[2018] UKFTT 289 (TC)

TC06519

Appeal number: TC/2016/00475

VAT – whether time of supply could occur before there was use and enjoyment of telecoms services – yes – whether pay monthly customers exchanged units for telecoms services such that the time of supply was only when there was use and enjoyment – no – whether pay monthly customers were supplied with electronic vouchers which were only taxable when telecoms services used – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HUTCHISON 3G UK LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at 7 Rolls Buildings, Fetter Lane, London on 9, 13-15 June 2017

Mr J Peacock QC, Mr M Ripley, counsel, instructed by Baker & McKensie LLP, for the Appellant

Mr N Pleming QC and Ms E Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

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	paragraph

1. The appellant appeals against decisions of HMRC relating to 12 VAT accounting periods falling between 1 June 2013 and 30 June 2016. The total amount of VAT in dispute is £414,757,878.40.

2. Perhaps as is befitting an appeal relating to the mobile phone industry, the parties' submissions and this decision are littered with acronyms and jargon. I use them as they are a convenient shorthand but to make the decision easier to follow I include the following glossary:

AYCE	'all you can eat'; in other words, an unlimited allowance of specified telecoms services within a specified period
F@H	'feel at home': the contractual rights described at §§4-6.
FVV	Face value voucher, as described in Sch 10A of VATA 1994 and §§266-273 of this decision
Handset	Device or mobile phone
MRC	'monthly recurring charge'; in other words, a fixed charge per month for PM contracts
MNO	Mobile network operation: a business with the capacity and licence to carry wireless data from mobile phones on the airwaves.
OOA	'out of allowance' – this referred to use of the appellant's telecoms services by PM customers beyond those services paid for by the MRC
PAYG	'pay as you go'; in other words, a customer who could make advance payments to H3G and then access H3G's services to

	the extent of his or her credit, as described at §§37-39.
PM	'pay monthly'; in other words, a customer contract with an MRC for a minimum term, as described at 23-36, which would permit the customer to use a specified amount of telecoms services (phone calls, texts and downloading data) per month in return for the monthly charge.
PPU	'price per unit' as described at §§76-87.
Roaming	Using a mobile phone outside the UK
SIM	The electronic card inserted into a handset which enables the handset to access the MNO's telecommunications network
SMS	'Short message service'; a text message sent by mobile phone, also referred to as a 'text'.
Text	A text message sent by mobile phone, also referred to as an SMS.
UFC	'up front charge' – a charge levied which might be levied by H3G when a device was supplied to the customer (as described at §58).

Outline of dispute

3. It was a given in the hearing that charges by the network operator (MNO) to its customers for using their device or phone abroad ('roaming charges') were normally considerably more expensive than charges for using the device in the UK. The reason for this was that foreign use of a device resulted in the customer's MNO owing foreign MNOs charges for the use of their networks, and this was passed on to the customer in the roaming charges.

4. Except with respect to one product that had been previously available from H3G but which is not relevant to this appeal and will not be referred to again, up to August 2013 H3G was like other MNOs based within the UK and had contractual terms with its customers which entitled it to levy roaming charges on its customers for any foreign use of their device. However, on 27 August 2013, the appellant unilaterally changed the contractual terms it gave its PM customers. PM customers were those who had contracts which entitled them to set allowances of phone calls, texts and data downloads (collectively 'airtime') per month in return for a monthly fee.

5. After that date, use of their device in certain specified locations abroad no longer incurred roaming charges. Instead, usage of the device abroad counted towards the customers' set allowances for phone calls, texts and data downloads. If the customer remained within his or her allowances in that billing period, effectively there was no marginal cost to them in using the phone in any of the specified foreign destinations; the charge was now wrapped up in the MRC. H3G referred to this new element of the contractual package offered to its customers as 'Feel at Home' or 'F@H'.

6. Originally only seven foreign destinations were within the F@H package; over the years, the appellant added more and more countries to the F@H package so that

by the time of the hearing there were 42 F@H destinations with another 18 about to be added to the list.

7. Use of the H3G's telecoms network from a country which was at the time not a F@H destination would be charged as it had been before F@H was introduced: there would be a roaming charge but such use of the phone would not be counted towards the airtime allowances of a PM customer.

8. The appeal was not concerned with business to business supplies so I do not discuss the VAT position of such supplies. The rest of this decision is therefore only concerned with business to consumer transactions and it should be assumed that those are the only type of supply discussed in this decision notice.

9. The law provides that business to consumer ('B2C') telecommunications services are not subject to UK VAT if they are 'effectively used and enjoyed' outside the EU. I set out the statutory provisions at §§170-171 below. H3G was liable to VAT on supplies of telecommunications services to its customers which were used and enjoyed within the EU. It was not liable to VAT on charges made for use of the device outside the EU.

10. The appellant saw the introduction of F@H as resulting in a fundamentally different VAT treatment of the monthly recurring charges ('MRC') which PM customers paid for their set allowances of airtime each month. HMRC's view was that the MRC should be in its entirety subject to VAT, but subject to an adjustment after the event to the extent that it was shown that the telecoms services had in fact been used outside the EU in a F@H destination and therefore such use paid for by the MRC.

11. The appellant's position was that the MRC should not be subject to VAT at the time it was paid. On the contrary, the appellant should only be subject to VAT on the airtime units actually used within the EU. This was far more than a timing difference: a significant proportion of the allowances of airtime for which PM customers paid with their MRC were never used at all. For instance, a customer might have a contract which entitled him or her to 200 minutes of phone calls per month but only use 98 of them in a particular billing period, with only 96 of those 98 being used within the EU. H3G's position was that no VAT at all was due on the MRC paid for these 200 minutes until after the end of the billing period and then VAT should only be paid on the actual airtime which had been 'used' within the EU (96 minutes), and no VAT paid on either the airtime within the allowances which had not been 'used' nor on the airtime used outside the EU (104 minutes). HMRC thought VAT was due on the full MRC at the time of payment, with a later repayment to reflect the 2 minutes actually used outside the EU.

12. The evidence established that the proportion of H3G's customers' airtime allowances used outside the EU was about 1%: the proportion of customers' airtime allowance not 'used' at all was very much higher and is the principle reason why the claim the subject of this appeal was so very high.

13. The appellant based its case on two (alternative) propositions:

> (1) The payment of the MRC did not trigger a tax point because all the relevant charging information was not known at the time of payment ('the tax point issue') and/or because the MRC was paid for units which were only converted into telecoms services when actually used ('nature of supply issue'). Both parties agreed that these questions gave rise to the question of whether the MRC on packages which included a handset were single or multiple supplies.
>
> (2) The consideration for the issue of a voucher is to be disregarded on its issue, and VAT only paid to the extent the voucher is exchanged for goods or services subject to VAT in the UK. The appellant considered that PM contracts amounted to electronic face value vouchers ('FVV').

The appellant needed to win only on one of its alternative propositions in order for its appeal to succeed.

The Facts

The witnesses

14. The appellant called three witnesses. Mr Thomas Malleschitz had been chief marketing manager for H3G since 2011, and prior to that held various roles in marketing in various H3G group companies. He was a key person in the introduction and continuing operation and expansion of F@H.

15. Mr Justin Cecil Bass was a qualified solicitor and director of legal and regulatory matters for H3G UK Ltd. He had been employed by them since 2003. His job was to ensure H3G fully complied with legal and regulatory requirements, but in so far as possible in a manner that fitted in with H3G's business plan.

16. Mr Darren Purkis was deputy chief financial officer for H3G UK Ltd from November 2013. He had joined H3G in a financial role in 2009 having had other finance roles in other businesses prior to that date.

17. There were two factual issues that were particularly contentious, and they were:

> (a) the reason why H3G's invoices referred to 'units'; and
>
> (b) whether, when a handset was provided to a customer, it was sold to them for the up front charge ('UFC') (if any) and nothing else or whether the MRC was paid, at least in part, in respect of it.

18. I had difficulty in accepting as reliable any of the reasons I was given for why H3G's invoices referred to 'units' because the reasons did not, as explained below at §§83-113 in detail, make sense. Evidence on less contentious issues (such as Mr Malleschitz' evidence on why F@H was introduced and why it was successful) was easy to accept as the explanations given by the witness made commercial sense;

however, such evidence contrasted with the evidence I was given about the reasons why H3G referred to units on its invoices, which did not make commercial or legal sense. The lack of commercial reality led me to consider the evidence on the purpose of the 'units' unreliable. That evidence was largely given by Mr Malleschitz and Mr Bass.

19. It was largely Mr Bass who gave the evidence about the handsets. My understanding of Mr Bass's evidence was that he had genuinely formed the opinion that any handset was sold by H3G for the UFC if there was one, or for nil if there was no UFC. I was given to understand that it was commercially expedient for H3G to hold that view, but it was no more than an opinion and not evidence and I did not rely on it. In so far as what the witnesses said about the MRC not including payment for the handset should be seen as being evidence rather than merely opinion, I reject it as it was not consistent with the documents and commercial reality. I explain this in more detail below.

20. So, in summary, I accepted the evidence of all three witnesses save in respect of these two contentious issues. And in so far as they were expressing opinions rather than evidence, I did not rely on what they said. The following findings of facts are based on the oral evidence which I did accept and on the documents.

H3G's contracts for telecommunications services

21. Whether the customer was a PAYG or a PM customer, and whether or not the customer got a device from H3G, H3G would invariably provide the customer with an H3G SIM card, which was essential to enable the customer to access H3G's telecommunications system. The SIM-card of necessity also came with its unique telephone number which was also essential to enable the customer to access H3G's telecommunications system. All H3G customers were permitted to receive phone calls and texts free of charge. They were also permitted to make free calls to the emergency services: this was a regulatory requirement.

22. H3G charged for airtime, by which I mean the use of the SIM card to make phone calls, send texts or access/download data on the internet. Phone calls were charged per minute or part of a minute; texts were charged for per text; data access was charged for per MB or part MB of data accessed/downloaded.

PM contracts

23. A customer could enter into a variety of PM contracts. He or she could take out a SIM-only contract for 1 or 12 months. In return, the customer would have to pay a one-off MRC (for the 1 month contract) or 12 MRCs (for the 12 months contract). It is perhaps a contradiction in terms to refer to the one-off payment by a one month SIM-only customer as an 'MRC' but for the sake of simplicity I will do so. The same VAT issue arises on true monthly recurring charges and on the one-off charges paid for a one months' allowance of airtime.

24. If a customer wanted a device with his airtime contract, the contract would be for 24 months and therefore the MRC would be payable for 24 months. Under some such plans there would be no upfront charge ('UFC') for the device; other plans would, in addition to the MRC, include an upfront charge for the device. The evidence, which I accept, was that the UFC would vary between various packages but in all cases would be lower than the normal retail price of the phone.

25. Under all these PM packages, the customer would be entitled to make a set number of calls, send a set number of texts and download a set number of MB of data.

26. I was given varying statistics on the % of PM customers with handsets compared to those who took out SIM-only contracts, depending on whether one was looking at the historic position, the current position or only at the customers taking out new contracts. Nevertheless, I am satisfied that the breakdown between SIM-only and with handset customers was fairly even over time, varying between 40-60%.

Exceeding the MRC

27. Where a PM customer reached the limit of his or her monthly allowance of phone calls, and then attempted to place a further call, technology was sufficiently advanced for H3G (acting via its computers) to make a virtually instantaneous and automated decision whether or not to connect the call. The computer would make this decision based on an instantaneous credit check of the customer, or, if the customer had set one, in line with the customer's maximum credit amount.

28. If the call was connected, the charge levied would be described as an 'out of allowance charge' ('OOA charge'). The rate would normally be higher than the price per minute paid under the relevant MRC for a SIM-only customer, which would reflect the fact, as would be expected, that H3G would give more favourable rates to customers who agreed to a level of commitment on their monthly spend with H3G. The same was true of texts or data downloads in excess of the allowance.

29. OOA charges form no part of the appeal as they were charged per call/text/data download and the place of use and enjoyment would be known before payment was due so none of the issues which arose in respect of MRCs arose in respect of OOA charges.

AYCE

30. Some of the packages offered by H3G gave unlimited allowances for calls and/or texts and/or data downloads. These were described as 'all you can eat' or 'AYCE' allowances. It became standard across H3G packages to offer PM customers AYCE allowances on texts for the seemingly counter-intuitive reason that no one wanted them (texting was not particularly popular) and because H3G's competitors offered AYCE texting.

31. That part of any package that was AYCE was not a part of this claim. Where any package that was entirely AYCE (ie AYCE calls, AYCE texts and AYCE data)

no part of the package was a part of the claim the subject of the appeal. Where only part of a package was AYCE, the methodology to split the MRC between the AYCE part and non-AYCE part of the package was not, as I understood it, agreed, but the parties expected to be able to agree it were I to allow the appeal.

32. As I understood it, it was the appellant's choice to exclude AYCE allowances from the appeal. The reason for this was not particularly clearly explained although I presume it was due to the impossibility of calculating the 'unused' element (see §115) of an AYCE allowance. HMRC suggested that the exclusion of AYCE allowances from the claim indicated that there was a flaw in the rationale to the appellant's claim. I do not think it matters: the appellant did not choose to claim for them, so I do not have to decide whether, if I accepted the claim in principle, AYCE allowances should be a part of the claim.

Cancellation charges

33. Cancellation of a PM contract by the customer would leave the customer liable to pay cancellation charges equal to the outstanding MRC less a discount; the amount of discount was set at the minimum permitted by the regulator, which was 3% in most cases but 10% where the customer had upgraded the contract.

34. Mr Bass' evidence, which I accept, was that in some cases of cancellation H3G would for reasons of customer goodwill, charge a smaller cancellation fee than permitted by the contract, or occasionally waive it altogether.

Material detriment

35. Mr Bass understood that the law was that if H3G made any contractual changes which were of 'material detriment' to their customers, the customers would have the right to withdraw from the contract without charge. I was not referred to the legislative provisions but this was not in dispute: it also explained Mr Bass' clear concern to ensure that H3G would never made such changes, particularly when tied with his evidence over H3G's pricing structure of 'with handset' packages (see second paragraph under (e) in §72 below).

36. The introduction of F@H to PM contracts by H3G was a unilateral change to contracts but (as I understood it) it was regarded by H3G as a universally beneficial change to all their affected customers and so it was not of 'material detriment' and did not trigger the right for customers to withdraw from their contracts.

PAYG contracts

37. A PAYG customer had no obligation to pay anything and did not receive an entitlement to a set amount of airtime. The PAYG customer would be entitled to make calls, send texts and/or download data up to the limit of his or her credit with H3G at the time in question. The credit with H3G was obtained by paying an amount of the customer's choosing to H3G as and when the customer chose to do so.

38. In addition to simply using up his or her credit by making calls, texts, and data downloads, the PAYG customer could use his or her credit with H3G to buy an 'add-on'. An 'add-on' entitled the PAYG customer to a set allowance of calls, texts and data within a one month period. Purchasing an add-on was effectively the same as becoming a 1-month SIM-only contract customer. It was a one-off MRC, and, on my understanding, such add-ons were the subject of this appeal as the same issues arose in respect of them as arose on other MRCs.

39. A PAYG customer's credit with H3G was indefinite subject to certain limits: the credit would expire if no portion of it was used within 6 months and if there was no top-up within 6 months. As long as some part of the credit was used every 6 months months or topped-up every 6 months, the remaining credit was indefinitely valid.

The difference between PAYG and PM customers

40. PAYG customers paid an amount of their choice to H3G. That amount could be applied (at the prices applicable to PAYG customers) to make calls and/or texts and/or data downloads. The unused balance would stand to the PAYG's customer's credit until it was used or expired. It would expire as explained above.

41. H3G's position, and Mr Bass' evidence, was that there was no fundamental difference between a PAYG and PM customer: the difference was simply the degree of commitment. I take Mr Bass' 'evidence' on this to be a matter of opinion.

42. Mr Bass pointed out that a PAYG customer could use the money held by H3G to his or her credit to buy an 'add-on', as explained above. I accept, as I explained above, that where an add-on was purchased, the PAYG customer was like a PM customer for the period that the add-on was valid.

43. But other than when an add-on was purchased, I do not accept that a PAYG customer was in the same position as a PM customer in all respects. However, the distinction between them was not in the level of commitment. A 1 month SIM-only customer had no more commitment to H3G than a PAYG customer: neither had an obligation to pay to H3G any more money than they had already paid. It seems to me that the difference between a PM and PAYG customer was in the obligations owed by H3G.

44. A PM customer was entitled within the contractual period to an agreed amount of calls, texts and data downloads. H3G had no such obligation to a PAYG customer nor did the PAYG customer have any rights to an agreed amount of calls, texts and data downloads within an agreed period. His right was, over an indefinite period, to allocate the amount standing to his credit with H3G to such calls, texts and data downloads as he chose at the prices H3G charged until his or her credit was all used up or expired.

