[2019] UKFTT 0736 (TC)

TC07494

VALUE ADDED TAX – vouchers issued by appellants to customers for use in their clubs – VAT treatment of consideration paid by customers – whether security for money and exempt pursuant to Item 1 Group 5 Schedule 9 VATA 1994 – face value vouchers pursuant to Schedule 10A VATA 1994 – whether single purpose vouchers – whether fee charged to dancers on redemption of vouchers is consideration for a supply of taxable services by appellants to dancers – whether fee charged to employees of appellants on redemption of vouchers is consideration for a supply of taxable services by appellants to employees – appeals allowed in part in relation to fees charged to employees

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal Numbers:
(1) TC/2014/05779 & TC/2016/05015
(2) TC/2014/05775 & TC/2016/02891
(3) TC/2014/05777 & TC/2016/05017
(4) TC/2014/05776 & TC/2016/02894
(5) TC/2014/05778 & TC/2016/05014

BETWEEN

(1) ROMIMA LIMITED
(2) PLATINUM LACE TRADING LIMITED
(3) BRIGHT CREW LIMITED
(4) ROCCO MANA LIMITED
(5) THE AVIARY (LEICESTER) LIMITED

Appellants

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS SONIA GABLE

Sitting in public at Taylor House, London on 24-26 June 2019

Mr Barrie Akin of counsel instructed by Hill Dickinson LLP for the Appellants

Ms Hui Ling McCarthy QC and Mr Edward Hellier of counsel instructed by HM Revenue and Customs Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. The appellants are separate companies within the same group of companies, each with their own VAT registration. They each operate as licensed "lap dancing" or "table dancing" clubs in various cities under the name "Platinum Lace". This appeal is concerned with the correct treatment for VAT purposes of transactions involving what are known as "Platinum Chips". In this decision we shall simply call them "Chips". In summary, customers purchase Chips of various nominal values from the clubs. The cost of purchasing a Chip where a debit or credit card is used is the nominal value plus a 20% premium. Chips are used by customers principally as a means of payment to self-employed dancers for performing dances. The dancers then redeem the Chips for cash from the clubs. In relation to the second appellant, which operates a club in London, dancers are charged a fee of 20% of the nominal value of the Chips when redeeming them for cash. Club employees who are given Chips by way of tips are charged a fee of 40% on redemption.

2. The matters under appeal comprise various assessments pursuant to section 73 Value Added Tax Act 1994 ("VATA 1994") and decisions refusing claims for repayment pursuant to section 80 VATA 1994. The assessments and decisions relate to VAT periods 07/10 to 07/15. We were not addressed in relation to the quantum of the VAT in issue and we were invited by the parties to give a decision in principle if we were minded to allow any part of the appeals.

3. We are concerned with the following issues in relation to VAT:

   (1) The VAT treatment on the supply of Chips by clubs to customers ("Issue One"), and

   (2) The VAT treatment on redemption of Chips by dancers and employees in the London club ("Issue Two").

4. By way of summary, in relation to Issue One HMRC have assessed the appellants to VAT on the supply of Chips to customers on the basis that the supply is a taxable supply. The appellants contend that it is an exempt supply, and if it is not an exempt supply then it is only the excess over and above the nominal value of a Chip that is chargeable to VAT.

5. In relation to Issue Two, which concerns only the second appellant, HMRC have assessed the second appellant on the basis that the 20% or 40% fee charged on redemption is consideration for a supply of taxable services by the club to the dancers and employees. The second appellant contends that there is no taxable supply.

6. We heard oral evidence from Mr Simon Warr and Mr Simon Gordon. Mr Warr is the managing director and indirectly the owner of each appellant company. He deals with the clubs and their management on a day to day basis. Mr Gordon, is a chartered accountant and the company secretary and chief financial officer of each appellant company.

FINDINGS OF FACT

7. Based on the oral and documentary evidence before us, together with a Statement of Agreed Facts, we make the following findings of fact which, unless otherwise stated, apply to the periods covered by the assessments and decisions.

8. The appellants operate lap dancing clubs in the UK. There is one club in central London and others in Brighton, Glasgow, Leicester and Norwich. Each club provides entertainment facilities to customers who are charged a fee to enter the club. This is generally a fixed fee but sometimes free entry is offered with promotional flyers. The clubs also serve alcoholic drinks

and in some cases food. Food and drink can be purchased with cash or by card. Chips cannot be used to pay for food and drink. A 15% discretionary service charge is added to bar bills which are paid by credit card. The service charge is split and paid to waitresses, waiters, Chip girls and bar staff. We set out the role of Chip girls in more detail below.

9. Clubs have a reception area, an ATM for cash withdrawals, cloakrooms, a bar area, a general sitting area, at least one dancer's stage, individual and VIP dance booths of varying sizes, a DJ booth controlling sound and light, customer toilet facilities, separate toilet and changing facilities for dancers, separate toilet and changing facilities for staff, locker facilities for dancers, shower facilities for dancers (except Romima Ltd), a management office and storage facilities. The clubs have CCTV systems for security purposes, including coverage in the dance booths.

10. The club licences require each club to facilitate carriage services for customers. When a customer leaves a club, where necessary the receptionist will normally call a dedicated taxi firm to provide a taxi. The call is complimentary and financial arrangements for payment of the taxi driver are between the customer and the driver, subject to our findings below in relation to the use of Chips. The clubs also receive relatively small sums by way of commissions from taxi firms.

11. The clubs each employ management, bar staff, Chip girls, waiters and waitresses, DJ's, receptionists and security staff. Staff use all public areas of the club where they are required to perform their duties, and appropriate staff areas.

12. The entertainment includes music and dancing. Dancers are self-employed, and they can and do work for clubs other than the appellants and may do other types of work. The clubs have a rota for dancers which is generally notified to dancers a week in advance. Dancers are charged an entrance fee for access to the clubs which varies with the time of day. It must be paid on entry. In London for example, the entrance fee for dancers is £75-100 on any night Monday to Saturday depending on the time of entrance. In return for the entrance fee, dancers can use the facilities of the clubs described above to provide dances and conversation to customers. Dancers also have access to the following services:

(1) A specialist dress-maker who is self employed and supplies dressmaking services directly to the dancers for a fee paid by the dancers. The dress-makers will sometimes provide hairdressing and make-up services to dancers for a fee.

(2) In the London club there is a "house mother" who looks after the welfare of dancers and who is paid directly by the dancers.

(3) Security services provided by the clubs which might be used for example if there is a dispute between a dancer and a customer.

(4) Carriage services, where the club receptionist will arrange a taxi for the dancer and club security will escort the dancer to a taxi or to her own vehicle. Dancers pay for their own taxis.

(5) Dancers can purchase drinks from bars in the clubs. Food is also available for purchase in the London club.

13. Dancers may also supply services to the clubs, such as distributing promotional flyers and photo shoots for the clubs' marketing purposes. Dancers are paid cash incentives for such work.

14. Clubs outside London charge the dancers a fee per dance. All dancers are female and dances are performed nude or semi-nude. Dancers are subject to a code of conduct to ensure compliance with licensing requirements.

15. It is not disputed that supplies of food and drink, entrance fees charged to customers and fees charged to dancers for entrance and per dance are taxable supplies.

16. Dancers perform semi-nude on stage. There is no payment for these dances. They are a way for dancers to promote themselves to customers for private individual dances in the dance booths or larger VIP booths. There is no charge by the clubs for use of an individual booth for a dance. Fees for dances are negotiated between individual dancers and customers. The clubs advertise suggested rates of £10 or £20 per dance in a booth depending on the type of dance.

17. In the VIP booths the dancers provide dances and conversation to customers, known as "sit downs". Access to a VIP booth depends on the customer(s) either spending a minimum amount on drink and/or food or agreeing a sit down with a dancer or dancers. The minimum spend on food or drink for access to a VIP both is normally £500-1,000 depending on the size of the booth or the night in question. Fridays and Saturdays are more expensive than other nights.

18. For a sit down in a VIP booth the suggested rate charged by the dancer is £500-600 per hour which is a standard industry rate. When a sit down is agreed, the dancer must notify the club of the length of time they wish to use a VIP booth but is not required to notify the club the amount she has negotiated as a fee. The dancer must pay the club a flat rate fee for use of the VIP booth.

19. Customers pay dancers directly for their services. The means of payment is agreed between individual dancers and customers. It is either payment in cash or by way of Chips. The clubs play no part in collecting or enforcing payment. Dancers are advised by the clubs to confirm and request payment in advance to minimise the risk of disputes. It is likely and we find that in most if not all cases dancers will be paid in cash or Chips before they provide their services.

20. Dancers can refuse to perform services for specific customers for any reason. However, dancers are there to dance for customers. There was no evidence as to the extent to which dancers do refuse to dance with customers and for what reason. The reality is that dancers will dance with customers unless they consider there is a good reason not to. It is likely and we find that dancers will generally dance with any customer unless there is reason to believe that a customer will not abide by customer codes of conduct publicised by the clubs.

