[2017] UKFTT 0234 (TC)

TC05722

Appeal number: TC/2015/05885

VALUE ADDED TAX - Assessments to VAT and HMRC ruling - Discounts paid by Brewers to a company in respect of its own and other publicans' aggregation of their purchases of beverages – Aggregation used to obtain discounts not disclosed to other publicans – whether a supply by the company to the publicans – yes – Sections 4 and 5 Value Added Tax Act 1994 ("VATA") – Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

REDWOOD BIRKHILL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RUTHVEN GEMMELL WS
MEMBER: IAN MALCOLM

Sitting in public at George House, Edinburgh, on 27 January 2017

Philip Simpson QC, instructed by Grant Thornton, for the Appellant

Mrs Sharon Spence, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Redwood Birkhill Limited ("Redwood") against decisions by HMRC notified by an assessment dated 16 May 2016 for under-declared VAT in an amount of £181,876, for the VAT periods 05/12 to 02/16 inclusive and a VAT655 Notice of Assessment issued on 31 May 2016, in respect of amounts of negotiated brewery discounts retained by Redwood, from the total amounts Redwood obtains for itself and a number of publicans, and against a ruling first issued on 2 July 2014 and confirmed, in part, by letter dated 11 June 2015.

2. The total amount of discount is obtained from two brewers, Heineken UK Limited ("Heineken") and Tennent Caledonian Limited ("Tennents") (and together "the Brewers") and is achieved by combining the buying power of Redwood and a number of publicans as a "buying group".

3. Evidence was given by Gordon Kevin Whiting, the Managing Director of Redwood and by Kirsty Drummond, a Higher Officer of HMRC. Both witnesses were credible and were examined and cross-examined.

4. The Tribunal had before them a bundle of documents received on the day of the hearing in accordance with Directions issued by HMCTS but which had been seen prior to the hearing by the parties.

Legislation

See Appendix 1.

Cases Referred To

See Appendix 2.

The Facts

5. Redwood negotiates discounts with Tennents and with Heineken in relation to four categories of establishment ("the Redwood estate").

6. The first category of these are owned and managed hotels and public houses and where the entire discount negotiated accrues to Redwood, or one of its companies, and where there is no dispute with HMRC regarding the VAT treatment.

7. The second category relates to owned and tenanted public houses where Redwood negotiate each year with the tenants and pays to them a proportion of the discount, retaining the other. The level of discount varies from public house to public house.

8. The third category is where Redwood has an investment in a public house. In order for a public house to be part of the buying group (with a major exception of the public houses belonging to Tassie and Boath in relation to the agreement with

Heineken), any public house not owned or managed or tenanted must be in receipt of an investment by Redwood.

9. In relation to the fourth category, the Tassie and Boath public houses, their purchases from Heineken are aggregated with those of the Redwood estate and Redwood pays a share of the discount to Tassie and Boath ("the Tassie and Boath arrangement").

10. The Redwood estate, excluding the public houses owned and managed by Redwood or one of its companies, is hereinafter referred to as "the Publicans".

11. Redwood in relation to the Redwood estate negotiates each year discounts with Heineken and Tennents in relation to quantities of beer, lager, cider, wines, spirits and minerals. Although lager and beer are normally delivered in kegs of 11 gallons, discounts are expressed in relation to the Wholesale Sale Price ("WSP") barrels of 36 gallons and discounts are expressed proportionately. The discount is paid either as an Off Invoice Discount ("OID") in the case of a small number of public houses where there were cash flow problems or, more usually, by cheque to Redwood.

12. It is common practice in the licensed trade for brewers to sell stock in barrels and to require customers to commit to a minimum purchase level and to incentivise purchases above that level by offering a retrospective discount per barrel where it is exceeded.

13. The Discount Agreement with Tennents specifies the discounts that would be paid and imposes obligations on the relevant Publicans in terms of promotion activities (using branded beer mats, branded bar runners, putting the beer on prominent taps and so on). The agreement with Heineken does not impose any obligations on Redwood other than binding Redwood to use Heineken as their exclusive supplier of certain types of drink.

