NCN: [2021] UKFTT 10 (TC)

TC07996

VAT – Public authority car park – Whether 'overpayment' of parking charge consideration for VAT purposes – Whether distinguishable from NCP v HMRC – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06732

BETWEEN

BOROUGH COUNCIL OF KING'S LYNN AND WEST NORFOLK (No. 2) **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

The hearing took place on 8 and 9 December 2020. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the restrictions arising as a result of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Dario Garcia of Mishcon de Reya LLP for the Appellant

Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the VAT treatment of an "overpayment" for parking at a public authority "pay and display" off-street car park. This is a situation that arises when, for example, a person who wishes to park their car for an hour, for which the tariff is £1.40 and who has only a pound coin and a 50p piece, puts £1.50 into a ticket machine that does not give change. The sole issue to be determined is whether that 10p "overpayment" should be treated as consideration for the supply of parking services and therefore subject to VAT.

2. In *National Car Parks Limited v HMRC* [2019] STC 1126 ("*NCP*") the Court of Appeal held that such an overpayment, the 10p in the example, was part of the consideration if provided by a private supplier of car parking services. However, in a previous appeal by the present appellant, the *Borough Council of King's Lynn and West Norfolk v HMRC* [2012] UKFTT 671 (TC) ("*King's Lynn No 1*"), the First-tier Tribunal ("FTT") had concluded that an overpayment was not consideration and therefore not subject to VAT if the car parking services was provided by a public authority.

3. Although there was no appeal against the decision of the FTT in *King's Lynn No 1*, as Newey LJ (with whom Males and Patten LJJ agreed) observed in *NCP*, at [23]:

> "The UT [Upper Tribunal] expressed the view that *King's Lynn and West Norfolk BC v Revenue and Customs Commissioners* [2012] UKFTT 671 (TC) had been wrongly decided. That case concerned car parks operated by a local authority where the "scale of charges" was laid down in a bye-law (viz. the Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Consolidation and Variation Order 2011). A differently-constituted FTT concluded that overpayments were not to be treated as consideration. Not ourselves having been taken to the Order or heard any argument on its implications, I do not think I am in a position to express a final view on the correctness of the FTT's decision. I would certainly not wish, however, to be taken to have endorsed it."

4. On 7 September 2019, almost four months after the Court of Appeal's decision in *NCP*, the Borough Council of King's Lynn and West Norfolk (the "Council") filed a "VAT652 error declaration" form. This notified HMRC of potential errors in its VAT returns in respect of the supply of car parking services and claimed a repayment of £4,518.86. In essence this was on the basis that *King's Lynn No 1* was correctly decided and, as it was distinguishable from *NCP*, remained good law. Following the rejection of its claim by HMRC, by letter dated 2 October 2019, the Council, on 15 October 2019, appealed to the FTT.

5. The Council were represented by Dario Garcia of Mishcon de Reya LLP. Brendan McGurk of counsel appeared for HMRC. I am grateful to both for their clear and succinct submissions, both written and oral.

LAW

6. In relation to VAT, as it is equally applicable in the present case, I can do no better than adopt what was said by the Court of Appeal in *NCP*:

> "6. Article 1(2) of Council Directive 2006/112/EC on the common system of value added tax ("the Principal VAT Directive") explains that the principle of the common system of VAT "entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services". Amongst the transactions subject to VAT are "the supply of services for consideration within the territory of a Member State by a taxable

person acting as such" (article 2(1)(c)). By article 73, in respect of a supply of goods or services:

> 'the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party …'.

7. Provisions to similar effect are to be found in the Value Added Tax Act 1994. Under section 4(1), VAT is to be charged on "any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him". "Supply" includes "all forms of supply, but not anything done otherwise than for a consideration" (section 5(2)(a)).

