[2015] UKUT 0641 (TCC)

Appeal number: UT/2015/0115

VAT – retailer vouchers – VATA, Sch 10A – provision of vouchers to customers free of charge as part of business promotion scheme – whether a right to claim deduction of input tax on acquisitions of vouchers from issuer retailers or intermediaries – arts 167, 168, Principal VAT Directive – whether provision of vouchers free of charge gives rise to an output tax charge - art 3, VAT (Supply of Services) Order 1993, art 26 PVD

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

ASSOCIATED NEWSPAPERS LIMITED **Respondent**

TRIBUNAL: LORD JUSTICE DAVID RICHARDS
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, London EC4 on 6 and 7 October 2015

Kieron Beal QC, Michael Jones and Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

John Walters QC, instructed by KPMG LLP, for the Respondent

DECISION

1. These are the combined appeals of HMRC against two connected decisions of the First-tier Tribunal ("FTT").

2. By the first ("ANL(1)"), which was released on 24 January 2014, the FTT (Judge Poole and Mr Adams) decided that the provision by Associated Newspapers Limited ("ANL") free of charge to its customers as part of a business promotion campaign of vouchers redeemable at certain high street retailers was not to be treated, by article 3 of the Value Added Tax (Supply of Services) Order 1993 ("the 1993 Order"), as a supply of services in the course or furtherance of ANL's business, and was accordingly not subject to a liability to account for output VAT in that respect.

3. By the second ("ANL(2)"), released on 13 August 2015, the FTT (Judge Poole alone) decided that ANL was entitled to deduct any input VAT that actually arose on ANL's purchase of the vouchers for the purpose of its business promotion schemes, both from the retailers themselves and from intermediaries, and that (it having been accepted by HMRC that supplies by an intermediary carried input tax at a "blended" rate reflecting an estimate of the liability to VAT on the supplies by the retailer on redemption) ANL incurred recoverable input tax, at such blended rate inherent in the vouchers, both on its direct purchase of the vouchers and on purchase from an intermediate taxable supplier.

4. HMRC appeal ANL(1) with permission of Judge Bishopp in this tribunal, and ANL(2) with permission of Judge Poole.

The facts

5. There is no challenge to the facts found by the FTT, which we can summarise quite shortly. They are set out in [6] to [31] of ANL(1) and at [3] to [13] of ANL(2).

6. As part of a promotional scheme designed to enhance the sales circulation of its newspapers, ANL bought retailer vouchers from popular retailers, such as Marks & Spencer. The vouchers were issued by the retailers directly to ANL, and at a discount to their face value. For customers who took ANL's titles for a requisite period of time, ANL would give those customers a retailer voucher for free. At different times the face value of the voucher was in various amounts between £10 and £100. In addition, ANL would provide the participating newsagent with a retailer voucher, in an amount, typically, of £5 for each customer who continued to take the newspapers throughout the promotional period. This scheme, described by the FTT in ANL(1), went under the acronym SPICE, which stood for Sales Performance Improvement by Circulation Excellence. It ran from 2007 to 2010.

7. In ANL(2), the appeals concerned both SPICE and the successor to SPICE, namely the Mail Rewards promotion which began in the summer of 2011. That scheme enabled customers who bought the Daily Mail or the Mail on Sunday to register unique reference numbers printed on the papers with an online or telephone

account. Those accounts would be credited with "points", which could then be redeemed for various rewards including some goods but also, and most popularly, retailer vouchers. The Mail Rewards programme was managed by an intermediary, theHut.com ("the Hut") for which the Hut was paid a fee, subject to VAT and with deduction of input tax for ANL, which is not in dispute.

8. As well as purchasing vouchers directly from retailers, ANL also, for a time at least, purchased vouchers from the Hut. The FTT recorded in ANL(2), at [13], that it had been accepted by HMRC that these vouchers had been acquired by the Hut from the retailers and then re-invoiced at cost by the Hut to ANL. HMRC's position on this is that they accept for the purposes of this appeal that it is possible that ANL purchased quantities of retailer vouchers from the Hut as an intermediary and that the Hut purchased the same vouchers from the retailers. They say that the characterisation of individual supplies will need to be considered on a case by case basis. That is not an issue that this tribunal needs to resolve.

9. The FTT found, in ANL(2) at [12], that although the Mail Rewards promotion was substantially different from SPICE in its detail, it contained the same key elements as SPICE, in that ANL's customers became contractually entitled to receive the retailer vouchers from ANL as a result of their participation. We would add that those vouchers, as in SPICE, were provided by ANL free of charge. ANL itself acquired those vouchers at a discount to face value from the retailers or, subject to HMRC's reservations, from the Hut.

HMRC's contentions

10. The decision of the FTT in ANL(1) cast doubt on the policy in relation to the VAT treatment of face value vouchers which HMRC have had in place since 2003. That policy is described in VAT Information Sheet 12/03, which was issued in August 2003 to provide guidance on the VAT treatment of face value vouchers following changes introduced in the 2003 Budget. As the FTT recorded in ANL(1), at [20], paragraph 14 of the information sheet states:

> "Where face value vouchers are purchased by businesses for the purpose of giving them away for no consideration, (e.g. to employees as 'perks' or under a promotions scheme) the VAT incurred is claimable as input tax subject to the normal rules. Output tax is due under the Value Added Tax (Supply of Services) Order 1993. Therefore all vouchers given away for no consideration will be liable to output tax to the extent of the input tax claimed."

11. The effect, therefore, of the FTT's decision in ANL(1) would be that to the extent that input tax was recoverable by ANL on its purchases of the vouchers, that input tax would be recoverable without a matching charge to VAT which would otherwise apply under the 1993 Order.

12. The question then in ANL(2) was about the recoverability of input tax in the circumstances of this case. HMRC's arguments in this respect, which were rejected by the FTT, and which are repeated in this appeal, were first that under Schedule 10A

of the Value Added Tax Act 1994 ("VATA") the initial issue of retailer vouchers by retailers should be treated as being made for no consideration, and thus as not giving rise to input tax, and secondly that in any event any input tax actually incurred by ANL, such as on purchase of vouchers from an intermediary, was directly and immediately attributable to an onward supply of the vouchers on which no output tax was charged, and which was consequently outside the scope of VAT, and was therefore not recoverable.

13. The combined result of the two FTT decisions, Mr Beal submitted, was the VAT equivalent of the alchemist's dream, at least from the taxpayer's perspective. The effect is that ANL is entitled to reclaim input tax paid to voucher retailers, such as Marks & Spencer (described as a paradigmatic example), but is not required to account for any output tax on the onward supply of that voucher free of charge to its customers. This, Mr Beal argued, was equivalent to conferring upon ANL zero-rating for its own provision of the vouchers, something for which there was no basis in UK law. Any extension of zero-rating would not be permitted by EU law; there is no directly enforceable right for a trader to have supplies taxed at a zero rate of VAT (*Marks & Spencer plc v Customs & Excise Commissioners* (Case C-309/06) [2008] STC 1408, at [23]-[24]).

14. This, Mr Beal argued, also created two fundamental problems for the VAT regime as a whole. First, the VAT which ANL may recover represents VAT which may arise on the supplies of goods or services on redemption of the voucher. The final consumer of those goods or services is the customer. However, because the VAT is recovered by ANL, no liability for VAT has been passed down the distribution chain to the final consumer. There is no "sticking VAT" either for the final consumer or for ANL as the last supplier.

15. Secondly, customers to whom ANL supplies the retailer voucher may or may not redeem those vouchers in return for goods and services. If the vouchers are not redeemed then no VAT will be paid by the retailer at all. No VAT will be accounted for to HMRC either by the retailer or by ANL. Yet the combination of the FTT's decisions in ANL(1) and ANL(2) means that ANL will still be able to recover input tax, without any countervailing charge to tax having actually arisen. That, it is said, will lead to a position whereby HMRC will be left paying out more VAT than it receives; effectively funding the voucher scheme from the public purse.

16. The task of legislating for a coherent VAT regime for face value vouchers, including retailer vouchers of the nature at issue in this case, is not straightforward. As the FTT noted, in ANL(2) at [44], the Principal VAT Directive (Council Directive 2006/112/EC, 28 November 2006) is silent on the treatment of vouchers. Although in May 2012 the EC Commission published a proposal for an amending directive to clarify and harmonise the rules on the VAT treatment of vouchers, no changes have yet been made. As the explanatory memorandum to the proposal explained:

> "The absence of common rules has obliged Member States to develop their own solutions, inevitably uncoordinated. The resultant mismatches in taxation cause problems such as double or non-taxation

> but also contribute to tax avoidance and form barriers to business innovation."

17. While therefore we note HMRC's submissions as to the effect of the FTT's decisions, our task is to determine the issues before us by reference to the established law. Tempting as it may be, and as it was for the FTT (see ANL(2), at [57]-[62]), to seek an outcome that provides economic coherence, if that is not possible on a proper construction of the EU and domestic legislation, then that will be a matter exclusively for the legislature.

Background

18. The question of the correct VAT treatment of a supply paid for by means of vouchers surfaced in *Argos Distributors Ltd v Customs and Excise Commissioners* (Case C-288/94) [1996] STC 1359. In that case, under an incentive scheme, Argos sold vouchers at a discount to their face value. The main buyers were companies who distributed the vouchers to their staff or representatives by way of incentive, and financial services companies which resold the vouchers to the public at or below their face value.

19. The case did not concern the tax treatment of the purchasers from Argos, but that of Argos itself on the supplies of goods on the ultimate redemption of the vouchers. The Court of Justice found:

> (1) The nature of the voucher was no more than a document evidencing the obligation assumed by Argos to accept the voucher, instead of money, at its face value (Judgment, at [19]).
>
> (2) The money equivalent accruing to Argos when it took a voucher in payment was ascertained by reference to the initial transaction comprising the sale (by Argos) of the voucher, at a discount or otherwise. It was the sum received by Argos on the sale of the voucher which therefore represented the consideration for the supply (at [20]).

