Ref: FTC/15/2015
Appeal No. UT/2015/0029
[2016] UKUT 17 (TCC)

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

FINDMYPAST LTD (formerly DC THOMSON FAMILY HISTORY LTD and before that BRIGHTSOLID ONLINE TECHNOLOGY LTD)

Appellant

v.

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD GLENNIE

Sitting in public at George House, 126 George Street, Edinburgh on 23 November 2015

Mr Philip Simpson QC, instructed by Henderson Loggie, for the Appellant (Findmypast)

Ross Anderson, advocate, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

DECISION

LORD GLENNIE

Introduction

[1] The appellant ("Findmypast") carries on the business of providing online access to genealogy and ancestry information. It owns or has licences to a number of genealogical websites. Customers wishing to search the historical records on the website may do so for free. But to use some features of the website, e.g. to view or

print most records on the sites, a customer will have to pay. This can be done in one of two ways: by subscription; or by Pay As You Go ("PAYG"). A subscription lasts for a fixed period. Within that period there are no limits to the use of the sites. PAYG, by contrast, works on the basis that a customer pays a lump sum, in return for which he is issued with a number of "credits" (sometimes called "units" or "vouchers"). These credits are used to view a record on the website. Each time the customer views a record, some of his credits get used up. The number of credits required for a record varies according to the nature of the particular record and is subject to change, but the customer is told how many credits are required for a particular record before he commits himself to viewing it.

[2] Credits are only valid for a fixed time. Any credits not used (or "redeemed") by that time will expire. Unused credits will be revived if the customer purchases more credits within 2 years, but otherwise they are lost.

[3] In this case, the appellant seeks repayment of VAT which, it claims, was accounted for incorrectly on unredeemed vouchers from September 2008 to 10 May 2012. The appellant argues, in short, that where units or vouchers have not been used or redeemed there has been no taxable supply and consequently no VAT liability. The claim relates only to PAYG; subscription payments do not raise the same issue. The claim does not extend beyond 10 May 2012 because, with effect from that date, the law was changed to make VAT due on single purpose face-value vouchers at the time of their issue.

[4] The appellant's claim for repayment was rejected by HMRC. The First-tier Tribunal ("FTT") dismissed its appeal. The appellant appeals from that decision to the Upper Tribunal.

The relevant contract terms

[5] It is useful to set out here those parts of the appellant's online terms and conditions which are of direct relevance to the issues in dispute:

> "**These Terms & Conditions** explain our conditions for you using the findmypast.co.uk website …

You must agree to the Terms & Conditions if you use the website, or buy something from us. If you do not agree with our Terms & Conditions or Privacy Policy, you must not use the website.

…

Getting access to the records: You can search the historical records on the website for free, but to view most records or use some features of the website you will need to buy either PayAsYouGo credits or a subscription, or use a voucher. You can also take a Free Trial. You have to register with us and be signed in to buy credits or a subscription, use a voucher, or to take out a Free Trial. You can buy vouchers from our voucher stockists. A contract between us begins when we send you a confirmation e-mail, after receiving your order and accepting your payment or voucher code.

…

PayAsYouGo credits: You can buy PayAsYouGo credits from us – these get used up when you view records and can be used to view any record on the website. Credits are only valid for a fixed time limit and will expire if you don't use them in time – this is made clear on the payment page when you buy them. When you have unused credits that expire, if you buy more credits within 2 years, we will add your expired credits (up to a maximum of 280) onto the new credits that you buy so that you don't lose them. Some records cost more credits to view than others: you can see how many credits each type of record costs to view.

Vouchers: If you have any kind of problem with a voucher, please contact the company who sold it to you first (as they are the person you paid the money to). In some cases this will be us, but normally it will be one of our voucher stockists. Only vouchers bought from one of our authorised stockists (rather than a bloke down the pub) are accepted.

…

Cancellation and your right to a refund: If you buy a subscription or PayAsYouGo credits, you can contact us and cancel within seven days of receipt of our confirmation e-mail and we will happily give you a full refund as long as you have not viewed any records. Sorry that we're strict about this, but you can use a Free Trial to see what the service is like before you decide to buy.

