[2018] UKFTT 557 (TC)

TC06731

Appeal number: TC/2016/04531

VAT – provision of credit facilities – whether consideration for supply of goods – no – whether reduction in payment amounted to a reduced consideration – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DIXONS CARPHONE PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at London on October 2, 3 and 4, 2017

Dario Garcia of Mischon de Reya LLP, for the Appellant

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. This is an appeal by Dixons Carphone PLC ("Dixons") against a decision by HMRC concerning the taxable amount of certain types of supplies involving consumer credit arrangements, made by retail entities within the Dixons VAT group (collectively, such retail entities are described in this decision as "DSG"), and whether DSG was entitled to make an adjustment to the calculation of their daily gross takings under the bespoke retail scheme agreement which applied to DSG.

Background

2. The particular transactions which are the subject of this case occur as follows:

   (a) a consumer purchases goods in a DSG store and pays a deposit to DSG;

   (b) the balance of the cost of the purchase is funded by a loan, provided by a third party company, LaSer;

   (c) the customer gives authority to LaSer to pay the money borrowed to DSG;

   (d) where the customer loan is on favourable terms (to the consumer), the amount paid by LaSer to DSG is a lower amount than that authorised by the consumer, following deduction of an amount described as a "Subsidy". The favourable terms are generally interest free arrangements, including "Buy Now, Pay Later" arrangements, whereby the customer pays no interest on the amount borrowed if the full amount of credit is repaid by the customer within the "Pay Later" offer period.

3. The question to be determined is whether the "Subsidy" deducted by LaSer is to be treated as part for the consideration for the supply of goods by DSG for VAT purposes.

Relevant law

4. Article 73, Principal VAT Directive of 2006/112 (the VAT Directive)

5. Article 395, VAT Directive

6. Section 19(2), Value Added Tax Act (VATA) 1994

7. Regulation 38, Value Added Tax Regulations 1995/2518 (VAT Regulations)

8. Regulation 67, VAT Regulations

Cases referred to:

9. *Argos Distributors Limited v Customs and Excise Commissioners* (Case C-288/94) (*Argos*)

10. Tesco Freetime Ltd and Tesco Plc v Commissioners for Revenue and Customs [2017] UKFTT 614 (TC) (*Tesco*)

11. *Revenue & Customs Commissions v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* [2013] UKSC 15 (*Aimia*)

12. *Customs and Excise Commissioners v First National Bank of Chicago* [1998] STC 850 (*FNBC*)

13. *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) (*Tolsma*)

14. *HMRC v Airtours Holiday Transport Ltd* [2016] STC 1509 (*Airtours*)

15. *MBNA Europe Bank Limited v Revenue and Customs Commissioners* [2006] STC 2089 (*MBNA*)

16. *Chaussures Bally SA v Belgium* [1993] ECRI 2871 (*Bally*)

17. *Secret Hotels2 Limited (formerly Med Hotels Limited v Revenue and Customs Commissioners* (2014) SDC 937 (*Secret Hotels2*)

18. *Primback* (C-34/00) (*Primback*)

19. *Wood v Capita Insurance Services Limited* [2017] UKSC 24 (*Wood*)

20. *CEC Commissions v Lex Services Plc (and others)* [2001] EWCA Civ 1542 (*Lex*)

21. *Finanzamt Essen-Nord Ost v GKFL Financial Services AG* (Case C-93/10*)* (*GKFL*)

22. *Finanzamt Gros-Gerau v MKG* (Case C-305/01) (*MKG*)

23. *Empresa de Desenvolvimento Mineiro SGPS SA v Fazenda Publica* [2005] STC 65 (*EDM)*

24. *HJ Glawe Spiel v Hamburg Tax Office* [1994] STC 543 (*Glawe*)

Dixons' case

25. Dixons' case is, in summary, that the taxable amount for the relevant transactions should be regarded as the amount received by DSG from LaSer.

26. It submitted that, for the relevant transactions, the lender's economic return could legitimately be received in several different ways: in this case, Dixons proposed that there are two potential options:

(a) DSG could be regarded as paying an incentive to LaSer; or

(b) DSG could be regarded as reducing the amount which LaSer has to pay to DSG, without LaSer reducing the amount paid by the consumer to LaSer

27. Dixons submitted that there was a free choice between the parties as to which option was selected, and that contract analysis in this case establishes that the option chosen by the parties was the second option.

28. For VAT purposes, the general rule, derived from Article 73 of the VAT Directive, is that the taxable amount is everything received by the supplier as consideration; such consideration may come from the customer, the recipient of the goods in this case. In more complex cases, with more than one paying party, the consideration will be everything moving from each paying party and received by the supplier.

29. In this case, it was submitted, there is simply a reduction in receipts, and therefore turnover, for DSG and so the taxable amount on which VAT should be calculated should be the amount received by DSG from LaSer. This was, it was submitted, the simplest solution and conformed to the contract terms and better reflected the commercial reality.

Adjustments to price

30. It was noted that price adjustments (within the context of Regulation 38 of the VAT Regulations), upward or downward, will have an effect on the taxable amount: this will be the case regardless of whether the customer is a party to the adjustment or whether it is a third-party paymaster which is subject to the adjustment. It was submitted that the neutrality principle in VAT requires that consideration is to be treated and determined in the same way whether it moves from the customer or a third person.

31. Dixons noted that adjustments to the taxable amount following price adjustments should be given effect independently of the knowledge of them by any particular party, following Argos and FNBC. It was therefore submitted that, where three parties are involved in a transaction as in this case, the contract price agreed by DSG with the customer should not be determinative on its own (as found in *Glawe* and *Argos* and many other cases). Instead, the contract with LaSer, as the third party paymaster, should be taken into account. It was submitted that this was also supported by *Aimia* and *Tesco*.

Application of Primback

32. Dixons submitted that HMRC's approach, that the VAT treatment of credit-financed transactions is determined by *Primback*, is incorrect. It submitted that *Primback* cannot be a universal solution; it was decided on its particular agreements, the terms of which had to be inferred (§15 of the decision in *Primback*). As has already been submitted, different agreements could lead to a different VAT treatment and the parties are free to have come to a different agreement to that in *Primback*.

