

## When is a Free Gift a Rebate?

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*John Walters QC, Gray's Inn Tax Chambers, and Peter Landon, CW Energy Tax Consultants Ltd, comment on the High Court decision in the Total UK Limited appeal on business promotion trading stamp schemes*

Sir Andrew Park's recent decision in the High Court in the case of *Total UK Ltd v HMRC* will have important and possibly wide-reaching implications. The decision, which has gone in Total's favour, reversed that of Stephen Oliver, QC, President of the VAT and Duties Tribunal. It is possible that HMRC will seek leave to appeal the Judge's decision to the Court of Appeal. But Sir Andrew Park's decision has been expressed in fairly forthright terms and it is therefore worth at this stage having a look at what the case was all about.

### A Brief Perspective

Primarily, it was an appeal about how *consideration* is viewed for VAT under Article 11 of the Sixth VAT Directive 77/388/EEC. It is the latest in a line of cases on the VAT treatment of business promotion schemes, the scheme, in this case, being the 'Total Oil Promotion Scheme', or 'TOPS' as it is generally known. It is a collector scheme that encourages customer loyalty by offering rewards and follows a familiar format. Customers who become cardholders, and who register with Total, collect electronic points on a plastic swipe-card at the rate of five points per litre of fuel purchased. The deal is thus:

'Collect 5,000 TOPS points and you become entitled to claim a £5 gift voucher issued by one of a selection of high street stores — Boots, M&S and Kingfisher/B&Q.'

Alternatively, the customer can choose to donate £5 to a recognised charity, school or community project via a charity gift voucher. So the promotion has similarities to that considered in the *Kuwait Petroleum* case — *Kuwait Petroleum (GB) Ltd v Commissioners of Customs and Excise Case C-48/97* [1999] STC 488 (but the customer's reward is a gift voucher, not goods) and that in *Tesco plc v Commissioners of Customs and Excise* [2003] STC 1561 (but in that case the vouchers were discount vouchers issued and redeemed by Tesco). In a nutshell, what Total was arguing was that, to accord with the cash-back aspects of the decision of the ECJ in *Elida Gibbs Case C-317/94* [1996] STC 1387, the value returned to the customer in the form of the gift voucher represented a retrospective rebate of the consideration received by Total for the fuel.

### An Illustration Of The Tops Scheme

To illustrate how the TOPS scheme works, suppose that a particular customer has his, or her, eye on a toaster, with a retail price in the Boots homewares section of £16.

- To get that toaster, the customer, needs, under the terms of the promotion, to buy 3,000 litres of Total fuel and amass 15,000 points.
- Having bought, say, 3,200 litres (16,000 points), the customer decides to apply to Total to redeem 15,000 of them for three Boots Gift vouchers worth £5 each, leaving a balance of 1,000 points on the card.
- The customer then takes the vouchers to Boots and exchanges them, with payment of the balance of the purchase price — £1, for the toaster.

On these facts, Total argued as follows:

- Just as the £1 paid by Elida Gibbs in redemption of the cash-back coupons in *Elida Gibbs* resulted in a return of value to the customer, so did the provision of the face-value voucher to the customer by Total, under the TOPS scheme.
- There is no supply of goods or services when Total obtains the face value voucher from the high street store; that transaction is indistinguishable from the issue of shares considered in the case of *Kretztechnik v Finanzamt Linz Case C-465/03* [2005] STC 1118.
- Alternatively, if there is a supply to Total by the high street store, it is an exempt supply of services within Article 13B(d)3. Those services are not cost components of supplies of fuel made by Total; they are used by Total in making rebates to customers.
- The vouchers are documents evidencing the high street store's obligation to accept them, instead of money, taken at face value. They are securities for money [or better, perhaps, financial instruments] and equivalent to cash.

At Tribunal level, none of these arguments was accepted.

### **The Tribunal's Reasons For Deciding Against Total**

Stephen Oliver QC decided that, if Total were to invoke *Elida Gibbs* successfully, it had to be able to show that the supply of the vouchers by the high street store to Total came within the same chain(s) of transactions as the transactions by which Total supplied fuel to its customers, who later called for the vouchers under the TOPS scheme. What he said was:

'There are two separate but related supply chains. The first is the chain of supply of the road fuel from Total (via the third-party dealer in some instances) to the customer. In contrast to the *Elida Gibbs* scenario, the customer obtains no cash-back voucher from Total in respect of this supply. The second chain starts with the retailer's supply of a £5 gift voucher for Total to use in the redemption process. There is no relevant linkage between the two chains. In particular no part of the cost components in the first supply chain are cost components in the second chain. And, vice versa, none of the cost components in the second chain, e.g. Total's payment for Boots' supply of a voucher ...

plus a part of the cost of administering the TOPS scheme, can properly be ascribed to Total's supply of the 50 litres of road fuel.'

### **What Are The Vat Chains Of Supply?**

But the Tribunal's analysis had critically misrepresented Total's contention. It was never part of Total's case that *spending* £5 to buy the £5 Boots voucher provided the 'retrospective discount'; the discount was the *transfer* of the voucher to the customer when he or she (having bought the requisite quantity of Total fuel) called for it. The price paid by Total for the vouchers on their issue was, of course, important. It quantified the value of the rebate given by reference to the cost of the voucher (as per *Argos Distributors Ltd v Commissioners of Customs and Excise Case C-288/94* [1996] STC 1359. But that's all. And the fallacy of the Tribunal's conclusion is then obvious if you look closely at these chains of supply.

