TC06730

Appeal number: TC/2015/07277
(Consolidating TC/2016/00605)

VAT – meaning of para 4(1) of schedule 6 to the Value Added Tax Act 1994 as in force prior to 1 May 2014 – whether supplies of fixed line services were made on terms allowing a discount for prompt payment within para 4(1) – whether para 4(1) applies to reduce the consideration on which VAT is due where the discounted amount is not paid – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VIRGIN MEDIA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 19, 20 and 21 September 2017

Mr David Scorey QC and Mr Edward Brown, instructed by Deloitte LLP, as counsel for the Appellant

Mr Kieron Beale QC and Mr Andrew Macnab, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

© CROWN COPYRIGHT 2018

DECISION

1. The dispute relates to the correct VAT treatment of supplies made by Virgin Media Limited ("**VML**") to its domestic customers of providing a connection to the telecommunications network through a fixed line fibre optic cable and related telephony services (the "**FLR services**") in the period from 28 August 2012 to 30 April 2014 (the "**relevant period**"). In outline, VML provided the FLR services to around 95% of its customers (the "**monthly customers**") on a monthly basis in return for a monthly sum (the "**monthly basis**"). The remaining 5% of customers (the "**saver customers**") chose to pay for 12 months of FLR services in return for a single sum (the "**saver price**") of a lesser amount than would have been due if the customer paid on a monthly basis over the same period (the "**saver basis**").

2. VML's stance is that it is liable to account for VAT on the supplies of FLR services it made during the relevant period, including those made to the monthly customers, by reference only to the saver price. VML, therefore, accounted for VAT on the supplies it made to monthly customers, broadly, as though they paid one twelfth of the saver price each month rather than the higher monthly amount they in fact paid.

3. In VML's view the supplies fall within the terms of para 4(1) of schedule 6 to the Value Added Tax Act 1994 ("**para 4(1)**" and "**VATA**"), as that para applied during the relevant period. Under this provision the amount of consideration on which VAT is due (under s 19 VATA) is reduced where "goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment" (a discount for prompt payment is referred to as a "**PPD**"). In that case, the consideration is taken for the purposes of s 19 VATA, "as reduced by the discount, whether or not payment is made in accordance with those terms". (I refer to para 4(1) in the present tense for convenience but all references in this decision to that provision and to other relevant VAT provisions are to those provisions as in force during the relevant period (except where expressly stated otherwise)).

4. HMRC notified VML in a letter of 4 December 2015 that, in their view, VML was not entitled to account for VAT on supplies of FLR services to monthly customers in this way and issued VML with assessments for (a) £63,661,434 of undeclared output VAT due on VML's FLR supplies for the relevant periods (under s 73(2) VATA) and (b) interest on the amount of the VAT assessment in the sum of £3,333,588.08, (under s 76 VATA). VML disputed liability for both assessments and the quantum of the interest assessment. The parties agreed that this hearing should address liability issues only. It is not disputed that VML is liable to account for VAT due on supplies of FLR services by reference to the saver price where the saver price was in fact paid albeit that HMRC arrives at that conclusion on a different analysis to that adopted by VML.

Legislation and EU rules

Charging provisions and chargeable consideration

5. VAT is due on the supply of goods or services made in the United Kingdom (including anything treated as such a supply). It is a liability of the person making the

supply and (subject to provisions about accounting and payment) becomes due at the time of supply (under s 1 VATA) on the value of the supply as determined under VATA (under s 2 VATA). Generally a business has to account for VAT in respect of all supplies which are regarded as taking place in an accounting period (which is usually a quarterly period), as determined under the time of supply rules, within a specified time of the end that period. In outline a "supply" for the purposes of VATA "includes all forms of supply, but not anything done otherwise than for a consideration" and "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" (under s 5 VATA).

6. Where a supply is for a consideration in money its value, on which VAT is charged, is taken to be "such amount as with the addition of the VAT chargeable, is equal to the consideration" (s 19 VATA). This is subject to schedule 6 VATA, including para 4(1), which at the relevant time provided that:

> "(1) Where goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment, the consideration shall be taken for the purposes of section 19 as reduced by the discount, whether or not payment is made in accordance with those terms.
>
> (2) This paragraph does not apply where the terms include any provision for payment by instalments."

7. Paragraph 4 was amended with effect from 1 May 2014 so that, as is not disputed, it is now beyond doubt that VAT is due only on the actual sums received for a supply made on a discounted basis.

8. As a matter of European law, articles 73 and 79 of the Principal VAT Directive 2006/112/EC ("**PVD**") contain provisions determining the taxable amount for VAT purposes as follows:

> "*Article 73*
>
> 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.
>
> ……..
>
> *Article 79*
>
> The taxable amount shall not include the following factors:
>
> (a) price reductions by way of discount for early payment;
>
> (b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;
>
> (c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

Time of supply rules

9. The applicable time of supply rules are set out in s 6 VATA and the Value Added Tax Regulations 1995 (the "**Regulations**")(together the "**time of supply rules**") as follows:

(1) Under s 6 VATA a supply of services is treated as taking place for the purposes of the charge to VAT:

(a) at the time when the services are performed (under s 6(3)); or

(b) if, before the time when the services are performed, the person making the supply issues a VAT invoice or receives payment in respect of it, to the extent the supply is covered by the invoice or payment, at the time when the invoice is issued or payment is received (s 6(4) VATA).

(2) For this purpose "VAT invoice" means such an invoice as is required under paragraph 2A of Schedule 11 VATA, or would be so required if the person to whom the supply is made were a person to whom such an invoice should be issued (s 6(15) VATA).

(3) Under regulation 90 of the Regulations ("**regulation 90**") where:

"services are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times-

(a) each time that a payment in respect of the supplies is received by the supplier, or

(b) each time that the supplier issues a VAT invoice relating to the supplies."

10. These UK provisions are based on articles 62, 63, 65 and 66 PVD:

(1) Under article 63, it is provided that the "chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied".

(2) Under article 62, for the purposes of the PVD:

(a) "chargeable event" is stated to mean "the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled"; and

(b) VAT is stated to become "chargeable" when "the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred".

(3) Under article 65 where “a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received”.

(4) Under article 66 it is provided that:

5

> “By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:
>
> 10
>
> (a) no later than the time the invoice is issued;
>
> (b) no later than the time the payment is received;..”

Overview of the issues

11. This section contains a summary of the issues. The parties’ full submissions are

15 set out below. In outline, the dispute is as follows:

(1) Whether para 4(1) applies to VML’s supplies of FLR services made in the relevant period on the basis that they “are supplied for a consideration in money and on terms allowing a discount for prompt payment”.

20 (2) Whether the supplies are excluded from falling within para 4(1) on the basis that “the terms include any provision for payment by instalments” under para 4(2) of schedule 6 VATA.

(3) If para 4(1) applies to the supplies of FLR services made during the relevant period, whether the effect is that VAT is due by

25 reference to the saver price on all of the supplies, whether or not a particular customer in fact paid that price, in particular, given the wording that “the consideration shall be taken…..as reduced by the discount, *whether or not payment is made in accordance with those terms*” (emphasis added).

30 *Does para 4(1) apply?*

12. On the first question:

(1) Clearly the supplies of FLR services were made for a consideration in money. The issue is whether they were supplied “on terms”, which it is accepted means legally binding terms,

35 “allowing a discount for prompt payment”.

(2) It does not appear to be disputed that this requirement is satisfied only if, under legally binding terms, the consideration for the supply is to be provided either by payment of (i) a sum, X, on or by a specified date or (ii) a lower sum, Y, on or by a date falling

40 before X is otherwise due. That is on the basis that, as these words are commonly understood:

(a) there is a "discount" only where a reduced price applies by reference to a higher price which the customer is otherwise liable to pay; and

(b) such a discount is "for prompt payment" only if it is given for receipt of the discounted sum on an earlier date than the higher price is otherwise due.

(3) The parties were at variance, however, on whether, para 4(1) applies where a discount is given for immediate payment and whether it applies only where there is a prior supply or deemed supply before payment is due (see [16] and [17]).

Contractual effect of the arrangements

13. In assessing whether these conditions are met, the parties are agreed that the terms of the contract between VML and its customers represent the starting point for the VAT analysis; and that the tribunal must consider whether those terms reflect the economic and commercial reality of the transaction (see *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 and *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509). However, the parties took different views of the correct contractual analysis and the resulting nature of the supplies.

14. VML's stance is that it made the same continuous supply of monthly FLR services to all customers under a single form of indefinite "rolling" contract. Under that contract all customers could choose, under a form of contractual unilateral option, to pay on a monthly or saver basis. On that basis:

(1) The saver basis simply enabled customers to choose to pay early an upfront lump sum of, for example, £120 for each monthly supply of FLR services he/she was to receive over a 12 month period for which a monthly payment would otherwise have been due of, for example, £13.90 (£166.80 in total over 12 months) giving rise to a significant potential discount in the overall price due for that period. (The precise figure varied during the relevant period but these figures are used throughout this decision for the purposes of illustration.)

(2) In all cases, therefore, supplies of FLR services were clearly made to both monthly and saver customers for consideration in money and on terms *allowing* a PPD whether or not the saver basis was taken up.

(3) VAT was due, therefore, in all cases as though the customer paid a total of £120 in any 12 month period (£10 per month).

15. HMRC argued that VML in fact had different contractual arrangements with and made different sets of supplies to the relevant customers:

(1) Monthly customers were entitled to only one month's worth of FLR services for a monthly price of £13.90 and saver customers were entitled to 12 months' worth of services for a fixed non-refundable price of £120.

(2) The saver price was simply the consideration for the relevant supplies made to saver customers. It cannot represent a PPD by reference to monthly sums payable as consideration for different supplies made to monthly customers.

5 (3) On that basis para 4(1) is simply not in point. VAT is due on supplies to monthly customers by reference to £13.90 for each monthly supply and on supplies of 12 months of services to saver customers by reference to £120.

Meaning of "are supplied ...on terms allowing" a PPD/effect of time of supply rules

10 16. HMRC argued that para 4(1) does not apply in any event as the words "*are supplied*…on terms allowing" a PPD require that the FLR services are first supplied or deemed to be supplied and payment is made later. Under the time of supply rules, each supply of FLR services was deemed to take place when payment was made. That is on the basis that, in each case, payment was received before the services were 15 performed and no VAT invoice was issued (see the time of supply rules in [9] above). In their view, the fact that, on that basis, the deemed supply and payment wholly coincided necessarily means that there were no terms allowing for a full payment on one date and a lower sum due at an earlier date, as in HMRC's view, is required for para 4(1) to apply.

20 17. VML made a number of points in response including, in particular, that (a) the time of supply rules are simply an accounting mechanism which cannot affect the substantive analysis of the arrangements and (b) HMRC's interpretation robs para 4(1) of its intended purpose as, on that basis, it would not apply in cases where a discount is given for immediate payment, which cannot have been the intent.

25 *What is the effect of para 4(1)?*

18. Assuming that the supplies of FLR services were made for a consideration in money and on terms allowing a PPD, VML said that, on its plain meaning, the effect of para 4(1) is that the consideration for each supply, on which VAT is charged, is reduced by the amount of the discount whether or not the particular customer paid the 30 discounted amount allowed for. On that basis, VML was correct to account for VAT on supplies made to monthly customers as though, in effect, each customer had paid £10 per month rather than £13.90.

19. In VML's view, it is irrelevant that the application of the provision may produce a loss of tax; that is simply its effect. The change to the legislation made with effect 35 from 1 May 2014 was introduced in recognition that the PPD regime previously operated in precisely this way; from that time the regime no longer applies where the discounted rate was not in fact paid. Moreover HMRC themselves recognised that the regime applied in this way prior to the change; HMRC's guidance at the relevant time stated that under para 4(1) a business was permitted to account for VAT on a 40 discounted sum whether or not it was paid.

20. HMRC said that the change in 2014 was merely made as para 4(1) was thought to be ambiguous as was recognised by the tribunal in the case of *Saga Holiday Ltd v HMRC* [2004] UK V18591, [2004] V&DR 94. HMRC acknowledged that prior to the change, in practice, they allowed a business to account for VAT on the discounted

amount even when it was not paid. However, as HMRC considered was clear from their guidance in place at the time, they interpreted para 4(1) as applying to that effect only where a business issued the customer with a VAT invoice for the contractual sum due at a later date on terms that an earlier lower payment could be made. That was to alleviate the practical difficulty that, in those circumstances, the business would not have known, when the liability to pay VAT was triggered by the issue of the invoice, whether the full price or the discounted amount would be paid. HMRC said that this may not be in accordance with EU law but they stood by this practice. They noted that, in any event, no VAT invoices were issued in this case so their previous practice is not in point.

21. HMRC considered that, adopting the approach in Case C-106/89 *Marleasing* [1990] ECR I-4135, the UK rules can be read to conform with the European law in the PVD under which it is clear that VAT is to be charged on the discounted amount only if that is in fact the amount paid. That was the approach correctly adopted by the tribunal in interpreting para 4(1) in the *Saga* case (see [30] to [38] of that case).

22. VML responded that HMRC were improperly attempting to amend the legislation retrospectively by way of a strained construction. In its view, there are limits to the *Marleasing* approach; it does not justify ignoring the clear meaning of the words used thereby going against the grain of the legislation. In its view, *Saga* was incorrectly decided.

23. VML noted that if a conforming construction of para 4(1) cannot be adopted, it is required and entitled to rely on the plain meaning of para 4(1) under UK law and to benefit from its application on that basis under European law. HMRC accepted that was the case.

Evidence

24. I have found the facts on the basis of the documents and correspondence in the bundles produced to the hearing and the evidence of Mr Alex Perrin and Mr Mark Davidson. Mr Perrin was until recently the Director of Commercial Partnerships at VML and was the Director of Fixed Line Telephony at the time VML launched the saver basis. Mr Davidson is an Executive Director at VML and until recently was responsible for customer contact and experience. Both witnesses attended the hearing and were cross-examined. VML also produced a witness statement from Mrs Margaret Codd, a customer of VML (who is related to an employee of the group).

25. The facts were largely uncontroversial. HMRC noted, however, that so far as the witnesses strayed into expressing opinions on the meaning of the contractual arrangements between VML and customers and the resulting VAT analysis, those opinions are irrelevant and, therefore, inadmissible. In support of this, HMRC referred to *Marriott Rewards LLC and Whitbread Group Plc v HMRC* [2017] UKFTT 140 (TC), at [5] to [6] and *Deloitte LLP v HMRC* [2016] UKFTT 0479 (TC).

26. VML did not disagree with this point but noted that it was relying on the relevant aspects of the evidence as demonstrating, as regards the evidence of Mr Davidson and Mr Perrin, what VML was seeking to achieve by making the saver basis available to customers and, as regards Mrs Codd's evidence, what the average consumer may consider he/she would obtain under the saver basis.

