FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 59
XA105/16

Lord President
Lord Drummond Young
Lord Tyre

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in an Appeal to the Court of Session

by

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

against

a decision of the Upper Tribunal dated 21 January 2016

in an appeal by

FINDMYPAST LIMITED

Respondent

Appellants: S. Smith QC, R. G. Anderson; Office of the Advocate General
Respondent: Simpson QC; Balfour & Manson LLP

8 September 2017

Introduction

[1] The respondent taxpayer carries on the business of providing access to genealogical and ancestry websites which it owns or in respect of which it holds a licence. Customers who wish to search the historical records on the website may do so without charge. If a

customer is to view or download most of the records on the website, however, he or she will require to pay the respondent. This may be done by taking out a subscription for a fixed period, which confers unlimited use of the records during that period. Alternatively, the customer may use a system known as Pay As You Go ("PAYG"). This involves the payment of a lump sum in return for which the customer receives a number of "credits", sometimes referred to as "units" or "vouchers". The credits may be used to view records on the website, and each time a record is viewed some of the credits are used up. The credits are only valid for a fixed period, but unused credits may be revived if the customer purchases further credits within two years; otherwise they are irrevocably lost.

[2] During the period between September 2008 and 10 May 2012 the taxpayer accounted for value added tax on the price of PAYG vouchers at the time when they were sold. The result was that tax was paid not only in respect of vouchers that were used to access genealogical records but also in respect of vouchers that remained unredeemed. In the present proceedings the taxpayer has claimed repayment of the value added tax accounted for in respect of unredeemed vouchers during the period from September 2008 to 10 May 2012. With effect from the latter date the VAT legislation was changed, and the result is that the present issue does not arise in respect of products purchased thereafter.

[3] The underlying question is whether value added tax should have been accounted for at the time when the vouchers were sold or subsequently, at the time when the vouchers were redeemed. It is in the latter event that the taxpayer would have a valid claim for repayment. That claim raises three distinct issues. The first of these is the nature of the supply made by the taxpayer to customers: whether it was the supply of genealogical records selected by the customer and viewed or downloaded by him, or whether the supply was a "package" of rights and services, which conferred a right to search the records on the

various websites to which the taxpayer's customers had access and, if so desired, to download and print particular items from those websites. If the former is correct, the supply only takes place if and when a particular record is viewed or downloaded; if the latter, the supply includes a general right to search which is exercisable as soon as the credits are purchased, with the result that the supply takes place at that point. The taxpayer contends for the former construction and HMRC for the latter.

[4] Even if the taxpayer is correct on the characterization of the supply, however, the tax point will still be advanced to the time when the voucher is purchased if the payment made for the voucher is characterized as a prepayment to which section 6(4) of the Value Added Tax Act 1994 applies. The second issue that falls for decision is accordingly whether on the purchase of a PAYG voucher the customer made a prepayment to which section 6(4) of the Value Added Tax Act 1994 applied. If a prepayment was made so that section 6(4) applied, the tax point would be advanced from the time when services were provided to the time when the prepayment was received by the taxpayer. HMRC contends that the payment made by a customer when a voucher was purchased constituted a prepayment falling within section 6(4); it was a payment made in advance for a particular category of service. The taxpayer, on the other hand, contends that such a payment did not fall within the definition in section 6(4): for a prepayment to occur all of the relevant information concerning the chargeable event must be known and the goods or services to which the payment relates must be identified with precision, and that was not so in the present case.

[5] The third issue is whether the credits purchased by customers were face-value vouchers as defined in paragraph 1(1) of Schedule 10A to the Value Added Tax Act 1994, as amended; "face-value voucher" is defined as "a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value

of an amount stated on it or recorded in it". If that is correct the consideration given for a voucher is ignored for the purposes of the Value Added Tax Act 1994, by virtue of paragraph 4(2) of Schedule 10A. If that were so the sale of vouchers would not give rise to a charge to value added tax. The taxpayer contends that the PAYG vouchers were face-value vouchers and that their sale was accordingly not taxable; HMRC by contrast submits that the PAYG vouchers were not face-value vouchers, on the basis that they did not "represent" the right to receive services from the taxpayer, and moreover did not contain or record the "value of an amount" stated or recorded in the voucher.

[6] We propose first to set out the facts of the case as found by the First-tier Tribunal, and then to summarize the decisions of the First-tier and Upper Tribunals. Thereafter we will deal with each of the three issues in turn, setting out the relevant legislation at both a national and a European level and discussing the applicable case law, before considering the application of the law to the particular facts of the case.

Facts

[7] The First-tier Tribunal made a number of findings based on evidence from Mrs Pamela Short, who had been the taxpayer's financial manager since September 2009, and treated those findings as findings in fact. The taxpayer's business was the provision of online access to genealogical and ancestry information. The taxpayer owned or had licences to access a range of datasets. Its services were advertised, and could be obtained either by subscription for a fixed period or by the PAYG system. Under the latter system credits were purchased by a customer and were subsequently redeemed when images or transcriptions of the websites were purchased. A unitized system was employed, which assisted the taxpayer in calculating royalties due to the business partners who provided access to their

websites. Both subscribers and PAYG customers had equal access to all of the databases, although PAYG customers might have a mixture of differently priced units. Promotional vouchers could be made available for corporate customers. In such a case the customer could not work out the cost of the individual units that he or she enjoyed. Vouchers acquired by PAYG customers could not be redeemed or transferred to third parties, and could only be used on websites registered by the taxpayer. The taxpayer's computers would have a record of monies expended in purchasing units, and the website would show the structure and pricing of vouchers and units. Finally, Mrs Short had explained that the claim for repayment of VAT had been prompted by the change in the taxation of vouchers in May 2012, at which point the taxpayer considered that VAT had been incorrectly accounted for on the issue of PAYG vouchers rather than on their redemption.

[8] Examples of documents downloaded from the taxpayer's website were made available to illustrate the procedures that are involved when a PAYG customer redeems vouchers. When vouchers are purchased the customer's account indicates the date when vouchers were purchased and the date when they expire, three months later. It indicates the cost of the vouchers and the number that remain valid at any given time. That number obviously decreases as the vouchers are used. Before any subscription is taken out, any potential customer can access the taxpayer's website and introduce search criteria; the example given was the name of an individual and his year and place of birth. The website then indicated that a record was available in a particular category; in the example supplied to the court this was the Register of Births for England and Wales 1837-2006, in the town of Beverley, Yorkshire. No further details were provided, however, and the actual record was not made available. To obtain access to the relevant record in the Register of Births, it was necessary for the customer to redeem vouchers.