21. Chips are circular plastic counters similar to casino chips. Each club issues its own Chips. Chips issued by a particular club state on their face that they are valid only at that club. They show the name of the issuing club and a face value of £10, £20 or £100 and state that they have no cash value. They are advertised on posters displayed in the clubs and by the DJs.

22. Chips are sold to customers by management, designated waitresses or "Chip Girls" who work for the clubs. Payment may be made by credit card, debit card or cash. Where payment is made by credit card or debit card the club charges the customer a fee of 20%. If a customer purchases Chips with a face value of £100 by card the total charge would be £120. Chips are bought for cash mainly where a customer is entertaining others and providing them with chips, or where a group of customers pool their cash to purchase Chips for the group.

23. Where Chips are purchased by card the clubs perform necessary administrative checks which depend on the amount being purchased. These include identity checks which may require a customer to provide copies of a driving licence or passport. For larger transactions, the club might call the customer's bank.

24. The evidence included documentation in relation to Chips sold to customers in the London club on Saturday 19 January 2013 by Rachel, one of the Chip girls. We are satisfied from that evidence that there were 10 transactions in which Rachel sold Chips to customers.

For each transaction there was a till receipt, a credit card transaction slip and what we shall call the "Chip Form". For example, at 11.52pm the till receipt shows 2 x £100 Chips, 6 x £20 Chips and 2 x £10 Chips being purchased by a customer. It also shows the 20% fee described as "commission" on those Chips giving the total cost of the Chips as £408. The Chip Form is a pre-printed form. It was signed by the customer, the waitress, in this case Rachel, and a manager and the date and time were inserted. The Chip Form showed separately the face value of Chips purchased, the 20% commission, a figure of £40 as a tip to Rachel and the total transaction value excluding the tip.

25. Rachel's tip was given in the form of Chips. During that night Rachel received tips to the value of £1,242. These were all in the form of Chips, save for a £2 tip which was included in the credit card total of one smaller transaction.

26. Chip girls are employees and they are paid a salary. They are not performers and do not pay any entrance fee to enter the clubs. They receive a share of the discretionary service charge on bar bills. They have a valuable opportunity to earn tips from customers in the course of their employment. Rachel received Chips by way of tips to the value of £1,240, which the club would have redeemed for £744 in cash.

27. The Chip Form contains the following terms and conditions:

"PLATINUM CHIPS

- Platinum chips can only be purchased with an approved credit/debit card or cash.
- If purchased by credit/debit card a handling fee of 20% will be added.
- They can only be used to pay dancers or for tips.
- They can only be redeemed at the club where they are purchased
- They cannot be refunded."

28. Similar terms are shown on menus in the clubs, with the addition that Chips can be used to tip employees. It is common ground that these are the terms on which Chips are purchased by customers.

29. Once sold to customers, Chips are non-refundable. Exceptionally, for example if a customer is asked to leave a club for any reason, a customer may be refunded the purchase price of unused Chips at the discretion of management. Some Chips are not redeemed at all, for example because a visitor inadvertently leaves a club without realising that he still has Chips and does not return. There was no evidence as to the number of Chips not being redeemed.

30. The appellants maintain that the 20% fee charged to customers purchasing Chips by card covers the financial risk associated with transactions subsequently being disputed by customers, the administrative costs to the clubs in processing card transactions and fees paid to the merchant acquirers. The merchant acquirers charge a fee to the appellants for each transaction. The highest such fee was for American Express which at one time was 2.5%. Fees in relation to other credit cards would be lower and in relation to debit cards would be much lower.

31. In 2014-15 the total value of card transactions disputed or queried by customers or card issuers was £76,933. Queries may arise for example because the following day a customer does not recall a transaction, or because there are repeat transactions for the same amount. Where transactions are disputed, most card issuers will initially ask the club for details of the transaction. American Express will reverse the disputed transaction as soon as a query arises, in which case Mr Gordon stated that the appellants "have to fight to get the money back". He

maintained that the senior bookkeeper, the club managers and he spent a lot of time dealing with disputes as part of their daily routine. Mr Gordon deals personally with the more problematic disputes. Disputes can take up to half a day to resolve. In one case CCTV footage had to be sent abroad to resolve the dispute.

32. The total amount of card transactions written off by the appellants following such disputes in the period 1 January 2012 to 30 June 2015 was £5,828. Mr Gordon suggested that was because of the procedures adopted by the Clubs and by himself in preventing and dealing with disputes. We note that in the same period the London club alone issued Chips with a face value of £14.5m. We do not know what proportion of those Chips were purchased by card, but we are satisfied that it would be a significant proportion.

33. In light of the evidence as a whole we do not consider that the 20% fee charged to customers purchasing by card is simply intended to cover the financial risks to the appellants associated with card transactions and the transaction fees incurred. We are satisfied that it is intended to provide a significant net income stream for the clubs after the costs of card transactions are taken into account, including time spent by employees in relation to card transactions.

34. The use of similar vouchers or chips is common in lap dancing clubs generally. The practice arose principally because of daily limits on the amount of cash that can be withdrawn from an ATM via credit or debit cards. The purchase of Chips allows customers to spend longer in the appellants' clubs consuming more drinks and food. There are also advantages in terms of security for customers and dancers who do not have to carry large amounts of cash and for the clubs in terms of money-laundering regulations. Mr Gordon accepted that competing clubs in London and the provinces operate similar charging structures to the appellants in relation to the issue and redemption of vouchers or chips.

35. Customers who spend large amounts of money in the clubs are more likely to do so using Chips. There are customers who spend many thousands of pounds in one night and an example was given of a regular customer of the London club who could spend up to £40,000 in one night. The London club advises dancers that customers are more likely to spend more money if they are using credit cards to purchase Chips than if they are using cash.

36. Mr Gordon's evidence was that dancers prefer to accept payment in cash, especially in London where they must pay a 20% redemption fee for Chips. If necessary dancers will encourage customers to use the club's ATM or if that is out of service an ATM outside the club. Mr Gordon had no direct knowledge of these matters. We accept that dancers in London might prefer to accept cash, because there is no Chip to redeem, but we find that it is unlikely a typical dancer would refuse to dance for Chips. Outside London, there is nothing to suggest that dancers would mind whether they were paid in cash or Chips.

37. Customers use Chips principally to pay dancers the agreed fee for a dance or a sit down. They also use Chips to tip dancers and club staff, such as the Chip girls, waiters and waitresses. Customers are encouraged by the clubs to tip staff. In the period January 2012 to December 2015 employees at the London club were charged fees of £390,000 on redemption of Chips, indicating that employees received Chips with a face value of £975,000 by way of tips. Customers might also use Chips purchased on a previous visit to pay the entrance fee, although strictly this is at the manager's discretion as the terms and conditions exclude use other than to pay dancers or for tips.

38. Dancers themselves might also tip staff using Chips, for example the receptionist, security staff or the Chip girls. Dancers can also use Chips to pay their entrance fee into the club, although it was not clear whether this applied at the London Club and if so how the 20% redemption fee was dealt with.

39. Chips are presented to the clubs for redemption by dancers or employees. In the London club a fee of 20% is charged to dancers and 40% to employees. No fees are charged for redemption of Chips at other clubs but dancers at other clubs pay a fee per dance to the club. The reasons for this difference are practical. Clubs outside London are smaller and dancers are local. There are fewer dances than in London. In London the club is much busier and dancers are more transient. It is easier to keep a check on the dances being performed outside London. It would not be practical to keep a check on dances being performed in London. This is also how the clubs' competitors operate both in and outside London.

40. In the period January 2012 to December 2015 dancers at the London club were charged £2.7m as commission on redemption of Chips indicating that dancers received Chips with a face value of £13.5m from customers.

41. Mr Warr's evidence was that Chips have been accepted in lieu of cash for many years by independent retailers, other businesses and a charity as follows:

(1) Local taxi firms, taxi drivers, takeaway food retailers and convenience stores.

(2) The clubs had an oral agreement or understanding with Simian Publishing, the publisher of Loaded Magazine. Mr Warr was the owner of Simian Publishing. The agreement was that a £20 Chip could be used in the clubs to purchase a six month subscription to the magazine. Simian put an iPad into each club so that customers could subscribe online. The £20 Chip would be given to the club which would make a corresponding deposit of cash into Simian's bank account. The agreement was said to be in place between April 2014 until May 2015 when Simian went into liquidation. The appellants did not have any records to support such payments and there was no correspondence or other documentation to evidence the amount of subscriptions taken out in this way. Mr Warr maintained that there was no reason for the appellants to keep such records.

(3) Chips could be used by customers to make donations to Help for Heroes. There was no documentary evidence as to the value of Chips used to make donations in this way. Help for Heroes was one of two charities promoted by the appellants. There were collections both outside and inside clubs and donation boxes were kept permanently at club reception desks. Chips which were gifted would be converted to cash by the managers and paid into the charity's bank account, sometimes with an outsized cheque presentation for promotional purposes. Mr Warr maintained that no records were kept because the appellants were simply facilitating the gifts.

