VAT – repayment claim for output tax on unused activity vouchers – whether contract to make future supplies of services or immediate supply of right to activity

VAT – whether output tax to be reduced by input tax in absence of provision of activity

LONDON TRIBUNAL CENTRE

ACORNE SPORTS LIMITED - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: JOHN CLARK (Chairman)

MRS JO NEILL, ACA

Sitting in public in London on 14 January 2003

Hugh Mainprice of Mainprice & Co, instructed by Pearce Taylor Taxation, for the Appellant

Raymond Hill, Counsel, instructed by the Solicitor's Office of HM Customs and Excise, for the Respondents

DECISION

1. Acorne Sports Ltd ("Acorne") appeals against the final decision of the Commissioners in their letter dated 11 March 2002 rejecting a voluntary disclosure claiming overpaid output tax in respect of unredeemed activity vouchers.
2. The evidence provided consisted of Acorne's bundle of documents, the Commissioners' bundle of documents, a witness statement and oral evidence given by Richard Gysselink ("Mr Gysselink"), the founding Director of Acorne, and oral evidence given by Edward Charles Bennett ("Mr Bennett") of the Commissioners' Oxford Business Centre. From the evidence we find the following facts.
3. Acorne, which was registered with effect from 21 August 1989, carries on business as a supplier of vouchers. These entitle the named holder (whether or not the purchaser) to participate in a named activity selected from a list of activities offered by Acorne. These activities include flying light aircraft and vintage aircraft, gliding, helicopter training, balloon flights, parachuting, tandem skydiving, using a flight simulator, motor racing, other driving activities, and relaxation days at health spas.
4. Each voucher has a unique serial number. It does not show a face value. It states that the named holder will be entitled to the specific activity chosen by the purchaser. The voucher is valid for a minimum of six months; the expiry date is shown. Condition 6 of the terms and conditions set out on the reverse of the voucher states: "The voucher is non-refundable and

may only be exchanged for the services described thereon. It cannot be exchanged for cash."

5. Vouchers are supplied both directly to individual members of the public, by reference to prices in Acorne's brochure, and to retailers (such as Argos) who sell them on to the public. Of the vouchers sold by Acorne, the large majority (80 to 90 per cent) is sold through retailers. The retailers decide their own selling prices for the vouchers, which Acorne sells to them at trade prices set out in a separate trade list. This appeal concerns both types of sale.
6. Although vouchers are normally issued to a named person, this is not always the case. Examples given in evidence of unnamed vouchers included vouchers offered as competition prizes, and vouchers sold through retailers. Where the voucher does not carry a specific name, Acorne only hears who has had the benefit of the voucher after it has been redeemed.
7. Of the vouchers bought by private individuals, about 90 per cent specify the name of the holder (who could either be the purchaser or, in the case of a gift, a person specified by the purchaser). Of all vouchers purchased, most are bought by one person to provide the activity for another person.
8. The purchaser pays the price shown in the brochure, or in the case of retail sales, the price charged by the retailer. The voucher gives the holder a contractual right to participate in the activity if he or she complies with the conditions. The holder contacts one of the activity centres (in any given area, depending on the specific activity, there are normally two or three choices) to make a booking. Acorne considers it advisable not to wait until late in the validity period before booking. The voucher is either sent to the activity centre when the booking is made, or brought by the holder on the day booked for the activity. When the holder has used the voucher, the activity centre sends the voucher to Acorne together with an invoice for the cost of the activity. Acorne accepts that it must guarantee the availability of the activity; if an activity centre were unable through financial difficulties to provide an activity to a voucher holder, Acorne must arrange this in some other way, regardless of cost. Mr Gysselink said that this had happened.
9. A voucher carrying a specific name can only be used by someone other than the named holder by specific arrangement with Acorne.
10. Originally a voucher for one activity could not be exchanged for one entitling the holder to a different activity. Now Acorne recognises it as good practice to allow exchange on a "like for like" basis. If the price for the substituted activity is higher, a supplement has to be paid; if lower, there is no refund, but the balance is carried forward as a credit if a voucher for a further activity is purchased. It is very unusual for such a balance to arise.
11. Vouchers are sold subject to a 14 day refund policy; it is not Acorne's policy to make refunds after that period has expired.
12. The brochure now states that the validity period of the vouchers can now be extended, subject to terms. In practice, Acorne gives 2 months' extension free, and 6 months subject to a charge. Normally the customer is quite happy to pay a modest revalidation charge. The reason for limiting the period of validity is to avoid Acorne carrying forward an unlimited "tail" of liability for unused vouchers. Acorne has been trading for about 15 years, and if for example a voucher was produced 10 years after purchase, the cost of providing the activity could have changed from what it would have been at around the time of purchase.
13. Where the holder has not used the voucher by the end of its period of validity (or by the end of the additional period, where the validity has been extended) there is no provision for any refund to the purchaser. There is