14. In most cases Heineken and Tennents pay the discounts to Redwood and there is a variation between the VAT treatments. Tennents advise Redwood of the discount due each month and invite Redwood to raise an invoice, including VAT, to Tennents and included in the advice note is a breakdown of the exact discount due to each public house. Heineken do the same but no VAT is applied to the discount.

15. Each month Redwood calculates the discount due to each public house and pays a portion of this to the public house, retaining a share for themselves ("the retained discount"). The amount of the retained discount is not disclosed to the Publicans (Method 1).

16. In a small number of cases Redwood has agreed with Heineken and Tennents to apply part of the discount, which has been negotiated, by means of a credit or a reduction in price of the amount invoiced directly to the relevant Publicans (an Off Invoice Discount or "OID"). This is done to assist the Publicans' cash flows. In these cases the balance of the discount is paid to and retained by Redwood (again "retained discount").

17. Redwood's agreements with the Publicans oblige them to sell the products of Heineken and Tennents and, so in Mr Whiting's words, Redwood can "dictate" the type of and source of supplies to those Publicans.

18. Redwood's agreements with the Publicans entitle Redwood to use those Publicans' barrelage as well as its own in calculating the volumes of product purchased by Redwood for the purpose of assessing the discounts Redwood receives from Tennents and Heineken.

19. Redwood uses the product to supply retail in the licensed premises it owns and the Publicans also purchase the product from the Brewers.

20. During the hearing, an entirely hypothetical mathematical example was used of a Brewer having a WSP of £500, paying a company, such as Redwood, £200 who in turn pay a publican a discount/rebate of £150. The retained discount is therefore £50. ("the hypothetical example").

21. Redwood remit a discount to the individual Publican, less an amount which is the undisclosed retained discount, to the Publican and, accordingly, Redwood make a profit from the transaction. The Publicans benefit from a rebate which is higher than they would have obtained based on their own individual orders or supplies, from Tennents or Heineken, or it was suggested, from any other brewer.

22. The other type of agreement and arrangement is the discount given off-invoice or OID from Tennents whereby Tennents agree with Redwood to deduct from the invoice to the Publican an amount equal to the payment that would otherwise have been made to the Publican by Redwood and also pay Redwood an additional amount of the retained discount as described under Method 2.

23. Mr Whiting explained in his evidence that by using Tennents and Heineken he can offer the Publicans a flexible range of products for sale. Redwood makes no adjustment for VAT on the rebate remitted to the Publicans.

24. Examples of leases and an example of a sample Discount Agreement between Redwood and certain Publicans were before the Tribunal. The Discount Agreement with a tenant publican specified that, in terms of the lease between them, the lessee was obliged to purchase a particular range of products from a named brewery and stipulated that for each barrel of beer supplied, Redwood would pay to the lessee a sum of money provided that the brewery paid Redwood that amount or more for each whole barrel of beer sold from the lessee's premises.

25. The Discount Agreement also provided that when the amount supplied by the brewery to the lessee was in excess of an aggregate amount, Redwood would pay to the lessee a further amount provided that Redwood received at least that amount from the brewer.

26. These discounts were payable quarterly in arrears and, whereas the Publicans were obviously aware of the discount they received from Redwood, the Publicans did not know the amount of discount that Redwood received from Heineken or Tennents. No

written contractual agreement existed which specified or confirmed that the Publicans knew that Redwood was obtaining a higher or greater discount than the Publicans were themselves receiving from Redwood, or how much it was, but Mr Whiting stated that this understanding was implicit or even an implied term in the agreements with the Publicans.

