TC03101

Appeal number: LON/2008/02423

VAT – Consideration – Other –arrangements similar to those used in Tower MCashback - appellant sold software to LLP investment vehicle – purchase funded by member subscriptions and debt incurred to bank 1 – debt guaranteed by bank 2 – guarantee secured by deposit made by appellant – appellant paid VAT on £22,602,979 received from LLP – whether correct VAT was lesser amount because some of that amount was security for bank loan to LLP and received subject to restrictions – yes – loan transaction which funded purchase and restrictions on the amount received elements of the same transaction – VAT due on amount actually received by appellant which was lesser amount taking account of the banking arrangements – alternatively as argued by the appellant VAT was lesser amount because later settlement of dispute reduced price through a collateral oral agreement between the appellant and the LLP – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CABVISION LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
NICHOLAS DEE

Sitting in public at 45 Bedford Square, London on 17, 18, 19, 20, 21 September 2012.

Peter Mason, counsel, CMS Cameron McKenna LLP for the appellant

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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Introduction

1. The appellant, Cabvision Ltd, sold software it had developed to an investment vehicle Taxi Technology LLP ("Taxi") for a sum and paid output tax on it. It received most of that sum from Taxi.

2. Taxi's purpose was to attract investors who wished to benefit from an advantage in relation to the capital allowances legislation by boosting the investment with debt incurred to a bank. Taxi's purchase of the software was to be funded 25% by subscriptions from individual members and 75% by a loan that Taxi took out with Lloyds TSB Bank Plc, which was guaranteed by Bank of Scotland and which in turn was secured by a deposit made by the appellant. The arrangements were similar, but not identical to, those used in the well known case of *Tower MCashback* [2011] UKSC 19. The appellant's role was akin to the software seller MCashback in those arrangements. However, unlike the case of *Tower MCashback,* this appeal concerns the correct VAT due on the sale, given the arrangements and the settlement of a subsequent dispute between the parties. There is no suggestion the appellant had any VAT avoidance purpose in entering into the arrangement.

3. The appellant argues the VAT due on the sale was reduced either because i) some of the sum was security for a bank loan to Taxi or ii) because, following a settlement that was reached between the appellant and Taxi, some of the sum was used to pay off the loan by the bank which had lent Taxi money.

4. The Respondents argue i) it is irrelevant to the appellant's VAT liability what the source of the money paid to it by Taxi was or what the appellant had agreed to do with that money once received and ii) that the result of the settlement was that the price of the software was reduced to the sum Taxi had in fact paid to the appellant and that the appellant was entitled to a corresponding VAT reduction of £81,282.75 but that there was no agreement between Taxi and the appellant for the greater reduction in VAT sought by the appellant of £3,014,867.53.

5. The appellant appeals against the Respondents' decision of 28 October 2008 rejecting the appellant's claim for repayment of output tax of £3,014,867.53 and to accept as due only a repayment to it of £81,282.75.

6. The issues in this appeal may be summarised as follows:

(1) **Issue 1** – What was the VAT due at the time of the agreed sale of the software rights? Was it the sum paid reduced by the amount of the sum which was security for a bank loan to Taxi, as the appellant argues? Or, was it the total sum in fact paid to the appellant as the Respondents contend? If the appellant is successful on this issue then issue 3 is relevant.

(2) **Issue 2** – If the appellant is unsuccessful on Issue 1, did the settlement between Taxi and the appellant have the effect of reducing the price agreed for the sale. The appellant argues it did because there was an agreement that the appellant would pay the amount of the loan to Taxi in return for Taxi returning some of its licence rights to the appellant. The Respondents say there was no such agreement and no price reduction.

(3) **Issue 3** – assuming the appellant is successful on issue 1 does the appellant have, as it argues, a valid bad debt relief claim or an EU law right to make an adjustment for a price reduction?

Evidence

7. We received 2 lever arch bundles of documentary evidence and received witness statements and oral evidence from Mr Peter Da Costa, the appellant's director and Mr Melvyn Langley, the appellant's accountant at the relevant time. Their evidence was cross examined by the Respondents. In addition the witnesses answered the Tribunal's questions.

Background / Agreed facts

8. We were greatly assisted by facts which were agreed by the end of the evidence phase of the hearing and which we have integrated into our findings below.

The background

9. The appellant is Cabvision Limited, a company incorporated in England and Wales on 1st February 1999.

10. Its trade is the development and exploitation of specialised software (with associated patents) for use with video screens in the passenger compartments of taxicabs, presenting audio visual information, entertainment and advertisements to passengers.

11. It was registered for VAT under VAT number 751 7143 40 with effect from 1 March 2000.

12. From its inception, the appellant had spent about £1,200,000, over a period of four years, in developing and patenting a system of in-taxi video screens known as the "Cabvision" System.

13. The aim was eventually to install screens in up to one quarter of London's approximately 22,000 black taxi cabs. In order to achieve this aim, substantial further funds would be required, for instance to pay for the cost of supplying and fitting the necessary equipment into the cabs concerned.

14. By 2002, the development of the Cabvision System had reached the stage where the appellant was seeking third party investors, with a view to the commercial exploitation of the system by generating revenue from the advertising displayed on the screens. Initial plans to obtain outside investment did not materialise, but in December 2003 the appellant entered into arrangements with Taxi described in further detail below.

15. An Information Memorandum issued by Taxi on 8 December 2003 set out the proposal in detail.

16. Key Features at page 5 of the Memorandum indicated the nature of the LLP (Taxi), the investment opportunity, risks and rewards.

17. The technology is described in the Memorandum as follows:

> "The Cabvision System involves a super high resolution Thin Film Transistor (TFT) screen in the back of the taxicab to present video and sound to taxi passengers.
>
> A prototype Cabvision System has been trialled in approximately 100 London Taxicabs, In the trial, pre-recorded programmes and advertisements were shown on a screen in the taxicab using the unit's computer hard drive with news headlines being sent to the unit as text messages via a receiver pager installed within the system.
>
> [Taxi] will purchase the ICT Software which includes an enhanced system which has been designed to allow daily programme and advertisement scheduling and downloads of real-time information, such as news, football scores and share prices. When trialling is completed, the enhanced system should be able to be upgraded to allow advertising display data uploads to be carried out via a GPRS radio link with each individual taxicab. This link will also enable the collection of valuable data on the frequency that the advertisements are shown on the screens. The Cabvision System is designed so that it will start as the passenger enters the taxicab and the taxi meter is engaged. The passenger would then control channel selection and volume using buttons in the armrests on both sides of the taxicab. Passengers would be provided with a choice of entertainment and factual interest programmes together with advertising. It is envisaged that programming and advertising content will be updated at least monthly by DVD directly by the custom-designed computer in the taxicab."

18. In entering into the arrangements with Taxi, the appellant sought to benefit from an upfront capital sum, a royalty income stream from licensing its proprietary technology to Taxi, and a commission on the proceeds of displaying advertising in taxicabs. As part of the deal, the appellant agreed to procure and guarantee certain loans to Taxi, which funded a large proportion of the purchase price of the software – explained further below, and Taxi granted the appellant a debenture over its assets.

19. It should be noted that not all the agreements were actually signed. In the end the situation was as follows:

Signed agreements:

20. *ICT Software Purchase Agreement, whereby Cabvision agreed to sell rights in the Cabvision system to Taxi.* The agreement was signed on 5 December 2003.This is the key agreement on which the invoice from the appellant was raised and in relation to which the appellant claims it is entitled to a VAT claim of some £3 million.

21. *Facility Agreement for a loan from Lloyds TSB Bank plc ("Lloyds") to Taxi.*

22. *Loan Guarantee Agreement between The Governor and Company of the Bank of Scotland ("BOS") and Lloyds.*

23. *Security Deposit Agreement between Cabvision, BOS and HBOS Treasury Services plc.*

24. *Deed of Indemnity and Debenture Agreement between Taxi and Cabvision, in favour of Cabvision* (although some signatures and the date are missing from the latter).

25. *The LLP Agreement, between Taxi and its founder members, to govern Taxi.*

Agreements not formally completed:

26. *Advertising Services Agreement between the appellant and Taxi.*

27. *Taxicab Liaison Services Agreement and Content Management Agreement between the appellant and Taxi.*

28. *Equipment Supply and Installation Agreement between KPM-UK Taxis Plc ("KPM") and Taxi.* This was not completed originally but was eventually entered into during settlement negotiations.

The size of the intended investments

29. The scheme involved the purchase from the appellant of legal and beneficial rights in the intellectual property of the Cabvision system. The extent of the rights transferred varied, according to the availability of a combination of investor subscriptions and loan finance (loans were to be raised for three times the level of subscriptions). The Price for the rights transferred was set at £75m.

30. In due course, Taxi claimed to have raised subscriptions from individual members of £6,780,894. The Price was set at £22,602,979 plus VAT.

Software purchase

31. On 5 December 2003, the appellant and Taxi entered into the ICT Software Purchase Agreement ("the ICT agreement"). Its terms included the following:

32. Clause 2.1: Cabvision granted an exclusive royalty free licence to use the information communications technology ("ICT") protected by the patents and to use the software to provide the "Ambient Media" in up to 10,000 Taxicabs, for the Term (being until Termination).

33. Clause 2.2: Cabvision was to deliver a reasonable numbers of copies of the software to Taxi who could make further copies for use in accordance with the Agreement.

34. The "Price" was defined as £75,000,000 or such other sum as may be calculated after taking into account any reductions to the Price arising pursuant to clause 3 exclusive of VAT.

35. Clause 3.1 set out the payment terms, based on the assumed Price of £75m.

36. Pursuant to clause 3.1 the price was to be paid by 31 March 2004 "in cleared funds…without any set-off deduction or withholding" and any applicable VAT was to be paid 30 days after this.

37. However, Clause 3.2 provided for a limitation in the extent of the ICT rights granted (i.e. an ability to exercise them in relation to a lesser number of taxicabs), if the Price were not paid in full by 31 March 2004, and provided for such rights to be valued ("Revised Valuation").

38. Under Clause 3.4 a Revised Valuation was to be determined on the same basis as that in the valuation of the software and by Valuation Consulting published within the Information Memorandum and the business model referred to in there but having regard to other information and Taxi's actual performance.

39. Under Clause 3.5 if the appellant wanted to offer licenses to others it should first offer these to Taxi.

40. The interpretation of Clause 3.6 under which the appellant agreed not to license the right to use the patents and software in London taxicabs for 3 years subject to certain conditions is a matter of dispute and is discussed in more detail at [266] onwards below.

41. Under Clause 3.7 Cabvision agreed to procure a bank loan and to procure security to the lending bank for the capital and interest payable under the loan.

42. Clause 14.6 stated that "This Agreement constitutes the entire understanding between the parties relating to the subject matter and supersedes all prior arrangements or promises in relation thereto and may only be varied with the prior written agreement of each party."

43. On 31 March 2004, the appellant invoiced Taxi (invoice number ICV052) for £22,602,979 plus VAT of £3,955,521.31 (a grand total of £26,558,500.32).

44. Taxi paid the "lesser amount" envisaged by clause 3.2. The payment of the lesser sum resulted in the right to use the licence in a correspondingly smaller number of taxi cabs. In the end the sale was for a right to use the licence in 3014 taxi cabs.

45. On 29 September 2004 the appellant sent a Cure Notice to Taxi. According to this notice, Taxi paid to the appellant £21,441,123.40 (the sum it had instructed Lloyds to pay to the appellant and a further sum) on or around 5 April 2004. In the Cure Notice the appellant argues that only £20,342,682 of this amount represented "part payment of the Price" as the remaining £1,037,506.02 was said to be an amount Taxi was liable to pay separately from the price (as loan interest and "margin

deposit"). According to the Cure Notice on or around 10 May 2004 Taxi paid £3,995,521.32 to the appellant and on or around 18 August 2004 Taxi paid a further amount of £616,000 to the appellant.

46. As part of the deal between the parties, it was agreed that Taxi was also to benefit from an undertaking by Cabvision to procure and guarantee the bank lending to Taxi and to make interest payments on Taxi's bank lending. These arrangements are described in more detail at [51] onwards below.

Draft Accounting Opinion

47. A draft Accounting Opinion was prepared by Deloitte for the board of directors of Cabvision on 24 June 2004.

48. In the Opinion, Deloitte noted the terms of all the arrangements between the parties, including the loan and guarantee arrangements, and concluded that Cabvision would receive a "Net Initial Amount of Cash" ("NIAC"), with further releases of cash later on. Absent the banking arrangements, Deloitte were of the view that the whole of the invoiced price of £22.6m would have been due in its accounts as received on 31 March 2004.

49. However, Deloitte concluded that the banking arrangements fundamentally changed the substance of the contract, from a certain fixed amount to being a sale where the consideration was a much smaller amount (the NIAC) plus an uncertain royalty stream. International Accounting Standard 18 (Revenue) specified that royalty revenue should be recognised on an accrual basis in accordance with the substance of the relevant agreement. The royalty stream in this case was contingent on Taxi making profits and using part of these to repay borrowings. Hence Deloitte's view was that Cabvision should treat further revenues contingent on Taxi's profits in the same way as a contingent asset under Financial Reporting Standard 12 on 'Provisions, Contingent Liabilities and Contingent Assets'.

Treatment in accounts

50. It is common ground that the part of the payment for the price under the ICT Agreement that was used as security deposit for the guarantee of Taxi's loan would be shown in the appellant's accounts as deferred income rather than income.

The banking arrangements

51. As stated above, Taxi's purchase of the software was to be funded 25% by subscriptions from individual members and 75% by the Facility Agreement, in respect of a loan that Taxi took out with Lloyds, which was guaranteed by BOS. The appellant provided collateral for the BOS guarantee.

Facility Agreement

52. Under the Facility Agreement, Lloyds granted a loan facility to Taxi of up to £67,500,000, being three times the capital contributions of the members. The terms of the loan included provisions that accrued interest on the balance outstanding would be paid at quarterly intervals throughout the term of the loan (clause 8) and that the principal amount outstanding had to be repaid in a lump sum on the Final Repayment Date at the end of the term (clause 12), subject to any earlier voluntary prepayments, which could be made either of the whole amount, or in multiples of £100,000 on the last day of any interest period, (clauses 9.5 and 13).

53. Lloyds could call in this loan on default. Events of default were listed in Schedule 5 of the agreement and included the event of appointment of administrative receivers over Taxi.

54. It was a condition of the loan that Lloyds should receive the "BOS Guarantee" (defined in schedule 6 as a guarantee issued by the Bank of Scotland to Lloyds in respect of Taxi's obligations under the Facility agreement) and the "Security Deposit Agreement" executed by the appellant (defined in schedule 6 as the security deposit agreement made between Lloyds and the appellant (clause 5.1 and Schedule 1).

Security Deposit Agreement and Loan Guarantee

55. The mechanics of the guarantee were that the appellant agreed to deposit with BOS under the Security Deposit Agreement and Charge on Cash Deposit an amount equal to the entirety of the loan to Taxi, together with a sum sufficient to cover the projected interest and bank margins over the ten year term of the loan ("the margin deposit") and BOS agreed to issue the guarantee (clause 2.2).

56. The purpose of this agreement was to provide collateral for the guarantee to be given by BOS in favour of Lloyds in respect of amounts advanced by Lloyds to Taxi, and BOS had a charge over monies deposited in the account. The amounts would only be released back to the appellant by BOS to the extent that Taxi had settled its liabilities to Lloyds (clauses 2.5-2.6).

57. Pursuant to the guarantee, all interest on the loan would be paid by BOS, by deducting such items from the deposit (clause 2.2).

58. The agreement was dated 5 April 2004. Under clause 2.1 the appellant was to deposit the loan amount and margin deposit in the appellant's HBOS account and under clause 2.2 the appellant was to move appropriate amounts to its BOS account (00236880) from which BOS undertook to transfer such amounts to a specified account Taxi had with Lloyds or such other account as Lloyds directed.

59. On 2 April 2004, Taxi declared in a Drawdown Notice to Lloyds that it had received a minimum level of subscriptions, being £6,780,984; hence a drawdown on the loan of three times that amount, £20,342,682, was requested. Taxi instructed Lloyds to pay the amount to the appellant's BOS account on account of monies due pursuant to the ICT agreement.

60. Monies advanced were deposited directly into Cabvision's account with BOS, in accordance with the instructions in the Drawdown Notice. The date the deposit was made is disputed between the parties and is discussed further at [196] onwards.

61. The appellant moved such amounts to its HBOS account in line with the Security Deposit Agreement.

62. Recital (C) to the Guarantee given by BOS to Lloyds on 5 April 2004 confirmed that £20,342,682 was drawn down by Taxi in relation to its acquisition of software and Cabvision deposited the same with the Guarantor, BOS, who issued a guarantee to the beneficiary Lloyds, as the lending bank.

