an alternative offer before inserting the coins and pressing the button on the machine. The terms – that overpayments are accepted and that no change will be given – are all part of the offer that is made to the customer and accepted when the customer presses the button on the machine. For this reason, we prefer a construction that is aligned with that of the Court of Appeal in *NCP CA*.

The Council's construction/the effect of the statutory regime

43. As we have mentioned above, the Council's position is that the Council has no capacity to enter into an agreement of this nature because it is authorized to charge for parking places only where the tariff is fixed in accordance with the statutory regime, in this case, as determined by the 2015 Order.

44. Ms Barnes's position is that the Council had no capacity to enter into an agreement on the terms that we have just described. If that was the correct construction, the contract would be void. An alternative construction is that the contract price for parking is the amount of the advertised tariff and any overpayment is a voluntary contribution made by the customer to the Council. On the basis of the validity principle – that where there is more than one alternative "realistic" construction of the contractual position, the court should prefer an alternative that makes a contract enforceable and effective over an alternative that would result in it being void (*Tillman* [41]-[42]) – Ms Barnes says that the tribunal should prefer this contractual analysis. On that basis, she says the overpayment (10p) was not paid pursuant to the agreement between the parties, was not part of the value given by the customer in return for the service and so was not part of the consideration for VAT purposes.

45. In support of this argument, Ms Barnes referred us to various authorities, but relied heavily on the decision of the House of Lords in *McCarthy & Stone*.

46. *McCarthy & Stone* concerned the legality of charges made by a council for informal advice relating to possible development proposals provided by the council's planning officers to developers in advance of the submission of formal applications for planning permission. The House of Lords held that the charges were not authorized by statute, ultra vires and void.

47. In his judgment, Lord Lowry set out the principle that any charge levied by the council required statutory authority, which must be provided by "express words or necessary implication" (page 66G). In support of this principle, Lord Lowry referred (page 67B-E) to the decision of the Court of Appeal in *Attorney-General v Wilts United Dairies Ltd.* (1921) 37 TLR 884 ("*Wilts United Dairies*") and, in particular, to the judgment of Atkin LJ where he said (at page 886):

> In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the court to believe that the legislature had sacrificed all the well-known checks and

> precautions, and, not in express words, but merely by implication, had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

48. Lord Lowry also referred (page 67F-G) to a separate passage from the judgment of Atkin LJ in *Wilts United Dairies* which demonstrates that the principle applies equally where a charge is levied directly or where the obligation to make the payment takes the form of an agreement between the council and the developer. The passage occurs in Atkin LJ's judgment at page 887 where he said:

> It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use.

49. Ms Barnes says that the principles derived from the decision of the House of Lords in *McCarthy & Stone* (and the Court of Appeal decision in *Wilts United Dairies*) apply to this case. For any charge imposed by the Council for car parking services to be lawful, it must be imposed by statutory authority expressed in clear terms, either by express words or necessary implication. It is irrelevant whether the charge is imposed under an agreement with the customer.

Does the statutory regime affect the capacity of the Council?

50. The Council has the statutory power to provide off-street parking places under section 32 RTRA. It also has a statutory power to charge for the provision of those parking places under section 35(1)(ii) RTRA and to use machines to collect those charges under section 35(3) RTRA. However, it can only charge for the provision of parking places by fulfilling the requirements under the Parking Regulations. The Council has exercised those powers by setting the tariffs in the 2015 Order.

51. In our example, the Council clearly has the statutory authority to impose a charge for parking in the amount of the advertised tariff of £1.40 for one hour. The question for this tribunal is whether it also has the power to collect the overpayment of 10p from a customer who tenders £1.50. Ms Barnes's submission is that it does not – because to allow the Council to collect the overpayment under the terms of an agreement with the customer would allow the Council to impose a charge for which it has no clear statutory authority.

