TC01560

Appeal number: MAN/04/0568

VAT – Consideration - whether donations to good causes by company making catalogue sales were part of consideration for its supplies – no – appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

FINDEL PLC **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: DAVID DEMACK (TRIBUNAL JUDGE)

Sitting in Manchester on 23, 24 and 25 May 2011

Kevin Prosser QC and James Henderson instructed by KPMG for the Appellant

Melanie Hall QC and Owain Thomas instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant company, Findel plc ("Findel"), previously called Fine Art Developments plc, is the representative member of a VAT group which includes Express Gifts Ltd ("Express"). Express is a mail order company and sells goods through two types of catalogue, which I shall describe as 'charitable' and 'non-charitable'. The catalogues the subject of the present appeal fell into the charitable category and were for specific brands within Express known as Fundraising Direct ("FD"), Webb Ivory and Miller. (I use the past tense to describe matters relating to all three brands, as only Webb Ivory continues to operate, the operations of the other two having ended in 2005). As Webb Ivory and Miller operated on a similar basis, I shall where appropriate to refer to them collectively as "WIM". The sales model for FD differed from that used by WIM.

2. The business model for sales through both the FD and WIM catalogues was based on a network of individuals known as "fundraisers" who wished to raise money for a good cause they identified. That cause may have been charitable, or it may not. Examples of such causes included churches, scout groups, schools, etc. Express relied on fundraisers to distribute its catalogues to members of the public, typically relatives, friends, work colleagues and neighbours, known as "supporters". It is common ground that, for the purposes of the relevant VAT principles, supporters were the final consumers of goods sold to them from the catalogues.

3. Express also relied on fundraisers to encourage supporters to buy goods from its catalogues. Over the years the specific content of the catalogues and the precise role played by fundraisers changed, and varied with each type of catalogue. However, the essential message which Express relied upon the fundraisers to deliver to supporters was that part of whatever sum was paid by a supporter would be passed to an identified good cause. The appeal concerns the question whether Express was liable to account for output tax on the whole sum paid by the supporter as final consumer ("the whole sum"), as the Commissioners contend, or whether liability was confined to the whole sum less the donation ("the net sum"), as Express contends.

4. The disputed decisions and assessment on appeal before me are as follows:

a) a decision of the Commissioners dated 13 September 2004 that output tax was payable on the whole sum:

b) the Commissioners' rejection of a voluntary disclosure for overpaid VAT made under s.80 of the Value Added Tax Act 1994 ("the 1994 Act") in the sum of £1,687,150 for periods from 09/00 to 06/02 when it accounted for VAT by reference to the whole sum

c) the Commissioners' rejection of a second voluntary disclosure for overpaid VAT, also made under s.80 of the 1994 Act, in the sum of

£11,008,579 for the periods 04/73 to 12/96 when it accounted for VAT by reference to the whole sum; and

d) an assessment made on 30 November 2007 for period 12/04 in the sum of £374,655.

5. Findel initially increased its claim at (c) above to £16,781,990 before withdrawing it for periods from 04/73 to 12/79 inclusive. I was not informed of the extent of the consequent reduction in the claim.

6. Findel appealed all the Commissioners' decisions and assessment and, in an undated document presented to me entitled "Appellant's Consolidated Grounds of Appeal", set out those grounds as follows:

> "1) It is common ground that Express at all times sold the FD catalogue goods directly to supporters, so that the value for VAT purposes of Express's supplies of those goods was the consideration obtained by Express for such supplies. Findel submits that the consideration obtained by Express for such supplies did not include the donations made by the supporters to charity.
>
> 2) Prior to Xmas 2002, Express sold the WIM catalogue goods to fundraisers, who resold them to supporters. Therefore during the periods when OMV directions were in force, the value for VAT purposes of Express's supplies of those goods was the open market value by retail of such supplies. Findel submits that the open market value by retail of such supplies was the consideration obtained by the fundraisers for their re-sales to the supporters, which did not include the donations made by the supporters to charity. For the avoidance of doubt, Findel no longer challenges the validity of the OMV directions as a matter of EU law. [OMV (open market value) directions are directions made under para 2 of Schedule 6 to the 1994 Act].
>
> 3) Findel submits that, from Xmas 2002 onwards, Express sold the WIM catalogue goods directly to supporters. The submission at 1) above (in relation to sales of FD catalogue goods) is therefore repeated.
>
> 4) Alternatively, if contrary to the submission at 3) above, from Xmas 2002 onwards Express continued to sell the WIM catalogue goods to fundraisers, rather than selling them directly to supporters, the submission at 2) above is repeated.
>
> Findel submits that the supporters' donations to charity are not part of the consideration for the supply of goods, whether the donations were voluntary or not. However, Findel also submits that as a matter of fact donations were voluntary in relation to 31 per cent of all supplies."

7. For the purposes of the final sentence of those grounds of appeal, Findel relies on the results of a survey of its fundraisers it carried out, details of which are contained in [66] infra.

8. The Commissioners' summary response to Findel's notices of appeal is contained in the 3rd Amended and Consolidated Statement of Case in the following terms:

> "15.1 The Commissioners contend that the consideration for the Appellant's supplies is the full amount paid by the supporters.
>
> 15.2 Further the Commissioners contend that the effect of the OMV Notice of Direction in respect of the Webb Ivory and Miller catalogues is that the Appellant was and is required to account for VAT on the open market value of the goods which is the full catalogue selling [price] of the goods (i.e. including any sums subsequently passed on to the good causes).
>
> 15.3 The OMV Notice of Direction is accepted to be valid and lawful by the Appellant and to apply to all supplies made by it pursuant to the Webb Ivory and Miller catalogues until changes were purportedly made in 2002. The Commissioners contend that the OMV Notice of Direction continues to apply after the purported changes were introduced.
>
> 15.4 Even if the changes purportedly made in 2002 had the effect, in respect of the Webb Ivory and Miller catalogues, that the Appellant made supplies directly to the supporters, the Commissioners' case is that the consideration for those supplies is the full catalogue selling price of the goods (i.e. including any sums subsequently passed on to the good causes).
>
> 15.5 The Commissioners do not accept that the results of the Appellant's survey serve to alter the legal analysis of the transactions in dispute. The Commissioners do not accept that the survey results provide evidence of voluntary donations as alleged. The weighting of the analysis is rejected. "

9. In view of the distinctions between the two types of catalogue with which the appeal is concerned, the changes made in 2002 and the history of the OMV direction, in determining what was the consideration for Express's supplies of goods by retail, I must consider each type of catalogue separately both before Christmas 2002 and after that date. I must also deal with a claim by Findel that for some of the prescribed accounting periods covered by the appeal, the sales Express made through the WIM catalogues were made directly to the fundraisers at a discounted price, so that the OMV direction was not applicable to them.

10. Before me Findel was represented by Mr Kevin Prosser QC leading Mr James Henderson, and the Commissioners by Mrs Melanie Hall QC leading Mr Owain Thomas.

11. I was provided with two agreed bundles of copy documents, an agreed bundle of authorities, the agreed witness statements of Thomas Mack and Mrs Patricia Smitten,

two of Express's fundraisers, and I took oral evidence from Mrs Amanda Reid, Express's sales promotions manageress.

12. It is from the whole of the evidence provided that I make the findings of fact which follow shortly. But first I shall deal with the legislation in point.

The legislation

13. The legislation is to be found in both EC Directives and domestic legislation. The former consists of Articles 1 and 2 of the Council Directive 67/227/EEC ("the First Directive"). Those Articles provide:

> *Article 1*
> *"Member states shall replace their present system of turnover taxes by the common system of value added tax defined in Article 2.*
> *Article 2*
> *The principle of the common system of value added tax involves the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which tax is charged."*

14. The relevant parts of the Sixth VAT Directive (77/388/EEC) ("the Sixth Directive") are the following:

> Article 2 provides: "*The following shall be subject to VAT;*
>
> *1. The supply of goods… for consideration within the territory of the country by a taxable person acting as such…"*

> Article 11(A) provides in para 1 that:
>
> *"A. Within the territory of the Country,*
> *1. The taxable amount shall be: (a) in respect of supplies of goods and services… everything which constitutes the consideration which has been or is to be obtained by the suppler from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies."*

> Article 27 provides:
>
> *"1. The Council, acting unanimously on a proposal from the commission, may authorise any member state to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging tax or to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage."*

15. I should add at this point that by Article 1 of Council decision 89/534, and following the case of *Direct Cosmetics Ltd and Laughtons Photographs Ltd. v Customs and Excise Commissioners* [1988 STC540], the European Council granted the United Kingdom an indefinite derogation in the following terms:

> *"By way of derogation from Article 11A(1)(a) of the Sixth Directive, the United Kingdom is hereby authorised to prescribe, in cases where a marketing structure based on the supply of goods through non-taxable persons results in non-taxation at the stage of final consumption, that the taxable amount for supplies to such persons is to be the open market value of the goods as determined at that stage."*

16. The domestic legislation in point is to be found in the following parts of the 1994 Act. Section 19, which deals with the value of supply of goods or services, provides:

> "(1) *For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6 and for those purposes subsections (2) to (4) below have effect subject to that Schedule.*
> *If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.*
> *If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.*
> *Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.*
> *For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration."*

17. And Paragraph 2 of Schedule 6 provides:

> *"Where –*
> *(a) the whole or part of the business carried on by a taxable person consists in supplying to a number of persons goods to be sold, whether by them or others, by retail, and*
> *(b) those persons are not taxable persons,*
> *the Commissioners may by notice in writing to the taxable person direct that the value of any such supply by him after the giving of the notice or after such later date as may be specified in the notice shall be taken to be its open market value on a sale by retail."*

18. As I earlier mentioned, notices given under para 2 of Schedule 6 are referred to as OMV directions. In the instant case such a direction was made on the basis that Express was supplying goods to fundraisers who were not registered for VAT in circumstances where they sold those goods to supporters for a greater sum. Para 2 of Schedule 6 was originally enacted as para. 3 of Schedule 3 to the Finance Act 1972, and the OMV direction in point in the appeal was made thereunder.

The Facts

Overview of the facts and a brief history of OMV directions

19. Most helpfully, Mrs Hall included in her skeleton argument a section entitled

> "An overview of the facts and brief history of OMV directions." I am grateful to her for having done so, and include it (with some amendments and additions) to the extent that I accept it as factual in the following four sections: (A) the OMV direction, (B) the FD catalogue pre-autumn/winter 2002, (C) the WIM catalogues pre-autumn/winter 2002, (D) and the changes made to the wording of the catalogues in 2002. The section extends from paragraphs [20] to [40] of my decision.

A. The OMV direction

20. Sales Express made through the WIM catalogues were subject to the OMV direction from the 1 January 1980. (The current OMV direction was made on 26 June 1985). The direction was issued on the basis that Express was supplying goods to fundraisers who were not registered for VAT in circumstances where they sold those goods to supporters for a greater sum. It required Express to account for VAT on the basis that the value of the goods sold to the fundraisers was to be taken as the open market value of those goods on a sale by retail, and that that open market value corresponded to the whole sum.

