TC02677

Appeal number: TC/2010/08209

VAT – sale of motor car on part-exchange terms – price of part-exchange car includes 'over-allowance' – value of supply of replacement car – periods prior to 1 August 1992 – s 10 VATA 1983 – application of 'open market value' – whether such value of replacement car should reflect a discount on a cash sale equivalent to the amount of the over-allowance

FIRST-TIER TRIBUNAL
TAX CHAMBER

N & M WALKINGSHAW LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JULIAN STAFFORD

Sitting in public at 45 Bedford Square, London WC1 on 11 and 12 March 2013

Amanda Brown, KPMG LLP, for the Appellant

James Puzey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of N & M Walkingshaw Limited ("the Appellant") against the decision of HMRC to refuse the Appellant's claim for VAT output tax said to have been overpaid in respect of the sales by the Appellant of motor cars in the period 1 January 1978 to 31 July 1992. The total sum claimed by the Appellant is £114,660.36.

2. This case has been directed to be a lead case under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. There are, we understand, more than 50 related cases where claims on the same point of law have also been refused. We are told that the total VAT being reclaimed is in the order of £33 million. We are asked to determine the point of principle in dispute; issues of quantum, so far as relevant, may be reserved for another day.

3. Essentially, at issue is the value in the relevant period of a supply of a motor car ("the replacement car") by the Appellant to its customer where the customer has proffered a car in part exchange ("the part exchange car") and the Appellant has paid a part exchange price in excess of what is said to be the cash realisable value of that part exchange car (referred to as an "over-allowance"). The Appellant's case is that, in these circumstances, what needs to be ascertained is the open market value of the replacement car, which should be determined by reference to the consideration in money that would otherwise have been payable in a cash transaction. According to the Appellant an equivalent cash transaction would have given rise to a discount on the price of the replacement car, and the best evidence of that discount is the amount of the over-allowance. The effect is to reduce the value of the supply of the replacement car by the amount of the over-allowance.

4. As we shall describe, that proposition is not accepted by HMRC. HMRC's position is that the value of the replacement car is what the Appellant and the customer agreed it was. Those parties were independent, unconnected parties, acting at arm's length. The negotiated and agreed price of the replacement car between unconnected parties is, HMRC say, the best evidence one can have of its open market value.

Illustrative example

5. It is, we think, helpful at the outset to set out an illustrative example of what might be described as a typical transaction in the relevant period. The cars and the prices referred to in this example are real cars and prices taken from a copy of Glass's Guide printed in 1979. The parties agreed that this example encapsulated for our purposes the facts on which the issue arises.

> 1. On 1 April 1979, Mrs Smith enters the showroom of the Appellant.
>
> 2. She speaks to Mr Jones, a salesman employed by the Appellant, and says that she is interested in purchasing a brand new Morris Princess,

Mark 2, 4 door saloon, "1800 HL", with an automatic gearbox ("the Princess").

3. The advertised "list price" of the Princess is £4,480.

4. Mrs Smith's existing vehicle is a 1977 Morris Marina 1700, 4 door saloon, "Super" (Automatic) ("the Marina").

5. Mr Jones carries out an appraisal of the Marina and notes that it has 20,451 miles on the clock and is in reasonably good condition for a vehicle of its age, with no significant faults or damage.

6. Mr Jones consults the March 1979 edition of Glass's Guide and notes that the Glass's "Trade" guide price for a vehicle of this age, make and model is £1,970. Bearing in mind that the vehicle is in good condition for its age and the mileage is slightly lower than the 24,000 guideline for a vehicle of that age, Mr Jones initially values the Marina at approximately £2,000.

7. It is the Appellant's policy to obtain two quotes from the trade before they accept a vehicle in part exchange. Mr Jones phones two traders and receives offers of £1,970 and £1,990 for the Marina.

8. Mr Jones informs Mrs Smith that he has been through the process described above and that his valuation of the Marina is £1,990, taking the higher of the two trade offers. There would therefore be an additional £2,490 to pay in order to purchase the Princess.

9. Mrs Smith believes that the Marina is worth nearer to £2,500 as she paid £2,945 for it from new in 1977, has kept it in good condition and has only driven around 10,000 miles per year. She is a returning customer, having bought the Marina from the Appellant, so expects to be treated well by the company. In addition, she had only budgeted to spend £2,000 extra in cash on a new car.

10. Mr Jones consults the sales manager. In 1979 the dealer margin on Morris motor cars was 18% of the list price. The wholesale price of the Princess was therefore £3,674 (i.e. £4,480 x 82%). No incidental costs have been incurred in respect of the Princess. The available profit margin in cash terms is therefore £806 (i.e. £4,480 - £3,674).

11. It is the Appellant's policy that they should always try to retain at least half of the dealer margin. The sales manager indicates that there is therefore £403 available for negotiation with Mrs Smith.

12. Mr Jones makes Mrs Smith an improved offer of £2,150 for the Marina (i.e. £1,990 plus £160 of the profit margin given as over-allowance).

13. Mrs Smith is holding out for more so, after further negotiation, Mr Jones agrees to give £2,300 for the Marina (i.e. £1,990 plus £310 of the Appellant's profit margin given as over-allowance) in order to complete the sale.

14. Mrs Jones pays to the Appellant the Marina plus £2,180 in cash for the Princess.

15. The Appellant's gross profit on the sale of the Princess is £496 (i.e. £4,480 - £310 - £3,674).

> *Note*. The list price of the Princess is stated inclusive of VAT. The gross profit figure expressed in this example therefore includes the VAT for which the Appellant is accountable on the sale of the Princess.

Lex Services

6. If this sounds familiar, it is because substantially the same issue, on substantially the same facts, has come before the tribunal and the courts on an earlier occasion.

7. That occasion was in respect of the case of *Lex Services plc v Customs and Excise Commissioners* [2004] STC 73, which reached the House of Lords. In that case Lex Services was in the same position as the Appellant here. It contended that the value of the non-monetary consideration consisting of the part-exchange car should be taken as its "true value", representing the value that Lex Services could obtain on a trade sale (the trade value), and not the negotiated allowance for the part-exchange car, which was greater than the trade value, and included therefore an "additional allowance".

8. The House of Lords dismissed Lex Services' appeal, holding that the Court of Appeal had been correct in holding, first, that the part-exchange price was specifically agreed for commercial reasons and it could not be recharacterised as a discount from the price of the car which Lex Services was selling, and secondly that the "true value" served a different and distinct purpose, namely to limit the refund which Lex Services would have had to have made if the customer decided to return his car within 30 days. The House of Lords also held that the principle of fiscal neutrality did not go so far as to require that transactions which had the same economic or business effect should for that reason be treated alike for VAT purposes.