42. Mr Warr's evidence was that allowing customers and others to use Chips with local businesses was commercially advantageous to the appellants. Customers were more likely to purchase Chips and remain in clubs for longer if they could use them with other traders, such as taxi drivers. Traders might also be more likely to recommend the clubs to their customers.

43. Mr Gordon's evidence was that prior to April 2015 acceptance of Chips by local businesses was an ad hoc arrangement at each club. There were no written agreements between clubs and third party suppliers prior to July 2015. The opportunity for customers to use Chips to pay third party businesses was not advertised to customers.

44. There was very little evidence as to the extent to which Chips might have been redeemed by third party businesses. Mr Warr's evidence was that the club in Leicester had opened in 2004 and by 2009 it had developed a "local economy" with Chips. There was a schedule in evidence purporting to show Chips being redeemed by seven third parties at the Leicester club in the period 5 April 2015 to 9 April 2016. The total said to have been redeemed in the year

was £760 and appears to have involved 38 x £20 Chips. The traders involved redeemed between 1 and 11 Chips each.

45. This level of use of Chips by customers with third parties can be compared to the face value of Chips sold by the Leicester club in 2015 which we find was a little over £500,000.

46. Mr Warr described these Chips as being "what was left in the customers' pockets" and what was more important was the amount the customers had spent in the club. He maintained that encouraging third parties to accept Chips and thereby building local relationships was a serious commercial aspect of the business. We do not accept that is the case. There is no evidence of any attempt by any of the clubs to encourage or advertise to customers and to local traders or preferred suppliers the possibility of such businesses accepting Chips which the clubs would redeem. Mr Warr suggested that the manager at Leicester would not do that because in an ordinary week it only had 250-300 customers and he would know the customers and local traders personally. However, there was no evidence from a manager at the Leicester club or any other club to that effect.

47. Further, there is no way of knowing whether Chips had been given to these third party businesses by dancers, staff or customers. Mr Warr accepted that was the case, but maintained it was unlikely to be dancers or staff using the Chips in this way. He said that dancers liked to keep Chips as a safe savings mechanism because they were "worthless to anyone else". Apart from the fact that they would not be worthless to someone using them to pay a third party with whom the club had an arrangement, in our view it is more likely that dancers and staff in London would use Chips to pay third parties if that was an option because they would get the full face value of the Chip without being charged a redemption fee. Mr Warr accepted that "in theory" dancers could use Chips in this way but he did not suggest any way in which it could be stopped.

48. We accept that clubs did have relationships with local businesses. An analysis of payments by the club in Brighton in January 2013 shows small sums being paid by way of commission to taxi firms and to the concierges of local hotels. In the course of a week £205 was paid to taxi firms and £290 was paid to various concierges. Similar payments were made in Leicester. There was also evidence of payments made by way of incentives to dancers. However, there was no documentary evidence that Chips were accepted by local businesses prior to 5 April 2015.

49. On 21 May 2015 Mr Warr emailed managers at the clubs. He stated as follows:

> "In an effort to reciprocate local businesses within the immediate vicinity or our clubs, and in an effort to support our existing trade partners, we want to drive business to them (as our preferred suppliers) by allowing them to use our chips as face value currency for our customers… I need you all to complete the following:
>
> - Speak to your nominated cab company or companies and see if they will be part of this opportunity. In reality, I doubt there will be much utilisation of the service (given the exclusive relationship between Dancers and chips) but I need every club to find a supplier who will agree to accepting chips as a form of payment …
> - As per the above, please find a local kebab, takeaway or restaurant who will also accept chips as a form of payment.
>
> Once each of you have identified your various suppliers, we will give them an agreement from us agreeing to reimburse them the full face value of [Chips] upon presentation.
>
> This is important and needs to be done ASAP. I know most of you already have existing relationships with local businesses so this should be a positive sound bite for you."

50. Mr Warr accepted that in reality he did not think the opportunity for customers to use Chips with third party businesses would be used very much. Whilst the email was directed to all managers, we were told that in fact is was aimed at one particular manager. The only response in evidence was from the general manager at the Leicester club, who was not the particular manager the email was aimed at. The response said:

> "Just to confirm we have the following businesses/trades to date, whom are happy to accept Chips as a form of payment."

51. The Leicester manager went on to identify 7 local businesses and 3 "possibles". The seven businesses identified were the same businesses on the schedule referred to above which generated £760 in the year ending 9 April 2016.

52. We note that the schedule showing Chips redeemed for third parties at the Leicester club commences on 5 April 2015, prior to the date of this email. It shows 5 Chips in total being redeemed prior to the date of the email. 2 x £20 Chips by an off licence and 3 x £20 Chips by a florist.

53. At the date of Mr Warr's email there was a dispute as to the VAT treatment of Chips and vouchers. Between 2012 and 2014 Mr Gordon had been having discussions with solicitors and HMRC following the introduction of paragraph 7A Schedule 10A VATA 1994 which concerned single use vouchers. At that time the appellants were arguing that the Chips were not single use vouchers because they could be redeemed with a number of service providers, namely dancers. There was no mention of redemption by any other third party traders, or indeed for Loaded Magazine or Help for Heroes.

54. Mr Warr accepted that the email was sent by him with knowledge of the VAT issues that had arisen between HMRC and the appellants. We think it likely that the email was prompted by those issues, and that it was more directed to the future than the past.

55. Even if, as Mr Warr said, Leicester had been doing this since 2009, in our view it was on a very small scale and was on an ad hoc basis. We cannot be satisfied that it was anything other than a matter of discretion for the club manager as to whether he redeemed such Chips. We are not satisfied that customers had any right to use Chips in this way or that the club had any obligation to redeem Chips presented by third party businesses. In our view the instances in which the Leicester club permitted third parties to redeem Chips were de minimis.

56. We are not satisfied that any of the other clubs outside London redeemed Chips presented by third party local businesses in the period we are concerned with.

57. In the London club, unlike the provincial clubs, Chips redeemed by dancers and staff are redeemed at less than face value. In theory therefore, only Chips exceptionally refunded to customers or redeemed by third parties would be redeemed at face value. At some stage a schedule was prepared by Mr Gordon summarising Chips redeemed in the London club on a daily basis in May 2015 and June 2016.

58. As we understand Mr Gordon's evidence, this schedule was prepared because of concern that there were unexplained differences between the Chips redeemed and the commission paid at the London club. It is important for the clubs to account for Chips sold and redeemed because it is the clubs which sell and redeem Chips. From the clubs' perspective, Chips equate to cash-in on sale and cash-out on redemption. Mr Warr said that he was "spitting feathers" because he was concerned that there appeared to be a large value of Chips being redeemed at face value at the London club. He believed the difference amounted to some £20,000. Mr Warr said that he spoke to the managers at the London club and was satisfied that the differences arose because of Chips redeemed at face value by third parties. The schedule was then produced and it showed that the difference was about £9,000 for May 2015 and £14,000 for June 2016.

59. We set out in the following table extracts from the schedule showing entries for 1 May 2015 and the total entries for May 2015 and June 2016:

	Total	**Dancer**	**20%**	**Staff**	**40%**	**Gross Comm**	**Diff**
01/05/15	18,350	16,730	3,238	1,620	648	17,810	540
May Total	336,510	306,940	59,652	29,570	11,636	327,350	9,160
June Total	332,650	291,570	58,360	41,080	10,624	318,360	14,290

60. The schedule purports to show that on 1 May 2015, Chips with a face value of £18,350 were redeemed by the London club, of which £16,730 were redeemed by dancers and £1,620 were redeemed by staff. The commission charged to dancers was 20% and totalled £3,238. In fact, 20% of £16,730 is £3,346 so the club was apparently short some £108. Mr Gordon's evidence was that he assumed this was because some of the Chips in the dancer column were redeemed by third parties at full value. Such Chips would be treated as dancers' Chips because Mr Gordon had not changed the till system to have a separate line for Chips paid out at full value.

61. The schedule showed a negative entry of £80 for 6 May 2015 under the 40% column which is the commission charged to staff on redemption of Chips. On that date the schedule shows no Chips being redeemed by staff.

62. The column "Gross Comm" grosses up the columns for commission charged to dancers and staff at 20% and 40% respectively to give the gross value of Chips redeemed by dancers and staff, assuming commission was charged at the relevant rates. The schedule then identifies the difference between the total value of Chips redeemed and the commission actually received, grossed up. On 1 May there was a difference of £540. In May 2015 and June 2016 the total differences identified were £9,160 and £14,290 respectively.

63. Mr Gordon was questioned as to whether the schedule included Chips refunded to customers. His evidence was not entirely clear and suggested some uncertainty in his mind. It was pointed out to Mr Gordon that in response to a formal request for further information, the appellants had stated that their accounting records did not distinguish between refunded and redeemed Chips. Mr Gordon then accepted that the schedule could include both refunded and redeemed Chips. However, by the end of his evidence he was adamant that the schedule did not include Chips refunded to customers. In terms of accounting for refunds of Chips to customers, Mr Gordon stated that this would be treated as a negative sale and would not be treated as a redemption.