21. In 1981 the Finance Act 1972 was amended in such a way as to render unlawful and unenforceable all OMV directions issued by the Commissioners. (see the judgment of the Court of Justice of the European Communities ('the ECJ') in Case C-5/84, *Direct Cosmetics Ltd v Commissioners of Revenue and Customs,* [1985] STC 479). Between 1981 and 1985 there was therefore no enforceable OMV direction in respect of the WIM catalogues.

22. On 13 June 1985 the EC authorised OMV directions by way of derogation from Article 11A(1)(a) of the Sixth Directive for a two year period (see EC Council Decision 85/369 OJ L 199 31.7.85 page 60). That derogation was extended for two years by an EC Council decision deemed to have been adopted on the 25 May 1987. (See OJ L93 7.4.87 page 17 and OJ L188 8.7.87 page52). Following the issue of an OMV direction by the Commissioners on 26 June 1985, traders unsuccessfully challenged EC Council Decision 85/369 in Joined Cases 138/86 and 139/86 *Direct Cosmetics Ltd v Commissioners of Revenue and Customs* [1988] STC 540. Thereafter the EC Council granted an indefinite derogation to issue OMV directions in cases where a marketing structure based on the supply of goods through non-taxable

persons resulted in non-taxation at the final stage of consumption, see EC Council Decision 89/534 (OJ L280 29.9.89 page 54). That decision explained that a derogation had only previously been granted for two years (in EC Decision 85/369) pending the ECJ's judgment in the *Direct Cosmetics* case. Council Decision 89/534 also recorded that the ECJ had confirmed the validity of Decision 85/369.

23. The OMV direction made with regard to the WIM catalogues was considered and endorsed by the House of Lords in *Fine Art Developments Plc v Commissioners of Revenue and Customs* [1996] STC 246. (As I mentioned earlier, Fine Art Developments Plc is the same entity as Findel Plc).

24. Express made certain changes to its selling structure of the WIM catalogues in 2002 and claimed that they meant that it no longer supplied goods to the fundraisers, but rather supplied them directly to supporters, with the fundraisers acting simply as Express's agents; so that the OMV direction had no application beyond 2002. By letter of the 9 May 2003 the Commissioners seemingly accepted the claim and agreed that Express need account for output tax only on the net sum and not on the donation element. But on 13 September 2004 they withdrew their earlier decision with effect from the 2 October 2004, and Express was again required to account for output tax on the whole sum. The Commissioners did so having concluded that the changes to the wording of Express's catalogues from Christmas 2002 did not have the effect of changing the nature of its transactions with supporters, so that there should have been no change to the way in which they were treated for VAT purposes. Consequently, the Commissioners now maintain that the OMV direction was and remains in place in respect of the WIM catalogues so that Express is required to account for VAT on the whole sum.

25. The VAT analysis, covering the FD catalogues pre autumn/winter 2002 (B), the WIM catalogues pre autumn/winter 2002 (C) and the changes made to the catalogues in 2002 (D), which follows, assumes that the OMV direction has no application.

B. The FD Catalogue Pre Autumn/Winter 2002

26. In common with catalogues produced under other brand names, the FD catalogue pre-autumn/winter 2002 was produced by Express twice a year. (In evidence Mrs Reid maintained that the FD catalogue was an annual one. Nothing turns on whether it was biannual or annual). One catalogue, produced in the autumn, was aimed at the Christmas market; the other was produced in the spring. The catalogue was distributed free of charge to fundraisers who had been recruited by Express.

27. Express supplied the fundraisers with stickers to affix to the front of the catalogues and the order forms showing details of the good cause to be supported. The fundraisers distributed catalogues to supporters who purchased goods from him or her. For the FD catalogue that was the limit of the fundraiser's role.

28. Goods were offered for sale at the single price displayed next to each item in the catalogue. The supporter would look through the catalogue and purchase goods by placing an order directly with Express making payment of the whole sum. The goods

were sent direct to the supporter with an invoice for the whole sum. The fundraiser was not involved at all at that stage of the process.

29. The Commissioners maintained that the whole sum was received by Express from the customer and 25 per cent was subsequently paid by Express to the specified good cause.

30. It was common ground that the FD pre-autumn/winter 2002 catalogues did not state that the supporter had the option of purchasing the goods at 75 per cent of the advertised price. Nor did they state that the supporter was being invited to make a donation or had a choice not to pay 100 per cent of the whole sum. The terms and conditions did not split the advertised price between the donation and the price of the goods. If a supporter returned goods, Express would refund him or her the whole sum and not 75 per cent thereof. Further, if an order was cancelled Express would make a full refund and nothing would be paid to the good cause in respect of that transaction.

C. The WIM Catalogues Pre Autumn/Winter 2002

31. Express's system for distribution, the frequency of distribution, the order form, the branding through stickers, the description of the price in the catalogues, and the system for refunds and cancellation were essentially the same for the WIM catalogues as for the FD catalogue, but with two differences:

a) the goods were sold by Express to the fundraiser (not to the supporter); and
b) the goods were sold to the fundraiser at a discount, i.e. for less than the catalogue price.

32. The whole sum was paid by the supporter to the fundraiser who then deducted the amount to be paid to the good cause and forwarded the balance to Express. The fundraiser then paid the specified part to the identified good cause. That part was variously described over the years, sometimes as "profit" and at other times as a "donation", or as "commission".

33. It was because the goods were sold at a discount to the fundraiser, who then sold them on to supporters for less than he had paid for them, that the Commissioners issued the OMV direction to ensure that there was no avoidance of tax at the final stage of consumption.

D. The Changes Made To The Wording Of The Catalogues In 2002

34. By letter of 3 December 2002 Express informed the Commissioners of changes it had made to its catalogues. However, it continued to invoice fundraisers, despite claiming that they were then acting as its agents. Fundraisers continued to receive the full catalogue price and, in the Commissioners' judgment, from a supporter's point of view nothing changed: the catalogue price paid remained VAT inclusive, and supporters were given no opportunity to buy goods at 75 per cent of the catalogue prices.

35. Against most items in the FD and WIM catalogues, Express split their prices expressly to reveal the amount or approximation of the amount to be paid to a good cause if a particular item was purchased. It made promotional statements such as, *"Up to 25% of the 'You Pay' prices in this catalogue is your donation and goes directly to the Guide or Brownie group named on the front cover."*

36. During the periods in dispute in the appeal, the terms and conditions in the various catalogues did not specify that the donations were voluntary. But a clause was included in the relevant section of the catalogues to make plain what was the price of the goods, and what was the donation element. For example, the Webb Ivory Christmas 2004 catalogue provided:

> "The 'You Pay' prices shown in the catalogue are made up of the two following things. Firstly, up to 25% is your Donation to the good cause shown on the front of this catalogue. You'll find the exact amount of your Donation is shown in the items description within the catalogue. The remainder of the 'You Pay' price is the 'Price of the Goods.' When you place an order with the fundraiser, you are entering into a contract with [Webb Ivory Ltd] under which we will supply you with the goods you ordered, (subject to availability) in return for payment of the 'Price of the Goods' as defined below. The fundraiser acts as our agent when taking orders and taking payment in relation to the price of the goods. The fundraiser shall act as your agent in receiving your Donation and ensuring it is passed on to the good cause shown on the front of the catalogue. The fundraiser receives no payment from us for these services and acts voluntarily for the benefit of the good cause."

37. (I might observe that the change referred to in the WIM catalogues was intended by Express to render the OMV direction inapplicable).

38. The equivalent statement in the FD catalogue (slightly adapted to take account of the different role of the fundraiser in FD transactions) was as follows:

> "The 'You Pay' prices shown in the catalogue are made up of the two following things. Firstly, up to 25% is your Donation to the good cause shown on the front of this catalogue. You'll find the exact amount of your Donation is shown in the items description within the catalogue. The remainder of the 'You Pay' price is the 'Price of the Goods.' When you place an order you are entering into a contract with Fundraising Direct under which we will supply you with the goods, (subject to availability) in return for payment for the 'Price of the Goods' as defined above. Fundraising Direct shall act as your agent in receiving your Donation and ensuring that it is passed on to the good cause shown on the front of the catalogue."

39. From Christmas 2002 Express reverted to its former practice of awarding different percentages of sales prices to good causes for card and wrap and other items, identifying on an item by item basis in its catalogues how much was to be paid to the good cause.

40. The Miller Christmas 2002 catalogue set out "important information" including a statement that the 'you pay' price was made up of two things: a donation of up to 25 per cent and the price of the goods. The 'important information' also stated that when a supporter placed an order with a fundraiser he or she was entering into a contract with Miller Leswyn Ltd. Before that change took place, Mrs Reid accepted that it was understood that Express entered into a contract with the fundraiser, and the fundraiser then entered into a separate agreement with the supporter.

41. Express made further changes in the wording of its catalogues in 2007, describing donations as 'voluntary'. The Commissioners considered that those changes did not alter the VAT analysis.

Further Facts

42. As the information provided by Mrs Hall, as set out at (A) to (D) above, consists of but an overview, it is necessary for me to expand upon it.

43. Mrs Reid disclosed that, as a relatively new member of the staff of Express, she could only assume that the company's 'procedures' for sales of catalogue goods prior to her arrival were similar to those presently prevailing. However, the operations of Express's Studio, Ace and WIM brands prior to 1991, which, as I understand it, continued through until 2002, were recorded in detail by Peter Gibson LJ in his judgment in the Court of Appeal in *Fine Art Developments Ltd v Customs and Excise Commissioners* [1994] STC 668 at 680 – 682, and repeated verbatim by Lord Keith of Kinkel in the House of Lords, as follows:

> "Fine Art Developments plc (FAD) is the parent company of a group of trading companies. Of such companies, Express Gifts Ltd (Express Gifts) carries on a mail-order business under four brand names: Studio, Ace, Webb Ivory and Miller Fund Raising. [Miller Fund Raising is the company I refer to as Miller: it is entirely separate from FD]. Two catalogues are produced each year for each name. One catalogue, produced in the autumn, is aimed at the Christmas market; the other is produced in the spring. The cover of each catalogue for a brand name differs from the covers of the catalogues for the other brand names, but the main body of each catalogue produced at the same time is largely the same, regardless of the brand name. It contains descriptions and pictures of the goods for sale together with the price and reference number for each item. The catalogues for Studio and Ace are aimed, typically, at housewives. Those for Webb Ivory and Miller Fund Raising are aimed at people interested in raising money for some cause such as a charity and who typically will sell the goods supplied by Express gifts to other at a profit which can be paid to that cause.
>
> Express Gifts recruits individuals, whom it calls 'agents' in relation to its Studio and Ace catalogues and 'fundraisers' in relation to its Webb Ivory and Miller Fund Raising catalogues, and does so in astonishingly large numbers. In 1989 the total number of agents and fundraisers (I shall call them indifferently agents) was over 800,000 of whom about 478,000 were Studio

agents, 245,000 were Ace agents, 78,000 were Webb Ivory agents and 25,000 were Miller Fund Raising agents. None of the agents is registered for value added tax (VAT).