63. Payment under the guarantee included payment following a demand under clause 17 of the facility agreement. Under clause 10.2 of the Guarantee, Lloyds could enforce the guarantee without first having to take any steps against Taxi.

64. On 4 March 2004, Taxi entered into a Debenture and Deed of Indemnity with the appellant, to indemnify the appellant for certain of its liabilities under the Security Deposit Agreement and to grant charges over its property in consideration for the appellant entering into the Security Deposit arrangements.

65. Taxi agreed to indemnify the appellant:

> "against all claims demands liabilities costs charges and expenses which may be brought against [the appellant] of which [the appellant] may incur arising out of or in connection with i) the indemnity or any other obligation given by [the appellant] in clause 3.1 of the Charge [defined as the security deposit agreement and charge with the Bank of Scotland] and/or ii) any actual or contingent counter-indemnity obligations in respect of the Guarantee (as defined in the Charge) which may…arise…".

Advertising revenue

66. The appellant and Taxi also negotiated arrangements under which the appellant would provide certain services to Taxi, including soliciting content for the Cabvision system and collecting revenue.

67. Under this agreement, Cabvision was appointed exclusively to procure advertising and media content suitable for display on equipment in London taxicabs, and also, as agent for Taxi, to invoice, collect in and distribute revenues derived from publishing. This was the key agreement whereby Taxi would earn income from its rights under the ICT agreement above, and pass on 25% to Cabvision.

68. The agreement was to some extent performed by the parties, although it was not formally executed at the outset. The Settlement Account (described along with the Settlement Agreement at [91] below) shows that net revenue was shared between the parties 75% to Taxi and 25% to the appellant in the period June 2004 to November 2005, as contemplated by the draft Advertising Services Agreement. The Settlement

Agreement provides at clause 3.1.2 that the Advertising Services Agreement is agreed as being completed and effective and incapable of termination by any of the Parties.

69. Under clause 8.6 of the Advertising Services Agreement the agreement terminated automatically if the ICT agreement was terminated. Under clause 11.4 of the ICT agreement termination of the Advertising Services Agreement would have the effect of allowing the appellant to sell licences to others prior to the date that would otherwise apply in relation to the appellant's obligation not to sell to others. Under clause 3.6 of the ICT agreement, that date was 5 December 2006 which was 3 years from the date of the ICT agreement of 5 December 2003.

70. From Mr Langley's evidence we find that there was advertising revenue of at least £160,000.

Other agreements

71. The arrangements also entailed the following:

(1) the Equipment Supply and Installation agreement, between KPM, another supplier which Mr Da Costa was also a director of, and Taxi whereby KPM agreed to supply Taxi with hardware and support services and Taxi agreed to place an order for 1,000 units with KPM by 31 March 2004; and

(2) the Taxicab Liaison Services and Content Management Agreement between the appellant and Taxi whereby Taxi appointed Cabvision as its agent to promote the benefits to London taxicab owners of having the equipment installed in order to maximise advertising revenue, and to manage, package, and deliver content for display on equipment installed in London Taxicabs (clause 2 and Schedules 1 and 2). Taxicab drivers were to be paid a fee of £750 in respect of equipment installed in their London taxicab and £1,000 inclusive of any VAT in respect of Livery. Cabvision was to invoice Taxi monthly to reimburse Cabvision for all agreed fees and expenses paid on Taxi's behalf, including the "Operating Charge". The Operating Charge covered Cabvision's costs in providing content by DVD to the computers in the taxis and liaison services to taxicab owners, including data download, network management, and content scheduling.

The establishment of Taxi and the intended direct tax treatment of the arrangements

72. On 4 December 2003, Taxi had entered into an agreement with the Founder Members of Taxi (the "LLP Agreement") which established Taxi as an LLP. Taxi was set up solely to facilitate higher rate taxpayers investing in the Cabvision software. It sought to attract investment from individual subscribers (who would subscribe to shares in Taxi), which was intended to be structured in a tax efficient manner. On 5 December 2003 Taxi issued an Information Memorandum, which set out the nature of the project and expected tax advantages for investors. It set out the minimum level of investors required, and the funding arrangements involved.

73. The LLP Agreement specified (recital E and clause 11.4) that each member's liability was limited to five times the amount subscribed for the member's share.

74. The rights to capital allowances were based on the "expenditure incurred". Subscribers planned to boost their investments with bank borrowings (as described at [51] to [54] above) and for the total amount (including these borrowings) to benefit from first year capital allowances at the rate of 100%, on expenditure relating to information communication technology (referred to as ICT) by a small enterprise. So, with expenditure funded by subscriptions of 25% and by borrowing of 75%, the arrangements envisaged that a higher rate taxpayer could therefore contribute 25% to an arrangement offering a a tax saving at their marginal rate (40 %).

75. If a claim under s45 Capital Allowances Act 2001 was not available, the Information Memorandum stated that there was also a possibility of an alternative lower claim for investors under s 44 of the Capital Allowance Act 2001, based on 40% capital allowances.

76. The appellant was not a subscriber to Taxi and did not stand to gain from the anticipated tax advantage. It sought the capital in order to expand its business.

77. Clause 8 of the LLP Agreement required Taxi to pay various fees and the appellant's commission (25%) from the advertising revenue. It also permitted Taxi to determine what amount of any revenue after that should be classified as "reserves".

78. Taxi did not use any of the advertising revenue it received to pay off the loan.

The dispute between the parties

79. After completion on 5 April 2004 a dispute between the parties arose as to whether insufficient investment funds (i.e. below the minimum level defined in the Information Memorandum) had been raised from subscribers.

80. On 10 August 2004 Jens Hills & Co, solicitors to the appellant, wrote to Taxi's solicitors setting out their concerns and stating that there had been a material breach of the contract. They warned Taxi that a cure notice needed to be issued. The penultimate paragraph of that letter stated what the appellant required to happen for the arrangements "to be restructured". Cabvision then served a Cure Notice on Taxi by letter on 29 September 2004.

81. The dispute was, amongst other things, about the sums still due to be paid on the invoice (as evidenced by the Cure Notice). In sum the appellant claimed £1.6m was still due for the purchase of the 3014 licences. It was acknowledged that some £1.03m of this had been paid by Taxi to the appellant but the appellant claimed that this was for the margin deposit which was Taxi's responsibility so that it did not form part of the payment of the price for the software.

82. Meanwhile, the appellant pursued claims for misrepresentation against what it described as the "prime movers" in the scheme and negligence against the solicitors who acted in the transaction at completion. On 3 December 2004 Cabvision appointed

Joint Receivers to Taxi pursuant to the provisions of the Debenture. This resulted in proceedings before the High Court and the Court of Appeal from December 2004 to December 2005. These proceedings involved Cabvision on the one hand and 3 out of the 5 Designated and Board Members of Taxi. By March 2005 these 3 Members had been excluded from Taxi by the Members of Taxi and a new Board constitution was put in place. However, members of Taxi brought a successful challenge in the High Court to the appellant's appointment of administrative receivers. (*Feetum and others v Levy and others* [2005] EWHC 349) and the appointment of Receivers was set aside by the High Court on 5 January 2005. On 20 December 2005 the Court of Appeal upheld the High Court decision against the appointment of receivers by the appellant and dismissed the appellant's appeal (*Cabvision v Feetum and others* [2005] EWCA Civ 1601).

83. Meanwhile, Cabvision and Taxi tried to settle the contractual disputes in negotiations conducted by Jens Hills on behalf of Cabvision and Jones Day Solicitors on behalf of Taxi.

Impact of the dispute on the banking arrangements

First default event

84. The appointment of the Joint Receivers over Taxi's assets on or about 3 December 2004 triggered a default event under the Facility Agreement and on 8 December 2004 Lloyds wrote to Taxi giving notice that the loan was immediately due and payable on demand. However, Lloyds did not pursue this default.

Second default event

85. By a letter dated 7 January 2005 Cabvision gave notice of termination to Taxi.

86. The appellant gave formal notice to Taxi that it was terminating the ICT agreement with immediate effect. It is said in that letter that:

> "[t]he existence of this wider dispute has resulted in formal notice from Lloyds TSB that the banking relations with both principals [Taxi] and [the appellant] are not to continue".

87. Grounds given for termination included, under clause 1.1 (v), Taxi's alleged assigning of some of its licences to third parties (another LLP, TTT 37) and under 1.2:

> "[the appellant] being required to repay the debt owed to [Taxi] to Lloyds TSB by way of payment under guarantee from BOS/HBOS in consequence of the formal indication by Lloyds TSB on 5 January 2005 that it did not wish to continue banking relations with the parties."

88. This amounted to a default event under the terms of the Facility.

89. On 14 October 2005, the Court of Appeal upheld the High Court's decision to strike out a winding up petition relating to Taxi (*Tower Taxi Technology LLP v*

Marsden and Smith [2005] EWCA Civ 1503). The petition had been brought by some Taxi members on 5 April 2005.

90. On 20 December 2005 the Court of Appeal upheld the High Court decision against the appointment of receivers by the appellant and dismissed the appellant's appeal (*Cabvision v Feetum and others* [2005] EWCA Civ 1601).

Settlement arrangements

91. The dispute between the parties was finally resolved around December 2005. On 21 December 2005, the parties signed both an agreed Settlement Account, and a written Settlement Agreement. In addition, a letter had been sent by the appellant on 16 December 2005, and a further letter (incorrectly dated 24 January 2005 instead of 24 January 2006) was sent by Taxi on 24 January 2006.

92. The relevant effects of the various documents are summarised below.

Resolution of the dispute

93. The Settlement Agreement was made in full and final settlement of all disputes between the parties.

The Settlement Agreement

94. The Recital at (B) stated that the Parties (Taxi, the appellant and KPM) "wish to settle the dispute on and subject to the terms of this Agreement". Clause 1.3 stated that if there was any conflict between any agreement and the terms of the Settlement Agreement, the Settlement Agreement would prevail.

95. Under clause 3.1.2 of the Settlement Agreement, the Advertising Agreement, Liaison Agreement and Equipment Agreement were deemed to be completed and effective and incapable of termination.

Loan arrangements

96. Under clause 2.5 of the Settlement Agreement, the appellant waived any entitlement, present and future, to payments due from Taxi. It was agreed that notwithstanding the terms of any agreements between the appellant and Taxi, the appellant would not receive any further payments in respect of payment of the Price (defined to be that in the ICT agreement) including any reimbursement of any monies spent by the appellant on Taxi's behalf or in respect of payment of the Price.

97. The Settlement Agreement provided at Clause 3.1.1 that Taxi would use its reasonable endeavours to procure that £20,242,682 of the loan that Lloyds had made to it was prepaid by 5 January 2006 and that the appellant would be entitled to receive any monies released as a result of such prepayment. In the event the money released was £728,416.46 (see [108]).

98. The appellant undertook to bear the interest and other costs of the bank lending from both Lloyds and BOS, under clause 2.6 of the Settlement Agreement.

99. Other than the obligations mentioned at [98] above, the appellant was under no obligation on the face of the Settlement Agreement to make any payment towards the loan. However, it directed that its bankers, BOS, release £20,242,682 from the Security Deposit held as collateral for the Guarantee, and pay them to the credit of the loan account held by Taxi with Lloyds. £100,000 was to remain outstanding as a liability. This transfer took place on 5 January 2006 under an agreement between the appellant and its bankers, BOS, of the same date, and is set out in the ledger that BOS sent to the appellant on 16 January 2007.

100. Under clause 3.1.3 it was provided that the cure notice of 29 September 2004 and the termination notice of 7 January 2005 should be withdrawn following execution of the Settlement Agreement.

101. Clause 6.1 stated the agreement was made in full and final settlement of any disputes between the parties to it.

The Price for the software

102. In a side letter sent by the appellant and KPM on 16 December 2005 to Taxi, the appellant and KPM stated that in signing the Settlement Agreement and putting it into effect, they would rely on the following:

> "1. the Price as defined in the ICT Agreement has not been paid by Taxi whether in accordance with clause 3.1 of the ICT Agreement or otherwise and payment of the Price will not arise in consequence of the settlement. Clauses 2.2 and 2.3 of the ICT Agreement shall be construed and apply accordingly;
>
> 2. all sums relating to the order by Taxi of 1,000 screens have not been paid and will not be paid in consequence of the settlement. Clause 7.2 of the Equipment Agreement shall be construed and apply accordingly."

103. In the Settlement Agreement, the "Price" was defined as meaning "… the same as in the ICT Agreement".

104. Clause 2.5 in the Settlement Agreement provided that:

> "… notwithstanding any of the terms of… any… agreement involving one or more of the Parties, Cabvision and KPM shall receive no further payments of any sort from the LLP, including, without limitation… in respect of payment of the Price."

Schedule

105. In a schedule dated the same day as the Settlement Agreement, 21 December 2005 titled "Account" the "Price" at 23 April 2004 is given as £22,602,980 plus VAT of £3,955,521.32 totalling £26,558,501.32 and the "Price" "At settlement" is given as

an identical sum: £22,602,980 plus VAT of £3,955,521.32 totalling £26,558,501.32. The Account also states "At settlement: 3014 IP licences."

Amended advertising revenue arrangements

106. Under clause 2.1 and 2.3 the Advertising Agreement was varied so that the appellant would receive 90% of net revenue as commission rather than the previous 25%.

107. The appellant also obtained an increased share of advertising revenues generated through the Cabvision business, to 90% of net revenue (clause 2 of the Settlement Agreement). This increase was subject to a "floor" amount for Taxi, whereby the appellant would pay a minimum of £10,000 to Taxi each year if Taxi's 10% share did not exceed that amount. Had the agreements operated as contemplated at the outset, the appellant would have received 25% of the net revenue direct, and would have obtained an indirect benefit to the extent Taxi applied certain net profits in releasing money from the banking arrangements for the benefit of the appellant

The appellant's cash position

108. The effect of the Settlement Agreement was that a further £728,416.46 was released from the banking arrangements, and received by the appellant.

The direct tax position

109. On 2 December 2005, the Inland Revenue issued an assessment to corporation tax of £7.5m, plus interest and penalties of £217,315.54 to the appellant, on the basis that the appellant had received income of approximately £25m on the sale of its ICT licences.

110. In describing how he felt when he received this assessment Mr Da Costa stated he "fell of his chair".

111. The appellant sought the advice of counsel in relation to the correct tax treatment of the consideration, as adjusted by the settlement agreement, that it received for the sale of the software. Counsel's opinion, dated 11 January 2006 was that the appellant should be taxed on its trading income of approximately £1,000,000 (i.e. the net amount of cash received at the outset) and of approximately £720,000 received pursuant to the Settlement Agreement. According to the opinion the remainder of the originally invoiced £22,602,979 did *not* fall to be taxed either as trading income or as a capital receipt. The appellant's corporation tax computations were submitted and agreed with the Respondents on this basis.

112. Counsel also opined that Taxi's tax position (in relation to the availability of capital allowances) would most likely be determined by the figure of approximately £1,720,000 that the appellant received for the software purchase, rather than the much higher £22,602,979 figure originally invoiced. In fact, Taxi settled on a slightly lower figure still (£1,600,000) with the Respondents.

113. On 29 May 2008 the Respondents wrote to Cabvision and confirmed they were able to accept the turnover figure as reported by Cabvision in their accounts. However they stated that this would not impact on the VAT analysis.. On the same day the Respondents issued a closure notice.

Supplemental Security Deposit Agreement and Charge on Cash Deposit ("SSDA")

114. The appellant's board of directors met on 3 January 2006 to approve a proposed "Supplemental Security Deposit Agreement and Charge on Cash Deposit" between the appellant and BOS dated 5 January 2006 in which the appellant instructed BOS to pay an amount equal to the prepayment to the account of Taxi with Lloyds or such other account as Lloyds directed in order to prepay Taxi's loan in the amount of £20,242,682. Clause 2.1 provided that the appellant was to pay the amount to Taxi's account with Lloyds "or such other account as [Lloyds] may direct".

115. A recital to the agreement between the appellant and BOS states that the appellant and Taxi agreed that the loan would be prepaid.

Payment

116. In a letter from BOS dated 16 January 2007 BOS confirmed that on 5 January 2006 (i.e. the date of the SSDA above) £20,242,682 was paid to Lloyds from the appellant's deposit.

117. Whether the money was paid to Taxi's account at Lloyds or paid to Lloyds is a matter of dispute between the parties and is discussed further at [282] to [289] below.

118. Following the appellant's payment of the loan £728,416.46 was released to the appellant.

Taxi's letter to appellant

119. In a letter dated 24 January 2005 (but which it is accepted by the parties should have been dated 24 January 2006) Taxi stated that it had acquired the right to use the licence in 3,014 taxis under the ICT agreement, had ordered 1,000 operating systems (from KPM), that it was not anticipated that it would be ordering more such systems and that Taxi accepted it was in Taxi's and the appellant's commercial interests for the appellant to seek other partners.