33. Further, an application of *Primback* would, it was submitted, be uncommercial in this case as it would require substituting a taxable supply (accepting referrals) and ignoring the underlying commercial activity of lending; it was submitted that such substitution is only appropriate in exception cases (as confirmed in *Aimia*).

34. Considering *Primback* itself, it was submitted that there were substantial differences to the present case, including:

(1) there were no written agreements between the lender and the retailer - only between the customer and the lender;

(2) accordingly, terms between the lender and the retailer had to be inferred by the court;

(3) the terms inferred were that there was a supply by way of undertaking to lend made by the finance company to the retailer; there was a payment obligation by the retailer to the finance company in respect of that supply equal to the discount or interest foregone; and a set off and settlement accordingly; on the basis of those inferred terms, the court of first instance held that the taxable amount for the sale of goods included an amount equivalent to the inferred commission which had been set off;

(4) there is no indication that any interest-bearing loans were provided and so no finding that any supply would be made by the lender factually in such case even if there was no consideration by way of commission;

35. The Court of Appeal rejected the contractual analysis of the court of first instance. The case was referred to the European Court of Justice (ECJ) without that analysis as part of the reference. It was submitted that the ECJ decision is unsafe as it adopted the contractual framework and, it was submitted, exceeded its authority in doing so (as made clear in *Aimia*). It was also submitted that the ECJ decision could not be binding in a case where the factual matrix was different, as in this one.

36. The ECJ concluded that there was a supply by the lender to the retailer of a guarantee, similar to the position in *Bally*. It was submitted that it was not open to the ECJ to do so, on the basis of the reference. It was also submitted that, in any case, the decision in *Bally* was not relevant to this matter as there is no agreement for a cross supply (of a guarantee, promotion and publicity), no agreement for commission and no agreed set off machinery. There was also no free credit, so that there was no economic gap arising.

Contract analysis

37. Dixons submitted that clear guidance on construing and giving effect to contracts in VAT cases had been provided by the Supreme Court in Secret Hotels 2, where Lord Neuberger states (in §1 of the decision) that characterisation of the parties's relationship is a matter of contract construction. The application of VAT directives to that relationship is then a matter of EU law (§20-23, 29-30 of the decision). In particular, he observed that parties are generally free to arrange or structure their relationship as appropriate for economic activities. The analysis of the contract is therefore key to determine the VAT consequences, as different structures may have different VAT consequences, as confirmed by the Supreme Court in *Aimia* (at §68).

38. Dixons submitted that the contract recital which states that the parties will "work together in a spirit of partnership and cooperation" means that the parties' relationship is a collaborative joint venture, although not a partnership in law. Dixons submitted that the contract sets up a commercial scheme which is not based on cross-supplies but on mutuality and cooperation. The parties, it was submitted, are pooling resources and not exchanging them other than as expressly agreed in the contract. In the joint venture, Dixons submitted that LaSer wants to offer credit facilities and needs a route to market which DSG provides through introductions to consumers. LaSer pays commission to DSG for those introductions.

39. Dixons submitted that the rules on contract construction were summarised in *Wood*, in §8-15 of the decision. Following those rules, and in contrast to the case of *Primback*, Dixons submitted that the contract between DSG and Laser is a detailed and professionally drafted contract. The contract is intended to deal entirely and comprehensively with the relationship between them, and so there is no basis on which to infer terms.

40. Additionally, clause 28 of the contract, in which LaSer states that it considers that "all the payments and consideration arising out of or in connection with this agreement to be payments of financial intermediary services", which Dixons submitted is inconsistent with any suggestion that there is a payment under the contract for any unspecified service supplied by LaSer to DSG.

Services provided by LaSer

41. The contract defines the services which LaSer is to provide and Dixons submitted that there is nothing in that definition which is capable of amounting to a taxable supply by LaSer to DSG. Dixons further submitted that there are no additional services to be supplied by LaSer in the contract and so no additional obligation on DSG to make any payment (whether the "Subsidy" or otherwise).

Whether there is a cross-supply between DSG and LaSer

42. It was submitted that the cross-supply solution in *Primback* cannot be sustained in this case as it is not supported by the contract for reasons already set out. Any suggestion that there is a doctrine of equivalence for VAT purposes so that the

Primback solution should be read into the relationship between DSG and LaSer was, Dixons submitted, expressly rejected in *Littlewoods/Lex* where, at §84 of the decision, the court stated that they "reject the submission that there is any principle that transactions which have the same economic effect are, necessarily, to be treated in the same way for the purposes of VAT".

43. Dixons also submitted that clause 26 of the contract confirms that the contract contains the entire agreement between the parties, and so excludes any inference of additional unspecified supplies, obligations and payments of considerations. In particular, Dixons submitted that LaSer cannot be regarded as making a supply to DSG of agreeing to accept referrals made by DSG as suggested by HMRC. Such a cross-supply, it was submitted, is in any case inherent in any introductory engagements otherwise the introduction cannot work and it cannot be a freestanding supply in its own right.

44. Further, it was submitted that the joint venture nature of the contract precluded any cross-supplies not specifically set out in the contract: instead, each party is acting on its own behalf in pursuance of the joint venture and actions are not therefore made in consideration for anything given by the other. Dixons submitted that this was supported by *EDM* (§89-91). Further, it was submitted that even if there is a possibility of a cross-supply, it could only be a "proto-supply", following *MBNA* (at §102-112), something which was a necessary pre-condition to the overall measures and not crystallised as a supply for VAT purposes. In the same way, Dixons submitted, the acceptance by LaSer of introductions is a necessary pre-condition in the appointment by LaSer of DSG as an introducer and so cannot be a supply even if in different circumstances it could be a supply. It was submitted that there is no need to infer a cross-supply to render the transaction commercial.

Payments between the parties

45. Dixons submitted that clause 8 of the contract needs to be read as a whole to determine as a single calculation the amount received by DSG as consideration, as clause 8.1 states that "Subject to the other provisions of this clause 8 … LaSer shall pay to DSG…". Dixons submitted that the clause should not be read as establishing a payment obligation in clause 8.1.1 which is then reduced by any "Subsidy" due from DSG to LaSer. In particular, Dixons submitted that the Subsidy is a step in the overall calculation of LaSer's payment obligation and not as a separate set off or settlement.