27. HMRC said that what Mrs Codd considered she may or may not be getting from VML was irrelevant. It is for the tribunal to determine the correct VAT analysis according to the tribunal's interpretation of the contractual arrangements. They also noted that it has been held that there are limits on the use of evidence on the views of an average consumer albeit in the different context of trademark infringement in *Interflora Inc & Anor v Marks & Spencer Plc* (Rev 1) [2013] EWCA Civ 319. In that case, at [59], Lewison LJ said in effect that there was no need for evidence from real internet users (as to what the consumer considered they were obtaining on the relevant website) as "the results thrown up by search engines on the internet fall within the general description of ordinary consumer services, in relation to which the judge can make up his or her own mind without the need either for expert evidence or the evidence of consumers".

28. As the tribunal noted in *Deloitte* there is a clear distinction between opinions "whose foundation is built on matters which are outside the tribunal's expertise" and opinions "whose foundation itself rests on legal matters which are properly for the tribunal to reach a conclusion on with the benefit of the relevant facts and legal submission" (see [52] and [65]). In this case, as set out below, the analysis relevant to the dispute before the tribunal centres on the correct contractual construction of the arrangements. That is a legal matter for the tribunal to determine; the views of the witnesses on such matters are not relevant. To the extent that the witnesses could be said to be expressing views on such matters, those views are, therefore, disregarded.

29. I do not consider Mrs Codd's views, as put forward as those of the typical consumer, or those of Mr Davidson and Mr Perrin, as to VML's view of the arrangements, to be relevant to my conclusions for the reasons set out in the discussion and decision section below.

Facts

30. VML was incorporated on 13 March 1991 (company no. 2591237) as NTL Group Ltd. It changed its name to VML on 8 February 2007.

31. VML was registered for VAT with effect from 6 December 1993, under VAT registration number 641 1447 65, as the representative member of the NTL Group Ltd VAT group. On 1 April 2006, VML joined the Telewest Communications Group Limited VAT group under VAT registration 591 8190 14. Since 14 March 2013, VML has been the representative member of the VAT group. Any references below to VML's business and related matters in the present tense apply equally during the relevant period unless expressly stated otherwise.

VML's business - overview

32. VML carries on business in the provision of cable television, telephony, broadband internet and other telecommunications services over a fibre optic network, as well as running some of the telecommunication systems over which those services are provided.

33. VML provides telecommunications services for reward both individually and, in order to sell as many services as possible, in the form of combinations or bundles of services. Customers who wish to receive digital television services, broadband internet services and/or fixed line telephony services from VML have to enter into a

contract with VML for FLR services as the provision of a fixed landline connection to the VML network is necessary to enable the customer to receive these services. Typically all of these services are provided to a particular household under a single contract. (VML also provides mobile phone connection services but those are not the subject of this appeal.)

34. In addition to the provision of a fixed line connection, the FLR services comprised:

> (1) "Free" telephone calls to 0800 numbers.
>
> (2) "Free" weekend telephone calls to any UK landlines.
>
> (3) "Free" weekend telephone calls to mobile phones on the VML mobile network.
>
> The references to "free" services mean that they were included in the price paid.
>
> (4) Access to directory enquiries services.

35. According to Mr Perrin the fixed line market in the UK is the biggest in Europe and is highly competitive. He said that the four main operators are VML, BT, TalkTalk and Sky. VML has been at the forefront of investing in bespoke fibre optic networks (which are used as the fixed line connection) which operate alongside the BT telecommunications network (which other operators have to use to provide their fixed line services).

36. Mr Perrin said that the market is saturated and business growth requires customers to be won from competitors. About 84% of households have a fixed line telephone service and 85% have a fixed line internet connection. The main operators use similar pricing structures involving monthly charges for FLR and other services and ad hoc charges, for example, for phone calls not included in the package. VML monitors the pricing used by competitors to ensure that it remains competitive in its pricing. The fact that its competitors introduced a form of saver basis prompted VML to consider doing so in 2012 as set out below.

Terms

37. The provision of the services during the relevant period was subject to the full terms and conditions (which are published on VML's website) (the "**main terms**"), the relevant price guide and terms in a section of the website described as "other legal stuff" (together the "**terms**"). The "other legal stuff" included the terms relating to the saver basis (the "**saver terms**"). Customers signed a residential services contract with VML setting out the details of what services they were to receive for what price and received a "welcome pack" setting out the main terms.

38. Attention was drawn to the "other legal stuff" in the main terms as follows:

> "the services have other legal stuff which applies to the services and their use as published by us on the Virgin Media website, these may be updated from time to time so please check the Virgin Media website regularly and read through it carefully. The other legal stuff includes our acceptable use policy and traffic management policy which you can read on the Virgin Media website."

39. There was little variation in the terms during the relevant period. Mr Perrin said his understanding was that the main terms did not change in any material way during the relevant period; to the best of his knowledge the saver terms did not materially change (and this was supported by correspondence in the bundles).

5 *Agreement to supply services for payments - overview*

40. The main terms set out the basic obligation and entitlements in general terms. VML had to supply the services from time to time, being those the customer had contracted to receive, and the customer had to pay the charges for the services as set out "in our price guides, or as otherwise notified to you, together with any applicable 10 value added tax or other applicable taxes". It was stated that VML could change the charges in certain circumstances but that may entitle the customer to end the agreement and that payment must be received by VML "by the due date for payment shown on your bill."

41. The main terms contained a number of provisions specific to particular services 15 such as television or broadband.

42. Subject to minimum commitment requirements and being up to date with payments, customers had flexibility in that they could add to or reduce the package or bundle of services they wished to receive from VML at any time (by for example subscribing for additional television channels or upgrading their internet speed). The 20 terms stated:

> "You may add to or reduce the services you receive from time to time by contacting our customer services team. If you ask us to provide any additional services to you, you agree to accept those additional services for at least the minimum period that applies to them."

25 43. As regards charges for services, subject to some differences where the saver basis applied (as explained below), the position was as follows:

(1) VML generally charged for the FLR services and applied additional charges for the chosen package of additional services monthly in advance. Phone calls which were not part of a 30 customer's package and "on demand" TV services were charged for monthly in arrears. The evidence was that charging for services monthly was in line with the approach of VML's competitors.

(2) VML sent customers their monthly bill in either paper form or by electronic notification (and the customer could view the bill 35 online via his or her "My Virginmedia" account).

(3) The bill separately itemised the charges for the FLR services, any bundle of other services and other items such as additional phone calls not included in the FLR service charge.

(4) Monthly payments were collected by VML by cash, cheque, 40 credit card, debit card or direct debit.

(5) VML issued the bill to the customer prior to the date on which the billing period commenced. An example of the standard billing sequence for the FLR services is as follows for dates in 2014:

Bill Date	Billing Period	Payment Date
23 January	5 Feb to 4 March	11 February
21 February	5 March to 4 April	11 March
21 March	5 April to 4 May	11 April
23 April	5 May to 4 June	12 May

(6) Mr Davidson said that, whilst bills went out to customers in advance of the period billed for, payment may not be made until later in the period, by which time the FLR service for that month was already being received by the customer. VML's internal analysis showed that around 8% of customers paying by direct debit and 20% of customers paying by other means paid in advance of the start of the billing period with the remainder paying after its start.

Charges for FLR services

44. As set out in Mr Perrin's witness statement, the charges for customers paying for FLR services were as follows:

(1) For those paying on a monthly basis:

(a) From 1 August 2012 to 31 January 2013, £13.90 per month.

(b) From 1 February 2013 to 31 January 2014, £14.99 per month.

(c) From 1 February 2014 to 31 January 2015, £15.99 per month.

(d) From 1 February 2015, £16.99 per month.

(Price changes for monthly charges generally took effect for bills issued after customers were notified of the price change.)

(2) For those paying on a saver basis, the saver price was:

(a) From 1 August 2012 to 31 January 2014, £120.

(b) From 1 February 2014 to 31 May 2014, £128.

(c) From 1 June 2014 to 31 January 2015, £144.

(d) From February 2015, £164.

45. It appears that no VAT invoices were issued in respect of the FLR services. Mr Perrin was referred to a letter from the head of tax at VML to HMRC in which it was stated:

> "As the supply of line rental by Virgin Media is a continuous supply of services, VAT is accountable when payment is received on the basis that no VAT invoice is issued. Consequently for the supply of line rental VAT is accounted for by Virgin Media on a cash basis. To this end the reporting systems are primarily set up to identify when cash is received from customers under the brought forward accounting methodology."

46. He said he was not qualified to comment on this but he thought it was correct that no VAT invoice was issued.

Minimum commitment period

47. Customers were typically subject to a minimum commitment period requirement of, for example, 12 months (a "**minimum period**"). If a customer terminated the contract during that period, the customer was subject to additional charges. In the Terms the minimum period was defined as follows:

> "the minimum period that you must keep a service, starting from the service start date or such other minimum period as you have agreed with us. For example, unless you are told otherwise by us, you must keep the phone service, the television service and the Internet access service for 12 months from the service start date in each case and, in the case of other services for at least 30 days. We may change the minimum period for any service but this will not affect you if you have already subscribed to that service."

48. At the end of the minimum period, a customer usually continued to receive the relevant services unless the customer or VML terminated the contract (such as by giving one month's notice). If the customer decided to take up a promotion/new bundle the customer may have been required to enter into a new minimum period.

49. Mr Perrin said that the minimum period allowed the considerable cost of winning business to be spread across the period of the customer relationship (which he noted was usually longer than the minimum period). He said that, in the industry typically minimum periods are between 12 and 24 months and VML typically requires periods of 12 or 18 months for FLR services. In December 2013, around 18% of customers were in an 18 month minimum period and 23% in a 12 month minimum period.

50. Mr Perrin noted that there is no link between the saver basis and the minimum period obligation. The 12 month period for which a customer paid the saver price did not necessarily correspond to or even overlap with a minimum period. The minimum period generally operated from (a) the time the customer first signed up with VML and (b) the time when a customer took a new package or signed up for certain time limited offers. By contrast a customer could take up the saver basis at any time, whether within or outside the minimum period.

51. Mr Perrin said that in fact VML's business model is based on retaining customers for as long as possible to minimise "churn" (meaning the movement of customers to competitors). He said that most of VML's customers remain as such for a lengthy period and those taking services requiring FLR services remain with VML on average for 6.5 years.

Changes to services and termination

52. As regards changes to services:

(1) As noted above, customers had flexibility in that they could alter the services received from time to time.

(2) There were provisions permitting changes, amendments, and alterations to the terms by VML in certain circumstances, such as,

for "technical operational reasons", "if the changes or additions are minor and do not affect you significantly or we wish to have all our customers on the same terms and conditions" or "in all other events where we reasonably determine that any modification to the relevant system or change in trading, operating or business practices or policies is necessary to retain or improve the services provided to you."

53. As regards termination:

(1) As Mr Perrin confirmed, throughout the relevant period customers were entitled to give 30 days' notice to terminate the contract with VML (as could VML) but, if they did so within the minimum period, they were charged an early disconnection fee calculated by reference to the remainder of the minimum period at the termination date. The terms stated:

> "Either party may end this agreement by giving the other 30 days' notice, you must pay any charges up to the end of that 30-day notice period, you may also have to pay an early disconnection fee if your services end within the relevant minimum period."

Mr Davidson confirmed that, where a saver customer terminated before the end of a minimum period, VML was not entitled to charge an early disconnection fee as regards the FLR services to the extent that element had already been paid for by the saver price.

(2) A customer could also terminate the agreement if VML was in breach of the terms and conditions of the agreement.

(3) Mr Perrin explained that VML was entitled to terminate a contract where the customer failed to pay for the services whether the customer was within or outside the minimum period and whether or not the customer paid on the saver basis. It was stated in the terms that if a contract was ended for any reason or if any of the services were cancelled:

> "we [VML] will be entitled to keep any money held, including deposits and advance payments and to use that money to pay any obligation or debt you may owe under this agreement. We will get in touch with you to refund to you any money remaining after these reductions, unless our costs to administer that refund outweigh the actual account balance."

(4) Mr Davidson explained that there was a "non-paid disconnect" procedure whereby VML could take steps to restrict the FLR service provided to a new customer from a fixed line if the customer did not make any payment. He confirmed that as set out in the documents, as saver customers paid for their "line rental upfront", this restriction did not apply to them:

> "If a customer falls into "non-pay disconnect", we will restrict services until payment is made. What we do not do, and what we did not do with line rental saver was restrict the use of the telco service, we would restrict back the broadband and TV but would not restrict the telco, so the inclusive calls, the directory enquiries, because they have made the upfront payment."

Saver basis

54. The saver terms were introduced by VML in 2012 following the introduction of similar arrangements by its competitors. As stated by Mr Davidson and evidenced also by the marketing materials in the bundles, the saver basis was offered to all customers with very limited exceptions (such as that it was not offered to employees who had their own discount arrangements and to those taking advantage of certain other discount offers). It was offered repeatedly via a variety of media channels; it was a choice open to all during the relevant period. Existing customers could take up the saver basis at any point.

55. During the relevant period the wording and mechanics of the saver terms, as set out in "other legal stuff", remained the same (albeit the pricing changed). The saver terms from 2014 stated the following:

> "£128 for 12 months Line Rental must be paid in advance by debit/credit card. Available to new and existing customers with a Virgin Media cable phone line. Call charges apply in accordance with your tariff. Not available with other line rental offers or Home Phone talk plan offers. If you cancel Line Rental Saver within seven working days of your order you will get a full refund of your advance payment to the debit and credit card plan you paid with. Otherwise the advance payment is non-refundable. After 12 months, you will automatically move to the standard line rental charges (currently £15.99 a month)."

56. The wording the call centre agents used when offering the saver basis to customers on the telephone contained the same essential features as set out in "other legal stuff", as shown in the "scripts" agents used on calls. Mr Perrin confirmed that the "script" was read out to a customer albeit perhaps not word for word and using more natural language. Similar wording was included in "door drop" leaflets and a buyer's guide (available in stores) in which the saver basis was advertised.

57. Mr Davidson set out that at the launch of the product VML conducted a marketing campaign advertising the saver basis by the following means:

> (1) A message was included with an existing customer's monthly paper bill such as:
>
> > "Save £46.80 on your next 12 months' line rental – simply pay an upfront fee of £120 for 12 months line rental rather than monthly. It's that easy. Normal rental costs will apply after the 12 months – unless of course you just pay upfront again next and carry on saving again."

(2) Promotional material was included with a customer's paper bill as an insert containing a similar message as set out above.

(3) The saver basis was advertised via an online banner on http://store.virginmedia.com accessible to the public and also in the private area of the website which those with a VML account could log into. For example in a screen shot from August 2012 it was stated that a customer saved £46.80 when paying for 12 months' line rental in advance for £120 and saved all year long and that:

> "The line rental will appear as zero pounds on your bill for the next 12 months. Your 12-month end date will also appear on your bill…..Normal rental costs apply after 12 months."

(4) Customers were notified of the saver basis when VML gave notice of price rises, for example, when customers were notified in November 2012 and November 2013 of price rises in 2013 and 2014 respectively.

(5) "Door drops" were made, meaning that standardised leaflets were delivered to all households in a particular area where VML provided cable coverage, or direct mail shots were made to named persons in that area, which included the following wording (or similar wording):

> "Prices start from £3.50 a month with a Virgin phone line for £13.90 a month or £120 upfront for a year, saving £46.80."

