[2017] UKUT 247 (TCC)

Appeal number: UT/2016/0058

VALUE ADDED TAX - car parking - whether overpayments consideration for taxable supply of services – link between consideration given and service received – whether sufficient link between consideration given and service received – whether overpayments subject to VAT - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

NATIONAL CAR PARKS LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: The Hon Mrs Justice Rose DBE (Chamber President)
Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 19 March 2017

Dario Garcia, solicitor, of Mishcon de Reya LLP, for the Appellant

Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. National Car Parks Limited ('NCP') carries on a business of operating 'pay and display' car parks. A person who parks his or her car in one of NCP's car parks is required to display a ticket in the car which shows that it is permitted to be in the car park for a specified time. The ticket is obtained from a machine. Different amounts are payable for tickets at different times and depending on how long the car is to be parked. The amounts payable are set out on a tariff board or boards in the car park. This appeal concerns machines that accept payment in cash. Where customers do not have the correct change to pay the exact amount stated on the tariff board, they must, if they wish to park, put in more than the amount due as the ticket machines do not give change.

2. In October 2014, NCP made a claim for repayment of overpaid VAT of £488,669 in respect of overpayments of car park tariffs by customers using NCP's pay and display car parks in the VAT accounting periods 06/09 - 12/12. The Respondents ('HMRC') refused the claim on the ground that the overpayments "should be regarded as consideration [for the right to park] and are therefore taxable". NCP appealed to the First-tier Tribunal (Tax Chamber) ('FTT') on the ground that the overpayments were not consideration for any supply but ex gratia payments outside the scope of VAT.

3. In a decision released on 15 December 2015 with neutral citation [2015] UKFTT 0666 (TC) ('the Decision'), the FTT (Judge Short and Gill Hunter) dismissed NCP's appeal. The FTT held that the full amount, including any excess, paid by the customer was consideration for the taxable supply of the right to park in the car park for a particular period of time.

4. NCP now appeals, with permission of the FTT, against the Decision.

Factual background

5. There was no dispute about the material facts for the purposes of this appeal and both Mr Garcia, who appeared for NCP, and Mr McGurk, who appeared for HMRC were content to make their submissions on the basis of the hypothetical example of a typical transaction given by the FTT in [22]:

> "A customer enters an NCP pay and display car park wishing to park for one hour. She parks her car in an available space and locates the pay and display ticket machine. The prices stated on the tariff board next to the pay and display ticket machine are: Parking for up to one hour - £1.40. Parking for up to three hours - £2.10. The pay and display ticket machine states that change is not given but overpayments are accepted and that coins of a value less than 5 pence are not accepted.
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> The customer finds that she only has change of a pound coin and a fifty pence piece and puts these into the pay and display ticket machine. The machine meter records the coins as they are fed into the machine, starting with the pound coin. When the fifty pence piece has been inserted and accepted by the machine, the machine flashes up 'press green button for ticket' which the customer does. The amount paid is printed on her ticket, as is the expiry time of one hour later. The customer displays the ticket in her car and leaves the car park."

6. If the customer does not have the correct change and inserts coins to a value above the tariff displayed, the machine does not grant any additional parking time to the

customer regardless of overpayment. The ticket issued to a customer states the full amount paid, including any overpayment. There are no barriers at a car park of this type and a customer could press a red button to cancel the transaction at any time until the green button is pressed for the issue of a ticket and drive away without paying anything.

Legislative framework

7. Article 2(1)(c) of Council Directive 2006/112/EC (the Principal VAT Directive or 'PVD') provides that supplies of services for consideration within the territory of a Member State by a taxable person acting as such are subject to VAT. Article 73 of the PVD provides:

> "In respect of the supply of goods or services, other than as referred to in Articles 74 to 77 [which are not relevant to this appeal], the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."

8. The provisions of the PVD have been implemented in UK law by the Value Added Tax Act 1994 ('VATA94'). Neither party suggested that the provisions of the PVD had not been properly implemented into UK law and both parties focussed their submissions on the provisions of the PVD. For completeness, however, section 5(2)(a) VATA94 defines 'supply' to include all forms of supply but not anything done otherwise than for a consideration and section 19(4) VATA94 provides:

> "Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it."