The catalogues are distributed free to agents who had ordered several items in the relevant catalogue in previous years. Express Gifts aim to obtain at least £30 worth of orders from each agent to whom a catalogue is sent. Such orders may be for goods for the agent's own purposes. But it may also be for the goods which the agent had sold or intends to sell to others, called in each catalogue customers. Although Express Gifts only sends one catalogue to each agent and does not send catalogues to an agent's customers, it is plain from the catalogue that the agent is expected to show the catalogue to the agent's customers. On the inside of the cover there is printed a welcoming letter to the customer, encouraging him or her to order from the catalogue. Further there is a guarantee from Express Gifts to the customer that if he or she is dissatisfied with any of the items purchased, the customer can return the item to the agent and recover his or her money. Inside the front cover of each catalogue are forms described as shopping lists which can be torn off and handed by the agent to the customers to enable them to order items in the catalogue by handing the completed shopping list to the agent. Those forms record the quantities and catalogue reference numbers of the items so ordered and their prices.

When the forms have been returned to the agent, the agent fills in another form, an order booklet which has been provided by Express Gifts. This enables the agent to order any items ordered by the agent's customers together with any items ordered by the agent. The order booklet contains simple instructions telling the agent how to order. On the inside pages are listed all the items shown in the catalogue with their respective reference numbers and their price and there is a blank column headed "How Many" in which the agent states the quantity required of each item ordered. However, in the Studio order booklet which we have seen, the price given is what is called the "agent's price", whereas, in the Webb Ivory order booklet shown to us, the price given is the "catalogue price". The agent's price is the price which the agent is required to pay Express Gifts, but that is a price lower than the price shown for that item in the catalogue. The difference between the two is called in the order booklet the agent's "commission", and "25% commission on cards, wraps and many gifts" features prominently on the front of the Studio order booklet. On some items the difference between the price in the catalogue and the order booklet price is a per centage lower than 25% of the catalogue price. The Webb Ivory booklet contained an explanation of the agent's "profit". The agent was told the significance of a number of symbols placed against the items listed, the most important of which was a black circle which indicated that the item was subject to "25% Fundraisers Discount". The agent was told that items against which there were no symbols were discounted at 10%.

The agent, having completed the order booklet, sends it to Express Gifts, from which in due course the agent will receive a parcel containing the ordered goods and an invoice. The sample invoice which we have seen and was addressed to an Ace agent gave details in respect of each item ordered, viz the quantity, the catalogue price, the total price (where more than one of that item are ordered) and, under "You Pay", the discounted price. A letter which formed part of the invoice thanked the agent for her order told her, "You have earned £5.82 commission on this order" (that sum being the total of the differences between the catalogue prices of the items ordered and the discounted prices paid) and exhorted her to "remember to turn to our catalogue to choose the perfect gift for all your family, friends and workmates."

There is much that is misleading in the terminology used. It is common ground that the agent is not the agent in law of Express Gifts to fulfil the agent's order, and that if the agent resells the goods, the agent does so on his or her own account and not for Express Gifts. The agent does not earn commission by placing an order, as Express Gifts will not pay the agent all or any part of that commission. If the agent sells an item for more than the agent has paid Express Gifts, the agent makes a profit. The agent may not make any profit, because the agent may be ordering goods for his or her own purposes and not for resale and even if the agent orders goods for resale to fulfil an order placed by a customer, the agent is under no obligation to Express Gifts to demand from the customer the catalogue price or indeed any particular price. The customer is the customer of the agent and not of Express Gifts, though it may become liable to the customer under the guarantee.

The undiscounted price shown in the catalogue for an item is the price which Express Gifts considers that the market will bear. It is calculated in this way. To the basic cost to it of itself providing the item it adds a 55% mark up. That is the price at which it will sell the item to an agent. To arrive at the catalogue price it adds the amount of the agent's commission which will vary in percentage because the catalogue price does not exceed what the market will bear. There are five different commission rates (between 25% and 7%) for goods purchased from Studio and Ace catalogues, but only two rates (25% and 10%) for the Miller Fund Raising catalogue.

Approximately 2 million orders are obtained by Express Gifts from agents in a year and approximately 35 million items are sold to agents annually. Express Gifts' aim is to sell as many goods as possible. It encourages its agents to buy goods in order to sell them on to customers. The emphasis on commission in its catalogues, order booklets and invoices is plainly designed to be part of that encouragement. But from the documents it is apparent that it is clearly contemplated by Express gifts that the agents may buy goods for their own use and an internal memorandum dated 28 November 1988 of Express Gifts shows that from its own surveys more than half the actual sales (in monetary terms) to Ace and Studio agents were not for resale. However, those surveys suggest that only about 10% and 20% of sales to Webb Ivory and Miller Fund Raising

agents respectively were for the agents' own use. The surveys also showed that on most occasions when agents ordered goods for resale, they charged the customer the full catalogue price. But on occasions which appear to be sufficiently numerous not to be classed as insignificant they sold the goods either at the agent's price or at a price between that and the catalogue price."

44. Nothing in that record was challenged before me as being incorrect and, in the absence of any challenge, I proceed on the basis that it is correct.

45. For completeness, and to bring matters up to date, I should add yet further information provided by Mrs Reid. To a limited extent it involves the duplication of matters with which Peter Gibson LJ dealt but, to put matters into context, I nevertheless consider it warrants inclusion.

46. Findel and its subsidiaries are commercial companies which seek, and have always sought, to maximise their profits. The fundraising aspect of Express's business has been in operation since before 1 April 1973.

47. The FD catalogue operated only between 1998 and 2005. Mr Prosser acknowledged, and I accept, that prior to Christmas 2002 Express had no detailed terms and conditions on which it traded with FD catalogue supporters. The catalogue contained the same products to be sold at the same prices as those in the WIM catalogues. The main difference between the two types of operation was that an FD fundraiser only had to distribute its catalogues; he or she did not have to obtain orders from supporters and deliver goods, those functions being performed by Express. Supporters were required to pay cash in full with their orders, 25 per cent thereof going to their fundraiser's good cause. Periodically, fundraisers were provided with statements showing the value of sales to supporters, and the amount due to their good causes. Following the provision of a final annual statement in January of each year, fundraisers were sent a cheque drawn, depending on their stated preference, either in their own favour or that of their good cause.

48. Mrs Reid was unable to say whether monies collected by Express designated for good causes were paid by the company into a separate bank account and, if so, whether interest accrued to the account. All the evidential indications were that monies were not paid into a separate bank account, and I so find. Mrs Reid observed that Express was under no obligation to pay monies designated to a good cause by a particular date; individual fundraisers chose when to hand over money to the good cause. Mrs Reid also claimed that for a period of some 12 months, which were not identified, Express included a form in its catalogues allowing a person to order goods without part of the price being paid to a good cause, i.e. for the net sum. In the absence of any supporting documentary evidence to that effect, I am not prepared to accept her claim.

49. In cross examination in relation to WIM sales, Mrs Reid having said, "It's up to the fundraiser to decide what price they charge for goods," added that "Express can't identify which sales are to a fundraiser for her own use and those made to supporters." She so said against a background of explaining that sales to fundraisers were always

made at a 25 per cent discount on catalogue prices, irrespective of whether the fundraiser sold the goods on to a supporter.

50. Mrs Reid also explained that acting as a fundraiser for WIM involved a person devoting a significant amount of time to distributing catalogues, collecting orders, and submitting them to Express. Express would then send the goods ordered direct to the fundraiser, who would arrange for collection and distribution to the supporters. Express would send an invoice to the fundraiser for the catalogue price of the goods, i.e. the whole sum. The fundraiser was under no obligation in turn to invoice the supporter. The supporter was merely asked to pay the whole sum and, since it was the amount he had agreed to pay, he had no choice but to pay it. And it was from the whole sum that the fundraiser subsequently extracted the donation destined for the good cause. Mrs Reid accepted that Express had no business case for appointing fundraisers as its legal agents, and said that nothing changed as a result of their appointment.

51. Mrs Reid explained that many WIM fundraisers ran their fundraising activities in a manner comparable to that of a small business, maintaining a separate bank account to receive funds from supporters and to pay invoices raised by Express. Some fundraisers even sent letters to supporters with catalogues explaining the benefit derived; others orally expressed the purpose and aim.

52. The current Webb Ivory catalogue and marketing information indicate to supporters that part of their payment will be retained by their fundraiser for the designated good cause as a voluntary "donation."

53. As part of her role in promoting Express's business, Mrs Reid meets fundraisers. She explained that Express provides an "enhanced level of service" to its "Gold Fundraisers", i.e. those with established high sales figures. Such fundraisers are allocated their own named contact at Express's call centre. Express recruits fundraisers either by word of mouth recommendation from other fundraisers in response to targeted marketing in the form either of advertising in specialist magazines such as scouts and guides publications, or in direct mailings to local voluntary organisations. Potential fundraisers responding to Express's marketing are issued with a new fundraiser's pack containing supporters' order forms, a fundraising catalogue, a reply-paid envelope for the order form and a guide to successful fundraising. Other helpful materials such as business cards and posters are available from the Webb Ivory website.

54. The majority of Express's good cause business is repeat business, many of the fundraisers using the catalogues as part of an annual cycle to raise funds.

55. On occasion, Express has agreed with the head office of an organisation for that organisation to provide Express with access to its members at a local level, but that type of relationship is the exception rather than the rule.

56. In the past, Express ran an annual fundraiser of the year event. The event was referred to in its marketing information, and each fundraiser nominated by their good

cause was invited to an awards evening. Due to cost constraints the event is no longer run annually but, according to Mrs Reid, "rather intermittently." As no such function has in fact been held since 2001, it is not unreasonable to assume, and I find, that it is no longer held.

57. Express holds some historic catalogues covering the period with which the appeal is dealing. The earliest one found by Mrs Reid was the Webb Ivory catalogue for Spring 1973, but the extract she exhibited contains no reference to the destination to a good cause of any part of the catalogue prices.

58. Mrs Reid produced various Express catalogues covering the period prior to autumn/Christmas 2002. In the Webb Ivory Christmas 1981 catalogue, it was said: "Every item you order will help a local good cause because they will benefit by 25% - and this money goes direct into their local funds." And the Webb Ivory Christmas 1986 leaflet stated: "Here's a way to keep up to 25% profit for your church, school, club, hospital funds, etc." The reference to 'up to' 25 per cent was included on the basis that for many years the percentage allocated to good causes differed depending on the type of goods being sold. For card and gift wrap items, the percentage was 25, but for other items it was 10 due to the lower profit margins on them.

59. The Webb Ivory spring 1990 catalogue included the statement, "Every item you purchase from this WI catalogue helps towards a good cause", and the Miller Christmas 1994 catalogue said, "£1 in every £4 you spend helps a worthy cause." From Christmas 1994 Express decided that 25 per cent of everything paid would go to the fundraiser's good cause, a practice that continued until 2002. Further examples of statements from Express's catalogues for the period through to Christmas 2002 produced by Mrs Reid include:

> "with £1 in every £4 going to a good cause"… for example if you spend £20 from the catalogue the cause will benefit by £5"
> (Webb Ivory Christmas 2001 catalogue)
> "We guarantee that 25% of the value of every order placed from this catalogue will be forwarded in cash direct to the good cause named on the front cover…" *
> (F D Christmas 2001 catalogue)
> "25% fundraising profit on every single item"
>
> (Webb Ivory Christmas 2000 catalogue)
> "Don't forget, £1 in every £4 you spend is donated to your fundraiser's cause"
> (Webb Ivory Christmas 1995 catalogue)
> "And don't forget that 25% of everything you spend will benefit a good cause"
>
> (Miller Christmas 1999 catalogue)
> *On each catalogue provision was made for the name of the good cause to be inserted in a box on the front cover.

