

Neutral Citation Number : [2006] EWHC 3422 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
CH/2006/APP/342

Royal Courts of Justice
The Strand
London WC2A 2LL

Date: 3rd November 2006

Before:

SIR ANDREW PARK
(Sitting as a Judge of the High Court)

Between:

TOTAL UK LTD

Appellant

-v-

THE COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondents

MR J WALTERS QC (instructed by in house Solicitors) appeared on behalf of the Claimant.

MR A MACNAB (instructed by Solicitors for HM Revenue and Customs) appeared on behalf of the Defendant.

JUDGMENT

Overview

1. In this judgment I refer to the appellant company, Total UK Limited, as Total. References to the Sixth Directive are to the Sixth EC Council Directive of 17th May 1977. It prescribes a common system of Value Added Tax ('VAT') with which the laws of Member States of the European Union are required to conform and in accordance with which the national laws should as far as possible be interpreted. I use the abbreviations 'the CJEC' for the Court of Justice of the European Communities, and 'HMRC' for Her Majesty's Revenue and Customs. HMRC are the Department responsible for the administration and collection of VAT. In earlier years the responsible Department was HM Customs & Excise. At times in this judgment I refer to Customs & Excise if I am describing something that happened in those earlier years.
2. This case is a VAT appeal by Total from a decision of the VAT and Duties Tribunal (Stephen Oliver QC, the President of the Tribunal) dated 17th March 2006. Total operates a sales promotion scheme which it calls the TOPS scheme. Sales promotion schemes have been highly productive of VAT appeals over the years, and this case is the latest in what I gloomily predict will be a continuing succession. I describe Total's scheme more fully later in this judgment, but the essence of it is that customers who join the scheme and purchase enough fuel at Total filling stations receive from Total vouchers which can be used at stores of some national retailing groups in or towards payment for goods or services purchased by the customers from the stores. Total incurs expense in buying from the retailers the vouchers which it transfers to qualifying purchasers of fuel.
3. Total is in principle liable to pay output tax by reference to the prices which it receives from sales of fuel. Those sales may be made by it directly to motorists at its own service stations, or may be made to wholesalers or dealers who sell Total fuel to motorists at service stations which Total does not own. Total argues that, in so far as the TOPS scheme requires it to transfer vouchers to motorists, the amounts on which it is liable to pay output tax should be, not the full prices which it initially receives for its sales of fuel, but those prices reduced by amounts equal to the cost which it has had to incur in purchasing the vouchers transferred.
4. The tribunal did not accept Total's argument and dismissed the appeal. However, I respectfully disagree with the tribunal. For the reasons which I will explain in the regrettably lengthy judgment which follows I agree with Total's argument, and I propose to allow its appeal.

5. I record that Mr John Walters QC appeared for Total and Mr Andrew Macnab appeared for HMRC.

The Facts

6. The summary of the facts which follows is derived from the decision of the tribunal and from documents which were before the tribunal. The facts were not controversial. To a large degree they were contained in a witness statement of Mrs Munro, the corporate communications manager of Total, and in the exhibits to the statement.
 - (1) Total is the United Kingdom refining, marketing and distribution subsidiary of the French oil company Total SA. Total, by which I mean the United Kingdom company, operates two refineries and sells motor fuels in this country through a network of service stations. At the time of Mrs Munro's witness statement there were 855 service stations. 520 of them were owned and operated by Total itself or on Total's behalf. 335 of them were owned and operated by third party dealers with Total branding. So far as the present case is concerned there is no suggestion that the difference between the two kinds of service station affects the outcome. There are, however, detailed differences of legal analysis between the two structures, and I will mention them occasionally as this judgment progresses. I will refer to the two kinds of service stations as, respectively, Total sites and dealer sites. At Total sites it is Total itself which makes supplies of petrol, diesel and other fuels to customers. (In the remainder of this judgment I use the collective term "fuel" to cover petrol, diesel and the other fuels which Total supplies.) At dealer sites Total has directly or indirectly supplied the fuel to the dealers, and the dealers supply it onward to customers.
 - (2) In 1991 Total introduced the TOPS scheme which is the subject matter of this appeal.
 - (3) Customers who choose to participate in the scheme become cardholders and register their names with Total. When they purchase Total fuel either at a Total site or at a dealer site their cards are swiped through a device at the till. This records the number of litres purchased. For every litre the customer is allocated five 'points'. When the customer has accumulated 5,000 or more points (that is when he has purchased 1,000 or more litres), he is entitled to claim from Total a voucher or vouchers which I describe in the next sub-paragraph.
 - (4) The vouchers are £5 gift vouchers issued by a small number of national retailing groups. At the time of Mrs Munro's statement the vouchers available were vouchers of the Boots Group, the Marks & Spencer Group and the Kingfisher Group. The

discussion in the course of the hearing tended to be illustrated by reference to Boots vouchers, and I will in general follow that in this judgment.