Commission paid to DSG

46. The contract provides (at clause 2.1) that "In consideration for the payment of the commission and/or the provision by LaSer of the Services, DSG shall … refer customers". Dixons submitted that the contractual obligation on LaSer is to provide Services and to pay commission to DSG; DSG's obligation is to make referrals. Dixons submitted that the obligation on DSG to make referrals is substantial.

47. Dixons submitted that the Services are therefore linked and reciprocal only to the referrals, and there is no link between the provision of the "Services" and the

"Subsidy". Further, it is clear that clause 2.1 establishes a reciprocal relationship which provides effectively for and deals rationally with each party's obligations comprehensively. Dixons submitted that there is no need or justification to infer, impose or identify any additional settlement and payments obligations on the parties.

Status of the "Subsidy"

48. The contract defines the "Subsidy" as "any amount LaSer is entitled to deduct … from any payment it is liable to make to DSG".

49. Dixons submitted that:

(1) the ordinary meaning of the word "subsidy" is overridden by this specific definition and, even in the ordinary meaning of the word, should not be regarded as payment of a price for a supply by the recipient of that supply.

(2) there is nothing in this definition or elsewhere in the contract which is a measure of any consideration or other payment obligation on DSG to LaSer;

(3) there is no link (direct or otherwise) or reciprocal performance with the provision of the "Services" by LaSer or anything else on its part

(4) the "Subsidy" only applies in certain cases, where beneficial interest terms are given to a consumer and, it was submitted, that there is no supply of credit for a consideration by LaSer to the customer. There is no requirement that it applies to any provision of the Services and so must be distinguished from the general commission in Bally. The credit facilities are provided separately and independently from the "Subsidy", and there is no causal or quantitive relationship between the Subsidy and the Services.

50. For a movement of money to be consideration, it must be "directly linked" to a supply, as indicated in *Tolsma*. Dixons submitted, therefore, that as it is submitted that there is no cross-supply, the Subsidy cannot be regarded as consideration passing between the parties for such a cross-supply. Instead, it was submitted that the reduction which is calculated by the "Subsidy" satisfies LaSer's economic requirements for the relevant transactions, as it substitutes interest with a price reduction.

51. Dixons submitted that the arrangement was similar to that in GKFL, in which a portfolio of mortgages was assigned at a discounted price to the open market of the value of the debts involved. The reduction in price was found not to be implicit consideration for any supply by the purchaser of the portfolio but, instead, a reflection of the actual economic value of the debts at the time of the assignment. This was contrasted by Dixons to the case of MKG, in which the services of a debt factor were held to be a supply provided for consideration as the contract expressly provided for payment of commission and de credere fees. As with GKFL, therefore, it was submitted that LaSer has obtained its economic return by reducing what it has to pay out rather than by increasing receipts of either interest or commission, as it is free to choose to do.

Bespoke Retail Scheme Agreement (BRSA)

52. Dixons noted that retail schemes substitute global accounting for the normal "supply by supply" method of VAT accounting. The use of a retail scheme must not make more than a negligible difference to the amount of VAT that would be paid by the retailer under the normal method. It was submitted that the amounts in this case produce a non-negligible difference because the BRSA does not recognise the reduced payments from LaSer.

53. The BRSA used by DSG already provides for a taxable amount that is different to the contract price, such as when vouchers are used by a consumer (in accordance with Argos). In such cases, the taxable amount is adjusted downwards from the shelf price without the knowledge of the consumer. Dixons submitted that the BRSA already requires a downward adjustment in relevant transactions, being those where the consumer uses one or more vouchers to pay for some or all of the deposit paid.

Evidence

54. In addition to the documentary evidence provided, two witnesses provided witness statements and gave oral evidence for Dixons. Both Ms Lewis and Mr Detain were employees of Dixons.

55. Ms Lewis provided an analysis of the payment mechanism for the pricing of products set out in Schedule 2 of the Retailer Contract. Her evidence was that the mechanism operates as follows:

> (1) A base price is set which is paid as a commission by LaSer to DSG or deducted from the figure payable to DSG if a number of assumptions as to London InterBank Offered Rate (LIBOR), bad debt, average transaction value and other figures are true. That is, if the payment mechanism calculated produces a positive figure for a particular credit product, it is deducted by LaSer and is described as the Subsidy. If the figure is negative, it is paid by LaSer and is described as a commission.
>
> (2) For Buy-Now-Pay-Later arrangements, two further elements are taken into account: the "Rollover" and "Settlement Fee Collection" rate. An arrangement will "rollover" if the borrow does not settle the full amount by the end of the "Pay Later" period and will become an interest-bearing fixed term loan agreement.
>
> (3) All of the calculations, set out in various tables in the Schedule, work together and are calculated on a product-by-product basis.
>
> (4) Changes to assumptions in each relevant period are taken into account in the mechanism to produce the follow quarter's Subsidy or Commission for each product. A product would have either a Subsidy or a Commission in a relevant period; it could not have both at any one time. However, adjustments in the assumptions underlying the pricing could mean that a product changed from providing a Subsidy to providing a Commission. DSG and LaSer would review the figures at agreed intervals and agree the necessary adjustments.

(5) DSG would provide LaSer with a calendar which set out what products would run, specifically Buy-Now-Pay-Later products, and which offer period would apply. Ms Lewis' witness statement described these as promotions.

(6) When the contract between DSG and LaSer was originally entered into, it was anticipated that there would be a limit to the number of Buy-Now-Pay-Later loans which LaSer would enter into. This was originally set at 20% of loans, with a second threshold of 50%. Over time, DSG has been able to exceed that limit as LaSer has become more familiar with systems.

(7) DSG have the right to run Buy-Now-Pay-Later agreements which LaSer must accept.

(8) Ms Lewis confirmed that the service levels agreement in the Retailer Contract were important to DSG, as they needed LaSer to cover store opening hours and to be available. DSG did not want customers and colleagues to be waiting for decisions as customers may not go ahead with the sale, and colleagues' time would be tied up.

56. Mr Detain provided further evidence as to the retail receipts which had been provided. He confirmed that the amount due shown on the receipt would be the total of the deposit paid and the amount financed through the loan agreement with LaSer.

57. Mr Detain also confirmed that if there were to be a fault with the goods supplied, a discount would be provided. For small blemishes, the store could offer a discount; for more serious defects, head office adjustments would be made or offered.

