Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 27 January 2022 [1]

Case C-607/20

GE Aircraft Engine Services Ltd
v
The Commissioners for Her Majesty's Revenue & Customs

(Request for a preliminary ruling from the First-tier Tribunal (Tax Chamber) (United Kingdom))

(Reference for a preliminary ruling – Value added tax – Transfers of vouchers as taxable transactions – Article 26(1)(b) of the VAT Directive – Concept of 'private use or that of his staff or, more generally, for purposes other than those of his business' – Provision of vouchers, free of charge, to staff as part of an employee reward scheme)

I. Introduction

1. The present case has layers. At the outer layer is the very interpretation sought by the First-tier Tribunal (Tax Chamber) (United Kingdom) in a dispute concerning the obligation to account for output VAT on the transfer of vouchers free of charge from a taxable person to its staff. The referring court is not certain whether that transfer must be considered a supply for 'private use or for that of his staff or, more generally, for purposes other than those of his business' under Article 26(1)(b) of Directive 2006/112/EC. [2]

2. However, lingering below the surface of that dispute is an issue of tax neutrality. Indeed, if the transaction at issue were considered to fall within Article 26(1)(b) of the VAT Directive, then VAT would be accounted for *twice* on the value of the same vouchers. That is, once at the point of transfer from the taxable person to his or her staff and once upon the use of his or her underlying right (to receive goods or services from a selected retailer).

3. Accordingly, in answering the referring court's questions, the Court will have the opportunity to clarify when, in the case of retail vouchers such as those at issue in the present case, the legal conditions necessary for VAT to become chargeable are fulfilled.

[1] Original language: English.

[2] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

II. Legal framework

4. The scope of application of the VAT Directive is set out in Article 2(1) thereof. Subparagraph (c) of that article provides that 'the supply of services for consideration within the territory of a Member State by a taxable person acting as such' shall be subject to VAT.

5. Pursuant to Article 14(1) of the VAT Directive, the 'supply of goods' is defined as 'the transfer of the right to dispose of tangible property as owner', whereas, under Article 24(1) of the VAT Directive, the 'supply of services' means 'any transaction which does not constitute a supply of goods.'

6. Article 26(1) of the VAT Directive reads as follows:

'Each of the following transactions shall be treated as a supply of services for consideration:

…

(b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.' [3]

7. By virtue of Article 62(1) of the VAT Directive, a chargeable event is defined as 'the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled'. As per Article 63 of the VAT Directive, 'the chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

III. Facts, national proceedings and the questions referred

8. GE Aircraft Engine Services Limited ('the applicant') is a company that services and maintains jet engines in the United Kingdom. It is part of the General Electric ('GE') group of companies, an American multinational conglomerate.

9. The applicant operated a staff recognition scheme called the 'Above & Beyond' programme. Under that programme, any member of the applicant's staff could nominate any other member of staff for acts which he or she considered deserved special recognition, in accordance with the eligibility requirements of the programme.

10. There were different levels of award under the 'Above & Beyond' programme. A person making a nomination was required to select the appropriate level and provide information as to why the nominee merited the award. At issue in the present case is solely the intermediate level of that award system. Under that level, and after an internal approval process, the nominee was awarded a retail voucher.

[3] For completeness, I observe that, pursuant to Article 26(2) of the VAT Directive, 'Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition.' In the present case, there is no indication that the United Kingdom made use of that possibility.

11. In the case of awards comprising retail vouchers, the nominee was sent a link to a website managed by Globoforce Limited ('Globoforce'), a provider of social recognition services. On Globoforce's website, the successful employee could select a retail voucher from a range of listed (and participating) retailers. Once selected, the voucher could only be redeemed at the selected retailer.

12. The supply of vouchers from Globoforce to the employee occurred as follows. First, Globoforce purchased the vouchers directly from the relevant retailers and sold them to GE in the United States ('GE US'). Then, GE US sold the vouchers to the headquarters of GE, also in the United States ('GE HQ'). Next, GE HQ would make a cross-border supply of the vouchers to a number of GE entities in the United Kingdom. Each of those entities, including the applicant, in its capacity as employer, provided the vouchers to the nominated employees under the 'Above & Beyond' programme.

13. Given that that supply of vouchers originated from entities outside the European Union, the applicant accounted for input VAT in respect of the supply of those vouchers from GE HQ on a reverse-charge basis and recovered the corresponding amount from the relevant tax authorities.

14. When the successful employee used the voucher awarded to him or her to purchase goods/services, the participating retailer would have to account for output VAT on the value of the voucher.

