AN COIMISIÚIN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

186TACD2024

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

Introduction

1. This Determination concerns the consolidated appeals of [redacted] ("the Appellant") brought under section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") of Value-Added Tax ("VAT") assessments of the Revenue Commissioners ("the Respondent") made on 23 November 2016, 21 December 2016, 10 January 2018, 29 January 2020 and 21 January 2021 in respect of the following periods ("the periods in question") and assessed amounts:-

   - November/December 2012 - €10,065;
   - January-December 2013 - €20,728;
   - January-December 2014 - €20,862;
   - January-December 2016 - €9,055;
   - January-December 2017 - €14,615;
   - January/February 2018 - €6,572

2. In the first instance, this appeal concerns whether supplies of certain "small value"[1] goods marketed as gifts ("the promotional goods"), made by the Appellant to its customers in conjunction with supplies of [redacted], were gifts as marketed or, alternatively, were supplies "for consideration" (i.e. made in return for value provided by the customer to the Appellant).

3. The Appellant contends that the promotional goods were supplied to its customers for free as part of promotions designed to increase its [redacted] sales and foster the loyalty of new and existing customers. As a secondary argument, it contends that the promotional goods were the ancillary element of a single "composite supply", also involving its [redacted], which were the primary or predominant element.

4. In the Appellant's submission, no VAT was chargeable in respect of the promotional goods whether they were given as a gift or sold as part of a single composite supply. In the first instance, VAT would not be chargeable as there was no consideration and VAT is a tax calculated on the consideration received by a vendor. In the second, the rate of VAT applicable to the single composite supply of goods would be zero per cent as that

[1] Within the meaning of Regulation 5 of the VAT Regulations 2010;

was the rate applicable to the [redacted], being the principal part of the composite supply.

5. The Respondent, on the other hand, contends that the reality of the supply of the promotional goods to its customers was that they were "individual supplies", distinct from the supply of the [redacted], that were part of a "multiple supply" of goods, the consideration for which was an overall sum of money that covered both the supply of the [redacted] and the relevant promotional good.

6. The Respondent further contends that even if it is found that there was a single composite supply constituting the Appellant's [redacted] and a promotional good, the rate of VAT applicable to the part of the supply constituting the promotional good should be the standard rate. This is so on the grounds that the zero rate applicable to [redacted], including in [redacted], as a consequence of an EU law derogation availed of by the State, cannot be extended to the promotional goods.

Background

7. The Appellant is a company incorporated in [redacted] that sells [redacted] and '[redacted]-related' products. It is registered for VAT in Ireland.

8. As the Appellant sells its [redacted], the applicable rate of VAT pursuant to section 46 of the Value Added Tax Consolidation Act 2010 ("the VATCA 2010") on the supply of such goods to its customers is zero. The Appellant claims input deductions in respect of its supplies of 'zero-rated' [redacted].

9. The Appellant sells its [redacted] in "[redacted]" (i.e. [redacted]). Each [redacted] contains [redacted].

10. The products other than [redacted] sold by the Appellant includes, to name but a few of them, [redacted].

11. The Appellant conducts its business in Ireland online and in a [redacted] physical premises. In order to purchase its [redacted] online, it is necessary to create an account with the Appellant and become a "[redacted]". This is done by the provision of an email address and the selection of a password.

12. As part of the registration process, prospective customers are asked if they wish to receive information regarding the Appellant's products, including promotional offers. No fee is required to become a [redacted] and the evidence given in the course of the appeal suggested that [redacted] is open to anyone who provides the registration details specified in the preceding paragraph of this Determination.

13. The Commissioner heard the evidence of [redacted] ("Witness 1"), Vice-President of Sales for the Appellant in [redacted].

14. Witness 1 gave the following evidence about the nature of the Appellant's business:-

> "[…] [redacted] *is primarily a direct to consumer business. We have a small proportion of our business that is* [business to business] [redacted], *but approximately* [redacted]*% of our business is the direct consumer and what I mean by direct consumer is that the* [redacted] *is* [redacted] *and there is a relationship directly between* [redacted] *and the consumer, which is the* [redacted] […] *So we have quite a unique model* […], *and a leading model, across the UK and Ireland. I think we are part of a global business. Predominantly, obviously, we are a* [redacted] *business and we sell items such as* [redacted] *to* [redacted]. *But if I look at our sales, approximately* [redacted]*% of our sales are* [redacted] *and our model is to sell* [redacted] […] [redacted] […]".[2]

15. The Commissioner heard evidence about a variety of different promotions directed to [redacted], or [redacted] with certain characteristics, that were emblematic of its promotions run over the periods in question. The quantity of [redacted] involved in the promotions could range from [redacted]. It was implicit from the submissions of the parties that the promotions highlighted at hearing could form the basis for the Commissioner's ruling in respect of all promotions arising in the relevant periods.

16. Witness 1 gave the following evidence regarding the value of the promotional goods:-

[2] Transcript of hearing, day 1, page 13;

"*So generally, the cost per item is between €[redacted] and probably €[redacted] range*, [that] *is where the majority would be. For example, a [redacted] is £[redacted] so that would be like €[redacted]* […] *The [redacted] are around €[redacted]. So generally it's around that type of a level."*[3] [4]

17. Later, the Commissioner heard evidence in the appeal of promotional goods, namely [redacted] offered as part of a promotion, with a cost to the Appellant of €[redacted]. The accuracy of the estimate of Witness 1 regarding the usual range of the cost of promotional goods was not called into question however.

18. The Commissioner also observes at this point that the promotional good with the highest cost to the Appellant was its "[redacted]" (€[redacted]). This being so, the good did not fall within the definition of a good of "small value" under Regulation 5 of the VAT Regulations 2010. For reasons that will become clearer as this Determination progresses, the Appellant conceded at the outset of the appeal hearing that the Respondent's assessments should stand in so far as they concerned VAT due in respect of supplies of this particular promotional good.

19. In his evidence, Witness 1 stated that the cost of a promotional good or goods offered in a promotion tended to correlate to the value of the [redacted] involved in that same promotion. In this regard, he stated:-

"[…] *ultimately, you have got to think that most of the order sizes that we are encouraging here, you know [redacted], is [redacted]* […]. *So we are in the business of making money, so naturally our cost of order or the implementing cost to get that [redacted] is in that relationship. So generally it's around that [redacted] level that we would position."*[5]

20. The first promotion in respect of which Witness 1 gave evidence was a "[redacted]" to new members making their first or second purchase. The promotional material directed to new [redacted] stated, *inter alia,* that the Appellant offered:-

"[…] *a variety of [redacted] packs, exclusively available on either your first or second purchase, which consist of a pre-selected range of [redacted] and a complimentary gift. These are specifically designed to give [redacted]*

[3] This witness made it clear that this was cost to the Appellant, rather than retail value. As a matter of inevitable commercial logic the retail price of the promotional goods when sold on their own must have been substantially higher;
[4] Transcript of hearing, day 1, page 54;
[5] Transcript of hearing, day 1, page 54;

[redacted] *the chance to be introduced to the world of* [the Appellant] *and our* [redacted].

To view these [redacted] *online, you will need to be logged in to your* […] [redacted] *account.*

There are two size options available, with three different [redacted] *in each so you can choose the most relevant for you* […]".

21. The two size options referred to were packs containing [redacted], with the customers having the choice of three types of [redacted] selections made by the Appellant in both quantities. Whatever the selection made, under the [redacted] a [redacted] was given their choice of one of three types of promotional good, described in the offer sent to the customer as a "gift". In common with the promotional goods available under other promotions run over the periods in question, these promotional goods were offered for sale in their own right on the Appellant's website and, it would appear in some if not all cases, in its physical stores as well. [6]

22. In respect of the [redacted], the promotional goods from which the customer was able to choose were a "[redacted]", a [redacted] and a [redacted].

23. Under the [redacted], the promotional goods were of higher value, these being a [redacted], a "[redacted]" and a [redacted] and [redacted].

24. Whichever of the [redacted] the customer chose to avail of, the page of the Appellant's website at which they went to make their purchase contained, at the top left, a picture of the package containing the [redacted]. On the top right of the same page was an icon representing a [redacted] alongside the number [redacted] and, to the right of that, another icon representing a gift-box. Between these two icons was a "+" sign. Directly beneath the [redacted] and gift-box icons was, for the "[redacted]"_, "€[redacted]." and, for the "[redacted]", "€[redacted]." Below that was a heading in the centre of the page *"SELECT YOUR GIFT"*, under that pictures and descriptions of the relevant promotional goods with the banner "*Free",* and under each of these a clickable 'button' entitled "*Select Your Gift".*

[6] It was, however, an uncontested fact that in rare instances the promotional good was an item that could not be bought in the Appellant's online or physical stores. One such item was an [redacted] bearing the Appellant's branding.

25. It is necessary to note at this point of the Determination that the prices of € and € constituted the prices normally charged by the Appellant for of its respectively. A common feature of all of the promotions brought to the Commissioner's attention was that the price asked for under the promotion was the price normally charged for the when not part of a promotion.

26. To avail of the promotion, or indeed make any purchase on the Appellant's website, the customer had to proceed from the offer page to the checkout page of the Appellant's website. To do so the customer was required to click on one of the buttons under the promotional goods. Once this was done, the "*Add to Basket*" button located at the bottom right of the page would turn from (un-clickable) to (clickable), such that the could then proceed to the checkout section. At all times to the left of the "*Add to Basket*" button, whether it was or , was another button, clickable at all times, entitled "*I am not interested for now*".

27. There was some doubt at the hearing of the appeal whether it was possible for the customer to proceed to the checkout section without selecting one of the promotional goods arising under the offers. Witness 1 was clear in his evidence that this could not be done on the website, though he suggested that if a customer was so minded they might seek to avail of the offers without taking the promotional good by calling the Appellant's customer service centre, where they would be assisted in so doing. The Commissioner notes at this point of the Determination that it is not clear why a customer would opt to avail of the offer without taking the promotional item, in circumstances where the prices of the , whereby a could acquire two items, were identical to the price normally charged by the Appellant for .

28. The aforementioned doubt regarding the functioning of the Appellant's online store arose from the evidence of the second witness called at the appeal hearing by the Appellant, ("Witness 2"), who until his retirement in was Indirect Taxes Manager for . In his evidence, Witness 2 sought to contradict the evidence of Witness 1 that the Appellant's website did not allow a person availing of a relevant promotion to proceed to the 'checkout' without selecting the additional item. It was the understanding of Witness 2, based on information given to him by unidentified members of the Appellant's IT staff, who were not present to give evidence, that this was possible from a technical standpoint.

29. An invoice purporting to indicate that this had occurred was produced for the first time at hearing without prior notice to the Respondent. This was done despite this matter having long been in dispute, as apparent from the content of the Respondent's pre-hearing written submissions. Witness 2 stated that this invoice had been obtained by the Appellant at his request by other persons employed by the Appellant. It related to a purchase made under a [redacted] and listed only [redacted] as a good supplied.

30. This was contrasted with other, more typical, invoices arising from purchases made under [redacted], which specified supplies of both [redacted] and promotional goods, with the full price being attributed to the former and the price of the latter being stated to be zero.

31. When cross-examined by counsel for the Respondent, Witness 2 accepted that, notwithstanding his evidence regarding the possibility that a customer might opt not to take the promotional goods, the instances where this would occur were likely, as a matter of logic, to be very rare.

32. Returning to Witness 1, he gave evidence in relation to a variety of other types of promotion made by the Appellant to its [redacted] giving rise to the assessments under appeal. Witness 1 gave evidence that a common theme of all of the Appellant's promotions was to encourage "[redacted]" in the purchases of its customers. This, he said, was because [redacted] the greater the range of [redacted] products bought by a customer, the more frequently they would buy from the Appellant and the greater loyalty they would show to the brand. With this in mind, the promotions directed to customers often involved a 'pre-selection' of different [redacted] of the Appellant's [redacted].