9. The difference between this case and that of *Lex Services* is in the period in respect of which the respective claims relate. In *Lex Services*, the relevant period was between September 1994 and September 1997. That period was after 1992, whereas the Appellant's claim in this case dates back to a time before 1992. The significance of that difference is that in 1992 there was an amendment to s 10 of the Value Added Tax Act 1983 ("VATA 1983"). In this case the Appellant relies on the former wording of the relevant section to argue that a different result should obtain from that reached in *Lex Services*.

10. Having regard to the different statutory provisions at issue, it was not argued in this case that we were bound by *Lex Services*, although of course HMRC argued that we should arrive at the same conclusion. We shall return to *Lex Services* when we review the authorities relied on by the parties.

The law

11. We have mentioned the significance of the change to the UK domestic law in 1992. This case resolves itself around the proper construction of the relevant statutory provision. We set out below the provisions of s 10 VATA 1983. The 1983 Act took

effect from 26 October 1983, but it was a consolidating Act, and there was no material difference between it and its predecessor provision, s 10 of the Finance Act 1972, which applied for the earlier part of the relevant period. Accordingly we shall refer only to the VATA 1983:

> 10.-(1) For the purposes of this Act the value of any supply of goods or services shall be determined as follows.
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the tax chargeable, is equal to the consideration.
>
> (3) If the supply is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value.
>
> (4) Where a supply of any goods or services is not the only matter to which a consideration in money relates the supply shall be deemed to be for such part of the consideration as is properly attributable to it.
>
> (5) For the purposes of this Act the open market value of a supply of goods or services shall be taken 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.
>
> (6) This section has effect subject to Schedule 4 to this Act.

12. Section 10(6) refers to Schedule 4 to the VATA 1983. Schedule 4 makes provision for valuation of the taxable supply in certain special cases. Open market value is available as an appropriate value in certain cases where the parties to a supply are connected (connection being established by reference to the tests in s 533 of the Income and Corporation Taxes Act 1970, as then applicable), or in cases where goods are supplied to non-taxable persons for retail (party plan mechanisms); no connection test applies in that case (see VATA 1983, Sch 4, para 3). It is the definition in s 10(5) that applies for those purposes.

13. The Appellant's claim relates to the period prior to 1 August 1992. With effect from that date, s 10(3) was amended to remove the reference to open market value in cases where the consideration was not wholly in money. The new provision read as follows:

> The value of a supply for a consideration not consisting of money, or not wholly consisting of money, is taken to be such amount in money as, with the addition of the tax chargeable, is equivalent to the consideration.

14. It was that amended provision, as we have described, that formed the domestic legislative context for *Lex Services*.

15. Domestic VAT legislation, of course, finds its genesis in EC and EU Directives. It was common ground, first, that a Directive cannot impose obligations on an individual and that a provision of a Directive may not be relied upon as such against

such a person (see *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401, and secondly that domestic legislation must be construed so far as possible in the light of the Directive, in order to achieve the result sought by the Directive (see *Marleasing S.A. v La Comercial Internacional de Alimentación S.A.* (Case C-106/89) [1990] ECR I-4135. We set out below the relevant EC and EU materials.

16. Article 8(a) of the Second Council Directive 67/288/EC sets out the fundamental principle for the basis of the assessment of VAT:

> The basis of assessment shall be:
>
> (a) In the case of a supply of goods and the provision of services, everything which makes up the consideration for the supply of the goods or the provision of the services, including all expenses and taxes except the value added tax itself.

17. Paragraph 13 of Annex A to the Second Directive expands on Art 8(a), and in particular refers to the use of goods as consideration for a supply, in other words a barter transaction:

> The expression 'consideration' means everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance etc.) that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange …

18. The Second Directive was superseded, on 17 May 1977, by the Sixth Council Directive 77/388/EC. Article 11 of the Sixth Directive is concerned with the taxable amount in respect of supplies of goods and services. Article 11A(1)(a) essentially replicates Art 8(a) of the Second Directive:

> The taxable amount shall be:
>
> (a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies.

19. At the material time Art 11A provided in one instance for the taxable amount to be the open market value of the relevant supply. Article 11A(1)(d) applied the open market value to certain self-supplies of services, and for this purpose "open market value" of services was defined to mean:

> … the amount which a customer at the marketing stage at which the supply takes place would have to pay to a supplier at arm's length within the territory of the country at the time of the supply under conditions of fair competition to obtain the services in question.

The evidence

20. For the Appellant we had a witness statement from Andrew Walkingshaw, the managing director of the Appellant, who gave oral evidence and was cross-examined by Mr Puzey. For HMRC, we had a witness statement from Fiona Fraser, an HMRC officer who is a member of the Motor Trade Unit of Expertise. Mrs Fraser was cross-examined by Ms Brown.

Mr Walkingshaw

21. The burden of Mr Walkingshaw's evidence was to confirm the mechanics of a part-exchange transaction in the Appellant's business as being fairly represented by the hypothetical example we have outlined above. We accept that as being the case.

22. We also accept that the conclusions drawn in respect of prices by a report of the Competition Commission in 1992 on the supply of new motor cars within the UK were apt in the case of the Appellant's business at the material time. We were taken to a number of sections of Chapter 7 of that report. The following are the most relevant:

> (1) The prices paid by customers, whether private or business, are often reached by negotiation. Relatively few customers in practice pay the list price; most will be able to negotiate a discount. These discounts are provided by car dealers, and come out of the dealer margin, which most suppliers set at levels recognising the necessity for dealers to provide discounts (para 7.3).
>
> (2) The whole of the negotiation (including optional financial benefits as well as discounts) is carried out between the customer and the dealer. It is complicated in most cases by an accompanying sale of a used car by the customer to the dealer, the transaction then being generally known as 'part-exchange', as the customer makes a single net payment to the dealer covering both the purchase of the new car and the sale of the used car. In some cases the dealer will agree with the customer a price for the used car in excess of its 'true' trade value and at the same time give the customer a lower discount on the new car. This is usually known as making an 'over-allowance' for the used car. In some cases invoices may not, however, reflect this aspect of the transaction (para 7.4).
>
> (3) For used cars detailed guidance on prices is provided by a number of publications, the most authoritative of which is Glass's Guide, which … is not available to the public (para 7.5).
>
> (4) Broadly speaking the discounts achieved by customers matched their expectations. Thus, for example, in 1990 of those who expected no discount 84% received no discount; and at the other end of the scale of those who expected more than 10%, 83% received more than 10% (para 7.84, table 7.19).
>
> (5) This information on discounts excluded any transaction which involved a part-exchange, although one of the dealer surveys showed that more than 80% of dealers gave away about the same in the form of an 'over-allowance' in

taking a used car in part-exchange as they would in discount when there is no part-exchange involved (para 7.86).

