

Neutral Citation Number: [2007] EWCA Civ 987

Case No: C3/2007/0045

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Sir Andrew Park
[2006] EWHC 342 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2007

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE RICHARDS

Between :

**Commissioners for Her Majesty's Revenue and
Customs**

- and -

Total UK Limited

Appellants

Respondent

Christopher Vajda QC and Andrew Macnab (instructed by **The Solicitor for Revenue and Customs**) for the **Appellants**

John Walters QC and Barrie Akin (instructed by **the Solicitor's Department of Total UK Limited**) for the **Respondent**

Hearing dates : 17-18 July 2007

Lord Justice Richards :

1. Total UK Limited (“Total”) operates a sales promotion scheme called the Total Oil Promotion Scheme (“TOPS”). Customers who join the scheme and purchase sufficient quantities of fuel at Total filling stations are entitled to receive vouchers which can be used in payment for goods or services purchased from certain national retailers. This appeal concerns the VAT consequences of the transfer of those vouchers by Total to members of the scheme. Total contends that the taxable amount of its sales of fuel, on which it is liable to pay output tax, is reduced by an amount equal to the value of the vouchers transferred (that value being taken as the cost to Total of purchasing the vouchers from the retailers). Total’s case failed before Sir Stephen Oliver QC, President of the Value Added Tax and Duties Tribunal, but succeeded on appeal before Sir Andrew Park, sitting as a Judge of the High Court, whose judgment is reported at [2007] STC 564. The Commissioners for Her Majesty’s Revenue and Customs (“the commissioners”) now bring this further appeal.

The facts

2. It is convenient to adopt the President’s summary of the factual background, which was based on oral as well as documentary evidence received by the tribunal. The summary reads (with the omission of sub-headings):

“3. Total is the UK refining, marketing and distribution subsidiary of the French oil company Total SA. Total operates two refineries and sells motor fuels through a network of 855 service stations in the UK. 520 of those are owned by Total and these are operated either by Total or by its contractors. 335 sites are owned and operated by third parties with Total ‘branding’.

4. In 1991 Total introduced TOPS as a customer loyalty scheme. The basis of the scheme is that the customers who become cardholders and who register their names and who collect 5000 TOPS points become entitled to claim £5 gift vouchers issued by a selection of high street stores; alternatively the cardholding customer can choose to donate a £5 charity gift voucher to a recognized charity, school or community project.

5. Total publicizes the TOPS scheme by advertisements. At the head of one advertisement is a picture of a card and the logos of Boots, B&Q, Woolworths and Marks & Spencer. At the centre are the words ‘You get more treats on TOPS. Apply for a TOPS card now at www.topscard.com’ and at the foot are the words – ‘You know where to turn. Total’. Another advertisement shows a card at the head, the words ‘The card that bags you £5’ at the centre and Boots and Marks & Spencer logos at the foot [in fact, on carrier bags]. The potential cardholder can obtain his card by going online and ordering one or by picking one up at the filling station.

6. The handout to the customer contains the following passages:

‘With TOPS, every litre of fuel you buy earns you TOPS points. Collect points to treat yourself to anything from bubble bath to power tools

We give you 5 points for every litre of fuel you buy when your TOPS card is swiped in-store ... Collect 5000 TOPS points and you can choose your £5 gift voucher to spend how you like – or if you open a TOPS multi-card account you can choose to give the same cash value to any recognized charity.

Apply for a multi-card TOPS account and you can collect points with a partner, family members or business colleagues. Multi-card TOPS accounts can also collect for charities

Each TOPS multi-card account has an allocated primary cardholder (you decide who when you apply) and this person is the only one who can manage the account online and redeem TOPS points for gift vouchers. The primary cardholder receives all the applied-for cards, as well as your security password and access to your online account.’

7. Each card has a number which registers its use on a central database kept by a service company for Total. A person buying road fuel may present a card which is swiped in at the till and the points attributable to that card are recorded on the database. The card so presented may be the one that bears his name. The card may bear the name of another cardholder who has become registered; this normally happens when a ‘family and friends’ account or a ‘business colleagues’ account has been opened in the name of one person.

8. Points collected on purchase of fuel products are stored electronically on the magnetic strip of the card and can be traced back to each purchase of fuel to which the points relate; the TOPS card can hold an unlimited number of points.

9. Before the points on the card can be redeemed, the person seeking to redeem must register. He does this by making an on-line or postal application.

10. Points can be redeemed in units of 5000 by the registered cardholder. The voucher or vouchers chosen by that cardholder will be sent to him within 28 days. The points redeemed are deducted from his points balance.

11. Each voucher issued by each high street store has the store’s name, the value (£5) and the words ‘Gift Voucher’ printed on one side. Taking the Marks & Spencer voucher as example, the other side contains an identification number and the words: ‘This voucher cannot be exchanged for cash. It can only be exchanged for goods, including foods, wine and selected financial services products.’

12. Total purchases stocks of gift vouchers at a discount to their face value. Through its bulk purchasing power Total can obtain discount rates of up to 11.5%.

13. Third party dealers at the 335 sites that are not owned and operated by Total itself buy and sell Total motor fuel products on their own account. They participate in the TOPS scheme and pay Total 0.28p per litre of the fuel purchased as their contribution to the

costs of the TOPS scheme. Total manages the scheme, acquires the gift vouchers from the high street stores and transfers them to cardholders on redemption and in so doing makes no distinction or adjustment for situations where motor fuel has been purchased from third party dealers.”

The issue

3. The issue, in short, is whether the transfer of a voucher by Total to a redeeming customer operates to reduce the consideration obtained by Total in respect of its supplies of fuel, and thus to reduce the amount by reference to which VAT output tax is payable.
4. The issue arises under the provisions of the Value Added Tax Act 1994 and EC Council Directive 77/388 of 17 May 1977 (“the Sixth Directive”); but since the 1994 Act is required to conform with the Sixth Directive and nothing turns on any special feature of the domestic legislation, it is possible in practice to confine attention to the Sixth Directive.
5. Article 11 of the Sixth Directive provides:

“11A(1) The taxable amount shall be:

(a) in respect of supplies of goods and services ... [there are immaterial exceptions], everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies ...

...

(3) The taxable amount shall not include:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply ...

...

11C(1) In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.”
6. It will be seen that the consideration can be reduced not only by price reductions or discounts at the time of supply (the situation at which art 11A(3) is directed) but also retrospectively by price reductions made at a later date (the situation at which art 11C(1) is directed).
7. In this case it is common ground that the whole of the price paid by a customer when he purchases fuel is consideration for the supply of the fuel. Although the purchase of fuel earns TOPS points for a participant in the scheme, and sufficient purchases lead to an entitlement to vouchers, it is not suggested that any part of the price paid for the fuel is to be treated as consideration for the TOPS points or vouchers. The question is

simply whether the subsequent transfer of a voucher to a customer on redemption of his TOPS points has the effect of reducing retrospectively the consideration for the supply of the fuel.