…

Changes to the website or records: We reserve the right to make changes to the website, including the records and services we offer, without notice; however, we would not be in business very long if we suddenly took things

away that you've paid for without offering you a decent replacement. If you're a subscriber, you'll be glad to know that you will generally get a lot of new records added to your subscription at no extra cost during the period of your subscription. Sometimes, if we launch a major new collection, we might make a separate charge for it, but this is rare. We may also change prices, make special offers to groups or individuals, or change the number of credits charged to view a record from time to time.

…

VAT: VAT at the current UK rate is included in the price. …

…

More legal bits – 2: Assignment: These Terms & Conditions and Privacy Policy are personal to you, and you are not allowed to transfer your rights under this agreement to anyone else."

The relevant legislation

[6] It was common ground that the supply in question was a service. The basic rule in terms of section 6(3) of the Value Added Tax Act 1994 (VATA 1994) is that the time of supply is when the service is provided or performed. Section 6(4) goes on to provide *inter alia* that if, before that time, the person making the supply receives a payment in respect of it, the supplier shall, to the extent covered by the invoice or payment, be treated as taking place at the time the payment is received.

[7] Part of the argument before me focussed on the provisions of Schedule 10A of VATA 1994 dealing with face-value vouchers. These provide as follows:

"**Schedule 10A**
Face-value vouchers

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.

2. *Nature of supply*
The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.

3 *Treatment of credit vouchers*

(1) This paragraph applies to a face-value voucher issued by a person who –

(a) is not a person from whom goods or services may be obtained by the use of the voucher, and

(b) undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a 'credit voucher'.

(2) The consideration for any supply of a credit 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.

(3) Sub-paragraph (2) above does not apply if any of the persons from whom goods or services are obtained by the use of the voucher fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them. …

4. *Treatment of retailer vouchers*

(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. …"

The issues

[8] Mr Simpson QC appeared for the appellant. Mr Anderson, advocate, appeared for the respondents. Both counsel produced detailed skeleton arguments for which I am grateful. The submissions focussed on the three discrete points summarised below. Before considering them in any detail, I should identify briefly what consequences flow from success or failure on each point.

[9] It was common ground that the first question to be considered was: what was the nature of the service provided by the appellant? Was it, as the appellant contended, the supply of genealogical records selected by the customer and viewed or downloaded by him? If that was correct, then VAT was chargeable only as and when the credits were used or redeemed and documents were viewed or downloaded; and, importantly, no VAT was chargeable on those credits which,

although purchased by the customer, expired without being used or redeemed. Or was it the case, as the respondents contended, that by purchasing PAYG credits the customer acquired a "package", which gave him the facility to take advantage of the work done by the appellant, the ability to search the records on the various websites, and the right to access and, if desired, download and print particular items which he had selected? If so, that package was provided as soon as the credits were purchased; and VAT was chargeable at that time on the full amount paid for the credits.

[10] The appellant accepted that the appeal would fail if it was wrong about the nature of the supply. It also accepted, and this was common ground between both parties, that even if the appellant was correct about the nature of the supply, it could succeed in the appeal only if the appellant was also correct in one or other of the following contentions, namely: (a) that the credit was a face-value voucher within the meaning of para 1(1) of Schedule 10A to VATA 1994, and fell to be treated for VAT purposes in accordance with section 6(4) of that Act; or (b) that the purchase of the credit was not a pre-payment for the service provided by the appellant, advancing the tax point to the time the pre-payment was received in terms of section 6(4) VATA 1994. These are the second and third points which arise for decision.

[11] I propose to deal separately with these matters in turn below, summarising the arguments, setting out the decision of the FTT, and explaining my own reasoning and decision on the point.