60. In 2007 the way in which Express stated its prices in the catalogue was again changed to refer to the amount going to the good cause for each item as a 'donation'.

The 'important information' section of the catalogue for 2007 included the same statement to the effect that when a supporter placed an order with a fundraiser, he or she was entering into a contract with Webb Ivory Ltd as in the 2002 catalogue.

61. From 2009 Express reverted to its former practice of simply stating that 25 per cent of everything paid went to the good cause, and its Webb Ivory catalogue continued to refer to the payment to a good cause as a 'donation'. The information section of the catalogues referred to the donation as a 'proposed voluntary donation'.

62. Mrs Reid explained that she worked closely with Express's buying team whose members set the price of goods in its charitable catalogues, and approved goods for inclusion. For the purpose, Express set a target margin for the business.

63. She also explained that Express found supporters willing to pay a little more for goods in its charitable catalogues than otherwise, being motivated to benefit the good cause. That contrasted with customers for Express's non-charitable titles 'Studio' and 'Ace' who paid more attention to the prices of competing retailers such as Argos.

64. In the process of preparing her witness statement (which formed her evidence-in-chief), Mrs Reid explained that she asked Express's IT department to interrogate its computer system to see whether it could prepare price comparisons of identical goods sold in both its charitable and non-charitable catalogues. The resultant comparison showed that, in general, the prices in the non-charitable catalogues were lower than those in the charitable ones. She did, however, claim that before 1996 the charitable and non-charitable catalogues used the same pricing structure.

65. Mrs Reid further explained that in the late twentieth century Express's fundraising business was much larger than it is now. For instance, she said that in 1997 it had 85,000 fundraisers compared with 16,000 in 2008. Turnover had also fallen dramatically, from £19.4 million in 1997 to £1.8 million in 2009. She attributed the decline in business to a change in commitment of individuals to fundraising activities and to changes in the market for the kinds of goods sold through the fundraising arm of the business. But she maintained that the biggest change in the market had come about as the result of the entry into the card and wrap and seasonal product market of supermarkets.

66. Late in 2008, Findel invited 1500 fundraisers to take part in a survey. Findel selected them at random, but it emerged from Mrs Reid's evidence that the sample chosen, whilst intended to be a representative cross-section of the fundraisers, was selected without the benefit of any professional advice on the conduct of such a survey, or how it might be weighted to give a more accurate result than that of a simple straw poll. For the purposes of the survey Mr Christopher Hinton, Findel's then finance director, prepared a questionnaire. 323 fundraisers replied to it. Question 4 was: Did you explain to customers that part of the purchase price was a donation to the good cause? In answering the question, the fundraisers were offered five different choices ranging from 'Always' to 'Never'. For the purpose of the summary each response was weighted on the following basis: Always 100%, Mainly 75%, Sometimes 50%, Rarely 25% and Never 0%. The weighted result of question 4

was 89 per cent, i.e. Findel claimed that 89 per cent of fundraisers explained to customers that part of the purchase price was a donation to the good cause. Question 5 was: Did you tell supporters that they were free to make no donation at all, but still buy the goods at the cost of goods price? The weighted result of that question showed that 31 per cent of fundraisers explained to supporters that they need not make a donation to the good cause. There was no material difference between the responses to the questions by long-term fundraisers and fundraisers more recently recruited.

Submissions and conclusion

67. At the outset of this section of my decision, I should explain that each party analysed the jurisprudence dealing with consideration somewhat differently, and in such a way as in part to prevent a straightforward comparison of their respective positions. To deal with that problem I propose first to deal with Mr Prosser's analysis and submissions, coupling with it Mrs Hall's responses to that part which did not impinge on her own substantive analysis. I shall then deal with her analysis and submissions, as I did with those of Mr Prosser.

68. Leading counsel for each party opened his or her closing submissions by reminding me of the following general principles applicable in interpreting Community law.

69. Mr Prosser observed that in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (Case 154/80) [1981] 445 (*the Dutch potato case*) the Court of Justice of the European Communities (the ECJ) established two principles that had been applied in all subsequent cases. The first, to be found at [12] of the judgment, was that:

> "…there must…be a direct link between the services provided and the consideration received…"

70. The second, at [13], was that:

> "…such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria."

71. And, Mr Prosser added, in *Naturally Yours Cosmetics v Customs and Excise Commissioners* [1998] STC 879, where the above principles were applied, the ECJ stressed the need to focus on the agreement actually reached by the parties to the transaction.

72. Mrs Hall noted that a broad purposive approach must be given to EC legislation, and that UK legislation giving effect to Community Directives, such as the Sixth Directive, must be construed, so far as possible, in conformity with Community law, see *Marleasing LA v LA Commercial Interactional de Alimentacion SA* (Case C-106 89) [1990] ECR 1-4135. She added that the importance of looking at what was supplied from the point of view of the consumer had been emphasised in two cases concerning the autonomous Community concept of consideration, namely *Kuwait*

Petroleum (GB) Ltd v Customs and Excise Commissioners (Case C-48/97) [1999] STC 488 and *Customs and Excise Commissioners v Primback Ltd* (Case C-34/99) [2001] STC 803.

73. Mrs Hall also observed that at [19] of its judgment in Elida Gibbs Ltd v Customs and Excise Commissioners (Case C-317/94) [1996] STC 1387 the ECJ said:

> "The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him."

74. The final matter brought to my attention by Mrs Hall as a matter of general application was the following statement by Geoffrey Lane LJ in *Trewby (on behalf of the Hurlingham Club) v Customs and Excise Commissioners* [1976] STC 122, cited with approval by Simon Brown LJ in *Eastbourne Town Radio Cars Ltd v Customs and Excise Commissioners* [1998] STC 669 at 676:

> "The correct approach is to see what in reality the member is getting for his money. What is the appropriate description of the services supplied by the taxable person in return for the members' subscription?"

The case analysis and submissions for Findel

a) Without the OMV direction

75. Against a background of Article 11 of the Sixth Directive providing that in respect of supplies of goods the taxable amount "shall be everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser," Mr Prosser submitted that, ignoring the effect of the OMV direction, the taxable amount of Express's supplies did not include the donations of supporters: the donations were not part of the consideration obtained by Express for supplies of goods within the meaning of art.11A of the Sixth Directive, or the consideration for those supplies within the meaning of s.19 of the 1994 Act. He maintained that that was clearly the case in relation to Express's supplies to fundraisers, i.e. the supplies of WIM goods before Christmas 2002, for the fundraisers did not make donations, and Express did not even receive donations, in connection with those supplies. It was also the case in relation to Express's supplies to supporters, i.e. the supplies of FD catalogue goods, and of WIM catalogue goods from Christmas 2002 onwards. Although supporters paid the donations to Express or the fundraiser, Mr Prosser contended that they did so, not in return for the goods, but instead on terms that Express or the fundraiser would pay the donations to the good cause. Further, in the case of WIM transactions from Christmas 2002 onwards Express did not even receive the donations.

76. In support of his various claims, Mr Prosser principally relied on the ECJ cases of *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 and *HJ Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* (Case C-38/93) [1994] STC 544. In *Tolsma* the ECJ held that an individual who played a barrel organ on the pubic highway was not supplying services for a consideration. Having noted the principles laid down in *the Dutch potato case*, in *Tolsma* the ECJ continued:

> "14. It follows that a supply of services is effected "for consideration" within the meaning of art 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is a 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**" (Emphasis added by Mr Prosser)..

77. Mrs Hall contended that *Tolsma* was of no assistance to Findel, for the donations made by supporters in the instant case were not voluntary, but compulsory, and there was a direct link between the goods and the consideration received by Express. The sums donated to good causes depended on the goods supporters chose to buy, and were based solely on the advertised catalogue price. It was not possible for a supporter to acquire catalogue goods without paying the catalogue price for them.

78. In the second case relied upon by Mr Prosser, *Glawe Spiel*, the ECJ held the taxpayer liable to tax only on the takings of gaming machines less sums paid out in winnings. Having observed that the stakes inserted by players were divided into two parts, one serving to replenish the reserve in the machine and thus pay out winnings, and the remainder entering the cash box, the ECJ said at [12], "Since the proportion of the stakes which is paid out in winnings is mandatorily fixed in advance, it cannot be regarded as forming part of the consideration for the provision of the machine to the players…."

79. Mr Prosser contended that Advocate – General Jacobs was not mistaken at [18] of his opinion in describing VAT as a tax on turnover, for that was the very definition of VAT in art.1 of the Second Directive; and the Advocate-General correctly stated that VAT was intended to be charged in proportion to the actual turnover which a trader earned from the supplies. Mr Prosser added, and I accept, that the judgment in *Glawe Spiel* has been applied by the ECJ in at least one other case, and has been referred to in others.

80. Having claimed that Advocate-General Jacobs erred in describing VAT as a tax on turnover, Mrs Hall submitted that the analysis called for in the instant case differed from that in *Glawe Spiel*, for that decision could have no application outside the context of gaming machines. As the ECJ observed at [30] of its judgment in *Freemans plc v Customs and Excise Commissioners* (Case C-86/99) [2001] STC 960, "gambling transactions do not lend themselves readily to the application of VAT",

and at [16] of the judgment of the Court of Appeal in *United Utilities plc v Customs and Excise Commissioners* [2004] STC 727 Arden LJ observed that the Advocate-General in *Town and County Factors Ltd v Commissioners of Customs and Excise* [2002] STC 1263 and the ECJ in *Glawe Spiel* "stress the inherent unsuitability of applying ordinary VAT principles to betting owing to the very nature of betting transactions and the difficulties of subjecting them to traditional concepts of consideration, supply and so on." Mrs Hall particularly noted that the sum of money which had to be paid out in *Glawe Spiel* was mandatorily fixed by law, and not by the provider of the services. In contrast, the terms upon which Express was prepared to make payments to good causes were based solely on its own commercial decisions.