Mr Davidson said that both door drops and named mail were aimed primarily at attracting new customers although existing customers may also receive them sometimes.

(6) Sales agents promoted the saver basis in VML stores or when operating "door to door".

(7) Printed marketing materials were made available in VML stores which included reference to the saver terms, such as in a "buyer guide". Sales agents in the stores and those operating door to door were able to refer to these to inform their discussions with customers.

(8) Call centre teams promoted the saver basis as set out in further detail below.

58. Mr Davidson said that the same marketing message was used in each case, namely, that a customer could choose to save money by paying for 12 months' of FLR services upfront. In his view that reflected that the saver basis was nothing more than a method of making early payment for 12 months of FLR services resulting in a customer saving a considerable amount of money on the equivalent monthly charges for the same services.

59. Mr Perrin noted that VML used the capitalised term “Line Rental Saver”, when referring to the saver basis, as a marketing tool with the aim of helping customers understand that they had a choice to save money on the fixed line rental cost. The capitalised term was used to draw the customer’s attention to the fact they could choose to save money by paying upfront.

60. Mr Davidson explained that VML had two call centre teams; a customer care team for existing customers and a telesales team for new and potential customers. They were all trained in the same way to be aware of the different discount offerings and to make customers aware of them, including the saver terms, as appropriate. For example the team discussed the saver terms with customers who specifically asked about it because competitors were offering a similar saving or if the customer indicated an intention to leave VML. Mr Davidson said that discounts could be an effective way of retaining customers.

61. Mr Davison said that, before the launch of the saver basis in 2012, VML’s agents and call centre staff were informed of the saver terms and the key messages to be shared with customers by way of internal communications circulated about four weeks before the launch. Other training material was used which gave an example of a conversation with a customer on the saver terms. It was not a script as such but it was designed to enable staff to explain how a customer could make a saving by paying for 12 months of rentals upfront. Mr Davidson said that such communications on such offers were designed to be another tool agents could use to attempt to retain customers and seek to attract new customers in a fiercely competitive market.

62. Mr Davidson noted that when a new or existing customer opted to take up the saver basis the decision had to be reflected in the customer’s account on VML’s internal IT system known as ICOMS. The system contained instructions to staff as follows:

(1) “It is very important to ensure that you take a £120 upfront payment first.”

(2) “Then you can apply one time charge (£120) and LRS campaign.”

(3) “New customer and those installing phone at the same time will generate an automatic contract document.”

(4) “For existing phone customers you will need to send them either a supermail or letter to ensure they get the information that they need.”

63. Mr Davidson and Mr Perrin confirmed that, accordingly, for all customers, payment was taken upfront via debit or credit card and the saver basis was then applied to a customer’s account. The FLR service was not available on the basis that a customer signed up now but paid some time later after the date of commencement of the agreement for the provision of the service. Both Mr Davidson and Mr Perrin said that the upfront payment meant VML received the funds from the customer as soon as possible and locked in the commitment from the customer.

64. Mr Davidson said that when customers wanted to take up the saver basis in-store, new customers could do so by making payment there and then through the sales

agents who inputted this into the relevant customer care system and existing customers were put in contact with the VML customer care team for them to process the payment. A customer who wished to take the saver basis on a door to door visit could do so by making payment to the agent who contacted the sales call centre in India who loaded the order on to the system. When the saver basis was taken up on a phone call, at the point of taking payment VML's representative read the terms to the customer, at least explaining the headline terms and conditions following the below wording as a guide:

> "Line Rental Saver – £120 for a year of Line Rental paid in advance by debit/credit card.
>
> You'll need to pay any additional call charges.
>
> Available to all customers with a Virgin Media cable phone line Standard Line Rental for landlines – Currently £13.90 a month.
>
> Line Rental Saver refund policy – If you cancel Line Rental Saver within seven working days of your order you will get a full refund of your advance payment to the debit or credit card you paid with. Otherwise the advance payment is non- refundable.
>
> Not available with other line rental offers or Home Phone talk plan offers.
>
> After 12 months, you will automatically move to our standard line rental, currently charged at £13.90 per month.
>
> On your first bill you will see an advanced payment of £120. From your second bill you will see in the phone line rental section the date when your Line Rental saver will end and £0 against phone line rental as you have already paid this up front."

65. Mr Davidson said that the intention was to provide customers with a very straightforward experience when arranging to take VML's services. That meant ensuring that the administration involved in setting up an account was simple and not tedious. In his view the saver terms are an example of this approach; the customer was simply able to elect for one of two payment choices. If the saver price was chosen VML explained that it was non-refundable and "relates to fixed line rental provided for a 12 month period only and that is the end of the matter. All other fixed line rental and contractual obligations are, and always have been, exactly the same, irrespective of the customer's payment choice."

66. Mr Davidson said that it was always VML's intention that the only choice the customer had to make was whether to pay the saver price to receive a discount. If the customer has no intention of leaving VML in the 12 month period and was happy to pay upfront the customer may take the saver terms. Customers who wanted to keep their options open may want to pay on the monthly basis. He noted that of course a customer who paid the saver price may still terminate the contract but, in his experience, it was more likely that such customers intended to have and did have an on-going relationship with VML and that was VML's objective as well. Mr Perrin also said that he thought that a customer who took the saver basis was less likely to leave during the 12 month period as the saver price was non-refundable although of course the customer remained entitled to terminate.

67. Mr Perrin confirmed that saver basis customers did not get the saver price back if they chose to terminate the contract and, on any such termination, lost the value accrued but not delivered over the 12 month period. He was shown notes of a meeting with PwC in which he said 4.3% of customers who took up the saver basis terminated their contract within the 12-month period and received no refund. He agreed that it was a relatively small percentage of people who lost value by terminating the contract early. Mr Davidson confirmed that if the monthly basis charge increased there was no corresponding increase in the saver price; it was a one off fixed amount.

68. Mr Perrin said that in layman's terms he would say the effect of the saver basis was that "you have paid for…..12 months' worth of services as opposed to one month". It was put to him that if VML refused part way through the contract to provide those services VML would be in breach of its contractual obligation. He agreed that "once somebody has paid for those services, paid £120, then [VML] is then obliged to, you know, provide the line rental services for the following 12-month period….. subject to everything else in the [terms] and so on".

Documentation and billing

69. As regards documentation:

(1) As noted, new customers received a residential service contract which incorporated the main terms and a copy of them was provided to the new customer. Where the customer took the saver basis, the residential services contract referred to the saver terms. There was no mention of the saver terms in contracts with customers paying on a monthly basis.

(2) Where an existing customer chose the saver basis, following payment, an email or letter was sent out to the customer confirming receipt of the payment and the saver terms. As Mr Davidson said: "It was an automatic trigger from the system to dispatch that to the customer if we have the email address on file. If not then we will dispatch a written letter to the customer's home address." He agreed that it was through this process that the additional saver terms applied to the customer paying the saver price. The typical e-mail or letter which VML sent was headed "Confirming Your Purchase of Line Rental Saver" and included the following wording:

> "Line Rental Saver is available to all customers with a Virgin Media cable phone line. Standard Line Rental for landlines is currently £13.90 a month. The offer is not available with other line rental offers or Virgin Media Phone talk plan offers. After 12 months, you will automatically move to our standard line rental which is currently charged at £13.90 per month."

70. As regards billing for new customers:

(1) The first bill sent to a new saver customer showed the saver price under the heading "Advance payments received". The amount of the saver price (£120) was credited against the total of the first

bill. The bill provided an explanation of the first month's package details and a breakdown of the charges for the next month's package. The charge for FLR services was not shown as part of the customer's bundle but as a separate item of £0.00, with an explanation that this represented the "12 month Line Rental Saver discount" and a note of the date on which the 12-month period ended.

(2) Bills issued to a new monthly customer included no reference to the saver terms/saver price. The bill included the "Standard Line Rental" as an item in the bundle for both the first and subsequent months. The bill contained no indication that the customer could avail himself or herself of the saver terms.

71. An existing customer who chose the saver basis continued to receive monthly bills from VML on the same billing sequence as other customers. As for new saver customers the charge for FLR services was shown as £0.00, together with a note indicating (1) that the customer had paid in advance for the line rental and (2) the end of the period to which the payment relates. As Mr Perrin confirmed, in cases where a monthly amount had already been paid in the month in which the saver basis was taken up, that amount was credited back to the customer's account and the credit was shown in the bill for the following month.

72. Otherwise the saver price was not impacted by amounts already paid by the customer. For example if a customer took the saver basis six months after signing up with VML, the customer obtained a new 12-month period of FLR services starting with the month in which payment was made. Accordingly, a section in the terms on customers' bills was headed "changes to your package" with the following note:

> "With Virgin Media you pay for your services one month in advance. When you change your package during the month, we adjust your next bill to reflect those changes. This could include a credit (CR) if you have cancelled a service or a debit if you have upgraded a service."

73. Mr Perrin said that, save as identified above, the monthly bill for saver customers was the same as that issued to monthly customers. In his view, all aspects of the customer's relationship with VML were the same regardless of which payment method was chosen. The same range of services and packages was available to all customers.

Saver basis renewals

74. VML wrote to saver customers before the expiry of the 12 month period for which they had paid, inviting them to take advantage of the saver basis for a further 12 month period. Mr Davidson confirmed that these letters were sent to saver customers routinely at the start of the final month of the relevant 12 month period; there was a trigger within the customer management system leading to their automatic issue. An example of a renewal letter is as follows:

> "Your offer's soon coming to an end, but it is really easy to renew things now and keep saving. Just call us on 150 from your Virgin Media phone or mobile, or 0845 454 1111 from any phone before the 5 June 2014.

> When you renew, your line rental will appear on your bill as £0 every month for the next 12 months. Happy days.
>
> Remember, you've only got until 5 June 2014 to let us know you'd like to renew, so get cracking!"

75. The renewal letter also reproduced the saver terms shown on the website as a footnote.

Saver basis – commercial basis

76. Mr Perrin agreed that it was in VML's financial interest to have the saver basis available to customers because VML wanted to compete with competitors but that, in a sense, it was in VML's interest for not many people to take it up. It was put to him that VML wanted to use the saver basis as a marketing tool but actually it cost VML money, because it received less money than it otherwise would have done. He said:

> "I am not sure I can agree it cost Virgin Media money, and this was the great big commercial debate, clearly anybody paying £120 for 12 months' line rental is paying less than 12 times £13.90 and the question is: did having line rental saver provide enough incremental volume? So enough extra customers choosing to stay or choosing to join to at least make up for the shortfall between the £120 and 12 times 13.90."

77. It was noted to Mr Perrin that the percentage differences in the total amount paid over a 12 month period by those paying for the FLR services monthly and those paying the saver price were 39% and 50% respectively when the monthly price was £13.90 and £14.99. In later periods (following the change in the PPD legislation) when the monthly price was £16.99 and later £17.99, the difference fell to around 17 % only.

78. Mr Perrin said he did not know if that reduction reflected that VML was getting the benefit of a superior VAT recovery during the relevant period or if there was any other reason. He noted pricing changed a huge amount over this period. It was noted that according to a table in his witness statement in February 2014 Sky stopped offering the saver terms and the prices offered by TalkTalk for its saver rose from £126 for 12 months' worth of service to £180.36.

79. Mr Perrin acknowledged in his witness statement that the VAT saving was relevant to VML when it decided to adopt the saver basis:

> "In considering the LRS payment option [meaning the saver basis] VML became aware of the VAT treatment that now gives rise to this appeal and the financial benefit VML's competitors could be achieving by offering a payment discount option to fixed line rental. This financial benefit was taken into account as part of the overall commercial considerations in deciding whether to offer a similar option."

80. He agreed that the VAT treatment was one of the factors persuading VML commercially to adopt the saver basis. He confirmed that VML took professional advice that this arrangement could be introduced and would produce the VAT treatment that was then adopted. He said that the persons who signed off and took the actual decision to introduce the saver basis were the chief executive, in the same way

that he would sign off major price changes or payment option changes, and the chief financial officer.

81. Mr Perrin was asked if those persons also took the decision to account only for VAT on the saver price, even if the customers were in fact paying on a monthly basis. He said he could not "comment on what decisions they took in terms of Virgin Media's tax affairs, but they took the decision to launch this payment option and they took that decision aware of the….the VAT treatment that we are all here reviewing."

Saver basis – witnesses' view

82. Mr Perrin referred to the saver price as "a charge that is upfront at a discounted rate". He agreed that it was not an arrangement where, for example, if the customer was offered a saver price of £120, the customer could ask to pay £110 if he paid within seven days or, if a customer paid £13.90 on a monthly basis, he could pay early for £10 per month. He said that "the choices were…to pay monthly at X pounds or choose to pay for 12 months in one lump sum at Y pounds."

83. Mr Perrin confirmed that, in return for the saver price, saver customers obtained the FLR service for the full 12 month period (as long as they remained customers of VML) and that the bill thereafter showed zero as regards FLR services as set out above. On the other hand monthly customers paid in advance for one month's worth of the FLR service in the following month. He noted that the underlying services received were the same in each case (in terms of providing access to the fixed line and free calls etc) but when paying the saver price the customer was "paying for 12 months in one lump sum". Mr Davidson also confirmed that when he said in his witness statement that there was no difference in the service provided he meant as regards the underlying telephone line rental and related services.

84. Mr Perrin thought it was correct to say that, when taking up the saver basis in return for the lump sum saver price, the customer received a 12 month entitlement to the FLR services. He agreed that the service was not available to a saver customer until such time as the debit or credit card payment had gone through; it was a case of payment first and then the provision of the service. He said: "So people were required to pay immediately and from that moment of the payment going through they would then have paid for the next 12 months".

85. It was put to Mr Davidson that he had described the saver basis as "a discount" in his witness statement but what he meant was a saving compared with a customer who paid on a monthly basis. He agreed that was the case. He agreed that the advantage for VML was that it received all the money in one go and, that it was fair to say that, whereas a customer on a monthly contract might not stay with VML, a customer who took the saver basis could be expected to remain with VML for the further 12 months as otherwise the customer would lose money.

86. In his witness statement Mr Davidson referred to the saver basis as nothing more than a method of making an early payment for 12 months of FLR services. At the hearing he said that by paying in advance customers "receive the discount treatment all the way through the 12-month period". He accepted that in paying upfront such customers are "getting a different deal" compared with monthly customers but did not accept that there is a different "bargain" between VML and a saver customer. In his view it was simply the case that VML agreed only to provide one month's worth of

the FLR service as opposed to agreeing to provide 12 months' worth of that service. He accepted that the customer who took the saver terms had the benefit of knowing that he/she had an entitlement over the 12-month period essentially at a fixed price whereas monthly payments could be subject to change; there was a value to the customer to "lock in" to that 12 month period.

87. In his witness statement Mr Perrin referred to a Sky Sports season ticket, which was introduced in 2014, whereby a customer could pay say £150 for a season of Sky services which was a considerable saving compared with the price a customer would pay over the same period on a monthly basis. Mr Perrin described this as the customer achieving a saving and agreed it was not a PPD.