45. The PAYG customer, in that sense, had better rights than the PM customer. Unlike the PM customer, he could allocate his credit between calls, texts and data as

he saw fit. A PM customer, on the other hand, only had his allocated allowance and could not swop unused portions of allowance for one of the 3 types of airtime to one of the other allowances. So, for example, a PM customer who had used all his phone allowance before the expiry of the billing period would have to pay OOA charges on any further calls within that billing period even if he had not used up his allowance of texts and data downloads.

46. Moreover, the PAYG customer's credit was indefinite (within certain limits). In complete contrast, a PM customer's allowances expired, whether used or not, at the end of the billing period. A PAYG customer's credit would only expire, as I have said, if there was no activity on the account for 6 months: it was open to a PAYG to ensure his unused credit lasted indefinitely by ensuring that there was a minimal amount of activity on his account every 6 months. A PM customer could do nothing to keep the unused portion of his airtime allowances: they expired automatically at the end of every billing period. He had to use them within the month, or lose them.

47. It was implicit in the evidence that a PAYG customer in effect 'paid' for his greater freedom because the effective per call rates charged by H3G would be greater for a PAYG customer than a PM customer, whose rates were effectively discounted to reflect his agreement in committing to pay an MRC. While such a pay structure makes commercial sense, it is not relevant to the issue before the Tribunal.

Reasons why F@H was introduced

48. I summarised above the F@H product. I had a great deal of evidence about why F@H was introduced and later expanded to additional foreign countries. It is of little relevance, but I outline it here. In 2003, H3G was a new MNO on the UK mobile market. For the first decade, it gained a small percentage of the market by offering low prices. It decided to change its marketing strategy. One of its prime new strategies was the introduction of F@H on 27 August 2013. That product, with others, has been successful in increasing H3G's market share and its profitability.

49. It achieved this objective because roaming charges were, as is well-known, high. Mobile phone customers without F@H in their contract, who continued to use their phone outside the UK, might come home to receive a very large and unexpected bill, something referred to in the industry as 'bill shock'. However, after F@H was introduced, a PM customer of H3G who went to a F@H destination, and continued to use his phone, would have no bill shock: there would be no roaming charges.

50. This did not mean that the use of the phone in a F@H destination was without charge by H3G: on the contrary, it now counted towards the use of the customers' monthly allowance. And once the allowance was exhausted, the customer would have to pay OOA charges on any excess telecoms services used by him or her.

51. F@H was a costly product to H3G as it meant that H3G could no longer levy roaming charges on its customers when they used their phone in a F@H location, while H3G remained liable to pay the foreign MNO's charges for that use of the phone. H3G minimised the actual cost to it of F@H by negotiating favourable rates

with a limited number of networks in the foreign destinations and then programming its SIMs so that the phones only connected to those networks when used in those foreign destinations. The need to provide good coverage throughout a F@H destination at a reasonable cost to H3G was the main reason that the number of F@H destinations which H3G could offer had been slow to increase: it had not always been possible to agree a rate affordable to H3G with sufficient foreign MNOs to provide good coverage in a particular jurisdiction.

52. H3G considered F@H had been very successful, allowing it not only to substantially increase its customer base but also to improve on its profit per customer. It was able to improve on its profit per customer because, due to its products now including F@H, it no longer had to offer the lowest prices in order to attract and retain customers. It had therefore increased its prices.

53. The nature of the F@H product meant that it attracted not only those customers H3G wanted but some it did not (or at least not on that tariff). F@H was therefore limited to H3G's non-business UK-resident customers. For that reason, this appeal only concerns H3G's agreements with domestic UK customers.

54. When F@H was introduced, it was introduced across the board to all H3G's customers. Some years later, H3G decided to offer 'Essentials' plans which did not include the various extras, such as F@H, that had previously formed part of every package offered. The prices for the Essentials plans were correspondingly lower. The revenue from the sale of Essentials plans therefore forms no part of this appeal as those plans did not include F@H.

55. H3G was still offering F@H at the time of the hearing, and planned to continue to do so even though roaming charges within the EU were outlawed on all mobile networks as from 15 June 2017 (which was coincidentally the fourth day of the hearing). They expected F@H to remain an attractive product because by 2017, F@H applied to a significant number of destinations outside the EU.

56. Mr Malleschitz accepted that F@H's success had been gradual, taking a number of years before it had significantly affected H3G's profits. His explanation for this was that, as more and more countries had been added as F@H destinations, the product had become more attractive to consumers. Secondly, H3G had become better at marketing it. One of its marketing strategies (since 2015) had been to send a text message to its customers on their return to the UK from a F@H destination telling them how much money they had saved on their phone usage in the F@H destination because they had not had to pay roaming charges. I refer to this congratulatory marketing text below.

The device

57. 'The device' was also referred to in the evidence as a 'handset' or mobile phone, and would include within its meaning the now ubiquitous smartphone. I will use the terms interchangeably.

58. The devices relevant to this appeal supplied by H3G were those supplied with an airtime contract. In such cases, the customer might pay an upfront charge on the device (a 'UFC') or might not.

59. The evidence was that the devices supplied by H3G to its customers were unlocked. In other words, they were not limited in operation to the SIM-card supplied by H3G but could be used in conjunction with any SIM-card. A device might well also have capabilities that could be accessed without a SIM-card being inserted into it: the differences between a computer and a mobile phone continue to diminish.

60. There was also evidence that was not explored in any great detail that in some cases where H3G agreed to provide a device to its customer as part of a package, title to the device would be transferred to the customer by a third party. In all other respects, the agreement with the customer and H3G was the same: the MRC and UFC (if any) was payable to H3G. The only logical assumption is that in these cases H3G reimbursed the third party for the cost of the device provided to its customer, in the same way that it paid its suppliers for devices to which it did take title before passing title to its customers. The following analysis applies to all devices, whether title passed to the customer directly from H3G or from a third party under arrangements with H3G.

One contract or two?

61. Mr Bass's evidence was that the device, when supplied to a PM customer by H3G, was supplied under a separate contract to the contract for airtime and it was not possible to say that any part of the MRC was paid for the device.

62. This evidence was hard to accept as it was contrary to the economic reality of the position as shown by H3G's pricing structure. In particular, it was clear from the documents that a particular airtime contract (in other words, so many minutes/texts/data) would be available to customers with or without a device. The MRC was significantly lower if a device was not included in the package: indeed, as Mr Pleming demonstrated, the difference between the two prices over 2 years (one for SIM-only and one for a package with a device and no UFC) was an amount relatively close to the normal retail cost of the phone with a small mark-up. Other documents clearly showed that the MRC for various packages including a particular phone and with the same amount of airtime went down as the UFC went up, clearly indicating that the amount of MRC was tied directly to how much, if any, the customer paid up front.

63. There was nothing surprising in this: it is what commercial sense dictates. H3G was not in the business of giving away its assets or selling them for less than they were worth.

64. It was clear from Mr Bass' evidence that H3G had adopted the position that it did not supply devices on credit. Mr Bass recognised that, were H3G to supply phones on credit, it would have to comply with Consumer Credit Act requirements and H3G did not do so. He was aware of at least one MNO which did do so and

aware of the compliance burden it imposed. Mr Bass' evidence that H3G did not supply phones on credit seemed to me to be a case of the wish fathering the thought: CCA requirements were burdensome and therefore to avoid them H3G desired to structure its business so that it did not sell phones on credit. Whether it was actually successful in avoiding liability for regulation under the CCA was not a question which arose in this Tribunal and one I will not address.

65. But the clear desire to avoid falling foul of the CCA appeared to me to be at the root of Mr Bass's statements referred to in §61 above, and whether what he said on this was properly seen as evidence or merely an expression of an opinion, either way I did not consider it unbiased or right. He was challenged extensively on what he said and appeared very reluctant to accept what was obvious, which was that whether or not any particular customer took a device from H3G, the value of the chosen device if s/he did, and any UFC s/he agreed to pay, directly influenced the amount of the MRC that his or her agreement with H3G would oblige that customer to pay.

66. The evidence was that, before 29 May 2015, H3G included the device and airtime in a single written document; there were two separate documents after that date. I find it makes no difference. In all cases, the customer had to agree to pay the MRC in order to obtain title to the device for 'free' or for only an UFC.

67. Even where the 'contracts' were ostensibly separate, with the 'contract' relating to the device having a term which stated it did not cover the airtime and the 'contract' relating to the airtime having a term which stated that it did not relate to the supply of the device, they were clearly interrelated. Both the services 'contract' and device 'contract' defined the MRC as the price for the 'package' as set out in the price guide. And the price guide listed the packages, making it clear which package included a phone. So in effect the price in both contracts was defined as being paid for both the airtime *and* the device (where one was supplied).

68. H3G's customers could have been in no doubt that the MRC reflected the phone chosen as well as the airtime package chosen. Not only was this clear on the face of the contractual documentation because they could not obtain the phone for nil or the agreed UFC unless they signed up to a 24 month MRC, it was clear in the marketing material. In a step by step guide, published by H3G to help customers choose a suitable package, it included the (clearly accurate) statement:

> 'your monthly charge will depend on device chosen and the amount you've chosen to pay upfront'....

Elsewhere marketing material made the (accurate) statement that PM contracts 'include the phone as part of your package'. And the price guide advertised 'plans...which include a device...' and 'Pay Monthly Package which includes a device....' and stated 'your monthly charge will depend on the mobile or device chosen'.

69. Mr Bass' final position seemed to be that there were two separate contracts, one for the sale (or gift, if there was no UFC) of the phone and one for the airtime in exchange for the MRC, but he accepted that there was a direct link between them as

the price of the device and UFC (if any) directly influenced the amount of the MRC. He maintained his position that, while the MRC had to reflect the cost of the phone provided (to the extent not paid for by any UFC), nevertheless customers were not paying for the phone when they paid the MRC.

70. In reality, Mr Bass was only expressing an opinion. It was his opinion that as a matter of law there were two contracts, one for the device and one for airtime, and that in law no part of the MRC was paid for the device. His evidence or opinion that there were two contracts rested on the fact that H3G passed title to the device to the customer at the start, provided a receipt for the device and (he said) had separate written contracts.

71. Mr Peacock's position was that evidence showed that as a matter of contract law the MRC was not consideration in whole or part for the device. In particular, he said:

> (a) The title passed to the customer at the outset and s/he would be given a receipt;
>
> (b) The documentation made it clear that the device was a separate contract to the contract for airtime;
>
> (c) The obligation to pay the MRC was not connected to the supply of the device.
>
> (d) The MRC was payable at the same level if the contract was not brought to an end after the 24 months;
>
> (e) If the customer terminated the contract early, H3G was not entitled to recover the device; H3G was only entitled to the cancellation fee and got no recompense for the value of the phone.

72. I do not accept that any of the above matters indicate that the provision of the device was not a part of the contract for which the customer paid the MRC.

> (a) While it is true that title passed on the start, that is not incompatible with the price for it being paid in instalments after title had passed. It is up to the parties to agree when title is to pass and when the consideration is to be paid.
>
> (b) I do not accept that the documentation did make it clear that there were two separate contracts for the reasons given at §§66-68; to the extent that there was a clear term that there were two separate contracts, that was be inconsistent with the actual agreement between the parties which was that the customer could only get title to the device for free or an UFC less than its retail value if at the same time the customer agreed to enter into an airtime agreement and pay the MRC;
>
> (c) I do not accept this for the reason given above. The obligation to pay the MRC at the level charged was a direct

consequence of the provision of the particular device agreed by the parties;

(d) It was true that the evidence indicated that the cost of the device was recouped out of the MRC after the fixed 24 month term and that was to be expected. It was also true that if the customer took no steps to terminate the contract at that point, s/he continued to be liable to pay the MRC at the same rate as before. Nevertheless, the customer was entitled to bring the contract to an end: it was only through apathy that some customers might continue to pay the MRC at a level that exceeded what they would have to pay if they switched to a SIM-only contract, as their original contract entitled them to do at the expiry of 24 months. However, none of these matters indicated that the device was not a part of the contract in respect of which the MRC was paid. The continuation of the contract with the MRC at the high level after the 24 months was effectively voluntary as the customer could have brought the contract to an end at that point without a penalty. The significant point was that the customer would not get the phone without the obligation to pay the MRC for first 24 months, whatever the customer did or did not do after the 24 months expired.

(e) This last point was clearly wrong: while title to the phone passed at the outset, if the customer then reneged on the deal, he became liable to the cancellation charges. The cancellation charges were directly related to the MRC (see §§33-34). As the evidence was that the MRC reflected the full cost of the phone (see §62-68), it follows that the cancellation charge reflected the cost of the phone. That analysis is not altered because the cancellation charge was at a discount on the outstanding MRC charges: a discount was to be expected as the customer would no longer get the airtime allowance to which the MRC had also entitled him. Nor does it matter that sometimes H3G chose to waive the cancellation charge in whole or part: that was a matter for H3G to weigh the economic value to the company of insisting on its legal entitlement or the goodwill that would be generated when letting a person off his or her full liability. It does not alter the fact that H3G was entitled to the cancellation charges under the terms of the contract.

Indeed, one small additional point here is that a clear theme through Mr Bass' evidence was his concern to ensure that H3G never made a detrimental change to its existing contracts, because doing so entitled the customer to bring them to an end *without any liability* to a cancellation charge. This concern appeared to be based not just on a desire to have customers tied in to paying for airtime on an ongoing basis but because in

practice (as Mr Bass did ultimately accept) part of the MRC reflected the full cost of the phone. If a customer, having received title to the phone, was then able to cancel without liability to pay the MRC, the customer would effectively get the phone for free (save to the extent of any UFC and any MRC already paid) and H3G would be out of pocket on the transaction. It was for this reason, at least in part, that Mr Bass was concerned that there should be no detrimental changes to existing contracts. Such a concern made sense but also indicated, what was plain from other factors, that part of the MRC was intended to reflect the full cost of the phone (less the UFC).

73. I find that as a matter of law there was a single contract when a customer selected a package which included a phone. This was obvious because the customer was unable to acquire title to the phone without agreeing to pay the MRC for the 24 month contractual period. The package entitled the customer to acquire immediate title to the device, and entitled the customer to make calls/texts and use data up to the agreed limits; in return for these benefits the customer was liable to pay the UFC (if any) and the MRC. It was not possible to acquire the phone from H3G for nil or for an UFC less than its retail value unless the customer also agreed to take an airtime contract with concomitant liability to pay the MRC. So where the customer purchased a device from H3G with an airtime contract, there was a single contract for both in return for the UFC (if any) and the MRC. So the UFC (if any) and the MRC were paid for both the phone and airtime.

74. I note in passing that Mr Purkis' evidence was that H3G's accounts divided the MRC between the device and the airtime on a 'fair value' basis. His view was that in law there were two separate contracts, with the customer paying only £0 or the UFC for the phone, and the full MRC for the airtime. Accounting standards, however, required the MRC to be divided up between the phone and telecoms services. Tellingly, Mr Purkis referred to the agreements for device and airtime as 'bundled' contracts, reflecting the fact that a customer could not have the device without agreeing to pay the MRC.

75. In so far as Mr Purkis considered that in law the MRC was not paid for the device, it was a matter of opinion and I do not consider it correct. However, I do accept that accounting treatment does not dictate the legal treatment. Nevertheless, in this case, it does appear that the accounting treatment was in line with the legal position. In law, in my opinion, the MRC was paid in part for the phone.

Units and PPUs

76. It was part of the appellant's case that it supplied units of telecoms services to its customers. I discuss below the significance of this to VAT law if proved to be true. Here I consider the facts.

77. From around 1 June 2013, which was shortly before the introduction of F@H, the appellant changed its invoices. Prior to that date its invoices made no reference to units; after that date the invoices contained references to units. An invoice from immediately prior to this date contained text which said:

> 'Your package includes minutes, texts, three to three minutes and all-you-can-eat data...' then sets out how many of each;

78. An invoice from 2016 contained text which said:

> 'your package is made up of units entitling you to the following allowances...' and then sets out how many minutes, texts and MB of data were included.

79. The units and the 'price per unit' ('PPU') calculated by H3G were not a part of the written contracts or marketing material (save as specifically mentioned below).

How were PPU calculated?

80. The PPU was calculated by someone within H3G taking the total MRC for a package (comprising a set number of minutes, a set number of texts and a set number of MB of data) and allocating that MRC between them.

81. I find that the calculation of the PPU was arbitrary in the sense that it was not directly influenced by market forces or what its customers wanted, because the PPU had absolutely no impact on H3G's customers or the market. It was an entirely subjective view formed by employees of H3G: nevertheless, I accept Mr Bass' and Mr Purkis' evidence that H3G attempted to reflect market values in its allocation of the PPU between the allowances for phone calls, texts and data within any single plan.