Issue 1: The nature of the supply

Submissions - appellant

[12] In support of this argument that the service provided to the customer was the supply of genealogical records selected by the customer and then viewed or downloaded by him, Mr Simpson accepted that there were different elements involved in the supply made by the appellant. In order to provide a service enabling customers to find and download any genealogical information in which they are interested, the appellant has sourced and collected relevant material; and its website contains a database, provides a search facility and permits examination of material

online. But the overarching principle, as laid down by the Court of Justice in *Card Protection Plan* v *Customs and Excise Commissioners* [1999] ECR I-973, [1999] 2 AC 601, at paras 29-30, was that, while every supply of a service must normally be regarded as distinct and independent, a supply which comprises a single service from an economic point of view should not be artificially split. It was necessary to identify the essential features of the transaction in order to determine whether the supply is of several distinct services or of a single service. Cases where one or more elements are to be regarded as constituting the principal service while others are merely ancillary thereto should be regarded as cases of a single service in which all elements share the tax treatment of the principal service. A service is ancillary to a principal service if it does not constitute for customers an aim in itself but is only a means of better enjoying the principal service supplied. That reasoning applied here. The supply in this case was the supply, in the virtual world, of documents of genealogical relevance to customers – everything else was merely ancillary to that. The search facility was free of charge. It was ancillary to the supply of the documents themselves. Mr Simpson gave the example of a bookshop. When a customer went into a bookshop, what he paid for was the specific book which he chose from the selection on offer. The sourcing and collection of material and putting it online was the virtual equivalent of a bookseller purchasing books and putting them in his shop. The organisation of the shop, the task of classifying books, indexing them and setting them out on shelves in a coherent and searchable manner, by author, subject matter or the like, enabled the customer to find what he wanted – it was the physical equivalent of the online search facility offered by the appellants. In the case of the bookshop, all that was ancillary to the principal service, the supply of books. So here, everything provided by the appellants by way of the search facility etc. was ancillary to the supply of documents selected by the customer.

Submissions - respondents

[13] The respondents disputed this analysis. They contended that by purchasing PAYG credits the customer acquired the facility to take advantage of the work done by the appellant, the ability to search the records on the various websites, and the

right to access and, if desired, download and print particular items which he had selected. That "package" of rights and services was provided to him as soon as the credits were purchased; and VAT was chargeable at that time on the full amount paid for the credits.

[14] It was common ground that VATA 1994 implemented Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112'). In terms of Article 2(1), this entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. The Court of Justice has held that, for the purposes of that Article, a supply of services is effected "for consideration", within the meaning of that provision, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. There has to be a direct link between the service supplied and the consideration received: *Lebara Ltd* v. *HMRC* [2012] STC 1536 at para 27.

[15] The starting point was to look at the terms and conditions of the contract between the appellant and its customers. Those rights were non-assignable. The terms (which I have already set out) showed: that the contract was made when a confirmation e-mail was received; thereafter the customer could immediately access all the services made available by the appellant up to his credit limit; the customer had only seven days to cancel the contract, after which he was not entitled to any refund even if he found nothing of interest to him; similarly, as soon as the customer accessed <u>any</u> records, the consideration paid by him became non-refundable even if only a few credits were used. Accordingly, the parties to the contract were clearly identified, the nature and quantity of the appellant's services were agreed at the outset; the credits set a maximum limit on the number of documents which a PAYG customer might view or download; and all of the services made available by the appellant to a customer purchasing PAYG credits were "services of one type, the nature and quantity of which are determined in advance and which are subject to a

single rate of tax": *Lebara* para 28. The direct link was created on the contract being concluded on payment, from which time the customer could access all of the services up to a maximum amount. The introduction by the supplier of notional or virtual credits did not alter the economic realities of the legal relationship or the appellant's supply.

[16] So far as concerned the appellant's reliance on the statements in the *Card Protection Plan* case, there were in fact two principles to be applied: first, each service is normally to be considered distinct and independent; and, second, regard must be had to the economic realities of the transaction. There was a single supply in particular in cases where one or more elements constituted the principal service, with other "ancillary" services sharing the tax treatment of the principal service. A service was to be regarded as ancillary to a principal service if it did not constitute for customers an aim in itself, but rather a means of better enjoying the principal service supplied. The appellant's characterisation of the principal service supplied as being the individual documents was not consistent with the findings in fact or indeed the economic reality of the transaction which demonstrated the value which the appellant's business added. That business involved the provision of online access to historical documents, and it did so by digitisation and, as a result of digitisation, the provision of search functionality. Making the documents available online in digital form would be practically useless without the search functionality. The transaction must be considered as a whole. Viewed in this way, it formed, "objectively, a single, indivisible economic supply, which it would be artificial to split", to adopt the language used in *Levob Verzekeringen BV* v *Staatssecretaris van Financiën* [2006] STC 766 at para 22. The FTT made no error of law in considering the supply of services by the appellant to be a single "package".