(6) Based on a consumer survey, consumers with no part-exchange believed they received a higher discount than consumers with a part-exchange. However, consumers may not equate a discount with an over-allowance or they may not know how large an over-allowance they are receiving (para 7.110, table 7.28).

23. Mr Walkingshaw produced as an exhibit the March 1979 issue of Glass's Guide. He explained that this was no more than a guide; the "trade value" given in the Guide for a vehicle would not provide a fully accurate valuation because it was too generic; however, it did provide a "ballpark" figure, or a starting point. Mr Walkingshaw confirmed that the Appellant would not rely solely on Glass's Guide; it would seek a firm bid from another dealer (who would likewise be relying on the Guide), and if there was more than one bid would adopt the higher of those in its discussions with the customer as to part-exchange price.

24. Although used in this way for the purpose of setting prices for part-exchange transactions, Glass's Guide itself does not give part-exchange values. It states (at para 4 of Notes):

> "Part Exchange values are not quoted because of the many possible variations in transactions involving a trade-in vehicle."

In this regard, Mr Walkingshaw explained, and we accept, that a figure for the part-exchange value could not be provided because of the many possible variations in the over-allowances that might be given on a part-exchange transaction.

25. Glass's Guide gives two values, a trade value and a retail value. The trade value reflected a price if the car were to be sold at auction or within the trade; the retail value provides a suggested selling price to retail customers. The value adopted by the Appellant as the "open market value" was the lower of these two values, the trade value. This was because it reflected the accounting practice of the Appellant not to ascribe a value for the part-exchange car at anything more than the amount the business could realistically realise for the vehicle within a short period. Mr Walkingshaw agreed, and we find, that there were many factors that came into play for a dealer in setting a trade price it would be prepared to pay. These included size and state of that dealer's business, its present stock, and whether the dealer had a buyer in mind.

26. Mr Walkingshaw explained, and again we accept, that there were a number of different values that could be applicable to the same vehicle. At the top end was the dealer asking price. At the bottom end was the auction or trade value. The part-exchange value, including the over-allowance, would be between these two prices, and would broadly equate to what the customer could achieve on a private sale.

27. As in the hypothetical example, the amount of the over-allowance that could be offered on a part-exchange transaction was for the Appellant dictated by the available profit margin on the replacement car. The over-allowance reflected an amount of that

available profit margin that the salesman was prepared to give away in order to complete the sale of the replacement car. It thus had the same overall financial effect as the giving of a discount; viewed in this way it could be regarded in economic terms as an amount of discount hidden within the over-allowance.

28. Mr Walkingshaw also confirmed that neither a discount, nor an over-allowance, would be offered unilaterally. So, if the customer was happy with the original trade-in value proposed, the part-exchange transaction would be completed at that value, and no discount would be offered on the replacement car. Likewise, for a cash customer willing to pay the list price, although that would, as Mr Walkingshaw explained, and we accept, be a very unusual occurrence, no discount would be offered.

29. Mr Walkingshaw was taken in cross-examination to a spreadsheet which had been prepared in relation to the Appellant's claim. The spreadsheet set out the details of the part-exchange transaction, showing the price actually paid to the customer for the part-exchange car, the amount of the over-allowance, and the price achieved by the Appellant on an onward sale, whether on a trade or retail sale. The aim of the spreadsheet is to identify the profit or loss on the part-exchange car, and to restrict the claim to the lower of the amount of the loss and the amount of the over-allowance, so as to reflect the effect of VAT for which the Appellant was required to account on the sale of the part-exchange car under the margin scheme.

30. The spreadsheet contained 50 entries. Of these 18 showed that the part-exchange car had been on-sold by the Appellant at a price greater than that which had been allowed (including the over-allowance), in each case on a retail sale. As those sales had been at a profit, no claim was made in those respects.

31. In re-examination, Mr Walkingshaw explained further, and we accept, that before a part-exchange car was retailed it would be checked, including for safety. Service histories would be brought up to date, and any necessary MOT inspection carried out. Any bodywork repairs would be carried out, and the car would be valeted. This we accept would have involved a certain amount of time and expense for the Appellant.

Mrs Fraser

32. The evidence of Mrs Fraser was primarily related to the impact of the replacement car being partly funded by way of a hire purchase transaction. In such a case, the replacement car would have been invoiced to the HP company at the agreed price, including VAT. That VAT would be recovered as input tax by the HP company. If the price of the replacement car was to be reduced by an amount of over-allowance, the amount of VAT accounted for to HMRC would be reduced, but the HP company would have recovered the original amount of VAT. The evidence of Mrs Fraser was that the effect of this would be that the HP company would have recovered more input tax on the purchase than the output tax paid by the dealer on the supply.

33. Mrs Fraser also gave evidence concerning the requirement, under the margin scheme, for particular values to be included in the stockbook or similar record. A revaluation of the part-exchange price would, she said, mean that it would not be possible for a taxpayer to comply with those requirements.

34. With respect to Mrs Fraser, we do not find her evidence to be material to the question we have to decide. Any issues that might arise are, we consider, essentially administrative in nature, and are not matters of principle. First, we do not regard the particular VAT treatment afforded to hire purchase transactions as material. In that respect, because the car will be both supplied to and supplied by the HP company at the same price, the output tax on the supply by it will always be offset by a corresponding amount of input tax directly attributed to the onward supply.

35. Secondly, we do not accept that the result sought by the Appellant would be distortive. We accept that, if the transaction is analysed as a purchase by the customer at the list price, and there is a reduction of the taxable value of the replacement car, there will be a reduction in the amount of VAT. Viewed in isolation, the final consumer could be regarded as having paid more VAT than HMRC will have received. But if the Appellant's argument is successful, the effect is that the final consumer will be treated as if he had received a discount equal to the over-allowance; the price he has effectively paid will be reduced, and there will be a corresponding effective reduction in the amount of VAT he can be regarded as having paid. The result would be similar to the customer, having paid VAT on the full price through the hire purchase mechanism, then receiving an amount by way of cashback from the dealer. That amount could then itself be analysed in part as representing VAT repaid to the final consumer, thereby eliminating the distortion inherent in Mrs Fraser's evidence. In either case the final consumer ends up effectively paying the same amount in VAT as the dealer accounts for.