no reference anywhere on the voucher to the payment being a deposit. In many cases, Acorne would not know the identity of the purchaser. Mr Gysselink indicated that if the circumstances were exceptional, a refund could be made. The normal position is that the voucher lapses and no refund is made; as the activity is not undertaken, there is nothing for any centre to invoice Acorne.

14. The proportion of vouchers not redeemed within their validity period is approximately 18 per cent.
15. Where vouchers provided to retailers have expired without being sold, the retailers return the expired vouchers and receive a credit note.
16. In September 2000, Acorne made a voluntary disclosure (in a sum not agreed by the Commissioners) in respect of the output tax on vouchers which had not been redeemed between 1 July 1997 and 31 December 1998. The Commissioners' final decision rejecting the voluntary disclosures was contained in their letter dated 11 March 2002.

The law

17. Under section 2(1)(a) of the Value Added Tax Act 1994 ("VATA 1994") the amount of VAT charged on a supply of goods or services is calculated by reference to the value of the supply. Under section 5(2)(b) VATA 1994, anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services. Section 19(2) VATA 1994 provides that where the supply is for a consideration in money its value is taken to be such amount as with the addition of the VAT chargeable is equal to the consideration. Under section 19(4) VATA 1994, where the supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be such part of the consideration as is properly attributable to it. Under Article 11A 1(a) of the Sixth Directive, the taxable amount is defined as:

    "everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies".

18. On the time of supply of services, section 6 VATA 1994 provides:

    "(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

    (4) If, before the time applicable under subsection . . . (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection . . . (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received."

Acorne's contentions

19. Mr Mainprice specified the issues before the Tribunal. The first was whether the payment made to Acorne by its customers was consideration for the supply by Acorne of one or more of the activities which was supplied by Acorne through sub-contractors. Secondly, if it was a prepayment for such a supply, on which VAT was accounted for at the

time of payment, was that VAT repayable if no supply took place? Thirdly, if the consideration for the supply was for the provision of the right to participate in an activity, was the value of the consideration the total amount received by Acorne, or the amount which it had received less the amount that it was or would have been charged by its sub-contractors for the provision of the particular activity?

20. On the first question, Acorne contended that the reality of its business was the making of supplies of exciting sports and leisure activities which were supplied to its customers by sub-contractors. Its method of operation was to issue, in return for payment, a voucher to each customer which authorised the sub-contractor to supply a particular activity and to invoice Acorne for that sub-contractor's charges. Mr Mainprice argued that payments for vouchers were made in advance of the supply and VAT was accounted for on the consideration received; these payments were considered to be payments in advance to Acorne for services that it was to supply. If the person for whom a voucher had been purchased did not contact a relevant sub-contractor, no supply had taken place in respect of which Acorne had received payment (consideration). The use of sub-contractors to supply the actual services did not alter the "supplier" of the service. VAT was a tax on supplies and there was nothing in the legislation which rendered chargeable to tax a supply which did not take place. Mr Mainprice referred to the Commissioners' Notice 700 at paragraph 8.13.1 in which they accept that where there is a cancellation charge, or the forfeiture of a deposit, any VAT charged can be reclaimed.
21. Mr Mainprice referred to the Commissioners' contention that Acorne was only supplying a right to participate in the relevant activity, with the inference that the whole of the payment received by Acorne for each voucher was the consideration for the supply of that right. He argued that there was a distinction between a right and the service. He gave the example of a contract to buy a car. Acorne supplied activities and took payment in advance; the VAT was due by reference to the time of payment. If the activity was not taken up, there was no supply and therefore the VAT paid by Acorne in relation to that voucher was refundable. He referred to Mr Gysselink's evidence that if there was a variation in the chosen activity and the cost of the new service was less than the service originally selected, there was no refund but Acorne held the balance as a credit. In *C & E Commrs v British Telecom plc* [1996] STC 818, the Court of Appeal held that overpayments inadvertently made by telephone subscribers credited to a later account were not to be accounted for in the accounting period in which they were received, but in the later period when an invoice was issued showing the credit. The question was whether VAT was due on a supply never made. In the case of Acorne's credit balance, this could not be regarded as consideration for a particular supply until the customer came back. Mr Mainprice accepted that in a case involving a prepayment, there was a tax point. In a number of cases there were examples of prepayment for goods, and if this was a deposit, it was payment for a supply in future. However, this was never so where a prepayment was received and no supply took place; VAT was a tax on supply. The Commissioners were saying that where there was no supply, it was to be recategorised to a supply of a right.
22. He gave an example of circumstances in which no supply would have been made. If a taxi firm were to take a booking for a journey to Newcastle, price £100 plus VAT payable in advance, but the customer never made the journey, and no refund was made, there would have been no supply. He submitted that in those circumstances the taxi firm would be entitled to reclaim the VAT accounted for to the Commissioners. He also cited *Howard* (VAT Decision 1106, reported at [1981] BVC 1,155) in which the Tribunal

