Neutral Citation: [2023] UKFTT 00012 (TC)

Case Number: TC08674

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2014/00781

VALUE ADDED TAX – discount offered but not taken up – whether this reduced the consideration for VAT purposes – Hansard and HMRC guidance considered – whether UK legislation in conflict with EU law – whether conforming construction possible – held, legislation in conflict with EU law and conforming construction not possible – whether on the facts, the appellant had offered discounts which came within the meaning of the relevant UK statutory provision – held, no – appeal dismissed

Heard on: 26 and 27 September 2022
Judgment date: 21 December 2022

Before

TRIBUNAL JUDGE ANNE REDSTON
MR CHRISTOPHER JENKINS

Between

TALKTALK TELECOM LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Andrew Hitchmough KC and Mr Quinlan Windle of Counsel, instructed by PricewaterhouseCoopers Legal LLP

For the Respondents: Mr Kieron Beal KC and Mr Andrew Macnab of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. TalkTalk is one of the UK's leading telecommunications providers. Between 1 January and 30 April 2014 ("the relevant time"), TalkTalk offered most of its retail customers the option of receiving a 15% discount on its services if their monthly bills were paid within 24 hours; this was called the "Speedy Payment Discount" or "SPD".

2. TalkTalk accounted for VAT on the basis that the consideration received for VAT purposes was reduced by the discount, whether or not customers had in fact paid within the 24 hours; in other words, whether or not the discount had actually been applied so that customers paid less. Around 3% of customers benefitted from the SPD.

3. TalkTalk considered its approach was consistent with Value Added Tax Act 1994 ("VATA"), Sch 6 Para 4(1) ("Para 4(1)"), which provided as follows (emphasis added):

> "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**."

4. That provision was amended with effect from 1 May 2014, so the relevant period lasted only four months. On 9 February 2015, HMRC decided that the SPD offer only reduced the consideration for VAT purposes where customers had actually paid the reduced amount, and that there was no reduction when the discount was not taken up.

5. On 20 April 2015, HMRC issued TalkTalk with a VAT assessment for £10,606,226 to recover the VAT underpaid during that four month period. TalkTalk appealed HMRC's decision and the related assessment to the Tribunal, and the two appeals were consolidated.

6. The First Issue was whether Para 4(1) had the meaning contended for by TalkTalk, and the Second Issue was whether, on the facts of the case, Para 4(1) applied to TalkTalk.

The First Issue

7. TalkTalk's position on the First Issue was that the meaning of Para 4(1) was clear, and its interpretation was supported by the history of the legislation. On behalf of HMRC, Mr Beal submitted that TalkTalk's reading was inconsistent with the Principal VAT Directive (Council Directive 2006/112/EC) ("the PVD"), and even if TalkTalk were correct as to the normal meaning of Para 4(1), the Tribunal had to construe that provision in accordance with the principle of conforming construction, see in particular *Marleasing* S*A v LA Comercial Internacional de Alimentación SA* (1990) C-106/89 ECR I-4135 ("*Marleasing*").

8. On behalf of TalkTalk, Mr Hitchmough accepted that its reading of Para 4(1) was inconsistent with the PVD, but submitted that no conforming construction was possible. We decided TalkTalk was correct, essentially for the reasons given by Mr Hitchmough.

The Second Issue

9. Para 4(1) only applied to services supplied "*on terms* allowing a discount for prompt payment". In deciding whether this was the case in relation to the SPD option, we first analysed the contractual position. Contracts between TalkTalk and its customers were governed by terms and conditions ("the T&C") published on TalkTalk's website. The SPD was not referred to in the T&C, but on a separate dedicated page within the same website.

10. Mr Hitchmough submitted that the T&C had been varied by the SPD option, so that the services had been "supplied…on terms allowing a discount for prompt payment" as required by Para 4(1), and that this applied to both services billed in advance (such as line rental), and those billed in arrears (such as call charges).

11. Mr Beal's submissions, with which we essentially agreed, was that the position was different as between services billed in advance, and services billed in arrears. In relation to services billed in advance, we found as follows:

(1) the SPD was an offer by TalkTalk to vary the T&C on a month by month basis in relation to (a) charges for services; (b) the timing of payment and (c) the payment method used by customers. It was only if a customer accepted the SPD offer within the narrow 24 hour window that the T&C were varied for that month.

(2) That contractual variation happened at exactly the same moment as the supply and the payment, and thus there were no terms "allowing a discount for prompt payment" on a future date.

(3) The contractual variation therefore did not include an offer for the customer to pay a discounted amount at some point in the future, so Para 4(1) did not apply to services billed in advance.

12. In relation to services billed in arrears, customers accepted the SPD offer after delivery of the services. We agreed with Mr Beal that the supply had therefore been made on the terms set out in the T&C, and the customer was therefore contractually required to pay the full amount. The SPD option was an offer by TalkTalk to accept a lower sum with an earlier payment date to discharge that pre-existing contractual obligation. As a matter of VAT law, this was an offer to accept a post-supply rebate of consideration already due; it was not a discount.

13. We therefore decided the Second Issue in favour of HMRC. We refused the appeal and confirmed the decision and the assessment.

PRELIMINARY MATTERS

14. We first set out three preliminary matters: the EU law position following Brexit; the First-tier Tribunal ("FTT") and Upper Tribunal ("UT") judgments in a related appeal made by Virgin Media Ltd ("Virgin Media"), and the structure of this judgment.

Brexit

15. It was common ground that, notwithstanding Brexit, UK law had to be interpreted and applied consistently with the PVD and the principles laid down in decisions of the Court of Justice of the European Union ("the CJEU") made on or before the UK left the EU on 31 December 2020, insofar as that was possible in accordance with established principles of conforming construction. We agree.

Virgin Media

16. TalkTalk also appealed against two other HMRC decisions made on 1 August 2013 and 15 January 2018 relating to its line rental service, for which TalkTalk had offered a "Value Line Rental" ("VLR") option, and those appeals had been consolidated with the SPD appeals.

17. Customers who selected the VLR option ("the VLR customers") paid an annual amount in advance; other customers paid monthly ("the monthly customers"). The VLR customers were charged less than the monthly customers. TalkTalk submitted that the VLR option was a "discount for prompt payment" or "PPD" within the meaning of Para 4(1), and as a result, the consideration was to be calculated net of the discount, whether or not customers had in fact chosen the VLR option.

18. Virgin Media had made similar appeals, also relying on Para 4(1), and TalkTalk's appeals were stayed behind those made by Virgin Media. That case was heard over three days in

September 2017 with Mr Beal and Mr Macnab representing HMRC (as in this case) but with different counsel representing the appellant (Mr Scorey KC and Mr Brown).

19. On 25 September 2018 Judge Harriet Morgan ("Judge Morgan") refused the Virgin Media appeals, on the basis that there were two different supplies: a supply to the VLR customers and a supply to monthly customers, and that as a result, Para 4(1) was not engaged, see *Virgin Media v HMRC* [2018 UKFTT 056 (TC) ("*Virgin Media FTT*").

20. Judge Morgan went on to consider what the position would be were she to be wrong in that conclusion, so that instead there was only one supply, with the VLR offer being a discount on the price of that supply. Having considered the meaning and effect of Para 4(1), Judge Morgan agreed with the appellant that the consideration was reduced by the discount whether the recipient of the supply:

(1) makes prompt payment and so pays the discounted amount; or

(2) does not make prompt payment and so pays the original higher amount.

21. She went on to find that it was not possible to apply a conforming construction so as to change that meaning, see [226]-[229] of her judgment. Although *obiter*, those conclusions were relied on by TalkTalk in relation to this appeal, and we return to them later in this judgment.

22. On 8 April 2020 Judge Morgan's decision was upheld by the UT (Morgan J and Judge Hellier) under reference [2020] UKUT 100 (TCC) ("*Virgin Media UT*"). The UT heard "full argument" on the Para 4(1) point, but decided "it would not be appropriate to engage in what would be only an *obiter* discussion", see [58] of that judgment.