20. On the same day, 24 October 1996, that the ECJ issued its judgment in *Argos*, it also issued its judgment in *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387. That case concerned first the value of the consideration for supplies by a manufacturer to retailers and to wholesalers and cash-and carry traders for resale to retailers, where the products in question were the subject of coupon schemes entitling consumers to a price reduction at the point of sale. Any price reduction that was allowed by a retailer was reimbursed by the manufacturer. Secondly, the case also concerned a scheme whereby the consumer could obtain a cash refund from the manufacturer.

21. At [19] of its judgment, the Court of Justice emphasised that "the basic principle of the VAT system is that it is intended to tax only the final consumer". Thus, at [21], it is not the taxable persons who themselves bear the burden of VAT. The role of the taxable person is to collect the tax on behalf of the tax authorities at each stage of the production and distribution process and account for it (at [22]). It is thus a basic feature of the VAT system that VAT is chargeable on each transaction only after

deduction of the amount of VAT borne directly by the cost of the various price components of the goods and services. As the ECJ described it, at [23], the "procedure for deduction is so arranged that only taxable persons are authorised to deduct from the VAT for which they are liable the VAT which the goods and services have already borne".

22. From those observations, the Court, at [24], drew the principle that the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer. To do so would breach the principle of neutrality as regards taxable persons (at [24]). The Court accordingly held, at [35], that in determining the taxable amount the various amounts refunded by the manufacturer, in respect of each of the schemes, were to be deducted from the price charged by the manufacturer on the supplies of goods, whether to retailers or wholesalers.

23. *Argos* considered the tax position of the retailer, and *Elida Gibbs* looked at the position of a wholesaler, in each case with respect to the taxable amount on a supply of goods by them. By contrast, the case of *Astra Zeneca UK Ltd v Revenue and Customs Commissioners* (Case C-40/09) [2010] STC 2298 was concerned with the position of a company that purchased retailer vouchers which it made available to its employees. The receipt by an employee of the vouchers entailed a deduction, in an amount a little less than the face value of the vouchers, from what would otherwise have been remuneration payable to the employee.

24. The company claimed that it was entitled to deduct input tax it had incurred in respect of its purchase of the vouchers. HMRC decided that the company was not entitled to deduct input tax, because it had not used the vouchers for the purposes of any taxable transaction; or alternatively that the company was entitled to deduct input tax but that it was required to account for VAT on the provision of vouchers to its employees, either on the basis that the vouchers were provided for a consideration, or that the vouchers had been made available to the employees for purposes other than business purposes.

25. Three questions were referred to the Court of Justice by the VAT and Duties Tribunal. The first was whether, in the circumstances, the provision by the company of vouchers to the employees constituted a supply of services for a consideration. The second was whether, if the answer to the first question was no, the provision of a voucher to be used by the employee for private purposes was to be treated, under art 26(1)(b) of the Principal VAT Directive, as a supply of services. The third question, if the provision of the vouchers was neither a supply of services for a consideration nor treated as a supply, was whether input tax was recoverable by the company on the basis that the purchase of vouchers constituted an overhead forming part of the company's operating expenditure.

26. The Court, in its judgment, addressed only the first question. It found, at [24], that in so far as Astra Zeneca provided retail vouchers to its employees in exchange for them giving up part of their cash remuneration, it was carrying out an economic activity for VAT purposes. It also held, at [26], that the provision of the vouchers was a supply of services. It then went on to find, at [32], that there was a direct link

between the provision of the vouchers and the part of the cash remuneration which the employees had to give up as consideration for that provision. The provision of the vouchers to the employees in those circumstances was a supply of services for consideration.

27. We shall return to *Astra Zeneca* when considering the particular issues in this appeal. The reasoning of the Court on the question it addressed is instructive in that regard, and the discussion by the Advocate General (Mengozzi) of both that question and the questions not addressed by the Court, and which are relevant in this case, is also of assistance.

28. The treatment of the provision of rights to services which may be indeterminate at the time of the provision of the rights was addressed by the Court of Justice in *MacDonald Resorts Ltd v Revenue and Customs Commissioners* (Case C-270/09) [2011] STC 412. That case concerned entitlements ("Points Rights") of members of a timeshare scheme to be credited with points in order to be able to exercise rights to occupy holiday accommodation. In the domestic proceedings from which the reference to the ECJ was made, HMRC had decided that the sale of Points Rights was to be treated as the taxable supply, in the UK, of benefits derived from membership of a club.

29. The Court referred, at [26], to the need, established by cases such as *Apple and Pear Development Council v Customs and Excise Commissioners* (Case C-102/86) [1988] STC 221 and *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, for there to be a direct link between the service supplied and the consideration received by the supplier. In the case of the provision of the Points Rights, the service was not fully supplied until the points were converted into specific services of, for example, holiday accommodation ([27]-[28]). Because the customer could not know exactly what accommodation or other services would be available, or the value of the points that would need to be converted, the factors necessary for VAT to become chargeable were not established when the Points Rights were initially acquired. It was only possible to determine the VAT treatment of the supply of services comprised in the provision of the rights when the points were converted ([29]-[30], [32]-[33]).

Domestic law

30. The VAT treatment of face-value vouchers under UK law is set out in Schedule 10A VATA. So far as material to these appeals, those provisions are:

> "*Meaning of "face-value voucher" etc*
>
> **1**— (1) In this Schedule "face-value voucher" means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> (2) References in this Schedule to the "face value" of a voucher are to the amount referred to in sub-paragraph (1) above.

Nature of supply

2 The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.

…

Treatment of retailer vouchers

4— (1) This paragraph applies to a face-value voucher issued by a person who—

(a) is a person from whom goods or services may be obtained by the use of the voucher, and

(b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a "retailer voucher".

(2) The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.

(3) Sub-paragraph (2) above does not apply if—

(a) the voucher is used to obtain goods or services from a person other than the issuer, and

(b) that person fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them.

(4) Any supply of a retailer voucher subsequent to the issue of it shall be treated in the same way as the supply of a voucher to which paragraph 6 applies.

…

Treatment of other kinds of face-value voucher

6— (1) This paragraph applies to a face-value voucher that is not a credit voucher, a retailer voucher or a postage stamp.

(2) A supply of such a voucher is chargeable at the rate in force under section 2(1) (standard rate) except where sub-paragraph (3), (4) or (5) below applies.

(3) Where the voucher is one that can only be used to obtain goods or services in one particular non-standard rate category, the supply of the voucher falls in that category.

(4) Where the voucher is used to obtain goods or services all of which fall in one particular non-standard rate category, the supply of the voucher falls in that category.

(5) Where the voucher is used to obtain goods or services in a number of different rate categories—

(a) the supply of the voucher shall be treated as that many different supplies, each falling in the category in question, and

(b) the value of each of those supplies shall be determined on a just and reasonable basis.

Vouchers supplied free with other goods or services

7 Where—

(a) a face-value voucher (other than a postage stamp) and other goods or services are supplied to the same person in a composite transaction, and

(b) the total consideration for the supplies is no different, or not significantly different, from what it would be if the voucher were not supplied, the supply of the voucher shall be treated as being made for no consideration.

Exclusion of single purpose vouchers

7A Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT.

Interpretation

8— (1) In this Schedule—

"credit voucher" has the meaning given by paragraph 3(1) above;

"face value" has the meaning given by paragraph 1(2) above;

"face value voucher" has the meaning given by paragraph 1(1) above;

"retailer voucher" has the meaning given by paragraph 4(1) above.

(2) For the purposes of this Schedule—

(a) the "rate categories" of supplies are—

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

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

(iii) zero-rated supplies, and

(iv) exempt supplies and other supplies that are not taxable supplies;

(b) the "non-standard rate categories" of supplies are those in sub-paragraphs (ii), (iii) and (iv) of paragraph (a) above;

(c) goods or services are in a particular rate category if a supply of those goods or services falls in that category.

(3) A reference in this Schedule to a voucher being used to obtain goods or services includes a reference to the case where it is used as part-payment for those goods or services."

31. For completeness we should say that it is common ground in this case that neither of paragraphs 7 or 7A (which were introduced to reflect the effect of *Lebara Ltd v Revenue and Customs Commissioners* (Case C-520/10) [2012] STC 1536) apply in the circumstances of this case.

Our approach to the issues

32. The original decision of HMRC, that of 18 October 2011, from which ANL's first appeal to the FTT was made, was that output tax was due on the provision by ANL of the vouchers free of charge under the 1993 Order to the extent that ANL had claimed input tax recovery. It was only following the release of the decision of the FTT in ANL(1) that on 12 November 2014 HMRC issued a decision refusing a number of claims by ANL in respect of the recovery of input tax on ANL's purchases of the vouchers and subsequently ANL appealed that decision and those appeals were determined by the FTT in ANL(2).

33. Although these appeals were therefore dealt with by considering the output tax issue before that of input tax, we approach the issues in the reverse order. We do so because it is a pre-condition for the application of the 1993 Order to services that the relevant person, which in this case is ANL, "has or will become entitled … to credit for the whole or any part of the tax on their supply to him" (1993 Order, art 6(b)). It is only therefore if the answer to ANL(2) were to be that ANL was entitled to deduct input tax on its purchase of vouchers from either or both of the retailer or an intermediary, such as the Hut, that the issue in ANL(1) could arise.

The input tax issues

34. As we have described, there are two circumstances that fall to be considered in determining whether ANL is entitled to deduct input tax on its purchases of the vouchers. The first is where the purchase is directly from the retailer. In that case the position of HMRC is that there is, by virtue of the disregard, up to face value, of the consideration for the issue of that voucher in accordance with VATA, Sch 10A, para 4(2), no input tax on that supply. The second is that in any event, whether the vouchers are acquired on issue from a retailer or from an intermediary, any input tax is not to be allowed as a deduction because it is directly and immediately attributable to the provision of the vouchers by ANL free of charge, which provision is therefore outside the scope of VAT.