The FTT decision

[17] The FTT found in favour of the respondents on this point. The relevant part of its decision is at para 26. It held that in return for payment for the credits the customer received a "package", which included the means of access to the records on the websites and the facility to search them, access them and, if desired, download

particular items. Those aspects of the service were inter-dependent. While the objective in acquiring the package was to obtain information in particular documents, those documents generally had to be identified and traced. Focusing only on the ability to view and download a document was too restrictive: it was only the final stage of the process. It might be the ultimate objective, but it did not stand independently of the other facilities acquired. On that analysis the supply for VAT purposes was made at the outset, on purchase of the "package", and not at a later date when units were used up. VAT was therefore chargeable on the full amount paid for the PAYG credits regardless of whether or not they were subsequently used or redeemed.

Discussion and decision

[18] The respondents argued that the appellant's characterisation of the principal service as being the provision of access to individual documents (to view, download or print) was not consistent with the findings in fact made by the FTT. I do not accept this. The fact findings made by the FTT are set out at paragraphs 4-11 of its decision. They are based upon the evidence given by Mrs Short, an employee of the appellant. Although the appellant's terms and conditions are not set out in the FTT's decision, it is not suggested that they cannot be taken into account. Clearly the FTT itself did this in its analysis at para 26. That analysis proceeded upon the findings in fact and the appellant's terms and conditions. But the conclusions drawn in para 26 are not in themselves findings in fact; they are conclusions of law based upon an analysis of the contract terms as understood in light of those earlier findings in fact.

[19] In those circumstances it is open to me to consider, as a matter of law, what is the nature of the supply provided by the appellant. The FTT's analysis, reflecting that of the respondents, is that what the customer acquires is a package which includes the search facility as well as the right to access and download particular items. The difficulty I have with this analysis is that, according to the appellant's terms and conditions, the search facility is free of charge. If, in the absence of taking out a subscription, the customer had to purchase PayAsYouGo credits in order to be allowed to access the search facility, albeit that credits were only used or redeemed

as and when a particular document was downloaded, then there would be something to be said for the FTT's analysis. On that hypothesis the payment for the PAYG credits would be the gateway to entering the appellant's website and using the search facility, even though once through the gateway the search facility itself was provided free of charge. But it was not suggested to me that that was the case and there is no finding in fact in paras 4-11 of the FTT decision to that effect. On a proper construction of the terms and conditions it appears that a potential customer can search the records for free and see what is available before deciding whether or not to subscribe or purchase PAYG credits.

[20] It follows that the use of the search engine is no part of any "package" paid for by the customer when he purchases a subscription or PAYG credits. What he buys, and this is in addition to his free use of the search facility, is the right to access individual documents as and when he chooses to do so, up to the limit of the credits purchased by him, provided he does so within the specified time. On that basis the service is provided or supplied when the individual documents are accessed.

[21] This analysis is, to my mind, consistent with the approach urged by the respondents under reference to cases such as *Lebara*. Those cases emphasise the need for a link between the consideration and the supply of services. There is no link here between the payment made by the customer and the use of the search facility on the appellant's website. All that the customer gets for his purchase is the ability to access and download particular documents that he has identified as being of interest to him.

[22] I conclude, therefore, that the appellant is correct in its arguments as to the nature of the supply. It is therefore necessary to consider the other issues, namely whether the credit was a face-value voucher and whether the payment for the PAYG credits amounted to a prepayment for the services.

Issue 2: Was the credit a face-value voucher?

Submissions - appellant

[23] Before the FTT the appellant had submitted that the e-mail which it sent confirming the purchase of credits constituted a face-value voucher. That particular argument was not insisted on before me. Instead Mr Simpson argued that the credit

was itself a face-value voucher. It is not clear to what extent he presented this argument on an *esto* basis before the FTT, but that does not matter for present purposes. He submitted that, from the definition in para 1(1) of Schedule 10A to VATA 1994, it was clear that four conditions had to be met in order for the credit to qualify as a face-value voucher: (i) there had to be a "token, stamp or voucher", whether physical or electronic; (ii) that token etc. had to represent the right to receive goods or services; (iii) the right had to be limited by a monetary value; and (iv) the monetary limit had to be stated on the token etc. or recorded in it.