15. On 20 December 2017, the Commissioners for Her Majesty's Revenue and Customs ('the respondent') issued, to the applicant, an assessment for 332 495 pound sterling (GBP) (approximately EUR 374 389) for the period going from December 2013 to October 2017 for undeclared output VAT on the value of the vouchers provided under the 'Above & Beyond' programme.

16. Harbouring doubts as to the interpretation of Article 26(1)(b) of the VAT Directive, the First-tier Tribunal (Tax Chamber) (United Kingdom) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the issue of vouchers for third-party retailers to employees by a taxable person as part of a recognition programme for high-performing employees constitute a supply "for his private use or for that of his staff or, more generally, for purposes other than those of his business" within the meaning of Article 26(1)(b) of the … VAT Directive?

(2) Does it have any significance in answering question 1 that the taxable person has a business purpose for the issuing of the retail vouchers to staff?

(3) Does it have any significance in answering question 1 that the retail vouchers issued to staff members are for their own use and can be used for the staff members' private purposes?'

17. The referring court has explained that the present case acts as the lead case for other appeals arising from similar facts and concerning 19 other members of the GE group.

18. Written observations have been submitted by the applicant and the European Commission. Those parties also presented oral argument at the hearing that took place on 24 November 2021.

IV. Analysis

19. This Opinion is structured as follows. I shall start with the interpretation of Article 26(1)(b) of the VAT Directive and, in light thereof, reply to the questions posed by the referring court (A). However, as I shall explain, in the present case, the result of that may be that the value of the same vouchers is twice subject to VAT. Accordingly, I shall question whether the transfer of those vouchers is a chargeable event in the first place (B).

A. Services provided for private use or for purposes other than those of a taxable person's business

20. In a nutshell, the referring court seeks to enquire whether the transfer of vouchers free of charge by a taxable person to its staff, under a staff recognition scheme such as that at issue in the present case, should be subject to VAT as a supply of services for consideration, as required by Article 26(1)(b) of the VAT Directive.

21. The resolution of that query requires the interpretation of the concept of 'private use or for that of his staff or, more generally, for purposes other than those of his business', as embodied in that provision.

22. Accordingly, I shall first turn to the interpretation of that concept (1) before answering the specific questions referred by the national court (2).

1. The law on identifying 'non-business purposes'

23. Under Article 26(1) of the VAT Directive, two types of situations must be treated as a supply of services for consideration. The first concerns the use of goods forming part of the assets of a business for the private use of a taxable person, of his or her staff, or for purposes other than those of the taxable person's business. The second concerns the supply of services, carried out free of charge, by a taxable person 'for his private use or for that of his staff or, more generally, for purposes other than those of his business'.

24. It is the supply of services free of charge that is of interest in the present case. At the outset, it should be clarified that it is not disputed between the parties that there was a supply of services, or that services were supplied free of charge. The sole question that remains is whether those services were provided for private or business purposes.

25. In this regard, it should be recalled that, ordinarily, the supply of services *without* consideration falls outside the scope of the VAT Directive.[4] However, Article 26(1)(b) thereof provides for a derogation from that general rule.[5] As the Commission explained at the hearing, that provision creates the legal fiction that certain transactions, although provided without consideration, nevertheless fall within the scope of the VAT system.

[4] Compare Article 2(1) of the VAT Directive and judgments of 5 February 1981, *Coöperatieve Aardappelenbewaarplaats* (154/80, EU:C:1981:38, paragraph 14), and of 1 April 1982, *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraph 10).

[5] Judgment of 11 December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711, paragraph 26).

26. The reason behind that derogation has been described as one of fairness and tax neutrality: Article 26(1)(b) of the VAT Directive seeks to prevent a taxable person from deriving an advantage from the private use of goods or services of its business over an ordinary consumer who bears the burden of VAT accrued at earlier stages of marketing.[6] Indeed, by contrast to the taxable person, the consumer does not benefit from the possibility of extending the figurative chain of (input) transactions to pass the tax burden 'further down'.[7]

27. In short, Article 26(1)(b) of the VAT Directive aims to ensure that, in circumstances which fall outside a business activity, the taxable person is recognised as a final consumer for VAT purposes.

28. To that end, Article 26(1)(b) of the VAT Directive, as I read it, treats, in a first step, all supplies of services free of charge as supplies for the *private use* of the taxable person or his or her staff. Those transactions are thereby assimilated to other (non-business) supplies of services for consideration, with the effect that the taxable person must account for output tax thereon.