8. The word "consideration", which features in both articles 2(1)(c) and 73 of the Principal VAT Directive and section 5(2)(a) of the 1994 Act, does not in the VAT context refer to what might be deemed "consideration" for the purposes of domestic contract law but has an autonomous EU-wide meaning (see eg Case 154/80 *Staatssecretaris Van Financiën v Cooperatiëve Vereniging Cooperatiëve Aardappelenbewaarplaats GA* [1981] 3 CMLR 337 ("the *Dutch potato* case"), at paragraph 9 of the judgment of the Court of Justice). "[T]he concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive [i.e. the predecessor of the Principal VAT Directive] presupposes the existence of a direct link between the service provided and the consideration received" (Case 102/86 *Apple & Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the Court of Justice's judgment; see also e.g. *Commission of the European Communities v Finland* [2009] ECR I-10605, at paragraph 45 of the Court of Justice's judgment). A supply of services is effected "for consideration", and hence is taxable, "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the Court of Justice's judgment; see also e.g. Case C-520/14 *Geemente Borsele v Staatssecretaris van Financiën* [2016] STC 1570, at paragraph 24 of the Court of Justice's judgment).

9. The authorities also show that "consideration" is a "subjective value" in the sense that "the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria" (the *Dutch potato* case, at paragraph 13 of the judgment). In Case C-285/10 *Campsa Estaciones de Servicio SA v Administración del Estado* [2011] STC, the Court of Justice explained in paragraph 28 of its judgment:

> 'According to settled case law …, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria.'

10. The *Tolsma* case related to a busker who solicited donations from passers-by. The sums he received were held not to be taxable. The Court of Justice said in its judgment:

> ‘16. If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.
>
> 17. First, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Second, there is no necessary link between the musical service and the payments to which it gives rise. The passers-by do not request music to be played for them; moreover, they pay sums which depend not on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.
>
> 18. In addition, contrary to the arguments of the German and Netherlands governments, the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive
>
> 19. That interpretation is not affected by the fact that a musician such as Mr Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain and the amount is practically impossible to determine.’”

7. In the *Isle of Wight Council and Others v HMRC* [2016] STC 2152 the Court of Appeal confirmed that the supply of off-street parking by a public authority was a standard-rated supply and subject to the same VAT principles applicable to private suppliers of car parking services. As Arden LJ (as she then was) observed in *ING Intermediate Holdings Limited v HMRC* [2018] STC 339 (“*ING*”) at [37]:

> “… when determining the nature of a transaction for VAT purposes, the court must look at the economic purpose of the transaction. However, the starting point is to determine what the parties have agreed. In my judgment, the correct reading of *Newey* and *Secret Hotels2* is that the court only goes behind the contract if the contract does not reflect the true agreement between the parties.”

8. It is clear from *McCarthy & Stone (Developments) Limited v Richmond upon Thames London Borough Council* [1992] 2 AC 48 (“*McCarthy & Stone*”) that, in the absence of a statutory power or authority to do so, a public authority is unable to charge for services it provides. As Lord Lowry observed, at 67-68, in that case:

> “The basis for the proposition, which was accepted by both sides, that statutory authority to charge is required is the well known principle exemplified by the ratio decidendi of *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 885 (Court of Appeal) (1922) 38 TLR 781 (House of Lords):
>
> > ‘In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the legislature is to be inferred from the

> language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the court to believe that the legislature had sacrificed all the well known checks and precautions, and, not in express words, but merely by implication, had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department:' per Atkin LJ 37 TLR 884 , 886.

Atkin LJ further observed, at p. 887:

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use.'

I refer also to the observation of Scrutton L.J., at p. 885:

> 'It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view the clearest words should be required before the courts hold that such an unusual delegation has taken place. As Wilde C.J. said in *Gosling v. Veley* (1850) 12 QB 328, 407: 'The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except under clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.'"

