

**THE HIGH COURT**

[2022] IEHC 642

[2021 44 R]

[TAC 21 44 R]

[TAC M 711/18]

**BETWEEN**

**THE REVENUE COMMISSIONERS**

**APPELLANT**

**AND**

**NOVARTIS IRELAND**

**RESPONDENT**

**JUDGMENT of Ms. Justice Emily Egan delivered on the 23<sup>rd</sup> day of November, 2022**

**Introduction**

1. This is a case stated for the opinion of the High Court pursuant to s. 949 AQ of the Taxes Consolidation Act, 1997 in relation to a determination of the Tax Appeal Commission (“the TAC”) of the 24<sup>th</sup> June, 2021 (“the determination”). This concerned an appeal by Novartis Ireland Ltd (“Novartis”) against a refusal of the Revenue Commissioners (“Revenue”) in respect of its claim for a refund of VAT in the total amount of €1,000,048.662. The substantive issue before the TAC was whether rebate payments made by Novartis to certain private health insurers (“the insurers”) constituted a reduction in the consideration received by Novartis for VAT purposes for its supply of Lucentis to certain private hospitals (“the hospitals”). The rebate payments in question were made by Novartis pursuant to contractual volume based discount agreements concluded as between it and the insurers in respect of its supply of Lucentis, a prescription only medicinal product, to the hospitals for use in the medical treatment of the insurer’s policy holders. The TAC found that the rebate payments granted by Novartis to the insurers constituted a reduction in the consideration received by Novartis in respect of

the supply of Lucentis. Consequently, the TAC found that Novartis was entitled to relief by way of repayment of VAT and that Revenue's refusal of a VAT refund could not stand. The sole question stated for this court is whether the TAC was correct in law in that determination.

### **Factual Background**

2. Novartis, a multinational healthcare company, supplies Lucentis. Lucentis is authorised for use in the treatment of age related macular degeneration and macular oedema caused by diabetes or by retinal vein occlusion. Lucentis is an ongoing treatment, rather than a once off treatment, and is administered by injection to patients by clinicians in the hospitals.

3. Lucentis is supplied by Novartis to its wholesaler, Allphar, who then distributes it to the hospitals. To this end, Novartis entered into various agreements with insurers, described as volume based discount agreements. Pursuant to these agreements, Novartis agreed to grant the insurers volume based discounts in the form of rebate payments in respect of the insurers' reimbursement to their policy holders of the costs of the administration of Lucentis. Pursuant to these agreements, the insurers agreed to provide full reimbursement cover under their relevant health insurance policies for up to nine vials of Lucentis per eye per year. The relevant price discounts/rebates are calculated by reference to the average ex-factory<sup>1</sup> price of Lucentis in the relevant year exclusive of VAT and other applicable taxes. The volume based discount agreements provide that in return for the volume based rebates which will be paid to the insurers by Novartis, the insurers agree to provide Novartis with data and information concerning the use, prescription and/or administration of Lucentis by relevant different clinical indications on a national basis. The agreed mechanism for applying the volume based discounts is on a retrospective basis within sixty days of receipt by Novartis of the relevant invoice from the

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<sup>1</sup>The ex-factory price is established in accordance with the framework agreement of the Irish Pharmaceutical and Healthcare Association and is the maximum price that can be charged for a medicinal product in Ireland. The ex-factory price is calculated at no more than the average price of a certain number of countries and is realigned every year.

insurer on foot of which Novartis would collate and calculate the rebates due based on the volume of the insurer's reimbursement for Lucentis in each specific year. The relevant discounts are applied on an increasing basis depending on the volume of vials reimbursed by the relevant insurer in the relevant year.

4. Two witnesses gave evidence at the hearing before the TAC. These witnesses were, respectively, Paul Johnson, head of finance with Novartis and Gilles Ducorroy, global head of real world evidence for global services with Novartis. These witnesses gave evidence that Novartis has concluded such volume based discount agreements with three insurers on the Irish market. The witnesses' evidence was that the information provided to Novartis by the insurers with reference to the number of vials of the medicinal product used was required to validate the calculation of the rebate. Information other than the number of vials of Lucentis was of no interest to Novartis. The validation process prior to the payment of rebates also involved checking the daily sales reports provided by the wholesaler to verify that the Lucentis administered was that distributed by Allphar and had not been sourced from outside Ireland. The witnesses clarified that the product flow of Lucentis was that Novartis provided the product to Allphar, who provided it to the hospitals after which the clinicians administered the product to patients in the hospitals. The funds flow in respect of the medicinal product was that Allphar made payments to Novartis, the hospitals made payments to Allphar, the insurers made payments to the hospital and Novartis made rebate payments to the insurers.

5. It is important to note that Novartis offers two separate volume based discounts in respect of Lucentis. In addition to the volume based discounts agreements referred to above which it has concluded with insurers, Novartis has also concluded volume based discount agreements with the hospitals. In respect of a particular vial of Lucentis, therefore, both the rebate payment to the insurer and the rebate payment to the hospital are entered in Novartis's financial records as a sales deduction against medicinal product sales for which a repayment of

VAT in the relevant amount is sought from Revenue. It is common case that Revenue have allowed a refund of VAT in respect of the volume based rebates paid by Novartis to the hospitals but not in respect of the volume based rebates paid by Novartis to the insurers.