81. As an example of the correct application of the principles applicable in the instant case, Mr Prosser offered the tribunal decision in *Church of England Children's Society v Commissioners of Customs and Excise* (2004) Decision 18633 (CECS), which was subsequently reversed but on other grounds. The issue in that case was whether the Society had obtained consideration for the supply of a newsletter to subscribing members. Having referred to a number of authorities, including *the Dutch potato case* and *Kuwait Petroleum*, the tribunal said:

> "47. From these authorities we derive the principles that: there must be a direct link between the supply and the consideration received; that the consideration is what is actually received and not an objective value; that there must be a legal relationship between the supplier and the recipient pursuant to which there is reciprocal performance; that the remuneration received by the supplier must constitute the value actually given in return for the supply to the recipient; and that it is for the national court to enquire whether the parties agreed, at the time of the supply, that the price or part of it constituted the value given in return for the supply.
> 48. …Mr Sherry (for the Appellant) argued that it did not matter that the Appellant was a charity, nor that the transactions with the givers were called donations or gifts, the objective analysis of the transaction was that the newsletters were given in return for the regular payments of £5.00 and the payments of £5.00 were given in return for the newsletters. Mr Parker (for Customs and Excise) argued that the payment made by the committed giver was not in return for the newsletters but was a gift with a stipulation that the giver would receive the newsletters. The newsletters were not provided "for" the donation. Adapting the words of Sir Andrew Morritt VC in *Church Schools Foundation* at 1675j, the newsletter was not a quid pro quo but a quid cum quo.
> 49. As directed by the Court of Justice in *Kuwait* we have to enquire whether, at the time that the committed giver signed the direct debit form, he and the Appellant agreed that the amount of the donation constituted value given in return for the newsletters. We therefore examine the nature of the transaction and the documentary evidence. We accept that regard has to be had to the objective nature of the transaction and that the main activity of the person making the supply does not determine the categorisation of all its supplies."

82. Having undertaken that examination, the tribunal held that the newsletter was not provided 'for' the payment of £5.

83. Applying the ECJ principles referred to in *CECS* to the instant case, Mr Prosser submitted that it was necessary to examine the nature of Express's transactions to determine whether it supplied the catalogue goods to supporters "for" the donation. He maintained that the essence of the transactions was that supporters paid one amount for the goods and another by way of donation to the good cause. The fact that supporters paid the donations to Express or the fundraiser rather than direct to the good cause did not mean that Express "obtained" them, let alone that the donations were part of the consideration for the goods. Express or the fundraiser received the donations as trustee for, and on terms that it would pay them to, the good cause.

84. As Mrs Hall responded to that submission with a somewhat different emphasis from that of Mr Prosser, and at some length, I propose to deal with her response in her own submissions and analysis.

85. At the invitation of Mr Prosser, Mr Henderson submitted that my own decision in *Barratt Goff and Tomlinson v Commissioners of Revenue and Customs* [2011] TC/0949 by analogy provided a further indication that donations made by Express to good causes did not form part of the consideration it received for retail sales of goods. The *Barratt* case was concerned with whether disbursements paid by solicitors for medical reports of their clients formed part of the consideration for their supplies. In reliance on the opinion of Advocate-General Kokoff in *De Danske Bilimporter v Skatteministeriet* [2006] ECR 1-4945, I held that the disbursements did not form part of the consideration for the solicitors' supplies, "the decisive test" she identified – whether the supplier paid the duty in his own name and on his own account - not being satisfied.

86. Another example of what he submitted was the correct application of the relevant principles provided by Mr Prosser was the decision of the High Court in *Customs and Excise Commissioners v Emap Maclaren Ltd* [1997] STC 490. There Emap, a publisher, made certain sponsorship payments which were paid into its ordinary bank account. McCullough J rejected the Commissioners' argument that the payments were consideration for Emap's supply of advertising and tickets to attend an awards lunch, holding that the sponsorship money had not been "obtained" by Emap because "Emap being unable to deal with the sponsorship money as its own, derived no benefit from it; it could not take it for itself; it was not part of its turnover; that was the commercial reality" (see 497b). Mr Prosser submitted that, adopting the same approach in the instant case, the commercial reality was that Express did not obtain the donation in return for the goods, or at all.

87. Mrs Hall denied that *Emap* provided any assistance to Findel, first, because Express obtained a considerable benefit from supporters' donations, for their interest in good causes meant that it had a ready made distribution network on which to build. Secondly, it was plain that the learned judge in *Emap* was unprepared to widen the application of the decision, which was now subject to the dicta of the Court of Appeal in *Debenhams Retail plc v Customs and Excise Commissioners* [2005] STC 1155.

She submitted that Commercial reality showed that the consideration obtained by Express was the whole sum.

88. Mr Prosser further relied on *Lex Services plc v Customs and Excise Commissioners* [2004] STC 73 as supporting Findel's claim that the consideration for Express's supplies did not include the donations to good causes. Lex, a motor dealer, accepted second hand cars in part exchange for new ones. Its documentation showed a vehicle price of, say, £20,000 and an agreed price for the part exchange car of, say, £2000 which was used to arrive at the amount of £18,000 actually payable by the customer. In most cases the part-exchange price used was higher than the car's 'trade-in value' for the car of, say, £1500. The documentation allowed the customer to cancel the transaction within 30 days, but if the car traded-in had been sold the customer was entitled only to its trade-in value. The House of Lords held that, in those circumstances, the taxable amount for VAT purposes was the cash Lex received of £18,000, plus the value of the non-monetary consideration agreed with the customer of £2000. In his speech, Lord Walker of Gestingthorpe observed that:

> "[18]… In a straightforward case the 'subjective value' of non-monetary consideration means the value overtly agreed and adopted by the parties to the transaction in question, just as the price overtly agreed and adopted by the parties is (in most cases) conclusive as to the quantum of monetary consideration. The concept of subjective value (correctly understood) achieves legal certainty and ease of administration of the VAT system…
> [19] Subjective value is therefore, in a straightforward case, the value which the parties to the contract have themselves recognised in the course of their dealings, and have in that way attributed to goods or services which amount to non-monetary consideration."

89. Mr Prosser maintained that Express's documentation from Christmas 2002 onwards made plain that the difference between the whole sum and the net sum was not part of the consideration for Express's supplies, but rather was a donation by the supporter, the parties to the contract having recognised that fact in the course of their dealings: the subjective value was thus the net sum.

90. As will appear from Mrs Hall's own submissions, which follow later, she maintained that the contrary was the case.

91. The nearest factual reported decision to the instant one, which Mr Prosser invited me to follow, is the tribunal decision in *Emily Patrick v Customs and Excise Commissioners* [1994] VATTR/247. There an artist sold a painting at a charity auction on terms that 50 per cent of the bid price, including VAT, would be paid to the artist, and the other 50 per cent to the charity. The tribunal held that, despite the fact that the bidder had to pay the full sum in order to receive the painting, only the 50 per cent passing to the artist should be treated as the consideration: the remainder, though contractually due, was given to the charity by way of donation.

92. Mrs Hall dismissed the *Emily Patrick* decision as irrelevant, claiming that it was not particularly well reasoned, was reached in the absence of any evidence from the

taxpayer and the chosen good cause, and made on the assumption that there was an oral agreement for payment of the donation. Further, the tribunal cited no authority for its conclusion other than *Glawe Spiel*.

b) The effect of the OMV direction

93. Express's sales to fundraisers, i.e. its WIM sales, were not, in Mr Prosser's submission, sales by retail, but the fundraisers' sales to supporters were. Consequently, he maintained that the open market value of its catalogue goods on a sale by retail must be the taxable amount of the fundraisers' sales to supporters. For exactly the same reasons as he had offered in relation to Express's supplies without the effect of the OMV direction, i.e. in relation to its FD sales, Mr Prosser contended that the taxable amount of the fundraisers' supplies to supporters did not include their donations to good causes.

94. Having maintained that the consideration paid by the customer for Express's goods was the whole sum, so that the Commissioners were entitled to take that as the open market value (see *Fine Art Developments* and *Direct Cosmetics*), Mrs Hall dismissed a claim by Mr Prosser that the OMV direction was not objectively justified because:

a) there was no question of any avoidance or abuse; and
b) the difference between the amount charged by Express and that paid by the supporter was solely attributable to a donation made by the supporter to a good cause, as unsustainable, indeed she referred to it as being "hopeless". She submitted that *Direct Cosmetics* clearly established that derogation was permissible, even in cases where there was no question of abuse. With regard to avoidance, Mrs Hall maintained that, on Findel's case, VAT would be avoided at the final consumption stage for only the net sum would be subject to VAT. If, by avoidance, Findel meant avoidance as a consequence of an abusive practice, the Commissioners accepted that there was no such avoidance: but, that was irrelevant.

95. As to a claim by Findel that the effect of the OMV direction was disproportionate, Mrs Hall observed that in *Fine Arts Developments* itself, the very direction the subject matter of the instant appeal was held to be objectively justifiable, and not disproportionate.

<u>a) Did Express sell goods to supporters or to fundraisers who resold them to supporters?</u>

96. Against a background of it being common ground that sales through the FD catalogues were to supporters so that the OMV direction was inapplicable, whereas sales through the WIM catalogues prior to Christmas 2002 were to fundraisers so that the OMV direction was applicable, Mr Prosser submitted that WIM catalogue sales from Christmas 2002 onwards were to supporters, rather than to fundraisers. In so

submitting, he relied on the specific terms and conditions of the Express catalogues. For instance, in the Miller Christmas 2002 catalogue it was stated:

> "when you place an order with a fundraiser, you are entering into a contract with [name of company] under which we will supply you with the goods that you ordered …..The fundraiser acts as your agent when taking your order…"

97. Mr Prosser maintained that it was plain that "you" meant the supporter, and 'we' Express.

98. Mrs Hall contended that Express's arrangements from Christmas 2002 onwards continued as before indicating a direct selling model, so that the OMV direction continued to apply; indeed Findel conceded that the essential features of transactions had not changed substantially as a matter of commercial reality. She maintained that the only change Express had made to its terms and conditions of trade was to insert a clause into the WIM catalogues asserting that, whereas it formerly supplied goods to the fundraiser, now it contracted directly with the supporter, but only in respect of the price of the goods: as a result it claimed that the fundraiser acted as the agent of the supporter for the purposes of that donation. Mrs Hall observed that Findel did not claim that there was a contract between the fundraiser and the supporter, but rather that the agency was voluntary on the fundraiser's part. She submitted that the correct analysis was that for the purpose of VAT the fundraiser agreed with Express that he would pass part of the consideration received to the good cause, as Express stated in its catalogues: it would not have been in a position so to state unless that was part of its arrangement with its fundraisers. She therefore maintained that whether the fundraiser was the agent of the supporter in English law was irrelevant to the determination of the issues, and the terms and conditions were not inconsistent with the analysis suggested.

<u>b) In so far as Express did sell goods to fundraisers, what was the "open market value by retail" of its supplies?</u>

99. At [53] of its judgment in *Direct Cosmetics* the ECJ observed that the expression "open market value" in Council Decision 89/134, UK legislation and the OMV direction "must be understood as meaning the value that is closest to the commercial value on a sale by retail, that is to say the actual price paid by the final consumer."

100. Against that background, Mr Prosser submitted that if only £7.50 of a sum of £10 paid by a supporter was the price paid for goods the "open market value by retail" must be £7.50. In the circumstances, to charge VAT on £10 would be wholly unjustified.

101. Notwithstanding that the analysis considered in *Fine Art Developments* itself and accepted by the parties in that case as common ground – that the open market value by retail was £10.00 - Mr Prosser sought to persuade me that it was wrong. He contended that the House of Lords was concerned with a quite different issue from that of the open market value by retail of the company's supplies, namely whether the OMV direction was applicable to sales to its agents, and whether it contravened EC

Law. Mr Prosser particularly observed that, in his speech, as reported at p. 261F-H, Lord Slynn said that "it was open to the revenue to take the catalogue price as being the true open market value except in those cases where Fine Art Developments could show what was the actual price." Mr Prosser maintained that, in the instant case, even assuming that all the goods were resold and that the supporters always paid £10.00, Findel was able to show the actual price of the goods was only £7.50, because £2.50 was not for the goods.