64. Possible explanations for the differences were canvassed during the evidence. Mr Gordon's evidence was that the difference would not relate to Chips refunded, because they were refunded with commission. Whilst dancers may sometimes be paid incentives by management, such payments would not be made by way of dancers Chips being redeemed to dancers at face value. Mr Warr said that the clubs would never waive the redemption fee for dancers cashing Chips because the "Chip bank" had to balance. Mr Gordon accepted that Chips redeemed by dancers and staff could be mistaken for one another, but he said that there should not be a vast number of such errors because dancers were cashed out separately to staff by different managers.

65. Mr Warr told us that the only possible explanation for the difference shown in the schedule was redemption of Chips at face value by third party traders.

66. It was not clear to us from the evidence what it was exactly that caused Mr Warr to become concerned about redemption of Chips at face value in London. We are not satisfied that the explanation for the differences shown on the schedule is third party businesses redeeming Chips at face value. If third parties did redeem Chips regularly, with a face value of some £14,000 in June 2016, then we think it likely there would have been provision for the treatment of such Chips in the till and accounting system, or at least some reconciliation of those Chips. We did not see any records for the Chip bank and we did not have any explanation as to how the Chip bank was reconciled to ensure that it balanced, or how if at all the fees charged on redemption of Chips was reconciled to Chips in the Chip bank.

67. Further, there is no evidence as to the identity of the third party businesses redeeming Chips at face value at the London club, no evidence as to what arrangements were in place with third parties and no evidence as to how customers were made aware that they could use Chips to pay third party businesses. It is not clear why the records for the Leicester club should enable a detailed analysis to be made, but not the London club.

68. There was no evidence as to any response from the London club to Mr Warr's email dated 21 May 2015, and no evidence from any manager of the London club as to the arrangements in place with third parties. This is despite the appellants' case that in May 2015 and June 2016 the London club redeemed Chips with a face value of some £23,000 to third party businesses.

69. Each club has an electronic till system showing individual transactions which is linked to a head office. Each club also sends all credit card receipts, till reports and records of Chip sales to Mr Gordon on a weekly basis. If the London club was redeeming Chips with a face value of £9-14,000 a month to third parties without a fee we think it likely that Mr Gordon and Mr Warr would have been aware of that fact and would have known that it was necessary to take this into account when considering the differences referred to above.

70. On balance, we are not satisfied that any of the clubs redeemed Chips for third party businesses other than on a discretionary and ad hoc basis for insignificant sums. We find that any redemption of Chips to third party businesses was de minimis and falls to be ignored.

71. We do have evidence from Mr Warr that customers had the facility in each club to use a £20 Chip to pay for a 6 month subscription to Loaded Magazine. There is also evidence that this was advertised on promotional material in the clubs. However, there is no evidence as to the extent to which customers might have done this. It appears that the appellants did not keep any records relating to Chips which might have been redeemed for this purpose, or any record of payments being made by the clubs to Simian Publishing. In the circumstances we are not satisfied that the level of such purchases was anything more than de minimis. It therefore falls to be ignored.

72. We also have evidence from Mr Warr that customers had the facility in each club to use Chips to make a donation to Help for Heroes. Again, there is evidence that this facility was advertised on promotional material in the clubs. However, there is no evidence as to the extent to which customers might have done this. It appears that the appellants did not keep any records relating to Chips which might have been redeemed for this purpose, or any record of payments being made by the clubs to the charity arising from donations of Chips. In the circumstances we are not satisfied that the level of such donations was anything more than de minimis. It therefore falls to be ignored.

REASONS

73. As we have previously identified, we are concerned with two broad issues. Issue One concerns the VAT treatment on the supply of Chips to customers by the clubs. Issue Two concerns the VAT treatment on redemption of Chips by dancers and employees in the London club. We shall deal with the two issues separately.

74. In the light of our findings of fact, we shall consider the two issues on the basis that Chips are used by customers to pay dancers or to tip dancers and club employees. They are therefore redeemed by dancers or employees and not by third parties. In order to illustrate the issues and the arguments we shall refer to a £100 Chip which is issued to a customer upon payment of £100 in cash or £120 by card, and redeemed by dancers for £80 or employees for £60.

Issue One

75. HMRC have assessed the appellants to VAT on the supply of Chips to customers on the basis that the supply is a taxable supply. The appellants contend that it is an exempt supply, and if it is not an exempt supply then it is only the excess over and above the nominal value of a Chip that is chargeable to VAT. The appellant's submissions in relation to Issue One may be broadly summarised as follows:

> (1) Chips are "security for money" when supplied to customers and the supply is therefore exempt pursuant to Item 1 Group 5 Schedule 9 VATA 1994 which implements what is now Article 135(1)(c) Principal VAT Directive 2006/112/EC ("PVD").
>
> (2) In the alternative:
>
> > (a) Chips are face value vouchers within Schedule 10A VATA 1994. They are credit vouchers and pursuant to paragraph 3(2) Schedule 10A it is only the consideration of £20 over and above face value which is taxable.
> >
> > (b) Paragraph 7A Schedule 10 which would disapply paragraph 3 and give rise to a taxable supply of £100 or £120 for vouchers issued on or after 10 May 2012 does not apply because Chips are not single purpose vouchers.

76. We deal with each of these arguments in turn. In doing so we approach the task of construction on the basis that exemptions from VAT should be construed narrowly (see *Sparekassenes Datacenter v Skatteministeriet* Case C-2/95 at [20]). However, as Chadwick LJ explained in *Expert Witness Institute v CCE* [2001] EWCA Civ 1882, a strict construction does not mean that the most restrictive meaning is to be given to the words used:

> "17. It does not follow, however, that the Court is required to give to the phrase "aims of a civic nature" the most restricted, or most narrow, meaning that can be given to those words. A "strict" construction is not to be equated, in this context, with a restricted construction. The Court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption; so that if the Court is left in doubt whether a fair interpretation of the words of the exemption cover the supplies in question, the claim to the exemption must be rejected. But the Court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.
>
> 19. … for the reasons which I have already sought to explain, I reject the premise that the proper approach to construction does require the court to confine the scope of an exemption if it can. The task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used."

77. It is common ground between the parties that in identifying the nature of supplies it is necessary to consider transactions objectively, having regard not only to any contractual terms

but also to the economic reality of the circumstances in which the transactions take place (see *HM Revenue & Customs v Newey* Case C-653/11).

(1) Security for Money

78. Article 135(1) PVD provides that the following transactions shall be exempt:

> "c. the negotiation of or any dealings in credit guarantees or any other security for money …
>
> d. transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection."

79. These provisions are implemented in UK domestic legislation by Item 1 Group 5 Schedule 9 VATA 1994 which provides for exemption of the following supplies:

> "The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money."

80. It is common ground that the financial exemptions in Item 1 Group 5 are not confined to supplies made by banks or other financial institutions.

81. The appellants contend that Chips are security for money when they are issued to customers and when there are subsequent dealings in Chips. Mr Akin referred us to a number of decisions as to the meaning of the term "security for money".

82. In *Kingfisher Plc v Customs & Excise Commissioners* (Decision 16332, October 1999) the VAT Tribunal was concerned with a voucher scheme whereby Provident, a financial services firm sold vouchers to the public, usually on credit. Retailers who participated in the scheme agreed in advance to accept Provident's vouchers and they were authorised by Provident to accept vouchers in their shops. The retailers then presented the vouchers to Provident who would pay the face value of the voucher less an agreed percentage of 10%. Kingfisher argued that when goods were supplied to a customer using a voucher, the consideration for that supply was the face value of the voucher less the agreed percentage deducted by Provident. Alternatively, if the supply was at face value, Kingfisher argued that Provident made a supply to it of the services of publicising the participating retailers which was a standard rated supply on which Kingfisher was entitled to input tax credit. It is the alternative argument that is relevant for present purposes. HMCE contended that the supply by Provident to retailers was an exempt supply.

83. The VAT Tribunal (Mr Stephen Oliver as he then was), held that the supply by Provident was an exempt supply consisting of the receipt or dealing with a security for money within Item 1 Group 5. He stated as follows:

> "The word 'security' when used without qualification or in a context which demands a narrow or specific construction has a wide meaning. The voucher when presented by the customer to the participating retailer, evidences Provident's obligation to meet the price for the goods purchased by the customer to the extent of the face value of the Voucher(s). As such it is a security within the wide meaning of that word."

84. On appeal to the High Court (reported at [2000] STC 992), Neuberger J agreed with the VAT Tribunal's conclusion. He held that that the transaction between Provident and Kingfisher fell within what are now Article 135(1)(c) and (d).

85. Mr Akin submitted that the analysis in Kingfisher was entirely consistent with observations made in *Customs & Excise Commissioners v Guy Butler (International) Ltd* [1976] STC 254. That case concerned a money broker acting as an intermediary between two banks engaging in a loan transaction on the security of a certificate of deposit. The issues are not directly relevant to the present case, but Mr Akin relies on an observation of Roskill LJ at 258h where he stated as follows in relation to the term "security for money" in Item 1:

"… the word 'security' is itself there undefined but would appear to be used in its ordinary sense, that is to say some instrument whereby the indebtedness of the borrower to the lender is by some means 'secured'."