HMRC's case

58. HMRC submitted that the correct approach to be taken in analysing the position can be established from the decisions of the Supreme Court in *Secret Hotels2* and *Airtours*:

(1) When analysing a transaction for VAT purposes regard must be had to all the circumstances in which the transaction, or combination of transactions, takes place;

(2) Consideration of economic realities is a fundamental criterion for the application of the common system of VAT;

(3) It is necessary, in any multi-party situation, to identify the nature of the relationship between the parties and the nature of the transactions carried out;

(4) The starting point is the contractual position and the written contractual terms, although they are not conclusive of the VAT analysis;

(5) It is then necessary to see whether any conclusion based on the contracts is vitiated by the facts relied upon by either party.

59. HMRC's case is, in summary, that the circumstances in this appeal are very closely analogous to those in the case of Primback and so that the taxable amount of DSG's supply of goods to the customer is the full amount payable by the customer,

regardless of the fact that LaSer can deduct an amount defined as a Subsidy when making payments to DSG.

60. HMRC submitted that the economic reality of the transactions between the parties is that there were four supplies for VAT purposes:

(1) The supply of goods by DSG to the customer

(2) The supply of credit by LaSer to that customer

(3) A supply of "introduction and related" services by DSG to Laser

(4) A supply of services being LaSer to DSG, being the provision of credit facilities for use by customers of DSG

61. HMRC submitted that the supply by DSG is not made in return for consideration from a third party but in return for money payable to DSG by DSG's customer: part of that amount is paid by the customer to DSG as a deposit and the balance is loaned to by the lender to the customer and paid direct, on behalf of the customer, by the lender to DSG. The lender, LaSer, not providing third party consideration but is acting on behalf of the customer in making payment to DSG of the amount lent to the customer. This is, it was submitted, a straightforward sale of goods to which there are only two parties. The contract between LaSer and DSG, and the credit agreement between LaSer and the customer, are background circumstances but not determinative of consideration.

62. Accordingly, HMRC submitted that the Retailer Contract agreement between DSG and LaSer had no impact on the taxable amount of supplies made by DSG to customers. The contract does provide an express obligation on LaSer to pay the "amount of credit" to DSG, which is an obligation already imposed upon LaSer by the credit agreement between LaSer and the customer.

The agreement between LaSer and DSG

63. HMRC submitted that this agreement states clearly that DSG wishes to obtain a "secure, competitive cost effective supply of credit facilities for its customers" and so clearly establishes a contractual supply, being the making available of such facilities, by LaSer to DSG.

64. The effect of the contract is that DSG refers customers seeking credit to LaSer, in consideration for the payment of "Commission" by LaSer to DSG, and the provision by LaSer of credit facilities for use by customer of DSG.

65. HMRC submitted that the obligation to provide credit facilities is an obligation owed by LaSer to DSG, which is of commercial benefit to DSG. Further obligations are also imposed upon LaSer by the Retailer Contract, including the maintenance of specific service levels in order to enable "instantly available" finance for DSG customers.

Calculation of payments under the agreement between LaSer and DSG

66. HMRC explained that clause 8 of the Retailer Contract contains a calculation mechanism for daily payments to be made by DSG, as follows:

> (1) 8.1.1: an unqualified obligation on LaSer to pay the "amount of credit" (the contract price less the deposit). This matches the obligation on LaSer under the credit agreement with the customer to pay the "amount of credit" to DSG;
>
> (2) 8.1.2: payment of commission by LaSer to DSG for the referral of customers. This amount is to be calculated in accordance with tables set out in the second schedule of the Retailer Contract;
>
> (3) 8.3: LaSer is permitted to "deduct and retain" a "Subsidy" from any payment under clauses 8.1.1 and/or 8.1.2. The Subsidy is also calculated in accordance with the tables in the second schedule of the Retailer Contract.

67. HMRC submitted that credit agreements between LaSer and DSG customers which are on "normal commercial" interest terms will allow LaSer to make a profit on the lending under those credit agreements. Accordingly, it is in LaSer's intent to pay the Commission to DSG for the opportunity to enter into such agreements. However, some of the credit products to be provided under the Retailer Contract are on interest-free or reduced interest terms, or on "Buy Now Pay Later" terms.

68. HMRC submitted that these credit products benefit DSG, as they are a promotional tool which enables DSG to promote sales of its goods. HMRC noted that DSG's witness, Ms Lewis, confirmed that LaSer's return on these products would be "diminished or extinguished" and that LaSer would still require "sufficient economic return to proceed" and that requirement was "satisfied by DSG by way of a "subsidy" … which provides LaSer with a return".

69. HMRc submitted that this makes it clear that the uncommercial credit agreements are of benefit to DSG, and that DSG are prepared to provide a Subsidy to LaSer as consideration for entering into those agreements. HMRC submitted also that the fact that the Subsidy is apparently capped at the amounts due to DSG from LaSer under clauses 8.1.1 and 8.1.2 is a matter of commercial negotiation, in the same way as the amounts of the Commission and Subsidy. HMRC submitted that Ms Lewis' evidence was that there was a clear link between the Commission and the Subsidy, as her evidence was that they were the product of a single/blended calculation.

Role of the Subsidy

70. HMRC submitted that the wide nature of the concepts of "supply" and "services" for VAT purposes in the VAT directive (particularly Article 2) mean that LaSer must be regarded as making a supply to DSG, as LaSer is obligated whenever specified loan decision-making criteria are met, to provide all customers referred by DSG with credit, under clause 2.1 of the Retailer Contract. Further, LaSer also agrees under that contract to maintain certain services standards and requirements relating to the way in which credit is made available, under Schedule 1 of that contract.

71. HMRC submitted that this is reinforced if the economic reality is considered: it is clearly beneficial to a retailer such as DSG to obtain, form a lender, the right to require that lender to always lend to the retailer's potential customers, subject to lending criteria being met. This is, it was submitted, a consumable benefit to DSG.

72. HMRC submitted that the Subsidy is directly linked to the supply of that benefit, or service, and is an amount due from DSG to LaSer by reason of the obligations which LaSer has undertaken to DSG under the Retailer Contract. HMRc submitted that this was supported by Dixons' witness evidence, which was that the interest-free and similar lending otherwise provided an insufficient economic return to LaSer and so LaSer required a return from DSG, which was the "Subsidy".