Credit Note

120. On 30 June 2006 the appellant issued Taxi a credit note for £20,242,682 made up of the amount stated to be refunded of £17,227,814.47 and VAT of £3,014,867.53. The Respondents refused to accept that this was a valid credit note. In their view there was no evidence of an agreement between the appellant and Taxi that this amount would be refunded to Taxi or that the price for the software would be reduced to this amount of for any return of licences. The Respondents accepted that the original price

had been reduced to the amount in fact paid to the appellant, but did not accept that the fact the appellant repaid the loan effected any further reduction in the price.

Law

Statutory provisions

121. The relevant provisions of Article 11 of Directive 77/308/EEC ("the Sixth Directive") provide:

> 11(A)(1) (a)
>
> "A. Within the territory of the country the taxable amount shall be: (a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies…
>
> 11(C)(1):
>
> In the case of cancellation, refusal or total or partial non-payment or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States. However, in the case of total or partial non-payment, Member States may derogate from this rule."

122. VAT Act 1994 ("VATA") Section 19 Value of supply of goods or services provides:

> "(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section…
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration."

123. Regulation 38 of VAT Regulations 1995 SI 1995/2518 provides that:

> "(1) [. . .] this regulation applies where—
>
> (a) there is an increase in consideration for a supply, or
>
> (b) there is a decrease in consideration for a supply,
>
> which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.
>
> (1C) Where an increase or decrease in consideration relates to a supply in respect of which it is for the recipient, on the supplier's behalf, to account for and pay the tax, the prescribed accounting period referred to in paragraph (1) is that of the recipient, and not the maker, of the supply.

But this paragraph does not apply to the circumstances referred to in regulation 38A.

(2) Where this regulation applies, both the taxable person who makes the supply and a taxable person who receives the supply shall adjust their respective VAT accounts in accordance with the provisions of this regulation.

(3) Subject to paragraph (3A) below, the maker of the supply shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

(3A) Where an increase or decrease in consideration relates to a supply on which the VAT has been accounted for and paid by the recipient of the supply, any entry required to be made under paragraph (3) shall be made in the recipient's VAT account and not that of the supplier.

(4) The recipient of the supply, if he is a taxable person, shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT allowable portion of his VAT account.

(5) Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the relevant taxable person.

(6) Any entry required by this regulation to be made in the VAT account of an insolvent person shall be made in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received.

(7) None of the circumstances to which this regulation applies is to be regarded as giving rise to any application of regulations 34 and 35."

The Issues

124. The appellant argues the VAT due on the sale was reduced either because i) some of the sum it received was security for a bank loan to Taxi (Issue 1) or ii) some of the security was ultimately used to pay the bank which had lent Taxi money following a settlement that was reached between the appellant and Taxi (Issue 2) .

125. On Issue 1, the Respondents argue it is irrelevant to the appellant's VAT liability what the source of the money paid to it by Taxi was or what the appellant had agreed to do with that money once received. On Issue 2 they argue that the result of the settlement was that price for the software was reduced to the sum Taxi had in fact paid to the appellant. While this meant the appellant was entitled to a corresponding VAT reduction of £81,282.75 the Respondents say there was no agreement between

Taxi and the appellant for the greater reduction in VAT sought by the appellant of £3,014,867.53.

126. We discuss these issues in turn.

Discussion

Issue 1

Parties' submissions in summary

127. The issue is what was the taxable amount of the consideration obtained at sale? In answering this question the appellant makes a distinction between "consideration obtained" and "consideration to be obtained." The relevance of this distinction, it says, is that to the extent consideration to be obtained though later events loses that character then there ought to be an adjustment for that under Article 11C(1) of the Sixth Directive.

128. In summary, the appellant argues the payment into the secured deposit account fell into the category of "consideration to be obtained" because it was subject to restrictions on the power to withdraw and to use the monies paid. It says the loan element of the price was not "consideration obtained" by the appellant. It was clear once the settlement agreement was signed that no further payments would be made and no more consideration was to be obtained and the appellant was entitled to issue a credit note on that basis (subject to issue 3). They say this is consistent with accounting treatment in that the element of price corresponding to the loan monies was not treated as turnover (equating this to consideration obtained) within the profit and loss account but was shown as deferred income and post settlement as "other creditors". The facts are similar to those in *Tower MCashback* and they say weight can be placed on the judgment to conclude the loan element of the price was consideration "to be obtained".

129. The Respondents say there is no basis for the division between "consideration obtained" and "consideration to be obtained". The appellant's witnesses accepted the consideration was for the software and not for anything else and that £21 million plus £3.9 million had been received as set out in the Cure Notice (mentioned at [80]). They say that not only was the £20 million or so actually received by the appellant but it did not start acting as security for Taxi's loan until three days later.

130. While the appellant agreed that it would use some £20m of the amount received as a security deposit, what the appellant or any supplier chooses to agree it will do with consideration received does not affect the question of what consideration was in fact received.

131. In VAT law the identification of what is the consideration on sale normally is the price the parties agree will be paid and is independent of both the question of what the source of the amounts paid is and the question of what the amounts will be used for by the party receiving them.

132. The appellant says that to look at the amount received as simply the amounts invoiced and nominally paid is too simplistic an analysis. The term "consideration obtained" must mean the funds are *paid* to the supplier unreservedly so they can withdraw and use them. The nature of payments is that they have the effect of transferring funds and that they entail changes in the legal and financial situation of the parties. Here, receipt of monies into the security deposit account did not change the financial situation of the parties as the appellant did not have the right to access the money. Payments which are made subject to restrictions and conditions on the power to withdraw and use them fall into the category of consideration to be obtained until the restriction is lifted or the condition is fulfilled.

133. In support of the above propositions the appellant referred to the cases of *Glawe, Freemans, Town & Country Factors,* and *FNBC.* The Respondents argue the cases on which the appellant relies are distinguishable from the appellant's case or they support the Respondents' case. We set out the parties' arguments on those cases below and then discuss our views on those.

Glawe Spiel (Case C-38/93)

134. Glawe installed and operated gaming machines in bars and restaurants and the question was whether the money put into the machines by players was all to be regarded as consideration received by Glawe or whether the amounts that went into a separate compartment from which "winnings" would be paid to players was not part of the consideration. The ECJ held that coins that went into the cash box automatically were obtained by the operator but those that were paid out as winnings were not.

135. According to the appellant this shows that where payments are transferred under conditions where they could never be obtained i.e. withdrawn and used, they could never form part of the taxable amount. They were clearly not obtained and could never be consideration "to be obtained".

136. The Respondents argue the case is restricted to its particular facts. In *Glawe* the ECJ relied on the fact the provision of a separate compartment for winnings was mandatory under statute and fixed in advance. The operator was not choosing what to do with those sums at all. They say the limited relevance of *Glawe* outside of gambling transactions is confirmed by *Freemans* (discussed below).

137. The appellant says *Glawe* should not be restricted to its facts, and that it is for example quoted in *FNBC* (also discussed below) where it was relied on in the main conclusion.

Freemans plc (Case C-86/99)

138. The question was whether a discount that Freemans credited to an agent's account (of 10% of the price) was a discount within Article 11A(3)(b) of the Sixth Directive. It was held it was not at the point of sale a discount as the agent had to pay the full price in the first instance. Freeman's calculation of VAT on the discounted

amount would infringe Article 11A(1)(a) as it would not include all the consideration received by it.

139. The appellant says *Freemans* is an example of a situation where monies are not treated as paid until a condition is fulfilled.

140. The Respondents argue *Freemans* is distinguishable and that it is actually a case about discounts under Article 11A(3)b). They say the appellant looks at the case from the wrong direction arguing that "consideration" did not pass from Freemans to the agent until the agent in fact withdrew the discount. In fact the consideration was passing from the agent to Freemans (in purchasing goods from Freemans' catalogue) and the question was whether that consideration was the price paid by the agent or the discounted price. The court decided it was the full price. The court was saying there was an infringement of Article 11A(1)(a) if VAT was not calculated on the full price. Similarly here the consideration is the full price.

Town and Country Factors (Case C-498/99)

141. The supplier organised a "spot the ball" competition and its obligations to any winner were said to be "binding in honour only". The supplier argued following *Glawe* that the amounts paid to winners should not be included as consideration. The court held that the consideration was the full amount of entry fees for the competition and no deduction was to be assumed to take account of the winnings.

142. The appellant says this case shows there is a line to be drawn between conditional payments at the recipient's disposal and payments to which the recipient has no access. In this case the monies which were received by the supplier were at his disposal. The appellant relies on this case for the proposition that the test is whether the monies are kept "technically and physically separate" or whether they are freely at the disposal of the recipient.

143. The Respondents point to the court's decision (that the full amount of entry fees for the spot the ball competition was the consideration and no deduction was to be assumed to take account of the winnings) as supporting their case. (The case also says *Glawe* was particular to its facts.)

First National Bank of Chicago (FNBC) (Case C-172/96)

144. A bank carried out foreign exchange on behalf of customers profiting over a period by virtue of the difference in prices at which its traders bought and sold currencies. It did not charge any fees and the question was whether it was making a supply for VAT purposes. It was held the bank was supplying services for consideration even though no fee was being charged and the consideration for its services, given that no fee was charged, was to be calculated by ascertaining what profit it made. The court looked at the profits of the bank over time to ascertain what the consideration was.

145. The appellant says *FNBC* is authority that one needs to look at consideration over time and that consideration can vary according to contingent factors.

146. The Respondents point out that in *FNBC* the court, in the absence of there being a fee which was charged for the services, calculated consideration by ascertaining the profit that had been made. The court looked at the profits over time to ascertain what the consideration was. The case cannot be relied on to say there is a general principle that it is profit or income over time which counts as consideration. At [48] the decision sets out how the taxable amount must be ascertained where the consideration depends on future factors such as passage of time. To say consideration depends on future factors begs the question – the appellant cannot use this case to say that the consideration in this case indeed depends on future factors, it must show appellant's case is like *FNBC*. There is, the Respondents say, no indication that where fees do exist one would look at overall result over time or that where a price is paid for a supply that would not be the relevant consideration.

Tribunal's discussion on Issue 1

147. We start by considering what legal principles are to be applied given the relevant legislative provisions and case-law. It was not in dispute between the parties that consideration has an autonomous meaning under EU law but as can be seen from the above paragraphs there were a number of other issues which were in contention.

Distinction between consideration "obtained" and "to be obtained"

148. We note that no authority has been put forward for the appellant's proposition that a distinction should be drawn between consideration "obtained" and consideration " to be obtained" such that the latter is to cover consideration which has not yet been received but which is contingent on future events.

149. It is helpful to remind ourselves of the actual wording of the provision in which these terms occur:

> "the taxable amount shall be…everything which constitutes the consideration which has been or is to be obtained."

150. In our view an ordinary reading of the words "is to be obtained" does not bear the interpretation the appellant seeks. The reference "is" connotes certainty – the provision captures consideration which has not yet been obtained but which will be. It deals with future consideration rather than contingent consideration.

151. In *Freemans* the court stated at [27]:

> "According to [Article 11A(1)(a)], the taxable amount is…everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser. According to the Court's settled case-law the definitive taxable amount for the supply of goods is the consideration actually received for them."

152. On the facts it was possible the agent discount may or may not have been claimed. The analysis in that case was that it was only when the customer used the discount and the discount was actually paid that the consideration was reduced. Although not expressly considered it is implicit that the contingency that that discount might be used was not sufficient for the court to hold that the taxable amount was reduced. That approach seems to us to point against an approach where consideration is brought into the taxable amount even though it may be received.

153. The equivalent article to Article 11(A)(1)(a) of the Sixth Directive is Article 73 of Directive 2006/112/EC. Article 73 uses the formulation "consideration obtained or to be obtained…". Recitals (1) and (3) of Directive 2006/112/EC make it clear the Directive 2006/112/EC is a recast of previous directives including Directive 77/388/EC and that the small amount of substantive amendments are listed exhaustively in the provisions of the Directive governing transposition and entry into force. Article 73 is not one of those provisions so on the face of it no substantive change was intended by the rewording of Article 73 as compared with Article 11 of the Sixth Directive. The fact that a later directive refers to consideration "to be obtained" rather than "is to be obtained" is no less consistent with our view that the provision deals with future rather than contingent consideration.

Tribunal's views on case law – Glawe / Freemans/ Town and Country / FNCB

154. In relation to *Glawe* we note that the Respondents' contention is not without support, for instance in A81 of the Advocate General's opinion in *Town and Country* a statutorily prescribed quota of winnings is contrasted with winnings which are instead determined by the organiser himself according to the economic circumstances.

155. But, in our view the Respondents' contention that *Glawe* can be distinguished simply on the basis that there was a statutory requirement there seems too narrow. The point of principle was a focus on what was received. It is not clear from the judgment that the proposition of assessing what is received can only be demarcated by a statutory requirement and not by other requirements.

156. At the other end of the spectrum is the situation where what the recipient takes is freely at its disposal. In between there is, we think, the possibility for what is ostensibly received, not to be freely at the recipient's disposal such that it does not then count towards the taxable amount.

157. We disagree however with the appellant's suggestion that *Town and Country* establishes that the test for whether there is a restriction which means that there is no freedom of disposal is one of "technical and physical separation".

158. The reasons for the court's decision are set out [28]:

> "In the case of the organisation of a competition such as that at issue in the main proceedings, the consideration actually received by the organiser for the service he supplies to the competitors is represented by the entry fees paid by them. He receives those fees in full and they enable him to cover the costs of his activity. It follows that it is the

> amount represented by those entry fees that constitutes the taxable amount, within the meaning of art 11A(1)(a) of the Sixth Directive, of the transaction in question."

159. The court then set out the reasons why this conclusion did not call into question its interpretation with *Glawe* at [29] and [30]:

> "[29] It should be observed, finally, that that interpretation of art 11A(1)(a) of the Sixth Directive does not call into question the Court's interpretation in H J Glawe Spiel-und Unterhaltungsgeräte Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst [1994] STC 543, [1994] ECR I-1679, in as much as the operation of the gaming machines concerned by that judgment and the organisation of the competition at issue in the main proceedings differ in essential points.
>
> [30] While those gaming machines were characterised by the fact that, in accordance with mandatory statutory provisions, they were set in such a way that at least a certain percentage, in fact 60%, of the players' stakes was paid out to them as winnings and those stakes were kept technically and physically separate from the stakes which the operator could actually take for himself, the competition at issue in the main proceedings does not display any of those features, so that the organiser of the competition has freely at his disposal the full amount of the entry fees received."

160. We think the reference to "technically and physically separate" by the court was its description of how the stakes in *Glawe* were kept. We do not understand the court to be suggesting that technical and physical separation is the only means by which something is found not to be freely at the recipient's disposal.

161. We have not overlooked the appellant's submissions on *Freemans* or *FNBC* but we do not agree with them.

162. *Freemans* is not as the appellant suggest an example of a case where monies were not being treated as received until a condition was fulfilled. At best, in the context of the question of what is a discount, it says that it is not enough to have a legal entitlement to discount, the discount must be paid.

163. In relation to *FNBC* we agree with the Respondents the case does not stand for a general proposition that consideration is to be determined over time. On the facts of *FNBC* it was significant that the bank did not value each transaction and in the absence of a fee charged for a service it was necessary to look at the profit achieved over a period of time.

Other cases appellant relies on and their relevance

164. The appellant argues that for the full amount to be "consideration obtained" it must be *paid* to the supplier unreservedly. According to the ECJ's decision in *Sparekassernes Datacenter (SDC) v Skattenministeriet* [1997] STC 932 payment in the context of banking must have "the effect of transferring funds and entail changes

in the legal and financial situation." The appellant argues receipt of the monies into the secured deposit account did not change the financial situation of the parties as Cabvision did not have the right to access this money.

165. In domestic law the appellant says payment is determined in its context but an unreserved payment amounts to consideration obtained and refers to the comments on Warren J in *Aberdeen Asset Management plc v Revenue and Customs Commissioners* [2012] UKUT 43 (TCC) at [65] and [66].

166. The court in *SDC* was considering the meaning of "a transaction concerning transfers" in the context of exemptions for particular transactions set out in Article 13B of the Sixth Directive. We do not think its decision can necessarily be read across to the question of what was paid for the purposes of ascertaining the taxable amount of consideration. In any case we do not see how the case would assist the appellant. It begs the question of what is a change in financial situation and whether Cabvision has acquired the loan monies and then does what it will with them (as HMRC argue) or whether the receipt of monies and charge are to be looked at in the round.