accepted the argument of the Commissioners that there could not be a supply of non-existent goods (containers) and that in the absence of a supply there could be no right to deduct input tax. He argued that where vouchers were supplied through Argos, Acorne was making supplies through Argos as agent. (We should point out that Acorne had previously accepted in correspondence that retailers did not act as its agent. It was because Mr Mainprice raised this argument that Mr Bennett had to be called to give additional evidence.) In *Nigel Mansell Sports Co Ltd* (VAT Decision 6116) customers wishing to purchase Ferrari motor cars paid a deposit of £5,000 to show good faith. When and if a suitable Ferrari was allocated to Nigel Mansell Sports Co Ltd, the £5,000 deposit was subsumed into the 10 per cent deposit. The terms were that if the customer never acquired a car, the deposit would be returned. The Commissioners contended that the original payment of £5,000 was consideration for the supply of a Ferrari motor car. The Tribunal allowed the company's appeal, holding that this was merely an agreement to make an agreement, and not consideration for a future supply. Mr Mainprice accepted that these circumstances were slightly different from those of Acorne. He did not dispute that monies paid for vouchers were consideration for a future supply. Mr Mainprice also referred to *Theotrue Holdings* (VAT Decision 1358) in which the Tribunal held that there was nothing in section 1 of the Finance Act 1972 (now section 1 VATA 1994) which rendered chargeable to tax a supply which did not take place, and therefore input tax on deposits paid in respect of intended supplies to the company could not be deducted. Mr Mainprice argued that in the present case, Acorne made no supply in respect of the unredeemed vouchers.

23. Mr Mainprice referred to *British Railways Board v C & E Commrs* [1977] STC 221 in which the Court of Appeal held that the purchase of a student travel card was part payment for the supply of transport by rail. He argued that in the present case, Acorne's customers received a service; this was to include the contractual right to demand that service. The payment was not for a right. It was an advance payment. He referred to *C & E Commrs v Bass plc* [1993] STC 42. On the face of it, this case was against the arguments that he was putting for Acorne. It concerned the VAT treatment of "no show" charges where customers had made guaranteed reservations but had subsequently failed to take up the rooms. The Divisional Court had accepted the Commissioners' submission that the company granted the customer a right to use the room. Mr Mainprice argued that the contract between Bass and its customers was for the supply of a room in a particular hotel for a particular night, and this had to be made available to the customer. He said that the circumstances in that case differed from those in the present case in that the purchase of a voucher did not give the purchaser the right to have supplied to him a service from a particular sub-contractor. (We have taken the references to the "purchaser" to be either to the purchaser or to the holder of the voucher, as in many cases the holder and the purchaser are not the same person.) First, the purchaser had a choice of a number of sub-contractors, and secondly, the time for provision of the activity was not specified; the particular sub-contractor selected might not be able to supply the service at the particular time required by the customer, who could then obtain the service from another of the authorised sub-contractors. In *Celtic PLC* (VAT Decision 14762) the supply involving a season book of match tickets was the sale of a ticket for a particular match at a particular time. The Tribunal held that the VAT treatment was not affected if the purchaser did not attend the particular match. Mr Mainprice argued that in *Celtic* there was a prepayment for a particular supply at a particular time; the customer had no control over the time of the match.