[9] We should further note certain provisions of the taxpayer's contractual terms and conditions, available online. These provided as follows:

> "**These Terms & Conditions** explain our conditions for you using the findmypast.co.uk website….
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> You must agree to the Terms & Conditions if you use the website, or buy something from us. If you do not agree with our Terms & Conditions or Privacy Policy, you must not use the website.
>
> …
>
> **Getting access to the records:** you can search the historical records on the website for free, but to view most records or use some features of the website you will need to buy either PayAsYouGo credits or a subscription, or use a voucher. You can also take a Free Trial. You have to register with us and be signed in to buy credits or a subscription, use a voucher, or to take out a Free Trial. You can buy vouchers from our vouchers stockists. A contract between us begins when we send you a confirmation e-mail, after receiving your order and accepting your payment or voucher code.
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> …
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> **PayAsYouGo credits:** You can buy PayAsYouGo credits from us – these get used up when you view records and can be used to view any record on the website. Credits are only valid for a fixed time limit and will expire if you don't use them in time – this is made clear on the payment page when you buy them. When you have unused credits that expire, if you buy more credits within 2 years, we will add your expired credits (up to a maximum of 280) onto the new credits that you buy so that you don't lose them. Some records cost more credits to view than others: you can see how many credits each type of record cost to view.
>
> **Vouchers:** If you have any kind of problem with a voucher, please contact the company who sold it to you first (as they are the person you paid the money to). In some cases this will be us, but normally it will be one of our voucher stockists…
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> …
>
> **Changes to the website or records:** We reserve the right to make changes to the website, including the records and services we offer, without notice; however, we would not be in business very long if we suddenly took things away that you've paid for without offering you a decent replacement. … We may also change prices, make special offers to groups or individuals, or change the number of credits charged to view a record from time to time
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> …
>
> **VAT:** VAT at the current UK rate is included in the price…".

First-tier and Upper Tribunals

[10] The First-tier Tribunal held first that what the customer acquired was a "package" including the means of access to the records on the website, with a facility to search these, and then to access and download particular items. Those matters were considered interdependent. While the objective was to obtain the information in particular documents, these had to be identified and traced. On that basis the supply for VAT purposes was made at the outset, when the "package" was purchased. Secondly, the First-tier Tribunal held that the document issued by the taxpayer did not qualify as a face-value voucher. While a coding or microchip in a ticket with a computer reference might enable a document so to qualify, the PAYG vouchers could be obtained by purchase, gift or in a promotion, and the consideration would vary in each case. It might not be disclosed to the holder. Furthermore unused units could be revived, which would frustrate any attempt to price the balance of unexpired units. Thirdly, section 6(4) of the 1994 Act, dealing with prepayments, was applicable, as the nature of the supply was known at the outset, and there was a direct link at the time of payment. Consequently the taxpayer's appeal was unsuccessful.

[11] The Upper Tribunal reversed the decision of the First-tier Tribunal. It held first that the use of the search engine was not part of any "package" paid for by a customer when he purchased a subscription or PAYG credits. What the customer bought, which was in addition to his free use of the search facility, was the right to access individual documents as and when he chose to do so, up to the limit of the credits purchased. On that basis the service was provided or supplied when the individual documents were accessed. There was no link between the payment made by a PAYG customer and the use of the search facility on the taxpayer's website. Secondly, the Upper Tribunal held that the PAYG credits were a face-value voucher that satisfied the requirements of Schedule 10A of the Value Added Tax

Act 1994. They were a voucher in electronic form that represented a right to receive services. Furthermore the voucher represented the right to receive services "to the value of an amount", and that amount was "recorded in it". These requirements had to be approached in a pragmatic way, in the context of an electronic document. The listing of unused credits on the taxpayer's website, made accessible to customers, should be understood as representing so much money's worth. The fact that the amount was recorded in credits rather than by reference to money value did not affect this analysis. Nor did it matter that the customer did not know the purchase price of the credits, for example if he or she received a gift. In every case the number of units available could be ascertained and that was sufficient. Thirdly, in relation to the prepayment argument, the customer bought a certain number of credits, but it was by no means clear that he would know what he could purchase with those credits; different documents or categories of document might command different prices, and what the customer could buy with his credits depended upon the current "price" (stated in credits) for those documents; prices might vary over time. Thus it could not be said that at the time of purchase of the credits the services to which the customer was entitled were fixed or clearly identified. Thus section 6(4) of the 1994 Act did not apply.

Nature of the supply

[12] The taxpayer contends that the service provided by it was the supply of genealogical records selected by a customer and viewed or downloaded by that customer. On that basis it is submitted that the supply only occurred at the point when credits were used or redeemed and documents were viewed or downloaded. Consequently VAT only became chargeable at that time. Correspondingly, because of the nature of the supply, no VAT was

chargeable on credits at the time when they were purchased. Nor was VAT due on credits which were purchased without being used or redeemed. HMRC, by contrast, contends that what was supplied to the taxpayer was a "package" of rights and services, which conferred a right to search the records on the various websites to which the taxpayer's customers had access and, if so desired, to download and print particular items from those websites. That package was available at the point when PAYG vouchers were purchased. Consequently, it is said, the service provided by the taxpayer was supplied as soon as a customer purchased vouchers, and VAT was due at that point.

Legislation

[13] The legislation governing VAT is found in the Value Added Tax Act 1994 as amended. It is agreed that the supplies made by the taxpayer were a service for the purposes of the Act. Section 5(2) of the Act provides that the word "supply" includes all forms of supply, but not anything done otherwise than for a consideration. The time of supply of a service is dealt with in section 6 of the 1994 Act. Subsection (3) of that section provides that, subject to subsections (4) to (14), a supply of services is to be treated as taking place at the time when the services are performed. Subsection (4) (which is discussed further at paragraphs [35] *et seq* below) provides that, if before the time applicable under subsection (3) the person making the supply receives payment in respect of it, the supply shall, to the extent covered by the payment, be treated as taking place at the time when payment is received.