23. Shortly afterwards, TalkTalk abandoned the parts of its consolidated appeal which related to the VLR, so the only issue in dispute before us was the correct treatment of the SPD option.

The structure of this judgment

24. Our analysis of the appeal is that there are two separate issues. The First Issue is whether Para 4(1) had the meaning contended for by TalkTalk, and the Second Issue is whether on the facts of the case, Para 4(1) applied to TalkTalk. In other words, it is first necessary to construe the legal provisions, and then consider whether TalkTalk came within those provisions. We have structured our judgment accordingly.

25. However, the parties did not present their case in exactly that way. Instead, they first considered (as issues 1 and 2 of their skeletons) whether the services were within Para 4(1) or excluded from it by Para 4(2) as being a payment by instalments, and then set out (as issue 3) their submissions on the VAT consequences if TalkTalk were to be correct. We mention the difference in structure between this judgment and the submissions in order to pre-empt any confusion which might otherwise be caused by our reference to "Issues".

THE RELEVANT LAW

26. The relevant law concerned the timing of a supply, the consideration given for a supply and the meaning of "rebate". The provisions set out below are those in force during the relevant period unless otherwise stated, and are cited so far as relevant to the issues in dispute.

The timing of a supply

EU law

27. Article 62 of the PVD provided:

> "For the purposes of this Directive:
>
> (1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

> (2) VAT shall 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."

28. Article 63 provided:

> "The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied."

29. Article 65 provided:

> "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."

30. Article 66 provided:

> "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:
>
> (a) no later than the time the invoice is issued;
>
> (b) no later than the time the payment is received;…"

UK law

31. The default rules for determining the time of a supply are found in VATA s 6, which provided:

> "(1) The provisions of this section shall apply…for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.
>
> …
>
> (3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.
>
> (4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.
>
> …
>
> (14) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding subsections (2) to (8)…) a supply is to be treated as taking place in cases where—
>
> > (a) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period, or…
>
> and for any such case as is mentioned in this subsection the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals."

32. In the exercise of the power given by s 6(14)(a) above, HMRC issued Reg 90 of the Value Added Tax Regulations 1995 ("the VAT Regs"), which by para (1) provided:

> "…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."

Consideration for a supply

EU law

33. Article 73 of the PVD provided:

> "In respect of the supply of goods or services…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…."

34. Article 79 provided:

> "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…"

UK law

35. VATA s 19 set out the default rules for determining the value of a supply:

> "(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.
>
> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration."

36. For supplies made before 1 May 2014, Sch 6, Para 4 provided (emphasis added):

> "(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 term**s.
>
> (2) This paragraph does not apply where the terms include any provision for payment by instalments."

37. With effect from 1 May 2014, Sch 6 Para 4 was amended by Finance Act 2014, s 108 in relation to "relevant supplies", defined by s 108(5) of that Act as "a supply of radio or television broadcasting services or telecommunication services made by a taxable person who is not required by or under any enactment to provide a VAT invoice to the person supplied". It was accepted that the supplies in issue in this appeal were "relevant supplies" and so within the scope of the amended paragraph. After the changes, Sch 6 Para 4 read (emphasis added):

> "(1) Sub-paragraph (2) applies where
>
> (a) goods or services are supplied for a consideration which is a price in money,
>
> (b) the terms on which those goods or services are so supplied allow a discount for prompt payment of that price,
>
> (c) payment of that price is not made by instalments, and

(d) payment of that price is made in accordance with those terms so that the discount is realised in relation to that payment.

(2) For the purposes of section 19 (value of supply of goods or services) **the consideration is the discounted price paid**."

38. As a result, the point in issue in this appeal is relevant only up to the date the law changed on 1 May 2014.

Rebates

39. Article 90 of the PVD read:

> "In the case of cancellation, refusal or total or partial non payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States."

40. In so far as it relates to reductions on price after the supply has taken place, that provision was not reflected in UK legislation (other than by Reg 38, which requires related adjustments to a trader's VAT account), but it had direct effect. In *NLB Leasing doo v Slovenia* (C-209/14) [2016] STC 55 at [35], the CJEU held as follows:

> "… it must be noted that Article 90(1) of the VAT Directive…requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, that person has not received part or any of the consideration. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received."

41. That provision is relevant to the analysis set out later in this judgment, see §150.

THE FIRST ISSUE: THE MEANING OF PARA 4(1)

42. The First Issue is the meaning of Para 4(1), namely whether TalkTalk were right that where a discount had been offered for prompt payment, the consideration for VAT purposes was reduced by that discount, whether or not customers had in fact taken it up, and despite (a) the fact that this reading conflicted with the PVD and (b) the requirement to apply a conforming construction where possible.

THE PARTIES' SUBMISSIONS

43. We set out below each of the submissions made by the parties, followed by our view.

The plain meaning

44. Mr Beal relied on *Saga Holidays Ltd v HMRC* [2003] VTD 18591 ("*Saga*"), a decision of the VAT Tribunal (Mr Richard Barlow and Mr D M Wilson). The appellant had offered discounts on holidays, and had claimed a repayment of VAT in reliance on Para 4(1) in relation to the discounts which had not been taken up. The VAT Tribunal held as follows (italics in original):

> "[33] Paragraph 4(1) could be more clearly worded. 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.
>
> 34. The last phrase also gives rise to some ambiguity. '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."

45. Mr Hitchmough disagreed with that analysis. He submitted that *Saga* was wrongly decided, and that the meaning of Para 4(1) was plain from the words "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".

46. He instead invited us to follow *Virgin Media FTT*, in which Judge Morgan had rejected the analysis in *Saga*, saying that the VAT Tribunal had taken "a disjointed view" of Para 4(1) by analysing that single statutory phrase as three separate steps, namely:

(1) "terms allowing a discount";

(2) "the consideration shall be taken … as reduced by the discount"; and finally

(3) "whether or not payment is made in accordance with those terms".

47. Judge Morgan went on to say that "on normal principles of statutory construction" this piecemeal approach is not permissible, but that instead "the provision has to be construed as a whole". She continued:

> "[226] …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."

48. We have no doubt that Judge Morgan was correct in her analysis, for the reasons she gives. We thus agree with TalkTalk that, when interpreted in accordance with the normal principles of statutory construction, Para 4(1) provides that where goods are supplied "on terms

allowing a discount for prompt payment", the consideration for VAT purposes is reduced by the discount, whether or not the discount is taken up.

The history of the provision

49. Mr Hitchmough also relied on the legislative history. FA 1972, Sch 3, Para 4(1) had previously provided, in very similar terms (emphasis added):

> "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**."

50. Before that provision was enacted, the Finance Bill Standing Committee considered and rejected an amendment. As recorded at col 359-60 of Hansard, the Financial Secretary to the Treasury said on 5 June 1972:

> "Amendment No 77 would cancel the provisions made for the VAT treatment of discounts which are allowed if payment is made immediately. In popular jargon, these are called "cash discounts". The effect would be to complicate the accounting arrangements of traders considerably, because VAT would then have to be calculated according to whether a discount was actually taken. An additional adjustment would be needed both to the output tax account of the taxable supplier and the input tax account of the taxable customer.
>
> This is a difficult area. We have had consultations with many of the trade interests involved. We feel that we should follow the long-standing provisions that exist for purchase tax. To that extent the traders are already familiar with the kind of operation that is involved in invoicing. Many of the discounted transactions will be between taxable traders, and in those cases the tax charges will be deductible input at the next stage. This is no great problem, and no loss of revenue will arise from applying the reduced tax value. There will be a considerable gain in simplicity. That being so, it seemed to us sensible to proceed on that basis.
>
> As I have said, this is an area in which the solution that we have arrived at is not necessarily the solution which all those who made representations to us would have favoured, but it seemed to us to have the advantage of precedent, and it would seem to be the simplest solution in terms of the treatment of discounts."

51. As Mr Hitchmough said, this passage confirms that "the paragraph was intended to apply irrespective of whether the discount was taken up".