The issue

9. The only issue in this appeal is whether the overpayments (10 pence in the hypothetical example in [5] above) are consideration obtained by NCP from the customer in return for a supply of services by NCP, namely the right to park a vehicle in a car park, and are thus chargeable to VAT. Before the FTT there was some discussion about whether the overpayment was separate consideration for some additional benefit such as the convenience of not having to find coins for the exact amount but this was not put forward by either party before us – it was agreed that the service that the customer acquired was identical whether she paid £1.40 or £1.50 in our example.

10. As the FTT observed, at [61], there is no definition of consideration in the EU VAT legislation and none of the cases decided by the Court of Justice of the European Communities, later the Court of Justice of the European Union, (together 'the ECJ') which dealt with the meaning of consideration and the value of supplies, is precisely analogous to the situation in this appeal.

11. The same issue has, however, been considered by the FTT in another case, *Borough Council of King's Lynn and West Norfolk v HMRC* [2012] UK FTT 671 (TC) ('*King's Lynn*'). The facts of the *King's Lynn* case were materially the same as in this appeal. The local authority operated car parks with ticket dispensing machines which did not give change. As in the example at [5] above, a customer who did not have the correct change would often insert more than the charge indicated and the machine retained the overpayment but the customer did not obtain any additional parking time. The scale of the charges for parking were fixed by a statutory order made by the

council. The issue in *King's Lynn* was whether the overpayment was chargeable to VAT. The FTT in that case described the critical question as whether there is a link between the total payment made for the parking in cases of overpayment and the supply of parking services. The FTT in *King's Lynn* decided that, in order for an amount to be consideration, there must be a link between what is supplied and what is paid for, established by reference to the agreement between the parties. The FTT decided that the required link was missing in the *King's Lynn* case because the amount to be paid was defined by the statutory order which could not be changed by the council and the customer could not unilaterally change the consideration by paying more when they did not have the correct change. The FTT accordingly allowed the council's appeal.

12. The FTT in this case declined to follow the decision in *King's Lynn*, which was in any event not binding on it. The FTT held that the excess payments made by the customer to NCP were not voluntary because the customer was required to pay at least the amount specified in order to park their vehicle and, if the customer did not have the correct change, the customer was required to pay an additional amount in order to obtain the right to park. The only sense in which the payment could be said to be "voluntary" is that the customer could decide not to buy a ticket which would mean not parking the car and having to go elsewhere. The FTT also found that the consideration was not uncertain because, while it was not possible to determine how much each individual customer would overpay, the amount paid by each customer for the right to park was known at the time that the customer pressed the green button on the machine for it to issue a ticket.

13. The FTT distinguished *King's Lynn* on two bases. First, the FTT in *King's Lynn* based its conclusion, to a significant extent, on the fact that the charges for parking were fixed by the statutory order and the council could not, therefore, lawfully charge customers more than the tariff amounts. This was not the case for NCP. Secondly, the FTT in this case had doubts about the soundness of the conclusion in *King's Lynn* that the council could not charge more than the scale charges set by the statutory order. In granting permission to appeal to NCP, the FTT recognised that there was a potential conflict between its decision and the decision in *King's Lynn* and observed that the issue would benefit from resolution by way of a decision of this tribunal.

Submissions

14. NCP and HMRC agreed that it is necessary to look at the contract, as a starting point, to see what is being supplied and what is being paid – see *HMRC v Airtours Holidays Transport Limited* [2016] UKSC 21, [2016] STC 1509 at [47] – [50].

15. Mr Garcia submitted that the proper approach to the question of whether there is consideration for VAT purposes was not one of domestic contract law (and, indeed, there was no issue in relation to the domestic contract law analysis). That was shown by the comments of the Advocate General Slynn in Case 102/86 *Apple and Pear Development Council v Customs and Excise Comrs* [1988] ECR 1466, [1988] STC 221 ('*Apple and Pear*'):

> "It would … be wrong to construe the phrase 'supply… effected for consideration' in the light of the technical meaning of the words in English domestic law…"

16. Mr Garcia said that it was necessary to start with the EU law concept of consideration and apply it to the contract to determine the nature of the supply and the

price agreed by the parties. The proper EU law test required a direct link between the amount moving from the customer to the supplier and only in so far as there was a direct link between the two did the amount of money paid by the customer constitute consideration for a supply when it was received by the supplier. He contended that if there was no direct link then the payment could not be consideration for the purposes of EU law regardless of the domestic contract law position. Mr Garcia submitted that a direct link requires two elements:

(1) a causal connection; and

(2) a quantitative connection.