[24] As to (i), the requirement for a "token, stamp or voucher", Mr Simpson submitted that the credit was a voucher in electronic form. It could be seen on the website when a customer logged in. There was no difficulty about this.

[25] As to (ii), the requirement that the voucher must represent the right to receive goods or services, Mr Simpson submitted that it was necessary to look at the substance of the arrangement. A customer who purchases credits has no interest in credits for their own sake – he purchases them because they represent a right to obtain services, i.e. the provision of access to documents, at a future date. They are exchangeable for the services, in the same way as a book token is exchangeable for books.

[26] As to (iii), Mr Simpson submitted that it was clear that the right to receive the appellant's supplies was limited by a monetary value. He referred to *Leisure Pass Group Limited* v. *HMRC* both before Park J (reported at [2008] STC 3340) and, after alteration to the scheme, before the VAT tribunal (reported at [2009] UKVAT V20910).

[27] As to (iv), Mr Simpson submitted that a practical or common sense approach was required. The customer's on-line account maintained on the appellant's website showed the initial purchase in both monetary value and the number of credits. The price per credit was arrived at by dividing the one by the other. As credits were redeemed and documents accessed, the on-line account showed the reduced number of credits remaining. This reduced number could be converted to a monetary value if so desired, though it was unnecessary to do so since documents were priced not in terms of monetary value but in terms of the number of credits required to access

them. In practical terms, from the beginning and at all times thereafter, the right to access the records was limited by a monetary value, reflected in the number of credits remaining in the customer's account. The fact that the remaining monetary value was recorded, in the form of the number of credits remaining, only in the appellant's computer system did not matter. In *Skyview Ballooning Limited* v. *HMRC* [2014] UKFTT 32 (TC), which concerned vouchers for hot air balloon rides, the vouchers had a monetary limit (the amount they had been purchased for) and, up to that limit, could be redeemed against balloon rides or other goods and services supplied by the taxpayer. However, because vouchers were often purchased as gifts, the value was not printed on the face of the voucher; rather, the voucher had on it a code which, if entered by the company into its computer system, showed the amount available to spend. The First-tier Tribunal held that this did not preclude the vouchers being "face-value vouchers". That was similar to the arrangement here. In any event, in the arrangement between the customer and the appellant the parties had agreed to translate a monetary amount expressed in sterling into what might be regarded as a currency between themselves. The currency was credits, and the appellant's services were priced in credits. Applying a common sense approach, if the credits on the appellant's website are regarded as the "token, stamp or voucher", then it is clear that there is a value "recorded in" them.

Submissions - respondents

[28] For the respondents, Mr Anderson pointed out that the appellant's argument had changed. It no longer argued that the e-mail receipt constituted a token, stamp or voucher; it now argued that the online credit itself constituted a voucher in electronic form. I did not understand Mr Anderson seriously to dispute this first stage in the appellants' argument, and understandably so. Once it is accepted that the token, stamp or voucher can be in electronic form, it is difficult to conceive of an argument which excludes any particular computer entry from that definition. The main area of dispute, as I understood it, turned on whether the online credit in the present case satisfied the other three requirements of the definition in para 1(1) of Schedule 10A to VATA 1994.

[29] On the question whether the credits could be said to "represent" the right to receive services from the appellant, Mr Anderson pointed out that the contract was concluded on the customer's receipt of the confirmation e-mail from the appellant. It followed that the customer could access the service from that point. Since the right to access the appellant's services was personal to the customer who had purchased the credits, neither the e-mail nor the credits themselves could be said to "represent" the right to receive those services: there was no need for any "representation" of the contractual right to receive the services because the identity of the customer was confirmed and non-transferable and the services were clearly identified. Further, taking the logic of the appellant's argument to its conclusion, the customer who buys, say, 100 credits, has received, in fact, 100 face-value vouchers. That contention was rejected by Sir Andrew Park in *Leisure Pass Group Ltd* v *HMRC* [2008] STC 3340, at para 20.