6. The witnesses' testimony was that the volume based discount agreements operating as between Novartis and the insurers, on the one hand, and as between Novartis and the hospitals on the other, facilitated patient access to Lucentis. In practice a clinician will not be in a position to prescribe a particular medication<sup>2</sup> unless it is included in the schedule of benefits of a private health insurance company such that the price thereof will be reimbursed by the insurer to the hospital. It is primarily a matter for an insurer to decide whether to include a product in the schedule of benefits. If it does so, the insurer generates a code and provides that coding information to the hospital and to Novartis.

7. No oral evidence was presented to the TAC by Revenue.

### **The determination**

8. The determination does not separately identify the Commissioner's material findings of fact. However, in the case stated the TAC records its material findings of fact which accord with the above factual summary. After setting out the arguments and submissions of both Novartis and Revenue, the TAC determined that Novartis granted discounts to insurers in respect of Lucentis supplied to the hospitals. The TAC observed that the taxable amount attributable to Novartis should be an amount corresponding to the price at which Lucentis was supplied, reduced by the discounts granted to the insurers. The TAC held that, in failing to afford Novartis the VAT refund sought, Revenue was collecting an amount of VAT exceeding that which Novartis had received. The TAC further determined that the economic and commercial reality was that the insurers could be viewed as the final consumer of Lucentis

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<sup>2</sup> Leaving aside any public arrangements for reimbursement

supplied by Novartis, notwithstanding the fact that the insurers were not the direct beneficiaries of the supply of the medicinal product as same was administered to their policy holders. The TAC determined that this fact was not such as to break the direct link between the supply of Lucentis and the final consideration received by Novartis. The TAC further determined that having regard to the contractual agreements into which it had entered with the insurers, Novartis did not have freely at its disposal the full amount of the price received in respect of the supply of Lucentis and that this was the case even though Novartis was not legally obliged to grant the insurers a discount but did so pursuant to a private contractual agreement.

9. Revenue appealed against this determination.

### **High Court's jurisdiction**

10. It is common case that the High Court's jurisdiction in appeals by way of case stated is as found in *Mara v. Hummingbird* [1982] ILRM 421, Kenny J. at p. 426, *MacCarthaigh v. Cablelink* [2003] 4 IR 510 and *Ó Culacháin v. McMullan* [1995] IR 217, Blaney J. at p. 223 as recently confirmed by Costello J. in *Deane v. Revenue Commissioners* [2018] IEHC 519 p. 3.

11. These establish per Blaney J:

*“(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*

*(2) Inferences from primary fact are mixed questions of fact and law.*

*(3) If the judge's conclusion show that he has adopted the wrong view of the law, they should be set aside.*

*(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*

*(5)Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the Court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.”*

**12.** In reality, there is no dispute as to the TAC’s findings of primary fact all of which were admitted or proved. Equally, no particular criticism is made by Revenue of the TAC’s inferences from primary fact. However, Revenue dispute the Commissioner’s finding that there is a reduction in the taxable amount for the purposes of the VAT Acts. This is essentially a finding of law which the court will set aside if based on an incorrect view of the law.

### **Legislative context**

**13.** Irish and EU law provide for a refund of VAT where the relevant price of the sale of goods or supply of services is reduced following sale. Article 73 of Council Directive 2006/112/EEC (“the VAT Directive”) provides:

*“In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, 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.”*

**14.** Article 90 (1) of the VAT Directive provides:

*“In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.”*

15. Article 90 is transposed into Irish law by s. 39 (2) of the Value Added Tax Consolidation Act, 2010 with the Value Added Tax Regulations 2010 providing for such refund.

**Case law of the European Court cited by the parties**

16. Both parties relied extensively, whether by way of application or contradistinction, upon a reasonably limited number of authorities of the European Court of Justice and the Court of Justice of the European Union (“collectively the European Court”).

17. It is necessary to consider the relevant cases in some detail in order to understand and adjudicate upon the arguments of the parties.

***Elida Gibbs Ltd v. Commissioner of Customs and Excise (Case C-317/94)***

18. Elida Gibbs, a subsidiary of Unilever, manufactured toiletries which it sold to retailers (or wholesalers and cash and carry traders for resale to retailers). To promote sales of its products, Elida Gibbs operated a money-off coupon scheme and a cash back coupon scheme.

19. There were two categories of money-off coupon scheme, the basic scheme and the retailer specific scheme. Under the basic scheme, Elida Gibbs promoted a particular product for a limited period and arranged for money-off coupons to be distributed to the public either directly or as cut out coupons in magazines and similar publications. Under the retailer specific scheme, the retailer organised a promotional scheme for a particular line of products. Pursuant to the basic scheme, the retailer (having paid Elida Gibbs the full price for the relevant products) could elect to either reject the money-off voucher or to accept it and provide the equivalent discount to the relevant consumer at the point of sale. Either way, provided it demonstrated a sufficient volume of purchases during the period of the campaign, the retailer was entitled to redeem the value of the voucher from Elida Gibbs. Under the retailer specific

scheme, the retailer was obliged to honour the voucher at the point of sale, but then had an automatic entitlement to make a redemption application to Elida Gibbs.

