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Case Number: UT/2024/000129

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

The Royal Courts of Justice,
Rolls Building, London

VALUE ADDED TAX – supplies of various “plan bundles” entitling purchaser to allowances in relation to specified telecommunication services for a fixed period, some with access to other services – whether VAT chargeable on sale of plan bundle or only when and if allowances used - whether plan bundles “vouchers” for VAT purposes

Heard on: 27 and 28 November 2025

Judgment date: 12 February 2026

Before

**MR JUSTICE CAWSON
JUDGE THOMAS SCOTT**

Between

LYCAMOBILE UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: James Rivett KC and Michael Ripley, instructed by Bryan Cave Leighton Paisner LLP

For the Respondents: Eleni Mitrophanous KC, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (“LMUK”) is a mobile virtual network operator. It sold various different “plan bundles” to UK customers, comprising allowances or rights for a specified period to access certain telecommunication services, and, in some cases, to access other services. LMUK treated the plan bundles as liable to VAT when and to the extent that the services available under that plan bundle were in fact used. HMRC considered that VAT fell due when the plan bundles were sold.
2. HMRC issued assessments for VAT for periods between 2017 and 2019, amounting to over £50 million in total. LMUK appealed to the First-tier Tribunal (Tax Chamber) (the “FTT”). In its decision issued on 18 July 2024 (the “Decision”), the FTT dismissed the appeal, although it held that in relation to certain bundles an adjustment to the VAT charged should have been made.
3. This is the decision on LMUK’s appeal against the Decision.
4. We were greatly assisted in reaching our decision by the written and oral submissions of Mr Rivett KC and Mr Ripley for LMUK and Ms Mitrophanous KC for HMRC.

BACKGROUND FACTS

5. References below to paragraphs in the form [] are, unless stated otherwise or the context requires otherwise, to paragraphs of the Decision. References to “VATA” are to the Value Added Tax Act 1994.
6. The FTT divided its findings of fact into those which were not in dispute and those which were. Facts which were not in dispute were set out at [16], and included the following which are relevant background to this appeal (emphasis added to original):
 - (1) the Appellant is part of an association of connected companies which together operate as the world’s largest international mobile virtual network operator (an “MVNO”) and one of the largest MVNOs in the UK;
 - (2) the Appellant is a supplier of telecommunication services in its own name using the infrastructure of a mobile network operator (an “MNO”) such as Vodafone, O2 or EE...;
 - (3) during the period which is relevant to the appeals, a customer of the Appellant would acquire a SIM card either through the Appellant’s network of partner retailers or through the Appellant’s website or by way of downloading the Appellant’s app...;
 - (4) the credits could be used by the customer in one of two ways as follows:
 - (a) first, they could be used by the customer to acquire telecommunication services (such as making telephone calls, sending text messages or accessing data) and a range of other services, in each case at the then prevailing price for the relevant service at the time of use. (There was no charge for receiving telephone calls or text messages in the UK). This was known in the industry as “Pay As You Go” or “PAYG” and we will refer to it hereafter in this decision as “PAYG”; or

(b) secondly, they could be used by the customer to acquire Plan Bundles;

...

(6) Plan Bundles lasted for a specified period of time – generally 30 days from the point of activation but sometimes seven or 14 days after that date – and entitled the customer to specified Allowances, which is to say specified volumes of telephone call minutes, text messages and/or data. However, some Plan Bundles entitled the customer to unlimited Allowances of telephone calls, text messages and/or data (subject to fair usage regulations and conditions);

(7) at the end of the specified period, any unused Allowances in a Plan Bundle were lost. This was different from PAYG credits, which continued indefinitely as long as the customer received a telephone call or text message, used his PAYG credits for any purpose or topped up his or her PAYG credits within a specified period;

(8) from the customer’s perspective, Plan Bundles were generally a potentially cheaper alternative to PAYG although, in some cases, where the customer’s usage was low, PAYG was the cheaper option;

(9) a customer could elect for a Plan Bundle to renew automatically once the previous Plan Bundle expired;

(10) there were significant variations in the composition of Plan Bundles. For example, a Plan Bundle might:

(a) limit the telephone call minutes to calls from the UK to other numbers in the UK; or

(b) entitle the customer to a specified number of international calls or text messages from the UK; or

(c) limit the customer to only one or two of the three types of Allowances – for example, data only;

...

(12) during the period which is relevant to the appeals, more than 60 different types of Plan Bundles were available at any one time;

(13) some of the Plan Bundles that were sold during the period to which this decision relates were comprised solely of the right to use Allowances. In the rest of this decision, we will refer to those Plan Bundles as “Type 1 Bundles”;

(14) some of the Plan Bundles that were sold during the period to which this decision relates included the right to use one or more of the Allowances within the relevant Plan Bundle to access certain specified additional services (the “value added services” or “VAS”)¹ unless the customer chose to opt out. In the rest of this decision, we will refer to those Plan Bundles as “Type 2 Bundles”;

...

(19) at certain points in the relevant period, a customer had the ability to subscribe for one or both of two other services offered by the Appellant (the “Subscription Services”) in return for a fee which was separate and distinct

¹ The FTT discussed the nature and terms of the VAS in detail at [16(15)-(18)].

from the amount paid for his or her Plan Bundle and then use the Allowances within the Plan Bundle to access those Subscription Services²...

...

(22) the contractual position between the Appellant and customers who purchased Plan Bundles was based primarily on:

(a) general terms and conditions, which applied to all customers, whether or not they held a Plan Bundle; and

(b) “bundle specific” terms and conditions, which set out the terms applicable to the particular category of Plan Bundle which the customer was acquiring. Not all of the terms and conditions described above were provided to us but we were provided with examples of both categories of terms and conditions;

(23) the examples of the general terms and conditions with which we were provided did not refer to either the Allowances or the VAS in the context of the Plan Bundles. Instead, they merely referred generically to the “products” which the Appellant offered...

(25) for every SIM card, the Appellant maintained an account within its billing system which recorded the relevant customer’s entitlement to, and usage of, the Allowances within a Plan Bundle...;

(26) according to figures produced by the Appellant for the purposes of the hearing, broadly only around five per cent. to ten per cent. of the Allowances in a Plan Bundle were actually used. Of course, the position would have varied from customer to customer and Plan Bundle to Plan Bundle but that range was the average of the usage figures;

...

7. In addition to Type 1 and Type 2 Bundles, the FTT categorised a third category of Plan Bundles as Type 3 Bundles.

8. One of the categories of VAS which was included in certain bundles was the **Non-EU Roaming Calls VAS**. This comprised the right to make telephone calls when travelling in non-EU countries for no extra charge. There was a further feature included in some bundles, with differences to the Non-EU Roaming Calls VAS, called “**Roam Like Home**”. The FTT found that this feature allowed the customer to use telephone call minutes, text messages and data Allowances from within a number of specified countries (including some non-EU countries) as if the customer was located in the UK at the relevant time. It referred to bundles including this Roam Like Home feature as **Type 3 Bundles**.

THE FTT’S DECISION

9. The FTT recorded that its decision was, with the consent of the parties, solely a decision in principle and did not deal with the issues of best judgment and quantum: [31].

10. The FTT addressed two issues: [32]-[33]. The first (“Issue One”) was the question of what service the Appellant supplied when it sold a Plan Bundle to one of its customers and when that service was supplied. The second issue (“Issue Two”), which arose only if the FTT

² The two Subscription Services were: (a) the right to send a text message to a specified number and receive a return text message containing that day’s horoscope or a joke (the “horoscope/joke Subscription Service”); and (b) the right to make a telephone call to a virtual doctor service for a consultation, including potentially obtaining a prescription or a referral (the “vDoc Subscription Service”): Decision at [16(19)].

decided Issue One in favour of HMRC, was the question of whether a Plan Bundle was a face-value voucher falling within provisions of the legislation which provided that no VAT was chargeable on the issue of the voucher and that VAT was chargeable only if and to the extent that the voucher was used. There was a change in the applicable voucher legislation within the period to which the appeal related.

11. The FTT summarised its conclusions at [184] as follows:

In conclusion, our views on the matters of principle that have been raised with us are as follows:

(1) when a Type 1 Bundle was sold by the Appellant, VAT was chargeable on the full amount of consideration which was paid by the relevant customer in return for the Type 1 Bundle, regardless of the extent to which the customer subsequently exercised his or her entitlement to Allowances under the Type 1 Bundle;

(2) precisely the same conclusion applies to:

(a) a Type 2 Bundle which did not include the non-EU Roaming Calls VAS;

(b) a Type 2 Bundle which did include the non-EU Roaming Calls VAS and was issued on or after 1 November 2017; and

(c) a Type 3 Bundle which was issued on or after 1 November 2017;

(3) in relation to a Type 2 Bundle and a Type 3 Bundle other than one referred to in paragraph 184(2) above, VAT was chargeable on the full amount of consideration which was paid by the relevant customer in return for the Type 2 Bundle or the Type 3 Bundle, as the case may be, regardless of the extent to which the customer subsequently exercised his or her entitlement to Allowances under the relevant bundle, provided that a subsequent adjustment to the VAT chargeable should have been made to reflect the extent to which the non-EU Roaming Calls VAS (in the case of a Type 2 Bundle) or Roam Like Home (in the case of a Type 3 Bundle) was exercised in a non-EU country; and

(4) the VAT analysis set out in paragraphs 184(1) to 184(3) above was not affected by the voucher legislation in Schedule 10A or the voucher legislation in Schedule 10B.

