



TC02342

Appeal number: TC/2010/06438

VAT – Overpayment – Whether consideration for a supply – No – No VAT charge on overpaid amounts – Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BOROUGH COUNCIL OF KING’S LYNN
AND WEST NORFOLK**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE DR K KHAN
TERENCE BAYLISS FFA, FAIA**

Sitting in public in London on 26 June 2012

Leslie Allen, counsel, engaged by Elysian Associates for the Appellant.

J P Holl, Senior Officer to HM Revenue and Customs, for the Respondents

DECISION

Introduction

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1. The disputed decision of the Commissioners for HM Revenue and Customs (“the Commissioners”) is contained in a letter dated 14 July 2010 rejecting a Voluntary Disclosure for VAT in the sum of £44,820.76. The decision was confirmed by the issue of a Notice of Voluntary Disclosure form VAT657 issued on 21 July 2010 in the sum of £44,798.00 (rounded down).

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Relevant Facts

2. The Appellant is a Local Authority providing statutory and non-statutory services. They conduct their business from premises at King’s Court, Chapel Street, King’s Lynn, Norfolk PE30 1EX.

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3. The Appellant was registered for VAT with effect from 7 July 1973 under registration number 106 932 87.

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4. By a letter dated 5 July 2010 the Appellant submitted a Voluntary Disclosure in the sum of £44,820.76 for the period 1 June 2006 to 31 March 2010. This was in respect of VAT which had been accounted for where members of the public had paid more than the set tariff amount into parking ticket machines at parking areas managed by the Appellant. It would be expected that such overpayment would occur where a member of the public did not have the correct amount of change to pay for the desired parking time. They overpaid in order to obtain a parking display ticket.

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5. By letter dated 14 July 2010 the Respondents notify the Appellant that the parking overpayment was liable to VAT as a charge made for parking. VAT was due on all consideration paid.

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Background

6. The Appellant operates car parks with ticket dispensing machines. The machines display sliding scale hourly parking charges car park information, opening times and payment instructions. The machines indicate that no change is given and overpayments are accepted.

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7. Where a member of the public puts money into the machine they obtain a parking sticker which can be fixed to the windscreen of their vehicle. It shows the day, month and year, the amount paid and the period of validity of the ticket. The Tribunal was offered copies of one such ticket as a sample of what the payer obtains.

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8. The machine accepts a variety of coins including 5p, 10p, 20p, 50p, £1 and £2. The parking facilities are available on a twenty-four hour seven day a week basis and tickets are purchased for daily parking between the periods 8.00am and 6.00pm and

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overnight parking at a fixed rate. The first hour is charged at £1.40. The first three hours at £2.10 and the first five hours at £4.10. The scale of charges for the charging periods are fixed by Order.

5 9. An overnight stay, after the daily opening period, is at the fixed rate of £1. The metered parking, properly called pay and display parking, provides a way for the Council to make money from its parking facilities and to augment its budget. The car parking charges are normally increased minimally after every two or three years.

10 10. The issue in this case concerns the voluntary overpayment by customers, which occurs when people pay more for a parking ticket than they are required to pay. The overpayment as a percentage of the total income varied from between 2.25% to 3.46% of total payments per year. It is not easy to establish when individual customers have overpaid. When the total takings from the machines are counted, overpayments are
15 then established and it is then possible for the machine to provide a printout of the amounts that have been paid which can be checked against the ticket issued for the payments. This in turn shows any overpayments made.

20 11. The Tribunal is grateful for the witness statement of Mr Dale Harvey Gagen, Corporate Project Officer with the Appellant. The Statement provided an outline of the parking facilities, the workings of the machines and the revenue receipts.

The Law

25 12. Value Added Tax Act 1994

4 Scope of VAT on taxable supplies

30 (1) VAT shall be charged on any supply of goods or services made in the United Kingdom where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the
35 United Kingdom other than an exempt supply.

Determination of value

19 Value of supply of goods or services

40 (1) For the purposes of the Act any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.

45 (2) If the supply is for a consideration in money its value shall be taken as such amount as with the addition of the VAT chargeable, is equal to the consideration.

(3) ...

(4) 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.