**20.** By contrast, under the cash back coupon scheme, the coupon was printed directly on the packaging of an Elida Gibbs product and the consumer purchasing the product from the retailer was then entitled to send the voucher directly to Elida Gibbs who would then make the promised cash refund.

**21.** The issue which arose was essentially whether or not Elida Gibbs was entitled to a VAT refund in respect of the rebates arising under these promotional schemes.

*Advocate General Fennelly*

**22.** Advocate General Fennelly emphasised that the retailer was a stranger to the transaction between Elida Gibbs and the customer. The relevant retailer may not know when purchasing the goods from Elida Gibbs that those goods are or would be the subject of a promotional scheme. Moreover, when a redemption application was made to Elida Gibbs, one was not in a position to verify whether the goods in respect of which the refund was granted were those which Elida Gibbs had actually supplied to any particular retailer. There was therefore a lack of correlation between the original supply and the goods in respect of which the coupons were subsequently redeemed. The Advocate General's view was that a unilateral payment made to some but not all retail customers could not be metamorphosed into an *ex post facto* price reduction for an entirely different and unidentified transaction. Therefore, in light of the need for a direct link between the goods or services provided and the alleged discount paid, the entitlement to a VAT refund did not arise.



*The Sixth Chamber of the European Court*

**23.** The European Court did not follow this reasoning. Much of the court's analysis centred on the principle that the VAT to be collected by the tax authorities could not under any circumstances exceed the amount of tax paid by the final consumer i.e., the retailer's customers. However, in addition to observing that the tax authorities may not charge an amount exceeding the tax paid by the final consumer, the European Court also noted that it would not be in conformity with the Directive for the taxable amount used to calculate the VAT chargeable to the manufacturer (who has refunded the value of the cash back coupon directly to the final consumer or has refunded the value of the money-off coupon to the retailer) to exceed the sum finally received by it. Were it otherwise, the principle of neutrality of VAT *vis-à-vis* taxable persons, of whom the manufacturer was one, would not be complied with.

**24.** The European Court did not appear troubled by the lack of a contractual link between Elida Gibbs and the ultimate consumer who benefitted from the discount or by the absence of a correlation between a particular supply of goods by the manufacturer and the goods in respect of which the coupon was redeemed. Rather, the European Court held that the principle of neutrality required that account can be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction either through its retailers or by direct repayment of the value of the coupons.

**25.** In the present case, Novartis observes that whilst it may fairly be said that it has no contractual relationship with the patient benefiting from the injections of Lucentis or indeed with the insurers (at least within the four corners of the relevant supply chain), such was the case in *Elida Gibbs*. Novartis thus argues that the volume based discount agreements with the

insurers fall within the ratio of *Elida Gibbs*. By contrast, Revenue argue that the present case is more akin to *Ibero Tours*, which I will now examine.

*Finanzamt Düsseldorf-Mitte v. Ibero Tours GmbH (Case C-300/12)*

**26.** Ibero Tours, a travel agent provided intermediary services to tour operators from whom it received an agreed commission. In order to promote its business, Ibero Tours, on its own initiative and at its own expense, granted the final consumer a reduction in the price of the principal service provided by the tour operator which it funded from part of its commission. Having first paid VAT on all of the commission, Ibero applied to the German tax authorities for an adjustment so that the price reduction granted to its clients would be deducted from the taxable amount. When this was refused the matter ultimately came before the First Chamber of the European Court.

**27.** The European Court stated that, in contradistinction to *Elida Gibbs*, the tour operator was not the head of a chain of operations ending with the final consumer. Rather, the tour operator provided services directly to the final consumer. Ibero Tours intervened as an intermediary in a single transaction providing a service totally separate from that provided by the tour operator. Furthermore, neither the consideration received by the tour operator for its services, nor the commission paid by the tour operator to Ibero Tours for its activity as an intermediary were reduced. Essentially, the tour operator was not affected by the existence or amount of the discount which had no impact on the price of the travel services provided by the tour operator or on the price of the intermediary services provided by Ibero Tours.

**28.** By analogy with *Ibero Tours* case, Revenue argue that the insurers are not part of the supply chain and that the payments made by Novartis thereto are extraneous thereto arising under discrete contractual arrangements. Extensive argument in the case centred upon the two *Boehringer* cases which I will now consider.

*Finanzamt Bingham-Alzey v. Boehringer Ingelheim Pharma GmbH & Co. (Case C-462/16)*  
*(“Boehringer I”)*.

