



TC04784

Appeal number: TC/2014/01114

VAT – car parking - whether overpayments consideration for taxable supply of services – link between consideration given and service received – HELD – sufficient link between consideration given and service received – overpayments subject to VAT - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

National Car Parks Limited

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
 Gill Hunter (Member)**

**Sitting in public at Royal Courts of Justice, the Strand, London on 9 November
2015**

Ms Valentina Sloane instructed by Deloitte LLP for the Appellant

**Mr Brendan McGurk, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This appeal concerns the application of VAT to so called “overpayments” made by customers at the Appellant, National Car Parks Limited (NCP)’s pay and display car parking sites in the UK.

2. As formulated by NCP the question for the Tribunal is “*whether voluntary payments in excess of car parking tariffs constitute consideration for a supply of services and so are subject to VAT*”.

10 *Background Facts*

3. NCP operates car parks in the UK. NCP made a claim on 24 October 2013 for overpaid VAT in respect of overpayments of car park tariffs in its pay and display car parks for the period 27 June 2009 – 28 December 2012. That claim amounted to £488,669.09.

4. HMRC issued a decision in a letter of 13 November 2013, confirmed in a review letter of 24 January 2014, that the overpayments made in relation to the pay and display car park charges levied by NCP were taxable because the overpayments made “*should be regarded as consideration and are therefore taxable*”.

5. NCP appealed to this Tribunal on 21 February 2014 on the grounds that the overpayments made at its pay and display car parks should rightly be treated as ex-gratia payments and outside the scope of VAT.

6. The overpayments in question arise as a result of customers not having the correct change to pay the exact amount due as stated on the tariff board in the NCP pay and display car parks and so putting more than the amount actually charged into pay and display ticket machines, which do not give change.

7. This appeal only concerns payments made through pay and display ticket machines which offer a cash only or cash plus credit/debit card payment choice.

Preliminary Matters

8. The periods under dispute were agreed before the Tribunal to be September 2009 – December 2012. The June 2009 – September 2009 period was accepted to be out of time and not part of this appeal.

9. At the hearing the Tribunal requested two pieces of additional information, both of which were provided after the date of the hearing: (i) confirmation from NCP’s witness, Mr Heath, that none of NCP’s pay and display ticket machines which had given rise to the disputed VAT displayed the expiry time reflecting the value of coins inserted (ii) a copy of the Statutory Order which was referred to in the *King’s Lynn* decision, an earlier tribunal decision which held that overpayments for car parking

were not subject to VAT (*Borough Council of King's Lynn & West Norfolk v Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 671 (TC)).

The Law

Principal VAT Directive 2006/112

5 10. Article 1(2)- *Subject matter and scope*

“The principle of the common system of VAT 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.”

10 11. Article 73 –*Supply of Goods or Services*

15 *“In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.”*

Domestic Legislation - The Value Added Tax Act 1994

12. S 5(2)(a):

““supply” in this Act includes all forms of supply, but not anything done otherwise than for a consideration.”

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Evidence

Mr Benjamin Heath for NCP

25 13. We saw a written witness statement provided by Mr Heath dated 7 May 2015. Mr Heath gave oral evidence to the Tribunal and was cross-examined by Mr McGurk. Mr Heath told us that he had worked for NCP since 2005 and was currently NCP's business development manager.

14. Mr Heath described the pay and display ticket machines which had given rise to the overpayments in dispute as; pay and display machines which were not configured to provide change to customers and where overpayments were accepted.

30 15. Mr Heath described the customer's journey in a pay and display NCP car park:

(1) A customer arrives by car and selects a place to park. There are no barriers at a car park of this type.

(2) The car park will have a number of pay and display ticket machines; usually coin only alongside cash and card machines.

(3) A tariff board next to the pay and display ticket machine sets out the tariff for various parking times.

5 (4) The customer decides how long to park for and inserts coins to pay for their parking into the pay and display ticket machine or, if available, pays by debit or credit card.

(5) The customer presses a button and the machine dispenses a ticket.

16. Mr Heath also described the payment process referring to the particular type of pay and display ticket machine used at the NCP car parks in question:

10 (1) A customer drops coins into the pay and display ticket machine, which accepts a variety of coins but nothing smaller than a five pence piece. A maximum of twenty coins are accepted per customer.

15 (2) Once enough change has been entered into the machine to equal the tariff price, the customer presses a button and a ticket is released which the customer takes.

(3) The customer is notified by the instructions on the front of the pay and display ticket machine that the machine does not give change; *“No change given overpayment accepted”*.

20 (4) If the customer does not have the correct change and inserts coins to a value above the tariff displayed, the machine will not recognise any additional parking time for the customer. The clear terms displayed on the pay and display ticket machine indicate that a customer will not receive any additional parking time in return for the overpayment.

25 (5) A customer can pay more than the amount indicated on the tariff board for the period of time they require and still obtain a valid ticket. The same parking service for the allocated period of time is provided regardless of overpayment.

30 (6) The display on the pay and display ticket machine states the amount paid by the customer but not, other than in one or two exceptional cases, the expiry time.

35 (7) Once the full amount of the minimum tariff has been fed into the machine, the machine will display a *“press green button for ticket”* message. A customer has the option to press the red button and cancel the transaction at all times until the green button is pressed for the issue of a ticket.