24. If the Tribunal did not accept Acorne's contentions that it was itself supplying the relevant activity, and that Acorne supplied the right to participate in the relevant activity, Acorne contended that the consideration for the grant of that right was not the full amount which Acorne initially received, but the difference between that amount and the amount which it would have paid to its sub-contractor had the activity actually been supplied to the holder of the voucher. Mr Mainprice distinguished the cases on which the Commissioners relied; in these, there was always a specific entity which was the subject of the contract to make the supply. In the case of supplies of the type of activities provided by Acorne, the recipient of the supply was in a position to choose which sub-contractor he or she would use in order to receive the supply for which he or she had paid. (We assume this to relate to the holder on the basis of the amount paid by the purchaser – see above). It might be the case that the sub-contractor selected was either unable or unwilling to provide the necessary supply.
25. He summarised his case by asking for a decision in principle including a finding that Acorne made a single supply of a service when the activity was provided and did not supply a right for a consideration at the time when the voucher was purchased. If the Tribunal found that the payment was made for a right to the activity, he asked that the consideration should be apportioned.

The Commissioners' contentions

26. Mr Hill specified the issues. The first and main issue was whether Acorne made a taxable supply in respect of vouchers which were not redeemed within the validity period. Acorne contended that it did not make a taxable supply; the supply represented by the voucher was the supply of the relevant activities. It argued that if a voucher was not redeemed, no supply had taken place and no output tax was payable. (Mr Mainprice had agreed this formulation of Acorne's contentions on this issue.) The Commissioners contended that Acorne did make a taxable supply; this was a supply of the right to participate in the relevant activity shown on the voucher, regardless of whether the voucher holder went on to take up that right. The Commissioners accepted that there was a single occasion of supply, but differed from Acorne in identifying the subject-matter of that supply. Acorne had subsequently raised a secondary issue. This was the contention that, even if the Commissioners were correct on the main issue, the consideration for that right (to participate) must be the difference between what Acorne paid to the sub-contractors, i.e. the providers of the experience, and the amount which they received from their customers. A further argument that Acorne acted as an agent for the activity centres had been abandoned; Acorne had accepted in correspondence that it acted as principal regardless of the true characterisation of its supplies. Both parties accepted that the vouchers were not "face value vouchers" within paragraph 5 of Schedule 6 VATA 1994. Mr Hill also pointed out that as the Commissioners had not agreed the figure contained in the voluntary disclosure, it would be necessary in the event that Acorne was successful in its appeal to agree the quantum of any refund claim and, in default of agreement, to return to the Tribunal on that issue.
27. On the characterisation of the relevant services, Mr Hill cited section 5(2)(b) VATA 1994 and section 6(3) VATA 1994 (see paragraphs 17 and 18 above). Under section 5(2)(b) the grant of a right for consideration had to be treated as a supply of services. Under section 6(3) and (4) the tax point was advanced if payment or invoice preceded performance of the

services. The Commissioners' view was that there had been a supply of a right, and that the tax point was payment. As a result Acorne had correctly accounted for VAT at those tax points, and it followed that the voluntary disclosure was incorrect. He referred to *Bass*, in which Popplewell J agreed with the Commissioners that the initial grant of a right to use an unidentified room was in itself a supply even if the customer did not turn up and use a specific room. Mr Hill cited the following passage at page 45 b-c;

"It might be thought that giving the word "supply" its natural and ordinary meaning would necessarily import some acceptance or receipt by the other party. But it seems to me that is not inevitably so. The reservation of a particular seat on a railway train is, in my judgment, clearly a supply for consideration. Common experience shows that on many occasions the reserved seat is not occupied.

In the instant case it seems to me that what the company are charging the customer for is the use of a room whether it is occupied or not. Making available a room, even if not a specified room, seems to me to constitute a supply. . . . the reality of the contract into which the customer enters in relation to a 'guaranteed reservation' is that he will have a room available for him and, whether he uses it or not, he will be required to pay the same figure."