[14] The relevant provisions of the Value Added Tax Act 1994 are based on European Directives, in particular predecessors of the Principal VAT Directive (2006/112/EC); they must accordingly be construed in accordance with that Directive. Article 1(2) of the

Directive sets out the principles of the common system of VAT, which entails the application to goods and services of "a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged". Article 2(1)(c) provides that the supply of services for consideration by a taxable person shall be subject to VAT. The reference to a consideration is important, and is reflected in section 5(2)(b) of the Value Added Tax Act 1994, which provides that a supply of services is to include "anything which is not a supply of goods but [which] is done for a consideration". Article 9 defines a taxable person as "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity". Any activity of a person supplying services is to be regarded as an economic activity, and the exploitation of intangible property for the purpose of obtaining income therefrom on a continuing basis falls within that concept. Under article 24, a supply of services is to mean any transaction which does not constitute a supply of goods, a provision that is reflected in section 5(2)(b) of the Value Added Tax Act 1994. It is clear from those provisions that the scope of VAT is wide, and is intended to cover all forms of economic activity. That is subject to one important qualification, however: there must be a consideration for a service if it is to be a supply for VAT purposes. This means that there must be a direct link between the service and the consideration, a point that was emphasized by the Court of Justice in Case C-520/10 *Lebara Ltd* v *HMRC* [2012] STC 1536, at paragraph 27 (discussed at paragraphs [17]-[18] below).

Case law

[15] The nature of the supply made by a taxpayer has been considered in a number of

cases, by both the European Court of Justice and the United Kingdom courts. In Case C-349/96 *Card Protection Plan Ltd* v *Customs and Excise Commissioners* [1999] 2 AC 601, it was necessary to determine whether a transaction consisted of a single supply or a number of distinct supplies, in order to discover whether those services wholly or mainly comprised "insurance… transactions", which were exempt from VAT. On that question, the Court of Justice stated (at paragraphs 28-31):

> "[W]here the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place
>
> … [T]aking into account, first, that it follows from [article 2(1) of the Principal VAT Directive] that every supply of a service must normally be regarded as distinct and independent and, secondly, 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… with several distinct principal services or with a single service.
>
> There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied…".

Those statements of principle were followed in Case C-41/04 *Levob Verzekeringen BV* v *Staatssecretaris van Financiën* [2006] STC 766, where the critical question was whether the supply and customization of computer software for a particular customer involved in insurance business in the Netherlands should be regarded as a single supply or as two distinct supplies, the software and its customization. The Court of Justice (at paragraphs 20-22) largely repeated what had been said in *Card Protection Plan*, and stated:

> "The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split".

On the facts of the case, the result was that if the software and its customization, considered objectively on an economic basis, formed a transaction that it would be artificial to split, there was a single supply. If the customization predominated, the result would be that the supply of the totality was a single supply of services.

[16] A number of important elements emerge from the foregoing statements of the law. First, transactions must be considered in context. This obviously includes the economic context. Secondly, each supply of a service will normally be regarded as independent, but if as a matter of economic reality what is provided is a single service it should not be artificially split. Thirdly, on a proper analysis, in some cases it will be found that there is a principal service and a series of other services that are ancillary to that principal service; in that event the ancillary services share the tax treatment of the principal service. It is obviously a matter for the judgment of the national court as to how those principles are to be applied to individual cases. In forming that judgment, an important question is whether a service is not an aim in itself but rather an enhancement of the principal service. Fourthly, the approach taken by the Court of Justice involves the application of a practical test, based on economic reality and having due regard to the factual and legal context in which a possible charge to tax arises.

[17] We have already mentioned the importance of consideration in determining whether the provision of services amounts to a supply for VAT purposes. This was emphasized by the Court of Justice in Case C-520/10 *Lebara Ltd* v *HMRC*, *supra*. The taxpayer distributed cards for making international telephone calls through intermediate entities in member states of the European Union, and the ultimate purchaser was able to use the cards to make inexpensive telephone calls to other countries. The case involved a complex set of

contractual arrangements with intermediaries and telephone companies. The Court of Justice held (paragraph 27) that:

> "[I]t is settled case law that a supply of services is effected 'for consideration' for the purposes of [article 2 of the Principal VAT Directive], hence taxable, only if there is a legal relationship between the service provider 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 to the recipient. There must therefore be a direct link between the service supplied and the consideration received".

That statement appears to us to accord with the standard analysis of contract in Scots law, whereby reciprocal performance can be regarded as the essential criterion for a contract; the existence of a link implies reciprocity. Consideration taken as signifying reciprocity is not of course the same as the technical doctrine of consideration in English law; this is hardly surprising given that the EU VAT legislation operates over a wide range of different legal systems.

[18] In applying the principle of reciprocity, the court must in our opinion apply the general approach found in cases such as *Card Protection Plan*; consequently it is necessary to examine the whole of the taxpayer's relationship with its customers, and to do so in context, in order to discover the true nature of the supply. On the particular facts of *Lebara* it was held that the supply of the telephone cards was a supply of services to intermediaries, but it did not follow that there was a second supply of services for consideration to the end user: paragraph 43; see also the analysis by the Advocate General at paragraphs 25-29. At that level, there was no direct link and therefore no consideration.

[19] Finally, we should note that in characterizing the nature of a supply the terms of the contracts used by the taxpayer are potentially important: *Secret Hotels2 Ltd* v *HMRC* [2014] UKSC 16; [2014] STC 937, at paragraph 31. That is unsurprising, as the relationship is almost inevitably contractual in nature.

[20] Certain further cases on the nature of a supply were cited by counsel for HMRC in support of the proposition that the existence of a contractual right to a service could demonstrate a supply for VAT purposes. We do not doubt that the existence of a contractual right may be an important indication that a supply has occurred. Nevertheless, in the light of the principles laid down in *Card Protection Services* we are of opinion that any contractual rights must be interpreted in the context of the whole circumstances of the individual case. We will return to this proposition when we consider the nature of the present supply, but at this point we will comment briefly on the cases that were cited. We do not think that any of these adds significantly to the statements of principle found in *Card Protection Plan*, *Levob* and *Lebara*; indeed, these cases were relied on in large measure because they appeared to provide analogies to the factual situation found in the present case. It seems to us that the application of tax law is through principle rather than analogy; in every case the underlying basis of the court's reasoning must be discovered, and it is the principles contained in that reasoning that govern future cases.

[21] In *HMRC* v *Esporta Ltd* [2014] EWCA Civ 155; [2014] STC 1548, the taxpayer operated health and fitness clubs which members of the public could join. A member had to sign up for a minimum commitment period of 12 months or longer and pay fees in advance. If a member defaulted on his her monthly instalments, the taxpayer would turn off the member's access card, although that did not terminate the membership. The taxpayer ultimately sought to recover outstanding membership fees for the remainder of the commitment period. The taxpayer was assessed to VAT on the outstanding membership fees recovered in such cases for the remainder of the contract period. It was held that these were subject to VAT; they were properly analyzed (per Vos LJ at paragraph 34) as consideration for the membership and right of access to the clubs throughout the

commitment period. Even though the contractual conditions provided for a member's exclusion for non-payment, that did not mean that the member was in the same position as a member of the public; the member of the public had no right to demand access and facilities even on payment of the fees, and the club was able to choose whether or not it wanted to contract with him. In the case of a defaulting member, however, the member was entitled to access to the club's facilities provided that the arrears were paid (paragraph 36).