(8) The ticket issued to a customer states the full amount paid, including any overpayment.

40 17. We were shown photographs of various pay and display ticket machines used by NCP and the ticket machine which was in question in the *King’s Lynn* case. Mr Heath confirmed that the NCP ticket machines photographed represented the pay and display ticket machines in use at NCP’s car parks during the relevant periods.

18. Mr Heath was clear that in his view a customer at an NCP pay and display car park always had choices if they did not have the correct change to pay the exact amount due on the tariff board; to overpay, to go and get change or to leave the car park. A customer was not obliged to make an overpayment. If a decision was made to pay £1.50 when £1.40 was the tariff amount, it was very clear to a customer that they were not getting any additional benefit for the additional 10 pence given.

19. Mr Heath also confirmed that for all relevant car parks and pay and display ticket machines NCP were acting as principal and there was no restriction on the amount which could be charged for parking.

10 *Other evidence seen:*

20. An example of NCP's standard terms and conditions as displayed on the tariff boards in their pay and display car parks which included:

15 (1) Clause 12 *“Tariff: The parking fees payable by you (as varied from time to time) shall be as displayed on the tariff board at the Car Park. You are obliged to pay the fee and to comply with any instructions on the tariff board”*

20 (2) Clause 15 *“Variation of the Terms and Conditions: These terms and conditions shall not be varied except in writing by our Company Secretary. Nothing said or done by any of our employees is capable of varying these terms and conditions”.*

21. The Statutory Order referred to in the *King's Lynn* decision: *Borough Council of King's Lynn and West Norfolk (Off-street Parking Places) Consolidation and Variation Order 2011*. (“The Statutory Order”).

Example transaction

25 22. For ease of reference we are going to refer to an example transaction to illustrate the arguments of the parties. A similar example transaction was relied on by the parties at the hearing and was accepted as reflecting the parking experience of a customer in an NCP car park:

30 *A customer enters an NCP pay and display car park wishing to park for one hour. She parks her car in an available space and locates the pay and display ticket machine. The prices stated on the tariff board next to the pay and display ticket machine are: Parking for up to one hour - £1.40. Parking for up to three hours - £2.10. The pay and display ticket machine states that change is not given but overpayments are accepted and that coins of a value less than 5 pence are not accepted.*

35 *The customer finds that she only has change of a pound coin and a fifty pence piece and puts these into the pay and display ticket machine. The machine meter records the coins as they are fed into the machine, starting with the pound coin. When the fifty pence piece has been inserted and accepted by the machine, the machine flashes up “press green button for ticket” which the customer does.*

The amount paid is printed on her ticket, as is the expiry time of one hour later. The customer displays the ticket in her car and leaves the car park.

In this decision the amount paid above the £1.40 (and below £2.10) as a result of the customer not having the right change is referred to as the “additional amount”.

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23. This example is based on the tariff board which was the subject of the *King’s Lynn* appeal which set out a range of payments for specified periods. None of the NCP tariffs which we were shown were exactly the same as this; the tariff boards of which we saw photographs offered either a day’s parking for a single price or parking for only one or two longer periods of time during the day. However the parties did not suggest, and we have accepted, that it makes no difference to the parties’ arguments or our conclusions exactly what type of tariff is set and in particular whether there is a range of tariff prices for different lengths of parking time or a single price for a set, longer period.

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15 24. Some of the photographs which we saw showed a tariff board which was integral to the pay and display ticket machine, in some of the photographs the tariff board was separate from the pay and display ticket machine. In all cases it was the pay and display ticket machine which gave details of the mechanics of payment including the fact that no change was given and overpayments were accepted.

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25 25. We were told by Mr Heath that in a small minority of cases (at train station car parks where parking was paid for by reference to a full day’s parking) the pay and display ticket machine did display the expiry time depending on the amount paid into the machine by a customer. Even in those cases, the machines did not indicate that any additional parking time was given as a result of coins above the daily tariff being put into the machine. It was agreed, and we have assumed for the purposes of this decision, that any pay and display ticket machines owned by NCP which did state through their display screen that an extended period of parking was given for payments made above the tariff amount, are not part of this appeal.

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30 *Appellant’s Arguments*

EU Law – meaning of consideration

26. On behalf of NCP Ms Sloane started by pointing out that “consideration” is an EU law concept. Although there is no definition of consideration in the EU Directives, the concept has been examined in a number of EU cases, which make it clear that in order to amount to consideration for a taxable supply a payment has to be for the services rendered. She also stressed that the EU concept of consideration is not the same as the UK domestic law concept.

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27. She referred us to the so called Dutch Potato case (*Staatssecretaris van Financien v Cooperatieve Aardappelenbewaarplaats GA C-154/80*) which she said makes it clear that the expression “consideration” is a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and

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scope. As stated at paragraph [12] of that decision “A provision of services is taxable, within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received.....”

28. This is reflected in the UK case *Apple and Pear Development Council v Commissioners of Customs and Excise*: C-102/86. In that case mandatory charges imposed on all members of the Council irrespective of the benefit received by them were held not have a sufficiently direct link with the services provided by the Council to amount to consideration for a supply of services. The payment was not “for” the services provided.