GROUND OF APPEAL

12. LMUK appeals on four grounds, as follows:

(1) **Ground 1:** Each of the different Plan Bundles was only chargeable to VAT if, and to the extent that, the Allowances were utilised by customers to receive services which were subject to UK VAT. Therefore, contrary to the Decision, VAT was not chargeable on the full amount of the consideration paid when any of the Type 1, 2 or 3 Bundles were sold or activated.

(2) **Ground 2:** The FTT erred in its treatment of VAS, by seeking to determine the importance of VAS to LMUK's customers generally and to conclude that VAS should be treated as ancillary to the supply of the Allowances.

(3) **Ground 3:** The Plan Bundles sold or activated on or after 1 January 2019 were electronic multi-purpose vouchers...Consequently, the consideration paid by customers

for the purchase of Plan Bundles fell to be disregarded and VAT only became chargeable to the extent that the Allowances were used to obtain services.

(4) **Ground 4:** The Plan Bundles sold or activated prior to 1 January 2019 were electronic multi-purpose vouchers within Schedule 10A VATA. Consequently, the consideration paid by customers for the purchase of Plan Bundles fell to be disregarded and VAT only became chargeable to the extent that the Allowances were used to obtain services.

13. HMRC **cross-appeal** on the ground that the FTT erred in finding that in relation to Type 2 Bundles a subsequent adjustment to VAT was necessary in relation to calls made from outside the UK prior to 1 November 2017.

14. As before the FTT, this decision deals only with points of principle, and not quantum or the categorisation of individual Plan Bundles into Type 1, 2 or 3.

15. We deal first with LMUK's appeal.

GROUND 1 : WHAT WAS SUPPLIED BY LMUK?

16. At the heart of this ground lies a simple question: was LMUK making a supply of services consisting of the allowances included in the bundle when it sold that bundle³ (as HMRC say) or (as LMUK says) was it only making supplies when and to the extent that those allowances were in fact used?

17. The question may be simple, but we are in the world of VAT. We were addressed at length on a considerable number of domestic and CJEU⁴ authorities as well as relevant legislation. We have considered all of the submissions made by counsel in reaching our decision, even if we have not found it necessary to deal with every point raised.

Relevant legislation

18. In this appeal, the position as regards EU law remains as stated by the FTT at [46]:

It is common ground in these proceedings that, as all of the relevant VAT periods ended before the UK left the EU:

(1) any question as to the validity, meaning or effect of the provisions of UK domestic law which apply in the present case are to be interpreted in accordance with the principles laid down, and any decisions made, by [the CJEU] prior to 11.00pm on 31 December 2020 (the "IP completion day"); and

(2) we are not bound by anything done by the CJEU on or after IP completion day although we "may have regard" to it.

The above is as a result of Sections 2 and 6 of the European Union (Withdrawal) Act 2018, as amended.

19. The relevant EU legislation is contained in the Principal VAT Directive (Council Directive 2006/112/EC) (the "PVD"). Under Article 2(1)(c) of the PVD, VAT is chargeable

³ The FTT recorded at [186] that it had proceeded on the basis that in relation to the time of supply, no distinction should be drawn between the time when the bundle was sold/paid for and the time when a customer activated it, and in the absence of any submissions from the parties we have proceeded on the same basis.

⁴ We use "CJEU" to refer to both the Court of Justice of the European Union and the earlier Court of Justice of the European Communities.

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

20. It is common ground that pursuant to Articles 45 and 58 PVD the place of supply of all services in this appeal was the UK. However, there was one relevant modification to that rule in the periods under appeal. Article 59a PVD gave Member States an option (exercised by the UK) in relation to telecommunication services supplied in the UK for the period up to November 2017 to treat the services as made outside the EU “if the effective use and enjoyment of the services takes place outside the Community”.

21. Article 62(2) PVD defines a “chargeable event” for VAT purposes, which drives the time of supply. The chargeable event is generally when the goods or services are supplied (Article 63) but may arise on receipt of the payment where a customer makes a payment on account before supply (Article 65).

22. These provisions are reflected in domestic legislation in VATA. The relevant provisions in this appeal are sections 1 and 6, and the “effective use and enjoyment” provisions which we set out below where relevant.

Case law

23. We discuss the case law relating to composite supplies and effective use and enjoyment in the context of our discussion of those issues later in this decision. First, it is necessary to refer to a number of decisions which were particularly relied on by the parties and/or the FTT in relation to the key issue in this appeal, namely the nature and timing of LMUK’s supply. Some of our discussions draw from the FTT’s helpful summaries of several of the following authorities.

24. Those decisions are as follows:

(1) *Macdonald Resorts Ltd v Revenue and Customs Commissioners* (Case C-270/09) [2011]; [2011] STC 412 (“*MRL*”);

(2) *BUPA Hospitals Ltd v Customs and Excise Commissioners* (Case C-419/02) [2006]; [2006] STC 967 (“*BUPA*”);

(3) *HMRC v Findmypast Ltd* [2017] ScotCS CSIH 59 (“*FMP*”);

(4) *Go City Ltd v HMRC* [2024] UKFTT 745 (TC) (“*Go City*”);

(5) *Air France-KLM and another v Ministère des Finances et des Comptes publics* (Joined cases C-250/14 and C-289/14) [2015]; [2016] STC 1451 (“*Air France*”);

(6) *Lebara Ltd v Revenue and Customs Commissioners* (Case C-520/10) [2012]; [2012] STC 1536 (“*Lebara*”);

(7) *Kennemer Golf & Country Club v Staatssecretaris van Financiën* (Case C -174/00) [2002] (“*Kennemer*”);

(8) *Hutchison 3G UK Limited v HMRC* [2018] UKFTT 0289 (TC) (“*H3G*”);

(9) *Vodafone Portugal – Comunicações Pessoais SA v Autoridade Tributária e Aduaneira* (Case C – 43/19) [2020]; [2020] STC 1975 (“*Vodafone*”);

(10) *Marcandi Limited (trading as ‘Madbid’) v The Commissioners for Her Majesty’s Revenue and Customs* (Case C – 544/16) [2018]; [2018] STC 1455 (“*Marcandi*”);

(11) *rhtb projekt gmbh v Parkring 14-16 Immobilienverwaltung GmbH*, (Case C-622/23) [2024] (“*rhtb*”);

(12) *The Opinion of the Advocate General in GE Aircraft Engine Services v The Commissioners for HMRC* [2022] EUECJ C-607/20 (“*GE AES*”).

25. In *MRL*, customers of a hotel group acquired contractual rights (“Points Rights”) which they could use once a year to book accommodation in one of a number of specified properties or to obtain other services. In approaching the question of the classification of the services provided by MRL, the CJEU started by identifying the “ultimate intention” of a customer in providing consideration for the Points Rights ([22]), which was to convert the Points Rights into the services offered by the arrangement and not simply to obtain the Points Rights themselves. The CJEU emphasised that the acquisition of Points Rights was not an aim in and of itself for the customer. Instead, it was to be regarded as a preliminary transaction in order to be able to exercise the right to receive the ultimate services: [24]-[25]. Thus, it was only when the customer received the accommodation or other services following the exercise of the Points Rights that they could be said to receive the consideration for their initial payments and the service was fully supplied.

26. The CJEU said this:

“29 ...it must [be] stated that, when ‘Points Rights’ are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. Moreover, it is MRL which determines the points classification of the available accommodation and services, so that the customer’s choice is limited from the outset to accommodation or services which are accessible to him with the number of points he has available.

30 In those circumstances, the factors necessary for VAT to become chargeable are not established when rights such as ‘Points Rights’ are initially acquired, which excludes the application of [Article 65 of the PVD].

31 As follows from the judgment in Case C-419/02 *BUPA Hospitals and Goldsbrough Developments* [2006] ECR I-1685, in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT (*BUPA Hospitals and Goldsbrough Developments*, paragraph 50).”

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

27. In *BUPA* (referred to in *MRL*), the taxpayer attempted to avoid the withdrawal of zero-rating on supplies of goods by entering into a prepayment arrangement, under which it agreed to buy goods for delivery in a later accounting period and paid in advance so that it might be able to recover the VAT input tax on the supply in the accounting period of prepayment. Under the contract, the goods to be supplied were listed in a schedule which could be amended by

agreement until the prepayment was completed. The CJEU held that the arrangement did not achieve its objective because the prepayment rule was a derogation from the general rule that a supply of goods was made only when the goods were actually supplied and therefore had to be construed strictly. In order to fall within the ambit of the provision, all of the relevant information concerning the chargeable event, namely the future delivery and future performance, had to be known at the time of the prepayment. Thus, a payment for goods or services which had not yet been precisely identified at the time of payment could not be subject to VAT: [44] to [51].

