Neutral Citation: [2022] UKFTT 00366 (TC)

Case Number: TC08616

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/02484(V)

Value Added Tax Act 1994. Value Added Tax Regulations 1995. Face-value vouchers, redeemable on the online games platform "Steam", owned by Valve Corporation. Vouchers sold to appellant by a concession run by DSG Retail Limited within Harrods Limited. Whether single purpose vouchers within the meaning of paragraph 7A of Schedule 10 to the Value Added Tax Act 1994. Held: no. Whether retailer vouchers within the meaning of paragraph 4(1) of that schedule. Held: yes. Whether supply to appellant was by an agent of the issuer of the vouchers (Steam). Abbotsley Limited and others v HMRC [2018] UKUT 191 (TCC), & Město Žamberk v Finanční ředitelství v Hradci Králové, now Odvolací finanční ředitelství, Case C-18/12, ECLI:EU:C:2013:95, [2014] STC 1703 considered. Held: no. The supply to appellant was not therefore the first supply of the vouchers ("the issue" of the vouchers) but a "supply…subsequent to the issue" of the vouchers. VAT was therefore chargeable on the vouchers by virtue of paragraph 4(4) of Schedule 10. Whether appellant paid that VAT. Held: yes. Zipvit v HMRC [2018] EWCA Civ 1515 considered. Whether HMRC erred in law in relation to regulation 29(2) discretion to accept evidence other than VAT invoices of VAT paid by the appellant. GB Housley Limited v HMRC [2016] EWCA Civ 1299 cited. Held: yes. Appeal allowed. Section 47(3) and (4) of the Value Added Tax Act 1994 considered.

Heard on: 13 and 14 December 2021
Post-hearing submissions:
16/3/2022, 18/5/2022, 1/6/2022[1]
Judgment date: 22 September 2022

Before

TRIBUNAL JUDGE RACHEL PEREZ
MS CELINE CORRIGAN

Between

LUCKY TECHNOLOGY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant:	Mr Michael Firth of counsel
For the Respondents:	Ms Sharon Spence and Ms Dawn Leppard both of HMRC, and, for post-hearing submissions, Mr Michael Ripley of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs
Oral evidence:	Mr Howard Suryaatmadja of the appellant. Officer X of HMRC.

[1] Received by panel 8 April and 16 June 2022, following which one of the panel was away for a time.

to reclaim. But, since we are deciding that the supply was taxable, we need not decide whether input tax was recoverable even if the supply was not taxable.

(8) Introduction: Questions for the tribunal

13. The questions for the tribunal therefore, are—

(1) Are the vouchers single purpose vouchers?

(2) If not, was Harrods acting as agent or as principal in supplying the vouchers?

(3) If Harrods was acting as agent, was Harrods nevertheless part of the supply chain by virtue of section 47(3) or (4), and so made a taxable supply to the appellant?

(4) Was the VAT, if chargeable, paid by the appellant?

(5) If the VAT was chargeable and the appellant paid it, did HMRC err in law in relation to their regulation 29(2) discretion?

B. Facts

14. The following facts did not appear to be in dispute.

(1) Facts: The nature of the vouchers

15. Two types of voucher were mentioned in a distribution agreement dated 15 October 2005 between Omega Logic Limited and DSG Retail Limited[9] (see paragraph 37 below). One type was an E-Voucher, the other a Point of Sale Activation card, referred to respectively as a "Steam E-Voucher" and a "Steam POSA Card". Each voucher bore a unique claim code, for entering onto the Steam website to redeem the voucher. The POSA card was a physical plastic item, bearing a scratch-off strip which would reveal the unique claim code. The card came inside packaging which bore instructions and terms and conditions, and which said "No Value Until Activated at Register". Entering the code onto the Steam website credited the user with funds on the website, referred to on the POSA card packaging as "wallet funds". It is not clear whether E-Vouchers too were sold as physical items (there is a reference to printing in relation to them in the distribution agreement).

16. As Mr Howard Suryaatmadja, the appellant's sole director and shareholder, said in his witness statement, and which HMRC accepted, "Over the years, the industry began to change. Initially, the vouchers were physical pre-activated vouchers. The more modern way of distributing vouchers was electronic. The change to electronic vouchers took place around 2014. The cards were only activated on purchase from the retailer. The cards come in various denominations [and] are activated by the retailer" (paragraph 14, page A182). The vouchers in this appeal were bought from 1 May 2016 onwards, so after the 2014 change that Mr Suryaatmadja mentioned. And it was common ground that the vouchers were not pre-activated, and were instead activated at the till at or just before the time of sale. But submissions were made on the basis – and we accept – that the vouchers in this appeal were the Point of Sale Activation cards that the appellant took off the shelf and to the Dixons (DSG Retail Limited) till within Harrods: in other words, they were physical cards but not pre-activated.

[9] As varied by an agreement between Epay[9] and DSG Retail Limited in 2013 to apply to Steam products

17. It was common ground that, by the time of the appellant's purchase of the vouchers in this appeal, more than merely games could be redeemed with the vouchers. The effect of that however was not common ground, as we shall explain later.

18. The price the appellant paid for the vouchers did not exceed their face value.

(2) Facts: The appellant's dealings with Harrods

19. The way in which the appellant dealt with Harrods was this. When Mr Suryaatmadja of the appellant purchased Steam vouchers from Harrods, he was provided with a till receipt. Since the till receipt did not show the VAT on the transaction, Mr Suryaatmadja would request a VAT invoice. He would collect the till receipts for a whole month and then his bookkeeper would transfer the relevant information from those receipts to a spreadsheet. The spreadsheet would show the date, transaction number and value. The bookkeeper would email the spreadsheet to Harrods along with a request for VAT invoices for the purchases mentioned on the spreadsheet. Usually, the appellant would receive in return a summary or "bulk" invoice from Harrods, showing VAT at 20%. The appellant submitted on its VAT returns the details from the summary or "bulk" invoice, and had no problem recovering input VAT, even after receipt of HMRC's 22 June 2015 letter (paragraph 175 below). It seemed to be common ground that – as Mr Suryaatmadja had said in his witness statement – the VAT previously recovered, for the November 2015 to April 2016 purchases, was recovered on the basis of bulk invoices. This is what Mr Suryaatmadja said in paragraph 26 of his statement—

> "26. The bulk invoices from 23 December 2015 to 30 April 2016 are exhibited at pages 2 to 7 and show sales of vouchers including Steam Cards from Dixons to Lucky Technology Limited. These vouchers were purchased over the counter and example till receipts are exhibited at page 8 to 23 of HS 1. As stated above, we would request these bulk invoices as evidence of VAT paid on the transactions. They were usually sent to us in the post by Harrods. It can be noted these included an amount for VAT and on the basis of these invoices, we did not have a problem recovering input VAT.".

20. However, by the end of 2016, it occurred to Mr Suryaatmadja and his bookkeeper that their request for VAT invoices appeared to have been ignored by Harrods. At first, Mr Suryaatmadja and his bookkeeper did not think this was out of the ordinary, because they "would often need to chase Harrods for the invoices". Mr Suryaatmadja spoke to a gentleman in Transaction Services at Harrods. The gentleman told Mr Suryaatmadja that he, the gentleman, would get the invoices done and sent, but that did not then happen. Despite further chaser emails by the appellant, Harrods was initially silent and subsequently refused to provide the requested invoices, which related to the May 2016 onwards transactions. We have set out below how Harrods' position appeared to change. (We make clear however that we include what is in this paragraph as background. Harrods was not before us to contest it. We do not expect what we say about Harrods' silence to be accepted as a fact in other proceedings if and to the extent that it is relevant in other proceedings.)

(3) Facts: The appellant's dealings with HMRC leading up to the decision

21. Before the appellant had put in the VAT claims on this appeal, Mr Andrew Jenkins of HMRC had written to the appellant on 22 June 2015 saying (among other things)—

> "Where a purchase exceeds £250 it is a requirement to ensure that before you claim VAT you have a valid VAT invoice. HM Revenue and Customs policy is quite clear and always has been, the requirements of what constitutes a VAT invoice are clearly set out in Notice 700 The VAT Guide Section 16, see also Regulation 14(1) of VAT Regulations 1995 (SI 1995/2518). HM Revenue and Customs

> statement of practice relating to Input Tax deduction without a valid VAT invoice, which was revised in March 2007 (please refer to Revenue & Customs Brief 83/09 which is available via the gov.uk website as an archived item) clearly states that discretion can only be applied in cases where there is no valid VAT invoice and it is not possible to obtain a proper VAT invoice. If there is any doubt as to whether you will be able to obtain a valid VAT invoice the first thing you need to establish is if it is possible to obtain valid VAT invoices, and from my correspondence with you (Mr Qureshi) this would certainly appear to be the case with supplies made by Harrods and other large retailers such as Sainsbury's and Tesco. You should not reclaim VAT input tax without valid VAT invoices, it is a requirement for suppliers, in this case retailers, to provide VAT invoices on request if the value of the supply exceeds £250; payment creates a tax point and it is a requirement that a VAT invoice is issued within 30 days or [sic] the creation of a tax point. Therefore you should have all the necessary documentary proof to support VAT input tax deduction if a VAT invoice is requested when the goods are purchased. Especially when considering that even if goods were purchased on the final day of a VAT period the due date will be over a month from this date.
>
> For the avoidance of doubt please do not reclaim VAT on purchases exceeding £250 unless you have first obtained valid VAT invoices, it is not acceptable to claim any VAT while anticipating that a valid VAT invoice may be supplied to you at some point in the future." (page A79).

22. HMRC had however – after this letter – continued to permit input tax claims for which till receipts and eventually bulk invoices showing 20% had been used. Those claims were for the November 2015 to April 2016 VAT periods.

23. After the appellant had put in VAT claims for the 2016 periods in question in this appeal, Mr John Payne of HMRC on 22 December 2016 emailed the appellant arranging to visit the appellant. The letter dated 23 December 2016 attached to the 22 December email said, among other things—

> "Thank you for your time on the phone earlier today. As we agreed, I have made an appointment for one of our officers to visit the company. Details of the visit and the officer's name are shown above.
>
> The purpose of the visit is to check the company's repayment return for the period 10/16 and to examine the records that relate to this return. If we need to look at records for any other periods, we will let you know.
>
> If you need to change the date, time or place of the visit, please phone me as soon as possible on the above number.
>
> Please note that until we have checked the company's claim, we will not be able to make the repayment." (page A63).

24. Officer X of HMRC visited the appellant on Tuesday 24 January 2017. At the visit, Officer X asked Mr Suryaatmadja for the supporting invoices. He told Officer X that the appellant had been attempting to obtain the invoices, but that Harrods had not been responding. Officer X emailed Mr Suryaatmadja two days later on 26 January 2017. The email said, among other things (emphasis in original)—

> "Thank you for the time you spent with me on Tuesday.
>
> As you know, I was disappointed to note that you had used till receipts from Harrods as evidence of your right to deduct input tax.
>
> You have been told on at least two previous occasions that this is not acceptable.

You must obtain a valid VAT invoice for each purchase you make on which you make a claim for input tax. Without a valid VAT invoice, you cannot reclaim the VAT paid on the purchase.

Harrods is a large company and should be well aware of the requirements for issuing a valid VAT invoice when making a supply to another registered person.

[…]

HMRC's position with regard to how and when input tax can be claimed is described in Regulation 29(1) of the VAT Regulations of 1995:

> "Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice".

The emphasis in that quotation, above, is mine to emphasise that input tax should not be claimed where the appropriate invoice is not held.

Regulation 29(2) of the same VAT Regulations of 1995 makes these even more explicit:

> "At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
>
> (a) a supply from another taxable person, **hold the document which is required to be provided under regulation 13**"

I urge you to look at The VAT Guide and regulation 13 and 14 of the VAT Regulations of 1995 for further details, should you need them.

As I clearly stated on Tuesday, you **must contact Harrods to obtain valid VAT invoices for all purchases you have entered onto your VAT returns to reclaim VAT. Please copy me in to any contact you have with Harrods by email**.

You must provide me with copies of those invoices by close of business on Thursday 9 February 2017. If I am not in receipt of those invoices by then, I will take steps to review the information I hold and disallow the VAT you have reclaimed when you were not in possession of a valid VAT invoice. I will then also make consideration to apply a penalty for the inaccurate return(s) you have submitted." (pages A378 and A379).

25. Mr Suryaatmadja of the appellant forwarded that email to Harrods. Mr Suryaatmadja received in reply an email on 27 January from Harrods, attaching zero-rated bulk invoices for the transactions in question, that is, the May 2016 onwards transactions. His evidence was that he immediately forwarded that email to HMRC. We could not see that email from him to HMRC, but whether he sent it immediately is not material; we accept that he supplied the zero-rated invoices to HMRC (and there were emails from him on 9 February in which he did so: see below).

26. Officer X of HMRC then wrote to the appellant on 2 February 2017 saying (among other things)—

> "During my review last week, it became apparent that there were large purchases – mainly from Harrods – that were not supported by a valid VAT invoice. You held till receipts and, when challenged, showed me that you only held invoices from Harrods up until April 2016. This is not acceptable and does not constitute appropriate evidence to support a VAT claim. You must not reclaim VAT on purchases exceeding £250 unless you have first obtained valid VAT invoices
>
> It is particularly disappointing that you are still doing this despite Mr Jenkins' clear direction.
>
> When I questioned you about this, you stated that you were aware that you were not supposed to claim this VAT but blamed Harrods for it as they are "slow to provide invoices". You said that you had been chasing them for invoices. The evidence you produced to support this showed you emailed them once in November 2016 and then once again in the middle of January 2017. I queried if you would have made more regular and persistent contact with them if they owed you an amount of money equal to the VAT you had reclaimed on purchases from them. You agreed you would. I believe this shows that you know you have not made sufficient efforts to obtain valid evidence to support your VAT claim.
>
> I gave you a two week period in which to obtain evidence from Harrods – see my email of 26 January 2017. I also gave you a copy of guidance showing what is included on a valid VAT invoice. **If you do not provide me with valid VAT invoices to support your purchases from them, I will disallow this input tax from your return**. You must provide these invoices by close of business on **Thursday 9 February 2017**." (pages A83 and A84, emphasis in original).

27. On 9 February 2017, Mr Suryaatmadja emailed HMRC attaching bulk invoices bearing the Harrods' logo and VAT registration number. Those invoices showed a nil VAT rate on the May 2016 onwards transactions, whereas invoices for the pre-May 2016 transactions had shown a VAT rate of 20% (the change from 20% to 0% is shown by comparing the transactions listed on page A192 with those listed on page A89).

(4) Facts: The terms of HMRC's decision letter

28. HMRC then sent the decision letter dated 16 February 2017. The letter said, among other things (emphasis in original)—

> "I can confirm that I have used the figures you have provided as per the table below in order to raise assessments under section 73 of the VAT Act 1994 for the VAT due.
>
> **Purchases exceeding £250**
>
> As I mentioned in my previous letter, my colleague Mr Jenkins was clear with regard to the evidence you must hold when reclaiming input tax (VAT on your purchases). We also discussed this is some depth when I visited your premises several weeks ago.
>
> During my visit, it became apparent that there were large purchases – mainly from Harrods – that were not supported by a valid VAT invoice. You held till receipts and, when challenged, showed me that you only held invoices from Harrods up until April 2016. This is not acceptable and does not constitute appropriate evidence to support a VAT claim. **You must not reclaim VAT on purchases exceeding £250 unless you have first obtained valid VAT invoices**

> I gave you a two week period in which to obtain evidence from Harrods – see my email of 26 January 2017. I also gave you a copy of guidance showing what is included on a valid VAT invoice.
>
> As you should be aware, the invoices you provided showed very little VAT.
>
> The email you sent to me on 13 February 2017 mentions "game cards" but the invoice example you provided specifically mentions gift cards. As such, I am not sure what relevance this has as it does not constitute an invoice for a specific purchase you have made.
>
> I have reviewed the purchase ledgers you provided and the transactions listed on the Harrods invoices. From this, I determined how much VAT you have claimed on returns since May 2016 when you were not in possession of a valid VAT invoice.
>
> […]
>
> As a result of the adjustment for the 10/16 period (shown above), the repayment previously claimed of £233,462.78 has been reduced to £159,068.39. The remaining amount will be credited to your VAT account in the next few days. Should you acquire valid invoices for any supplies where I have disallowed the VAT claimed, you may consider including this on a later return. You may have to bear in mind the Error Correction procedures and I urge you to research these on the gov.uk website or by searching for Public Notice 700/45 in most internet search engines." (pages A118 and A119).