29. Thus, if services are supplied without charge, the taxable person is, by default, treated as the final consumer. However, in a second step, Article 26(1)(b) of the VAT Directive provides that a supply of services free of charge may, nonetheless, be deemed *not* to have been provided for private use (and therefore as a supply of services for consideration) if the use of that supply served the *business* purpose of a taxable person.[8]

30. But how is that determination made?

31. According to the applicant, it is the subjective intention of the taxable person underlying the free-of-charge supply of goods or services that should be taken into consideration. Thus, if a taxable person provided a service free of charge with the *aim* of serving his or her business, that service should be treated as having a business purpose within the meaning of Article 26(1)(b) of the VAT Directive. Therefore, in the applicant's view, business policies of a taxable person that seek to indirectly increase staff productivity through improvements of employee satisfaction and engagement should be recognised as falling within the concept of 'business purpose'.

32. As I explained in point 28 of this Opinion, Article 26(1)(b) of the VAT Directive proceeds from the premiss that *all* supplies of services free of charge by a taxable person to his or her staff are considered supplies of services for non-business use. At this point of the analysis, therefore, no assessment of the particular transaction at issue is carried out. Accordingly, it is irrelevant, by virtue of that premiss, for the treatment of a particular transaction under Article 26(1)(b) of the VAT Directive, whether the taxable person subjectively intended the supply to be for business purpose or for private use. If it was free of charge, the VAT Directive presumes it was for private use.

33. The particular characteristics of a transaction only gain in importance where a taxable person wishes to show that a particular transaction falling within the scope of Article 26(1)(b) of the VAT Directive was actually not performed for private, but for business purposes. The two main cases

6 See, among others, judgments of 8 March 2001, *Bakcsi* (C-415/98, EU:C:2001:136, paragraph 27); of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 41); and of 9 July 2015, *Trgovina Prizma* (C-331/14, EU:C:2015:456, paragraph 21).

7 See, for instance, judgment of 27 June 1989, *Kühne* (50/88, EU:C:1989:262, paragraph 12). See also recital 30 of the VAT Directive. To that effect, see also judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraph 25); of 20 January 2005, *Hotel Scandic Gåsabäck* (C-412/03, EU:C:2005:47, paragraph 23); and of 11 December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711, paragraphs 46 to 48).

8 See the first subparagraph of Article 26(1) of the VAT Directive.

on the interpretation of that provision, *Fillibeck*[9] and *Danfoss and AstraZeneca*,[10] indicate that the Court identifies a business purpose by enquiring whether the service provided (which, in those cases, concerned free transport and free lunch, respectively) was 'necessary' in the light of the requirements of *that particular taxable person's business*.[11]

34. I cannot deny that the focus on the term 'necessary' may be interpreted so as to introduce a certain element of subjectivity. That is essentially what the applicant argues and what would flow from a natural reading of that term. However, to my mind, one must look beyond its purely linguistic meaning and view the applicant's suggested approach in a broader context.

35. Indeed, if the alleged business intention proposed by a taxable person is accepted as a test, the effect would be that it falls to the individual taxable person to decide when a particular transaction is for business purposes, and thus not taxable. The courts would in consequence be put in the awkward position of having to second-guess those business decisions as regards their true necessity. What is more, allowing the meaning of the term 'necessity' to be left to the subjective interpretation of a taxable person liable to VAT would lead to the unreasonable result that two taxable persons with identical taxable supplies in the course of carrying out an identical activity could nonetheless come to different conclusions as to the 'necessity' of a service. That would open the possibility to exclude an otherwise taxable transaction from the scope of the VAT Directive. Obviously, such a result cannot be reconciled with the strict interpretation that the Court has given to that provision.[12]

36. Hence, I read the judgments in *Fillibeck*[13] and *Danfoss and AstraZeneca*[14] as approaching the interpretation of the 'necessity' of a transaction from two objectively determined elements: first, the existence of a link between a service provided free of charge and the taxable person's economic activity, and, second, the presence of control over the use of that service to ensure that it is indeed used in relation to or in furtherance of the taxable person's economic activity.

37. The former element ensures that the service in question is provided with a view to serving the economic activity of the taxable person.[15] However, as the applicant noted both in its observations as well as at the hearing, that requirement cannot be interpreted strictly so as to require that that person's business would be impossible without it.