52. The Sixth Council Directive 77/388/EEC ("the Sixth Directive") was adopted on 17 May 1977; this included as Article 11(1) the same text as is now found in Article 73 of the PVD, namely that "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply". It also included as Article 11(3)(a) that the amount shall not include "price reductions by way of discount for early payment". This is identical to the current Article 79(a) of the PVD.

53. On 29 July 1977, Parliament passed Finance Act 1977. Section 14 of that Act was headed "Restatement of value added tax", and it provided as follows:

> "As from 1st January 1978, Part I of the Finance Act 1972 (which imposes the charge to value added tax) shall be amended as shown in Part I of Schedule 6 to this Act (these being amendments mainly to give effect to new Community provisions relating to the incidence and operation of the tax).

> As from that date, in consequence of subsection (1), that Part of the 1972 Act, and the other enactments and subordinate legislation mentioned in Part II of that Schedule, shall have effect subject to the amendments there specified; and Part III of the Schedule shall have effect for transitional purposes."

54. One of the amended passages was Sch 3, Para 4(1) of FA 1972, which read:

> "(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 10 of this Act 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."

55. It is thus clear that when Parliament changed the law in 1972 following the adoption of the Sixth Directive, the phrase "whether or not payment is so made" had been changed to "whether or not payment is made in accordance with those terms", and Para 4(2) had been added.

56. Other than in relation to the internal cross reference, the wording in FA 1977 was carried through unchanged into the Value Added Taxes Act 1983 and thence into VATA, as Para 4(1).

Mr Hitchmough's submissions

57. Mr Hitchmough made the following submissions about the history of Para 4(1):

(1) Between the introduction of VAT and the change of the law in May 2014, it has always been a fundamental feature of the UK's VAT legislation that where a discount is offered for prompt payment, consideration for VAT purposes is the reduced amount, whether or not prompt payment is in fact made.

(2) This was the position when the prompt payment discount provision was originally introduced into UK law. It is clear from the speech given by the Financial Secretary to the Treasury during the Parliamentary debate that in passing FA 1972, Parliament considered any tax loss arising as a result of the provision was the acceptable price of fiscal simplicity.

(3) When the EU subsequently introduced a provision dealing with prompt payment discounts, Parliament amended the UK prompt payment discount provision to bring it more closely into line with the EU law provision, but chose to maintain the position that the consideration for VAT purposes was reduced whether or not prompt payment was made.

(4) The text of the original provision in FA 1972 was materially identical to Para 4(1), and the two provisions cannot have different meanings.

(5) Through two further enactments of the prompt payment provision in UK law, Parliament chose to retain this key feature.

58. In his submission, the meaning and effect of Para 4(1) was put beyond any possible doubt by this legislative history.

Mr Beal's submissions

59. Mr Beal described the above as an "archaeological excavation", and submitted that even if the *Hansard* extract were to be admissible, it did not assist TalkTalk. He said that it was instead clear that by FA 1977, Parliament was expressly implementing the Sixth Directive, and there was no evidence that Parliament "was seeking to mis-implement – or intentionally refusing to implement" any relevant part of the that Directive.

The Tribunal's view

60. Although Mr Beal made a passing reference to the possibility that the *Hansard* extract may be inadmissible, neither party referred to *Pepper v Hart* [1993] AC 593 at p 640, where Lord Browne-Wilkinson set out the three conditions which must be met before a statement made in Parliament can be a legitimate aid to statutory interpretation, namely that (i) the provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which is being considered.

61. Applying those principles, we find as follows:

(1) Para 4(1) is not "ambiguous or obscure" and does not lead to absurdity, for the reasons we have already given, see §48;

(2) although the statement was made by a minister, he was speaking about the legislation enacted in 1972, not the amended legislation introduced by FA 1977 and carried through to VATA; but

(3) the extract does explicitly state that the intention of that earlier provision was that consideration would be reduced by an offered discount, whether or not the discount was taken up.

62. The fact that the first (and arguably the second) conditions are not satisfied means that the *Hansard* extract cannot be relied on to interpret Para 4(1).

HMRC's own guidance

63. At the relevant time, HMRC's guidance consistently stated that VAT was to be calculated on the net price, whether or not a customer took up the offered discount. In the VAT Guide (Notice 700), under the heading "Discounts for prompt payment", the text read:

If…	**Then…**	**But…**
you offer a discount on condition that the customer pays within a specified time	the tax value is based on the discounted amount even if the customer does not take up your offer.	if your terms allow the customer to pay by instalments, the tax value is based on the amount the customer actually pays.

64. HMRC's VAT Cash Accounting Manual at VCAS5100, under the heading "Cash accounting scheme: Records and accounts: Discounts on VAT invoices", read as follows:

> "If a prompt payment discount is offered, VAT is chargeable on the discounted tax-exclusive invoiced price, even if the customer does not take up the offer. Where an eligible business using cash accounting offers such a discount, you should ensure that the VAT accounted for is the amount actually charged on the invoice and not the VAT fraction of the payment reflecting the invoice total; otherwise the business will be accounting for more tax than is due. The input tax reclaimable is similarly limited to the maximum of the VAT charged on the invoice."

65. Mr Hitchmough said that TalkTalk was not relying on this guidance in order to interpret the meaning of Para 4(1),, but submitted it was nevertheless instructive that HMRC's published view was entirely consistent with the position taken by TalkTalk in this appeal.

66. Mr Beal explained HMRC's guidance as follows:

> "Paragraph 4(1) was applied to address the practical difficulty businesses had in accounting for VAT if, when the obligation to account for VAT arose, it was not known whether a discounted sum would 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 a VAT invoice which provided (as a matter of contract) for payment of sum £*X* on (say) Day 30 or of sum £(*X*-*Y*) on or before (say) Day 15. In that situation, at the time of the taxable event, the specific consideration attributable to the supply which had taken place could not be known with certainty."

67. Mr Beal went on to say that in TalkTalk's case there was no such practical difficulty. TalkTalk did not issue VAT invoices, and it knew within 24 hours whether or not the discount had been taken up.

68. The Tribunal agrees with the parties that the view expressed in Notice 700 and HMRC's manual are not aids to the interpretation of Para 4(1). Nevertheless, HMRC's published view is consistent with the position taken by TalkTalk; by Judge Morgan in *Virgin Media FTT* and with our own reading, namely that Para 4(1) provides that where goods are supplied "on terms allowing a discount for prompt payment" the consideration for VAT purposes is reduced by the discount, whether or not the discount is taken up.

Breach of EU law

69. It was common ground that if TalkTalk were correct in their reading of Sch 6, Para 4(1), the UK would have failed to implement EU law. That is because:

(1) Article 73 defined "the taxable amount" as "everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply". It therefore plainly includes the full amount paid by customers who did not benefit from a prompt payment discount.

(2) Although Article 79 provided that the consideration was reduced by discounts, and Article 79(a) stated that the taxable amount shall not include "price reductions by way of discount for early payment", Mr Hitchmough did not seek to argue that this paragraph should be read as including discounts which had been offered but not taken up. Instead, he said that "TalkTalk accepts that Art 79 PVD intends that VAT is due on the reduced sum only where the discount is claimed by the customer and that the UK's implementation conflicts with the PVD".

A conforming construction?

70. The parties agreed that if applying the normal principles of statutory construction to a UK statute produces a result which conflicts with EU law, the Tribunal must take "a highly muscular approach" to construing the provision, provided the result goes "with the grain" of the legislation. We begin by setting out the case law from which those principles are derived, followed by the parties' submissions and the Tribunal's view.

The Treaty and the case law

71. The Treaty on European Union, to which the UK was a signatory, provided by Article 189:

> "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force."

72. In *Marleasing* the CJEU held at [8]:

> "…in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

73. In *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 AC 337, Lord Sumption said 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."

74. In *Wilkinson v Churchill Insurance Co Ltd* [2012] EWCA Civ 1166, [2013] 1 All ER 1146 at [50], Aikens LJ said that "the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching" and went on to restate the principles which should be applied when considering a conforming construction of a legislative provision which infringes EU law. Those principles were then summarised by Sir Andrew Morritt C in *Vodafone 2 v HMRC* [2010] Ch 27 at [37]-[32], and that summary was in turn approved by the Supreme Court In *Swift v Robertson* [2014] UKSC 50; [2014] 1WLR at [21].