17. In our hypothetical example, there is no direct link between the excess payment by the customer and the supply made by NCP and, accordingly, the excess payment is not consideration for the supply and does not form part of the taxable amount. Mr Garcia contended that there was no causal connection between the excess amount and the supply of parking because the supply would be made if the customer did not pay the excess. He also submitted that there was no quantitative connection because the same supply was made notwithstanding the excess or the amount of it. He also submitted that the excess payment was voluntary, in that the customer could choose not to park and drive away, and therefore not consideration for the supply.

18. Mr McGurk, who appeared for HMRC, did not disagree with Mr Garcia's submission that it would be wrong to construe the agreement between NCP and the customer according to domestic contract law when determining the consideration for VAT purposes. Mr McGurk said that the only test for determining whether a payment is consideration for a supply is whether there is a direct link between the two. He described the causal and quantitative elements which Mr Garcia sought to introduce as "unhelpful glosses". Mr McGurk pointed out that there was no authority in the ECJ case law for these additional tests. He contended that, in the hypothetical example, NCP was not prepared to accept less than £1.40 to allow customers to park for an hour. Even if a customer paid more than £1.40, NCP would not grant any additional parking time unless the customer paid at least £2.10 when NCP would allow the customer to park for up to three hours. This showed that NCP agreed to supply one hour's parking for payment of any amount between £1.40 and £2.09. If a customer paid £1.50, there was no overpayment or excess as that was the agreed charge for the right to park for an hour. The fact that NCP would have accepted less (ie £1.40) is irrelevant.

Case law

19. The FTT in *King's Lynn* did not make any specific reference to EU case law authorities whereas the FTT in this case was referred to several decisions of the ECJ, as were we, and it is to those that we now turn. The earliest of the cases that we were referred to was Case 154/80 *Staatssecretaris van Financiën v Association Coöperatieve Aardappelenbewaarplaats GA* [1981] ECR 445 ('the *Dutch Potato* case'). The case concerned a farmers' co-operative which owned a refrigerated potato store. During 1975 and 1976, the co-operative found it unnecessary (because it was planning to sell the store) to levy the usual storage charges on its members. The Dutch tax authority claimed that there was nevertheless consideration for the farmers' use of the store in the form of a reduction in the value of their shares in the co-operative. The ECJ rejected the tax authority's analysis. In its judgment, the ECJ set out some principles which have been followed and applied in later cases. In paragraph 9, the ECJ stated that the interpretation of 'consideration' was a matter of Community law. It is clear, therefore,

that the meaning of 'consideration' for English law purposes does not determine the taxable amount for what is now Article 73.

20. At paragraph 12 of the *Dutch Potato* case, the ECJ set out the requirement for a direct link:

> "A provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received …"

21. At paragraph 13, the ECJ described some of the characteristics of consideration:

> "… the consideration for the provision of a service must be capable of being expressed in money … such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria."

22. It is clear from the *Dutch Potato* case that there must be a direct link between the consideration and the supply if the consideration is to be taken into account in determining the taxable amount. The ECJ did not elaborate on what it meant by a 'direct link' - a point which is important for the issue in this case. There is no difficulty in this case with the requirement that the consideration must be capable of being expressed in money as the relevant payment for the parking charges was made in cash.

23. The third characteristic of consideration stated by the ECJ in the *Dutch Potato* case is that the consideration is a subjective value and not a value assessed according to objective criteria. Mr Garcia submitted that this third characteristic meant that consideration is not to be assessed according to objective criteria in the sense of matters extraneous to what the parties have agreed. It seems to us that this characteristic indicates that the taxable amount should be assessed by reference to the value of the consideration, expressed in monetary terms, actually received by the supplier even if it could be shown that the price paid is in fact higher or lower than, say, an objectively ascertained market price. This has been confirmed more recently in Case C-285/10 *Campsa Estaciones de Servicio SA v Administración del Estado* [2011] ECR-I 5059 ('*Campsa*'). That case concerned the relationship between the supply and the value of the consideration given in return for it. The issue in the case was whether a provision of Spanish law that imposed VAT on a greater amount where goods were sold at an undervalue was contrary to EU law. In paragraph 25 of its judgment, having summarised and applied the principles already set out above, the ECJ observed that "the fact that the price paid for an economic transaction is higher or lower than the cost price, and therefore, higher or lower than the open market value is irrelevant" for the purposes of classifying the transaction as 'a transaction for consideration'. At paragraph 28, the ECJ stated:

> "According to settled case-law, in accordance with that general rule, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. Moreover, that consideration must be capable of being expressed in money."