**29.** Boehringer manufactured medicinal products and supplied those products, subject to tax, to pharmacies via wholesalers. Pharmacies issued Boehringer’s pharmaceutical products to persons with statutory public health insurance. The mechanism was that the pharmacies would supply the medicinal products to the public health insurance funds and that the latter would then make them available to persons insured by them. In so doing, the pharmacies granted the public health insurance funds a discount on the price of the medicinal products. Boehringer was obliged by statute to provide the pharmacies with a commensurate price rebate after supply. Pharmacies also issued pharmaceutical products to persons with private health insurance pursuant to individual contracts with them. Unlike the public health insurance funds, the private health insurance funds did not purchase the medicinal products. Rather, they merely reimbursed the persons insured by them for the costs incurred in the purchase of the products. However, pharmaceutical companies like Boehringer were similarly bound by German law to grant the private health insurance companies a discount on the price of the medicinal products. Germany’s taxation authority allowed Boehringer to deduct the price rebate applicable with respect to supplies of the medicinal products in the context of public health insurance but not in the context of private health insurance. This was because the private health insurance companies did not purchase the medicinal products prior to their supply to the ultimate patient/consumer and therefore were not part of the supply chain leading from Boehringer to the final consumer.

*Advocate General Tanchev*

**30.** Advocate General Tanchev stated that the essence of the development of the law in *Elida Gibbs* lay solely in the finding that it was unnecessary for a taxable person to be

contractually linked to the direct beneficiary of a discount before the discount could amount to a price reduction after supply for the purposes of Article 90. Therefore, the absence of a contractual link between Boehringer and the private insurance funds to whom it was required under German law to issue a discount was also irrelevant. The *Elida Gibbs* rule did not apply only when the recipient of a discount was the final consumer in a supply chain beginning with the taxable person providing that discount.

**31.** Tanchev stated that *Ibero Tours* did not govern the case before the court because Ibero Tours was held to be an intermediary to a single transaction only rather than part of a chain of transactions.

Having rejected the applicability of *Ibero Tours*, Tanchev stated that as a result of discounts mandated by legislative intervention, Boehringer had not freely at its disposal the full amount of the price received at first sale of its products to pharmacies or wholesalers. At most Boehringer was a mere temporary custodian of that part of the amount received that it was bound to pay later to the public and private health funds as a rebate.

**32.** In Tanchev's view, none of this was impacted by the fact that the private insurance fund was not the direct beneficiary of the medicinal products supplied by Boehringer. This did not break the direct link between the supply of the goods and the consideration received. Indeed, Tanchev took the view that the private health insurance fund, rather than the privately insured person, could be viewed as the final consumer as this accorded more with the economic realities which is a fundamental criterion of the VAT system.

**33.** Finally, Tanchev stated that no question arose in the case as to whether Boehringer made payments to the private health fund as consideration for some sort of service<sup>3</sup>. This

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<sup>3</sup> See paragraph 42 of his opinion, Tanchev stated; “Nor, would I add, does any question arise as to whether Boehringer makes payments to private health funds as consideration for some sort of service. This is clearly not the case”

observation, with which there is no suggestion the court disagreed,<sup>4</sup> strongly suggests that the provision of reimbursement cover by an insurer does not represent the provision of a service to the manufacturer of the product in question.

*The fifth Chamber of the European Court*

**34.** In its judgment, the European Court emphasised that Article 90 requires member states to reduce the taxable amount (and consequently the amount of VAT payable) whenever after the transaction has been concluded, part or all of the consideration has not been received by the taxable person. The European Court stated that one of the fundamental principles of the VAT Directive was that the taxable amount is the consideration actually received by the taxable person. This principle is repeated on several occasions in the court's judgment (see paragraphs 32, 35, 39 and 42).

**35.** Therefore, where the pharmaceutical company was not able to freely dispose of the full amount of the price received on the sale of its products to the pharmacies, on the basis that there was in place a discount fixed by law that the pharmaceutical company was obliged to grant, the taxable amount must be reduced commensurate therewith.

**36.** The court agreed with Tanchev's analysis that in the particular circumstances of the case before it, the private health insurance companies must be regarded as being the final consumer; as a result of which the taxable amount on which VAT was calculated could not exceed that paid by the private health insurance companies.

**37.** Novartis argue that it falls squarely within this rationale. It contends that in this case also, the insurers may be regarded as the final consumer and that the taxable amount on which

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<sup>4</sup> The judgment of the European Court specifically refers to paragraph 42 of Tanchev's opinion at paragraph 45 of its judgment.

VAT is levied may be no greater than that paid by the insurers net of the discount granted to them.

**38.** Revenue, on the other hand submit that *Boehringer* is distinguishable from the present case on the basis that the hospitals and not the insurers are the final consumer. This is because unlike the position that pertained in *Boehringer*, Lucentis is not supplied to the patients as part of a supply of goods but as part of a medical service provided by the hospital to its patients (involving a range of clinical and health services necessary for the safe and effective injection of Lucentis into the patient's eye at the hospital). This, Revenue maintain, breaks the chain of supply as between Novartis, Allphar and the hospitals on the one hand and all subsequent bilateral payment related transactions involving the insured patients/ policy holders and their insurer; the insurer and the hospitals; and/or the insurers and Novartis. I will consider this argument further below.

*Boehringer Ingelheim RCV GmbH & Company KG Hungarian Branch v. Appeals Directorate of the National Tax and Customs Office (Case C-717/19) ("Boehringer 2")*.