28. *FMP* was a decision of the Inner House of the Court of Session. The taxpayer's website provided access to records on genealogical and ancestry websites. A person who wished to search the historical records on the website was able to do so without charge. However, if the person wished to view or download most of the records on the website, they were required to pay. This could be done either by taking out a subscription for a fixed period or by using a system known as "pay as you go" in which, in return for a lump sum, the person received a number of credits which could then be used to view or download a record. The credits were valid only for a fixed period although unused credits could be revived if the person purchased further credits within two years.

29. The Court of Session considered the nature of the supply made to a person acquiring credits: was it the supply of the records which were in fact selected by the customer and then viewed or downloaded, or was it instead the supply of a package of rights and services including the right to search the records on the various websites and to download and print particular items from those websites?

30. The Court considered (at [16]-[19]) that the approach taken by the CJEU (specifically in *Lebara*) involved the application of a practical test based on economic reality and having due regard to the factual and legal context in which a possible charge to tax arose. In that regard:

- (1) a supply of services was taxable only if there was a legal relationship between the service provider and the recipient pursuant to which there was reciprocal performance – namely, remuneration received by the service provider in return for the provision of the service;
- (2) it was necessary to examine the whole of the relationship between the service provider and its customers and to do so in context, in order to discover the true nature of the supply; and
- (3) the terms used in the relevant contracts were potentially important.

31. Applying those principles, the Court noted that the taxpayer was providing two services – first, a general search function and, second, the viewing and downloading of documents. The first service was not an end in itself. Instead, it was merely a means towards the customer's ultimate end of receiving the second service. In addition, it was provided for free to members of the public regardless of whether or not they were customers. It followed that the consideration provided by a customer who acquired credits was provided solely for the second service and not the first.

32. *Go City* is a decision of the FTT released after the Decision. It concerns two types of leisure pass, entitling a buyer to enter various specified attractions and use certain forms of transport without further payment. The FTT found (at [253]) that "both as a matter of contractual construction and as a matter of economic substance and reality, the Appellant was

supplying a credits package whereby a customer could in due course convert credits into rights to enter specific Attractions (including buildings and passenger transport services). Each of these are distinct services, provided by the different and varied undertakings which make the supplies acquired by the Appellant and sold on to the Passholders”. The FTT considered the application of the principles in *MRL* and *FMP* to these facts, and decided that the facts were in all material respects the same as that of *MRL* ([260]) and *FMP* ([270]). On that basis, the FTT found that VAT arose only when a customer used the pass, not when they bought it, stating that “the position is essentially the same as in *MacDonald Resorts* and *Findmypast*”: [274].

33. In *Air France* the CJEU addressed the VAT treatment of consideration paid for non-refundable air tickets which were no longer valid as a result of customer “no shows” and invalid exchangeable tickets which had not been used during the period of their validity. The CJEU held that the taxpayer was required to account for VAT on the consideration because there was a legal relationship of reciprocity between the taxpayer and the relevant customer and a direct link between the consideration paid by the customer and the service supplied in the context of that legal relationship. The customer did not have the right to benefit from the performance of the taxpayer’s obligations until the time of boarding and the taxpayer fulfilled its obligations by putting the customer in position to benefit from the services. The CJEU stated (at [25]-[28]):

25. ...a supply of services, such as air passenger transport, is subject to VAT where, first, the sum paid by a passenger to an airline company, in the context of the legal relationship constituted by the transport contract, is directly linked with an identifiable service for which it constitutes the remuneration and, secondly, that service is performed.

26. In that regard, the court has stated that the services provided in performance of obligations arising from a contract to transport passengers by air are the checking-in and the boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, their disembarkation in conditions of safety at the place of landing and at the time scheduled in that contract...

27. However, it is possible to perform those services only if the passenger of the airline company turns up on the agreed date and at the agreed place of boarding, the customer’s right to performance of those services being given by the company until the time of boarding, according to the conditions set out in the contract to transport passengers concluded when the ticket was purchased.

28. Therefore, the consideration for the price paid when the ticket was purchased consists of the passenger’s right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services.

34. In *Lebara*, the taxpayer sold telephone cards to distributors, who then on-sold those cards to users in Member States. Each card was limited to the face value shown on the card and to a fixed period, and represented the right to receive telecommunication services from the taxpayer. The CJEU held that the supply of a phone card to a distributor was the supply of a telecommunications service by the taxpayer to the distributor because the card contained all the information necessary for making calls using the taxpayer’s infrastructure and the definition of “telecommunications service” included “not only the transmission of signals or sounds as

such, but also all services ‘relating to’ the transmission, and the related transfer of the right to use capacity for such transmission”. There was not a separate supply by the taxpayer to the user of the card.

35. The CJEU stated as follows:

33. In order to identify the recipient of the sole supply of services made for consideration by that operator and, accordingly, the sole taxable supply, it is necessary to determine whether it is the distributor or the end user which is linked to the telecommunications services operator by a legal relationship in the course of which there is reciprocal performance.

34. In that connection, it should be noted first that, by the sale of the phone cards, the telecommunications services operator supplies the distributor with all the information necessary for making international phone calls of a fixed duration by means of the infrastructure provided by that operator, which means that it transfers to the distributor the right to use that infrastructure in order to make such calls. The telecommunications services operator thus supplies a service to the distributor.

35. That service is covered by the term ‘telecommunications services’ as used in the tenth indent of art 9(2)(e) of the Sixth Directive. That provision defines that term broadly, so as to cover not only the transmission of signals and sounds as such, but also all services ‘relating to’ the transmission, and the related transfer of the right to use capacity for such transmission.

...

41. It follows that there is reciprocal performance...between the telecommunications services operator and the distributor at the time of the initial sale of the phone cards to the distributor...

36. The CJEU in *Kennemer* considered whether there was a direct link between annual subscription fees charged by a golf club to its members and the facilities provided by the golf club. Separate admission fees were charged to members: [10]. The Court held that such a direct link did exist and that therefore those subscription fees were consideration for the services provided by the golf club in making the facilities available to the members even though some of the members paying those fees did not use, or regularly use, the relevant facilities: [36]-[42]. In particular, the CJEU rejected the argument of the Netherlands government that the fact that certain members did not avail themselves of the facilities meant that there was no direct link between the subscription fees and the services provided by the golf club.

37. *H3G* is a decision of the FTT relating to similar issues to those in this appeal. The FTT in this appeal agreed with many aspects of *H3G* but disagreed with some others. The case related to the VAT consequences of supplies of telecommunication allowances in return for monthly recurring charges. The taxpayer argued that it was not required to account for VAT on the whole of the monthly recurring charges at the time when those charges were paid but should instead be required to account for VAT only on the portion of the charges which was attributable to those of the allowances that were actually used (at the time of such use) and even then only to the extent that such use did not involve the effective use and enjoyment of the allowances outside the EU. The FTT rejected this argument. It agreed with HMRC that VAT was payable on the full amount of the monthly recurring charges at the time of payment, with a later repayment of VAT to reflect any actual use of the allowances outside the EU.

38. *Vodafone* concerned whether a payment made for early termination of telecommunication services was a supply for consideration. The CJEU determined the question by reference to the existence of a “direct link”, stating (at [31]-[32]):

31. A supply of services is carried out ‘for consideration’, within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received...

32. As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has held that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from that contract, irrespective of whether the customer uses that right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself or herself of that right...

39. *Marcandi* can be contrasted with *MRL*. The taxpayer sold goods in its online shop and also through online auctions. A customer wishing to participate in an auction was required to purchase “credits” in order to bid. The credits could not be used for any other purpose. In particular, they could not be used to make purchases in the online shop, or converted into cash and they were not credited towards the price of any goods purchased in the auction. The CJEU held that, taking those features into account, the issue of the credits could not be treated as a preliminary transaction to the supply of goods but was itself a supply of services that was entirely separate from the supply of goods which might take place pursuant to the auctions. The CJEU distinguished the factual position in *MRL*: [29]-[32] and [49].

40. *rhtb* was a decision of the CJEU after IP Completion Day, which does not bind us but to which we may have regard. It concerns VAT on an amount contractually due following the termination by the customer of a building project which had already begun and which the construction undertaking was prepared to complete. The CJEU held that the termination payment was liable to VAT, stating (at [15]-[17]):

15 In that regard, it must be recalled that, in accordance with Article 2(1)(c) of the VAT Directive, which defines the scope of VAT, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to that tax.

16 According to the case-law of the Court, a supply of services is carried out ‘for consideration’, within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received (judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 31 and the case-law cited).

17 As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has held that the consideration for the price paid at the time of the signing of a contract for the supply of a

service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from that contract, irrespective of whether the customer uses that right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself or herself of that right (judgment of 11 June 2020, *Vodafone Portugal*, C-43/19, EU:C:2020:465, paragraph 32 and the case-law cited).

41. Mr Rivett asked us to consider the following passages from the Opinion of the Advocate General in *GE AES* (footnotes omitted):

59. Indeed, since it is the supply of goods or services which is subject to VAT, rather than payments made by way of consideration for such supplies, not every transaction for consideration, particularly when involving (future or unascertainable) rights, gives rise to a chargeable event. Simply put, where no complete supply of those goods or services occurs, no chargeable event can arise.