28. Mr Hill argued that the situation in the present case was directly comparable. Once the purchaser had paid for one of Acorne's vouchers, then so long as the holder complied with the relevant terms and conditions for its redemption, he or she had a contractual right to participate in the specified activity at the activity centre of his or her choice without further payment. Acorne accepted the obligation to provide the activity. Whether or not the voucher holder in fact went on to exercise his or her right to participate in the activity, there was nevertheless a taxable supply of the contractual right itself. Mr Hill compared the position of a person with a voucher for a flying lesson, valid for 6 months, with the position of the customer in *Bass*. Acorne in the present case was supplying a guaranteed flying lesson at one of its centres during the whole validity of the voucher. The only difference between Acorne's position and that in *Bass* was simply one of degree, the length of time, as Acorne's vouchers had a 6 month validity period. This did not change the nature of the supply; there was a supply of a contractual right.
29. Mr Hill argued that in exactly the same way, VAT was due from a football club on the sale of season tickets giving the right to attend football matches, even if the supporter chose not to turn up and watch a particular game. He cited *Celtic PLC*, and in particular the final paragraph of the decision:

"What has been purchased is specific – the right to attend the match in question. . . . In such circumstances I do not see how it can be seriously suggested that VAT would only be due if the purchaser of the ticket chose to attend the performance. That would mean that payments received were dependent on attendance and that in effect the football club would be the recipients of a gift of money from the purchaser if he stayed away. That does not seem to be a sensible result."

30. Mr Hill contended that, just as in *Celtic PLC*, there was in the present case a prepayment by the purchaser of one of Acorne's gift vouchers for a

specific supply – a flight, a parachute jump or a relaxation day – to be provided by one of Acorne's sub-contractors at the activity centres. The voucher did not identify when or from which activity centre the activity would be provided. The holder of the voucher could not use it like a book token simply to purchase any activity at any centre up to a particular value. Acorne agreed that when it sold a voucher it was contracted to supply a specific service. Mr Hill argued that although the activity centre for the performance of the activity remained to be chosen by the purchaser (again, as we have stated, this should be a reference to the holder), this did not detract from the fact that the payment by the purchaser of a voucher related to a specific supply. He compared this with *Celtic*, where the consideration related to a specific supply even though some season tickets did not identify a specific seat, and with *Bass*, where no room was actually allocated to the person making the booking. The difference between Acorne's case and *Celtic* was one of degree in identifying the date on which the service was to be supplied, as Acorne's vouchers had a 6 month validity period. In *Celtic*, if the holder of the season ticket did not take up his seat during the match, he had missed the validity period but had received the supply. The period in Acorne's case was 6 months rather than 1 ¾ hours. The difference between this and *Celtic* and *Bass* was one of degree in the "window of opportunity". The customer had paid for a right to a specific supply within the period.

31. Mr Hill also referred to *New World Payphones Ltd* (VAT Decision 15964). This held that VAT was due on coins inserted into a public telephone box, even if the caller hung up with credit still showing on the display and did not take up the right to make a call for the whole of the time allowed. The Tribunal commented:

    "The Tribunal does not consider that this unused credit can be considered to be a gift by the customer to the Appellant. It is for the customer to decide whether he wishes to avail himself of the credit that is to say to make another telephone call at once or not. The commercial realities of the matter are that the customer selects the coins which he wishes to use or has available, and uses up the credit which these coins purchase or not as he pleases. However what he has purchased with the coins inserted into the call box is the possibility of making telephone calls up to the amount of the coins inserted. The length of the telephone call made does not convert the credit purchased by those coins into a surplus or gift. It remains a credit which has been purchased by the customer, for which he has paid, and for which the possibility of making calls up to that amount is placed at his disposal by the Appellant."

32. Mr Hill argued that what the purchaser of one of Acorne's vouchers had purchased was the possibility of the named individual on the voucher experiencing the specified activity. If the holder did not avail himself or herself of that opportunity, that did not make the amounts paid by the purchaser into a gift to Acorne. What the purchaser had received for his or her money was that the voucher holder had been provided with the possibility of taking up the activity. Mr Mainprice had referred to *British Telecom* as useful in dealing with the position of a credit on exchange of vouchers, and had said that this showed that there was no supply at the first point. He had argued that output tax should only be charged on the lower amount and the credit should be dealt with later. Mr Hill contended that in the light of *New World Payphones*, this was not correct. *British Telecom* could be distinguished, as the customers had paid too much by mistake, for example by paying an account and then paying again on receipt of the red final reminder account. This second payment was one

made under a mistake of fact. In *New World Payphones*, the Tribunal drew attention to this difference; there was no suggestion that the excess credits were paid to New World Payphones by mistake. If the customer inserted a £1 coin, he had bought the contractual right to £1 of calls. In the present case, if Acorne exchanged a voucher for a £60 activity for one at £40, output tax was payable immediately on £60, as the customer had the right to the £40 activity plus a right to a further £20 of activities.