29. Ms Sloane also referred to the most often cited case which demonstrates the principle of the need for some formal link between a supply made and a payment: *R J Tolsma v Inspecteur der Omzetbelasting Leeuwarden* C-16/93; which held that payments made by passers-by to an organ grinder in Amsterdam were not consideration for the supply of a service because the payments were made voluntarily and there was no necessary link between the payments made and the supply of music; “The payments were entirely voluntary and uncertain and the amount is practically impossible to determine.” Paragraph [19].

30. Ms Sloane concluded on the basis of these authorities that in order for a payment to be treated as consideration for a taxable supply there has to be a direct link between the service supplied and the payment made. In NCP’s case, the tariff board stipulates the price for the right to park: £1.40 in our example transaction. That means that any additional price paid above £1.40 and below the next tariff band cannot be for the supply of parking. On Ms Sloane’s analysis any payment made above the stated tariff due is an arbitrary amount of the customer’s choosing and as such does not have a direct link to the services supplied (the right to park in an NCP car park).

31. Ms Sloane referred to the *Finland* case which concerned subsidised legal advice; (*Commission of the European Communities v Republic of Finland* C-246/08) as illustrating the principle that a supply of services is effected for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. In the *Finland* case the level of payment made depended not on the value of the legal services provided, but on the income of the recipient of the services and it was held that there was no direct link between the services provided and the payment made. Ms Sloane said that this was analogous to NCP’s case because the amount paid by a customer is dependent on extraneous factors; the amount of change which a customer has and how much they need to park at a particular place at a particular time.

32. Ms Sloane described the additional payment made by NCP customers as analogous to a gratuity; it is uncertain, arbitrary, and optional or voluntary. Therefore it cannot be treated as consideration. This is made clear in the EU cases dealing with gratuities and other similar payments including *Tolsma* and the French infraction proceedings; *Commission of the European Communities v French Republic* C-404/99.

That case held that “extra gratuities”, or “free gratuities”, which were not included as part of the contract with a customer were outside the scope of VAT, while mandatory service charges had to be treated as part of the consideration for a taxable supply.

5 33. The *Societe thermale* decision about the VAT treatment of deposits is also in point; a deposit was treated as paid outside the terms of the contract made between the parties for hotel accommodation and so was not subject to VAT. (*Societe thermale d'Eugenie-les-Bains v Ministere de l'Economie, des Finances et de l'Industrie* C-277/05.) The payment of a deposit to oblige a hotelier not to let a room to another customer did not entail reciprocal performance, because the reciprocal obligations
10 related to the contract to provide hotel accommodation, which was separate from the payment of the deposit.

No supply if no consumption

15 34. Ms Sloane also argued that on first principles VAT is a tax on consumption; if nothing has been consumed for the additional payment made, it cannot be consideration for a supply of services. If there is no identifiable additional service supplied in exchange for the additional payment, there is no VAT. This is made clear in *Landboden-Agrardienste GmbH & Co KG v Finanzamt Calau* C-384/95, concerning the compensation paid to farmers for reducing potato production. Agreeing to refrain from doing something does not give rise to any consumption and
20 no benefit is obtained which is capable of being a “cost component of the activity of another person in the commercial chain”. On NCP’s facts, as made clear by Mr Heath, customers knew that they were not obtaining any extra benefit for the additional payment made.

25 35. Counter to HMRC’s suggestion, nothing additional is obtained for the additional payment, it is not correct to say that NCP provide “convenience” for the customer, in not having to park elsewhere, or not having to obtain change. That is conflating the customer’s motive with the nature of the supply.

Contract law analysis

30 36. From NCP’s perspective, the terms of the contract between NCP and its customers are set out on the tariff board displayed at the car park. These cannot be altered by a customer. Ms Sloane referred to NCP’s example standard Terms & Conditions as set out on the tariff board and in particular sections 12 and 15 which meant that a customer could not change the prices charged. In Ms Sloane’s view the *Thornton v Shoe Lane* decision relied on by HMRC is of no particular relevance to
35 these facts, being mainly about the time when a contract is treated as made, not the terms of the contract itself. (*Thornton v Shoe Lane Parking Ltd* ([1971] 2 QB 163))

40 37. The correct analysis of the formation of this contract is that NCP makes an offer for parking at the price stated on the tariff board. This offer is accepted by a customer when coins are inserted of the correct amount, in our example £1.40. If the customer inserts more than £1.40, the pay and display ticket machine has nevertheless accepted the offer for parking for only the amount stated on the tariff board. The acceptance of

the extra 10 pence, in our example, does not convert the offer made by NCP into an offer to park for a minimum amount.

38. NCP argues that customers are aware, as a result of these terms and conditions and as a result of the statement on the pay and display ticket machine, that
5 overpayments are allowed but will not give rise to extra parking time. This is in contrast to the position in the *New World Payphone* decision, where the additional payment was stated to give rise to a credit and it was clear that the payment made gave the right to use the telephone for a specific period of time and so could not be treated as a gift (*New World Payphones Limited v Commissioners of Customs and*
10 *Excise* Decision Number 15964).