27. After a number of visits to Redwood and an exchange of correspondence, Kirsty Drummond, for HMRC, issued a ruling on 11 June 2015 stating that "There is no supply from Redwood to the brewers for aggregating the drinks purchases. The brewers are free to make the commercial decision whether or not to adjust VAT on the payment of the discounts in line with current HMRC guidance. There is however a supply from Redwood to the individual Publicans. This is a taxable aggregation of purchases service for which the consideration is the proportion of the discount, earned by the Publicans, which they (Redwood) retain".

Submissions by Redwood

28. Redwood say that Method 1, whereby all the discount is paid by the Brewers to Redwood, is a *supply* by the Publicans to Redwood, namely the grant of the right to use the Publicans barrelage in ascertaining the volume sold by the Brewers for the purpose of calculating retrospective discounts. The *consideration* for the supply is money Redwood pays to the Publicans. In the hypothetical example. The Publicans should invoice Redwood for £150 for this supply.

29. Redwood say that Method 2, whereby the discount is granted by Tennents to the Publicans, is a supply by Redwood to Tennents of the exclusivity. The consideration for that supply is the money paid by Tennents to Redwood.

30. Accordingly, the Publicans pay directly to Tennents the price of the products sold and Tennents pay Redwood for procuring the exclusivity obligations undertaken by the Publicans. The former takes into account the OID given directly by Tennents to the Publicans.

31. It is surmised that the Publicans are aware that the amount of the OID is higher per barrel than the discount the publican in question would receive if dealing directly with the brewers.

32. Redwood undertakes an obligation to the Brewers to pay the price for goods purchased by the Publicans although, in practice, the individual Publicans place orders with Tennents or Heineken for goods and pay for them directly.

33. There are also contracts between Tennents and Heineken and individual publicans where standard terms apply. Under these contracts, there is a contract of sale directly between the Brewers and the Publicans. The Publicans are also under an obligation, owed directly to the Brewers, to pay the price for the product. In Method 1, the amount due is the pre-discount price. In Method 2, credit is given for a discount against future invoices.

34. Redwood say that there is no obligation on them to pay the whole discount to the Publicans and the latter could not sue for it. Redwood are not agents for, or on a commission sharing type arrangement with, the Publicans. Instead, Redwood agree to pay the Publicans a certain level of discount from an amount they receive from the Brewers which may or may not be in excess of that level.

35. The only obligation in relation to the whole discount is on the Brewers to pay to Redwood; the only variation to this being where an OID arrangement allows the discount or part of it to be paid by the Brewers direct to the Publicans.

36. Redwood say that VAT on a transaction relates to the consideration for a supply of goods and/or services.

37. Redwood say the central issue to ascertaining the nature of the supplies is to consider what, from an economic point of view, is being supplied. This requires a consideration of the issue at the level of generality that corresponds to social and economic reality or by "following the money" and refer to the case of *HMRC v Newey* [2013] STC2432 ECJ.

38. The payment by Redwood to the Publicans is an amount known to both and agreed by them. No money is paid by the Publicans to Redwood nor does the publican procure a third party to pay Redwood an amount which would be due to the publican. The Publicans do not know how much is retained or how the discount is split.

39. Redwood say that if HMRC's case is correct, that Redwood is making a supply to the Publicans, then it is impossible for the Publicans to complete their VAT returns accurately as they do not know the value of the supplies HMRC are saying that the publicans are paying to Redwood.

40. Redwood say that it is clear that Redwood pays the Publicans money in exchange for the right to use the Publicans' barrelage but no money passes between Redwood and the Publicans. Consequently, either there is no supply between Redwood and the Publicans or the consideration is the fact that Redwood procures a discount for the Publicans, which Redwood say is unlikely because it feeds into the amount due by the Publicans to the Brewers for the cost of the beer. In neither of these situations is that a "consideration".

41. *HMRC v Newey* related to a loan broker who, to avoid the non-recoverability of advertising costs to attract potential borrowers, incorporated a company in Jersey where the VAT directive does not apply. Broking contracts were concluded directly between lenders and the Jersey company with the result that broking commissions were not paid to Mr Newey but to that company.