167. In *Aberdeen Asset Management Plc,* the issue was the interpretation of "payment" in the Income Tax (Employments) Regulations 1993. In the paragraphs referred to the point is made that the word "payment" has no settled meaning and that it must take its meaning from the context in which it is used. In the context of other arguments which were relevant it was accepted that placing money unreservedly at the disposal of a recipient is a payment. The statutory construction of the term "payment" is not in issue in this case, we are looking at the issue of what consideration has been or is to be obtained. Even if we equate unreservedly placing something at someone's disposal as meaning they have "obtained" it, it does not point us towards whether the boundaries around the issue extend further and whether consideration subject to reservations counts as consideration obtained.

168. The appellant also referred us to an excerpt from HMRC's manual at VATTOS9365. This refers to a situation where a stakeholder holds the money on behalf of both parties pending satisfactory performance of the contract and it is accepted payment cannot be said to have been received until eventually released by the stakeholder. HMRC's acceptance is neither here nor there as a matter of authority and in any case the money is received by the stakeholder not by the party so it is difficult to see how it could be said that the party has the amount at its disposal before it is released.

169. In addition to the above cases the appellant also referred us to *Elida Gibbs* (Case C-317/94). The appellant relies on this to say that consideration is the subjective value of what is actually received (and highlights that "subjective" in this context has a particular civil law meaning which is different from ordinary English understanding of the term "subjective").

170. We note that the passage relevant to this point is to be found in the Advocate General's opinion rather than the court's judgment. At [26] the Advocate General refers to the court defining consideration "as an amount which must be capable of

being "assessed in money" and as a "subjective value" namely the money which is "actually received" by the person supplying the goods or services "and not a value assessed according to objective criteria"". (He refers to [13] of *Dutch Potatoes* (Case 154/80) for support). We do not understand the proposition to be in contention. What is in dispute is how to apply the test of what is "actually received" to the facts.

Law to be applied to facts here - restrictions arising out of contract

171. What we conclude from the above is that it is clear from the authorities that consideration is the amount which is actually received. But, in looking at what is actually received it is clear that it is necessary to look at whether there are restrictions on what is received such that the amounts are not at a person's free disposal.

172. In this case the source of the purported restrictions is contractual. *Town and Country Factors* and *Glawe* do not help with restrictions arising from the recipient's non statutory but contractual obligations. In *Glawe* the obligations were statutory. In *Town and Country* the obligations were binding in honour only.

173. Although the cases we were referred to do not specifically address the situation where the purported restrictions originate in the contract we are not persuaded that the notion of receipt is only circumscribed by restrictions deriving from statute and proceed on the basis that restrictions arising out of contract are capable of giving rise to the receipt of a lesser amount.

174. Furthermore, there was no authority we were referred to on the point of whether restrictions arising from contractual conditions the recipient has agreed to can mean the recipient is not to be regarded as receiving the restricted amount.

175. We note however the contrast the Advocate General in *Town and Country* drew between a statutorily prescribed quota of winnings and winnings which are instead determined by the organiser himself according to the economic circumstances. We think that when considering whether a recipient can be said to place what has been received at its disposal, it is relevant to look at any restrictions on that ability and the degree to which the recipient can amend or control those restrictions.

176. At one level there is no obligation to agree to certain terms so from that point of view any restriction arising from contract that a recipient agrees to is within their control. On the other hand we think it is relevant to take account of whether it is the case that the consideration would not have been received in the first place but for the appellant agreeing to the restriction.

177. The appellant suggests that if we have any doubt about the law in this area we should make a referral to the CJEU. But, whether the purported restrictions in this case are such that the appellant cannot be said to have received the full amount, is something we think must be determined on the basis of the particular facts of this case. We do not think there is an issue of legal interpretation that requires a referral to be made.

Application to facts

178. In applying the law to the facts there is a key issue between the parties as to whether Tribunal should look only at Cabvision's obligation to sell and Taxi's obligation to pay in the ICT agreement, which is the Respondents' case, or whether we should also look at the whole of the ICT agreement and whole web of agreements together as the appellant suggests.

179. The Respondents accept the appellant agreed it would use some £20 million of the amount received as a security deposit for Taxi's loan but it argues that what the appellant chooses to agree it will do with consideration received does not affect what consideration was in fact received. They also say that further arrangements for Taxi to use some part of its advertising revenue to pay the loan which would release part of the appellant's security deposit was similarly a separate arrangement from the VAT transaction for the purchase of licences. The release of the security deposit depended on whether there would be advertising revenue and whether any part of that was to be used by Taxi to pay the loan. The operation of the LLP agreement was such that Taxi could avoid any obligation to pay advertising revenues towards its loan and in fact no payments were made.

180. We were not referred to any particular authorities as to the approach to be taken in relation to analysing the issue of consideration in the context of a web of agreements. But, in any case, in order to address whether we look at the sale and purchase obligations in isolation, or whether we draw back and ascertain consideration from looking at the agreements as a whole, we need to consider the terms of the ICT agreement in more detail and how, if at all, they connect with the other agreements.

181. We also need to consider and make a finding on the disputed issue of fact between the parties as to when the payment was received by the appellant, and whether it is correct that the appellant had the whole amount at its disposal for 3 days before it started acting as security.

Analysis of agreements - what was consideration received?

The ICT Software Purchase Agreement between Cabvision and Taxi 5 December 2003

182. Clause 2 headed "Grant and Extent of Licence" states:

> "Subject to the provisions of this Agreement and in consideration of the payment of the Price to Cabvision, Cabvision hereby grants to [Taxi] an exclusive royalty-free licence to use the technology…"

183. Under Clause 3.7 of the ICT agreement between Cabvision and Taxi, the appellant undertook to procure the bank loan (defined under Clause 1.1 as "the bank loan or loans to be provided by any bank advancing monies in order to assist [Taxi] in paying the Price and acquiring the equipment and/or any replacement funding for such loan or loans"). Under this clause the appellant also undertook to procure security to the lender in respect of the bank loan by way of bank guarantee in respect

of all interest payable under the bank loan and further to procure the payment of all interest for which Taxi is liable under the bank loan.

184. Clause 3.1 of the ICT agreement requires the Price to be paid in cleared funds "to such bank account or in such other manner as Cabvision may specify from time to time…".

185. Pausing there we note that this does not say anything about how any consideration received is to be applied. We also note that that there is no condition precedent that a loan or guarantee or security deposit agreement be entered into although it is clear from other references to bank loans and guarantee that these will be entered into (although the bank loan or guarantee have not been particularised). There is no provision setting out how, if at all, any bank guarantee would be secured and whether this would be for the amount equivalent to the purchase price. There is no quantification of the bank loan but equally the ICT agreement does not make any provision for what is to happen if there is no bank loan. It assumes there will be a bank loan. By using the term "assist" in paying the price (Clause 1.1) the possibility is left open that Taxi will only need a loan for part of the purchase price not all of it. Although no provision is made for the situation where there is no bank loan that situation could nevertheless arise insofar as the obligation to procure the bank loan which the appellant was subject to did not necessarily mean there would be a bank loan as a matter of fact.

Facility Agreement between Taxi and Lloyds dated 16 March 2004

186. Clause 3 headed "purpose" states:

> "the Loan shall be used only to make payments to [Cabvision] in accordance with the ICT Software Purchase Agreement (defined as the agreement set out above) and to KPM UK-Taxis plc…"

187. Clause 5.1 states the obligations of the Bank in respect of the Loan shall not become effective until the Bank has received all of the documents and evidence listed in Schedule 1 (Conditions Precedent) in form and substance satisfactory to it. Paragraph 3 of Schedule 1 refers to the BOS Guarantee. Paragraph 7 refers to the Security Deposit Agreement duly executed by Cabvision together with the board minutes of Cabvision authorising the same. The Security Deposit Agreement is defined in Schedule 6 as "the security deposit agreement in the agreed form made between Bank and Cabvision".

Terms of the Security Deposit Agreement (SDA) dated 5 April 2004:

188. This agreement was between Cabvision, BOS and HBOS Treasury Services. Under clause 2.1 Cabvision shall:

> "on or before 12 noon (London time) on the date the Guarantee is to be issued by the Bank deposit an amount equal to the aggregate of the Loan Deposit and the Margin Deposit in the Account subject to this

> Agreement and the Bank irrevocable agrees that on receipt by Treasury….the Bank will issue the Guarantee."

189. Clause 2.2 of the SDA then charges the account.

190. The term "Guarantee" is defined in clause 1.1 as:

> "the guarantee dated on or around the date of this deed…to be issued by the Bank to the Lending Bank in substantially the form of Appendix II to this Agreement".

BOS guarantee to Lloyds dated 5 April 2004

191. The Notice of Drawdown in the Facility Agreement refers to "Bos Charged Account" but no definition is provided of this. Under the Facility Agreement the loan is made available to the Borrower i.e. Taxi.

Summary of contractual position

192. The ICT agreement suggests the appellant can direct where funds received go to. The appellant must procure security to the lender (but there is no obligation as to the specifics of the security). The Facility Agreement envisages the loan for the borrower will go to "BOS Charged Account". This is an account of Cabvision which is subject to the SDA. In the SDA the appellant says it will deposit an amount which is equal to the loan amount in the charged account.

193. In summary, the ICT agreement assumes Cabvision will procure a bank loan and guarantee. The calculation of price is not contingent on the financing. The ICT agreement cross referred to the LLP Agreement which contemplated the purchase would be financed using capital and debt and which contemplates a loan facility. The loan between Lloyds and Taxi is contingent on the guarantee and security deposit. The guarantee will not happen without the security deposit, and the loan will not happen without the guarantee.

194. From a contractual perspective, the software could be purchased without a loan in that it was possible to pay at least some of the price without a loan. The appellant had obligations to procure a loan and implicitly it could be said to procure a guarantee but there was no obligation to use the Price received in any particular way.

What actually happened?

Disputed issue of fact: when was payment received?

195. The Respondents' contention is that the £20,342,682 that Taxi paid was received by the appellant in its own bank account on 2 April 2004 but it did not start acting as security for Taxi's loan until 3 days later on 5 April 2004.

196. They refer to the fact the Drawdown Notice from Taxi (instructing Lloyds to pay £20m to the appellant's BOS account) is dated 2 April 2004 and instructs

payment to be made on that date. The Security Deposit agreement is signed on 5 April 2004.

197. The appellants say the Drawdown notice of 2 April 2004 shows the date when the money was requested. It does not show when the £20,342,682 was actually paid over.

198. We note that 2 April 2004 fell on a Friday and 5 April 2004 fell on a Monday. It was a condition precedent of the Facility Agreement that the SDA was entered into. In our view it is highly unlikely that Lloyds would have been prepared to make the advance to the appellant's account without the SDA being in place, vastly increasing Lloyds'credit risk on a £20m loan. We find it more likely that while the Drawdown Notice was drawn up on the Friday the payment was not made until the SDA was entered into. We find on the balance of probabilities that the payment was made on Monday 5 April 2004.

Payment of price with loan

199. While under the contracts a price could have been paid without the loan, in fact the price was paid by Taxi with the assistance of the loan. Further, given the terms below we think it would not be realistic to say that the price would have been paid without a loan element.

200. Recital B of the LLP agreement of 4 December 2003 provides "[Taxi] intends to raise capital **and debt** with which to finance the acquisition of ICT Software…" [emphasis added] and at D "[Taxi] will seek to raise debt pursuant to the Facility Agreement". We note Clause 11.3 of the ICT Agreement (Cabvision's right to terminate) refers to the LLP failing (as required under the LLP agreement) to repay the capital outstanding under the Bank Loan. The LLP Agreement is defined under clause 1.1. of the ICT Agreement as "the agreement constituting the LLP and made on or around the date of this Agreement…"). "Facility Agreement" is defined in clause 1.1 of the LLP agreement as "the facility agreement in a form to be agreed to be entered into between the Bank and [Taxi] relating to the advance of up to £67.5 million to the LLP by the Bank". "Bank" is defined in the LLP agreement as "such bank as may advance funds to [Taxi] in order to enable [Taxi] either to meet its obligations to pay the price attributable to it under the [ICT agreement] or to repay any of the amounts advanced pursuant to the terms of the Facility Agreement".

201. Looking also at the linkage between the ICT agreement and the LLP agreement (which refers to a facility agreement) it seems clear that a loan of £67.5 million was contemplated although a bank had not been identified).Under the ICT agreement there would be no supply of licenses until a price was paid.

Application of what was received to charged account

202. Although under the agreements there was not a specific obligation for the appellant to put what they received into the charged account this is what they did.

203. There was no evidence before us to suggest the appellant had any other arrangements in place to ensure that the amount required for the charged account could be provided from other sources. The reality was that the appellant was going to use the price received to place on deposit.

Mr Da Costa's evidence and Mr Langley's evidence on what they thought the appellant was receiving

204. While we accept Mr Da Costa's and Mr Langley's evidence on what they thought the appellant was receiving were honest recollections of their understanding of how the agreements worked this evidence does not help us with the question of what was actually received by way of consideration.

Approach to assessing consideration

205. Returning to the question posed at the outset of the examination of the contractual position and the facts we note the ICT agreement was not a free-standing agreement but linked, in some cases explicitly, and other cases implicitly with the LLP agreement, the Facility Agreement, the Guarantee and the Security Deposit Agreement. The reality of the situation was the software would not have been purchased without a loan, the loan would not have been entered into without a guarantee and the guarantee without the Security Deposit Agreement. Realistically the obligation in respect of the charged account could not have been fulfilled without using the proceeds for the sale of the software.

206. Given the linked nature of the agreements and the contingencies between them both according to their terms and how the transaction operated in practice we cannot adopt an approach of isolating a particular obligation in one of a series of agreements. We must, we think, look at how they operated together.

207. We disagree with the Respondents' argument that the loan transaction which funded the payment at one end and the use of the proceeds in a charged account at the other are separate transactions. These were elements of the same transaction. We find it to be the case that the restrictions arising from the Security Deposit Agreement on what was received are inextricably bound up with the payment of the consideration.

208. Where the party's agreement to restrictions is what enables the supply to take place we do not think these restrictions may be ignored just because they arise from something the appellant has signed up to. The facts here are different from the situation the Respondents depict where a taxpayer receives the price and then independently decides to use that as security for a loan.

209. Our view, taking into account the contractual documents surrounding the transaction, and taking into account what happened and what was to happen realistically, is that the amount the appellant received is the net amount, the remainder being subject to restrictions in the SDA which meant the appellant cannot be regarded as receiving the full amount of £20m.

210. Further arguments were made by the appellant as to the relevance of the accounting treatment and *Tower MCashback* which we deal with below in order to see whether they bolster or point against our conclusion above.

Relevance of accounting treatment

Appellant's arguments

211. The appellant says accounting evidence can be relevant and the Tribunal can place weight on it. The appellant referred us to the cases of *Eon* (Case C-118/11) and *Sofitam* (Case C-333/91).

212. The accounting treatment should carry weight because it assists in ascertaining the difference between turnover (equating to "consideration obtained") in the profit and loss account, and deferred income / other creditors (equating to "consideration to be obtained" on the balance sheet).

213. The appellant also refers to article 2.3 of the Fourth Company Law Directive (EC Council Directive 78/660) that company accounts should give a true and fair view.

214. It is accepted that the element of the price corresponding to the loan monies was not treated as turnover within the profit and loss account but was shown in its accounts as deferred income (and post-settlement as other creditors) on the balance sheet.

215. This treatment the appellant says further supports its analysis that this element of the Price was not obtained by the appellant.

Respondents' arguments

216. The Respondents disagree that there is any general principle of weight being given to accounting evidence for VAT purposes. In relation to *Eon* in referring to international accounting standards they point out the CJEU was clear that such standards were produced in an EC Commission Regulation. The case is not authority for any claim that in VAT law one ascertains the consideration by considering how accounts treat income.

Tribunal's views

217. In relation to *Eon* the CJEU referred to an accounting standard as an example of something (that was also in an EC Regulation) which provided a description of the difference between a finance lease and an operating lease.

> "However, as is clear from the international accounting standard IAS 17 relating to leases, produced in EC Commission Regulation 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with EC Regulation 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320, p 1), an

> operating lease must be distinguished from a finance lease, the nature of the latter being that substantially all the risks and rewards of legal ownership are transferred to the lessee. The fact that a transfer of ownership is provided for on the expiry of the contract or the fact that the present value of the lease payments is practically identical to the market value of the property constitute, separately or together, criteria which permit a determination of whether a contract can be categorised as a finance lease."

218. The case did not end there; the CJEU had to consider what that meant for VAT purposes. The Tribunal is not precluded from looking at accounting standards but we agree with the Respondents this case does not establish any general proposition that accounting standards must be taken into account or should be given any particular weight.