52. We disagree. In our view, this is not a case like *McCarthy & Stone* or *Wilts United Dairies*. In *McCarthy & Stone*, the council charged developers a fixed fee of £25 for pre-application planning advice provided by its planning officers under a policy that was adopted by council. The developers had no choice but to pay the fee if they wanted to obtain the service. The House of Lords found that it was unlawful for the council to charge for the pre-application planning advice because it lacked the statutory authority to impose any form of charge for that service. In *Wilts United Dairies*, the Ministry of Food, which was granted extensive powers in wartime to regulate the distribution of food, granted licences to dairies to purchase milk on terms that they had to pay a levy calculated by reference to the amount of milk purchased. There was no express statutory power for the Ministry to levy any charge. The Court of Appeal (and House of Lords) found that there was no statutory authority for the levy and it could not be enforced against the dairies.

53. In this case, there is no dispute that the Council has authority to impose a charge for parking that is set through the appropriate statutory procedures. In our example, that charge is the authorized tariff of £1.40 for one hour. At no point in the course of the transaction with a customer using the car park does the Council seek to impose a charge of anything other than the authorized tariff of £1.40. A customer wishing to use the car park is made aware from the signage of the advertised tariff, that no change is given, and that overpayments are accepted. If the customer does not have the correct change, the customer can seek to obtain the correct change before parking. If the customer inserts coins in the machine with a value in excess of the advertised tariff, the customer is able to cancel that transaction and to pay the advertised tariff at any point before the customer presses the button on the machine to accept the transaction. If the customer presses the button to confirm the transaction having inserted coins with a value in excess of the advertised tariff, this will be because the customer has chosen to do so for their own convenience (or perhaps because the customer has made a mistake). However, at no point has the Council imposed a charge higher than £1.40.

54. In our view, the principle set out by the Court of Appeal in *Wilts United Dairies* and endorsed by the House of Lords in *McCarthy & Stone* is not engaged in these circumstances. This is not a case in which a customer has been required by the Council to pay an additional charge for which it had no statutory authority in order to obtain a service. The Council has not sought to impose a charge that is higher than the advertised tariff of £1.40. The powers of the Council under the RTRA contemplate that it will use machines to collect the car parking charges. They must also be taken to contemplate that those machines might not be able to provide change to customers. If not, the Council would have to maintain machines with sufficient coins at all times to provide the exact change for any combination of coins offered by the customer or not to permit parking for customers who cannot present the exact change.

55. For these reasons, we agree with HMRC that the statutory scheme does not prohibit the collection of the overpayments by the Council as one of the terms of the agreement that is reached between the Council and a customer who uses a ticket machine to pay for off-street parking services. There was no limitation on the capacity of the Council in this respect. It follows that the statutory regime does not prevent the Council from entering into an agreement with the customer on the terms that we have described – that is, on the basis of an offer by the Council to provide off-street parking for one hour for coins worth at least £1.40, subject to the conditions that no change will be given but that overpayments will be accepted. If that offer is accepted by a customer who makes an overpayment, it does not change the analysis.

The taxable amount

56. As we have described, the meaning of consideration for VAT purposes is clear from the case law. It does not have the same meaning as it does for the purposes of English contract law. It is the value of everything given by the customer (or a third party) and received by the supplier in return for the service supplied. It is not a value assessed according to objective criteria, for example, by reference to the market value of the service.

57. The service and the value given or to be given in return for it can be ascertained from the legal relationship between the supplier and the customer. Under the agreement between the Council and the customer which is formed when the customer inserts money into the machine at the car park, the Council grants the customer the right to park their car for one hour in return for inserting coins with a value of not less than the advertised tariff, in our example, £1.40. If a customer accepts that offer by inserting coins of a higher value, in our example £1.50, that amount (including the overpayment) is the value given by the customer and received by the Council under the legal relationship between them in return for the right to park for up to one hour. That is the taxable amount for VAT purposes.

58. It follows from our analysis that *King's Lynn No.1* was wrongly decided. We agree with the Upper Tribunal in *NCP UT* (*NCP UT* [44]) in that respect.