24. The meaning of 'direct link' was considered by the ECJ in *Apple and Pear*. The Apple and Pear Development Council was a statutory body established with the

principal object of promoting the sale of apples and pears in England and Wales. All commercial growers with two hectares or more and 50 or more trees had to register with the Council and pay a compulsory annual charge, based on the area of their land, to meet its expenses. The issue, which was the subject of successive appeals and finally came before the ECJ, was whether the Council carried on a business for VAT purposes and this turned on whether it involved the making of taxable supplies for consideration. The ECJ focussed on the meaning of 'direct link'. At paragraph 15, the ECJ stated:

> "Moreover, no relationship exists between the level of benefits which individual growers obtain from the services provided by the Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order."

This led the ECJ to conclude that the mandatory charges did not constitute consideration having a direct link with the benefits accruing to the individual growers as a result of the Council's activities. Accordingly, those activities could not be regarded as supplies of services effected for consideration for VAT purposes. The *Apple and Pear* case shows that the direct link between the consideration and the supply requires there to be some causal relationship between the amount paid or to be paid (in the case of monetary consideration) and the benefit obtained by the customer from the services provided. That is not to say that some objective assessment of the value of the supply must be applied as that would be contrary to the ECJ's clear ruling in the *Dutch Potato* case that the consideration is a subjective value and not a value assessed according to objective criteria.

25. The meaning of 'direct link' was explained further by the ECJ in Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leuwarden* [1994] STC 509 ('*Tolsma*'). The facts of that case, which are almost too well known to set out, concerned the operator of a barrel organ who played music on the public highway for which he solicited remuneration from passers-by by offering his collecting tin for donations. The Dutch tax authority claimed that Mr Tolsma should account for VAT on the amounts collected from the passers-by. At paragraph 14, the ECJ stated:

> "… a supply of services is effected 'for consideration' … and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

26. The ECJ observed, in paragraphs 17 and 19, that there was no agreement between the parties, ie Mr Tolsma and the passers-by, and no necessary link between the musical service and the payments to which it gave rise, which were entirely voluntary and uncertain, the amount being practically impossible to determine in advance. It is clear from *Tolsma* that there is a taxable transaction only if a direct link exists between the services supplied and the consideration received. The direct link means that there must be a legal relationship between the supplier and the customer pursuant to which the supplier receives remuneration in return for the services supplied to the customer which is the value actually given by the customer in return for the service.

27. The ECJ returned to the meaning of 'direct link' in Case C-246/08 *Commission v Finland* [2009] ECR I-10605 ('*Finland*'). The case concerned infraction proceedings brought by the Commission because it considered that Finland had breached EU law by not charging VAT on legal aid services relating to legal proceedings that were provided

by public offices to individuals in return for a part contribution from those individuals. The ECJ dismissed the proceedings. The ECJ explained that the Commission had not asserted in the proceedings that the provision of legal services was an economic activity in those instances where they were provided to people whose income was so low that they paid no contribution at all. The Commission challenged the legal aid scheme only as it required part payment by recipients whose incomes, whilst modest, were higher than those of persons entitled to free legal aid. The ECJ concluded, in paragraph 51, that the link between the legal aid services provided by the public offices and the payment made by the recipients did not appear to be sufficiently direct for the contributory payment to be regarded as consideration for those services. The facts and reasoning that led the ECJ to that conclusion are set out in paragraphs 48 and 49 of the judgment:

> "48. Although this part payment represents a portion of the fees, its amount is not calculated solely on the basis of those fees, but also depends upon the recipient's income and assets. Thus, it is the level of the latter and not, for example, the number of hours worked by the public offices or the complexity of the case concerned which determines the portion of the fees for which the recipient remains responsible.
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> 49. It follows that the part payment made to the public offices by recipients of legal aid services depends only in part on the actual value of the services provided [;] the more modest the recipient's income and assets, the less strong the link with that value will be."