75. The parties agreed that the principles were as set out in the list below; this excludes the citations of authorities within the original judgment, but includes certain linking and clarificatory phrases added by Henderson J (as he then was) in *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch) [2014] STC 1236 at [101]:

(1) the obligation is not constrained by conventional rules of construction;

(2) it does not require ambiguity in the legislative language;

(3) is not an exercise in semantics or linguistics;

(4) it permits departure from the strict and literal application of the words which the legislature has elected to use;

(5) it also permits the implication of words necessary to comply with Community law obligations;

(6) the precise form of the words to be implied does not matter;

(7) it is only constrained to the extent that the meaning should "go with the grain of the legislation" and be compatible with the underlying thrust of the legislation being construed;

(8) it must not lead to an interpretation being adopted which is inconsistent with a fundamental or cardinal feature of the national legislation, since this would cross the boundary between interpretation and amendment; and

(9) cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate.

76. It follows from these principles that Para 4(1) must be read consistently with Articles 73 and 79 of the PVD, so far as that is possible without breaching principles (7) to (9) above.

Submissions

77. Mr Beal submitted that the Tribunal should follow the analysis in *Saga*, because this was a "tenable" construction which met the requirement that Para 4(1) be read consistently with the PVD.

78. Mr Hitchmough said that it was a "fundamental" and "cardinal" feature of Para 4(1) that consideration was deemed to be reduced by the offered discount, irrespective of whether or not the customer made the payment promptly so as to secure that discount. In his submission, any construction of Para 4(1) that stripped it of that feature would "go entirely against the grain of the legislation". He added that Judge Morgan had come to the same conclusion in *Virgin Media FTT* when she said at [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."

79. Again, we agree with Judge Morgan for the reasons she gave.

CONCLUSION ON THE FIRST ISSUE

80. For the reasons set out above, we agree with Mr Hitchmough that Para 4(1) means what it says, namely that where goods or services are supplied on terms allowing a discount for prompt payment, consideration is deemed to be reduced by the amount of the discount, whether or not the customer obtains the discount as the result of paying promptly. We also agree with him that it is not possible to construe Para 4(1) so that it is consistent with the PVD, because to do so would go entirely against the grain of the provision, and would "cross the boundary between interpretation and amendment".

THE SECOND ISSUE: WHETHER PARA 4(1) IS SATISFIED ON THE FACTS

81. We next consider whether the supplies made by TalkTalk come within Para 4(1). We first outline the evidence and then set out our findings of fact based on that evidence. The parties' submissions and our analysis then follows.

THE EVIDENCE

82. The Tribunal was provided with a Bundle prepared by TalkTalk, which included the following:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) a copy of the T&C which was dated 13 February 2014, but which stated they were effective from 30 September 2013. Both parties accepted that these T&C were in force

throughout the relevant period. References in this decision to "the T&C" are to this version, unless otherwise stated;

(3) a copy of the T&C dated 11 August 2014, after the relevant period;

(4) various screenshots from the TalkTalk website;

(5) sample customer bills; and

(6) an HMRC policy paper entitled "prompt payment discounts" issued in March 2014, alongside the 2014 Budget.

83. In addition, Ms Lorraine Harper, TalkTalk's Director of Group Finance, Tax and Treasury during the relevant period, who continues to hold that role, provided a witness statement, gave evidence-in-chief led by Mr Hitchmough, and was cross-examined by Mr Beal.

84. Mr Thomas Detain, TalkTalk's Head of Tax since January 2021, provided a short witness statement and was cross-examined by Mr Beal. The purpose of his evidence was to exhibit the two versions of the T&C referred to above, and to provide some further information about billing, the contract period and termination rights. Both he and Ms Harper were straightforward and credible witnesses.

85. The findings of fact in the next part of this judgment derive from the evidence summarised above, and were not in dispute.

FINDINGS OF FACT

86. TalkTalk is a subsidiary of TalkTalk Telecom Group plc, and the representative member of the TalkTalk VAT Group. These findings of fact are made on the basis that they relate to TalkTalk acting in that capacity, and references to TalkTalk may therefore include activities carried out by other companies within that VAT Group.

87. TalkTalk is one of the UK's leading telecommunications providers, and supplies both retail and commercial customers. As the issue in dispute concerns only retail customers, our findings relate to that part of TalkTalk's business.

88. At all material times, TalkTalk offered its retail customers various services, of which the following are relevant to this appeal:

(1) Line Rental ("LR") service;

(2) Calls service;

(3) TV service; and

(4) Broadband Internet Access ("Broadband service").

89. Customers could select a bundle of services to suit their own requirements, although those who took the LR service also had to take the Calls service.

The T&C

90. The contracts between TalkTalk and its customers were governed by the T&C published on TalkTalk's website, which included the provisions set out below. Clauses in the T&C which were not relevant to the issue before the Tribunal have been omitted.

> **"1. General Provisions Relating to the Services**
>
> *Eligibility*
>
> 1.1 The Services are for home use only and not for business.
>
> *Duration*

1.4 The Services, for which you enter a Contract, will start on the Commencement Date and will continue until terminated in accordance with clause 10 of these Conditions. Your Contract may also be subject to a Minimum Period, but we will tell you what this is before you sign up.

Your Bill

1.7 We will send you a bill, which you must pay on time. We may send you separate bills if you take more than one Service from us. If you choose to manage your account online, you must provide us with a working email address so that we can send you our bill.

10. Charges and Payment

Your Bill

10.3 Within thirty (30) days of the Commencement Date, we shall prepare and send to you a bill for the Services you have used. Thereafter we shall prepare and send to you a bill at the end of every Billing Period.

10.4 You may choose to receive your bills in paper or electronic form (including accessing your bills online). If you choose to receive your bill in paper format we reserve the right to charge you an additional amount for providing you with this service.

10.5 The LR Service, the Broadband Service (if applicable) and certain charges for the Call Service, the TV Service, Mobile Service and/or the Boost and/or the Fibre Optic Broadband Service will be billed monthly in advance. Monthly charges incurred for periods of less than one month will be calculated on a pro rata basis. Calls made using any Service will be billed in arrears.

10.6 All bills must be paid by way of direct debit to TalkTalk or such other entity as we may notify to you from time to time. We shall collect each bill payment from the bank account you register with us on the payment due date shown on your bill. This date will be on or around the same time each month, unless we otherwise notify you in writing in advance. Unless we expressly agree otherwise, any and all Charges are inclusive of VAT.

Call Charges

10.12 Charges for calls you make using any Service will be calculated using details logged and recorded by us. Calls are charged based on the rate applicable when the call was initiated.

Changing Our Charges

10.16 We shall be entitled to amend our Charges or change the Tariff Plan you are on from time to time and we will notify you of such changes by making the amended list of Charges available on our Website. If Charges are decreased this will be reflected in your next bill. Should we increase the Charges we shall provide you with thirty (30) days' notice of such increase and the increase will take effect from the end of that period. In this instance you may, in accordance with and subject to the provisions of clause 16.1, be entitled to terminate our Services made available under these Conditions. Any changes that may apply to VAT charges from time to time, which may result in an increase or decrease in your Tariff Plan Charges, will not be regarded as a price increase.

TV Transactional Charges

10.17 TV Transactional Charges will be invoiced in arrears and in accordance with our records. If you view the relevant programming subject to the TV

Transactional Charge then you will be liable to pay the TV Transactional Charge no matter how brief the period of viewing was.

Additional Channel Charges

10.18 We may offer Additional Channels which you can choose to purchase for inclusion in the TV Service. You will be notified of any additional Charges payable for the Additional Channels prior to your Order as well as any minimum commitment that may apply.

Ending Your Contract

11.1 If you no longer want to receive one or several of our Services, you must tell us a certain number of days in advance. How many days will depend on which Service(s) you currently take from us. If you receive more than one service (for instance Calls and Broadband), you must also tell us which Services you no longer want. Please note that for certain Tariff Plans offering a bundle of Services you may not cancel part of the Services. For further details please contact Customer Services.