219. In relation to *Sofitam* the Advocate General's opinion reflects authority that "turnover" must be interpreted by reference to its general economic meaning in common parlance. The Advocate General went on to refer to how that term was referred to in the Fourth Company Law directive and the distinction made there between net turnover and income from participating interests.

> "That is also indicated by the fact that, in the absence of a specific definition in the Sixth Directive, the concept of 'turnover' in art 19(2) of the directive must be interpreted by reference to its general economic meaning in common parlance. (That principle of interpretation was applied by the court in other VAT cases as well: see in particular Van Dijk's Boekhuis BV v Staatssecretaris van Financiën (Case 139/84) [1985] ECR 1405.) In common parlance, that concept refers to the value of the total sales of goods and services by an undertaking during a given period. In my opinion, it is clear that the receipt of dividends cannot be brought under that concept. The Community legislature also uses the concept of 'turnover' in that sense in EC Council Directive 78/660 of 25 July 1978 based on art 54(3)(g) of the EEC Treaty on the annual accounts of certain types of companies (OJ L222 14.8.78 p 11) (the Fourth Company Law Directive). Article 28 of that directive defines 'net turnover' with a view to drawing up the profit and loss account as being (OJ L222 14.8.78 p 22)—
>
> '... the amounts derived from the sale of products and the provision of services falling within the company's ordinary activities, after deduction of sales rebates and of value added tax and other taxes directly linked to the turnover.'
>
> The difference between the turnover of an undertaking and the dividends which accrue to it as a result of its holdings in other undertakings is, moreover, clear from the layouts provided for by the Fourth Company Law Directive regarding the presentation of the profit and loss account: in it the heading 'net turnover' is always distinguished from the heading 'income from participating interests' (see arts 23 to 26 inclusive of the Fourth Company Law Directive (OJ L222 14.8.78 p 19–21))."

220. We note however no mention is made in the Court's decision of the relevance or otherwise of these accounting standards.

221. While it is not impermissible to take account of terminology in accounting directives, there is no general proposition that we *must* take account of accounting treatment.

222. To the extent Deloitte's draft accounting opinion notes consistency between International Accounting Standard 18 on Revenue and FRS12 we note that IAS18 has been adopted by Commission Regulation 1725/2003.

223. To the extent the standards used to prepare the appellant's accounts hang off the notion of looking at economic reality and to the extent we are interested in that for VAT purposes we cannot say the accounting treatment is irrelevant.

224. We note the way the transaction was treated under the draft Deloitte opinion. The best that can be said of the value to this case is that an accountant taking account of the impact of a EU endorsed standard which essentially says "look to the substance" came to the view that this transaction should be looked at in the round rather than in its separate components and that this conclusion is not inconsistent with our view. The value relies on the assumption being made that the economic reality sought after by the accounting treatment and the economic reality used in ascertaining what is received in relation to VAT transaction here are materially similar.

Relevance of Tower MCashback /res judicata

225. In *Tower MCashback* there was a purchase by an LLP of software rights for £27.5 million which included a loan from a bank for which the seller had provided security. The LLP claimed it had incurred expenditure of £27.5 million. The Supreme Court held that the loan element of the consideration was not to be treated as capital expenditure under the Capital Allowances Act 2001. It was not expenditure for the acquisition of the software rights.

226. The appellant says the facts in *Tower MCashback* are substantially similar to those in this appeal. The Cabvision scheme was devised by Tower, the same operators as in *Tower MCashback* and at the very same time in early 2004. As in Cabvision's case *Tower MCashback* also concerned arrangements whereby investors subscribed for investments in an LLP which were boosted by a loan from a bank of three times the value of the subscription element in the hope of gaining 100% capital allowances on the full value of the investment. The 75% loan was able to be raised because the element of the price for the ICT technology corresponding to the amount of the loan was required to be paid to a second bank which acted as guarantor of the loan and which placed a collateral deposit of the same value as the loan with the lending bank.

227. There were factual differences. The loan was made directly to investors rather than to the LLP, a company was interposed between the lending bank and individual investors, and rather than paying monies into a deposit account, monies were paid to a

second bank guarantor which then paid them to the lending bank. But the appellant says none of these differences are material.

228. The appellant says that statutory interpretation for direct tax requires that the courts establish the facts and contractual analysis first and then apply the test purposively construed. They say it is for the Tribunal to decide how much weight to place on the decision.

229. The Respondents say there are a number of reasons why *Tower MCashback* cannot be relied on to show the loan element of the expenditure was not consideration for the purposes of VAT.

230. The decision concerns a different tax with its own particular question "Was the expenditure capital expenditure on the provision of plant or machinery?". The decision did not concern the meaning of consideration at all (indeed the full amount amount including that deposited as security for the loan was referred to as "consideration").

231. The appellant argues that "expenditure incurred" is simply the other side of the coin to "consideration obtained" and that absent third party consideration they ought to be the same amount.

232. The Respondents point out that consideration in VAT law has an EU meaning. What any one Member State's position on what counts as "consideration" (and a fortiori "expenditure" in a domestic tax) for direct tax purposes is irrelevant for VAT purposes.

233. The appellant agrees consideration has an EU meaning but argues this does not mean there cannot be an overlap between the UK meaning and the EU meaning.

234. In relation to the factual similarity of the two matters the Respondents say a key fact the Supreme Court considered in finding that the loan element was not "expenditure for the software" was that the borrowed money did not go to MCashback (the software supplier) "even temporarily" ([77]). This led to the conclusion that the LLP did not pay the borrowed money to MCashback to acquire software rights but that the money was instead "put into a loop as part of a tax-avoidance scheme". On 2 April 2004 Taxi requested drawdown of the loan in the amount of £20,342,682 instructing Lloyds to pay that amount to the appellant on account of monies due pursuant to the ICT Agreement. Although the Respondents acknowledge they still took the position that the loan element of the transaction in this case was such that the loan should not be considered as relevant expenditure for capital allowance purposes, as a precedent, the Supreme Court decision can be distinguished from this case.

235. The Respondent highlights the direct tax position is consistent. While Taxi was not able to treat the amount borrowed from Lloyds as funding expenditure for capital allowance purposes the appellant was not required to pay income/ corporation tax on the full price received from Taxi.

Non-arbitariness - relevance of Jokela v Finland [2003] 37 EHRR 26,

236. The appellant argues it should be able to expect a consistent approach from the tax authorities and courts where there are the same primary facts. It says there should not be different treatments for different aspects of the same types of transaction without justification or a sufficient explanation for why and relies on the case of *Jokela.*

237. In *Jokela* the facts concerned inconsistent valuations of expropriated property. A lower value had been given for assessing compensation and a higher value for assessing inheritance tax due on the land. The court decided that the inconsistent valuation was such as to require an explanation. In the absence of such an explanation there was a violation of Article 1 of the first protocol of the European Convention on Human Rights.

238. The Respondents say the appellant's reliance on this case is misplaced. In *Jokela* both courts were trying to assess "market value" and arrived at inconsistent answers. Here the direct tax question"What is the relevant expenditure?" is a different question from "What is the consideration received for VAT purposes?" Thus there is an explanation for the different treatment of money received. What is not "expenditure" for one tax may (and is) nonetheless the consideration paid for VAT.

239. The Respondents' position is that neither the question of how is the loan is to be treated for capital allowances nor the question of how it is to be shown in the accounts is relevant to the question of whether that amount was consideration for VAT purposes.

Tribunal's views on relevance of Tower MCashback / Jokela

240. We cannot place any significant weight on *Tower MCashback* as regards the issue before us. There were different parties before the Supreme Court in that case, and the findings of fact are not binding. We have to make our own findings here. Further the appeal concerned a different tax and therefore a different legal issue. Consideration for supply is not the same as expenditure under the Capital Allowances Act 2001. We are not persuaded the terms are functionally similar and that we should make the kind of equation the appellant seeks to make. We do not rule out that there may, depending on the facts of a matter, be some overlap between what counts as expenditure and what counts as consideration but they are certainly not equivalent concepts. That means we approach any argument that we should read across the conclusions in *Tower MCashback* to this matter with a great deal of caution. Accordingly we agree with Respondents' views that reliance on *Jokela* is misplaced. We are dealing here with two very different taxes. We are not looking at two sides to the same coin as the appellant suggests. If anything, we are looking at different sides to different coins.

Tribunal's conclusion on issue 1 – whether full amount "consideration obtained" or "consideration to be obtained".

241. We find the consideration was the net amount. The reality was that the appellant only able to get £20 million on the basis it would put a large part of what it received into a secured deposit account. It only had access to that money as and when the amounts owed by Taxi to Lloyds were repaid and money was thereby released. The full amount of £20 million was not consideration obtained. The obligation to guarantee and the receipt of the price were all part of the same transaction. It is artificial to separate them out. We are not persuaded that on this basis the amount to be charged was consideration at all as it was not received by the appellant. Therefore output tax was not due on the amount which was received subject to restrictions. The issue of whether the appellant has an in-time claim for repayment of overpaid output tax is discussed under the heading of Issue 3 at [391] onwards.

242. There is nothing in the appellant's *Tower MCashback* arguments or accounting evidence arguments takes the matter further. Equally we do not consider the Respondents' arguments on the irrelevance of those arguments serve to undermine the conclusion we have reached above.

Issue 2

243. Issue 2 is only relevant if the appellant is unsuccessful on Issue 1. What follows below is our analysis on issue 2 in the event our conclusion on Issue 1 is wrong.

Summary of parties' arguments

244. By way of reminder, Issue 2 concerns the matter of whether the settlement between Taxi and the appellant had the effect of reducing the price agreed for the sale. The appellant argues it did because there was an agreement that the appellant would pay the amount of the loan to Taxi in return for Taxi returning some of its licence rights to the appellant. The Respondents say there was no such agreement and no price reduction.

Legal issue: For purposes of VAT – what is required for price reduction – must the variation take effect contractually or can it take effect under broader principle of reciprocity?

245. There is a dispute between the parties as to whether the evidence points towards there having been a contractual reduction in price or waiver of rights. But, in any case we understood the appellant to be arguing that for the purposes of VAT a contractual reduction or waiver was not necessary as long as there was a requisite level of reciprocity.

246. We note that consideration for the purposes of VAT need not derive from contract. On the facts of the spot the ball competition in *Town and Country,* consideration arose out of an unenforceable contract which was an arrangement which was binding in honour. In *Tolsma,* where the facts concerned a busker, it was highlighted that for there to be a supply there needed to be a legal relationship / reciprocity. There did not necessarily need to be a contract. The question arises as to whether any variation of price would need to be contractual.

247. On the facts of this case, on the assumption that issue 2 is only relevant if appellant has failed on issue 1 and it is accepted that the whole consideration was the £20 million figure, then the £20 million consideration arises from that being the sum paid according to the contract (in the sense that although Taxi was not obliged to pay a specific sum, the contract expressly contemplated a lesser sum being paid and became effective once a lesser sum was paid).

248. Where as in this case the supply arises out of contractual obligations we can see how it might be argued that any reduction or waiver would need to be effective contractually. If the situation was that original consideration arose out of an obligation in honour then logically something less than a contractual variation would be effective to vary or waive the original obligation but that is not relevant on the facts here. We were not referred to any particular authority on the point of whether, when the supply arises out of a contractual obligation a reduction or waiver for the purposes of Article 11C(1) could arise from something less stringent than a contractual obligation. Equally we were not referred to any authority confirming that the variation had to be effective in contract.

249. We noted however that in *Freemans* it was suggested by Freemans and the Commission that Article 11C(1) covers cases in which the reduction in consideration arises from an amendment to the contract after the time of supply, citing *Elida Gibbs* where the court held the provision refers to the normal case of contractual relation entered into directly between two contracting parties which are modified subsequently. The court in *Freemans* stated at [33]:

> "In that regard, it suffices to state that the the wording of Article 11C(1) of the Sixth Directive does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. In principle it requires the Member States to reduce the taxable amount whenever after a transaction has been concluded part or all of the consideration has not been received by the taxable person [refers to *Goldsmiths* [16,17 and 18]]. Moreover, there is no indication that in its judgment in *Elida Gibbs*, cited above, the Court wished to restrict the scope of the application of that provision. On the contrary it is apparent from the facts of the *Elida Gibbs* case that there had been no modification of the contractual relations. Nevertheless, the Court held that Article 11C(1) of the Sixth Directive was applicable."

250. We appreciate the statement ought however to be read in the context of the decision and the principle that the position of taxable persons must be neutral. At [31] the court stated:

> "account should be taken, when calculating the taxable amount of VAT, of situations where a taxable person who having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer grants the consumer a reduction through retailers or by a direct repayment of the value of the coupons. Otherwise the tax authorities would receive by way of VAT a sum greater than that paid by the final consumer, at the expense of the taxable person."

251. We cannot read the above statement as definitive of a price reduction or variation being accepted even though it does not take effect contractually. Given the issue is only relevant if it is determined that there was no contractual variation or reduction we propose to first consider whether on the facts and evidence before us there was a contractual variation / waiver of rights such that the price was reduced and then return to the question of whether something less than contract will do if it turns out there was no contractual reduction.

252. The particular question is whether it is the case, as the appellants argue, there was a reciprocal agreement that Taxi return license rights in return for the appellant paying off a loan owed by Taxi.

253. Contractual variations, can in principle take place i) by written agreement ii) by oral agreement (or a combination of oral and written agreement), or iii) can be implied from the parties' conduct. We consider each of those possibilities by reference to the evidence below.

254. But, before doing so, it is necessary to deal with three disputed issues of fact / legal construction which may colour the analysis of whether there was a contractual variation. The first, was whether the appellant was free to sell licenses to others anyway because the ICT agreement had been terminated. The second, relates to the nature of what the appellant's exclusivity in the agreement was, even if the ICT agreement was not terminated. The third issue relates to whether it is the case that a sum of money was paid from the appellant to Taxi to reduce its loan, as the appellant argues, or whether the sum of money in fact went to Lloyds as the Respondents argue.

Was it the case that the appellant could sell software licenses to others anyway because the ICT agreement had been terminated?

255. The Respondents say the appellant terminated the ICT agreement in January 2005. The termination also automatically terminated the Advertising Agreement (by operation of clause 8.6). This allowed the appellant to sell to others. The appellant had also alleged Taxi had sold to others (7 January 2005 termination notice ground 1.1(v)). Again if Taxi had sold licenses to others this fact would allow the appellant to sell to others.

256. The appellant argues the breaches were affirmed and the contracts continued. The appellant says affirmation can be shown through conduct and refers to *Tele2 International Card Company SA v Post Office Limited* [2009] EWCA Civ 9.

257. In that case Tele2 agreed to provide pre-paid phone cards to Post Office Limited (POL) who agreed to promote the phone cards and services through its Post Office outlets, internal marketing and other suitable channels. The issue was whether POL was entitled to give notice of termination. Tele2 said POL had delayed so long in giving notice (by nearly a year after it could have done so) that it had affirmed the agreement by election. POL argued there was a waiver / forebearance clause which

was effective at preventing an election to affirm which would otherwise have occurred.

258. The Court of Appeal held the waiver clause to be irrelevant. It referred to and applied principles set out by Lord Goff in *The Kachenjunga* [1990] 1 Lloyd's Rep 391 in particular at [53] that:

> "…an election can be communicated to the other party by words or conduct. However in cases where it is alleged that a party has elected not to exercise a right, such as to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party "has so communicated [its election] to the other party in clear and unequivocal terms.""

259. In *Tele2* the Court of Appeal agreed with the judge's conclusions that continued performance of the agreement for nearly a year without any protest or reserve of any kind was only consistent with an election to abandon the right to terminate for that breach.

Tribunal's views on termination, whether there were breaches and if there were breaches whether they were affirmed

260. As to whether the ICT agreement was terminated when the appellant gave formal notice on 7 January 2005 there is no reason in our view to suppose the notice did not do what it purported to do.

261. The Settlement Agreement of 21 December 2005 provides at clause 3.1.3 that: "the cure notice dated 29 September 2004 and the termination notice dated 7 January 2005 shall be deemed automatically withdrawn and of no further effect". This meant that even if the termination notice was of continuing effect up until 21 December 2005 the notice was to be regarded as void from the outset. Although it might be argued that this provision of the Settlement Agreement by stipulating that the termination notice was regarded as withdrawn had the effect of resurrecting the ICT agreement, this does not assist the appellant in any explanation for why in the period between 7 January 2005 and 21 December 2005 there were any restrictions preventing the appellant from selling software licenses to others.

262. While the terms of the appellant's letter of 16 December 2005 refer to certain clauses (2.2 and 2.3) of the ICT Agreement applying, this letter is we think in anticipation of the settlement agreement resurrecting the ICT agreement rather than an indication that the ICT Agreement was still in operation.