28. In paragraph 50 of its judgment in *Finland*, the ECJ stated that the disparity between the level of the contributions and the gross operating costs of the public offices providing the legal services suggested that the contributory payments must be regarded "more as a fee, receipt of which does not, per se, mean that a given activity is economic in nature, than as consideration in the strict sense." The ECJ did not explain what it meant by "a fee" or how that should be distinguished from consideration. This is confusing as "fees" in paragraph 48 clearly refers to consideration for the legal aid services. Given the facts of the case, it appears to us that "fee" in paragraph 50 of *Finland* must refer to a payment to a public body as a contribution towards costs met by that body where the contribution is set not (or not wholly) by reference to the cost or value of any services provided but by reference to extraneous factors such as the payee's income and assets.

29. A very similar issue to that considered in *Finland* arose in Case C-520/14 *Gemeente Borsele v Staatssecretaris van Financiën* judgment of 12 May 2016, [2016] STC 1570 ('the *Dutch School Bus* case'). The facts of that case were that the municipality of Borsele provided transport to and from school for certain pupils. The municipality paid for the transport and recovered means tested contributions from around one third of the parents, recovering 3% of the cost to the municipality of providing the school bus service. The key issue in the case was whether the municipality was making a supply of services for VAT purposes when it provided the school bus service. That turned on whether the parental contribution to the transport costs was consideration. The ECJ noted, in paragraph 25, that the contribution by the parents was not calculated on the basis of the distance travelled, the cost of each journey or the number of journeys made. The ECJ then observed at paragraph 26:

> "However, the fact that the price paid for an economic transaction is higher or lower than the cost price is irrelevant to the question whether a transaction is to be regarded as a 'transaction effected for consideration'. The latter

> concept requires only that there be a direct link between the supply of goods or the provision of services and the consideration actually received by the taxable person."

30. In paragraph 27, the ECJ stated that the fact that approximately one third of the parents paid a contribution towards the school transport permitted the inference that the municipality supplied services for consideration for VAT purposes. In paragraph 28, the ECJ, approving the observations of the Advocate General, noted that the existence of the supply of services for consideration is not enough to establish the existence of an economic activity for VAT purposes. The ECJ, notwithstanding that there was a supply of services for consideration, then turned to consider whether the municipality should be regarded as carrying on an economic activity for VAT purposes. In paragraph 33, the ECJ noted that contributions were paid by only a third of the parents and accounted for only 3% of the overall transport costs and then observed:

> "33. … Such a difference between the operating costs and the sums received in return for the services offered suggests that the parental contribution must be regarded more as a fee than as consideration.
>
> 34. It therefore follows from that lack of symmetry that there is no genuine link between the amount paid and the services supplied. Hence, it does not appear that the link between the transport service provided by the municipality in question and the payment to be made by parents is sufficiently direct for that payment to be regarded as consideration for that service and, accordingly, for that service to be regarded as an economic activity within the meaning of Article 9(1) of the VAT Directive."

31. The ECJ then also noted, in paragraph 35, that the school bus service was provided on different conditions from those under which passenger transport services were usually provided and that the municipality bought in the transport services and made them available to parents as part of its public service activities. The ECJ concluded that for all the reasons set out in paragraphs 33 to 35 of its judgment, the municipality was not carrying out an economic activity and, therefore, was not a taxable person.

32. Mr Garcia submitted that *Finland* and the *Dutch School Bus* case showed that there is a quantitative element in the direct link that is required in order to establish that a payment is consideration for a supply. He contended that the contributions in *Finland* and the *Dutch School Bus* case did not relate to the work performed or service supplied just as the excess payment to NCP did not relate to the number of hours parked. We do not accept that the position in the present case is akin to the position in the *Finland* and *Dutch School Bus* cases. It appears to us that, in those cases, the ECJ was saying that the amount paid for goods or services may be higher or lower than the cost of providing them and still be consideration for VAT purposes. However, in those cases the amounts paid (or payable) to the public authorities were not only unrelated to the actual cost or value of the services supplied but were set by reference to other factors such as means; such other factors not being the factors which normally determine the level of consideration for that kind of service in a more typical commercial relationship. In those circumstances, the link may not be sufficiently direct to be regarded as consideration for the supply. Further, in our view, it is significant that the disparity between the amounts paid by the customers in *Finland* and the *Dutch School Bus* case and the cost or value of the services supplied was very great. It is that factor (the lack of symmetry) which in part led the ECJ to conclude that the link between the amount paid and the services supplied did not appear to be sufficiently direct to amount to

consideration for VAT purposes. We do not consider that, in those cases, the ECJ was stating that an amount paid by a customer can only be consideration for VAT purposes if and to the extent that it is causally or quantitatively linked to the services supplied. The relevant test remains whether there is a direct link between the payment and the supply and that does not require further elaboration nor should it be over refined.