**39.** The facts of *Boehringer 2* are very similar to *Boehringer 1* save that the underlying case concerned discount payments made by *Boehringer* to the Hungarian State Health Insurance Agency (NEAK). Unlike the position that pertained in Germany, Hungarian law did not mandate the granting of such a discount. However, *Boehringer* elected to conclude discount agreements because this guaranteed that the medicinal products that it marketed would be subsidised within Hungary by NEAK.

**40.** The Seventh Chamber of the European Court held that such discounts, granted not by virtue of legislation of a binding nature but on the basis of a private law agreement the conclusion of which was optional for the parties, ought to be treated in the same way as the legislatively mandated discounts granted in *Boehringer 1*.

### **Legal Principles emerging from this jurisprudence**

41. The following legal principles, emerge from the case law of the European Court considered above.

1. The amount which is considered for tax purposes for the calculation of VAT, or the taxable amount, includes everything which can amount to consideration obtained by a manufacturer or supplier<sup>5</sup> in return for the supply in question irrespective of whether the consideration is received from the customer or from a third party.
2. A taxable person has an entitlement under Article 90 to reduce the taxable amount whenever some or all of the consideration has not been received.
3. The approach of the European Court to the interpretation of the entitlement of a taxable person under Article 90 to reduce the taxable amount has not in general been to interpret this provision restrictively.
4. The basic principle set out in Article 90 has been explained or formulated by the European Court in several different ways, two of which I will highlight and contrast here.
5. Pursuant to the first formulation, the emphasis is on the principle that the VAT system is intended to tax only the final consumer. Therefore, the taxable amount serving as a basis for the VAT to be collected from the taxable person by the tax authorities cannot exceed the amount of tax paid by the final consumer. Thus expressed, Article 90 is an expression of the principle that similar goods should bear the same tax burden regardless of the length of the distribution chain. Importantly there has been no insistence that the VAT to be collected by the tax

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<sup>5</sup> Although the European cases concerned manufacturers, there is no reason not to apply the same logic to suppliers of products. No argument was made by Revenue in this regard.

authorities must be no less than or equal to the VAT actually paid by the final consumer, only that it cannot exceed that sum. This formulation would not in and of itself hugely assist Novartis in its claim to a VAT refund as regards the totality of rebates paid. This is because, irrespective of whether one regards the insurer or the hospital as the final consumer, each of these entities benefit from only one discount, whereas Novartis is applying serial discounts. In other words, Novartis discounts the price of the self-same vial twice, once by dint of its volume based discount agreement with the hospitals and then a second time by dint of its volume based discount agreements with the insurers who reimburse the hospitals. In both instances, Novartis grants a *de facto* price reduction. This serial or double discount means that if Revenue levied VAT by reference to the consideration paid by either the hospital or the insurers (depending upon which one regards as the final consumer), the taxable amount on which VAT is calculated would still exceed the sum received by Novartis.<sup>6</sup>

6. However, the second formulation, potentially overcomes this difficulty. This formulation emphasises that it would not be in conformity with the Directive for the taxable amount used to calculate the VAT chargeable to a manufacturer or supplier as a taxable person to exceed the sum finally received by that person. Were it otherwise, the principle of neutrality of VAT *vis-a-vis* taxable persons would not be complied with. Pursuant to this formulation the taxable amount may be less than that exigible on the consideration actually paid by the final consumer. This may be the case, for example, where a manufacturer or supplier

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<sup>6</sup> As Revenue are prepared to allow deduction of the discount granted to the hospitals in any event, and as no argument is made that one discount impacts on the other, only the discount granted to the insurers is relevant for present purposes.



has given serial discounts to several parties along a supply chain and where these parties do not pass the discounts on to subsequent parties in the chain. In determining the sum or consideration finally received by the taxable person, that consideration is the subjective value, that is the value actually received in each specific case and not a value estimated according to objective criteria.

7. In determining what constitutes the consideration actually received in respect of the relevant supply, the European Court has regard to the economic and commercial realities of the transaction; to whether in practice the taxable person freely has at its disposal the full amount of the price received; or to whether on the other hand the taxpayer is a mere temporary custodian of the relevant amount.
8. In certain cases, the final consumer may be a party other than the beneficiary of the relevant goods or services. In such cases, the discount can be afforded to a party other than the person enjoying the benefit of the goods or services. As such, it is more accurate to characterise the final consumer as the party who pays for the goods (or services). In the present case, both parties are agreed that it would not be accurate to characterise the patient into whose eye Lucentis is injected as the final consumer. Novartis argues that the insurer as the party who pays for the product at the end of the supply chain is the final consumer. Revenue submit that the supply chain ends with the hospital who is thus the final consumer.
9. Although neither party argues that this is position in the present case, I also note for the sake of completeness, that in *Boehringer 2* the European Court appeared to contemplate that there could be two final consumers in any particular supply chain. Thus, in *Boehringer 2*, it appears that the European Court interpreted both the individual customers/patients (who were not fully reimbursed but had to pay a residual charge) and the State Health Insurance Agency, NEAK, as final

consumers for VAT purposes. The taxable amount was thus the amount exigible on the combined consideration paid by both.