[30] On the question of the right having to be limited by a monetary value stated on the voucher or recorded in it, Mr Anderson submitted that the credits on the appellant's website did not contain or record the "value of an amount". He referred again to the judgment of Sir Andrew Park in *Leisure Pass*. The credits recorded in the customer's account had no intrinsic value nor did they express any value in currency or monetary terms. Even though the value of the remaining credits could be ascertained, in the absence of any description containing a monetary equivalence it could not be said that the value of the entitlement to receive services was contained or recorded on the credits or even on the website.

The FTT decision

[31] The FTT rejected the appellant's argument in para 29 of its decision. Its reasoning focused on the submission that it was the confirmatory e-mail which constituted the face-value voucher. This was understandable given the nature of the argument presented to them. They did not consider that the confirmatory e-mail qualified as a face-value voucher. However, some parts of their reasoning apply *mutatis mutandis* to the submission now advanced that the credit itself is the face-value voucher. Under reference *inter alia* to the decision in *Leisure Pass* at para 14,

they accepted that calculation of value by way of a coding in the ticket together with a computer reference might enable a document to qualify as a face-value voucher. However, on the evidence they had heard, this did not help. PAYG vouchers could be obtained in a number of ways, such as by purchase or gift or in a promotion. The consideration for that purchase might vary from case to case and, e.g. in the case of a gift, might not even be disclosed to the holder of the vouchers. Further, any unused or unredeemed units in one allocation (purchased at one or more particular prices) could be "revived" by the purchase of further units (perhaps at yet another price) within a specified time period. A statement on the on-line account as to the number of credits remaining would not necessarily enable the customer to know the monetary value represented by those credits. In those circumstances, the document issued on purchase (the confirmation e-mail) was no more than a simple receipt, and did not constitute a face-value voucher in the context of Schedule10A.

Discussion and decision

[32] The FTT appear to have accepted that the credits satisfied the first two points in para 1 of Schedule 10A. In other words, it must have accepted that the credits satisfied the requirements (i) that they were a token, stamp or voucher (in electronic form) and (ii) that they represented a right to receive goods or services. I agree with the FTT on these two points. Indeed, with all due respect to Mr Anderson's careful argument, I find it difficult to see how it could be otherwise. The statutory language itself allows the voucher to be in electronic form. There is no reason to suppose that the website entry showing the credits purchased and yet to be used is not covered by this language. As to the question of representation, I fail to see how the fact that a ticket is to a particular service and non-transferable militates against it representing a right to receive goods or services. A ticket to a concert or a football match "represents" the right to be admitted and enjoy the entertainment on offer. A book token "represents" the right to purchase a book up to the value of the token. In neither case does it matter whether the holder of the ticket or token is the original purchaser; nor does it matter whether or not the ticket is transferable. I do not accept Mr Anderson's argument that because the customer has the right to use the service

there is no need for any token or voucher "representing" that right. The holder of a ticket to a concert or football match has the right to be admitted, but only upon presentation of the ticket which represents that right. Despite having purchased the ticket, he will be turned away if he does not present it. So also the holder of a book token has the right to purchase a book up to that value, but he will not be allowed to do so unless he presents the token representing that right.

[33] The final two questions are whether the voucher represents the right to receive services "to the value of an amount" and whether that amount is "stated on it or recorded in it". The FTT, correctly in my view, approached this question in a pragmatic way. They recognised that just as the calculation of value by way of a coding in the ticket together with a computer reference might enable a document to qualify as a face-value voucher, so also in this case the confirmatory e-mail listing the number of credits available to the customer might, when taken with the customer's or the appellant's knowledge of the amount paid for those credits, be sufficient to qualify as a face-value voucher. I have already noted that the FTT's reasoning on this point applies primarily to the submission that the confirmatory e-mail itself constituted the face-value voucher. Nonetheless, if that reasoning is correct it must, in my view, apply equally, if not more so, to the submission that the unused credits shown on the customer's on-line account themselves constituted the face-value voucher. I see no difficulty in holding that the listing of unused credits on the company's website, made accessible to the customer by means of his individual password and capable of being understood as representing so much money's worth, qualifies as a face-value voucher.