86. Mr Akin placed particular reliance on a decision of the Upper Tribunal in *Wiltonpark Ltd v HM Revenue & Customs [2015] UKUT 0343 (TCC)* ("Wiltonpark").

87. Wiltonpark concerned the VAT treatment of vouchers known as "Secrets money" also in the context of lap dancing clubs. There are clear similarities between Chips and Secrets money, and some differences. Dancers received Secrets money which customers had purchased from the clubs and when they came to redeem them they were charged a 20% commission. Unlike Chips, customers could also use Secrets money to purchase food and drink from the clubs and only dancers could redeem Secrets money. Wiltonpark contended that the services it provided in exchange for the 20% commission were exempt pursuant to Item 1 Group 5.

88. For present purposes it is relevant that the FTT held that Secrets money was 'security for money'. The FTT also held that the commission was consideration for the supply to dancers of a broad set of services including access to the taxpayer's facilities and access to a broader market of non-cash customers. We shall return to that aspect of the case below.

89. On appeal, the Upper Tribunal held that the Secrets money vouchers were security for money. At [26] – [30] Rose J as she then was stated as follows:

"**Are the vouchers 'security for money' within the meaning of Item 1**

26. I can deal with this first issue quite shortly as I am entirely in agreement with the reasoning and conclusions of the Tribunal as set out in the Decision. The Tribunal held (paragraph 70) that 'security' in Item 1 has a wide meaning and that nothing within the VAT Act restricts such meaning. *When presented for redemption by a dancer*, a voucher clearly evidences, albeit implicitly, a Secrets company's obligation to meet the value stated on its face. They held that security for money can be issued without the issuer being a person within Note (4) to Group 5. The fact that Secrets suffer no significant exposure to credit risk as a result of their being the subject of chargebacks was irrelevant.

27. In my judgment, the voucher is given by the club patron to the dancer as an assurance to her that he has, by buying the Secrets money, made an arrangement with the club which means that she can confidently dance for him or provide table company without being paid by him in cash. This is because she knows, on taking the Secrets money, that she will be paid for her services at the end of the evening on redeeming the voucher. The voucher is given to the dancer by the patron precisely as a security for the money that the patron wants to pay her and which she will receive from the club when she redeems the voucher. It is well within the ordinary meaning of the words used in Item 1.

28. HMRC say that this is not a security for money because there is no extension of credit by the dancer, or even by the club, to the customer. However, I do not see that this is a necessary element and that was not part of the reasoning of either Sir Stephen Oliver or Neuberger J in Kingfisher.

29. HMRC sought to distinguish Kingfisher on the grounds that the judgments record that the Provident voucher had written on it that it authorised retailers with Provident Trading Accounts to charge their account to the sum shown. Here the Secrets money does not contain any such statement on its face. HMRC refer to the decision of the VAT Tribunal in Dyrham Park Country Club Ltd v The Commissioners [1978] VATTR 244 where the tribunal held that certain bonds issued by the club there were security for money, and defined that term as meaning 'a document under seal or under hand at a consideration containing a covenant, promise or undertaking to pay a sum of money'. Miss McCarthy, appearing for HMRC, argued that the Secrets vouchers do not contain any such promise. If a piece of paper without such a statement on it could be treated as security for money, then she said the term might be used to cover any item or token such as the tokens used by players in a game of Monopoly – something that does not look like a security for money at all.

> 30. I consider that the Secrets money vouchers are securities for money even though they do not say on their face that the dancer is entitled to encash them. The Tribunal found that the club was under a legal obligation to redeem the vouchers when the dancer presented them. The Secrets money scheme depends on both patrons and dancers being confident that the vouchers can be used to pay the dancers what they earn. If the club refused to pay the dancer for the voucher, the Secrets money scheme would quickly collapse. I therefore uphold the Tribunal's conclusion that the vouchers are security for money."
>
> Emphasis added

90. The appellant submits that the Chips in the present case evidence the appellants' obligation to customers to meet the price for the dancers' services purchased by the customers up to the face value of the Chips, or to meet the gratuitous intent of the customer if used as a tip to dancers or employees. As in Kingfisher, the Chips evidence and secure the obligation of the issuer to meet the price.

91. HMRC contends that the Chips are not security for money *in the hands of customers*, because customers could not exchange them for cash. In support of this submission HMRC relies upon the meaning of the term used in Item 1 Group 5 and Article 135, namely "security for money", and on various authorities. In contrast, HMRC accept that Chips are security for money *in the hands of dancers and employees*. They evidence and act as security for an obligation on the part of the appellants to pay cash to the face value of Chips presented by dancers and employees redeeming them, less fees in the case of the second appellant.

92. Ms McCarthy submitted that in ordinary parlance "security for money" is something which can be exchanged for money. It is an instrument which recognises a debt to the owner or holder of the security from a third party. The terms of the exemption clearly exempt transfers of money or transactions which are equivalent to transfers of money because they give to the transferee a right to money. Not every voucher is a security for money, otherwise they would be exempt on issue and Schedule 10A would be redundant.

93. In support of these submissions, Ms McCarthy relied on the fact that in the hands of customers there was no obligation on the appellants to pay cash to the value of the Chips. Further, Chips could not be used to purchase food or drink in the clubs. They were not as good as money as between the clubs and customers. Ms McCarthy submitted that in both Kingfisher and Wiltonpark the focus was on vouchers in the hands of retailers and dancers, rather than the issue of vouchers to customers. When Chips were issued to customers they carried certain rights, including the right to be provided with £100 of entertainment on the club's premises. At the point of issue, there was no obligation or debt which the Chips could be seen as securing.

94. Ms McCarthy sought to distinguish Kingfisher. She accepted that in the hands of the retailer, the voucher was security for money, because the retailer could demand payment of money in return for the voucher. She accepted that this was equivalent to Chips in the hands of the dancers. However, she submitted that the case said nothing about vouchers on issue to customers or in the hands of customers.

95. Similarly, Ms McCarthy submitted that in Wiltonpark, the Upper Tribunal was concerned with vouchers in the hands of dancers and not customers. The finding that Secrets money was a security for money was predicated on the basis that it was held by dancers and in their hands Secrets money could be exchanged for cash.

96. At one stage Mr Akin submitted that customers purchasing Chips had no right to be provided with entertainment because dancers could refuse to dance with anyone. We do not accept that submission. The reality is that dancers will dance with customers unless there is a good reason not to. There is a right to entertainment from dancers although it is on terms that the customer abides by the customer code of conduct.

97. We have found that dancers are advised to request payment in advance and in most if not necessarily all cases dancers will be paid in advance. Where it is agreed that payment will be in the form of Chips, the Chips are given to the dancer in advance. It seems to us that the contract or legal relationship between customer and dancer is established only when the Chips are given to the dancer. At that stage, the dancer is obliged to provide her services and the club is obliged to redeem the Chip for money.

98. When the Chip is handed over to the dancer, it does not secure the customer's obligation to pay the dancer. At that time, the customer has no obligation to the dancer. In our view it is only when the Chip is in the hands of the dancer that it becomes security for money. The Chip then represents the club's obligation to pay cash to the dancer on presentation of the Chip. Ms McCarthy submitted that prior to that the Chip simply gave the customer a bundle of rights to obtain entertainment from dancers in the clubs. We accept that submission. As far as customers are concerned the Chips do not evidence a debt or secure the payment of money to the customers. It is only in the hands of dancers and employees that Chips secure any obligation on the part of clubs to pay money. Customers have no right to be refunded by the clubs for unused Chips. The only right they have is to use the Chips to secure entertainment. They could expect a dancer to accept a Chip as long as they were complying with the club's code of conduct.

99. Chips when issued to customers might be seen as securing the right of customers to enforce a future obligation of the clubs to pay cash to dancers on redemption. But in reality, customers have no interest in securing payment of the dancers because they do not incur any debt or obligation to dancers. Chips might also be seen in the hands of customers as securing a right to be refunded if for any reason the customer is asked to leave the club. But the terms provide that Chips are non-refundable. Any refund that a customer might receive if asked to leave the club, or indeed in other exceptional circumstances is at the discretion of management. In our view therefore, Chips do not secure any right of the customer to payment of money Nor do they secure the right of a dancer to payment of money at that stage because the dancers have no rights until they accept the Chips as payment in advance of a dance or sit down. Chips represent a right of the customers to receive services from dancers in the club, which as we shall see defines them as face value vouchers for the purposes of Schedule 10A. If anything, the Chips are security for those rights, and not for the payment of money.

100. The same analysis applies if a Chip is used to tip a dancer or a club employee. The customer never has any obligation to the dancer or employee. It is only once the Chip is in the hands of the dancer or employee that it becomes a security for money.