(5) For the purposes of this Act the open market value of a supply of goods or services shall be taken as the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in such relationship with any person as would affect that consideration.

**VATA 1994
SCHEDULE 9
PART II
THE GROUPS
GROUP 1-LAND**

Item No.

(1) the grant of any interest in or right over land or of any licence to occupy land, or in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than –

...

(h) the grant of facilities for parking a vehicle.

**PART 1
GENERAL**

Commencement and Citation

1. The Order shall come into operation on the 7th day of November 2011, and may be cited as The Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Consolidation and Variation Order 2011.

**THE BOROUGH COUNCIL OF KING'S LYNN AND WEST NORFOLK
(OFF-STREET PARKING PLACES) CONSOLIDATION AND
VARIATION ORDER 2011**

The Borough Council of King's Lynn and West Norfolk, in exercise of their powers under sections 32, 35, 38 and with the consent of Norfolk County Council under section 39 of the Road Traffic Regulation Act, 1984 (hereinafter referred to as "the 1984 Act"), Part 6 of the Traffic Management Act 2004 ("hereinafter referred to as the 2004 Act") and of all other enabling powers, and after consultation with the Chief Officer of Police in accordance with Parts I to III of Schedule 9 to the Act, hereby make the following Order.

and given the absence of this nexus, the payment made as an overpayment cannot be treated as consideration for the purposes of VAT.

The Respondents' contentions

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15. The Respondents contend that there is a supply of services made by the Appellant in raising a charge for parking a vehicle. This is not an exempt supply nor is it a non-business activity of the Appellant. Once consideration is payable in money for the supply, which is not a mixed supply, then VAT is due on the whole consideration paid or payable.

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16. Further, they say that the ticket which is provided is a simplified VAT invoice which can be used to recover VAT. In that sense, this documents the receipt of the total sum stated on the ticket and allows for the recovery of the VAT element of the payment. The machine in stating that it accepts overpayment allows customers to pay more for the parking facilities and to treat the amount overpaid as consideration for the services provided. The consideration for the supply is the amount which is paid and the ticket in stating the amount paid confirms the full payment as being made for the supply.

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Discussion

17. The principal issue in this case is a simple one, which is, whether the overpayment made by a person purchasing a ticket from a pay and display machine attracts a VAT charge. The view of the Commissioners is that the customer has paid the money in the full knowledge that they will not receive any change. The consideration for the supply of parking is therefore the total amount which has been paid and VAT is due on that total sum. The Appellant says that no supply is made for the extra consideration and therefore there is no taxable supply to that extent. The overpayment is gratis.

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18. The relevant law is contained in section 5 VATA 1994. It provides that a supply takes place for VAT purposes where something is provided or done for a consideration. Consideration is not a defined term. It has however a wide meaning and covers anything which is received in return for the supply of goods or the provision of services. There must be a direct link between the supply made and the consideration given. The supplier would normally expect something in return for a supply and will not fulfil their contractual obligation unless payment is received or forthcoming. If there is no direct link between the supply which is made and the payment received or if a party was not obliged to pay then it cannot be said that there was consideration for the supply. There must be some form of reciprocity between the parties.

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19. The other relevant piece of legislation is the Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Consolidation and Variation Order 2011 ("the Order"). The Order came into operation on 7 November 2011 and seeks to regulate off-street parking. In that Order there is a definition of "Parking Charge"

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which means the sum of money specified in Column 6 of the Schedules to the Order. In that Column of that Schedule there is provided the Scale of Charges for Charging Periods which is listed as £1.40 up to one hour, £2.10 for up to three hours and £4.10 for up to five hours with an overnight charge of £1. The charges are fixed by the Order. The Order states, inter alia, that the parking bays are available on “payment of such charges as are specified in relation to the parking place in the Schedules to this Order” and customers must pay the appropriate “Parking Charge in accordance with the scale of charges specified in column 6 of Schedule 1 to 3 of the Order” The Order is clear on the rate of charge, which is fixed on a sliding scale basis.