102. The analysis agreed in *Fine Art Developments* was in Mrs Hall's submission the correct one. She observed that it was unlikely that Mr Andrew Park QC, leading counsel for Fine Art Developments and later to be elevated to the High Court bench, and the various very senior judges who dealt with the appeal as it made its way through the Court of Appeal and House of Lords would not have questioned the agreed analysis of Express's WIM catalogue sales had any one of them considered it incorrect.

103. The commercial reality of the transaction could, in Mr Prosser's yet further submission, also be determined by answering the question: whose donation to charity is it? He accepted the Commissioners' claim that whether the £2.50 payment by a supporter was in return for the goods or not depended on the commercial reality of the transaction viewed from the point of view of the supporter. He did however contend that the Commissioners' "repeated emphasis" on Express being in business to make a profit was misplaced: Express's point of view did not explain the supporter's point of view. On the other hand, Express's business model was based on the supporter's point of view: the supporter was willing to buy the goods from Express when at the same time he made a donation to charity.

104. If, in a transaction at a catalogue price of £10, £2.50 was the donation of Express or the fundraiser the £10 was all in return for the goods. But if £2.50 was the supporter's donation, only £7.50 was for the goods. Mr Prosser contended that, in the instant case, the £2.50 was not Express's donation. Express was not in the business of making charitable donations. Thus the Commissioners were wrong to characterise the transaction as Express telling the supporter that if he bought the goods, it would make a donation to charity. Instead, Express merely undertook to "forward" £2.50 to charity. The donation was plainly made by the supporter, not by the fundraiser. That was plain from Express's 2002 Christmas catalogue: it referred to "your (the supporter's) donation". It was equally plain from statements from earlier catalogues. Thus, Mr Prosser submitted the Commissioners were wrong to say that the act of donation to the good cause was a transaction separate from the supporter's payment: when the supporter paid £10, he was at once buying the goods for £7.50 and making a donation to charity of £2.50: "every time you spend you give."

105. He also submitted that it was irrelevant that the good cause received the £2.50 only after the supporter paid £10: from the supporter's point of view, the donation was made when the £10 was paid. It was equally irrelevant that Express, in the case of FD, earned interest between receiving the £2.50 and passing it to the good cause:

one had to consider the nature of the transaction from the supporter's point of view, not that of Express, and the supporter did not know that Express earned that interest.

106. Mrs Hall contended that Express was in business to sell goods, and not to generate funds for charity. The sums it received and paid over to third parties were simply part of its required outgoings, and thus were costs of making the supply. She maintained that it was legitimate to view the donations as a commercially intelligent step allowing Express access to people motivated to distribute its catalogues, and thus to generate sales. The company's profits derived from the mark-up between its costs and 75 per cent of the catalogue prices of the goods.

107. That contention was, in Mr Prosser's submission incorrect in a number of respects. First, the £2.50 was not at Express's disposal and then paid away, *Town and County Factors*. Secondly, Express presumably considered that it received more by selling through the fundraising catalogues on terms that it received £7.50 and £2.50 went to a good cause. Thirdly, the instant case was not analogous to *Primback:* there, Primback agreed to sell the goods to a customer for, say, £100 payable in future interest free. By a separate transaction, a third party agreed to provide interest-free credit to the customer; in return for that service Primback permitted the third party to retain £10 of the customer's £100, so that Primback received a net sum of £90. In contrast, in the instant case, Express received £7.50, not because a third party performed a service for Express, but because the supporter wished to pay £2.50 to charity.

108. Mr Prosser maintained that the terms and conditions in the WIM catalogues must be taken to have been accepted by the supporter when ordering catalogue goods, and by the fundraiser when passing the order on to Express: the fundraiser equally accepted the terms when passing on the order.

109. Although they did not say that the terms and conditions from Christmas 2002 onwards were a sham, Mr Prosser claimed the Commissioners did pejoratively describe them as a 'device' since they were introduced for VAT reasons and made no commercial difference. On the authority of *Telewest Communications (Publications) Ltd v Customs and Excise Commissioners* [2005] STC 481 at [34], he submitted that that was irrelevant: a contractual term was effective whether or not it was commercially significant. In *Telewest*, the Court of Appeal ruled that two supplies consisting of a monthly magazine providing details of programmes and broadcasting services, where each supply was provided by a different company, albeit in the case of the magazine published by a subsidiary company of the broadcasting company specifically formed for the purpose, could not be treated as a single supply because the customer could not enter into one transaction without the other.

110. In his further submission the real issue was whether the agency terms were fundamentally inconsistent with what the parties actually did, so that the fundraiser could not be Express's agent despite its terms. Mr Prosser maintained that there was a contractual change from Christmas 2002 onwards, as the Commissioners initially accepted, so that the OMV direction applied only to pre-Christmas 2002 sales. In particular, he claimed that the fact Express continued to invoice the fundraiser was

inconsistent with the fundraiser acting as Express's agent to sell goods, and to collect and pass on £7.50 from the fundraiser.

Contract and trust law analysis

111. Mr Prosser submitted that from Christmas 2002 onwards Express contracted with supporters for the sale of the FD catalogue goods and of WIM catalogue goods. Before Christmas 2002 he claimed that Express contracted with fundraisers for the sale of WIM catalogue goods. In every case, it was a term of the contract that Express or the fundraiser would pay the donation to the nominated good cause. He contended that the term was enforceable by the fundraiser or supporter, as the case might be, and also, following the Contracts (Rights of Third Parties) Act 1999, by the good cause itself. Moreover, the donation when received was held by Express or the fundraiser upon trust to pay it to the charity, see *Quistclose Investments v Rolls Razor* [1968] Ch 540.

112. Mr Prosser also contended that the contractual and trust analysis reflected commercial reality in that:

> 1) the £2.50 was paid to Express or the fundraiser, as the case might be, as the supporter's agent for passing on to the good cause;
> 2) the supporter had a legal right to require Express (or the fundraiser) to forward the supporter's donation to the good cause;
> 3) the Contract (Rights of Third Parties) Act 1999 gave the same right to the good cause; and
> 4) Express (or the fundraiser) held the £2.50 upon trust for the charity.
>
> He further submitted that Express's terms and conditions from Christmas 2002 onwards made plain what was already the commercial reality, and there was nothing unethical or objectionable in its seeking to do so.

113. Findel's reliance on the Contract (Rights of Third Parties) Act 1999, and case law on trust was, in Mrs Hall's submission, wholly misplaced: each body of law was irrelevant to the issues in the appeal. It was well established that consideration was an autonomous concept of Community law whose boundaries could not shift with domestic law concepts such as those on which Findel relied. In that connection, she depended particularly on [22] of the ECJ judgment in *Town and County Factors* where it was said, "…adopting [the approach of making the existence of a legal relationship in the *Tolsma* sense depend on the obligations of the provider of the service being enforceable would compromise the effectiveness of the Sixth Directive and] would enable a taxable person to avoid paying VAT by including in his contracts for sales or services a form such as that at issue in the main proceedings."

The Survey

114. Mr Prosser further relied on the results of Express's survey to show that in 31 per cent of cases, the supporter was told the donation to the good cause was optional. He challenged the Commissioners' claim that the survey could not be relied on as a matter of principle, it having been objective whereas consideration was a subjective

value: it was evidence of what certain fundraisers said to supporters, which was no different in principle from what supporters were told in the catalogues. He accepted that the survey was not the work of an independent expert, but maintained that the Commissioners had not insisted on that in other cases, e.g. in *Fine Art Developments* itself. The Commissioners had co-operated in devising the questions for the survey, indeed suggesting two additional questions of their own.

115. Nothing of any value could be derived from the survey, in Mrs Hall's submission, for consideration was the price subjectively agreed between the parties, see *Customs and Excise Commissioners* v *Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453; it could not be determined by reference to extraneous or objective criteria, as Findel sought to do. It was precisely for that reason that EC Council authorisation was needed to issue OMV directions. On the facts, the result of the survey was wholly unreliable: the choice of persons at whom it was aimed, the questions posed, and the conclusions said to have been arrived at were all indicative of a less than professional approach. She further contended that Findel was forced to rely on the results of the questionnaire because the terms and conditions contained in its catalogues did not provide for a discounted sale price, i.e. one without payment of a donation. A supporter was asked for the whole sum, and had no choice but to pay it; and it was from that sum that the donation was subsequently extracted to be paid to the good cause. Mrs Hall submitted that I should ignore the survey as an irrelevance: it was not agreed by the Commissioners; nor did they consent to be bound by its results.

The Case Analysis and Submissions for the Commissioners

116. Mrs Hall opened by analysing at some length the cases of *Kuwait Petroleum, Town and County Factors, Debenhams* and *Primback* in some detail. As I consider those cases as right examples of the relevant principles, I propose to follow Mrs Hall's example. But before doing so, I should observe that Mr Prosser maintained that the cases merely reinforced the point that it was necessary to analyse the transaction to determine what consideration Express obtained for catalogue goods.

117. *Kuwait Petroleum* concerned retail sales of fuel. The company operated a sales promotion scheme under which a customer was offered a voucher for every 12 litres of fuel purchased. When he had collected enough vouchers, he was entitled to redeem them for goods chosen from a gift catalogue, or for certain services. Kuwait described the redemption goods as "gifts"; but whether or not the vouchers were taken the retail price of the fuel sold remained the same, and that price was the only one referred to in the sales invoice for fuel purchased. The ECJ, in considering whether the goods provided in exchange for vouchers must be treated as a supply for consideration within the meaning of art 5(6) of the Sixth Directive, held at [31] that Kuwait could not "reasonably maintain that, contrary to the statement on the invoices which it issued, the price paid by the purchasers of fuel in fact contained a component representing the value of the vouchers or of the redemption goods." It therefore concluded that, on payment of the full retail price for the fuel, the disposition of goods for the vouchers "must… be treated as a supply for consideration within the meaning of [art 5 (6) of the Sixth Directive]."

118. Mrs Hall relied on [31] of *Kuwait Petroleum* to claim that, although in the instant case a WIM catalogue fundraiser was under no obligation to render an invoice to a supporter, the latter was required to pay the whole sum, and had no choice but to pay it; it was from the whole sum that the fundraiser subsequently extracted the donation due to the good cause, and applied it thereto. As in *Kuwait*, the supporter was invoiced by Express for the whole sum.

119. The facts in *Primback*, a furniture retailer, were that its customers paid for goods they purchased at the price advertised and invoiced either directly or by an arrangement whereby, by a separate contract between the customer and a finance house, the latter agreed to pay the invoiced amount to Primback and the customer agreed to repay that amount, with no interest added, to the finance house by a series of monthly instalments. The finance house then entered into a further oral contract with Primback whereby it agreed to pay Primback a lesser sum than that invoiced.

