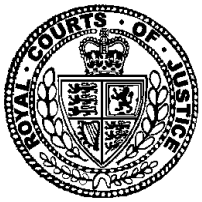

Neutral Citation Number: [2019] EWCA Civ 854

Case No: A3/2017/2435

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mrs Justice Rose and Judge Greg Sinfield
[2017] UKUT 247 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

NATIONAL CAR PARKS LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Roderick Cordara QC (instructed by **Mishcon de Reya LLP**) for the **Appellant**
Mr Brendan McGurk (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 2 May 2019

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Approved Judgment

Lord Justice Newey:

1. This appeal concerns a situation familiar to motorists. A person wishing to park in a "pay and display" car park pays a sum in excess of the tariff shown for the period for which he wishes to park because, say, the coins he has do not enable him to pay the exact figure and the ticket machine does not give change. The question raised by the present proceedings is whether the excess over the tariff is subject to value added tax ("VAT").

2. The appellant, National Car Parks Limited ("NCP"), operates, among others, "pay and display" car parks in which there are ticket machines which take cash. A board or boards will specify the amounts that must be paid to park for different lengths of time. Someone wishing to leave his car for a particular period has to insert coins to the value of at least the figure given for that period in order to obtain a ticket which must be placed in his vehicle's windscreen. Once the requisite coins have been accepted by the machine, the customer will be able to obtain his ticket by pressing a button. Each machine indicates that no change is given and that "overpayments" are accepted.

3. Before both us and the Upper Tribunal ("the UT"), the parties advanced their submissions by reference to the following hypothetical example given by the First-tier Tribunal ("the FTT"):

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

4. As the UT noted (in paragraph 6 of its decision):

> "If the customer does not have the correct change and inserts coins to a value above the tariff displayed, the machine does not grant any additional parking time to the customer regardless of overpayment. The ticket issued to a customer states the full amount paid, including any overpayment. There are no barriers at a car park of this type and a customer could press a red button to cancel the transaction at any time until the green button is

> pressed for the issue of a ticket and drive away without paying anything."

5. In 2014, NCP sought to recover sums for which it had accounted to the respondents, HM Revenue and Customs ("HMRC"), as VAT in respect of "overpayments" made in its pay and display car parks between 2009 and 2012. HMRC refused the claim on the ground that the overpayments "should be regarded as consideration [for the right to park] and are therefore taxable". NCP appealed on the basis that the overpayments were to be regarded as ex gratia payments outside the scope of VAT, but the FTT (Judge Short and Gill Hunter) dismissed the appeal and the UT (Rose J and Judge Sinfield) agreed with the FTT. NCP now challenges the UT's decision in this Court.

6. Article 1(2) of Council Directive 2006/112/EC on the common system of value added tax ("the Principal VAT Directive") explains that the principle of the common system of VAT "entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services". Amongst the transactions subject to VAT are "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" (article 2(1)(c)). By article 73, in respect of a supply of goods or services:

> "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 …".

7. Provisions to similar effect are to be found in the Value Added Tax Act 1994. Under section 4(1), VAT is to be charged on "any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him". "Supply" includes "all forms of supply, but not anything done otherwise than for a consideration" (section 5(2)(a)).

8. The word "consideration", which features in both articles 2(1)(c) and 73 of the Principal VAT Directive and section 5(2)(a) of the 1994 Act, does not in the VAT context refer to what might be deemed "consideration" for the purposes of domestic contract law but has an autonomous EU-wide meaning (see e.g. Case 154/80 *Staatssecretaris Van Financiën v Cooperatiëve Vereniging Cooperatiëve Aardappelenbewaarplaats GA* [1981] 3 CMLR 337 ("the *Dutch potato* case"), at paragraph 9 of the judgment of the Court of Justice). "[T]he concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive [i.e. the predecessor of the Principal VAT Directive] presupposes the existence of a direct link between the service provided and the consideration received" (Case 102/86 *Apple & Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the Court of Justice's judgment; see also e.g. *Commission of the European Communities v Finland* [2009] ECR I-10605, at paragraph 45 of the Court of Justice's judgment). A supply of services is effected "for consideration", and hence is taxable, "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the Court of Justice's judgment; see also e.g. Case C-520/14 *Geemente Borsele v Staatssecretaris van Financiën* [2016] STC 1570, at paragraph 24 of the Court of Justice's judgment).

9. The authorities also show that "consideration" is a "subjective value" in the sense that "the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria" (the *Dutch potato* case, at paragraph 13 of the judgment). In Case C-285/10 *Campsa Estaciones de Servicio SA v Administración del Estado* [2011] STC, the Court of Justice explained in paragraph 28 of its judgment:

> "According to settled case law …, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria."

10. The *Tolsma* case related to a busker who solicited donations from passers-by. The sums he received were held not to be taxable. The Court of Justice said in its judgment:

> "16. If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.
>
> 17. First, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Second, there is no necessary link between the musical service and the payments to which it gives rise. The passers-by do not request music to be played for them; moreover, they pay sums which depend not on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.
>
> 18. In addition, contrary to the arguments of the German and Netherlands governments, the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive.
>
> 19. That interpretation is not affected by the fact that a musician such as Mr Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain and the amount is practically impossible to determine."