36. If the Appellant is right in principle, then – subject to relevant time limits – adjustments to such matters as invoicing and accounting would need to be made along the supply chain in order, where necessary, to ensure that the proper VAT treatment could properly be reflected. The need to make such adjustments to avoid any perceived distortions is administrative in nature, and cannot affect the matter of principle we are asked to decide.

37. For these reasons, we do not consider that the issues raised by Mrs Fraser are material to our decision on the question of principle before us.

The authorities

38. The concept of "open market value" in the VAT context was considered by the ECJ in *Direct Cosmetics Ltd and Laughtons Photographers Ltd v Customs and Excise Commissioners* (Cases 138/86 and 139/86) [1988] STC 540. Those cases concerned a direction issued under VATA 1983, Sch 4, para 3 to each of the taxpayer companies requiring that VAT be charged by reference to open market value. In each case the relevant goods were sold by the companies to persons who were not taxable persons, and those persons, or others, were to sell the goods on by way of retail. The question,

essentially, was whether para 3 was capable of having been adopted as a derogating measure, where the transactions were for commercial reasons and not to obtain a tax advantage.

39. The Advocate-General (Da Cruz Vilaça) referred, at [148] of his Opinion, to the comparability of the definition of "open market value" in s 10(5) VATA 1983 to the definition in art 11A of the Sixth Directive that we have noted earlier. The Advocate-General then continued:

> "150. In that regard, it is appropriate to begin by pointing out that the reference in the second sub-paragraph of art 11(A)(1) of the directive to the 'open market value' is clearly aimed at situations in which the service, as it is supplied 'for the purposes of [the taxable person's] undertaking', does not have a contractual price.
>
> 151. None the less, under the directive, a supply of services in those circumstances may be treated by the member states (in accordance with the consultation procedure provided for in art 29) as a supply of services for consideration for the purposes of applying the tax 'in order to prevent distortion of competition' which might arise in certain situations (art 6(3)).
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> 152. In that case, the only way to determine the basis of assessment is by means of the open market value, as defined in the second sub-paragraph of art 11(A)(1).
>
> 153. As regards the term 'open market value' used in the United Kingdom legislation, both in Sch 3 of Annex 4 to the Value Added Tax Act 1983 and in s 10(5) thereof, which it is not appropriate to interpret here, it must be said that, whatever meaning it was intended to have in that Act, its use is compatible with the objectives of the derogating measure and with the principles laid down by the Sixth Directive only in so far as it does not purport to impose tax on an amount exceeding the value added along the entire length of the distribution chain as far as the final consumer.
>
> 154. That means, in my view, that, if such a measure is not to be seen as excessive or disproportionate, the choice of a taxable amount different from the consideration actually paid to the taxable person by the 'retailer' to whom the goods are supplied must not be based on anything other than the real price at which the goods are sold to the final consumer, or their open market value if, and only if, it is impossible or excessively difficult to ascertain that price.
>
> 155. In the latter case, however, it must be the 'open market' or 'current' value at which the goods reach the final consumer in transactions of the same kind.
>
> 156. That means transactions concluded in the same manner and involving goods of the same kind (for instance, cosmetic products which cannot be sold by other means and not products of 'standard quality' sold through the usual commercial channels)."

40. The ECJ in its Judgment referred, at [50], to the taxpayers' argument that the concept of open market value was too vague to constitute a precise taxable base and

was therefore capable of being applied in an arbitrary manner. The Court referred, at [52], to art 27 of the Sixth Directive, under which the derogating measure had been authorised, and to the statement, which it described as conforming to the fundamental principle of the Sixth Directive, that measures intended to simplify the procedure for charging the tax should not, except to a negligible extent, affect the amount of tax at the final consumer stage. The ECJ went on to say (at [53]):

> "Having regard to the foregoing considerations, the open market value for the purposes of the system established by the derogating measure in question 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. That interpretation finds support by art 11(A)(1)(d) of the Sixth Directive, which refers to the open market value of the services supplied, and by art (11)(B)(1)(b), which refers to the open market value, in connection with the importation of goods, where no price is paid or where the price paid or to be paid is not the sole consideration for the imported goods. Accordingly, the concept of open market value is neither vague nor imprecise."

41. *Direct Cosmetics* sets out the context, within the Directive, for the construction of the meaning of "open market value" in a domestic provision such as s 10(5) VATA 1983. It falls to be construed so as to mean the value that is closest to the commercial value on a retail sale, which is to say the actual price paid by the final consumer. Furthermore, the use of open market value must assume transactions of the same kind, both as regards the nature of the goods in question and the way in which the transaction is concluded.

42. In *Naturally Yours Cosmetics Ltd v Customs and Excise Commissioners* (Case 230/87) [1988] STC 879, the taxpayer company made wholesale sales of beauty products to beauty consultants for resale by them at private parties. The parties were organised by others (hostesses). As a reward for organising a party the beauty consultant would give the hostess a pot of cream as a "dating gift". The pot of cream was supplied by the taxpayer to the beauty consultant for a price below its normal wholesale price. The Commissioners, relying on s 10(3) VATA 1983, assessed VAT on the normal wholesale price. The case was referred to the ECJ for a preliminary ruling on what constituted the taxable amount in those circumstances.

43. The ECJ held that the taxable amount was the sum of the monetary consideration and the value of the service provided by the beauty consultant in procuring the hostess's services. The value of that service had to be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price.

44. In his Opinion, Advocate-General da Cruz Vilaça (the same Advocate-General as in *Direct Cosmetics*) referred, at [53] and [54], to the use of open market value as the basis of assessment in the *NYC* case as "misconceived". He based this conclusion on the aim being to determine the value actually assigned by the parties to the consideration, so that tax could be assessed on that amount (at [55]). He distinguished, at [57], the way in which s 10(3) VATA 1983 was sought to be applied

in *NYC* from the strict sense of "open market value", that is "a fictitious concept dissociated from the terms of the transaction in question and from the synallagmatic relationship established between the two parties to the contract."