10. Article 90 does not require the discount to have been granted directly by the manufacturer or supplier to the party next along the supply chain. Rather, it is possible that the rebate is granted by the manufacturer or supplier to a party with whom they do not have a direct contractual relationship for the purposes of the relevant supply chain.
11. By contrast, if the discount or rebate arises by way of an entirely separate independent or discrete contractual relationship parallel to or outside of the supply chain, then the Article 90 entitlement is unlikely to arise. This, Revenue argue, is the position here because the volume based discount agreements between Novartis and the insurers are completely outside the supply chain.
12. Similarly, the entitlement under Article 90 to reduce the taxable amount will not arise if the arrangement or contractual agreement pursuant to which the discount or rebate is paid or received is a separate contract pursuant to which it may be said that the payment/rebate is a consideration for a service rendered to the taxable person by the party to whom the rebate is granted. Revenue contend that this is the position here because Novartis receives separate consideration in return for the rebate from the insurers in the form of their agreement to provide full reimbursement for Lucentis and/or the product usage information they provide.
13. The European Court has not tended to distinguish between discounts which arise because of statutory imperative and those which arise under a contractual relationship or even *ex gratia*. The *Boehringer 2* decision was decided after the determination in the present case and after Revenue formulated their Notice of

Appeal. As such, it disposes of one of the arguments originally advanced by Revenue to the Appeal Commissioner that *Boehringer 1* could be distinguished on the basis that the contractual arrangements entered into as between Novartis and the insurers were voluntary commercial agreements which were not mandated by law. In light of the European Court's judgment in *Boehringer 2*, this point could clearly not succeed.

### Analysis

**42.** I will consider below the arguments advanced by Revenue in support of its proposition that the rebate granted by Novartis to the insurers pursuant to the volume based discount agreements is not deductible from the taxable amount for VAT purposes.

#### Arguments based upon *Ibero Tours*

**43.** Revenue contend that the consideration one receives for supply is the payment or proceeds received within the relevant supply chain less discounts offered regarding that supply. What one then decides to do with those proceeds, such as making discrete payment to third parties such as the insurers, does not retrospectively affect the amount of the consideration received for the supply. Revenue argue that deciding to enter into a discrete contractual relationship for the purposes of enhancing or ensuring the supply in question is not an activity which is directly linked to the relevant supply transaction. Novartis is not therefore the first link in a chain of transactions which ends with the final consumer. Therefore, although Revenue accept that the payments to insurers are undeniably a business expense deductible against corporation tax, they are not deductible for VAT purposes.

**44.** Thus articulated, Revenue's argument is largely indistinguishable from the argument rejected by the European Court in *Boehringer 2*. In *Boehringer 2*, *Boehringer* decided, for its

own commercial reasons, to enter into the discount agreement with the Hungarian State Health Insurance, NEAK. The discount agreement was necessary in order to secure, and indeed guarantee, a market for Boehringer's pharmaceutical products. The same is the case here. Accordingly, although *Boehringer I* might be distinguished from the present case on the basis that Boehringer was required by German law to provide the discount in question, *Boehringer 2* makes it clear that a discount which has its genesis in contractual negotiations concluded to secure market access ought to benefit from the same analysis.

**45.** Revenue nonetheless submit that the present situation is equivalent to *Ibero Tours* and not to either *Boehringer* case. It argues that the relevant supply chain is that from Novartis to Allphar, followed by the subsequent supply from Allphar to the hospitals. Revenue contend that the contractual agreements between Novartis and the insurers are separate from any agreement for the supply of Lucentis to the hospital; these contractual agreements are not a condition of the making of such supply and do not affect the consideration which Novartis is entitled to receive from the hospitals. It is argued that, because the insurers are not part of this supply chain, the payments made by Novartis to the insurers are extraneous to that supply chain and arise under discrete contractual agreements in a manner analogous to the payments considered in *Ibero Tours*.

**46.** The consideration of economic realities is a fundamental criterion for the application of VAT. When appropriate, it is necessary to recognise the substance and reality of the transaction over the form (*Viera Ltd v. O'Donagain* [2021] IECA 334 at paragraph 109). Regard must be had to the totality of the relationships between the actors involved in the transactions under consideration. Thus analysed, it is not accurate to say that the volume based discount agreements concluded with the insurers are not directly linked to the supply transactions.

**47.** The economic reality is that private hospitals will not use or administer a medicinal product if it is not included in the schedule of benefits of a private insurance company.

Consequently, a pharmaceutical company such as Novartis will be unable to secure or develop a market for its products in private hospitals in Ireland unless the insurers are prepared to reimburse the costs of same. It further goes without saying that very few patients could afford medication such as Lucentis out of their own resources were it not covered by private health insurance. It is not disputed that but for the insurers agreeing to reimburse the costs of Lucentis the hospitals would not supply same. Likewise, it is not disputed that the volume based discount agreements negotiated as between Novartis and the insurers are essential to securing such reimbursement.