35. The second of these contentions therefore applies generally, and irrespective of the outcome of the argument in relation to the first. Depending on the determination of the second issue, the first may not be material. On the other hand, because it is the case that VAT was in all cases charged by the intermediary, at a "blended" rate

pursuant to para 6, Sch 10A, VATA (see below), and it is common ground that such VAT was properly charged and is input tax, the second issue falls to be determined whether or not input tax arises on the issue of the vouchers by the retailer. We therefore consider first the general question of the recoverability of input tax actually incurred in the circumstances of this case. That, we note, was the order in which the FTT, in ANL(2), also considered the input tax issues.

Recoverability of input tax

Legislation

36. We set out here the relevant legislation, which we have confined to that from the Principal VAT Directive. The corresponding provisions of the VATA, including in particular sections 24 to 26 with regard to allowability of input tax as a credit against output tax, implement the provisions of the Directive. Nothing turns on the UK legislation in this respect.

Principal VAT Directive

37. Article 1 of the Principal VAT Directive sets out the basic principle of the common system of VAT established by the Directive:

> "…
>
> 2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.
>
> On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.
>
> The common system of VAT shall be applied up to and including the retail trade stage."

38. The supply of goods or services for consideration is subject to VAT if it is made by a taxable person acting as such (art 2(1)). Article 9(1) explains what is meant by "taxable person" and in that context "economic activity":

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

39. The charge to VAT is subject to a right of deduction of applicable VAT. That right to deduct is relevantly described in articles 167 and 168:

> "**Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.
>
> **Article 168**
>
> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person …"

Discussion

40. The FTT dealt with the first input tax issue quite shortly (ANL(2), at [63]–[70]). The judge focused on the commercial nature of ANL's business promotion schemes, the clear purpose of which, as he described them, was to increase newspaper sales. He then referred to the judgment of the Court of Justice in *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* (Case C-48/97) [1999] STC 488, and in particular to what the Court had said at [19]:

> "The first point to note is that, in the present case, the exchange of goods for Q8 vouchers was effected for business purposes, since—as the national court found—the object of the promotion scheme was, both for Kuwait Petroleum and for the independent retailers taking part, to increase fuel sales. For that reason, a taxable person in the same situation as Kuwait Petroleum is authorised to deduct, in accordance with art 17(2)(a) of the Sixth Directive, the amount of input VAT paid for the purchase of those goods."

41. *Kuwait Petroleum* concerned a sales promotion scheme operated by the company which entailed the provision of vouchers to customers buying fuel at service stations which the customers could then exchange for goods listed in a catalogue. The company deducted input tax on the goods which it purchased for this purpose. It was assessed to output tax under para 6 of Schedule 6 VATA, on the basis that the relevant goods had been transferred or disposed of so as no longer to form part of the assets of the company's business, so that there was a supply of goods by virtue of para 5(1) of Schedule 4 VATA, and that the supply was for no consideration.

42. The Court held that art 5(6) of the Sixth Directive (now art 16 of the Principal VAT Directive) applied so that the free-of-charge supply of goods forming part of the business assets of Kuwait Petroleum would (except where the goods were of small value within the second sentence of that provision) be treated as a supply made for a consideration, where input VAT was deductible on those goods, and that it was immaterial for the purpose of art 5(6) whether the disposal of the goods was for business purposes. Accordingly, the provision by the company of the goods for the

vouchers under the sales promotion scheme was to be treated as a supply for a consideration.

43. Mr Beal is right to point out that *Kuwait Petroleum* was not a case about input tax. The company had deducted input tax on the supply to it of the goods, and there was no argument that it had done so wrongly. There is nonetheless, in our view, considerable force in the Court's observation at [19] to the effect that the exchange of the goods for vouchers as part of a sales promotion scheme was for business purposes, and that this entitled the company to deduct input tax. The fact that one of the conditions for the application of art 5(6) was the deductibility of input tax does not detract from the clear statement of principle which emerges from what the Court said at [19]. Nor does any part of the Court's reasoning on the application of art 5(6) limit the way in which the Court's expression of that principle is to be understood.

44. Mr Beal urged us to consider the question of deductibility of input tax by reference to the decisions of the Court of Justice directed to that specific issue. In that connection, he took us to *Investrand BV v Staatssecretaris van Financiën* (Case C-435/05) [2008] STC 518 where the question concerned the deductibility of input tax on legal costs of a dispute relating to the calculation of sums payable to a company for a period when the company was a pure passive holding company.

45. The Court referred to the two means by which a taxable person might have a right to deduct input tax. The first, which the Court referred to at [23], is where there is a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct. The second is where the costs of services are overhead costs, described by the Court, at [24] in the following terms:

> "… a taxable person has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (see, inter alia, *Midland Bank*, paras 23 and 31, and *Kretztechnik*, para 36).

46. The Court held, at [25]-[26], that the sale of shares in itself did not constitute an economic activity, and nor did steps taken by a taxable person to recover a claim or establish the true value of a claim. There was, accordingly, no direct and immediate link with a particular transaction or transactions giving rise to the right to deduct (at [28]). In relation to whether the relevant costs could have a direct and immediate link with Investrand's economic activity as a whole, the Court decided they did not. The costs, being related to activities which were not economic activities at the relevant time, would have been incurred whether or not Investrand had subsequently undertaken economic activity; accordingly, the costs had no direct and immediate link to those activities.

47. The Court, at [35], distinguished *Investrand* from the case of *Kretztechnik v Finanzamt Linz* (Case C-465/03) [2005] STC 1118. In *Kretztechnik*, the question concerned the deductibility of input tax paid on supplies obtained by a company in connection with its admission to a stock exchange and the increase of its capital by means of an issue of bearer shares. The issue was whether an input tax deduction should be denied on the basis that the services obtained should be attributed to the exempt supply of the share issue. The Court held that, since the share issue was to raise capital, that issue did not constitute a supply of services. Nonetheless, because the aim of the share issue was to increase the company's capital for the benefit of its economic activity in general, the relevant costs formed part of the company's overheads and were therefore component parts of the price of its products.

48. In *Kretztechnik* the Court summarised, at [33]-[35], the fundamental principles of input tax recovery:

> "33. In that connection, it must be borne in mind that, according to settled case law, the right of deduction provided for in arts 17 to 20 of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, in particular, *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greece* (Case C-62/93) [1995] STC 805, [1995] ECR I-1883, para 18, and *Gabalfrisa SL v Agencia Estatal de Administración Tributaria* (Joined cases C-110/98 to C-147/98) [2002] STC 535, [2000] ECR I-1577, para 43).
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> 34. The deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, to that effect, *Rompelman v Minister van Financiën* (Case 268/83) [1985] ECR 655, [1985] 3 CMLR 202, para 19; *Belgium v Ghent Coal Terminal NV* (Case C-37/95) [1998] STC 260, [1998] ECR I-1, para 15; *Gabalfrisa*, para 44; *Midland Bank*, para 19, and *Abbey National*, para 24).
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> 35. It is clear from the last-mentioned condition that, for VAT to be deductible, the input transactions must have a direct and immediate link with the output transactions giving rise to a right of deduction. Thus, the right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see *Midland Bank*, para 30, and *Abbey National*, para 28, and *also Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* (Case C-16/00) [2002] STC 460, [2001] ECR I-6663, para 31)."

49. The Court was not dissuaded by the fact that the costs could be associated with the share issue, an operation that was outside the scope of the Sixth Directive, from finding, at [36], that because the increase in the company's capital had been for the benefit of the company's activities as a whole, the relevant costs formed part of its

overheads and as such component parts of the price of its products. The supplies in question thus had a direct and immediate link with the whole taxable activity of the taxable person.

50. Mr Beal referred us to *Securenta Göttinger Immobilienanlagen und Vermögensmanagement AG (as the legal successor of Göttinger Vermögensanlagen AG) v Finanzamt Göttingen* (Case C-437/06) [2008] STC 3473, a case in which the taxpayer company sought to rely upon *Kretztechnik* in support of an argument that input tax incurred in connection with the acquisition of new holdings was in principle wholly deductible. It was argued that the share issue served to increase capital for the benefit of the company's economic activity in general, and that deductibility should be determined only by reference to the proportion of taxable and exempt transactions.

51. The Court rejected that argument. It pointed to the fact that the underlying activities of the company comprised both economic and non-economic activity, the latter including financial holdings in other businesses. The costs associated with the share issues were not therefore solely attributable to downstream economic activities carried out by the company. Accordingly, the Court held, at [30], that to the extent that input VAT relating to expenditure incurred by a taxpayer is connected with activities which, in view of their non-economic nature, do not fall within the scope of (what is now) the Principal VAT Directive, it cannot give rise to a right to deduct.

52. Mr Beal argued that this was a clear statement of principle that should be applied in this case. The provision of the vouchers by ANL to its customers without consideration was an activity outside the scope of VAT. The cost of acquiring the vouchers was directly and immediately linked to that provision of the vouchers, and there should accordingly be no right to deduct.

53. We do not consider that *Securenta* can have the effect urged upon us by Mr Beal. In contrast to *Kretztechnik*, *Securenta* was concerned with the downstream economic activities. The step of ignoring the link with the share issue itself, which formed the foundation for the judgment in *Kretztechnik*, was accepted in *Securenta*. *Securenta* does not therefore provide any basis for finding that ANL's expenditure on acquiring the vouchers must, as a matter of law, be linked to ANL's provision of the vouchers. The question of the direct and immediate link is one that must be addressed by reference to all the circumstances. That might result in a finding that there is a direct and immediate link with the activities of the taxable person as a whole. If that is the case, it is only at that stage that the extent of the deductibility of input tax falls to be determined by reference to the respective proportions of activities that are economic and non-economic, and within the former category, taxable or exempt.