8. As the language of art 11A(1)(a) makes clear, the focus is strictly on the consideration *obtained* by Total for its supplies of fuel. Since purchases of Total fuel that earn TOPS points are made both at sites owned and operated by Total and at sites owned and operated by third parties, the consideration obtained by Total relates in part to supplies made direct to motorists and in part to supplies made to third parties who supply the fuel on to motorists. For present purposes, however, it is agreed that the VAT consequences are the same in each case.
9. A further element of common ground is that if the transfer of a voucher does have the effect of reducing the consideration for the supply of the fuel, then the amount to be taken into account by way of reduction of that consideration is the cost to Total of purchasing the voucher from the relevant retailer.
10. Given the nature of the issue for decision and the extent of common ground surrounding it, one might think that the matter could be dealt with relatively simply. The decision of the President of the tribunal took that course and the submissions for the commissioners encourage a similar approach. Sir Andrew Park's judgment is more elaborate, as are the submissions for Total. I take the view that the issue is at heart a short one, but a fair amount of exposition is required in order to do justice to the rival arguments. In particular, the debate has centred around a number of decided cases, the principles to be derived from them, and the factual similarities or differences between those cases and this one; and I think it helpful to examine those cases in some detail before turning to consider the decisions below and the submissions on the present appeal.

The case-law

11. *Elida Gibbs Ltd v Customs and Excise Commissioners* [1996] STC 1387 was a decision of the European Court of Justice ("the ECJ") on the interpretation of arts 11A(1)(a) and 11C(1) in the context of schemes operated by Elida Gibbs, a manufacturer of toiletries which sold its products either to retailers or to wholesalers for resale to retailers. To promote the retail sales of its products, the company operated two coupon schemes. The first offered consumers a price reduction at the point of sale on the production of money-off coupons which had been distributed to the public directly or circulated in magazines or other publications. The price reduction so allowed was reimbursed by the company to the retailer. Under the second scheme the consumer could obtain a cash refund from the company, in respect of products purchased from retailers, by returning cash-back coupons which were printed on the packaging of those products. The amount invoiced by the company to retailers and wholesalers for supplies of the products was determined irrespective of any present or future promotion scheme. The company claimed that the reimbursement of the face value of the coupons operated as a retrospective discount and that the taxable base for calculation of the VAT due from the company should be reduced accordingly. This led to proceedings before the tribunal, which made a reference to the ECJ for a preliminary ruling.
12. The ECJ started its examination of the issues with some general considerations:

“19. The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.”

It went on to state that one of the principles on which the VAT system is based is neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain (para 20), and to make further observations on how the basic principle clarifies the role and obligations of taxable persons within the machinery established for the collection of VAT (paras 21-24).

13. With that introduction the court turned to the questions on which a ruling was sought. Having referred to art 11A(1)(a) and to the proposition established by the court's settled case-law that consideration is the “subjective value”, that is to say the value actually received in each specific case, it continued:

“28. In circumstances such as those in the main proceedings, the manufacturer, who has refunded the value of the money-off coupon to the retailer or the value of the cash-back coupon to the final consumer, receives, on completion of the transaction a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons. It would not therefore be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with.

29. Consequently, the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons.

30. That interpretation is borne out by art 11C(1) of the Sixth Directive which, in order to ensure the neutrality of the taxable person's position, provides that, in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount is to be reduced accordingly under conditions to be determined by the member states.

31. It is true that that provision refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently. The fact remains, however, that the provision is an expression of the principle, emphasised above, that the position of taxable persons must be neutral. It follows therefore from that provision that, in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through retailers or by direct repayment of the value of the coupons.

Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person.”

14. Total has placed considerable reliance on *Elida Gibbs* in support of its case, and Sir Andrew Park interpreted the ECJ’s judgment in a way which he held to cover the present case and to be decisive in Total’s favour.
15. *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* [1999] STC 488 concerned a sales promotion scheme whereby customers buying fuel at Q8 service stations were offered vouchers which they were entitled to exchange for goods listed in a gift catalogue (the redemption goods) or occasionally for services. The price of the fuel was the same whether or not the customer accepted the vouchers. In accounting for VAT, Kuwait Petroleum deducted the input tax paid in respect of redemption goods purchased by it for the purposes of the scheme. The primary issue in the case was whether it was liable to account for output tax on the supply of such goods to customers under the scheme. The commissioners contended that that supply was “free of charge” within the meaning of art 5(6) of the Sixth Directive, with the consequence that the supply was to be treated as a supply for consideration and output tax was payable. Kuwait Petroleum contended that the goods were not supplied free of charge, since the price paid by a customer for the fuel included an element of consideration for the redemption goods, and that output tax had therefore already been paid. On a reference from the tribunal, the ECJ made clear its view that Kuwait Petroleum’s contention should be rejected:

“26. Goods are supplied ‘for consideration’ within the meaning of art 2(1) of the Sixth Directive only if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied

27. It is for the national court to inquire whether, at the time of purchasing the fuel, the customer and Kuwait Petroleum had agreed – through the dealers, as the case may be – that part of the price paid for the fuel, whether identifiable or not, would constitute the value given in return for the Q8 vouchers or the redemption goods. There is nothing, however, in the documents before the court to suggest that there was in fact any such reciprocal performance by the parties concerned.

28. As the Advocate General has pointed out in para 43 of his opinion, the sale of the fuel and the exchange of goods for vouchers are two separate transactions.

29. Moreover, there are two considerations in the case in the main proceedings which suggest that the exchange of goods for Q8 vouchers is a disposal free of charge, within the meaning of art 5(6) of the Sixth Directive, and that the application of those goods is therefore to be treated as a supply for consideration and, accordingly, taxable.

30. First, under the sale promotion scheme set up by Kuwait Petroleum, the redemption goods were described as gifts.

31. Second, it is not contested that the retail price of Q8 fuel, whether or not the purchaser accepted the vouchers, was the same, and this was the only price referred to on the invoice relating to the fuel purchase which, pursuant to art 22(3) of the Sixth Directive, Kuwait Petroleum or the independent retailers had to issue to the customers who were themselves taxable persons. That being so, Kuwait Petroleum cannot reasonably maintain that, contrary to the statements on the invoices which it issued, the price paid by the purchasers of fuel in fact contained a component representing the value of the Q8 vouchers or of the redemption goods.”

16. Para 43 of the Advocate General’s opinion, to which the court referred in that passage, stated:

“43. In reality, it is not possible to treat as a single economic transaction a series of events consisting of two distinct transactions; sale of fuel coupled with the supply of stamps and the subsequent supply of redemption goods for those stamps. This applies a fortiori when, in addition to the above events, the sale of fuel to an independent dealer and the latter’s participation in the ... scheme must also be considered In the present case, as Kuwait Petroleum accepted at the hearing, a number of transactions are involved. At a minimum, the sale of fuel and the supply of the redemption goods were separable not only in time but as to subject matter. Where the ... scheme is operated by a dealer, yet another transaction occurs.”

17. Following the ECJ’s ruling, the tribunal found as a fact that the redemption goods had been disposed of free of charge, and that decision was upheld on appeal to the High Court. In those further proceedings Kuwait Petroleum also advanced a new argument, contending that the supply of the redemption goods should be treated as a reduction in the price of the fuel. That argument, too, was unsuccessful both before the tribunal and on appeal to the High Court. But the Court of Appeal struck out Kuwait Petroleum’s further appeal on the basis that the price reduction issue had not been raised in the notice of appeal to the tribunal and had not therefore been properly before the tribunal, so that the tribunal’s decision on it was of no legal effect and the High Court and Court of Appeal had no jurisdiction to entertain further appeals in relation to it.
18. The issue for decision in the present case is similar to the price reduction issue canvassed unsuccessfully in the proceedings that followed the ECJ’s judgment in *Kuwait Petroleum*; and the commissioners contend that the present case is in any event closer to *Kuwait Petroleum* than to *Elida Gibbs*.
19. The facts in *Customs and Excise Commissioners v Primback Ltd* [2001] STC 803 were that Primback, a furniture retailer, offered its customers the possibility of paying for goods on the basis of credit, described as interest-free credit, obtained from a finance house. Customers making use of that possibility paid the same price as customers paying by cash. The credit transaction took the form of a separate agreement with the finance house for a loan in an amount equivalent to the cash price of the goods. The finance house undertook to lend that sum to the customer, paying it direct to Primback in settlement of the amount owed for the goods, in return for the customer agreeing to repay it by monthly instalments of a fixed amount. In fact there

was an oral arrangement between the finance house and Primback whereby, unknown to the customer, the finance house deducted commission from the amount it paid to Primback. Primback contended that it was liable to pay VAT only on the sums actually paid to it, whether by customers in the case of cash payments or by the finance house where customers had bought goods on credit. On a reference for a preliminary ruling, the ECJ rejected that contention, holding that the taxable amount was the full amount payable by the customer.