[22] In our opinion that case turns on an analysis of the member's rights during a period of default, when there remained a possibility of paying arrears and resuming active membership. The present case, by contrast, concerns the characterization of the services supplied by the taxpayer to customers at the outset of the contractual relationship, in a situation where the initial search facility is made available to the public generally, not merely to members. In these circumstances the analysis of the supply is clearly different from that applicable to the period of default in *Esporta*. In that case importance was attached to the existence of a particular contractual right, but of course the significance that is attached to any particular contractual right must depend on the nature of the right and the manner in which it fits into the contractual and economic context of the particular case. In the present case we are of opinion, for reasons discussed below, that the difference between a contractual right to conduct a preliminary search, without access to the actual records, and the ability of the public to conduct a similar search, albeit without a contractual right, is insubstantial from an economic standpoint. On that basis we consider that *Esporta* should be distinguished.

[23] Case C-250/14 *Air France-KLM* v *Ministère des Finances et des Comptes publics* [2016] STC 1451, concerned liability for VAT on air tickets that were not used. One of the issues in the case concerned tickets which were no longer valid because the ticket was non-refundable

and the customer had been a "no-show" at boarding. The Court of Justice considered the obligations incumbent on an airline (paragraph 26) checking-in and boarding passengers, transporting them to their destination, and disembarking them there. Performance of those services, however, required the passenger to turn up on the agreed date and at the agreed place for boarding. On that basis the court held that the consideration for the price paid when the ticket was purchased consisted of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercised that right, since the airline company fulfilled the service by enabling passenger to benefit from those services (paragraph 28). Consequently VAT was due in respect of tickets that had been issued but not used, where the passenger was unable to obtain a refund. Counsel for HMRC submitted that this demonstrated that the supply was regarded as taking place as soon as a legal right arose, even in a case where the taxpayer's customers did not avail himself or herself of that legal right.

[24] That appears to us to be too simplistic, however. As already indicated, the nature of the supply for VAT purposes must be determined in the light of a range of factors, including both the parties' contract and the overall economic context in which that contract operates. With a non-refundable airline ticket, the supply is of a specific service that must be utilized at a particular time and place, and there is no scope for the passenger's unilaterally postponing the service. In the present case, however, the service for which the customer requires to pay can be invoked at any time within a three-month period, with the possibility of extension, and can be used in a very large number of ways. Furthermore, the initial search facility, which is available free of charge to members of the public, is not something that the customer would regard as an end in itself: it is merely a means to the end of viewing or downloading particular documents held on the taxpayer's websites. If one were to

suggest an analogy (which we generally prefer not to do), it would be with the premises and shelves in a bookshop rather than an airline ticket; the flexibility accorded to the customer is very much greater.

[25] In the light of the foregoing cases and the underlying legislation, we will now consider the analysis of the service actually provided by the taxpayer in the present case.

Analysis of the taxpayer's services

[26] In determining the nature of the service supplied by the taxpayer, the factors summarized at paragraphs [16]-[19] above are relevant. The court should have regard to precisely what the taxpayer does and what it undertakes to do for its customers; the notions of consideration and reciprocity are of fundamental importance. The contractual relationship between the taxpayer and its customers is important, but that must be looked at in context. It is also necessary to determine what the principal supply is that the taxpayer makes to its customers, and whether any particular features of that supply are to be regarded as merely ancillary or as independent supplies. At all times a practical test, based on economic reality, must be applied.

[27] The starting point must therefore be the services that the taxpayer provides to its customers. In the present case the taxpayer essentially provides two services: a general search function and the viewing and downloading of specific documents. The critical question is what the consideration is for the amounts paid by PAYG customers, applying the principle of reciprocity as explained in cases such as *Lebara*. In our opinion the consideration for those payments is the viewing and downloading of specific documents. The customer is engaged in genealogical research. He requires particular documents in order to carry out that research – documents related to the particular family that he is investigating. It is those

documents that provide the necessary information about family history, and they are only available through use of the viewing and downloading service. It is that service, and that service alone, that can only be accessed by making use of the PAYG credits.

[28] The search function, by contrast, does not provide the information about a family that is contained in historical documents, usually from the public records of births, marriages, deaths and the like. When the search function is used, it is impossible to know with certainty whether a particular document is in fact relevant to the customer's search; all that is available is an indication that a document that might be relevant to that search exists on the website. Consequently the search function cannot be considered an end in itself; it is no more than a means towards the customer's ultimate end, namely viewing and downloading documents about the family that is being researched. On this basis, it appears to us that the service provided by the taxpayer by way of consideration is the viewing or downloading of documents, and so far as existing customers of the taxpayer are concerned the search function is no more than ancillary. That applies in particular to the purchasers of PAYG vouchers, who are existing customers because they have paid money with a view to making use of the taxpayer's services.

[29] The search function is, however, available not merely to existing customers but to the general public. It is available free of charge. As a matter of commercial reality, the reasons for this appear obvious. In order to carry on business the taxpayer must attract users to its website from among the general public. To achieve this, potential users must be persuaded that the website has something to offer them, but that cannot be achieved without allowing some degree of access to the website. There is perhaps an analogy with a traditional bookshop, where customers can view the books on the shelves and examine them in a relatively cursory manner; the same is true of websites such as Amazon, where a level of

information is inevitably provided about the books (whether physical or digital) that are on offer. It is clearly for this reason that the taxpayer allows the public free access to the general search function, so that potential customers may discover whether there might be something of interest to them. For this reason it appears to us that the general search function must be available free of charge to the general public.

[30] This is important in view of a major focus in the argument presented for HMRC. It was submitted that a major factor supporting HMRC's analysis of the service provided by the taxpayer as a "package" which included the general search function was the existence of a right of the customer to maintain access to the search function. Members of the public, by contrast, had no such right, but merely a privilege to examine the general search function. That privilege only existed for as long as the taxpayer saw fit, and would only be on such terms as the taxpayer was prepared to allow. While that is technically correct as a matter of legal analysis, it seems to us to ignore the fundamental practical point made in the last paragraph: if the taxpayer is to maintain its business and attract new customers, it must allow the public substantial access to the search function. Thus as a matter of economic reality the search function cannot in practice be withdrawn from the general public.