(5) Facts: Harrods' actions

29. Having been supplying bulk invoices showing VAT for Steam voucher transactions shown in till receipts up to the end of April 2016, that is, for the pre-May 2016 transactions, Harrods had stopped supplying them, as mentioned above. The appellant forwarded to Harrods Officer X's post-visit email of 26 January 2017. Harrods responded by email on 27 January 2017 attaching bulk invoices which showed zero VAT for purchases of Steam vouchers from 1 May 2016 onwards. The evidence before us was – and we find – that this was the first time that Harrods had indicated to the appellant that Harrods was saying Harrods had not charged VAT on those purchases. Having received from Harrods the zero-rated bulk invoices on 27 January 2017, the appellant raised the apparent zero rating with Harrods. Harrods responded by email of 9 February 2017 saying they had discussed the matter with their VAT accountant who had said that the transactions were properly zero rated (we could not see this Harrods email in the bundle but the appellant said this in paragraph 23 of his statement and we accept it). That 9 February 2017 email was, on the evidence before us, the first time that Harrods had told the appellant, in so many words (as opposed to attaching zero-rated invoices), that Harrods was saying it had not charged VAT on the May 2016 onwards transactions.

30. The appellant then received HMRC's decision letter. On the same day as he received the decision letter, 16 February 2017, Mr Suryaatmadja forwarded it to Harrods' VAT accountant, Mr Jay Majevadia. Mr Majevadia replied the same day, saying—

> "I would agree your point the concession vouchers should be marked as 20% Standard Rated as these are SPV's. The nature of the change made by the concession has a large material impact on your input VAT claim and I note the letters you have received from HMRC. I will be contacting the VAT Accountant at Dixons Apple for an immediate explanation. Without second guessing their response I am fairly sure they will admit they have miss-coded their vouchers with the wrong VAT rates. Once I get their agreement there will no doubt be credits notes and revised invoices showing the correct VAT. Harrods will in turn make a voluntary disclosure to HMRC which will also create revised VAT invoices for your above three invoices."

(email page A63, the date is not shown but we were told, and accept, that this email from Mr Majevadia was sent on 16 February 2017).

31. There was then correspondence on 14 and 15 March 2017 between Harrods and HMRC (pages A457 and 458). In his email of 14 March 2017 to HMRC, Mr Majevadia of Harrods – having agreed in his above email to the appellant that the vouchers should be "20% Standard Rated" – wrote to Jamie Yeardley of HMRC, saying—

> "Jamie
>
> I hope you well. It has been some time since we last spoke so I think we are about due for a "tricky" VAT question, and there is no other area which can be as problematic than the area of "vouchers".
>
> If I may detail some back ground information.
>
> The Dixons Group operates a concession within the store and this concession covers products from, Dixons Retail, The Carphone Warehouse and Apple Inc.
>
> The concession sells the following products :-
> Mobile Phone Top-Up Vouchers.
> Netflix Vouchers, Google Play Vouchers, iTunes Vouchers,
> Steam Cards, SONY PSN, XBOX Live & Minecraft Game Vouchers.
>
> As with most concession agreements we rely on the concession to give us a database of all the articles they wish to sell together with the appropriate VAT rates to apply to that product. Our self-billing sale to the concession and the back to back sale to the customer would follow that given VAT rate. Part of my routine compliance work is to check the article VAT rates on all sales are correct and to that cause I have the above articles which are giving some concerns.
>
> I would like some guidance on what the retail VAT rate should be when we Harrods Ltd sell the above to our customers. There is some dispute if these vouchers are classed as :-
> Single Purpose Vouchers (SPV) or Multi Purpose Vouchers (MPV).
>
> A SPV would lead to applying and selling the vouchers as standard rated 20% articles. (the principal being VAT is charged and claimed along the re-selling chain and no VAT is accounted for by the final redeeming company).
>
> A MPV would lead to applying and selling the vouchers as non-VATable articles 0%. (the principal being VAT is not charged or claimed along the re-selling chain and only at the redemption stage does the final redeeming company account for VAT).
>
> Our current stance on these vouchers is that we treat them as MPV and do not account for any VAT on the onward sale.
>
> On receiving the articles from the Dixons group their classification is - All point of sale authorised vouchers are done on a sub-agency basis. They are not principal in the supply chain and as such VAT is not accounted for on the onward sale." (page A458).

32. Jamie Yeardley of HMRC replied to Mr Majevadia of Harrods on 15 March 2017—

"Good afternoon Jay

> My source for the answer below is VATA 1994, Sch 4A para 9 and VAT Notice 741A para 13.
>
> In determining the purpose of the vouchers I have looked at the place of supply rules, for both mobile phone vouchers and the electronic supply of services.
>
> My previous email explained the procedure for mobile phone vouchers and the answer is similar for the electronic supply of services.
>
> At the time of supply you will not know in which country the service will be used and enjoyed. The supplier of the electronic supply of service has to determine that part of the supply enjoyed in the UK, that part enjoyed in other EC states, and that part of the service enjoyed outside of the EC. The supplier of the service will then account for the VAT accordingly.
>
> Therefore the voucher, whilst being for a supply of electronic services, can attract differing VAT rates, depending on where it is enjoyed, and will be a multi-purpose voucher (MPV) following the use and enjoyment provision.
>
> Unlike the mobile phone vouchers the use and enjoyment provision will not be changing in the summer of 2017 for the electronic supply of services.
>
> Your current accounting of the vouchers listed in your email below is therefore correct.
>
> Regards
>
> Jamie" (page A459).

33. So, according to their emails, Harrods' position had changed. On 16 February 2017, shortly after receiving the forwarded HMRC decision letter of that date, Harrods' position was still, as Harrods told the appellant, that "I would agree your point the concession vouchers should be marked as 20% Standard Rated as these are SPV's" (Mr Majevadia's 16 February 2017 email to the appellant). But by the time of Mr Majevadia's 14 March 2017 email to HMRC, Harrods' position had become, at least in what Harrods told HMRC in that email, that "Our current stance on these vouchers is that we treat them as MPV and do not account for any VAT on the onward sale".

34. The appellant adduced a note of a meeting of 11 July 2017 between Mr Suryaatmadja and Mr Steve Plowman both of the appellant, and Mr Majevadia of Harrods (page A374). If accurate, the note evidenced a different position on the part of Harrods in its dealings with the appellant compared with Harrods' dealings with HMRC. According to the note, Mr Majevadia of Harrods "was genuinely surprised that after charging VAT and showing it as a separate entry on the invoices before 1.5.16, that [sic] someone made a decision to show them without VAT after 1.5.16" and that "he would like to review the matter in detail and asked for all of LTL's invoices (Howard sent these to Jay on 12.7.17). As Jay acknowledged that there was no record of any change in the policy of accounted for VAT on these cards in May 2016, and if there had have been Harrods should have notified LTL and other customers".

35. We need make no finding as to whether that meeting note was accurate (though we do not suggest that any inaccuracy would be dishonest). But it was not disputed, that – as we

accept – Harrods did not tell the appellant at any time prior to the purchases in question that those purchases would not include VAT. Indeed, Harrods' position that Harrods had not included VAT was not – according to their 16 February 2017 email to the appellant – adopted until after that email (and if the appellant's note of the 11 July 2017 meeting is accurate, Harrods still had not adopted that position by 11 July 2017 in their dealings with the appellant, at least). This point was relevant to Mr Firth's arguments for the appellant as to legal certainty.

(6) Facts: The concession agreement and other contracts

36. The appellant had bought the vouchers from a concession run within Harrods by DSG Retail Limited. The relationship between Harrods and DSG Retail Limited regarding the concession was governed by a contract dated 13 July 2011 between Harrods Limited and DSG Retail Limited (**"the concession agreement"**), which HMRC supplied to the appellant as being the relevant agreement. The concession agreement was expressed to continue until 31 May 2017 unless lawfully terminated sooner than that. It was common ground that the concession agreement was in force at the relevant times in this case.

37. There were three other contracts. They were adduced by HMRC as evidence of the supply chain from Valve Corporation (Steam), via a distributor (Epay), to DSG Retail Limited. The appellant was not in a position to accept that those were the contracts in the supply chain, or to accept that they were the only such contracts. And the appellant disputed in any event the effect that HMRC said those contracts had. We merely narrate at this point that the contracts were adduced. They were—

(1) A contract between Transact Elektronischezahlungssysteme GMBH (defined as "Epay" on page 1 of the contract) and Valve Corporation (Steam) entitled "Master Point Of Sale Activation Card & E-Voucher Distribution Agreement". This contract is undated at the top, but signed by one of the signatories on 10 or 16 July 2013. We shall refer to this as **"the Steam and Epay contract"** (pages A517 to A543).

(2) A contract dated 15 October 2005 between Omega Logic Limited and DSG Retail Limited (which operates the concession). Its recitals said—

> "A. Omega is a marketing services and technology provider for iTunes.
>
> B. DSG is a specialist electrical, PC and communications retailer in the Territory.
>
> C. This Agreement sets out the conditions pursuant to which Omega will deliver PINs electronically to DSG retail outlets in the Territory for sale to consumers" (as varied – see subparagraph (3) below – we refer to this as "**the Omega/Epay and DSG contract**") (pages A461 to A470).

(3) A variation agreement between Epay and DSG Retail Limited dated 3 October 2013 (pages A515 and A516). The variation agreement extended a contract dated 15 October 2005 to refer – in addition to the supply of iTunes products – to the supply of "Steam POSA [Point Of Sale Activation] Products" in the same way as the contract referred to supply of iTunes products. We did not have evidence of Epay having stepped into Omega's shoes for the purposes of the 15 October 2005 contract, and the appellant was not in a position to accept that either. But Officer X, who had been supplied with the three contracts by one or more parties to those contracts, told us that the contract on which the variation agreement operated was the 15 October 2005 contract between Omega and DSG, and that Epay had stepped into Omega's shoes for the purposes of varying the 15 October 2005 contract to apply to Steam products. We shall refer to the 15 October 2005 contract, as varied, as **"the Omega/Epay and DSG contract"**. Given

our view that that contract as varied did not help HMRC's case, we have not needed evidence of Epay having stepped into Omega's shoes for the purposes of that contract.

38. We return later to these three contracts. We discuss them in relation to whether Harrods acted as agent, which in turn is relevant to whether VAT was chargeable.

C. LAW

(1) Legislation: Input tax deduction

39. The law relating to input tax deduction is contained in the VAT Act 1994 and the VAT Regulations 1995.

40. Section 4(1) of the VAT Act 1994 provides for VAT to be charged on any taxable supply of goods or services by a taxable person in the course or furtherance of any business carried on by him. Taxable person is defined in section 3. It was common ground that Harrods and the appellant were each a taxable person. Section 24(1) defines input tax. Sections 25 and 26 provide for recovery of input tax. Section 26(3) provides that the Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within section 26(2). Regulations 13 and 29 of the VAT Regulations 1995 are relevant. Regulation 13 provides that, subject to exceptions, where a registered person makes a taxable supply to a taxable person, he shall provide a VAT invoice to that person.

41. It was common ground that, if the supply to the appellant in the present case was liable to VAT, the supply did not come within any of the exceptions in regulation 13 and the appellant should therefore have been provided with a VAT invoice for that supply. By virtue of section 96(1) and section 6(15) of the VAT Act 1994, "VAT invoice" is defined as "such an invoice as is required under paragraph 2A of Schedule 11, or would be so required if the person to whom the supply is made were a person to whom such an invoice should be issued".

(2) Legislation: Tax treatment of supply of vouchers

42. By virtue of section 51B of the VAT Act 1994, Schedule 10A to that act has effect in relation to face-value vouchers issued before 1 January 2019 (the ones in this case were issued before that date). We borrow, if we may, HMRC's helpful introduction to Schedule 10A: "the liability of vouchers throughout the supply chain could vary depending on the type of voucher (eg credit vouchers, retailer vouchers, 'multiple purpose vouchers' ("MPV") or 'single purpose vouchers' ("SPV")); the nature of supply/redemption (credit voucher/retail voucher/other voucher); and the role of a supplier/agent/customer in the supply chain (first issue, subsequent issue etc)".

43. Paragraph 8(1) of Schedule 10A provides that "face value [sic] voucher" has the meaning given by paragraph 1(1) of that schedule. Paragraph 1 of Schedule 10A provides—

> "(1) In this Schedule "face-value voucher" means a token, stamp or voucher (whether in physical or electronic form) that represents a right to receive goods or services to the value of an amount stated on it or recorded in it.
>
> (2) References in this Schedule to the "face value" [sic] of a voucher are to the amount referred to in sub-paragraph (1) above.".

44. It was common ground that the vouchers in the present case are "face-value vouchers".

45. Paragraph 2 of Schedule 10A to the VAT Act 1994 provides—

"The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act".

46. Paragraph 4 of Schedule 10A to the VAT Act 1994 provides—

"*Treatment of retailer vouchers*

4(1) This paragraph applies to a face-value voucher issued by a person who—

(a) is a person from whom goods or services may be obtained by the use of the voucher, and

(b) if there are other such persons, undertakes to give complete or partial reimbursement to those from whom goods or services are so obtained.

Such a voucher is referred to in this Schedule as a "retailer voucher".

(2) The consideration for the issue of a retailer voucher shall be disregarded for the purposes of this Act except to the extent (if any) that it exceeds the face value of the voucher.

(3) Sub-paragraph (2) above does not apply if—

(a) the voucher is used to obtain goods or services from a person other than the issuer, and

(b) that person fails to account for any of the VAT due on the supply of those goods or services to the person using the voucher to obtain them.

(4) Any supply of a retailer voucher subsequent to the issue of it shall be treated in the same way as the supply of a voucher to which paragraph 6 below applies.".

47. Paragraph 7A of Schedule 10 to the VAT Act 1994 provided, at the relevant times—

"7A Exclusion of single purpose vouchers

Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT.".

(3) Legislation: Evidence used for recovering input tax

48. Regulation 29(2) of the VAT Regulations 1995 provided at the relevant times—

"(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

[…]

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.".

49. It was common ground that, in the present case, the document required to be provided under regulation 13 was the VAT invoice.

(4) Case law: Disposal in relation to failure properly to exercise discretion

50. *In GB Housley Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 1299, the Court of Appeal said—

> "70. The following propositions were also common ground:
>
> i) If HMRC had unreasonably failed to exercise their discretion at all, or had wrongly failed to take relevant material into account, then a tribunal could nevertheless dismiss a taxpayer's appeal if, on a proper exercise of the discretion, HMRC would inevitably have decided the same thing – i.e. in the present case, have declined to have exercised the discretion under regulation 29 . That proposition was based on this court's decision in John Dee supra at 953 and the decision of the Upper Tribunal in Best Buy Supplies supra at [50] – [56].
>
> ii) If the tribunal was of the view that, on the basis of the material before HMRC, no body of Commissioners could reasonably have come to any conclusion other than to exercise the discretion under regulation 29 in the taxpayer's favour, then the tribunal should/could have allowed the taxpayer's appeal.
>
> […]
>
> 75. [Citing John Dee] (d) That once the tribunal had decided that the commissioners had misdirected themselves the appeal should have been allowed and the tribunal should have left it to the commissioners to take a fresh decision if they thought fit…
>
> [,,,]
>
> 79. In my judgment a similar approach to that adopted by this court in John Dee is applicable to a case such as the present, where the relevant decision was a failure by HMRC, as a result of a misapprehension as to the necessity of a billing agreement, to consider the exercise of their discretion under regulation 29(2) to allow input tax. The present case was one where, on the findings of fact by the FtT, HMRC clearly could not have suggested that, if they had properly considered or re-considered the exercise of their discretion under regulation 29, they would inevitably have come to the same result – i.e. to have refused to allow the credit for the input tax. Indeed, Mr Mandalia did not seek so to argue.
>
> 80. Now, of course, in John Dee the appeal was not, as in the present case, against an actual assessment or in respect of the amount of any input tax which might have been credited to the tax payer. But, in my judgment, it follows from the approach in John Dee that, if the appellant's appeal against the assessment is to be allowed, on the grounds that HMRC wrongly failed even to consider the exercise of the regulation 29(2) discretion, then necessarily – since the appeal is against the assessment itself – the assessment falls to be discharged, leaving HMRC, if they wish to do so, to consider the proper exercise of their discretion on the correct legal basis and, if they are able (given the statutory time constraints), to issue a new assessment if so advised. It follows that, in my judgment, the Upper Tribunal was wrong to have allowed HMRC's appeal against the FtT's decision, and, effectively, to have given HMRC a further opportunity retrospectively to have justified their assessment".