20. In reaching that conclusion, the court applied its existing case-law on the effect of payments by credit card. It also expressly rejected, however, arguments by Primback that if the taxable amount were the full price invoiced by the retailer to the customer, without deduction of the commission retained by the finance house, the basis of assessment would correspond to an amount greater than that actually received by the seller and, in particular, VAT would be charged on the provision of credit, contrary to the exemption of credit under art 13B(d)(1) of the Sixth Directive; alternatively, the amount of commission retained by the finance house amounted to a discount or rebate on the price within the meaning of art 11A(3)(b) of the Sixth Directive and should not therefore be included in the taxable amount. The court stated *inter alia*:

“40. Second, with regard solely to the legal relationship between seller and purchaser, Primback cannot validly claim that, for purposes of determining the basis of assessment for VAT, one must break down the single price advertised and invoiced to the consumer, distinguishing between the portion relating to the value of the goods and the portion relating to the cost of the credit ultimately borne by the retailer.

...

42. ... [I]n the present case, the price agreed between the parties to the contract of sale and paid by the consumer was the same, irrespective of the means by which the purchase of the goods was financed, with the result that Primback cannot reasonably argue that the price advertised in fact contained a component representing the value of the credit (see, by way of analogy, *Kuwait Petroleum* ...).

43. It follows that, from the point of view of the final consumer, the transaction which, in this case, he concludes with Primback is to be seen as a single transaction consisting in the sale of goods, by reason of the fact that the retailer supplies goods to his customers in return for payment of a single price advertised by the seller, invoiced to the purchaser and payable by him, but also offers at the same time the possibility of credit described as credit free of interest or other costs to the consumer. That being so, the credit which Primback claims to have afforded the customer cannot be regarded as a transaction effected for consideration within the meaning of art 2 of the Sixth Directive.

...

47. Primback therefore cannot validly argue that the provision of interest-free credit as such reduces the countervalue of the supply of the goods. On the contrary, the option given to customers to purchase

on credit not only increases the volume of the retailer's sales, but also enables the retailer to avoid having to accept payment by instalments and guarantees him payment for the goods sold, with the result that, in consideration of this supply of services provided by the finance house, the seller accords to the latter a commission which reduces his profit margin. That commission constitutes for Primback a charge connected with its business in the same way as, for example, its costs in respect of financing, advertising or rent."

21. In *EC Commission v Germany* [2003] STC 301, the ECJ affirmed its earlier judgment in *Elida Gibbs*: Germany's failure to give effect to that judgment had prompted the Commission's action against it, and the case was used as an opportunity to re-argue the issues. In reaching its decision, the court distinguished the situation in *Kuwait Petroleum*, stating at para 77 that "although the two types of promotional scheme, namely the issue of money-off coupons and the offer of advertising gifts, come under two distinct sets of rules, that difference in tax treatment is inherent in the structure of the Sixth Directive and cannot cause distortion of competition ...". The Advocate General dealt with the point more fully, at paras 102-107 of his opinion. What he said included this:

"106. There is indeed a difference in fiscal treatment here, but as the Commission points out that difference in treatment is inherent in the provisions of the Sixth Directive. It is clear from 11A(3)(b) and 11C(1) that discounts and rebates are not to be included in the taxable amount, whether allowed at the time of supply or subsequently. It is also clear from those provisions and from art 5(6), as interpreted by the court in *Kuwait Petroleum*, that the supply of goods (such as 'free gifts') free of charge for business purposes is a supply for consideration, the taxable amount being their cost price, and there is no discount or rebate in such circumstances. The two types of scheme fall under different provisions, which explains the difference in treatment. As the Commission pointed out at the hearing, one scheme involves supplying more goods at the same price, the other involves supplying the same goods at a lesser price."

22. *Tesco plc v Customs and Excise Commissioners* [2003] EWCA Civ 1367, [2003] STC 1561 concerned Tesco's Clubcard scheme. Customers who joined the scheme earned points when purchasing goods from Tesco stores (the premium goods). Each quarter Tesco converted the points earned into vouchers which were sent to the customer, who was then able to redeem them by tendering them in payment for goods on sale in Tesco's stores (the redemption goods). There existed a basic scheme and various third party schemes. The issue was whether, as Tesco contended, the vouchers were issued for consideration, for the purposes of para 5 of sched 6 to the 1994 Act. That contention was to some extent successful before the tribunal but failed on further appeal. In the Court of Appeal the leading judgment was given by Jonathan Parker LJ, with whom the other members of the court agreed. He held that the matter should be approached as follows:

"160. ... I consider that, for VAT purposes, the correct approach to the analysis of the Clubcard scheme ... is to examine the entire cycle of transactions which it comprises, in order to determine objectively (that is to say without regard to the parties' subjective intentions, save in so far as they are reflected in the terms of the scheme), and

having regard to the scheme's economic purpose, whether its legal effect is such that vouchers issued under it fall within para 5: that is to say, whether vouchers issued under it are issued for 'consideration', in the Community law sense of that term."

23. On the facts of the case, Jonathan Parker LJ held that even if a member of the scheme when purchasing premium goods paid for something else in addition to the premium goods, that something else could only be the *points* he earned on the purchase of those premium goods: it could not be the *vouchers*. That was sufficient to dispose of the appeal. He nonetheless went on to deal with the consideration issue. In the course of rejecting Tesco's contention on the issue, he stated:

"174. Even stronger support for the commissioner's case is, in my judgment, to be found in the court's decisions in *Kuwait Petroleum* and *Primback*. In each of those cases the court considered it to be a highly material factor that a member of the scheme and a customer who is not a member paid exactly the same amount on purchasing premium goods (that is to say an amount equal to the full shelf-price of the goods) The point is not that the two transactions (one by the member, the other by the non-member) have the same economic effect: rather, it is that the amount paid by the member when purchasing premium goods is exactly equal to the full shelf-price of those goods. Hence, to the extent that any part of what he paid is not consideration for those goods, he must have purchased them for less than their full shelf-price. The question, therefore, is whether, viewing the entire scheme objectively in accordance with the approach set earlier, that is that the effect of the scheme.

...

176. I agree with the judge that (viewing it objectively, in accordance with the approach set out earlier) the Clubcard scheme cannot be taken to have that effect. In the first place, there is nothing in the scheme documentation to support such an interpretation: the whole emphasis of the sample enrolment form and the leaflet referred to in Part 2 of this judgment is on the fact that 'points' are freely earned on the purchase of premium goods. Secondly, the economic purpose of the scheme is to encourage customers to make further purchases, thereby increasing customer loyalty. That seems to me to be a strong indication that the essence of the scheme – its 'cause', to use the Community term – is to enable its members to make *future* purchases (i.e. purchases of redemption goods) at preferential rates."