45. In saying this the Advocate-General was drawing the same line he had drawn in *Direct Cosmetics* between those cases where it is possible, or not excessively difficult, to identify the price at which goods are sold, and those where it is not. The use of "open market value" in the strict sense is confined to the latter. The Advocate-General emphasised that the concept of open market value, or normal value, had its place, giving (at [61]) as an example a case where in two contracts for the sale of a particular product payment is made partly in money and partly in the form of goods or services. The value of the supply could not differ between those two cases merely on the basis that in one the parties fixed the value of the goods or services provided, and in the other they did not. The use of open market value could avoid the distortion that would derive from different treatment being accorded to transactions that are virtually identical from the economic point of view.

46. That said, the Advocate-General reiterated his observation in *Direct Cosmetics* on the use of an objective open market value. He said (at [68] – [71]):

> "68. But, as I observed in my opinion in *Direct Cosmetics Ltd and Laughtons Photographs Ltd v Customs and Excise Comrs* Joined Cases 138/86 and 139/86 [1988] STC 540 at 549, the normal value will only have to be taken into account where no price has been paid by the purchaser and where it is impossible (or at least, excessively difficult) to attribute to the consideration, by some other means, its true value for the purposes of the transaction, or, at least, its real market value. At this point it must be stated that the expression used in the United Kingdom legislation and in the English version of the Sixth Directive, 'open market value', which we could assimilate to 'ordinary market value', seems to me to be more felicitous than the expression 'normal value' used in the Romance-language versions of the directive. It is only where there is no *market* that it is necessary to have recourse to a value other than the real value, or to a deemed value.
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> 69. In any event, being a tax on consumption VAT must be levied as precisely as possible on the actual amount spent by the consumer and, accordingly, reference to open market values rather than to real values should be permitted only (otherwise than in cases where that approach is expressly provided for) where it is impossible to follow some other procedure which comes closer to determination of what the court has called the 'subjective value' of the consideration.
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> 70. The court has confirmed this in the judgment which it gave very recently (on 12 July 1988) in the *Direct Cosmetics* case [1988] STC 540 at 574 (para 53) to which I referred, in which it held that 'the open market value for the purposes of the system established by the derogating measure in question 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'.

> 71. In the present case an approximation of that kind is possible in so far as a value can be accurately (although indirectly) attributed, within the relationship between the parties, to the service provided as consideration for the goods supplied, without its even being necessary, contrary to what might be suggested by the terms of the domestic provision (and particularly by the normal translation thereof into the various Romance languages) pursuant to which the commissioners took their decision, to refer to the concept of normal value or open market value."

47. As the compatibility of s 10(3) was not in issue, the Advocate-General offered no comments on its drafting. He merely observed that the value of the service incorporated in the consideration for the pot of cream fell to be determined by reference to the subjective value attributed to it by the parties.

48. The point was dealt with shortly by the ECJ. It held, relying on the well-known authority of *Staatssecretaris van Financiën v Coöperative Aardappelenbewaarplaats GA* (Case 154/80) [1981] ECR 445 (commonly referred to as "the *Dutch Potato Case*"), that, firstly, the consideration must be capable of being expressed in monetary terms and, secondly that it is a subjective value, since the basis of assessment is the consideration actually received and not a value estimated according to objective criteria. As it was possible to ascertain, by reference to the normal wholesale price of the pot of cream, what monetary value the parties had attributed to the services of the beauty consultant in procuring hostesses to arrange parties, that value should be used in respect of that part of the consideration.

49. The ECJ considered part-exchange transactions in connection with motor vehicle sales in *Commission of the European Communities v Ireland* (Case 17/84) [1985] ECR 2375. That case concerned the validity of a particular Irish provision which provided that, in computing the amount on which VAT was chargeable on the replacement car, a deduction could be made for the value of second-hand movable goods accepted in exchange or in part-exchange. It was held that the Irish system, predating as it did the authorisation of margin schemes for second-hand goods, was within the Directive.

50. The significance of this case, so far as the Appellant is concerned, is in how the Court described the Irish system. That system was conceded by the Irish government as involving a loss of revenue for the Exchequer when the second-hand goods were resold at a price lower than the trade-in price. However, it was argued that that should be equated with a discount originally given by the taxable person, or as an allowable input on goods acquired for the purpose of the taxable person's business.

51. Ms Brown referred us to two passages of the ECJ's judgment, at paras 17 and 21. At para 16 the Court had referred to the margin scheme proposals put forward by the Commission, the effect of which was that it would be at the time of resale of the second-hand goods that the residual part of the VAT borne by those goods would be taken into account. At para 17 the ECJ then said:

> "Under the Irish system, account is taken of that residual part at an earlier stage, when the second-hand goods are acquired by the taxable

> person by means of a trade-in. That system only gives the appearance of resulting in a reduction of the chargeable amount for the new goods. The reduction is exactly proportional to the price paid by the taxable person for the second-hand goods which he buys from the non-taxable person and in fact offsets the residual part of the VAT which the second-hand goods have already borne. As the goods have already benefited from a remission of tax on the occasion of their acquisition by the taxable person wishing to resell, tax may be charged in the normal manner when the goods are resold without distorting competition with direct sales between consumers."

52. The loss of revenue argument was considered by the Court at para 21:

> "The fact that the Irish system results in a loss of revenue for the Exchequer in cases in which the resale price is lower than the trade-in price is not a decisive factor either. By providing that supplies effected by a taxable person are subject to tax and that the tax paid by him at an earlier stage may be deducted, the general rules set out in the directives also reduce the revenue paid to the Exchequer when new goods are sold at a loss. The Irish provisions concerning the trade-in of second-hand goods therefore do not infringe the general rules contained in the Community directives in that respect either."

53. The reasoning of the Court in this regard is concentrated on the equation of the Irish system of allowing a full deduction on the taxable value of the replacement car, which over-compensated for the VAT inherent in the price of the second-hand vehicle if that vehicle was sold at a loss, with the general rules for deduction of input tax attributable to the acquisition of goods then resold at a loss. We see nothing in that reasoning to support Ms Brown's submission that the Court had equated a loss on the sale of the second-hand vehicle to a discount on the price of the replacement car. Indeed, it is apparent from what the Court said at para 18 that economic equivalence was something that would be provided through price adjustments made by the parties, adjusted according to the system adopted. If, therefore, a price was to be discounted, that would be by virtue of the agreement of the parties.

54. We turn now to the domestic authorities. We were taken to two in particular, the cases of *Hartwell plc v Customs and Excise Commissioners* [2003] STC 396 and *Lex Services*, to which we referred earlier, albeit briefly.