11. In the present case, the UT, upholding the FTT's decision, considered that in the hypothetical example set out in paragraph 3 above the taxable amount and consideration for VAT purposes was the full £1.50 actually paid rather than the £1.40 tariff for up to an hour's parking. The UT's reasoning can be seen from paragraph 43 of its decision:

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

12. Mr Roderick Cordara QC, who appeared for NCP, took issue with the UT's conclusions. The "direct link" requirement has, he suggested, a quantitative aspect as well as a causal one. A payment by a customer to a supplier will thus represent "consideration" only if and to the extent that there is a direct link to the supply. In the hypothetical example, the supply would have been made regardless of whether the customer had paid the extra 10p. Payment of the 10p was voluntary in the relevant sense and so it is not part of the consideration for the supply. The UT was, moreover, mistaken in its analysis of the contractual position. The customer in the hypothetical example was contractually obliged to pay no more than £1.40 for her parking. While it might have been difficult for her to recover the excess 10p from NCP in practice, she could have done so in principle.

13. For his part, Mr Brendan McGurk, who appeared for HMRC, argued that the UT's view of the contractual position was correct and that, even were that not so, an overpayment would be part of the consideration and thus taxable. In the hypothetical example, Mr McGurk maintained, the contractual price for the parking was fixed at £1.50. In any event, so Mr McGurk contended, there was a direct link between the supply of an hour's parking and the £1.50 in fact paid for it.

14. In the course of argument, Mr Cordara accepted that if, from a contractual point of view, the price of the hour's parking was set in the hypothetical example at the £1.50 paid by the customer, NCP's appeal could not succeed. That must be right. If £1.50 was the price for the parking as a matter of contract, the requisite "direct link", "legal relationship" and "reciprocal performance" must all exist. None of the £1.50 would be "voluntary" in the same way as the payments to the busker in *Tolsma*. That the parking could have been obtained for 10p less would, moreover, be irrelevant given that consideration is a "subjective value".

15. What, then, is the correct contractual analysis? More specifically, was the contractual price in the hypothetical example £1.40 (as Mr Cordara argued) or £1.50 (as Mr McGurk suggested)?

16. A contract between NCP and the customer will, in the hypothetical example, have been concluded no later than the point at which the customer chose to press the green button to receive her ticket. As Mr Cordara pointed out, she could also have obtained a ticket for an hour's parking by paying 10p less (although without the right coins that was not a practical possibility). The tariff board showed the price for an hour's parking as £1.40. That, Mr Cordara said, was also the contract price. That the 10p was not part of the price is confirmed, he submitted, by the reference to "overpayments" being accepted: it would not be appropriate to speak of the 10p as an "overpayment" if it formed part of the price.

17. On the other hand, the customer in fact obtained a ticket by inserting coins to the value of £1.50. The customer had, moreover, been warned that no change would be given. That being so, she ought reasonably to have appreciated that she was parting with her money on an out-and-out basis.

18. English law, of course, generally adopts an objective approach when deciding what has been agreed in a contractual context. Here, it seems to me that, taken together, the tariff board and the statement that "overpayments" were accepted and no change given indicated, looking at matters objectively, that NCP was willing to grant an hour's parking in exchange for coins worth at least £1.40. In the hypothetical example, the precise figure was settled when the customer inserted her pound coin and 50p piece into the machine and then elected to press the green button rather than cancelling the transaction. The best analysis would seem to be that the contract was brought into being when the green button was pressed. On that basis, the pressing of the green button would represent acceptance by the customer of an offer by NCP to provide an hour's parking in return for the coins that the customer had by then paid into the machine. At all events, there is no question of the customer having any right to repayment of 10p. The contract price was £1.50.

19. This is the contractual analysis in the hypothetical example where the customer has only a pound coin and a 50p piece, and therefore has no alternative but to pay £1.50 if she wishes to park in the car park. However, the analysis is the same even if it is possible for the customer to obtain the right coins, for example by obtaining change from another user of the car park. If the customer nevertheless chooses to insert £1.50 and presses the green button, it remains the case that she has accepted the offer to provide an hour's parking at that price.

20. This analysis may be slightly different from that of the UT, which referred to an offer by NCP to grant the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. In fact the offer made by NCP is more specific, to grant the right to park for an hour in return for the coins shown by the machine as having been inserted when the green light flashes. That is the offer which the customer accepts. However, if this is a difference of analysis, it makes no practical difference in the present case.

21. It follows that the price paid by customers for a set period of parking will vary somewhat. In the hypothetical example, some customers will pay just £1.40 for an hour's parking. In other instances, the price might be up to £2 (if, say, a customer had only two one pound coins and chose to insert those). There is no question of the price being uncertain in any individual case, however. It will be whatever sum, equal to or in excess of £1.40, that the customer has paid into the machine.

22. In the circumstances, I agree with the UT and FTT that, in the hypothetical example, the consideration and taxable amount was £1.50. Like the UT, I consider that, "[i]f a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to an hour". That means that NCP's present appeal should be dismissed.

23. The UT expressed the view that *King's Lynn and West Norfolk BC v Revenue and Customs Commissioners* [2012] UKFTT 671 (TC) had been wrongly decided. That case concerned car parks operated by a local authority where the "scale of charges" was laid down in a bye-law (viz. the Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Consolidation and Variation Order 2011). A differently-constituted FTT concluded that overpayments were not to be treated as consideration. Not ourselves having been taken to the Order or heard any argument on its implications, I do not think I am in a position to express a final view on the correctness of the FTT's decision. I would certainly not wish, however, to be taken to have endorsed it.

24. I would dismiss the appeal.

Lord Justice Males:

25. I agree.

Lord Justice Patten:

26. I also agree.