24. *Lex Services plc v Customers and Excise Commissioners* [2003] UKHL 67, [2004] STC 73 concerned the quantification of non-monetary consideration. Lex sold both new and used cars, often by way of part-exchange. The allowance for the vehicle taken in part-exchange (the part-exchange price) was negotiated with the customer and usually exceeded the value that Lex could obtain on a trade sale (the trade value). The difference between the part-exchange price and the trade value was described by Lex as an "additional allowance", and it was the trade value that appeared on Lex's documentation as the "true value" of the part-exchange vehicle. The customer was entitled to cancel a purchase within 30 days and to obtain a refund, but he was not entitled to the return of the part-exchange vehicle (which might already have been

sold) and the refund in respect of it was limited to the true value. Lex contended that the value of the non-monetary consideration represented by the part-exchange vehicle should be determined by the true value rather than the part-exchange price. That contention failed before the tribunal and on appeal.

25. The Court of Appeal thought it right to take the part-exchange price for three main reasons: (i) it rejected the submission, based on the principle of fiscal neutrality, that transactions which have the same economic effect must be treated in the same way for VAT purposes; (ii) it said that the part-exchange price was specifically agreed for commercial reasons (in the tribunal's words, "as a marketing tool" and as a step not taken "unless this was necessary to ensure the sale") and that it could not be re-characterised as a discount from the price of the car which Lex was selling; and (iii) the true value served a different and distinct purpose, that is to limit the refund which Lex would have to make if the customer decided to return the purchased car within 30 days.
26. In the House of Lords the main judgment was given by Lord Walker of Gestingthorpe. He endorsed the reasoning of the Court of Appeal but added some observations on the principle of fiscal neutrality, stating that its central core meaning "is that whether goods purchased by the final consumer have been through the hands of a dozen different traders at successive stages of their manufacture, distribution and marketing or are the product of a single manufacturer who is also a retailer the VAT should (through its mechanisms of input tax and output tax) produce the same end result" (para 26, citing *Elida Gibbs*); but that the principle must co-exist with other general principles, such as the objective of legal certainty, and that "the principle does not go so far as to require that transactions which have the same economic or business effect should for that reason be treated alike for VAT purposes" (para 27). It was argued that in *Hartwell plc v Customs and Excise Commissioners* [2003] EWCA Civ 130, [2003] STC 396 another car dealer had achieved a saving of VAT by providing a "purchase plus discount" (evidenced by a voucher) to perform the function of the additional allowance in the Lex case, and that it was absurd that there should be different VAT treatment of identical transactions. Lord Walker dismissed that argument, stating (at para 29):

"... But in my opinion these are not identical transactions. Hartwell, no doubt learning from Lex's experience, decided to adopt a scheme which explicitly made a different attribution of value, possibly with different commercial repercussions ... and certainly with different tax implications for the customer if he were registered for VAT"

27. In a final comment, on academic articles concerned mainly with free gift cases rather than part-exchange cases, Lord Walker observed (at para 31):

"... I would readily agree ... that some of the 'services' performed in what I have loosely called the 'free gift' cases were almost illusory, and that the dividing line between such 'services' and the giving of a discount is correspondingly obscure (just as the dividing line between a contract and a conditional gift may be obscure). But in the VAT system legal certainty is important, as well as fiscal neutrality, and if a supplier wishes to give a discount it is up to him to make his intention clear, especially in the context of part-exchange

transactions. *Hartwell* shows that it is possible, with appropriate documentation.”

The tribunal’s decision

28. Against the background of those authorities I return to the present case. The President of the tribunal expressed his conclusions in brief but clear terms:

“18. For illustrative purposes I summarize what, on the evidence, appears to be a typical scenario where Total itself makes the supply of road fuel to the end-consumer. To set the scene I mention that the sale prices at the pump are advertised to customers. The expression ‘money-off’ or ‘cash-back’ or like words do not appear at the filling station – at least so far as road fuel is concerned. The TOPS scheme and its advantages are, as noted above, advertised to customers. The prices used in the scenario that follows are provided for ease of calculation and bear no relation to real prices.

(a) On Day 1 a registered TOPS cardholding customer, ‘A’, buys 50 litres of standard petrol at 100p a litre from a filling station owned and operated by Total. The ‘taxable amount’ of that supply for purposes of Article 11A.1(a) alone is £50. A’s card is swiped and his purchase, ‘the Day 1 supply’, earns him 250 TOPS points.

(b) On Day 90 A buys 100 litres of diesel for 50p a litre (paying £50 in all). This purchase, ‘the Day 90 supply’, earns 500 TOPS points.

(c) A goes online and finds he now has 5000 TOPS points. He presents his card for redemption and indicates that he wants a Boots voucher.

(d) On Day 100 Total pays £5 to Boots for a Boots gift voucher. (I am deliberately ignoring the discount offered by Boots to Total: it does not affect the present VAT principle.)

(e) On Day 110 Total transfers the Boots voucher to A.

Expressing Total’s first proposition, is it correct to say of the £5 spent by Total in buying the £5 Boots voucher on Day 100 (transaction (d)) which is transferred to the customer on Day 110 that, for VAT purposes, the £5 amounts to a ‘retrospective discount’ being a reduction in the price of the Day 1 and the Day 90 purchases of road fuel (transactions (a) and (b)), and indeed for all the other purchases that made up A’s 5000 TOPS points?

19. On a plain reading of Article 11A, I would conclude that the incurring of £5 by Total on the Boots voucher to enable it to redeem A’s accrued TOPS points did not operate as a reduction in the price paid by A in return for the Day 1 and the Day 90 supplies. Article 11A.1 directs that the taxable amount in respect of a supply of goods is to be the consideration obtained by the supplier for *that* supply; and when subsequently the price is reduced after *that* supply takes place, Article 11C.1 provides that the taxable amount for *that* supply is to be reduced accordingly. In the present circumstances, and using the above scenario, the £5 spent by Total on Day 100 buys it a £5

Boots voucher. The consideration obtained by Total in return for the Day 1 and the Day 90 supplies to A remains exactly as it was, i.e. £50 for 50 litres of standard petrol and £50 for 100 litres of diesel. It is immaterial to this conclusion whether Total's transfer of the Boots voucher to A (transaction (e) on Day 110) is to be analyzed for VAT purposes as either a cash payment, as a virtual cash payment, as an assignment of a chose in action, as the physical handing-over of a Boots voucher or as a 'nothing' for VAT purposes."

29. In relation to transaction (d) in the President's illustrative example, it should be noted that the true factual position is that Total holds stocks of vouchers rather than purchasing vouchers to meet specific requests by customers redeeming their points. Further, Total purchases the vouchers at a discount to their face value: the assumption made for general illustrative purposes in the case has been that Total pays £4.50 rather than £5 for a voucher with a face value of £5.
30. The President went on to examine the ECJ's judgment in *Elida Gibbs*, concluding that it did not help Total. He said that in *Elida Gibbs* the court was addressing the question whether an adjustment to the supplier's taxable amount was required as a result of a rebate that leap-frogged one or more links in the normal VAT chain; and it followed that, if Total was to invoke *Elida Gibbs* successfully, it had to demonstrate that the Day 1 and Day 90 supplies came within the same chain of transactions as the transactions by which they provided £5 of consideration in purchasing a £5 Boots voucher. In relation to the present case, however, he held:

"24. ... There are two separate but related supply chains. The first is the chain of supply of the road fuel from Total (via the third party dealer in some instances) to the customer. In contrast to the *Elida Gibbs* scenario, the customer obtains no cash-back voucher from Total in respect of this supply. The second chain starts with the retailer's supply of a £5 gift voucher for Total to use in the redemption process. There is no relevant linkage between the two chains. In particular no part of the cost components in the first supply chain are cost components in the second chain. And, vice versa, none of the cost components in the second chain, e.g. Total's payment for Boots' supply of a voucher on Day 100 plus a part of the cost of administering the TOPS scheme, can properly be ascribed to Total's supply of the 50 litres of road fuel on Day 1. In this respect I share the opinion of the Advocate General (Fennelly) in *Kuwait Petroleum* ... where, at para 43, he says: 'In reality, it is not possible to treat as a single economic transaction a series of events consisting of two distinct transactions; the sale of fuel coupled with the supply of stamps and the subsequent redemption of goods for those stamps.'"