33. Witness 1 stated that while the aforementioned [redacted] were directed at new [redacted], other promotions would target different types of person, for example '[redacted]' [redacted]

34. Thus, in [redacted] the Appellant offered its [redacted] customers "[redacted]" with a purchase of [redacted] of its "[redacted]" and its [redacted] customers the more valuable "[redacted]" with a purchase of [redacted] of the same pre-selection of [redacted].

35. Moreover, some promotions would not target a particular type of [redacted] at all, but rather a new line or variant of its [redacted]. One such promotion was part of a campaign in [redacted] to promote the Appellant's "[redacted]". This promotion, available only in the Appellant's physical stores in [redacted], offered customers a "[redacted]" with a purchase of [redacted] of the relevant [redacted].

36. Whatever the nature of the promotion in question, they all possessed certain common characteristics. Firstly, it was possible for the [redacted] to avail of a promotion directed to them only once. Secondly, the promotions were invariably time bound, having to be availed of no later than a particular time and date, after which they expired. Thirdly, there would be "terms and conditions" attached to the promotion that the additional items would be "*subject to availability"* and could not be "*exchanged for cash or product of equivalent value".*

37. When cross-examined, Witness 1 accepted that it was a standard term and condition of the Appellant when entering into transactions with its customers, whether transactions arising from a promotion or just ordinary purchases of its products, that the customer's right to a product for which they had provided consideration be "subject to availability". Witness 1 gave evidence that this term was used to "*manage* [customer] *expectations*".

38. Witness 1 gave evidence that, with just one exception, all of promotional goods forming part of its promotions were available to purchase on their own on either the Appellant's website or in its physical stores. When cross-examined, he accepted that in the context of the promotions concerned, the only way to obtain the promotional goods described as being "*free*", "*complimentary*" or a "*gift*" was for the [redacted] to pay the price asked for by the Appellant for its [redacted].

39. Witness 2 was cross-examined on the evidence given by Witness 1 in relation to the commercial purpose of the promotions in issue. He agreed that this was to entice a customer to purchase particular products that it wished to promote and increase its sales generally.

Legislation

40. Article 2(1) of Council Directive 2006/112/EC on the common system of value-added tax ("the VAT Directive") provides:-

"*The following transactions shall be subject to VAT:*

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

[…]"

41. Article 14(1) of the VAT Directive provides:-

"*Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner*".

42. Article 16 of the VAT Directive provides:-

"*The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.*

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration."

43. Article 73 of 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*."

44. Article 110 of the VAT Directive sets out the circumstances in which a Member State of the EU may opt to avail of the derogation allowing it to apply a 'zero rate' of VAT on certain goods:-

"Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates. The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

45. There is no dispute in this appeal that the State was, as of 1 January 1991, "*applying reduced rates lower than the minimum"* (i.e. a rate of zero) to [redacted]

[redacted]. There is further no dispute that under Schedule 2 to Part 14 of the VATCA 2010, the State has opted to avail of the derogation available under Article 110 of the VAT Directive to maintain a rate of zero per cent on [redacted].

46. Article 110 of the VAT Directive in effect carries on the derogation previously set out in Article 28(2) of Directive 77/388 ("the Sixth Directive") (as amended by Council Directive 92/77EEC). This is clear from the wording of Article 28(2), when read in conjunction with Article 17 of Second Council Directive 67/228/EEC :-

    "*Exemptions with refund of the tax paid at the preceding stage and reduced rates lower than the minimum rate laid down in Article 12 (3) in respect of the reduced rates, which were in force on 1 January 1991 and which are in accordance with Community law, and satisfy the conditions stated in the last indent of Article 17 of the second Council Directive of 11 April 1967* [i.e. Second Council Directive 67/228/EEC]*, may be maintained."*

47. Article 17 of Second Council Directive 67/228/EEC provided that Member States could provide for reduced rates or exemptions with refund of the tax paid at the preceding stage if, *inter alia*, the exemptions or reduced rates were "[…] *for clearly defined social reasons and for the benefit of the final consumer."*

48. Section 19 of the Value-Added Tax Consolidation Act 2010 ("the VATCA 2010"):-

    "In this Act "supply", in relation to goods, means –

    (a) The transfer of the ownership of the goods by agreement (including the transfer of ownership of the goods to a person supplying financial services of the kind specified in paragraph 6(1)(e) of Schedule 1 where those services are supplied as part of an agreement of the kind referred to in paragraph (c) in respect of goods […]

    (g) subject to subsection 1(A), the appropriation of the goods by an accountable person for any purpose other than the purpose of his or her business or the disposal of the goods free of charge by an accountable person where –

    (i) tax chargeable in relation to those goods –

        (I) upon their purchase, intra-community acquisition or importation by the accountable person, or

(II) upon their development, construction, assembly manufacture, production, extraction or application under paragraph (f)

As the case may be, was wholly or partly deductible under Chapter 1 of Part 8, or

(ii) the ownership of those goods was transferred to the accountable person in the course of a transfer of business or part thereof and that transfer of ownership was deemed not to be a supply of goods in accordance with section 20(2), and […]"

49. Section 2(1) of the VATCA 2010 defines "*composite supply"* as:-

"a supply made by a taxable person to a customer comprising 2 or more supplies of goods or services or any combination of those, supplied in conjunction with each other, one of which is a principal supply".

50. *"Principal supply"* is defined in section 2(1) of the VATCA 2010 as:-

"[…] *the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary".*

51. "*Ancillary supply"* is defined in section 2(1) of the VATCA 2010 as:-

"[…] *a supply, forming part of a composite supply, which is not physically and economically dissociable from a principal supply and is capable of being supplied only in the context of the better enjoyment of that principal supply".*

52. Section 2(1) of the VATCA 2010 defines "*multiple supply"* as:-

"*2 or more individual supplies made by a taxable person to a customer where those supplies are made in conjunction with each other for a total consideration covering all of those individual supplies, and where those individual supplies do not constitute a composite supply".*

53. "*Individual supply"* is defined in section 2(1) of the VATCA 2010 as:-

"[…] *a supply of goods or services which is a constituent part of a multiple supply and which is physically and economically dissociable from the other goods or services forming part of that multiple supply, and is capable of being supplied as a good or service in its own right".*

54. Section 3 of the VATCA 2010 sets out the charge to VAT:-

> "*Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions:*
>
> > *(a) The supply for consideration of goods by a taxable person acting in that capacity when the place of supply is the State*
>
> […]"

55. Section 21 of the VATCA 2010 provides:-

> "*Anything which is a supply of goods by virtue of section 19(1)(f), (g) or (h) shall be deemed, for the purposes of this Act, to have been effected for consideration in the course or furtherance of the business concerned except—*
>
> > *(a) a gift of goods made in the course or furtherance of the business (otherwise than as one forming part of a series or succession of gifts made to the same person) the cost of which to the donor does not exceed a sum specified for that purpose in regulations, or*
> >
> > *(b) the gift, in reasonable quantity, to the actual or potential customer, of industrial samples in a form not ordinarily available for sale to the public*."

56. Regulation 5 of the VAT Regulations 2010 provides:-

> "*For the purposes of section 21(a) of [the VATCA 2010], a gift of goods made in the course or furtherance of business (otherwise than as one forming part of a series or succession of gifts made to the same person) the cost of which to the donor does not exceed €20, exclusive of tax, shall be deemed not to have been effected for consideration."*

57. Section 37 of the VATCA 2010 concerns the calculation of the taxable amount on which VAT is to be charged. It provides, in so far as relevant:-

> "*The amount on which tax is chargeable by virtue of section 3(a) or (c) shall, subject to this Chapter, be the total consideration which the person supplying goods or services becomes entitled to receive in respect of or in relation to such supply of goods or services, including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of that supply."*

58. Section 47(1) of the VATCA 2010 provides:-

> "*Subject to section 41—*
>
> > *(a) in the case of a composite supply, the tax chargeable on the total consideration which the accountable person is entitled to receive for that composite supply shall be at the rate specified in section 46(1) which is appropriate to the principal supply, but if that principal supply is an exempted activity, tax shall not be chargeable in respect of that composite supply*
> >
> > […]"

Submissions

Submissions of Appellant

59. Section 3 of the VATCA 2010, which reflects Article 2 of the VAT Directive, provides that the transactions subject to VAT are supplies of goods and services "for consideration". Section 19 of the VATCA 2010 provides that a "supply" includes the disposal of goods by an accountable person free of charge. Thereafter, section 21 deems the supply of a good made free of charge to have been "*for consideration in the course or furtherance of business*" unless, *inter alia*, the cost of the good to the donor does not exceed a sum specified in regulations, in which case it might be a gift. Regulation 5 of the VAT Regulations 2010 prescribes that the cost of the gift to the donor is to be no more than €20.

60. Counsel for the Respondent pointed out that as all of the promotional goods that were at issue in the appeal had a cost to the Appellant of less than €20, they did not fall to be "deemed" supplies for consideration pursuant to section 21 of the VATCA. The primary issue to be decided in this appeal therefore was whether the promotional goods supplied to its [redacted] as part of its promotions were supplied in exchange for actual consideration, which he said was not the case.

61. Counsel referred to the judgment in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (ECLI:EU:C:1994:80) ("*Tolsma"*), where the Court of Justice considered whether payments made by passers-by to a street musician constituted consideration given in return for his provision of the service of playing the barrel organ. In finding that they did not, the Court of Justice held that there was no agreement between the musician and the passers-by that he would be paid for playing his music. As it pointed out, discerning the motives of those who gave money to him was impossible. Some who did

not stop to listen to his music gave sums of money, whereas others who did gave nothing at all. The giving of money could have been motivated by pleasure derived from the music or, alternatively, a sense of sympathy for the Appellant. There could thus not be said to be an agreement for "reciprocal performance" between the musician and those passers-by and there was no "direct link" between the money given and the playing of the barrel organ. It was, in other words, not consideration for the supply in question. Accordingly, the musician's earnings collected while playing the barrel organ were not chargeable to VAT.

62. In making this finding, the Court of Justice in *Tolsma* cited its earlier judgment in *Coöperatieve Aardappelenbewaarplaats* (ECLI:EU:C:1981:38) ("*Dutch Potatoes"*), where it underlined the need for a "direct link" between the consideration received by a taxable person and their supply of a good or service. In this case, a Dutch co-operative society provided cold-storage facilities to its members who were the producers of potatoes. For several years the storage service was provided to the co-operative's members for a fee. However, in the years 1975 and 1976 it opted not to charge, with the consequence that the value of the shares held by those members fell on account of its reduced income. The Dutch tax authority took the view that the reduction in the value of the shares held by the members in the co-operative amounted to consideration for the storage service provided to them. However, the Court of Justice disagreed on the grounds that there was no direct link between the reduction in share value and the storage service availed of.

63. Returning to *Tolsma,* counsel for the Appellant highlighted paragraph 14 therein, where the Court of Justice held:-

> *"It follows that a supply of services is effected 'for consideration' within the meaning of Article 2 (1) of the Sixth Directive, 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."*

64. Counsel for the Appellant submitted that it was essential when assessing whether the promotional goods were supplied for consideration or not to take into account the Appellant's [redacted] model. He stated that the evidence was that the only way to buy [redacted] online was by being a [redacted]. Counsel for the Appellant pointed out

that a person who was not a [redacted] could not, as he put it, "[wander] *in off the street"* and have access to [redacted] offers. In this regard, he submitted:-

> "[redacted] […] *has benefits for both sides. It has significant benefits obviously for* [the Appellant] *because the* [redacted] *are committed* [redacted] […].