33. Mr Hill referred to the transactions involving retailers. If Argos was acting as principal, what had it bought? On Mr Mainprice's argument, it had bought nothing. The only sensible construction was that Argos had bought a contractual right. Mr Mainprice was saying that Argos was acting as an agent in selling vouchers to the ultimate consumer. His contention was that there was only a sale when the user got into the helicopter and had the flight. However, this required Mr Mainprice to explain what Argos was buying; if the voucher holder never had the activity, Argos had bought nothing. Further, it was inconsistent with an agency relationship for Argos to be able to set its price to the customer. If the basis was the "best price possible", Argos would have to account for this to Acorne. If Acorne were a principal, Argos would have to give a refund or provide the activity itself if Acorne were to become insolvent. Mr Hill drew attention to Acorne's trade price list included in the bundle. He argued that if Argos was buying as principal, it must be buying something whether or not the end consumer took up the activity; Acorne was buying that from the activity centre. He argued that this was conclusive; what was being supplied from Acorne to Argos then from Argos to the consumer was the possibility of the activity, i.e. the contractual right. On Mr Mainprice's argument, there was no supply to Argos, nor any supply on to the end consumer. Mr Hill argued that Argos actually accounted for VAT on what it charged its customers for the vouchers.
34. Mr Hill referred to the other cases cited by Mr Mainprice. Both *Theotrue* and *Howard* concerned payment relating to future supplies of goods. This missed the point in the present case; the right was being supplied. Mr Hill accepted that if there never was a supply, there was no obligation to account for output tax. Here there was a supply of a right, so that the obligation did arise. The *Nigel Mansell* case involved a deposit; this was returnable. There was no contractual relationship between the parties at that stage. The dealership was not committed to supply a car if one was available. There was no obligation on either side. The relationship only became binding when the order form was completed. The payer of the returnable deposit had not paid for anything: not the car, nor the right to have the car at a future date. With Acorne, there was a binding contract. The purchaser had bought the right to engage in the activity. *British Railways Board* related to a two-part tariff; the customer bought the railcard first, then paid for the ticket. Here the customer paid all the money to Acorne "up front". The real analogy with the rail situation was that if a customer reserved a seat or bought a limited validity ticket and did not use it, he had received what he had paid for: the right to the seat or to the travel. Mr Hill repeated that the "window of opportunity" was longer in Acorne's case.
35. In summary, the Commissioners submitted that there was a taxable supply on payment by the purchaser of the voucher whether or not the holder of the voucher chose to exercise the right to participate in the named activity, and that VAT remained due on such vouchers, whether or not they were redeemed.
36. On the question of consideration, Mr Hill argued that if the Commissioners were right on the first issue, there had been one supply. He cited Article 11A 1(a) of the Sixth Directive. He argued that the consideration for the

right to participate in the relevant activities was clearly the whole amount paid to Acorne by the purchaser of the voucher, just as the consideration for the right to make calls in *New World Payphones* was the whole amount entered into the payphone, the consideration for the right to occupy a room in *Bass* was the full room charge, and, in *Celtic*, the consideration for the right to view all of Celtic FC's home games was the full cost of a season ticket. The consideration could not be, as Acorne suggested, simply the difference between the amount paid by the purchaser for the voucher and the amount paid by Acorne to the activity centre. The purchaser of the voucher paid the whole list price of the relevant activity in order to obtain from Acorne the right to participate in that activity. He or she did not pay an initial deposit to Acorne and then the balance to the activity centre. The correct analysis of the situation was that Acorne was liable to pay output tax on the whole amount paid by the purchaser for the voucher, but could deduct as input tax any VAT paid by it to the activity centre.

37. In any event, even if Acorne were right on its secondary argument and it was only required to pay output tax on the difference between the amounts paid to it by purchasers of the vouchers and amounts paid by it to the activity centres, on the transactions in question Acorne had paid nothing to the activity centres because the purchasers of the vouchers never redeemed them at the centres and therefore there was no charge by the centres to Acorne for supplying the activities. Therefore, the "difference" was zero and the taxable amount remained the whole of the payment made by the purchasers of the vouchers to Acorne.