55. In *Hartwell*, H plc sold both new and used cars. Frequently its customers wished H plc to accept an existing car in part exchange for a replacement car. It was common practice in the motor trade for a dealer to offer a part exchange price which was higher than market value in order to make a sale. H plc attributed market value to customers' existing cars. In many cases the balance of the purchase price, or part of it, was provided through a finance company. H plc issued two types of voucher when it sold a car, one of which was called 'purchase plus', which took the form of a purchase plus discount note which the customer received. In purchases involving finance the amount of the purchase plus note was accepted by H plc as part payment of the 10% deposit against the purchase price which finance companies usually required. Where no finance was involved, the note was credited against the purchase price together with the agreed value of the car which was taken in part exchange.

56. In *Hartwell*, the parties had made it clear that the value they had attributed to the existing car was its trade or market value. The purpose of the purchase plus voucher scheme was to make it clear that there was no overvaluation of the part exchange car. The voucher itself had no monetary value. The conclusion of the VAT Tribunal, that despite the agreement of the parties as to the value of the part-exchange car the purchase plus amount should be treated as an increase in the value of the existing car, was wrong. In the Court of Appeal, having posed the question "what monetary equivalent is to be ascribed to the part exchange car?", Chadwick LJ said (at [26]):

> "That question is answered by identifying the value which the parties to the relevant transaction (in this context, the supply of the replacement car) have given to the part exchange car, not by reference to the way in which the finance company has treated the voucher for the purpose of its borrowing ratios. The judge [in the High Court] was right to describe the tribunal's approach as a 're-writing' of the transaction; and right to hold that that approach was impermissible and wrong."

57. We described earlier the conclusion reached by the House of Lords in *Lex Services*. In that case there was no voucher as there was in *Hartwell*. There was an over-allowance of the nature at issue in this case. The existing car was traded in for a stated part-exchange price, of which an amount was described as "additional allowance", representing the difference between the highest trade offer and the figure the customer had successfully bargained for. The part-exchange price less the allowance appeared on a form headed "Part Exchange Details & Declaration" as "true Value".

58. After referring to the *Dutch Potato Case*, and the need for the consideration to be capable of being expressed in money and be a subjective value and not a value assessed according to objective criteria, Lord Walker explained that the use of subjective values accorded with the principle of legal certainty. He said (at [18]):

> "The expression 'subjective value', to be understood in the sense described above, has been repeated in many later cases before the Court of Justice, including *Argos Distributors Ltd v Customs and Excise Comrs* (Case C-288/94) [1996] STC 1359, [1997] QB 499, para 16 and the other cases cited in that paragraph. Nevertheless the expression continues to cause some difficulty, partly because it naturally suggests a value which is chosen as a matter of individual discretion, and might therefore be expected to be more vague, labile and difficult to ascertain than one determined by objective criteria. But any such impression would be mistaken and would overlook one of the basic strengths of the VAT system. It is a system which is intended to be self-policing in the sense of operating automatically on the economic activities of registered taxpayers and final consumers, with the least possible need for VAT authorities to undertake independent investigation of the facts. 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. So far from introducing an element of vagueness or obscurity, the concept of subjective value (correctly understood) achieves legal certainty and ease of administration of the VAT system (just as a subjective apportionment of the consideration for a package of taxable goods and exempt services may achieve those results: see *C R Smith Glaziers* (*Dunfermline*) *Ltd v Customs and Excise Comr*s [2003] UKHL 7, [2003] STC 419, [2003] 1 WLR 656, especially the speech of my noble and learned friend Lord Hoffmann (at para 21)."

59. The Court rejected the argument of Lex Services based on the principle of neutrality. It had been argued that it was absurd that Lex Services should be accorded a different VAT treatment from that applied to Hartwell in identical transactions. Lord Walker dismissed this argument, saying (at [29]) that the two were not identical. Hartwell's transactions explicitly made a different attribution of value to the part-exchange car to that in *Lex Services*.

Discussion

60. The essence of the Appellant's case is that, where the consideration received for the replacement car does not consist wholly of money but also includes non-monetary consideration (namely the part-exchange car), the applicable UK domestic provision, s 10(3) VATA 1983, requires the value of the replacement car to be determined by reference to open market value. By s 10(5) the open market value of the replacement car is essentially to be determined by reference to the consideration in money that would otherwise have been payable. This, on Ms Brown's argument, requires an equivalent cash transaction to be assumed, which would have resulted in a discount (equivalent to the amount of the over-allowance on the part-exchange car) being applied in arriving at the price of the replacement car.

61. As Ms Brown submitted, the value of the part-exchange car is not strictly relevant to the test in s 10(5), which looks to the value of the replacement car. But it is argued that, where an over-allowance is given, the best evidence of the cash discount that would have been available on the same replacement car is the amount offered to the customer for the part exchange in excess of the true value of the part-exchange car, which is taken as the trade value that the Appellant would have been prepared to offer before application of the over-allowance. On this basis it is argued that it is reasonable that the true value should be used as a proxy for determining the monetary value of the consideration received by the Appellant because, mathematically, the true value of the part exchange plus the cash received from the customer should equal the same as the screen (or list) price of the replacement car less the cash discount available.

62. The argument thus proceeds on the basis that the subjective values agreed by the dealer and the customer are, as a consequence of the requirements of s 10(3) and (5), to be ignored. Instead, it is submitted, s 10 imposes the concept of open market value in the strict sense described by the Advocate-General in *NYC*; namely a fictitious concept, determined independently of the terms of the transaction itself and of the

relationship of mutuality or reciprocity between the parties. Thus, there needs to be an objective, and not a subjective, approach.

63. This of course is a different approach from that adopted in *Hartwell* and *Lex Services*. It is different, says the Appellant, because of the requirements of s 10(3) and (5), which were not applicable in those cases. Ms Brown referred us to what Chadwick LJ had said in *Hartwell* regarding what had been said in the Court of Appeal regarding *Lex Services*. At [3] Chadwick LJ had made the point that in ascertaining the taxable amount by reference to the consideration actually received for the supply of the replacement car, it was not correct to substitute some other value – say the market or trade value of the part exchange car – for the monetary equivalent which the parties had actually agreed. That substitution, argued Ms Brown, was by contrast exactly what was required by s 10(3) and (5).

64. Ms Brown submitted that *Hartwell* had recognised there was a true value for the part exchange. That true value was agreed between the parties and was thus the subjective value to be adopted for VAT purposes. The same result would have been obtained if the objective open market value of the replacement car fell to be ascertained; that valuation would have been determined by reference to the cash equivalent of that part of the consideration which was received in the form of non-monetary consideration, namely the true value of the part-exchange car.