39. On NCP's approach to the contractual analysis, the amount paid as stated on the ticket issued to customers cannot change the terms of the contract because it is issued after the contract has been made. A customer is not obliged to make an overpayment; she can choose to park elsewhere or pay by a different method. The overpayment is
15 not part of the contract and so should not be subject to VAT. The UK VAT case about the treatment of restaurant tips demonstrates this: *NDP Co Ltd v Commissioners of Customs and Excise* ([1988] VATTR 40) holding that since it was no part of the contract that the customer should pay a charge for service, and customers who did not pay had every right not to, the service payments were not part of the consideration for
20 the supplies made by the appellant.

The King's Lynn decision

40. Ms Sloane argued that the tribunal's decision in *King's Lynn* is in line with her analysis; its conclusion is based on the EU concept of consideration and the lack of a direct link between the payment and the supply. In her view it was not critical to the
25 tribunal's conclusion in that case that the Statutory Order restricted the amount which could be charged for parking; there was no restriction on more being accepted for parking, as happened in practice. The decision depended on the fact that no sufficient link was established between what was supplied and what was paid for.

41. In that case and here, there could be no agreement between the parties to treat any
30 amount above the tariff stated as consideration as made clear by the tribunal at paragraph [21] "*a party cannot unilaterally change the terms and conditions of payment and in doing so make themselves liable to a greater amount of VAT because they have paid more than the consideration agreed*". There must be a link defined by an agreement between the parties between what is supplied and what is paid for. That
35 is missing in the *King's Lynn* case and in this case.

Right to sue for overpayment

42. By reference to HMRC's argument that a customer could not sue NCP for the overpayments made, Ms Sloane said that it is not significant that a customer does not have the right to sue for overpayment; that does not make the payment consideration,
40 rather, it is in line with the treatment of the payment as a gratuity: see *Virgo on Restitution* at p149: "*if a person with knowledge of the facts pays money which he is*

not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot thereafter be re-opened”.

Fiscal neutrality

5 43. Referring in particular to the decision in *Rank Group plc*, NCP made the point that the services supplied by NCP and the services supplied by the local authority in *King’s Lynn* are similar from the customer’s view point and the principle of fiscal neutrality means that they have to be treated the same for VAT purposes. See *Commissioners for Customs & Excise v Rank Group plc* C- 259/10 and 260/10:

10 *“The principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of value added tax of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle”.*

15 On that basis HMRC are obliged to treat the overpayments made for car parking supplied by NCP in the same way as the overpayments for the car parking supplied by King’s Lynn as not subject to VAT.

HMRC’s Arguments

20 44. Mr McGurk started by pointing out that it is not correct to refer to the additional amount paid by customers at NCP’s pay and display car parks as an “*overpayment*”; this assumes some pre-existing agreement between the parties about what the agreed price for the service is, equal to the tariff price. That is not in line with the legal analysis of how the price is agreed between NCP and their customers on these facts.

25 *Contract law analysis*

45. According to Mr McGurk the correct place to start is an analysis of the contract made between NCP and its customers by reference to domestic law concepts not EU law; this approach is made clear in the *A1 Lofts Limited* and *Telewest Communications* decisions both of which concluded that it is necessary to establish
30 how the contract is made between the parties first before asking how any consideration is linked to the agreed supply. As stated in *A1 Lofts*;

35 *“The identification of the parties’ obligations is a matter of contract. But once their obligations have been identified, the nature or classification of those obligations, and whether they answer a particular statutory description, is not necessarily concluded by the contract.”*

“The starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.” Paragraph [40]

supported by the summary of the correct approach set out in detail in paragraph [47] by Lewison J (*AI Lofts Ltd v HM Revenue and Customs* [2009] EWHC 2694(Ch) and *Telewest Communications Plc & Anor v Customs & Excise* ([2005] EWCA Civ 102).

5 The legal analysis of the contract needs to be undertaken before the character of the supply made under the contract can be considered.

46. Mr McGurk said that the labelling of the payment is not determinative. This is made clear in the Supreme Court *Secret Hotels* decision. The fact that the pay and display ticket machine refers to the additional sum as an *overpayment* does not make
10 it one. (*Commissioners for Her Majesty's Revenue & Customs v Secret Hotels2 Limited* [2014] UKSC 16.)

47. The correct contract law analysis is as per *Thornton v Shoe Lane Parking* in the context of dealing with a car parking machine;

15 *“it can be translated into offer and acceptance in this way; the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not*
20 *otherwise.”*

48. On these facts the correct contractual analysis is either (i) an offer from the pay and display ticket machine to accept a minimum price of £1.40 or any greater amount, which is accepted by customer on making payment or (ii) a general offer made by the pay and display ticket machine that it will accept at least £1.40, a counter-offer by the
25 customer of a higher amount followed by acceptance by the pay and display ticket machine, when it states “press button for ticket”. The time when the contract is made is when the green button is pressed and a parking ticket is issued. On both of these approaches there is a binding contract between the pay and display ticket machine and the customer when the ticket is issued.