38. That notwithstanding, the requirement of necessity cannot denote a service that is usually and generally connected with every type of business either. Thus, transportation of employees to and from work is, of course, necessary to organise work. However, it is not in itself considered to be a 'business purpose' within the meaning of Article 26(1)(b) of the VAT Directive. It cannot, therefore, be offered free of charge and not be subject to VAT. When accepting the provision of transport services free of charge in *Fillibeck*[16] as being for business purposes, the Court linked

9 Judgment of 16 October 1997 (C-258/95, EU:C:1997:491).

10 Judgment of 11 December 2008 (C-371/07, EU:C:2008:711).

11 See, in that regard, judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraph 29), and of 11 December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711, paragraph 59).

12 See, to that effect, judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraphs 26 and 29), and of 11 December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711, paragraphs 57 and 58).

13 Judgment of 16 October 1997 (C-258/95, EU:C:1997:491).

14 Judgment of 11 December 2008 (C-371/07, EU:C:2008:711).

15 See, to that effect, judgments of 11 July 1991, *Lennartz* (C-97/90, EU:C:1991:315, paragraph 21); of 8 March 2001, *Bakcsi* (C-415/98, EU:C:2001:136, paragraph 29); of 23 April 2009, *Puffer* (C-460/07, EU:C:2009:254, paragraph 46); and of 22 March 2012, *Klub* (C-153/11, EU:C:2012:163, paragraphs 38 to 41). See also Opinions of Advocate General Mengozzi in *Astra Zeneca UK* (C-40/09, EU:C:2010:218, point 65), and in *Vereniging Noordelijke Land- en Tuinbouw Organisatie* (C-515/07, EU:C:2008:769, point 46).

16 Judgment of 16 October 1997 (C-258/95, EU:C:1997:491).

that service to the 'special characteristics of building firms'.[17] It was, therefore, 'necessary' in those specific circumstances, even though the Court did not consider transport to and from work necessary in the traditional sense of that word.

39. In *Danfoss and Astra Zeneca*,[18] no such industry-specific qualifying criteria appeared. Still, the Court noted that the 'specific manner in which the business is organised' must show that the supplies at issue provided free of charge were not for purposes other than those of the business.[19] Thus, a free lunch was nonetheless accepted as serving a business purpose because it was closely tied to the specific organisation of the taxable person's business (that is to say, free lunch offered only during particular business meetings).[20]

40. In the same way, even if it cannot be denied that increased efficiency resulting from greater satisfaction of one's employees has a link to a taxable person's economic activity, that link is *general* and thus insufficiently specific to the particularities of a taxable person's business, in the same way as transport and the provision of meals for employees are general interests of any business. Therefore, free gifts which motivate employees do not differ from free lunches or free transport. They simply do not fall under the concept of 'business purpose', inherent in Article 26(1)(b) of the VAT Directive, unless it can be established that the specific characteristics of the organisation of the taxable person's business or some other special circumstances can make the provision of services free of charge 'necessary', thereby moving such services from the sphere of private use to the concept of 'business purpose'.

41. The second element – that of control – ensures that, throughout its provision, the service at issue remains linked to the taxable person's economic activity. The existence of control is assessed objectively. Pursuant thereto, it must be shown that the taxable person *alone* determined the intended end use of a service at all times.[21] Thus, in *Fillibeck*,[22] control was established by the construction company dictating the transport routes and times, that not being a choice of its employees.[23] Similarly, in *Danfoss and AstraZeneca*,[24] it was the respective employers that dictated the time, place and occasion at which the free meals accompanying business meetings would be provided to their staff.[25]

42. It is true, as the applicant notes, that the element of control does not, in itself, exclude the possibility that an employee may derive a certain private benefit from the use of goods or services provided free of charge by his or her employer. Indeed, it is convenient and economic to receive free transport back and forth from a hard-to-reach worksite as well as to receive sandwiches during long or important business meetings. However, the mere fact that an employee benefits from a service provided free of charge by his or her employer (including, as usually is the case, heating, general safety measures at work and office furniture) does not negate or lessen the

17 Ibid., paragraph 32.

18 Judgment of 11 December 2008 (C-371/07, EU:C:2008:711).

19 Ibid., paragraph 63..

20 Ibid., paragraphs 59 and 60.

21 See, by analogy, judgment of 17 July 2014, *BCR Leasing IFN* (C-438/13, EU:C:2014:2093, paragraph 26).

22 Judgment of 16 October 1997 (C-258/95, EU:C:1997:491).

23 Ibid., paragraph 22, and Opinion of Advocate General Léger in *Fillibeck* (C-258/95, EU:C:1997:19, point 44).

24 Judgment of 11 December 2008 (C-371/07, EU:C:2008:711).

25 Ibid., paragraphs 53 and 60.

'business' purpose of such goods and services.[26] After all, the taxable person determines and controls the provision of those overheads. Any subjective benefits to the employees derived therefrom are merely ancillary to the 'principal' supply of the goods or services at issue.[27]