20. The critical question in this case is whether there is a link between the total payment made for the parking in cases of overpayment and the supply of parking services. The link is to be determined by reference to the agreement between the parties and that agreement is determined by reference to the scale of charges which are published in the Order. The sliding scale published tariffs which are shown on the machine reflects the scale charges in the Order. The Appellant is not able to change those scale charges without changing the Order itself.. The paying member of the public is also not able to unilaterally change the consideration by paying more or less than the scale charges which are stated on the machines. The agreement between the parties is that the payer must pay the scale charges in order to obtain a ticket for parking. The customer understands, from the instructions on the meter, that where there has been an overpayment, over and above the scale charges, no change would be given. An overpayment by a customer is not accidental but may arise where the customer does not have the precise change for the machine but requires a ticket in order to park. A decision is then made by the customer to pay more than the sum required to obtain the ticket. In doing so the payer is making an ex gratia payment of the amount which exceeds the scale charges. The customer understands that they are not receiving anything extra for the overpayment which has been made. The parking service given by the ticket is being provided regardless of the overpayment. The overpaid sums goes into the general fund of the Council for general spending, they do not expect to have to return those sums to the customer.

21. It is fair to ask whether the overpayments were received in respect of the supply of services. In other words was it consideration for the supply of services. They cannot be payments made for services or be treated as consideration for services unless both the payer and payee agree to treat the consideration as such. The terms and conditions displayed on the pay and display machine indicates that overpayments are accepted and no change is given. This would seem to indicate that a payer can pay more than required for obtaining the appropriate ticket, in the event that they do not have the correct change. In other words, to facilitate the issue of a ticket a payer or customer can pay more than the amount indicated on the sliding scale tariff charges for the period of time they require and still obtain a valid ticket. This means that the exact change does not have to be used to obtain the ticket. However, it is only that part of the supply of services for consideration that is subject to VAT. The agreed consideration which is to be obtained from the customer is the amount indicated on the sliding scale tariff charges. It is the price which is being charged according to the tariff charges and as indicated on the pay and display machine, which is the

consensual payment. A party cannot unilaterally change the terms and conditions of payment and in so doing make themselves subject to a greater amount of VAT because they have paid more than the consideration agreed. The payer is only obliged to pay the amount indicated on the tariff charges and that is the amount of the consideration which gives rise to the reciprocal performance by the payee. That is the amount which must be treated as received by the Appellant and on which VAT is to be accounted.

22. Mr Holl for the Respondents argued that since the payer obtains what is in effect a VAT invoice completes with a VAT number for the amount actually paid (rather than the amount due to be paid) and the correct interpretation is that the amount actually paid becomes liable to VAT. In other words the overpayment becomes consideration because the VAT invoice states it to be. This is putting the cart before the horse. The fact that a person has overpaid does not make the overpaid amount consideration. If the invoice incorrectly states the consideration then it should be corrected. HMRC in their own guidance (VAT SC 63600) in dealing with the payments that are not consideration and overpayments stated:

“The value of a supply is not affected if a supplier receives payment twice for a single supply due to a mistake by the customer. The value remains at original advertised price and cannot be increased simply because of an overpayment and so the additional payment is outside the scope of VAT. This applies whether or not the supplier makes provision to return the overpayment.”

23. The invoice must be issued for the correct amount. The payment which has been made in this case by the customer is clearly additional to the price of the supply and there is no obligation to make the payment of the additional amount. The Appellant would make the supply to the customer even if that extra or additional payment was not made. There is no agreement between the parties to pay the additional sum. It is not treated as an amount which would be put to a future bill since this is a one-off transaction. It is more in the nature of an ex gratia payment which customers would not seek to recover and from the evidence given by Mr Gagen, there has been no occasion when a customer has sought to recover the amounts which have been paid over and above the sliding scale tariff charges.