60. Hence why, to my mind, a distinction must be drawn between, first, the transfer of a right 'as such', and, second, the transfer of a 'right to a future supply' of goods and services.

61. The former type of supply is subject to VAT by virtue of the fact that it actually embodies, for the purchaser, a completed supply which would enable him or her to be considered a consumer of a service. A chargeable event occurs at the moment when the 'as such' right is transferred and VAT is determinable in full. Indeed, the recipient is provided with the right to make use of the voucher he or she receives much in the same way as that person would be transferred the right to exploit an intellectual property right or to make use of a gym membership.

62. The latter type of situation, that is to say, the 'right to a future supply' of goods or services, concerns an entirely different taxable scenario. Consider the examples of prepayment vouchers giving access to a spa or certain types of city cards. Those types of supplies may only be subject to VAT if all the relevant information concerning that supply is already known at the point in time when a particular transaction takes place. That is because only in those circumstances have the parties to the transaction demonstrated their intention that all the financial consequences of their supply should arise in advance. However, if such future supplies are not yet clearly identifiable, they cannot be subject to VAT at the point in time when the right to their supply alone is transferred (because, obviously, the rate of VAT would not yet be determinable). In those cases, the chargeable event simply shifts 'one level down' the chain of transactions to the point in time when the right to said supply is transferred, or when all the information concerning that future supply becomes available and the financial consequences of that supply are crystallised.

The FTT's decision

42. The FTT concluded as follows in relation to the three types of Plan Bundle:

Type 1 Bundles

43. The FTT decided that VAT arose at the point of sale in relation to Type 1 Bundles. We set out its detailed reasoning below.

Type 2 Bundles

44. The FTT did not consider the fact that a customer could use the Allowances in a Type 2 Bundle to access the Subscription Services altered the analysis which it had reached of Type 1 Bundles [119]. However, the right to access the VAS was different.

45. The FTT reiterated its finding of fact that the availability of VAS was not important to a customer who acquired a Type 2 Bundle: [18]-[21] and [121].

46. The FTT concluded that the sale of each Type 2 Bundle should be treated for VAT purposes as a “single composite supply” of which the Allowances were the principal element and the VAS were ancillary to the Allowances: [122].

47. The FTT said that the authorities established that the ancillary elements within a single composite supply share the same treatment as the principal element within that supply: [123]. The position was therefore the same as for Type 1 Bundles, so VAT arose on sale of the bundle.

48. However, the FTT decided that there was an exception to this analysis for the non-EU Roaming Calls VAS (see paragraph 8 above). The FTT decided that even though the non-EU Roaming Calls VAS was an ancillary service, that could not override the rule in place prior to November 2017 regarding “effective use and enjoyment”. Therefore, for Type 2 Bundles which included the non-EU Roaming Calls VAS, the VAT treatment would follow that set out below for Type 3 Bundles: [125]-[127].

Type 3 Bundles

49. As the FTT explained, at [128]:

These differed from the Type 2 Bundles which included the non-EU Roaming Calls VAS in that:

(1) the ability to use the Allowances within a Type 3 Bundle was not restricted to telephone calls but included text messages and data;

(2) use of the Allowances within a Type 3 Bundle was confined to specified non-EU countries; and

(3) Roam Like Home was promoted extensively in the Appellant’s leaflets and posters and therefore we have found as a fact that its availability was important to customers who chose to acquire Type 3 Bundles.

50. The FTT decided that supplies of Type 3 Bundles made on or after 1 November 2017 should be treated in the same way as Type 1 Bundles: [130].

51. However, in relation to supplies of Type 3 Bundles before that date, the “effective use and enjoyment” rule applied. This meant that there would need to be a retrospective adjustment to the VAT arising on sale of the bundle to the extent (if any) that the Allowances were effectively used and enjoyed within a relevant non-EU country: [131]-[132]. The fact that there was no express provision within either the PVD or VATA entitling LMUK to make a repayment claim for such an adjustment did not mean that this conclusion was wrong, and it did not call into question the FTT’s analysis of Type 1 Bundles: [136]-[138].

Submissions of the parties

LMUK

52. LMUK argued that all three of the different Plan Bundles were only chargeable to VAT if and to the extent that the Allowances were actually used by customers to receive services which were liable to VAT, and not on sale of a bundle.

53. Mr Rivett said that the Opinion of the Advocate General in *GE AES* illustrates that there are two types of rights for VAT purposes:

(1) “as such rights” which are taxable when the rights are transferred, and

(2) “rights to future supplies” which are not taxable when transferred unless all relevant information about the future supplies is already known. Examples of cases falling within this category include *MRL*, [*FMP*] and most recently [*Go City*].⁵

54. Mr Rivett submitted that LMUK’s position was similar to that in *MRL*, and the “real service” was the actual use of Allowances. He said that *MRL* also established that a tax point for VAT could not arise until all relevant information in relation to the supply was established. That was also made clear in *BUPA* and *Marcandi*. These principles were also applied in *FMP* and *Go City*. To the extent that *H3G* suggested otherwise, it was wrongly decided.

55. Applying those principles in this case, argued Mr Rivett, Plan Bundles are plainly rights to future services and the purchase of a Plan Bundle is a preliminary transaction, because acquiring the rights within a Plan Bundle is not an aim in itself for customers. Plan Bundles are comparable to PAYG credits and the “real supply” occurs only when and to the extent that Allowances are in fact used.

56. Further, he said, the purchase of a bundle cannot give rise to a tax point because at that stage LMUK did not have “all the relevant information concerning the chargeable event”. In particular, *FMP* shows that uncertainty as to usage is an important factor. The uncertainty was even greater in relation to Type 2 and Type 3 Bundles, because LMUK did not know which of the many services available would in fact be selected, and some of those services might not even be subject to VAT. In oral submissions, Mr Rivett said that it is not possible to have a VAT supply where there is any uncertainty as to what is supplied.

57. The analysis contended for by LMUK, said Mr Rivett, is entirely consistent with VAT being a tax on consumption. The fact that no VAT charge would accrue in respect of unused rights was expressly recognised in *MRL* and *FMP*; the FTT erred in trying to avoid this conclusion by “filling in the gaps” in the law.

58. Mr Rivett argued that the FTT erred in concluding that receipt of the Allowances was the customer’s purpose. The rights to the Allowances were not acquired for their own sake; “the customer’s sole aim in acquiring a Plan Bundle was to use the allowances to receive one or more of a number of future services”.⁶ The FTT erred in relying on *Lebara* and *Kennemer* in reaching its conclusion to the contrary. It also erred in stating that the extent of use was

⁵ Appellant’s skeleton argument paragraph 38.

⁶ *Ibid* paragraph 58.

irrelevant, because that was contrary to the Court of Session's decision in *FMP*. Plan Bundles had no inherent value to customers beyond the ability to use the allowances.

59. The FTT also erred, said Mr Rivett, in relying on the fact that there was a legal relationship of reciprocity when the bundle was acquired, because that is the case whenever a right is acquired, and it sheds no light on the real supply. If a contract for the grant of a right supported by consideration was enough to trigger a tax point, *BUPA*, *MRL*, *FMP* and *Go City* would all have been wrongly decided.

60. Mr Rivett argued that the necessity found by the FTT for a non-statutory retrospective adjustment in relation to Type 2 and 3 Bundles indicated the FTT had gone wrong. Finally, he said, the FTT's analysis gave rise to a number of practical difficulties.

HMRC

61. Ms Mitrophanous approached the question in a different way. In her submission, there were four questions which logically arose. First, what is the supply? This may involve considering whether there is a single supply or a composite supply. Second, what is the rate of VAT on that supply? Third, what is the place of supply? Fourth, when is HMRC entitled to the VAT: is it at the time of supply, or on prepayment if there is one?

62. She argued that the key issue in determining the first question was reciprocity, and establishing when the necessary reciprocity arose. She rejected Mr Rivett's position that there were two types of case—in fact, all the cases asked and answered the reciprocity question. The cases in which there was a preliminary step of supplying a means of payment to the customer were unusual, because in the vast majority of cases there was no such preliminary step. In this appeal, she said, there is no such preliminary step, but rather the true supply (of allowances) is selected, fixed and paid for at the outset. Most Plan Bundles are materially under-utilised, because what is being paid for is guaranteed availability at a fixed price.

63. Ms Mitrophanous said that in practice supplies of guaranteed availability/access were not unusual. Examples might include air tickets, theatre tickets, streaming bundles such as Netflix and gym membership.

64. She argued that the authorities illustrate that it is always possible to make a VAT supply of availability, with actual use being irrelevant. Examples include *Lebara*, *Kennemer*, *Air France* and *Vodafone*. Other authorities were cited to us to support this.

Discussion

65. The key issue, in this appeal and under Ground 1, is whether VAT arises when Plan Bundles are sold or only when and if used. Notwithstanding the extensive submissions which we heard from counsel, it is important not to lose sight of the fact that this is a simple question. Since this is an appeal and not a rehearing, it is also essential to consider the way in which the FTT approached that question, and whether in doing so they erred in law.

66. It is helpful to bear three points in mind in considering the authorities, namely:

- (1) It is clearly possible to have a supply consisting of availability/access.