30 49. On Mr McGurk’s analysis, the additional amount is part of, not separate from, the valid contract made between the pay and display ticket machine (on behalf of NCP) and the customer. It cannot be treated as falling outside the terms of the contract and amounts to consideration provided for the supply of the right to park at NCP’s car park for the agreed time. It is artificial to suggest that the contract can be split
35 between the tariff amount due and the additional amount paid. That is not how the customer views the agreement which has been made or how it is expressed by the tariff board.

50. The tariff board is stating the minimum amount payable, not the terms of the definitive bargain between the parties. The tariff board price is not an “absolute sum”
40 payable by the customer; there is an additional term of the agreement that overpayments are accepted. This overrides the tariff board and the terms and conditions, demonstrated by the fact that payments above £1.40 are accepted.

EU law meaning of consideration

51. EU law concepts of consideration are secondary to the domestic contract law analysis. In Mr McGurk's view, the EU authorities concerning gratuities are not in point here; in those cases there is no legal relationship between the payer and the recipient of the gratuities. An NCP customer is not in the same position as the passers-by in *Tolsma* or of a customer who chooses to pay a gratuity in a restaurant or to a taxi driver. A much better analogy is of a service provider who provides the same service to different customers at different prices depending whether they pay on a daily, weekly, or monthly basis.

52. If it is arguable that an element of the consideration paid by the customer to NCP represented by the additional amount is not for car parking services, it is nevertheless consideration for a practical benefit; a customer avoids the need to go away and obtain change or find somewhere else to park. On the basis of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* ([1991] 1 QB 1), that factual benefit can amount to consideration.

53. Any questions of the alternative choices available to the customer are not relevant; the only relevant question is what the customer was actually willing to pay for this service.

54. NCP's reliance on the *Societe thermale* case concerning deposits is not relevant because as a matter of contract a deposit cannot be part of the consideration given by the buyer for performance of the contract. In this case the additional amount is part of the contract agreed between the parties, not a separate element.

55. All of the conditions set out in the *Finland* case for the full amount of the payment made by NCP's customers to be treated as consideration for a taxable supply are met; there is a direct link between the service supplied and payment by the customer; the supply is made under a binding contract; a price for the contract is agreed between NCP and the customer.

King's Lynn decision

56. HMRC's position is that the tribunal decision in *King's Lynn* is limited on its facts; unlike the legal situation in *King's Lynn*. NCP has no statutory restriction on the amount which it can charge for parking. Any "overpayments" in *King's Lynn* were ultra-vires for the seller because it could not, by law, charge more than the stipulated amounts for parking. Mr McGurk also pointed out that no specific reference was made in *King's Lynn* to EU law authorities and nor was there much analysis of the process by which the contract was agreed between the parties.

Right to sue for overpayment

57. HMRC clarified that it was not part of their case that an ability to sue for overpayment means the additional payment is not a gratuity, but pointed out that since there was no distinction in terms of contract law between the tariff price and the additional amount paid, a court would not artificially split the single amount of

consideration and allow a customer to sue only for the return of the additional amount. Nor can it be argued that there was a total failure of consideration in relation to the additional amount since the customer has received a practical benefit for the additional amount paid.

5 *Fiscal neutrality*

58. Mr McGurk's response to NCP's reliance on principles of fiscal neutrality is that the supply made by NCP and the supply made by the local authority in the *King's Lynn* decision are not made in identical or similar circumstances; the local authority in *King's Lynn* was subject to a statutory restriction on the amount which could be charged for car parking, NCP is not. Therefore NCP cannot rely on the principle of fiscal neutrality to suggest that overpayments made to it must be treated in the same way as overpayments made to King's Lynn.

Findings of Fact

59. On the basis of the evidence provided to us we make the following findings of fact:

(1) There was in each case in which an additional amount was paid for parking to NCP a valid contract under domestic law between the pay and display ticket machine representing NCP and the customer. The actual price paid by the customer, including any additional amount was printed on the ticket given to the customer.

(2) The customer was aware, before payment was made, as a result of the statement on the pay and display ticket machine, that "overpayments were accepted".

(3) The contract was completed at the time when a customer pressed the green button to obtain the parking ticket; at that time the customer knew how much she had paid, the pay and display ticket machine knew how much it had received.

(4) If a customer did not have the correct change, the pay and display ticket machine would not offer to issue a parking ticket until coins above the tariff price had been put into the machine; in our example, only when the 50 pence coin was inserted into the machine.

(5) Additional payments did not give rise to any credit; in effect (using the example transaction) any payment between £1.45 and £2.05 could only purchase 1 hour of parking.

(6) 99% (or 3 out of 300) of the NCP car parks concerned offered both cash and credit card payment, so that customers had a choice of how to pay.

(7) All of the pay and display ticket machines were situated in car parks which were barrier free; so it was possible to drive into the car park and straight out again if a decision was made not to park there, without having to purchase a ticket.

(8) In all but a minority of cases, the expiry time was not shown on the pay and display ticket machine as coins were fed in, but the value of the coins accepted was shown, on a coin by coin basis.

Decision

5 60. The parties' starting point for their arguments was very different. NCP rooted its arguments in EU law concepts of consideration, HMRC based its case on domestic concepts of contract law. We are dealing with VAT for which the primary legislation is EU law and the Principal Directive and for that reason we are starting our analysis by looking at the approach of EU law, while accepting HMRC's arguments that it is
10 not possible to consider the concept of consideration without understanding the legal contractual framework within which it arises.