24. Let us turn to the cases which were cited by the parties. The first case is the Court of Appeal decision in *British Telecom Plc* (1996) STC 818 where the issue arose as to the status of overpayments made by customers, either inadvertently or otherwise, in paying their telephone bills. It was the practice of British Telecom where, if a customer made an overpayment, they would retain the overpayment in the customer’s account to be credited against future bills. The Tribunal, High Court and Court of Appeal found that such accidental payments cannot be said to be made in respect of the supply and therefore did not create a tax point. The issue in this case, unlike our case, is one where continuous supplies are being made and there is a contractual relationship spreading over a much longer period. In such a case, the Court said that their “inadvertent overpayment of a present debt is not a payment on

account of a future liability, more so where the payer does not subsequently agree to allocate the amount of the overpayment to any particular future supplies.” This was a case dealing with continual supplies where there was a contractual relationship over a much longer period. Our case can be distinguished from this case to that extent, but
5 the important point is that the Court acknowledges that an overpayment is not a payment for services and there was no contractual term which would allow the payment to be treated as such. In the Tribunal’s decision of *NDP Co Ltd v Customs and Excise Commissioners* [1988] VATTR 40 the question arose whether the payment of a service charge by customers in the Appellant’s restaurant was an
10 optional payment and if so, whether such money should be brought into the appellant’s tax return. The Court decided that is not part of the contract between the customer and the appellant that a service charge would be paid and accordingly it was not part of the consideration for the meal and therefore it was not to be included in the relevant tax return. The point about this case, which is helpful to our case, is that the
15 service charges did not form part of the consideration for the meal since there was no link between the payment of the gratuitous service charge and the payment for the meal. The contract between the restaurant and the customer was created by the terms of the menu and since the bill was given at the end of the meal after the contract had been made and the supply had been completed it cannot then be treated as part of the
20 consideration for the meal. This case is helpful to our case because there was no obligation to pay the extra consideration as indeed there was no obligation to pay the suggested gratuities or tips after having the restaurant meal.

25. In another decision in *C&E Commissioners v Tron Theatre*, CS 1993. [1994] STC 177 the issue arose as to whether payment to a theatre for having a personalised brass plaque on one’s seat as part of a sponsor a seat programme amounted to a donation or payment for a package of benefits which included, in addition, priority bookings and certain limited edition prints. The Court of Sessions found that a £150 was consideration for the package of benefits supplied by the theatre. The point in
30 this case that there was a clear link between the payment and the benefits received and once that link had been established it was difficult to treat part of the consideration as a donation and the goods and services provided could not have been provided for less than £150, which was the consideration paid. It was clear here that there was no additional amount paid as consideration but rather the total amount paid was
35 consideration in money for the supply which was made. The Court also made the point that in determining the value of a supply of goods or services one should not be concerned with the motives for either the supply of the services or the recipient. In our case, the motive for overpaying is not clearly established from any of the facts. What can be stated is that it is possible that certain customers did not have adequate
40 change to make a payment for the exact amount. This does not change the nature of the consideration or the supply being made.

26. In the case of *New World Pay Phones Ltd* (Tribunal decision 15964), the
45 company operated a series of call boxes which took coins ranging between 10p and £1. A customer was refunded a wholly unused coin, where a coin was partially used credit was given for future calls amounting to the unused amount, the question arose as to whether the company were required to account for output VAT on the full

amount of the coins inserted into the call boxes on the basis that this was consideration for the taxable supply. The Appellant said that there was no link between the unused balances and any call or services that it provided. The Tribunal found that the unused balances were a credit rather than a surplus which was not a gift by the customer to the company. Therefore all coins inserted into the call boxes which were not returned to the customer were consideration for taxable supplies of telephone services. The Tribunal in this case clearly felt that there was no overpayment by the customer and there was a reciprocal performance in return for payment by supplying a telephone service to the customer. The unused balances on the coins inserted were treated as part of the taxable consideration. This case can be distinguished from our case in that in ours there was an intentional overpayment of consideration but no supply was made for that overpayment.

Conclusion

27. The case which best supports our case is the Court of Appeal decision in *British Telecom*. It is clear that the fact that a party receives a sum of money does not mean that that sum represents consideration. There must be a link defined by reference to an agreement by the parties between what is supplied and what is paid for. This is missing in our case. A consensual element is required for the payment to be consideration. In our case, the amount to be paid is defined by the Order which cannot be changed by the Appellant and there is therefore no supply made for the overpayment. The consideration cannot be unilaterally changed by the customer paying more simply because they did not have the correct change to make the correct tariff charge payments.

28. For these reasons, the appeal is allowed and the overpayments are not to be treated as consideration for a supply.

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

**K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 1 October 2012