33. We were also referred to Case C-38/93 *Glawe Spiel- und Unterhaltungsgerate Aufstellungsgesellschaft mbH&Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] ECR-I 1679 [1994] STC 543 ('*Glawe*'). The taxpayer company operated gaming machines which were regulated by law so as to ensure that they paid out as winnings at least 60% of the coins inserted by players. This was achieved by ensuring that when coins were inserted into the machines, they either went into a reserve compartment, which held the stock of coins from which the winnings were paid out, or into a cash box compartment, the contents of which were retained by the operator. The issue was whether the operator was required to account for VAT on the total amount inserted into the machine by players or only the amount retained by the operator, ie the total stakes less winnings. The ECJ decided that the taxable amount did not include the statutorily prescribed proportion of the total stakes inserted which corresponded to the winnings paid out to players.

34. Mr Garcia submitted that *Glawe* showed that, although the player had to insert a set amount into the machine to play the game, that contractual consideration did not determine the taxable amount for VAT purposes. The operator was not required to account for VAT on the full amount inserted but only on the smaller amount that represented the consideration for the supply.

35. Mr Garcia also referred us to another gaming machine case, Case C-440/12 *Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt) v Finanzamt Hamburg-Bergedorf* judgment of 24 October 2013, [2014] STC 505 ('*Metropol*') in which the amounts payable as winnings were stipulated by law in a way that was similar to that in *Glawe*. The ECJ said at paragraph 38:

> "… the taxable amount is determined by what the taxable person actually receives as consideration, and not what one particular service user pays …"

36. In our view, the rationale of *Glawe* is that the consideration given by the customers in return for the right to play the gaming machine did not include the proportion of the stakes diverted to the reserve compartment as those amounts were never actually received by the operator. This was made clear by the ECJ in *Metropol* at paragraph 42:

> "… the consideration actually received by an operator in return for making gaming machines available is subject to 'mandatory statutory requirements' and, as a result, consists only of 'the proportion of the stakes which he can actually take for himself' (see *Glawe*, paragraph 9, and Case C-377/11 *International Bingo Technology* [2012] ECR I-0000, paragraph 26), that is to say, the cash receipts after a set interval."

37. Although neither the operator nor the customer would know whether the stake or any individual coin was destined for the reserve or the cash box, the ECJ appears to have taken a pragmatic approach and determined that the taxable amount is the consideration actually received by the operator in return for making the machines available, consisting only of the proportion of the stakes which he can actually take for

himself (see paragraph 40 of *Metropol*). We consider that the facts of *Glawe* and *Metropol* are very different to the facts of the present case. Both NCP and the customer inserting the coins know how much has been paid and received for any particular supply of the right to park. There is also no question of NCP not receiving and retaining the excess payment in the hypothetical example given above – NCP retains the whole £1.50. We do not consider that *Glawe* and *Metropol* are of any assistance in relation to this case and they do not support the submissions made on behalf of NCP.

38. Mr Garcia also relied on Case C-404/99 *Commission v French Republic* [2001] ECR-I 2667 ('the *French Tips* case') which concerned infringement proceedings brought by the European Commission against France in relation to the VAT treatment of compulsory service charges. The relevant French legislation concerned the levying of VAT on tips or service charges which were defined for this purpose as compulsory price supplements which are included in the total price charged to the customer and which are generally borne by the customer by way of remuneration for the 'service' provided. The ECJ made clear that it was not in this case dealing with "gratuities or voluntary tips paid by the customer spontaneously and directly to employees of the establishment in question as a token of his satisfaction, over and above the service charge itself" (see paragraph 7). The Commission accepted that, in accordance with *Tolsma*, those gratuities were not liable to VAT (paragraph 16). Under French law although VAT was generally chargeable on the total price including the service charge, there was an administrative concession allowing the taxpayer to exclude service charges from VAT if certain conditions were met, including that the amount was shared out in full between the staff members having direct contact with the customers and was recorded in the employees' annual wage statement. The ECJ held that France had failed to fulfil its obligations because the total sum demanded from the customer or appearing on the bill constituted the consideration for the service supplied to the customer and that consideration included the service charge. Mr Garcia submitted that the ECJ did not concern itself with the subjective reasons why a customer did or did not pay a voluntary tip but looked only at whether the amounts shown on the bill were compulsorily payable. Where a customer paid both the compulsory element of the bill and left a gratuity, an apportionment was required.