88. Mr Perrin was referred to a sample letter of November 2012 notifying a customer of an increase in charges. It stated: "here is how we can help you keep your bill to a minimum. You have already opted for e-billing and direct debit, which is great as it means you save £81 a year, but here is another way you can help keep the costs down, opt for line rental saver, you will save over £55 a year by paying for 12 months" line rental upfront."

89. Mr Perrin accepted that VML saw e-billing and direct debit as a cheaper way of dealing with customer management and so were prepared to offer savings on the amount of money taken from customers if they agreed to take debit debt and e-billing on their account. He said "I mean technically - well it is correct, there was a charge for paper bills for example, so e-bills were cheaper than paper bills" so a customer who did not pay by direct debit and took paper bills would pay more on a monthly basis. He said that to his knowledge VML had not sought to suggest that the e-billing and direct debit saving was a PPD compared with customers who were billed on paper and did not pay by direct debit

90. Mrs Codd is a customer of VML who has been receiving VML's services, including the FLR services, over a number of years. She made the following main points in her witness statement:

(1) She paid for the FLR services initially on a monthly basis but from January 2014 under the saver terms.

(2) She did not expect and had not had any difference in the nature or quality of the services provided by VML since paying for the FLR services under the saver terms; as far as she was concerned she received exactly the same service.

(3) She did not believe there were any changes to the terms of her contract with VML as a result of paying the saver price other than to add some specific terms, namely, that the payment was non-refundable. The only difference was that "my monthly bills are less because there is no fixed line rental component to pay for."

(4) She chose the saver terms "to obtain a significant discount on the price I would otherwise have to pay".

(5) The fact the saver price was not refundable did not trouble her as she has no plans to leave VML, change service provider or move home.

(6) She recalled changing her bundles sometimes but thought the FLR service was the same throughout. The only change was to pay for a years' worth of FLR services in advance to receive the discount that was on offer. She understood that if she did not take up the saver terms again she would be required to pay monthly at the more expensive non-discounted price unless she were to terminate the contract.

Discussion and decision on whether para 4(1) applies

Contractual analysis – different supply argument

HMRC's submissions - interpretation

91. In HMRC's view the PPD regime applies only if, under contractually agreed terms, services or goods are supplied in return for payment for that supply of (a) a sum, the full price, to be made by a date falling after the supply is made (T1) or (b) a lower amount, the discounted sum, in satisfaction of the full price, to be made by a specified period or date (T2) falling before T1.

92. As set out above, I consider that this largely accords with the plain meaning of the wording of para 4(1). The point of dispute, however, is HMRC's assertion that the dates for payment have to fall after the supply is made or is deemed to be made. That would mean that para 4(1) could not apply in cases where a discount is given for immediate payment made before a VAT invoice is issued and the services are performed. This is considered further below.

HMRC's submissions – contractual analysis

93. HMRC noted that the standard approach to considering VAT classification issues is to ask who supplied what to whom in return for what consideration (see *HMRC v Reed Personnel Services Ltd* [1995] STC 588, QBD, per Laws J at page 595; *HMRC v Plantiflor plc* [2002] UKHL 33; [2002] 1 WLR 2287, HL, per Lord Millett at [67]). This process normally involves considering and construing the contractual terms between the parties as set out by Lord Neuberger in *Secret Hotels2* and *Airtours* (as considered by the Upper Tribunal in *ING Intermediate v HMRC* [2016] UKUT 298 (TCC) [2017] at [35] to [38]). HMRC did not contend that the contract between VML and a customer was a sham or did not reflect the economic and commercial reality of the transactions between them.

94. As noted, HMRC's view is that VML made different supplies of FLR services to monthly and saver customers. HMRC said that the key point is that, depending on whether the monthly basis or saver basis was selected, different consideration was paid in return for different temporal entitlements thereby giving rise to different contractual obligations and entitlements:

(1) Where the monthly basis applied:

(a) VML was obliged to supply and the customer was entitled to receive only one month's worth of FLR services in return for the monthly consideration paid.

(b) If the customer failed to make the advance monthly payment, VML had no obligation to provide the services for the one-month period.

(c) The customer had to pay any higher monthly figure if a price change was imposed during the currency of his or her contract.

(d) Unlike under the saver basis, the customer was not committed necessarily to pay for the entire 12 months; if the customer terminated after 30 days, he would have made only a one-off payment of the monthly amount.

(2) Where the saver basis was chosen:

(a) VML was obliged to provide and the customer was entitled to receive a 12-month FLR service in return for a single upfront sum.

(b) If the services were not provided, VML was in breach of its contractual obligations.

(c) Any change in the monthly charge did not affect the customer.

(d) There was no refund of the saver price in the event that the customer terminated the contract with VML during the 12 month period.

95. In HMRC's view, accordingly, the saver terms only applied contractually to those customers who actually paid the saver price. The customer's contractual entitlement to receive the FLR service for 12 months arose only once the customer paid that amount. In effect the receipt of the saver price operated as a condition precedent to VML's (single and indivisible) contractual obligation to provide a guaranteed FLR service for a 12 month period. HMRC said that the fact that, as commonly understood, the saver terms offered a saving by comparison with the monthly price applicable to monthly customers does not affect this analysis.

96. HMRC considered that it follows that there were separate supplies of one months' worth of services to monthly customers for consideration of £13.90 per month and of 12 months' worth of services to saver customers in consideration of £120. On that basis neither set of supplies was made on terms allowing a PPD; there was, in each case, simply a supply for the actual consideration given. The supplies of FLR services to the monthly customers could not be said to be made on terms allowing a PPD by reference to the price payable by different customers on different supplies.

97. HMRC said that the billing was consistent with this. The fact that each monthly bill issued to a saver customer after the saver price was paid showed a charge for FLR services of zero reflected that there was nothing further to be supplied.

VML's submissions – contractual analysis

98. VML consider that HMRC are incorrect in their interpretation of the contractual provisions and the VAT analysis of the supplies. VML made the following main points:

(1) In all cases the underlying supplies of services were exactly the same (namely, of FLR services) and, critically, the supplies were made under the same single contractual regime pursuant to identical terms under which customers could choose whether to take up the saver basis or not.

(2) In all cases there was a "rolling" contract with a customer for an indefinite period unless and until one party lawfully terminated. Unlike the situation in *Esporta Ltd v HMRC* [2014] EWCA Civ 155, [2014] STC 1548, at the end of any minimum period, the contract continued indefinitely on a rolling basis (see [121] to [125] for a description of the relevant passages in the decision in the *Esporta* case). In fact contracts for the provision of FLR services lasted on average for 6.5 years. That is relevant to the contractual analysis as a factual commercial factor, which was known to both parties at the date of contract. This factor is not, as HMRC assert (see below) post-conduct behaviour of the type which Lord Neuberger said in *Secret Hotels2* should not be taken into account in construing a contract.

(3) Accordingly, no new contract came into place where a customer (a) chose the saver basis or (b) did not take up the saver basis again on expiry of the 12 month period for which the saver price was paid. If a customer did not take the saver basis again, the customer automatically reverted to paying on a monthly basis as a continuation of the original contract

(4) As a matter of basic contract law, the saver terms formed part of the single contractual regime and, therefore, applied to all customers. The right to exercise the option was a pre-existing latent right which could be activated unilaterally by any customer; it was not merely a pre or extra-contractual offer which could be rescinded or revoked by VML at will. If the customer elected to take up the saver basis, there was no ability on the part of VML to refuse it:

(a) Those who became customers of VML following the introduction of the saver basis in 2012 became bound by the terms on signing up with VML (whether on a monthly basis or otherwise).

(b) For customers who had already signed up with VML when the saver basis was introduced in 2012, the saver terms became part of the binding terms under the provisions regarding changes, or became part of the terms de facto by conduct given that the ability to benefit from the saver basis was disseminated to all customers.

(c) There was consideration for the saver basis in that once it was offered under the terms, and the customers continued to receive services, it became part of the governing terms of that relationship.

(5) Whilst certain contractual terms were relevant at different times and only in the event of different eventualities, the terms remained the same for all customers. Where the saver basis "option" was exercised, the supply for future months was subject to the same terms and resulting rights and obligations that applied in any event, including the right to terminate on both sides (as confirmed by VML to the customer). Whilst there may be different contractual consequences for saver and monthly customers, they were all subject to the same contractual regime.

(6) Whilst the saver price was non-refundable, the right to terminate was not illusory. A customer may terminate, for example, if a competitor offered to compensate him/her for the saver price. VML could decide it no longer wished to supply to a particular area, such as the Outer Hebrides, and, therefore, withdraw its service from that area. In such a scenario, there was a right to a refund under the provisions referred to at [53(3)] above (for example, if the service was terminated halfway through the year, the refund would be £60, ie £10 referable to each future month).

99. VML viewed the saver basis, therefore, essentially as an upfront, early, advanced, very prompt payment so that customers could make substantial savings on their FLR services by paying for a certain period in advance. In its view that accorded with the billing in that, if the saver price was paid, the FLR element was still shown on the monthly bills but was shown as reduced to zero because it had already been paid for.

100. VML continued that HMRC is wrong to determine the nature of the supplies by reference to the payment mechanism. The nature of a supply is determined by looking at what the business provides. This is clear from the decisions of the Court of Justice of the European Union (the "**CJEU**") in *Bookit Ltd v HMRC* (Case C-607/14) and *HMRC v National Exhibition Centre Limited* (Case c-130/150. In the context of card handling services (under article 135(1) PVD) the CJEU decided that the method of payment could not alter the nature of the supplies being made; no distinction was drawn between supplies where payment was made by credit card or by other means in terms of the primary supply.

101. VML noted that, in any case where a PPD is provided for, there will necessarily be two different prices. If that of itself meant there were two different supplies, the PPD provisions would never operate. It simply follows from the early payment for future months, as a necessary consequence, that the customer secured the performance of services in those months at the saver price then paid. That does not detract from the fact that the rights and obligations of the parties were still those under the single contract. A customer was not buying any more in terms of volume; he was just paying in advance for future supplies.

102. VML continued that there is an obvious difference in the synallagmatic relationship between those who take up the discount and those who do not in the classic case in which para 4(1) applies; namely, where widgets are ordered and an invoice issued on terms that the customer may pay £100 in 60 days or £90 in 30 days. In that case those who pay the discounted sum lose the right to take 60 days' credit but that clearly does not lead to something different being supplied. (I understand the reference to the "synallagmatic relationship" to be to a contractual relationship with reciprocal obligations.)

103. VML emphasised that construing the terms of the contract is not an exercise to be conducted in a vacuum; it is necessary to look at all the surrounding circumstances and examine the terms through the lens of commercial common sense (referring to the comments of Lord Neuberger in *Secret Hotels2* at [32]). In its view, that involves having regard to the marketing materials and witness evidence, as demonstrating what VML intended as regards the saver basis and how a typical consumer would have understood the saver basis.

104. In VML's view, whilst the contract itself is very clear that the position is as set out above, the position is reinforced by the marketing materials and witness evidence. In the marketing materials it is evident that customers were simply offered a saving on the monthly amounts they would otherwise pay on the basis that all other terms were the same. As a matter of commercial common sense, each customer bought the same service and, where the saver basis was taken up, merely paid for the service earlier. Mrs Codd's evidence was that, from the perspective of a customer, all the services she obtained from VML were provided to her on exactly the same basis. Mr Perrin and Mr Davison explained that all aspects of the customer's relationship with VML were the same regardless of which payment option was taken as was reflected in the billing. On the approach taken by Lord Neuberger in *Secret Hotels2* it is then for HMRC to point to external factors to vitiate that commercial characterisation of the nature of the supply.

HMRC's further submissions - contractual analysis

105. HMRC countered that for a term or option to be binding contractually consideration has to be provided. In fact there was merely an offer by VML for the saver basis that was part of a suite of contractual terms that a customer could obtain on a binding basis, but only on satisfying the precondition of actually paying for it. The terms merely provided a framework as regards the different sets of services offered; different sets of contractual entitlements were offered under the aegis of one standard set of terms. For each particular customer it is necessary to work out which terms applied according to which services were chosen. In the same way as a customer who did not choose to receive television services was not subject to the terms applicable to those services, a customer who did not choose the saver basis was not subject to the saver terms.

106. In HMRC's view the agreement under the saver basis was plainly not for an indefinite term given the clear statement in the saver terms that on paying the saver price the customer obtained FLR services for 12 months (and HMRC referred to *Esporta* at [34] (see [124] below)). That is reinforced by the fact that if the customer chose to terminate the contract, there was no rebate of the saver price but with no question of any additional disconnection charge in respect of the FLR service (as the

customer has already paid for all it was entitled to receive under the saver basis). HMRC also noted that:

> (1) It cannot be asserted that all services supplied to a customer were supplied on a rolling basis given that different elements of the bundled package had different pricing options.
>
> (2) The fact that at the end of the 12 month period a saver customer was subject to the same terms as applied to a monthly customer, simply confirms that there were two different sets of contractual obligations.
>
> (3) The fact that customers may in practice have continued to obtain FLR services for periods in excess of 12 months is not relevant. *Secret Hotels 2* confirms that post contractual conduct by the parties is not relevant to contractual construction (except in certain circumstances, which do not apply here).

107. HMRC noted that the example VML gave of where VML may terminate a contract as regards the Outer Hebrides is purely hypothetical. VML was not entitled to refuse to supply FLR services to saver customers; if it did so, it would have been in breach of contract as Mr Perrin recognised in his evidence. The clause VML referred to (see [53(3)]) is aimed at providing a refund if, for example, a customer paid in advance on a monthly basis but did not receive the service for the full month. That provision does not bite where there was a specific provision that the saver price was non-refundable. The customer may have been entitled to claim as compensation a pro rata refund of the money paid but that would be due for the entire unexpired period and the calculation would most naturally be made on a day-by-day basis. Any claim for compensation may not have been confined to a refund but could, for example, cover the costs of obtaining the service from a competitor.

108. HMRC said that VML's "single contract" approach conflates the underlying supply of services from a technical perspective with the supply that is made for VAT purposes. Moreover this case is not about the classification of the nature of the underlying supply but about valuation and how much is paid for a given service. That necessarily brings with it time of supply issues (as regards when the tax point is triggered), but it does not bring into the equation exactly what the nature of the service is, which, in any event, is undisputed.

109. HMRC noted that the distinction they drew as regards the different nature of the supplies is not merely based on the method of payment but on the amount paid for a different contractual entitlement over a different period of time. On that basis, the decisions in *Bookit* and *NEC* are of no direct relevance.

110. They said that their analysis does not negate the intended effect of para 4(1). It is inherent in a paradigm discount case that the customer is offered, and the parties to the contract agree, two alternative prices for the same supply. HMRC accept that if those two alternative prices are shown by the taxpayer on a tax invoice, then a tax point arises and the taxpayer may account for output tax on the lower of the two sums shown on the invoice. The statutory construction of para 4(1) cannot be pushed further beyond this point without falling so far foul of European law as to call for the

type of muscular conforming construction found in *HMRC v IDT Card Services* [2006] EWCA Civ 29, [2006] STC 1252 (in order to ensure that national law conforms to EU law).