65. Counsel continued that, on the other hand:-

> "*It is* [redacted] *of this* [redacted] *that allows* [redacted] *to buy* […] [redacted] *because if they are not a member of that* [redacted]*, and you will see this time and time again with all the promotions that were listed there, and the terms and conditions, you have to be a member in order to buy this* [redacted]*. More importantly, you have to be a member in order to get the gifts."*

66. Shortly thereafter, counsel for the Appellant submitted:-

> "*You were given promotions which are to your benefit as a customer, because of your status as a* [redacted]*. It is the* [redacted] *that makes the link for us here in relation to this. That's the motivation here for what is going on. That is the reason and the sine qua non for the gift in relation to this. My friend will point out you couldn't have got the gift unless you bought the* [redacted] *and I think that is accepted* […], *but more importantly you couldn't get the* [redacted] *without being a member, you couldn't get the gift without being the member".*

67. Counsel for the Appellant cited the terms and conditions attached to the promotions run over the periods in question. In this regard, he submitted that, although it provided the promotional goods to customers along with [redacted], it was under no contractual obligation to do so in circumstances where the promotional goods were "*subject to availability".* In addition, he emphasised that return or reimbursement of the value of the promotional goods was excluded. These, he said, were further hallmarks of gifts, rather than supplies made for consideration.

68. Counsel then referred to the judgment of the Upper Tribunal of the United Kingdom in *Marks & Spencer v Commissioners of Customs and Excise [2019] UKUT 182.* There, the taxpayer ran a promotion in its stores that was advertised as "*Dine in for Two - £10 – with Free Wine".* Under the promotion a customer was able to choose three selected food dishes for £10 and also obtain a bottle of wine that was described as being "free". Whatever combination of food items was chosen by the customer availing of the

promotion, their combined value when sold outside the promotion was in all instances at least £10, and in almost all instances more. Though the customer was not obliged to take the free wine in order to avail of the offer, in nearly all cases they opted to do so, or take a non-alcoholic alternative that also was described as being free.

69. In finding that the reality of the transaction was that the wine was supplied for consideration, the Upper Tribunal held that there was a direct link between the payment of the £10 and the supply to the customer of the wine. This was evident from the fact that the wine could not be obtained without payment of this sum. The description of the wine as being free was, in the Tribunal's view, the language of advertising. There was a legal relationship between the taxpayer and the customer who took up the promotional offer. In a single simultaneous transaction that customer paid £10 and in return received four items, three food and one beverage.

70. Counsel for the Appellant contended that although *Marks & Spencer* had a certain "superficial attraction" as regards the question before the Commissioner, when one examined its facts it was clear they were in marked contrast to the instant case and the authority, which in any event was of persuasive value only, could thus be distinguished. In this respect, counsel for the Appellant submitted, firstly, that there was no suggestion in *Marks & Spencer* of the existence of a [redacted] such as that established by the Appellant, or anything akin to it. Persons seeking to avail of the *Dine in for Two - £10* promotion could do so merely by walking in off the street.

71. Secondly, counsel for the Appellant pointed out that the facts in *Marks & Spencer* were that those customers bought the items comprising the *Dine in for Two - £10* promotion by putting them through a checkout, which act constituted the customer's 'offer' to purchase that was then accepted by the vendor. The till receipts thus produced indicated just why the Upper Tribunal had reached its conclusion as to the reality of the promotion. In the words of the First Tier Tribunal:-

> "*The till receipt for the Promotion would show each of the items, both food and wine, at their full prices, and then the total of those items as 'Balance before Saving'. The receipt would then show as a deduction the saving on the food items, against the entry 'Dine in Meal for £10', and the saving on the wine against the entry 'Free Wine or Non Alc'. The receipt would conclude 'Items 4: Balance to Pay £10' and state 'You have saved £x on our Promotion today."*

72. Counsel submitted that the receipts in *Marks & Spencer* indicated that a portion of the consideration offered by the customer in that case was for the wine, as well as the food items. In the instant case, by contrast:-

> "[…] *there has never been any allocation of consideration towards the gift* […] *It has always been expressed to be a free gift and that is the end of it*."[7]

73. Counsel for the Appellant also observed that the wine in the Marks & Spencer offer was, according to the facts found by the First Tier Tribunal, the most costly element of the promotion by some margin and an "integral" part of it. In the case of the promotional goods offered by the Appellant to its [redacted], they were of low value (i.e. less than €20 cost to the Appellant) and much less costly than the [redacted] with which they were also supplied. This was a further factor that should lead the Commissioner to hold the promotional goods, in accordance with their description, to be gifts.

74. Counsel for the Appellant also made reference to the judgment of the CJEU in *Apple and Pear Development Council v Commissioners of Customs and Excise* (ECLI:EU:C:1988:120). There, the House of Lords referred a question to the Court of Justice regarding whether mandatory charges levied on certain producers of apples and pears by a statutory body tasked with promoting public consumption of these fruits, constituted consideration given by those producers to that body for its promotion services. In finding that the levies did not constitute consideration of this kind as there was no "direct link" between them and the services provided by the statutory body, the Court of Justice held that:-

> "[…] *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 the pay* […]".[8]

75. Drawing a parallel to the facts of the instant case, counsel for the Appellant submitted:-

> "*In the promotions we are talking about in our case* […] *there is no relationship between the price of the* [redacted] *and the gift that is given. The gift is whatever it is at the time and people either decide they want the gift or they don't. They get it because they are members of the* [redacted]*, they get it because they have already bought the* [redacted]*. And it comes to them after they have bought the* [redacted]*. Effectively, they decide on buying*

[7] Transcript of hearing, day 1, page 118;
[8] Paragraph 15;

the [redacted] *and then they decide whatever free gift they are going to take, if they choose to take that free gift."*[9]

76. Later on in oral submission, counsel for the Appellant stated:-

"[…] *this is all about* [redacted] *in our case here. This is what gives us the nexus, this is what is the link, rather than payment for the* [redacted]*. The payment for the* [redacted] *is, I say, incidental to things here. It is just simply a step along the way that you have to get to in order to get your free gift, but you are getting it because you are a member, or you are getting it because you are* [redacted] […], *or you are getting it because you are* [redacted]*, or for whatever reason that motivates them, but it is not the motivation of paying for a gift."*[10]

77. Counsel for the Respondent referred to the judgment of the Court of Justice in *Kuwait Petroleum (GB) Ltd v Commissioners of Customs & Excise* (ECLI:EU:C:1999:203). This case concerned, *inter alia*, whether 'free gifts', supplied by a fuel company as part of a scheme, using 'vouchers', were in fact paid for by the customer as part of the price charged at the station, ostensibly for fuel . Vouchers were given at the till to a customer for every 12 litres of fuel bought. They could later be exchanged for goods and services listed in a catalogue where a person had accumulated a sufficient number for a particular good or service. The Commissioners for Customs and Excise of the United Kingdom assessed the fuel company as owing VAT on the goods and services from the catalogue supplied under the promotion, where they exceeded the 'small value' amount applicable under legislation in that jurisdiction (i.e. the equivalent of Regulation 5 of the VATCA 2010). This was premised on their view of the goods redeemed with vouchers as being gifts.

78. The fuel company appealed this assessment on the grounds that, in its view, the vouchers, and the goods and services later given in exchange for them, were supplied for consideration as part of a "multiple supply". The consideration in question was the price paid at the pumps by the customers, which it said related not just to the fuel but also the vouchers/the exchanged items. Notably, it took this position despite the fact that its own pre-existing promotional material described the goods and services listed in its catalogue as being free gifts.

[9] Transcript of hearing, day 1, page 136;
[10] Transcript of hearing, day 1, page 139-140;

79. On foot of the referral by the House of Lords of a preliminary reference, the Court of Justice held that it was for the national court to determine whether, when the fuel was purchased, part of the price paid at the pump, whether identifiable or not, constituted value given in return for vouchers or the catalogue goods and services. Nevertheless, it held at paragraph 27:-

"*There is nothing, however, in the documents before the Court to suggest that there was in fact any such reciprocal performance by the parties concerned*."

80. In its view the purchasing of fuel by a customer and any subsequent acquisition of the items in the fuel company's catalogue in exchange for vouchers had the hallmark of "*two separate transactions".*

81. The Court of Justice then went on to find from paragraph 29:-

"*Moreover, there are two considerations in the case in the main proceedings which suggest that the exchange of goods for Q8 vouchers is a disposal free of charge, within the meaning of Article 5(6) of the Sixth Directive, and that the application of those goods is therefore to be treated as a supply for consideration and, accordingly, taxable.*

First, under the sales promotion scheme set up by Kuwait Petroleum, the redemption goods were described as gifts.

Second, it is not contested that the retail price of Q8 fuel, whether or not the purchaser accepted the vouchers, was the same, and this was the only price referred to on the invoice relating to the fuel purchase which, pursuant to Article 22(3) of the Sixth Directive, Kuwait Petroleum or the independent retailers had to issue to the customers who were themselves taxable persons. That being so, Kuwait Petroleum cannot reasonably maintain that, contrary to the statements on the invoices which it issued, the price paid by the purchasers of fuel in fact contained a component representing the value of the Q8 vouchers or of the redemption goods."

82. Counsel for the Appellant drew parallels between the facts that led the Court of Justice in *Kuwait Petroleum* to express the view that there was no supply for consideration in that case and the circumstances present in the instant one. First, the Appellant's own promotional material and invoice documents likewise described the additional items as being free gifts. Furthermore, the price charged under all of the relevant promotions was the same as that charged usually for the relevant [redacted] product outside of the promotion with no additional item due to the customer. Both factors should lead to the conclusion

that there was just one supply for consideration; namely the [redacted] product. The additional item was, as advertised, a free gift. *Kuwait Petroleum* was, in short, far more relevant to the instant appeal than *Marks & Spencer* and the Commissioner should reach the same conclusion as that of the Court of Justice in the former case; the additional items were free gifts.

83. Counsel for the Appellant referred in submission to the judgment of the Upper Tribunal of the United Kingdom in *National Car Parks Limited v Revenue and Customs Commissioners* [2017] UKUT 247 (*"NCP"*). There, the operators of a private car park argued that the chargeable amount for its services was the price it asked of its customers for its parking service over a given period. It did so despite the fact that in many instances its customers ended up paying more than the price asked because the operator required payment in cash at the exit barrier and did not give change. In finding that the amount chargeable to VAT was the sum *received* by the car park operator from each customer, and not the amount asked, the Upper Tribunal observed that it was a fundamental tenet of the VAT system that tax was charged not on an objective analysis of the value of a service or good supplied. Rather, VAT was charged on what the parties to the relevant transaction themselves decided was appropriate payment for the service or good supplied. Put somewhat differently, VAT was charged not on the objective or "market value" of the good or service, but on the 'subjective' value agreed upon by the vendor and purchaser.

84. Counsel for the Appellant submitted that, in allocating a portion of the consideration paid by the customers of the Appellant to the promotional goods as well as the [redacted], what the Respondent was doing was, in effect, applying an objective value to the promotional goods so as to charge VAT. Again, it was clear from the terms of the offers that the parties to the relevant transactions viewed the value of the [redacted] as being the price normally charged and the value of the promotional goods, being a gift, as nil. As such, no VAT was chargeable in the absence of consideration. Although section 38 of the VATCA 2010 allows the Respondent to make a determination that VAT on a transaction should be charged on "open market value", rather than the subjective value of the supply in question decided on by the parties, this can occur only where certain specified circumstances exist. These include that the supplier and purchaser involved in the transaction in question are "connected persons" or that one exercises "control" over the other. Neither of these circumstances existed in respect of promotions arising in the instant case, which fact was not in dispute.