- (5) If I have understood correctly, points were redeemable in units of 5,000, and each 5,000 points qualified for a £5 voucher. So suppose that a customer had made purchases of fuel which had accumulated, say, 17,450 points, and that at that stage he applied to redeem his points for Boots vouchers. Total would deliver to him three Boots vouchers of £5 each (or possibly one voucher of £15, but I surmise that three £5 vouchers would be more likely). 15,000 of his 17,450 points would thereby have been redeemed, and he would have 2,450 as yet unredeemed points to carry forward.
 - (6) Mrs Munro's witness statement exhibits the kinds of vouchers delivered to customers. They are plainly not specially constructed for Total's TOPS scheme. They appear to me to be the standard forms of gift vouchers which the retailing groups sell to customers generally. A £5 Boots voucher received by a participant in the TOPS scheme will, I think, be identical to the voucher received by a person who goes into a Boots store and buys a £5 gift voucher, for example to serve as a present to a grandchild.
 - (7) Total holds stocks of vouchers issued by the retailing groups, and so redeems points by delivering vouchers to customers out of quantities of vouchers which it has already purchased in advance. (See Mrs Munro's witness statement paragraph 18).
 - (8) Total is able to negotiate to purchase the vouchers from Boots and the other retailers at discounts of up to 11.5 per cent. In the argument it was assumed for illustrative purposes that a £5 voucher delivered by Total to a redeeming customer had been purchased by Total for £4.50. I shall make the same assumption in this judgment.
 - (9) Once the customer has received a voucher from Total by way of redemption of points, Total is not concerned with what the customer does with it. I take it that the retailing group's standard terms of issue of its gift vouchers apply. So if a Total customer receives a Boots voucher for £5 he can take it to a Boots store and apply it in discharge or in reduction of the price of retail goods bought by him from Boots. He cannot exchange it for cash, and if he uses it to purchase goods whose retail price is less than £5 Boots will not give him change in money.
7. In the tribunal's decision the President gave for illustrative purposes a simplified summary of what he said to be a typical scenario. The simplified example is helpful but in one respect I do not think that it is

accurate. The illustration assumes that a customer joins the scheme on day 1 and purchases 50 litres of petrol then. Having presumably made other purchases in the meantime, on day 90 he makes a purchase which takes his points up to 5,000. He presents his card to Total for redemption and requests a Boots voucher. The President assumes that Total, after receiving the customer's request on day 90, goes to Boots on day 100 and buys a £5 voucher. Total is then assumed to transfer the voucher to the customer on day 110.

8. In fact, as paragraph 6(7) above indicates, it is not the case that Total, upon receiving a request for a Boots voucher, then goes to Boots and buys the voucher. It has already bought stocks of vouchers in advance, and it satisfies the customer's request for a £5 Boots voucher by transferring to him a voucher which it already owns and for which it has paid with £4.50 of its own money. (An exhibit to Mrs Munro's witness statement shows that Total was transferring something like 50,000 £5 vouchers a month to participants in the TOPS scheme. From that it is obvious that Total in practice had to hold stocks of vouchers rather than acquiring them piecemeal in response to requests for redemption of points.)
9. I doubt that this difference between the President's assumed scenario and what actually happened would have caused him to change his conclusion, though I think that the detailed reasoning could not have been quite the same. Nevertheless, I modify the President's example in this respect.

How The VAT Issue Arises

10. To illustrate how the issue in this case arises I stay with a simplified example, similar but not identical to the one which the President gave. A customer has accumulated 5,000 points and by way of redemption of them under the TOPS scheme receives a Boots voucher. The voucher has a nominal value of £5 but Total had purchased it from Boots for £4.50 some time previously. For the customer to have accumulated 5,000 points he needed to have purchased 1,000 litres of fuel. If he made his purchases at a Total site he would have paid Total for the fuel, and Total would in principle have been liable to account to HMRC (or in earlier years to Customs and Excise) for VAT (output tax) on the consideration that he paid. At the time of writing this judgment petrol prices are rather less than £1 per litre, but for simplicity I will assume that the customer had paid £1,000 for the fuel and that Total had received the £1,000.
11. Total would have been liable to pay to HMRC (or to Customs and Excise) output tax calculated on a VAT inclusive consideration of £1,000. The output tax would have been some £148.94. (£1,000 divided by 117.5 times 17.5 equals £148.94 approximately). That would have been the end of the matter without the TOPS scheme.