101. The Agreed Statement of Facts provides as follows:

> "3.4 Dancers negotiate the precise terms of the services that they supply to customers, the price of those services and the means of payment, directly with customers. The clubs play no part in those negotiations but advertise suggested prices of £10 or £20 per dance, depending on the kind of dance"

102. We do not consider that our findings above are inconsistent with those agreed facts. It is only once a Chip is handed over that the contract between customer and dancer becomes legally binding. At that stage, the dancer is bound to perform the services but the customer has no further obligations to the dancer. In particular the customer does not have any debt to the dancer. When Chips are redeemed by dancers the clubs are not satisfying any obligation of the customer. The clubs are satisfying an obligation that they owe directly to the dancer to redeem the Chips. That obligation arose when the dancer came to hold the Chips.

103. Ms McCarthy also relied on *Dyrham Park Country Club Ltd v HMCE [1978] VATTR 244*, where "security for money" was understood to be a bearer document containing a promise

to pay money and enabling the holder to obtain value in cash. We do not consider that this case advances HMRC's argument. It was referred to by the Upper Tribunal in Wiltonpark but it is not clear to what extent the Upper Tribunal regarded it as persuasive. It does not appear to us that it assists in relation to the arguments presented in this case.

104. Mr Akin submitted that it was not necessary for a security for money to be exchangeable for cash and that there was nothing in the authorities to support that submission. Otherwise, an instrument securing payment at a future date would not fall within the term and the status of such an instrument could change arbitrarily. For example, if a customer used a £100 Chip to pay for £80 and received a £20 Chip in change, the £20 Chip would have been a security for money in the hands of the dancer but would have then lost that status when given to the customer.

105. In our view a security for money must secure the payment of money. It is not a security for money if it secures the performance of some other obligation such as the provision of services. There is no reason an instrument should not objectively satisfy the definition of the term "security for money" in the hands of one person but not in the hands of another. It is not suggested that any VAT implications would arise from a change in status of such an instrument. In the hands of the customer a Chip evidences a right to be supplied with services during a visit to a club, whereas in the hands of the dancers and employees the Chip evidences a right to be paid cash.

106. Ms McCarthy submitted that if the appellant's argument is right, then any credit voucher within para 3 Schedule 10A would be a security for money when it was issued. As such it would be exempt on issue. As to this point, Mr Akin submitted that in most if not all voucher schemes, the issuer undertakes to procure services for a customer but does not supply those services. They are not security for money, but they are still credit vouchers under paragraph 3 Schedule 10A. As will be seen, it is common ground that if Chips are not security for money on issue to customers, then they are face value vouchers. In other words, they are tokens representing a right to receive goods or services to the value of an amount stated on them. Ms McCarthy submitted that if Mr Akin is right that such tokens are also security for money, then Schedule 10A would be redundant because the issue and redemption of a token would be exempt. Mr Akin says that even if Schedule 10A is redundant, it does not necessarily follow that the appellants' argument as to security for money fails.

107. Arguments based on redundancy rarely carry much weight. However, Ms McCarthy's submission does at least suggest that the meaning of security for money is not as wide as Mr Akin submits. The conclusion we have reached in relation to Chips in the hands of customers gives effect to both Item 1 Group 5 and Schedule 10A. In the hands of customers, Chips represent a right to receive services to the value stated on the Chip. That is a security for the right to receive value for the money paid rather than a security for the money itself. In the hands of dancers and employees, Chips represent right to be paid money by the clubs. They are a security for the money which the clubs are obliged to pay on presentation of the Chips.

108. If, contrary to our findings, Chips are security for money in the hands of customers, then HMRC accept that payment of the nominal value by a customer when purchasing a Chip is consideration for a supply which is exempt from VAT. However, they say that the premium paid on issue by customers paying by card is consideration for a supply of services, namely facilitating the purchase of entertainment services by non-cash customers. They say that the supply is directly analogous to the supply in Wiltonpark where the Court of Appeal found that as a matter of economic reality the 20% commission charged to dancers on redemption allowed dancers to access a market of non-cash customers and was too large to be for the supply of

encashment services. Mr Akin submitted that if that was right, the supply in Kingfisher would have been a taxable supply.

109. In Wiltonpark the Upper Tribunal held firstly that Secrets money was security for money in the hands of dancers. Secondly, that the 20% commission charged to dancers on redemption went significantly beyond the simple receipt or dealing with security for money. It was the consideration for a standard rated supply to dancers of the facilities and opportunity to make more supplies to a wider market of non-cash customers.

110. The decision of the Upper Tribunal in Wiltonpark was appealed to the Court of Appeal (at [2016] EWCA Civ 1294). The taxpayers accepted that the supply was for more than mere encashment of vouchers and included facilitating access to the non-cash market, but contended that was a single supply falling within the exemption.

111. At [46] and [48] the Court of Appeal distinguished the voucher scheme in Wiltonpark to that in Kingfisher as follows:

> "46. HMRC and Rose J were right to emphasise that the dancers trade not from their own premises but at the appellants' clubs. This distinguishes this case from cases such as *Kingfisher* and *Diners Club* where the retailer, equivalent to the dancer in this case, trade from their own premises. Rose J was also right to say at [40] that the reality is that both the club and the dancers are in effect dependent on each other for success and profitability and at [44] that the dancers cannot provide their services in exchange for vouchers without the facilities of the club. For the dancers to make money from the non-cash customers they need not only the voucher scheme but also the club's premises and facilities. Payment of the entrance fee does not give them access to the non-cash customers but, as a matter of economic reality, enables a dancer to use the club only for the provision of services to cash customers. As Ms McCarthy observed in her submissions, a dancer paying only the entrance fee could dance for a non-cash customer but would receive only valueless pieces of coloured paper in return. This would make no economic sense and would not happen in the real world.
>
> 47. …
>
> 48. …a commission of 20% for the encashment of a voucher, even with the benefits of inclusion in the scheme, is on the face of it very high, particularly as the appellants ran, as they knew, a very low credit risk. If they had wanted to demonstrate that it was a fair or market rate for those services, the burden was on them to adduce the evidence to support it. In the absence of such evidence, Rose J was entitled to take the view that the size of the commission suggested that it was charged for more than just those services. Neuberger J adopted a similar approach in the *Kingfisher* case at [46]."

112. Mr Akin submitted that the 20% commission on issue should be seen as consideration for an exempt supply. He pointed to evidence as to the substantial amount of work done in relation to running the voucher scheme and in particular dispute resolution. He submitted that HMRC's case on the £20 premium confused the nature of a supply with the effect of a supply. In this case the supply was exempt as the issue of security for money. The effect of the supply was that customers were able to use Chips as payment to dancers. We are not satisfied that the £20 fee charged to customers does merely reflect work in running the voucher scheme. The evidence and our findings of fact do not support the appellants' submission.

113. The respondents' argument is that when a £100 Chip is purchased for £120 there are two supplies. An exempt supply of a security for money and a standard rated supply of services which facilitate the purchase of entertainment services by non-cash customers. We were not referred to any authorities on single and multiple supplies or how the analysis derived from those authorities would apply to the facts of this case. In those circumstances, having found that Chips are not security for money in the hands of customers we prefer to say nothing in relation to this alternative argument.

(2) Face value vouchers

114. This section of our decision proceeds on the basis that Chips in the hands of customers are not security for money. We also proceed on the basis, which is common ground, that Chips are face value vouchers for the purposes of Schedule 10A VATA 1994.

115. Schedule 10A makes specific provision for the VAT treatment of face value vouchers. The relevant provisions of Schedule 10A are as follows:

> "**1. Meaning of "face-value voucher" etc**
> (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" of a voucher are to the amount referred to in sub-paragraph (1) above.
>
> **2. Nature of supply**
> The issue of a face-value voucher, or any subsequent supply of it, is a supply of services for the purposes of this Act.
>
> **3. Treatment of credit vouchers**
> (1) This paragraph applies to a face-value voucher issued by a person who—
>
> (a) is not a person from whom goods or services may be obtained by the use of the voucher, and
> (b) undertakes to give complete or partial reimbursement to any such person from whom goods or services are so obtained.
>
> Such a voucher is referred to in this Schedule as a "credit voucher".
>
> (2) The consideration for any supply of a credit 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 any of the persons from whom goods or services are obtained by the use of the voucher 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) …
>
> **4. Treatment of retailer vouchers**
> (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.
> …

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."

116. The appellants accept that Chips are face value vouchers even where, as we have found, they do not represent any right to receive goods or services from third parties other than dancers. Further, it is common ground that Chips are credit vouchers falling within paragraph 3 Schedule 10A. The effect of paragraph 3, where it applies, is that the consideration on the supply of a credit voucher is disregarded save to the extent that it exceeds face value. Hence it is only the £20 in excess of the £100 face value of a Chip purchased by a customer using a card which is taxable.

117. That is the agreed position in relation to supplies of Chips up to and including 10 May 2012. The significance of that date is that it is the date on which paragraph 7A comes into force. The effect of paragraph 7A for vouchers issued on or after 10 May 2012 is limited to what are called "single purpose vouchers". In the case of single purpose vouchers, paragraph 3 is disapplied. The parties agree that if Chips are single purpose vouchers then this has the effect that the whole consideration for the issue of a £100 Chip is taxable at the time the Chip is issued.

118. The dispute between the parties at this stage is whether in the period from 10 May 2012 the Chips are single purpose vouchers.