85. Counsel for the Appellant submitted that in assessing what was agreed between the parties to a transaction, one had to begin with the terms of the written documentation. It was only if these terms did not reflect the economic and commercial reality of the transaction, such that they were "*wholly artificial",* or an abuse of the law, that the Commissioner should find that the agreement constituted something else altogether. In other words, he submitted that the parties' apparent *"subjective"* understanding of the transaction should be accepted unless it was found by the Commissioner to be *"a sham".* In support of this submission as to the law, counsel for the Appellant relied on, *inter alia, Customs and Excise Commissioners v United Biscuits (UK) Limited* [1992] STC 325, *Halifax plc & Ors v Commissioners of Customs & Excise (ECLI:EU:C:2006:121)* and *MacCárthaigh v Cablelink Limited,* [2003] IR 510.

86. Counsel for the Appellant then submitted:-

> "*And my submission* […] *is simply that there is nothing artificial about what we are doing. This is a purely commercial transaction. We are at arm's length with our customers who happen to be members of a* [redacted] *that we have set up* […] *The wording* [of the promotion] *is clear, we know what the consideration is.* […] *This isn't a label, this isn't a sham, this isn't wholly artificial* […] *We are simply* […] *selling* [redacted] *and we are doing it in a commercial way."*[11]

87. Counsel for the Appellant submitted that even if the Commissioner did not agree with him that the supply of the promotional goods was a gift, the Appellant should succeed in the appeal against the VAT assessment on an alternative ground. This was that the supply of the [redacted] and the promotional goods should be taken to be the elements comprising a single "composite supply", involving a principal good (the [redacted]) and an "ancillary supply" (the promotional good). In the submission of counsel for the Appellant, the ancillary nature of the promotional goods was evident from that fact that they were items that enhanced the customer's enjoyment when [redacted].

88. Counsel for the Appellant submitted that, were the Appellant's supplies of [redacted] in conjunction with promotional goods held by the Commissioner to be a composite supply, the effect would be that, pursuant to section 47 of the VATCA 2010, the ancillary promotional goods would fall to be taxed in accordance with the rate applicable to the principal [redacted]. This rate being zero, the Appellant would therefore owe no VAT on the promotional goods.

[11] Transcript of hearing, day 1, page 158;

89. Furthermore, counsel for the Appellant submitted that it was clear from the relevant definitions in section 2(1) of the VATCA 2010 that there was a presumption that a supply of several goods made together in return for a single sum of money constituted a single composite supply, rather than a "multiple supply" of several "individual goods" for total consideration. This submission was based on the definition of a multiple supply in section 2(1) of the VATCA 2010 as:-

> *"*[…] *two or more individual supplies made by a taxable person to a customer where those supplies are made in conjunction with each other for a total consideration covering all of those individual supplies, and where those individual supplies do not constitute a composite supply*." [Emphasis added].

90. For this reason also, if the supplies of the promotional goods were held not to be supplies in the form of a gift, made for no consideration, then they should instead be found to be the ancillary element of a single composite supply made for consideration, with the effect that they should be taxed at the rate of zero.

91. Counsel for the Appellant referred in replying submission to the Respondent's reliance on the case of *Talacre Beach Caravan Sales Ltd v Commissioners of Customs & Excise* (ECLI:EU:C:2006:451) ("*Talacre Beach Caravans")*, a case in which it was held by the Court of Justice that the United Kingdom was not prohibited from excluding from zero rating fittings that were the ancillary part of a supply of zero rated non-moveable caravans. The details of the Appellant's and the Respondent's submissions on this matter are set out in the subsequent sections of this Determination. It is necessary to say at this point, however, that counsel for the Appellant submitted that the judgment of the Court of Justice in *Talacre Beach Caravans* turned on the particular nature of the relevant domestic legislation of the United Kingdom. That the case should be confined to its own facts was reflected in the comments of Advocate General Pikamae in her Opinion in *Blackrock Investment Management (UK) Limited v Commissioners for Her Majesty's Revenue and Customs* (ECLI:EU:C:2020:196), where she observed at paragraph 56 that the circumstances in *Talacre Beach Caravans* were "*very specific".*

Submissions of Respondent

92. Counsel for the Respondent began by making the point that VAT is a tax on supplies, though it is calculated on amounts. Counsel for the Respondent submitted that the question of whether or not a supply for consideration had occurred was a question of law,

not one to be determined by reference only to a label ascribed by a party or the parties to a transaction.

93. Counsel for the Respondent then submitted that the key question as regards whether the promotional goods were supplied for consideration was whether there was "reciprocal performance" between the Appellant and its customers and a "direct link" between the payments made by the latter to the Appellant and its supply of the promotional goods. Counsel drew the Commissioner's attention to *Apple and Pear Council,* discussed by the Appellant in its submissions. This was, she said, an example of an instance where there was no direct link because the amount received in levy payments by the council from the producers of apples and pears:-

> "[….] *didn't relate to the value of the benefit received by any one* [producer] *on whom the levy was raised*."[12]

94. Counsel for the Respondent referred to the judgment of the Court of Appeal in *Nationwide Controlled Parking Systems Limited v Revenue Commissioners [2021] IECA 150 (*"*NCPS"),* which she said laid out in clear terms many of the fundamental legal principles applicable to VAT lying at the heart of the appeal.

95. This case concerned the question of whether de-clamping fees received by the appellant company from motorists constituted consideration for a service supplied, in which case the service was chargeable to VAT, or, alternatively, something in the nature of damages for trespass, in which case it was not. In their joint judgment for the Court, Collins J and Murray J held that the fees were the former, with the effect that VAT should have been charged.

96. Counsel for the Respondent, referred in particular to paragraph 39 of *NCPS,* which was headed *"Relevant principles of VAT law".* There, the Court held:-

> *"The following principles are derived from the authorities opened to us and do not appear to be in dispute:*
>
> *(i) First, and fundamentally, the VAT Directive establishes a common system of VAT based on, inter alia, "a uniform definition of taxable transactions" (Case C-653/11, Newey, at para 39; Case C-36/16 Posnania Investment SA, at para 25). That*

[12] Transcript of hearing, day 2, page 11;

definition "assigns a very wide scope to VAT" (Joined Cases C-354/03, C-355/03 and C-484/03, Optigen, at para. 37)

(ii) Second, it is the supply of services (or goods) that is the subject of VAT, rather than the payments by way of consideration for such supply (Case C-520/10 Lebara, at para. 26).

(iii) The term supply of services is objective in nature and applies without regard to the purpose or results of the transaction, and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (C-653/11 Newey, at para. 41; Cases C-250/14 and C-289/14 Air France KLM).

(iv) Whether particular transactions constitute a supply of goods or services for the purposes of these provisions requires regard being had to all the circumstances in which the transactions in question took place in order to identify their characteristic features (Case C-231/94 Faaborg-Gelting Linien, at para. 12).

(v) When categorising a transaction as a taxable transaction, consideration of "economic and commercial realities" is a "fundamental criterion" for the application of the common system of VAT (MEO, at paras. 43 and 44).

(vi) A supply of services is effected "for consideration" within the meaning of Article 2(1) 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 service provider constituting the value actually given in return for the service supplied (Case C-16/93 Tolsma, at para. 14). Some "corresponding performance" on the part of the taxable person is necessary (Case C-36/16 Posnania Investment, at para. 34)

(vii) 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", which 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 (Case C-412/03 Hotel Scandic Gåsabäck, at para. 22)

(viii) Where a provider receives only one payment in the course of supplying a service, it cannot be treated as carrying out two supplies of services for

consideration and it is necessary to identify the recipient of the sole supply of services (Lebara, at paras 31 to 33).

(ix) The objective of the consideration is not decisive for its classification (MEO, at para. 62), nor is the characterisation by national law of such an amount as a remedy, damages, penalty or remuneration relevant to the inquiry (ibid. at para. 68).

(x) The existence of binding and enforceable legal obligations between service supplier and recipient is not essential. The necessary legal relationship may arise even where it has been agreed that the provider is bound in honour only to provide the services (Case C-498/99 Town & County Factors, at paras. 20 to 24)

[…]"

97. Counsel also referred to *MEO — Serviços de Comunicações e Multimédia SA v. Autoridade Tributária e Aduaneira,* ECLI:EU:C:2018:270 *("MEO").* There, the Court of Justice held that amounts due under a contract for telecommunications services for early termination of that contract, labelled as "damages" in the relevant contractual material, constituted a taxable supply for the purposes of the VAT Directive. In so finding, the Court of Justice observed from paragraph 43 that:-

"*As regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 20 June 2013, Newey, C-653/11, EU:C:2013:409, paragraph 42 and the case-law cited).*

Inasmuch as MEO has a right under the agreements at issue in the main proceedings, in the event of failure to observe the minimum commitment period, to payment of the same amount as it would have received as payment for services which it undertook to supply in the event that the customer had not terminated his contract, a matter which it is for the referring court to ascertain if necessary, the early termination of the contract by the customer, or its termination for a reason attributable to that customer, does not alter the economic reality of the relationship between MEO and its customer.

In those circumstances, it must be held that the consideration for the amount paid by the customer to MEO is constituted by the customer's right to benefit from the fulfilment, by MEO, of the obligations under the services contract, even if the customer

does not wish to avail himself or cannot avail himself of that right for a reason attributable to him. In the present case, MEO enables the customer to benefit from the service within the meaning of the case-law cited in paragraph 40 of this judgment and the cessation of that service is not imputable to it."

98. Applying this principle to the facts before it, the Court of Justice found:-

"[…] *the amount due for non-compliance with the minimum commitment period must be considered an integral part of the total price paid for the services, divided into monthly instalments, which amount becomes payable immediately in case of failure to pay."*

99. Counsel for the Respondent submitted that what *MEO* underlined again was that the question of whether a transaction was a supply for consideration was not bound to be determined according to the parties' own characterisation of what had occurred, unless that characterisation could be proved to be wholly contrary to reality or a sham. Rather, the transaction had to be looked at objectively.

100. Furthermore, the parties' own subjective perception or understanding of whether or not there was a supply for consideration made or a gift given was not decisive. Counsel repeated that the question that the Commissioner had to ask was whether there was reciprocity between the Appellant and its customers whereby consideration was given for goods received, and a portion of that consideration was for the additional item as well as the [redacted] product forming part of the promotions in question.

101. Counsel pointed out that whether or not the Appellant was legally bound to provide the promotional goods did not decide the question of reciprocity, as was made clear by the Court of Appeal in *NCPS,* at point 'x' of paragraph 39, quoted above in this Determination.

102. Counsel for the Respondent then proceeded to address the question of whether the Appellant's supply of [redacted] and of a promotional good pursuant to the promotions in issue constituted separate and distinct supplies forming part of a "multiple supply", within the meaning of section 2 of the VATCA 2010, or were the primary and ancillary parts of a single "composite supply" under the same provision.