120. At [28] of *Primback*, the ECJ confirmed what had previously been decided in *Chaussures Bally SA v Belgium* [1997] STC 209, namely that the harmonisation sought by art 11A(1)(a) of the Sixth Directive "could not be achieved if the taxable amount varied according to whether the calculation was for the VAT to be borne by the final consumer or for determining the sum to be paid to the revenue authorities by the taxable person."

121. At [26] of *Primback* the ECJ observed that "the parties to the contract of sale agreed that the consideration for the goods would be their price as advertised, known in advance by the customer and invoiced to him by Primback, there being, moreover, no variation in that price according to whether the customer pays in cash or makes use of the credit offered by the retailer and provided by the finance house." The court went on to say, at [33], "…in a situation such as that in point in the main proceedings, the taxable amount of the transaction consisting of the sale of goods concluded between the retail trader and the final consumer is the full amount advertised by the seller, invoiced to and payable by the purchaser." And at [43] the court held that, "from the point of view of the final consumer, the transaction … he concludes with Primback is to be seen as a single transaction consisting in the sale of goods, by reason of the fact that the retailer supplies goods to his customer in return for payment of a single price advertised by the seller, invoiced to the purchaser and payable by him…" . Further, in relation to a claim by Primback that it would permit a reduction in the sale price in the event of payment in cash, it was common ground that no such reduction was volunteered, but had to be requested and negotiated in each case. The result was that in many cases the customer simply paid the advertised price either because he was unaware that he might ask for a discount, or because he did not want to ask for one. Consequently, the availability of a reduction in price did not affect the consideration.

122. At [47] and [48] the ECJ held:

> "47… the option given to customers to purchase on credit not only increases the volume of the retailer's sales, but also enables the retailer to avoid having to accept payment by instalments and guarantees him payment for the goods

sold, with the result that, in consideration of the supply of services provided by the finance house, the seller accords to the latter a commission which reduces his profit margin. That commission constitutes for Primback a charge connected with its business in the same way as, for example, its cost in respect of financing, advertising or rent.

48. By calculating VAT on the total price advertised and invoiced by the seller, the Commissioners are not therefore charging a taxable person such as Primback an amount of tax exceeding that ultimately borne by the final consumer (in *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387, paras 24 and 31)."

123. Mrs Hall submitted that that conclusion applied equally in the instant case.

124. *Debenhams* involved a scheme whereby, when customers paid for goods by debit or credit card, small print on the receipt asked them to pay a card handling fee, typically 2.5 per cent, even though the price they paid was exactly the same as that paid by a cash purchaser. The fee, charged by an associated company, was then treated as an exempt supply. The Court of Appeal held that the full price of the goods was the consideration; the concept of receipt of consideration encompassed the delivery of consideration to another at the supplier's order. At [34] Mance LJ provided the following "Analysis of the contractual position":

"[34] The contractual effect of the new arrangements represents, as I have said, a starting (although not necessarily the finishing) point in any analysis of the incidence of VAT. DR's [Debenhams Retail] submission is that, under the new arrangements, two separate contracts came into existence, one between the customer and DR for the supply of goods for 97.5% of the total paid, the other between the customer and DCHS [Debenhams Card Handling Service] for 'card handling services' for the other 2.5%. Before us, Mr Philpott [junior counsel for DR] following Mr Milne [leading counsel for DR] in order to develop DR's submissions on the contractual position, submitted at one point that it would make no difference to the VAT analysis if there was only one contract, under which the customer agreed with DR to pay 97.5% to DR and the remaining 2.5% to a third party, DCHS. But, on the next day of the hearing, Mr Milne wisely made clear that this was no part of DR's case. A company cannot avoid VAT simply by providing for part of the price of goods either to be paid to a subsidiary or to be given away, for example to a charity. The Court of Appeal said of consideration in the *Trafalgar Tours Ltd* v *Customs and Excise Comrs* case that: 'The concept of receipt for this purpose is not to be confined to mere physical receipt; anything which is received by persons for and on behalf of the supplier must be treated for this purpose as received by the supplier himself…. ([1990] STC 127 at 135) and the Court of Justice of the European Communities in *Kuwait Petroleum* said that there must be 'a legal relationship between the supplier and the purchaser entailing reciprocal performance' ([1999] STC488 at para 26) (cf para 8 above). But reciprocal performance cannot be restricted to performance involving the actual delivery of, or payment for, goods or services to the other contracting

party. Delivery to the other contracting party's order must suffice; while a person must be treated as having received consideration under a contract, if he stipulates for it to be paid to an associate or given to a complete third party (such as a charity). I add in this connection that I should not be taken as accepting Mr Milne's suggestion that it would make any difference, if a supplier, instead of stipulating for a promise to give money to a third party, simply made it a non-promissory pre-condition to any sale that the purchaser should have paid such a sum to the third party. It is not suggested that any such pre-condition existed here, and, even if the suggestion were otherwise correct (which I doubt), it could not enable a supplier to introduce a pre-condition of a prior payment either to itself or to an associate when this would involve corresponding benefit to itself. It follows that DR cannot uphold the judge's decision in this case, unless there were two separate contracts. But even that may not, necessarily, suffice.

125. Mrs Hall derived six propositions from [34] of Debenhams, namely:

i) that the contractual effects were just the starting point in any VAT analysis;
ii) that more than one contract could be created out of a single contract was unsustainable;
iii) that a company could not avoid VAT by providing that part of the price of goods supplied could be given away;
iv) that the concept of receipt was not confined to mere physical receipt;
v) that a person must be treated as having received consideration for a contract if he stipulated that payment was to be made to a third party; and
vi) that any such stipulation would be irrelevant.

126. Applying those propositions in the instant case, Mrs Hall maintained that the consideration for Express's supplies consisted of the whole sum.

127. In *Town and County Factors*, the ECJ was concerned with a company that organised competitions with an obligation to give prizes which was binding 'in honour only'. The court held at [28]:

> "He [the organiser] receives [the entry] fees in full and they enable him to cover the costs of his activity. It follows that it is the amount represented by those entry fees that constitutes the taxable amount, within the meaning of art 11A(1)(a) of the Sixth Directive, of the transaction in question."

128. In reliance on that paragraph, Mrs Hall again maintained that the taxable amount in the instant case was the whole sum.

129. In relation to the question of whether a restrictive meaning was to be given to the words "obtained by the supplier" so as to take outside the scope of the Sixth Directive monies received for a supply which were subsequently paid over to a charity, Mrs Hall submitted that:

a) from an economic point of view, Express obtained the whole of the consideration paid by the customer;
b) excluding from the taxable amount money paid over to others by the supplier was contrary to the principle that VAT was a tax on consumption to be borne by the final consumer;
c) Express's construction of the taxable amount by reference to the net sum was contrary to the approach of the ECJ in decisions such as *Primback*, where the taxable amount was treated as being the amount advertised by the seller and payable by the consumer;
d) from the point of view of the customer, i.e. the supporter, he paid over the whole of the price to Express, or to its agent.

130. Of the first of those submissions, that from an economic view Express obtained the whole sum, Mrs Hall contended that that reflected in the contractual arrangements. In the case of FD catalogues, Express received the whole sum directly, and retained an amount net of monies paid to good causes. That it retained the net amount entailed it first obtaining the whole sum. And in a WIM context, Express received the payment through its agents. The use of agents in that way could not affect the VAT analysis. The contractual arrangements stated that "25 per cent of the value of every order" would be paid to a good cause, pre-supposing that the value of the order, and hence the true consideration for the supply of goods, was 100 per cent of Express's catalogue selling price. The catalogue pages exhibited simply contained a single price against a specific item of goods. Similarly, after the 2002 changes, Express referred to the catalogue prices as "you pay" prices; and each "you pay" price of, say, £7.99 was followed by a statement "80p of which goes to your good cause."

131. She invited me to accept that Express's behaviour in making a full refund where a customer returned the goods or cancelled an order was consistent with the view that the payments to good causes were made from the proceeds of sale, rather than that the money was never obtained by Express as consideration.

132. In relation to her second submission, Mrs Hall maintained that to exclude from the taxable amount monies which, although consideration for the supply and part of the price paid by the final consumer, were paid over to others, was contrary to the principle that VAT was a tax on consumption where the tax collected corresponded to the price paid by the final consumer. The case of *Elida Gibbs* showed that the most important economic factor was that of final consumption, because that was what the system was designed to tax. In *Primback*, the ECJ viewed the prospect of not taxing part of the price paid by the final consumer as contrary to the principle of fiscal neutrality, relying for the purpose on *Elida Gibbs*.

133. Mrs Hall contended that Findel's analysis of Article 11 of the Sixth Directive, as set out in her third submission, required a two-stage test to determine first, what the consideration was and, secondly, how much of it was physically obtained by the supplier and, if the latter was less than the former, to claim that only the latter was subject to VAT. She contended that that analysis of article 11 of the Sixth Directive ran contrary to *Primback* where, notwithstanding that the company obtained less than the advertised selling price in the disputed transactions, the ECJ decided that the

consideration was to be determined by what the parties had agreed was the price (see [26] and [33]). Further, the court rejected the taxpayer's appeal to commercial reality because, in principle, the liability of Primback on its supply to the customer had to be determined without reference to its relationship with a third party, in that case the finance house [38]. From the point of view of the final consumer, the transaction must be seen as a single transaction [43] and [44]. The ECJ also considered it relevant that the customer who paid in cash did not pay less than the customer who also paid with the aid of credit [42]. It added that, even if technically a reduction in the sale price was available to a cash customer, it was not 'volunteered' by Primback but had to be negotiated by the customer, and that, in many cases, the customer would pay the full amount either because he was unaware of the availability of the discount or because he did not want to ask for one [46]. Mrs Hall suggested that that had some relevance to Express's current catalogues where the customer was said to "volunteer" a donation. She further maintained that the ECJ viewed the credit commission which Primback paid as a cost of its business like any other, particularly since there was an economic benefit to it of offering sales by credit.

134. Mrs Hall contended that a practice/promise to pay a third party some of the consideration did not serve to reduce the value of that consideration was supported by the Court of Appeal at [34] in *Debenhams*.

135. In dealing with her fourth submission, Mrs Hall maintained that it was plain that from the point of view of the supporter he had to pay the sum set as the price of the goods in order to obtain them. In the case of FD, he paid the whole sum to Express directly, and Express obtained it on the basis that it was the price of the goods.

136. Customers had no involvement in the subsequent transactions between Express and the third parties, and the transactions must be treated as separate from the analysis of the supply between Express and customer (see *Primback* at [38]-[43]). She submitted that the situation was no different in the case of the WIM catalogues, where the fundraiser acted as Express's agent.

Conclusion

137.In both WIM and FD catalogue sales there was a direct link between the supply and the consideration received; the consideration was what was actually received, and not an objective value; there was a legal relationship between the supplier and the recipient pursuant to which there was reciprocal performance; the remuneration received by the supplier constitutes the value actually given in return for the supply to the recipient; and it is for the tribunal to enquire whether the parties agreed, at the time of the supply, that the price or part of it constituted the value given in return for the supply.

138. I should say at this point that, in my judgment, the analysis of Express's transactions called for in the instant case differs from that in both *Tolsma* and *Glawe Spiel*. Consequently, I would be prepared to place substantial reliance on those judgments only were I to be satisfied that no other case law more nearly reflected the

transactions in point in the appeal. In so deciding, I agree with Mrs Hall that *Tolsma* is of no assistance to Findel, and I rely on the reasons she offered for so concluding.