42. The Jersey company did not itself process the loan applications but used Mr Newey's services for that purposes which were provided under a subcontract and by his employees carrying on their business activities in the UK. The advertising services were provided by another company ("Jersey Advertising") not connected with the Jersey company but also established there and who in turn used other

advertising agencies established in the United Kingdom. The services provided by the Jersey company to Jersey Advertising were not subject to VAT.

43. The court were asked for a preliminary ruling on the meaning of "supply of services" under Article 2(1) of the Sixth Directive which states that "the supply of goods or services effected for consideration within the territory or country by a taxable person acting as such" is to be subject to VAT. The court held that the supply of services is effected "for consideration", within the meaning of the Article and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is a reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

44. The court held that in this particular case the contractual terms were purely an artificial arrangement which did not correspond with economic and commercial reality of the transactions.

45. Redwood say that in a normal bipartite relationship between the Brewers and the Publicans, the former would sell products to the latter; the Publicans pay the price and, if an agreed volume is exceeded, the Brewers will give the Publicans a discount retrospectively. The appropriate amount will be paid by the Brewers to the Publicans or given as a credit against future invoices. No supply is involved in the discount, it is merely a price adjustment.

46. In the case before the Tribunal, however, the position is that Redwood is permitted by the Brewers to take into account purchases made by third parties, namely the Publicans. In Method 1, the Publicans give up their right to receive any discount directly. Instead the Brewers pay Redwood an aggregate amount on the basis of the aggregated volumes and Redwood then pays part of this amount onto the publicans.

47. In Method 2, the Brewers give the Publicans credit for part of the larger discount and pay the rest to Redwood.

48. In both Methods 1 and 2, the Publicans do not know how much is paid to Redwood by the Brewers, they only know that they, the Publicans, received more by way of a discount than they would by seeking a discount directly (they may in addition surmise that Redwood make some additional money from the arrangement, but they do not know how much).

49. Redwood say that in Method 1 it seems clear that the Publicans have agreed to transfer their rights to claim a discount from the Brewers to Redwood in exchange for the payments that Redwood makes to the Publicans in respect of the discount, or, Redwood's agreement that the Brewers should grant the discount direct to the Publicans by means of a credit against invoices.

50. Accordingly, the Publicans have made a supply of a service to Redwood. The supply is standard rated. The Publican must charge VAT on the supply and Redwood is entitled to deduct the VAT charged as input tax. The Publicans and Redwood know how much money is paid and therefore how much VAT is payable.

51. Redwood say that in Method 2, the Brewers pay Redwood to procure the Publicans to undertake exclusivity obligations. There is thus a supply by Redwood to the Brewers. This is standard rated. There is no supply between Redwood and the Publican.

52. Having accepted this analysis, HMRC changed their view and their current position is that, to the contrary, it is Redwood who has made a supply to the Publican; the supply being the "organising/facilitating the aggregation of the purchases made by the individual publicans in order to achieve increased discounts for members of the publicans group".

53. Redwood say this analysis is unrealistic because no money actually passes from the Publicans to Redwood and in fact passes in the opposite direction in Method 1, from Redwood to the Publicans and, in Method 2, no money passes at all between them.

54. Redwood say that for this analysis by HMRC to be correct, the "consideration" for the supply would have to be the part of the payment that Redwood receives from the Brewers that Redwood retains. Thus, the "consideration" would not be a payment but an authority granted by the Publicans to retain money or to contract with Tennents for a payment. No invoices are issued for this. The Publicans do not know how much money is received or retained by Redwood and it is impossible for the Publicans to claim credit for the input tax element of this amount because they do not know how much it is when it is paid and becomes due to Redwood.

55. Redwood refer to *Tolsma*, a case involving a barrel organ player on a public highway in the Netherlands who had a collecting tin for donations but also sometimes knocked on the door of houses to ask for donations but without being able to claim any remuneration by right. He was assessed to VAT. The European Court of Justice concluded that "where a person's activity consisted exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT"....and "a provision of services is therefore taxable only if it is a direct link between the services provided and the consideration received".