103. The key in this case, submitted counsel for the Respondent, was to ask whether the promotional goods were or were not physically and economically dissociable from the [redacted] products supplied to customers. In answering this, counsel for the Appellant relied on the judgment of the Supreme Court in *MacCathaigh v Cablelink,* where it was held

that Cablelink's supply of cable television and radio services were separate to its connection and reconnection services. Therein, Fennelly J held at page 17:-

> *"It is true of course that the sole purpose of the connection and reconnection service is to enable the television and radio service to be delivered and that the equipment remains the property of the taxpayer.*
>
> *Several features of the entire service nonetheless warrant treating the connection and reconnection service as a distinct supply. Firstly, this work is physically and temporally distinguishable from the delivery of the signal itself. It must be performed before the service can be switched on and requires work on site. Secondly, and for the same reason, it is capable of being separately costed both in respect of the labour and materials. Thirdly, the extent to which a connection or reconnection service is required will vary over time and from one customer to another: a new customer will have to pay for a full connection only when it is made for the first time and not over ensuing periods, unless he is disconnected for non-payment and has to be reconnected; a customer moving into a house or flat already fitted with the service will not have to pay to the same extent as if the dwelling has to be newly cabled. This will make the charge proportionate to the service actually provided. Fourthly, it is hypothetically possible that the connection service could be performed by an independent company. In that case, there can be no doubt that there would be an independent supply."*

104. It could not, counsel for the Respondent said, be clearer that the supplies of the [redacted] and the promotional goods were dissociable economically and physically from one another, with the effect that there was not one single composite supply, but rather a multiple supply involving individual supplies made for total consideration. The promotional goods, it was submitted, were manifestly distinct from the [redacted]. This applied whether one took into consideration the [redacted], [redacted], [redacted], [redacted] or [redacted]. As counsel for the Respondent put it:-

> "*All of* [the promotional goods] *are physically and economically dissociable from the* [redacted]*, capable of being supplied in their own right and by someone else in some other circumstance. They are not used as packaging for the* [redacted] […] *they are physically separate. Some of the gifts, like* [redacted]*, last but a moment; others could last a lifetime like a* [redacted]*, and long after you have finished* [redacted]*. They are not ancillary to the supply of the* [redacted] *and they are not, in fact, a means of*

better enjoying the [redacted]. I don't see how, for example, an [redacted], once you put it on, means that while you are [redacted] […][13]

105. Counsel for the Respondent continued:-

"*You can buy a [redacted] anywhere, you don't have to buy a [redacted] to enjoy [redacted], it's a separate item, you can separately cost it, it doesn't make your [redacted] better or worse, [redacted].*"[14]

106. Counsel for the Respondent also opened a decision of the VAT and Duties Tribunal of the United Kingdom, *MD Foods Plc v The Commissioners of Customs & Excise (Lon/00/899),* where the Tribunal Members held that a butter dish, taxed at the standard rate and sold with Lurpak butter, which was zero rated, was not the ancillary part of a single composite supply. In arguing that the dish was ancillary to the butter supply, counsel for the appellant in that case argued that:-

"*It is an important attribute of the butter dish* […] *that it enables the butter to be kept outside a fridge so that the butter remains easily spreadable; and if kept in the butter dish has a long life as it would have if kept in the fridge."*

107. As part of its reasoning to the contrary, the tax tribunal held at paragraph 25:-

"*When the hearing was over we retired and asked ourselves the simple question. In the light of the evidence that we have seen and heard, what in reality does the buyer get when he pays the unit price for the Limited Edition Pack? The answer we both independently produced was this: a cardboard package containing a pottery butter dish with its cover and two wrapped 250g packs of Lurpak butter. This conclusion followed from the fact that the cardboard package was designed to hold and display the butter dish. The butter dish was the most prominent item in the cardboard package and was given the most prominence in the written material on the outside of the package. The butter dish was not designed or used as a container within which to sell the butter; the butter packs were, instead, stacked at the sides of the cardboard package. The butter dish, unlike the packs of butter, was designed for long-term use and, unless broken, would long outlive the two packs of butter in the cardboard package."*

108. Referring to the decision in *Customs & Excise Commissioners v United Biscuits (UK) Ltd* [1992] STC 325, the Tribunal members held:-

[13] Transcript of hearing, day 2, page 32;
[14] Transcript of hearing, day 2, page 33;

"*In the present circumstances however, the butter dish, like the biscuit tin in United Biscuits, had a life of its own; but, unlike the biscuit tin it was not ancillary to the butter."*

[…]

Nor, in our view could the butter dish fairly be described as a means of better enjoying the principal item supplied. See the test applied by the ECJ in Customs and Excise Commissioners v Madgett & Baldwin, paragraph 24. In reality the supply of the butter dish was, for the reasons we have given, a principal supply in its own right."

109. Counsel for the Respondent submitted that this case, though not binding, further underlined why the promotional goods should not be taken to be the ancillary part of a single composite supply. Rather they were supplies in their own right made as part of a multiple supply for total consideration, within the meaning of section 2 of the VATCA 2010.

110. Having sought to establish that the supply of the promotional good was separate to the supply of [redacted], counsel for the Respondent then turned to question of whether the former was made for consideration. In this respect, counsel made extensive reference to the aforementioned decision in *Marks & Spencer.* In urging the Commissioner to apply the same reasoning as that of the Upper Tribunal of the United Kingdom, she emphasised the factual similarities between the respective promotions. In the view of counsel for the Respondent:-

"[…] *it is crystal clear that the most common feature between that case and this is that* […] *you can't get the gift unless you pay for the deal. That's the critical feature between both of them.*

[…][15]

111. Just as in *Marks & Spencer,* this, more than anything else, was fatal to the claim that the item, marketed as being free, was a gift disposed of for no consideration.

112. The Appellant, counsel for the Respondent said, had highlighted the terms and conditions attaching to the promotions to the effect that receipt of an additional item by a customer was 'subject to availability', that they were time-limited and that additional items could not be returned or exchanged. These terms were designed to manage the expectations of customers. They did not alter the economic and commercial reality that

[15] Transcript of hearing, day 2, page 40;

where those customers provided consideration, they did so for two items, the [redacted] and the promotional good in question.

113. Counsel for the Respondent submitted that it was irrelevant to the outcome of *Marks & Spencer* that, if a customer opted to avail of only the food portion of the promotion in that case, and forego the wine on offer, the price of £10 would remain the same. Likewise, in the instant case, if a customer opted not to take an additional item, and it was doubtful that this was even technically possible in relation to online offers, it did not matter in the overall analysis.

114. Counsel for the Respondent submitted that many of the features that the Appellant argued distinguished the instant case from the circumstances of *Marks & Spencer* in fact did nothing of the sort. The fact that the Appellant engaged with its customers through its [redacted] was not of any legal significance. Nor was the manner in which Marks & Spencer's till receipts recorded purchases made under their dine-in for £10 offer a distinguishing feature. When one read the judgment of the Upper Tribunal it was clear that this was not a factor in its reasoning, or at least not one of any centrality. Furthermore, the fact that wine available in the promotion in *Marks & Spencer* was its most valuable constituent part, whereas the promotional goods offered under the promotions were not, changed nothing in principle. Summing up this aspect of the Respondent's submissions, its counsel said:-

> "*In theory, of course, it is possible to give something away for free and that's clear from the Kuwait Petroleum case at a level of principle and that's acknowledged in the M&S case at page 1685*
>
> […]
>
> *Here you couldn't get the gift without paying and I think the Tribunal had a colourful way of looking at that; in other words, if a customer strolled into the shop and simply asked for a free bottle of wine, he would have been given short shrift*."[16]

115. Counsel for the Respondent then addressed the judgment of the CJEU in *Kuwait Petroleum*. The Court of Justice, in finding the goods supplied on foot of the presentation of vouchers were gifts, made comment at paragraphs 29 and 30 regarding certain factors indicating that they were genuine gifts. These factors were (a) that Kuwait Peteroleum's own promotional material referred, contrary to its submission before the Court, to the

[16] Transcript of hearing, day 2, page 45;

goods in question as being gifts and; (b) that the price paid at the pump for fuel was the same whether or not the customer availed of the opportunity to take vouchers arising from their purchase.

116. However, this was not the crux of the decision of the Court of Justice in *Kuwait Petroleum*. In this regard counsel for the Respondent submitted:-

> "[…] *in Kuwait Petroleum* […] *the national tribunal had said that there were two separate transactions, that came up to the CJEU. Their first port of call was that fact. They do go on to say that it was difficult to argue that* [the goods exchanged for vouchers weren't] *free because they were described as a gift, and that the* […] *price paid for the petrol was the same whether or not you ultimately availed of the gift. But those were comments on the facts, the critical paragraphs preceding, which activated the judgment, in my respectful submission, concerned the separate nature of the supplies and the lack of reciprocity, and that is recorded by the Tribunal, and precisely the same applies here* […]".[17]

117. Counsel for the Respondent finished by addressing a final issue in relation to the Appellant's suggestion that the promotional goods, being as it contended the ancillary part of a composite supply, could benefit from the zero rate of VAT applicable to the principal part, namely the [redacted].

118. In this regard, counsel opened the judgment of the CJEU in *Talacre Beach Caravan Sales Ltd v Commissioners of Customs & Excise* (ECLI:EU:C:2006:451). That case concerned supplies made by a seller of fitted caravans based in the United Kingdom. The particular issue that arose was whether a VAT rate of zero could be applied to the fittings installed in caravans by the Appellant, as well as the caravans themselves. This was in doubt in circumstances where the relevant national legislation that applied a zero rate to caravans, which resulted from the United Kingdom availing of a derogation under Article 28(2) of the Sixth Directive whereby it could opt to retain reduced rates of VAT in force under national law on or prior to 1 January 1991, expressly excluded from its scope the "removable contents" of caravans. As the Court of Justice explained at paragraph 25 of its judgment, the United Kingdom did so in its law because, "*It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans"*

119. The question that came before the Court of Justice, on a preliminary reference made by the Court of Appeal of England and Wales, was whether this exclusion was in

[17] Transcript of hearing, day 2, page 47;

contravention of EU law in circumstances where, it said, the supply of the caravan fittings, being removable contents, were part of a single supply along with the caravan. In finding that the exclusion legislated for by the United Kingdom was not in contravention of EU law, the Court held, at paragraph 22, that allowing the zero rate to apply to goods in respect of which there was no reduced rate of VAT applied by the United Kingdom as of 1 January 1991 would:-

"[…] *run counter to that provision's wording and purpose, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation* […]"

120. The Court of Justice then held at paragraph 26:-

"[…] *there is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system*."

121. Counsel for the Respondent also placed emphasis on paragraph 24 of the Court of Justice's judgment, where it held :-

"*The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case-law on the taxation of single supplies, relied on by Talacre and referred to in paragraph 15 of this judgment, does not relate to the exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned. While it follows, admittedly, from that case-law that a single supply is, as a rule, subject to a single rate of VAT, the case-law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28 (2) (a) of the Sixth Directive on the application of exemptions with refund of the tax paid.*"

122. On this basis, and on the basis of the subsequent judgment of the CJEU in *Stadion Amsterdam CV v Staatssecretaris van Financiën (ECLI:EU:C:2018:22),* it was submitted by counsel for the Respondent that even were the Commissioner to find that the supply of the additional items was part of a single composite supply with the zero rated [redacted] items, the zero rate should not be applied to the additional items, which all stood to be taxed at the standard rate. To do otherwise would be to apply a zero rate to a good that was, when sold on its own, supposed to be taxed at the standard rate of VAT. This, it was submitted, would be contrary to the proper working of the VAT system and would

infringe the principle that derogations of the kind permitting the State to apply a zero rate to the supply of [redacted] be interpreted strictly.