82. It meant that within a single package or plan, while the PPU for each minute of a phone usage would be the same, the PPU for phone usage would not be the same as the PPU for a text or the PPU for a unit of data. Moreover, each 'plan' would have different PPUs to any other plan. This was so because MRCs varied between plans (depending on packages available at any time, what device was linked to the plan and what if any UFC paid). Moreover, H3G's perception of relative value of phones/texts/data to each other changed over time. The PPUs allocated to any particular plan would remain constant throughout the life of the plan.

Did PPUs have a commercial purpose?

83. Mr Bass' and Mr Purkis' evidence was that H3G started to calculate PPUs for individual plans some time before 2013 for management reporting purposes and Ofcom statistics. In other words, PPUs started life as a management accounting tool, internal to H3G. What I found difficult to understand or accept was the explanation given for why H3G, in mid-2013, started to put 'units' on its customer invoices.

84. As a matter of common sense, the units appeared arbitrary, irrelevant and meaningless to the customer and, far from making the invoices clearer, made them more opaque.

85. PPUs were arbitrary so far as a customer was concerned as the customer had absolutely no possibility of influencing them. They did not form a part of the contractual documentation a customer would see before committing him or herself to the deal, but were only shown on invoices received once a customer was committed to the contract. Even if PPUs had been referred to in the contracts, as they had no impact on the customers' obligations or rights, they would have been of no real interest to the customers.

86. PPUs were irrelevant to a customer because a customer agreed to pay the MRC in return for a set number of minutes, texts and MB of data. And that is what H3G delivered. H3G's decision to describe in the invoices each minute, text, and MB as a 'unit' neither added anything to the agreed deal, nor took anything away from it. In particular, the units were not interchangeable: so, for example, and as I have said above at §45, if a PM customer had used up all his or her minutes (or units) of phone calls before the end of a billing period, s/he could not transfer unused texts (or units of texts) to his or her allowance of phone calls.

87. The PPUs was meaningless to customers because, apart from anything else, the units had different prices. A unit (in other words a minute) of phone time, a unit of text (in other words, a single text) and a unit of data (in other words, a MB of data) each had a different price. Moreover, there was no evidence that any other MNO published its prices in units so they could not be used for purposes of comparison. On the contrary, plans were sold as so many minutes of calls, so many texts and so many MB of data for a specified MRC and that was how a customer could compare the competitiveness of the various plans offered by the various MNOs.

88. Three business purposes for putting PPUs onto customer facing documents were suggested to me by the witnesses and I will consider each of them:

(a) Clearer invoices

(b) Marketing

(c) Regulation

Did PPUs result in clearer invoices?

89. By introducing units into invoices, I find PPUs actually complicated rather than simplified them. It increased the words used, without adding anything to the sense. Mr Pleming made the valid point that the invoices would read better by deleting the reference to units, as shown by omitting the text in italics from the text in the invoice, as follows:

> 'Depending on the package you choose, you may receive an allowance made up of *units being voice units, text units and data units, which entitled you to a specified number of* voice minutes, text messages and/or data'

Which would be more concise and more clear if rendered as:

> ‘Depending on the package you choose, you may receive an allowance made up of voice minutes, text messages and/or data’

90. Despite his evidence that PPUs made invoices transparent, Mr Malleschitz was unable to give an explanation of any additional information the PPU would give to a customer reading its invoice. Indeed, it created a potential for confusion. A customer might think that the PPU was the OOA charge, which would be wrong as OOAs were usually higher than the ‘normal’ within allowance charge rolled up in the MRC. While Mr Bass said he was not aware of customers calling in with complaints because they had confused the PPU with the OOA charges, he accepted H3G did try to make it clear to their customers that the PPU was not the OOA. There was text on the invoices which explained that the PPU was not the OOA charge.

91. Clear invoicing was a real concern to H3G. Mr Malleschitz’s evidence, which I accept, was that providing clear and up to date information to their PM customers enhanced customer retention and fundamentally would make H3G more profitable. H3G had an enhanced digital billing project a part of which was to make invoices easier to understand. They introduced an ‘app’ so customers could see their account online. Each customer’s online account would usefully show exactly how much of their monthly allowance they had used in up to that point in time.

92. While this push to provide better information to its customers made sense, it sat oddly with the evidence on PPUs, as PPUs made H3G’s invoices less easy to understand and clearly did not contribute to a customer’s ability to see how many within allowance calls/texts/data he or she had left to use in any billing period.

93. Indeed, it was obvious that PPUs did not convey any information to H3Gs customers: by 2016 references to PPUs had been removed from the front of the invoice and from then on they were restricted to the ‘small print’ on another page. Mr Malleschitz was unable to explain, if PPUs were as important as he tried to say, why this was so.

94. It was also significant that PPUs were not included on the invoices for business customers: I was not convinced by Mr Malleschitz’s explanation that PPUs were not on business invoices because H3G did not wish to attract such customers. Firstly, on the face of a business customer invoice there was a reference to some extra ‘free’ calls which was clearly an attempt by H3G to market its services to business customers, and, secondly, since expressing PPUs on invoices did not appear in any way to give private customers any information, business customers seemed advantaged by the absence of PPUs from their invoices. H3G’s statement in the invoice that the purpose of units was ‘to help you understand the value you’re getting from your plan’ seemed quite wrong.

95. Because I considered PPUs clearly detracted from rather than enhanced H3G’s invoices, and confused the message to their customers, and because none of the witnesses could give me a credible explanation of why they thought PPUs enhanced H3G’s invoices, I was unable to accept as reliable their evidence that PPUs were introduced on H3G’s invoices to enhance them.

Did PPUs enhance marketing?

96. There were two possible threads to the suggestion that PPUs improved H3G's marketing. The first was that PPUs could be used by customers to compare the deal they received from H3G with the deals on offer by other MNOs. However, Mr Malleschitz's evidence was that he was unable to say whether or not any of H3G's competitors used PPUs. Clearly, therefore, PPUs were not introduced to allow customers to compare PPUs between MNOs.

97. Moreover, the division of the MRC between calls, texts and data was a subjective decision made by H3G. Any competitor calculating a PPU would similarly have to make a subjective decision on that division. Therefore, no meaningful comparison could be made between PPUs even if H3G was not the only MNO to make its PPUs known to its customer base. (For instance, two MNOs might offer an identical package of calls, text and data allowances for an identical MRC, but their (hypothetical) PPUs could be quite different because the attribution of the MRC between the three allowances (calls/text/data) would be subjective to each MNO.) In any event, such a comparison would be pointless unless the customer was comparing virtually identical packages. And if the packages were virtually identical, a much simpler comparison would be to compare the MRC and UFC required to be paid. PPUs were useless for the purpose of comparing packages. This reinforces what I said in the previous paragraph: I do not accept as reliable the suggestion that PPUs were introduced to allow customers to compare their H3G package with packages offered by other competitors.

The congratulatory marketing message

98. The second reason given for PPUS on the invoices given by Mr Malleschitz was that PPUs enabled H3G to send the congratulatory marketing text to customers returning to the UK. As I said at §56, the 'congratulatory marketing text' was a text message sent by H3G, introduced in 2015, to customers returning to the UK informing them how much they had saved by having a contract which included F@H. The calculations were done by working out the (notional) roaming charges on the phone calls/texts/data usage made outside the UK and deducting an amount reflecting a portion of the MRC allocated to that usage of the phone, to leave an amount the customer was said to have 'saved'.

99. The evidence, which I accept, was that the congratulatory marketing text increased customer retention and was therefore a valuable marketing tool to H3G. However, that does not mean I accept that including units on customer invoices had a commercial purpose.

100. Firstly, it was clear that the PPU was introduced on bills two years before the introduction of this congratulatory marketing text message to returning customers. That marketing purpose therefore could not have been the reason why PPUs were introduced on the invoices.

101. Secondly, while I accept that H3G, in order to send this congratulatory marketing text, had to make an arbitrary division of the MRC between calls, texts and

data in order to be able to calculate how much their customers had 'saved' by not paying roaming charges, it did not need a PPU to do so. It merely needed to know the price per minute, per text and per MB as those were the units on which its competitors charged roaming. It could and did divide the MRC between calls, texts and data without any need to refer to a minute of a call as a unit, without any need to refer to a text as a 'unit of text' and without any need to refer to a MB of data as a unit of data. All it needed to do was allocate a proportion of the MRC to calls, and then to divide that allocation by the number of minutes within the package; to allocate another percentage of the MRC to texts and to divide that up by the number of texts within the allowance; and then to allocate the remaining percentage of MRC to data, and to divide it by the number of MB within the allowance to achieve a price per MB.

102. So, in conclusion, for the reasons given in the two preceding paragraphs, I reject as reliable the witnesses' evidence (and in particular Mr Malleschitz's) that PPUs were introduced on the invoices for marketing purposes.

Were PPUs introduced for regulatory reasons?

103. Mr Bass' evidence was that H3G needed the PPU for regulatory reasons. He gave 3 reasons for this: the first, and it appeared the main one, was the capping regulations on roaming charges. The second was the regulator's requirement for transparency on billing. The third was the use of 'units' in regulation and in advertising standards.

104. I note in passing that his evidence that PPUs were introduced for regulatory reasons was at odds with Mr Malleschitz's evidence that the main reason for them was marketing. They could not both be right: my view is that none of what they said on this was reliable.

105. Mr Bass' evidence appeared to give prime place to the need to comply with the roaming cap regulations as the reason for the introduction of the PPUs on invoices. Roaming fees have caps. Once H3G ceased to charge roaming fees as such, he was concerned to ensure that what charges H3G levied for using the telecoms services within the EU would not be seen by the regulator as breaching the cap. He said he believed having PPU would enable H3G demonstrate compliance with this obligation.

106. Mr Bass said H3G had a problem because the result of F@H putting certain EU use of H3Gs telecoms services into a PM customer's monthly allowance was that H3G could no longer identify a specific price for a call minute, text or MB of data used from outside the UK. As I understood his evidence, it was H3G's concern that, where a customer used only a small portion of their monthly allowance, the regulator might attribute the entire MRC as relating to that usage, resulting in a very high charge for that telecoms usage, which might put H3G in breach of the roaming regulations if that small usage occurred in an EU destination. For example, taking the extreme example of a PM customer who only used his phone once during the entire billing period, and that single use was to send a text from a F@H destination somewhere within the EU, the regulator might view the entire MRC in that month as

paid for that single text, and, if so, the MRC was likely to exceed the maximum permitted roaming charge for a text.

107. I could not understand this evidence. There was no attempt to explain to me why the regulator might take such a view, or why in law the regulator would be entitled to take such a view, and I was far from convinced that the regulator would take such a view. On the contrary, the MRC had been paid for the allowance of calls, texts, and data downloads, so any actual use of the allowance was effectively free.

108. Putting that aside, even if the regulator were inclined to take the view that the MRC was only paid for the actual use of the telecoms services which took place in any one billing period, it could make no difference to that determination by the regulator whether H3G introduced what was effectively a statement on the invoices dividing the MRC up amongst the full amount of calls, texts and data allowed. The deal between H3G and the customer was unchanged: the customer had paid MRC in exchange for his or her allowance of calls, text and data downloads.

109. Mr Bass' evidence was that another regulatory obligation was to send a text message to customers when they entered a member State other than that of operator stating the charge they will incur for using phone in that location. H3G took the decision to send two text messages in order to comply with this obligation: the first would state that the customer could use their phone up to their allowance for no extra charge; the second would state the roaming charges if the customer exceeded their monthly allowance while outside the UK. It was not suggested that the PPU had any relevance to this regulatory obligation.

110. Mr Bass' statement that PPUs would help H3G comply with the obligation to be transparent in billing was hard to understand for all the reasons discussed above. PPUs added extra information to the bill which would be, for reasons already given, of no use to the customer. It was therefore hard to accept this evidence as reliable.

111. Mr Bass' last point on regulation emphasised that the roaming regulations and advertising standards referred to things as 'units' so, he said, it was better for H3G to unitise their charges. Again, I found this very difficult to understand: the MRC was already unitary, the units were minutes, texts and MB of data. The roaming regulations used units of minutes, texts and MB of data. The PPU did nothing more than change nomenclature: a 'minute' because a 'unit', so one minute of call time = one unit of call time.

112. In conclusion I was not satisfied that PPU were introduced for the purpose of regulatory compliance. That leaves me in the position of not knowing why H3G introduced PPUs onto their invoices: and it is not for me to speculate.

113. Largely, despite the amount of cross examination on the issue, the motive for the introduction of PPUs onto the invoices was not relevant to the appeal, although I found it puzzling that the appellants' witnesses were not able to give a coherent and convincing explanation for it and it did give me pause for thought over their evidence in general. The real question was the relevance of the PPUs to the appeal: it was the

appellant's case that the existence of the PPUs on the invoices changed the VAT treatment of the telecoms supply. I discuss this below when I consider the nature of the supply as a matter of law.

The legal issues in dispute

114. The fundamental dispute between the parties related to the PM contracts with non-business customers whose contracts included F@H. Was the appellant liable to account for VAT on the full MRC at the time of payment of the MRC, subject only to a repayment of VAT to the extent that there was actual usage of the phone outside the EU (as contended by HMRC), or was the appellant not liable to VAT on any of the MRC at the time it was paid, but only liable to pay VAT on the value of the units actually used within the EU at the time of that use?

115. As I have said, the difference in VAT liability was far more than mere timing: most users on a monthly contract paying an MRC did not make full use of their allowances. So fundamentally the dispute was about whether the appellant was liable to VAT on that part of the MRC which represented the 'unused' allowances for which the MRC was paid.

116. As I have said, the appellant relied on two propositions in support of its case:

> (1) Firstly, the appellant's position was that there was no tax point unless and until its PM customers with F@H used their phone. The appellant took this position because (it said) a payment cannot trigger a tax point unless all relevant charging information was known; and the place of supply was not known until the phone was used (it described this as the 'tax point issue'). It also arrived at the same conclusion for another reason and that was because it was also its case that the MRC was paid for 'units' which were only converted into texts/calls/data when actually used ('nature of supply issue').
>
> Both parties agreed that there was a sub-issue to this which was whether packages which included a handset comprised a single supply or multiple supplies.
>
> (2) Secondly, the appellant's position was that it provided its PM F@H customers with a voucher, and as consideration for the issue of a voucher was to be disregarded on its issue, VAT was only to be paid to the extent the voucher was exchanged for goods or services subject to VAT in the UK ('the 'face value voucher issue').

I will consider all these issues, starting with the question whether, when a handset was supplied as part of the package, there was a single supply or multiple supplies, and why it matters.

(1) Single or multiple supply?

117. My understanding is that the question of whether the MRC was paid for a single supply of telecommunications services, or whether it was paid for multiple supplies,

including a supply of telecommunications services, was relevant to the main dispute between the parties largely because of quantum.

118. Art 24 of the PVD provides:

> (2) 'Telecommunications services' shall mean services relating to the transmission, emission or reception of signals, words images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems including the related transfer of assignment of the right to use capacity for such transmission.

119. It was agreed that in §35 *Lebara* [2012] EUECJ C-520/10 the CJEU gave a broad definition to telecommunications services. Both parties were agreed that the appellant made a supply of telecommunications services: they did not agree when and where the supply was made, and did not agree therefore on the appellant's VAT liability in respect of its telecommunications supplies.

120. Telecommunications services, as defined, would in my view encompass the supply of the right to make and receive calls, to make and receive texts, and to download (and upload) data via a mobile phone. It would not encompass the physical supply of a SIM card (together with its unique telephone number) nor handset. This is because (see §171 below) telecoms services are *services* relating to the transmission, emission or reception of signals, and not the supply of goods (such as a SIM card or handset).

121. In all cases in issue in this appeal, the SIM-only PM customer was provided with a SIM card (with its unique telephone number) and his or her airtime allowances. The only options on whether this was one or more supplies where a SIM-only customer was concerned were:

> (a) The supply for which the MRC was paid was a single supply of telecommunications services;
>
> (b) The supply for which the MRC was paid was a single supply of something other than telecommunications services;
>
> (c) There were multiple supplies in return for the MRC; the airtime allowances were supplies of telecommunications services; the supply of the other items in the package were supplies of something other than telecommunications services.

122. Where the package included a handset, I have already determined (at §§61-75) that, contractually, the MRC was in consideration for it, as well as being in consideration for the airtime allowances. The contractual position, however, does not necessarily determine the VAT position. The options on whether this was one or more supplies were:

> (a) The supply for which the MRC (and UFC if there was one) was paid was a single supply of telecommunications services;

(b) The supply for which the MRC (and UFC if there was one) was paid was a single supply of something other than telecommunications services;

(c) There were multiple supplies in return for the MRC and UFC (if there was one), and the supplies may not be subject to the same VAT treatment.