Sir Andrew Park's judgment

31. Sir Andrew Park took the view that the President had addressed the wrong question and that the foremost reason given by the President, in para 19 of his decision, for rejecting Total's case did not really meet the argument advanced. The President had formulated the issue in terms of whether the amount spent by Total in *purchasing* vouchers from the retailers ranked as a reduction in the price of the fuel supplied to customers; but Total's case was that the subsequent *transfer* of the vouchers to the customers, not their *purchase* from the retailers, constituted reductions in the taxable

consideration for supplies of fuel to customers. The significance of the tribunal having concentrated on the earlier stage of purchase of the vouchers was heightened by the feature that, contrary to the tribunal's summary of a typical scenario, Total bought stocks of vouchers in advance to meet anticipated future claims under the TOPS scheme, rather than buying the vouchers after customers had made their claims.

32. The judge also disagreed with the President's reliance, at para 24 of his decision, on the existence of two separate supply chains. The judge said that he could see that Total's purchase of a voucher was part of a chain where a supply which attracted VAT was a supply of the goods by the retailer. But he did not see that therefore Total's transfer of the voucher to the customer was not part of a chain of transactions in which a supply which attracted VAT was a supply of fuel by Total. In his view it plainly was. If the customer was a participant in the TOPS scheme, Total supplied fuel to him for money prices and on terms that, if he purchased enough litres, Total would transfer to him a voucher with a nominal value of £5. When the customer satisfied the condition, Total transferred the voucher to him. It did so because of the purchases of fuel which he had made. In those circumstances, it appeared plain that the transfer of the voucher was a part of the supply chain which included Total's supplies of fuel.
33. The core of the judge's own reasoning is to be found in his exposition of the ECJ's judgment in *Elida Gibbs*, as to which he stated (at para 30):

“As it appears to me the CJEC was concerned, not to decide a relatively narrow point about art 11C(1), but rather to lay down a wider principle that, where a trader supplies goods or (no doubt) services for a stated consideration, but under a sales promotion scheme is obliged to pay an amount away to the ultimate consumer or to an intermediary in the chain of supply, the consideration upon which the trader should be finally liable to VAT is reduced by the amount so paid away.”

34. He repeated that passage at para 58, reiterating that the principle so formulated covered this case. He did not believe that the result was changed by the fact that what was paid away was in the form of a voucher rather than money. He also considered it important that the transfers of vouchers were made because of the terms on which fuel was supplied to the customer. Further, he considered that Total's case accorded with the neutrality principle:

“60. There are references in *Elida Gibbs* and in other cases to the neutrality principle. What ‘neutrality’ means in this context is that the trader should not be charged VAT on an amount greater than the true proceeds to him of the transaction of supply, or on an amount greater than the true cost of the supply to the ultimate consumer. *Elida Gibbs* establishes that, if the terms of the supply provided for circumstances where the trader, having received a consideration for it in the first instance, is later obliged to part with an amount related in some way to the supply transaction, the true proceeds of the supply must take account of what the trader has to part with.

61. If Total's scheme was a pure money scheme, and a customer who had purchased 1,000 litres of fuel at Total stations, paying £1,000 at that stage, was entitled to receive £5 from Total, the true

cost of the fuel to the customer would fall from £1,000 to £995. That is all that, in the end, the customer has paid. It would offend the neutrality principle if Total was required to pay VAT by reference to £1,000, not £995. This case is almost the same as that. The difference is that Total is able to meet its commitment to the customer at a cost to itself of £4.50, not £5. The neutrality principle still in my judgment requires that Total should not be liable to pay VAT by reference to £1,000. But the principle is complied with if Total is liable to pay VAT by reference to £995.50. That is the result for which Total contends”

35. The judge went on to consider and dismiss a number of arguments advanced on behalf of the commissioners. The first, which he called “the absence of reduction labelling point”, was that there was nothing in Total’s publicity material or in other documents relating to TOPS which said that the vouchers operated as reductions of the prices already paid for fuel. The judge’s view was that the vouchers could not realistically be viewed as anything else: the only reason why Total was willing to transfer a voucher to a customer without receiving any further payment from the customer was that the customer had already bought and paid for the fuel. He went on:

“67. Anyone who reflects upon Total’s motivation for introducing the scheme will surely conclude that Total is prepared to accept a reduction in the amount of its initial takings from sales if the takings referable (directly or indirectly) to a particular customer are large enough to make the reduction worthwhile. I cannot believe that the sensible and natural consequences of that only arise if the documents about the TOPS scheme specifically spell out what is clear to see anyway, whether it is spelt out or not.”

36. The second of the commissioners’ arguments that the judge dismissed was what he called “the vouchers, not money, point”, namely that what Total provides to qualifying customers is not money but vouchers. Whilst accepting that a voucher is not itself money, the judge stated that there is no principle of law which prevents a reduction effected not in money but in kind from operating as a reduction in the taxable consideration previously received for a supply of goods or services, at least if there is some element clearly expressed in monetary terms within the ‘kind’ which operates as a reduction in the taxable consideration. In the present case the consideration upon which Total was liable to account for output tax was the amount of the consideration in money (on the purchase of the fuel) less the value of the refund in kind, and that there was no difficulty in quantifying the value of the refund in kind.
37. The judge also rejected an argument that there were two economic transactions, not one, and that the transfer of vouchers to customers who had made purchases of fuel could not therefore operate to reduce the taxable consideration for the supplies of fuel. He stated:

“79. I cannot see how the ‘two economic transactions’ argument helps HMRC in this case. I can accept that Total’s supply of fuel to a customer is one economic transaction and that a retailer’s issue of a voucher and subsequent acceptance of it towards the price of goods or services is another economic transaction. But a term of the first economic transaction (the supply of fuel by Total) is that, if the customer buys enough fuel, Total will transfer a voucher to him. If

the customer fulfils the condition, the transfer of the voucher is plainly a part of the economic transaction between him and Total. Maybe the transfer of the voucher is also part of the economic transaction which begins with the issue by a retailer of the voucher and ends with the voucher being accepted by the retailer in or towards payment for goods or services. But even if it is, that cannot conceivably mean that the transfer of the voucher is not part of the fuel supply transactions between Total and the customer.”

38. As the judge observed, what he said about two economic transactions had affinities to his criticisms of the President’s reasoning concerning two chains of supply.
39. Finally, the judge examined the reasoning of Laddie J in *Kuwait Petroleum* on the similar issue raised late in that case. He expressed respectful disagreement with the reasoning and stated that it did not cause him to change his view that Total’s submissions about art 11 and *Elida Gibbs* were correct and that the tribunal’s decision was wrong.