54. In *Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën ("VNLTO")* (Case C-515/07) [2009] STC 935, the taxpayer carried on both economic activities, in the form of services provided to its members and non-members for a fee, and non-economic activities, promoting the general interests of its members. It claimed a deduction for input tax in respect of goods and services it had acquired and which it used both for its economic activities and its non-economic activities. The Court held, following *Securenta*, that, as non-economic activities did

not fall within the scope of the directive, deduction of input VAT was allowed only to the extent to which that expenditure was attributed as an output to the taxpayer's economic activity. However, in common with *Securenta*, that was a case where the question concerned the attribution of input VAT to the underlying activities of the taxable person, to which there had been established a direct and immediate link. It does not assist in determining to what transactions such a link may be established.

55. In *Skatteverket v AB SKF ("SKF")* (Case C-29/08) [2010] STC 419, costs were incurred by a parent company of an industrial group in relation to certain share disposals the purpose of which was to obtain funds to finance other activities of the group. Those share disposals were exempt transactions. However, the Court, applying the principle of fiscal neutrality, determined, at [68], that no distinction should be drawn between transactions outside the scope of VAT (such as in *Kretztechnik*) and exempt transactions. Thus, even where the relevant costs are related to an exempt transaction such as a disposal of shares, it is still possible for those costs to have a direct and immediate link with the overall economic activities of the taxable person and for input VAT to be deductible accordingly (see [71]-[73]). Having regard to the equivocal findings of the referring court (described at [61]), the Court went on to state that it was for the referring court to take account of all the circumstances surrounding the transactions and to determine whether the costs incurred were likely to be incorporated in the price of shares sold or whether they were among only the cost components of the taxable person's economic activities.

56. In determining whether there is such a direct and immediate link, however, the ultimate aim of the taxable person is irrelevant (*BLP Group plc v Customs and Excise Commissioners* (Case C-4/94) [1995] STC 424). The relevant link is an objective one; any other test would require an inquiry into the intention of the taxable person, which would be contrary to the objectives of ensuring legal certainty (*BLP*, at [19] and [24]).

57. Mr Walters submitted that the structure of the relevant legislation (both European and domestic) indicated strongly that there is an assumption that VAT paid on the acquisition of the vouchers would, as a general rule, be deductible as input tax, and the question to be raised is whether there is a deemed supply, by virtue of art 26 of the Principal VAT Directive and the 1993 Order, which would give rise to a corresponding charge to output tax. We do not agree. No such assumption can be discerned. In particular, we do not consider that the comments of the Court of Justice in *Kuwait Petroleum*, at [19], can be regarded as supporting any such assumption. It is clear, for example from *VNLTO*, that the first step in any analysis of the VAT position of an acquirer of goods or services claiming a VAT deduction must be whether that VAT has a direct and immediate link with an economic activity giving rise to the deduction. If it does not, then the question whether a free-of-charge transaction may be treated as a supply for consideration and give rise to output tax is irrelevant. From the domestic perspective, that is explicitly recognised by the 1993 Order, which applies only if a credit for input tax is available.

58. The starting point, then, is the question of direct and immediate link. It is clear from the case law of the ECJ that the question whether costs incurred have a direct

and immediate link to a particular transaction or to the economic activities of the business as a whole is to be addressed by reference to factors which are both objective and economic. Although it may be possible to identify a connection, such as physical or legal, between certain costs and a particular transaction, such as a share issue or the sale of shares, that connection will not be conclusive of a direct and immediate link, unless it reflects the economic reality. Furthermore, in determining where that link is to be found, consideration must be given to all the circumstances. Although proximity of transactions will be a factor, there is no rule that the link must be found by reference to the most proximate transaction.

59. It is not material to the input tax issue we are now considering whether the provision of vouchers without consideration can, on its own, be regarded as an economic activity. We are satisfied that because the vouchers were provided by ANL to its customers without consideration, that is not (unless deemed to be so by virtue of art 26(1)(b) of the Principal VAT Directive) a supply of services for VAT purposes, and that the mere provision of the vouchers is therefore outside the scope of VAT. Transactions for no consideration cannot fall within art 2(1) of the Principal VAT Directive, nor are they within the scope of art 9 as the exploitation of property for the purpose of obtaining income therefrom on a continuing basis (see *Finanzamt Saarlouis v Malburg* (Case C-204/13) [2014] STC 1916, at [36]).

60. We do not accept Mr Walters' submission that the provision of vouchers in this way can be a supply which is, in principle, subject to VAT. Mr Walters sought assistance for this proposition from the judgment of the Court of Justice in *VNLTO*, at [36]. But there the Court was seeking to distinguish cases where the input tax related to economic activities from those which, by reason of their non-economic nature, do not come within the scope of the Directive. It provides no support for an argument that an activity which is outside the scope of VAT because it is not carried on for a consideration can be regarded as within the scope because, if it were done for a consideration, it would be an economic activity.

61. The enquiry is not, at the initial stage, whether a particular activity is or is not an economic activity or is or is not in principle subject to VAT. The first question is whether, and the extent to which, the supplies giving rise to input tax have a direct and immediate link to activities of the taxable person which give rise to the right to deduct. In this case, the purchase of the vouchers may of course be traced through to the provision of those vouchers by ANL to its customers. There is, to adopt the phraseology used by the Advocate General (Kokott) in her opinion in the recent case of *'Sveda' UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos and another* (Case C-126/14) (ECLI:EU:C:2015:712; 22 October 2015), a causal link between the purchase and provision of the vouchers. But that is not conclusive of the direct and immediate link; as the Advocate General has said, at [45] of her opinion in *Sveda*, a merely causal link is clearly not sufficient. It is necessary to have regard to whether it can be ascertained, applying an objective test, that there is a direct and immediate link either with particular economic activity of the taxable person, or with the economic activity of the taxable person in general.

62. *Sveda* concerned the right of deduction of input tax, and art 168 of the Principal VAT Directive, in the context of VAT relating to the acquisition and production of certain capital goods.

63. The judgment of the Court was published after the hearing before us. We heard argument based on the opinion of the Advocate General, and following the hearing Mr Walters provided us both with a copy of the Court's judgment and an official translation of the Advocate General's opinion and some further submissions based on the judgment. We also received submissions from Mr Beal, Mr Jones and Mr Pritchard. We are grateful to them. We have considered all the further submissions, but we have concluded that *Sveda*, although instructive as an example of the application of the principles established by the Court of Justice which we have discussed above, does not mark any change of principle. Nonetheless, in the light of the submissions we have received, we shall set out what we consider can be derived from the approach adopted by the Court in its judgment.

64. As the Court described the position, Sveda is a for-profit legal person whose activities consist in the provision of accommodation, food and beverages, the organisation of trade fairs, conferences and activities, as well as the engineering and consultation associated with those activities. The costs at issue in the case before the Court were the costs of implementing a project for the establishment of a "Baltic mythology recreational (discovery) path" to which the public were to have access free of charge. An agency of the Ministry of Agriculture committed to pay 90% of the costs, with the remaining expense being covered by Sveda. The referring court had found that the expenses relating to the capital goods at issue were ultimately intended for the carrying out of the economic activities planned by Sveda. It had been objectively ascertained that the recreational path could be regarded as a means of attracting visitors with a view to providing them with goods and services, such as souvenirs, food and drinks as well as access to attractions and paid-for bathing.

65. We bear in mind that *Sveda* was a case concerning capital goods. However, there is no indication in *Sveda* that the principles relied upon by the Court as to the application of art 168 of the Principal VAT Directive, and the initial right to deduction of VAT, were in any way affected by that fact.

66. The Court referred, at [27], to the need, in principle, in order to found an entitlement to deduct input VAT, for a direct and immediate link between a particular input transaction and a particular output transaction giving rise to such an entitlement. It noted, however, at [28], the right to deduct where the expenditure is incurred as part of general costs, so that the expenditure has a direct and immediate link with the taxable person's economic activity as a whole. That, as we have described earlier, requires the consideration of all the circumstances and the taking account only of the transactions which are objectively linked to the taxable person's taxable activity (*Sveda*, Judgment at [29]).

67. The question in *Sveda* was whether, due to the capital goods at issue being directly intended for use by the public free of charge, there could be a direct and immediate link with Sveda's planned economic activity as a whole. The question, in

essence, was whether the intervening making available of the path for use free of charge could sever the link between the expenditure and the subsequent economic activities of Sveda.

68. In considering this question, the Court referred to *Eon Aset Menidjmunt OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'—Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-118/11) [2012] STC 982, in stating, at [32], that where goods or services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted. In each of those circumstances, no distinction being drawn between exempt transactions and those outside the scope, the direct and immediate link between the input expenditure incurred and the economic activities subsequently carried out is severed.

69. In *Eon*, the Court had examined the position both from the perspective of the acquisition of capital goods and the acquisition of a service. In regard to the latter, the Court, at [48], referring to *SKF*, stated that whether there was a direct and immediate link depended on whether the cost of the input services was incorporated either in the cost of particular output transactions or the cost of goods or services supplied by the taxable person as part of his economic activities.

70. The Court in *Sveda* focused on the evident intention of Sveda, when acquiring or producing the relevant capital goods, to carry out its underlying economic activity. Thus, as the Court found at [33], the expenditure was linked to that economic activity, and did not therefore relate to activities that were outside the scope of VAT. Accordingly, immediate use of the goods free of charge did not, in the circumstances, affect the existence of the direct and immediate link between the input and output transactions or with the taxable person's economic activities as a whole, and consequently that use had no effect on whether a right to deduct VAT existed (*Sveda*, at [34]). In reaching this conclusion, therefore, the Court placed emphasis on the determination of the economic substance of the necessary link.