123. The appellant's position, as I understood it, was that there was a separate supply of telecoms services and separate supply of SIM card and (where there was one) handset: and the MRC was paid solely for the telecoms services. HMRC did not agree.

124. If (b) was the right answer, the appeal would be over as there would be no applicable use and enjoyment provisions. This was because the use and enjoyment provisions only applied to the supply of telecommunications services (see §171).

125. If the answer was either (a) or (c) the only relevance to the appeal would be on quantum: if the answer was (a) the entire consideration (MRC plus UFC) would be paid for telecommunications services and the use and enjoyment provisions which (potentially) determined the place of supply would apply to the entire consideration; if (c) was the right answer, only a part of the consideration (MRC plus UFC) would be attributable to the supply of telecommunications services and only that part subject to the use and enjoyment provisions which (potentially) determined the place of supply.

126. Whether (a), or (b) or (c) was the right answer was potentially different depending on whether the package included a handset or not. So I will consider them separately. But before doing so, I consider the legal principles on how to determine where the MRC (and UFC if there was one) was paid for single or multiple supplies, and if so, of what?

The case law on whether there is a complex single supply

127. It is well-known that the CJEU has ruled that there are in effect two types of situation where the provision of a number of different goods and/or services should be seen as a single supply and, in summary they are where:

(1) One or more elements of the supply comprised a principle element and the other elements were ancillary to it in the sense that they were not an end in themselves but a means of better enjoying the principle element (as per *CPP* C-349/96 [1999] STC 270 at [30]); or

(2) Two or more elements of the supply were so closely linked that objectively they formed a single indivisible supply which it would be artificial to split (as per *Levob* C-41/04 [2006] STC 766).

128. The practical distinction between these two kinds of single supply is that, with the *CPP* type single supply, the nature of that supply is clearly that of the principle element of it; it can be harder to determine the nature of the supply where a *Levob* type supply is concerned, as there is no principle element.

129. It is also convenient to refer to the Upper Tribunal's summary of the law on single and multiple supplies in *Middle Temple* [2013] UKUT 250 (TCC). Neither party suggested that later CJEU case law on complex single supplies had superseded anything said in *Middle Temple.* So I will rely on the key principles for determining whether a transaction comprised one or more supplies set out by the Upper Tribunal at [60]:

> The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
>
> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
>
> (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.
>
> (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.
>
> (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
>
> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

> (12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.

130. It is perhaps worth considering some of the concepts set out here in a little more detail.

131. Firstly, even though two 'types' of complex single supply are recognised by the CJEU (*Levob* and *CPP)* many of the rules are common to both: what the Upper Tribunal said at (1)-(4) of [60] is equally applicable to both types of complex single supply. That also appears to be true of what the Upper Tribunal said at (10)-(12). What was said at (5)-(7) relates specifically to *Levob* type supplies (although (7) would appear to apply to any type of complex single supply); what was said at (8)-(9) relates specifically to *CPP* type supplies.

132. It is clear that with either type of complex single supply the focus should be on typical customer perception (see (6) for *Levob* and (10) for *CPP).* This reflects what the CJEU has said: see, for example [32] of *Middle Temple*. Customer perception looks at, in particular, whether the various elements are of any practical use to the consumer if supplied separately:

> [51]....it is necessary to have regard to the economic reason or purpose of the whole transaction from the point of view of the typical customer
>
> *Middle Temple*

133. For instance, in *Levob* the CJEU pointed out that the off-the-peg software purchased was 'of no use' (see [24]) to the customer without the customisation which was also a part of the deal.

134. Customer perception also considers whether it is possible and financially practical for the consumer to buy the elements separately. So far as the ability to buy elements of the supposed complex single supply separately is concerned, the CJEU has stressed (for instance at [31] of *Purple Parking*) that the fact the items are supplied separately 'in other circumstances' is 'of no importance'. This clearly implies that if the items are supplied separately *in the same circumstances*, it is relevant to the question of single/mixed supply. This is in any event clear as the CJEU puts emphasis on customer choice. The Upper Tribunal in *Middle Temple* analysed a number of CJEU cases as follows:

> [57] ..... We consider that [the CJEU decision in *BGZ*] indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. In our view, [the CJEU decision in *BGZ* also] shows that, while the ability to choose is an important factor in determining that there is more than one supply, it must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> .....

> [61]..... In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply.

135. The facts of *Middle Temple* itself are a good illustration of the principle discussed here. It was taken as a given that renting land without a water supply was economically useless; and it was found as a fact that in that case (very unusually) only the landlord could supply the water (as, for historical reasons, the landlord owned the water supply). It was irrelevant that other tenants in other areas could take a water supply direct from a water company: Middle Temple tenants could not. The supply of the land and water in those circumstances was therefore a single complex supply.

136. I take into account [57] of *Middle Temple* where the Upper Tribunal said when considering the CJEU decision in another case (*BGZ)* as follows:

> [57] At [43], the CJEU referred to the fact that the lessee does not have to take the insurance offered by BGZ but can insure with the insurance company of its choice. The CJEU stated that this showed that the requirement that the goods are insured does not, in itself, mean that a supply of insurance by the lessor is indivisible or ancillary to the supply of the leasing services. We consider that this indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. At [44], the CJEU stated that separate invoicing and pricing of services supported the view that the services are independent, without being decisive. The CJEU then referred, at [45], to the separate pricing and invoicing reflecting the interests of the parties in BGZ. The CJEU also stated that the lessee's decision to obtain insurance from the lessor was made independently of the decision to lease the goods. In our view, this shows that, while the ability to choose is an important factor in determining that there is more than one supply, it must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

137. The CJEU has always stressed that none of the above tests provides by itself a conclusive answer to the question of whether the supply is single or mixed. All factors have to be considered and an overall conclusion reached.

138. Even though I did not understand either party to suggest that what the Upper Tribunal had said in *Middle Temple* was superseded by what the CJEU had said in later cases on mixed/single supplies, I was also referred to the latter CJEU cases on the issue. It seems to be that they provide further practical illustrations of the principles the CJEU has already expressed.

139. *Mesto Zamberk* [2013] EUECJ C-18/12 §30-35 was a *Levob*–type case. It concerned an aquatic park where a single entrance fee gave customers access to a number of different activities. The court said in that where a single entrance fee

entitled the user to access all of the facilities without restriction it was strong evidence that there was a single supply (§30). This provides an example of the application of the principles discussed at §§134-136: where there is a single entrance fee and no ability to take only part of what was offered, it is likely to be a single supply.

140. I was also referred to the more recent CJEU case of *RR Donnelley Global Turnkey Solutions Poland sp zoo* (2013) C-155/12, which was a *CPP*-type case. The appellant provided a number of different services (storage, packing, loading/unloading and sending) the CJEU indicated that this was likely to be a *CPP*-type single supply of the service of storage of the goods because to the appellant's customers the storage was principally what they wanted with the other services being ancillary to the storage (in other words, enabled the storage to take place and/or ensured the goods were better stored). But re-packing the goods for purposes other than just storage was a separate service (see §21-24).

141. Lastly, I was referred to *Everything Everywhere* (2010) C-276/09 which was also a case involving an MNO but where the issue was something quite different to that in this appeal. In that case, the issue was whether a contractual charge levied on customers who chose to pay by certain means (eg by card or cash) rather than by other means (such as direct debit) for their supply of telecoms services was part-consideration for a single supply of telecoms services or consideration for a separate supply of exempt financial services. The CJEU held that the former was correct: it was part consideration for a single supply of telecoms services. At ¶29, the CJEU said

> "...the fact that a single price is invoiced, or that separate prices were contractually stipulated, has no decisive significance for the purposes of determining whether it is necessary to find that there are two or more distinct and independent transactions or only a single economic transaction..." and that because the taxpayer's "customers who pay their mobile telephone bills using one of the payment methods which incur the [charge] do not intend to purchase two distinct supplies, namely a supply of a mobile telephone service and a supply whose purpose is to handle their payments. From the customer's point of view, the supply of payment handling services supposedly provided by the telecommunications services provider to its customers at the time those services are paid for using certain payment methods must, in the circumstances such as those of the main proceedings, be regarded for VAT purposes, as being ancillary to the principal supply of those telecommunications services "

Again, this seems to be an example of the principles discussed at §§134-136. The customer had no choice but to pay the fee if they chose to pay by card; and the service for which they paid had no purpose independent of their contract for telecoms services.

142. HMRC put reliance on the Court of Appeal decision in *Baxendale* [2009] STC 2578. Customers purchased food packs from the taxpayer who provided them with 'free' weight loss counselling at the same time. The Court said:

> [37] ....it is unrealistic in my view to regard them as other than part of a continuous programme of dieting and weight stabilisation designed to achieve the permanent reduction of the customer's weight. The inclusion of the support service in the price paid for the food packs, whilst not conclusive in itself, seems to me consistent with this being what the taxpayer offers and, more particularly, what the consumer wishes and intends to purchase and receive. The support services are integral to the achievement of the customer's needs.....
>
> [40] ....The LighterLife food packs are not sold other than as part of a package which includes the support services nor are they bought on any other basis by the typical customers of this taxpayer. The fact that other types of low calorie diets can be bought over the counter for personal use does not therefore assist the court in determining the correct tax treatment of the transaction in question....

The Court decided that there was a single complex supply of services so the food packs could not be zero rated. This case again seems to be an example of the principles discussed at §§134-136: while the food packs might have been of use to the taxpayers by themselves, they could not in practice be bought separately.

143. What do these principles mean for the supplies at issue in this appeal?

Transactions with SIM-only PM customers

144. In all cases in issue in this appeal, the SIM-only PM customer was provided with a SIM card (with its unique telephone number) and his or her airtime allowances (see §23). I accept that such customers also received from H3G the right to receive calls and texts, and there was no separate charge for this.

145. I have found (and it was not in dispute) that the SIM-card with its unique telephone number were essential to enable the customer to use his airtime allowance. Technologically speaking, the SIM-card with its unique telephone number was what enabled the customer to access H3G's network and make/receive the calls, send/receive texts and download data. The SIM-card and unique telephone number had no other use. There was no separate charge for them.

146. The application of the principles set out in the above cases to these SIM-only transactions is therefore straightforward and I do not think it was in dispute: it is a classic *CPP*-type single supply. It would be artificial to treat the supply of the SIM-card and unique telephone number as separate to the supply of the telecoms services. From the point of the consumer, the two elements were a single economic supply because what the customer wanted was the telecoms services from H3G but to get them the customer had to have the SIM-card and unique telephone number provided by H3G. Moreover, the telecoms services (the right to make calls, send texts and download data) comprised the principle element and the SIM-card and unique phone number were ancillary to it in the sense that they were not an end in themselves but the means by which the customer could enjoy the telecoms services. The lack of ability to buy the elements separately and the lack of a separate charge for the SIM-card and telephone number, while not decisive, support my conclusion that there was

a single supply to SIM-only customers, the principle element of which was a supply of telecoms services.

147. I consider this conclusion consistent with the above case law and in particular with *CPP, Everything Everywhere* and *Donnelly.*

148. Customers were also given free of any separate charge the right to receive calls and texts. Whether this was a part of the single supply in return for the MRC or whether it was a separate supply would be a moot point given that it was also a supply of telecoms services and would have the same VAT treatment. I would be of the view, if it mattered, that it was part of the single supply of telecoms services; it would be artificial to split the right to make calls from the right to receive calls: economically speaking the typical customer required the right to do both via the same SIM-card. The lack of separate charge for the right to receive calls supports the view it was part of a single supply of telecoms services.

Transactions with PM customers which included a handset

149. Whether there was a single supply or a number of supplies comprised in the transactions involving handsets was a matter of contention. All that I have said above at §§144-147 about the VAT treatment of the SIM card and allocation of unique telephone number applies equally to transactions including a handset. Those aspects were all part of a single supply of telecoms services. The question is whether the handset was also a part of that single supply of telecoms services.

150. It is the case that while a handset might have some functionality that could be accessed whether or not a SIM-card was inserted and whether or not the handset was connected to a network, its main functionality was clearly to access a network. By the same token, the supply of telecoms services was without value to a customer who did not have a handset to receive them on. That does not make it a single supply: the fact that land is useless without water did not, without more, make the supply of them together a single supply in *Middle Temple.*

151. The question must be addressed by looking at the typical consumer. Was the handset supplied by H3G of any use without the telecoms services, and the telecoms services of any use without the handset supplied by H3G? Clearly the telecoms services were of use without a handset supplied by H3G: a significant proportion of H3G's customers were SIM-only customers. And while the telecoms services were of no use without a handset, the handset did not need to be supplied by H3G.

152. It is worth noting that because the handsets supplied by H3G were unlocked, any handset supplied by H3G could have been used with a SIM card provided by any MNO. Similarly, the SIM card provided by H3G could have been used in any unlocked handset. The implication of the evidence was that where a customer selected a 'with handset' package, he could have decided to use the handset and telecoms services entirely separately: he could have inserted a different SIM card into the device, and inserted the H3G SIM card into a different device. Both the device and airtime supplied by H3G under the single contract would then have been enjoyed

entirely independently of each other. Having said that, there was no evidence that a typical 'with handset' customer would do anything other than use the H3G SIM-card in the device supplied by H3G.

153. Looking at the matter from an economic point of view, the typical customer had a clear and genuine choice whether to opt for a SIM-only contract (and use a handset he already owned or a new one purchased from another supplier) or to opt for a 'with handset' package. The evidence showed that the customers had a very genuine freedom to choose to take the exact same package of airtime allowances from H3G's either with or without a device: the difference would be in the price. And, as I have said, that price difference genuinely reflected the retail cost of the phone: that was the effect of Mr Bass' evidence which I did accept and in any event HMRC also accepted it (see §62). In other words, the SIM-only price for the same airtime package reflected the cost of the telecoms services; the identical but 'with handset' package, whether or not with an UFC, reflected that same cost with the addition of the retail price of the phone. I find this gave the typical customer a real economic choice of whether or not to take a SIM-only or a 'with handset' contract.

154. Indeed, the evidence showed (as one would expect) that the total price (MRC + UFC) for a 'with handset' package varied considerably depending on the type of handset selected. The more advanced the smartphone, the more expensive the package. This reiterates the point made above: to a typical consumer the handset was dissociated from the telecoms services. He could take the identical telecoms services package with which ever handset he chose from the range available, or with none.

155. While it is true the availability of other handsets from other suppliers 'in other circumstances' is not relevant, it is highly relevant that *in these circumstances* the typical PM consumer could (and often did) use a handset which was not supplied by H3G.

156. While I recognise that choice and separate pricing are not decisive they are important. While the price for a 'with handset' package was a single price for both handset and telecoms services, that does not (in my view) detract from the fact that the customer would know (or be able to find out) the price for just the telecoms services element of an identical package which did not include the phone, as the evidence showed this was freely made available in the price guides supplied by H3G. In reality, there was real economic choice to take the telecoms services with or without a handset because the customer would know (or easily be able to discover) the price of the same telecoms allowances both 'with' and 'without' and handset and the evidence showed (see §62) that the difference between them genuinely reflected the normal retail cost of the phone. That genuine economic choice means that it is not artificial to see the supply of the handset as separate to the supply of the telecoms services. I note that in the cases relied on by HMRC, such as *Baxendale,* the customer had no choice: he had to take both elements of the supply. That was not true here.

157. In that sense, the handset was in a quite different position to that of the H3G SIM-card provided to all its customers. That SIM card with its unique telephone number was essential to the ability of the customer to enjoy H3G's telecoms services

for which s/he paid: the services for which s/he contracted and paid could not be received without the SIM card. That was not true of the handset. The handset could be used to receive H3G's telecoms services but it was not essential. It could not even be said that it was a *better* means of enjoying the telecoms services: presumably an identical unlocked handset acquired from a different supplier would have been an equally good means of enjoying H3G's telecoms services.

158. It must be true that a handset is principally a means of enjoying telecoms services (even though some sophisticated smartphones may well have functionality that does not require the insertion of a SIM-card); nevertheless, that does not of by itself mean that there is a *CPP*-type supply. As *Middle Temple* made clear at [10], whether the customer has a real economic choice on whether or not to take only a part of the claimed single supply is significant. Here, the customer had the clear ability to get the same telecoms services for less if he opted for a package without a handset, or pay more for the same telecoms services with a handset. He had a very real choice. I do not consider that this is a *CPP*-type single supply.

159. Further, I also do not consider it right to see a 'with handset' package as a *Levob* type of single supply where two elements of a supply are so closely linked that objectively they form a single indivisible supply which it would be artificial to split. Certainly, technologically speaking telecoms services are the only means of using the handset, and a handset is the only means of receiving the telecoms services. However, that does not make the supply of the actual handset and telecoms services supplied in this appeal indivisible. They were clearly divisible because the customer had the choice of taking the telecoms services without a handset, thus receiving the telecoms services on his own device. It was essential to have a handset, but it was not essential to have the handset supplied by H3G. It would not be artificial to split the handset from the telecoms services.