11.2 Some of our Services have a Minimum Period. This means that you are legally obliged to keep receiving our Service until the end of that term. If you leave before the end of the Minimum Period, you accept that you have to pay us an additional charge. Please see clause 11.8 about this charge.

Term

11.3 For the LR Service and the Broadband Service, unless we otherwise tell you, the Minimum Period is 12 months. However, if you have taken both of these Services, the Minimum Period may be either 12, 18 or 24 months. We will tell you when you sign up if that applies to you. For Tariff Plans that include the TV Service the Minimum Period will be either 18 or 24 months. We will confirm this with you when you place your Order. Please see the definition of Minimum Period if you would like more information.

Payments Due on Termination

11.8 If your Contract has a Minimum Period and you terminate the Service before the end of that Minimum Period you must pay us, as compensation for our losses the relevant amount detailed on our Website at www.talktalk.co.uk/legal/etc.html multiplied by the number of months remaining of your Minimum Period.

General

Changing these Conditions

16.1 We may change these Conditions at any time for legal, regulatory or commercial reasons. We will notify you of all such changes in writing and/or by publishing them on our Website (www.talktalk.co.uk). To the extent that we believe such changes are to your material detriment we will give you at least thirty (30) days' notice of such changes by writing to you and/or publishing them on our Website or providing them on our Customer Services telephone line by way of a recorded message, or for changes to the Mobile Service [by] sending you an SMS or by posting them on our website for the Mobile Service. If you object to a change that we believe is to your material detriment you may terminate your Contract without charge provided that you notify us in accordance with the provisions of clause 11 and prior to the date that the relevant change is due to take effect.

16.2 The Contract sets out the whole agreement between you and us for the provision of the Services and supersedes all prior agreements between you and

us. Neither of us has relied on any representation arrangement understanding or agreement (whether written or oral) not expressly set out in these Conditions.

SCHEDULE 1

Definitions and interpretation

Charges means our published list of prices as amended from time to time applicable both to our Services in general and your particular Tariff Plan. To obtain a copy please telephone Customer Services or visit our Website.

Commencement Date means the date upon which our supply to you of any Service commences, and the relevant Commencement Date for each Service will be as communicated to you by us. This date is not guaranteed but a Customer of the Call Services shall be deemed to be 'active' from 12 midnight on the day before such a Customer's Commencement Date;

Conditions means these terms and conditions as amended by us from time to time in accordance with clause 16.1;

Contract means the contract between you and us to pay for and receive one or more of the Services set out in these Conditions (together with such changes and/or other terms as may be notified to you from time to time) and your current Tariff Plan as amended from time to time.

Website means the website for the TalkTalk business currently located at url: www.talktalk.co.uk."

91. The T&C therefore included in particular the following provisions:

(1) all the services were billed in advance, except those relating to calls made by customers and TV Transactional Charges ("TV usage"), which were both billed in arrears (Clauses 10.5 and 10.17);

(2) customers were required to pay for TalkTalk's services by direct debit (Clause 10.6);

(3) changes to charges were to be notified by making the amended list of charges available on www.talktalk.co.uk (Clause 10.16);

(4) changes to the T&C were to be notified in writing and/or by publishing the changes on the same website (Clause 16.1);

(5) some services were subject to a minimum period (Clause 11.3); and

(6) the T&C included a "whole agreement clause" (Clause 16.2).

92. Although Clause 1.7 provided that customers may be sent separate bills for different services, Mr Detain's unchallenged evidence was that they were sent a single bill. Despite the frequent references to "invoices" in the T&C, TalkTalk accepted that it did not issue VAT invoices to its retail customers.

My Account

93. Customers could access their account with TalkTalk by using a system called "My Account". This allowed customers to view their bills; change the particular services in their packages and manage their payments; it was accessed via TalkTalk's webpage. TalkTalk communicated by post with customers who did not have an activated "My Account".

The VLR option

94. On 1 October 2011, TalkTalk introduced its VLR option. This enabled a customer to pay for 12 months' line rental in advance, by way of one-off payment by credit or debit card. The single VLR charge was less than the aggregate of the monthly charges which the customer would otherwise have had to pay during the following 12 month period.

The SPD option

95. The SPD option was introduced on 1 January 2014. Information about the SPD was provided on a dedicated page within TalkTalk's website, being talktalk.co.uk/speedypayment ("the SPD webpage").

96. The SPD webpage set out a number of questions and answers. The first question was "what is the speedy payment discount", to which the answer was as follows:

> "The Speedy Payment discount is a reward for customers who pay their bill early. Simply pay your bill within 24 hours of receiving your bill notification email and receive a 15% discount…"

97. The SPD webpage also explained how to access the SPD; the position for customers who did not have a "My Account", how the SPD was shown on customers' bills, and the position in relation to the direct debit arrangements the customer had already set up in accordance with Clause 10.6 of the T&C. We make further findings about these points below.

Availability of the SPD

98. The SPD was available to customers who had an active My Account for all services other than "mobile packages", and thus included calls, LR, broadband and TV. The SPD was also available to certain other customers in exceptional circumstances, but only if offered by a call centre agent. This was most likely to happen where a reasonable adjustment for disability was required, or when a customer did not have broadband access. In such cases the call centre staff would allow the customer to pay the reduced amount by credit or debit card over the phone. Ms Harper did not know how many SPD offers were made on this exceptional basis, and no other evidence was provided to the Tribunal. However, we find that it was very few, because:

(1) the standard SPD offer was only available within 24 hours of the bill being issued, and it was very unlikely that bills sent out by post would have reached customers within that time frame; and

(2) the offer was not part of the script provided for call centre agents and would thus have been made only if the customer had asked for it, or if the agent took an independent initiative.

99. The parties' submissions were only about the position of customers who had a My Account; no separate submissions were made about this very small number of other customers, and we have taken the same approach.

Customers with paper bills

100. Customers who did not have an online My Account received paper bills, of which the first page included a text box on the right hand side. This said (where £XX was 15% of the total bill amount):

> **"Your account updates**
>
> **Save £XX per year with My Account**
>
> Managing your account online is easy and saves you money.
>
> - Check your bill 24/7

- Save 15% extra every month with Speedy Payment…

Register quickly and easily at talktalk.co.uk/my account."

101. On page 2 of the paper bill was a box entitled "how to pay your bill"; this included the words: "You may be eligible for a Speedy Payment Discount on your future bills. To find out more information, please visit talktalk.co.uk/speedypayment". Ms Harper confirmed in cross-examination that the words "you may be eligible" reflected the fact that customers would only be eligible if they accepted the SPD offer within the 24 hour window, and it was not known whether or not they would do this. Customers who did not open a My Account received their next bill in paper form, with similar information about the SPD.

Accessing the SPD option

102. Customer who operated their TalkTalk account online were notified by email when a new bill had been posted to their My Account. That email read:

"**Your TalkTalk bill is ready to view**

Dear [name]

Your latest TalkTalk bill for [month] is now available in My Account [ref] to check the details…

Log in to My Account To view your bill. No payment is required on this bill."

103. That was followed in bold type by the words "Pay quickly and save 15% with Speedy Payment Discount". Customers who clicked on the words "Speedy Payment Discount" were taken to the "Bills & Payments" page on their My Account; alternatively, they could log into My Account directly, without using the embedded link.

104. Customers who accessed their Bills and Payments page within 24 hours of receiving the email alerting them to a new bill would see their account balance and the following message:

"Good news! You are eligible for our Speedy Payment Discount. Pay your TV, Broadband and Phone bill in full today and save 15%."

105. The bill showed both the original amount due and the discounted amount, together with the message ""Pay in full today and you will save £X", where £X was the value of the 15% discount in the particular case. Next to this was a "continue" button and the words "pay a lesser amount instead".