The case for the commissioners

40. For the commissioners, Mr Christopher Vajda QC submitted that the tribunal’s analysis was correct. The facts set out in the tribunal’s decision show that this is not a price discount scheme but a customer loyalty scheme. The motorist pays the same price for fuel whether or not he is signed up to the scheme (a consideration that was very important in *Kuwait Petroleum* and *Tesco*); but under the scheme he earns points and vouchers which encourage him to keep coming back to buy fuel at the full price. Nothing in the scheme documentation, the importance of which is again underlined by *Tesco*, suggests that the motorist gets anything off the price of fuel. The tribunal was also right to emphasise the existence of two separate chains of supply. It is true that there is a link between the two chains, in that members of the scheme have a contract with Total under which they earn points (and, on earning sufficient points, vouchers) by the purchase of fuel. That link, however, does not determine the relevant question in this case. In VAT terms, the motorist purchases one thing, fuel. The consideration is the full price of the fuel and is not affected by the provision of vouchers under the scheme.
41. Mr Vajda submitted that Sir Andrew Park fell into error in deriving from *Elida Gibbs* the principle set out at para 30 of his judgment and in then treating this case as covered by that principle. The court in *Elida Gibbs* was dealing with what were clearly price discount schemes and with specific items to which those discounts attached. The difficulty with which the court was concerned arose out of the existence of a chain of supply of the specific items. The propositions to be derived from the case are that: (i) the VAT cannot exceed the consideration actually paid by the final consumer for the supply of goods; (ii) the first proposition applies however many stages of supply there are between manufacturer and final consumer; (iii) where the consumer has paid less than the indicated shelf price of the goods and the cost of the discount is funded by the manufacturer either by paying the consumer directly (cash-back) or by paying the retailer (money-off), the consideration received by the manufacturer for his supply to the wholesaler or retailer is the price paid by the wholesaler or retailer less the cost of the discount; and (iv) the third proposition is supported by art 11C(1) of the Sixth Directive. Further, the court gave answers that

were very specific to the facts of the money-off and cash-back schemes. The wider principle that Sir Andrew Park sought to derive from the case is not supported by the judgment.

42. The judge's further comment at para 60 about the principle of neutrality, in particular that the trader should not be charged VAT on an amount greater than the true cost of the supply to the ultimate consumer, was likewise submitted to be mistaken and contrary to authority. In *Kuwait* the supplier had to pay for the redemption goods; in *Primback* the supplier paid a commission to the finance house; in *Tesco* the supplier incurred the cost of the Clubcard scheme; and in *Lex* the supplier had to meet the cost of the additional allowance. Yet in none of those cases were those costs of supply held to reduce the taxable amount. And again *Elida Gibbs* does not support the proposition for which the judge cited.
43. Mr Vajda submitted further that the reasoning of the ECJ in *Kuwait Petroleum* applies to the facts of this case. In particular, the supply of fuel and the provision of vouchers are two separate transactions; the scheme is not described as, and is not capable of being described as, a price discount scheme in respect of the supply of the fuel; and the retail price of the fuel is the same whether or not the customer earns points under the scheme. In the further *Kuwait Petroleum* proceedings Laddie J reached the right conclusion on the price reduction issue, though Mr Vajda did not support all his reasoning.

The case for Total

44. For Total, Mr John Walters QC emphasised to us, as he had done to Sir Andrew Park, that Total's case is that it is the *transfer* of the voucher to the customer, not the *purchase* of the voucher by Total, that is the price reduction, albeit the subjective value of the voucher is its cost of purchase by Total. He invited the court to consider the vouchers as being as good as money in the customer's hands: Total gives a rebate of value to the customer, which operates for VAT purposes as a price reduction. He submitted that there is no basis in the Sixth Directive for distinguishing in treatment between a customer loyalty scheme and a price discount scheme: they are both sales promotion schemes which encourage repeated custom. He supported para 30 of Sir Andrew Park's judgment, submitting that the words "without any countervalue" should be inserted after "is obliged to pay an amount away" in order to reflect what the judge plainly meant. In *Elida Gibbs* there was no countervalue for the supplier's payment, and the same applies to the provision of the voucher in the present case, whereas in *Primback* and *Lex* the trader paid something out in order to get something back. As to *Kuwait Petroleum*, Mr Walters submitted that the ECJ decided only that the price paid by the customer purchased just the fuel and that the redemption goods were supplied free of charge; and that the Advocate General was incorrect, at para 106 of his opinion in *Commission v Germany*, to refer to the *Kuwait Petroleum* scheme as involving "supplying more goods at the same price". Mr Walters adopted Sir Andrew Park's criticisms of the decision of Laddie J on the price reduction issue raised in the further *Kuwait Petroleum* proceedings. He submitted that the later authorities relied on by the commissioners (*Primback*, *Tesco* and *Lex*) were all consistent with Total's case.
45. Mr Walters also formulated ten main propositions upon which he elaborated. First, he submitted that the commissioners' case contains no discernible argument on whether

the voucher is “negative consideration” for the fuel, in particular whether there is a direct link with the purchase of fuel: “negative consideration” was an expression used by Mr Walters to describe an amount that reduces the taxable amount. Legal analysis from first principles shows that it does operate as negative consideration. Goods are supplied for consideration if there is a legal relationship between the supplier and the purchaser entailing reciprocal performance, the price received by the supplier constituting the value actually given in return for the goods supplied (see e.g. *Kuwait Petroleum*, para 26). Here, there is a legal relationship in the context of which the voucher is supplied: Total provides the voucher because of the terms on which the fuel has been sold. Thus there is a direct causal and contractual link between sale of the fuel and provision of the voucher.

46. Secondly, Mr Walters submitted that the correct analysis must focus on Total as supplier and what it obtains as consideration (see the terms of art 11A(1)(a) itself), whereas the commissioners’ arguments focus on the customer.
47. Thirdly, in relation to the issue of single economic transaction and chain of supply, Mr Walters submitted that the existence of two economic transactions is irrelevant. The concept of a single economic transaction is not a term of art but appears in *Kuwait Petroleum* only because of the arguments put forward by the supplier in that case. If in the present case the provision of the voucher is a separate economic transaction from the supply of fuel, that is no bar to the voucher being a rebate on the price of the fuel: cf *Elida Gibbs*, where the honouring of the coupon was a separate economic transaction from the manufacturer’s sale of the item to the wholesaler or retailer. Further, there are not even two chains of supply in this case, since none of the transactions relating to the vouchers (issue of voucher by retailer to Total, transfer of voucher by Total to customer, and presentation of voucher by customer to retailer) constitutes a supply for VAT purposes. But even if there are two chains of supply, it does not affect the analysis. What matters is that the voucher is provided between two persons who are links in the chain of supply of the fuel, i.e. the manufacturer and the consumer, and as a result of the terms on which fuel is supplied. The provision of the voucher therefore takes place in that chain of supply.
48. Fourthly, Mr Walters took issue with the commissioners’ contention that the terms of the TOPS scheme and surrounding facts and circumstances do not suggest that the provision of a voucher was, or was envisaged as, a reduction in the price of fuel. He submitted that even if that is true, it is irrelevant. What is relevant is the nature of the scheme (or its “cause”, in Community terminology), not its labelling.
49. Fifthly, Mr Walters submitted that as a matter of substance the TOPS scheme is different from that in *Kuwait Petroleum* and nearer to that in *Elida Gibbs*, in that (i) there is no supply of redemption goods, and art 5(6) of the Sixth Directive is not in point, and (ii) a significant element of TOPS is the customer’s choice of issuing store and his discretion to give the voucher to charity, which means that Total is giving away a means of exchange rather than a free gift.
50. Sixthly, Mr Walters repeated the submission that TOPS is not a free-gift scheme but a free voucher scheme (said to be equivalent to a money-back scheme) and submitted that it is irrelevant that a free gift scheme operates differently from a money-back scheme.