D. Analysis

(1) Analysis: Introduction

51. It was common ground that, if the vouchers are, as the appellant contends, single purpose vouchers within the meaning of paragraph 7A of Schedule 10A to the VAT Act 1994[10], then the vouchers are liable to VAT. It was also common ground that, if the vouchers are not single purpose vouchers within the meaning of that paragraph 7A, then the vouchers are retailer vouchers within the meaning of paragraph 4(1) of Schedule 10A. It was common ground that Steam (or technically Valve Corporation since Steam seems not to be a separate company) was the person who issued the vouchers for the purposes of paragraph 4(1) of Schedule 10A. Nothing turned on any distinction between Steam and Valve Corporation. The parties used "Steam" to refer to the issuer of the vouchers. If the vouchers are retailer vouchers within the meaning of paragraph 4(1) of Schedule 10A, then their tax treatment will depend on whether the supply of them to the appellant falls within paragraph 4(2) of Schedule 10A or within paragraph 4(4) of that schedule. It was common ground that, if the supply of the vouchers to the appellant falls within paragraph 4(2) of Schedule 10A, then the supply is not subject to VAT. And it was common ground that, if the supply falls within paragraph 4(4) of that schedule, then the supply <u>is</u> subject to VAT (because it was common ground that that would be the effect of treating the supply – as paragraph 4(4) says to do – in the same way as the supply of a voucher to which paragraph 6 of that schedule applies).

52. What is not common ground is which of the two subparagraphs of paragraph 4 of Schedule 10A applies to the supply of the vouchers to the appellant (if they are retailer vouchers). The appellant contends for subparagraph (4). HMRC contend for subparagraph (2).

53. So the first question is: are the vouchers single purpose vouchers within the meaning of paragraph 7A of Schedule 10A to the VAT Act 1994?

(2) Analysis: Question 1: Are the vouchers single purpose vouchers?

54. We do not find that the vouchers are single purpose vouchers, for the following reasons.

55. Paragraph 7A of Schedule 10A provided—

> "**7A Exclusion of single purpose vouchers**
>
> Paragraphs 2 to 4, 6 and 7 do not apply in relation to the issue, or any subsequent supply, of a face-value voucher that represents a right to receive goods or services of one type which are subject to a single rate of VAT.".

56. Mr Suryaatmadja in his witness statement for the appellant said that hardware could be bought on the website at the times of the transactions in question (page A188)—

> "35. Steam is a video game distribution platform that launched in 2003. Almost all products for sale on the site are video games. These are purchased as digital downloads. Once purchased the customer will download the video game to their local device. Until the end of 2015, I understand that there were no other items available from the Steam site.

[10] We say "within the meaning of paragraph 7A" but that paragraph does not expressly define "single purpose voucher". It is only that paragraph's heading which uses that phrase, and headings are not generally relied on for statutory construction. However, single purpose vouchers was the term used in argument and is a useful shorthand.

> 36. However, in November 2015, it appears that Steam launched the Steam controller, and this became available to purchase on the Steam site. This is a device for controlling games purchased from Steam and is merely ancillary to the main products sold on the site.
>
> 37. At the same time, Steam released the Steam Machine. This is a hardware platform and again is a means of better enjoying the video games sold on the Steam site. It is ancillary to the primary purpose of the Steam site; the purchase and downloading of video games.
>
> 38. In April 2016, Steam began to sell the HTC Vive. This is a virtual reality platform developed by Valve and HTC. Again, this is a means of enjoying the primary product available on the site, video games.
>
> 39. Apart from these items of hardware, the only items available for sale on the Steam site are software downloads and these software downloads are principally computer games intended to be played on PCs."

57. Mr Suryaatmadja had also said in his statement that "Over the years, the industry began to change. Initially, the vouchers were physical pre-activated vouchers. The more modern way of distributing vouchers was electronic. The change to electronic vouchers took place around 2014. The cards were only activated on purchase from the retailer". Mr Firth's case for the appellant was however based on the vouchers in the present case being physical POSA cards, although not pre-activated.

58. In cross-examination, Ms Spence for HMRC asked Mr Suryaatmadja about a printout from the Steam website (page A165). Ms Spence suggested that it showed that any of the products mentioned on it, which included hardware, could be bought either individually or together and asked whether that was so. Mr Suryaatmadja said he did not know.

Are the vouchers single purpose? Appellant's submissions

59. Mr Firth submitted that the vouchers were single purpose vouchers because, as provided in paragraph 7A of Schedule 10A, they represented a right to receive goods or services of one type which are subject to a single rate of VAT. He submitted that the question depends on an objective evaluation from the perspective of the typical purchaser of the voucher rather than on a forensic interrogation of the redeemer's inventory and offering from time to time, and that the voucher is to be categorised in accordance with its main use, which is for games. Mr Firth cited for that submission: paragraphs 11, 14, 15, 41, 48 to 50 and 54 of the Upper Tribunal's decision in *Abbotsley Limited, Cromwell Golf Club, Cambridge Meridian Golf Club v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 191 (TCC) ("Abbotsley") and paragraphs 33 to 35 of the CJEU's preliminary ruling in *Město Žamberk v Finanční ředitelství v Hradci Králové, now Odvolací finanční ředitelství*, Case C-18/12, ECLI identifier: ECLI:EU:C:2013:95, [2014] STC 1703.

60. In *Abbotsley*, the Upper Tribunal said at paragraph 54—

> "it is settled law that a supply of a service is "essential to" the exempted transaction if the supply is of such a nature and quality that, without it, there could be no assurance that the exempted transaction would have an equivalent value".

61. There was no evidence of whether the Steam website printout on page A165 reflected the website as it was at the times of the transactions to which this appeal relates, that is, the May 2016 onwards transactions. But Mr Firth accepted for the appellant that hardware could, at the relevant times, be bought from the website separately from the games, and that the hardware could be used to play games other than those purchased from Steam. He accepted also that the hardware that could be bought with the vouchers was not "essential" – essential

having been used in paragraph 54 of *Abbotsley* – to be able to play the games bought from Steam (and he told us that there were 12 years in which Steam sold only the games, before Steam introduced the hardware). Mr Firth's position was however that, although "incidental" is not in the statutory provisions, "incidental" is nonetheless the test derived from *Abbotsley*. He submitted that the hardware that could be bought with the vouchers was "very much incidental to the games" on an objective view, and that the voucher is to be categorised in accordance with its main use, which is for games. He submitted that it did not prevent its being a single purpose voucher if the redeemer buys a few bits of hardware, because those bits of hardware were "incidental" or "ancillary" to the games.

Are the vouchers single purpose? HMRC's submissions

62. Ms Spence submitted for HMRC that the vouchers were not single purpose because they could be redeemed for hardware separately from redeeming them for games. She submitted that the exceptions in paragraph 7A of schedule 10A do not mention "incidental" or "ancillary" supplies, and that the argument relying on those terms was not relevant. She argued that it simply came down to the fact – as Mr Firth had accepted – that the redeemer of the voucher can purchase goods and/or services with it.

Are the vouchers single purpose? Analysis

63. We accept in view of Mr Firth's concession that hardware could be bought separately from games on the Steam website at the relevant times, and that the hardware was not "essential" to be able to play the games bought from Steam. We accept also that the hardware could be used to play games other than those available from Steam. Those three points, but in particular that the hardware was not essential to be able to play the Steam games, mean in our judgment that the hardware available on the Steam website at the relevant times was not only for enhancing the Steam game experience and was not merely incidental or ancillary to the Steam games (even assuming that "incidental" or "ancillary" were the right test).

64. However, that would not matter if, nonetheless, the vouchers which the appellant bought could be redeemed only for games. Mr Firth accepted that the burden was on the appellant to show that the vouchers were single purpose vouchers.

65. The photograph on page A126 of the front of a Steam POSA card said "Download and play thousands of your favorite [sic] games". Despite its American spelling, it bore only a pound (£) sign and a euro (€) sign, and no dollar sign. So it appeared apt for use from the UK or from a Euro currency country, and therefore potentially a relevant example for the purposes of this case. We say potentially because there was no evidence of whether it accurately reflected the vouchers in the present case. There was an almost identical photograph of a voucher on the Steam website printout on page A165. That voucher photograph bore the exact same statement – "Download and play thousands of your favorite [sic] games" – but bore a dollar sign. That photograph was part of a Steam webpage which we accept showed that hardware could be purchased separately from games. In other words, the webpage which showed that hardware could be purchased separately from games appeared to suggest that a voucher that referred only to games could be used for purchasing hardware too.

66. It was not clear whether that webpage printout accurately reflected what the website had shown at the relevant times. Nor was it clear whether the printout accurately reflected that the vouchers in the present case could have been used, as could the voucher bearing the dollar sign, to buy hardware as well as games. However, the burden was not on HMRC to show that the vouchers were not single purpose, as Mr Firth accepted; it was on the appellant to show that

they were. Even assuming that the vouchers in the present case did say only "Download and play thousands of your favorite [sic] games", we were not persuaded – given the website printout on page A165 which may or may not have reflected what the website showed at the relevant times – that from the perspective of the typical purchaser of the voucher, the voucher was for just one type of goods or services, namely games. We do not find therefore that the vouchers could in fact be used only to download and play games. That, taken with our finding that the hardware on the Steam website was not merely incidental or ancillary to the games, means we are unable to find that the vouchers were single purpose vouchers.

67. It was common ground that, if we did not find the vouchers to be single purpose, then they were retailer vouchers within the meaning of paragraph 4(1) of Schedule 10A to the VAT Act 1994.

Are the vouchers single purpose? Conclusion

68. So, we accept that the vouchers were retailer vouchers. The next question is, therefore, was Harrods acting as agent or as principal in supplying the vouchers to the appellant?

(3) Analysis: Question 2: Was Harrods acting as agent or as principal in supplying the vouchers?

(i) Was Harrods acting as agent or principal? Introduction

69. The question of whether Harrods was an agent of Steam in supplying the vouchers to the appellant (via the DSG Retail Limited in-store concession) is relevant because VAT is not chargeable on the (first) issue of the vouchers (paragraph 4(2) of Schedule 10A to the VAT Act 1994). We parenthesise "first" because paragraph 4(2) refers only to "issue" rather than to "first issue" or to "first supply". But a contrast between "issue" in paragraph 4(2) and "supply … subsequent to the issue" in paragraph 4(4) distinguishes between the first issue/supply of the voucher (within paragraph 4(2)) and later supplies of it (within paragraph 4(4)). It appeared undisputed that Steam was the (first) issuer of the vouchers (referred to in argument as the initial issuer), and that Steam's issue of each voucher was the "issue of a retailer voucher" referred to in paragraph 4(2) of Schedule 10A (if we were against the appellant on the single purpose voucher question). That meant that the consideration for Steam's issue of the vouchers was to be disregarded, by virtue of paragraph 4(2) of Schedule 10A, for the purposes of the VAT Act 1994 (except to the extent if any that the consideration exceeded the face value of the vouchers, which does not apply here). If Harrods was supplying the vouchers only as Steam's agent, then Harrods' supply of the vouchers was not a subsequent supply, but was rather still the first issue of them by Steam (via Steam's agent, who would in that hypothesis be Harrods). That would mean that the price the appellant paid for the vouchers was to be disregarded – in other words not subject to VAT – by virtue of paragraph 4(2) of Schedule 10A.

70. But if, conversely, Harrods acted as principal and not as Steam's agent, then Harrods' supply of the vouchers was not Steam's issue of them (Steam's issue of the vouchers being the first issue of them, as appeared to be common ground). That in turn would mean that Harrods' supply of each voucher was not the first issue of that voucher and so Harrods' supply of the vouchers would not fall within paragraph 4(2) of Schedule 10A. The consideration the appellant paid for them would not then be disregarded under that subparagraph. Instead, Harrods' supply of the vouchers would be a "supply … subsequent to the issue" of the vouchers within the meaning of paragraph 4(4) of Schedule 10A. Paragraph 4(4) would in that case

require Harrods' supply of each voucher to be treated in the same way as the supply of a voucher to which paragraph 6 of Schedule 10A applied. That would mean – as was common ground if paragraph 6 applied – that VAT was in fact chargeable on the supply of the vouchers to the appellant.

71. Both parties relied on the following text in HMRC Notice 700 as a suggested helpful summary of the law of agency—

> "22.2 … To act as an agent, you must have agreed with your principal to act on their behalf in relation to the particular transaction concerned. This may be a written or oral agreement, or merely inferred from the way you and your principal conduct your business affairs. Whatever form this relationship takes:
>
> - it must always be clearly established between you and your principal, and you must be able to show to HMRC that you're arranging the transactions for your principal, rather than trading on your own account
> - you will not be the owner of any of the goods, or use any of the services which you buy or sell for your principal
> - you will not alter the nature or value of any of the supplies made between your principal and third parties".

We have not used that text as the law of agency, of course. But we include the summary given that the parties suggested it was not inconsistent with the law.

72. Ms Leppard submitted for HMRC that Harrods supplied the vouchers as agent and not as principal. We thank her for her extremely thorough oral exposition and post-hearing written submission. Ms Leppard's submissions were in four broad parts: First, she advanced a different interpretation of the concession agreement from that advanced by Mr Firth. Second, Ms Leppard relied on the two contracts which she had adduced to show the chain of supply (i) from Valve (Steam) to Epay (the Steam and Epay contract) and (ii) from Epay to DSG Retail Limited (the Omega/Epay and DSG contract). Third, Ms Leppard relied on the terms and conditions on the back of the packaging of the physical POSA card. And fourth, Ms Leppard relied on HMRC's assertion that the voucher has no value until activated at the till. We take each of those points in turn.

(ii) Was Harrods acting as agent or principal: The concession agreement

73. The concession agreement allows "the Licensee", defined as DSG Retail Limited, to operate a concession by way of licence within Harrods' store (pages A471 to A514). Clause 2 provides that the agreement runs until 31 May 2017 unless terminated sooner (it had not been terminated by the time of the appellant's purchase of the vouchers). The licence to occupy is at clause 3. Clause 4 governs the floor space to be allocated to DSG as the Allocated Area. Clause 5 deals with Shopfitting obligations in relation to the Allocated Area.

74. Clause 1.1 of the concession agreement defines "Goods" and "Services" (pages A473 and A475)—

> ""Goods" means multi·branded mainstream consumer electronic equipment including related accessories and computing products but excluding products of the luxury brands of Bang and Olufsen, Loewe and Linn, integrated cinema solutions, video games consoles, security surveillance equipment, white goods, kitchen goods and any other particular categories of goods or services which, acting reasonably, Harrods may from time to time require the Licensee to exclude from retail sale within the Department on the grounds that they are inappropriate and/or offensive to Harrods and/or its Customers."

““Services” means the Licensee’s “KNOWHOW” services which the parties agree are to be offered for sale within the Department namely delivery, installation, repair of Goods and (subject to clause 8.22) customer support agreements. Any proposed new “KNOWHOW" services shall be subject to Harrods prior consent before being offered for sale under this Agreement;”.

75. Clause 6.1 of the concession agreement provides (our emphasis) (page A481)—

> “6.1 Harrods shall be entitled to receive all sales proceeds in respect of the Goods and Services. The Licensee shall collect all sales proceeds in the Department for and on behalf of Harrods in respect of the Goods, and, subject to clause 8.3, for and on behalf of the Licensee in respect of the Services with Harrods acting as the selling agent. The Licensee shall log all sales in the Harrods point of sale systems and shall immediately store all sales proceeds in the Harrods till(s) located in the Department. Harrods shall be exclusively entitled to and (save as expressly stated otherwise above) responsible for the control and banking of, and the collection and processing of all sales proceeds (including amounts payable pursuant to, all cash, cheques, travellers' cheques, vouchers, tokens, trading checks and other proceeds received from Customers of the Department) and records of sales (including records of sales settled by debit, credit, charge or other card and other forms of credit sale) made to Customers through the Department. The Licensee shall, when so requested by Harrods, deliver daily to Harrods an analysis of the Department’s trade in such form as Harrods may from time to time require. Such analysis must show all sales and refunds or credits and/or other transactions made to Customers through the Department.”.