Indeed HMRC say, and the tribunal has decided, that it was and remains the end of the matter also with the TOPS scheme.

12. Total disagrees. It says that when, pursuant to its commitment under the TOPS scheme, it transferred the voucher to the customer it parted with an asset and did so in consequence of the customer having made purchases of fuel which reached the level of 1,000 litres and 5,000 points. It contends that, under the legislation and the case law regulating the amounts to be taken into account as consideration for output supplies made by a VAT-registered person, the transfer of the voucher operated to reduce the consideration for the supplies of fuel from £1,000 to £995.50. Whether Total is right in that respect is what the case is about.
13. Obviously VAT on £4.50 is a trivial sum, but the present appeal covers the operation of the TOPS scheme from 1st October 2001 to 31st October 2004. Total claims that, by reason of the vouchers transferred by it under the TOPS scheme over those three years not having been shown as reducing its taxable outputs, it has overpaid VAT to the extent of some £1.6 million. This appeal is concerned with the principle of the matter, not with detailed figures, but it seems clear that quite a significant amount is involved.

Four Non-Controversial Points

14. Before I move on to examine the specific legislative provisions and case law decisions on the basis of which this case falls to be determined, there are four points which it is convenient to mention here. They are not in themselves controversial, but they could have a bearing on the issues which are controversial.
 - (1) First, it will be noticed from the example which I have given that Total says that the reduction in the taxable consideration for its supplies of fuel should be £4.50 (the amount that Total has paid to purchase the voucher) and not £5 (the face value of the voucher and the amount for which Boots will accept it in payment for goods). However, Total does not say that it is its payment of £4.50 to Boots which itself operates to reduce the taxable consideration. Its case is that it is the transfer of the voucher which operates to reduce the consideration; and the amount by which the consideration has been reduced should be quantified at an amount equal to the sum which Total had paid to acquire the voucher. HMRC contend that the taxable consideration remains £1,000 and is not reduced at all, either by £4.50 or by £5 or by any other amount. But if they are wrong on the general principle raised by this appeal, I do not believe that they make any point about the reduction being measured at £4.50 and not at £5.

- (2) Second, the example which I have given assumes purchases of fuel by the customer at Total sites so that the supplies of fuel are made to him by Total. To the extent that he made his purchases at a dealer site the supplies of fuel to him would have been made by the dealer, not by Total. However, Total would itself have supplied the fuel to the dealer (with or without other intermediaries in the chain) and therefore would itself have made a supply of the fuel which the customer later purchases from the dealer. Total would have been liable to account for output tax on the consideration for that supply by it. If Total is later required by the TOPS scheme to transfer a voucher to a customer who has purchased 1,000-litres of fuel at a dealer site, it contends that the same underlying principle applies as in the case of a purchase from a Total site. Therefore £4.50 should be eliminated from the consideration taken into account in determining the amounts of output tax for which it is accountable to HMRC. This point is not itself controversial. As I have already mentioned, neither Total nor HMRC advance any argument that there is a difference in the VAT consequences for Total between, on the one hand, transfers of vouchers by it which originate from sales of fuel to customers at Total sites and, on the other hand, transfers of vouchers which originate from sales at dealer sites.
- (3) Third, it is not disputed that, where a supply is made for a consideration and there is a subsequent reduction in the consideration, the reduction can operate retrospectively to reduce the consideration by reference to which output VAT is payable. Further, that is so whether or not the reduction is made in the same VAT period as that in which the unreduced consideration was received. Essentially this is in itself just a matter of mechanics, not of principle. In the output tax box in a trader's three monthly return he puts a figure for the aggregate consideration for all output supplies made in that period. If in that period some event has happened which reduces an amount of consideration received in an earlier period and returned for that earlier period (an uncontroversial example of such an event would be a simple refund to a customer or an issue of a credit note to a customer), I believe that the practice is simply to reduce the amount in the output tax box for the current period rather than to re-open the figures in the return for the earlier period.
- (4) Fourth, it is agreed that, in the example that I have given, the whole of the £1,000 paid by the customer was consideration for the supply of 1,000 litres of fuel. The £1,000 does not fall to be apportioned into two parts: one part (which would obviously be the greater part if there was an apportionment at all) being consideration for the fuel, but the other part being consideration for the points under the TOPS scheme or for the voucher which is transferred by Total to the customer under the scheme once he has