(2) It is also possible, but less common in practice, to have a supply consisting of a sale of some type of “currency” as a preliminary step in allowing access to goods or services.

(3) Additionally, VAT can arise on payment rather than supply under the prepayment rules.

67. Turning now to the Decision, having set out relevant case law in some detail, the FTT discussed the identification of the supply by LMUK (in relation to Type 1 Bundles) at [95]-[119]. It described the exception to the basic rule that VAT becomes chargeable on supply which can arise where there is a prepayment. It then prefaced its discussion as follows, at [100]:

The CJEU authorities show that there is another quite separate – and logically anterior – issue which needs to be determined when a supply of services is made and that is that, before the time of a supply can be determined, it is necessary to identify the services which are actually being supplied in return for the consideration paid. In other words, it is necessary to identify the nature of the service which the supplier is agreeing to perform in return for the consideration paid by the customer. That issue – identifying the true nature of the supply which is being made – is not the same as identifying how the prepayment exception to the general rule as regards the tax point for the supply is to operate but it overlaps with it to some extent in the judgments. That is because the CJEU has sometimes supported its conclusion in relation to identifying the nature of the services which are being supplied by referring to the case law that prevents a prepayment from crystallising the tax point – see, for example, *MRL* at paragraphs [27] to [33].

68. The FTT expanded on this by explaining that *MRL* was not a prepayment case, but simply referred to the prepayment position to support its identification of the real supply: [101]. The FTT rejected Mr Rivett’s submission that “that there is an overarching principle within the VAT legislation (supported by CJEU case law) to the effect that the tax point for a supply of services can never arise until all the relevant information in relation to the relevant supply is known”: [102]. It followed that the extent and nature of any uncertainties in relation to a Type 1 Bundle were irrelevant; all that was required was to identify the real supply being made: [103].

69. The FTT continued, at [104]:

It follows from the above that, in each case, before identifying the time when a supply of services was made, it is necessary first and foremost to identify the service which was being supplied in return for the consideration paid to the supplier. That is what the CJEU in *MRL* described at paragraph [32] as the “real service” for which the consideration was provided, as distinct from some preliminary step which was not, in and of itself, the purpose for providing that consideration. That process is not as straightforward as it might seem because there are circumstances where there are steps leading to a subsequent supply and it is necessary to determine whether those steps are merely preliminary to the eventual “real supply” or amount to a “real supply” in their own right.

70. The right approach, said the FTT, was first to identify the true nature of the supply, and then the tax point for that supply. That was the approach taken in *FMP*, in which the Court of Session placed no reliance in its conclusion on any uncertainties as to the relevant supply: [106]-[107].

71. In an important passage, at [108], the FTT described the approach it would take to applying the legal principles to the facts:

Turning then to the facts in the present case so far as they relate to the sale of the Type 1 Bundles and the ensuing use of the Allowances in the Type 1 Bundles, we need to determine the true nature of those transactions, based on the legal and economic context in which they occurred, the relationship of the Appellant with its customers and the purpose of the customers in paying their consideration to the Appellant. In particular, in the light of the decisions in *MRL* and *FMP*, we need to ask ourselves whether the sale of the Type 1 Bundles was the “real supply” for which the customers contracted in buying the Type 1 Bundles – which is to say, a supply of services in and of itself – or was merely a preliminary step to the “real supply” – which was the use of the Allowances contained within the Plan Bundles in due course.

72. At [109], the FTT found that, having carried out that process, there was only one answer, which was that the sale of the Type 1 bundles amounted to the “real supply”. Receipt of the Allowances was the customer’s purpose in buying the bundle. The Allowances conferred the right to use, and the extent of actual use was irrelevant: [109] and [111]. When a bundle was acquired, there was a legal relationship of reciprocity between the customer and LMUK and a direct link between the consideration paid and the Allowances: [112]. VAT therefore arose at the point of sale.

73. The FTT rejected Mr Rivett’s parallels between the facts in the appeal and *MRL* and *FMP*. In those cases, at the initial stage the customer had only acquired a “currency” which was of no inherent value: [113]-[115]. The FTT considered that the Allowances in a Type 1 Bundle were also completely different from PAYG credits: [118].

74. In our opinion, the FTT correctly directed itself in law, properly applied that law to the facts and reached the right conclusion on this issue. In particular, the FTT was right to reject Mr Rivett’s arguments. First, the authorities do not support a general proposition that there can be no supply so long as any uncertainties remain as to the terms of the supply. As the FTT pointed out, that is a proposition which has been developed in relation to the potential application of the prepayment rules, not to the identification of the supply. Indeed, if Mr Rivett’s argument were correct, it is difficult to see how there could ever be a supply of availability or access; when I pay my monthly subscription for a streaming service, it is impossible to know how much, if at all, I will use that service. Second, while the authorities do indeed include cases in which there has been held to be a preliminary supply of some sort of currency, with the real supply occurring at a later stage, those decisions turned entirely on their facts. Mr Rivett’s continued assertion that there was no inherent value in the Allowances is no more than assertion. The FTT was entitled to find on the facts that what customers were contracting for in buying Plan Bundles was guaranteed availability, at a fixed price, for a fixed period. Indeed, although the FTT did not rely on this in reaching its decision, we consider that the FTT’s finding of fact (at [16(26)]) that, on average, only 5 to 10% of the Allowances in a Plan Bundle were actually used is, at the very least, consistent with the FTT’s conclusion.

75. Mr Rivett’s submissions that there were “two types of case” and that the FTT was wrong to draw analogies with the authorities which it did are in substance an assertion that the facts in this appeal are analogous to those cases in which a preliminary supply of currency was found to arise. However, we agree with Ms Mitrophanous that the facts found by the FTT simply do not make that assertion good.

76. Mr Rivett referred to various authorities under Ground 1. He relied on *MRL*, *BUPA* and *FMP* as support for the principle that there cannot be a supply when any relevant uncertainties exist, but as the FTT explained, those authorities set out that principle in relation to the prepayment rules, not the identification of the supply. *Go City* was simply an example of a case which on its facts was held to be on all fours with *MRL*, so it does not further Mr Rivett's arguments. He challenged the correctness of the FTT's decision in *H3G*, but this is an appeal against the Decision, not against *H3G*, and we need make no comment on that decision. Mr Rivett criticised the FTT for relying (at [109]-[110]) on *Lebara* as support "for treating all rights to telecommunication services as the "real supply"...regardless of the customer's ultimate aim"⁷, but the FTT did not reach or support any such conclusion. Mr Rivett said that the FTT erred in drawing a comparison between LMUK's supplies and those in *Kennemer*, since separate admission fees were charged in *Kennemer* in addition to the membership fees, and that was the reason for the CJEU's decision. We disagree. First, the CJEU did not rely on that fact in reaching their decision. Second, as a matter of principle a supply of availability/access does not lose that characterisation because a separate fee may be included as part of the arrangement; a monthly access fee might, for instance, be supplemented by additional charges for premium services. Finally, Mr Rivett said the FTT was wrong on the facts to distinguish *Go City*, *FMP* and *MRL*, and also to draw an analogy with *Marcandi*. For the reasons we have explained, we consider that the FTT was justified in reaching the conclusions in relation to those decisions which it did.

77. While we have concluded that the FTT's approach involved no error of law, it is important to record that we do not accept Ms Mitrophanous' submission in this appeal that the process of identification of the real supply is driven by the point at which reciprocity arises.

78. It is well established that reciprocity is an aspect of the "direct link" which must be present in order for a supply of services to be "for consideration" for VAT purposes. As the CJEU explained in *Kennemer*, at paragraph 39:

...according to the case-law of the Court, the basis of assessment for a provision of services is everything which makes up the consideration for the service provided and a provision of services is taxable only if there is a direct link between the service provided and the consideration received (*Apple and Pear Development Council*, paragraphs 11 and 12, and Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 13). A supply of services is therefore taxable only if there exists between the service provider and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the provider of service constituting the value actually given in return for the service supplied to the recipient (*Tolsma*, paragraph 14).

79. However, Ms Mitrophanous' proposition in effect confuses cause and effect. We agree with Mr Rivett that reciprocity is a necessary element of the existence of a supply on which VAT is due but it is not sufficient. In particular, it does not tell us what the real supply is in any particular case. It is indeed referred to in the numerous authorities to which we were taken by Ms Mitrophanous, but that is because it is necessary for it to be present for the reasons we have explained, so it is entirely unsurprising for its presence to be considered by the relevant court or tribunal. That is what the FTT did in this case, quite correctly, at [112]. However, it does not provide the route to identification of the real supply. The FTT's approach was the way to answer that question.

⁷ Appellant's skeleton argument paragraph 60.

80. Our conclusion is not affected by subsidiary arguments raised by Mr Rivett in challenging the FTT's decision:

(1) Mr Rivett said that the FTT's approach could produce anomalous or unfair results. There are two answers to that objection. First, that cannot be a reason for failing to follow the correct approach: see the comments of the CJEU in *MRL* at [36]-[40]. Second, Mr Rivett's approach would, as he accepted, likely result in 90% or more on average of the consideration received by LMUK being free of VAT, because, as we have described, actual usage of the Allowances averaged 5 to 10%. That does not mean Mr Rivett's approach must be wrong, but it demonstrates that surprising results can arise under either party's formulation.