76. Clause 8.3(b) of the concession agreement provides (our emphasis) (page A484)—

> “(b) each contract of sale in respect of Goods shall be made between the Customer and Harrods and the Licensee shall (in consideration of the rights granted to it under this Agreement but without further entitlement to remuneration or compensation) display, offer for sale and sell the Goods on behalf of Harrods;”.

77. Clause 8.3(d) of the concession agreement provides (our emphasis) (page A484)—

> “(d) each contract for Services shall be made between the Customer and the Licensee directly and Harrods shall act as the selling agent on behalf of the Licensee. For the avoidance of doubt, all sales proceeds in respect of the Services shall be collected by the Licensee through the Harrods till system (with the Margin being paid in the same way as for the Goods) and the Customer shall receive a Harrods receipt by way of proof of purchase, in addition to their contract for Services with the Licensee. The Licensee shall ensure the Customer is made aware that the Services are being provided directly by the Licensee (under the “KNOWHOW” brand) and that their contract for Services is with the Licensee;”.

78. Subclauses 8.3(g) and (h) of the concession agreement provide (our emphasis) (page A485)—

> “(g) until immediately prior to the sale of any Goods and Services to a Customer the title and risk in such Goods and Services shall remain with the Licensee;
>
> (h) the property in each item of Goods shall pass to Harrods immediately before it passes to the relevant Customer but, as between Harrods and the Licensee, each such item shall be at the risk of the Licensee at all times until it is at the risk of the Customer;”.

79. Clause 8.4 of the concession agreement provides (page A485)—

> "8.4 Save in respect of the provision of the Services, the Licensee shall not inform or imply to any Customer or third party that the Department is or was or will be operated as a business separate from that of Harrods.".

80. Clause 8.5 of the concession agreement provides (page A485)—

> "The Licensee will ensure that:
> (a) the Goods shall be the sole property of the Licensee and not subject to any charge, lien or encumbrance and the Licensee shall ensure it can pass full title to a Customer at the point of sale".

Concession agreement: Submissions

81. At the hearing, Ms Leppard for HMRC took us to paragraphs 6.1 and 8.3(d) of the concession agreement, and to the definition of "Services" in clause 1.1 of the agreement. She submitted that, regardless of the definition of "Services" in the concession agreement – which she accepted defines them as DSG Retail Limited's KNOWHOW services – the supply of the vouchers to the appellant was a supply of services by Harrods, because the supply of the vouchers falls within the definition of "services" in paragraph 2 of Schedule 10A. That paragraph 2 provides that "The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.". Ms Leppard argued that it is therefore the part of clause 6.1 relating to services that applies here, and not the part of it relating to goods. As was common ground, the part relating to services says that Harrods is <u>DSG's</u> selling agent rather than the other way around.

82. Mr Firth for the appellant relied on clauses 6.1, 8.3(b) and (d) of the concession agreement. Mr Firth submitted that HMRC's construction of the concession agreement, using paragraph 2 of Schedule 10A to the VAT Act 1994, depends entirely on interpreting "goods" and "services" in that agreement to mean something that is in flat contradiction to the definitions of those terms in the agreement. The definition of services was he submitted exhaustive, and Knowhow is a clearly defined part of the offering from DSG Retail Limited that has been given special treatment in the concession agreement. Moreover, the end of clause 8.3(d) of the concession agreement provides that "The Licensee shall ensure the Customer is made aware that the Services are being provided directly by the Licensee (under the "KNOWHOW" brand) and that their contract for Services is with the Licensee". That text makes it, said Mr Firth, impossible that the supply of the vouchers pursuant to the concession agreement is a supply of services: There is no legal principle that Mr Firth was aware of which would allow the tribunal to infer that the contracting parties meant also that "services" should be defined in the agreement by reference to paragraph 2 of Schedule 10A of the VAT Act 1994. And, he submitted, the deeming provision in that paragraph 2 is "for the purposes of this Act". So he submitted there was no basis, whether by virtue of legislation or in contract, to suggest that the parties intended to incorporate paragraph 2 of Schedule 10A into the agreement.

83. Mr Firth submitted that both Harrods and DSG Retail Limited acted as principal and that therefore the supplies were liable to VAT.

84. Our analysis at paragraphs 87 to 136 below is based on the above submissions made at the hearing. In post-hearing written submissions by Michael Ripley of counsel, HMRC did not now dispute that they were goods for the purposes of the concession agreement. But HMRC argued that "it is clear that Steam do not sell title to the Steam Products to Epay and it is envisaged that all parties in the chain will be acting as agents of Steam such that they are only distributing the vouchers on behalf of Steam. As explained below, the rest of the chain must be viewed against that backdrop and (above all) neither DSG nor Harrods could sell the Steam Products as principal (regardless of what the Concession Agreement says) because neither DSG/Harrods ever owned them" (paragraph 11, post-hearing submissions). HMRC further

argued in the post-hearing submissions that "However, for the reason explained at paragraph 11 above it does not matter whether the Steam Products are within the meaning of "goods" or "services" for the purpose of the Concession Agreement. Harrods simply could not have sold the Steam Products as principal because it had not acquired them from anyone. Neither DSG nor Epay owned the e-vouchers and were only ever in the position of agent. In the absence of any agreement between Harrods and Steam, Harrods could not have acted as principal because its only contractual counterparty (DSG) was unable to make Harrods a principal" (paragraph 18).

85. Mr Firth's written submission in reply to Mr Ripley's post-hearing written submission was that HMRC's post-hearing argument "is wrong for three reasons: 5.1. It is based on a failure to read the contracts properly – nothing prevented DSG from selling to Harrods. Harrods was thus in a position to sell as principal and DSG acted as agent in respect of that onward sale, precisely as the agreement stated. 5.2. In any event, even if the Steam/Epay agreement did purport to limit who DSG should sell to, that could not override or change what is in the DSG/Harrods agreement. It is the DSG/Harrods agreement that governs what happened between DSG and Harrods. 5.3. HMRC's analysis does not satisfy the legal requirements for Harrods to supply as agent" and that "HMRC [sic] cashflow analysis accepts that DSG collects the £100 "on behalf of Harrods" (§§23 and 28), i.e. DSG acts as Harrods' agent. That is fatal to their argument that Harrods acts as DSG's agent" (paragraph 28).

Concession agreement: Findings

86. The concession agreement is dated 13 July 2011 and is between Harrods Limited and DSG Retail Limited.

87. We accept that the concession agreement makes DSG Retail Limited Harrods' agent in relation to "Goods" supplied by DSG Retail Limited pursuant to the agreement and that Harrods acts as principal in relation to those goods (we return at paragraph 96 below to whether the vouchers were "Goods" for this purpose). We say that because of our analysis – adopting almost entirely Mr Firth's analysis – of clauses 6.1, 8.3(b), 8.3(d), 8.3(h) and 8.4 of the concession agreement, along with the definitions of "goods" and of "services" in the agreement. We take each of those clauses in turn.

Clause 6.1 of the concession agreement

88. As to clause 6.1 of the concession agreement, we accept Mr Firth's submission that the reference at the end of the second sentence of clause 6.1 to "Harrods acting as the selling agent" applies only to "Services" (in respect of which, by virtue of clause 6.1, DSG Retail Limited acts as principal, with Harrods as DSG's selling agent). So clause 6.1 provides that DSG Retail Limited shall "collect for and on behalf of Harrods" all sales proceeds in respect of "the Goods" to which the agreement refers. Mr Firth submitted that the provision in clause 6.1 that Harrods is exclusively entitled to control and banking of all sales proceeds also shows that Harrods acts as principal in relation to "the Goods". We are not persuaded that that part of clause 6.1 does show that; Harrods also has the right to control and bank the sales proceeds for "the Services" referred to in that clause. But, as appeared to be common ground, Harrods does not act as principal under the concession agreement in relation to "the Services" to which that agreement applies. That point does not however alter our judgment that, without more, the provision in clause 6.1 that DSG collects proceeds for "the Goods" for and on behalf of Harrods means that Harrods acts as principal in relation to "the Goods" supplied pursuant to the agreement by DSG Retail Limited. That construction is reinforced by the contrast with the provision later in the

same sentence that DSG collects the proceeds for "the Services" for and on behalf of itself with Harrods acting as the selling agent.

89. We have said that clause 6.1 has that effect without more. But we are satisfied that, read with the other parts of the concession agreement, clause 6.1 still has that effect. Indeed, other parts of the agreement reinforce that Harrods is acting as principal in relation to "the Goods" mentioned in the agreement. We say that for the following reasons.

Clauses 8.3(b) and 8.3(d) of the concession agreement

90. Clause 8.3(b) of the concession agreement provides not only that DSG displays, offers for sale and sells the goods on Harrods' behalf but also that each contract of sale in respect of goods is between the customer and Harrods.

91. That is reinforced, in our judgment, by the contrast of clause 8.3(b) with clause 8.3(d). The latter provides effectively the opposite for services, that is, that each contract for services is between the customer and DSG directly, with Harrods acting as DSG's selling agent. So important is this considered to be that the clause goes on to require that the customer be made aware (i) that the services are provided directly by DSG, and (ii) that the customer's contract for services is with DSG.

Clause 8.3(h) of the concession agreement

92. Clause 8.3(h) of the concession agreement reinforces that Harrods acts as principal in relation to goods by procuring that the property in each item of goods passes to Harrods immediately before it passes to the customer. That is not altered by the fact that the clause goes on to provide that the risk in the goods remains with DSG for the scintilla of time in which the goods belong to Harrods before property in the goods passes to the customer. That provision appears driven by practicalities: it would be difficult, and not legally or practically certain, to attempt to establish whether any insured event had started to take place during the scintilla of time in which property in the goods rests with Harrods.

93. Nor is clause 8.3(h)'s treatment of Harrods as principal undermined by the provision in clause 8.3(g) that, "*until immediately prior to the sale of any Goods and Services to a Customer the title and risk in such Goods and Services shall remain with the Licensee*". The reference to "immediately before the sale" in clause 8.3(g) has to be read in light of clause 8.3(h). The time "*immediately before the sale*" is clearly intended to precede the scintilla of time in which property in the goods is with Harrods before passing directly from Harrods to the customer. While these distinctions will make no practical difference to the way the sale takes place, especially from the customer's point of view, the distinctions are important to the provision in the concession agreement as to who is whose agent.

94. We consider too that the reference in clause 8.5 to the licensee (DSG) ensuring that it can pass full title in the goods to a customer at the point of sale does not mean, in and for the purposes of the concession agreement, that the licensee has title to the goods immediately before title vests in the customer. Read with clause 8.3(h), clause 8.5 of the concession agreement is about the licensee ensuring that the licensee has full, unencumbered title immediately before that title vests in Harrods pursuant to clause 8.3(h). Harrods will not be in a position to ensure that because Harrods acquires property in the goods pursuant to clause 8.3(h) only to the extent that the licensee has full, unencumbered title to them. It might in any event be said that the strict wording of clause 8.5 does not envisage that the title is in the licensee immediately before it passes to the customer; clause 8.5's express requirement is to

ensure that the licensee can "pass full title", rather than to ensure that the licensee can "pass the Licensee's full title". However, while that distinction might not, without more, be conclusive as to whether the licensee has full title immediately before title vests in the customer, clause 8.3(h) makes clear that the licensee does not have full title immediately before title vests in the customer.

Clause 8.4 of the concession agreement

95. Clause 8.4 of the concession agreement is also of some support in permitting only the services, and not also the supply of goods, to be seen as operated as a business separate from that of Harrods.

"Goods" versus "Services" within the concession agreement

96. That is not however the end of the matter regarding the concession agreement. We have established that Harrods acts as principal for the purposes of the concession agreement in relation to the supply of "the Goods" mentioned in the agreement. The question then is whether the supply of the vouchers by DSG Retail Limited to a customer pursuant to the concession agreement is a supply of goods or a supply of services, for the purposes of the concession agreement. We consider first what the effect is of applying the definitions in the concession agreement of "Goods" and "Services". We consider second whether the definition of "Services" in the concession agreement should, as Ms Leppard submitted for HMRC, be replaced by the text of paragraph 2 of Schedule 10A to the VAT Act 1994 which provides that the issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of the act.

97. The first of our considerations mentioned at paragraph 96 above is the effect of applying the definitions in the concession agreement of "Goods" and "Services". We find that the supply of the vouchers by DSG Retail Limited to a customer pursuant to the concession agreement is a supply of goods within the meanings of the definitions of "Goods" and "Services" in the concession agreement. We say that for the following reasons.

98. The concession agreement gives the following definitions in clause 1.1 (pages A473 and A475)—

> ""Goods" means multi·branded mainstream consumer electronic equipment including related accessories and computing products but excluding products of the luxury brands of Bang and Olufsen, Loewe and Linn, integrated cinema solutions, video games consoles, security surveillance equipment, white goods, kitchen goods and any other particular categories of goods or services which, acting reasonably, Harrods may from time to time require the Licensee to exclude from retail sale within the Department on the grounds that they are inappropriate and/or offensive to Harrods and/or its Customers."
>
> ""Services" means the Licensee's "KNOWHOW" services which the parties agree are to be offered for sale within the Department namely delivery, installation, repair of Goods and (subject to clause 8.22) customer support agreements. Any proposed new "KNOWHOW" services shall be subject to Harrods prior consent before being offered for sale under this Agreement;".

99. We accept that the supply of the vouchers via the concession is a supply of goods, because we accept that the vouchers are "Goods" within the meaning of "Goods" in the concession

agreement. Although the phrase "related accessories and computing products" in the definition of "Goods" does not, alone, make that clear, it is clear from the agreement's definition of "services" that the vouchers are not services. As Mr Firth said, the definition of services is specific to the "KNOWHOW" services, which are exhaustively defined in the definition to be "namely delivery, installation, repair of Goods and … customer support agreements". Since the concession agreement covers only supply of goods and supply of services, if the vouchers are not within the agreement's definition of "Services", then the vouchers must be within the agreement's definition of "Goods". Mr Firth's submission for the appellant was that the vouchers came within the "computing products" part of the phrase "related accessories and computing products" in the "goods" definition. If we had to decide which of accessories and computing products the vouchers are, we might find them to be accessories. But either way the vouchers are within the phrase "related accessories and computing products". (Whether "related" qualifies only accessories or also computing products is not in issue and we cannot see that it would make a difference on the facts of this case.)

100. The second of our considerations mentioned at paragraph 96 above is whether the definition of "Services" in the concession agreement should, as Ms Leppard submitted for HMRC, be replaced by the text of paragraph 2 of Schedule 10A to the VAT Act 1994. We find that, as Mr Firth submitted for the appellant, it should not. We accept that paragraph 2 of Schedule 10A, which defines as "a supply of services" the issue and any subsequent supply of a face-value voucher, does not mean that supply of a face-value voucher is a supply of "services" in and for the purposes of the concession agreement. We say that for three broad reasons.

101. First, the agreement has its own definition of services, and does not provide that "Services" is to be construed in accordance with the definition in paragraph 2 of Schedule 10A.

102. Second, the last sentence of clause 8.3(d) of the concession agreement cannot be made to work as was clearly intended if one takes the definition of "Services" from paragraph 2 of Schedule 10A to the VAT Act 1994 and transplants that definition into the last sentence of clause 8.3(d), as we illustrate below.

103. Paragraph 2 of Schedule 10A provides—

> "The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.".