106. Customers who clicked on the "continue" button were taken to a payment screen, where they were asked to enter their credit or debit card details and "make payment" of the discounted amount. Following payment, the customer was taken to a "payment completed" screen which confirmed the payment had been successful and displayed the "amount paid", being the original bill less the SPD discount.

107. Despite the lower payment, the customer's "account balance" showed the original amount due, and that only 85% of that amount had been paid. This was because TalkTalk's system was not able to identify that an agreed discounted amount had been paid in "real time". The SPD was subsequently reflected in the customers' on line account balance and shown on their next bill as a "speedy payment discount" under the heading "Adjustments".

108. Customers who accessed their Bills and Payments page more than 24 hours after receiving the notification emails saw the following message:

"Unfortunately you have missed your Speedy Payment Discount period this month. You can take advantage of the 15% discount by making a payment on the day you receive your eBill next month."

109. These customers were also unable to access the relevant alternative payment page so as to pay that month's bill (reduced by 15%) by credit or debit card, because the relevant link had been removed from their My Account page.

110. As required under Clause 10.6 of the T&C, all customers had to have a direct debit in place at all times. Ms Harper confirmed in cross-examination that this was why the email notification of the bill sent to the customer included the words "No payment is required on this bill", because the bill gave a due date in the future (see Clause 10.6), and the sum owed would be automatically collected on that date by direct debit.

111. Where a customer had paid by credit or debit card under the SPD option, TalkTalk did not activate a customer's direct debit for that month, but if a customer did not accept the SPD option by paying within 24 hours, the billed amount would be collected by direct debit. Customers were advised on the SPD webpage not to cancel their direct debit arrangements, and that if they did so, they would be charged an administration fee for the arrangements to be reinstated.

Other findings about the SPD

112. Ms Harper accepted that the SPD was not mentioned in the T&C, and no amended version of the T&C was sent to customers who accepted an SPD offer. Ms Harper also agreed that customers who wanted to access the SPD "had to go through a separate process" under which they were "redirected to a website to make a separate payment".

113. As already noted at §37, Parliament amended Para 4(1) with effect from 1 May 2014, removing the words "whether or not payment is made in accordance with those terms". From that date, TalkTalk paid VAT on the full amount collected from customers, including sums received from those who did not accept the SPD offer. From 1 December 2014, TalkTalk reduced the discount to 10%, and it was withdrawn altogether from December 2015.

114. In the financial year 2015, SPD offers were accepted by customers on 864,032 occasions; Ms Harper's unchallenged evidence was that this represented 2.9% of customers who received electronic bills via My Account. No figures were provided for the four month period January to April 2014, but it was common ground that the percentage of customers who accepted the SPD offer in any month of that period was similarly very low.

Meetings and correspondence with HMRC

115. On 21 May 2014, TalkTalk held a meeting with HMRC about the SPD. On 9 February 2015, Ms Debra Picksley, an HMRC Senior Avoidance Investigator, issued TalkTalk with a decision letter in which she held that the SPD was not within Para 4(1). She also said:

> "Please provide me with a schedule of the amounts received that you have treated as a PPD not subject to VAT for the VAT Period ending 31 March 2014 and the month of April 2014 to enable HMRC to take corrective action."

116. Ms Harper responded on 3 March 2015, asking for a statutory review of Ms Picksley's decision, and saying that in the first four months of 2014, a sum of £10,606,226 collected from customers had not been paid over to HMRC.

117. On 17 April 2015, the HMRC Review Officer, Mr O'Neil, upheld Ms Picksley's decision. On 20 April 2015, HMRC issued TalkTalk with a VAT assessment of £10,606,226. On 12 May 2016, TalkTalk appealed to the Tribunal against Ms Picksley's decision and against the assessment.

THE STARTING POINT

118. Para 4(1) requires that the services be supplied "*on terms* allowing a discount for prompt payment". As the UT said in *Virgin Media UT* at [46] when analysing whether the VLR service at issue in that case came within Para 4(1):

> "...Para 4(1) is dealing with the value of a particular supply: although it speaks of services being 'supplied, its purpose is to prescribe the value of a particular 'supply'. Before it can be applied, the supply to which it is to be applied has to be identified."

119. The UT went on to say at [47] that this required analysis of the contractual terms which applied to the particular supply being considered.

120. The starting point for deciding the Second Issue is thus to establish the contractual position as between (a) TalkTalk as the supplier and (b) the customers who were offered the SPD payment option in relation to the supplies in issue.

121. In that context, both parties referred to the guidance given by Lord Neuberger in *Secret Hotels2 v HMRC* [2014] UKSC 16. Lord Neuberger referred at [29] to *HMRC v Newey* (Case C-653/11) [2013] STC 2432, in which the CJEU said at [41] and [42] that under the case law of that Court "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". He continued at [30]:

> "Where the question at issue involves more than one contractual arrangement between different parties, this court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, 'regard must be had to all the circumstances in which the transaction or combination of transactions takes place'—per Lord Reed in *Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15 at [38], [2013] STC 784 at [38], [2013] 2 All ER 719. As he went on to explain, this requires the whole of the relationships between the various parties being considered."

SERVICES BILLED IN ADVANCE

122. All services were billed in advance, except those in relation to Calls and TV usage, which were billed in arrears, see Clauses 10.5 and 10.17. This part of our judgment considers the services billed in advance; we consider those billed in arrears at §148 below.

Mr Hitchmough's submissions

123. Mr Hitchmough acknowledged that T&C do not refer to the SPD option. However, he relied on Clause 16.1, which provided that the T&C could be changed "at any time for legal, regulatory or commercial reasons"; by the same clause, TalkTalk undertook to notify customers of such changes "in writing and/or by publishing them on our Website (www.talktalk.co.uk)".

124. Mr Hitchmough submitted that this Clause allowed TalkTalk unilaterally to vary the T&C, and it had done so by publishing the details on the SPD webpage, which was part of TalkTalk's website. The services had therefore plainly been supplied on terms "allowing a discount for prompt payment", and so Para 4(1) applied.

Mr Beal's submissions

125. Mr Beal disagreed. He said that the SPD webpage did not say that there had been any change to the T&C, so its contents had not been "incorporated by reference"; instead, as Ms Harper had accepted, customers who wanted to access the SPD "had to go through a separate process" under which they were "redirected to a website to make a separate payment".

126. Mr Beal's analysis was as follows:

(1) In relation to services billed in advance, no service had as yet been supplied to the customer by TalkTalk. The offer and acceptance of the SPD was thus a "supervening agreement" which was "wholly outside the written terms of the agreement captured by the T&Cs" and which supplanted the customer's obligation to pay by direct debit for the services provided in that particular month.

(2) The default time of supply rules in VATA s 6(3) and (4), which implement Articles 62 to 66 of the PVD, provide that services "are supplied" on the earlier of payment and delivery. In the case of telecoms services, Reg 90 provides that the services are supplied at the earlier of payment or receipt of an invoice.

(3) TalkTalk had rightly accepted that the bills it issued to customers were not VAT invoices, and as all services other than Calls and TV usage were billed in advance of the delivery of the service, those services were "supplied" when payment was received from the customer.

(4) Customers accepted the SPD offer by paying the amount shown on the payment screen within 24 hours of the bill being issued. Services billed in advance were therefore supplied when those payments were made.

(5) Those services were supplied under the terms agreed for that particular supply. In particular, the terms included the following:

(a) the cost of the services was 85% of the sum which would otherwise have been payable under the T&C; and

(b) payment was made using a credit or debit card rather than using the direct debit arrangement provided for by the T&C.

(6) As supply and payment happened at the same moment, there were no terms allowing the supply to be paid for on a *future* date. Equally, there were no terms "allowing a discount for prompt payment" on such a future date because the supply and the payment had happened at the same moment. There was nothing to which any offer of a PPD could attach. Para 4(1) therefore did not apply.

Mr Hitchmough's response

127. In response Mr Hitchmough put forward various hypothetical examples and also sought to rely both on Article 79 of the PVD, and on the discussion of a similar point in *Virgin Media FTT*. We discuss those submissions below, together with our explanation as to why we were not persuaded by them.