160. In conclusion, I consider that there were two separate VAT supplies (albeit under a single contract) being made in the 'with handset' transactions: a supply of a handset and, separately, the supply of telecoms services (including SIM-card, unique telephone number and the ability to receive calls and texts as well as the ability to make calls, send texts and download data).

Implications of Tribunal's conclusion on multiple supply issue

161. For the packages which include a handset, I reject solutions (a) and (b): the MRC and UFC (if any) were not paid for a single supply of telecoms services, nor a single supply of the handset. The MRC and UFC (if any) were paid for multiple supplies.

162. My impression from its submissions was that, if I reached the conclusion that I have reached, the appellant believed it would be entitled to treat the entire MRC as paid in consideration for the telecoms services, and treat the UFC (if any) as consideration for the handset.

163. But that is quite wrong. The cases make clear that where consideration is paid for two supplies, there must be an apportionment. For instance, at [31] of *CPP* the CJEU said:

> In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paragraphs 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin*, paragraphs 45 and 46).

164. So was the MRC paid for two supplies?

165. I have concluded (see §§61-74) that there was a single contract and that in contract law the consideration (MRC plus UFC if any) was paid for both the handset and airtime. However, I accept that the contractual position does not determine the VAT position. Nevertheless, application of the VAT rules leads to the same outcome. Article 73 of the PVD provides that:

> ...the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier in return for the supply.....

166. For all the reasons given at §§61-74, I find that the consideration in the meaning of Art 73PVD for the handset was the MRC and UFC (if any). The MRC and UFC (if any) was also paid for the supply of telecoms services. VATA has a specific provision (s 19(4)) which apportions consideration for two supplies between them: this does not appear to reflect a provision of the PVD but does appear to reflect EU law (see the above citation from *CPP).*

167. The effect on the appeal is to reduce the quantum of the appellant's claim if it succeeds on one or other of its two main arguments. That part of the MRC as properly relates to the supply of a handset must be excluded from the claim. If the appellant succeeded in its claim, the parties would have to agree the apportionment or revert to the Tribunal: in the event, and for the reasons given below, the appellant does not succeed so the apportionment would not at first glance appear necessary. I note for future reference of the parties, though, that my conclusion may call into question the manner of calculation of the use and enjoyment element of any MRC. In other words, the use and enjoyment calculation should apply to both MRC and UFC but *only* after there has been an apportionment to remove the device element of the consideration.

168. I move on to consider the main issue between the parties; to put it in its context I look first at the law on whether telecommunications services are subject to UK VAT

depending on where the customer is located and when: this is referred to as the 'place of supply'.

(2) The tax point issue

The law on place of supply

169. The law on place of supply changed on 1 January 2015, but both parties were agreed that that had no impact on this appeal. Before 1 January 2015, the basic place of supply of telecommunications services on business to consumer ('B2C') supplies the place where the supplier had established his business; the basic place of supply of B2C telecommunications supplies after that date was the establishment or residence of the consumer. Either rule in this case meant that the basic place of supply was the UK as both suppler (H3G) and consumers were established/resident in the UK.

170. However, Art 59a(a) of the PVD permitted a derogation to the basic place of supply. It provided as follows:

> 'Member States may consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community.'

171. The UK made use of this derogation. Paragraph 8 of Schedule 4A VATA 94 contained a derogation to the basic place of supply rule and provided:

> (1) this paragraph applies to a supply of services consisting of the provision of -
>
> (a) telecommunication services, or
>
> (b) radio or television broadcasting services.
>
> (2) In this Schedule 'telecommunication services' means services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including –
>
> (a) the related transfer or assignment of the right to use capacity for such transmission, emission or reception, and
>
> (b) the provision of access to global information networks.
>
> (3) Where –
>
> (a) a supply of services to which this paragraph applies would otherwise be treated as made in the United Kingdom, and
>
> (b) the services are to any extent effectively used and enjoyed in a country which is not a member State,
>
> the supply is to be treated to that extent as made in that country.
>
> (4) Where –

> (a) a supply of services to which this paragraph applies would otherwise be treated as made in a country which is not a member State, and
>
> (b) the services are to any extent effectively used and enjoyed in the United Kingdom,
>
> the supply is to be treated to that extent as made in the United Kingdom.

172. The significant provision for this appeal was §8(3) which provided that telecommunication services for which the place of supply would otherwise be the UK, would be outside the EU if and to the extent they were 'effectively used and enjoyed' outside the EU.

173. The meaning of these provisions were considered by the Upper Tribunal in *Telefonica* [2016] UKUT 173 (TCC). In that case, the taxpayer, also an MNO supplying telecommunications services to its customers, charged for line rental (described as a network access charge). It didn't have a product like F@H, so its customers had to pay an MRC for UK phone use and roaming charges for non-UK use, but the line rental had to be paid irrespective of whether the customer used his phone entirely in the UK or EU, or whether all or part of the use was outside the EU.

174. So the question arose about the place of supply of the line rental: to what extent was it subject to UK VAT? The appellant and HMRC agreed that the line rental should be apportioned between EU and non-EU line usage; they did not agree on how that apportionment should be calculated. The taxpayer wanted to do the apportionment based on its charges. This was favourable to it because (as I have already said) roaming charges were much higher than charges to use the phone within the UK. HMRC originally agreed this apportionment but then required the taxpayer to change methodology to one based on 'use' (so apportionment would be based on the time for which the phone was used inside compared to outside the EU, which was obviously a calculation more favourable to HMRC).

175. The taxpayer challenged the lawfulness of this direction from HMRC in judicial review proceedings. In considering the appeal, the Upper Tribunal made various statements about the use and enjoyment provisions.

176. Firstly, it was made clear at [15] that use and enjoyment only occurs at the time the customer uses its credit: the service

> 'is only effectively used and enjoyed when it is actually accessed, ie used to make or receive calls and send or receive texts and data'

and

> 'effective use and enjoyment requires some actual use of the network to make, send or receive calls, text or data'

And

> [52] We consider that words 'effective use and enjoyment' in Article 59a PVD and 'effectively used and enjoyed' in paragraph 8 of Schedule 4A to VATA94 require more than the mere ability to access a network. In our view, that service is only effectively used and enjoyed when it is actually accessed, ie used to make or receive calls and send or receive texts and data.
>
> [53] 'a person whether in the EU or outside still receives a supply of services even if he does not turn on his mobile phone for the whole months – he still agrees to pay the consideration for that supply in the form of the monthly access charge, On those circumstances, the customer has received a service but, in our view, cannot be regarded as having effectively used and enjoyed the service' (§54)

177. In summary, and it was not in dispute, effective use and enjoyment only took place when the customer used his right to make calls, send texts and download data. There was no effective use and enjoyment merely from having the right to do so.

When VAT falls due

178. While the Upper Tribunal was not called on to consider the implications of this, its ruling gives rise to the inevitable consequence that the MRC (paid in advance) will be paid *before* it is known where the telecoms services will be used and enjoyed. This may sit uneasily with the VAT rules on *when* VAT must be paid.

179. The VAT rules on when VAT must be paid (the 'tax point' or 'time of supply') are set out in Art 65 of the PVD:

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

This was reflected in VATA 1994 which provided at s 6(3) and (4) that the time of supply was when the services were performed, save to the extent that there was earlier payment, at which point the time of supply was, to the extent of the payment, the time of the payment.

No tax point without certain place of supply?

180. As I have said, the appellant's case was that, despite the EU and UK law that the *time of supply* was at the time of payment, EU case law established that no supply could take place unless and until the *place of supply* was certain. The appellant's case was that, because of F@H, the *place of supply* of its telecoms services to its PM customers was uncertain at the time the MRC was paid because the place of supply depended on where use and enjoyment of the telecoms services took place, and all were agreed (following *Telefonica)* that that would depend on the location of the customer at the time s/he made the call, sent the text and/or downloaded data. As the MRC was paid before the telecoms services were used, so said the appellant, the place of supply at the time the MRC was paid was uncertain and so, said the appellant, it

followed that the time of supply could not occur at the date of payment of the MRC. The earliest the time of supply could occur would be at the time of use and enjoyment of the telecoms services: so the time of supply of the telecoms services used within the EU in respect of a PM customer who paid an MRC for X minutes of calls, Y number of texts and Z MB of data downloads only occurred to the extent that customer actually used those rights within the EU.

181. This argument was (on H3G's case) unique to H3G as it was (because of F@H) the only telecoms services provider whose customers paid an MRC which entitled them to use the telecoms services in various locations both within and outside the EU. It was the only telecoms services provider (it said) for whom the place of supply could be uncertain at the time of payment of the MRC.

182. And, as I have said, this reasoning gave rise to non-taxation of the unused rights to telecoms services, and the very large claim for VAT repayment the subject of this appeal.

183. HMRC's position was that the place of supply of the rights to the telecoms services was the UK so the place of supply was certain at the time the MRC was paid; in particular, the use and enjoyment provisions could only alter the place of supply at the time of use and enjoyment. So until use and enjoyment actually occurred outside the EU, the place of supply was the UK. Actual use and enjoyment outside the EU would result in a retrospective adjustment, such as HMRC had already permitted H3G. But rights to telecoms services which were either used within the EU, or which remained unused, would all have been taxed at the time the MRC was paid and there would be no retrospective adjustment to remove them from taxation as there would be no use and enjoyment of them outside the EU.

184. I also understood it to be HMRC's alternative position that, even if the place of supply was uncertain, the time of supply was unaltered and had to be taxed on the basis of what was known at the time, subject to a retrospective adjustment if and to the extent non-EU use and enjoyment was shown to have taken place, with the same result as explained in the immediately preceding paragraph.

185. While H3G had had a retrospective adjustment to allow for non-EU use and enjoyment, it did not accept that such an adjustment was lawful under EU or UK law. It said that there were no provisions of EU law which permitted a retrospective adjustment to take place. This supported, it said, its conclusion that there could be no *time of supply* until *place of supply* was certain. HMRC's position was that the power (indeed, duty) to make a retrospective adjustment was implicit in the EU and UK law which permitted member States to adjust the place of supply based on use and enjoyment outside the EU. This was because, as I have said, as payment triggers the tax point, the time of supply could often occur before use and enjoyment of the thing supplied.

186. Other issues raised by the appellant were that it did not consider EU or UK law permitted a single supply with more than one place of supply; it also considered that a clear reading of the derogation on use and enjoyment meant that the normal place of

supply rules were ousted. I will consider all these points below, but will first consider the case law on which the appellant rests its case.

The uncertainty principle?

187. The appellant relies on a number of cases to support its position that time of supply cannot occur until place of supply is certain. The earliest was the *BUPA* case C-419/02 (2006). In that appeal, the taxpayer made a prepayment on drugs and prostheses (with the intention of pre-empting a change in liability); the CJEU held that the payment did not create a tax point because at the point of payment the goods to be purchased were not precisely identified:

> [51].... prepayments of the kind at issue in the main proceedings whereby lump sums are paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller and from which the buyer may possibly select articles, on the basis of an agreement which he may unilaterally resile from at any time, thereupon recovering the unused balance of the prepayments, do not fall within the scope of the second subparagraph of Article 10(2) of the Sixth Directive.

188. The taxpayer had effectively given a sum of money to its supplier to hold as a credit balance, against which it could draw down later to purchase a variety of goods, the list of which was not finite (because the list could be altered) or instead choose to have all or part of the money refunded to it.

189. The appellant also placed significant reliance on the more recent case of *MacDonald Resorts Ltd v HMRC* C-270/09 (2010) (‘*MRL’*) and in particular on §§23-35. In that appeal, the taxpayer had numerous timeshare holiday properties for rent on its books. Its customers purchased or acquired (through giving up their own timeshare rights to holiday accommodation) what were described as ‘points rights’. The only thing that a customer could do with his ‘points rights’ was to convert them into the right to stay at accommodation available from the taxpayer. At the time the customer purchased or acquired the points rights, he did not have to identify any particular holiday accommodation he wanted to rent. The list of available properties could change between the time at which the points were acquired, and the time at which they were allocated by the customer to a particular property. Nor would the customer know at the time of acquisition of the points, how many points would be required for any particular holiday accommodation. The points had to be used in the 12 month period in which they were acquired although in certain cases some or all of the points could be carried forward for another year. A customer could also in some cases borrow against his or her future points rights.

190. The issue was whether the sales of the points rights was subject to VAT and the CJEU held that they were not:

> [30] In these circumstances, the factors necessary for VAT to become chargeable are not established when rights such as ‘points rights’ are initially acquired.....

> [31] As follows form the judgment in ...*BUPA Hospitals and Goldsborough Developments* ....in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT....
>
> [32]...the real service is obtained only when the customer converts the points attaching to the 'points rights' that he has previously acquired, the chargeable event occurs and the tax becomes chargeable only at that moment....

191. The CJEU repeated these principles in the cases of *Orfey Bulgaria* [2013] STC 1239 §28 and *FIRIN OOD* [2014] STC 1581 at §36.

192. The appellant draws from these cases the principle that where there is uncertainty there is no supply. In *MRL* the location of the property(s) to be supplied was uncertain, and therefore, says, the appellant, the tax liability of the supply was uncertain and could not be taxed. The same is true here, says the appellant.

193. But that is not my understanding of what was said in *MRL* and the other cases. My understanding is that what the CJEU was saying in *MRL* was that there was no tax point at the time the points rights were purchased or acquired because there was no supply: there was no supply because the thing to be supplied was uncertain. In *BUPA,* which particular drugs and prostheses were to be supplied and to what value was uncertain; in *MRL* which particular properties were to be supplied, when, and for how much (see §§29-30), was unknown at the date of sale of the points rights.

194. *BUPA* and *MRL* were not dealing with cases where the supply was certain, but its tax liability uncertain; they were dealing with cases where the supply was uncertain and (at least in the case of *BUPA)* the tax status was certain. *MRL* was different in that both the supply and its tax treatment was uncertain (as the location of the yet-to-be selected holiday property was uncertain at time of acquisition of the points rights and could have been in Spain or UK). Nevertheless, the CJEU's conclusion made no reference to uncertainty of taxation and so was clearly made on the basis of the uncertainty of the supply itself.

195. VAT is a tax on final consumption: it taxes consumption. It does not tax an agreement to agree. An agreement to make a supply at a future date is not taxed; only a supply is taxed. At best in *BUPA* and *MRL* there was payment for a possible supply at a later date; but in both cases the terms of the supply were so uncertain it did not amount to an agreement for a supply.

196. Looking closely at what the CJEU said in *MRL*, it said it would look at the customers' 'ultimate intention when they pay for the services received'(§22), 'in order to identify the services supplied as consideration for the fees charged by the supplier of services'(§18), and applying that 'it appears that 'Points Rights' under the Options

Scheme are purchased with the intention of using those rights in order to convert them into services offered under the Options Scheme.' (§23). 'Therefore, the purchase of 'Points Rights' is not an aim in itself for the customer. The acquisition of such rights and the conversion of points must thus be regarded as preliminary transactions in order to be able to exercise the right to temporarily use a property, or to stay in a hotel or to use another service.' (§24).

197. Mr Peacock's interpretation of *MRL* was that the 'key' information that was missing was the place of supply of the property to be rented to the customer, and that information was key because it was essential to know whether the property was sited within the EU or not in order to know the VAT liability of the supply.

198. What the appellant seeks to draw from *MRL* is a principle that if the terms of the contract are sufficiently certain for the supply to be identified, nevertheless it is not a supply if there is uncertainty over the tax treatment of the supply. But *MRL* simply cannot be used to support such a proposition. The CJEU found that the nature of what was agreed was too uncertain because what was to be supplied, when it was to be supplied and how much it would cost was uncertain. The fact that the tax treatment was also uncertain was a logically consequence of that position and not a reason why the CJEU decided that there had been no supply.

199. I do not accept the appellant's proposition that the 'key' uncertainty in *MRL* was the place of supply under the VAT legislation. The case might be less than clear on this because it just so happened that the thing to be supplied (holiday accommodation) necessarily involved land, the location of which was unidentified; and at the same time, the taxation of such supply would depend on whether or not the land was situated in the UK or Spain. So there might be some room for doubt whether, when the CJEU referred to its location being uncertain, they were concerned that the precise address of the property was unidentified because that would mean the supply was uncertain, or whether they were concerned with whether the property was within the UK or not as that would determine the taxation status, but reading the decision makes it clear that the uncertainty with which the CJUE was concerned was the uncertainty over <u>what</u> was to be supplied, and not its <u>place</u> of supply.

200. No such confusion could arise in *BUPA* where the subject of the agreement was drugs and prostheses: in that case the supply was uncertain because it was uncertain which drugs and prostheses would be supplied. There was no uncertainty over place of supply. In *MRL* the supply was uncertain because the *address (*and not just national location) of the holiday accommodation was uncertain: the CJEU's answer would have been the same even if the only available accommodation had all been based in the UK.