73. In the alternative, HMRC submitted that even if the Subsidy was not consideration for a supply by LaSer, Dixons' witness evidence was that the Commission and the Subsidy were a "single/blended calculation" and so the Subsidy should be recognised as related to the Commission and lowering, over a period of time, the overall amount which LaSer has to pay to DSG in respect of the supply of services by DSG to LaSer. That is, the Subsidy is a reduction in the Commission and not a reduction in the "amount of credit" payable by LaSer to DSG.

Supply of goods to the customer

74. HMRc submitted that it is clear from the retail receipt issued by DSG that the customer agrees to pay the advertised ticket price, recorded on the receipt as the "amount due" from the customer. HMRC argued that this was a strong parallel with *Primback*, on a point which was central to the CJEU decision. Further, there was no suggestion that customers were offered a lower price depending on whether they paid in cash or entered into a credit agreement, whether generally or on interest-free terms.

75. HMRC submitted that the conclusion that the taxable amount was the ticket price was reinforced by consideration of the credit agreement, under which the balance of the ticket price was loaned to the customer by LaSer and LaSer was obliged to pay that balance amount to DSG on behalf of the customer.

76. HMRC submitted that it was neither legally accurate nor economically realistic to treat that payment by LaSer on behalf of the customer, of money borrowed by the customer, as provision of third party consideration by LaSer. The fact that the money was paid by LaSer to DSG, under an obligation in the credit agreement, did not mean that the consideration fo the supply of the goods to the customer was obtained from LaSer.

77. HMRC further submitted that, if DSG's contentions were correct, that there was a significant problem with the credit agreements made by LaSer as they would overstate the true price of the goods, and the amount of credit (defined as the cash price less the deposit) would be overstated, the amount that LaSer would be obliged to pay to DSG would be overstated, and - in contravention of the Consumer Credit Act 1974 – the interest charge would be incorrectly stated or there would be some other charge which was not disclosed to the customer.

Bespoke Retail Scheme Agreement

78. HMRC submitted that the Subsidy does not reduce the taxable amount of DSG's supplies and so it is not relevant that the terms of the bespoke retail scheme agreement do not allow the Subsidy to be treated as reducing the taxable amount of DSG's supplies.

Discussion

79. The matter to be determined is, in short, whether the Subsidy aspect of the calculation of the payment to be made by LaSer to DSG under the Retailer Contract between them is taken into account in determining (and so reducing) the taxable value of the supply of goods from DSG to the customer.

80. As is clear from case law, such as para 11 of the decision in *Aimia*, it is "essential to bear in mind the particular characteristics of the business carried on when considering the issue raised in the present appeal", and that the analysis of the contract is key to determining the VAT consequences (*Aimia*, at paragraph 68). As also set out in case law, regard must be had to all of the circumstances of the transaction or transactions, and that the economic realities must be considered together with the relationship between the parties. The contractual position must be considered, together with the evidence and facts.

81. The starting point for this matter is the question of whether there is any third-party consideration. If answered in the negative, this will also be the conclusive point for this matter – it was agreed by the parties that, if consideration for the transaction is not provided by LaSer, then the Subsidy has no impact on the taxable value of the supply.

82. Dixon's case is, necessarily, that this matter involves the provision of consideration by LaSer for the goods acquired by the consumer. It is only if LaSer is providing consideration (and not merely transferring funds) that the Subsidy can have any bearing on the taxable amount of the supply (Article 73 of the VAT Directive; Regulation 38 of the VAT Regulations).

83. HMRC's case is that this is a straightforward sale of goods between DSG and the customer with no third-party consideration.

84. Some of the delay in producing this decision has been as a result of considerable review and re-review of the contractual documentation to endeavour to determine whether there is any support for Dixons' position. Both parties agreed, and I accepted, that the VAT position must be determined on the basis of the specific provisions of these contracts and not merely on the basis of earlier case law, as the particular terms of contracts may result in substantially different position for VAT purposes.

85. In this case, the contracts available are the Retailer Contract between DSG and LaSer and the credit agreement documents between LaSer and the customer. Retail receipts were provided to illustrate the transactions between customers and DSG, but there is no formal written contract between DSG and a customer.

86. I considered each of the contracts in turn, to determine their effect and, in particular, whether any of the contracts amounted to the provision of consideration by LaSer.

Retailer Contract

87. The "Retailer Contract" between DSG and LaSer makes it clear that this is an arrangement between DSG and LaSer for the provision of credit facilities. Those facilities are "for use *by customers of DSG* to purchase goods" (as set out in the Recitals, emphasis added). The purpose of the contract is to provide DSG with "a secure, competitive and cost-effective supply of credit facilities for its customers" and LaSer is to "provide a minimum share of those credit facilities".

88. There is, therefore, nothing in the Recitals to suggest that LaSer is providing consideration for the relevant purchases. The Recitals state only that LaSer will provide credit facilities to enable DSG's customers to make purchases. Whilst there must be a supply of goods by DSG to a customer in order for a credit agreement to be entered into by LaSer with that customer, that does not mean that amounts paid by LaSer to DSG must always be consideration for that supply.

89. LaSer's principal obligation under the Retailer Contract is to provide Services (clause 2 of the contract), which are defined in that contract as "the provision of credit facilities for use by customers of DSG to purchase goods and services through DSG Outlets". This definition does not include any reference to the provision of consideration for such purchases, only to the provision of credit facilities to enable others to make purchases. Clause 2 of the contract also requires LaSer to provide credit to customers of DSG where they meet the necessary criteria. That obligation is, again, to provide credit and not to provide consideration for any supply by DSG to the customers.

90. DSG's obligation under the Retailer Contract is to refer customers to LaSer (clause 2). There is no obligation on DSG to supply goods to customers under the Retailer Contract.

91. Clause 8 of the Retailer Contract is entitled "Payments to DSG". The contents of this clause set out payment calculations. Any payment under this clause is linked to provision by DSG to LaSer of a "Settlement File from DSG containing details of each Credit Agreement executed on behalf of LaSer by DSG" (clause 8.1). Further, clause 8.3 specifically states that the payment of the "amount of credit" is made pursuant to the credit agreements. It is not stated to be made pursuant to any supply of goods.