Material Facts

123. The facts material to this appeal that were not in dispute were as follows:-

- the Appellant is a company incorporated in [redacted] that sells [redacted];
- [redacted];
- the applicable rate of VAT on the Appellant's supply of [redacted] is zero;
- the Appellant claims input deductions in respect of its supplies of zero-rated [redacted];
- the Appellant sells products other than [redacted], including [redacted];
- the Appellant conducts its business in Ireland online and in [redacted] physical stores;
- in order to purchase the Appellant's [redacted] online, it is necessary to create an account with the Appellant. An account is created by the provision of an email address and the selection of a password;
- a person who creates an account is referred to by the Appellant as a "[redacted]" and receives a personal membership number;
- a person who wishes to create an account with the Appellant need pay no fee to do so. Anyone may seek to create an account;
- an account holder with the Appellant may receive information regarding promotional offers where they agree that the Appellant may send them such information;

- promotions involve the Appellant offering an account holder an additional good, described as a "free gift" or "complimentary gift", when they purchase a particular types or types of its [redacted] in set quantities;

- over the periods in question the Appellant ran promotions where it offered account holders, or account holders of a particular kind, a promotional good when they purchased a particular type or types of its [redacted] in specific amounts ranging from [redacted]

- in some of its promotions over the periods in question the Appellant targeted particular types of account holder. Examples of these types of account holder were new account holders, '[redacted]' (those who had made no purchase for six months), '[redacted]' ([redacted]) and '[redacted]');

- in other promotions run over the periods in question the Appellant offered account holders promotional goods where they purchased a particular variant of [redacted] in a given quantity;

- all of the Appellant's promotions ran for limited periods of time and were capable of being availed of by an account holder only once;

- in every instance the aim of the Appellant in running its promotions was to encourage account holders to buy new variants of [redacted], foster brand loyalty and increase sales;

- the Appellant runs promotions of the aforementioned kind on a regular basis. Doing so is a part of its commercial strategy;

- the promotional goods offered in the promotions run over the periods in question included: [redacted];

- the cost to the Appellant of the promotional goods in general ranged from €[redacted] - €[redacted], though there was evidence of certain goods costing €[redacted];

- in all but one instance the cost to the Appellant of the promotional goods offered as part of the promotion was less than €20.00. The Appellant did not seek to

challenge the part of the Appellant's assessments relating to the one good, the [redacted], the cost of which exceeded €20.00;

- the cost to the Appellant of the promotional good on offer in a given promotion tended to correlate to the quantity and/or value of the [redacted] required to be purchased under the promotion;

- under one such promotion, entitled "[redacted]" the price of [redacted] to the account holder was €[redacted], with that person entitled to their choice of one of three gifts; [redacted], [redacted], and [redacted];

- under another promotion, entitled "[redacted]" the price of [redacted] to the account holder was €[redacted], with that person entitled to their choice of one of three gifts; the [redacted], the [redacted] and [redacted];

- under another promotion, relating to its "[redacted]" [redacted], an account holder was entitled to a [redacted] with a purchase of [redacted];

- the provision of promotional goods by the Appellant to the account holders was in all promotions run over the periods in question dependent on the account holder purchasing the Appellant's [redacted];

- under the terms and conditions of the promotions run over the periods in question, the promotional goods were stated to be "*subject to availability*" and their return or exchange once acquired was not permitted by the Appellant;

- each promotion run by the Appellant over the periods in question could be availed of by that account holder only once;

- the invoices issued to customers in respect of the promotions run over the periods in question referred both to the [redacted] supplied and the promotional item;

- the invoices ascribed the entirety of the price charged to the [redacted]. The charge for the promotional good was described as being nil;

- the Appellant charged VAT on its supplies of [redacted] at zero per cent and did not charge VAT on the supply of the promotional goods;

- the Respondent raised assessments to VAT in respect of the period November/December 2012, the calendar years 2013, 2014, 2016 and 2017 and the period January/February 2018. The sums of VAT assessed as owed by the Appellant arose from the supply of the promotional goods in respect of which it had charged no VAT;

- the Appellant appealed the aforementioned assessments to the Commission.

124. A factual matter in dispute in this appeal was whether it was possible to avail of the Appellant's online promotions without opting to receive the additional good. In this respect, on the basis of the evidence given by Witness 1, the Commissioner finds, as a fact material to the issues arising in this appeal, that it was not possible to proceed to the Appellant's online checkout without selecting a promotional good.

125. This finding of fact is made despite the subsequent contradictory evidence proffered by Witness 2, who also was called by the Appellant, which he admitted was based not on his own knowledge, but rather on what other persons who worked in the Appellant's IT department had told him about the functioning of its website. In this regard, it is necessary to recall the judgment of the High Court in *Menolly Homes v Revenue Commissioners [2010] IEHC 42,* where Charleton J stated at paragraph 22:-

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."*

126. Met with the contradictory evidence given by two of the Appellant's own witnesses, the Commissioner in this instance is compelled to find that the onus resting with it to prove that a customer could proceed from the online 'offer' page to the web checkout has not been met. This is so notwithstanding that at hearing the Appellant produced an unproven document to be commented on by Witness 2, supposedly amounting to an invoice demonstrating an instance where a customer proceeded to buy [redacted] pursuant to a promotion but declined to take the relevant gift.

127. It is, however, worth observing that the above factual dispute is, in the view of the Commissioner, of little if any real import to the outcome of this appeal. This is so because,

as a matter of logic, it is difficult to understand why a person seeking to make a purchase pursuant to a promotion would opt not to receive the additional item offered to them and such instances must, at a minimum, have been rare. This was reasoning which Witness 2 himself agreed with when it was put to him in cross-examination by counsel for the Respondent.

Legal Analysis

Whether supplies of the promotional goods were "supplies for consideration"

128. This was the primary legal issue arising in the appeal and the parties were in effect in agreement as to the test to establish whether a supply had been made for consideration. This was that there be a "*direct link between the* [good] *or service provided and the consideration received*" (*Dutch Potatoes,* paragraph 12) and a "*legal relationship between the provider of the service and the recipient pursuant to which there was 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" (Tolsma,* paragraph 14).

129. A significant part of the submissions of both parties focused on two authorities, one being *Marks & Spencer* and the other *Kuwait Petroleum.* In the case of the Appellant, it sought to draw points of distinction with the circumstances of the former while highlighting similarities with the latter, which it emphasised was a binding judgment of the Court of Justice. The Respondent, by contrast, drew parallels with the circumstances analysed by the Upper Tribunal in *Marks & Spencer* and sought to distinguish *Kuwait Petroleum.*

130. The essential facts of this case should not be overcomplicated. The Appellant ran promotions which combined the supply to its customers of [redacted] with its own broadly [redacted] products which, with a couple of exceptions, were available to be purchased on its own on its website and/or in its physical stores. It was apparent from the evidence of Witness 1, who was called by the Appellant, that the running of such promotions was an important part of its overall commercial strategy. The promotional goods were, he said, part of the Appellant's [redacted] "[redacted]" and their supply encouraged brand loyalty and boosted the prospects of future purchases by customers.[18] It must also be said that their production would have represented a cost to the Appellant's business.

[18] Transcript of evidence, page 13.

131. In the Commissioner's assessment, the promotions at issue have some distinguishing features from the promotion that was considered by the Upper Tribunal in *Marks & Spencer.* Counsel for the Appellant pointed out that any member of the public was able to walk off the street into a Marks & Spencer premises and avail of the *"Dine in for Two - £10 – with Free Wine"* offer. They could do so on multiple occasions if they so wished, subject to the availability of the various items. This was not true of any of the promotions at issue, which were directed to particular persons who had registered with it to have an online account and who could avail of a promotion of which they had been notified once only. While this is so, it is not clear to the Commissioner why, had that been the case in *Marks & Spencer,* the outcome of that tax appeal would have been different. Whether its £10 promotion was available to a customer only once, or whether it was directed to particular customers having certain characteristics does not seem to have an impact on the principle involved.

132. Of greater significance is that the most valuable single element of the Marks and Spencer promotion was, by some margin, the wine on offer. It is clear from the decision of the First Tier Tribunal that, while one could take only the food items and still make some sort of saving when paying the £10, the bulk of the benefit to the customer when availing of the promotion was to be found in the wine. There was thus an artificiality to its self-description of the wine as being "free" which, critically, the Upper Tribunal found an ordinary consumer would be able to detect and comprehend as being the language of marketing rather than a reflection of commercial reality.

133. It is true too that the till receipt produced by Marks & Spencer that recorded the purchase of its promotion first stated the full price of the wine and the food and then, thereunder, the saving made in respect of each. This contrasts with the invoice produced by the Appellant, which, while recording the supply of the relevant promotional item, attributes no consideration to it.

134. However, in the final analysis these differences do not, in the Commissioners view, alter the fundamental fact that, as in *Marks & Spencer*, there was both a "direct link" between the provision of monetary consideration by customers who availed of the promotions in question and the supply to them of the promotional goods, and a legal relationship entailing reciprocal performance. In this regard, an apposite question is; what would an ordinary person, seeking to avail of one or other of the promotions in issue that had been directed to them, have considered they were providing their money in return for? The answer to this, it seems to the Commissioner, is readily apparent and is indicative of how the transactions should be viewed objectively. That person would

provide the money asked for by the Appellant in order that they receive not [redacted] alone, but [redacted] and a further promotional good.

135. This is not a case akin to *Tolsma,* where the playing of the barrel organ and the giving of money by passers-by were not reciprocal acts under a legal relationship because it was impossible to identify the reason for which the money in question was given. Nor is it a case akin to *Dutch Potatoes* or *Apple and Pear,* where there was no sufficient link between money provided and a service rendered subsequently. No more or less than the [redacted], the customer would not receive the promotional goods unless and until the customer made payment. If they did, the evidence was that they would receive it. The "*subject to availability"* terms and conditions attaching to the promotion were, Witness 1 accepted in cross-examination, a standard formula used by the Appellant to manage customer expectations. If the Appellant ran out of a particular promotional good, such that it could no longer provide it along with a [redacted], the promotion would either be amended or it would be terminated altogether. What did not happen was that the Appellant would simply refuse to supply the promotional good having indicated that it would do so.

136. In this key respect the promotions at issue are no different to those in *Marks & Spencer,* and the analysis of the Upper Tribunal of the United Kingdom at paragraph 101 therein, with which the Commissioner agrees, is applicable to the facts of the instant case:-

> "*In our view, the payment of £10 constituted consideration both for the three food items and also for the wine. There was a direct link between the provision of the wine and the payment of the £10. The wine would not be provided unless the customer provided/ paid £10 at the till. Furthermore there was reciprocal performance between the customer and M&S. In a single simultaneous transaction, the customer paid £10 and M&S supplied the three food items and supplied the wine. This was not a case like Kuwait Petroleum where there were effectively two separate transactions which destroyed the reciprocity of performance between the parties (ie between the payment for the fuel and the supply of the reward goods): see para [81] above. Indeed it was not possible for the customer to separate the transaction into two: he or she could not buy the three food items first, and then return later that day or the next day to claim the wine* […]"

137. In the Commissioner's view, the reality of the promotions in issue was encapsulated by the response of Witness 1 to the following question put to him by counsel for the Respondent:-

Q. "[…] *I think it is reasonable to say that you can't just get a gift without making payment?"*

A. "Well, it is pretty difficult to get a gift for…we are a commercial organisation, [we] *don't just give you gifts*."[19]

138. In reaching this conclusion about the real nature of the promotions in issue, the Commissioner does not consider their limitation to specific types of '[redacted]' (i.e. a person who has registered with it so as to make online purchases) to be of significance. In so far as it was suggested in submission by counsel for the Appellant that it should be held that the promotional goods were given by the Appellant simply in recognition of their having so registered, and thereby having enhanced its ability to market specific [redacted] to specific types of customer, this appears to the Commissioner to be contrary to the aforementioned evidence given in the appeal hearing. To take, as an example, the Appellant's [redacted]', the promotional goods on offer were not supplied to the customer upon their having registered as a [redacted], with no further action required of them. It is necessary to emphasise again the fact that the promotional goods were only supplied on condition that a purchase of [redacted] was made as part of the same transaction. Counsel for the Respondent submitted that the Appellant's model of requiring registration as a [redacted] to make online purchase was legally irrelevant to the determination of this appeal. This is a point with which the Commissioner agrees.

139. In *Kuwait Petroleum* it was held by the Court of Justice that the promotional goods and services supplied by that company to customers in exchange for vouchers previously given upon their purchase of set quantities of fuel, constituted gifts made in return for no consideration. Counsel for the Appellant submitted that in reaching this finding, the Court of Justice had identified as relevant factors, firstly, Kuwait Petroleum's own description of the promotion as involving "gifts" and, secondly, that the retail price of the fuel purchased at the pump did not depend on whether the customer in question took up the opportunity to take the vouchers. Counsel for the Appellant submitted that, no less than in *Kuwait Petroleum,* these were factors favouring the determination of the instant appeal in the Appellant's favour. He highlighted that the price sought under the promotion always reflected what would be charged for the [redacted] in the normal course outside of

[19] Transcript of hearing, day 1, page 59.

promotions. In other words, what was being charged for was the [redacted], not the promotional good. This, underscored that the Appellant's own description in its promotional offers and invoices of the goods as being "free" or "complementary" gifts, accorded with commercial reality, and should not be deviated from by the Commissioner.