purchased enough fuel. That is the effect of the *Kuwait Petroleum* case to which I come at a later point in this judgment. It is tempting to say that, because all of the money is paid for the fuel and none of it is paid for the voucher, the voucher is a gift. Indeed, some of Total's promotional documents refer to the scheme giving rise to gift vouchers. But in my view, as a matter of the clear legal analysis which the case requires, the term "gift" (or some similar expression) can be misleading. Total does not transfer a £5 voucher to a customer out of the kindness of its heart or as a voluntary gesture of gratitude. It transfers the voucher because it is bound to do so under the terms on which fuel was supplied to a customer who participated in the TOPS scheme. Once the customer has accumulated 1,000 points he has fulfilled the condition upon which he is entitled to the voucher. The transfer of the voucher is a contractual matter between Total and the customer, but the consideration which the customer provides under the contract - the money which he pays for his fuel - is all for the fuel, and the voucher has to be transferred to him without any specific consideration being given by him for the voucher itself.

The Relevant Statutory Provisions

15. The provisions are partly found in the Value Added Tax Act 1994 (henceforth VATA 1994) and partly in the Sixth Directive. VAT in the United Kingdom is imposed by the VATA, but the Act should comply with the Directive and should so far as possible be construed in conformity with it.
16. In the tribunal's decision in the present case the President refers only to provisions of the Directive, but I will begin with the domestic statute. VATA 1994 Section 2 provides so far as is relevant:

“2(1) ... VAT ... shall be charged (a) on the supply of goods or services, by reference to the value of the supply as determined under this Act ...”

Total's supplies of fuel, either to customers at Total sites or to dealers at dealer sites or to intermediate wholesalers, were of course supplies of goods.

17. Section 19 is headed *Value of supplies of goods or services*. Section 19(1) provides:

“(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6 ...”

I interject two points. First, so far as Total's supplies of fuel are concerned there is nothing “otherwise provided by or under this Act”. Second, Schedule 6 deals with certain special cases and is irrelevant to

this appeal. Therefore the value of Total's supplies of fuel is to be determined in accordance with subsequent subsections of section 19. I can proceed to section 19(2):

“(2) If the supply is for a consideration in money its value shall be taken to be such amount as with the addition of the VAT chargeable is equal to the consideration.”

Thus Total's output tax on its supplies of fuel is calculated by reference to the “consideration” for which the supplies are made. Unless I am overlooking something the United Kingdom statute does not expand on the concept of the consideration for which a supply is made, but at this point certain provisions of the Sixth Directive are relevant.

18. I set out articles 11A(1)(a) and 11C(1) of the Directive:

“11A. Within the territory of the country

(1) the taxable amount shall be:

(a) in respect of goods and services other than [irrelevant in this case] 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 ...

“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.”

In Article 11C(1) the words which may be important in this case are "where the price is reduced after the supply takes place", rather than words referring to cancellation, refusal or total or partial non-payment. However, as I will explain later I think that Article 11A(1)(a) is of more direct relevance.

19. The foregoing provisions of Article 11 need to be considered in the light of decisions of the CJEC. I will refer to two of them under the next subheading, but first I need to mention certain other statutory provisions which may have an indirect influence, since they bear on the VAT consequences (or the absence of VAT consequences) of the transactions affecting the vouchers. (The provisions to which I have referred so far are or may be relevant to the VAT consequences of Total's supplies of fuel.)

20. So far as Total's involvement is concerned there are two transactions affecting the vouchers: first, when Total purchases vouchers from the retailers, and, second, when Total transfers vouchers to customers who have accumulated enough points. When Total purchases vouchers from a retailer no VAT is charged upon the retailer which issues the voucher. (When the retailer later supplies goods and accepts payment in the form

of a voucher, the retailer is in principle accountable for output tax upon the supply of the goods, but I am at present focusing on the retailer's issues of vouchers.) Until 2003 the absence of a VAT charge on the issue of a voucher was an effect brought about by VATA 1994, Schedule 6, paragraph 5. From 2003 it has been the effect of a similar provision in a new schedule 10A to the Act, introduced by the Finance Act 2003. A corollary is that there is no input tax included in the price which Total pays for the voucher, so Total is not entitled to any form of VAT credit arising from its purchases of vouchers.