71. Thus, as can be discerned from the established case law on which the Court's judgment in *Sveda* is based, it is always a question of identifying, in economic terms, the true direct and immediate link between the input expenditure and activity of the taxable person. If such a link is established with a particular transaction, whether exempt or outside the scope, no input tax deduction will be permitted. In those circumstances, any link that might have been found with subsequent economic activity will not be capable of being established; it will, in effect, be severed. But, as *Sveda* illustrates, the mere fact of an intervening transaction for which the goods or service acquired may be used will not, as a matter of principle, create the necessary direct and immediate link with that transaction. The analysis is more nuanced than that. If, on examination, the true economic link is with the underlying economic activity, that link will prevent there being a link with the intermediate transaction, and will create the right to an input tax deduction, depending on the nature of the economic activity concerned. The immediate use of the relevant goods or services for an intermediate transaction will not, in those circumstances, affect the direct and

immediate link with the underlying economic activity, nor therefore the right to an input tax deduction.

72. Although a right to a deduction exists if expenditure can be regarded as having a direct and immediate link to a taxable person's economic activity as a whole, the initial focus must be on whether there is a link with a particular activity, or type of activity. That accords with the view of the Advocate General in *Kretztechnik* at [76]; it is only where inputs cannot be linked to specific output transactions that they may fall to be attributed to a taxable person's activity as a whole. If such a link can be established, there is then the question whether the link is with both economic and non-economic activity (in which case there must be an apportionment, as in *Securenta* and *VNLTO*), and whether the input VAT is fully or partially recoverable having regard to the taxable and exempt supplies that constitute the economic activity with which the link has been established.

73. In our judgment, having regard to all the circumstances and viewed objectively from an economic perspective, the answer in this case is plain. The vouchers were acquired for the purpose of the business promotion scheme to increase the circulation of ANL's newspapers, and also to facilitate the associated sales of advertising. That is not to rely on the subjective intention of ANL; it can be objectively discerned from the nature of the business promotion scheme itself. It is to that element of the economic activity of ANL to which the acquisition of the vouchers and any input tax attributable to that acquisition is directly and immediately linked. Viewing the circumstances from an economic perspective, no such link can be established with the provision of the vouchers by ANL to its customers for no consideration, and the immediate use of the vouchers acquired by ANL in providing those vouchers to its customers free of charge cannot affect the direct and immediate link with ANL's economic activity. The costs associated with the acquisition of the vouchers were cost components of the sales of the newspapers and of advertising, and thus cost components of transactions within the scope of ANL's taxable activities. The output supplies by ANL in that respect were taxable supplies, and input tax is accordingly deductible.

Does input tax arise on ANL's acquisition of vouchers from a retailer?

74. We have decided that any input tax which arises on a supply to ANL of the vouchers which it provides to its customers free of charge as part of the business promotion schemes that are the subject of this appeal is in principle deductible. Subject to any issues as to the nature of the arrangements between ANL and the Hut, or any other intermediary supplier of vouchers, input tax which arises on those supplies may in principle be deducted.

75. That principle applies equally to input tax which arises on the issue of vouchers by retailers to ANL. The question in that case is whether, having regard to para 4(2), Sch 10A VATA, which provides that the consideration for the issue of a retailer voucher is to be disregarded for the purposes of the VATA except to the extent (if any) that it exceeds the face value of the voucher, in this case no input tax would arise at all on such supplies, and there would thus be nothing for ANL to deduct.

76. The FTT reasoned that the issue of the vouchers by the retailer was a supply of services. It could not be outside the scope of VAT, and thus was a taxable supply. Schedule 10A had been introduced to eliminate the double taxation that would arise if the retailer were required to account for VAT at both the stage of the issue of the voucher and on redemption of the voucher for goods or services supplied by the voucher. Schedule 10A treated the ultimate redemption supply of goods or services as the "crucial taxable supply". The FTT considered that the VAT rate proper to the ultimate supply was applied to the supply of the voucher, and that there was a merging of the retailer's supply of the voucher, when issued, with the ultimate supply, thus effectively resulting in a single taxable supply (so far as the retailer is concerned) which is completed when the voucher is redeemed.

77. Applying this reasoning, the FTT construed paragraph 4(2) of Schedule 10A as simply relieving the retailer from accounting for VAT at the stage of the issue of the voucher on the basis that the tax would ultimately be accounted for when the voucher was redeemed for a supply of goods or services. At that stage the original supply of the voucher would effectively be subsumed into the redemption supply. The issue of the voucher was nonetheless a taxable supply on which input tax, at the rate provided for in Schedule 10A, would arise.

78. HMRC's case in this respect is that paragraph 4(2) of Schedule 10A deems the consideration on the issue of the vouchers by retailers to be zero. The issue of vouchers does not therefore bear VAT. The consequence is that no VAT was due from the supplier, and none was paid. That means, in HMRC's submission, that there is no entitlement of any recipient of an invoice from such a supplier to recovery of VAT.

79. In support of that submission, Mr Beal referred us to *Véleclair SA v Ministre du budget, des comptes publics et de la réforme de l'Etat* (Case C-414/10) [2012] STC 1281. That case concerned the compatibility or otherwise of a national provision in French law, which made deductibility of VAT conditional on actual receipt by the tax authorities of the VAT, with art 17(2)(d) of the Sixth Directive (VAT "due or paid" in respect of imported goods).

80. The Court held, at [22]-[23], that the creation of the right to deduct VAT was independent of whether payment of the consideration in respect of the goods imported had taken place. It followed that the right to deduct VAT on importation could not, in principle, be made conditional on the actual prior payment of that VAT. In reaching that conclusion, the Court referred, at [19], to art 17(2)(a) (now art 168(a)) and to the clear provision there that the taxable person's right to deduct concerned not only VAT which he has paid, but also VAT which is due, that is, which is still to be paid.

81. The Court also stated, at [20], that the term "due" refers to an enforceable tax claim and therefore requires that the taxable person has an obligation to pay the amount of VAT for which the deduction is sought. In doing so the Court endorsed the view expressed by the Advocate General (Kokott), at [56]-[58] of her opinion, that there must be a legally enforceable obligation on the part of the taxable person to pay

the VAT. If there is no such obligation, there is no entitlement to deduct VAT which has not yet been paid.

82. ANL does not argue that it should be entitled to a deduction for VAT that has not been paid and has not become due within the meaning of that term as described in *Véleclair*. Its argument is that ANL has paid VAT in the purchase price for the vouchers acquired from the retailer. Mr Walters submitted that paragraph 4(2) of Schedule 10A should be interpreted according to the principles of *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305 as deferring the time at which the retailer accounts for the VAT received on its issue of a retailer voucher, and not as denying the right of deduction for input tax which arises under the Principal VAT Directive on normal principles. He argued that this was in accordance with art 62(2) of that Directive, under which VAT becomes "chargeable" when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

83. Mr Walters submitted that when a voucher is redeemed, it is at that stage that the retailer who has issued the voucher becomes obliged to account for the output tax included in the price received on issue of the voucher, which will be calculated precisely by reference to the goods or services supplied on redemption. That VAT is output tax in a chain of supply of those goods or services, but that, according to Mr Walters, does not affect the fact that ANL will, by purchasing the voucher, have paid that VAT (albeit at a rate derived from Schedule 10A, which may be a blended rate). He submitted further that to deny ANL a deduction for that VAT on the basis that there is no VAT to deduct would be a manifest breach of the principle of neutrality.

Discussion

84. It is of the nature of a voucher that its face value, which represents the consideration given for the ultimate supply of goods on redemption of the voucher, includes the element of VAT which is inherent in that consideration. Thus, the Court of Justice in *Astra Zeneca*, to which we referred earlier, in the context of deciding that the provision of vouchers by the company to its employees in return for giving up part of their remuneration was a supply of services for a consideration, held, at [32], that the burden of the VAT on the provision of the vouchers had been borne by the employees as the final consumers of the good or services for which the vouchers could be redeemed, because the deduction from the remuneration included the price of the vouchers and all the VAT on them.

85. The Advocate General (Mengozzi) in *Astra Zeneca* analysed the position in a little more detail. He said, at [45]-[49]:

> "45. … I would observe that, from an economic standpoint, it is the employee who is ultimately liable for the VAT, which is in any event consistent with the VAT system, under which the tax is to be borne by the final consumer. As Astra Zeneca acknowledged at the hearing, *the value of the voucher as accounted for in the employee's pay slip already includes the VAT payable on the goods which, by using the*

voucher, can be purchased in the retailers' shops. In other words, with the deduction made from his pay, the employee pays the price of the goods and/or services which he will purchase from the retailer and that price includes VAT. It is the final payment in the VAT chain and the VAT borne by the employee clearly includes both that initially included in the original supply of the voucher by the retailer to the intermediary[1] and that accumulated over the subsequent stages, in particular the stage at which the intermediary made a profit. At the point at which the worker/consumer goes to the retailers' to use the voucher, he simply has to hand over the voucher itself, which includes VAT, and receives in exchange the goods or services required.

46. It is worth clarifying in this connection that, notwithstanding the complexity of the VAT chain in the present case, which prompted a debate at the hearing, the fact remains that there is just one payment of the tax. The VAT on the goods or services purchased from the retailer is incorporated in the voucher and, at the point at which he receives it, providing goods or services in exchange, the retailer 'completes the circle' and pays over to tax authorities, after deducting any amount which the retailer himself may have paid by way of input tax, the VAT collected in supplying the voucher to the intermediary.

47. There are two consequences to the observations made at point 45.

48. First, the fact that the VAT element included in the vouchers is in fact paid by the employee means that, of the two interpretative approaches set out above, preference should be given to that which requires such VAT to be charged. In that way, the situation is avoided in which that tax, which is in any event borne by the employee, 'disappears', becoming a kind of 'hidden' VAT.

49. Second, it is clear that the fact that Astra Zeneca is required to account for VAT on the provision of vouchers to its employees does not, in itself, give rise to any particular economic damage for that company, since the burden of the tax ultimately rests, in accordance with the general principles governing VAT, with the final consumer of the products, namely the employee.[2]"

86. This analysis proceeds on the footing that the VAT for which the retailer ultimately accounts is the VAT chargeable in respect of the ultimate supply of goods or services on redemption of the voucher. If the voucher is not redeemed, so that

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[1] [Advocate General's footnote] As was seen in points 9 and 10, under the system which applies in the United Kingdom, that part of the VAT is paid to the treasury by the retailer only at the point at which the voucher is used to purchase goods and/or services. However, that particular feature of the system, as the Commission also observed at the hearing, has an effect only with regard to the *time* at which the tax is paid and not other aspects of the tax.