201. The 'uncertainties' referred to by the CJEU in *MRL* §29 which meant that there was no direct link between the initial payment/acquisition of points rights and the ultimate service provided (§26) and a lack of 'relevant information' as required in *BUPA (*§31 of *MRL)* were that the accommodation nor its price were known at the time of initial payment/acquisition of points rights. The CJEU did not refer to the place of supply being unknown. While the place of supply would vary in accordance

with the location of the property, the CJEU's concern in §29 with the location appeared to be that without knowing the precise property, its cost could not be known.

202. There was no suggestion that, if only it was known that the property would be in one national territory or another, then that would be sufficient. On the contrary, the CJEU only referred to place of supply in §§33-36 to explain why the place of supply was determined at the time that the supply became certain. If they had meant that unless and until the place of supply was certain, there could be no supply, then no doubt they would have said so. They did not.

203. I do not accept that the case law supports the appellant's position on this: there is no authority for saying that uncertainty with respect to the place of supply would prevent a time of supply arising. The time of supply of the appellant's telecoms services was therefore when the MRC was paid.

204. Reverting to *Telefonica,* in that appeal neither party challenged the underlying assumption that the place of supply could be uncertain at time of supply and that a subsequent adjustment was appropriate where use and enjoyment meant that the initial place of supply was not the actual place of supply. Nevertheless, I accept that Mr Peacock is right to say that the case is not authority on the point because it was not raised and the Upper Tribunal made no ruling on the matter. But my conclusion in this appeal is consistent with the ruling in *Telefonica* even though the matter was not explicitly considered.

(3) The nature of the supply issue

205. Putting aside the issue of the uncertainty over the VAT treatment it was (as I understood it) the appellant's case that the purchase by its customers of a right to use a certain amount of airtime 'units' should be taxed in the same way as the 'points rights' in MRL.

206. As it saw it, the customer exchanged its 'units' for telecoms services when s/he chose to use the allowances to which his or her contract entitled them. The appellant saw this as no different from a customer in *MRL* using its points to book a particular holiday property on particular dates. In particular, it was uncertain whether and on what days any particular customer of H3G would use his right to make calls, send texts and download data, and uncertain where s/he would be at the time they did so.

Economic reality

207. HMRC's point was that the economic reality was that the appellant supplied minutes of calls, texts and MB of data downloads and did not supply units which were then 'exchanged' for minutes of calls, texts and MB of data downloads.

208. I was referred to *Newey* [2013] STC 2432 45 and *Secret Hotels2 Ltd* [2014] STC 937. While HMRC accepted that the contracts here were completely commercial and at arm's length, their position was that the provisions in the invoices

on ‘units’ and ‘price per unit’ were of no commercial relevance to the customer and completely artificial.

209. I agree with HMRC, as I have said, that the ‘units’ formed no part of the contract because they were irrelevant to the customer: they neither gave the customer rights nor obligations. Indeed, they didn’t even really purport to be part of the contract as they were inserted into the invoices and not the contracts.

210. While I accept that the ‘price per unit’ had an internal accounting significance to H3G, it had no relevance to its relationship with its customers.

211. Mr Peacock’s submission on this was that the ‘units’ were not actually inconsistent with H3G’s contracts with its customers, and therefore I should give effect to them. Only terms which were inconsistent with the economic reality of the contract should be ignored.

212. Even if he is right, it makes no difference. While I accept that the units were not inconsistent with the contracts, that is because they neither gave the customers any rights nor imposed on them any obligations. The description of the rights as ‘units’ was meaningless. I can’t ‘give effect’ to the units because the reference to ‘units’ was nothing but a change in nomenclature, a different (and pointless) way of describing the rights to which the contracts entitled the customers in any event.

213. I do not accept that it makes any difference to this part of its case that the invoices described H3G’s customers as buying ‘units’ of calls, texts and data-downloads. There was no difference between a phone call ‘unit’ and a minute of phone time: they were the same thing. It was just a different method of description. Even accepting (which I do not, for the reasons given above) that it was a part of the contract that the customers were entitled to X phone call units, Y text units and Z data download units, this was just the same as saying the customer was entitled to X minutes of phone calls, Y texts and Z MB of data downloads.

214. The economic reality is that the ‘units’ were irrelevant. It would be wrong to say that the units were exchanged for telephone calls, texts or data downloads because nothing was exchanged for anything. It was just a change in nomenclature: the underlying rights of the customer were unchanged whether they were described as buying ‘units’ of phone calls or ‘minutes’ of phone calls, as each unit of phone call was worth exactly one minute of phone calls, each text unit was worth exactly one text, and each unit of data was worth exactly one MB of data downloads. Phone units could not be exchanged for text units or data units and vice versa. No exchange took place. All that happened was that the rights to make a set number of calls, send a set number of texts and download a set amount of data could be used up: in other words the customer could exercise the rights it purchased.

215. The ‘units’ were nothing like the ‘points’ in *MRL*. In *MRL* there was no certainty of what the ‘points’ could be exchanged for: the properties available and their prices were unknown when the points were acquired. Here, the units were not ‘exchanged’ for anything: the units always represented a known quantity. If they

were phone units, there were from the moment of acquisition until they were used worth one minute of phone call time; if they were text units, they were worth one text, and if they were data units, they were worth one MB of data downloads. Even if it could be said (which it can't), that the 'units' were 'exchanged' for telecoms services, what they were exchanged for was always a known quantity. If they were phone units, there were and remained worth one minute of phone call time; if they were text units, they were worth one text, and if they were data units, they were worth one MB of data downloads. 'Units' were just a different, and somewhat confusing, method of describing the customer's entitlement to minutes, texts and data under the contract.

216. Once it is clear that 'units' were simply a matter of nomenclature, the question is simply whether the principles explained by the CJEU in cases such as *MRL* and *BUPA* apply to a telecoms services contract which entitled the customer to a set allowance of calls, texts and data, but which allowance might well not be fully used up.

217. I have already said that *MRL* and *BUPA* were not authority for the proposition that uncertainty over the place of supply could delay the time of supply such that the time of supply would not be the date of payment of the MRC but when the place of supply was known. Nevertheless, before finally leaving this topic, I move on to consider whether the uncertainty of whether the rights would be exercised could delay the time of supply because of what was said in the *Findmypast* decision.

Uncertainty over whether the allowances would be used

218. In the hearing, the parties referred me to the Upper Tribunal decision in *Findmypast;* after the hearing, the Inner House of the Court of Session ('IHCS') issued its decision on that case ([2017] CSIH 59). It is not strictly binding (as I understand it) on an FTT Tribunal sitting in England and Wales, although of course I accord it respect and have considered what the court said.

219. In that case, the taxpayer operated a website which allowed certain documents to be viewed and downloaded by its customers. In a manner reminiscent of PM and PAYG customers in this appeal, the taxpayer in *Findmypast* had two types of contracts. A customer could pay a fixed amount to access the website and view/download the documents for a fixed time, or a customer could use PAYG credits to access/download individual documents for an individual fee. It was the PAYG contracts that were in issue. The PAYG credits had to be used up within a certain period or be lost *unless* the customer topped up his credits, in which case all the unused credits remained live. In this way, the credit of a *Findmypast* PAYG customer could be indefinite.

220. Moreover, the cost of accessing/downloading individual documents could change over time and the content of the website changed over time as well. A significant amount of PAYG credits were never used at all and the taxpayer claimed to recover the VAT it had accounted for on them. It succeeded.

221. The IHCS ruled:

[42].... The purchase of points rights and the conversion of points was thus not an aim in itself, but merely a preliminary transaction in order to achieve a further objective. It was therefore at the final moment of that conversion that the purchaser of points rights received the consideration for his initial payment....'

[43] ...[MRL] is nevertheless a reiteration of the basic principle laid down in *BUPA Hospitals Ltd*, namely that the normal point for the imposition of VAT is the time when goods or services are supplied, and that if VAT is to be charged before that time the goods or services in question must be "precisely" or "clearly" (the word used in paragraph 50 of *BUPA Hospitals Ltd*) identified.

[44].... The elements of uncertainty that were identified were those at paragraph 29:

the customer did not know exactly what accommodation or other services would be available in a given year; the customer did not know what the points value would be of a holiday in that accommodation or of those services; and it was the taxpayer, *Macdonald Resorts*, that determined the points classification, so that the customer's choice was limited to accommodation or services accessible within the points that he had available.

[46] The general approach taken by the Court of Justice in relation to article 65 and its predecessors appears to us to have three principal components. First, the chargeable event for the purposes of VAT is the supply of goods or services, not the payment of the price. That underlies the structure of articles 63 and 65. Secondly, it follows that the normal rule is that VAT is payable when the supply is made. Thirdly, VAT may be payable in advance of that date if the requirements of article 65 are satisfied, but for that to happen there must be precise identification of the goods and services that are to be supplied.....When a customer acquires PAYG vouchers and makes a payment to the taxpayer, a number of matters are uncertain. First, and most importantly, it is uncertain whether the chargeable event – redemption of a credit by viewing or downloading a document – will ever occur. This possibility is not hypothetical; the present proceedings have arisen because in a substantial number of cases PAYG credits have not been redeemed. Secondly, it is not clear when redemption will occur, and by that time a number of features of the service might have changed. In particular, the items that are available for viewing and downloading on the taxpayer's website might have changed. The price in credits to view and download any particular document might have changed by then. It is also theoretically possible that the VAT rate might have changed. Of these factors, the possibility that the available documents might have changed appears to be a real one. In its contractual terms and conditions the taxpayer expressly reserves the right to make changes to the website, including the records and services that are offered. The terms and conditions also provide that the number of credits charged to view a record may be changed from time to time.

> [49] The foregoing features are obviously different from those that were considered in BUPA Hospitals Ltd and Macdonald Resorts Ltd. In the former case, lump sums were paid for goods that were described in general terms in a list which could be altered at any time by agreement between the parties. In the present case, the items available on the taxpayer's website can be changed by the taxpayer alone, without further agreement, although the terms and conditions indicate that if anything is deleted a "decent" replacement will be offered. In both cases, however, as a matter of economic reality, it is obvious that a good selection of products must be made available if the commercial arrangement is to work. In BUPA the taxpayer/customer was entitled to select articles from the list provided by the supplier, which is similar to the present case. Finally, in that case the customer was entitled to resile unilaterally from the agreement at any time and to recover the unused balance of the prepayment. That feature is absent from the present case, although, as we have remarked, it is not uncommon for the customer simply to fail to use credits that have been paid for.
>
> [50]... The customer did not know exactly what accommodation or other services would be available in a given year, and did not know what the points value would be of a holiday in that accommodation or of those services at the relevant time. The taxpayer determined the points classification, thus limiting the customer's choice of accommodation or services. Thus a considerable level of uncertainty existed.
>
> [51] If a prepayment is to be chargeable to VAT, it must relate to a particular supply of goods or services, with a direct link between the goods or services and the consideration paid in advance. Unless such a link exists, the payment made in advance of the supply is a mere payment to the general account of the customer, without a sufficient link to the service that is to be supplied. In the present case, the uncertainties are significant. It is plain that a substantial number of PAYG credits are never redeemed, and there is obviously no link with a service in such cases. Furthermore, the taxpayer has a contractual power to vary the services that are offered, by varying the website, and also to vary the price of the various services, expressed in credits. While those powers are no doubt constrained by commercial considerations, as the terms and conditions acknowledge, the exact record that is on offer at the time when PAYG credits are purchased may not be the same as the record that is offered at the time when credits are redeemed, and the price may have varied.

222. The first uncertainty referred to by the IHCS was whether or not the credits would be redeemed:

> .....First, and most importantly, it is uncertain whether the chargeable event – redemption of a credit by viewing or downloading a document – will ever occur.....

I am far from certain that the IHCS was right to consider that uncertainty over redemption was a relevant uncertainty: it was not a relevant uncertainty mentioned by the CJEU. It was not an uncertainty in the nature of the supply but merely whether it

would be used. And what the IHCS said here appears to be contrary to what the CJEU said in *Air France* which I deal with below.

223. In any event, the IHCS identified other uncertainties, which were that the list of documents available could be unilaterally changed and the prices of the documents could be unilaterally changed during the period for which the credits were valid. The IHCS did not specifically mention the fact that the credits could be valid indefinitely (although that was true too). These were the sort of uncertainties that the CJEU considered relevant in *BUPA* and *MRL*. So it seems the *Findmypast* decision is consistent with the CJEU authorities on this point (bar its reliance on the uncertainty over whether the points/credits would be used).

224. If the appellant were to rely on *Findmypast* as suggesting that uncertainty over whether the credit would be used is a sufficient uncertainty by itself to prevent a supply taking place, I would consider it an incorrect proposition. The IHCS did not say this. It certainly has no basis in any CJEU decision. It is also inconsistent with the CJEU decision in *Air France*, which could be seen as a case where the only uncertainty with the supply was whether the customer would use its 'credit'.

225. It is clear that there is no rule that a supply does not take place until execution or completion of the transaction. For instance in *MRL* the implication of what the CJEU said was that a supply took place at the moment the points were converted by the customer booking accommodation, and not the point at which the customer actually occupied the property. There remained the possibility that the customer would not actually use the holiday accommodation he had booked, but that was irrelevant to the question of whether a supply had taken place. The VAT legislation clearly envisages a tax point on payment where payment preceeds completion (s6(4) VATA which reflects the PVD). And wherever a taxpoint arises before completion, there is always the possibility that the customer will not take what has been paid for: that does not negate the existence of the supply.

226. In *Air France* [2015] EUECJ C-250/14, customers booked and paid for specific flights. But they did not always turn up to board the plane, which would then depart without them. Was the airline liable for VAT on the price paid by these 'no shows'? The CJEU ruled that it was. The contract was certain. The supply was of the right to be on a specific flight to a specific destination on a specific day at a specific time and at a specific price. The customer had the contractual right to be on that flight, but had chosen not, or been unable, to exercise it, for whatever reason.

227. An agreement with certain terms, where one party has carried out his side of the bargain to provide consideration, but the other side has not yet carried out his side of the bargain because it is not yet time to do so, is liable to VAT. In *Air France* the airline completed its side of the bargain by making the agreed flight available to the purchaser: the purchaser's failure to turn up for the flight did not affect the airline's VAT liability.

228. The CJEU in *Air France* said:

> It follows from the above that a supply of services, such as air passenger transport, is subject to VAT where, first, the sum paid by a passenger to an airline company, in the context of the legal relationship constituted by the transport contract, is directly linked with an identifiable service for which it constitutes the remuneration and, secondly, that service is performed....
>
> [28] Therefore, the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services.
>
> ....
>
> [39] Moreover, the Court has held that, in order for VAT to be chargeable before the supply is made, it is necessary and sufficient that all the relevant information concerning the chargeable event is already known and therefore, in particular, that, at the time the payment on account is made, the goods or services have been clearly identified (see judgment in *Orfey Balgaria.....'*
>
> *[40]* ... all of the information concerning the future transport service is already known and clearly identified at the time of purchase of the ticket.
>
> *[41]* ... in the event of a 'no-show', the airline company which sells a transport ticket fulfils its contractual obligations where it puts the passenger in a position to claim his rights to the services provided for by the transport contract....

229. The implication of what the CJEU says here is that its decision would have followed that in *BUPA* and *MRL* if, instead, the customer had paid Air France a sum of money and the agreement had been that the customer could call down all or part of the sum to pay for a flight, the date, destination and price of which was uncertain at the date the customer paid the money to Air France.

230. But my understanding is that it was *crucial* to the CJEU's decision in *MRL* (and the earlier case of *BUPA)* that a tax point could not arise earlier than the date of conversion of the points because the 'relevant information' about the supply was not known before that date. So the question is what is 'relevant information' and was it known before the alleged conversion of units into airtime in this appeal?

231. It is clear that only particular uncertainties matter:

> (a) Is there an uncertain time in which to use up the money paid?
>
> (b) Is there an uncertain price for whatever the credit can be paid for?
>
> (c) Is the subject of the credit uncertain?

232. In *MRL,* all of these uncertainties existed: (a) the period in which the points rights could be exercised could in certain cases be extended; (b) at the time the points rights were acquired, it was not known how many points would be needed for any of the available holiday accommodation; and (c) at the time the points rights were acquired, the list of available holiday accommodation was not finalised.

233. Similarly, in *BUPA* all of these uncertainties existed: (a) the period in which the credit could be drawn down was entirely indefinite; it was effectively infinite; (b) the costs of the drugs/prostheses was undetermined at the time the rights were acquired; (c) the list of drugs/prostheses could be altered (within certain constraints).