**48.** I therefore cannot accept Revenue's argument that the contractual agreements between Novartis and the insurers are separate from the supply chain. Such arrangements are in my view integral to the supply chain; they are essential to the ultimate payment for the product supplied. The payments made to the private health insurers in *Boehringer 1* and to NEAK in *Boehringer 2* in return for reimbursement were not held to be extraneous to the supply chain and the same may be said of the volume based discount agreements in issue here.

Hospital is involved in the supply of services and not the supply of goods

**49.** Revenue argue that the TAC determination failed to take account of the multiple overlapping and discrete supply transactions in issue here. Novartis, through Allphar, supplies Lucentis to the hospitals – by way of a supply of goods. Thereafter, the hospitals provide VAT exempt medical services to their patients during which a clinician administers Lucentis by injection into the eye. This supply of medical services, by the hospital to their patients is a discrete (and VAT exempt) transaction. The insurers then make payments to the hospital for the medical services received by the policy holder *qua* patient and simultaneously provide VAT exempt health insurance services to their policy holders. Finally, the relationship between Novartis and the insurers is governed by discrete contracts under which payments are made to

the insurers calculated by reference to the quantities of Lucentis reimbursed to the hospitals in the treatment of the insurers' policy holders.

**50.** Revenue rely upon Articles 14 and 24 of the VAT Directive ("Articles 14 and 24"). Article 14 provides that '*supply of goods*' shall mean the transfer of the right to dispose of tangible property as owner. Article 24 provides that '*supply of services*' shall mean any transaction which does not constitute a supply of goods. Revenue argue that the supply of goods in this case is from Novartis, through Allphar to the hospital which acquires the right to dispose of the medicinal product as owner to its patients. This, Revenue submit, is where the supply of goods ends. The insurer does not acquire an Article 14 right of disposal and the administration of Lucentis by the hospital's clinical staff is a supply of medical services to the patients and not a supply of goods. This, it is contended, breaks the chain of supply.

**51.** However, the uncontested evidence is that the invoice which issues from the hospitals to the insurers is itemised as between the Lucentis supplied and the medical and associated services such as the clinical care, any diagnostic tests, any overnight stays and outpatient care etc. Each of these separate elements has a different code. The insurer only receives rebate payments from Lucentis in respect of its reimbursement of the cost price of Lucentis and not for any of the other costs. Therefore, although the medicinal product the subject matter of the original contract for the sale of goods has been subsumed into a contract for the supply of services, this does not in my view end the chain of supply starting with Novartis. Rather, the specific vial of medication administered to any particular patient, the consideration ultimately paid to Novartis for that vial and, crucially any discount associated therewith, remain identifiable throughout the entire transaction. Merely therefore because the onward journey of a particular vial of medication once it arrives at the hospital is in the context of the supply of medical services does not impact upon the VAT treatment thereof.

**52.** Were it otherwise, an unjustifiable distinction would inevitably arise as between medicinal products – such as those in issue in *Boehringer* – which are supplied through pharmacies on the one hand and goods – such as those in issue in the present case – which must be administered by clinicians. From a VAT perspective, I can see no reason in principle for such a distinction.

**53.** I also doubt that a customer buying medication from a pharmacy is not in receipt of a health service. Although undoubtedly the health service is of a different kind to the medical and health services afforded to a patient in a hospital, one cannot fairly describe such a transaction, particularly insofar as it involves prescription medication, as a mere sale of goods.

**54.** For all of these reasons, I do not see that the interposition of an arrangement consisting of either a supply of services or of a mixed supply of goods and services impacts in any way on the *Boehringer* analysis. There is no suggestion whatsoever that the private health insurance funds in *Boehringer I* acquired ownership of the medicinal products and decided, of their own volition to whom it could or should be sold or prescribed, within the meaning of Article 14. Rather, these decisions were made in the usual way by the patients' clinicians and the private health fund duly reimbursed the pharmacy for the cost of the medicinal products. The same is the position here, save that the method of administration of Lucentis requires a greater medical input. Provided, however, that the Lucentis is separately itemised on the hospital's invoice to the insurer, which it is, it does not seem to me that much turns on this distinction.

**55.** This may be further illustrated by considering the position were Novartis to provide the discount directly to the patient. In such circumstances, it would be very hard to argue that the patient is not part of the supply chain merely by dint of the fact that Lucentis is administered to him or her by the injection of a clinician in a hospital. The deductibility of such discount from the taxable amount received by Novartis would not be impacted in any way by the fact that a particular patient might have health insurance entitling them to a reimbursement of the

cost of the Lucentis, presumably net of the discount. Why then should matters be different merely because, for reasons of administrative convenience, the insurer pays the hospital directly pursuant to its obligations to its policy holder/patient.

The hospitals are the final consumers

**56.** Revenue emphasise that *Boehringer I* involved an unbroken chain of supply to the patients consisting of the supply of goods in an outpatient setting through pharmacies. The medicinal products were supplied by Boehringer via the wholesalers to the pharmacies and thence directly to the patients. Here, however, it is said that the chain of supply stops at the hospital after which the relationship between the hospital and its patients is one of the supply of services rather than the supply of goods. It is argued that *Boehringer I* is distinguishable because here the hospitals and not the insurers are the final consumers.