[2] [Advocate General's footnote] If the exact amount which Astra Zeneca has paid for the vouchers is reflected in the employees' pay slips, that company will account for VAT simply by declaring that the input VAT and the output VAT are exactly the same and will not have to pay anything to the tax authorities. If the amount shown as having been deducted in the pay slip is greater than that actually paid to the intermediary, the VAT which Astra Zeneca will have to pay, the burden of which will in any event be passed on to the employee, will be only the VAT on the difference between those amounts.

there is no ultimate supply of goods or services, no VAT liability arises. There is no separate obligation on the retailer in those circumstances to account for VAT on the supply consisting of the issue of the vouchers. That is the effect of the para 4(2), Sch 10A; as the consideration for the issue is to be disregarded, that supply is not a taxable supply, and no VAT can become due or be paid in respect of that supply.

87. The VAT that is ultimately chargeable on the supply of goods or services on redemption of the voucher is represented by the face value of the voucher. Thus, if the voucher had a face value of 90, and were thus redeemed in the purchase of goods or services for 90, 15 of that amount would represent the VAT on the supply of the goods or services in question. To the extent that a person acquires the voucher for consideration, that person can be regarded as having borne the VAT, or part of it, which is in the end chargeable.

88. Merely bearing the VAT on a supply is not, however, sufficient to found a right to deduct VAT. The right to deduct can arise only with respect to "VAT due or paid … in respect of supplies to [the taxable person] of goods or services" (art 168(a), Principal VAT Directive). The fact therefore that the consideration paid by ANL for the acquisition of the voucher includes an amount that, on redemption, would satisfy the VAT element of the price for the goods or services supplied to the customer redeeming the voucher does not render ANL the consumer of the relevant supply. The consumer of that supply is the customer to whom ANL has provided the voucher. The supply to ANL is the supply of the voucher on which, by virtue of para 4(2), Sch 10A, no VAT is chargeable at all.

89. We respectfully disagree therefore with the analysis of the FTT in this respect, and with the submissions of Mr Walters to the same effect. We see no possible construction of Schedule 10A, whether by reference to the *Marleasing* principle or otherwise, according to which the effect of paragraph 4(2) is confined to relieving the retailer of the obligation of accounting for the VAT on the supply of the voucher, or in subsuming the original supply of the voucher into the supply on redemption of the voucher.

90. We agree with the FTT when it reasoned, at [87], that the "crucial taxable supply" for the purpose of Schedule 10A is the ultimate supply on redemption of the voucher. By virtue of paragraph 4(2), that ultimate supply is the only taxable supply on which VAT may be charged; the issue of the voucher is not a taxable supply. It is instead the mechanism whereby the retailer receives an amount which, in due course, and subject to the voucher being redeemed, will represent the taxable consideration for the goods or services supplied on redemption. On the other hand, it is in our view not correct to construe the single taxable supply on redemption as the product of a merger of that supply with the supply of the issue of the voucher. The circle which the Advocate General in *Astra Zeneca* perceived, at [46] of his opinion, as having been closed when the retailer redeems the voucher for the supply of goods or services and pays the VAT due on that supply, is comprised of the receipt of the consideration for that supply at the stage of the issue of the voucher for payment (limited – as we have described by reference to *Argos* – to the amount received on issue of the

voucher), which is the stage of collection of the VAT, and the ultimate supply on redemption, which is the stage at which VAT becomes chargeable on that supply.

Principle of fiscal neutrality

91. We do not consider that the construction of Schedule 10A which we have determined would breach the principle of fiscal neutrality. By that principle, at least in one of its manifestations, as Mr Walters reminded us, similar goods and supplies of services, which are thus in competition with each other, are precluded from being treated differently for VAT purposes (see, for example, *Revenue and Customs Commissioners v The Rank Group plc* (Joined Cases C-259/10 and C-260/10) [2012] STC 23, at [32]). It is sufficient, absent actual competition, if the supplies are identical or similar from the point of view of the consumer and meet the same needs of the consumer (*Rank*, at [36]).

92. According to our conclusions, ANL would be able to recover input tax on its acquisition of vouchers from an intermediary, but not on its acquisition on issue by a retailer. This, argued Mr Walters, would be contrary to the principle of fiscal neutrality. We do not agree. The construction of Schedule 10A which we have determined would result in all supplies by a retailer on issue of the vouchers being treated the same. As a matter of law, no input tax would be due or paid in respect of such supplies, and consequently no deduction for input tax would be capable of being claimed by any recipient of such a supply, whether a company in the position of ANL, or a company (an intermediary) making onward supplies. Any distortion is, we consider, only introduced if one takes into account the concession – which is not a matter of law or construction of the statutory provisions – whereby HMRC permit an intermediary to deduct input tax (at the rate determined under Schedule 10A) referable to the issue of the vouchers to the intermediary. The input tax deduction to which ANL would become entitled on its purchase of the vouchers from an intermediary, and which gives rise to the different treatment as between purchases from an intermediary and purchases directly from an issuer of the vouchers, would include therefore, through the chain of supply, an element of input tax for which recovery had been allowed by concession. Absent the concession, the price paid by ANL on a purchase from an intermediary would be the amount chargeable by the intermediary, including any profit, without taking account of any input tax recovery for the intermediary, plus VAT at the rate provided for by Schedule 10. ANL would be able to recover in full that VAT. Other than in respect of any profit of the intermediary, the net position for ANL would be the same as on a purchase of the vouchers from the issuing retailer.

93. The following example illustrates what we mean. If a retailer issues to ANL a voucher with face value of 100 for 90, the net cost of that voucher to ANL is 90. If the retailer issues the voucher to an intermediary for 90, according to HMRC's concession an amount of VAT at a blended rate, say 9, is recoverable by the intermediary. Ignoring any intermediary profit, the intermediary supplies the vouchers to ANL for 90, and sets off the 9 of input tax against the 9 of VAT chargeable on the supply. ANL is entitled to deduct the 9 of input tax, giving rise to a

net cost for ANL of 81. (This example ignores any VAT chargeable on ANL on the provision of the vouchers free of charge; that issue is considered below.)

94. However, it is only the concessional treatment afforded by HMRC to the case of an intermediary that produces this result. Absent the concession, the intermediary would pay 90 for the voucher, and recover no input VAT. To achieve a net sale for 90, therefore, the intermediary would need to charge 100, of which 10 (at the same blended rate) would be VAT. ANL would recover that 10 of input tax, leaving it with a net cost of 90, the same as on a direct purchase from the issuing retailer.

95. The construction of Schedule 10A which we have determined, coupled with our findings regarding the deductibility of input tax on the purchase of vouchers from an issuing retailer, do not therefore amount to a breach of the principle of neutrality, and the application of that principle does not mandate any different conclusions to those we have reached.

Article 168, Principal VAT Directive

96. For completeness, we should also mention an alternative contention advanced by ANL, that art 168 of the Principal VAT Directive is unconditional and sufficiently precise to give ANL EU law rights on which it may rely, notwithstanding para 4(2), Sch 10A VATA, to claim entitlement to deduct VAT. That argument founders, however, on the very wording of art 168, which requires the VAT to be due and paid in respect of supplies to the taxable person. For the reasons we have set out above, there is no such VAT on the issue of the vouchers to ANL in this case, and consequently no deduction can be available.

Conclusions on the input tax issues

97. We have concluded, for the reasons we have explained, that the FTT made no error of law in respect of its finding that, to the extent input tax arises on a supply to ANL of vouchers which ANL provides, as part of the business promotions schemes at issue in this case, to its customers free of charge, ANL is entitled to deduct that input tax. The appeal of HMRC in that respect is therefore dismissed.

98. On the other hand, for the reasons we have given, we conclude that the FTT made an error of law in finding that input tax arose on the issue by the retailers of the vouchers. We accordingly allow HMRC's appeal to that extent and set aside that part of the FTT's decision, and re-make it by determining that no input tax arises on such supplies, and that consequently ANL is not entitled to a deduction in that respect.

Provision by ANL of vouchers free of charge: the output tax issue

99. We have decided that, to the extent that VAT is chargeable on a supply of vouchers to ANL by an intermediary, ANL is entitled to a deduction in respect of that input VAT. To that extent, therefore, one of the conditions for the application of the 1993 Order (art 6(b)) is met, and we must consider whether, as HMRC argue to be the case, art 3 of that Order has the effect that the provision of the vouchers by ANL to its

customers free of charge is to be treated as a supply in the course or furtherance of ANL's business, and at a value, according to art 5, of that part of the value of the supply of the vouchers to ANL as fairly and reasonably represents the cost to ANL of providing the vouchers. If HMRC are correct, the effect would be that there would be a charge to output VAT on ANL on its deemed supply of an amount equal to the input VAT which ANL would be entitled to deduct.

100. This issue was the subject of ANL(1). The FTT found that art 3 of the 1993 Order did not apply in the circumstances of this case.

Legislation

101. We set out here the relevant provisions of the 1993 Order.

> "**3** Subject to articles 6, 6A and 7 below, where a person carrying on a business puts services which have been supplied to him to any private use or uses them, or makes them available to any person for use, for a purpose other than a purpose of the business he shall be treated for the purposes of the Act as supplying those services in the course or furtherance of the business except for the purposes of determining whether tax on the supply of the services to him is input tax of his under section 24 of the Act.
>
> …
>
> **5** The value of a supply which a person is treated as making by virtue of this Order shall be taken to be that part of the value of the supply of the services to him as fairly and reasonably represents the cost to him of providing the services.
>
> **6** This Order shall not apply in respect of any services—
>
> (a) which are used, or made available for use, for a consideration;
>
> (b) except those in respect of which the person carrying on the business has or will become entitled under sections 25 and 26 of the Act to credit for the whole or any part of the tax on their supply to him;
>
> …
>
> **7** Nothing in this Order shall be construed as making any person liable for any tax which, taken together with any tax for which he was liable as a result of a previous supply of the same services which he was treated as making by virtue of this Order, would exceed the amount of input tax for which he has or will become entitled to credit under sections 25 and 26 of the Act in respect of the services used, or made available for use, by him; and, where the tax chargeable would otherwise exceed the amount of that credit—
>
> (a) he shall not be treated as making a supply of the services where the amount of that credit has already been equalled or exceeded; and

(b) in any other case, the value of the supply shall be reduced accordingly."