[31] If the search function is available free of charge to the general public as well as to PAYG and subscription customers, it cannot be said that it is something that those customers pay for; it is simply not part of the consideration for the payments made by those customers. As the judge of the Upper Tribunal explained under reference to *Lebara* (paragraph [21]), there is no link between the payment made by the customer and the use of the search facility on the appellants' website. On that basis all that the customer gets for his payment is the ability to access and download particular documents that he has identified as being of interest to him. Furthermore, in our opinion it is apparent that the relationship

between the ability to view and download particular documents and the search function is essentially that of a principal service and an ancillary service; the search function is not an end in itself, but is merely used by customers to identify the documents that may be of interest so that those documents can be viewed and downloaded. That, as we have explained, is the consideration for the payments made by customers.

[32] Counsel for HMRC also placed reliance on the decisions of the Court of Justice in *Air France-KLM* and the Court of Appeal in *Esporta*. We have already considered these cases (paragraphs [21]-[24] above) and indicated why we think that they must be distinguished.

[33] For the foregoing reasons we are of opinion that the taxpayer's analysis of the nature of the supply is correct. The consideration for the payments made by customers to obtain PAYG credits is the ability to view or download particular items on the taxpayer's website, and does not extend to the general search facility that is available both to customers and to the public. That conclusion will only entitle the taxpayer to succeed, however, if the payments made by PAYG customers are not "prepayments" within the meaning of section 6(4) of the Value Added Tax Act 1994. We now consider that question.

Prepayment

Legislation

[34] In the Principal VAT Directive, the normal rule regarding the time when VAT becomes chargeable is set out in article 63:

> "The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied".

That rule is reflected in section 1(2) of the Value Added Tax Act 1994:

> "VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply".

[35] Section 6(3) of the 1994 Act provides that, subject to subsequent provisions, a supply of services is to be treated as taking place at the time when the services are performed. This general rule is, however, subject to an exception for payments made in advance that are considered prepayments, that is to say, payments that fall within the terms of section 6(4) of the 1994 Act. That subsection is in the following terms:

> "If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received".

That exception implements what is now article 65 of the Principal VAT Directive, which provides as follows:

> "Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received".

Case law

[36] It is apparent from the terms of sections 1(2) and 6(4), interpreted in accordance with the corresponding provisions of the Principal VAT Directive, articles 63 and 65, that the general rule is that VAT is due at the time when a service is actually supplied, and that section 6(4) and article 65 are exceptional in providing for payment at an earlier time, either when an invoice is issued in respect of a service or when payment is received in respect of a service. Because the provisions for early payment are exceptional, in the literal sense of that word, they fall to be construed strictly. The general approach to these provisions has been considered in a number of cases before the Court of Justice. Two of those cases contain important general statements of the law. Case C-419/02 *BUPA Hospitals Ltd* v *Customs and*

Excise Commissioners [2006] Ch 446, concerned an attempted prepayment that was held to be caught by what is now article 65 of the Principal VAT Directive. Case C-270/09 *Macdonald Resorts Ltd* v *HMRC* [2011] STC 412, was not directly concerned with prepayments, but it contains a helpful discussion of the law applicable to the incidence of VAT under the Principal VAT Directive.

[37] *BUPA Hospitals Ltd* related to a change in the VAT regime applicable to supplies by health providers in the UK; prior to 1 January 1998 they had been zero rated, but thereafter they became exempt, with the result that health providers were no longer able to deduct input tax on purchases of medical supplies. To pre-empt this change, prior to its becoming effective, BUPA, an operator of private hospitals, set up a scheme to take maximum advantage of the existing right of deduction of VAT. The scheme relied on what is now article 63. BUPA entered into a contract with an associated company whereby, in consideration of an immediate payment by BUPA of a sum that included £17.5 million of VAT, the associated company would make future supplies to BUPA of drugs and prostheses described in a schedule that was subject to amendment. Either party could terminate the contract on notice, in which case BUPA would be entitled to recover the value of the goods that had not yet been delivered. The claim to recover £17.5 million as input tax was refused by HMRC, and a reference to the Court of Justice was made in subsequent judicial proceedings.

[38] The Court initially observed (at paragraphs 44-45) that what is now article 63 of the Principal VAT Directive provides that the chargeable event occurs and VAT becomes chargeable when the goods are delivered or services are performed. What is now article 65, which provides that when payments are made on account before goods are delivered or

services are performed VAT becomes chargeable on receipt of payment on the amount received, is a derogation from the rule in article 63; as such it must be interpreted strictly.

[39] In general, under the Directives the "chargeable event" for VAT is the occurrence of an event whereby the legal conditions necessary for tax to become chargeable are fulfilled (paragraph 46). Consequently tax may become chargeable at the same time as or after the occurrence of the chargeable event, but not before that unless there is provision to the contrary. In a case where what is now article 65 (then article 10(2) of the Sixth (VAT) Council Directive 77/388/EEC) applies, there is a departure from the usual chronological order in that, where a payment is to be made on account, the VAT becomes chargeable without the supply's having yet taken place. The Court observed (at paragraph 48):

> "In order for the tax to become chargeable in such a situation, all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known, and therefore, in particular,… when the payment on account is made the goods or services must be precisely identified".

Such a view was endorsed in the Court's opinion by the Proposal for a Sixth Council Directive on the harmonisation of turnover taxes (Bulletin of the European Communities (1973), Supplement 11/73, p 13), in which it was observed by the Commission that:

> "when payments on account are received prior to the chargeable event, receipt of these amounts gives rise to a charge to tax, since the parties to the transaction in this way demonstrate their intention that all the financial consequences of the chargeable event should arise in advance".

In *BUPA* the Court further observed (at paragraph 50) that:

> "it is the supplies of goods or services which are subject to VAT, rather than the payments made by way of consideration for such supplies…. A fortiori, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT".

[40] The decision of the Court in *BUPA* is summarized at paragraph 51. The case involved the payment of lump sums for goods referred to in general terms in a list which

might be altered at any time by agreement and from which the buyer might possibly select articles. The buyer might unilaterally resile from the agreement at any time. Payments (referred to as "prepayments") of that kind did not fall within the scope of what is now article 65. The facts of the case were accordingly some way from those now under consideration. Furthermore, the case involved an aggressive tax avoidance scheme rather than an ordinary commercial transaction. Nevertheless, in our opinion the statements of principle made by the Court of Justice are pertinent, especially that in paragraph 48, quoted above. Those statements are expressed in general terms, and they appear to us to be intended to provide a general explanation of the meaning and scope of article 10(2), now article 65 of the Principal VAT Directive.