**57.** This is essentially a reiteration of Revenue's previous argument, and the answer is therefore the same. In *Boehringer I*, the European Court concluded that the private insurance funds were the final consumers, essentially because they paid for the medicinal product. This was despite the fact that, unlike the public health insurance funds, the private insurance funds never purchased the product. The private insurance funds were held to be the final consumers despite the fact that, on Revenue's analysis, they also did not take part in a supply of goods. The European Court did not find that the final consumer was the party acquiring ownership in the medicinal product, but rather the party paying for same.

**58.** There is therefore no particular reason to treat the hospitals, rather than the insurers as the final consumers in this case. It matters not that in the present case, as in *Boehringer I*, the medicinal product is supplied directly to the ultimate beneficiary of the product, the patient, by another party, (in *Boehringer*, the pharmacy and in the present case, the private hospital). In *Boehringer*, the Court found that the final consumer in the supply chain was the private health



insurance fund as this accorded more with the economic realities of the case. The same may be said of the private health insurers in the present case.

**59.** In any event, it can be seen that at a higher level of principle, the identity of the final consumer is not in any event crucial. This is of course because, under the second formulation discussed at paragraph 41.6 above, the crucial issue is not the identification of the final consumer or the amount paid by that person, but rather the amount actually received by Novartis.

#### Hospital's provision of health services is VAT exempt

**60.** Revenue maintain that, for VAT purposes, the supply of both goods and services ends at the hospitals as their services to patients, being medicinal services, are VAT exempt. I see no distinction to be made on this basis. Many products supplied by pharmacies may in any event be zero rated for VAT purposes (albeit not strictly speaking VAT exempt).

**61.** The hospitals' VAT exempt services cannot impact upon the VAT treatment of the discount granted by Novartis to the insurers. Whether or not the supply of Lucentis by the hospital onward to the patient is or is not a VAT exempt transaction is to my mind entirely irrelevant. The effect of this discount is that Novartis does not freely have at its disposal the full amount of the price received in respect of the supply of Lucentis and that is sufficient to render it deductible pursuant to Article 90.

#### Reciprocal arrangement for the supply of services by the insurers

**62.** Revenue also tentatively argue that the contract between Novartis and the insurer pursuant to which Novartis pays a rebate is a reciprocal arrangement for the supply of services. Essentially, Revenue submit that the rebate payment is in consideration of a service rendered

to Novartis by the insurers. The identification of what this service could be is however problematic.

**63.** In *Boehringer I*, Tanchev's view was that the private health insurers were not rendering a service to Boehringer. I agree with this view. The provision of cover by a health insurer is not a service provided to the manufacturer or supplier of the product concerned. This may be contrasted with the kinds of arrangements which have been held to constitute a service in return for a rebate such as, for example the provision of credit by a credit card company or the provision of finance to customers by a finance company.<sup>7</sup> It is not artificial to view these kinds of arrangements as the provision of consideration to the manufacturer or supplier in return for a rebate.

**64.** Revenue also argue that the data on the usage of Lucentis provided by the hospitals to Novartis in pursuance of their obligations under the volume based discount agreements may represent valuable consideration. However, the uncontested evidence is that the data and information supplied merely enabled Novartis to calculate the relevant discounts and to confirm that the vials of Lucentis concerned were imported into this country via Allphar rather than by way of parallel imports. There is simply no evidence that the data provided is of other benefit or value to Novartis. I therefore cannot accept the argument that the rebate is in exchange for consideration offered by the insurers to Novartis.

### **Conclusion**

**65.** The fundamental applicable principle in cases such as this is that the tax authorities may not levy VAT in excess of the amount received by the manufacturer or supplier. In this case, this is precisely what occurred on foot of the failure to allow the VAT refund sought by

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<sup>7</sup> See *Chaussures Bally SA v. Belgian State, Minister for Finance* (Case C-18/92) [1993] ECR I-02871 and *Commissioners of Customs & Excise v. Primback Ltd* (Case C-34/99) [2001] ECR I-03833

Novartis. Being contractually bound to grant the rebate to insurers, Novartis does not have freely at its disposal the full amount of the price received in respect of the supply of Lucentis. To levy VAT on the pre-discount consideration is not therefore permissible.

**66.** It seems to me that the finding of the TAC that the rebate payments by Novartis to the insurers constituted a reduction in the consideration received by it for its supply via Allphar to the hospitals and that it was entitled to relief by a repayment of VAT under s. 39 (2) of the Value Added Tax Consolidation Act, 2010 is entirely correct. The sole question stated by the TAC must therefore be answered in the affirmative.

### **Reference to CJEU**

**67.** At the conclusion of the hearing Revenue suggested that the court might consider making a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union. I do not consider such a reference is necessary to answer the question posed in the case stated and accordingly I decline to do so. In my view, the TAC determination does not, as contended by Revenue, represent an extension of the *Elida Gibbs/Boehringer* line of authority, but rather an application thereof.