111. In HMRC's view VML's contentions are based on a fictional premise that monthly customers *could have* entered into the same contract as saver customers. VML cannot validly compare a hypothetical contractual scenario with what actually took place; the synallagmatic terms of the contract in each case are materially different (meaning the reciprocal relationship is different).

112. In HMRC's view the marketing materials add nothing to the debate on the correct contractual construction given the existence of the clear and unambiguous saver terms. On any view of the caselaw, there is no support for the suggestion that the terms of the contract can simply be ignored and the position assessed by some sort of constructed economic reality which deviates from the contractual terms and treats payments as made on an entirely hypothetical basis. The *Airtours* case makes it clear that the contractual terms are very much the starting point and, if necessary, the end point of the analysis (see also the comments of the Upper Tribunal in *ING*).

113. HMRC said that the suggestion that VLM can account for VAT due from the 95% of their customers who paid for FLR services on a monthly basis, on the basis that they paid £10 a month when in fact they paid £13.90, is wholly unreal. It does not reflect commercial or economic reality and instead contributes to what Sedley LJ in one case referred to as "the fiscal theme park of VAT legislation".

114. HMRC noted that cases where an advance payment or a pre-payment is made before delivery are subject to different rules: see Case C-419/02 *BUPA Hospitals* [2006] ECR I-1685, [2006] STC 967 at [44] to [50]. In their view, the saver basis is not an example of a pre-payment for a service, as the full contractual entitlement of the customer was received against immediate payment.

115. HMRC said that in any event the BUPA case provides no support for VML's position. In that case, BUPA prepaid for certain medical items with the intention of triggering an immediate VAT charge before the law was changed to subject such items to VAT at the standard-rate instead of the zero-rate. The goods were in a general list from which the buyer could select items. The list could be altered by agreement between the parties and the buyer could resile from the agreement at any point on recovering the unused balance of the prepayment.

116. The CJEU decided that prepayment did not trigger a VAT charge under the relevant provisions relating to payments on account. At [48] the CJEU noted that for VAT to be chargeable under the relevant provision "all the relevant information concerning the chargeable event, namely the future delivery or future performance, must already be known and therefore, in particular,…when the payment on account is made the goods or services must be precisely identified". At [50] they said it had to be borne in mind that "it is the supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies…A fortiori, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT".

117. HMRC noted that there was not the same issue in this case; the saver price was clearly paid for the provision of identifiable FLR services over a 12 month period. This case provides no basis for the proposition that a separate suite of contractual obligations relating to monthly supplies of such FLR services can be treated as if they were made on that same basis. VML responded that the decision in the *BUPA* case is simply irrelevant given the very different factual circumstances relating to an attempt to accelerate the liability to VAT to avoid an adverse change in the rules.

118. Finally HMRC said that there is a practical difficulty with VML's case in that it may not be possible to quantify any potential "discount". That is because there could be a price change as regards the monthly amounts paid by monthly customers in the 12 month period for which a saver customer paid the saver price. The saver customer would not necessarily have known at the outset, therefore, when the saver price was paid, whether there would in fact be a discount by reference to the monthly sums otherwise due or what the level of the discount would be.

VML's alternative argument

119. VML said that even if HMRC's view is adopted, supplies of FLR services to customers who were subject to minimum periods would in any event fall within para 4(1). In effect such customers were committed to taking the FLR service for a period of at least 12 months; if they terminated the contract for FLR services in that period they nevertheless had obligations as regards other services (such as television or broadband services) that could not be used without access to the FLR services. On that basis, on HMRC's own analysis, those monthly customers in effect received the same supplies of 12 months' worth of FLR services as saver customers. In those circumstances, the argument that the saver price could not operate as a PPD by reference to monthly amounts due under different supplies falls away; the supplies were entirely comparable.

120. HMRC said that even if VML is right on the effect of a minimum period obligation, the position remains that there were two different sets of supplies due to the other contractual differences. The fact remains that a monthly customer was obliged to pay twelve lots of £13.90 over 12 months subject to price increases whereas a saver customer was obliged to pay a non-refundable fixed sum of £120 and that there were different consequences on termination.

121. In any event on the basis of *Esporta* and regulation 90, the positon remains that a monthly customer was required under regulation 90 to pay VAT on £13.90 each month and not by reference to a hypothetical amount (see also HMRC's arguments on the time of supply issues below). In *Esporta* the issue was whether late paid fees for membership of a health and fitness club were consideration for a supply of services for VAT purposes or damages or compensation for breach of contract. The fees were due to be paid monthly in advance for a minimum commitment period of 12 months or longer. If a member defaulted Esporta denied the member access to its clubs but did not terminate the membership and sought recovery of the late paid fees.

122. The issue was whether there were any services which Esporta provided to the defaulting members in return for the payment of the overdue fees, and if so what precisely those services were. Esporta argued that, construing its terms and conditions according to the economic reality and taking into consideration regulation

90, each monthly payment should have been regarded as consideration for the usage of the gym facilities for that specific month, and not for the whole commitment period, meaning that there was no direct and immediate link between an overdue payment for that month and access to the club's facilities, because such access had in fact been denied

123. HMRC referred to the comments of Vos LJ, at [28], that regulation 90 has the effect of modifying the tax point for VAT purposes by deeming services to be separately and successively supplied at the earlier of the time that payment is received or a VAT invoice issued. Therefore, Esporta did not have to account for output tax on the relevant supplies until payment was made.

124. At [34], Vos LJ said that it was clear that the monthly payments were initially made in return for the services to be provided during the whole commitment period (being the membership of the club and the right to access its facilities). He did not agree that, as the Upper Tribunal had held, a late paid fee in respect of month 12 of the commitment period could properly be regarded as part consideration for the right of access to the club that was granted in, say, months one to three, before the default began. Rather, the late paid monthly fees remained consideration for the membership and right of access throughout the commitment period.

125. At [35] he concluded that the contract provided "for the member to be allowed access to the facilities in return for the monthly payments during the Commitment Period and thereafter until termination, but that access is conditional on the regular payments being kept up". The exclusion of members on non-payment did not mean that they were provided with no services at all. They were provided with the same services as before, namely, the right to access the facilities provided they paid the monthly fees.

126. HMRC said that by analogy in this case it could be held that a monthly customer who was subject to a minimum period was obliged to pay the monthly price throughout that commitment period. In that case, if those monthly fees were not paid in a given month it would be open to VML to refuse to supply the rest of the monthly services. Nevertheless, on the basis of regulation 90 and in accordance with the comments in *Esporta* set out above, the supplies would be regarded as taking place on a monthly basis as and when monthly payment was made. The position remains, therefore, that VAT was due when the monthly payment was received by VML and that the consideration for that supply necessarily was the monthly amount.

Decision on contractual analysis – different supply argument

Caselaw

127. As noted, it was common ground that in assessing whether para 4(1) applies, the starting point is to analyse the contractual nature of the arrangements following the approach set out by Lord Neuberger in *Secret Hotels2* and *Airtours*. I have set out an overview of the relevant comments from those cases as well as comments to which Lord Neuberger referred in the earlier case of *Revenue and Customs Commissioners v Newey* (Case C-653/11) [2013] STC 2432.

128. In *Newey* the Upper Tribunal sought a preliminary ruling from the CJEU on the extent to which the contractual position is determinative of the VAT analysis in the

context of a situation where the taxpayer used Jersey companies to avoid having irrecoverable VAT. At [42] to [45], the CJEU held that economic and commercial realities are fundamental in applying VAT, but the contract usually reflects these realities unless the contractual terms constitute a purely artificial arrangement:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT….
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

129. In *Secret Hotels2* Lord Neuberger considered the role of contractual interpretation and the correct approach to contractual interpretation in the context of analysing the VAT position on supplies made by an online travel business. In considering whether the business acted as an agent or principal under English law, Lord Neuberger said, at [31], that where parties have entered into a written agreement "which, on the face of it, is intended to govern the relationship between them," then, in order "to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations", unless it constituted a sham. As regards interpreting an agreement under English law, in summary, he said the following:

> (1) The court must have regard to "the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense" (at [32]). When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight.
>
> (2) Under English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement (at [33]).
>
> (3) Such behaviour or statements can, however, be relied on for other limited purposes including to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a

subsequent contract (agreed by words or conduct) or to establish that the written agreement represented only part of the totality of the parties' contractual relationship (at [33]).

130. He continued (at [34]) that, in the circumstances, the correct approach was "to characterise the nature of the relationship between [the relevant parties in the light of [the relevant agreement/terms]", next to consider whether "that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts" and finally, "the result of this characterisation so far as [the relevant European law (article 306)] is concerned." At [35] he said that in order to identify the nature of the relationship between the relevant parties:

> "one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."

131. As regards the correct approach under European law, he said, at [55], that the "CJEU's suggested approach as to how the issue should be determined seems very similar to that of the English court". Referring to CJEU decisions including the passages from *Newey* set out at [128] above, he said that he took from those cases that:

> "'the travel agent's contractual obligations towards the traveller' are of particular importance in deciding whether [the relevant European law] applies but it is also necessary to 'hav[e] regard to all the details of the case', and, in that connection, the 'economic and commercial realities' represent 'a fundamental criterion'. A contract which does not reflect 'economic reality' and a 'purely artificial arrangement' are similar to the shams, rectifiable agreements and other arrangements considered in para 33 above."

132. At [57] he decided that economic reality did not in that case assist a contrary view to that based on his analysis of the contractual position noting that:

> "one must be careful before stigmatising the contractual documentation as being 'artificial', bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation – see *RBS Deutschland*…"

133. In *Airtours* the issue was whether Airtours could recover as input tax VAT it paid on fees charged by PwC for services primarily relating to a report prepared for financial institutions as regards a refinancing of Airtours. It could do so only if it received the supply of PwC's services. Lord Neuberger considered that, on the true construction of the contract, PwC did not contract to supply services to Airtours nor did PwC have a contractual duty to Airtours to provide the institutions with the services (and in particular the report) nor could any such duty be implied.

134. Lord Neuberger went on to consider, at [43], Airtours' argument that, even if it was not contractually entitled to have the services provided to the institutions, the facts that (i) it had a substantial commercial interest in those services being provided by PwC to the institutions, and (ii) it not merely countersigned the contract pursuant to which they were provided, but thereby agreed to pay PwC for the services, lead to

the conclusion that the services were "supplied" to Airtours (as well as to the institutions).

135. At [47], he referred to the comments of the Supreme Court in the case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at [27], Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He noted that Lord Reed then went on to analyse the series of transactions in question, and at [39], explained that the tribunal had concluded that "'the reality is quite different' from that which the contractual documentation suggested". He continued that, effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality and concluded from this as follows:

> "In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

136. At [48] he noted that the same approach was adopted by the CJEU in *Revenue and Customs Commissioners v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651, at [39] and [40], where they stated, citing previous judgments, that:

> "'consideration of economic realities is a fundamental criterion for the application of the common system of VAT', and added that that issue involved consideration of 'the nature of the transactions carried out' in the particular case."

137. He continued, at [49], to cite comments from other CJEU cases as being much to the same effect such as the CJEU's comments in *Newey* 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, which the CJEU explained as meaning "the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient". He said that, at [41] of the decision in in *Newey,* the CJEU went on to explain that a supply of services is therefore:

> "objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person".

138. He noted that the court in *Newey* then observed, at [42] to [43] of that decision, that:

> "'consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT' and that 'the contractual position normally reflects the economic and commercial reality of the transactions'. An exception to the normal rule that the contractual relationship is central was then identified by the court as being where 'those contractual terms constitute a purely

artificial arrangement which does not correspond with the economic and commercial reality of the transactions' (para 45)."

139. He concluded at [50] that, from the authorities he set out, it was clear that, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier. He said, at [51], that the contract did reflect the economic reality and was not in any way an artificial arrangement.

140. HMRC referred to the decision of the Upper Tribunal in *ING* as further authority for the proposition that the effect of these decisions is that the contract may not only be the starting point of the analysis of the nature of arrangements for VAT purposes but also the end point if the terms reflect economic and commercial reality. At [37], the Upper Tribunal said:

> "In our view the correct approach is clear from *Newey* and *Secret Hotels2*. The test is an objective one (see also on that *Commission v Finland* (Case C-246/08) [2009] ECR I-10605 at [37]). The contractual terms must be considered. It is also necessary to consider the 'economic and commercial reality'. If the terms reflect the economic and commercial reality then it is not necessary to go any further."

141. Since the hearing, the Court of Appeal has released their decision on the appeal to them in the *ING* case (*ING Intermediate Holdings Ltd v HMRC* [2017] EWCA Civ 2111, [2018] STC 339) in which Arden LJ (with whom the other members of the Court of Appeal agreed) expressed a similar view. She said, at [37], that, in her view, "the correct reading of *Newey* and *Secret Hotels2* is that the court only goes behind the contract if the contract does not reflect the true agreement between the parties". Hence whilst she accepted that "when determining the nature of a transaction for VAT purposes, the court must look at the economic purpose of the transaction" nevertheless "the starting point is to determine what the parties have agreed".

Application of the approach in this cases

142. On the basis of the above authorities:

(1) It is necessary to assess (a) the contractual effect of the arrangements between VML and its customers in relation to the provision of the FLR services in the relevant period, (b) in the light of the contractual nature of the arrangements, what was supplied to whom for what consideration and on what terms and (c) in the light of that analysis, whether the FLR services "are supplied for a consideration in money and on terms allowing a discount for prompt payment" within the meaning of para 4(1).

(2) In assessing the nature of the contract between VML and its customers, as set out in *Secret Hotels2*, the tribunal must consider the words used, the provisions of the agreement as whole, the surrounding circumstances in so far as they were known to both parties, and commercial common sense.

(3) In analysing the effect of the arrangements for VAT purposes it must be borne in mind that consideration of economic and commercial realities is a fundamental criterion for the application of VAT. Whilst the contractual position normally reflects that reality, the contractual position may be vitiated on the relevant facts if, for example, the contractual terms constitute a wholly artificial arrangement. This is also reflected in the principle that there is a supply 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. It follows that a supply of services is objective in nature and applies without regard to the purpose or results of the transactions concerned.

143. As set out in detail in the facts section above, VML provided a range of services. Customers often chose to receive a bundle or package such as for telephone, digital television and broadband services. When a customer first signed up with VML the customer received a residential services contract with a copy of the main terms (which were also published on VML's website) which incorporated by reference the terms in "other legal stuff". The saver terms were included within "other legal stuff" and were also advertised widely by a variety of means.

144. The residential services contract set out details of the particular services which the customer purchased. Where a customer contracted for the provision of FLR services, the saver terms were included only within contracts where the customer had chosen the saver basis. If an existing customer chose the saver basis, the customer received an email or letter setting out the saver terms. The main terms contained general provisions applicable to all customers (such as regarding payment and termination) and terms, such as those relating to specific services, which may or may not apply depending on what services a customer had contracted to receive.