51. Seventhly, Mr Walters repeated the submission that the voucher is part of the same chain of supply as the fuel: the voucher is supplied only because of the sale of the fuel. He also referred to multi-card TOPS accounts, where points can be earned by other members of the primary cardholder's family, and submitted that this aspect can be explained in terms of assignment.
52. Eighthly, Mr Walters submitted that *Lex* is of no direct guidance because the money paid away in that case was in consideration of a countervalue and because there was agreed to be a "direct link". The issue in *Lex* was the subjective value of a car taken in part-exchange, whereas the issue here is whether there is a direct link between the supply of fuel and the provision of the voucher.
53. Ninthly, Mr Walters took issue with the contention advanced in the commissioners' skeleton argument that the judge's application of *Elida Gibbs* involved a circular argument and begged the question. He submitted that the judge's finding that the case fell within the scope of *Elida Gibbs* was based on objective analysis, not assumption.
54. Tenthly, bringing in matters raised in a respondent's notice, Mr Walters advanced a broader point on fiscal neutrality than that referred to by the ECJ in *Elida Gibbs*. He cited various authorities on the scope of the principle: *Fischer v Finanzamt Donaueschingen* [1998] QB 883, *EC Commission v France* [2001] STC 919, and *JP Morgan Fleming Claverhouse Investment Trust plc v Commissioners of HM Revenue and Customs* (Case C-363/05, ECJ judgment of 28 June 2007), in the last of which the court stated at para 47 that the principle includes the principle of elimination of distortion of competition as a result of differing treatment for VAT purposes, that distortion is established once it is found that supplies of services are in competition and are treated unequally for the purposes of VAT, and that it is irrelevant in that connection whether the distortion is substantial. Mr Walters submitted that the principle is sufficiently general to determine the application of art 11A(1) and art 11C(1) on the facts of this case in Total's favour. There will clearly be an inequality and distortion of competition if the overall tax collected from different retailers operating customer loyalty schemes with the same economic purpose and essentially similar methods of achieving that purpose is not the same. An appendix to his skeleton argument (which was not agreed by the commissioners) contained a comparison between TOPS and schemes operated by Tesco (Clubcard) and Sainsbury (Nectar). In relation to sales of fuel by the three suppliers, on terms assumed to be essentially the same save for the "technically different" schemes of the three suppliers, it was submitted that to accede to the commissioners' arguments in the present case would result in a greater amount of VAT being collected from Total than from either Tesco or Sainsbury; and that this distortion could only be remedied by acceding to Total's case that the consideration for the fuel is reduced by the value of the TOPS vouchers.
55. Mr Walters submitted that if this court were not otherwise minded to uphold Sir Andrew Park's decision, it should make a reference to the ECJ on the proper interpretation of art 11 in relation to a case of the present kind.

Discussion and conclusion

56. I have reached the clear view that the transfer of a voucher by Total to a customer redeeming his points under TOPS does not operate to reduce the consideration

obtained by Total in respect of its supplies of fuel. To treat the transfer of the voucher as the grant of a retrospective discount or rebate on the price of fuel is to mischaracterise it. Nothing in the authorities supports, let alone compels, such an approach. Thus, in respectful disagreement with Sir Andrew Park, I would endorse the conclusion reached by the President of the tribunal.

57. I attach importance to the fact that the scheme's documentation does not describe the transfer of a voucher as a discount or rebate on the price of fuel. On the contrary, the earning of TOPS points and thereby of vouchers by the purchase of fuel is presented to customers as a means of obtaining "more treats" in the form of goods or services from the selected retailers or the opportunity to make gifts to recognised charities. The focus is on the acquisition of something extra through participation in the scheme. There is no suggestion that the voucher constitutes money-off or cash-back in respect of the purchases of fuel by which the points have been earned, or that the customer in some way pays less than the full price of the fuel purchased. That is underlined by the existence of multi-card TOPS accounts, where qualifying purchases of fuel can be made by family, friends or colleagues but it is only the primary cardholder who is entitled to redeem the TOPS points for vouchers.
58. As previously mentioned, Sir Andrew Park was not impressed by the commissioners' reliance on the documents relating to the TOPS scheme, which he called "the absence of reduction labelling point". He focused on Total's motivation, stating (at para 67) that Total is prepared to accept a reduction in the amount of its initial takings from sales if the takings referable to a particular customer are large enough to make the reduction worthwhile, and that he could not believe that "the sensible and natural consequences of that only arise if the documents about the TOPS scheme specifically spell out what is clear to see anyway, whether it is spelt out or not". In my view, however, the authorities call for a different approach. It is apparent from *Tesco* that an objective analysis is called for, without regard to the parties' subjective intentions or motivation, and that the scheme documentation should play an important part in the analysis: see the passages from the judgment of Jonathan Parker LJ quoted at paras 22-23 above. Similarly, the observations of Lord Walker in *Lex*, quoted at paras 26-27 above, show the significance of the scheme's documentation in determining its VAT treatment. Moreover the ECJ in *Kuwait Petroleum* relied on how the redemption goods were described in the sales promotion scheme in determining whether there was a disposal of them free of charge or a supply for consideration. It is therefore in line with the authorities to attach the importance that I do to the TOPS documentation.
59. *Tesco* also makes clear that regard should be had to the economic purpose of the scheme. TOPS is a customer loyalty scheme, the purpose of which is to promote sales of Total fuel by encouraging motorists to come back for repeat purchases. Total's evidence is that it was introduced as "a scheme that rewarded the customer who returned again and again for Total fuel ... and added value for the customer" (witness statement of Kathryn Munro, para 9). I see no necessary inconsistency between a customer loyalty scheme and a price discount scheme, since there is no reason in principle why customer loyalty should not be secured by offering retrospective discounts on the price of fuel to customers who make a sufficient number of repeat purchases. But I do not see such a feature in TOPS or in the evidence about it; and in my view everything about TOPS tends to suggest that the

economic purpose is to encourage repeat purchases of Total fuel *at the full pump price*.