56. The ECJ continued; "it follows that a supply of services is effected "for consideration" within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is a reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient".

57. Redwood say that *Landmark Cash & Carry Group, Ltd*, a case which involved a buying consortium, and relied upon by HMRC, concerns a different relationship between the taxpayer in that case, and its members, and the parties before the Tribunal. Redwood say that the decision is not "altogether clear". The taxpayer was a company limited by guarantee. It acted as an "umbrella" company for a number of wholesalers. It negotiated discounts with certain manufacturers that depended on the

volume of sales achieved by its members and arranged for members to engage in promotional activities.

58. Redwood say that it appears that the VAT Tribunal held that "the taxpayer was making a supply not to its members but to the manufacturers in providing the manufacturers with a larger market than would otherwise have been available to them and providing this larger market at a cheaper cost to those manufacturers than if they had undertaken promotional schemes on their own account".

59. The VAT Tribunal found that the supply by the "umbrella" company was to the manufacturers and not to the members. Redwood say that the equivalent relationship in the present case is that between Redwood and the Brewers and that the VAT Tribunal in *Landmark* did not consider a relationship equivalent to that between Redwood and the Publicans. Accordingly, it is of no assistance in the present case as regards Method 1 and indicates that in Method 2 there is indeed a supply by Redwood to the Brewers.

60. Redwood say that the amount retained by them cannot be a consideration because the Publicans do not know how much it is.

61. Redwood say that the ruling on review and the assessments should be set aside.

HMRC's Submissions

62. HMRC say that the transactions between Redwood and the Publicans are within the scope of VAT in accordance with Sections 4 and 5 of VATA as they are a supply of services, take place in the UK and are made by a taxable person in the course of furtherance of a business carried on by Redwood.

63. Redwood has entered into agreements with the Publicans where the common aim is to increase the rebate/discount received from the Brewers. Redwood provides services to the Publicans by organising/facilitating aggregation of the purchases made by the individual Publicans in order to achieve increased discounts for the members of the Publicans group.

64. HMRC say that Redwood manages and distributes the increased rebate/discount received from the Brewers passing part of the discount back to the individual publicans. In consideration for the service provided, Redwood retains a portion of the rebate/discount. Accordingly, supplies are made by Redwood to the Publicans and thus Redwood is liable to account for VAT on the consideration retained by it.

65. HMRC say that the buying group does not take title to the goods supplied by the Brewers as the individual members do and so the payment received is not a discount on the purchase price but the consideration for the service provided to the buying group and thus is taxable at the standard rate.

66. The supply from Redwood to the individual publicans for the value of services in arranging the buying group discount (ie the amount retained before passing the

balance of the discount from the Brewers to the Publicans), that is to say the retained discount is a taxable supply upon which VAT is due.

67. HMRC say that, even if there are no written formal agreements with the Publicans, Redwood has an agreement with the Publicans that it will use their purchasing power and that this is an implied term of the agreements between the Publicans and Redwood.

68. HMRC say that the economic reality is that Redwood entered into an agreement with the Publicans with a common aim to increase the rebate and, accordingly, Redwood provides a service to the Publicans, not the other way round. Redwood negotiates discounts on behalf of the group to increase the level of discount.

69. HMRC say that following that, the Publicans know that Redwood will get a benefit and that the Publicans must have an agreement, even if it is not writing, because the Publicans are allowing Redwood to negotiate on their behalf and be paid through them.

70. Redwood receives and redistributes the discount and passes part of it back in line with each agreement with each individual publican. The consideration is the amount of the retained discount which relates directly to the purchases made by each publican.