92. The payments made by LaSer to DSG are not, therefore, specified to be contingent upon a supply of goods by DSG. There is no express obligation on DSG to make a supply of goods in order for payment to be made by LaSer to DSG. The obligation on LaSer to pay the "amount of credit" borrowed by the customer to DSG is, in my view, part of the calculation of the amount to be transferred from LaSer to DSG as there is already an obligation on LaSer to transfer the "amount of credit" to DSG under the credit agreement with the customer (see below).

93. There is one sub-clause within clause 8 which makes reference to goods or services supplied by DSG: clause 8.4.5 provides that LaSer can declare a credit agreement invalid where "the goods or services described in the credit agreement differ in any material respect from the goods or services actually supplied to the [customer] … PROVIDED THAT LaSer suffers financial loss as a result of the occurrence [of that difference]". This sub-clause, therefore, does not require that DSG makes a supply but, instead, provides a mechanism for compensation to LaSer where it suffers a loss as a result of a mis-description of the supply between DSG and the customer. I do not consider that this sub-clause can be regarded as giving LaSer's payments to DSG any of the characteristics of consideration for the supply made by DSG to the customer.

94. Clause 8, therefore, provides a mechanism for calculating the amounts to be transferred between the parties arising from the provision of credit by LaSer to customers. It does not establish any amounts of consideration to be paid by LaSer in relation to the supply of goods by DSG to customers.

95. Schedule 7 sets out the contents of an "Undelivered Goods" report to be provided by DSG to LaSer under clause 10.3.1. That report includes details of goods to be delivered to customers. LaSer is entitled to adjust payment periods if DSG does not provide information, and (under Schedule 5) to delay payments to DSG where the amount of credit in relation to undelivered goods reaches specific levels. However, there is no adjustment to the amount of any payments made as a result of any failure by DSG to provide the goods to customers. The adjustment is as to how many days the total payment can be delayed and not to whether a particular amount is paid at all. Those adjustments are also not to payments for specific transactions but, instead, global timing adjustments as to the payment of all amounts to be paid from LaSer to DSG. Accordingly, LaSer is not entitled to withhold amounts altogether simply because goods have not been delivered nor is any permitted delay in payment specific to particular transactions. I do not consider that the adjustments permitted in relation to undelivered goods give the payments by LaSer any of the characteristics of consideration for the supplies made by DSG to customers.

96. Clause 11 provides that LaSer is entitled to recover money from DSG where credit agreements are cancelled; there is no right of recovery in relation by DSG to a failure to supply goods or services, under this clause or any other of the contract.

97. Clause 28 states that "LaSer considers that all payments and consideration arising out of or in connection with this Agreement to be payment for Financial Intermediary Services". There is nothing in this clause to indicate that LaSer is providing consideration for the supply of goods or services by DSG to customers.

Contract between LaSer and customer

98. The contractual documentation between LaSer and customers makes it clear that LaSer is providing a loan of the "amount of credit" to the customer: there are no provisions in that documentation which suggest that LaSer is providing consideration

to DSG for the supply of goods to the customer. DSG is not entitled to change the documentation provided by LaSer (clause 4.1 of the Retailer Contract).

99. The terms and conditions state that LaSer (described as Creation Consumer Finance Limited) will lend money to the customer (clause 1). Although the amount lent is then required to be paid to the supplier (clause 13), it is paid on behalf of the customer. I consider that the effect of the contract is that funds are lent to the customer, becoming money belonging to the customer, and it is therefore the customer that provides consideration for the related supply to the supplier (in this case DSG), albeit via the lender (LaSer).

100. Similarly, the "pre-contract credit information" and "fixed sum loan agreement" documents state that LaSer "will pay the amount of credit directly to [DSG] on [the customer's] behalf".

101. I do not consider that there are any grounds for interpreting the loan contract documentation as an agreement that LaSer provide consideration to DSG for the supply by DSG to the customer, in consideration for payment by the customer to LaSer in instalments.

Retail receipts

102. There is no written agreement between DSG and the customer, but the example retail receipts provided by Dixons set out the agreed price, provides details of the deposit given by the customer and refer to the balance of payment being made by "CCF Agreement" (consumer credit finance agreement; the loan agreement between LaSer and the customer). In my view, the retail receipts, do not provide any particular assistance one way or the other as to whether the Subsidy affects the taxable amount of the supply of goods evidenced by the retail receipt.

Conclusion as to whether there is third party consideration

103. Having reviewed the contracts in considerable detail, and considered the evidence put forward as to the relationships between the parties, I consider that Dixons' position is not sustainable as I find that LaSer does not itself provide consideration for the supply of goods by DSG to customers.

104. For a movement of money to be consideration, it must be "directly linked" to a supply, as set out in *Tolsma*. Having reviewed all of the documentation and evidence provided, I find that that there is no such "direct link" between the supply to the customer and the movement of money from LaSer to DSG. In particular, there is no obligation on DSG under any of the contractual documents to supply goods to customers in return for the payments made by LaSer. LaSer is not, therefore, procuring the supply of goods to consumers. There is also no obligation on LaSer itself to make payment for any supply of goods. LaSer's obligation is to pay to DSG money which belongs to customers.

105. I find that LaSer's role in these transactions is to provide facilities which enable customers to pay DSG for such supplies using money which at the time of the transaction belongs to those customers, which has been loaned to the customers by LaSer and which is held by LaSer to be paid to DSG on behalf of those customers.

106. The effect of the contracts is that the payment of the "amount of credit" by LaSer is a payment by the customer of that amount to DSG, even though the relevant funds transfer is made by Laser and DSG permits amounts to be deducted by LaSer prior to that transfer. That is, the payments by LaSer to DSG are discharging LaSer's obligations to the customers under the loan documentation and not are the provision of consideration by and on behalf of LaSer to DSG for supplies made to those customers.

107. This is, clearly, a substantially different position to that in (for example) *Tesco* and *Aimia*, where the consideration for a supply by one party to a second party was paid by a third party on their own behalf, on being invoiced by the first party, without any repayment or recourse to the customer.