[34] The FTT ultimately rejected the appellant's argument not because of any conceptual difficulty but, as I understand it, because it considered that on a practical level it would not always be possible for the customer to translate the number of credits into a monetary amount. One example given was that the credits might be given as a present, so that the customer (the person having access to the website and use of the credits) would not be able to know what that number of credits represented in terms of monetary value. Another example might be that the unused credits in a customer's account might be comprised of some credits purchased at one

price and others purchased at a different price. It would not be possible simply by looking at the number of credits to ascertain what they represented in money terms. A third example might be when the account was comprised of newly purchased credits combined with "revived" lapsed credits which had been purchased at an earlier time at a different price. No doubt other examples could be given. As I understand the FTT's reasoning, it was the fact that a customer could not readily ascertain the monetary value of the credits in his account which prevented this part of para 1 of Schedule 10A being satisfied.

[35] I am unable to agree with the FTT on this point. The credit balance shown on the website represents the right to access documents up to a particular amount. So far as the customer is concerned, that amount is represented by credits which have been purchased with money. The money used to purchase the credits represents the amount up to which the service will be provided. The fact that it is recorded on the website in terms of credits rather than by reference to money value does not affect this. Nor is it affected by the fact that the customer, the user of the services, may not, if he has received the credits as a gift, know the value up to which the service will be provided. All he knows is that he has a certain number of credits. But that is sufficient; it does not detract from the fact that the service will be provided up to the amount in money terms used to purchase the credits standing to his account. This is consistent, in my opinion, with the view expressed by Sir Andrew Park in *Leisure Pass* at para 15.

[36] There is, of course, the question of whether the amount is stated on or recorded in the credit. But this does not present difficulties. The website records the number of credits originally purchased and/or remaining unused. Each credit cost a certain amount when it was purchased. It is a matter of record what each credit cost to purchase. Different credits may have cost different amounts, but that does not present a difficulty. Nor does the fact that the monetary value of each credit is not stated on the webpage itself: see e.g. *Skyview Ballooning Ltd.* Nor does it matter that that the monetary value of the remaining credits may not be ascertainable by the customer, whether because they have been received as a gift or because different credits costing different amounts are lumped together on the webpage. The fact is

that the webpage shows the number of credits remaining to be used; and the monetary value of the total, and of each individual credit, can be ascertained by the appellant from its records. That is sufficient to meet the requirements of para 1 of Schedule 10A.

[37] I should mention that during the course of his argument Mr Anderson at one stage submitted that a fixed monetary value could not be attributed to any of the credits because under its terms and conditions the appellant reserves the right to increase the number of credits required for any particular record or category of records. There is nothing in this point. Increasing the number of credits required for a particular record or category of records is simply a way of increasing the price of those records; it changes the price of the records but does not alter the value of the currency, be it credits or pounds sterling.

[38] In those circumstances I consider that the appellant succeeds on this point also. It follows that the appeal succeeds.

Issue 3: Was the purchase of the credit a pre-payment for the services?

[39] This point only arises if, as I have held, the supply is a supply of documents as and when they are viewed or downloaded; and if, contrary to my decision on the previous point, the credits are not "face-value vouchers". In those circumstances the question is whether the purchase of the credits is a pre-payment for the supply in terms of section 6 of VATA 1994. In light of my decision on the first two points, this issue is academic, but I should nonetheless set out my opinion on it.

Submissions - appellant

[40] Mr Simpson pointed out that section 6 of VATA 1994 implements what is now Article 65 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('Directive 2006/112'), which provides:

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

This was a derogation from the general rule that the time of supply is the time when the goods are made available to the purchaser or the service is performed, and therefore requires to be construed strictly: *Case C-549/11 Direktor na Direktsia v Orfey Balgaria EOOD ("Orfey Balgaria")* 2013 STC 1239 at paras 27 and 28 and Case C-107/13 *Firin* v. *Direktor na Direktsia* 2014 STC 1581 at paras 35 and 36. Decisions of the Court of Justice in cases such as *BUPA Hospitals Limited* v *Commissioners of Customs and Excise* [2006] ECR I-1685, *Macdonald Resorts Limited* v *Revenue and Customs Commissioners* [2011] STC 412 and, most recently, *Orfey Balgaria* established that, before a pre-payment can bring about a charge to VAT, all the relevant information concerning the chargeable event must already be known and the goods or services to which the payment relates must be precisely identified. That was not so in the present case; at the time the credits were purchased the customer would usually not know which documents he wished to access, his selection would only be made on one or more later occasions just before the credits were used and his power to select would be subject to changes in availability and pricing decided on by the appellant.