59. Our conclusion on this point is sufficient to decide this appeal in favour of HMRC. There are, however, two issues that were argued before us and which we should address if, for any reason, this appeal proceeds further.

Section 111(1) LGA

60. The first such issue is the potential application of section 111(1) LGA.

61. Although Mr McGurk's principal submission – with which we have agreed – was that there was nothing in the statutory scheme that prevented the Council from collecting the overpayments under the terms of an agreement between the Council and the customer in the form that we have described, Mr McGurk also submitted, in the alternative, that section 111(1) LGA provided the Council with the power to collect the overpayments on the grounds that to do so "was calculated to facilitate" or is "conducive or incidental to" the discharge of its functions of providing and charging for off-street parking facilities and using ticket machines to collect the charges. So, once again, there was no limit on its capacity to enter into an agreement with the customer which contemplated the collection of the overpayments by the Council.

62. Ms Barnes submitted that section 111(1) LGA did not extend the Council's powers to enable it to impose a higher charge for parking than the charge set out in the 2015 Order.

> (1) The relevant function of the Council for the purpose of section 111(1) LGA in this case was the power of the Council to provide off-street parking. The power to charge an additional amount for off-street parking in excess of the authorized tariff (i.e. the overpayment) was not incidental to that function (and so could not be conferred by section 111(1)). It was at best incidental to the power to charge the authorized tariff for off-street parking, which was not a function of the Council (*McCarthy & Stone* per Lord Lowry at page 74H to page 75A).
>
> (2) Furthermore, Parliament had enacted a clear statutory code for the charging of fees for off-street parking. Section 111(1) LGA could not be used to imply powers to circumvent the statutory code where Parliament had set out detailed provisions as to how the statutory function should be exercised (*Credit Suisse v Waltham Forest London Borough Council* [1997] QB 362 per Neill LJ at page 374C).

For these reasons, Ms Barnes submitted, HMRC could not rely on section 111(1) LGA as providing the basis for the Council's capacity to enter into a contract that contemplated the collection of the overpayments by the Council.

63. We disagree with Ms Barnes's submission.

64. If we had been unable to reach the conclusion that the Council had capacity to enter into contracts with customers in the form that we have described under the RTRA, the Parking Regulations and the 2015 Order, we would have concluded that the Council had such capacity on the basis of section 111(1) LGA.

> (1) The reference to the "functions" of a local authority in section 111(1) LGA is broad and extends to all the activities of the local authority which it is under a duty to perform or which it has power to perform under relevant legislation (*McCarthy & Stone* per Lord Lowry at page 69B and 69D referring with approval to the judgments of Woolf LJ in the Divisional Court and Stephen Brown P in the Court of Appeal in *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 QB 697 (Divisional Court) and [1992] 2 AC 1 (Court of Appeal)).

(2) There is no distinction to be made between functions which the Council has a duty to provide, and those which it has a power to provide (*McCarthy & Stone* per Lord Lowry at page 70H). The powers of the Council to provide parking places, to charge for the use of the parking places, and to use ticket machines as a means to collect those charges are all part of the functions of the Council for the purposes of section 111(1).

(3) For similar reasons to those that we give at [54] above, the ability to collect overpayments facilitates, or is conducive or incidental to, the discharge of those functions (and so is conferred by s111(1)). Without the ability to collect overpayments, the Council would not be in a position to use ticket machines except those which provide exact change or would not be able to offer parking places for payment to customers who did not have the exact change.

Fiscal neutrality

65. The second issue relates to the application of the principle of fiscal neutrality.

66. We have reached our conclusion on the issues on this appeal without material consideration of the principle of fiscal neutrality. Our conclusion is nonetheless consistent with the decision of the Court of Appeal in *NCP CA* and no issue of the potential distortion of competition arises.

CONCLUSION AND DISPOSITION

67. For the reasons that we have given above, we agree with the FTT that, for VAT purposes, the overpayments are part of the consideration for the provision of off-street parking by the Council.

68. We dismiss this appeal.

MR JUSTICE MILES

JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 06 December 2022