Acorne's reply

38. Mr Mainprice accepted that if it was correct to regard the transaction as the payment for a right, Acorne's case collapsed. He argued against this conclusion. The trade price list showed the prices charged to customers. He argued that Argos was a selling agent: it made no supply of goods or services, but only supplied the voucher. It was a selling agent in the same way as an insurance broker. An agent did not have to account for more than the principal would have charged. The short point was the true nature of the supply. The customer did not say, "Can you supply me with the right to a balloon trip?" If the payment was a prepayment, any prepayment was for the supply. If one argued that it was for the right to be supplied with a car, this would cause trouble for VAT purposes. Plainly and obviously it was not paid for the right.
39. The cases relied on by the Commissioners could be distinguished fairly simply; in all of them there was a limited time to benefit from the service. In Acorne's case, if the voucher holder did not arrange a helicopter flight, it did not go. In *Bass*, there was a specific window of opportunity. An Acorne voucher holder had to arrange the activity. The case relating to cars involved a prepayment. In both *Bass* and *Celtic* there was a specified time; the dates were indicated. In *Celtic* the customer was purchasing a seat. In Acorne's case, there was no specified time; there was an activity when the voucher holder had made the arrangements. The money in Acorne's hands where no activity was undertaken was a "windfall". He accepted that in *New World Payphones* there was a supply; however, the direct comparison in Acorne's case would be where a voucher holder for a car activity took one trip in the car then felt too frightened to take any further trips to which he was entitled. Mr Mainprice agreed that in those circumstances Acorne would have made a supply.
40. In relation to retail sales, he argued that the supply was not from the retailer (e.g. Argos). In *Bass*, the hotel room was there and the customer had bought his stay. In Acorne's case the customer had purchased the

activity; if the voucher holder did not use it, no supply was made. He pointed out that if the voucher holder made the arrangements with the activity centre and then did not turn up, Acorne still had to pay the centre.

41. On the question of consideration, Lord Denning in *British Railways Board* said that the purchase of the student voucher was a part payment, and that the real question was "What did the purchaser get in return for the payment?"

Conclusions

42. We accept that the real question is as formulated in the previous paragraph. This question has to be asked both in relation to the direct sales made by Acorne, and to those where the vouchers are purchased from retailers such as Argos. In each case, the purchaser has the benefit of the voucher; in the majority of cases, this benefit is being provided to another person in the form of a gift or reward. Provided that the voucher has not expired, no further approach to Acorne has to be made by the purchaser or the voucher holder. All that is necessary is for the voucher holder to contact the centre. We have difficulty in viewing the transaction as anything other than the purchase by the customer of a bundle of rights for the benefit of the voucher holder. The fundamental right is, as argued by the Commissioners, the contractual right to participate in the relevant activity shown on the voucher, provided that the holder complies with the relevant terms and conditions for its redemption. Subject to the distinction that the voucher holder and the purchaser may well be different persons, we do not consider that there is any difference between the supply in Acorne's case and those in *Bass*, *Celtic* or *New World Payphones*. The 6 month or greater validity period for Acorne's vouchers is a necessary commercial feature provided to the holder to ensure that he or she has the opportunity to take up the right to engage in the activity. It does not affect the analysis of the supply, even though it is for the voucher holder to choose when to arrange to take up his entitlement to the activity. In *Bass*, the right to the benefit of the room only needed to last for the length of the booking. In *Celtic*, the right to attend a particular match, whether or not with the benefit of a specified seat, only lasted until the match had taken place (or until the last point at which the ticket holder could be admitted). In *New World Payphones*, the unused credit only lasted until the caller left the telephone for the next user. In all these cases, it was not the duration of the right that mattered; it was the treatment of the right as the subject-matter of the supply. The voucher holder's choice as to the time of taking up the activity is therefore a peripheral matter.

43. We think that the analysis of the transactions involving retailers helps in arriving at our conclusion that the supply is of the right to the activity. If Mr Mainprice were correct in his argument that no supply takes place until the activity is provided, what would be the nature of the transactions between Acorne and the retailer, and then the retailer and its customer? Although the agency argument had previously been abandoned, Mr Mainprice sought to characterise the role of the retailer as the agent through whom the service of making the activity available was provided. We do not consider the agency analysis to be consistent with the terms of the sample Argos "Product Specification Form" contained in the bundle. This is couched in terms of the supply of goods, and relates to the physical form in which the vouchers are supplied in their packaging, and to relevant standards. Clause 19(2) provides:

"The entire contract between supplier and Argos shall be contained in the contract documents and the order placed by Argos."