(2) The FTT held that in relation to some bundles a subsequent adjustment to the VAT due on sale of a bundle might be necessary under the rules regarding "effective use and enjoyment" outside the EU which applied until 1 November 2017. Mr Rivett said that this indicated that the FTT's basic analysis was wrong for three reasons. First, he argued, there was no express adjustment mechanism. However, we agree with the FTT that any necessary adjustments could probably be dealt with either pursuant to section 80 VATA or by the exercise by HMRC of its general powers of care and management. Second, Mr Rivett argued, such an adjustment would be contrary to section 7A(3) VATA, which links a supply of a "right to services" to the place of supply of the underlying services. However, again in agreement with the FTT, the supplies in this appeal are not "rights to services" but are themselves telecommunication services, so that section 7A(3) does not apply. Finally, he argued, the adjustment would mean that a supply could have more than one place of supply. We agree that that is one way of characterising the use and enjoyment rules, but their effect and intention were clear.

(3) Mr Rivett argued that only LMUK's approach was consistent with the principle that VAT is a tax on consumption. However, this is a bootstraps argument, as it begs the question of the services which are liable to VAT. On the FTT's analysis, which we have found to be correct, consumption takes place in full on sale of a bundle, because that is when the real supply of services takes place.

(4) Mr Rivett argued that the FTT was wrong to distinguish Allowances under a Plan Bundle from PAYG credits. While there are admittedly similarities, it is not part of this appeal to determine the VAT position of PAYG credits. In any event, as Ms Mitrophanous pointed out, a buyer of PAYG credits can save money by not using the credits, whereas a buyer of a Plan Bundle cannot save money by not using all of the Allowances.

(5) Mr Rivett referred to the FTT's statement at [3] that "The Plan Bundles comprised rights to future telecommunication services...". However, it is clear reading the Decision in its entirety that the FTT was not in this introductory passage referring to what the Attorney General in *GE AES* described as "as such" rights, but simply to the fact that the Allowances could be used for a specified future period after purchase, typically a month.

Conclusion

81. The appeal under Ground 1 is dismissed.

GROUND 2: WHETHER VAS ARE ANCILLARY

The FTT's decision

82. In relation to Type 2 Bundles, the FTT considered that the availability of the VAS potentially affected the applicability of the analysis which it had reached regarding the supply made under Type 1 Bundles. The FTT set out (at [121]) seven factors in relation to VAS, and then concluded as follows (at [122]):

On the basis of all those factors, we have concluded that, from the viewpoint of the typical customer of the Appellant, the sale of each Type 2 Bundle should be treated for VAT purposes as a single composite supply of which the Allowances were the principal element and the VAS were ancillary to it because they were not an end in and of themselves but merely a means of better enjoying the Allowances.

83. The FTT correctly noted that for VAT purposes the ancillary elements within a single composite supply share the same VAT treatment as the principal element within that supply. Consequently, for most of the VAS, those VAS would fall to be disregarded for VAT purposes because they were merely ancillary elements in a single composite supply of telecommunications services. So, Type 2 Bundles were to be analysed in the same way as Type 1 Bundles, with VAT arising on sale of the bundle: [124] and [184].

84. The FTT decided that this analysis required modification in relation to the non-EU Roaming Calls VAS, but although that is relevant to HMRC's cross-appeal it is not relevant to Ground 2.

LMUK's submissions

85. Mr Rivett spent relatively little time on Ground 2 in his oral submissions, but his skeleton argument asserted that in reaching the above conclusion the FTT made the following errors of law:

(1) If LMUK is right about the true supply, then the various Allowances are all consumed for VAT purposes at different times, and there is no basis for treating as a composite supply elements that are provided at different times.

(2) The FTT appears to use its analysis of the composite supply question to disregard, in establishing the time of supply, the uncertainty arising from the availability of VAS to customers, an approach which is not warranted by the authorities.

(3) In any event, it makes no sense to treat VAS as a separate element; they are just another way of using the Allowances.

(4) The CJEU's approach in dealing with rights to receive is based not on a principal/ancillary analysis but on the principles set out in *MRL* and other authorities.

(5) "For example, a customer who exhausts the whole of their data allowance in receiving IAT VAS⁸ cannot be sensibly treated as having received a single supply of data services in the UK. That customer would not in fact have received any such services.

⁸ The "IAT VAS" comprised the right to make an "international airtime transfer" of some or all of the customer's PAYG credits from his or her own account to another customer of the Appellant located in another country: Decision at [16(15)(e)].

Treating IAT VAS as ancillary to a service which was not in fact received would be absurd. The analysis needs to be conceptually coherent in such a way as to apply to all circumstances irrespective of how likely they are to arise in practice”.⁹

(6) The authorities referred to by the FTT do not support its approach.

Discussion

86. A number of these arguments effectively fall away in light of our rejection of Ground 1. Argument (1) has no force if, as we have found, the FTT was correct to treat the real supply as arising on the sale of a plan bundle. Argument (2) fails in view of our conclusion that the FTT was correct to reject Mr Rivett’s proposition regarding uncertainties preventing a supply from arising; that argument is wrong, and does not become right simply because the number or range of uncertainties is increased, as it is by the addition of the VAS in Type 2 Bundles.

87. Similarly, argument (5) falls to be rejected because the real supply is not the actual use of an allowance, of whatever category, but the sale of a plan bundle. Once that proposition is found to be correct, there is no illogicality or absurdity in failing to track the VAT consequences of individual instances of usage.

88. It appears that under Ground 2 LMUK also challenges the FTT’s decision to categorise VAS as separate, because they are just another way of using Allowances. In oral submissions. Mr Rivett appeared to suggest that the FTT’s decision in this respect was illogical, because it was inconsistent with the decision to treat VAT as arising on sale, with actual usage being irrelevant. If it is being argued that the FTT could not logically have decided to treat VAS as a separate element in a Type 2 Bundle in view of its decision that there was a single supply on sale of a bundle, we disagree. First, we have found that the FTT’s conclusion that there was single supply, arising on sale of a bundle, was correct. Second, The CJEU authorities¹⁰ clearly establish that, having established the existence of a supply, it may be necessary where that supply has a number of elements to consider whether it is a single composite supply, consisting of a principal element and an ancillary element. As HMRC pointed out, the FTT might also have taken the view that in relation to Type 2 Bundles there was a single composite supply made up of a predominant element (again, the Allowances) and a minor element (again, the VAS). If the FTT had taken that approach, its analysis of the VAT treatment of Plan 2 Bundles would have been the same.

89. Given our rejection of the appeal under Ground 1, the FTT’s conclusion, at [124], that “the sports update VAS and the IAT VAS were not separate supplies in their own right but were merely ancillary elements in a single composite supply of telecommunication services” was, in our opinion, a rational decision which was justified by the factors and reasoning set out at [121]-[122].

90. The appeal under Ground 2 is dismissed.

GROUND 3: VOUCHERS ISSUED AFTER 1 JANUARY 2019

91. As we will see shortly, Ground 4 deals with the voucher position prior to 1 January 2019.

⁹ Appellant’s skeleton argument paragraph 72.

¹⁰ We were taken to the relevant authorities by Ms Mitrophanous, and the FTT referred to some of them, but we need not repeat them here.

92. Ground 3 is that Plan Bundles sold or activated on or after 1 January 2019 were “electronic multi-purpose vouchers”, so the consideration paid by customers for their purchase fell to be disregarded and VAT only became chargeable to the extent that the Allowances were actually used to obtain services.

Relevant legislation

93. For the period after 1 January 2019, the PVD was amended by Council Directive 2016/1065 (the “Voucher Directive”). As the FTT explained, at [143]-[144]:

143. In 2016, the Voucher Directive was enacted in order to ensure a consistency of treatment across the EU in relation to transactions involving vouchers. Amongst other things, it sought to identify what constituted vouchers (as distinct from payment instruments) for VAT purposes and to ensure that, in relation to multi-purpose vouchers, VAT should be charged only when the goods or services to which the voucher related were supplied and that consideration received for the issue of a voucher should not give rise to VAT to the extent that the voucher remained unused.

144. Article 2(1) of the Voucher Directive amended the PVD by inserting new Articles 30a, 30b and 73a in relation to vouchers issued on or after 1 January 2019.

94. In order to reflect the amendments to the PVD made by the Voucher Directive, the VATA was amended by the introduction of Schedule 10B of the VATA (“Schedule 10B”) in relation to vouchers issued on or after 1 January 2019. The relevant provisions of Schedule 10B are as follows (taken from the FTT’s helpful summary):

Paragraph 1 provides that:

(1) In this Schedule “voucher” means an instrument (in physical or electronic form) in relation to which the following conditions are met.

(2) The first condition is that one or more persons are under an obligation to accept the instrument as consideration for the provision of goods or services.

(3) The second condition is that either or both of—

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

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

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

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

(5) The following are not vouchers—

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

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

...

Paragraph 3 provides that the issue and subsequent transfer of a voucher is to be treated for the purposes of the Act as a supply of relevant goods or services;

Paragraphs 4 and 5 set out the rules for single purpose vouchers, as follows:

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

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

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

...