145. The saver terms, whether set out in writing or as described in marketing material or on the phone, were expressed in very similar terms. It was set out that on payment in advance by debit or credit card of a specified sum, the saver price, the customer would receive 12 months of FLR services on the basis that (a) the saver price was non-refundable except in an initial cooling off period and (b) at the end of the 12 months the customer would automatically move to the monthly basis. It was stated that this could not be combined with certain other offers and that the customer's normal call charges would apply.

146. In my view, the effect of the provisions, as interpreted having regard to the surrounding circumstances as regards the manner in which VML did business with its customers and commercial common sense, is that, as HMRC argued, there were in effect two different sets of contracts with monthly and saver customers pursuant to which the parties had materially different entitlements and obligations:

(1) In return for a payment of £13.90 per month, a monthly customer contracted with VML to receive FLR services for one month at a time (albeit on an on-going month by month basis) subject to the parties' rights to terminate. In that case the customer was potentially subject to price rises but could terminate on one

month's notice for no further charge subject to an early disconnection fee if termination was within a minimum period.

(2) On payment of a fixed non-refundable amount of £120 a saver customer contracted with VML to receive FLR services for a defined period of 12 months on the basis that, thereafter, he/she would become a monthly customer. Such a customer could also terminate on 30 days' notice but, if he or she did so within the applicable 12 month period, he or she did not receive a refund of the saver price. If the customer terminated the contract within a minimum period there was no disconnection fee by reference to the FLR services as the customer had already paid in full for the FLR services over the 12 month period.

147. The saver terms essentially comprised only an offer to contract on the basis set out and were binding contractually only on those customers who chose to take that offer up on paying the saver price. The terms provided a framework of terms and conditions only some of which may have applied contractually to a particular customer depending on the package of services he contracted to receive and which of the many advertised offers he took up. In my view, on the plain meaning and applying commercial common sense, the saver terms constituted one element of the overall suite of offers available which a customer could choose to contract for in the same way as he could choose to contract for a television service or a broadband service or a particular package. As submitted by HMRC that offer became a binding contractual term only as regards those customers who in fact took the offer up, as and when the saver price was actually paid by the customer. It was inherent in the way in which the saver terms were phrased that it was only on paying the saver price that a customer was subject to the saver terms.

148. I cannot see that, as VML argued, monthly customers somehow gave consideration for the saver terms such that they comprised a form of unilateral option, which was contractually binding from the outset of such a customer's relationship with VML (or which became binding on existing monthly customers when the saver basis was introduced). There was nothing in the residential services contract signed by a monthly customer or in the surrounding circumstances, such as in bills issued to monthly customers, to indicate any link between the value given for the monthly supply of services, of £13.90 per month, and the ability to take the saver terms. There was no mention of the saver basis in the residential contract with monthly customers or in the bills issued to them. There was nothing to suggest that the monthly price paid was for anything other than the receipt of one month's worth of FLR services.

149. The fact that the saver terms were widely advertised in a number of ways both to existing and potential customers (in similar ways to other offers of savings and different packages) merely emphasises that the saver terms were simply an offer until a customer took the offer up on paying the saver price. The offer was available to those with no existing contractual relationship with VML in precisely the same way as to those with an existing relationship. In that context I cannot see that in agreeing to receive the FLR services (or other services) on an on-going basis a customer thereby provided consideration for an "option" to take the saver basis.

150. Unlike some other offers made by VML, the saver terms were also included in "other legal stuff", alongside other terms which may well be binding contractual terms. However, in the same way as the labels used by the parties are not determinative of the contractual relationship, the placing of an offer within other contractually binding terms does not somehow convert the offer into a contractually binding option if that is not its true nature (until it becomes binding on payment being made).

151. I note that VML's view is that there was in each case a contract for an indefinite term noting that, as regards the saver customers, the contract reverted to the rolling on-going monthly basis at the end of the 12 month period (unless the customer terminated or chose the saver basis for a further 12 months). VML also said that it was relevant to the analysis that contracts with customers who received FLR services in fact lasted on average for 6.5 years; in its view that has a bearing as a factual commercial factor which was known to both parties at the date of contract.

152. However, the saver terms clearly stated that the saver price of £120 was a non-refundable payment for an entitlement to receive the FLR services for a defined period of 12 months. That the saver terms set out that, after the end of that period, the customer would receive services on a monthly basis, merely constituted the different basis on which VML contracted with the customer at the end of that defined period.

153. I cannot see that the fact that, in practice, the contractual relationship continued on average for 6.5 years has any relevance. It cannot simply be assumed that customers were aware of the average length of customers' contractual relationships with VML; I can see no reason to suppose they were aware of that. In any event, I cannot see that an awareness that, in practice, the overall contractual relationship between the parties could last well beyond the 12 month period for which a customer paid the saver price, affects the nature of the relationship during that 12 month period. The tribunal is required to assess the precise nature of the contractual relationship at each point in time; the eventual overall length of the relationship does not if itself determine that nature.

154. As regards its view that there was one contract, VML emphasised that, aside from the different terms as to payment, the rest of the terms were the same for both saver and monthly customers. VML noted that a saver customer could still terminate the contract before the end of the 12 month period as could VML and gave illustrations of when that may arise. VML suggested that, in the example it gave, whereby VML could withdraw services in a particular area (such as the Outer Hebrides), in effect VML would be required to refund the saver price under a term of the contract (see [53(3)]). However, it is difficult to see that the provision VML relied on applies to saver customers given the clear statement in the saver terms that the saver price was non-refundable. If VML withdrew the services, it would simply have been in breach of its contractual obligation to provide the FLR services for 12 months in return for the non-refundable price albeit the customer may be able to claim compensation for that breach.

155. The contractual position entirely reflects the commercial and economic reality, namely, that a monthly customer was entitled to receive one months' worth of services for a monthly price of £13.90 and a saver customer was entitled to receive 12

months' worth of services for a single fixed upfront non-refundable price of £120. I cannot see that the views of Mrs Codd, Mr Perrin and Mr Davidson as to the effect of the arrangements are relevant in the context of assessing the commercial or economic reality or otherwise. Whether as a matter of contractual interpretation or VAT analysis the test is an objective one. The question is not how an individual customer or VML perceived the relationship or how VML presented it for marketing purposes.

156. In any event, it is uncontroversial that a typical consumer may well have viewed the saver basis as providing a saving, as that term is commonly understood, for the receipt of 12 months of services when compared with the monthly basis, and that VML consistently marketed the saver terms on that basis. Equally it is clear that Mrs Codd was aware that the saver price was non-refundable; she had no plans to terminate or change provider and so that was not a concern to her. I cannot see that these unsurprising perceptions or marketing strategies shed any light on the correct contractual and legal characterisation of the arrangements and/or the correct meaning of para 4(1).

157. My view is that it follows from this analysis, that during the relevant period correspondingly VML made two different sets of supplies to saver and monthly customers. In accordance with the contractual position (1) VML supplied FLR services to monthly customers for one month at a time for £13.90 per month and (2) VML supplied FLR services to saver customers for a 12 month period for a non-refundable price of £120 (and thereafter made monthly supplies (unless the contract was terminated or the saver basis was taken again)).

158. I note that VML emphasised that in each case, the underlying service provided to customers was the same. As set out above, there is a supply 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 sense that the remuneration received by the supplier constitutes the value actually given in return for the service. In my view, the nature of what is supplied in return for the value given is not necessarily the same where the same underlying services are provided to two sets of customers on different contractual terms thereby giving rise to different entitlements/obligations and resulting contractual consequences (such as on termination). The value given to a supplier for receipt of a service may well reflect and differ according to the particular characteristics of and consequences flowing from the particular legal relationship.

159. In this case the different values of £13.90 and £120 paid by a monthly and a saver customer reflect the different nature of the contractual relationship between the parties:

> (1) The payment of the higher monthly amount reflected that VML was obliged to provide and a monthly customer was entitled to receive a supply of services for one month at a time on the basis that the customer thereby had the flexibility to terminate on one month's notice with no additional payment (except as regards a possible disconnection fee if within a minimum period) but that VML had the ability to increase the monthly price.

(2) The lower saver price reflected that VML was obliged to provide and a saver customer was entitled to receive 12 months of services for a fixed price but with no refund on termination (and no disconnection fee as regards the FLR services if termination was within a minimum period).

160. In a sense these different consequences may be said, as VML argued, to result and flow from a customer making a single fixed lower payment of a sum upfront as opposed to payments of higher amounts over a period of time. However, that does not detract from the fact that in each case, the consequence of the different payment and different temporal entitlements is that there is a difference in the reciprocal relationship thereby created.

161. I note that VML said that para 4(1) can never operate if the fact that there are two different payment options means that it does not apply. However, it is not simply the fact that different payments were made that leads to this conclusion. The critical factor is that, in these circumstances, the different payments lead to different contractual entitlements/obligations and resulting consequences. On that basis the cases VML referred to as regards the effect of the method of payment are not in point.

162. This analysis does not render the provisions of para 4(1) redundant as regards supplies of services. Paragraph 4(1) may well apply if, for example, a customer were to contract for the provision of 12 months of FLR services on the basis that he or she would pay either (a) a total fixed non-refundable amount of £166.80 to be met by 12 payments of £13.90 per month or (b) within 10 days of commencement of the contract, a fixed non-refundable amount of £120. In those circumstances the ability to pay, at an earlier date, £120, instead of on-going amounts over 12 months totalling £166.80 can plainly be seen as a term allowing a discount for the receipt of early payment for the same supply of 12 months of FLR services.

163. Essentially, for all the reasons set out above, in this case, however, there was a different bargain or different reciprocal relationship between VML and the monthly customers and between VML and the saver customers and accordingly a different supply. In short, the ability for a customer to pay £120 was not provided simply in return for early payment of monthly sums otherwise due but for the provision of an entitlement to receive 12 months of FLR services at a fixed rate (the corollary being the lack of flexibility to terminate on one month's notice for one month's payment only).

164. I have concluded, therefore, that on the basis of the above contractual analysis, para 4(1) does not apply to the supplies of FLR services made by VML in the relevant period. The FLR services were not supplied on terms allowing a PPD; they were supplied to monthly customers on a monthly basis in consideration of the monthly amount paid and to saver customers for a 12 month period in consideration of the saver price.

165. In particular, I note that it cannot be concluded that the FLR services were supplied to monthly customers on terms allowing a PPD merely because they could have decided to take advantage of an offer to receive the services on a different basis, namely, for 12 months for a single fixed non-refundable price. The saver terms only applied and, accordingly, supplies were made on those terms, only to the customers

(whether new or existing) who chose to contract on that basis on paying the saver price.

166. As regards VML's alternative argument (see [119] to [126] above), my view is that the minimum period does not affect the duration of the contract between VML and a monthly customer. As VML itself argued in relation to the position under para 4(2) (see [197] to [202]), a minimum period requirement does not convert the contract into a fixed-term contract of limited duration. Unlike the position in *Esporta*, it is clear from the terms that VML could not enforce the advance payment of monthly payments falling due during the minimum period given VML was obliged only to provide its service on a monthly rolling basis. The customer retained the ability to terminate during the minimum period albeit that there may be an early disconnection fee; the customer was not otherwise liable for any fixed fee for the FLR services due over the remainder of the minimum period.

167. This is sufficient to dispose of these appeal proceedings. However, in case this is found to be wrong, I have considered the further arguments raised.

"Are supplied"/time of supply argument

Overview

168. To re-cap, para 4(1) applies "where goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment". As set out above, that requires (a) the determination of the nature of the supply (in terms of what is supplied to whom for what consideration) on an analysis of the contractual position and (b) an assessment of whether, in the light of that analysis, para 4(1) applies on its correct contractual construction.

169. The question here is whether para 4(1) applies if, contrary to my view, the correct outcome of the required contractual and VAT analysis is that VML made a single form of supply of FLR services to all customers which was on-going and continuous (broadly, unless a customer gave notice to terminate or there was another termination event) and which was made on binding contractual terms as regards the saver basis.

170. In VML's view it follows from its analysis that para 4(1) applies given that, on that analysis, a customer was contractually entitled to elect, at any point whilst the on-going supplies were being made to the customer, to pay the saver price for a 12 month period and that, if the customer did so, the customer would achieve a substantial upfront saving compared with the monthly amounts otherwise due for those supplies over the same period. In its view all supplies of FLR services were plainly made on terms *allowing* a PPD; what matters is that the binding contractual terms provided for a PPD not whether that PPD was taken up or not.

171. HMRC argued that the requirement in para 4(1) that goods or services "*are supplied*….on terms allowing a PPD" is in any event not satisfied. In their view this requirement can be met only if a supply or deemed supply occurs before payment is made. They said that was not the case as, under the time of supply rules, a deemed supply of FLR services was triggered on each occasion when a customer made payment (whether under s 6 VATA or regulation 90). As payment coincided with the making of the deemed supply (thereby triggering it), at that point there were no terms

allowing for the payment of sum, X, at a subsequent date or a lower sum, Y, at an earlier subsequent date, as in HMRC's view is required for para 4(1) to apply.

172. Evidently HMRC's concern, as under their primary argument, is to avoid the position that VML is liable to account for VAT on all supplies of FLR services only by reference to the saver price even where the saver basis was not taken up and the higher monthly amounts were paid. HMRC disputed that, if para 4(1) applies, it has that effect but if their analysis on this point has the result they argue for, the need for that further debate falls away.

173. On this approach HMRC reach the desired result on the basis that whether para 4(1) applies as regards monthly customers is to be assessed, in effect, on a month by month basis by reference to each monthly supply which is deemed to take place when payment is made under the time of supply rules. On that view, therefore, the consideration or value for each monthly deemed supply in effect is fixed at the point in time when payment was made for it, by reference to the payment made. The corresponding position is reached as regards saver customers, namely, that a deemed supply triggered by payment of the saver price was made in return for the saver price.

174. I note that HMRC's argument is premised on the basis that payment was made in advance of the provision of the FLR services in all cases. Whilst that is correct as regards payment of the saver price, the evidence was that monthly customers did not in fact pay in advance of the provision of the FLR services in all cases. Mr Davidson said that, whilst bills went out in advance of the period billed for, payment may not be made until later in the period, by which time the FLR service for that month was already being received by the customer (see [43] above). It appears, therefore, that HMRC's analysis only potentially applies to some of the supplies made in the relevant period.

Detailed submissions

175. A set out above, a supply of services is treated as taking place when the services are performed or, if earlier, when a VAT invoice is issued or payment is received in respect of the supply (under s 6(4) VATA). It was not disputed that the monthly document issued by VML to customers was not a VAT invoice (as defined in s 6(15) VATA, para 2A of Schedule 11 to VATA and regulation 14(1) of the Regulations). In HMRC's view, where payments were made before the services were performed (whether a customer paid monthly or upfront), payment triggered the time of supply under these provisions.

176. HMRC continued that further or alternatively, the supplies of FLR services were continuous supplies of services which, under regulation 90, are treated as "separately and successively supplied" on the earlier of the date a VAT invoice is issued and that on which payment is received in respect of the supply. HMRC said that again as no VAT invoice was issued, there was a separate monthly supply to monthly basis customers each time that a payment was made for that supply (again assuming payment was made in advance of the performance of the services for the relevant month).