71. HMRC rely on the *Landmark* case. *Landmark* was established as an Association by number of cash-and-carry companies and its purpose was to "improve the profitability of its members". One of the ways it did this was by organising promotions in cooperation with the manufacturers. The manufacturers contributed to the cost of the promotions and made additional "override payments" to *Landmark* based on the sales of the promoted products.

72. It was submitted at the *Landmark* Tribunal that the Association did nothing in relation to these override payments other than to negotiate the terms relating thereto but this was not accepted by the Tribunal. They judged that the Association, in addition to its promotion activities, entered into "deals" with suppliers.

73. The Tribunal stated "*While there is no evidence before us that the promotional activities of the Association were linked to the achievement of any particular target, we have no doubt that the Association entered into these deals with a view to the targets being achieved whether or not this involved the Association in taking any positive action to that end. In each case as and when a target was achieved the Association collected the override payment. In our judgement in entering into these deals in achieving the target (whether or not this involved the Association in any positive activity) something was "done" by the Association within the meaning of Section 6 (2) (b) above. We also conclude that the overrider payment constituted a consideration for the 'something' which was done. It follows therefore, that the Association was in relation to these overrider payments making taxable supplies in the course of its business*".

74. HMRC accept the relationship between *Landmark* and its members is not the same as the relationship between Redwood and the Publicans. Agreements between these types of groups and suppliers vary but a common feature is that the periodic payments to the group are normally based on the level of sales, as in Redwood's case.

75. The members' group in *Landmark* and the Publicans group in the present case have similar aims, ie, to join together for the purpose of increasing profits. Redwood takes on the primary role in these arrangements by facilitating the aggregation of the purchases made by the publicans in order to achieve the increased rebate/discounts from the breweries.

76. Redwood raises an invoice to the Brewers for the amount of rebate/discount. The rebate/discounts are paid directly by the Brewers to Redwood. Redwood then pays a proportion of the rebate/discount to each publican and (in line with individual rates agreed between Redwood and each publican) Redwood retains the balance as consideration for its services to the publicans and that is a vatable supply.

77. It is for the same reason that the Brewers pay discount to Redwood per public house and not in the manner of a lump sum. The Brewers, therefore, recognise that the discounts are due to each outlet. HMRC say that Redwood is getting a rebate directly on the back of the barrelage which the publicans allow them to use.

78. Accordingly, HMRC say that the rebate/discounts retained by Redwood are similar to the override payments in *Landmark*, and any amount retained by Redwood is the consideration for its services of aggregation of purchases, made to the Publicans and thus is subject to VAT.

79. HMRC referred to *Apple and Pear Development Council v Customs and Excise Commissioners* as authority that "the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received". Accordingly, any amount retained by Redwood is consideration for its services for combining barrelage and negotiating discounts and, therefore, subject to VAT.

80. HMRC say the appeal should be dismissed.

Decision

81. The issue before the Tribunal relates to the ruling first issued by letter on 2 July 2014 and confirmed by letter of 11 June 2015 which stated that Redwood were correctly accounting for the payment received from Tennents but were asked to raise VAT invoices and account for VAT on payments received from Heineken. This was clarified by a letter dated 11 June 2015 which stated "there is no supply from Redwood to the Brewers for aggregating the drinks purchases. The Brewers are free to make commercial decisions on whether or not to adjust VAT on the payment of the discounts in line with current HMRC guidance". Accordingly, HMRC were prepared to accept the difference in VAT treatment that Redwood received from Heineken and Tennents.

82. The letter of 11 June 2015 stated that there was a supply from Redwood to the individual Publicans. This was described as a "taxable aggregation of purchases service for which the consideration is the proportion of the discount, earned by the Publicans, which they (Redwood) retain".

83. Following on from the ruling on review dated 11 June 2015, the assessments dated 16 and 31 May 2006 in respect of the VAT period 05/12 to 02/16 were issued.

84. As stated at the hearing, the Brewers paid all the retrospective discount to Redwood and Redwood then passed on to the Publicans an amount agreed in advance between them and retained the rest in amounts that were unknown to the Publicans (Method 1).