EU law

15 61. Given that the EU law meaning of consideration is a fundamental issue in this case, it is unfortunate that there is no EU definition of consideration. Equally although Ms Sloane cited and took us through a number of EU authorities, none of the cases to which we were referred are precisely analogous to this situation.

20 62. NCP was keen to characterise the additional payments as "overpayments" which were made voluntarily, akin to a gratuity paid outside the terms of the contract made between the parties, similar to the deposits in the *Societe thermale* case. Our view is that there are several crucial differences between the additional payments made to NCP and the gratuity type payments considered in *Tolsma* and other cases. We do not agree that the additional payments made to NCP were either voluntary, uncertain or arbitrary.

Are the additional payments "voluntary"?

25 63. A gratuity is "voluntary" because it does not impact the validity or otherwise of the underlying contract; non-payment of a tip does not mean that you have not paid the amount due for your meal (or for your taxi). That is not true in this case; if a particular customer does not have the right money to pay to park, there is a binary choice, pay an additional amount and receive the service (the right to park) or don't
30 pay and don't receive the right to park.

35 64. On these facts there is a requirement for some additional payment to be made if a customer wants to park in a particular NCP car park at that time and does not have the right change. There is nothing optional or voluntary about this. If no additional payment is made, there will be no contract. The additional payment is a term of the contract which is made; because there is a requirement to pay at least the amount due to park. The customer has a choice, but the choice is between having the right to park and not having the right to park. The payment is "voluntary" to the extent that the customer can choose to park elsewhere or go and get change, but is an obligatory element of the contract if the customer does decide they want to park in this particular
40 car park.

Is the consideration uncertain?

65. The parties seemed to agree that the contract was made at the time when the green button was pressed on the pay and display ticket machine. At that time, the customer knew, and the pay and display ticket machine “knew” how much money had been
5 paid. It is true on these facts, that it is not possible to predict how much each individual customer will choose to “overpay”, but that does not mean that, on a customer by customer, contract by contract basis, the consideration is “uncertain”. While the price payable for any individual contract might be unpredictable, it was settled by the time the green button was pressed on the pay and display ticket
10 machine.

Is the consideration arbitrary?

66. We did not hear any evidence of the range of overpayment amounts received by NCP, but it was accepted that different customers would pay different amounts depending on the amount of change they had. From NCP’s perspective, this was an
15 “arbitrary amount” looked at across all customers. In a mirror image of the position in the *Apple and Pear Development Council* case, it was possible for one customer to pay a greater amount and only get the same amount of benefit.

67. But our view is that the question is not whether the consideration differed between customers, but whether for each contract and each customer, the consideration is
20 “arbitrary”.

Sufficient link between supply and payment

68. Of all the EU cases cited to us it is the *Finland* case that is the most analogous to our facts because the level of payment depended on ability to pay, not the value of the service (legal advice) being given. In the *Finland* case recipients of legal aid were
25 charged for legal services depending on their income on a set scale from zero to 75% of the actual value of the legal services. The court said that:

“the part payment made.... by recipients of legal aid services depends only in part on the actual value of the services provided – the more modest the recipient’s income and assets, the less strong the link with that value will be”
30 para [49] and concluded as a result of this logic that “it does not appear that the link between the legal aid services provided....and the payment to be made by the recipient is sufficiently direct for that payment to be regarded as consideration for those services....” para [51]

Exactly as for NCP’s pay and display ticket machines, it was possible for one
35 customer to pay a greater amount for the same amount of benefit as a customer who paid less.

69. Our view is that in NCP’s case, despite the fact that customers are paying more than the stipulated tariff, dependent on their ability and willingness to pay (the amount of change they have), there is nevertheless a direct link between what they do pay and
40 the service provided because, unlike in the *Finland* case, what they pay is the result of

a commercial decision by them, a bargain made by them, at the time when they put their money into the pay and display ticket machine. In *Finland* the amount payable was set by the government and could not be negotiated by the customer; if their income fell within a certain bracket that was the percentage of the fee which had to be paid. Those fees were referable to circumstances which were extraneous to the customer. In NCP's situation it is the customers themselves who decide whether they are prepared to "overpay" for the car parking service offered and it is this element of bargain which, in our view, results in a sufficiently direct link between the payment and the service supplied.

70. It is notable that many of the EU law cases cited concerning the lack of a sufficiently direct link between payments made and services supplied involve prices which have been set by third party statutory bodies, whether regulating the production of potatoes or of legal services. The same is true of the *King's Lynn* decision in which car parking prices were set by the Statutory Order. In our view this marks a critical distinction between those cases and our facts; there was no third party setting the price which a customer was prepared to pay at an NCP pay and display car park. That decision was made by each individual customer depending on their own circumstances.

71. English contract law is based on the premise that parties are free to choose whether and at what price they are prepared to enter into a contract. In many instances, different people will be prepared to enter into a contract for the same supply of goods or services, for a different price, depending on their bargaining position. On our facts that "bargaining position" depended on (i) the amount of change a customer had and (ii) how much they needed to park at this particular place at this particular time. It is correct that the bargain made by a customer who did not have the correct change was made under some kind of "situational duress", but we have to assume that each customer made a free and rational (if grudging) choice that it was worth paying the price which was actually paid, otherwise they would not have paid it. The price was therefore not "arbitrary", but reflected the particular bargain which each customer was prepared to make.