[41] In *Macdonald Resorts Ltd*, the taxpayer sold timeshare rights in properties in holiday resorts. It set up an option scheme to utilize unsold timeshare inventory and to offer customers greater flexibility. Customers were able to acquire "points rights" which could be redeemed for various benefits, including accommodation in holiday resorts provided by the taxpayer or hotel accommodation provided by third parties. The accommodation could be situated in either the United Kingdom or Spain. Points rights could be purchased from the taxpayer in return for the deposit of the customer's own timeshare usage rights, together with payment of an "enhancement fee". HMRC contended that the sale of points rights should be treated as a taxable supply in the United Kingdom of benefits derived from membership of a club. Proceedings took place before the VAT and Duties Tribunal and then in this Court, which referred certain questions for a ruling by the Court of Justice. These were concerned with the proper characterization of the supplies made by Macdonald: whether they should be characterized as the leasing or letting of immoveable property, or as

membership of a club, or in some other manner. They also raised the question of the place of supply: whether the United Kingdom or Spain.

[42] The Court of Justice held that a fundamental criterion was the members' ultimate intention when they paid for the services received by them (paragraph 22). When points rights were purchased, the intention was to use them for conversion into services offered under the scheme. Thus the customer's intention was not to collect points but to acquire the use of accommodation or other services at a later date. The purchase of points rights and the conversion of points was thus not an aim in itself, but merely a preliminary transaction in order to achieve a further objective. It was therefore at the final moment of that conversion that the purchaser of points rights received the consideration for his initial payment (paragraphs 24-25). The Court continued (paragraphs 26-27):

> "According to the case law of the court, the basis of assessment for a supply of services is everything which makes up the consideration for the service supplied and a supply of services is taxable only if there is a direct link between the service supplied and the consideration received by the supplier….
>
> Therefore, it appears that, in a scheme such as [the scheme under consideration], the actual service for which 'points rights' are required is the making available to participants in that scheme of the various possible benefits which may be obtained by virtue of the points deriving from those rights. The service is not fully supplied until those points are converted".

This is essentially a reiteration of the basic principle that it is the supply of services, rather than the making of a payment by way of consideration, that is the taxable event.

[43] The Court then addressed the elements that are required for VAT to be chargeable (paragraphs 29-31):

> "[W]hen 'points rights' are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. …
>
> In those circumstances, the factors necessary for VAT to become chargeable are not established when rights such as 'points rights' are initially acquired, which excludes the application of [article 65 of the Principal VAT Directive].

> As follows from the judgment in *BUPA Hospitals Ltd* v *Customs and Excise Commissioners*…, in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT".

The foregoing passage is obviously not directly connected with prepayment, which was not in issue in the case. It is nevertheless a reiteration of the basic principle laid down in *BUPA Hospitals Ltd*, namely that the normal point for the imposition of VAT is the time when goods or services are supplied, and that if VAT is to be charged before that time the goods or services in question must be "precisely" or "clearly" (the word used in paragraph 50 of *BUPA Hospitals Ltd*) identified.

[44] On the facts of *Macdonald Resorts Ltd*, it was only when points were converted into accommodation or another service that it was possible to determine the VAT treatment that was applicable, and the place of supply was therefore the place where the accommodation was obtained. The elements of uncertainty that were identified were those at paragraph 29: the customer did not know exactly what accommodation or other services would be available in a given year; the customer did not know what the points value would be of a holiday in that accommodation or of those services; and it was the taxpayer, Macdonald Resorts, that determined the points classification, so that the customer's choice was limited to accommodation or services accessible within the points that he had available.

[45] We were also referred to the decision of the Court of Justice in Case C-107/13 *Firin* v *Direktor na Direktsia Obzhalvane*, [2014] STC 1581. The facts of the case were very different from the present case. A circular arrangement for the supply of wheat had been concluded between the taxpayer and other companies whereby the taxpayer contracted to buy the wheat, made a prepayment of the price, and the funds so paid were used ultimately by

another company to acquire shares in the taxpayer. The wheat was not supplied and the seller became insolvent before output tax was paid, but the taxpayer reclaimed the input tax. In this case the goods to be supplied were clearly identified when the prepayment was made, but it was uncertain whether the chargeable event, the supply of the wheat, would ever take place; indeed, it was possible that the whole scheme was fraudulent. If there were uncertainty as to whether the supply would occur, article 65 could not apply (paragraphs 38-39). In these circumstances the Court of Justice held that it was permissible for the national tax authorities to obtain repayment of the VAT that had been deducted by the taxpayer on the basis that the supply had not been made. The Court affirmed the view that it is the supply of goods and services that is the chargeable event for the purposes of article 65, and that uncertainty about the supply would prevent the prepayment rule from applying. Nevertheless, the facts of the case are somewhat singular, and the decision as a whole is of limited assistance.

[46] The general approach taken by the Court of Justice in relation to article 65 and its predecessors appears to us to have three principal components. First, the chargeable event for the purposes of VAT is the supply of goods or services, not the payment of the price. That underlies the structure of articles 63 and 65. Secondly, it follows that the normal rule is that VAT is payable when the supply is made. Thirdly, VAT may be payable in advance of that date if the requirements of article 65 are satisfied, but for that to happen there must be precise identification of the goods and services that are to be supplied. This conclusion follows from the general rule, discussed at paragraphs [14] and [17]-[18] above, that a supply for VAT purposes requires a consideration, and there must be a direct link between the consideration and the goods or services that are supplied: reciprocity is fundamental.

Consequently both the goods or services and the consideration must be clearly identified before there can be a charge to VAT.

[47] Finally, we consider that the various factors discussed at paragraph [16] above are relevant to the application of the prepayment rule. The rule must be applied in a practical and pragmatic manner, having proper regard to the economic reality of the transaction under consideration. Once again, the overall context in which the transaction occurs is of fundamental importance.

Analysis of payments to the taxpayer

[48] When a customer acquires PAYG vouchers and makes a payment to the taxpayer, a number of matters are uncertain. First, and most importantly, it is uncertain whether the chargeable event – redemption of a credit by viewing or downloading a document – will ever occur. This possibility is not hypothetical; the present proceedings have arisen because in a substantial number of cases PAYG credits have not been redeemed. Secondly, it is not clear when redemption will occur, and by that time a number of features of the service might have changed. In particular, the items that are available for viewing and downloading on the taxpayer's website might have changed. The price in credits to view and download any particular document might have changed by then. It is also theoretically possible that the VAT rate might have changed. Of these factors, the possibility that the available documents might have changed appears to be a real one. In its contractual terms and conditions the taxpayer expressly reserves the right to make changes to the website, including the records and services that are offered. The terms and conditions also provide that the number of credits charged to view a record may be changed from time to time.