The Tribunal's view

128. As Mr Beal said in his skeleton argument, for paragraph 4(1) to apply, the following conditions must be satisfied:

(1) there has to be a supply of services;

(2) that supply has to be for consideration in money;

(3) there must be terms on which the supply is made;

(4) those terms must allow a discount;

(5) the discount must be for prompt payment; and

(6) the terms must not include any provision for payment by instalments.

129. We agreed with Mr Hitchmough that Clause 16.1 allowed TalkTalk unilaterally to vary the T&C, but we also agreed with Mr Beal that posting the offer on the SPD website did not,

in itself, change the T&C. Instead, the SPD option was an offer by TalkTalk to vary the T&C on a month by month basis in relation to (a) the charges for the services; (b) the timing of payment and (c) payment method used by customers. It was only if a customer accepted the SPD offer within the narrow 24 hour window that the T&C were varied for that month.

130. That this is correct can be seen from the following:

(1) After the SPD offer had been accepted for a particular month, the T&C applied the following month, unless the customer subsequently accepted the SPD offer within the 24 hour window for that following month.

(2) Customers who did not accept the SPD offer in any particular month had to pay the billed amount "on time" and in full by direct debit, in accordance with the T&C, see Clauses 1.7, 10.2 and 10.6.

(3) The contractual position in relation to the charges was as follows:

(a) Clause 10.1 provided that the "Charges" for providing the services "will be calculated according to [the customer's] Tariff Plan".

(b) The term "Charges" was defined by Schedule 1 to the T&C as meaning TalkTalk's "published list of prices as amended from time to time applicable both to [its] Services in general and [the customer's] particular Tariff Plan".

(c) Clause 10.15 allowed TalkTalk to change the Charges "from time to time", with such changes being notified to customers "by making the amended list of Charges available on our Website".

(d) However, the SPD offer did not amend the Charges or the Tariff Plans. Instead, on a month by month basis, TalkTalk offered certain customers a discount on the Charges. The following month, the Charges remained as shown on the published list of prices/Tariff Plans, unless the customer accepted that month's SPD offer within the 24 hour window.

(e) As Mr Beal rightly identified, the box on the paper bills said "you may be eligible" for the SPD; this wording had been used because TalkTalk did not know whether that customer would accept the SPD offer within the 24 hour window.

131. We also agreed with Mr Beal's further legal analysis, and find as follows:

(1) for the reasons given by Mr Beal, services billed in advance were supplied when payment was received from the customer;

(2) the variation of the contract took place at exactly the same moment as the supply and the payment, and there was thus no term allowing the supply to be paid for on a *future* date;

(3) it follows that there were no terms "allowing a discount for prompt payment" on such a future date; and

(4) as a result, there is nothing to which any offer of a PPD could attach, so Para 4(1) did not apply. In other words, of the six elements contained within Para (4), the fourth and fifth elements were not present because the terms on which each supply was made did not allow a discount.

132. In coming to those conclusions we fully considered Mr Hitchmough's submissions. We next explain why we did not accept them.

The examples

133. Mr Hitchmough put forward two scenarios involving a conveyancing solicitor which he said exemplified the reasons why Mr Beal's analysis was incorrect:

> (1) The solicitor agreed with a client that the fee for a conveyance would be £1,000 if paid 30 days after completion, discounted to £900 if paid within 14 days of completion. The service was supplied when the conveyancing was carried out, and the delivery of that service constituted the supply for VAT purposes. Applying Mr Beal's "time of supply" approach, Para 4(1) applied because at the time of the supply, the terms of the contract allowed a discount for prompt payment.
>
> (2) The solicitor instead agreed with a client that the service would be discounted to £900 if full payment was made *before* any conveyancing services were carried out. In this scenario, were Mr Beal to be correct about the application of the time of supply rules, the payment triggered the supply. On his understanding of Mr Beal's arguments, that would mean Para 4(1) did not apply.

134. Mr Hitchmough submitted that this could not be correct, because Para 4(1) applied where there was "a discount for prompt payment" and the epitome of a "prompt" payment was that payment was made upfront. Moreover, the difference between the two scenarios showed that Mr Beal's analysis would create arbitrary and capricious distinctions depending on the operation of the "time of supply" rules.

135. We disagree. Mr Hitchmough's submission overlooks the fact that in both examples, the solicitor and the client have come to a contractual agreement before either (a) the services are carried out or (b) payment is made. One of the terms of that contract is that the fee will be reduced if payment is made promptly. Para 4(1) therefore applies to Example 2 just as it does to the Example 1, because when the supply took place (on payment), there were terms already in existence which allowed a discount for prompt payment. In other words, all the six elements required for Para 4(1) to apply were present.

136. TalkTalk's contractual position is different from that in these examples. In TalkTalk's case, the T&C contained no term allowing a discount for prompt payment. If a customer accepted the SPD offer he agreed to vary the contract by paying for the services. The new contractual term comes into existence at exactly the same moment as the payment and the supply. There was never a contractual term under which a lower amount was payable if payment were made earlier.

The time of supply rules

137. Mr Hitchmough relied on the examples to support his submission that the time of supply provisions were irrelevant to the meaning of Para 4(1). We disagree. As the UT said in *Virgin Media UT*, before Para 4(1) can be applied "the supply to which it is to be applied has to be identified" together with the contractual terms which relate to that supply. It is thus not possible to apply Para 4(1) without establishing whether a particular supply has been made, and that in turn requires the application of the time of supply rules.

Article 79

138. Mr Hitchmough submitted that Article 79 provided a basis for such a divergence. That Article is set out earlier in this judgment but repeated here for ease of reference. It provides:

> "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…"

139. Mr Hitchmough contrasted the wording of para (a) of that Article, which referred to "price reductions by way of discount for early payment" with the wording of para (b), which reads "price discounts and rebates granted to the customer and obtained by him at the time of the supply…". In his submission, had the time of supply provisions been relevant to prompt payment discounts, they would have been referred to in (a) just as they had been in (b), and that as a result, the time of supply rules are not relevant.

140. Again, we disagree. The reason why there is no reference to the time of supply rules in Article 79 can be explained by reference to Mr Hitchmough's Examples of the conveyancing solicitor. In both, the parties agree a contract which includes a discount for prompt payment. In Example 1, the supply occurs when the conveyancing is carried out, and the discounted amount is paid after the supply; in Example 2, the supply occurs when the discounted amount is paid. In both, in accordance with Article 79, the consideration for VAT purposes is the discounted amount. There is no reference to the "time of supply" rules in Article 79 because where there is an agreement in place allowing a prompt payment discount, the payment of that discount reduces the consideration for VAT purposes, whether the discounted payment is made after the making of the supply, as in Example 1, or whether the payment itself triggers the supply for VAT purposes, as in Example 2. In both Examples, the parties had come to a prior agreement that the consideration would be reduced for early payment.

141. The fact that the time of supply rules are not referred to in Article 79 does not mean they are irrelevant. It is still necessary for there to be a discount "for early payment", and there can be no "early payment" unless there is a contractual term in place fixing a subsequent payment date. That is not the position where the contractual term setting the price and the payment date occurs at the same moment as the supply and the payment.

Virgin Media FTT

142. Mr Hitchmough also relied on the discussion of the similar point in *Virgin Media FTT*. However, the appellant's starting point in that case was that "there is contractual term providing for a discount to be given for early payment", see [178] of the judgment. In other words, the position was essentially similar to that of the solicitor in the two Examples considered above. Most of the analysis of the similar issue in *Virgin Media* is therefore on the basis that there was an existing contractual obligation.

143. Consistently with that starting point, Judge Morgan said at [193] (our emphasis):

> "…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."

144. In TalkTalk's case, the position is different: there is no contractual term in place unless and until the customer accepts the offer by paying for the services via the link on the SPD webpage.

145. It is true that Judge Morgan went on to say:

> "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."