177. On HMRC's view, therefore, para 4(1) applies in the context of supplies of services only where a supply is triggered by performance of the relevant services or the issue of an invoice. HMRC said that their practice at the relevant time, as set out

in their guidance, reflected the intention that para 4(1) applies to address the practical difficulty businesses have in accounting for VAT if, when the obligation to account for VAT arises, it is not known whether a discounted sum will be paid or not. Accordingly, in the relevant period, HMRC allowed businesses to account for VAT on a discounted sum (whether or not it was in fact paid) where a deemed supply was triggered by the issue of an invoice which provided (as a contractual matter) for payment of sum, X, on a subsequent date or of sum, Y, on a subsequent date before that on which sum X was otherwise due. HMRC said that they were prepared to abide by this guidance (notwithstanding that it may not be in accordance with EU law) but noted it is not in point here as VML did not issue VAT invoices.

178. In VML's view there is simply no requirement for a prior supply or justification for the view that the regime only applies where an invoice is issued containing payment terms. VML said that HMRC's analysis is wholly out of kilter with para 4(1) and the relevant provisions in the PVD which are clearly intended to apply where a discount is given for immediate payment. What matters is that there is a contractual term providing for a discount to be given for early payment.

179. VML noted that there are many situations in which a discount could arise where no supply has yet taken place or at the very time a supply is made. In its view, there is no reason, for example, why para 4(1) should not apply where, in response to a placard over the till stating that there is a "10% discount for immediate payment", a person orders widgets on paying the reduced amount for delivery a week later and on receiving the invoice at that later time. Similarly there is no reason why the PPD regime does not apply where an immediate discount is offered for subscription to a monthly publication (such as a magazine) over a number of months or where, as here, a customer has an option to pay upfront for supplies which are to be received over a period of months under an on-going contract of indefinite duration.

180. In VML's view, the PPD regime would be robbed of its very purpose if, in those circumstances, rather than it applying to reduce the taxable amount, there is actually a penalty for very prompt payment. VML said that such distinctions are not sustainable and are not found within the terms of para 4(1). In that regard, VML noted the following:

(1) The predecessor of para 4 (para 4 of schedule 3 to the Finance Act 1972) specifically referred to a reduction in payment made immediately:

> "Where goods or services are supplied for a consideration in money, which is to be reduced if payment is made immediately or within a specified time, the consideration shall be taken for the purposes of this part of this Act as so reduced whether or not payment is so made."

(2) Article 79 PVD states that the taxable amount shall not include not only price reductions by way of discount for early payment, but also "price discounts and rebates granted to the customer and obtained by him *at the time of supply*."

(3) On the plain meaning and certainly without resorting to any muscular interpretation the term "prompt" is more than able to cover

> "immediate" or "early". The natural meaning of the term is "without delay" or "immediate".

181. VML said that on the basis that para 4(1) applies to immediate discounts, it is plain that it is not premised on the condition that there is a prior supply. There is simply no language in para 4(1) which is sufficiently robust to indicate that Parliament intended that the PPD regime is not to apply where a discounted payment is made in advance of the time when the supply is made (whether that is in a factual or tax point sense).

182. VML continued that, in any event on HMRC's own analysis, where payment triggers the tax point, the deemed supply is coterminous with payment; it does not precede payment. The words "are supplied" must surely cover a supply which is co-terminous with payment. HMRC's concern appears to be that for new customers there was no binding obligation to pay until they triggered the saver basis by paying the price. Clearly, that same objection does not apply to existing customers who were of course under an existing contract which gave rise to rights and liabilities.

183. In VML's view, in any event regulation 90 (being in its view the applicable provision to determine the tax point of any given FLR supply) merely determines the accounting period in which a supply of services is deemed to fall for VAT accounting purposes. It does not create a distinction in the number of or the nature of supplies made to a particular customer. VML noted that this was recognised in *Esporta* (see [121] to [125] above for a description of that case). In that case, at [28], Vos LJ concluded in effect that regulation 90 had no bearing on the question of the nature of the relevant services:

> "I should also deal with the point on Regulation 90, which I regard as something of a red herring. Regulation 90 provides that where services are supplied for a period for a consideration payable periodically, those services "shall be treated as separately and successively supplied" at certain designated times. As Ms McCarthy submitted, that merely has the effect of modifying the tax point for VAT purposes by deeming the services to be separately and successively supplied at the earlier of the time that payment is received or a VAT invoice issued. It delays Esporta's obligation to account for output tax to HMRC until it actually receives the payments. *It says nothing about the nature of the services in exchange for which the payments are made, but seems instead to throw attention back to the contract under which the services are supplied*." (emphasis added)

184. HMRC responded that VML's hypothetical examples regarding widgets should be treated with caution given the fundamental difference between goods and services. They said that payment in advance in return for a performance of services on a continuous basis over a 12-month period is a very different set of facts from the classic widget example.

185. In HMRC' view the circumstances in which there could be an immediate PPD for a supply of services are remote. For example a barrister could provide a client present in his office with an invoice for written advice not yet provided on the basis that, if payment is made immediately, £90 is due but, if payment is made within 90 days, £100 would be due. On the basis of HMRC's guidance that may qualify for the

PPD regime. However, as a matter of practical reality, that scenario starts to look like a sham. It would be very odd if a supplier were to issue an invoice based on the premise of immediate payment, knowing full well by the time that the advice is handed over that payment has not been made immediately.

Decision on meaning of "are supplied" and time of supply argument

186. The dispute centres on the role, if any, which the time of supply rules play in determining whether para 4(1) applies to the supplies of FLR services made by VML in the relevant period. My view is that the time of supply rules plainly do not affect the analysis involved in determining what was supplied to whom for what consideration. As recognised in *Esporta* the provisions in regulation 90 simply trigger the tax point thereby determining when the supplier must account for VAT on the services supplied. Accordingly, in *Esporta* Vos LJ held that regulation 90 had no role to play in deciding on the nature of any services provided by a health and fitness club to its members in return for late paid fees (see the description of this case at [121] to [125] and [183] above). The same principle must apply as regards the time of supply rules in s 6 VATA to the extent that is in point.

187. The further question raised by HMRC's argument, however, is whether, as a matter of statutory construction, in the context of on-going supplies of services, para 4(1) can be interpreted as requiring that its application is to be tested on each occasion when a supply is deemed to take place under the place of supply rules, in effect, by reference to the supply so far as it is deemed to take place at that point. In their view, on that basis, para 4(1) cannot apply where an advance payment triggers the making of the deemed supply. The on-going supplies, to the extent thereby treated as taking place at that time, were not made on terms allowing for a higher and a lower subsequent payment; necessarily, they were made in return for the sum then paid (£13.90 or £120 depending on whether the saver basis was taken up). This provides, therefore, a different way of arriving at the same end result as applies under HMRC's primary argument. HMRC justified this on the basis that the opening words of para 4(1), "where services …*are supplied*…" require that there has been a supply/deemed supply before payment is made.

188. As set out above, HMRC accepted at the relevant time that, to avoid the practical difficulty a business may otherwise face in accounting for VAT, para 4(1) applied to allow it to account for VAT on a discounted sum whether or not that sum was in fact paid, where it was not known, when the tax point was triggered, what price would be paid. That was the case, for example, when the issue of an invoice triggered the making of a supply under the time of supply rules, if it was made on terms allowing for future payment. The concern appears to be that in this case, on the other hand, where a supply was deemed to take place on payment being made in advance of the services being provided the result was that, VML of course knew, when the tax point was triggered, what price had in fact then been paid.

189. I note that HMRC present a somewhat simplified position in this regard. There is not necessarily a VAT accounting difficulty in all cases where an invoice triggers a tax point. Whether in fact the business knows what price has been paid in time to account for VAT on the relevant sum depends on precisely when in an accounting period a supply is deemed to take place and what the precise payment terms are. I also note that in this case, a monthly customer could elect to take up the saver basis in

any month notwithstanding the customer had already paid the monthly amount for that month. In that case the customer obtained a credit for the monthly amount already paid.

190. In any event, HMRC's interpretation of the opening words of para 4(1) relies on a strained construction, which does not accord with the natural meaning of the words used. It seem to me that it is not permissible to construe the provision in this strained way to achieve the result HMRC argue for. The question of whether para 4(1) applies to allow VML to account for VAT on supplies of the FLR services by reference to the saver price even where the higher monthly price was paid is to be addressed through the analysis of the effect of para 4(1); it is not to be addressed by inappropriately constraining the circumstances in which para 4(1) may be held to apply in the first place.

191. A supply is defined in s 5 VATA to include all forms of supply, "but not anything done otherwise than for a consideration" and "anything which is not a supply of goods but is done for a consideration…..is a supply of services". With this in mind, on their natural meaning, the words "where….services *are supplied* for a consideration and on terms allowing" a PPD require no more than that there *is*, as a factual and legal matter, the provision of a service for consideration or that something is done for consideration and that the provision of the service or something done takes place on the specified basis namely, that the consideration is in money and the services are provided on terms allowing a PPD. The reference to "on terms allowing" a PPD clearly connotes that a discount is merely provided for and not that it is actually paid. The words themselves do not suggest that para 4(1) requires an assessment of whether these conditions are satisfied by reference to each notional supply which is deemed to take place under the time of supply rules or that there is any timing requirement that there is a prior supply/deemed supply.

192. I note that, looking at para 4(1) in the context of its function within the overall VAT rules, it is a valuation provision the operation of which is, in a sense, linked with the time of supply rules. The time of supply rules provide the point by reference to which a business has to account for VAT on a particular supply and para 4(1) (in conjunction with s 19 VATA) determines what value is placed on that supply thereby determining the VAT due. In practice, a business has to assess whether para 4(1) applies as at each occasion when a deemed supply is triggered to work out the value on which it must then account for VAT. It seems to me, however, that this context does not of itself, given the plain meaning of the words used, justify the view that an assessment of the position is required by reference to each deemed supply as opposed to by reference to the on-going factual supply of services.

193. As set out above, for para 4(1) to apply, the supply must be made on terms allowing for the payment of one sum by a specified date or of a lower sum at an earlier time. The effect of HMRC's argument is that para 4(1) necessarily does not apply where the terms allow for a lower sum to be paid immediately (for example, when the contract is made and before an invoice is issued and the services are performed). However, on its natural meaning, the word "prompt" means "without delay". It is apt, therefore, to cover a supply made on terms allowing a discount for immediate payment; that simply constitutes a discount for the most prompt of payments.

194. Moreover, on the basis that para 4(1) is intended to give effect to the relevant provisions in article 79 PVD (albeit, on normal principles of construction it does not entirely reflect that article as set out below), I can see no reason in principle why para 4(1) applies where goods or services are supplied on terms allowing a payment, X, due in 30 days or a lower sum, Y, due within 10 days but does not apply if Y is due immediately. I note that on HMRC's analysis in any event VAT would be due only on £120 where the saver basis is in fact taken up but, in my view, it does not require a strained construction, such as HMRC adopt, to reach that result.

195. In conclusion, therefore, if VML's analysis on the contractual and VAT analysis is correct, it follows that on the natural meaning of the opening words of para 4(1) that this was a case where "services are supplied…..on terms allowing a PPD". On that analysis VML's customers were entitled, at any point in time whilst on-going supplies were being made to them, to pay the saver price for 12 months rather than the higher monthly amounts otherwise due over that period. The terms on which the FLR services were provided to customers, therefore, allowed for a "discount for prompt payment" on the basis that the saver price which could be paid upfront for any 12 months was considerably lower than the overall future monthly payments otherwise due. As noted, the reference to "on terms allowing" clearly connotes that a discount is merely provided for and not that it is actually paid.

196. That raises the prospect that, on this analysis, VML is liable to account for VAT on all its supplies of FLR services made in the relevant period by reference to the saver price, if that is this correct interpretation of the effect of para 4(1) (see [202] onwards for the discussion on that). HMRC's alternative construction, however, is out of kilter with the plain meaning of the provision giving rise to the difficulties set out above.

Discussion and decision on instalments argument

197. HMRC contended that, if their other arguments fail, the arrangements were nevertheless excluded from falling within para 4(1) on the basis they involved payment by instalments within the meaning of para 4(2) of schedule 6 VATA as regards:

> (1) supplies of FLR services made to a customer who was within a minimum period, and
>
> (2) supplies made to saver customers if, contrary to HMRC's primary case, such supplies were properly to be treated as supplies of services made on a monthly basis over a 12 month period.

198. HMRC noted that regulation 90 determines the time of supply of services "where services … are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time". In their view, that wording reflects the ordinary meaning of "instalment", namely, a payment of a sum of money by means of a series of payments spread over a period. In the circumstances specified above, the arrangements between VML and its customers were for continuous supplies of services for a 12 month period, payable by monthly instalments.

199. VML contended that the word "instalment", on its plain and natural meaning relates to a due debt, which is certain or ascertainable, arranged into lesser amounts

payable at certain intervals. In the present case, all customers contracted for the provision of FLR services on a monthly "rolling" basis which continued indefinitely until the contract was terminated. Given the indeterminate length of the relationship, it was not possible to determine how much a customer would actually pay to VML. Nor did money fall due in respect of any month other than that which was billed. In all cases the obligations on the parties were the same and were unaffected by whether the saver basis was adopted or not. VML concluded that it did not, therefore, make time-restricted supplies for 12 months; there was no larger total debt due for which the monthly payments could be said to be instalments.

200. VML continued that there is no difference in the analysis where a customer was subject to a minimum period requirement. That did not convert the contract into a fixed-term contract of limited duration: the contract remained one of indeterminate duration as described. That was further demonstrated by the fact that VML could not enforce the advance payment of monthly payments falling due during the minimum period, since the obligation on VML was to provide its service on a rolling basis. If the contract was terminated within a minimum period there may be an early disconnection fee but the customer was not otherwise liable for any fixed fee for the FLR services. Acceptance of the saver basis did not change the application or otherwise of any minimum periods in place under the contract.

201. VML also noted that the time of supply provisions in regulation 90 do not give rise to instalments where there are none (see *Esporta* at [34] as set out above).

202. My view is that if, contrary to my conclusions set out above, VML is correct that the contract for the provision of FLR services is in all cases a "rolling" monthly contract of indefinite duration, then the instalments provisions in para 4(2) do not apply. As VML argued, on the normal meaning, "payment by instalments" requires that there is a debt due of a specified amount which is to be satisfied by payments due at intervals. That is simply not the case assuming the contractual analysis is as VML argued for. I cannot see that the position is any different as regards supplies made to a customer who was within a minimum period. For the reasons set out above, the minimum period does not affect the duration of the contract. Nor can I see that regulation 90 provides any support for HMRC's argument for the same reasons as set out in relation to the time of supply argument above.

Discussion and decision on the effect of para 4(1)

Submissions

203. HMRC considered that if, contrary to their view, the supplies of FLR services are supplies of services made on terms allowing a PPD regime within the meaning of para 4(1), para 4(1) does not in any event apply to reduce the consideration on those supplies where the saver price was not in fact paid. VML contended that, on the contrary, the plain meaning of the provision is that the consideration is reduced whether or not the discount is taken up.