[49] The foregoing features are obviously different from those that were considered in *BUPA Hospitals Ltd* and *Macdonald Resorts Ltd*. In the former case, lump sums were paid for goods that were described in general terms in a list which could be altered at any time by agreement between the parties. In the present case, the items available on the taxpayer's website can be changed by the taxpayer alone, without further agreement, although the terms and conditions indicate that if anything is deleted a "decent" replacement will be offered. In both cases, however, as a matter of economic reality, it is obvious that a good selection of products must be made available if the commercial arrangement is to work. In *BUPA* the taxpayer/customer was entitled to select articles from the list provided by the supplier, which is similar to the present case. Finally, in that case the customer was entitled to resile unilaterally from the agreement at any time and to recover the unused balance of the prepayment. That feature is absent from the present case, although, as we have remarked, it is not uncommon for the customer simply to fail to use credits that have been paid for.

[50] *Macdonald Resorts Ltd* was not directly concerned with prepayments, and therefore the statements of law are only a reaffirmation of the principles laid down in *BUPA*. There is a definite statement that payments on account of supplies of goods and services that have not yet been clearly or precisely identified cannot be subject to VAT. In *Macdonald Resorts Ltd*, a number of elements of uncertainty existed (paragraph 29). The customer did not know exactly what accommodation or other services would be available in a given year, and did not know what the points value would be of a holiday in that accommodation or of those services at the relevant time. The taxpayer determined the points classification, thus limiting the customer's choice of accommodation or services. Thus a considerable level of uncertainty existed.

[51] In the present case we are of opinion that the elements of uncertainty described at paragraph [48] above are sufficiently important to exclude the application of the prepayment rules contained in section 6(4) of the Value Added Tax Act 1994 and article 65 of the Principal VAT Directive. If a prepayment is to be chargeable to VAT, it must relate to a particular supply of goods or services, with a direct link between the goods or services and the consideration paid in advance. Unless such a link exists, the payment made in advance of the supply is a mere payment to the general account of the customer, without a sufficient link to the service that is to be supplied. In the present case, the uncertainties are significant. It is plain that a substantial number of PAYG credits are never redeemed, and there is obviously no link with a service in such cases. Furthermore, the taxpayer has a contractual power to vary the services that are offered, by varying the website, and also to vary the price of the various services, expressed in credits. While those powers are no doubt constrained by commercial considerations, as the terms and conditions acknowledge, the exact record that is on offer at the time when PAYG credits are purchased may not be the same as the record that is offered at the time when credits are redeemed, and the price may have varied.

[52] These elements differ from those considered in *BUPA Hospitals Ltd* and *Macdonald Resorts Ltd* (where in any event the question before the court was not the existence or otherwise of a prepayment in terms of article 65), but the statements of principle in those two cases are clear. Those statements are, moreover, expressed in terms of general application. We consider that the principles laid down by the Court of Justice must be applied to the facts of the present case in the manner in which they are stated; in the application of EU law, as with Scots law, the proper approach is based on principle rather than analogy. Thus the factual differences between the present case and earlier cases are of less significance than the applicability of the general principles. On that basis, we are of

opinion that the uncertainties in the present case are so material that the payment made when PAYG credits are purchased cannot be considered a prepayment towards the cost of any particular search. The important elements of uncertainty are stated at paragraph [48] above. It is, moreover, significant that, as previously explained, credits are not purchased as an aim in themselves but in order to view and download particular documents. The search facility that precedes access to a particular document is available free, and is in any event at a very general level. Thus both the practical purpose of the credits and the background in which they occur, viewed as a matter of economic reality, lead to the conclusion that the service paid for by a customer is supplied when a document is viewed or downloaded, and not before that time.

[53] In addition, a practical problem arises if the prepayment rule contained in section 6(4) is applied in the circumstances of the present case. If that section applies, the supply takes place at the point when payment is made. At that stage, however, it is necessary to determine what the consideration is for that supply. The supply is the viewing and downloading of documents, but it cannot be known at the time when the payment is made how many credits will actually be used and how many will remain unredeemed. That makes it impossible at that stage for the taxpayer to know how much VAT should be accounted for. It simply cannot be known in advance whether a credit will remain unused, especially as unused credits can be revived if more credits are purchased within a specified period. That problem supports the view that a prepayment does not occur at the point when PAYG credits are purchased. In essence, article 65 and section 6(4) proceed on the proposition that a deemed supply takes place, but if the extent of that supply cannot be known at that point the system of accounting for VAT becomes unworkable.

[54] In view of our conclusions on the nature of the supply and the prepayment issue, the appeal by HMRC must be refused, and the question of whether the PAYG credits amounted to face-value vouchers does not arise. Nevertheless, full arguments were presented to us on this issue, and we understand that it is regarded by HMRC as a matter of some importance, in particular in relation to multi-purpose face-value vouchers; the law has been altered in relation to single-purpose vouchers by removing them from Schedule 10A to the 1994 Act following the decision in *Lebara Ltd* v *HMRC, supra*. We will accordingly consider the arguments that were addressed on this issue.

Face-value vouchers

Legislation

[55] The United Kingdom legislation governing face-value vouchers is found in Schedule 10A to the Value Added Tax Act 1994. So far as material, this is in the following terms:

> "*Meaning of 'face-value voucher' etc*
>
> 1- (1). In this Schedule 'face-value voucher' means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> (2) References in this Schedule to the 'face value' of a voucher are to the amount referred to in sub-paragraph (1) above.
>
> *Nature of supply*
>
> 2- The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.
>
> …
>
> *Treatment of retailer vouchers*
>
> 4- (1) This paragraph applies to a face-value voucher issued by a person who –
>
> > (a) is a person from whom goods or services may be obtained by the use of the voucher, and

> (b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.
>
> Such a voucher is referred to in this Schedule as a 'retailer voucher'.
>
> (2) The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher…".

[56] The important requirements in those provisions, which are set out in paragraph 1(1), are four in number. First, there must be a token, stamp or voucher, in physical or electronic form; no distinction is drawn between physical and electronic vouchers. Secondly, that token, stamp or voucher must represent a right to receive goods or services. We consider the meaning of this requirement at paragraphs [57]-[58]. Thirdly, the right to receive goods or services must be "to the value of an amount". Fourthly, the amount in question must be stated on or recorded in the voucher. We return to these requirements at paragraphs [59]-[60]. If a voucher satisfies those requirements the effect, stated in paragraph 4(2), is that the consideration for the issue of the voucher is disregarded for the purposes of the 1994 Act except to the extent, if any, that it exceeds the face value of the voucher. The result is that the issuing of the voucher is not a taxable transaction, and VAT is only charged at the point when the voucher is redeemed in exchange for goods or services. For this purpose, however, it is essential that what is issued satisfies the requirements of a face-value voucher as set out in paragraph 1(1).