What was the "additional amount" paid for?

72. NCP's answer is that it was paid for nothing and therefore there has been no consumption and so there should not be any VAT. In the *Landboden* decision, no benefit was obtained by the farmers who agreed to limit their potato crop, here no extra benefit was gained by a customer paying an additional amount to NCP. Our view is that there is a distinction between the *Landboden* case and our facts; in that case it was the entire agreement between the parties which was treated as a non-supply. In our case the "non-supply" is just one element of a transaction which is accepted as being mainly a taxable supply of car parking services. The additional payment is part of an agreement which gives rise to a taxable supply, unless it can be treated as payment for a separate supply.

73. However, our view, as made clear at [64] is that the additional payment, in these circumstances, was a necessary component of the contract; if the "overpayment" had

not been made, no contract would have been entered into at all. On that analysis it cannot be said that the payment was made for nothing. A customer who “overpays” has made a bad bargain as a result of their own bargaining position (a lack of change or a lack of time), but that does not mean that they have paid for “nothing”.

5 *Separate supply*

74. Neither of the parties made any serious attempt to argue that the additional amount was for some supply other than car parking services. HMRC suggested that it could be argued that NCP was supplying “convenience” by allowing overpayments to be made and this amounted to additional consideration in exchange for the additional payment on the basis of *Williams v Roffey*. Taking account of the general disinclination of the courts to artificially split supplies for VAT purposes as made clear in the *Telewest* decision;

15 “A Service must not be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service”

and also in *the French Infraction Proceedings*, our view is that the only realistic approach to these facts is that there was only one supply; of the right to park in that particular car park. The additional payment is not only a “means of better enjoying the principal service” it is, for a customer without the right change, the only way of enjoying the principal service.

75. Any payment differential arises not from a difference in the nature of the supply, but from a difference in the bargaining position of the buyer. We cannot see that this should impact the VAT analysis of the supply made.

English law of contract

25 76. We agree with HMRC that it is important to have a clear idea of how the contract was made between a customer and NCP. We are dealing with a customer plus a mechanical representation of NCP in the form of the pay and display ticket machine, but it is clear, on the basis of *Thornton v Shoe Lane Parking*, that English contract law analysis can still be applied.

30 77. NCP argued that the tariff board represented the non-negotiable terms of the contract between the parties; £1.40 or nothing, was the price to pay and those terms could not be varied as made clear in NCP’s terms and conditions set out on the tariff board. On the basis of English contract law as applied to pay and display ticket machines by Lord Denning in *Thornton v Shoe Lane*, we do not agree for three reasons (i) the NCP pay and display ticket machine itself stated that it was open to other offers “overpayment accepted” (ii) the machine did in practice, accept other offers and confirm those in the shape of a parking ticket with the actual price paid stated on it (iii) the tariff board itself implicitly (if not explicitly) stated, by reference to our example, that all payments between £1.45 and £2.05 would give the right to 1 hour of parking.

78. We think the best analysis of the contractual process, of the two offered by HMRC and by reference to our example transaction, is that there is an offer by NCP through its pay and display ticket machine of parking for one hour at a minimum price of £1.40 and a maximum of £2.05. A customer responds to that offer by feeding coins to the machine, which the machine accepts after the minimum price has been exceeded, by stating “press for ticket”. Agreement is confirmed by the customer when the green button is pressed and the agreed price is printed on the ticket. The contract is made, for an agreed price, at the time when the green button is pressed.

79. It is very difficult, on this analysis, to see how the terms of the tariff board could be interposed to override the price actually agreed and paid by the parties as NCP suggest. This is not a situation, as in *Shoe Lane Parking*, where there is any doubt that the customer knew the terms on which she was dealing; the machine told her the price to be paid and made clear that no change was given but overpayments were accepted. The customer was aware of this specific information about how payment was to be made to park given to her before she put her money into the pay and display ticket machine. On any contractual analysis those statements made by the pay and display ticket machine must be part of the contract between the parties.

80. It is hard to see how any potentially contradictory statements contained in NCP’s detailed terms and conditions on the tariff board could override these agreed terms. Those more detailed terms and conditions were not explicitly stated to override what the pay and display ticket machine had told the customer and arguably, in line with *Thornton v Shoe Lane*, were not sufficiently drawn to her attention to form part of the contract at all. In fact we would doubt that many customers read the detailed terms and conditions, having been given all the critical information which they needed by the pay and display ticket machine itself.

81. In any event, on one interpretation of the statements on the tariff board, there is no contradiction between the prices stated there and the statements made by the pay and display ticket machine; the tariff board is implicitly stating that all amounts between £1.45 and £2.05 will only purchase an hour’s parking time.