43. That brings me to the questions referred by the national court.

2. The questions put to the Court

44. The referring court poses three questions. By its first question, that court essentially asks whether the supply of the vouchers in question is made for the purposes of the applicant's business or for private use, within the meaning of Article 26(1)(b) of the VAT Directive. The second and third questions then build on the answer the Court is to give to the first question. They enquire, respectively, whether the answer to the first question is affected by the presence of a business purpose for the issuance of the vouchers at issue (Question 2) and whether any significance could be attributed to the fact that the vouchers are for the staff members' own use and can be used for their private purposes (Question 3).

45. I shall deal with all three questions together.

46. Given that, as explained, Article 26(1)(b) of the VAT Directive starts from the premiss that services offered free of charge by a taxable person to his or her employees are to be treated as services for their private use, it should, at the outset, be concluded that the service provided by the applicant by awarding its employees with vouchers to be used in retail shops falls within the scope of application of that provision. In answer to the referring court's second question, it should be pointed out that the taxable person's subjective understanding (or intention) that these vouchers are provided for a business purpose makes no difference to that finding.

47. However, if it can be established that the services at issue were 'necessary' for the economic activity of the applicant, that would mean that they were provided for a business purpose even though those services were offered free of charge. The answer to the referring court's third question must therefore be that it is necessary that the services at issue be linked to the economic activity of the taxable person and that the latter, as provider of those services free of charge, have control over their use to ensure a continued link to or furtherance of his or her own economic activity.

48. The order for reference explains that the 'Above & Beyond' programme is intended to encourage and reward employee performance and behaviour by means of retail vouchers. Those vouchers could be redeemed from a range of participating retailers. At the hearing, the applicant explained that it had no knowledge over what employees would do with their vouchers. From the case file, there also appears to be no use limitation other than that of choosing a participating retailer from the Globoforce website. In other words, and as also confirmed by the applicant at the hearing, an employee could use the vouchers at issue entirely at their own discretion and for their personal use. The control of the award scheme would only extend to the question of whether, and if so at what level, an employee would be rewarded for his or her additional effort at work.

[26] Judgments of 16 October 1997, *Fillibeck* (C-258/95, EU:C:1997:491, paragraph 30), and of 11 December 2008, *Danfoss and AstraZeneca* (C-371/07, EU:C:2008:711, paragraph 62).

[27] See, by analogy, judgment of 19 December 2018, *Mailat* (C-17/18, EU:C:2018:1038, paragraph 34 and the case-law cited). See also, for an explanation of the reasons underlying that exemption of ancillary services, judgment of 18 January 2018, *Stadion Amsterdam* (C-463/16, EU:C:2018:22, paragraph 30).

49. If those elements were confirmed, then there would be no indication either of a sufficient link to the applicant's economic activity or of the presence of control over the use of the vouchers. In other words, if the test advanced by the Court in *Fillibeck*[28] and *Danfoss and AstraZeneca*[29] were followed, then the transfer of the vouchers at issue would not be deemed 'necessary' for the requirements of the applicant's business. In other words, the transaction at issue would fall within the default rule of Article 26(1)(b) of the VAT Directive as a supply of services for consideration.

B. Vouchers and taxable transactions

50. If the present case concerned the gifting of microwaves[30] or other straightforward goods or services, my Opinion could stop at this point. However, by virtue of the complex nature of vouchers, the above conclusion should give cause for reflection.

51. Indeed, if the transaction at issue really falls within the scope of Article 26(1)(b) of the VAT Directive, then the applicant would have to bear the burden of VAT on the value of those vouchers as if it were their final consumer. However, when the employees later credit those vouchers against goods or services of participating retailers, they would also bear the burden of VAT on the *same* value. In other words, VAT would be charged twice on the value of the same vouchers.[31]

52. Compare that to the fictional situation of a taxable person gifting microwaves to his or her employees. There would be no double taxation. VAT would only have to be charged on the gifting transaction.

53. It is obvious that an outcome leading to double taxation sits uneasily with the principle of tax neutrality[32] (as well as with, I might add, fundamental principles of equity).

54. However, I am not convinced that that result is the automatic side effect of the system established by the VAT Directive as applied to certain types of vouchers.