139. As to *Glawe Spiel*, it is plain from art.1 of the First Directive that VAT was intended to replace what were turnover taxes, but art.2 clearly defines it as a 'general tax on consumption'. That Advocate-General Jacobs erred in describing it as a tax on turnover, I accept. The tax is plainly one of consumption for, as *Primback* clearly shows, it is payable on the amount paid by the final consumer, which may be more than that received by the taxpayer.

In my judgment, that is clearly confirmed by [29] to [31] of *Town and County Factors* as follows:

> "[29] It should be observed, finally, that that interpretation of art 11A(1)(a) of the Sixth Directive [that the amount represented by the competition entry fees in point that constitutes the taxable amount] does not call into question the Court's interpretation in H J *Glawe Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft mbH&Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] STC 543, [1994] ECRI-1679, in as much as the operation of the gaming machines concerned by that judgment and the organisation of the competition at issue in the main proceedings differ in essential points.
> [30] While those gaming machines were characterised by the fact that, in accordance with mandatory statutory provisions, they were set in such a way that at least a certain percentage, in fact 60%, of the players' stakes was paid out to them as winnings and those stakes were kept technically and physically separate from the stakes which the operator could actually take for himself, the competition at issue in the main proceedings does not display any of those features, so that the organiser of the competition has freely at his disposal the full amount of the entry fees received.
> [31] In those circumstances…art 11A(1)(a) is to be interpreted as meaning that the full amount of the entry fees received by the organiser of a competition constitutes the taxable amount for that competition where the organiser has that amount freely at his disposal."

140. That extract clearly confirms that the two critical factors which determined the outcome of the *Glawe Spiel* case were that players' stakes were kept physically separate from the stakes available to the operator and that, in accordance with certain mandatory statutory provisions, the gaming machines concerned were set to pay out as winnings at least a certain set percentage of the total stakes.

141. Neither of those factors was present in either *Emap* or *Emily Patrick* and, in their absence, in my judgment those cases were wrongly decided. My decision in that behalf in relation to *Emap* is reinforced by the fact that McCullough J also relied on the Court of Appeal decision in *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1996] STC 310, which decision was subsequently overturned by the House of Lords.

142. I regard the *Barratt* decision as of no assistance to Findel, for it dealt with a particular aspect of consideration which does not feature here. And, as to the *Lex Services* case, whilst I take careful note of Lord Walker's observations at [18] and [19] of his speech, I am not satisfied that [19] thereof is sufficient to exclude from the consideration for Express's supplies its donations to good causes: the full amount received by each taxpayer constituted the taxable amount for it had that sum freely at its disposal.

143. In so far as the contract and trust law analysis provided by Mr Prosser is concerned, I am quite satisfied that Mrs Hall's submission that each body of law is irrelevant to the issues in the appeal is correct, and the argument is wholly misplaced. And, in relation to the results of the survey carried out by Express, I also agree with Mrs Hall that nothing of value can be derived from it. As she claimed, the consideration for Express's supplies was the price subjectively agreed between the parties, and cannot be determined by relevance to extraneous or objective criteria.

144. Having dealt with Mr Prosser's submissions, I then turn to those of Mrs Hall. She relied upon individual indicators in the various cases she cited as analogous to the instant one to build up her case that the consideration for Express's supplies of catalogue goods was the whole sum paid by supporters.

145. The first indicator Mrs Hall selected and invited me to rely on was that to be found in *Kuwait Petroleum*. There the ECJ held that the consideration for the company's supplies of fuel was the whole sum, that being the sum the customer was invoiced in and required to pay. By analogy, Mrs Hall submitted that the consideration for Express's supplies was also the whole sum, the catalogue price, that being the sum the supporter was invoiced in and required to pay, indeed had no choice but to pay. Having accepted Mrs Hall's invitation in that behalf, I shall rely on that indicator in reaching my conclusion.

146. Mrs Hall placed particular reliance on the ECJ judgment in *Primback*, implicitly claiming that it was analogous to the instant case. Mr Prosser submitted to the contrary, maintaining that, whereas in *Primback* the third party, the finance house, provided a service to the taxpayer, in the instant case the good causes provided no services. However, since both cases relate to the sale of goods by retail at the full amount advertised and invoiced by the seller, both involve the taxpayer obtaining less than the advertised selling price, in both the marketing tools were intended to increase the value of the taxpayer's sales, and in both cases the customer had to pay the sum set as the price of the goods in order to obtain them, I am satisfied of the correctness of Mrs Hall's claim. I therefore propose to rely on the indicators she extracted from *Primback* in reaching my conclusion. I might add that, in my judgment, the donations to good causes were just as much a part of Express's costs as were its payments of commission to its agents dealing with non-charitable sales, and as would have been its costs of operating a call centre or running a promotional campaign; the donations in charitable catalogue sales and payments of commission in non-charitable catalogue sales were equal in amount, and were clearly made to increase sales volumes. There was nothing altruistic in Express making, or arranging, the payments to good causes.

147. In my judgment, *Debenhams* naturally follows on from *Primback* and, in the absence of any objection by Mr Prosser to the six propositions derived from [34] of *Debenhams* by Mrs Hall, I am content to adopt those propositions as yet further indicators on which I should rely.

148. Finally, I must mention [28] of the ECJ judgment in *Town and County Factors* where it was held by the ECJ that that the fact the taxpayer received the competition entry fees in point in full, enabled it "to cover the costs of [its] activity". Again Mrs Hall submitted, and I accept, that I should rely on that indicator.

149. I then turn to apply those indicators to the facts of the different types of sales concerned in the present appeal.

FD catalogue sales pre-Christmas 2002

150. As I mentioned earlier, Express started selling goods through its FD catalogue as late as 1998, and used that catalogue only until 2005. The *Fine Art Developments* case was heard by the House of Lords in 1994. Consequently, the description of Findel's sales provided by Peter Gibson LJ, and subsequently repeated by Lord Keith of Kinkel, could not have covered FD catalogue sales. In the case of the FD catalogue sales Express itself obtained orders from and delivered goods to supporters. It contracted direct with them only on the basis that they paid the full catalogue price, and it was from the price so paid that it accounted to the good causes for the monies due to them.

151. In those circumstances, adopting the relevant indicators identified by Mrs Hall, I hold that the parties to FD catalogue sales agreed that the consideration for the goods would be their price as advertised in the catalogue, known in advance by the supporter and invoiced to him by Express (see [26] of *Primback*). I also hold that from the point of view of the final consumer, the supporter, the transaction he concluded with Express is to be seen as a single transaction consisting in the sale of goods, by reason of the fact that Express supplied goods to the supporter in return for a single price advertised by Express, invoiced to the supporter and payable by him (see [43] of *Primback*). Thus by calculating VAT on the total price advertised and invoiced by Express, the Commissioners were not therefore charging a taxable person such as Findel an amount of tax exceeding that ultimately borne by the final consumer (see [48] of *Primback*). A company cannot avoid VAT simply by providing for part of the price of goods to be given away, for example to a charity (see [34] of *Debenhams*).

WIM catalogue sales pre-Christmas 2002

152. As Mrs Hall observed in her overview of WIM catalogue sales pre Christmas 2002, there were two differences between those sales and FD catalogue sales. First, in WIM sales the goods were sold by Express to the fundraisers and it was they who accounted to their chosen good causes for the monies collected for them; and, secondly, those sales took place at a discount on the catalogue price. She also acknowledged that, but for the House of Lords judgment in *Fine Art Developments*

itself, Findel's case that supporters' payments to fundraisers for good causes never became part of Express's turnover might have had some substance.

153. As I am bound by the House of Lords decision in *Fine Art Developments*, I do not consider it open to me, whatever I might believe to be the true position, to consider the decision wrong on the basis that the case was concerned with issues other than the consideration for the taxpayer's supplies. In any event, as Mrs Hall observed, it is unlikely that the senior judiciary before whom that case came would not have questioned what was an agreed analysis of the catalogue sales had they considered it incorrect.

154. However, in fairness to Mr Prosser, I must consider his claim that in a transaction at a price of £10, £7.50 was received by Express, the supporter only being willing to buy on the basis that he made a donation to a good cause of £2.50. It will be recalled that in those circumstances, Mr Prosser claimed that Express merely undertook to "forward" £2.50 to the good cause, the donation being made by the supporter, not the fundraiser. Attractive though that claim is, I am not persuaded by it. In my judgment, Mrs Hall's contention that Express was in business to sell goods, and not to generate monies for good causes trumps Mr Prosser's claim; the sums received for good causes were part of Express's required outgoings, and thus costs of its making supplies.

155. Of Mr Prosser's submission that the £2.50 was not at Express's disposal and then paid away, I would merely observe that, in my judgment, reading the decision in *Glawe Spiel* in the light of the observations of the ECJ on that case at [29] to [31] of the judgment in *Town and County Factors*, the money was at the company's disposal. I do not consider Mr Prosser's claim that Express presumably considered that its sales increased by selling goods through its fundraising catalogues on terms that it received £7.50 and £2.50 went to a good cause, takes matters further. I have already dealt with, and rejected, Mr Prosser's submission that the instant case is not analogous to *Primback*.

156. As in *Fine Art Developments* itself, notwithstanding Mr Prosser's claim to the contrary, Mrs Reid admitted that Express kept no record of fundraisers' sales to supporters, so that the company did not know which of them took place at the full catalogue price, resulting in donations to the good causes, and which took place at the discounted price at which the sales were made to fundraisers.

157. It follows that I hold that the consideration for Express's sales of WIM catalogue goods pre Christmas was the full catalogue price, i.e. the whole sum.

<u>FD and WIM catalogue sales from Christmas 2002 onwards</u>

158. Following Findel's letter of 3 December 2002 advising the Commissioners of certain changes made to the Express catalogues, they initially accepted that Findel need account for output tax only on the net sum. But on 13 September 2004 they withdrew their earlier decision with effect from 2 October 2004. However, the changes made no difference to Express's sales arrangements: it continued to invoice

fundraisers despite them said to be acting as its agents and, as Mrs Hall observed, you do not invoice your agent. Nor did it inform supporters that no VAT was payable on their donations, so that the catalogue price still appeared to be a VAT inclusive figure. Nor were supporters given the option of buying goods at 75 per cent of their catalogue prices. Not surprisingly, against that background, Mrs Hall submitted that the changes said to have been made by Express were made "ineptly".

159. I accept the Commissioners' case that the changes made to Express's catalogues in 2002 made no difference to the correct analysis of all Express's sales, namely that output tax is payable on the whole sum. The changes in wording did not change anything.

160. Express made further changes to the wording of its catalogues in 2007, indicating that donations to good causes were "voluntary". I do not regard those changes as changing the VAT analysis.

161. Whilst I have carried out my own VAT analysis of Express's sales, my conclusions are those which Mrs Hall would have me reach. If my own analysis is in any way deficient, this decision should be read as fully endorsing the submissions for the Commissioners. I dismiss the appeal in its entirety.

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

TRIBUNAL JUDGE

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