85. The alternative method allowed Tennents to give the Publicans part of the retrospective discounts, agreed in advance between Redwood and the Publican, and then paid Redwood an additional amount (Method 2).

86. "Supply" is not defined in the VAT legislation and Redwood cited a number of authorities to the effect that a proper approach in ascertaining the nature of supply is to consider what, from an economic point of view, is being supplied which they say should be considered at the level of generality that corresponds to social and economic reality.

87. The Tribunal considered that a supply must be considered on its own in order to determine its nature for VAT purposes and the supply must be chargeable where there is a supply for a consideration in terms of Article 2.1 of the, then, Sixth Directive.

88. The issue before the Tribunal was, who makes what supply to whom?

89. Redwood put forward the submission that the circumstances in the current case should be considered against a normal bipartite relationship which would be where a brewery sells a product to a publican, the publican pays the price and, if an agreed volume is exceeded, the brewery will give the publican a discount retrospectively. No supply is involved in the discount; it is merely a price adjustment.

90. In the circumstances in this case, the relationship changes and the entitlement to a discount which exists in a bipartite relationship is transferred and then enhanced by being aggregated with others in the hands of Redwood as in Method 1.

91. Method 2, where the Brewers grant part of the discount direct to the Publicans, Redwood say is contingent on Redwood's agreement and the lever or impetus for the Brewers making such a discount direct to the Publicans are Redwood's agreements to exclusivity. The Brewers pay Redwood for having supplied the exclusive obligations to buy from the Brewers

92. HMRC's case is that Redwood has made a supply to the Publicans under both methods. HMRC say the supply is organising/facilitating the aggregation of the purchases, made by the individual Publicans, in order to achieve increased discounts for members of the Publicans' group.

93. In the hypothetical mathematical example, therefore, HMRC say that Redwood makes a supply in return for the retained discount of £50 and should invoice the individual Publicans for this amount.

94. HMRC's cite authority for this proposition in the *Landmark Cash & Carry Group Limited* case.

95. Both parties accepted that the relationship in that case between the taxpayer, the Association, and its members, was different from the relationship in the present case and the Tribunal agreed with Redwood that the decision is not altogether clear. What was clear was that *Landmark* was simply an Association acting as an umbrella company for a number of wholesalers.

96. The supply that the VAT Tribunal held that the taxpayer was making was providing the manufacturers with a larger market than would have otherwise been available to them but this was also linked to the cost to the manufacturers of undertaking promotional schemes on their own account. The supply was to the manufacturers and not to its members.

97. This Tribunal feels that the decision is significantly distinguished and of limited assistance as, in this case, the issue is whether Redwood, which is not a manufacturer (or in this case a Brewer), made a supply to its members (in this case the buying group). In addition, the Tribunal consider that the circumstances are also different because Redwood also own and manage public houses who benefit from the enhanced levels of discount as a result of the aggregation of barrelage and on which there are no VAT consequences. Redwood itself has a benefit beyond that of benefitting the Publicans.

98. The Tribunal considered that Redwood supplied an aggregation service to the Publicans for the purposes of increasing discounts and it was for this reason that the Publicans joined the Redwood estate. In relation to the public houses owned and managed by Redwood there is no dispute with HMRC regarding the VAT treatment and in relation to the Tassie and Boath arrangement there are no additional obligations of any kind such as those that relate to the owned and tenant in public houses or where Redwood has an investment in a public house. It is, therefore, given the Tassie and Boath arrangement, not an absolute requirement for a public house to be part of the buying group unless it is owned or managed or tenanted or in receipt of investment by Redwood.

99. The Brewers make supplies for cash with payment made directly by the Publicans to the Brewers. Redwood supplies its aggregation service to the Publicans for the purpose of increasing the discounts which is why the Publicans joined the Redwood group and, in the case of the Tassie and Boath arrangement, there is no other reason or tie obligation for them to do so.