55. As the submissions of the parties and the discussion at the hearing indicated, the apparent call for the taxation of all transactions involving vouchers appears to find its origin in a flawed interpretation of the judgment in *Astra Zeneca UK*.[33] Indeed, by classifying the transfer of a voucher as a 'supply of services' separate from its underlying right, it was the Court which allegedly rendered that transfer an independent taxable transaction.

56. I disagree.

[28] Judgment of 16 October 1997 (C-258/95, EU:C:1997:491).

[29] Judgment of 11 December 2008 (C-371/07, EU:C:2008:711).

[30] At the hearing, the Commission referred to the provision of microwaves free of charge to simplify the discussion surrounding the application of Article 26(1)(b) of the VAT Directive and thus to recall the taxable person's general need to account for output tax on all gift transactions.

[31] Of course, that is only true if the VAT on the voucher was not expressed in its price and was already accounted for at the moment of issuance. However, that is possible only if the exact amount of VAT is already known at that very moment.

[32] See, by analogy, judgment of 30 September 2021, *Icade Promotion* (C-299/20, EU:C:2021:783, paragraph 31 and the case-law cited). See also, more generally, as regards the connection of the principle of tax neutrality and double taxation, judgment of 27 September 2012, *VSTR* (C-587/10, EU:C:2012:592, paragraph 28 and the case-law cited).

[33] Judgment of 29 July 2010 (C-40/09, EU:C:2010:450).

57. In *Astra Zeneca UK*,[34] the employer offered its staff the possibility of receiving retail vouchers in exchange for that staff giving up part of their cash remuneration.[35] It is within that context that the Court held that, for VAT purposes, the transfer of those vouchers constitutes a 'supply of services' within the meaning of Article 24(1) of the VAT Directive.[36] That conclusion is fully justified: Article 14(1) of the VAT Directive defines the supply of goods as 'the transfer of the right to dispose of tangible property as owner', whereas Article 24(1) of the VAT Directive contains a fall-back definition that treats all supplies that are not 'supplies of goods' as *necessarily* constituting 'supplies of services'.

58. However, it would be short-sighted to conclude from that statement alone that the transfer of vouchers automatically becomes an independent chargeable event. Aside from ignoring the conditions underlying Article 62 of the VAT Directive, that conclusion would also disregard economic and commercial reality by conflating two entirely distinct transactions: that is to say, the transfer of the voucher, on the one hand, and the transfer of its underlying right, on the other hand.[37]

59. Indeed, since it is the *supply* of goods or services which is subject to VAT, rather than payments made by way of consideration for such supplies,[38] not every transaction for consideration, particularly when involving (future or unascertainable) rights, gives rise to a chargeable event.[39] Simply put, where no complete supply of those goods or services occurs, no chargeable event can arise.[40]

60. Hence why, to my mind, a distinction must be drawn between, first, the transfer of a right 'as such', and, second, the transfer of a 'right to a future supply' of goods and services.

61. The former type of supply is subject to VAT by virtue of the fact that it actually embodies, for the purchaser, a completed supply which would enable him or her to be considered a consumer of a service.[41] A chargeable event occurs at the moment when the 'as such' right is transferred and VAT is determinable in full.[42] Indeed, the recipient is provided with the right to make use of the voucher he or she receives much in the same way as that person would be transferred the right to exploit an intellectual property right or to make use of a gym membership.

62. The latter type of situation, that is to say, the 'right to a future supply' of goods or services, concerns an entirely different taxable scenario. Consider the examples of prepayment vouchers giving access to a spa or certain types of city cards. Those types of supplies may only be subject to VAT if all the relevant information concerning that supply is already known at the point in time

34 Ibid.

35 Ibid., paragraph 24.

36 Ibid., paragraph 26.

37 See, for instance, judgments of 24 October 1996, *Argos Distributors* (C-288/94, EU:C:1996:398, paragraph 15); of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 32); and of 5 July 2018, *Marcandi* (C-544/16, EU:C:2018:540, paragraph 32).

38 Judgment of 21 February 2006, *BUPA Hospitals and Goldsborough Developments* (C-419/02, EU:C:2006:122, paragraph 50 and the case-law cited).

39 Ibid., paragraph 50, and judgment of 16 December 2010, *Macdonald Resorts* (C-270/09, EU:C:2010:780, paragraphs 31 and 32).

40 By analogy, judgments of 16 December 2010, *Macdonald Resorts* (C-270/09, EU:C:2010:780, paragraphs 24 and 32); of 21 February 2006, *BUPA Hospitals and Goldsborough Developments* (C-419/02, EU:C:2006:122, paragraphs 44 to 51); and of 5 July 2018, *Marcandi* (C-544/16, EU:C:2018:540, paragraph 54).