146. We respectfully disagree with this further elaboration. Instead, in our judgment the contractual and VAT position where a lower sum is "paid immediately…when the contract is made" can be illustrated by the following example:

(1) a customer is offered a service for £900 if payment is made now, and for £1,000 if payment is made later;

(2) the customer accepts the contract on the basis that he pays £900 now;

(3) the terms of that contract are that the services will be provided for £900;

(4) no term of that contract allows a discount for prompt payment; instead, the parties negotiated the price of £900 before coming to the agreement;

(5) the fact that there was a hypothetical alternative contract into which the customer could have entered, under which he would pay £1,000 at a later date is irrelevant. This would have been a different contract with different terms; and

(6) VAT is due on the consideration paid and received of £900 under normal principles, and Para 4(1) is irrelevant.

Conclusion on services billed in advance

147. For the reasons set out above, we find that Para 4(1) did not apply to services billed in advance.

SERVICES BILLED IN ARREARS

148. As is clear from Clauses 10.5 and 10.17 of the T&C, Calls and TV usage were billed in arrears.

The parties' submissions

149. Mr Hitchmough took the same position as he had done in relation to services billed in advance, namely that the "terms" under which the Calls and TV services had been supplied were amended to include the SPD option, and as a result there were terms "allowing a discount for prompt payment" so that Para 4(1) applied.

150. Mr Beal submitted as follows:

(1) The Calls and TV usage services had already been consumed when TalkTalk billed the customers.

(2) The terms under which those services had been supplied were those in the T&C. As a result, the customer was required to pay the full amount of the Charges as set out on its website and in the customer's Tariff Plan, and to make payment by direct debit. In other words, the customer had an existing contractual obligation to pay for those services.

(3) VATA s 6(3) and (4), implementing Articles 62 to 66 of the PVD, provide that services "are supplied" on the earlier of payment and delivery. As a matter of VAT law, the Calls and TV usage services had already been supplied, because they had been delivered. The sum due under the T&C was the consideration for those services.

(4) The SPD option was an offer by TalkTalk to accept a lower sum with an earlier payment date to discharge the customer's pre-existing contractual obligation. As a matter of VAT law, this was an offer to accept a post-supply rebate of the consideration already due. A customer accepted this offer by making payment within 24 hours by credit or debit card.

(5) It follows that the Calls and TV usage were not "supplied for a consideration…on terms allowing a discount for prompt payment", and so Para 4(1) did not apply. Instead, TalkTalk had offered a rebate within Article 90, but had given that rebate only to customers who accepted the SPD option.

(6) The rebate was applied as an "Adjustment" to the following month's bill, see §107. Around 3% of customers accepted the SPD offer, and TalkTalk only credited those customers with an Adjustment. In other words, it was only those customers who benefitted from the rebate.

(7) However, TalkTalk had charged a VAT inclusive price to all its customers, and the 97% of customers who did not accept the rebate had paid over an amount of VAT on the full price, and that VAT had not been paid to HMRC. There was no legal basis for this approach.

The Tribunal's view

151. The Tribunal agrees with Mr Beal for the reasons he gave. We find that customers who accepted the SPD offer had received a rebate on a pre-existing contractual obligation, while those who did not accept the offer paid for their Calls and TV usage in accordance with the T&C. In neither case were those services "supplied on terms allowing a discount for prompt payment", and Para 4(1) did not apply.

INSTALMENTS

152. It follows from our conclusions in relation to services provided in advance and services provided in arrears that HMRC succeed in this appeal. However, both parties also made submissions in relation to Para 4(2), which provides that Para 4(1) does not apply if "the terms include any provision for payment by instalments". We set out their positions and our view below.

Mr Beal's submissions

153. HMRC's primary case was that the services do not fall within Para 4(1). However, in the alternative and strictly without prejudice to that main case, Mr Beal contended that the "instalment" provisions in paragraph 4(2) applied, but only where a customer was within an agreed "minimum period".

154. That alternative submission was made briefly, and was based on the following:

(1) By the T&C, TalkTalk agreed with its customers that it would provide services for a minimum period of at least 12 months; that agreement was made in advance of the services being supplied.

(2) The customer had therefore agreed to pay TalkTalk during that minimum period, and the monthly payments were therefore instalments of the total amount the customer had contracted to pay in relation to the minimum period.

Mr Hitchmough's submissions

155. Mr Hitchmough disagreed. He said that the phrase "payment by instalments" instead applies where there is a debt due of a specified amount, which is satisfied by payments due at intervals. That was not the position here, because the contract between the customers and TalkTalk continued indefinitely, see Clause 1.4. As a result, the length of the contract (and thus the total payable to TalkTalk by the customer) was not capable of being determined in advance, and the monthly payments could therefore not be "instalments".

156. Mr Hitchmough also relied on *Virgin Media FTT*, where at [202] Judge Morgan had rejected essentially the same submissions made by Mr Beal, similarly made in the alternative, saying:

> "…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…I cannot see that the position is any

> different as regards supplies made to a customer who was within a minimum period…the minimum period does not affect the duration of the contract."

The Tribunal's view

157. We agree with Mr Hitchmough. The Oxford English Dictionary confirms his definition of "instalment", saying that it means:

> "Each of several parts into which a sum payable is divided, in order to be paid at different fixed times; a part of a sum due paid in advance of the remainder.

158. Jowett's Dictionary of English Law similarly defines an "instalment" as:

> "A portion of a debt. When a debt is divided into two or more parts, payable at different times, each part is called an instalment, and the debt is said to be payable by instalments."

159. It is clear from Clause 10 of the T&C that the contracts between TalkTalk and its customers "continue until terminated", so there is no fixed period over which a known amount could be spread so as to be paid "by instalments". There are also uncertainties as to the amounts payable:

(1) Clauses 11.2 and 11.8 provide that a customer who wishes to terminate before the end of the applicable minimum period has to pay "an additional charge" to "compensate for [TalkTalk's] losses". There was no evidence before the Tribunal as to the computation of this additional charge, other than that it was a multiple of the number of months remaining in the minimum period (Clause 11.8).

(2) In most cases, it is reasonable to assume that the amounts payable by customers will include charges for Calls. These would have been highly variable as between customers and on a month by month basis.

160. Although we were referred to *Esporta v HMRC* [2014] EWCA Civ 155, we did not find this case to be of assistance. It is true that it concerned monthly payments made by members of a sports club which were described as "instalments", but the issue in *Esporta* was whether payments made by defaulting members were damages, or whether they were consideration for a supply of services. It was no part of the *ratio* of the case to decide on the meaning of the term "by instalments".

161. Reference was also made to Reg 90, but that simply provides the date on which a supply is deemed to be made when the 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". It does not help us to establish whether TalkTalk's customers were paying "by instalments".

CONCLUSION ON THE SECOND ISSUE

162. For the reasons explained above, HMRC succeed on the Second Issue. None of the supplies made by TalkTalk come within Para 4(1) because, in summary:

(1) In relation to services billed in advance, there were no terms "allowing a discount for prompt payment". This was because the contract was only varied (so that the customer paid a lower amount for a particular month) if the customer accepted the SPD offer for that particular month by making the payment within 24 hours. The variation of the terms happened simultaneously with the payment, and there was no term allowing for a discounted payment to be made on a *future* date.

(2) In relation to services billed in arrears, the SPD was an offer by TalkTalk to accept a lower sum with an earlier payment date to discharge a pre-existing contractual

obligation, and was thus a post-supply rebate of the consideration already due. Again, Para 4(1) did not apply.

163. Were we to be wrong in those conclusions, we would have found that TalkTalk succeeded on the instalments issue.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

164. We decided the First Issue in TalkTalk's favour, concluding that Para 4(1) means what it says, namely that where goods or services are supplied on terms allowing a discount for prompt payment, consideration is deemed to be reduced by the amount of the discount, whether or not the customer obtains the discount as the result of paying promptly. It is not possible to construe Para 4(1) so that it is consistent with the PVD, because to do so would go entirely against the grain of the provision, and would "cross the boundary between interpretation and amendment".

165. However, we went on to decide the Second Issue in HMRC's favour, for the reasons summarised at §162. It follows that we refuse the appeal and uphold the decision and the assessment.

Appeal rights

166. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21st DECEMBER 2022