108. In this case, I find that the "amount of credit" in full is consideration provided by the customer to DSG for the supply of the goods. The taxable amount for a supply of goods by DSG is therefore the amount due from the customer for that supply, as set out in the retail receipt for the supply, subject to any adjustments for the use by a customer of vouchers in payment of the deposit. Such voucher-related adjustments are agreed by the parties to be already catered for by the bespoke retail scheme agreement between the parties.

109. As I find that the payments made by LaSer do not amount to consideration for the supplies by DSG to consumer, the amount of any payment (including any deduction of the Subsidy) between LaSer and DSG cannot affect the taxable amount of those supplies and, therefore, the amount of such payment does not affect the bespoke retail scheme agreement used by Dixons.

110. The appeal must therefore be dismissed.

Further discussion

111. Having found that LaSer are not providing consideration for the supply of goods to DSG's customers, it is not strictly necessary for me to consider the nature of the Subsidy under the Retailer Contract. However, in case I am incorrect as to whether LasSer have provided consideration for the supply, I have considered the parties' submissions with regard to this.

Is the Subsidy consideration for a supply by LaSer to DSG?

112. Dixons' case is that it is the net amount passing from LaSer to DSG that should be regarded as consideration for the supply of goods. It contends that this arises as the parties have chosen to allow a reduced payment rather than a deduction from the payment.

113. In particular, it was submitted that the difference in payment could not be attributed to a cross-supply between DSG and LaSer (such as the cross-supply that was considered to arise in *Primback*) because no such cross-supply is set out in the contract.

114. In particular, it was submitted that the contract contains no taxable supply made by LaSer to DSG to which the difference in payment could be attributed. It was also submitted that the contract amounted to a form of joint venture which precluded any cross-supplies not specifically set out in the contract. Further, Dixons submitted that LaSer could not be regarded as supplying a service of accepting referrals, such as that proposed by HMRC in their submissions.

Is there a supply?

115. I consider that an analysis of the contract terms does not support Dixons' contentions.

116. Firstly, Dixons' contention that the relationship between the parties should be regarded as some form of mutual "joint venture" between the parties is not supported by the Retailer Contract, which specifically states at clause 30 that it is not intended to establish any joint venture between the parties. Further, the contract does make specific reference to services to be supplied between the parties, including the referral of customers, the maintenance of service levels by LaSer and other such terms.

117. I find that it is clear from a consideration of the Retailer Contract as a whole that the purpose of the contract (in the context of products involving a "Subsidy") is to enable DSG to offer credit facilities to customers which are not competitive products for LaSer as the credit provider (although, conversely, attractive to customers) such as the Buy-Now-Pay-Later arrangements.

118. In such cases, DSG is willing to allow LaSer to "deduct and retain" a Subsidy to compensate LaSer for the provision of such facilities. This was confirmed by Ms Lewis in her evidence, as she confirmed that these products on attractive/preferential terms are ones which DSG wishes to make available as a promotional tool. For these "promotional tool products", her evidence was that LaSer's economic return is "satisfied by DSG by way of" the Subsidy.

119. I consider, therefore, that the evidence and commercial reality is that LaSer is providing a service to DSG in making available credit facilities at DSG's request and to DSG's specification, so that DSG can offer them to their customers. The benefit to DSG is clear from the witness evidence, albeit not spelt out in the contract, in that these types of credit facilities will enable DSG to make more sales than it would otherwise be able to if customers did not have access to attractive credit facilities. The service levels, similarly, are required to be maintained at a particular standard to ensure that DSG do not lose any such sales.

120. Further, both the contract terms (clause 2.8) and the witness evidence make clear that it is DSG who can request "New Credit Products" and not LaSer who can

suggest such new products. For example, the definition of "New Credit Products", which are defined as "any credit product, other than an Existing Credit Product, that DSG wishes to make available during the Term". Ms Lewis' evidence was also that DSG had the right to run Buy-Now-Pay-Later agreements which LaSer were required to accept.

121. Dixons submitted that because clause 26 of the contract confirms that the contract contains the entire agreement between the parties, that must exclude any inference of additional unspecified supplies, obligations and payments of consideration.

122. I do not consider that it is necessary to "infer" that there is a supply by LaSer to DSG of the making available of these promotional tools, as the contract clearly contains provision for DSG to request the relevant services from LaSer (the making available of the New Credit Products required by DSG) and provides for the negotiation of pricing between the parties in connection with such request. It should be noted that the contract does not in fact apparently contain a mechanism for LaSer to decline to provide such products (despite the fact that it is described as having a right of first refusal in clause 2.8), other than by pricing them so uncompetitively that DSG seeks another provider. This was confirmed by Ms Lewis' evidence that LaSer was required to accept the Buy-Now-Pay-Later agreements which DSG wanted to run.

123. Dixons submitted that if there were a supply between LaSer and DSG, it would amount only to a "proto-supply", in accordance with *MBNA*, as a necessary pre-condition to the overall lending activity by LaSer. I consider that this is not the case: although, clearly, the credit facility terms need to be established before any credit facilities can be offered, in this case uncommercial promotional terms are requested and specified by DSG and LaSer provides the makes available the relevant credit facilities to DSG for it to offer to customers. I consider that this is more than a "proto-supply" in the *MBNA* context.

124. Dixons also asked, possibly rhetorically, how could any such supply be inferred? In the same spirit, however, one could ask how such supply could not be inferred – why would Dixons agree to accept less payment than it is otherwise entitled to (in the deduction of the Subsidy) if it is not in fact receiving some benefit related to the reduction in the payment?

125. It was submitted by Dixons that the parties are simply working together for mutual benefit, providing LaSer with a route to market for its credit facilities. However, as noted above, it is not LaSer who set the terms of credit facilities but, instead, DSG who request those terms.

126. It was also submitted that any supply would be substituting for the separate lending activity by LaSer. However, as set out already, the contract clearly anticipates a supply of services to DSG in providing the specific types of finance requested by DSG. I find that this is not a substitute supply for the lending activity by LaSer; it is

the making available of an uncommercial lending activity at the request of, and as specified by, DSG.

127. In summary, therefore, I find that LaSer is making a supply to DSG. That supply is the making available of credit facilities which DSG can offer to its customers, on terms requested and specified by DSG. In particular, LaSer is making available uncommercial credit facilities which DSG uses for promotional purposes.