41 Judgment of 29 February 1996, *Mohr* (C-215/94, EU:C:1996:72, paragraph 22). To that effect, see also judgment of 5 July 2018, *Marcandi* (C-544/16, EU:C:2018:540, paragraph 45).

42 Judgment of 16 December 2010, *Macdonald Resorts* (C-270/09, EU:C:2010:780, paragraph 32).

when a particular transaction takes place.[43] That is because only in those circumstances have the parties to the transaction demonstrated their intention that all the financial consequences of their supply should arise in advance.[44] However, if such future supplies are not yet clearly identifiable, they cannot be subject to VAT at the point in time when the right to their supply alone is transferred (because, obviously, the rate of VAT would not yet be determinable).[45] In those cases, the chargeable event simply shifts 'one level down' the chain of transactions to the point in time when the right to said supply is transferred, or when all the information concerning that future supply becomes available and the financial consequences of that supply are crystallised.[46]

63. That distinction reflects itself in the use of vouchers as follows.

64. The transfer of a voucher that acts as the supply of an 'as such' right to the supply of goods or services becomes a completed supply and thereby an individual chargeable event by virtue of the fact that a benefit is transferred which renders the recipient of that right a (potentially immediate) consumer. Similarly, the transfer of a voucher that acts as the supply of a 'right to a future supply' of goods or services which is sufficiently identified or identifiable also becomes a completed supply, and thus a chargeable event in itself (for example, the purchase of a plane ticket). In that scenario, however, the right to a future supply only becomes taxable by virtue of the fact that all information concerning that future supply is available at the point in time when that right is transferred (thereby assimilating it, in essence, to the transfer of an 'as such' right).[47] In both those scenarios, VAT would become chargeable on the transaction at issue (and, indeed, on every transaction involving the transfer of that voucher).

65. By contrast, the transfer of a voucher that contains a 'right to a future supply' of goods and services, and which does not satisfy the criteria for a completed taxable transaction (that is to say, for which not all relevant information is known), *cannot* act as an individual chargeable event at the point of transfer. In such a scenario, no payment of VAT becomes chargeable at this point in time. Indeed, as explained in point 64 of this Opinion, the event giving rise to the payment of VAT occurs only when the criteria for the complete identification of the underlying right are satisfied. That will usually be at the point in time when the consumer credits the voucher for a desired good or service.

66. I am supported in this conclusion by the rules set out in Directive 2016/1065.[48] That directive recognises that the VAT treatment of vouchers is not sufficiently clear or comprehensive under the current framework and therefore seeks to lay down specific rules on their VAT treatment

[43] Judgments of 21 February 2006, *BUPA Hospitals and Goldsborough Developments* (C-419/02, EU:C:2006:122, paragraph 48); of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraph 26); of 19 December 2012, *Orfey Balgaria* (C-549/11, EU:C:2012:832, paragraph 29); and of 23 December 2015, *Air France-KLM and Hop!-Brit Air* (C-250/14 and C-289/14, EU:C:2015:841, paragraph 39).

[44] Judgment of 21 February 2006, *BUPA Hospitals and Goldsborough Developments* (C-419/02, EU:C:2006:122, paragraph 47).

[45] Ibid., paragraph 50.

[46] See, to that effect, judgment of 16 December 2010, *Macdonald Resorts* (C-270/09, EU:C:2010:780, paragraph 32), thereby ensuring, as the Commission questioned at the hearing, that VAT is payable by 'someone'.

[47] See, in particular, judgment of 19 December 2012, *Orfey Balgaria* (C-549/11, EU:C:2012:832, paragraph 40).

[48] Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/EC as regards the treatment of vouchers (OJ 2016 L 177, p. 9) ('Directive 2016/1065').

with a view to simplifying and harmonising them.[49] While that directive does not apply to the facts of the present case *ratione temporis*,[50] it does provide general guidance on how the VAT treatment of vouchers remains consistent with the general principles of the VAT Directive.[51]

67. Directive 2016/1065 converges the transfers of 'as such' vouchers and of identifiable 'right to a future supply' vouchers into a single category of 'single-purpose voucher'.[52] By contrast, a voucher with an unidentifiable 'right to a future supply' is categorised as a 'multi-purpose voucher'.[53] For the former type of voucher, Article 30b of that directive explains that *each transfer* thereof must be regarded as an individual supply of the goods or services to which the voucher relates, and hence an individual chargeable event.[54] For the latter type, VAT is only charged at the point of the actual handover of the goods or the actual provision of the services in question. No prior transaction incurs VAT, including the transfer from the taxable person to the transferee.[55]

68. It is for those reasons that I am doubtful that the transfer of the vouchers at issue in the present case *actually* constitutes an independent chargeable event, within the meaning of Article 62 of the VAT Directive.