104. Transplanting that definition into the last sentence of clause 8.3(d) of the concession agreement would produce the following for clause 8.3(d)—

> "(d) each contract for Services shall be made between the Customer and the Licensee directly and Harrods shall act as the selling agent on behalf of the Licensee. For the avoidance of doubt, all sales proceeds in respect of the Services shall be collected by the Licensee through the Harrods till system (with the Margin being paid in the same way as for the Goods) and the Customer shall receive a Harrods receipt by way of proof of purchase, in addition to their contract for Services with the Licensee. The Licensee shall ensure the Customer is made aware that ~~the Services are~~ **the issue of a face-value voucher, or any subsequent supply of it, is** being provided directly by the Licensee (under the "KNOWHOW" brand) and that their contract for ~~Services~~ **the issue of a face-value voucher, or any subsequent supply of it** is with the Licensee;".

105. Within the agreement as well as in reality, what was to be provided under the "KNOWHOW" brand was, as the definition of "Services" in the agreement said, "*namely delivery, installation, repair of Goods and (subject to clause 8.22) customer support agreements. Any proposed new "KNOWHOW" services shall be subject to Harrods prior*

consent before being offered for sale under this Agreement". So the last sentence of clause 8.3(d) of the concession agreement is about DSG making clear to the customer that delivery, installation and repair of Goods, and that customer support agreements, are supplied by DSG. That is very different from the issue or subsequent supply of face-value vouchers as mentioned in paragraph 2 of Schedule 10A to the act. Substituting the text of paragraph 2 of Schedule 10A into the last sentence of clause 8.3(d) of the concession agreement would mean that the agreement made no provision for DSG to make clear to customers that delivery, installation and repair of Goods, and that customer support agreements, are supplied by DSG and not by Harrods.

106. Third, the definition in paragraph 2 of Schedule 10A is expressed to be "for the purposes of this Act", not more generally. While it is arguable that "for the purposes of this Act" is broad enough to include construction of documents in considering VAT questions under the act, that would be a step too far in this case, given the unintended effect on clause 8.3(d) that would be produced.

Concession agreement: Conclusion

107. It is for the reasons at paragraphs 87 to 106 above that we accept (i) that the concession agreement makes DSG Retail Limited Harrods' agent in relation to "Goods" supplied by DSG Retail Limited pursuant to that agreement, (ii) that Harrods acts as principal in relation to those goods, and (iii) that, in and for the purposes of the concession agreement, the vouchers are goods within the meaning of "Goods" in the concession agreement.

108. The next question is whether the other points relied on by HMRC detract from the apparent effect of the concession agreement so as to render Harrods nonetheless agent in supplying the vouchers to the appellant. We find that HMRC's other points do not detract from the apparent effect of the concession agreement to make Harrods an agent, for the following reasons.

(iii) Was Harrods acting as agent or principal? The contracts between other parties

(a) The Steam and Epay contract

109. The Steam and Epay contract sets out the following background (page A518)—

> "**BACKGROUND:**
>
> **(A)** The Provider owns and operates the Provider Web Site.
>
> **(B)** The Retailer markets, sells and promotes branded stored value Point of Sale Activated (POSA) prepaid products including but not limited to POSA Cards and E-Vouchers which can be used to purchase merchandise or Provider services on the Provider's Web Site. These POSA Cards and E-Vouchers operate through a Claim Code which is distributed or activated by Epay and can be redeemed at the Provider Web Site for the full face value in order for the Consumer to purchase goods and services.
>
> **(C)** Epay has an established relationship with the Retailers in the Territory and shall distribute the POSA Cards and/or Claim Codes to the Retailers, thus enabling the Consumer to purchase the POSA Cards and/or E-Vouchers from the Retailer, before purchasing goods and services from the Provider Web Site.
>
> **(D)** The Consumer pays the Retailer directly for the POSA Cards and/or E-Vouchers. The Retailer transfers to Epay the face value price of the POSA Card less their

margin. Epay then transfers to the Provider the face amount of the POSA Card less only the Epay Commission (the Retailer's margin is included in the Epay Commission).

(E) Epay shall enter into this Agreement with the Provider to distribute the POSA Cards and Claim Codes in the Territory to Consumers through the Retailer's Stores.

(F) Epay shall enter into a back to back agreement with the Retailers.".

110. "Retailer" is defined in clause 1 as "any person or entity that distributes prepaid products or services including but not limited to POSA Cards and E-Vouchers pursuant to a Retailer Agreement" (page A521).

111. Ms Leppard took us to the following parts of the Steam and Epay contract (pages A523 to A525)—

> "2.5 Epay shall distribute the Claim Codes to the Retailers on behalf of the Provider, in accordance with the terms of this Agreement and the Retailers shall distribute the Claim Codes, either on POSA Cards or, if applicable, on E-Vouchers, to the Consumers on behalf of Epay and the Provider. Epay and the Retailers are acting as Provider's agent in this regard. Epay agrees that it will not, and that it will use reasonable endeavours to ensure that Retailers do not take any action inconsistent with the agency model, and in particular will not take any action that would likely confuse a Consumer regarding the agency model described herein. Epay shall ensure that, in the case of any POSA Cards or E-Vouchers, in addition to any other language Provider requires to be printed on those Claim Code Carriers, the following is included: Steam Wallet Cards {E-Vouchers} are issued and supplied by Valve Corporation. In distributing the cards, retailer is acting as agent for and on behalf of Valve Corporation. For full terms, see www.steampowered.com.
>
> […]
>
> "2.8 The Provider [Steam] shall accept the Claim Codes when properly presented by the Consumers at the Provider Web Site [Steam's website] for up to the full face value of, or the remaining unused balance associated with, the Claim Codes, provided that such Claim Codes have been Activated by the Retailer [Harrods], Epay and the Provider [Steam] in accordance with Clause 4.
>
> […]
>
> "**4. ACTIVATION OF PROVIDER PRODUCTS**
>
> 4.1 Upon the purchase of a Claim Code set out In a POSA Card or an E-Voucher by a Consumer from a Retailer's store, the Retailer shall:
>
> 4.1.1 take payment from the Consumer equivalent to the face value on the particular POSA Card and/or E-Voucher;
>
> 4.1.2 swipe or scan the inactive POSA Card using the POS Terminal or integrated point of sale till system. In the case of an E-Voucher, the Retailer shall choose either a pre-determined value on the POS Terminal or key in a variable value of the Claim Code that is to be printed on the E-Voucher;
>
> 4.1.3 then procure authorisation from Epay who shall then in turn procure authorisation from the Provider in order to authorise the sale of the Claim Code;
>
> 4.1.4 then activate the POSA Card via swipe, scan or other applicable means or in the case of an E-Voucher print out the E-Voucher; and

> 4.1.5 notify the completion of sale of the POSA Card and/or E-Voucher to Epay.
>
> 4.2 The Provider shall simultaneously send an Activation acknowledgement to Epay, and Epay shall in term [sic] simultaneously send the Activation acknowledgement to the relevant Retailer Store stating that such POSA Card has been Activated.
>
> 4.3 At the point of sale as set out under Clause 4.1.1 above title in the Claim Code on the POSA Card or E-Voucher shall pass from the Provider to the Consumer.
>
> […]
>
> 5.2 The Provider [Steam] shall be responsible for all customer services to the Consumers associated with the use of the goods and services purchased with any POSA Card or E-Voucher.".

112. Ms Leppard made two points for HMRC in reliance on the Steam and Epay contract. First, she submitted that the contract means that Harrods, as agent of DSG Retail Limited, distributes the claim codes to consumers (the person buying the voucher at the till), on behalf of (i) Epay and (ii) Steam (Valve). This she argued was derived from the express statement in clause 2.5 that Epay and the retailer (which she said was Harrods) act as the provider's (Valve's/Steam's) agent in this regard. This effect was, she submitted, reinforced by Epay agreeing in clause 2.5 to use reasonable endeavours to <u>ensure</u> that retailers (so Harrods, she explained) do not take any action inconsistent with the agency model set out in the agreement between Epay and Valve/Steam. Ms Leppard's second point in reliance on the Steam and Epay contract was that, pursuant to clause 4.3 of that contract, title in the code passes from Steam (Valve) to the appellant directly, and not via Harrods.

113. Mr Firth submitted for the appellant that HMRC' had misconstrued the Steam and Epay contract; the definition of consumer in the Steam and Epay contract meant anybody who purchases from the retailer. He submitted that Harrods is the consumer and not the retailer – and DSG Retail Limited is the retailer and not the consumer – within the meaning of those terms in the Steam and Epay contract. He submitted that whatever the Steam and Epay contract says, it cannot override what is said in the concession agreement, and who knows whether Harrods even saw the Steam and Epay contract. Moreover, a party's obligation in clause 2.5 of the Steam and Epay contract to use reasonable endeavours to ensure that a person not party to that contract did not take action inconsistent with the agency model mentioned in the contract did not, argued Mr Firth, mean that the person did not in fact take such action. He said that HMRC's argument seemed to be that the Steam and Epay contract meant the vouchers cannot be sold to anyone but a consumer, and that HMRC seemed wrongly to rely on the appellant being that consumer within the definition of that term in the contract. Mr Firth submitted that nothing in the Steam and Epay contract said the vouchers cannot be sold to Harrods.

Findings: the Steam and Epay contract

114. We do not accept HMRC's argument that the Steam and Epay contract makes Harrods an agent in supplying the vouchers. Harrods is not a party to that contract (nor indeed is DSG Retail Limited). The contract cannot therefore affect the relationship between Harrods and DSG Retail Limited. More particularly, the requirement in clause 2.5 of the Steam and Epay contract that Epay "will use reasonable endeavours to ensure that Retailers do not take any action inconsistent with the agency model" – relied on by HMRC on the assumption (challenged by Mr Firth) that the "Retailer" in that clause is Harrods – cannot mean that Harrods has not in fact taken any such action. The clause does not bind Harrods. HMRC argued that the Steam and Epay contract meant that title in the code passed directly from Steam to the appellant and not via Harrods. We disagree. Again, that contract could not dictate the

terms or effect of the concession agreement, between two parties who were not party to the Steam and Epay contract. There might also be a distinction to be made between, on the one hand, title to the voucher, which the concession agreement provided shall pass to Harrods immediately before passing to the customer (the appellant) and on the other hand, title to the code, the code being given to the customer at the point of sale. That distinction was not however the subject of submissions at the hearing and we need not consider that distinction given our judgment that the Steam and Epay contract simply cannot affect or dictate the relationship between Harrods and DSG Retail Limited.

(b) The Omega/Epay and DSG contract

115. The Omega/Epay and DSG contract provided at clause 2.1 (page A462)—

> "Omega shall deliver PINs in an agreed format to the electronic tills in DSG's retail outlets in the Territory on an individual basis in a timely manner to enable DSG to supply the PIN to an End User upon request".

116. Clauses 3.1 and 4.1 of the Omega/Epay and DSG contract provided (page A463)—

> "3.1 DSG shall: … (vi) not incur obligations to third parties on Omega or iTunes' behalf [extended, said Ms Leppard, to or "Steam's behalf" by the extension letter dated 3/10/13), and will not represent to third parties that it is authorised to do so"
>
> "**4. Payment Terms**
>
> 4.1 By 9.30am on the first Working Day of each week, Omega [Epay] will:
>
> (i) issue a payment request to DSG for an amount equal to the Face Value of all PINs sold and/or delivered by Omega at DSG retail outlets in the period between midnight on the Sunday immediately before and midnight on the Sunday seven days previous to that (the "Previous Week's Voucher Transactions" and the "payment request for the Previous Week's Voucher Transactions"). For the purposes of this Agreement, a PIN is deemed sold upon Omega's supply to DSG unless voided by Omega in accordance with clause 2.3 above; and
>
> (ii) issue a self-billed invoice to DSG for an amount equal to the DSG Commission as applied to the value of the Previous Week's Voucher Transactions together with any value added tax properly chargeable in respect of that supply provided that the invoice will be a proper tax invoice (the "DSG Commission invoice for the Previous Week's Voucher Transactions");".

117. Ms Leppard made three points for HMRC in reliance on the Omega/Epay and DSG contract. First, she submitted that clause 3.1 of the contract meant that DSG Retail Limited was authorised to sell the voucher card but not to enter into obligations for Steam. Second, she argued that clause 4.1 shows that there is no VAT on the payment request made by Epay to DSG Retail Limited, in contrast to VAT being chargeable on the commission. She derived this from her interpretation of "that supply" in clause 4.1(ii), which she said referred not to "Omega's supply to DSG" mentioned in clause 4.1(i) but to the supply of commission mentioned in clause 4.1(ii), although clause 4.1(ii) does not in fact use the word "supply" in relation to commission. Third, Ms Leppard argued that the Omega/Epay and DSG contract

showed that DSG Retail Limited does not buy services from Valve (Steam), and that the nature of the relationship between them cannot be altered by the nature of the supply.

118. In response to HMRC's reliance on the Omega/Epay and DSG contract, Mr Firth pointed to clause 14.6 of that contract (under "Miscellaneous") (pages A468 and A469)—

> "14.6 Except as specifically provided to the contrary· in this Agreement, nothing in this Agreement is intended to or should be deemed to constitute either party as an agent, legal representative, partner, joint venturer, franchisee, employee, or servant of the other.".

119. Mr Firth submitted for the appellant that that clause excludes the possibility that DSG Retail Limited was acting as agent of the other contracting party, unless that was said elsewhere in the agreement.

120. Clause 3.1(vi) of the Omega/Epay and DSG contract (page A463) provided that DSG shall "not incur obligations to third parties on Omega or iTunes' behalf, and will not represent to third parties that it is authorised to do so". HMRC appeared to rely on that clause to argue that DSG Retail Limited was an agent. But, said Mr Firth, that clause provides that DSG Retail Limited shall not incur obligations to third parties on behalf of Omega and so that clause is saying that, when DSG Retail Limited contracts with a customer, DSG cannot be doing so on behalf of Omega.

121. Mr Firth argued that, if there is no agency by DSG Retail Limited for Epay or Omega, you would expect to see a supply from Epay to DSG Retail Limited and a supply from DSG Retail Limited to the next person in the chain. Whereas if DSG Retail Limited was acting as agent, you would, he explained, expect DSG Retail Limited not to be making a supply because the supply would be direct from Epay to the next person in the chain. He submitted that it is a two-supply model that this contract reflects, and which is reinforced by clause 2.1, which says (page A462)—

> "Omega shall deliver PINs in an agreed format to the electronic tills in DSG's retail outlets in the Territory on an individual basis in a timely manner to enable DSG to supply the PIN to an End User upon request".

Payment twice over

122. We asked the parties about a point arising from a comparison between the Omega/Epay and DSG contract (as varied, on HMRC's evidence, to apply between Epay and DSG for Steam vouchers/cards) on the one hand, with the concession agreement on the other. That comparison seemed to show that DSG is required to pay twice over in respect of the same transaction (if there is no distinction between claim codes, pins and vouchers). We derive that from the following analysis.

123. As varied by the variation agreement, and as read with clauses 2 and 4 of the variation agreement, clause 3.1(ii) of the Omega/Epay and DSG contract, which Ms Leppard for HMRC told us governs the supply between Epay (previously Omega) and DSG, provides that DSG is responsible (to Omega/Epay) for collecting the face value in respect of all PINs sold at DSG's outlets pursuant to this agreement. And by virtue of clauses 4.1(i) and 4.2 of the Omega/Epay and DSG contract, DSG then has to pay that amount to Omega/Epay, less DGS's commission. But clause 6.1 of the concession agreement between DSG and Harrods says DSG collects the "sales proceeds" for "Goods" (which we have found includes vouchers; paragraphs 96 to 106 above) on behalf of Harrods. So, for £100-worth of face-value vouchers, DSG has to pay that £100 to Harrods, but also has to pay it (minus DSG's commission) to Omega/Epay.

124. If we are talking about the same £100, clearly DSG cannot pay it over both to Omega/Epay and to Harrods, no matter what any of the contracts says. Deciding as invited by the appellant, without more, would have been, it seemed to us, to ignore that conflict. So we invited submissions on how to resolve that conflict.

125. Mr Firth submitted (submission 1/6/22) that "The simple answer is that DSG does have both these obligations, but the missing link is that Harrods also has to pay the periodic payment to DSG (clause 6.2) and DSG uses this money to be able to satisfy its obligation to Epay". Mr Ripley of counsel submitted for HMRC at paragraph 28 of his post-hearing submission that there is no question of DSG having to pay out the same amount twice, without receiving anything back. Mr Firth agreed.