Lord Lowry continued, at 70-71:

> "The rule is that a charge cannot be made unless the power to charge is given by express words or by necessary implication. These last words impose a rigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service. Furthermore, as it seems to me, the relevance of the contrast attempted to be drawn, with respect to the power of a council to charge, between duty functions and discretionary functions is vitiated when one has regard to the large number of discretionary functions for the provision of which express statutory authority to charge has been enacted. I am not impressed by the submission that an express power to charge for the performance of discretionary functions may have been conferred "for the sake of clarity."

9. The statutory provisions enabling the Council to charge for the provision of car parking services are contained in the Road Traffic Regulations Act 1984 ("RTRA"), the Local

Authority Traffic Orders (Procedure) (England and Wales Regulations 1996 ("Parking Regulations") and the Borough Council of King's Lynn and West Norfolk (Off-street Parking Places) (No 2) Order 2015 (as amended by the Borough Council of King's Lynn and West Norfolk (Off-Street Parking Places) Amendment Order 2018) (the "Parking Order") which replaced The Borough Council of King's Lynn and West Norfolk (Off-street Parking Places) Consolidation and Variation Order 2011 that was considered by the FTT in *King's Lynn No 1*.

10. Under s 35 RTRA a local authority may, by order, make provision for parking and "the charges to be paid in connection with its use where it is an off-street one)". Such charges may be varied under s 35A RTRA in accordance with the procedures set out in the Parking Regulations. These require a local authority to publish a notice of variation at least once in a newspaper circulating in the area in which the parking places to which the notice relates are situated, at least 21 days before it is due to come into force. The notice must contain information about the new charges, when they come into effect, where they apply, and other details. Additionally, for off-street parking places, a local authority must display a copy of the notice in the parking place on the date on which the notice is given and take all reasonable steps to ensure that it continues to be displayed and remains in a legible condition until the date on which it comes into force.

11. "Parking Charge" is defined by paragraph 2(1) of The Borough Council of King's Lynn and West Norfolk (Off-street Parking Places) (No 2) Order 2015 as "the sum of money specified in Column 6 of Schedules 1 to 3 of this Order". This can be seen from the following extract from Schedule 1 of the Order:

IN THE BOROUGH OF KING'S LYNN AND WEST NORFOLK
SCHEDULE 1

1	2	3	4	5	6
Name and Location of Parking Place	Classes of Vehicles	Position in which Vehicles may wait	Days of Operation of Parking Place	Charging Periods at Parking Place	Scale of Charges within that Charging Period
1 Albert Street King's Lynn	Motor car, motor cycle and disabled persons vehicle displaying a disabled persons badge	Wholly within parking bays where marked at the parking place	Monday to Sunday (including Bank Holidays except Christmas Day)	Monday to Sunday 0800 hrs to 1800 hrs 1800 hrs to 0800 hrs	£1.40 for up to 1 hour £2.10 for up to 3 hours £4.10 for up to a maximum permitted stay of 5 hours £1.00 standard charge
1A Albert Street Car Park, King's Lynn (4 Voucher Parking Bays – south western side	Motor car, motor cycle and disabled persons vehicle displaying a disabled persons badge	Wholly within parking bay marked for 20 minute time limited parking	Monday to Sunday (including Bank Holidays except Christmas Day)	Monday to Sunday at All Times	Waiting Limited to 20 minutes with no return within 3 hours No Charge

FACTS

12. As it was not challenged, the witness statement of Lorraine Gore was admitted into evidence as read. Ms Gore is the Council's Chief Executive who, for the period of the claim, was the Council's Chief Financial Officer with responsibility for the proper administration of its financial affairs including to complete, authorise and submit statutory returns.

13. The underlying facts were not disputed and are, essentially, the same as set out in *Kings Lynn No 1*:

> "6. The [Council] operates car parks with ticket dispensing machines. The machines display sliding scale hourly parking charges car park information, opening times and payment instructions. The machines indicate that no change is given and overpayments are accepted.
>
> 7. Where a member of the public puts money into the machine they obtain a parking sticker which can be fixed to the windscreen of their vehicle. It shows the day, month and year, the amount paid and the period of validity of the ticket. ….
>
> 8. The machine accepts a variety of coins including 5p, 10p, 20p, 50p, £1 and £2. The parking facilities are available on a twenty-four hour seven day a week basis and tickets are purchased for daily parking between the periods 8.00am and 6.00pm and overnight parking at a fixed rate. The first hour is charged at £1.40. The first three hours at £2.10 and the first five hours at £4.10. The scale of charges for the charging periods are fixed by Order."