69. Naturally, only the referring court is in possession of sufficient factual information to conclusively determine how the vouchers were issued in the first place (that is to say, inclusive or exclusive of VAT), what kind of right is transferred by them, and when (if at all) VAT was paid.

70. That being said, it appears from the limited information on the court file that the transaction at issue concerns specific prepayment vouchers with a set face value for use with third-party retailers. That would imply that VAT was inherent in those vouchers (that is to say, present at face value), with the effect that the final consumer should have borne the burden of paying it when crediting the voucher with a specific retailer (with the latter, in turn, accounting for output tax).

71. There is also insufficient information on the nature of the vouchers at issue in the present case. That is to say, whether those vouchers can only be used for clearly identified or identifiable items or for any good or service offered from participating retailers. However, at the hearing, the applicant confirmed that, at the point of their transfer, there is no certainty over the types of goods or services that those vouchers are used for (and hence not on the VAT due on those goods or services either). Indeed, the applicant explained that, under the changes introduced by Directive 2016/1065, the vouchers at issue would be assimilated to 'multi-purpose' vouchers. If that were confirmed by the referring court, then it would indeed appear that, under the case-law recalled in point 62 of this Opinion, the provision of those vouchers from the applicant to its staff merely constituted the transfer of a 'right to a future supply' of (as yet indeterminate) goods or services.

[49] Ibid., recitals 1, 2 and 13.

[50] Ibid., Article 2 and recital 15.

[51] Ibid., recital 2. In that sense, Directive 2016/1065 does not actually create new rules for the VAT treatment of vouchers but instead merely restates more clearly what the law was all along. In that respect, see Terra, B., Kajus, J., '13.2.2.1. The voucher Directive', *A Guide to the European VAT Directives 2019: Introduction to European VAT*, IBFD, Amsterdam, 2021, and Amand, C., 'EU Value Added Tax: The Directive on Vouchers in the Light of the General Value Added Tax Rules', *Intertax*, Vol. 45(2), 2017, p. 156.

[52] Ibid., Directive 2016/1065, Article 30a(2).

[53] Ibid., Article 30a(3).

[54] Ibid., Article 30b(1).

[55] Ibid., Article 30b(2).

72. In such a scenario, the transaction at issue would remain incomplete, for VAT purposes, at the point of transfer between the applicant and its employees and thus only preliminary to the actual (and later) consumption of the future supply of the goods and/or services in question.[56] The transfer of the vouchers between the applicant and its employees would hence not constitute a chargeable event within the meaning of Article 62 of the VAT Directive.[57]

73. In that way, VAT would only be charged once on the two transactions inherent in the use of those vouchers,[58] the principle of tax neutrality would be respected, and the economic reality of the transaction would be taken into consideration. Would that conclusion not be preferable to that seemingly advocated by the respondent and the Commission?

V. Conclusion

74. In conclusion, I propose to the Court that it answer the questions referred by the First-tier Tribunal (Tax Chamber) (United Kingdom) as follows:

Unless all the relevant information concerning the right to a supply of goods or services is already known when a voucher is transferred from a taxable person to his or her staff, that transfer does not constitute a taxable transaction within the meaning of Article 62 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

It falls to the referring court to determine whether the transaction at issue in the main proceedings satisfies those requirements.

In the alternative, I propose that the Court reply to the questions posed to it as follows:

The transfer of vouchers free of charge to employees by a taxable person as part of an employee recognition scheme, such as that in the present case, without that taxable person requiring any link to his or her economic activity or exercising any control over the use of those vouchers, constitutes a supply 'for [the taxable person's] private use or for that of his staff or, more generally, for purposes other than those of his business' within the meaning of Article 26(1)(b) of Directive 2006/112.

It is of no significance to that conclusion that the taxable person has a business purpose for the issuance of such vouchers.

[56] By analogy, judgment of 16 December 2010, *Macdonald Resorts* (C-270/09, EU:C:2010:780, paragraphs 25 to 30).

[57] As explained in point 70 of this Opinion, the taxable event would thus arise only later, when the employee seeks to credit the voucher with a participating retailer.

[58] Although of course the applicant had to pay VAT when importing the vouchers from outside the European Union. According to the referring court's order, that happened by means of the reverse-charge method. See, for more detail, point 13 of this Opinion.