102. The 1993 Order is derived from what is now art 26 of the Principal VAT Directive:

> "1. Each of the following transactions shall be treated as a supply of services for consideration:
>
> (a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;
>
> (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.
>
> 2. Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition."

103. Article 26 concerns transactions which are to be treated as supplies of services. The corresponding article of the Directive dealing with the treatment of certain matters as supplies of goods is art 16:

> "The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.
>
> However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration."

104. As the FTT summarised the position at ANL(1), [46], the effect of the 1993 Order is that if a taxable person acquires services (and, we would add, is entitled to credit for the whole or part of the VAT on that supply) and "uses them, or makes them available to any person for use, for purposes other than a purpose of the business", he is treated as making a supply of those services. The value of the supply is the cost to him of providing the services (which will generally be his acquisition cost), and he will be liable to output tax accordingly. However, the output tax liability will not exceed his allowable input tax.

105. In that way, the result is that the taxable person is effectively denied recovery of the input tax that would otherwise fall to be deducted. His position is equated to that of a final consumer who bears the VAT on the supply to him.

Discussion

106. The question before the FTT, and the question before us, is whether the provision of the vouchers by ANL to its customers free of charge as part of the business promotion schemes was such as to be treated, by art 3 of the 1993 Order, as a supply of services. The question, which turns on the analysis of the relevant provisions of the Directive that appears from the case law of the Court of Justice, is whether ANL provided the vouchers "for a purpose other than a purpose of the business".

107. In *Julius Fillibeck Söhne GmbH & Co KG v Finanzamt Neustadt* (Case C-258/95) [1998] STC 513, a building company provided free transport to work for employees who lived more than 6 km from their workplace. No payment was made, and no sum was deducted from the employees' wages. The Court having held that the provision of the transport was not for a consideration, the question was whether the transport was to be treated as a supply of services by virtue of art 6(2) of the Sixth Directive (now art 26(1)(b), Principal VAT Directive).

108. The Court, at [25], noted that the purpose of art 6(2) was to ensure equal treatment as between taxable persons and final consumers. It was designed to prevent the non-taxation of business goods used for private purposes and of services provided free of charge by a taxable person for private purposes. In light of that, the Court took the view, at [26], that because the place where an employee lived was ordinarily a decision solely for the employee and not one in which the employer was involved, under normal circumstances the transport services would be for the private use of the employee within the meaning of art 6(2).

109. The Court went on, however, at [29], to acknowledge that there were circumstances in which the provision of transport could be for the purposes of the business. The circumstances identified by the Court were those where the requirements of the business made it necessary for the employer to provide transport for employees between their homes and the workplace. Examples were where only the employer was able to provide suitable transport, or where the workplace was liable to change. In those "special" circumstances, as the Court described them at [30], the personal benefit derived by the employees from the transport could be regarded as of only secondary importance compared to the needs of the business.

110. In *Danfoss A/S and another v Skatteministeriet* (Case C-371/07) [2009] STC 701, the taxpayer companies (Danfoss and Astra Zeneca A/S respectively) sold food and beverages to staff in their canteens, which were also used for the provision, free of charge, of meals for business contacts and staff in the course of work meetings. The relevant questions concerned whether art 6(2) of the Sixth Directive was to be interpreted so as to cover, on the one hand, the supply of meals free of charge to business contacts in connection with meetings at the company, and on the other, the supply of meals free of charge to staff in connection with such meetings.

111. After summarising the purpose of art 6(2), referring to cases including *Fillibeck*, the Court turned first to the question of the provision of meals to business contacts. The Court said (at [51]-[55]):

> "51. It is … appropriate to examine, first, whether the provision, free of charge, of company canteen meals to business contacts in connection with work meetings constitutes a provision of services by the taxable person for purposes other than those of its business.
>
> 52. In this respect, it must be recalled that Danfoss is a company that produces and markets, on an international basis, industrial automation products for use, in particular, in the regulation of refrigeration and heating systems. AstraZeneca, for its part, is a pharmaceutical company which seeks primarily to distribute its pharmaceutical products on the Danish market.
>
> 53. It is apparent from the order for reference and the observations submitted to the court by the parties in the main proceedings that Danfoss and AstraZeneca provide meals free of charge to their business contacts only in connection with meetings that take place on company premises. AstraZeneca invites doctors and other health professionals in order to pass on, in that context, knowledge relating to epidemiological fields and the positioning and use of its pharmaceutical products. Furthermore, the meals at issue are provided to participants in the canteen if that is dictated by the time at which the meeting is held or its duration—which may sometimes be whole days.
>
> 54. Such circumstances suggest that the meals at issue are provided for purposes that are not other than those of the business.
>
> 55. However, it is true that it can be difficult to monitor effectively whether meals provided by company canteens are provided for business-related or other purposes, especially where those meals are provided in the course of the normal operation of those canteens. Therefore, if objective information shows—and this is something which the national court must establish—that the meals in question have been provided for strictly business-related purposes, the provision of those meals will not come within the scope of art 6(2) of the Sixth Directive."

112. In considering next the position of meals provided free of charge to staff, the Court adopted a similar approach to that which had been taken in *Fillibeck*, a case which also concerned the provision of services to staff. It accepted, at [57], that in normal circumstances the provision of meals to staff was something that would fall within the scope of the personal choice of each member of staff, and consequently that ordinarily art 6(2) would apply so as to deem the provision to be a supply of services.

113. But the Court went on, at [58], to apply in the context of the provision of meals the same test of necessity, having regard to the requirements of the business, that had been applied in *Fillibeck*. The timing and place of the meetings, and the choice of food, were not a matter of choice of the employees. In those particular circumstances, the Court held, at [62], that the provision of meals to employees by the employer was not for the private use of the employees and was not for purposes other than those of the business. The personal advantage which the employees derived from such provision appeared to be merely accessory to the requirements of the business.

114. We were taken also to the opinion of the Advocate General (Sharpston) in *Danfoss*. There the Advocate General noted, at [49], that certain types of expenditure on accommodation, food, hospitality and entertainment was capable of serving strictly business purposes. Where that could be demonstrated and where it is a cost component of taxable output supplies, that should give rise to a right to deduct input tax in accordance with the neutrality of VAT.

115. The Advocate General pointed, in this context, to the likelihood that the cost of providing a canteen lunch or a tray of sandwiches provided free of charge to business contacts would, as it avoided the inconvenience and wasted time entailed in seeking other possibilities for lunch, be regarded as incurred for business purposes, contrasting the likely treatment of a free lunch, as an alternative to a meal at the participant's expense in a nearby restaurant once the meeting is over. The Advocate General also considered *Fillibeck* with respect to the provision of meals to staff. She took the view, consistently with *Fillibeck*, that it was not normally part of an employer's business to provide employees with food and drink, and that food and drink normally serve an employee's private purposes.

116. The Advocate General summarised the position at [54] in the following way:

> "It is, of course, for the national court to determine in the main proceedings whether, both as regards business contacts and as regards staff, the provision of canteen meals, or trays of sandwiches, free of charge does in fact serve principally the purposes of the business or the private purposes of the recipients but, as the Commission points out, the indications in the order for reference all suggest that the former is the case."

117. We do not consider that this formulation adds anything to the analysis of the Court. It is evident that, in principle, the Court followed the Advocate General's opinion, but its analysis requires no elaboration by reference to the Advocate General's discussion. It is, according to the Court, a matter for the domestic courts to determine in a given case whether the relevant provision is for strictly business-related purposes or, in the case of provision to staff, necessary having regard to the requirements of the business.

118. In particular, we do not consider that the distinction drawn by the Advocate General between the purpose of the business and the private purposes of the recipients suggests any test that turns on whether the recipient uses the service for his private purposes, nor on the purpose of the recipient. It is evident that services which, objectively speaking, serve a private purpose of a person, be it transport or catering, may have a strictly business-related purpose. The relevant purpose is that of the taxable person, and the question is whether that purpose is a business purpose or to serve the private purpose of the recipient.

119. Neither *Fillibeck* nor *Danfoss* was concerned with the provision of vouchers. Although in *Kuwait Petroleum*, to which we have referred earlier, the business promotion scheme involved the issue of vouchers which could be exchanged for goods, the question did not concern the provision of the vouchers but whether there

was a deemed supply of the exchange goods by virtue of art 5(6) of the Sixth Directive (now art 16, Principal VAT Directive). The answer to that question turned on the particular wording of art 5(6), which treated the disposal of goods free of charge as a supply of goods for consideration.

120. The Court was clear that this wording applied so as to deem the relevant supply, whether or not the disposal was for business purposes. The exclusion within art 5(6) for the application of goods for business use as samples or gifts of small value would make no sense if the test required in any event that the goods be applied otherwise than for business purposes (Judgment, at [22]). Thus, the Court confirmed, at [23], that gifts of goods that are not of small value must be treated as taxable supplies, even where made for business purposes.

121. We do not regard *Kuwait Petroleum* as material to the issue before us. Mr Beal sought to argue that art 16 provides support for a strict construction of art 26 because the inclusion of the saving provision means that the provision of business assets as samples would otherwise be capable of being categorised as supplies other than for the purposes of the business. He argued on this basis that the phrase "for the purposes of the business" must be interpreted not from the perspective of the commercial rationale of the provision of samples, but from the point of view of how and when the business assets are consumed.