Findings: the Omega/Epay and DSG contract

126. We do not accept HMRC's argument that the Omega/Epay and DSG contract makes Harrods an agent in supplying the vouchers to the appellant. We accept Mr Firth's submissions. That contract, too, cannot affect or dictate the relationship between Harrods and DSG Retail Limited.

127. What, then, of the point we raised with the parties, about DSG paying twice over, once to Omega/Epay and once to Harrods? Given the parties' agreement that there is no question of DSG having to pay out the same amount twice without receiving anything back, we accept that there is no material conflict on that score between the concession agreement and the Omega/Epay and DSG contract. If there had been such a conflict, that might have required a reading of one or both of those contracts that departed from a prima facie reading. That in turn could have affected our construction of the concession agreement, which agreement has been key to our findings as to agency versus principal. Whether having to resolve such a conflict would have materially changed our findings we cannot say and need not now decide.

(iv) Was Harrods acting as agent or principal? The text on the physical POSA card voucher packaging

128. The back of the packaging of the physical POSA card gave the following instructions (page A149)—

> "1. If you already have Steam, go to **the Library tab**, then click the + icon at the bottom of the page to activate a product on Steam.
>
> 2. Otherwise, go to **www.steampowered.com/wallet**
>
> 3. Enter the unique Wallet Code revealed below and follow instructions.
>
> 4. The funds will be added to your account and you will land on the game page to complete your purchase. Have fun!" (emphasis in original).

129. Wallet funds are the credit the consumer has on the Steam website. The unique wallet code was beneath a scratch-off strip on the card. But Ms Leppard explained for HMRC that merely scratching off the strip would not of itself enable the voucher to be used; the voucher needed to be "activated" at the till in order for the voucher to be usable.

130. The back of the card packaging also included, under "Terms and Conditions"—

> "Wallet funds are not redeemable for cash or credit and are not for resale"
>
> "Wallet funds are issued by Valve Corporation"
>
> "Retailer acts as agent for Valve Corporation in distributing wallet funds".

131. Ms Leppard explained that consumers do not have the benefit of the Steam and Epay contract, which she had relied on to argue that Harrods acts as DSG's agent. But, she said, Steam rely on the above statements under "Terms and Conditions" on the back of the card packaging to define Steam's relationship with the person buying the card, and particularly Steam rely on the statement that the retailer acts as agent for Valve Corporation "in distributing wallet funds". Ms Leppard submitted that it does not matter if the consumer does not know that Valve Corporation is Steam; the consumer knows he is buying "wallet funds" when buying the card, and it is in respect of distributing those to the consumer that the retailer is said on the card packaging to be acting as agent. So, explained Ms Leppard, the consumer knows – from what is on the back of the card packaging – that Harrods is selling the voucher card as agent for someone else and not as principal.

132. In response to HMRC's reliance on the back of the card packing (page A149) as meaning that the retailer acts as agent, that text had, submitted Mr Firth, no contractual force between Harrods and DSG Retail Limited and was a complete red herring.

Findings: the text on the physical POSA card voucher packaging

133. We do not accept that the text on the back of the POSA card packaging makes Harrods an agent in supplying the vouchers. As Mr Firth submitted, that text has no contractual force between Harrods and DSG Retail Limited. Moreover, "retailer" on the back of the packaging seems to mean something different from "retailer" within the meaning of the Steam and Epay contract. That illustrates why definitions in contracts between others cannot simply be borrowed from those contracts and inserted into relationships not governed by those contracts.

(v) Was Harrods acting as agent or principal? Activation of voucher at the till

134. Ms Leppard submitted that the voucher has no value until activated at the till and that it is therefore at that point that it is issued, by Harrods, on behalf of Steam.

135. Mr Firth submitted that it is irrelevant whether or not the vouchers have value before they are "activated"; it simply means that the supply of services for all parties in the chain occurs at that point. It tells one nothing about whether anyone in the chain of supply is acting as agent or not.

Findings: activation at the till

136. We do not accept that the voucher being inactive until activated at the till makes Harrods an agent in supplying the vouchers. As Mr Firth submitted, it tells us nothing about whether anyone in the chain of supply is acting as agent or not.

(vi) Was Harrods acting as agent or principal? Generally

137. We accept Mr Firth's submission that "nothing prevented DSG from selling to Harrods. Harrods was thus in a position to sell as principal and DSG acted as agent in respect of that onward sale, precisely as the agreement stated. 5.2. In any event, even if the Steam/Epay agreement did purport to limit who DSG should sell to, that could not override or change what is in the DSG/Harrods agreement. It is the DSG/Harrods agreement that governs what happened between DSG and Harrods". We also accept his submission that "HMRC's cashflow analysis accepts that DSG collects the £100 "on behalf of Harrods" (§§23 and 28), i.e. DSG

acts as Harrods' agent. That is fatal to their argument that Harrods acts as DSG's agent" (paragraph 28).

(vii) Was Harrods acting as agent or principal? Conclusion

138. It is for the reasons at paragraphs 69 to 137 above that we accept the appellant's submission that Harrods was not acting as agent in supplying the vouchers to the appellant.

(4) Analysis: Question 3: If Harrods was, however, acting as agent, was Harrods nevertheless part of the supply chain by virtue of section 47(3) or (4), and so made a taxable supply to the appellant?

(i) Section 47: Submissions

139. Mr Firth submitted that, if we found that Harrods was in fact acting as agent, Harrods was nevertheless part of the supply chain and made a taxable supply to the appellant. He advanced two arguments, one based on section 47(4) of the VAT Act 1994, the other based on section 47(3) of that act. Section 47(4) applies to electronically supplied services. Section 47(3) applies to other services.

140. Mr Firth submitted that the service that Harrods supplied to the appellant in supplying the vouchers was a credit on the Steam website, or access to a credit on the Steam website. He submitted that that was an electronically supplied service, that section 47(4) therefore applied, and that the supply of the credit or of access to the credit is to be treated therefore both as a supply to Harrods and as a supply by Harrods, and that the supply of the credit (or of access to it) to the appellant was therefore subject to VAT. Mr Firth submitted alternatively that, if the service was not electronically supplied, then section 47(3) applied instead. That subsection gave a discretion to HMRC to treat the supply as being both a supply to the agent and a supply by the agent. Mr Firth submitted that HMRC had effectively exercised that discretion in paragraph 22.6 of Notice 700, by giving Harrods the option to treat itself as both receiving and supplying the services. He submitted that Harrods had chosen that option and that therefore the supply by Harrods to the appellant was subject to VAT (and that Harrods could not retroactively or without reasonable advance notice change that choice because that would be contrary to the requirement for legal certainty, citing *Ireland v Commission*, 325/85, EU:C:1987:546, at paragraph 18 and *Andrei* C-144/44, at paragraphs 34 to 35). Mr Firth argued that HMRC seek to say that Harrods made a mistake in charging VAT, but, he said (i) the question of whether an agent has treated itself as supplying the services must be assessed objectively, and (ii) HMRC have not produced proper evidence to support this contention, let alone a witness who can speak to the matter.

141. Ms Spence for HMRC submitted that, whether or not Harrods was entitled to change its treatment of the vouchers without prior notification to the appellant is a matter for the civil courts. The appellant was, said HMRC, clearly advised, in HMRC's letter of 22 June 2015, that for purchases exceeding £250 it is a requirement that before VAT is claimed a taxpayer must hold a valid VAT invoice and that it is not acceptable to claim any VAT while anticipating that a valid VAT invoice may be supplied at some point in the future. Despite this, said HMRC, the appellant continued to claim the amounts in question without holding a valid VAT invoice. HMRC did not agree that the liability of the supplies depends on the whim of the supplier. Rather, they said, suppliers and taxpayers in general are responsible for, and required to apply, the appropriate VAT treatment to their transactions, in accordance with Schedule 10A and any advisory publications applicable at the relevant time, which HMRC said was Revenue &

Customs Brief 12/12. That Harrods had previously incorrectly applied VAT to the supply and then corrected the position without notifying the appellant was, said HMRC, a matter which the appellant should pursue in the civil courts.

(ii) Section 47: Analysis

142. Section 47(3) to (6) provided, at the relevant times—

> "(3) Where services, other than electronically supplied services and telecommunication services, are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent.
>
> (4) Where electronically supplied services or telecommunication services are supplied through an agent, the supply is to be treated both as a supply to the agent and as a supply by the agent.
>
> (5) For the purposes of subsection (4) "agent" means a person ("A") who acts in A's own name but on behalf of another person within the meaning of Article 28 of Council Directive 2006/112/EC on the common system of value added tax.
>
> (6) In this section "electronically supplied services" and "telecommunication services" have the same meaning as in Schedule 4A (see paragraph 9(3) and (4) and paragraph 8(2) of that Schedule).".

143. Subsection (4) applied if the services that Harrods provided were "electronically supplied services". Subsection (3) applied if the services were not electronically supplied services (and were not telecommunication services).

144. By virtue of section 47(6), paragraphs 9(3) and 9(4) of Schedule 4A to the VAT Act 1994 gave a non-exhaustive definition of "electronically supplied services" for the purposes of section 47—

> "(3) Examples of what are electronically supplied services for the purposes of this Schedule include—
>
> (a) website supply, web-hosting and distance maintenance of programmes and equipment,
>
> (b) the supply of software and the updating of software,
>
> (c) the supply of images, text and information, and the making available of databases,
>
> (d) the supply of music, films and games (including games of chance and gambling games),
>
> (e) the supply of political, cultural, artistic, sporting, scientific, educational or entertainment broadcasts (including broadcasts of events), and
>
> (f) the supply of distance teaching.
>
> (4) But where the supplier of a service and the supplier's customer communicate via electronic mail, this does not of itself mean that the service provided is an electronically supplied service for the purposes of this Schedule.".

145. Whether section 47 of the VAT Act 1994 would help the appellant would arise only if we were wrong in finding that Harrods acted as principal. But we would have liked to give

what some Court of Appeal or Upper Tribunal panels might consider to be help, by making a finding as to section 47 in the alternative.

146. We were not persuaded however that we could find in the alternative that VAT was chargeable by virtue of section 47(3) or (4). We say that for the following reasons.

Section 47(4)

147. As to section 47(4), the vouchers supplied to the appellant seemed to be only the physical point of sale activation cards rather than the "E-Vouchers" referred to in the Omega/Epay and DSG contract. The appellant took the card off the shelf and to the till, where the appellant was, in exchange for the purchase price, given property in the physical card voucher along with a code to use with that voucher. The way the code was to be used was by entering it onto the Steam website. As we understood it, the code was not supplied by email, but in any event the card supplied was the physical card, in its packaging. The card, with the code, gave the buyer (i) credit on the Steam website, (ii) the means (not in terms of hardware but in terms of a code to use) to access electronically that credit on the website, (iii) the means (again not in terms of hardware) to use that credit electronically on the website, to buy or play games (and/or to buy hardware), and (iv) where the credit was used to buy or play games, the thing purchased was supplied electronically (whereas, where the credit was used to buy hardware, the credit was used electronically, but the hardware it bought was not supplied electronically).

148. Paragraph 2 of Schedule 10A to the VAT Act 1994 provides that "The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act". It was common ground that the vouchers in the present case are face-value vouchers. So Harrods' supply of the vouchers was by virtue of paragraph 2 of Schedule 10A a supply of services for the purposes of section 47(4) (as distinct from "Services" in the concession agreement). But to satisfy section 47(4), the supply needs to have been electronically done.

149. Whether the supply was electronically done depends on what is deemed supplied for the purposes of paragraph 2 of Schedule 10A. Paragraph 2 of Schedule 10A does not specify the nature of the services deemed supplied by that paragraph.

150. On the face of it, what Harrods supplied was the physical card, the code and the activation. If the physical card and the code are the services deemed supplied by paragraph 2 of Schedule 10A, then – unless the activation at the till gave an electronic character to the supply of all three – it might be said that the services were not supplied electronically. On the one hand, that could be said to reflect that a face-value voucher can be "in physical or electronic form" in the definition of "face-value voucher" in paragraph 1 of the schedule. But on the other hand, treating the services deemed supplied as physical might not fit with the purpose of that paragraph 2.

151. As to the purpose of paragraph 2 of Schedule 10A, we had a look at the explanatory notes that accompanied clause 19 of, and Schedule 1 to, the Finance Act 2003, which inserted section 51B and Schedule 10A into the VAT Act 1994. We could not find the latest version of the explanatory notes that accompanied the act at royal assent. But the version of the notes that we found said—

> "Paragraph 2 provides that the supply of a face value voucher is a supply of services. This permits the sale of the voucher to be equated to the underlying supply. This means that if it is known that the voucher has been redeemed for zero-rated goods or services then an intermediate supplier in the sale can make an adjustment to reflect the liability of the final supply".

152. If that text matched the version of the explanatory notes in force on royal assent to the Finance Act 2003, then it gave room for Mr Firth's submission that the "services" supplied for the purposes of paragraph 2 of Schedule 10A were the credit on the Steam website. Mr Firth's argument was that the credit was available electronically. If that were right, then that would mean that the credit was an electronically supplied service for the purposes of section 47(4) of the VAT Act 1994. But whether the explanatory notes on assent could be relied on would itself need to be considered. And consideration would also need to be given to whether, in any event, the "underlying supply" mentioned in the explanatory notes was the credit or the software or the downloading of the software (if distinctions between any of those made a difference).

153. The points at paragraphs 147 to 152 above would need to be addressed before we could say that we were satisfied that what Harrods supplied was electronically supplied services for the purposes of section 47(4) of the VAT Act 1994. A finding that section 47(4) applied would not however be determinative of whether Harrods made a taxable supply to the appellant unless we were wrong in finding that Harrods acted as principal and not as agent. In view of that, and given the points that would need to be further addressed, we did not consider it proportionate to consider this further, and do not make a finding as to whether section 47(4) applied.

Section 47(3)

154. If we are wrong in finding that Harrods acted as principal and if we had found Harrods <u>not</u> to have supplied services electronically (for section 47(4)), it might on the face of it seem that section 47(3) must apply. That would be, as Mr Firth argued, (i) because HMRC exercised their section 47(3) discretion by giving the option in Notice 700 to Harrods to treat itself as both receiving and supplying the vouchers, and (ii) because, by supplying VAT invoices to the appellant, Harrods took that option. Mr Firth went on to argue that Harrods was not entitled retroactively to cease doing that without reasonable advance notice to the appellant.

155. We would not however accept, on submissions so far, that VAT was nonetheless chargeable on Harrods' supply of the vouchers by virtue of section 47(3) (remembering that this question would arise only if we were wrong in finding that Harrods acted as principal). We accept that, in Notice 700, HMRC purported to exercise their section 47(3) discretion as to whether to treat the supply both as a supply to the agent and as a supply by the agent by giving the option to the agent to "treat yourself as both receiving and supplying those services". But, Notice 700 included a condition on the availability of that option which was not in section 47(3). The condition is that the supplies be taxable. On the face of it, therefore, Notice 700 does not purport to farm out the entirety of HMRC's section 47(3) discretion; it purports to farm it out only where the supplies are taxable. Since the reason section 47(3) is relied on for the appellant is to support the argument that the supply was taxable, we would be reluctant to find that Harrods' choice to treat itself as both receiving and supplying the services (if we were wrong in finding that Harrods acted as principal) means that the section 47(3) discretion has been exercised and that the supply was therefore taxable. That would be circular.

156. It may be that the condition in Notice 700 is ineffective, to the extent that section 47(3) is determinative of whether a supply is taxable. If the condition in Notice 700 were ineffective, then we would accept Mr Firth's argument that Harrods' choice meant that section 47(3) was after all satisfied and that VAT was therefore chargeable on the supply of the vouchers by Harrods. We would however need to consider further submissions on whether the condition in Notice 700 is or is not effective. If we had been against the appellant on the agency question, we would have had to resolve the section 47(3)/Notice 700 point. But since that point is

material only if we are wrong on the agency question, we consider it disproportionate to explore it further, merely to enable us to make an alternative finding.

157. So, we have found that VAT was chargeable on the purchases of the Steam vouchers because Harrods acted as principal in supplying the vouchers.

158. The next question is whether that VAT was paid by the appellant.

(5) Analysis: Question 4: Was the VAT paid by the appellant?