263. Even if we were to put aside the termination of the agreement on 7 January 2005, the appellant has not identified what words or conduct would enable us to find that any breaches had thereby been affirmed. There is certainly not any conduct in the way of continuing performance which satisfies the clear and unequivocal communication required by the principle applied in *Tele2* as discussed above.

264. The upshot is that up until 21 December 2005 there was no issue with the appellant selling licenses to others. To the extent Mr Da Costa's and Mr Langley's evidence suggest the contrary, while we accept this is what they thought, their understanding does not alter the fact that during this period the appellant could have sold licenses to others.

265. But, this conclusion does not obviate the need to consider the nature of "exclusivity" under the agreement because that issue is relevant to what the position was at the time of the settlement when the ICT agreement was resurrected.

Nature of exclusivity

266. It is a matter of dispute between the parties as to what it means to say that the appellant had "exclusivity" in the software licenses.

267. The appellant says clause 2.1 of the ICT agreement contains the main exclusivity provision of the agreement to which clause 3.6 is additional. The reference in Clause 3.6 to "to *assist* the LLP in exploiting the value of its rights …" under the ICT agreement reflected that the rights were already granted by another part of the agreement.

268. The appellant says the combined effect of clause 2.1 and clause 3.6 was that:

(1) Until the end of the Term, Taxi would have exclusive rights to acquire licences for up to 10,000 London Taxis;

(2) Until Taxi had subscribed for this amount of licences, the appellant would be unable to grant licences (in respect of London Taxis) to anyone else; and

(3) Once the appellant had supplied the full 10,000 licences to Taxi, it would be free (after expiry of the 3 year exclusivity period at clause 3.6) to sell licences to other people in London.

269. Taxi immediately acquired 3014 licences and the right (after the 3 years were up under clause 3.6) to buy a further 6986 licenses before exclusivity would be exhausted.

270. Licences were useless without the equipment to use them on but owning an exclusive licence without the related equipment did however prevent the appellant from selling a licence to anyone else and from earning advertising revenue in respect of that licence.

271. The Respondents on the other hand say that the "exclusivity" referred to the effect of clause 3.6 which prevented the appellant selling to anyone else for three years from the date of the agreement (i.e. until 3 December 2006) subject to clause 11.4 (the termination of the Advertising Services Agreement or Taxi's assigning its licenses to a third party (independent of any termination). They make the point that the exclusivity could not refer to the number of licenses at all. By its nature what made a licence exclusive is that no one else could have a licence not the number of licences that Taxi bought.

272. The relevance of this issue is that it affects what was in play at settlement. It is also relevant to the Respondents' argument that there was no reason for a price reduction i.e. there could be no reason for a waiver by Taxi of an obligation that the appellant could not sell to others in return for price reduction of £20 million if there was no such obligation, or there would be less of a need to enter into such an agreement if the exclusivity would end by 5 December 2006 anyway.

Tribunal's views on exclusivity issue / construction of ICT agreement

273. The key point of difference is whether, "exclusivity" in relation to the software licenses meant the appellant could not sell to anyone else for the longer of i) a three year period or ii) until the appellant had sold 10,000 licenses to Taxi (as argued by the appellant), or whether exclusivity would expire after the 3 year period, (or upon certain termination events if earlier) as argued for by the Respondents.

274. On the face of it the appellant's interpretation does seem rather surprising. Why would the appellant agree to being hamstrung for potentially the whole length of the ICT agreement term without being able to force Taxi to buy the remainder of the licenses up to 10,000? On the appellant's interpretation Taxi could buy a minimal sum and then the appellant would be unable to sell to others for the length of whole term.

275. On the other hand we note certain territorial limitations in the agreement which mean the result is not as surprising as it might first seem. Clause 3.5 of the ICT agreement contemplates the appellant can sell outside of London but must offer licenses to Taxi on terms at least as favourable. Clause 3.6 only operates in relation to London. On this basis it is not the case the appellant was not able to sell indefinitely until Taxi bought 10,000 licenses because the appellant could still sell outside of London.

276. However we note the Supreme Court's views at [19] in *Rainy Sky* [2011] UKSC 50, a decision the appellant referred us to which is discussed at [354] onwards to the effect that the fact that a term in the contract appears particularly unfavourable to one party or the other is irrelevant. The term may have been agreed in exchange for some concession made elsewhere in the transaction or it may simply have been a bad bargain.

277. Mr Da Costa's evidence was that that Taxi had exclusivity "up to 10,000". His understanding of the settlement that was reached was that for paying money the appellant got 2014 licenses back and exclusivity for the remainder. His view was the appellant could not move on otherwise.

> "The done deal was *exclusive* to [Taxi] they had all the rights in what was effectively the first 50% of the market [22,000 taxi cabs in London] so unless we could regain those rights – because [Taxi] was not using them- then the business could never grow to its full potential."

278. While we accept this was Mr Da Costa's understanding of the effect of the nature of the contractual agreement this does not alter the effect of the agreement that

was entered into. It may be relevant to the issue of whether it was more or less likely that there was an oral agreement and we consider that at [329] onwards. But it does not affect how the written agreement should be construed. The fact Mr Da Costa was mistaken as to the effect of the agreement does not mean that the agreement must thereby be construed according to such a view.

279. As a matter of legal construction we prefer the Respondents' interpretation. The appellant's construction requires us to read in terms which are not specifically drafted. If the intention was that the appellant could not sell in London until 10,000 licenses had been bought by Taxi we would expect this to be spelled out more clearly.

280. We note though that even if we agree with the Respondents' interpretation of exclusivity there was still a period of time left to run on such exclusivity. There could still have been an agreement that Taxi waive those rights. The 3 year period ran from the date of the agreement. The date of the agreement was 5 December 2003, the 3 year period ended 5 December 2006. The date of payment was 5 January 2006. There was therefore 11 months to run on exclusivity even on the Respondents' interpretation.

281. We accept Mr Da Costa's evidence that he needed to move quickly with the idea or he would lose out to competitors. That being the case it was not implausible that the appellant would not have chosen to wait until 5 December 2006 for the exclusivity to expire.

Was the loan paid to Taxi or to Lloyds?

282. The Respondents say the appellant has provided no documentary evidence that the loan monies were paid to Taxi's account. While Mr Langley in his evidence sought to claim the loan would have to be paid to Taxi's account at Lloyds the Respondents says payment could and would be to the bank itself rather than to the account of borrower. Mr Langley accepted that if the amount was paid to Taxi who then used it to pay the loan this ought to be reflected in its accounts. It is to be noted that Taxi's accounts did not show any reduction in fixed assets which contradicts any claim that it returned the number of licences it had purchased. While Mr Langley also said Taxi's accounting could not be trusted the documents do not support any claim of a payment to Taxi. The only relevant document being letter from BOS of 16 January 2007 states the money was paid to "Lloyds TSB".

283. The appellant says it is a well established principle of banking law that payment to a bank account is treated as a payment to the account holder. They refer to clause 2.1 of the SSDA.

284. It did not matter that the clause gave BOS the power to pay the money to "such other account as the Lending Bank [Lloyds] may direct" as under the terms of the clause the purpose of the payment would still have to be "in order to prepay the Loan". The appellant also points to interest payments due on the loan being seen to be reduced afterwards. The monies must have been applied to the loan account.

Tribunal's conclusion – loan paid to Taxi

285. On balance we accept the monies were paid to Taxi's account with Lloyds with a view to reducing the Lloyds loan to Taxi. The recitals to the SSDA record that the appellant Taxi and Lloyds have agreed the Loan is to be prepaid and that the appellant has agreed that "£20,242,682.00… is to be utilised to prepay the Loan…". Clause 2.1 of the SSDA requires the appellant to deposit the amount in its account with Lloyds and further provided for an undertaking by BOS to transfer £20,242,682 "to account of [Taxi] with [Lloyds]…or such other account as [Lloyds] may direct in order to prepay the Loan in an amount of £20,242,682.00 on behalf of [Taxi]."

286. As between the possibilities of the appellant paying money to Taxi's loan account at Lloyds for purposes which are stated in the SSDA and the appellant paying money to Lloyds for no ostensible reason we find the former is the more likely.

287. The fact that a letter from BOS to the appellant of 16 January 2007 setting out account transactions states that on 5 January 2006 a capital repayment of £20,242,682 was a payment "made to Lloyds TSB" reflects that the destination account was one held at Lloyds. It is not inconsistent with the monies being paid to Taxi's loan account at Lloyds.

288. Given the deficiencies in Taxi's accounts which Mr Langely highlighted (a disparity between members' interests and net assets and a balance sheet which did not balance), we have difficulty placing reliance on those accounts. The absence of a payment to Taxi in those accounts is not therefore significant in our view.

289. Having made the above findings we now return to the question of whether there was a contractual reduction in price / waiver of rights in return for licenses as the appellant suggests.

a) Was there a variation effected by written agreement?

290. The appellant does not appear to argue that the price reduction was effected by the Settlement Agreement. For the sake of completeness we have considered the agreement.

291. The upshot of the settlement agreement was that the appellant was to get more commission when it did source advertising. No further licenses were to be sold and the appellant was not going to get any more payments. Taxi agreed to use its reasonable endeavours to ensure the loan made to Taxi was pre-paid. In our view the agreement is free standing. It does not need other terms to be implied by necessity in order for it to work.

292. There is nothing in the Settlement Agreement which shows the appellant was agreeing to take less price, or that it was returning anything to warrant a reduction in price.

b) Written plus Oral variation?

293. The appellant argues there was a "global settlement" including provisions that the exclusive IPR rights in the software would be varied in return for a refund of the loan element of the Price on the basis that either of the two alternatives set out at [294] and [295] below:

294. The parties had agreed all terms by 21 December 2005 i.e. comprising written and oral agreements encompassing:

(1) The written Settlement Agreement of 21 December 2005

(2) The Cabvision side letter of 16 December 2005 and the Settlement Account of 21 December 2005; and

(3) Contemplation of the waiver of the rights as per the further side letter and the release of the Security Deposit Monies to prepay the loan as per the Supplemental Security Deposit Agreement;

295. Alternatively there were two sets of separate variations:

(1) The written settlement agreement of 21 December 2005 ; and

(2) A further oral agreement in January 2006 that exclusivity rights would be varied, in return for a refund of the Price (evidenced by the Side Letter of 24 January 2006) waiving IPR rights and the Supplemental Security Deposit Agreement.

296. The appellant makes a number of points as to why this is the only interpretation that makes commercial sense given the agendas of the parties, their conduct and the commercial and economic reality.

297. We understand this to be a two fold argument: 1) that the parties' motivations / background would tend to show it is more likely than not that there was an oral agreement in the terms suggested, or 2) that from the parties' conduct it must be implied that there was an agreement. (The latter argument was not raised in such terms but we think it is open to us to consider it if no agreement is found by other means given implication from conduct is one of the routes by which contractual terms may be inferred.)

298. The appellant refers in its skeleton argument to there being an "oral collateral agreement".

299. The Respondents say the evidence from appellant's witnesses does not support any claim there was an oral collateral agreement. The Respondents' position is that there was no other settlement agreement apart from the Settlement Agreement, and the appellant has not established that there was an agreed price reduction. The Respondents say that for whatever reason the payment was made there no evidence that the payment constituted a reduction in price in exchange for licenses so as to provide a basis for a reduction in the appellant's VAT liability.

300. In particular the Respondents argue:

(1) An argument that an agreed reduction in price would have made commercial sense is not the right kind of reason for finding that there was in fact any such agreement. Parties agree what they agree not what it makes sense they would have agreed. Reciprocity is key in VAT. It is not just a coincidence of goods/services and consideration being handed over but the supply in return for consideration which marks a VAT transaction. The Respondents say there is no agreement.

(2) Second, and in any case, commercial sense does support there being no agreed reduction in price. The Respondents point to a number of reasons why it made sense for the appellant to pay the loan other than in relation to a reduction in price / refund.

Significance of No Oral Amendment clause in ICT agreement – if a bar is there any evidence clause has been waived / contract rescinded

Entire agreement / necessity for variation to be in writing

301. Before considering what evidence there is for an oral agreement it is necessary to deal with point of contractual interpretation to do with what are commonly called "No oral amendment" (NOA) clauses and their effectiveness on the facts of this case.

302. In relation to the Respondents' mention of clause 14.6 of the ICT Agreement saying that the agreement may only be varied with the prior written agreement of each party the appellant points to the fact the Settlement Agreement was in writing. They say that agreement did not contain an "entire agreement" clause nor any provision stating that variations or additions to it had to be in writing. Therefore, the appellant says, the parties were at liberty to agree oral variations or additions to it.

303. Where clause 6.1 stated the agreement was "made in full and final settlement of any disputes between the Parties" this did not limit the parties' ability to agree further changes by consent whether oral or in writing.

304. In any event the appellant says that the aspects of what they have termed the "Global Settlement" that operated to add to or vary the terms of the ICT Agreement (the side letter of 16 December, the Settlement Account, the side letter of 24 January and the Supplemental Security Deposit Agreement) were all in writing. The oral aspects of the Global Settlement were confined to the reciprocity/ quid pro quo aspects and/or pre-agreed intention to exchange these documents / acts, which did not of themselves serve to vary the terms of the ICT Agreement.

Tribunal's views on NOA clause and whether waived

305. While it is true the Settlement Agreement did not preclude oral amendments being made to it the issue still remains that the ICT agreement did contain such a clause. In our view when the agreement was resurrected (through the termination notice of 7 January 2005 being deemed to be disapplied), the NOA clause was also resurrected. There is however evidence before us from the parties' conduct which suggests they agreed to waive the application of this clause. We accept the evidence

of Mr Da Costa and Mr Langley that Taxi had made it known to the appellant that Taxi had concerns about recording any return or variation in the licenses because of the impact it would have in relation to their arguments in relation to Taxi's capital allowances position for the purposes of direct tax. That Taxi had a concern (in relation to the their capital allowances position) is corroborated by an e-mail from Taxi's solicitors Jones Day.

306. In an e-mail to Jens Hills dated 4 November 2005, Jenny Afia of Jones Day wrote the following:

> "The Board have been considering how to accommodate your client's wish that, other than for the first 1000 licences, exclusivity is waived. The fundamental concern is that this would mean the LLP has not retained the same value of ICT Software as that upon which the tax relief was based. If this hurdle can be overcome, there remains the issue of how to implement the change without requiring the unanimous consent of the members".

307. From the evidence of Mr Da Costa and Mr Langley it is clear to us that the appellant's priority was in moving forward with its business and this meant selling to others even though the ICT agreement did not allow this (there were still 11 months left to run on this restriction). While the appellant appeared to be willing to concede that the drafting of any written agreement would not reflect all that it wanted it still wanted to achieve its business priority. Taking into account the appellant's priority but also Taxi's concern we think it is more likely than not that the parties sanctioned changes being made to the ICT agreement without insisting that they be in writing.

308. Before considering whether there was an oral agreement we consider whether any of the other documents the appellant refers to enable a finding to be made that there was an agreement in the terms the appellant suggests. We have already considered the Settlement Agreement and have concluded this does not show the agreement the appellant claims. Our approach will be to consider each additional document the appellant relies on to see whether it makes any difference to the analysis of what was agreed between the parties.

309. We then go on to consider whether there is evidence for an oral agreement for the return of licenses in return for payment of the Taxi loan as the appellant argues.

Settlement Agreement + Side letter of 16 December 2005 from Mr Da Costa on behalf of the appellant to Taxi

310. The 16 December 2005 side letter sets out certain matter which the appellant and KPM will rely on in signing the settlement agreement. These were that:

(1) Payment of the Price (defined in ICT as £75 million or such other sum) will not arise in consequence of settlement.

(2) Appellant to deliver reasonable number of copies following payment of price to apply accordingly (Clause 2.2).

(3) Taxi to only make as many copies as is necessary, plus Taxi will make sure copies contain copyright and proprietary notices) are to be construed and applied accordingly (Clause 2.3) .

(4) All sums relating to Taxi's order of 1000 screens which have not been paid will not be paid. Clause 7.2 of the Equipment agreement applies accordingly (retention of title to products sold until sums due paid).

311. In relation to the statement in the letter noting that the price for the software had not been paid, the Respondents say this must be understood to mean that the full price had not been paid as it is common ground that part of it had been. Mr Langley agreed that this is what the letter meant and that it corresponded to the point in the Settlement Agreement that Taxi would not be paying anything further towards the price. The Respondents say the evidence of the appellants' witnesses did not support any claim made in the appellant's case that the letter signified a reduction in price in the amount the appellant claims.

312. We agree with the Respondents. There is nothing in the side letter which signals a reduction in price in return for licenses. Further, we note that the position under the Settlement Agreement and the letter was that the appellant got to retain more commission but that it was not getting the amount that it was expecting. There is nothing implausible about this as a bargain or which suggests that something else e.g. return of licenses was being agreed to elsewhere.