65. Ms Brown referred us to the short concurring judgment of Lord Millett in *Lex Services*. Lord Millett said (at [4] and [5]):

> "[4] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Walker of Gestingthorpe. I have found this case more difficult than your Lordships; in particular, I have found it difficult to accept that a sum of money which is not available to the seller of a second hand vehicle except by way of an allowance against the price of a new vehicle is an unequivocal attribution of value to the second hand vehicle. In so far as the sum exceeds that which would be paid for the second hand vehicle free from any obligation to apply it towards the purchase of the new, it seems to me to have all the characteristics of a hidden discount.
>
> [5] But the question is one of fact, and your Lordships take a different view. In those circumstances, though with some misgiving, I too would dismiss the appeal."

Mr Brown submitted that this was a concern which confirmed the approach that the Appellant seeks the Tribunal to adopt. Those concerns, it is argued, arise only because of the application of a subjective value test, and would disappear on application of the objective concept of open market value.

66. Ms Brown argued, by reference to *Hartwell*, that, since the customer's agreement to "do the deal" does not represent non-monetary consideration, and so does not affect the taxable value of the replacement car, this removes from the equation any notion of value associated with the "deal", and the calculation of open market value of the replacement car can be made by reference to the true value of the

part exchange. We do not accept this analysis. In *Hartwell*, the question was whether the dealer who supplied the voucher had obtained any consideration for it. If he had, then that would have formed part of the consideration for the sale of the replacement car. The only possible consideration was the agreement on the part of the customer to complete the transaction. That agreement had a value of nil. That is not authority for the proposition that the agreement reached by the parties on the part-exchange value must be disregarded.

67. Ms Brown argued, in reliance on *NYC*, that where there is a monetary price otherwise payable, the subjective value attributed by the parties can be imputed by reference to that price. There the value of the service provided by the beauty consultant could be ascertained by reference to the wholesale price of the pot of cream that would otherwise be applicable. Ms Brown submitted that, if *NYC* were to have been followed after 1992, the value of the replacement car would, on the facts, have been the discounted price, as in both *Hartwell* and *Lex Services* it was clear that discounts were regularly and consistently offered on the sale of replacement cars.

68. For the reasons we shall now give, we do not accept Ms Brown's arguments.

69. The issue in this case resolves itself into the construction of s 10(3) and (5). We do not accept the Appellant's argument that s 10(5) provides solely for an objective value. In our judgment the question of value has to be approached according to the circumstances in which such a valuation falls to be made. An objective valuation will be called for only if there is no other basis upon which a value consistent with the requirements of s 10(5) can be arrived at by reference to the actual transactions in question. Otherwise, those observable features of the transaction itself, including the subjective agreements made by parties, acting at arm's length, will inform the ascertainment of the open market value.

70. Where, as in this case, s 10(3) directs the open market value of a supply to be ascertained, that expression is not at large. It is a defined term, such that it is only necessary that the value arrived at should meet the requirements of s 10(5). That provision is a deeming provision and it requires that the open market value should be taken to be the amount that would fall to be taken as its value under s 10(2) 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.

71. The first question is whether s 10(5) requires a wholly cash transaction to be assumed, in other words a different transaction from that actually undertaken by the parties. We do not consider that this is its effect. The reference in s 10(5) to a consideration in money does no more than reflect the terms of s 10(2), which applies the general rule in determining the taxable value of a supply where the consideration is in money. Those words cannot, in our view, operate to deem the transaction to be something different from the actual transaction of part exchange. We reject the submission of Ms Brown that what s 10(5) is looking to identify is the value in money of the replacement car if there had been no part exchange. We also reject the submission that the reference to consideration in money requires the part-exchange

car to be valued at its cash realisable amount (and thus, on the Appellant's argument, the "true value").

72. Ms Brown argued that, on the basis of fiscal neutrality, it is not permissible, when looking at open market value, to determine it differently depending on whether the consideration is in cash or in kind. She relied in this respect on the ECJ case of *Goldsmiths (Jewellers) Ltd v Commissioners of Customs and Excise* (Case C-330/95) [1997] ECR I-3801. In that case, the UK domestic provision in question limited bad debt relief to cases of non-payment of consideration in money and excluded cases where the consideration was in kind. In its judgment the Court said (at paras 23 and 24):

> "23. … no distinction between consideration in money and consideration in kind is drawn in either Article 11A(1)(a) or Article 11C(1). As is apparent from the judgment in *Naturally Yours*, cited above, paragraph 16, for those provisions to apply it is sufficient if the consideration is capable of being expressed in money (see also Case C-33/93 *Empire Stores v Commissioners of Customs and Excise* [1994] ECR I-2329, paragraph 12). Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.
>
> 24. It follows that the refusal to refund VAT in the case of transactions in which the consideration is to be paid in kind, where such consideration is not paid in whole or in part, leads to discrimination against transactions of that type as compared with those in which the consideration is expressed in money."

73. We do not consider that *Goldsmiths* can have the effect on the construction of s 10(3) and (5) for which Ms Brown contends. As well as being a decision on the scope of a derogation, and not on questions of value, the Court makes it clear that it is only where the transactions in question are both economically *and commercially* the same that the two types of consideration are to be treated in the same way. That therefore requires the transactions to be identical, and not merely economically equivalent, a conclusion endorsed later in *Lex Services*. *Goldsmiths* is not authority for the proposition that s 10(3) and (5) require open market value to be ascertained by reference to a notional cash transaction where the transaction actually undertaken by the parties includes non-monetary consideration.

74. It follows from this that the submission of the Appellant that the replacement car should be valued by reference to a cash transaction, and not a transaction of part exchange, cannot be accepted. Open market value does not fall to be determined by reference to an equivalent cash transaction; it falls to be determined by reference to the actual transaction expressed in terms of a monetary value. The reference in s 10(5) to a consideration in money provides no scope for re-analysing the transaction as if it had been a cash sale, with no part exchange, and then on that basis applying a discount said to be applicable if the transaction had been wholly for cash.

75. In our view, the sole requirement of s 10(5) is that the value of the supply be ascertained on the basis that the parties have no relationship that would affect the

consideration paid. This turns therefore on the scope of the meaning to be accorded to "relationship" in this context. Ms Brown submitted that s 10(5) is framed in deliberately broad terms, with the express purpose that any relationship capable of influencing the value must be ignored. She argued on this basis that the car dealer is effectively influenced by the customer's desire to secure a perceived value for the part exchange into over-valuing the non-monetary consideration.