140. However, there are factors evident from the Court of Justice's judgment in *Kuwait Petroleum* that, in the Commissioner's view, mean that it should not be taken as authority that the Appellant should succeed in its appeal of the Respondent's assessments. Firstly, it is clear that a critical factor in the reasoning of the Court of Justice was that there was a temporal gap between the purchasing of fuel and the production of vouchers by a customer so that they might "redeem" promotional goods specified in a catalogue. This factor led AG Fennelly to conclude in his Opinion at paragraph 43, with which conclusion the Court of Justice agreed in its Judgment at paragraph 28, that the purchasing of the fuel and the redeeming of the promotional goods in return for vouchers were two "distinct" and "separate" transactions. No such temporal gap is present in this case.

141. Furthermore, and as a secondary observation, it is perhaps relevant to the proper reading of this authority that Kuwait Petroleum was, in contrast to the instant appeal, seeking to argue that the supplies of its promotional goods were *not* gifts and were supplied in return for consideration paid at the pump, which covered both the fuel and the promotional item/voucher. Kuwait Petroleum made this case in circumstances where, if successful, it would have succeeded in overturning the assessments of the Customs and Excise Commissioners of the United Kingdom, which were based on it having made self-supplies of goods that were not of small value, and thus fell to be treated as taxable supplies made for consideration. Kuwait Petroleum's argument that its own promotional goods were in fact taxable supplies, in respect of which consideration had been paid previously and VAT already accounted for, was in the teeth of its own contemporaneous description of these supplies as free gifts in its marketing and invoicing. It should not, therefore, be of great surprise that it did not succeed in its argument.

142. For the foregoing reasons, the Commissioner finds that the Appellant's supplies of promotional goods were supplies made "for consideration" and thus were chargeable to VAT in accordance with the terms of Article 3 of the VAT Directive.

Whether the supply of the promotional goods comprise part of a single supply with the [redacted]

143. This leads to the second, and alternative, ground of appeal advanced by the Appellant, whereby it suggested that supplies of the promotional goods were the "ancillary" element

of a single "composite supply" of goods. In the submission of the Appellant, the effect of this would be that, pursuant to section 47 of the VATCA 2010, both elements of the single supply fell to be taxed at the rate of zero per cent applicable to the "principal" part of the same supply, namely the [redacted].

144. The Respondent contended, by contrast, that what occurred when the Appellant supplied a customer with [redacted] and a promotional good was a "multiple supply" of separate "individual supplies" as defined by section 2 of the VATCA 2010. Each individual supply fell to be taxed at the rate appropriate to it, which in the case of each and every one of the promotional goods was the standard rate of VAT. It further contended that, even were it to be held that as a matter of law the transaction involving the supply of the [redacted] and the promotional goods amounted to a single supply, it was nevertheless the case that the [redacted] and the promotional goods had to be treated separately for VAT purposes.

145. In analysing this issue, it is appropriate to begin with the general principle, expressed on numerous occasions by the CJEU, including in the case of *Stadion Amsterdam*, relied on by the Appellant, that:-

> "[…] *it follows from Article 2 of the Sixth Directive that every transaction* [i.e. supply] *must normally be regarded as being distinct and independent".* [20]

146. From this it follows, as a matter of principle, that each individual supply must be assessed separately for VAT purposes. This holds true even where there exist links between multiple supplies because they pursue a single economic aim.[21]

147. However, there are "*exceptional cases where a derogation from that principle is permitted*".[22] These exceptions are not set out in express terms in the VAT Directive, but are explained in the case law of the CJEU as being (a) where there is a single *"complex supply"* where two or more elements of a supply are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to consider separately[23] and (b) where a particular supply is "ancillary" to another principal supply.[24]

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[20] Paragraph 22.
[21] *BGZ Leasing* (EU:C:2013:15), paragraph 42.
[22] As stated in the Opinion of AG Kokott in *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira* (ECLI:EU:2020:855), which Opinion was followed by the Court of Justice in *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira***.**
[23] In other words, the combination of elements that one their own would be individual supplies creates an altogether new *sui generis* supply;
[24] *Stadion Amseterdam,* paragraphs 23 and 30;

148. It is the latter type of single supply involving multiple elements, principal and ancillary, that the Appellant contends took place on foot of the promotions run over the periods in question.

149. What constitutes an ancillary supply was defined in *Card Protection Plan Ltd v Commissioners of Customs and Excise* (ECLI:EU:C:1999:93) ("CPP") as being one which does "[…] *not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied*."[25]

150. This emphasis on the objective nature of the supply of a good being judged from the perspective of the customer was underlined in *Stadion Amsterdam,* where the Court of Justice held at paragraph 30 that:-

> "[…] *the essential features of the transaction concerned must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with one single service*."

151. The concept of a composite supply as defined in section 2 of the VATCA 2010 is the State's expression in legislation of the exceptions set out in paragraph 136 herein, that have been expressed in the case law of the CJEU concerning the interpretation of the VAT Directive. This legislation prescribes that for the supply of a good to be "ancillary" to a "primary supply", and thus composite and chargeable to tax in accordance with section 47 of the VATCA 2010, it must not be "*physically and economically dissociable from a principal supply and* [be] *capable of being supplied only in the context of the better enjoyment of that principal supply."*

152. It might be argued that the test for establishing what is an ancillary part of a single supply under section 2 of the VATCA 2010 is more stringent than that applied in the case law of the CJEU. The Commissioner, however, considers that the reference to the need for physical and economic indissociability does not signal any divergence between national and EU law. As a matter of EU law, for a good to be an ancillary part of a supply it is an essential condition that the typical customer have no "economic interest" in acquiring that good independent of their economic interest in obtaining the principal part.[26] It is thus not sufficient alone to ask whether it might be a means by which a consumer might enhance their consumption or use of another good. In the context of the

[25] Paragraph 30;

[26] Volkswagen Financial Services (UK) (EU:C:2018:845), paragraph 33;

supply in question, there must be no other purpose for it in the eyes of the typical consumer.

153. Before proceeding to apply the aforementioned test to the instant case, the Commissioner wishes to address one net issue arising from the Appellant's submissions relating to the interpretation of the VATCA 2010 and the relationship between "composite supplies" and "multiple supplies".

154. Section 2 defines the alternative concept of a "multiple supply" of separate "individual supplies" as being:-

> *"2 or more individual supplies made by a taxable person to a customer where those supplies are made in conjunction with each other for a total consideration covering all of those individual supplies, and where those individual supplies do not constitute a composite supply*"

155. It should be noted "individual supply" forming part of a multiple supply is to be taxed under section 3 according to the rate appropriate to it.

156. At hearing, counsel for the Appellant submitted that the wording of section 2 therein indicated that there was a presumption that a transaction involving several supplies or "elements" was a composite supply rather than a multiple supply. The Commissioner finds there to be no basis to conclude that this is so from the relevant definitions given in section 2 of the VATCA 2010. Moreover, the general principle under EU law that each supply must normally be regarded as distinct and independent suggests that the opposite is true.

157. Thus, the Commissioner returns to the question of whether, based on all of the circumstances, the supplies of the promotional goods were ancillary to the supplies of the [redacted]. From the point of view of a typical customer, was the receipt of the various types of promotional good an end in itself or was it only a means of better enjoying the Appellant's [redacted], presented in [redacted]?

158. The answer to this, in the Commissioner's view, is that receipt of them did constitute an end in itself. In reaching this conclusion it must be borne in mind that, according to the agreed facts, nearly all of the promotional goods were marketed and sold on their own by the Appellant to its customers. This is, at a minimum, a significant indicator that these customers had a free-standing interest in receiving the promotional goods that was distinct from their interest in receiving [redacted] with which they were supplied at

the same time. It is also a relevant factor that, even though all of the promotional goods at issue in the appeal cost the Appellant less than €20.00, and though the evidence was that the cost price of the goods was, in the main, in the range of €6.00-€12.00, their price "*to the consumer*" would not have been negligible. This is further evidence of the existence of an economic interest on the part of the typical customer in acquiring the promotional good, which was separate from that customer's interest in acquiring the [redacted].

159. Furthermore, although some of the promotional goods, for example [redacted] and [redacted], were linked in a direct sense to [redacted][27], they were not dependent on the principal supply. Many, from the point of view of the customer, would have a life of their own that would long outlast the [redacted] supplied and could be used just as easily with goods, [redacted] or otherwise, other than those of the Appellant. [redacted], [redacted] and [redacted] all fall under this heading. Others, such as [redacted], [redacted] and [redacted] might be said to be ones that could be enjoyed at the same time as a [redacted], but they are in the end goods which from the point of view of a typical customer would be valued and [redacted] in their own right. The Commissioner finds that these facts bring the promotional goods mentioned outside the realm of being only ancillary to the [redacted].

160. Accordingly, the Commissioner finds that the supply of the [redacted] and the promotional goods mentioned above do not constitute one single composite supply. Rather, the Commissioner is satisfied that the [redacted] and the promotional goods are a "multiple supply" being two individual supplies made in conjunction with each other for a total consideration covering all of those individual supplies.

161. Before proceeding to the final part of this Determination, the Commissioner acknowledges that the [redacted] promotional goods, which were available in only a small proportion of the promotions run over the period in question, stand out from the other promotional goods to some degree. They do so on the grounds that their use is specific to the Appellant's own [redacted]. On the other hand, their availability for purchase on their own online and in the Appellant's stores still suggests that from an economic perspective they had a life of their own, independent of the purchasing and [redacted]. On balance, the Commissioner finds that these promotional goods also cannot be considered ancillary in circumstances where, though they may be taken as enhancing the enjoyment of the use or [redacted] of the Appellant's [redacted]

[27] For example, it is open to debate whether the [redacted], the [redacted], [redacted]s and [redacted] could be so linked in any direct sense to the [redacted].

[redacted], the customer would appear to have an economic interest in their acquisition distinct from that of the [redacted].

Whether the zero rating applicable to supplies of [redacted] should be applied to the promotional goods

162. Furthermore, even if the Commissioner is in error in finding that all or some of the promotional goods were not ancillary to the supply of the [redacted], this would not have an effect on the outcome of this appeal. This is so for the following reasons.

163. It was not in dispute in this appeal that the basis upon which [redacted] is subject to VAT at zero per cent is that the State has exercised its right of derogation under Article 110 of the VAT Directive. This right of derogation is open to the State only because, as of 1 January 1991, it allowed this good an "[…] *exemption with deductibility of the VAT paid at the preceding stage or applied* [a] *reduced rate lower than the minimum laid down in Article 99* [of the VAT Directive]" [28]. Moreover, the exemption/reduced rate existing on 1 January 1991 must have been in place "[…] *for clearly defined social reasons and for the benefit of the final consumer*".

164. Article 110 of the VAT Directive in essence replicates the derogation previously enumerated in Article 28(2) of the Directive 77/388 ("the Sixth Directive") (as amended by Council Directive 92/77EEC).

165. In *Talacre Beach Caravans* the Court of Justice considered whether both elements of a supply of non-trailable fitted caravans, namely the caravan and the various removable fittings installed therein, had as a matter of EU law to be given the VAT treatment applicable under the domestic legislation of the United Kingdom to such caravans. This was that they were zero rated on account of the United Kingdom having exercised the right of derogation open to it under Article 28(2) of the Sixth Directive to have them so taxed. In ruling on this question it was implicit that the Court of Justice was taking the supply of a non-moveable caravan and its removable fittings to be, *prima facie*, a single supply.