Settlement Agreement +Side letter + Settlement account?

313. We have considered the signed statement of account, between Taxi, appellant and KPM dated 21 December 2005. On the first page under a row entitled "A Cabvision Agreements" it states the words "At settlement: 3014 IP licenses".

314. The settlement account does not assist the appellant in any argument that licenses were returned in return for payment of the Taxi loan. However to the extent the appellant's case is that there was a global settlement not just comprising of these documents we are not persuaded the reference assists the Respondents' view that no licenses were handed back or waived. The reference to "at settlement" does not make it clear whether the number is pre or post settlement. In referring to a number of licenses it does not say anything one way or the other in relation to the nature of rights encompassed by those licenses in terms of any waiver of restrictions in relation to selling to others.

315. *Settlement Agreement + Settlement account + "contemplation" of future actions (SSDA and letter of 24 January 2006)*

316. In relation to the appellant's arguments on certain documents' "contemplation" we understand this to mean that the 24 January 2006 side letter and the amended SSDA indicate that there was an earlier agreement that licenses were to be returned and that the loan was to be repaid.

317. Again, as the Respondents say, there is no implication in any of these documents that there was any return of licenses in return for a price reduction at all and certainly not for a price reduction of £20 million.

SSDA

318. The agreement is between the appellant, BOS and HBos Treasury services plc.

319. The appellant highlights that recital B states "The Company, the LLP and the Lending Bank *have agreed* that the loan is to be prepaid" and says this is evidence that the release of monies to prepay the loan was not a unilateral act on the part of the appellant but done in agreement with Taxi as well as BOS.

320. The Respondents say the recital does not establish that there was such an agreement. Taxi was not a party to the agreement. The recital does not say the appellant will pay the loan or that it would do so in return for anything from Taxi.

321. We note, as the Respondents point out, that Taxi is not a party to the agreement but nevertheless we think that on the face of it the recital is evidence which supports the argument that there was an agreement. What it does not tell us though is even if there was an agreement with Taxi that the loan was to be pre-paid by the appellant repaying the loan, what such repayment was made in relation to. It does not establish that the repayment was for return of the licenses. The recital takes the appellant some way but not far enough.

Letter of 24 January 2005 from Taxi to appellant

322. This letter referred back to the ICT agreement and the Equipment Agreement. In relation to clause 2.1 of the ICT agreement it states:

> "…the LLP has acquired an exclusive royalty-free licence to use the technology protected by the Patents for as long as any one of the Patents is in the Field of Use and to use the Software to provide the Ambient Media in 3014 Taxicabs for the Term."

323. It then goes on to state:

> "In light of the LLP's limited financial resources it is not anticipated that it will be ordering any further Products in the foreseeable future. Consequently, in order to increase the number of active screens available to advertisers, it would be in the commercial interests of both Cabvision and the LLP for Cabvision to seek other trading partners and the LLP accepts this."

324. How are these statements to be construed? The appellant says the effect of the letter was that Taxi gave up or sold to the appellant all of its IPR rights other than those relating to the 1000 screens it had already bought. The appellant highlights that the letter refers to clause 2.1 (not 3.6) supporting its view that exclusivity derives

from a combination of clauses 2.1 and 3.6 and not just clause 3.6 and also that this shows the appellant wanted to reacquire 2014 of the 3014 licences supplied.

325. The appellant says the reference to seeking other trading partners only makes sense if the letter was waiving all of Taxi's exclusivity rights (i.e. the reference in clause 2.1 of the ICT agreement and the right to buy up to 10,000 and for appellant not to sell until that happened, as well as exclusivity arising under clause 3.6). As a result of the settlement agreement Taxi would be getting a smaller share but they say this was a smaller share of a bigger pie. Taxi had an interest therefore in allowing Cabvision to be free to sell licences to third parties.

326. The Respondents point to the fact that by 24 January 2006 there were only 10 months left of the three year exclusivity. They say that even if the letter is taken as implying that Taxi was waiving its rights under the ICT agreement that the appellant could not sell more licences to others for the 10 months until that right was extinguished this was not a return of licenses. If Taxi wanted to buy more equipment than the 1000 sets already bought it could do this as it still had another 2014 licences. Taxi's retention of 3014 licences would not mean that others could not also have licences. At most the letter indicates the appellant could sell to others.

Tribunal's views

327. We note there is no reference in the 24 January 2006 side letter to the settlement agreement. Nor is there any reference to repayment of the loan. We do not accept the appellant's argument that this letter indicates licenses were being returned, or that Taxi was accepting that the appellant did not have to wait for Taxi to buy 10,000 licenses before it could sell to others. The letter is just as consistent with Taxi encouraging the appellant to sell to others despite there being 10 months left on the exclusivity period under clause 3.6. Although the letter might at best be viewed as a waiver of Taxi's rights to insist that the appellant could not sell licenses to others there is nothing, as the Respondents say, in this letter to establish that such waiver was in return for the appellant repaying the £20 million loan.

328. For the reasons discussed above although the documents do contain indications which support there being an agreement by the appellant that it agreed with Taxi to repay the loan and separately that there should be a waiver of rights in the licenses we are not persuaded that any of the documents relied on by appellant amount to evidence which is sufficient to support a finding that the two actions were linked i.e. that there was an agreement to return licences or waive exclusivity in respect of the licenses *in return* for Taxi repaying the loan.

Oral agreement?

329. Is it possible to find that there was an oral agreement in January 2006 as the appellant suggests?

330. The appellant points to the close proximity of various events:

(1) Settlement agreement 21 December 2005

(2) appellant approves reduction in security 3 January 2005

(3) SSDA requiring pre-payment of loan on 5 January 2006

(4) BOS confirms to appellant loan repaid to Lloyds, 16 January 2007 letter from BOS states £20,242,682 paid on 5 January 2006.

(5) Side letter from Taxi – appellant says waives rights to IPR on 24 January 2006.

331. Both Mr Da Costa and Mr Langley gave evidence to the effect they thought the settlement was on the basis that in return for pre-paying the loan the appellant would "get its licences back". By this they meant the appellant would get the ability to sell licences to others even though Taxi had not paid for 10,000 licences and in any event even though the 3 year restriction on selling to others in the ICT agreement had not expired.

332. We also need to consider the suggestion by Mr Langley that the written agreement was "camouflage". This was in the sense that there was nothing in the documents which explicitly stated that there was to be a return of licenses in return for repayment of Taxi's loan because of Taxi's desire to structure it in such a way that arguments they wanted to run in respect of direct tax were kept in tact.

Relevance of camouflage point

333. The fact an explicit agreement would have been seen as detrimental to Taxi's direct tax position serves to make it more likely than not that there was an oral collateral agreement than would otherwise be the case. By itself it does not evidence that there was such an agreement.

Lack of direct evidence vs inferences

334. Although Mr Da Costa and Mr Langley gave us evidence of their understanding of what was agreed neither were in a position to give us evidence of what the appellant said to Taxi and what Taxi said to the appellant, the negotiations between the parties having been handled on the appellant's behalf by Mr Jens Hills. That Mr Da Costa and Mr Langley thought there was an agreement on certain terms does not mean there was in fact such an agreement. It is however open to us consider the extent to which their evidence allows us to make inferences as to whether there was an oral side or collateral agreement in the terms suggested by the appellant.

Facts that may be inferred from Mr Da Costa's evidence.

335. We found Mr Da Costa to be a credible witness. He was straightforward and clear when he did not know the answer to a question. He was frank about his reliance on those around him to advise him and that contracts were not his speciality.

336. Mr Da Costa was the innovator behind the concept of Cabvision and the controlling mind of the appellant. Without Mr Da Costa there would be no Cabvision.

It was he that was approached by Simon Smith who then formed Taxi. It was Mr Da Costa who was then approached by Taxi. Various key letters went out in Mr Da Costa's name. He was the person invited by Taxi to Cannes for the purpose of encouraging investment in the business.

337. We accept Mr Da Costa relied on advice from Jens Hills and from other advisors such as Mr Langley and the Finance Director. But it was Mr Da Costa who made or authorised the business decisions. Jens Hills took instructions from Mr Da Costa. We find that it is improbable that Jens Hill would negotiate an agreement without taking instructions on the business direction Mr Da Costa wanted to go in (even if it was left to Jens Hills to use his legal knowledge to figure out the precise route.)

338. Although Mr Da Costa initially attended meetings he clashed with one of the lawyers at Jones Day. Mr Da Costa ended up having to walk out of the meeting and was unwilling to attend further meetings.

339. Mr Da Costa told us what his understanding of the deal was. We accept this was his understanding at the time, not with the benefit of hindsight. He left it to his lawyer Jens Hills to negotiate the agreement but as stated above Jens Hills would have negotiated an agreement which followed Mr Da Costa's instructions. We accept his evidence that he trusted Mr Hills to "sort things out" and "do the right thing" and that Mr Hills negotiated the deal after Mr Da Costa walked out.

340. Mr Da Costa was clear what he wanted. In his words "All I wanted was for the rights to come back in order to move forward." This was to be achieved by unwinding the transaction whereby the appellant would get the right to sell licenses to others in return for the appellant repaying the loan. Mr Da Costa may not have understood the intricacies of the particular steps that needed to be taken to make that happen but we do not think his advisors can have been left in any doubt that that was what was meant to happen.

341. Why then was the return of licenses in return for repayment of the loan not recorded in the written settlement agreement? We accept Mr Da Costa's evidence that the appellant signed the settlement the way it was signed to keep up the appearance that Taxi were entitled to full capital allowances. There would therefore have been a reason why the entirety of the agreement was not all recorded in writing. The appellant had nothing to gain by not putting all of the detail in writing whereas it appears Taxi did. The view that Taxi's motivations for not recording a deal in writing might appear underhand, and the propriety of the appellant going along with this are not matters which should, we think, distract us from the objective task of determining the question of what the nature of the agreement, if any, was that was negotiated between Taxi and the appellant. While we in no way condone any tactic of "camouflage" or to put it more directly of obfuscation, the propriety of Taxi's motivations and the effectiveness of such strategy in relation to their direct tax position is not an issue before us. As mentioned above Mr Langley's and Mr Da Costa's evidence that Taxi wanted the deal negotiated in this way is consistent with Taxi's lawyer's e-mail of 4 November 2005 [see [306]].

342. Mr Langley was not able to give direct evidence of any oral agreement reached between the appellant and Taxi. He was able to say there were meetings which took place between Jens Hills and Jones Day. We accept that evidence.

343. There were meetings and discussions between Jens Hill and Jones Day leading up to and following the written settlement agreement. We infer from what Mr Da Costa told us that Jens Hill would be working to instructions from Mr Da Costa that the appellant wanted its licenses back in return for repaying the loan. The e-mail from Jones Day to Jens Hills of 4 November 2005 referring to waiver of exclusivity is consistent with license rights being varied. The recital to the SSDA (see [319]) is consistent with the appellant having agreed to repay the loan. We find that it is more likely than not that an oral agreement was made between Jens Hills and Jones Day for waiver of license rights in return for repayment of Taxi's loan.

344. While the proximity in time of the various events the appellant referred us to does not of itself mean that there was thereby an agreement to return licenses the proximity is consistent with there having been an oral agreement reached in the course of the meetings between Jens Hills and Jones Day.

345. The Respondents say there are several reasons why it made sense for the appellant to pay Taxi's loan other than in return for licences. These are variously:

(1) The appellant gets £728k back. According to Mr Da Costa the loan amount was not "the issue". It was the payment beyond the loan amount that he was relying on for his business and the failure to receive all of this was the key issue of dispute between the appellant and Taxi. In the light of the dispute it was unlikely that there would be a release of security (i.e. that the advertising project was successful over time if Taxi chose to exclude it from "reserves" under Clause 8 of the LLP Agreement.) In fact although there had been advertising revenues at no point were these used to diminish the loan and release monies to the appellant. In the appellant's experience it had not gained and there was no prospect of its gaining anything from the security deposit remaining as security. On the contrary the way to get money released was for the loan to be paid off. In paying off the loan the appellant released £728k to itself.

(2) The appellant had nothing to lose by paying the loan. At all relevant times prior to the appellant's paying off the loan amount to Lloyds, that loan amount had already been called in by Lloyds and the appellant itself was bringing about default events that would lead to its being called in.

The appellant submits the events of default had been extinguished by the time of the "Global Settlement" and there would have been no grounds for Lloyds to call in the guarantee. In any event Lloyds had taken no action to enforce the guarantee in a period of a year. The appellant says the modern reality is that if a guarantee is to be called it happens quickly. They say that if payment were being made under the guarantee and SDA there would have been no need for the parties to sign a new loan guarantee amendment agreement (a copy of this was not before the Tribunal) or the SSDA nor for the appellant to authorise Treasury / BOS to release monies from the account.

(3) The desire to reduce £7.5 million direct tax bill. The repayment of the loan was an attempt to reduce bill by showing that £20m of the £25m had been paid to Lloyds.

346. We do not find any of these explanations for why the loan was repaid to be credible.

347. In relation to the £728k figure this was a consequence of the loan being repaid. It was not a reason for the loan to be repaid. Mr Da Costa's evidence which we accept was this was not the reason for repaying the loan. Indeed, if, as suggested by the Respondents' case there was no agreement between the appellant and Taxi that the loan was to be repaid by the appellant, and getting £728k was the motivation for repaying the loan we cannot see why the appellant would not have acted sooner.

348. While the loan had been called in by Lloyds on 8 December 2004, it appears nothing had been done about it. However we do not understand the Respondents' main argument to be that when Taxi repaid the loan this was a payment made under a guarantee. Rather, their argument is that because the appellant was at risk anyway they had nothing to lose. We are not however persuaded the appellant was so at risk. Given the length of time over which Lloyds had not acted upon the breach, irrespective of whether that amounted to affirmation we accept that the appellant did not regard the possibility of the loan being called in as a real risk and also that in fact the risk of the loan being called in was unlikely to materialise.

349. In relation to the £7.5 million direct tax bill while Mr Da Costa may well have fallen off his figurative chair when he received the bill, we accept Mr Langley's evidence that advice was sought from tax counsel and the view reached that the sum was not due. We do not think the loan can have been repaid as a precaution. We have looked at the advice sought from counsel on the issue. If repayment of the loan was linked to the direct tax bill we think this is something that would have been raised and considered but the advice says nothing about the issue. We do not accept that receipt of the £7.5 million direct tax bill was a reason for the appellant repaying the loan.

350. In the course of his evidence Mr Langley made an argument to the effect that because the appellant could have used its counter-indemnity against Taxi to claim Taxi's assets (i.e. licenses) if the appellant's security deposit called in this was a reason to pay off Taxi's loan. However as the Respondents point out the counter-indemnity would be a reason for the appellant not to pay the loan. Mr Langley also raised an argument in the course of his evidence that under the LLP agreement the members of Taxi would have been liable to five times their initial contribution and would have been good for the counter-indemnity. As the Respondents point out this analysis is misconceived as if the appellant got licences back and they were worth what they were valued to be worth, there would then be no consequent Taxi insolvency which could call in member contributions.

c) Agreement to be inferred from conduct?

351. We were not referred by the parties to any of the authorities on when a contract or contractual terms may be inferred by the parties. The authorities are well

established and it should not we hope be controversial to set out the relevant legal test as set out by the Court of Appeal in for instance the *The Elli* 1985 1LlRep 107 (pg 115 per Staughton LJ):

> "It is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract."

352. Having found above that there was an agreement which amounted to a price reduction it is not necessary for us to consider whether the contract in the terms the appellant was arguing for was inferred by conduct.

353. We were referred to various authorities by the appellant which for the reasons explained below we do not think were on point on this particular issue. We were referred by the appellant to the case of *Rainy Sky*. The appellant relies on this case for the proposition that the court is entitled to prefer the construction that is consistent with business common sense. The Respondents say this reliance is misplaced. The settlement agreement is unambiguous; its language is not construed but simply applied. The question is whether there was any other agreement and the evidence presented for the appellant does not support any such finding.

354. *Rainy Sky* raised a question of construction of shipbuilder's refund guarantees given according to 6 shipbuilding contracts. At [14] Lord Clarke (the others all agreed his judgment) agreed the ultimate aim of interpreting a provision in a contract especially a commercial contract is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. At [21] Lord Clarke does indeed say:

> "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".

355. At [30] he summarised the correct approach as being in essence that:

> "where a term of a contract is open to more than one interpretation it is generally appropriate to adopt the interpretation which is most consistent with business common sense."

356. We agree with the Respondents' argument. *Rainy Sky* does not support why we must find an agreement beyond the written one. But, to the extent there are difficulties of interpretation in the ICT or other documents it reminds us we should adopt the one which is most consistent with business common sense.