Case law

[57] The requirement in Schedule 10A that there should be an amount to the value of which the voucher conferred on the holder a right to services was considered by Sir Andrew Park in the English High Court in *Leisure Pass Group Ltd* v *HMRC* [2008] STC 3340. It was held, in paragraph 15, that the statute only applied to a voucher which had a monetary limit

placed upon it, in the sense that when that limit was reached the voucher was exhausted. A book token was given as an obvious example. The case involved a pass that conferred access to various tourist attractions in London. There were limits on the use of the pass: each of the attractions could be viewed only once, and the duration of the pass was limited. Nevertheless, these limitations were not monetary in nature. It followed that the pass was not limited by reference to an "amount", and was not a face-value voucher. That case is not directly relevant to the present one, but the approach taken indicates that the requirements set out in paragraph 1(1) are to be given due effect.

[58] In *Skyview Ballooning Ltd* v *HMRC* [2014] UKFTT 32 (TC), the First-tier Tribunal required to consider vouchers issued by a taxpayer who provided hot air balloon rides. Those vouchers had a monetary limit, but the value was not printed on the face of the voucher, essentially because they were frequently purchased as gifts. On the face of the voucher there was printed a code that, when entered into the taxpayer's computer system, divulged the amount that the voucher was worth. It was held that this did not prevent the vouchers from being face-value vouchers. The fourth of the requirements in paragraph 1(1) (in the form in use at that time) specified that the amount of the voucher should be "stated on it or recorded in it". (In the Tribunal's discussion "printed" is used in place of "stated", but this make no material difference). The value was clearly not printed on the voucher, but it was held that it was "recorded in" the voucher. There was a code on the face of the voucher, which was held equivalent to the value recorded on a retailer's card. The critical factor, however, was that information was contained on the face of a physical voucher that represented the value of that voucher. Once again, the importance of the requirements in paragraph 1(1) is apparent.

Application to the facts

[59] The essence of a face-value voucher is that it is a physical or electronic document that represents a right to receive goods or services to a specified amount, which is stated on or recorded in the document itself. That follows from the basic definition in paragraph 1(1) of Schedule 10A. The document is therefore acquired for its own sake, as the representation in physical or electronic form of a right to a specified product. The most traditional form of such a voucher is perhaps the book token, which can be redeemed against the price of books at a very wide range of retailers. A face-value voucher can be confined to a single retailer, however, and vouchers of this nature are commonly issued by many retailers, whether over-the-counter in physical form or online in electronic form, or sometimes in electronic form on a card that is supplied by the retailer. So understood, the face-value voucher is distinguishable from a mere credit with a retailer; the credit is an accounting entry, whereas the face-value voucher is representative of a right. Moreover, the face-value voucher will normally be capable of transfer to another person, typically by way of gift.

[60] In our opinion the PAYG credits, or vouchers, issued by the taxpayer, do not amount to face-value vouchers, but are rather mere credits that permit the customer to view and download particular documents on the taxpayer's website, through the operation of the taxpayer's accounting system. As we have already indicated in discussing the nature of the vouchers, we are of opinion that they are not purchased for their own sake but as a means to view or download documents. That is quite different from the typical face-value voucher. Furthermore, if a customer (other than a subscription customer) wishes to access documents on the taxpayer's website, the only way of doing so is by using the PAYG credits; they cannot be used, in the same way as book tokens or typical retailer vouchers, in conjunction with the customer's own funds to pay for the desired service. The PAYG credits are

transferable at the point when they are issued, as they may be the subject of a gift made at that point, but thereafter they cannot be transferred; in this respect too they are different from typical face-value vouchers. For these reasons we consider that the PAYG credits cannot be said to "represent" the right to receive services, but are merely a credit that can be utilized to obtain such services.

[61] Moreover, we are of opinion that the third and fourth of the requirements of paragraph 1(1) of Schedule 10A are not satisfied. These require that the right represented by the voucher should be "to the value of an amount" and that that amount should be "stated on" or "recorded in" the voucher. The wording used indicates that the value must be recorded within the voucher itself; that appears to us to be of the essence of a face-value voucher which represents particular rights. In the present case, however, the PAYG voucher itself does not contain information that "states" or "records" the amount of the credits; that amount can only be ascertained through access to the taxpayer's own accounting records. It is only there that the actual value of the PAYG voucher can be discovered, because that depends upon the prices currently charged for viewing or downloading particular documents on the website. No doubt the sum is expressed in "credits", and it was argued for the taxpayer and accepted by the Upper Tribunal that that was sufficient to constitute an "amount". In effect it was argued that the credits were a form of private currency. The value of those credits, however, cannot be discovered from the PAYG voucher itself, but only from the taxpayer's accounting system. Furthermore, because of their fluctuating value at the point of use, it is difficult to accept that those credits take the form of a private currency; the value can be changed at any time by the taxpayer. No doubt for good commercial reasons any such changes are likely to be modest, but what the credits are worth

in practice can be changed unilaterally by one party to the transaction, which appears to rule out the taxpayer's analysis.

[62] For these reasons we are of opinion that the PAYG vouchers do not represent a right to receive services "to the value of an amount", because what the vouchers are worth is uncertain until the time of redemption; thus the third requirement of paragraph 1(1) is not satisfied. We are further of opinion that the value of the vouchers is not stated or recorded on them; it is only ascertainable by reference to the taxpayer's own accounting system. Thus the fourth requirement is not satisfied. In relation to the third requirement, the uncertainty in the ultimate value of the voucher when it is redeemed is an important factor in our decision that the prepayment provisions of section 6(4) of the 1994 Act do not apply, but that uncertainty also affects the question of whether the PAYG credits are face-value vouchers, in a manner that excludes such a characterization.

Conclusion

[63] For the foregoing reasons we agree with the result reached by the Upper Tribunal, on the basis that the nature of the taxpayer's supply to PAYG customers was the supply of genealogical records selected by a customer and viewed or downloaded by that customer, and that the payments made by customers when they purchased PAYG credits did not amount to a prepayment within the meaning of section 6(4) of the Value Added Tax Act 1994. We consider that the PAYG credits did not amount to face-value vouchers within the meaning of Schedule 10A of the 1994 Act; on this matter we agree with the decision of the First-tier Tribunal. Nevertheless, on the basis of our decision on the nature of the supply and the prepayment issue, we will refuse the appeal.