60. The reality is that the customer pays the full pump price for the fuel whether or not he is a member of TOPS and whether or not, if a member of TOPS, he earns sufficient points under the scheme to qualify for a voucher. The customer who receives a voucher does not thereby receive a discount on the price of the qualifying purchases of fuel, but gets something extra for the price he paid for the fuel. At para 106 of his opinion in *Commission v Germany*, quoted at para 21 above, the Advocate General distinguished between the type of scheme in *Kuwait Petroleum* and a discount or rebate scheme, observing that “one scheme involves supplying more goods at the same price, the other involves supplying the same goods at a lesser price”. In my view he was right to refer to the *Kuwait Petroleum* scheme in those terms, but in any event the broad distinction drawn is a useful one and I am satisfied that TOPS is a scheme under which the customer gets more at the same price rather than the same at a lesser price. He pays the full price for the fuel but sufficient purchases of fuel entitle him to a voucher that he can use for the acquisition of additional goods or services or to make a gift to charity.
61. I find it helpful to talk in terms of what the customer *pays* even though the ultimate question under art 11A(1), as Mr Walters stressed, is the consideration *obtained* by the supplier. The two amounts will generally be the same (though the interposition of third party distributors may give rise to additional issues); and in *Elida Gibbs* and other decided cases the amount paid by the consumer has been an integral part of the analysis of the consideration obtained by the supplier. Indeed, no sensible answer can be given to the issue in the present case without examining whether the voucher operates to reduce the price paid by the customer for fuel.
62. I would reject Mr Walters’s submission that the vouchers are “as good as money” in the customer’s hands. As Mr Vajda pointed out in reply, a voucher has value only if spent on the acquisition of something else; and it is difficult to see how something that can be used only to purchase future goods or services at one of the selected retailers (or for a gift to charity) can be said to be as good as money – or, indeed, how it can be said to be a retrospective discount on past purchases of fuel. In my view such a voucher is materially different in its nature from a monetary refund or rebate of part of the price paid for fuel.
63. I agree with the President of the tribunal that *Elida Gibbs* does not help Total. The court in that case was concerned with an undoubted price discount scheme, under which the coupons entitled consumers to money-off or cash-back in respect of specific items of goods purchased by them. If the company had been a retailer as well as manufacturer and had supplied the relevant items direct to consumers, the redemption of the coupons would plainly have operated to reduce the consideration obtained by it: the money-off coupons would have given rise to a price discount at the time of supply, within art 11A(3)(b), and the cash-back coupons to a retrospective discount within art 11C(1). The issue in the case arose out of the existence of a supply chain, with the company supplying to retailers and wholesalers rather than to consumers, but giving the benefit of the discounts to consumers. The court’s approach to that issue, however, was still premised on the fact that the discounts served to reduce the price paid by consumers for specific items purchased by them. The court held that the taxable amount for VAT could not exceed the price so paid,

and that this applied however many stages of supply there were between the person who granted the discount and the consumer who received it (a result also required in order to ensure observance of the principle of fiscal neutrality). Nothing in the judgment of the court requires TOPS to be treated as a price discount scheme if, on proper analysis by reference to its particular facts, it is not otherwise a price discount scheme; and if it is not a price discount scheme, nothing in the judgment of the court requires the value of the voucher to be treated as a reduction in the consideration obtained by Total.

64. As explained at paras 33-34 above, Sir Andrew Park extracted from *Elida Gibbs* a wider principle which he considered to cover the present case. I accept that, as the judge put it, *Elida Gibbs* was not simply concerned “to decide a relatively narrow point about art 11C(1)”: the ECJ referred to art 11C(1) as bearing out a broader point of interpretation of art 11. However, I do not read the ECJ’s judgment as containing or applying the wider principle formulated by the judge, whether or not one inserts the additional words suggested by Mr Walters. I accept Mr Vajda’s submissions as to the more limited effect of the ECJ’s judgment and agree that the judge fell into error in interpreting it as he did.
65. I do not think that it is particularly useful to consider whether the present case is “closer” to *Kuwait Petroleum* than to *Elida Gibbs*. There are of course important similarities between TOPS and the scheme under consideration in *Kuwait Petroleum*, but there are also potentially material differences, in that the present case concerns the provision of vouchers, not the supply of redemption goods, and art 5(6) is therefore not in point. More importantly, however, the ECJ in *Kuwait Petroleum* did not express any opinion on the price reduction issue even on the facts of that case, since it was raised only in the later proceedings in the national courts; and although Mr Vajda was able to derive support from the ECJ’s reasoning in deciding the issues that were before it, that reasoning is not determinative of the present case. As to the judgment of Laddie J in the later national proceedings, I think it better to leave it to one side since the Court of Appeal held that the tribunal’s decision had no legal effect and that the High Court had no jurisdiction to entertain an appeal.
66. Since in my view the transfer of a voucher cannot properly be characterised in any event as the grant of a retrospective discount on the price of the fuel, I do not think that anything ultimately turns on the arguments as to separate economic transactions, chains of supply and direct link. But in my view, and as Mr Walters appeared to concede, the supply of fuel and the transfer of a voucher cannot be said to be a single economic transaction. They are, or form part of, separate transactions, in the same way as the supply of fuel and the supply of redemption goods were held in *Kuwait Petroleum* to be separate transactions (see para 28 of the ECJ judgment and para 43 of the Advocate General’s opinion, quoted at paras 15-16 above): the differences between redemption goods and vouchers do not justify a different conclusion on that point. And it is difficult to see how the transfer of the voucher, if it is or forms part of one transaction, can amount to a reduction in the consideration paid for the fuel in a different transaction.
67. To say that there are two different chains of supply, one relating to the fuel and the other to the vouchers, is to express essentially the same point in a different way. As to the question of “direct link”, there is certainly a contractual relationship between Total and members of TOPS, who have an entitlement under the scheme to earn

points by making qualifying purchases of fuel and, when a sufficient number of points has been earned, to redeem them for vouchers; and the contractual relationship is reinforced by the fact that Total is the supplier of the fuel, either directly or through third party retailers. In that sense there is plainly a link between the supply of fuel and the transfer of a voucher. But for VAT purposes it does not seem to me to be a “direct link” capable of causing the transfer of the voucher to be treated as the grant of a discount on the price of the fuel. Again, therefore, I agree with the President of the tribunal that in this case there are two chains of supply with no relevant linkage.

68. I should add that, although the President concentrated in his reasons on Total’s *purchase* of the vouchers rather than on their *transfer* to members redeeming their TOPS points, in my view this did not vitiate his analysis. Nor did the fact that in his “typical scenario” he assumed that Total purchased vouchers to meet specific requests on redemption rather than holding stocks of them. The substance of his analysis remains valid when the focus is placed on the transfer of the vouchers to members rather than on their purchase by Total.
69. Total does of course incur a cost in purchasing the vouchers, but that does not affect the resolution of the present issue. The situation is analogous to the incurring of a cost by the supplier in *Primback* in the form of commission to the finance house which provided the consumer with interest-free credit. As the ECJ put it at para 47 of its judgment, quoted at para 20 above, “[t]hat commission constitutes for Primback a charge connected with its business in the same way as, for example, its costs in respect of financing, advertising or rent”. The same applies to the costs of operating TOPS, including the cost of the vouchers. The incurring of such costs in order to promote sales of fuel is very different from obtaining a reduced consideration for the fuel itself.
70. Finally, Mr Walters’s arguments based on the principle of fiscal neutrality are in my view of no substance. As Mr Vajda submitted in reply, either the transfer of a TOPS voucher constitutes a retrospective discount or it does not. If it does not, the principle of fiscal neutrality cannot avail Total. The VAT treatment of the scheme is inherent in the Sixth Directive. The mere fact that different schemes have different VAT consequences does not give rise to any distortion of competition and is not otherwise objectionable under EC law. This accords with what was said by the ECJ and the Advocate General in *Commission v Germany* (see para 21 above) and with the reasoning of Lord Walker in *Lex*, quoted at para 26 above, when he disposed of a similar argument to that now advanced by Mr Walters by pointing out that the transactions in question were not identical.
71. I do not accept that any reference for a preliminary ruling by the ECJ is called for in this case. The relevant principles are sufficiently clear, and the case is concerned with the application of those principles to a particular set of facts rather than with novel issues of interpretation of art 11 of the Sixth Directive. References to the ECJ seem to abound in this area. It is not necessary or desirable, however, to ask for a ruling on each permutation of sales promotion scheme that the ingenuity of lawyers is able to devise.
72. In conclusion, I would allow the commissioners’ appeal and reinstate the tribunal’s decision.

Lord Justice Maurice Kay :

73. I agree.

Lord Justice Mummery :

74. I also agree.