76. Ms Brown referred us to a number of provisions of the VAT legislation where there was a requirement to apply open market value. She argued that in each case there was a particular relationship that needed to be ignored in determining that value.

77. Thus, for example, she referred us to the requirement in s 18E VATA 1994 which applies open market values in cases where goods that have been subject to a fiscal warehousing scheme are found to be missing or deficient. Ms Brown argued that the relationship that should be eliminated in this case is one with the potential to give rise to fraudulent release of goods into free circulation. Another example was s 44 VATA 1994 which requires an open market value of certain chargeable assets transferred to a representative member of a group as part of the transfer of a business as a going concern (on which no VAT will have arisen). Ms Brown says in this respect that the influence of any connection (in that case there is a deemed supply by the representative member to itself) should be disregarded.

78. We do not consider that this is the right way to approach the construction of "relationship" in s 10(5). The only assumption that needs to be made is that the parties do not have a relationship that of itself affects the consideration for the supply. The purpose is not to eliminate the circumstances in which the open market value falls to be ascertained. Where those circumstances do amount to a relationship that would affect the consideration, then that relationship will be ignored. But where it does not, then the only requirement is to assume that the parties to the transaction will have no such relationship. We agree with Mr Puzey, and reject Ms Brown's submission in this respect, that to construe "relationship" so as to include anything which affects the commercial bargain struck between the parties would be to go far beyond the meaning that term can properly bear in this context.

79. It is only if it is the very relationship that affects the price that it will fall to be disregarded. Otherwise the transaction itself must be respected. We do not consider that the fact that a customer wishes to provide part of the consideration for a replacement car by means of a part exchange can amount to a relationship that itself affects the price of the replacement car. It is not the relationship that affects the consideration, but the application by the dealer of an over-allowance in preference to a discount. That was the commercial pricing choice made by the Appellant. It was a choice open to him in an open market transaction of part exchange. In our view s 10(5) does not operate to alter the effects of that choice.

80. In our view, the Appellant faces insuperable hurdles in seeking to apply a value to a replacement car different from that agreed between the parties. The Appellant and the customer are independent of one another and acting at arm's length. They agree a price not only for the replacement car, but also for the part-exchange car.

That is the very essence of an open market. We accept therefore Mr Puzey's submission that the negotiated and agreed price of the replacement car between the Appellant and the customer is the best evidence of its open market value. In the absence of any relevant relationship that would have affected the price, we consider that the application of s 10(5) gives a value of the replacement car equal to what the parties agreed.

81. Although Ms Brown sought to derive assistance from *Exeter Golf and Country Club Ltd v Customs and Excise Commissioners* [1981] STC 211, we do not think this can help in these circumstances. That was a case in which the open market value rule was applied where, as a condition of membership of the club, a member had to provide an interest-free loan to the club. That was held to be non-monetary consideration, thereby engaging s 10(3) and s 10(5). There was no discussion of the relationship question, no doubt for the reason that s 10(5) requires *any* relationship affecting the consideration to be ignored and is not solely addressing the particular relationship between the parties. In *Exeter Golf* it was clear that the parties were not operating at arm's length; that non-arm's length relationship, and any other relationship affecting the price, had to be ignored in fixing a market rate of interest for the loan. That non-arm's length feature is absent from this case.

82. We are of the view that, on a natural reading of s 10, the contentions of the Appellant must fail. The open market value of the replacement car is in each case the price agreed for that car by the parties. The value of the consideration is in each case the cash amount plus the agreed price for the part-exchange car, including the over-allowance.

83. This also, in our view, reflects EU law. As we have described, having regard to *Direct Cosmetics* and *NYC*, a domestic provision such as s 10(5) falls to be construed so as to mean, where possible, the value that is closest to the commercial value on a retail sale, namely the actual price paid by the final consumer. The use of open market value must assume transactions of the same kind, both as regards the nature of the goods and the way in which the transaction is concluded. Open market value in its strict sense, where a wholly hypothetical supply has to be postulated, is applicable only where a value cannot accurately be attributed, within the relationship between the parties, to the supply in question. In this case the customer is the final consumer, and there is clear evidence of the actual price paid by that customer. The open market value can therefore readily be ascertained by reference to the terms of the actual transaction carried out by the parties.

84. There is no scope, in our view, for arguing that the value of the replacement car is anything other than the price agreed by the parties. We do not accept the argument of Ms Brown, based on *NYC*, that the discounted price applicable to a cash sale can be taken as the benchmark for valuing the part exchange car. Not only is the discount, on the facts, not universally applicable, the part-exchange car itself has an agreed price, and is not in the nature of services as in *NYC*, to which there was no monetary value ascribed.

85. Nor can reference to the judgment of Lord Millett in *Lex Services* alter this conclusion. As Lord Millett recognised, the question whether the over-allowance amounted to a discount or an attribution of value to the part-exchange car was one of fact. It was not argued before us that on the facts an actual discount had been given. It is clear, and we find, that the over-allowance was part of the agreed price for the part-exchange car, and that the price for the replacement car was agreed without a discount. There is no scope, in our view, for treating the value of the replacement car as having been discounted. Furthermore, as *Lex Services* makes clear, a transaction involving an over-allowance in the price of a part-exchange car is not the same, even if it is economically equivalent to it, as a discount on the price of the replacement car. The transactions are different, and accordingly have a different VAT treatment.

86. That, in our judgment, is sufficient to dispose of the appeal. However, we should add that we agree with the submission of Mr Puzey that in any event the value sought to be ascribed to the replacement car by the Appellant is not an objective value. The "true value" argued for by the Appellant is simply a value adopted by the Appellant from a combination of the trade values in Glass's Guide, its own estimation of the condition of the vehicle and a value subjectively put forward by another dealer. The Appellant adopts the true value for its own purposes, including accounting and as the starting point for its own negotiation of a higher price for the part-exchange car by way of an over-allowance. We agree with the observation of Mr Puzey that this process is no less subjective that a negotiated agreement between buyer and seller, and that arguably it is more so because it is entirely one-sided, taking account only of the Appellant's view, and is thus further removed from an open market valuation. This would, as Mr Puzey submitted, be the antithesis of legal certainty.

Decision

87. For the reasons we have given, we dismiss this appeal.

Application for permission to appeal

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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 29 April 2013