159. We find that the VAT was paid by the appellant on the May 2016 onwards transactions, for the following reasons.

160. First, if VAT was properly chargeable on the transactions (as we have found), then the price paid must be assumed to have included VAT. For a seller to argue that, where VAT was properly chargeable, the seller had not in fact charged VAT, would be to assert wrongdoing by the seller, even if the seller were to assert that it was innocently done. We have no direct evidence at all from Harrods, and no evidence from them to the effect that, if VAT was properly chargeable, the price nonetheless did not include it.

161. Second, on the contrary, on the evidence we do have from Harrods, Harrods itself told the purchaser, not merely before the May 2016 onwards transactions, but after them, that Harrods had charged VAT on them (email 16 February 2017, apparently abandoning the position taken in Harrods' 9 February 2017 email, which we have not seen but accept was sent).

162. Third, Harrods, like any seller, should have known in advance of each purchase whether it was charging VAT. It was common ground that Harrods had issued bulk invoices showing 20% VAT for purchases prior to May 2016. In view of that, and given that Harrods said – as we find – nothing at all to the appellant to change the VAT position prior to the May 2016 onwards purchases, Harrods' position prior to each of those purchases was – outwardly – that Harrods was in fact charging VAT on them.

163. Fourth, it was common ground that, for the May 2016 onwards transactions, the price did not go down as compared with the price of the pre-May 2016 transactions, which HMRC (and eventually Harrods) said had wrongly charged VAT. Moreover, as we have noted above, Harrods itself was still telling the purchaser (the appellant), after all of the May 2016 onwards transactions, that the transactions had borne VAT; see Harrods' email of 16 February 2017. The reason the price did not go down may well be because Harrods decided only after the May 2016 onwards transactions that those transactions had not borne VAT. We make no finding on that because we have no evidence of what was in Harrods' mind prior to each of the May 2016 onwards transactions. But we did have evidence, and have found, that Harrods did not outwardly – that is in Harrods' dealings with the appellant prior to the purchases – adopt the position that the purchases would not bear VAT. And the fact remains that the price did not change in the May 2016 onwards transactions as compared with the pre-May 2016 transactions for which Harrods had issued bulk invoices showing 20% VAT. Take a voucher for which Harrods charged, say, £10 in the pre-May 2016 transactions. If that price was said by the seller to include VAT (rightly or wrongly), which it was common ground was originally so because of what was shown on the pre-May 2016 bulk invoices, then the price of a £10 voucher excluding VAT for the pre-May 2016 transactions was £8.33. HMRC did not however argue that the non-VAT price had increased from £8.33 for the pre-May 2016 transactions to £10 for the transactions after that. Nor was there evidence that the price had so increased. We find that it did not.

164. Fifth, that the price did not go down was explained away, according to HMRC, because VAT had not been charged on the pre-May 2016 transactions either. We do not accept however

that VAT was not charged on the pre-May 2016 transactions. Officer X of HMRC said in paragraph 32 of that officer's witness statement (page A48) that "Harrods have maintained that they have not charged VAT on the sales although they did show VAT, in error, on some of the invoices they provided to Lucky Technology Ltd "early on" – prior to and including April 2016.". Officer X relied for this assertion on an email from HMRC themselves to Harrods dated 12 June 2018 (page A551) which said—

> "You mentioned that you had issued VAT invoices for a period of time to Lucky Technology due to a 'template error' although the supplies were treated as non VAT able within your system. I would ask you to cancel and reissue the relevant invoices in order to correct the position".

165. We did not however have evidence from Harrods to the effect that the VAT was not in fact charged on the pre-May 2016 transactions. The 12 June 2018 email was from HMRC to Harrods. Moreover, the assertion that Harrods did not in fact charge VAT on those pre-May 2016 transactions depends on a position that Harrods adopted outwardly, whether to the appellant or HMRC, only after all of those transactions (and after all of the May 2016 onwards transactions). The earliest outward implication that Harrods was now saying that any transactions at all had not borne VAT was in the bulk invoices for the May 2016 onwards transactions showing zero VAT, which Harrods emailed to the appellant on 27 January 2017. That was 13 months and four days from the earliest of the pre-May 2016 transactions, dated 23 December 2015, some eight months from the latest of the pre-May 2016 transactions, the latest being dated 30 April 2016. And those invoices related only to the May 2016 onwards transactions, not to the pre-May 2016 transactions. Even if it could be said that the appellant should have realised from those May 2016 onwards bulk invoices that the same might now turn out to apply to the pre-May 2016 transactions, that still means that the appellant would not have "discovered" or realised that until 13 months and four days after the first of those transactions.

166. Assuming for a moment that HMRC's 12 June 2018 email to Harrods accurately reflected that the pre-May 2016 invoices had shown VAT merely due to a template error, that position seems to have been adopted expressly by Harrods for the first time only in the week or so prior to the 12 June 2018 email which narrated that position. Ms Leppard's reliance on the assertion in Officer X's witness statement that Harrods now says that VAT was not in fact charged on the pre-May 2016 transactions does not therefore lead us to find that VAT was not in fact charged on those transactions.

167. Sixth, HMRC argued that, "Put simply, HMRC has confirmed that [Harrods] did not charge VAT to the Appellant on the supplies subject to assessment, therefore the Appellant has not borne the burden of VAT and has no right to deduct amounts as input tax.". However, HMRC also said that "HMRC does not agree with point 15 of the Appellant's additional [grounds] ie that the liability of the supplies at issue depends on the whim of the supplier. Suppliers and taxpayers in general are responsible for, and required to apply, the appropriate VAT treatment to their transactions, in accordance with legislation in Schedule 10A VATA 1994 and any advisory publications applicable at the relevant time ie Revenue & Customs Brief 12/12 [page A162-A164 DB]". That HMRC position is consistent with our finding that, given that VAT was properly chargeable for the May 2016 onwards transactions, the price did include the VAT and so the appellant did bear that VAT.

168. Seventh, Officer X went on to say in paragraph 32 of that officer's statement that "I have not issued assessments on these early transactions [the pre-May 2016 transactions] as this should be taken account of by Lucky Technology Limited with a credit note issued by Harrods". But if the pre-May 2016 transactions did not in fact bear VAT as HMRC say, and

which HMRC say is also Harrods' position, why would Harrods need to issue a credit note to the appellant? There would be nothing to credit. It would rather be a case of issuing revised invoices for those transactions with the price still showing as £10 (taking our example of earlier) but saying that VAT was zero.

169. Eighth, Mr Firth submitted that the fact that the appellant did not hold a VAT invoice does not mean that the appellant has not incurred and paid VAT on supplies to it, and indeed believed it was doing so. He submitted, relying on *Zipvit v HMRC* [2018] EWCA Civ 1515 at paragraphs 85 to 90, that there is no requirement for the contract explicitly to identify that the price paid is inclusive of VAT for it to be possible to say that VAT has been paid by the customer.

170. HMRC opposed that argument, relying on what the Court of Appeal in *Zipvit* said, at paragraph 116—

> "116. Even if it is open to Zipvit to recharacterise the original payment in this way (which at this stage of the argument must be assumed in Zipvit's favour), there would be an obvious detriment to HMRC and the public purse if Zipvit were able to obtain such a deduction without first showing that the tax in question had been paid by Royal Mail. The normal way of fulfilling that obligation is by production of a fully compliant VAT invoice. Since Zipvit is unable to produce such an invoice, I am unable to see any grounds upon which HMRC could properly conclude that Zipvit should nevertheless be allowed the deductions claimed, to the detriment of the general body of taxpayers. In effect, a retrospective recharacterisation of sums originally paid on the footing that the supplies in question were exempt would now yield an uncovenanted bonus to Zipvit, generated by nothing more than Zipvit's unilateral decision to treat the amounts originally paid as VAT-inclusive. It would, I think, be offensive to most people's sense of fiscal justice if a mechanical accounting exercise of this nature were permitted to generate a very substantial input tax credit, in circumstances where (for whatever reason) none of the tax in question has been paid by the supplier.".

171. Mr Firth argued for the appellant however that, contrary to the present case, at the time of entering into the supply both the supplier and the customer in *Zipvit* believed the supply was exempt (paragraph 6 of the CA judgment). Mr Firth argued that this was fundamental to the Court of Appeal's decision.

172. We accept that the present case is to be distinguished from *Zipvit*. In *Zipvit*, Lord Justice Henderson, with whom the other members of the Court of Appeal agreed, set out the situation at paragraph 115 of the judgment—

> "115. It needs to be remembered in this context that the amounts for which Zipvit is claiming a deduction have not been paid by Zipvit in response to a request by Royal Mail for payment once the taxable status of the supplies had been established. In that situation, Royal Mail would have rendered an invoice showing the VAT due, and would then have been liable to account for it to HMRC as output tax in the usual way".

173. In the present case, however, the bulk invoices showing zero VAT came after the purchases in question. Those purchases were made after receipt of invoices for previous purchases which showed VAT to have been charged, and without any suggestion by the seller after receipt of those invoices and before the May 2016 onwards transactions, that the seller was no longer charging VAT on that kind of purchase. Indeed, even after the May 2016 onwards transactions, Harrods was still saying – in its email to the appellant of 16 February 2017 – that VAT should in fact have been charged on those purchases.

174. Ninth, Ms Spence for HMRC argued that, if Mr Firth was right, VAT would be paid twice. Mr Firth submitted that that was wrong. The structure of paragraph 4 of Schedule 10A is, he said, that the first issue of the voucher, which he said (and we have found) was by Steam, is not liable to VAT in any circumstances (paragraph 4(2) of Schedule 10A). Moreover, he explained, he was not asking us to reach a different conclusion on that. He submitted that – as was common ground – every supply subsequent to that first issue is subject to VAT (paragraph 4(4) of Schedule 10A). So as long as Harrods was acting as principal (which we have found it was) then, argued Mr Firth, Harrods' supply to the appellant is liable to VAT and Steam's initial issue of the voucher is not liable to VAT. Then, he explained, when the voucher is redeemed via the Steam website, Steam (Valve) will account for VAT at that time and not before and, he submitted, that is how Schedule 10 is meant to operate. Mr Firth argued that that also explains why Ms Spence was wrong to say you cannot have VAT embedded in a purchase of a £10 voucher for £10. You absolutely can, he submitted, because that is how VAT is passed down the chain, by embedding it in the £10, so that when the final consumer buys the £10 voucher for £10 the consumer is paying an amount that includes VAT. That must be right, he argued, because where else does the VAT come from? Always from the end user. On Ms Spence's analysis you would, he argued, be trying to sell a £10 voucher for £12, to charge the VAT. "Good luck with that", he said. What consumer would pay £12 for a £10 voucher?

175. We do not accept that our finding that Harrods supplied the vouchers as principal, and that VAT was therefore chargeable on vouchers, means that VAT will be paid twice. As Mr Firth said, the structure of Schedule 10A is designed to prevent that.

Was the VAT paid by the appellant? Conclusion

176. It is for the reasons at paragraphs 160 to 175 above that we accept that VAT was charged as part of the price the appellant paid, and that the appellant therefore paid the VAT.

177. The next question is whether HMRC erred in law in relation to their discretion in regulation 29(2) of the VAT Regulations 1995.

(6) Analysis: Question 5: Did HMRC err in law in relation to their regulation 29(2) discretion?

(i) Regulation 29(2) discretion: Evidence

178. Officer X said in a helpful witness statement—

> "10. I was asked to check the credibility of the repayment claimed on the period 10/16 VAT return submitted by Lucky Technology Ltd on 07/12/2016. Lucky Technology Ltd had claimed a £233,462.78 repayment of VAT for the period. Total input tax claimed on the return was £315,086 with the output tax due on sales (£81,624), accounting for the difference.
>
> 11. The VAT repayment had largely arisen as there was VAT reclaimed on purchases but none charged on some sales as the supplies were deemed as exports not subject to VAT.
>
> 12. I visited Lucky Technology Ltd on 24 January 2017 to perform this check (see exhibit DL2 page 7-17 of EB).
>
> 13. During that visit, I requested to see the documents supporting the claim.

14. Some of the documents provided did not meet the statutory requirements of a valid VAT invoice as defined by SI1995/2518 ("The Value Added Tax Regulations 1995") – see exhibit DL3 (page 18-20 of EB).

15. Lucky Technology Ltd did not hold full VAT invoices for their purchases from Harrods. They had used till receipts to support the claim. The till receipts were typical of a receipt received when paying by credit card at a retailer. They included no separate reference to the amount of VAT charged on the transaction (see exhibits DL4 & DL5 page 21 and 22 of EB).

16. Lucky Technology had been instructed about the requirement to hold valid VAT invoices as evidence of a right to deduct input tax in a letter from another VAT Compliance Officer dated 22 June 2015 – a copy of this letter is at exhibit DL6 (page 23-25 of EB (see page 2 of letter specifically)).

17. When I challenged the Director about this, he confirmed that he did not have full VAT invoices. He said: that it was difficult to get full VAT invoices from Harrods, and; Lucky Technology Ltd had used the till receipts as evidence of their VAT repayment claim.

18. I wrote to the company (and also sent a copy of that letter via email) after the visit to cover a number of issues. This included a section on the evidence required when making purchases over £250. This applied to the purchases from Harrods – all were over £250. A copy of this letter – dated 2 February 2017 – is at exhibit DL7 (page 26-29 of EB).

19. I gave the company two weeks to get valid VAT invoices from Harrods in relation to their purchases.

20. On 9 February 2017, the Director emailed me with copies of invoices he had got from Harrods. These invoices were summaries of the purchases which had otherwise been shown on till receipts – see exhibits DL8 and DL9 (page 30-42 of EB).

21. The invoices provided to me by Lucky Technology Ltd showed that there were a number of transactions on which the company had reclaimed VAT where Harrods showed none had been charged – see exhibits DL10a to DL10e (page 43-53 of EB). I exhibit a reconciliation of these amounts against the purchase ledgers for Lucky Technology Ltd at exhibit DL11 (page 54-62 of EB).

22. Lucky Technology Ltd had included the gross purchase price for these transactions in their accounts and applied VAT on the assumption that VAT had been charged at standard rate. This VAT had been included in box 4 of each appropriate VAT return – to reclaim it.

23. On 16 February 207 I raised assessments under section 73 of the VAT Act 1994 for VAT claimed as input tax by Lucky Technology Ltd on purchases of vouchers from Harrods where the invoice summaries provided by Harrods showed no VAT had been charged.

24. This assessment covered the periods from 05/16 to 11/16 and totalled £391,215.16, and was notified by letter dated 16 February 2017 - see exhibit DL12 (page 63-65 of EB) and VAT 655 Notice of Assessment, issued on 6 March 2017 - see exhibit DL13 (page 66-70 of EB).".

179. Officer X's oral evidence-in-chief included this—

Q – When you gave two weeks for the appellant to supply VAT invoices, did you have any concerns about these purchases at this point?

A – No, it was just a question of looking at the figures and looking for that figure in a document elsewhere.

Q – When looking at the purchases with the till receipts, were you aware at that time that previous invoices did show VAT?

A – It didn't come up.

Judge – Repeats question – were you aware at that time?

A – No.

Q – [Question not noted by judge].

A – The period I was looking at initially was in October.

Q – Harrods sent you the invoices starting page 92.

A – No, Mr Suyraatmadja provided them to me.

A – I understood that this was a bulk invoice got from Harrods to support purchases previously made that had till receipts. My understanding that Mr Suryaatmadja would ask Harrods after the purchases to send invoices reflecting the till receipts.

180. In cross-examination, Officer X accepted that, having seen the till receipts at the 24 January 2017 visit, Officer X had decided they were not enough and that – when sending Officer X's 26 January 2017 email on pages A378 and 379 – Officer X was not going to consider alternative evidence—

> "Q – Later in the email, on page A379, you only quote the first part of regulation 29(2)(a) and not the part of regulation 29 saying alternative evidence.
>
> A – No.
>
> Q – So, we have an email saying that without a VAT invoice you can't reclaim the VAT, then you set out the regulation regarding invoices. So is it correct to say that you were not going to consider alternative evidence?
>
> A – Not at that time, no".