100. The Publicans accept that whilst they will receive a higher discount than they could achieve on their own, they pay for this service by forgoing a part, albeit an

unknown part, of the discount payable on their sales of the retained discount and by allowing Redwood to use that barrelage.

101. Redwood's submissions referred to the Publicans paying directly to Tennents the price of the products sold and Tennents paying Redwood for procuring the exclusivity obligations undertaken by the Publicans. The Tribunal considered that Redwood procures exclusivity because they believe they offer their Publicans a range of drinks their customers wish and the Brewers wish exclusivity to reduce competition from other brewers. Accordingly, there is a mutual benefit which the Tribunal did not accept was equivalent to Redwood procuring exclusivity obligations in favour of the Brewers for which, consequently, Tennents were required to pay Redwood.

102. The Tribunal considered that Redwood provided a service of organising and/or facilitating the aggregation of the purchases made by the individual publicans in order to achieve increased discounts for members of the Publicans group.

103. The Tribunal favour HMRC's submission that the Publicans do not take title to the goods supplied by the Brewers as the individual publicans do and so the payment received is not a discount on the purchase price but the consideration for the service provided by Redwood to the publicans and thus is taxable at the standard rate. That supply is arranging/obtaining the Publicans' discount and the consideration for this is the amount of the retained discount upon which VAT is due.

104. The Tribunal consider this to be the economic reality and that the reason the retained discount is not disclosed to the Publicans is a matter of commercial judgement or practice which may not, nonetheless, be a tenable arrangement within the VAT regime.

105. The Tribunal considers that there is a supply, notwithstanding that there are no formal agreements between the Publicans and Redwood and, consequently, no legal obligation that Redwood *will* (emphasis added) use its purchasing power to achieve a discount. On the facts, the Publicans enter into these arrangements with Redwood for the reasons stated by HMRC.

106. The Discount Agreement presented to the Tribunal showed that there could be no benefit, but also no loss, to Redwood as the discounts are only paid if they are at least matched by the discounts from the Brewers to Redwood. In those circumstances clearly the consideration for the supply could reduce to the point of being non-existent.

107. The Tribunal considered that the agreement between Redwood and the Publicans was not a purely artificial arrangement and instead did correspond with the economic and commercial reality of the transactions and that the basis of this was to enhance the amount of discount obtained from the Brewers in return for which Redwood received the retained discount as a consideration.

108. The Tribunal consider that there has been a supply of services for consideration within the meaning of the VAT legislation and that there is a direct link between the service provided and the consideration received. The consideration is the retained

discount, by Redwood, in consideration for its services for combining barrelage and negotiating discounts for the Publicans and is, therefore, subject to VAT.

109. The appeal, for the reasons stated, is dismissed.

110. 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.

RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

RELEASE DATE: 17 MARCH 2017

Appendix 1

Legislation

Value Added Tax Act 1994

Section 4 Scope of VAT on taxable supplies.

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

Section 5 Meaning of supply: alteration by Treasury order.

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.
(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

Appendix 2

Cases Referred To

Case C-16/93 *Tolsma* [1994] ECR-I 743
Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Commissioners* [1999] A.C.601
Case C-41/04 *Levob Verzekering BV v Staatssecretaris van Financiën* [2004] ECR-I 9433
Dr Beynon and Partners v Customs and Excise Commissioners [2005] 1 W.L.R. 86
Case C-653/11 *HMRC v Newey* [2013] S.T.C. 2432 (ECJ)
HMRC v Newey [2015] S.T.C. 2419
HMRC v Secret Hotels2 Limited [2014] S.T.C. 937
British Telecommunciations Plc v Customs and Excise Commissioners [199] 1 W.L.R. 1376
Airtours Holidays Transport Limited v HMRC [2016] UKSC 21
Landmark Cash & Carry Group Limited v Commissioners of Customs and Excise, unreported, 1979/LON/883
HMRC v BUPA Purchasing Limited [2007] EWCA 542