166. The background to the question asked of the Court of Justice in *Talacre Beach Caravans* was that the relevant legislation of the United Kingdom, in force as of 1 January 1991, expressly *excluded* removable caravan fittings from being zero rated. However, although the VATCA 2010 does not exclude any of the promotional goods from zero

[28] It was not in dispute that zero rating constitutes an "*Exemption with deductibility*";

rating treatment, the Court of Justice's reasoning in finding that the elements of the supply in issue in *Talacre Beach Caravans* could be taxed separately is, in the Commissioner's view, clearly relevant to the instant case and indicates that the [redacted] and the promotional goods should be taxed separately. This reasoning of the Court of Justice, and the findings derived therefrom, is set out at paragraphs 23-26 of the Court of Justice's judgment and is worth setting out in full:-

"*23.*[…] *as the Court has pointed out on a number of occasions, the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly (see, to that effect, Joined Cases C-308/96 and C-94/97 Madgett and Baldwin [1998] ECR I-6229, paragraph 34; Case C-384/01 Commission v France [2003] ECR I-4395, paragraph 28; Joined Cases C-394/04 and C-395/04 Ygeia [2005] ECR I-10373, paragraphs 15 and 16; and Case C-280/04 Jyske Finans [2005] ECR I-10683, paragraph 21). For that reason as well, the exemptions with refund of the tax paid referred to in Article 28 (2) (a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature.*

24. The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case-law on the taxation of single supplies, relied on by Talacre and referred to in paragraph 15 of this judgment, does not relate to the exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned. While it follows, admittedly, from that case-law that a single supply is, as a rule, subject to a single rate of VAT, the case-law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28 (2) (a) of the Sixth Directive on the application of exemptions with refund of the tax paid.

25. In this connection, as the Advocate General rightly pointed out in points 38 to 40 of her Opinion, referring to paragraph 27 of CCP, there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account. In the light of the wording and objective of Article 28(2)(a) of the Sixth Directive, recalled above, a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the Member State concerned, for social reasons and for the benefit of the final consumer. In the present case, the United Kingdom of Great Britain and Northern Ireland has determined that only the

supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans.

26. Lastly, there is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system (see, by analogy, Case C-63/04 Centralan Property [2005] ECR I-11087, paragraphs 79 and 80)."

167. It also is helpful to have regard to the Opinion of Advocate General Kokott in this case, to which the Court of Justice referred with approval at paragraph 25 of its Judgement. In particular, at paragraphs 15-21 the Advocate General emphasised that Article 28(2) of the Sixth Directive was a derogation provision and drew a distinction between goods zero rated as a consequence of the fulfilment of strict criteria in that provision with goods exempt from VAT or taxed at a reduced rate pursuant to the harmonised system under the Sixth Directive.

168. Later, at paragraph 27, Advocate General Kokott quoted *Card Protection Plan Ltd v Commissioners of Customs and Excise* (ECLI:EU:C:1999:93) (*"CPP"*), where the Court of Justice observed that the purpose of the rules laid down on the taxation of single supplies (i.e. that in general an ancillary supply be taxed at the same rate as a principal supply) was that:-

"[…] *a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service."*

169. Taking this passage into consideration, Advocate General Kokott embarked on the following analysis from paragraph 35 of her Opinion, which it is worth setting out in full with the parts underlined that the Commissioner considers to be especially apposite:-

"35.If one were to apply the principles developed in the case-law on composite supplies irrespective of the particular circumstances of the present case, one might conclude that caravans and their removable contents in fact constitute one single supply. Only one rate of VAT would then have to be applied to that supply, namely the rate applicable for the principal element of the supply. Assuming that the principal element

is the caravan, the zero rate would have to be extended to the ancillary supply of the removable contents.

36. However, in the present situation the extension of the exemption would be contrary to the objectives of Article 28 of the Sixth Directive, as set out above. This conflict between the principle that national exemptions under Article 28(2)(a) of the Sixth Directive should not be extended and the rules developed in the case-law for the treatment of composite supplies can be resolved by comparing the purpose of each principle.

37. The rules established in CPP and other relevant decisions are based on the consideration that splitting transactions too much could endanger the functioning of the VAT system. In contrast to this objective, is the concern to limit national derogations from the rules of the Sixth Directive to those which are absolutely necessary.

38. When balancing these objectives, the interest in not undermining the harmonisation of law achieved by the Sixth Directive by extending national exceptions should be given priority over the objectives pursued by the Court with its rules determining the scope of a supply. In essence those rules have been developed only for reasons of practicality and do not claim absolute application.

39. Thus in CPP the Court emphasises that the question of the correct method of proceeding when determining the scope of a supply cannot, in view of the diversity of commercial operations, be answered exhaustively for all cases. The rules laid down in CPP cannot therefore be applied systematically. Instead, when determining the scope of a supply all the circumstances must be taken into account, including the specific legal framework. In the present case, it is necessary to have regard to the particularity that the United Kingdom has established the exemption in a specific way in accordance with its socio-political evaluation and that national reliefs under the transitional regime of Article 28 may continue to exist but may not be extended.

40. The application of a national exemption under Article 28(2)(a) of the Sixth Directive is permissible only if it is — in the view of the Member State — necessary for precisely defined social reasons for the benefit of the final consumer. In that regard the United Kingdom has determined that the zero rate should be applied only to the supply of caravans. It did not consider that the inclusion of the removable contents was justified on social grounds. This assessment of the national legislature cannot simply be overridden.

41. Moreover, the functioning of the VAT system is not seriously called into question if the supply of caravans and their removable contents — possibly departing from the principles laid down in CPP — had to be regarded as separately taxable transactions. In particular it is not apparent that the separate indication of the relevant components of the price and the application of different rates of taxation to those components presents significant difficulties, as the manufacturer of the caravan already sets out both parts of the supply separately in its invoice to Talacre.

42. Finally, although it must be conceded that the Court has accepted that tax exemptions for the principal element of a composite supply may be extended to ancillary supplies connected with it, nevertheless, as the United Kingdom Government rightly submits, those cases concerned exemptions under Article 13 of the Sixth Directive, and therefore exemptions enshrined in the scheme of the directive and in the application of which the right of deduction is excluded. In contrast, the national exceptions under Article 28 lie outside the harmonised framework. They are not directed at the same objectives as the exemptions provided for in the directive itself and differ in form from those exemptions. Consequently, in those cases it is necessary to take particular care that the exceptions are not extended."

170. It is not altogether clear from the judgment of the Court of Justice whether, because of the "*specific legal framework*" forming part of the circumstances in *Talacre Beach Caravans* (i.e. Article 28(2) of the Sixth Directive), the supply of the caravans and the fixtures therein did not fall to be regarded as a single supply at all, or, alternatively, a single supply which was to have its primary and ancillary elements taxed at different rates. Though this question appears to be academic in practice, on balance the Commissioner interprets the judgment of the Court of Justice, in particular when read in light of the Advocate General's Opinion, as meaning that the supply of the caravans and the fittings would, because of the applicability of the derogation to one but not the other of the goods, have to be regarded as separate supplies. Thus, the caravan was to be zero rated, whereas the fittings were not. This, the Court of Justice observed, did not lead to any *"insurmountable difficulties capable of affecting the proper working of the VAT system".* In fact, the contrary was true. In circumstances where the United Kingdom had no entitlement under EU law to apply a zero rating to those fittings, and had never sought to do so, it is clear that the Court of Justice considered that the application of the derogation to them would have endangered the proper working of the harmonised VAT system.

171. The effect of the above reasoning when applied to the circumstances of the instant case is clear to the Commissioner. Those circumstances are that the Appellant makes two supplies of goods at the same time. One is a supply of [redacted] which, under Schedule 2 to Part 14 of the VATCA 2010, is zero rated. The other is a promotional good that is taxable at the standard VAT rate. At the core of *Talacre Beach Caravans* was the clash of ostensibly conflicting objectives. One was to ensure the strict application of the derogation whereby a Member State could zero rate certain goods where, "*for clearly defined social reasons",* it was already zero rating them prior to 1 January 1991. It is patent that the Court of Justice considered the zero rating of the caravan fittings to be inimical to this objective. The other objective was the application of the Court of Justice's rule regarding the taxation of single supplies, where that supply is composed of primary and ancillary elements. In *Talacre Beach Caravans,* the Court was clear in deciding that the former objective should prevail over the latter.

172. In submission, counsel for the Appellant, relying on the judgment of the Court of Justice in *Blackrock Investment Management (UK) Ltd* and the earlier Opinion of AG Pikamae, argued that *Talacre Beach Caravans* was a case that should be confined to its own specific facts. In particular, he emphasised that, as of 1 January 1991, the domestic legislation of the United Kingdom at issue expressly "kicked out" caravan fixtures from being zero rated along with the caravan itself. The Commissioner does not agree that this fact undermines the application of the Court of Justice's logic in *Talacre Beach Caravans* to the circumstances of the instant case. Once again, the mandatory conditions for the zero rating of a good, now prescribed under Article 110 of the VAT Directive, include that the good was, for clearly defined social reasons already being granted zero rating prior to 1 January 1991. There is agreement between the parties that none of the promotional goods were, as of or prior to that date, taxed at a zero or reduced rate and thus, no more or less than the aforementioned caravan fittings, cannot meet these mandatory conditions.[29]

173. The logical consequence of this is that, were the transactions at issue involving [redacted] and the promotional good found to be a composite supply taxable as a whole at zero per cent, there would be a breach of the objective of ensuring the strict application of derogations from the harmonised system of VAT. Moreover, the circumstances of the instant case are such that taxing the [redacted] and the promotional goods at the

[29] Article 110 being, as noted already, in effect a continuation of the transitional provision under Article 28(2) of the Sixth Directive.

rates applicable to them if sold in different transactions creates no difficulties in the working of the VAT system that the Commissioner can discern.

174. The Commissioner has held already that the sale of the [redacted] and the promotional goods do not amount to a single composite supply, on the grounds that the promotional goods constitute an end in themselves and not merely a means of better enjoying the [redacted]. However, even if the Commissioner was incorrect to hold against the transactions involving the simultaneous supply of [redacted] and the promotional goods being a single composite supply on this basis, this would not avail the Appellant in its appeal of the assessments relating to the periods in question. This is because the "legal framework" forming part of the circumstances of the case necessitates the treatment of the supply of the [redacted] and the promotional goods as separate and individual supplies forming part of a "multiple supply" for "total consideration". They are thus, under section 3 of the VATCA 2010, taxable at their own appropriate rate, this being zero per cent for the [redacted] and the standard rate for all of the promotional goods. This is what was done pursuant to the assessments under appeal and they are thus correct and stand affirmed.

Determination

175. The Commissioner finds that the VAT assessments of the Respondent made on 23 November 2016, 21 December 2016, 10 January 2018, 29 January 2020 and 21 January 2021 in respect of the periods and assessed amounts set out hereunder are correct and stand affirmed:-

- November/December 2012 - €10,065;
- January-December 2013 - €20,728;
- January-December 2014 - €20,862;
- January-December 2016 - €9,055;
- January-December 2017 - €14,615;
- January/February 2018 - €6,572

176. The reasons for this Determination are:

- First, the promotional goods were supplied for consideration and thus were not gifts and were chargeable to VAT;

- Secondly, the supply of the [redacted] and the promotional goods were not elements of a single composite supply;

- Thirdly, even were the supply of the [redacted] and the promotional goods held to be elements of a single composite supply, the promotional goods stand to be taxed at the standard rate as opposed to the zero rate applicable to the [redacted].

177. This Appeal is determined in accordance with Part 40A of the TCA 1997 and in particular sections 949AK. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

Notification

178. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

179. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
20 September 2024