DISCUSSION AND CONCLUSION

14. Mr McGurk, for HMRC, submits that this case cannot be distinguished from the decision of the Court of Appeal in *NCP* which should therefore be applied. Additionally, he contends that, in any event, I am bound by the decision of the UT in *NCP* (reported at [2017] STC 1859) that *King's Lynn No 1* was "wrongly decided" and considered, at [44], that:

> "… the tribunal in that case was unduly influenced by the fact that the car parking charges were set by statutory order and that neither the council nor the customer was able unilaterally to alter the charge without the order being amended. We do not however, accept that the way in which the tariff of charges is set can determine the nature of the overpayment. Our decision does not mean that a car park operator is in breach of a statutory tariff by accepting an overpayment in our hypothetical example. That would depend on the proper construction of the statutory order bearing in mind the prevalence of machines accepting overpayments and the council's awareness of the use of those machines."

15. Mr Garcia contends that, in the light of the observation of Newey LJ at [23] (to which I have referred at paragraph 3, above) the UT decision in *NCP* is not binding. He also submits that this case can be distinguished from *NCP* because the Council is a public authority and, although he accepts that there is some contractual relationship between the Council and a driver, the parking charges are set by statutory order and not by contract as they were in *NCP*.

16. It is therefore necessary to consider the transaction between a driver parking his or her vehicle and the Council to determine its nature for VAT purposes. The starting point for this, as is clear from *Newey*, *Secret Hotels2* and *ING*, is to determine what was agreed between the parties. This was the approach adopted by the Court of Appeal in *NCP* and it is common ground that I should do so in the present case.

17. The parties agree that there is an offer by the Council to a driver to park his or her vehicle in the off-street car park at rate shown on tariff board, ie the £1.40, and that the contract was concluded the moment the money was put into the machine by the driver. As Lord Denning MR said in *Thornton v Shoe Lane Parking* [1971] 2 QB 163 at 169:

> "The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was

> concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot."

18. However, the parties differ in relation to the contractual analysis. Mr McGurk contends by putting £1.50 into the machine a driver is making a counter offer which, as it is clear that no change is given, is accepted by the machine whereas Mr Garcia, relying on *McCarthy & Stone*, argues that it would be *ultra vires* for the Council to either vary its offer upwards or accept a counter offer and, as such, the excess charge (10p) is not consideration and is recoverable by the driver.

19. I agree with Mr Garcia that it is clear from *McCarthy & Stone* that the Council cannot make any offer to provide off-street parking at a price other than as set out in the scale of charges contained in the Parking Order and shown on the tariff board. However, there is nothing within the Parking Order or any other statutory provision to prevent a driver from making a counter offer in excess of parking charge or for the Council to accept such a counter offer. Indeed by doing so the Council is not seeking to unilaterally extend its power, contrary to the Parking Order or impose a higher charge, as it is the driver who, for his or her own reasons, such as not having the correct change, has offered to pay more than the tariff rate in order to park.

20. As such, adopting Mr McGurk's analysis of the contractual arrangement between the Council and driver (ie the acceptance of the driver's counter offer by the Council), it follows that, notwithstanding the £1.40 tariff, there is a direct link between the entire £1.50 and the supply of parking with the result that that 10p "overpayment" should be treated as consideration for the supply of parking services and therefore subject to VAT.

21. Having reached such a conclusion it is not necessary to consider whether I would have been bound to do so by the decision of the UT in *NCP*.

22. Therefore, for the reasons above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 18 January 2021