122. We reject this submission. It is clear from *Kuwait Petroleum* that there is a difference between art 16 and art 26. The difference is in the inclusion in art 16 of a separate circumstance, that of the disposal of goods free of charge, which operates independently of the purposes of the business. It cannot be inferred, therefore, that the provision of samples or small gifts would be for purposes other than the business, and that the test must look to the purpose of the recipient, rather than that of the taxable person. Although Mr Beal sought to rely on what the Advocate General (Sharpston) had said in *Danfoss*, at [47] of her opinion, to the effect that the concept of a purpose being "other than those of his business" applied equally under art 5(6) and art 6(2) of the Sixth Directive, that remark was made in the context of the particular questions before the Court in *Danfoss* and does not mean that the particular provision in what is now art 16 of the Principal VAT Directive concerning disposals of goods, which applies irrespective of business purpose, can shed any light on the meaning of art 26 of that Directive.

123. It is clear, both from the wording of art 26 itself, and from the approach taken by the Court of Justice, that what must be considered is the purpose of the provision of the relevant supply by the taxable person. That is a question which must be addressed objectively by reference to all the circumstances, and it must be determined whether the purpose is a strictly business-related purpose or to meet some private purpose of the recipient.

124. In certain cases, which in the Court of Justice have been confined to cases concerning the provision of transport and meals to staff, there has been identified a normal case where, by virtue of the personal choice ordinarily exercisable by an employee, such as where to live or where, when and what to eat, the provision of the

transport or meals will be for the employee's own private use. In those circumstances, the Court has said that it is necessary to look at the requirements of the business and whether it is necessary to make the relevant provision. If it is necessary, then in such a case the personal advantage to the recipient is merely accessory to the requirements of the business.

125. Mr Beal referred us to the opinion of the Advocate General (Mengozzi) in *Astra Zeneca*. That case, as we have described earlier, concerned the provision of vouchers to employees. The case was decided on the basis that the provision of vouchers was for consideration, and the questions concerning whether there would be a deemed supply were not therefore addressed by the Court. However, they were considered by the Advocate General. His opinion was that, even if it were decided that the provision of the vouchers was not for a consideration (in the form of reduced remuneration), they were not "gifted" to the employees, but were consideration for the work performed by the employees, and were thus not "free of charge".

126. The significant part of the Advocate General's opinion, to which Mr Beal drew our attention, is in [65] where he said:

> "Consequently, even though the ultimate purpose of the vouchers themselves cannot be said to relate to the business's activities, since they are clearly intended for the private needs of the staff*, the requirement that the supply should be free of charge is in any event not fulfilled."

127. We have inserted an asterisk in that text, in place of a footnote marker in the original, as we need to set out here the terms of the footnote:

> "There is in fact no connection between purchases that can be made by employees with the vouchers and the employer's running of the business. Moreover, in that connection, the case law of the court has tended to favour a strict interpretation of the circumstances in which a connection can be said to exist with the activities of the business. See, for example, *Fillibeck* (paras 26 and 29), and *Danfoss* (paras 57 and 58)."

128. Mr Beal argued that the Advocate General could be taken as having implicitly considered that if the vouchers had been "gifted" to the employees, and were intended for their private use, that could not be said to relate to the employer's business activities. Private consumption, he submitted, would not be equated with use for "business purposes", even if the business had a commercial motivation for the free supply of vouchers to its own workforce.

129. Mr Beal developed this argument by reference to this case, submitting that the same reasoning should apply. He argued that the customers of ANL to whom the vouchers had been provided were even less directly connected with the running of the business. He submitted that the fact that the gift of vouchers may have a sound commercial rationale, or be for the benefit of the business through maintaining good industrial relations with the workforce, does not mean that the gift is "for the purposes of the business" within the meaning of that term in art 26 of the Principal VAT

Directive. He argued, as the Advocate General had observed, that a strict interpretation of the concept of "connection" with a business purpose has been adopted. He submitted that the connection must be direct, not indirect, and strictly necessary for the operation of the business.

130. We do not consider that the approach advocated by Mr Beal can be derived from the Advocate General's opinion. The test is not one of connection of the recipient of the service with the business. Nor, with respect to the Advocate General, is it one of the ultimate purpose of the vouchers themselves. All the cases have been concerned with circumstances in which the service went to satisfy some private need of the recipient. That did not prevent the Court from concluding that the service had been provided for strictly business purposes of the taxable person, such that any private need that had been satisfied was seen as ancillary. That is the test which must be applied.

131. We accept that the purpose of art 26, as described by the Court, is to ensure equal treatment as between a taxable person who applies goods or services for his own private use or for that of his staff and a final consumer who acquires goods or services of the same type. Where a taxable person which has been able to deduct VAT on the purchase of goods (or services) applies those goods (or services) from its business for its own private use or that of its staff, that person becomes a final consumer and must be treated accordingly (see, for example, *Danfoss*, Judgment at [46]-[47]). However, disagreeing with Mr Beal, that does not mean that the focus must be on the customer as the final consumer, and on the private purposes for which the customer might consume the service. It is, as the Court in *Danfoss*, at [47], makes clear, the position of the taxable person to which regard must be had, and consequently the purpose of the taxable person, objectively ascertained by reference to all the circumstances. It is only if that purpose is not a business purpose that the taxable person will be regarded as the final consumer, and the equality of treatment provided for by art 26 will become applicable.

132. Nor does the mere fact that the vouchers were provided for no consideration (and that such provision would therefore, as we have accepted, be outside the scope of VAT and would not of itself constitute an economic activity) necessarily mean that art 26 would apply. Whether art 26 does apply will depend on the circumstances. There will be some cases, such as *État belge v Medicom SPRL and another* (Joined Cases C-210/11 and C-211/11) [2013] All ER (D) 61 (Nov) (use of part of a building rent-free by staff for residential purposes), where such provision might not be held to be for strictly business-related purposes (or, in the case of staff, necessary for the requirements of the business), and others, such as *Fillibeck* and *Danfoss*, where the necessary business purpose is established notwithstanding the absence of consideration.

133. In its decision in ANL(1), the FTT noted, at [87], the different approach adopted by the Court in *Danfoss* to the provision of free meals to business contacts on the one hand and employees on the other. The Court concluded, at [65] and in its *dispositif* at [66], that:

> "Article 6(2) of Sixth Directive 77/388 must be interpreted in such a way that, on the one hand, it does not cover the provision, free of charge, of meals in company canteens to business contacts in the course of meetings held on the company premises where objective evidence indicates—this being a matter for the referring court to determine—that those meals are provided for strictly business-related purposes. On the other hand, art 6(2) applies in principle to the provision, free of charge, of meals by a company to its staff on its premises, unless—this likewise being a matter for the referring court to determine—the needs of the company, such as the need to ensure that work meetings are run smoothly and without interruptions, require the employer to ensure that meals are provided."

134. Whilst noting, at [88], that a finding of "business purpose" was in principle perfectly acceptable in either case, even though the result would be that VAT on private consumption (that is, by the business contacts and employees) would be recovered, the FTT went on to examine, at [89], the different approaches that had been taken by the Court to those cases.

135. We agree with the FTT that there is a difference in the way the Court approached the case of business contacts on the one hand and employees on the other. Although we would not wish to characterise the analysis in relation to employees as a presumption, we nonetheless agree with the FTT that the Court identified a general principle of taxability in the case of meals provided to staff on the company's premises, which could however be overridden by reference to particular needs of the company. No such principle was identified in the case of business contacts. The test in that case was simply whether the meals were provided for "strictly business-related purposes".

136. The FTT concluded that it was the "strictly business-related purposes" test that fell to be applied in the context of the provision of vouchers to customers. We agree. There is no authority for the application of any different, or more stringent, test. Thus, agreeing with Mr Walters, the test is not whether the provision of the vouchers was "strictly necessary" for the operation of ANL's business, or provided any direct support for the operation of the business, or was a practical necessity or an unavoidable consequence of the operation of the business. Each of these formulations was put forward by Mr Beal for HMRC. In the context of this case, none of them is supported by authority.

137. In our judgment, therefore, the FTT made no error of law in the test it applied. Nor can any error of law be discerned in its application of that test. The FTT referred, at [96], to the SPICE campaign as having been a highly effective business promotion campaign. ANL had distributed the vouchers as a result of binding legal commitments to do so which had been undertaken on a fully commercial and arm's length basis and in the normal course of its business. The conclusion of the FTT that it could not be said that, by distributing the vouchers, ANL had made them available to its customers for purposes other than a purpose of ANL's business was one that was open to the FTT on the evidence, and is not one with which this Tribunal may

interfere. We would add that, in any event, we would ourselves have reached the same conclusion.

Conclusion on the output tax issue

138. We conclude that the FTT made no error of law in determining that the provision of the vouchers by ANL to its customers free of charge as part of the business promotion schemes was for strictly business-related purposes and accordingly was not deemed to be a supply of services in the course or furtherance of ANL's business pursuant to art 3 of the 1993 Order. In consequence, no obligation to account for output tax arose.

139. Accordingly, we dismiss HMRC's appeal on the output tax issue.

Reference to the Court of Justice

140. We do not consider this is a case where the assistance of the Court of Justice is required. The principles are, for the reasons we have explained, well-established, and we entertain no doubts as to the application of those principles in this case.

Decision

141. We allow HMRC's appeal on the input tax issues so far as it relates to the non-deductibility of input tax in relation to the issues of vouchers by retailers to ANL. We determine in that respect that no input tax arises on such supplies, and that consequently ANL is not entitled to a deduction in that respect

142. Otherwise we dismiss the appeals.

Costs

143. Any application for costs should be made not later than 14 days after the date of release of this decision. As any order will be for detailed assessment, if costs are not agreed, it will not be necessary for the application to be accompanied by a schedule of costs.

LORD JUSTICE DAVID RICHARDS

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 1 December 2015