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

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

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

Paragraph 6 specifies that a voucher is a multi-purpose voucher if it is not a single purpose voucher;

Paragraph 7 provides that any consideration for the issue or subsequent transfer of a multi-purpose voucher is to be disregarded for the purposes of the Act and that the supply which is deemed by paragraph 3 to be made on the issue or subsequent transfer of the multi-purpose voucher is to be treated as not being a supply falling within Section 26(2) of the Act (which is to say, as not being a supply giving rise to a right of recovery for attributable VAT input tax);

Paragraph 8 provides for taxation on redemption of a multi-purpose voucher.

The FTT’s decision

95. The FTT adopted the following description by Mr Rivett of the five conditions imposed by Paragraph 1 of Schedule 10B in order for Plan Bundles to be vouchers for the purposes of that schedule:

(1) the first condition: there needed to be “an instrument (in physical or electronic form)”.

(2) the second condition: one or more persons must have been under an obligation to accept that instrument as consideration for the provision of goods or services.

(3) the third condition: either or both of the goods or services for the provision of which the instrument might be accepted as consideration and the persons who were under the obligation to accept the instrument as consideration for the provision of goods or services must have been limited and be stated on or recorded in the instrument or the terms and conditions governing the use of the instrument.

(4) the fourth condition: the instrument must have been transferable by gift (whether or not it was transferable for consideration); and

(5) the fifth condition: the instrument must not be specifically excluded by paragraph 1(5).

96. In addition, in order to qualify for the VAT treatment contended for by LMUK, the vouchers needed to be “multi-purpose vouchers”.

97. The FTT concluded that Plan Bundles did not qualify as vouchers for the purposes of Schedule 10B. The FTT considered that Plan Bundles would not satisfy the second and third conditions, stating as follows (at [178]-[179]):

178...It is difficult to see how the use of the entitlements contained within a Plan Bundle can properly be described as involving the acceptance by the Appellant of an instrument as consideration for services. That language is clearly directed at the classic example of a voucher such as a book token which is presented for payment when services or goods are being acquired with the voucher. In that case:

- (1) there is an instrument containing a reference to a monetary amount;
- (2) that instrument is accepted by the relevant supplier as payment or part payment for a specified service; and
- (3) as a result, the monetary amount is reduced.

179. In our view, the use by a customer of entitlements which he or she has acquired on the purchase of a Plan Bundle cannot be said to involve an acceptance by the Appellant of the Plan Bundle as consideration for the services reflecting those entitlements without an unacceptable level of intellectual gymnastics. The entitlements under the Plan Bundle required the Appellant to provide services but to describe the exercise of those entitlements as involving the acceptance by the Appellant of the Plan Bundle as consideration for those services would be a misnomer.

98. The FTT added that it also had “some reservations” about the ability of Plan Bundles to meet the first condition, because it was not persuaded that a Plan Bundle could properly be described as an “instrument”: [180]-[181].

99. For good measure, the FTT stated that in any event Plan Bundles would not have been multi-purpose vouchers: [182].

Grounds of appeal

100. In relation to Ground 3, LMUK argued as follows:

(1) Plan Bundles were “instruments”. Allowances were recorded on LMUK’s billing system as “units” and were essentially electronic tokens, like PAYG credits, which the FTT accepted were instruments. It is not necessary for vouchers to be recorded as a monetary amount.

(2) As to the second condition, the FTT was wrong to say that treating the Plan Bundle as consideration for services is a misnomer. LMUK exchanges the instrument in return for services, in the same way as PAYG credits.

(3) Plan Bundles were multi-purpose vouchers, because they could be used to receive supplies with different VAT treatments. The FTT wrongly focussed on the voucher itself, whereas the statute looks to the services accepted as consideration for the voucher.

Discussion

101. We can deal with Ground 3 relatively briefly.

102. We share the FTT's scepticism as to whether a Plan Bundle is or includes an "instrument". As the FTT said at [181], a Plan Bundle does not naturally fall within the meaning of that word, unlike a PAYG credit, which, as the FTT put it, "was a monetary amount which could be used to acquire telecommunication services at the applicable rate at the time when they were used and were consequently reduced". Indeed, it is not completely clear precisely what the "instrument" is said to be.

103. However, even if we were to assume, in LMUK's favour, that a Plan Bundle satisfied the first condition, we consider that the FTT was clearly correct in its conclusion at [178]-[179] (set out above) that a Plan bundle does not satisfy the second and third conditions in Schedule 10B, or the equivalent wording in the PVD.

104. We entirely agree with the comments and reasoning of the FTT set out at [178]-[179], which are reinforced by two further points.

105. First, the FTT's analysis is consistent with the analysis which we have found to be correct of the "real supply" (Ground 1). The transaction between LMUK and a purchaser of a Plan Bundle is not the supply of allowances, when and if used, but the supply of availability, being a supply which arises on sale of a Plan Bundle. To describe that as then entailing an obligation on LMUK to accept an instrument as consideration for the provision of the supply of services, when the services are the availability, is incoherent.

106. Second, as Ms Mitrophanous stated, LMUK have pointed to nothing in the contractual position or economic reality which supports their voucher analysis. Mr Rivett suggested that the necessary obligation must exist because LMUK is contractually obliged to allow customers to use the services under a Plan Bundle, but that is the case in any contract and is not an indicator of the presence of a voucher mechanism.

107. Our conclusion means that we need not comment on the FTT's analysis of whether a Plan Bundle was a multi-purpose voucher, and we do not do so.

108. The appeal under Ground 3 is dismissed.

GROUND 4: VOUCHERS ISSUED BEFORE 1 JANUARY 2019

109. Ground 4 is that Plan Bundles sold or activated prior to 1 January 2019 were electronic multi-purpose vouchers within Schedule 10A VATA. Consequently, the consideration paid by customers for the purchase of Plan Bundles fell to be disregarded and VAT only became chargeable to the extent that the Allowances were in fact used to obtain services.

Relevant legislation

110. The PVD did not make provision for vouchers prior to 1 January 2019. However, Schedule 10A VATA contained the following provisions relevant to vouchers issued prior to that date:

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.

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

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

...

(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), ..., 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 (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.

The FTT’s decision

111. The FTT adopted Mr Rivett’s description of the requirements for Plan Bundles to be face-value vouchers within Schedule 10A¹¹:

(1) condition 1: there needed to be a token, stamp or voucher, whether physical or electronic:

¹¹ The Decision at [160].

- (2) condition 2: that token, stamp or voucher needed to represent the right to receive goods or services;
- (3) condition 3: that right to receive goods or services needed to be “to the value of an amount”, namely, limited by a monetary value; and
- (4) condition 4: that monetary limit needed to be stated on the token, stamp or voucher or recorded in it.

112. In addition, in order to fall within Schedule 10A Plan Bundles needed to be “retailer vouchers” and not to be single-purpose vouchers.

113. Having first noted that it was unclear which instrument or Allowance or unit was claimed to be a “voucher”, the FTT concluded that it made no difference, because in every case the same defect would arise, as stated at [171]:

...That defect is that the entitlements under the Plan Bundles which were shown on the Appellant’s system were not a monetary amount to be used in purchasing future services but were instead entitlements to Allowances (which is to say something other than a monetary amount) that could be used from time to time while the Plan Bundle remained valid.

114. The FTT considered that as a result Plan Bundles failed the requirement in condition 3 that the right to receive services needed to be “to the value of an amount”, meaning limited by reference to a monetary value. Instead, the customer’s entitlement to future services under the Plan Bundle was expressed in terms of remaining available Allowances. There was no monetary amount which was reduced. This was “wholly unlike” the position in relation to PAYG credits: [172].

115. The FTT also decided that, even if it were possible to do a calculation to express remaining entitlements in monetary terms, any monetary amount so calculated was not shown on LMUK’s system. This meant that condition 4 was not satisfied.

116. The FTT added a further reason why Plan Bundles did not satisfy Schedule 10A (at [176]):

The simple fact is that the entitlements under the Plan Bundles were not monetary amounts which could be used to acquire future services. Instead, they reflected the fact that services had already been supplied. For that reason, the entitlements did not represent the right to receive future services, as required by condition 2, but instead represented the product of services which had already been supplied.

117. So, concluded the FTT, Plan Bundles failed to satisfy any of conditions 2, 3 or 4: [177].

Grounds of appeal

118. Mr Rivett argued as follows:

(1) As regards condition 2, the FTT was wrong at [176], because “the services which the customer wants to receive are only obtained by depleting their entitlements in their account on LMUK’s system”¹².

(2) Conditions 3 and 4 were satisfied because LMUK’s system recorded the purchase price for a Plan Bundle, and a customer could see their remaining allowances on LMUK’s app.

(3) The FTT’s conclusion that a voucher has to show a monetary amount which is reduced by usage and can be exhausted is not an EU-law compliant reading of Schedule 10A. Although the Voucher Directive was only implemented with effect from 1 January 2019, at all times the rules for vouchers have been a matter of EU law. As a matter of EU law, there was never any condition that a voucher had to satisfy the FTT’s interpretation of conditions 3 and 4. The Voucher Directive can also be used to provide guidance on the general principles relating to vouchers, and it contains no equivalent of conditions 3 and 4. The requirements in conditions 3 and 4 relating to the need for a monetary amount should, therefore, be set aside.