There was nothing in the documentation before us to suggest that Argos or any other retailer had entered into any form of agency agreement. In addition, Mr Bennett's understanding was that retailers were provided with batches of vouchers, each with a unique serial number, and that the retailers returned expired vouchers in return for credit notes. His conclusion was that vouchers were sold to retailers such as Argos, who included them in their catalogue, set the sale price, and accounted for VAT on that price. No information was available on the input tax treatment in the hands of retailer. Apart from our discomfort at having to consider a question previously conceded in correspondence, and on which the evidence was consequently very limited, we do not think that the case for the retailer performing an agency role has been made out. (To deal properly with the question of agency, we would also have needed more legal argument.) The transaction in our view involves a supply to the retailer as principal, and then a supply by the retailer to the customer.

44. On this analysis, we do not accept that when a retailer such as Argos buys a batch of vouchers, it is paying for a future supply. The retailer pays for, and expects to be able to pass on to its customer, the right to participate in the specified activity. Where that right is no longer available because the voucher has expired, the retailer returns the voucher in return for a credit note. This is because the right already supplied has ceased to be of value, not because a future supply already paid for in advance by the retailer has not taken place. What if the retailer supplies the voucher within the validity period but the voucher holder does not use it within that period? The retailer has bought something, and has sold something to the customer. If the voucher holder wishes after all to use the voucher, the purchaser needs to contact Acorne to arrange for its revalidation. There is no suggestion that the customer needs to return to the retailer. Nor, if the voucher expires and is not revalidated, does the retailer's transaction need to be recharacterised as a non-supply; in any event, this could not happen if the retailer was unaware that the voucher had not been used. From this we conclude that once the retailer has supplied the voucher to the customer, the whole benefit of the voucher has been provided to the holder. It is an outright sale of the right to participate in the activity.
45. Acceptance that there is an immediate supply of the right to participate means that there is no need to distinguish between direct supplies and those through retailers. It also avoids complication in another context; where, as in many cases, the voucher holder and the purchaser are different persons, who would be treated as the recipient of the supply if the supply were not treated as taking place until the activity was provided? It seems to us that this would have to be the purchaser, on the basis that he or she had simply passed on the benefit of the voucher. We are far more comfortable in concluding that what passes from Acorne to the customer is the right to participate in the activity, and that the customer in asking for the voucher to be in someone else's name is simply passing on the benefit of that right to the voucher holder; where a retailer is involved, there is one more step, as the right also passes through the retailer.
46. In concluding that the supply is of the right to participate, we are not denying that Acorne is entitled to retain the "windfall" benefit of the purchase price for the unused vouchers; we are simply saying that the failure to use a voucher does not have any consequences for VAT purposes. The question of unjust enrichment was not referred to in

argument. It may need to be addressed if a case arises in which VAT can be reclaimed on the basis that a supply has not taken place.

47. On the question of consideration, we agree with Mr Hill that there is one supply of the right to participate, and that the consideration for this is the whole amount paid to Acorne by the purchaser of the voucher. Output tax must be accounted for on this consideration. Where the voucher is used, Acorne has to pay the activity centre, and is entitled to treat as input tax the VAT charged by the centre. Where the voucher is not used, there is no basis for any input tax deduction against the output tax charged on that voucher, as there has been no charge to Acorne for the provision of any activity. There is therefore no "difference" to reduce the amount of output tax charged on the voucher. There is no basis for deducting the amount which Acorne would have paid had the activity been supplied, as input tax is tax actually suffered on the supply to the taxable person of any goods or services used or to be used for the purposes of a business carried on by the taxable person (section 24(1) VATA 1994). A notional amount does not qualify as input tax.

Summary

48. As Acorne's supplies to its customers (direct or to retailers) are of the right to participate in the relevant activity, output tax has been correctly accounted for and we confirm the Commissioners' decision in their letter dated 11 March 2002 rejecting Acorne's voluntary disclosure claiming overpaid output tax. As the consideration for that right is the whole amount paid to Acorne by the purchaser, output tax is due on that whole amount. There can be no reduction of the output tax due by setting against it input tax charged by an activity centre, because in the circumstances of the voucher being unused, there is no supply by any activity centre.
49. The appeal is accordingly dismissed. Mr Hill did not ask for costs, so we make no order as to costs.

JOHN CLARK

CHAIRMAN

RELEASED:

LON/2002/0254