Nature of the Subsidy

128. Dixons also submitted that its position was supported by *GKFL*, in which a reduction in price was found not to be implicit consideration for any supply by the purchaser of a portfolio of debts but was, instead, a reflection of the actual economic value of those debts at the time of the assignment. However, I find that in this case, LaSer is neither purchasing debts nor factoring them; it is, instead, offering favourable credit terms to customers at DSG's request. The Subsidy is also not a reflection of the economic value of the credit agreements specified in the "Settlement File" which is the precursor to payment under Clause 8 of the Retailer Agreement.

129. A detailed analysis of Schedule 2 of the Retailer Contract shows that although elements of the Subsidy are set out and definable for each credit agreement, there is a particular element of the Subsidy which cannot be established at the time a relevant credit agreement is entered into and so cannot amount to a reflect of the economic value of such credit agreement at that time.

130. That Subsidy element is the "rollover" element in Buy Now, Pay Later agreements (where the credit facility allows for an interest free period, following which interest is charged if the loan is not repaid). A "rollover" Subsidy element is set for each offer period but this is then, following the end of the offer period, compared to the actual "rollover" rate (the agreements which do not settle in full at the offer period end date plus seven days ending in the previous month). This variance "will be settled (by either party) in the quarter following the calculation" (page 81 of the sample Schedule 2 provided to the Tribunal). This element of the Subsidy therefore clearly not established at the time of the credit agreement; it is a later payment between the parties in relation to credit agreements which do not perform as originally anticipated. It is also clearly stated to be payable "by either party", rather than specifically deductible by LaSer. In contrast, other variable elements of the Subsidy have effect for new agreements rather than being settled between the parties.

131. Finally, the Subsidy is stated in clause 8.3 to be "payable by DSG". Dixons submitted that this wording should not be taken literally because it could not relate to a supply; however, Dixons also submitted that the contract documentation had been negotiated between parties with professional advisers (in contrast to *Primback*). In those circumstances, I do not consider that it is appropriate or, indeed, necessary to recategorise the phrase "payable by DSG' as having any meaning other than that which is plain on the face of the words.

Whether the Subsidy is consideration for a supply by LaSer

132. The Subsidy is clearly linked to credit facilities made available by LaSer which have favourable credit terms (for the customer) at DSG's request, as the elements of the Subsidy are calculated by reference to those credit terms (at the time of the credit agreement and subsequently in the case of the rollover amount). This was also confirmed by Dixons' witness evidence.

133. Therefore, I find that the Subsidy is consideration provided to LaSer by DSG for the making available by LaSer at DSG's request of otherwise uncommercial credit facilities.

134. The fact that it is deducted and retained from the "amount of credit" under clause 8 of the Retailer Contract does not change this. In accordance with the decision in *FNBC*, the "amount of credit" remains "the amount which [DSG] can actually apply to its own use" as DSG, in agreeing the pricing on credit products, applies part of that "amount of credit" otherwise payable by LaSer on behalf of the customer to its own use in agreeing that LaSer can deduct and retain of the Subsidy payable by DSG from the "amount of credit" as consideration payable by DSG to LaSer.

135. This is made clear by the calculation mechanism in clause 8 which clearly separates the deduction of the Subsidy from the calculation of amounts payable by LaSer to DSG. Although clause 8.1 states that it is subject to the other provisions of clause 8, that does not mean that the whole of clause 8 necessarily establishes a single net amount of consideration. The clause establishes a net payment to be made, but that is not necessarily determinative of the amounts due between the parties.

136. Considering the relevant parts of clause 8: clause 8.1 establishes amounts to be paid by LaSer to DSG in accordance with clause 8.2. These amounts are the "amount of credit" under the credit agreements for the relevant period and any Commission payable to DSG.

137. Clause 8.2 then requires LaSer to make the payment calculated in clause 8.1 in accordance with the payment terms in Schedule 5 of the Retailer Contract.

138. Clause 8.3 then allows LaSer to "deduct and retain" the Subsidy "from any payment which it is liable to make to DSG pursuant to any Credit Agreement in accordance with clause 8.1".

139. The remainder of clause 8 provides for adjustments in relation to invalid credit agreements.

140. I find that clause 8.1 of the Retailer Contract therefore establishes an amount which is payable by LaSer to DSG, and that amount is required to be paid in accordance with the provisions of Schedule 5 by clause 8.2. LaSer is subsequently entitled to deduct from the amount which is payable to DSG, the amount of the Subsidy. Clause 8 does not, therefore calculate reduced consideration as contended by Dixons but, instead, a reduced payment to DSG by LaSer.

141. Dixons argued that clauses 8.1 to 8.3 could not be interpreted in this way because there could be no "set-off" of amounts owed between the parties, as this was prohibited by clause 31.1 of the Retailer Contract other than in specific circumstances, which did not include the general Subsidy deduction in clause 8.3. It was submitted that the Subsidy could not therefore be a payment for a supply which is set-off by LaSer against amounts due to DSG.

142. I consider that clause 8.3 clearly allows LaSer to deduct and retain the Subsidy from any payment which it is liable to make to DSG. The fact that clause 8.3 is not cross-referenced in clause 31.1 relation to set-off does not, in my view, mean that the Subsidy cannot be consideration for a supply.

143. In summary, I find that – if LaSer were to be providing consideration for the supply of goods to customers – it would be the "amount of credit" in full, and not the "amount of credit" net of the Subsidy, which would be the consideration provided by LaSer and so taken into account in determining the taxable amount of the relevant supply of goods by DSG.

144. The parties made a number of submissions also the interpretation of the CJEU decision in *Primback*; as I have approached this decision on the basis of the contracts, documentation and evidence in this particular matter I do not consider that it is necessary to deal with those submissions. The contractual position in this matter was substantially different in its details to that in *Primback* such that I consider that the *Primback* decision does not materially assist in this matter.

145. In addition, Dixons made a number of submissions as to the VAT treatment of the Subsidy deduction in the hands of LaSer; I do not consider it necessary to address those as they have no bearing on the matter under appeal, which is whether the Subsidy is to be taken into account as a reduction in consideration when assessing the taxable value of the supply of goods to the end customer.

Decision

146. The appeal is dismissed.

147. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2018