Discussion

119. In our opinion, it is clear that Plan Bundles were not vouchers within Schedule 10A.

120. The Plan Bundles plainly failed to satisfy condition 2, for the reason given by the FTT at [176]. As we have found in relation to Ground 1, the FTT was correct to regard the true supply as the sale of a Plan Bundle. It follows that Plan Bundles could not satisfy the requirement that they represent a right to receive goods or services to the value of an amount stated on or recorded in the Plan Bundle, because the services have already been supplied in full when LMUK sells a Plan Bundle. Plan Bundles are not vouchers to be exchanged for future services; they represent services which have already been supplied.

121. What the FTT rightly describes as this “simple fact” is sufficient to dispose of Ground 4. Since we heard argument on the FTT’s other reasons for reaching its decision, we will comment briefly on those arguments.

122. We consider that the FTT was right to conclude that Plan Bundles also failed to satisfy condition 3, because a customer’s right to Allowances was nowhere stated or recorded by reference to a monetary value. In other words, if I paid £15 for a 30-day Plan Bundle, then as I used my Allowances throughout that 30 days what was recorded was how much of each Allowance I had used and how much remained. How much of my £15 remained in monetary terms was not recorded or stated as such. The FTT rightly contrasted the position in relation to PAYG credits at [172], observing that “...the Plan Bundle may have been sold for a monetary amount at inception but thereafter it carried an entitlement to Allowances and it was those Allowances, and not a monetary amount, which were reduced through usage and could be exhausted”.

123. We are wholly unpersuaded by Mr Rivett’s suggestion that Schedule 10A is somehow not in conformity with EU law insofar as it imposes conditions by reference to monetary amounts. He suggested that the approach adopted in the Vouchers Directive could in some way be read back into the position prior to 2019. There is no authority to support that approach, and in any event, as Ms Mitrophanous pointed out, it is expressly stated that the provisions of the

¹² Appellant’s skeleton argument at paragraph 93.

Voucher Directive “should apply only to vouchers issued after 31 December 2018 and are without prejudice to the validity of the legislation and interpretation previously adopted by the Member States”¹³. Mr Rivett also sought to argue that the “EU law” principles applicable to voucher treatment needed to be established by reference to decisions such as *MRL* and *Lebara*, but again we consider that proposition to be unjustified and misconceived.

124. The appeal under Ground 4 is dismissed.

HMRC’S CROSS-APPEAL: EFFECTIVE USE AND ENJOYMENT AND TYPE 2 BUNDLES

125. By way of Respondents’ Notice, HMRC sought permission to cross-appeal in relation to the ground discussed below. LMUK objected to permission being granted for this ground, on the basis that it was not an argument which had been raised before the FTT, and so could not be raised by way of Respondents’ Notice¹⁴. We decided that in fact the argument was encompassed by certain amendments filed by HMRC to their Statement of Case before the FTT, but that to the extent that permission was required we would grant it.

126. In relation to Type 2 Bundles, to recap, the FTT decided that (1) these comprised a single composite supply, of which most of the VAS were merely ancillary elements, but (2) where a Type 2 Bundle included the non-EU roaming VAS, then, as with Type 3 Bundles, there would need to be an adjustment to the VAT arising on sale of a bundle before 1 November 2017 in respect of any “effective use and enjoyment” of data in a relevant non-EU country.

127. HMRC challenge the second of these conclusions.

128. The FTT set out its reasoning at [125]-[127]. Having concluded that most of the VAS in a Type 2 Bundle were merely ancillary elements in a single composite supply of telecommunications services, the FTT said this:

125. However, the non-EU Roaming Calls VAS raises a slightly different question in that that service is generically no different from the telecommunication service comprising the telephone call Allowances which were to be used within the UK. As such, even though the non-EU Roaming Calls VAS was an ancillary service, we do not see how that fact can override the “effective use and enjoyment” place of supply rule which was in place prior to 1 November 2017 in relation to telecommunication services.

126. It is very different from disregarding an ancillary service which, had it been a service in its own right, would have fallen into a different charging category – for example, zero-rated or exempt – from the principal telecommunication service for VAT purposes or even a different type of service from the telecommunication service albeit in the same charging category. To all intents and purposes, when the customer was using the non-EU Roaming Calls VAS, he or she was enjoying precisely the same service as when he or she was making use of the Allowances in the UK. It is just that he or she was doing so in a different location.

¹³ Voucher Directive Recital (15).

¹⁴ HMRC’s application was made under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Under Rule 24(1B)(a), a respondent who wishes to rely on any grounds on which it was unsuccessful in the proceedings which are the subject of the appeal must (subject to any Tribunal direction) provide a response. Under Rule 24(1C), in such a situation, to the extent that the respondent needs any permission the response must include an application to the Tribunal for such permission. The normal rule that a party seeking to appeal against an FTT decision must first apply for permission to the FTT is disapplied in relation to such an application: Rule 21(1A).

127. Thus, we think that, for a Type 2 Bundle which included the non-EU Roaming Calls VAS, the VAT treatment of the relevant Type 2 Bundle should follow the treatment described below in relation to Type 3 Bundles. We appreciate that, in reaching this conclusion, we are departing from the submission made by Ms Mitrophanous to the contrary effect but we do not see any basis for disregarding the place of supply rules in relation to part of what is effectively a single supply of telecommunication services simply because that part of the single supply was minimal or of no importance to the customer and was therefore ancillary.

129. Ms Mitrophanous argued that the basic error made by the FTT was not to follow through the logic of its single composite supply analysis to the effective use and enjoyment provisions. The predominant element of a composite supply is relevant to all VAT issues, she said, including the place and rate of supply, and there was no basis on which the FTT could have concluded that an exception to this should arise for the effective use and enjoyment provisions.

130. Put another way, once an element of a single supply is identified as minor or ancillary, it can play no role in identifying any aspect of the VAT treatment.

Discussion

131. Ms Mitrophanous' proposition appears straightforward. However, it raises an obvious question. That is why HMRC do not also seek to challenge the FTT's conclusion that the effective use and enjoyment rules apply for *Type 3 Bundles* supplied before 1 November 2017. The FTT's conclusion in this respect was set out at [131]:

However, in relation to supplies of Type 3 Bundles made prior to 1 November 2017, the "effective use and enjoyment" rule in paragraph 8 of Schedule 4A to the VATA applied. The Upper Tribunal held in [*R (on the application of Telefonica Europe plc) v HMRC* [2016] UKUT 173 (TCC)] at paragraphs [52] to [54] that a telecommunication customer had effective use and enjoyment of a telecommunication network for the purposes of paragraph 8 of Schedule 4A to the VATA only to the extent that he or she actually accessed the network to make or receive telephone calls or send or receive text messages or data and did not do so merely by having the ability to take advantage of that facility... It means that the "effective use and enjoyment" rule would make no difference to the VAT treatment applicable to a Type 3 Bundle supplied prior to 1 November 2017 where the relevant customer did not actually use the Type 3 Bundle to make a telephone call, send a text message or access data from within a non-EU country.

132. Ms Mitrophanous explained this by saying that there is no inconsistency because "in Type 3 Bundles there is no contention that any used element while outside the EU is from an ancillary/minor element of the supply"¹⁵. However, this assumes that in relation to Plan 2 Bundles the FTT considered that non-EU calls would be made from the ancillary or minor element of the composite supply. This assumption is wrong, because the thrust of the FTT's analysis at [125]-[126] (set out above) is that, notwithstanding the VAS label, usage of the non-EU calls VAS was precisely the same for a customer as usage of the Allowances (being the principal element of the composite supply), save that it was usage enjoyed from a location outside the UK.

133. That is presumably why Ms Mitrophanous' challenge under this ground also explicitly challenges the FTT's finding that it was the same service being used for both Allowances and

¹⁵ HMRC's skeleton argument at paragraph 76.

non-EU roaming calls in Type 2 Bundles. Unless that challenge succeeds, there is no material basis of distinction between Type 2 and Type 3 Bundles in this respect.

134. We consider that the FTT was entitled to reach the conclusion it did that in Type 2 Bundles “to all intents and purposes, when the customer was using the non-EU Roaming Calls VAS, he or she was enjoying precisely the same service as when he or she was making use of the Allowances in the UK” ([126]). The FTT had all the evidence before it, and this was an inference which it was rationally able to make.

135. The consequence of this is that the FTT decision which is challenged by HMRC’s cross-appeal, properly understood, was not (as HMRC say) a decision that usage of a minor or ancillary element of a Plan 2 Bundle could fall within the effective use and enjoyment rules. Rather, it was a decision that *in substance* the relevant usage was of the same service as the predominant element (the Allowances) and so fell to be treated in the same way as for Type 3 Bundles.

136. We do not consider that the FTT erred in law in its conclusion regarding Type 2 Bundles, with the consequence that HMRC’s cross-appeal is dismissed.

DISPOSITION

137. LMUK’s appeal and HMRC’s cross-appeal are dismissed.

**MR JUSTICE CAWSON
JUDGE THOMAS SCOTT**

Release date: 16 February 2026