234. Similarly, in *Findmypast*, all of these uncertainties existed: (a) the period in which the rights could be exercised could be extended if further credit was purchased; (b) the price of documents could alter after purchase of the rights; and (c) at the time the points rights were acquired, the list of available documents could be unilaterally altered after the credits were purchased (within certain constraints).

235. There was an additional uncertainty in *BUPA*, which was not present in *MRL* and *Findmypast*, which was that the customer could demand the return of unused credit, so it was not even known how much the customer was actually paying. But this uncertainty is clearly not essential as it was not present in *MRL* and *Findmypast.*

236. Because all of the three uncertainties I have identified were all present in *MRL, BUPA* and Findmypast, it is not possible to say whether or not the presence of only one of them might be enough to mean that there is no supply until that uncertainty was resolved. It does not matter in this appeal because *none* of these three uncertainties are present. So far as PM customers paying their MRC are concerned:

> (a) They do not have an indefinite time in which to use up their rights purchased by their payment. On the contrary, they have the billing period at the end of which time their rights to a set number of calls, texts and data downloads in that period will expire;
>
> (b) The cost of the rights for which they have paid is certain. This is because the MRC is certain.
>
> (c) What the MRC purchases is certain. It buys the specified number of call minutes, texts and MB of data downloads.

237. I reject the case that PM customers buy units which are later converted into the supply of services to them. Even if it is right as a matter of English contract law, or EU VAT law, that the PM customers buy 'units' of airtime from H3G, the purchase of the units is itself the supply to the PM customers. The supply is certain and identifiable at that time. When PM customers pay their MRC, they are paying for an identifiable number of phone minutes, identifiable number of texts and an identifiable amount of data downloads in a finite and specified period of time. This is not a case comparable to *MRL, BUPA* or *Findmypast.* It is not a case comparable to the payment by a H3G PAYG customer.

238. On the contrary, so far as a PAYG customer of H3G is concerned, it is also true that these three uncertainties all exist at time of payment by a PAYG customer: (a) their credit is in certain circumstances indefinite; (b) it follows from (a) that the cost of the airtime (whether calls, texts and/or data downloads) could vary between the time the credit was paid and the time it was used and (c) customers have the choice whether to use their credit for calls, texts and/or data downloads (although that list is closed: the choice is only calls, texts and/or data). These uncertainties simply do not exist with PM customers.

239. The only uncertainty is whether the PM customer will use up their full entitlement of minutes, texts and data downloads: that is their choice, but as with the 'no-shows' on flights, the VAT supply takes place no later than the time of payment. In so far as *Findmypast* suggests otherwise, it is not binding and is inconsistent with the CJEU decision in *Air France.* I prefer the *Air France* decision which is consistent with economic reality.

Is it possible to adjust place of supply after the time of supply?

240. The appellant's point was that it must be right that it is not taxable at the time of payment of the MRC, but only on actual use and enjoyment within the EU of its telecoms services, because otherwise there would have to be a retrospective adjustment to its VAT liability. Its point is that such an adjustment is not provided for in the EU legislation and therefore is not possible.

241. HMRC considers the correct interpretation of the law is that the appellant is taxable at the time the MRC is paid and, as there has at that point been no use and enjoyment of the telecoms services outside the EU (as there has been no use and enjoyment of them at all), the place of supply is the UK and the full MRC is subject to VAT. If and to the extent there is actual use and enjoyment of the services outside the EU there should be a later adjustment by repayment of the VAT, as happened in *Telefonica.*

242. HMRC accepts that there is no explicit provision for a later adjustment in the PVD or UK legislation but considers that it is implicit in the use and enjoyment provision because use and enjoyment can only be measured at the actual time of consumption of the services, whereas the PVD provides for the tax point (the time when the VAT is due) to occur at the time of payment when it precedes actual consumption.

243. Mr Pleming said that although the legislation actually reads:

> (3) Where –
>
> (a) a supply of services to which this paragraph applies would otherwise be treated as made in the United Kingdom, and
>
> (b) the services are to any extent effectively used and enjoyed in a country which is not a member State,
>
> the supply is to be treated to that extent as made in that country.

H3G's interpretation of the law would require it to be read as if it said:

> (3) Where –
>
> (a) a supply of services to which this paragraph applies would otherwise be treated as made in the United Kingdom, and
>
> (b) the services ~~are~~ may or may not, to any extent be effectively used and enjoyed in a country which is not a member State,
>
> the supply is to be treated to ~~that extent~~ the extent that it may be made in that country, as in fact ~~as~~ made in that country.

244. Mr Peacock made the point that HMRC's interpretation depended on the assumption that the place of supply was residence (the general rule in Art 58) except to the extent it was proved that the special rule (use and enjoyment) was proved to apply: but he considers the language of the PVD ousts the general rule on place of supply entirely. So, in his view, unless and until place of supply is determined by use and enjoyment, there is no place of supply at all.

245. Mr Peacock relied on a comment in *RR Donnelley Gobal Turnkey* [2014] STC 131 §28-29 which said that special rules make the basic rule irrelevant: his analysis was that meant that the basic place of supply rule simply could not be applicable to a supply which was affected by the use and enjoyment rules. HMRC countered this by pointing out that the legislation on the basic place of supply said that it was 'subject' to the special rules, indicating that it was only modified by the special rules if and when the special rules actually affected a supply, in other words, when the supply was actually used.

246. I think that, literally, the PVD could be read either way, but should be read to be consistent with its objectives. Two of the stated objectives of Art 59a (and which are well-known as objectives of the PVD in general) are to avoid 'non-taxation' and 'distortion of competition'. And so I move on to consider these and other general principles which can be applied to determine how the PVD should be interpreted.

Non-taxation is possible under EU law?

247. Mr Peacock's reading of the legislation results in non-taxation of those telecoms services which are not 'consumed' in the sense of actually being used up, whereas it is clear from *Air France* that the purchase of rights which are then not used is nevertheless a supply that is subject to VAT.

248. Mr Peacock does not accept that non-taxation is abhorrent to the PVD. For this proposition he relies on *RBS Deutschland* [2010] EUECJ C-270/09 and *MRL*. I consider his reliance misplaced. So far as *MRL* and *BUPA* were concerned, there was no non-taxation of a supply because the CJEU ruled that no supply had taken place at the time the money was paid. So far as *RBS Deutschland* was concerned, I accept that the outcome of that case was non-taxation of a supply but would see that as a special case where the member states concerned had each correctly, but differently, exercised their discretion under the VAT directive such that the rules of each resulted in the right to levy the tax on the supply lying with the other member State, thus resulting in

the non-collection of the tax on the supply. In my view, the principle that VAT law should be interpreted to avoid non-taxation nevertheless in general remains true.

249. Mr Peacock also suggested that EU principles, such as avoiding non-taxation, do not apply where a member State acts under a discretion (such as here where the UK exercised the choice given to it by Art 59a to implement the use and enjoyment provisions). However, he also said he accepted that there was authority binding on me to the contrary so he did not ask me to rule in his favour on this. And I do not. He reserves the right to argue the point if the case goes further.

Distortions of competition should be avoided?

250. H3G's reading also creates a massive distortion of competition because it means that H3G (with its F@H) would avoid VAT on the unused element of the MRC (worth about half a billion pounds to it) whereas all its competitors (none of whom have a product like F@H and so the place of use and enjoyment of the services bought with the MRC would always be in the EU) would be liable to the VAT on the full MRC irrespective of the fact there would be an unused element of the MRC.

251. HMRC point out that in *IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, the Court of Appeal applied a purposive interpretation of the law to prevent breach of principle of non-taxation and breach of principle of non distortion of competition in circumstances where the taxpayer had tried to use the face value voucher rules to create a supply in the UK outside the scope of taxation. The Court of appeal said of its interpretation which prevented that outcome:

> This is not beyond the bounds of permissible interpretation because there is no indication that Parliament specifically intended to depart from the Sixth Directive in this respect. The provisions of Schedule 10A are equally consistent with Parliament not having foreseen the particular problem that has arisen in this case.

252. I also note that at [36] of *MRL* the CJEU gave as one of the reasons for rejecting a suggestion of the appellant for an apportioned place of supply (see [35]) was that such an interpretation had the potential to give rise to abuse. That would be because a supplier could include a foreign property in the mix just to dilute its VAT liability. I note that if I adopted H3G's position in this appeal, that would be an option open to all MNOs: include a single foreign location within the MRC allowances to avoid VAT on all unused calls. While a minor point, it reinforces my view that H3G's interpretation is not correct.

253. My conclusion is that, if possible, the legislation should be interpreted to avoid distortions of competition and non-taxation, as that is consistent with its purpose. That means I prefer HMRC's interpretation of the legislation which permits adjustment to the place of supply after the time of supply.

Can a single supply have more than place of supply?

254. The appellant suggested, but did not particularly make a point of, its proposition that a single supply could not have more than one place of supply. It seems to me, however, the opposite is implicit in the PVD because it is an inevitable consequence of having (a) single supplies that comprise multiple elements and (b) a place of supply determined by use and enjoyment. In other words, because the supply of the right to X number of phone calls for a single price is a single supply, and it is possible to make those calls in lots of different places, it is an inevitable consequence of the PVD's rules on place of supply being determined by place of use and enjoyment that a single supply can have more than one place of supply.

Can taxable status of supply change after time of supply?

255. The appellant also referred me to the case of *Muster Inns Ltd* [2014] UKFTT 563 (TC) §36 where, in the process of deciding that events occurring after the time of supply could not affect the question of the permanence of the taxpayer's establishment, it said:

> [36]...the principle of legal certainty requires that the VAT treatment of the supply must be capable of determination of (sic) the time the supplies made (see for example *Halifax* ...[2006] STC 919 [72] 'Community legislation must be certain in its application foreseeable by those subject to it....The requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail fiscal consequences....') As a result events taking place after a supply is made cannot affect whether or not an establishment has sufficient permanence for the purpose of determining whence the supply is made. The question must therefore be judged only by reference to matters known at the time of the supply.

256. I do not call into question its specific conclusion about permanent establishments: in so far as the Tribunal made a general statement that nothing happening after the time of supply could affect the taxable status of that supply, it was a statement made without any consideration of the use and enjoyment provisions, and is therefore not authoritative on that. Certainly the Upper Tribunal in *Telefonica* did not appear to be aware of any general principle that nothing happening after the time of supply could affect the taxable status of that supply, although I accept that the point was not strictly in issue in that case. As an FTT decision, *Muster Inns* is not binding in any event.

Conclusion

257. As I have said, the use and enjoyment provisions could be read either way, but should be read to be consistent with the objectives of the PVD. The principles of avoidance of non-taxation and distortions of competition strongly suggest that it should be read as suggested by HMRC. In other words, at the time of the supply there is no non-EU use and enjoyment so the place of supply of the entire MRC is the UK; there is a subsequent adjustment to the extent the appellant proves that use and enjoyment outside the EU took place.

258. I accept that HMRC's reading brings its own difficulties: there is no explicit mechanism for an adjustment in the legislation and there may be problems where the use and enjoyment occurs in a different accounting period to the payment of the MRC. But as is shown by *Telefonica*, HMRC has the power to make reasonable directions to deal with these matters: as the PVD itself provides, the administration of the rules of the PVD is (within certain limits) for the national tax authorities to determine.

259. Moreover, I think it is implicit within Art 59at that a place of supply could change after the time of supply in circumstances where the use and enjoyment can be shown to have taken place outside the UK. It is implicit because the time of supply occurs at the time of payment if it precedes actual use and enjoyment.

260. It must also be implicit in Art 59A that a single supply can have more than one place of supply. This is because it is obvious that a single supply of a bundle of telecoms services could be used partly inside and partly outside the EU.

261. The CJEU do not appear to have difficulties with similar propositions: for instance, in *Talacre* [2006] EUECJ C-251/05 it ruled that different elements of a single supply could be subject to different rates of VAT. My conclusion is that a single supply can have more than one place of supply where that follows from the application of Art 59a.

262. In any event, it is as true to say that the appellant's proposition that the time of supply cannot be fixed until the place of supply is finalised is also inconsistent with provisions of the PVD and in particular the provision which makes payment the time of supply. As the appellant's interpretation leads to significant non-taxation and distortion of competition, HMRC's interpretation is to be preferred as a matter of principle. It is in any event the interpretation which is most consistent with the authorities; and any problems of implementation can be and are dealt with by the HMRC's general powers to administer VAT.

263. I accept that that conclusion means that H3G has entirely different VAT treatment for its PAYG customers compared to its PM customers: that this is right is demonstrated by the cases of *MRL* and *BUPA*. For PAYG customers, there is no supply until the telecoms services are actually used. For PM customers, the supply takes place where the MRC is paid because at that point the supply is certain.

264. In conclusion, H3G should pay VAT on the full MRC at the time it is paid by its PM customers irrespective of whether the contracts included F@H. There should be a subsequent adjustment for any actual use and enjoyment outside the EU. Its claim fails on its first basis: I move on to consider the second basis for its claim.

Face Value Vouchers

265. Putting aside its reliance on *MRL* and the claim that at the point of payment there are sufficient uncertainties such that no supply takes place until the place of supply is known and/or that it supplies 'units' and that no supply takes place unless

and until these units are 'exchanged' for airtime, the appellant's case is that it supplies its customers with electronic vouchers.

Legislation

266. Sch 10A VATA provides

> *1. Meaning of 'face-value voucher' etc*
>
> (1) In this Schedule 'face-value voucher' means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> (2) References in this Schedule to the 'face value' of a voucher are to the amount referred to in sub-paragraph (1) above.
>
> *Nature of supply*
>
> 2 The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.
>
> ....
>
> *Treatment of retailer vouchers*
>
> 4 (1) This paragraph applies to a face-value voucher issued by a person who –
>
> (a) is a person from whom goods or services may be obtained by the use of the voucher, and
>
> (b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.
>
> Such a voucher is referred to in this Schedule as a 'retailer voucher'.
>
> (2) the consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.
>
> ....
>
> *Exclusion of single purpose vouchers*
>
> 7A Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT.
>
> *Interpretation*
>
> 8(1)....
>
> (2) For the purposes of this Schedule-
>
> (a) the rate categories are-
>
> (i) supplies chargeable at the rate in force under s 2(1) (standard rate),
>
> (ii)-(iii)

(iv) exempt supplies and other supplies that are not taxable supplies.

267. The appellant's position is that it provides its PM customers with electronic face value retailer vouchers which are not within paragraph 7A. Therefore, says the appellant, the time of supply is as and when the vouchers are redeemed, which is when, says the appellant, the airtime is actually used by a phone call being made, a text sent or data downloaded. If the appellant is right on this, it means that it is not liable to tax on that part of the MRC which is unused, or that part which is used and enjoyed outside the EU.

The qualifications to be a FVV

268. For the appellant to be right it must demonstrate that what its PM customers get in exchange for their MRC is:

(a) An electronic voucher (¶1(1));

(b) Which represents the right to receive services (¶1(1))

(c) To the amount stated or recorded on it (¶1(1)

(d) That H3G is a person from whom services may be obtained by the use of the FVV (¶4(1)(a)) and

(e) The FVV does not represent a right to receive services of one type which are subject to a single rate of VAT (¶7A)

269. So far as (d) was concerned, I think HMRC accepted that if there is a voucher, it would be within ¶4 as a retailer voucher. H3G clearly is a person from whom services may be obtained by the use of the (alleged) voucher. There was rather more dispute about the other requirements.

270. So far as (a) was concerned, it was the appellant's case that there was an electronic voucher because each customer had a separate account which they could access and see in real time how much credit they had left. Moreover, merely by making a phone call, sending a text, or downloading data, the customer was able to access and use up the credit he had purchased with his MRC.

271. So far as (c) was concerned, it was the appellant's case that there was an amount 'stated or recorded' in each customer's online account. The appellant relied on the case of *Skyview Ballooning* [2013] UKFTT 32 (TC) for the proposition that as long as the face value was ascertainable from a computer system, there was an amount 'stated or recorded'. I revert to this point at §296.

272. So far as (e) was concerned, the appellant considered what it supplied was a multi-purpose voucher as it could be used for phone calls, texts and data downloads. It was not services 'of one type'. Firstly, I am far from certain it is right to see various types of telecommunications services as different types of service. But even if it was, the appellant's case on this suffers the more fundamental flaw that the 'voucher' was not interchangeable: it could not be used for calls or texts or data downloads. On the contrary, that element of the 'voucher' which gave the right to make phone calls could not be used to send a text or download data, and so on (see

§45). It would be more accurate, if it was a voucher at all, to see it as a collection of three vouchers, one voucher for phone calls, one for texts and one for data downloads. If it was a voucher, the single price (MRC) was paid for three vouchers. Each of those vouchers was for one type of service.