204. HMRC noted that it is clear from the relevant provisions in the PVD that VAT is due on the consideration actually obtained for a supply. Accordingly, where a discounted sum may be paid as consideration, VAT is due on the discounted sum only if that is the amount actually paid. They said this accords with the case law of the CJEU in which it is clearly established that a supplier must account for VAT on the

consideration actually obtained (referring, for example, to Case C-288/94 *Argos Distributors* [1996] ECR I-5311).

205. HMRC continued that it is also well established that UK law must be interpreted, so far as possible, in conformity with EU law in accordance with the established principle of conforming construction stated in Case C-106/89 *Marleasing* [1990] ECR I-4135. As stated in *Test Claimants in the FII Group Litigation v RCC* [2012] UKSC 19, [2012] 2 AC 337 at [176], *Marleasing*, at any rate as it has been applied in England:

> "is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom."

206. HMRC noted that this approach applies whether the EU law point is taken by the taxpayer or HMRC referring to *HMRC v IDT Card Services* [2006] EWCA Civ 29, [2006] STC 1252. In HMRC's view, the correct approach is set out in that case and in *Swift (trading as A Swift Move) v Robertson* [2014] UKSC 50, [2014] 1 WLR 2438 at [20]-[22] (Lord Kerr). (The relevant comments in these decisions are set out in the decision section.)

207. In HMRC's view, on the muscular approach advocated in these authorities, para 4(1) can be interpreted in accordance with the PVD as only applying to reduce the consideration for the supply of FLR services to the extent that the "discounted" saver price was actually paid. That was the approach adopted in the *Saga Holiday Ltd* case and the same approach should be followed by the tribunal in this case. Details of the *Saga* case are set out in the decision section below.

208. HMRC accepted that if para 4(1) cannot be interpreted to conform in full with the PVD, and it is held that para 4(1) entitles a taxpayer to account for VAT based on an amount less than it had in fact received, then (subject to para 4(2)), the taxpayer can rely on that entitlement notwithstanding the correct position under EU law.

209. In HMRC's view, when the PPD legislation was changed in 2014, there was a clear recognition that the previous version of para 4(1) in dispute here could be interpreted as being in line with the PVD but, because of the degree of ambiguity, it was amended to provide clarity. This was not, as VML asserted, a narrowing of the previous scope of para 4(1). The explanatory memorandum published with the draft legislation in 2014 stated that the PVD requires VAT to be accounted for on the consideration actually received and noted that whilst "UK legislation may be interpreted as being in line with the PVD" it "has a degree of ambiguity, so is being amended to provide clarity on the VAT treatment of prompt payment discounts." HMRC's own guidance published at that time stated that the changes were made "in order to protect the revenue and to put it beyond doubt that the UK legislation is aligned with EU legislation".

210. VML did not dispute that under EU law VAT must be paid on the consideration actually obtained for a supply and that, under the *Marleasing* principle, the tribunal must construe para 4(1), so far as possible, to give effect to the correct application of EU law. VML disputed, however, that a conforming construction was possible in this case and argued that *Saga* was incorrectly decided.

211. VML said that the *Marleasing* approach has its limits. It does not permit the legislation to be re-written contrary to its plain meaning or the adoption of a construction which goes against the grain (see *IDT*). The *Marleasing* approach does not permit a construction in this case which would cut through the very plain meaning of and intent behind para 4(1). In VML's view in *Saga* the tribunal failed to take on board the deeming nature of para 4(1) and failed to apply a correct approach to statutory construction.

212. VML submitted that it is entirely plain that para 4(1) allows for a reduction in consideration whether or not the discount is paid. It is a purely technical deeming provision. There is no suggestion that a discount must be realised; in fact if a discount is allowed or provided for, it is the discounted sum that must be taken to be the consideration. VML considered that is clear, in particular, from the reference to terms "allowing" a PPD and that the consideration shall be reduced by "the discount", meaning the discount allowed for, and the final words, "whether or not payment is made in accordance with those terms".

213. In VML's view this deeming provision is clearly aimed at providing a practical basis for taxpayers to account for VAT in discount cases, regardless of when the invoice is issued or whether there is a prior supply. The rules resolve the problem that, at the time when it is liable to account for VAT on the relevant supply, a business would not necessarily know whether the full amount or the discounted amount would be paid. It is clear that it does not matter whether the PPD is taken up by a majority of customers or indeed any customer.

214. VML said that whilst this may result, as it does in this case, in a VAT saving, that was simply the express intention and purpose of this deeming provision. VML noted that this is not an unusual type of provision in the VAT rules. There are other areas where, for convenience, the VAT rules deems a taxable amount to be other than that actually received (such as under the flat rate scheme).

215. VML submitted that the rules operate in this way is also demonstrated by the fact that they were changed in 2014; from that time the taxable amount is only adjusted if the discount is in fact realised. In its view, there was no ambiguity in the previous rules; HMRC accepted that they operated in this way under their clear practice at the time whereby they allowed suppliers to account for VAT on the discounted amount whether or not received. VML clarified that this was not a point about the applicability of HMRC's guidance. It was accepted that any point on the applicability of that guidance is a public law issue for a different forum. VML's point was simply that HMRC's own view accorded with the plain meaning of the provisions.

216. HMRC noted that, if the provision is not construed as HMRC argued for, where the customer is a business, the result for HMRC would be worse than the loss of VAT on the difference between the actual amount paid and the discounted amount. In that case the business customer would recover input VAT on the full amount paid notwithstanding that VML only accounted for VAT on the lesser discounted sum. VML said that this was irrelevant as VML did not have business customers. HMRC responded that it was relevant as there could be cases in which a self-employed person

was on a consumer or customer tariff with VLM and claimed a portion of the monthly bill back on the basis it could be allocated to home use for business purposes.

Decision on effect of para 4(1)

217. The issue is whether or not under the *Marleasing* principle para 4(1) can be construed, in conformity with the PVD, as applying to reduce the consideration for supplies of FLR services made by VLM only in those cases where the saver price was in fact paid and not where the monthly basis applied.

218. HMRC referred to the decisions in *Swift* and *IDT* as demonstrating the correct approach under the *Marleasing* principle. In *IDT* Arden LJ noted, at [79], that it was held in that case that "the national court's obligation is to interpret domestic legislation, so far as possible, in the light of the wording and the purpose of a directive in order to achieve the result pursued by the directive and thereby comply with Community obligations".

219. Arden LJ referred to the speech of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 as providing authority for the correct approach under the *Marleasing* principle. That case was concerned with the application of human rights legislation which similarly had to be interpreted "so far as possible" in a manner which was compatible with European law. She summarised, at [89], the "critical point" made by Lord Nicholls in that case as follows:

> "……the effect of interpretation in accordance with [the relevant provisions] may be to change the meaning of the legislation but…..the meaning adopted by the court must not conflict with a fundamental feature of the legislation…..the interpretation chosen by the court must "go with the grain of the legislation". Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt an interpretation that would make the legislation compatible with Convention rights because that would involve making policy choices which the court was not equipped to make……. It is also clear….that the interpretation of legislation under…..the *Marleasing* principle may involve a substantial departure from the language used though it will not involve a departure from the fundamental or cardinal features of the legislation. It is possible to read the legislation up (expansively) or down (restrictively) or to read words into the legislation…."

220. In the more recent *Swift* case the Supreme Court, at [21], endorsed the approach to the principle that a national court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the directive which it seeks to implement set out in *Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs* [2010] Ch 77, at [37] and [38] as follows:

> "……In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the Pickstone case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the Pickstone case, at p 126B and per Lord Nicholls of Birkenhead in Ghaidan's case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in

Ghaidan's case, at paras 31 and 35; per Lord Steyn, at paras 48—49; per Lord Rodger of Earlsferry, at paras 110—115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the Litster case, at p 577A; per Lord Nicholls in Ghaidan's case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the Pickstone case, at pp 120H—121A; per Lord Oliver in the Litster case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the Pickstone case, at p 112D; per Lord Rodger in Ghaidan's case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)…..

….The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: see per Lord Nicholls in Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 33; Dyson LJ in Revenue and Customs Comrs v EB Central Services Ltd [2008] STC 2209, para 81 …"

221. HMRC argued that, as regards para 4(1) the conforming construction to be adopted in this case is that set out by the tribunal in the *Saga* case. In that case Saga claimed that it had overpaid VAT on its takings on supplies of holiday services, as it had accounted for tax on the full price, without taking account of discounts offered for early payment. HMRC accepted that tax was overpaid in cases where the appellant's customers actually received discounts but not where discounts were available but were not taken up.

222. The tribunal set out at [30] to [32] the history of para 4(1) and the relevant wording in the European provisions and concluded that para 4(1) was clearly intended to enact the equivalent of article 79 relating to discounts for early payment. At [33], the tribunal noted that para 4(1) could be more clearly worded but concluded that the better interpretation is that the PPD regime applies to reduce the consideration for VAT purposes only where a discount is in fact achieved. The tribunal formed this view by ignoring, at this stage of the analysis, the final words of para 4(1) "whether or not payment is made in accordance with those terms":

"The reference to terms "allowing" a discount does open up the possibility of reading the provision as applying where, although the terms allowed for it, the discount had not been achieved. The possibility of so reading it is diminished by the next phrase "the consideration shall be taken … as reduced *by the discount*". If it had been meant to reduce the consideration as long as the discount had been available, even if it was not achieved, the provision might more accurately have been expressed as "the consideration shall be reduced in accordance with those terms", or words to that effect. The words "by the discount" can more readily be interpreted as a reference to a discount that has actually come into existence than to one that is available but may never come into existence. We hold that although the provision does contain an element of ambiguity the better

> construction of the words used is that the consideration is only reduced where the discount is achieved."

223. The tribunal continued at [34] that the last phrase of para 4(1) also gives rise to some ambiguity but that did not affect the conclusion:

> "Whether or not payment is made in accordance with those terms" could suggest that it is the existence of the right to a discount that gives rise to the reduced consideration for VAT purposes. However, if the earlier words mean that the discount has to be achieved before it can affect the consideration, as we have held they do, the last words in the paragraph can be taken to apply to the situation where the discount is in fact allowed, even though on the strict terms agreed between the parties it could have been refused. We do not therefore hold that the closing words contradict the interpretation that we have put on the opening words."

224. At [35] the tribunal said that this interpretation was confirmed in two separate but related ways. First, at [36], the tribunal noted that the general scheme of VAT both in UK law and in community law is that the tax is payable by reference to the actual consideration paid, in the case of a monetary consideration, rather than by reference to the terms agreed between the parties, where there is a difference between the two. It was appropriate to resolve an ambiguity in this general context. Secondly, at [37], the relevant article could not be said to contain the same ambiguity as para 4(1). The phrase "price reduction by way of discount" cannot sensibly be read as meaning "a price reduction available by way of discount whether or not achieved". In the tribunal's view that also bolstered the conclusion.

225. VML submitted that the tribunal misinterpreted the provision, in particular, in failing to construe it as a whole in its context having regard to its deeming nature, whereby, in VML's view, it is clearly looking at deemed sums and not actual amounts. VML said that, as a matter of statutory construction, it was improper for the tribunal in effect to divorce its interpretation of the final words "whether or not payment is made in accordance with those terms" from its interpretation of the earlier words. VML noted that the comments made at [37] of the decision may be right as a matter of interpretation of European law but the tribunal simply did not deal with the UK language. HMRC responded that, given the duty to interpret the legislation in conformity with the PVD, the approach in *Saga* is perfectly legitimate noting that the tribunal had not had to resort to reading in words (although that is permitted where necessary).

226. My view is that on normal principles of statutory construction it is not permissible to interpret para 4(1) as the tribunal did in *Saga* on a disjointed view of the provision; the provision has to be construed as a whole. On that approach, my view is that it is very plain from the wording used that the legislature intended the provision to apply where (a) there are terms "allowing" a PPD and (b) that the consideration is reduced by the discount allowed for, whether or not the discounted sum allowed for is paid in accordance with those terms or not.

227. The word "allowing" clearly connotes that a discount is provided for under the terms but not necessarily paid. In construing the words in the overall context of the provision, the natural meaning of the subsequent reference to "the discount" by

reference to which the consideration is reduced, is to the discount as so allowed or provided for under the terms. The matter is put beyond doubt by the final wording "whether or not payment is made in accordance with those terms", meaning that the consideration is reduced by the discounted sum whether or not payment is made in accordance with the terms allowing or providing for the discount. In other words, the consideration is reduced by the discount whether the recipient of the supply pays the discounted amount or the higher amount by reference to which the discount applies.

228. In view of the very clear meaning of the words used it appears that the purpose was to ensure that VAT was charged only on the discounted sum in all cases; both whether the discounted sum was paid and where it was not paid. It can only be assumed, from this plain meaning, that the intention was to charge VAT on this lesser sum as a practical measure to alleviate the problem businesses may have in accounting for VAT in discount cases given that, at the time they are required to account for VAT, the actual price (whether discounted or full) may not be known. (The rules in place during the relevant period did not contain specific provisions allowing for any subsequent adjustment to be made to the VAT account unlike the rules which apply from 1 May 2014).

229. It is not disputed, however, that this interpretation is not in conformity with European law; under European law VAT must be charged on the actual consideration paid. The question arises, therefore, whether a conforming construction can be adopted whether on the same or a different basis to that adopted in *Saga*. I note that, as set out in *IDT* and *Swift*, the obligation on the English courts to construe domestic legislation consistently with the PVD is a a broad and far-reaching principle which is not constrained by conventional rules of construction and permits, for example, the meaning of the wording used to be altered. The only constraint on the broad and far-reaching nature of this interpretative obligation are that the meaning should "go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed".

230. My view is that the thrust of the legislation in this case is (and indeed the intended meaning of para 4(1) could hardly be clearer) that the consideration on which VAT is to be charged is to be reduced where supplies are made on terms allowing or providing for a discount for prompt payment by the amount of the discount whether or not the discount provided for is in fact paid. To adopt an interpretation (whether by reading in words or otherwise) that the effect of para 4(1) is that the relevant consideration is reduced only where a discounted sum is in fact paid would, therefore, go against the grain or thrust of the provision Parliament decided to enact. The rule in para 4(1) may be something of a blunt instrument to alleviate the practical problems in accounting for VAT in discount cases and, in a case such as this it may go further than desired if these particular circumstances had been drawn to the attention of the legislature. However, it is not for the tribunal in effect to counter the very clear intent as to how the provision is to apply.

231. In any event, for all the reasons set out at [127] to [166] I have concluded that para 4(1) simply did not apply in these circumstances. In my view, the correct analysis is that VML made monthly supplies of FLR services to the monthly customers for the monthly amounts paid and of twelve months of services to the saver

customers for the saver price. The conclusion on the effect of para 4(1) (and on the time of supply argument) is relevant, therefore, only if that is found to be wrong.

Conclusion

232. For all the reasons set out above, the appeal is dismissed.

233. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2018