82. Nor do we think that NCP’s contractual analysis, that the pay and display ticket machine makes and accepts an offer of only exactly the £1.40 stated on the tariff board, sits easily with the facts on the ground; in our example the pay and display ticket machine accepts the customer’s offer only when her fifty pence piece is put into the machine. It does not reflect reality to suggest that what the machine is actually doing is accepting an offer of £1.40; this amount was never offered, the customer offered a £1 coin, which was below the minimum tariff and so the machine did not accept the offer or allow the customer to press the green button for a ticket, and then a fifty pence piece, which was accepted by the machine as being more than the price due and so allowed the customer to press the green button for a ticket.

83. The cases referred to by HMRC support the primacy of the English contract law analysis, but the *AI Lofts* decision in particular suggests that there can be “space” between the analysis of a supply for VAT purposes and the private law contractual obligations arising between the parties, particularly in situations where a contract is

tripartite. The court in that case made a distinction between the “identification” of obligations, which it said was a matter of contract and the “classification” of those obligations which might not necessarily be determined by the contract.

5 84. Our view is that on the above analysis there can be little doubt as to the identification of the obligations of the parties. If there is any issue with the classification of those obligations, our view is that there is only one supply of services here and that is a supply of the right to park.

The King’s Lynn decision

10 85. Both parties referred extensively to the *King’s Lynn* decision. As another decision of the First-tier Tax Tribunal that decision has no binding legal force on this Tribunal and its conclusions are of persuasive value only.

15 86. The tribunal in that decision placed significant reliance on the Statutory Order which it described as preventing the local authority from charging more than the tariff amounts stipulated for car parking. This seems to have informed the tribunal’s decision and its main finding that there was an insufficiently direct link between the additional payment and the supply of the right to park. As we have discussed above, the European cases do suggest that the interposition of a statutory charge or restriction on price between a buyer and seller of services can sever the direct link required to enable a payment to be treated as consideration for a supply of services.

20 87. We asked to see the Statutory Order which was referred to in the *King’s Lynn* decision so that we could understand the distinctions which were being made by the parties between that case and this. Having considered the terms of that order we have some doubts about whether it did in fact prevent *King’s Lynn* from charging more than the stipulated amounts, given that it merely sets out the charging bands for the relevant time periods in each case.

25 88. Nevertheless, it was a significant aspect of the tribunal’s reasoning that *King’s Lynn* could not, as a matter of law, make an offer to customers of parking services for any amount other the tariff amounts. That is not the case for NCP and that is one of the reasons why we do not feel bound to follow its conclusions.

30 89. In addition, many of the detailed points which were put to us, particularly concerning the UK contract law analysis of how the price for parking was agreed, were not covered in *King’s Lynn* but do form a critical part of our reasoning.

Principle of fiscal neutrality

35 90. Finally we have considered whether, in the light of the *King’s Lynn* decision, holding that the additional amount paid through a pay and display ticket machine which accepts overpayments is subject to VAT is counter to the principle of fiscal neutrality; that economic operators carrying on the same activity should be treated in the same way.

91. NCP argue that this principle means that local authorities who provide car parking subject to statutory restrictions on price and privately run car parking companies which have no such restrictions, should be subject to the same VAT treatment of the supplies which they make; on that analysis NCP's VAT treatment must be the same as the local authority in *King's Lynn*.

92. Leaving aside the factual issue of whether there were actually statutory restrictions on what King's Lynn could charge for parking, we agree with NCP in this instance that, even if there was such a statutory restriction which operated in the King's Lynn car parks, from a customer's perspective, there is no significant difference in the service which is being supplied whether she parks in a King's Lynn or an NCP car park and does not have the right change. The *Rank* decision to which we were referred makes it clear that the test for this purpose is from the perspective of the consumer, not the supplier and that minor regulatory or legal differences should not be taken account of.

93. We have not had the advantage of studying all of the evidence in the King's Lynn case and our conclusions on this point need to be qualified to that extent, but from the information which we do have, our view is that the statutory restrictions on price referred to in that case, are, from a customer's perspective, "*an artificial distinction based on insignificant differences*"; the King's Lynn car park notices, did not as far as we are aware, make it clear that payments above the stated tariff could not legally be charged by the local authority but simply stated that overpayments were accepted, just as the NCP car park notices did.

94. Mr McGurk suggested that overpayments accepted by King's Lynn were ultra-vires, and while that might be right, we do not think that this is sufficient to differentiate the supplies for VAT purposes. The customer was not aware of the illegality of the charges and it is accepted, as was stated in *Rank*, that legal distinctions will not necessarily alter the character of a supply for VAT purposes.

95. Having accepted, with some qualifications, that the two customers should be treated as in receipt of similar supplies of car parking services, we nevertheless have significant misgivings with accepting that this necessarily means that we have to apply the decision in *King's Lynn* to this taxpayer. That decision was a decision of the First-tier Tax Tribunal, which has no binding authority on us and which was decided without reference to some of the detailed arguments which we have heard, particularly in respect of the UK contract law analysis. For that reason we do not accept NCP's suggestion that this case must follow *King's Lynn* in order to comply with the principle of fiscal neutrality.

Conclusion

96. In a situation where there is no legal restriction on the amount which can be charged for parking and taking account of EU law and English contract law, our view is that the full price paid by the customer, including any additional amount, is consideration for the supply of a single taxable service, being the right to park at a

particular NCP car park for a particular period of time. For these reasons NCP's appeal is dismissed.

5 97. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

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