273. But were those single types of service subject to a single rate of VAT? I presume it was the appellant's case that the services to which the 'voucher' gave its customers the right were not subject to a single rate of VAT because F@H meant that it was possible that the services might be outside the scope of UK VAT (if the phone was used outside the EU). I do not agree with this analysis: telecommunications services, whether phone calls, texts or data downloads, are all subject to the same rate of VAT. The rate of VAT does not vary: it is simply not chargeable if the use and enjoyment is outside the EU. My conclusion would be (if the MRC was paid for vouchers) that the vouchers were within ¶7A. The effect of that is that the special rules for FVV do not apply and the appeal must be dismissed.

Does a PM contract represent the right to a supply of services?

274. Nevertheless, putting these matters aside, there seems to me to be another fundamental issue with the appellant's claim that the MRC is paid for vouchers, and that is whether the 'voucher' meets the condition (b). Is it true to say that what its customers acquire is something which 'represents a right to receive...services to the value of an amount stated on it or recorded in it'?

275. The appellant's case is, obviously, that it does represent such a right to receive telecommunications services: once the PM customer has paid the MRC, he or she is entitled to receive a stated amount of telecommunications services. HMRC do not agree with the appellant's analysis. Both parties referred me to, but relied on different dicta from, the three decisions relating to the 'London Pass'.

The London Pass case

276. The case was *Leisure Pass Group.* The facts were that the taxpayer sold a 'pass' which looked rather like a credit card. It entitled the purchaser during a set period to enter (once) any or all of a number of stated attractions in London. The question was whether the pass was a face value voucher; the VAT Tribunal (2007)V20351 decided it was a voucher but not a face-value voucher as it did not have an amount of money stated on its face. The matter was appealed to the High Court. The decision of the High Court [2008] EWHC 2158 was more nuanced but agreed with the VAT Tribunal that the London Pass was not a face value voucher.

277. The taxpayer then altered the terms of its 'pass' so that it included a face value, and that it would expire at the first of (a) the expiry of the set period for which it was valid and (b) exhaustion of the face value. The face value would be reduced by the gate price of the various attractions visited, with the result that the visitor would be unable to use it if the balance left on the pass was less than the gate price of the next attraction he wished to visit. (To make it attractive to consumers the pass was sold for substantially less than its face value).

278. The second VAT Tribunal (2009)V20910 held that the London Pass had a face value and did 'represent a right to receive goods and services to the value of an amount stated on it'. It allowed the appeal.

279. As I understand it, the appellant's point was that, putting aside the obvious difference that the London Pass was a physical voucher and an H3G PM contracts were only a virtual 'voucher' (if at all), there were no real differences between a London Pass and the 'voucher' given to a PM customer. In particular, a PM customer had an allowance of call minutes, texts and data downloads: if he uses up that allowance, it expires; if he doesn't use up the allowances, they expire anyway at the end of the billing period.

280. As I understand it, HMRC does not necessarily accept that the second VAT Tribunal decision in the *London Pass* saga was correct; in any event they choose to rely on dicta from Sir Andrew Park in the High Court decision, dicta which was not referred to in the subsequent VAT tribunal case. And that dicta was at §23 where Mr Pleming's point that if 'H3G PM plan' was substituted for the word 'pass' what Sir Andrew Park said there would apply equally to this appeal (thus, perhaps unintentionally, corroborating Mr Peacock's view that there was very little difference in VAT essentials between the London Pass and the H3G PM plan). Sir Andrew Park said:

> [23]...if Sch 10A meant that sales by LPG of London Passes did not attract VAT when they were made, there would be a[n] ... inconsistency with the basic policy of the VAT system.....The policy is that, if a person receives a payment or other consideration for the supply of something which the person in in the business to supply, then, exemptions and zero-ratings apart, VAT should be payable; further VAT should be payable when the supply is made, and in principle the liability should not be affected by waiting to see what use the recipient makes of what has been supplied to him. If LPG is right in this case, that policy is not fulfilled. A supply by LPG of a London Pass is complete when a customer buys the pass, regardless of how much or how little use the customer makes of it. The extreme case would be a customer who buys a pass, pays the full price for it, but in the event never uses it at all. In my opinion, the policy of the VAT system is that in such a case LPG should be liable to account for VAT on the consideration which it receives from the customer. (an analogy would be the sales of a theatre ticket where in the event the purchaser does not turn up to see the play. VAT is obviously payable by the theatre.) .....

281. My understanding of what Sir Andrew Park said here was that where UK legislation refers to a voucher which 'represents a right to receive goods or services...' it must be understood in the context of EU VAT law as a whole and in particular could not be given an interpretation which ran counter to basic EU VAT law. In particular, if without the UK FVV legislation, there would be a supply for VAT purposes, UK FVV legislation did not override that. There would be a supply.

282. In other words, there could only be a voucher if there was no supply of a right to receive goods or services. 'Represents' had to be understood as meaning that the 'voucher' entitled the holder to obtain at a future point a right to receive goods or services, but was not itself the supply of a right to receive goods or services.

283. Sir Andrew Park could not have referred to the subsequent decision of the CJEU in *Air France* case but it seems he anticipated what that court would rule. He referred to a theatre ticket but a plane ticket is just the same. Neither are FVV. This is because they do not represent the right to receive services: they *are* the right to receive services.

284. Put another way, if the payment for an alleged voucher is a payment for goods or services that is sufficiently certain to amount to a supply for VAT purposes (as described by the CJEU in *BUPA* and *MRL* and other cases*),* then the time of supply has occurred and VAT is payable. The FVV legislation at that point is irrelevant: there is no voucher for a future supply: there is a supply. The 'voucher' does not *represent* a right to receive goods or services, it is the right to receive goods or services. So by the use of the word 'represents' the UK FVV legislation must be understood as referring to something which can be exchanged for the right to receive goods or services, but is not in fact the right to receive goods and services.

285. If I am wrong on this, it would mean all PM customers, all theatre tickets, all plane tickets, and anything similar, are all vouchers and (subject to the ¶7A point) VAT would not be due unless and until used.

286. A book voucher is often cited as the classic FVV voucher. And I would agree. At the time the voucher is purchased, it 'represents', in the sense that it can be exchanged for, the right to receive goods (and perhaps even services) from one or more bookshops, but it is not the right to receive goods or services because the supply is too uncertain.

287. I have discussed above what are relevant uncertainties the presence of which in an agreement mean that there is no supply:

(a) Uncertainty over the period in which the rights can be used up;

(b) Uncertainty over the cost of what it can be used for;

(c) Uncertainty over the identity of the goods/services for which it can be used.

288. I have also commented that it would seem that perhaps only one or two of these uncertainties need to be present in order for there to be no supply. With a book token, they may be no uncertainty over its expiry date but there is clearly potential for the prices of the books to change before the expiry date, and clearly uncertainty over which books the bookshop(s) will be selling at any point in time before the expiry date and uncertainty over which book(s) the customer will select. A book token therefore does have the potential to be a voucher within Sch 10A (subject to fulfilling the other requirements such as having a face value etc).

289. There are no such uncertainties with theatre or plane tickets. The 'expiry' date is fixed (the date of the flight/performance): the price is fixed (the price of the ticket); the service is fixed (the particular performance or flight). A plane or theatre ticket is therefore not a voucher: one does not even have to ask whether it has a face value or whether it is for a single purpose within ¶7A.

290. I recognise that no such analysis was used in the second VAT tribunal decision on the *London Pass.* That makes the decision far less persuasive: the Tribunal gave no consideration to §23 of the High Court decision, nor to the case of *BUPA.*

291. It is not for me to say whether or not the second VAT tribunal in the London Pass case came to the right conclusion, but I do not agree with its method of analysis. I think it should have considered whether the sale of the London Pass was itself sufficiently certain to amount to a VAT supply in its own right, such that it could not be a voucher as it would not represent the right to a supply but would actually *be* the supply.

292. I consider the Tribunal should have considered whether the London Pass had any of the uncertainties identified at §287 above. It is clear that the London Pass did not have an indefinite time until expiry; it is not so clear whether the gate prices could alter in between the purchase and use of the London pass. It does appear that the list of attractions was finite but there was uncertainty over which would be selected by the customer. I am not certain whether that is sufficient uncertainty to mean that the London Pass was not itself a supply of a right, rather than merely representing a right.

293. But I am quite clear, as I have already said above, that there are no relevant uncertainties in this appeal. The payment of the MRC entitled the PM customer to a set amount of calls, texts and data downloads within a set period. The time of expiry of the rights was certain; the cost of the rights was certain (the MRC); the nature of the rights was certain (a set allowance of calls, texts and data downloads). The only uncertainty was whether and to what extent the customer would use the rights he had purchased. That is not a relevant uncertainty: see *Air France.*

294. There was therefore no voucher which represented the right to receive services: there was a supply of telecoms services.

295. That is the end of the appellant's case but I make a few further points.

Value stated in or on voucher?

296. The 'voucher' must not only represent a right to receive goods or services, it must represent such a right 'to the value of an amount stated on it or recorded in it.' (See (c) on the list at §268). My understanding of this is that that terminology reflects the fact that with a voucher there is inherent uncertainty in precisely what goods or services will be selected and inherent uncertainty in the price of the goods/services which can be selected. All that is certain is the face value of the voucher. So where there is no uncertainty in what goods/services will be selected and no uncertainty as to

their price, there is no voucher. There is a supply. The 'face value' is not the face value of a voucher, but the price for the supply.

Findmypast

297. As I have said, the decision of the Inner House of the Court of Session in *Findmypast* [2017] CSIH 59 was issued after the hearing. Mr Peacock relied on the Upper Tribunal decision which had found that the credits in that case were FVVs; the Inner House, however, overturned that decision and found that the credits were not FVVs.

298. What the Inner House said was as follows:

> [59] So understood, the face value voucher is distinguishable from a mere credit with a retailer; the credit is an accounting entry, whereas the face value voucher is representative of a right....
>
> [60] In our opinion the PAYG credits, or vouchers, issued by the taxpayer, do not amount to face value vouchers, but are rather mere credits that permit the customer to view and download particular documents on the taxpayer's website, through the operation of the taxpayer's accounting system
>
> As we have already indicated in discussing the nature of the vouchers, we are of opinion that they are not purchased for their own sake but as a means to view or download documents. That is quite different from the typical face value voucher.... The PAYG credits are transferable at the point when they are issued, as they may be the subject of a gift made at that point, but thereafter they cannot be transferred; in this respect to they are different from typical face value vouchers. For these reasons we consider that the PAYG credits cannot be said to "represent" the right to receive services, but are merely a credit that can be utilized to obtain such services.
>
> [62] For these reasons we are of opinion that the PAYG vouchers do not represent a right to receive services "to the value of an amount", because what the vouchers are worth is uncertain until the time of redemption; thus the third requirement of paragraph 1(1) is not satisfied **.....**

299. The CSIH also looked at the question, as I have, of whether there was a voucher which 'represents a right to receive goods or services to the value of an amount stated on it or recorded in it.' and divided that question up into whether it (i) represented a right to receive goods or services and (ii) whether it had an amount stated on it or recorded in it.

300. So far as (i) the question of representation was concerned, the CSIH approached it rather differently. The CSIH appears to have decided it was not a voucher because it was simply a credit with a retailer. Nevertheless, it was clear that the CSIH did not consider that the agreement between taxpayer and its customer was sufficiently certain to amount to a supply. What they say therefore is consistent in effect with what I have said: but they drew a distinction between a mere credit with a retailer and

an actual voucher, which they saw as something more akin to a transferable currency. It is clear in this case that the payment of the MRC was not a mere credit with H3G, such as in *MRL* or *BUPA.* It was a payment for a certain supply.

301. So far as (ii) was concerned, the CSIH dealt with this in [62] and I have some difficulties with what they said as my understanding of the facts of that case is that the monetary value of the credit with the taxpayer was certain from the moment it was paid, it was just uncertain how much that credit would buy at the date of redemption. That is of course true of all vouchers and indeed in my view one of their distinguishing features (§296). It is therefore difficult to see what the CSIH said as consistent with Parliament's intention as it would appear to prevent all vouchers from being within ¶10A: as I have said, the face value of the archetypal voucher, the book token, is known at the time of its purchase: what it is actually worth (in the sense of how many books it will purchase) is not known until redemption.

302. However, what the CSIH said here does not matter in that in this case the 'value' of the MRC is known at the time it is paid: both its monetary value, and its real value (measured in numbers of minutes of calls, texts and MB of data downloads) was clear at the time the MRC was paid. Applying the test that the CSIH appeared to have applied in *Findmypast*, H3G's PM contracts would fail to qualify as vouchers because their value was certain at time of payment.

303. Operating on the basis that what the CSIH said here was neither right nor binding, nevertheless the PM contracts would fail to qualify as vouchers for the reasons given at §273, §293 and §296.

PAYG contracts are vouchers?

304. Mr Peacock's case is that HMRC already accept that PAYG customers receive vouchers when they pay H3G: he says fiscal neutrality should mean that this Tribunal should also find PM customers receive vouchers when they pay H3G.

305. It appeared agreed that HMRC treated PAYG contracts as vouchers; moreover they treated the purchase of an add-on by a PAYG contract as a voucher too. Mr Pleming gave it as his opinion that HMRC were wrong to treat the purchase of an add-on by anyone, including a PAYG customer, as a voucher.

306. I am certain that how HMRC chooses to tax PAYG contracts does not give rise to fiscal neutrality issues: the question is not how HMRC tax PAYG contracts, but how they are properly treated under UK law.

307. I agree with Mr Pleming that HMRC are wrong to treat the purchase of an add-on by a PAYG customer as the purchase of a voucher. It is exactly the same as the purchase of one-off PM contract and should be treated the same. It is a supply of rights which are certain and for a certain value. Under the law as explained in *BUPA* and *MRL,* it should be taxed as it is a supply.

308. The result of what appears to be a misapplication of the law by HMRC has worked in the appellant's favour as they have presumably paid less VAT on add-ons purchased by PAYG customers than properly should have been paid: but such beneficial treatment does not mean that all PM contracts should be treated as vouchers, when in law they are not.

309. In any event, fiscal neutrality is an aid to interpretation, it is not a fundamental principle of law (see Lord Neuberger in *Airtours* [2016] UKSC 21 at [52]). Therefore it cannot override what are fundamental principles of law, one of which in VAT is that VATable supplies should be taxed.

310. Putting all that aside, for reasons I have already given there are relevant uncertainties with PAYG contracts. There is:

(a) Uncertainty over the period in which the rights can be used up (because in some cases the credit can be kept alive indefinitely);

(b) Uncertainty over the cost of what the credit can be used for (this is implicit from (a));

(c) Uncertainty over the identity of the goods/services for which it can be used (ie whether calls, texts or data downloads) (discussed at §45).

311. Whether or not a PAYG contracts satisfies the definition of a FVV in all other respects, it clearly satisfies the requirement that it merely 'represent' the supply of rights to telecoms services, rather than being the supply of telecoms services. The uncertainties identified mean that it cannot be a supply of telecoms services. The same is not the case with a PM contract where there are no relevant uncertainties.

What is the relevance of PPU, F@H and handsets to the voucher issue?

312. It is difficult to see how the existence of PPUs, even if they were a contractual term, could assist the appellant's case that its PM contracts amounted to electronic vouchers. While vouchers must have a stated value, unless the value of what can be bought with the vouchers is uncertain, it seems to me there can be no voucher for the reasons given at §293. A PPU is the antithesis of this as it shows that the value of what can be bought with the purported 'voucher' is certain at the time of payment: in any event that is obvious with or without a PPU as the MRC is certain and the number of calls, texts and MB of data is set.

313. It is similarly difficult to see the relevance of *F@H* to the appellant's case that its PM contracts amounted to vouchers. It may have relevance to the question of whether, if the PM contracts were vouchers, they were caught by ¶7A, as discussed at §273. Other than that, I see no relevance at all.

314. So far as the question of single and multiple supplies, I have accepted that the handset was a separate supply to the supply of the telecoms services; I have not

accepted that the MRC was solely in consideration for the telecoms services. My conclusion is that the MRC must be split between the handset and telecoms services.

315. That conclusion is relevant to the voucher question, or would be relevant if I had not already concluded that the PM contracts did not even get over the first hurdle of qualifying as a voucher. It would be relevant because of the requirement that a voucher represents the right to receive services to the value of an amount stated or recorded on it. However, the MRC (and, it follows, the PPU) was never split between telecoms services and the handset, so any 'amount' stated in the 'voucher' did not represent the right to receive services to that value. The right to receive telecoms services was for a lower value; the price of the handset needed to be stripped out.

316. Irrespective of the question of whether the PM contracts were vouchers at all, PM contracts with handsets could not be vouchers because they did not entitle the holder to services to the stated amount, but only to a lesser, unstated, amount.

Conclusion

317. My conclusion on the issues before me, for all the reasons given above, is that the appeal should be dismissed in its entirety.

318. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 1 JUNE 2018