Submissions - respondents

[41] I did not understand Mr Anderson to dispute the legal proposition advanced by the appellant. But he submitted that cases such as *BUPA* and *Macdonald Resorts* were quite different and of no assistance. In *BUPA* there was a schedule containing the medical supplies or prostheses which the parties could alter by agreement. In *Macdonald Resorts* the rights represented by the points in the scheme were ultimately redeemable for rental rights in immoveable property; and identification of the property of which the customer would have exclusive short-term occupancy was essential. The present case was very different. The contracts were consumer contracts in which the appellant's apparently unilateral right to change the supply is circumscribed by consumer law. In any case, the right reserved under the terms and conditions to change the services supplied could not and did not change the economic realities of the situation. He submitted that the appellant offered no suggestion as to possible, likely or actual changes that had been or might have been made under those provisions of its terms and conditions. If there was any analogy to

be drawn it was with the ticket cases: the customer pays now for the use of the services which are supplied later to the extent of his credits. The credits are like tickets for a concert or football match, allocating a particular seat at a particular time: the payment is a prepayment for a supply provided later and VAT is due on the prepayment when made: *Customs & Excise Commissioners* v *Richmond Theatre Management Ltd* [1995] STC 257, *Celtic plc* v *Commissioners of Customs and Excise* [1997] V&DR 111.

The FTT decision

[42] Had the point arisen for decision, the FTT would have found that the amounts paid to purchase credits were pre-payments, that the time of supply was therefore the time those pre-payments were made, pursuant to section 6(4) VATA 1994, and that the full price paid for the PAYG credits was chargeable to VAT, whether or not the credits were ultimately used or redeemed. It considered that the circumstances in the present appeal were distinct from those in *Macdonald Resorts* and *BUPA*. The nature of the supply was known at the outset and there was no unilateral right to resile such as existed in *BUPA*.

Discussion and decision

[43] Yet again I find myself disagreeing with the FTT. There is no dispute about the legal principle to be applied. The dispute is as to its application to the facts of this case and, in particular, to the appellant's terms and conditions. In the present case the customer buys a certain number of credits. While, no doubt, at the time of purchase the price of accessing any particular document is fixed, it is by no means clear that the customer knows what that price is until he seeks to access it. Different documents or categories of documents may command different prices. What he can buy with his credits depends upon the current "price" (stated in credits) for the documents in which he is interested. Furthermore, the appellant reserves the right to alter the price for any particular document or category of documents. While some customers, having purchased credits, may choose to use them within a matter of days or even hours, so that it is unlikely that the price will have changed between the

time they purchased the credits and the time they use them, in other cases use of the credits may be desultory and spread out over a significant period. Sometimes credits will not be used during the fixed time allowed and may only come back into play as live credits if the customer purchases new credits at a later date. It is quite possible that by then the price for access to documents, perhaps all of them or perhaps only to particular categories, will have changed, with the result that the customer cannot at that point access the full range of documents which his initial purchase might have entitled him to access.

[44] That being the case it cannot be said that at the time of purchase of the credits the goods or services to which the customer was thereby entitled were fixed or clearly identified. While the nature of the supply is clear at the time of purchase, the precise specification of the documents available to be accessed with those credits is not fixed and cannot be fixed until the time comes when the documents are identified and the credits used.

[45] It follows from the above that the payment for the PAYG credits does not amount to a pre-payment triggering a charge to VAT at that point. Accordingly, even if I had been against the appellant on the face-value voucher point, the appellant would still have succeeded in its appeal.

Decision

[46] The appeal is therefore allowed. I shall reserve all questions of expenses.

Lord Glennie

Decision Released: 21 January 2016