357. The appellant also relies on the case of *Kleinwort Benson v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 for the proposition that the contract should be construed from the terms of the documents and surrounding factual circumstances.

The appellant says that here, all the evidence pointed to the repayment being by agreement and that there was no commercial reason for the bank to call in the guarantee as it was fully protected in terms of capital and repayment by virtue of the security arrangements.

358. We were not referred to any particular passage in the judgment but having considered it we do not agree it supports the proposition put forward by the appellant. The case concerned whether certain letters of comfort had contractual effect. The court took account of evidence showing the context in which the comfort letters were produced for the purposes of ascertaining whether the defendant's affirmation in the letter had been intended as a warranty or contractual promise. It found that the evidence did not support such a conclusion. We do not see how the case assists the appellant on the facts of this matter. There is no question around whether the written settlement agreement was a contract and we do not understand the appellant to be arguing that other documents by themselves are contractual despite not appearing to be.

359. The appellant's supplementary skeleton also mentions the Court of Appeal's approval of a dicta of Gibson LJ in *Kleinwort* in the case of *Ferryways* (*Associated British Ports v Ferryways NV and another* [2009] EWCA Civ 189) again suggesting that the document should be construed from the terms of the documents and surrounding factual circumstances. It appears to us however that the reference was by way of illustrating that when considering whether a letter of comfort gives rise to contractual liability the label used by the party is not necessarily determinative.

Appellant's application to make further submissions

360. It is convenient to deal at this point with an application made by the appellant subsequent to the hearing. On 30 April 2013 the appellant made an application to refer to passages from Andrews and Millett, Law of Guarantee 6th Edition 2011 on the principle of "co-extensiveness" and to submit a short written submission by way of letter explaining its significance. The Respondents took objection highlighting that it is in the interests of justice that there be finality to the opportunity for parties to make submissions and that save in exceptional circumstances this position is reached at the end of the hearing. They say the appellant has not put forward any exceptional reason.

361. We agree with the Respondents. The appellant has not satisfied us that the submissions could not have been made at the hearing. Further the appellant refers us to documents that were in the bundles but to which we were not referred to. No explanation is given for why we could not have been referred to the documents at the hearing. The point raised is in any event not one which affects the analysis in this decision in any significant way. It is just one element of the Respondents' case that the guarantee was called in. If the appellant is able to show it was not that does not mean they succeed. We are not satisfied it is in the interests of justice to accept the appellant's submission.

If no contractual variation then will reciprocal exchange of rights and obligations suffice?

362. We have found above that there was a contractual variation but in case we are wrong on this point we return to the question of whether it is nevertheless possible for there to be the requisite reduction with something less than a contractual variation.

363. The appellant says there was a reciprocal exchanges of rights and obligations which were sufficiently linked to amount to a variation in consideration for a supply for VAT purposes. The links were the web of contacts and course of dealings, the dispute, the parties' mutual desire for settlement, the timing of events, and recital B of the SSDA.

364. As discussed above at [248] onwards it is not clear to us that in a situation where the original reciprocity was derived from contract that the variation of that can be a less stringent form of reciprocity. Nevertheless we were referred by the appellant to various authorities in support of the proposition that the requisite degree of reciprocity can be founded on the basis of the broader principles and that it is also relevant to have regard to economic reality. We deal with these below.

365. In *AEG(UK) Ltd v CCE* [1993] VATTR 379 a debt held by the appellant became due and was unpaid. A meeting of creditors was held under sections 3 and 4 of the Insolvency Act 1986 where the director's proposal for a voluntary arrangement for the issue of shares in full consideration of the debts outstanding was agreed. The VAT tribunal accepted the appellant received shares in return for its debt. We do not see how this decision assists the appellant here. While the linking between receipt of shares to the payment of the debt arose out of a voluntary arrangement as opposed to contractual agreement the voluntary arrangement had binding effect through the operation of statute.

366. The appellant cites *Naturally Yours* (Case C-102/86), *Town and Country*, and *Apple and Pear development Council* (Case C-102/86) as examples of it only being necessary that there is a sufficient link between the consideration and supply of goods or services, and that to require a contractual agreement is too restrictive.

367. *Naturally Yours* does not assist. The reciprocal exchange of rights and obligations was contractual. At [17] the court refers to NYC and the beauty consultant as "parties to the contract" stating that they:

> "…have reduced the wholesale price of the pot of cream by a specific amount in exchange for the supply of a service by the beauty consultant which consists of procuring hostesses to arrange sales parties by offering them the pots of cream as gifts. In those circumstances, it is possible to ascertain the monetary value which the two parties to the contract attributed to that service."

368. In *Dutch Potatoes* (Case C-154/80) and *Apple and Pear Development* the requisite direct link between the service provided and consideration received was not found. While a contractual relationship is not required to establish such a link there still needs to be a direct link.

369. In *Town and Country* the ECJ having decided that there was a legal relationship between the competition organiser and the competitors in the *Tolsma* sense stated at [24]:

> "a supply of services which is effected for consideration but is not based on enforceable obligations, because it has been agreed that the provider is bound in honour only to provide the services, constitutes a transaction subject to VAT".

370. None of these cases are authority in our view for a price reduction / waiver being able to be effected by something less than a contractual variation when the originating legal relationship is founded in contract. Having said that we accept that there is no authority that we were referred to for the proposition that the price reduction must be achieved through a contractual agreement.

371. To the extent it is possible for a variation to be accepted through something less than a contract, i.e. a degree of reciprocity falling short of a contractual agreement we find from the inferences we drew from Mr Da Costa's evidence as to the nature of the deal that there was a requisite degree of reciprocity in that the understanding reached by the parties (on the assumption that there was not an oral agreement) was that license rights would be waived in return for the appellant repaying the loan. This conclusion would also be applicable to the extent we were wrong on our analysis of the no oral agreement clause in the ICT agreement with the effect that the oral agreement we find was reached was not effective at varying the license rights in the ICT agreement.

372. Before concluding on Issue 2 it is necessary to deal with the relevance of the decision given by the High Court in proceedings between the appellant and the LLP investors in *Cabvison Ltd v Feetum and others* [2009] EWHC 3400 (Ch).

Relevance of Feetum

373. The judgment in *Feetum* is potentially relevant to consider in two respects. First, in relation to its findings that the banking transactions were not completed and the funds were not paid until 5 April 2004 rather than 2 April 2004, to what extent can this be taken into account in finding that funds were transferred on 5 April 2004 and that the moment they were transferred they were subject to the SSDA?

374. Second, *Feetum* appears to suggest that licences were handed back. HMRC do not rely on this point as they fairly admit that it is not clear whether Norris J when setting this point out was making findings or whether he was setting out the appellant's account of the facts. The appellant says we are to note that this was a different case for different purposes. This Tribunal does not know what was submitted there and we are to attribute such weight as we set fit.

Caselaw principles on admissibility of finding of fact in other judgments

375. We were referred by the appellant to *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 and the more recent case of *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 32.

376. The latter case concerned proceedings for disqualification of the managing director of the company. By the time of the proceedings the director had been dismissed and his claim for damages for wrongful dismissal had been unsuccessful both at first instance and on appeal. The Court of Appeal held that the factual findings and conclusions of the judge at first instance in the wrongful dismissal proceedings were not admissible as evidence of the facts found in the disqualification proceedings. In *Hollington* the court ruled a conviction for careless driving was inadmissible in a negligence action against the driver. The Court of Appeal in *Bairstow* surveyed a number of subsequent authorities which applied principles extracted from *Hollington* which prevented findings made from earlier cases from being used subsequently as evidence of the facts found. It rejected the Secretary of State's argument that *Hollington* was confined to cases in which the earlier decision was that of a criminal court.

377. The findings of fact in *Feetum* would accordingly be inadmissible in subsequent civil proceedings. However under Rule 15(2)(a) of the Tribunal's Rules the Tribunal may:

> "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom.".

378. Underlying the non-admissibility of such evidence is the concern that it is unfair to hold a party to a fact when they did not have the opportunity to cross-examine, or put in other evidence and also that it is open for a party to replead evidence. In this case the Respondents were not a party to *Feetum*. There is therefore an issue of whether it is unfair to hold them to facts from *Feetum* which are advantageous to the appellant. Against that it should be taken into account that the evidence which the appellant submitted in that case from the appellant's solicitor, Jens Hills, is not available in the proceedings in this Tribunal.

379. Our view is that the facts from *Feetum* should not be admitted and that if they were to be admitted they should bear little if any weight. The prejudice to HMRC outweighs that to the appellant in that it was open to them to have summonsed Jens Hills or to have sought to plead relevant parts of his evidence in this case. Further, in relation to the timing of the banking transactions, the appellant was not seeking to rely on *Feetum* to respond to HMRC's point about payment being received on 2 April 2004. We see no reason why we should in those circumstances place reliance on the findings in *Feetum*.

Conclusion on Issue 2

380. If we are wrong on issue 1 and it becomes necessary to consider Issue 2 our conclusion is that there was an agreement to waive rights in relation to Taxi's licenses in return for the appellant paying Taxi's loan leading to a reduction in price. The

Respondents accept that the appellant could issue the credit note and exercise an EU law right to make an adjustment had there been a price reduction and we have found that there was. The appellant would therefore succeed on issue 2.

Issue 3

381. The appellant further argues that assuming it is successful in its argument that the loan element of the consideration was consideration "to be obtained", it ceased to be so by virtue of clause 2.5 of the Settlement Agreement when the parties agreed that no more monies would be paid. The appellant therefore had the right to make an Article 11C(1) adjustment to the taxable amount.

382. Relying on *Kraft Polska* the appellant argues that the UK conditions requiring an agreement to a price reduction and passing of value should be disapplied. The UK rules are unsuitable for the situation of contingent future consideration which ceases to be obtainable. The national conditions regarding issue of a credit note are impossible or excessively difficult for the appellant to satisfy. Under the principle of effectiveness it must be possible for the appellant to exercise its article 11(C)(1) rights. All the appellant has to show to issue a valid credit note is simply to show there has been a reduction in the value of the consideration to be obtained. The accounting entries are sufficient for this.

383. The appellant's accounts for the period following signature of the ICT Software Agreement were not prepared until 2006 after the Settlement Agreement. Accordingly even though the deferred loan element of the price had originally been recognised as deferred income by the time the accounts had been produced that part had been written off as deferred income and transferred to "other creditors" to match what was still in that period an equal and opposite amount showing as an assets at financial year end 2004 in respect of the deposit nominally in the name of the appellant in the HBOS Treasury account.

Bad Debt Relief?

384. The appellant submits further and in the alternative that is should be able to make a claim for bad debt relief on the basis it has suffered non-payment.

385. The appellant altered its accounting treatment of the deferred element of the price from "deferred income" to "other creditors" to recognise the effect of the dispute between the parties. But this does not mean there has been a "bad debt" as a contingent source of income cannot be a realisable debt until the contingency comes to pass and the debt crystallises as due. The creditor has still however suffered a "non-payment" event which should give rise to an Article 11(C)(1) adjustment.

386. At the moment when the deferred income is transferred to "other creditors" it is written off in the accounts within s36 VATA. The reference to "as" in "as a bad debt" suggest a potential deeming of a bad debt even if it is not written off in a profit and loss account labelled as such. The term "accounts" in s36 has not been qualified. Therefore a write off can occur either from the profit and loss account or from the

balance sheet. Under the principle of effectiveness a conforming interpretation requires the bad debt relief provisions to be read so as to allow a claim. Regulations under s36 cannot go beyond the primary legislation from which it is derived.

387. The appellant says a formal bad debt relief claim is not necessary under a conforming interpretation. All that is required is an adjustment in the VAT return.

388. The Respondents do not accept there is bad debt relief because the consideration was paid (less the small amount that can be reclaimed). In any event they say the appellant made no claim for bad relief evidenced by a writing off in its accounts of the relevant amount as a bad debt and that it is out of time for claiming bad debt relief.

EU law right to make an adjustment?

389. If the appellant does not succeed on the credit note issue, or the bad debt relief issue above then it suggests there is a lacuna in the UK legislation if it prevents an adjustment to the taxable amount in these circumstances. The principle of effectiveness means the appellant is entitled to make a 11C(1) claim and its credit note should be treated as an appropriate claim (*HMRC v GMAC UK Plc* [2012] UKUT 278 (TCC) at [188]*)* citing *Fantask* (Case C-188/95) and *Ecotrade* (joined cases C 95/07 and C 96/07).

390. The Respondents say this is misconceived as there was no agreement for a price reduction. The Settlement agreement is clear Taxi will not pay anything further but makes no mention of the appellant paying anything back to Taxi and refers to Taxi (not the appellant) procuring the payment of the loan.

Tribunal views on issue 3

391. Given our views on issue 1 that "consideration to be obtained" refers to future consideration and not to contingent consideration, and that there was not future consideration here it is not necessary for us to consider the appellant's arguments on there being a lack of mechanism available to cover circumstances where "consideration to be obtained" does not subsequently become obtained.

392. Our conclusion on issue 1 that the consideration was for the lower amount means that the question arises as to whether there is something which can be treated as a claim for repayment of overpaid output tax and whether any such claim was made in time.

393. At the relevant time s80 VATA claims for repayment of output tax which a person had paid to the Commissioners but which was not due as output tax had to be made 3 years from the relevant date. The relevant date was 3 years after the end of the prescribed accounting period to which the overpaid output tax related.

394. Given that the route by which we have found for the appellant on Issue 1 was not one that was argued by the appellant we acknowledge that it is perhaps not surprising that the parties did not address us specifically on this issue.

395. We note the following. From the Respondents' re-amended Statement of Case it appears the appellant paid output tax of £3,955,521.32 to the Respondents some time between May and August 2004. The appellant invoiced Taxi on 31 March 2004. The earliest end of accounting period would be 31 March 2004 and therefore the earliest deadline for a claim would be 31 March 2007.

396. From the correspondence between the appellant and the Respondents referred to in Mr Langley's evidence we note that the appellant wrote to the Respondents on 8 June 2006 with a description of the software sale agreement and adjustment at settlement enclosing copies of the various agreements. On 14 July 2006 the appellant wrote to the Respondents to say that a credit note would be incorporated in the first available return (June 2006). A later letter from the Respondents dated 23 January 2008 to the appellant refers to the credit note CCV 0009 dated 30 June 2006 for output tax of £3,014,867.53 and a repayment of £3,032,200.03 having been requested on the appellant's 06/06 return. That return which had a due date of 31 July 2006 is dated 26 July 2006.

397. A letter dated 22 August 2006 from the Respondents to the appellant refers to the Respondents wanting to arrange an appointment in relation to the appellant's "period 06/06-vat repayment return." A letter from the Respondents to the appellant dated 25 October 2007 to the appellant seeking further information from the appellant states:

> "I am writing to you regarding your request for a repayment of output tax of £3,014,867.53 following the issue of a credit note (Invoice No. CV 0009) dated 30 June 2006."

398. From the above we find that the 06/06 return dated 26 July 2006 which included a request for repayment of output tax of £3,014,867.53 was received by the Respondents no later than 22 August 2006. We therefore consider that an in time claim for repayment was made.

Input tax claim

399. The appellant argues Taxi waived its rights in IPR in return for prepayment to its bank account of the loan by the appellant. It says the waiver of the right can be a supply and hence this was a taxable supply by Taxi to Cabvision (citing *AEG* and *Berck*). It says the appellant was entitled to treat either the credit note or the settlement documentation as a VAT invoice in respect of this supply to it (*Bernhard Langhorsti* (Case C-141/96) and *Cumbria County Council* [2011] UKFTT 621 (TC))

400. The Respondents deal with the argument that there was a new supply pursuant to the settlement agreement by which the appellant bought some of its licenses back in return for paying Taxi's loan in their Statement of Case. They say there is no indication the payment of the loan was consideration for a new supply in particular as shown by the accounts annexed to the settlement agreement there was no indication it was consideration for a supply of some of the 3014 licences Taxi had purchased. It had 3014 licences before and after the settlement. The board minutes of 3 January 2006 make no mention of the prepayment being related to a return of licences.

401. Given our finding that the appellant succeeds on issue 1 and in the alternative that it would succeed on issue 2 we consider it is not necessary for us to make a determination on this issue.

Conclusion

402. The appellant succeeds on issue 1 although not for the reasons it argued and because of that it is not necessary to reach a conclusion on the arguments the appellant has raised on issue 3.

403. If we are wrong on issue 1, then the appellant succeeds on issue 2.

404. Accordingly the Respondents' decision of 28 October 2008 rejecting the appellant's claim for repayment of output tax of £3,014,867.53 and accepting as due only a repayment of £81,282.75 is wrong. The balance, of £2,933,584.78 was also due.

405. The appellant's appeal is allowed.

406. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 29 November 2013