- The first chain of supply is that of fuel. This commenced with Total, in the case of a third-party dealer involved an intermediate supply, and ended up with the customer. Under the TOPS promotion, each sale of fuel to that customer, whether by Total direct or via a dealer-owned site, can be specifically tracked and the transfer of the voucher is a return of value by Total against the consideration it had earlier received and in recognition of those cumulative supplies of fuel.

- The second chain of supply is the provision, in our example, of the toaster by Boots. This is entirely a matter between Boots and the customer. Total is not part of that transaction and its purchase of the voucher is irrelevant.

- There is, perhaps, a third chain of supply, starting with the issue of the voucher and ending with its acceptance in part payment for the toaster. But this is a very arid chain of supply and (as HMRC accepts) produces no VAT at all.

### **The Judge's Decision On Chains Of Supply**

Sir Andrew Park agreed with Total's analysis and decided that the principle of *Elida Gibbs* applied to the TOPS scheme. That principle is that, where a trader supplies goods (or, no doubt, services) for a stated consideration but under a sales promotion arrangement is obliged to pay an amount away to the ultimate consumer or to an intermediary in the chain of supply, the consideration upon which the trader should be finally liable to VAT is to be reduced by the amount so paid away. It is true that what was paid away in TOPS was in the form of a voucher rather than money. However, that did not change the result. It was clear that Total transferred vouchers to customers because of the terms on which fuel was supplied to the customers. When a customer who joined the TOPS scheme filled up his car with fuel at the Total station (or at a dealer station supplying Total fuel), he did so on terms that he would pay the full price charged at the pumps but would be entitled to receive a voucher from Total if the current fuel purchase and other purchases which he made were large enough to qualify. Conversely, Total was committed to transfer vouchers to customers as part of the terms on which fuel was supplied.

### **Broad effect of *Elida Gibbs* not confined to facts**

Commenting on *EC Commission v Germany Case C-427/98* [2003] STC 301) Sir Andrew Park observed that the ECJ had reaffirmed the full force and ambit of the *Elida Gibbs* decision. *EC Commission v Germany* had concerned infraction proceedings brought by the Commission on the ground that Germany had retained in its domestic VAT law provisions which were incompatible with *Elida Gibbs*. However, despite attempts by the German and the UK governments to persuade the Court to reconsider its judgment in *Elida Gibbs*, it was clear that the analysis in *Elida Gibbs* was upheld. Interestingly, the Judge referred, at one point, to paragraphs 26 to 30 of the ECJ judgment in *Elida Gibbs*, where emphasis was placed on Article 11A(1)(a) of the Sixth Directive, rather than just Article 11C(1), whose words, he felt, would not perfectly fit the situation of the cash-back scheme. The Court had expressed the view that it would not have been in conformity with the Directive for the taxable amount used to calculate the VAT chargeable to the manufacturer (*Elida Gibbs*), to exceed the sum finally received by it. Otherwise the principle of neutrality would not be complied with. The decisions in *Elida Gibbs* and *Total* were really concerned with the ambit of Article 11A(1)(a) — what constitutes consideration for VAT purposes — rather than with the narrower question of what type of payment is a rebate within Article 11C(1). We suspect, though, that it is the fact that in the TOPS scheme (as in the cash-back scheme in *Elida Gibbs*) the return of value was made in recognition of past supplies to the customer — and not as an inducement to receive future supplies — that will be the key to understanding this decision. There may, for example, be difficulty in applying what Sir Andrew Park has said to situations, like those in *Primback*, where interest-free credit is offered for current or future purchases and where the expense of providing this is a cost component of the principal supply.

### ***The attainment of this neutrality — (implications of Kuwait?)***

What neutrality means is essentially that VAT should not be charged on an amount greater than the true proceeds of the transaction of supply and this must take account of what the trader has to part with. As the Judge observed:

'If Total's scheme was a pure money scheme and a customer who had purchased 1,000 litres at Total stations, paying £1,000 at that stage, was entitled to receive £5 from Total, the true cost of the fuel to the customer falls from £1,000 to £995. That is all that, in the end, the customer has paid. It would offend the neutrality principle if Total was required to pay VAT by reference to £1,000, not £995. This case is almost the same as that. The difference is that Total is able to meet its commitment to the customer at a cost to itself of £4.50, not £5. The neutrality principle still requires that Total should not be liable to pay VAT by reference to £1,000, but it is complied with if Total is liable to pay VAT by reference to £995.50. That is the result for which Total contends. HMRC's case is that it should be liable to pay VAT by reference to £1,000.'

Incidentally, *Kuwait Petroleum*, which was relied on heavily by HMRC, was thought to be largely irrelevant, as the issue there was the treatment of the redemption goods and not the consideration received for the supply of fuel.

### **By The Way ...**

A last observation you may like to note: Total had argued the vouchers, whilst not money, were sufficiently close for it to make no difference. This prompted the Judge's comment that they are *choses in action*, representing not a right to obtain goods or services (from Boots in the examples used) but a right to have the price payable for goods or services satisfied in whole or in part by an amount equal to the face value of the voucher. Where that leaves HMRC's policy in relation to VATA 1994, Schedule 10A — which is drafted on the assumption that these vouchers confer rights to obtain goods or services — remains to be seen. John Walters was the Counsel for Total and Peter Landon was their Adviser