119. Schedule 10A does not define or give further guidance as to what is meant by "goods or services of one type which are subject to a single rate of VAT". It is common ground that paragraph 7A was introduced following a decision of the Court of Justice of the European Union in *Lebara Limited v HM Revenue & Customs* Case C-520/10. It was introduced to bring UK domestic law into line with the decision in that case (see HMRC Business Brief 12/12). It was intended to establish a charge to output tax when a voucher is purchased and the VAT on goods or services intended to be acquired on redemption of the voucher is known at the time of purchase (see the discussion of the Upper Tribunal in *Lunar Mission Ltd v HM Revenue & Customs* [2019] UKUT 0298 (TCC)).

120. The appellants contend that Chips are not single purpose vouchers because at the time of issue it cannot be known what goods and services will be supplied, by whom and at what rate of VAT. Firstly, a Chip may be used to tip dancers or employees which would be outside the scope of VAT; secondly a particular dancer may or may not be registered for VAT. It cannot be said what rate of VAT would be applicable to any supply when Chips are purchased by customers. The Respondents are effectively seeking to charge VAT on a supply which may be outside the scope of VAT or on a supply of services by dancers who are not VAT registered.

121. Ms McCarthy submitted that the key question in relation to single purpose vouchers is whether what is supplied is subject to tax at a single rate, for example standard rated without the possibility of the supply being exempt, zero rated or subject to a reduced rate. That depends on the nature of the supply, and not the identity of the supplier. Sections 29A, 30 and 31 VATA 1994 define reduced rate, zero rate and exempt supplies by reference to the nature of the supply. Hence it is irrelevant that one dancer may be VAT registered and another dancer may not be VAT registered.

122. Ms McCarthy further submitted that the relevant supplies we are concerned with are supplies of entertainment by dancers. That is one type of supply which is charged to VAT at a single, standard rate. Even if Chips could be used to tip dancers or employees then just because

those transactions were outside the scope of VAT did not mean that the voucher represented a right to receive goods or services of more than one type.

123. We accept Ms McCarthy's submissions. Mr Akin did not point to any aspect of paragraph 7A which suggests that the VAT treatment of credit vouchers depends on the VAT registered status of the ultimate supplier of goods or services. We have since noted that paragraph 3(3) disapplies paragraph 3(2) if the ultimate supplier fails to account for VAT in which case the consideration for supply of the voucher up to face value is not disregarded. It seems to us that if parliament had intended the VAT treatment of credit vouchers to depend on the VAT status of the ultimate supplier of goods and services then it would have expressly made provision to that effect. We note in passing that there was no evidence before us as to the VAT status of any of the dancers at the clubs.

124. We do not consider that the potential use of Chips to tip dancers and employees affects the VAT treatment of Chips for the purposes of paragraph 7A. Paragraph 7A refers to the goods and services which the vouchers represent a right to receive. These are the same goods and services which define face value vouchers in paragraph 1. In other words, it is first necessary to look at the goods and services which the voucher represents a right to receive for the purposes of paragraph 1. It is that right which constitutes the voucher a face value voucher. It is then necessary to consider whether those goods and services are "of one type which are subject to a single rate of VAT".

125. In the present case, the Chips are face value vouchers because they represent a right to receive entertainment services from dancers. Those services are one type of service taxable at a single rate of VAT. The fact that a Chip may also be used to tip a dancer or employee because it has a value in the hands of a dancer or employee does not affect that analysis. Using the Chip in this way is, as Mr Akin says, a transaction which is outside the scope of VAT but the Chip is not being used in respect of the right to receive goods or services.

126. In the circumstances, for Chips issued prior to 10 May 2012 we find that VAT was due on the consideration paid by customers but only to the extent that the consideration exceeded the face value of the Chips. Chips issued on or after 10 May 2012 were single purpose vouchers and we find that VAT was due on the whole consideration paid by customers.

Issue Two

127. HMRC have assessed the second appellant on the basis that the 20% or 40% fee charged to dancers and employees on redemption is consideration for a taxable supply of services by the second appellant. The second appellant contends that there is no taxable supply.

128. Both parties accept that the 20% or 40% deduction from the face value of a Chip is consideration for a supply. The second appellant argues that it is consideration for redemption of the Chip which, because the Chip was security for money, was an exempt supply. HMRC accept that Chips in the hands of dancers and employees are security for money. However, they contend that the fee charged to dancers was consideration for a range of taxable supplies by the second appellant to dancers to enable dancers to access the non-cash customers. In relation to employees they contend that the redemption by employees is an "incidental by-product of the Chip scheme" and should be treated as de minimis. In the alternative, the fee charged to employees was consideration for a supply of services enabling employees to earn tips from non-cash customers.

129. In the period January 2012 to December 2015 dancers were charged fees of £2.7m on redemption of Chips and staff were charged fees of £390,000 on redemption of Chips. We shall deal firstly with arguments in relation to dancers.

130. HMRC say that the relevant facts in relation to dancers are indistinguishable from Wiltonpark where dancers traded from Wiltonpark's premises. As a matter of economic reality, the 20% fee gave dancers access to a market for non-cash customers and the size of the fee suggests the dancers are paying much more than for encashment. Clubs other than the London club charged dancers a fee per dance which was properly regarded as taxable. It was the absence of that fee in London which in part at least justified the second appellant charging dancers a fee on redemption of Chips.

131. The second appellant seeks to distinguish the facts of Wiltonpark. In particular, there was little evidence in Wiltonpark as to the extent to which Chips were used to tip dancers. In the present case, Chips are used to tip dancers and employees. In Wiltonpark the Upper Tribunal considered at [48] the redemption of Chips by dancers on behalf of waiters or to settle debts between dancers and found that was not part of the purpose of the scheme. However, the present scheme is not simply a scheme to charge dancers for a supply of services. It is a wider scheme which encompassed Chips being used by customers to tip dancers and employees and by dancers to tip employees. Mr Akin submitted that the Court of Appeal in Wiltonpark did not lay down any general rule independent of the facts. It simply accepted at [50] that the Upper Tribunal's analysis was a legitimate interpretation of the facts.

132. Mr Akin relied on evidence of Mr Warr and Mr Gordon that the purpose of the Chip scheme was to encourage customers to spend more time and therefore more money in the club. He submitted that a consequence of the scheme was access to a wider market of customers for dancers but that was not a purpose of the scheme. Further, it was submitted that the lack of uniformity between clubs pointed towards the lack of a unifying scheme.

133. We accept that one purpose of the Chip scheme in each club was to facilitate customers spending more time and therefore more money in the clubs. We acknowledge that the Chip scheme did not operate uniformly, in particular with regard to the London club. However, we are not satisfied that giving dancers access to the non-cash customers was in some way an unintended consequence of the Chip scheme in the London club. We consider that the Chip scheme in London with a 20% redemption fee for dancers operated partly to encourage customers to spend more time and money in the club, partly to give dancers access to the non-cash customers and partly as a way to charge dancers for that access.

134. Mr Akin submitted that the retailer in Kingfisher also received benefits from the voucher scheme but this did not prevent the fee charged to the retailer being exempt. At [59], Neuberger J noted the following benefits to the retailers:

> "…the retailer is obtaining benefits. First, it is able to sell goods to a customer who might otherwise not have the cash to purchase goods, or who might not purchase goods from the retailer if the retailer were not part of the scheme. Secondly, the retailer has relative certainty of payment from Provident, rather than having to take the risk of customer's credit, which is almost certain to be significantly less good than that of Provident."

135. Mr Akin also relied on a comparison with Note 4 Group 5 which exempts supplies by a person carrying on a credit card operation made in connection with that operation, irrespective of the benefits that a retailer gets from the arrangement. In Kingfisher it was acknowledged that the supplies by Provident were similar to those of a credit card company.

136. We do not accept that HMRC's case is inconsistent with Kingfisher or the treatment of supplies by credit card companies. We accept Ms McCarthy's submission that HMRC's case in relation to dancers on the present facts is on all fours with Wiltonpark and that Wiltonpark was not inconsistent with the treatment of fees charged to the retailers in Kingfisher. The latter point is illustrated by what was said by the Upper Tribunal in Wiltonpark at [42]:

> "In my judgment, the Kingfisher case establishes that when a voucher is redeemed of the kind in issue here, there is more than the encashment that is being provided. It is, at the least, the whole voucher system. I agree with Miss McCarthy's submission that Kingfisher and Diners Club show that the scope of the supply in the case of a credit card scheme, and schemes akin to a credit card scheme is determined not just by looking at the final step in the transaction, namely the presentation of the voucher for payment but at the whole scheme, including giving the retailer access to the customers it could [not] otherwise access. As Neuberger J said in Kingfisher the benefit that Woolworth derived from Provident was not merely the payment of money: it was the right to be included in the scheme operated by Provident and the ability to redeem the vouchers. Without Provident's consent, Woolworth could not benefit from the scheme. It could not, for instance, advertise the fact that it was prepared to accept Provident's vouchers for purchase of goods in their stores. Similarly, in the present case, the benefit that the dancer derives from the Secrets money is the right to be included in the scheme which the clubs set up for patrons to be able to pay for entertainment at the club even though they have no cash. Without the club's role in operating the Secrets money scheme, the dancer would not be able to accept the invitation of non-cash customers to dance at their table or provide them with table company."