181. Cross-examination of Officer X later addressed Officer X's 2 February 2017 letter—

> "Q – You also repeat what you say in your email, and then go onto say that if you do not provide valid VAT invoices, I will disallow this input from your return. So no suggestion that at this time you were considering exercising discretion to consider alternative evidence is there?
>
> A – No, I was considering the primary evidence.
>
> Q – But it goes further in saying "if you do not, I will disallow the input tax". So you were saying you will disallow and so definitely not exercising your discretion, do you agree with that?
>
> A – I was saying that intent, yes.
>
> Q – To be clear, at this point you were saying you would not consider alternative evidence?
>
> A – Because I had already considered alternative evidence at the visit.
>
> Q – We don't have your visit record, do we?
>
> A – No, but my letter summarises it.

Q – So, you are saying you went to the visit, at the visit you saw till receipts which you rejected as sufficient…

A – [intervening] and credit card receipts.

Q – …and having seen those, you decided they were not enough and you were not going to look further at alternative evidence?

A – No.

Q – And that was it. A one-off opportunity?

A – Yes, but can I explain? I acknowledge that my letter does not say this, then in my mind I was thinking that, if you can't provide me with anything else, I will disallow. So I look at what is provided at the visit, and what is provided after, then decide.

Q – The problem is that you have just said that at this time you were not considering exercising a discretion to accept alternative evidence, then you said you considered it at the visit, but now you said you considered it later.

A – [….][11] if Howard emailed me saying he can't provide invoices, I would have considered what else would do. It was just my intention if he did not supply valid VAT invoices.".

182. So Officer X's evidence was that, while acknowledging that Officer X's letters did not say this, "in my mind I was thinking that, if you can't provide me with anything else, I will disallow. So I look at what is provided at the visit, and what is provided after, then decide" and "if [Mr Suryaatmadja] had emailed me saying I can't provide invoices, I would have considered what else would do. It was just my intention if he did not supply a valid VAT invoice". Mr Firth suggested to Officer X that Officer X's recollection of having had this in mind when writing the pre-decision letters might not be reliable, and that it might have arisen over the long period of time in which Officer X was preparing for this litigation, with the discretion point repeatedly made during preparation. Officer X denied having misremembered, but accepted that it was fair to say that Officer X's letter nearer the time was more accurate.

183. Officer X also said in oral evidence that, had Officer X reached the view that VAT had in fact been chargeable and paid, Officer X would not have decided not to allow the input VAT. Equally, Officer X told us that, had Officer X reached that view after making the decision under appeal, Officer X would have withdrawn the decision and the assessments and would have allowed the input VAT after all.

(ii) Regulation 29(2) discretion: Submissions

184. Mr Firth made clear that he was not for a moment suggesting any dishonesty on Officer X's part.

185. Mr Firth submitted for the appellant that it is true that the appellant does not possess VAT invoices normally required to justify input VAT, but that this was because Harrods is wrongly refusing to provide them and HMRC have a statutory discretion to permit deduction of input tax in such circumstance under regulation 29(2). He submitted that either Officer X did not consider exercising the discretion under regulation 29 (because Officer X erroneously did not

[11] Judge's notes of the hearing do not record the introduction to this answer.

think the supply to the appellant was taxable) or, if Officer X did consider exercising the discretion, Officer X failed to take into account the relevant consideration that the supply is taxable or, to similar effect, Officer X took into account an irrelevant consideration, namely, Officer X's belief that the supplies were not taxable. Mr Firth submitted that, on either basis, the appeal should be allowed, citing *GB Housley Limited v HMRC* [2016] EWCA Civ 1299, paragraphs 79 to 80. Mr Firth reminded the tribunal that the only reason the appellant does not have VAT invoices is because the supplier is refusing to provide them, despite being asked, and that it is outside of the appellant's control to force the supplier to provide those documents. In those circumstances, he argued, for HMRC to insist upon the provision of VAT invoices renders it impossible for the appellant to exercise its right to recover VAT, contrary to the EU law principle of effectiveness.

186. Ms Spence submitted for HMRC that the right to deduct input tax is not an absolute right. Rather, she said, the taxable supply must be made for the purposes of the taxpayer's business and the appellant must hold a VAT invoice or such alternative evidence to satisfy HMRC that a taxable supply has been received, at a positive rate. She submitted that Officer X's 2 February 2017 letter at page A83, and the decision letter at page A118, clearly showed that Officer X did consider alternative evidence, namely the till receipts. Ms Spence submitted that Officer X was entitled to reject the till receipts because, although they do say what was bought, they are not the kind of till receipts that show the VAT amount but are rather credit card payment receipts. Ms Spence said that, if the till receipts had been of the type showing VAT (rather than credit card payment receipts), "things might be different, who knows?", but that even then the receipts still did not show the purchaser's name and that the credit card numbers varied. Ms Spence reminded us of Officer X's evidence that there had been runners who did the purchasing of the vouchers for appellant.

187. Ms Spence accepted however that HMRC could have asked the appellant for the names to link to the credit card numbers and that that would have established the purchasers' names (along with evidence which HMRC could also have sought of the purchasers' links to the appellant). But Ms Spence argued that that would not have established the VAT paid. She submitted that, once the Harrods' bulk invoice summaries showing zero VAT were provided to Officer X, Officer X was entitled to take them – as Officer X did – as confirming that no VAT had been charged to the appellant. This was, argued Ms Spence, because Officer X then held a document required by regulation 13(1), which meant that no further evidence of a VAT charge was required, and so Officer X was not then required to consider alternative evidence before issuing the assessment. Finally, Ms Spence submitted that the assessments were made to best judgment and issued within the legislative time limits, and HMRC had taken into account and applied or considered all relevant information, knowledge and documentation in reaching their decision**.**

(iii) Regulation 29(2) discretion: Analysis

188. We record at the outset that we accept that there is no dishonesty whatsoever in any of what Officer X said in oral or written evidence. We were impressed by Officer X. Officer X was a forthcoming witness and was clearly trying Officer X's best to recall what had happened and when, and to help the tribunal. Officer X, like Ms Spence, had put a lot of effort into this case.

189. We find however that HMRC erred in law in relation to their regulation 29(2) discretion, for the following reasons.

190. First, we find that HMRC failed to exercise the discretion to accept alternative evidence, for the following reasons.

191. To put it in context, HMRC's 22 June 2015 letter from Andrew Jenkins had told the appellant about that discretion (page A79)—

> "HM Revenue and Customs statement of practice relating to Input Tax deduction without a valid VAT invoice, which was revised in March 2007 (please refer to Revenue & Customs Brief 83/09 which is available via the gov.uk website as an archived item) clearly states that discretion can only be applied in cases where there is no valid VAT invoice and it is not possible to obtain a proper VAT invoice".

The 22 June 2015 letter had gone on to say (page A79)—

> "If there is any doubt as to whether you will be able to obtain a valid VAT invoice the first thing you need to establish is if it is possible to obtain valid VAT invoices, and from my correspondence with you (Mr Qureshi) this would certainly appear to be the case with supplies made by Harrods and other large retailers such as Sainsbury's and Tesco. You should not reclaim VAT input tax without valid VAT invoices, it is a requirement for suppliers, in this case retailers, to provide VAT invoices on request if the value of the supply exceeds £250.".

The firm instruction in this letter that the appellant must have VAT invoices appears based on the letter writer, Mr Jenkins', understanding that "this would certainly appear to be the case with supplies made by Harrods".

192. HMRC's insistence on VAT invoices for the claims in this appeal came however without the qualification that Mr Jenkins has given: that it be impossible to obtain VAT invoices from Harrods. HMRC repeatedly told the appellant – in every letter and email to the appellant after the 24 January 2017 visit and before the decision – that only VAT invoices would be accepted, without mentioning that, "if it is not possible to obtain a proper valid VAT invoice" then "discretion can … be applied", as the 22 June 2015 letter had put it.

193. Moreover, Officer X had in the 2 February 2017 letter referred to what Officer X called a "ruling" by HMRC's Mr Jenkins in his 22 June 2015 letter that, for purchases over £250, VAT invoices were required (and without mentioning the qualification Mr Jenkins had given in that letter: that it be impossible to obtain VAT invoices) (page A83). Officer X accepted in cross-examination that "ruling" overstated the matter, and that what Mr Jenkins had said had no formal status and was just a letter. In Officer X's 2 February 2017 letter, Officer X had also gone so far as to say (emphasis in original) (page A84)—

> "I gave you a two week period in which to obtain evidence from Harrods – see my email of 26 January 2017. I also gave you a copy of guidance showing what is included on a valid VAT invoice. **If you do not provide me with valid VAT invoices to support your purchases from them, I will disallow this input tax from your return.** You must provide these invoices by close of business on **Thursday 9 February 2017**." (second paragraph on the page).

194. Whether or not Officer X had misremembered having in mind, when writing the pre-decision letters, that "if you can't provide me with anything else, I will disallow", Officer X's evidence was that Officer X did not before or after making the decision say that to the appellant, whether orally or in writing. We accept that evidence. And we accept Mr Firth's submission that having only in your mind that you would take further evidence depending on what comes in is not an exercise of discretion.

195. We find that it was an error of law repeatedly to tell the appellant that only VAT invoices would do. That is so in any event, but especially when taken (i) with the erroneous reference in the 2 February 2017 letter to a previous "ruling", and (ii) with the statement of intent in that letter: "I will disallow". The error of law was in giving the appellant the impression that there was no point in Mr Suryaatmadja obtaining and then providing alternative evidence such as

information to inform the till receipts – for example, which credit card matched which purchaser and how that purchaser was linked to the appellant (if the purchaser was not Mr Suryaatmadja himself) – because alternative evidence would at that point make no difference. Whether Officer X viewed what Officer X had done as a mental exercise of discretion, outwardly it was not an exercise of discretion.

196. Second, there were errors of law in what HMRC did after receiving the bulk invoices showing 0% VAT. Despite HMRC having previously allowed 20% VAT for the same type of vouchers where bulk invoices had shown 20% VAT (paragraphs 19 and 22 above), Officer X simply relied on the 0% invoices at that point. Officer X did so as determinative not merely of the question of what evidence would suffice, but of the question of whether VAT had been chargeable and paid. This was an error of law in that, on receipt of the 0% bulk invoices, HMRC closed their mind to the possibility (raised by the appellant) that those invoices were mistaken and to the possibility (raised by the appellant) that VAT was chargeable and paid, and did not consider that question in light of the facts and the law as applied to those facts. This in turn led to the error of law that an irrelevant (and simply wrong) matter was taken into account, that matter being the mistaken view that VAT was not chargeable. This meant that – as was common ground – even if the appellant had, after supplying the 0% bulk invoices, provided bulk invoices showing 20% or even an individual 20% VAT invoice within the meaning of regulation 13 for each transaction, those invoices would not by that time have made a difference.

197. Third, it appeared from the evidence that Officer X had not, by the time of forming the conclusion based on the 0% bulk invoices, had internal advice from HMRC to the effect that VAT was not in fact chargeable and that HMRC had therefore previously been in error in allowing the input VAT for the periods for which the bulk invoices had said 20%. But if and to the extent that Officer X formed that view independently of the 0% bulk invoices (whether on advice or not), and prior to making the decision, that view was – in light of our findings earlier this decision – wrong. It follows that we accept that, if Officer X did form a view on chargeability independently of the 0% bulk invoices, that was an error of law in that, again, an irrelevant (and simply wrong) matter was taken into account, namely the mistaken view that VAT was not chargeable. This means again that, even if the appellant had, after supplying the 0% bulk invoices, provided bulk invoices showing 20% or even an individual 20% VAT invoice within the meaning of regulation 13 for each transaction, those invoices would not by that time have made a difference.

198. The points at paragraphs 196 and 197 above are reinforced by Officer X's evidence – which we accept – that, had Officer X reached the view that VAT had in fact been chargeable and paid, Officer X would not have decided not to allow the input VAT and that, had Officer X reached that view after making the decision, Officer X would have withdrawn the decision and the assessments and would have allowed the input VAT after all. In other words, whatever alternative evidence the appellant might have been able to provide, that would have made no difference once Officer X had formed a view as to VAT chargeability.

(iv) Regulation 29(2) discretion: Conclusion

199. It is for the reasons at paragraphs 190 to 198 above that we accept the appellant's submission that HMRC erred in law in relation to HMRC's regulation 29(2) discretion.

(v) Regulation 29(2) discretion: Observations

200. It seems that the power for HMRC to accept alternative evidence is aimed at where HMRC do not, or would not, accept that purchases were made (and therefore the VAT paid) without the VAT invoice. But in the present case, HMRC appeared by the time of the hearing to have accepted that the purchases had been made. For HMRC to continue nonetheless to resist the appeal by relying on an argument that there was no error of law in relation to the regulation 29 discretion – even if we were to find, as we do, that VAT was in fact chargeable and paid – would appear to be to attempt to get out of allowing the input VAT. That did appear to be HMRC's position. We say that because Ms Spence did not accept that the regulation 29 point would fall away if we were to find that VAT was chargeable and paid, despite Officer X having told us that, had Officer X reached the view, post-decision, that VAT had in fact been chargeable and paid, Officer X would have withdrawn the assessments and would have allowed the input VAT after all.

201. Finally, we observe that the letter dated 23 December 2016 arranging the visit (attached to the 22 December 2016 email) had warned the appellant that (page A63, our emphasis)—

> "The purpose of the visit is to check the company's repayment return for the period 10/16 and to examine the records that relate to this return. If we need to look at records for any other periods, we will let you know.".

202. But at the visit Officer X questioned evidence to support claims for the other periods in this appeal. The notes attached to that letter had however also said (page A65)—

> "We may also ask to see your records from earlier VAT periods if we think it is necessary".

203. No point was taken as to this, and we have not based any of our reasoning on it.

(7) Analysis: Generally

204. Ms Spence submitted for HMRC at the hearing that "further enquiries made by HMRC confirm that no VAT was paid to HMRC by the supplier and moreover, no VAT is chargeable on the supplies at issue. With this in mind, it is submitted that, to allow the Appellant to recover an amount claimed as input tax which it has not borne the burden of and which has not been paid to HMRC by the supplier, could equally be seen to render the right of deduction ineffective, call into question the neutrality of VAT or be contrary to the EU law principle of effectiveness" (skeleton, paragraph 90). HMRC's post-hearing submission by counsel echoed this: "[Officer X] considered whether to allow input tax and determined not to do so because Harrods had not itself accounted for VAT" (paragraph 36, post-hearing submission, 1 May 2022).

205. We do not accept that Harrods' actions in its dealings with HMRC should properly dictate whether or not the appellant, who has no control over Harrods, is entitled to reclaim input VAT.

E: DISPOSAL

206. It appeared to be common ground that the First-tier Tribunal's approach to the exercise of HMRC's regulation 29(2) discretion is supervisory, and that – as Mr Firth summarised it – there would be an error of law if HMRC had failed to exercise the discretion, or had exercised it unreasonably, or had taken account of irrelevant matters, or had failed to take account of relevant matters. In other words, the typical judicial review grounds were, he submitted, the extent of our jurisdiction in relation to the exercise of the discretion.

207. Mr Firth submitted that we should allow the appeal because the outcome would not inevitably be the same if HMRC were to conduct a proper exercise of their regulation 29(2) discretion. He cited paragraphs 70, 75 and 79 of *GB Housley Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 1299.

208. Ms Spence submitted that the "legislative conditions set down in the VAT Act 1994 and the VAT Regulations 1995 have not been met and the Appellant is not entitled to reclaim the amounts assessed as input tax"[12] and invited the tribunal to dismiss the appeal and to find that the amounts set out in the table reproduced at paragraph 7 above are properly due from the appellant.

209. We accept that the outcome would not inevitably be the same were we to allow the appeal. We have found that VAT was chargeable and paid. We remind the parties, incidentally, that Officer X accepted (i) that, had Officer X reached the view that VAT had in fact been chargeable and paid, Officer X would not have decided not to allow the input VAT and (ii) that, had Officer X reached that view after making the decision, Officer X would have withdrawn the decision and the assessments and would have allowed the input VAT after all.

F. CONCLUSION

210. It is for all of the above reasons that we allowed the appeal but did not remit.

G. APPEALING AGAINST THIS DECISION

211. 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 the First-tier Tribunal not later than 56 days after this decision is sent to the party making the application. 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.

RACHEL PEREZ
TRIBUNAL JUDGE

Release date: 22 September 2022

[12] Skeleton, paragraph 91.