39. We do not consider that the *French Tips* case sheds any light on the issue for determination in this case. The Commission and the Court accepted that real gratuities were like *Tolsma* payments and were not liable to VAT because they were purely optional and uncertain, and their amount was practically impossible to determine. The giving of a gratuity in a restaurant differs from the *Tolsma* type of donation because in the case of the street musician, there is never any legal relationship between the musician and the passer-by whereas in a restaurant there is a legal relationship between the customer and the establishment pursuant to which consideration, including the service charge has been paid in exchange for the food and service. But in the case of a true gratuity, that legal relationship simply forms the backdrop to the giving of the additional sum; the gratuity is paid only after the food and service have been consumed and where there is no contractual obligation to pay it. The payment, or the promise to pay, is not a precondition for the acquisition of the service. In the present case, the money must be paid to NCP before the right to park your car can be acquired. The payment of the extra 10 pence is not 'purely optional' in the sense in which that term is used in *Tolsma* and the *French Tips* case.

Discussion

40. The only issue for us, as it was for the FTT, is whether NCP is required to account for VAT on the payments in excess of the charges for car parking shown on the machines. This turns on whether such payments are consideration for a supply of services by NCP for VAT purposes.

41. It is clear from *Tolsma* that there is a supply of services for VAT purposes where there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. Article 73 of the PVD states that the taxable amount is everything which constitutes consideration obtained or to be obtained by the supplier from the customer or a third party in return for the supply, including subsidies (which are irrelevant in this case). In the hypothetical example, the customer paid £1.50 to obtain a ticket which allowed him or her to park for up to an hour. The customer could have obtained the same right in return for a payment of £1.40. When determining the taxable amount, the question posed by Article 73 is not: could the customer have obtained the same service for less? Article 73 requires the Tribunal to ask what was consideration received or to be received by the supplier from the customer (there was no third party in this case) in return for the supply.

42. Consideration for the purposes of VAT does not bear the same meaning as it does for the purposes of English contract law and an analysis based on domestic law would not necessarily produce the correct result for VAT purposes - see paragraph 9 of the *Dutch Potato* case. There is accordingly no need to analyse the supplies using English contract law concepts of offer and acceptance or consideration. It follows that what is shown on the machine or written on the ticket is of only limited relevance.

43. The meaning of consideration for VAT purposes is clear from the *Dutch Potato* case and *Campsa*: it is the value actually given by the customer (or a third party) in return for the service supplied and actually received by the supplier and not a value assessed according to objective criteria. The service and the value given or to be given in return for it may be ascertained from the legal relationship between the supplier and the customer. Under the contract between NCP and the customer which is formed when the customer inserts money into the ticket machine at the car park and receives a ticket, NCP grants the customer the right to park his or her car for one hour in return for inserting not less than £1.40. If the customer wishes to park for up to three hours then he or she must pay not less than £2.10. It follows that NCP agrees to grant a customer the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. If a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to one hour. Accordingly, that is the taxable amount for VAT purposes.

44. It follows from our analysis that we also consider that *King's Lynn* was wrongly decided. We consider that the tribunal in that case was unduly influenced by the fact that the car parking charges were set by statutory order and that neither the council nor the customer was able unilaterally to alter the charge without the order being amended. We do not however, accept that the way in which the tariff of charges is set can determine the nature of the overpayment. Our decision does not mean that a car park operator is in breach of a statutory tariff by accepting an overpayment in our hypothetical example. That would depend on the proper construction of the statutory order bearing in mind the prevalence of machines accepting overpayments and the council's awareness of the use of those machines.

Disposition

45. For the reasons given above, NCP's appeal against the Decision is dismissed.

Costs

46. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and should include a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mrs Justice Rose DBE

Judge Greg Sinfield

Release date: 16 June 2017