137. The Upper Tribunal went on to find that the supply to dancers in that case was not a single supply of encashment, but a composite supply characterised as the wider services which it described as follows:

> "44. … In the present case, the retailer, that is the dancer, cannot provide the service for which she receives the voucher from the patron without the facilities of the club. It is the club which attracts the patrons and provides them and her with the facilities needed for her to perform table dances and offer table company to non-cash customers. For the dancer to make money from non-cash customers she not only needs the Secrets money scheme but the rest of the facilities that are provided by the club to her and to the patrons as the environment in which she can earn money.
>
> …
>
> 47. Further, I agree with HMRC's submission that the size of the commission is an indication that the dancer is paying for much more than encashment or for the narrow composite service of access to the Secrets money scheme. …I agree that the 20 per cent charge reflects the fact that the dancer cannot provide her services to the non-cash customers without the much wider bundle of facilities and services provided by the clubs to create the environment in which the dancer can earn the Secrets money. That is what she is paying for.
>
> 48. This conclusion is not undermined by the fact that the vouchers are also redeemed by dancers on behalf of waiters or in settlement of a debt owed to her by another dancer. That is not the purpose for which the scheme is operated. Clearly the 20 per cent commission has to be charged on those encashments too because it would be too difficult to police a differential commission rate since the club does not monitor how many dances the dancer performs during the evening."

138. As mentioned above, the Court of Appeal agreed that this was a legitimate interpretation of the facts.

139. In the present case, Mr Akin did not rely on any argument concerned with single or composite supplies. The only question for us in relation to Issue Two is whether the supply is consideration for encashment of the Chips or consideration for a wider supply including access to facilities to earn money from non-cash customers.

140. We accept Ms McCarthy's submission that the 20% charged to dancers on redemption of Chips is simply one of a number of ways the second appellant charges fees to dancers in return for providing facilities and services to enable dancers to earn money from non-cash customers. It is only because it is impractical in the London club to charge dancers a fee per dance that a redemption fee is charged to dancers. The services provided to dancers at all clubs however are the same.

141. The second appellant also contended that if HMRC were right then supplies by two different dancers, one for cash and one for Chips, would be treated differently for tax purposes even though they had received the same services from the club. The result would be inconsistent with the EU principle of fiscal neutrality and equal treatment described in *Finanzamt Steglitz v Zimmermann* Case C-174/11. It is more logical to strip away the similar services received by the two dancers which leaves the only supply received for the fee as the encashment service, which is a dealing in securities for money and exempt.

142. No neutrality arguments were raised in Wiltonpark. We do not accept the argument here. In our view it ignores the fact that what is received by the dancer performing for Chips is a composite supply which includes encashment services but which is properly characterised as a supply of services enabling dancers to earn money from non-cash customers.

143. For the sake of completeness, we should note that we were also referred to a decision of the FTT in *Dazmonda Ltd v HM Revenue & Customs* [2014] UKFTT 337 (TC). That case concerned use of booths by dancers in a lap dancing club and whether the supply of booths to dancers was exempt as a supply of land. The FTT found that the supply of booths was part of a composite supply of services supplied by the club to dancers which was standard rated. It is decided on its own facts and it does not assist us in the context of the arguments presented on this appeal.

144. We turn now to consider fees charged to employees redeeming Chips. HMRC's primary case is that consideration charged for the redemption of Chips by employees is an "incidental by-product of the Chip Scheme" and will follow the VAT treatment on redemption by dancers. HMRC relied on what was said by the Upper Tribunal in Wiltonpark at [48] (set out above) and by the Court of Appeal at [49]:

> "49 …the services supplied for the commission are to be ascertained from the standpoint of the typical dancer. The judge was clearly correct to say that the encashment of vouchers on behalf of waiters was not a purpose, but an incidental by-product, of the scheme and sheds no light on the services supplied in return for the commission payable under the scheme. Still less does the commission paid on vouchers given by one dancer to another in discharge of a debt. In that case, the appellants will have provided the same services as with any voucher given by a customer to a dancer."

145. HMRC say that the typical user of the Chip scheme is a dancer and that encashment by employees should be disregarded, either as an incidental by-product of the scheme or on the basis that it was de minimis. We do not accept these submissions. There appears to have been little if any evidence in Wiltonpark as to the extent to which Secrets money was used to tip employees. To this extent we accept Mr Akin's submission that the second appellant's Chip scheme is wider than the Secrets money scheme in Wiltonpark. The London club encourages customers to tip staff using Chips as appears from the documentation in relation to Rachel. We do not consider that the level of tips to staff can be viewed as simply a by-product of the Chip scheme. It seems to us that it is a part of the scheme. Further, the fees charged to employees in a four year period were £390,000. Whilst that is considerably smaller than the £2.7m charged to dancers in the same period it is not in our view de minimis. It indicates Chips with a face value of £975,000 being given to employees by way of tips.

146. Alternatively, HMRC say that the 40% charge on redemption by employees is consideration for a supply of services to employees, namely facilities to enable employees to earn tips from non-cash customers. The amount charged suggests that it was not a redemption fee.

147. The second appellant's employees are paid a salary and in some cases receive a share of the service charge added to bar bills. However, their jobs also give them other opportunities to

earn money from customers. For example, Rachel was able to earn significant amounts by way of tips. The clubs themselves are able to earn income from these opportunities by charging staff a 40% redemption fee. Ms McCarthy submitted that the employees effectively become part of the Chip Scheme. Unlike Wiltonpark, where staff could not redeem Secrets money, staff at the appellants' clubs could redeem Chips. Outside London there was no redemption fee but in London the 40% fee was consideration for services provided to staff outside their employment contracts. Those services were access to the Chip Scheme and facilities to earn tips from non-cash customers.

148. Ms McCarthy submitted that there was no legal distinction between dancers and employees for these purposes. Employees were supplied with facilities to enable them to obtain tips from non-cash customers. Employees outside London get 100% of the face value of Chips because those clubs monetise their services in a different way. What the employees were doing was not part and parcel of the duties of their employment.

149. The second appellant contends that the appellant does not provide a service to employees for a consideration. It was a distortion to say that clubs provided facilities to employees to enable them to earn tips. Even if there was a service, there was no direct link between the service provided and the redemption fee charged to employees.

150. It is common ground that there must be a direct link between the consideration and the service provided. We were referred to what was said by the Advocate-General in *Town and County Factors Ltd v Customs & Excise Commissioners* Case C-498/99 at [35]:

> "…the concept of a supply for consideration … presupposes the existence of a 'direct link' between the supply made and the consideration received. Only if that connection between the supply and the consideration exists can there be a supply for consideration and a taxable transaction."

151. The requirement for a direct link, or "reciprocal performance" is not controversial and was confirmed by the CJEU in that case, which also confirmed the requirement for a "legal relationship" between the service provider and recipient.

152. There was no evidence before as to the salaries of any employees, or of any salary differential to reflect the fact that outside London employees were able to earn Chips by way of tips without any redemption fee.

153. We note that dancers are required to pay an entrance fee to obtain access to the club. Employees obtain access as employees and there is no supply to employees of access to the club. Nor do we consider that it can realistically be said that the club provides facilities to employees which enable them to earn tips from non-cash customers. We are satisfied that Chips are given to employees as tips in the course of their employment. It was not suggested that employees are doing anything other than fulfilling the terms of their employment contracts. The only service that is provided to employees over and above what they need to do their job is the encashment service. We accept that the redemption fee charged to employees is far too high to suggest that it is merely an encashment fee. However, we consider that the fee charged to employees is inextricably bound up with the employment relationship. The income of the employees derives from the work they do in the club. For the purposes of VAT, the economic reality is that the net payment received by employees where they are tipped by way of Chips is simply another form of income derived from their employment, along with their salary and cash tips they might receive. The deduction is not consideration for a supply of services by the employer to the employee. As such there is no taxable supply of services by the second appellant to employees.

CONCLUSION

154. For the reasons given above we are satisfied that:

(1) The supply of Chips to customers is not exempt as the issue of a security for money.

(2) Chips are face value vouchers and fall to be treated as credit vouchers for the purposes of Schedule 10A VATA 1994. In the period up to 10 May 2012, output tax is due on the consideration paid by customers for Chips over and above face value. In the period from 10 May 2012 onwards, Chips fall to be treated as single purpose vouchers pursuant to paragraph 7A Schedule 10A. Output tax is due on the whole consideration paid by customers for Chips.

(3) The 20% redemption fee charged to dancers is consideration for a taxable supply of services.

(4) The 40% redemption fee charged to employees is not consideration for a supply of services.

155. At the invitation of the parties we have determined these appeals in principle. The parties shall have permission to apply to the Tribunal within 90 days of the release of this decision if they are unable to agree any issues of quantum arising from this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

156. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 04 DECEMBER 2019