21. When Total transfers a voucher to a customer there is no liability on Total to account for output tax. That is the result of provisions which I need not examine in detail since there is no dispute about them. However, under the United Kingdom's domestic law, the key points in my view are (1) that there could only be a VAT liability if the transfer of the voucher by Total to the customer was a "supply" (VATA 1994 section 2(1)(a)), and (2) that as a general rule anything done otherwise than for a consideration is not a supply (section 5(2)(a)). As I have already recorded (see paragraph 14(4) above) the transfer of the voucher to a customer, though done under a contract, is not itself done for a consideration.
22. The position is the same under the Sixth Directive. By Article 5(2) the supply of goods or services "for consideration" is to be subject to VAT. Although there are provisions in the Directive under which in certain circumstances a supply of goods without charge may be treated as a supply for consideration (see in particular Article 5(6)), there is nothing similar for a supply of services; by virtue of Article 6 Total's transfers of vouchers to customers are supplies of services, not supplies of goods.
23. At a later stage, in connection with the *Kuwait Petroleum* case, I shall have to refer in a little more detail to Article 5(6) of the Directive, but it is best if I explain the circumstances to which and the manner in which Article 5(6) applies after I have described the nature of that case.

Two Important Cases: (1) *Elida Gibbs* and (2) *Kuwait Petroleum*

24. ***(1) Elida Gibbs Ltd v CCE, Case C317/94; [1996]STC 1387.***

This is a decision of the CJEC about the impact of Articles 11A(1)(a) and 11C(1) of the Sixth Directive on a scheme which Mr Walters submits is in essential respects equivalent to Total's TOPS scheme. Elida Gibbs was a manufacturer of toiletries. Its products were sold to members of the public, not by Elida Gibbs itself, but by retailers who had purchased them either from Elida Gibbs or from intermediate wholesalers. Elida Gibbs operated two coupon schemes. Under one of them members of the public could cut out coupons from advertisements in newspapers or magazines. If they presented the coupons to a retailer the retailer sold Elida Gibbs products to them at reduced prices. The

retailer forwarded the coupons to Elida Gibbs, which paid to the retailer an amount equal to the reductions in price. Thus Elida Gibbs sold its products to retailers or wholesalers for an agreed price, but later had to make money payments to retailers to whom coupons had been tendered by customers and who therefore received lower prices from the customers than they otherwise would have received.

25. The VAT issue was whether, as Customs & Excise contended, Elida Gibbs should be liable to pay output tax by reference to the initial prices which it charged to its own customers (the retailers or wholesalers), or whether, as it contended, it should be liable to pay output tax on those prices reduced by the amounts which it had to pay to retailers under the coupon scheme. The decision of the CJEC, rejecting the arguments of Customs and Excise, was that the second of those two alternatives was the correct one.
26. Elida Gibbs' second scheme had the same objective and a similar economic result, but worked in a different way. The company marketed some goods in such a way that their packaging contained a coupon. The customer bought the goods from the retailer at the normal price, but if the customer cut out the coupon and sent it to Elida Gibbs the company paid a sum of money to him or her. The customer did not receive anything back from the retailer to whom he or she had paid the normal shop price, but economically the scheme would, no doubt, be viewed by him or her as a partial refund of the price of the goods.
27. From Elida Gibbs' point of view it had supplied the goods to retailers or wholesalers for prices no parts of which it refunded to the retailers or wholesalers; but in economic terms what it derived from its sales to retailers and wholesalers was reduced by the amounts which it paid to customers who sent in their coupons.
28. In the case of the second scheme the VAT question was again whether the consideration by reference to which Elida Gibbs was liable to account for VAT on its supplies was the full amounts received by it from its own purchasers (the retailers or wholesalers), or rather was those amounts reduced by the payments which Elida Gibbs made to the end consumers. Again, the CJEC rejected Customs and Excise's arguments and decided in favour of the second analysis.
29. In the court's discussion of the issues it referred to Article 11A(1)(a) and to Article 11C(1). In my view the decision was essentially a decision upon Article 11A(1)(a), not upon Article 11C(1). Indeed, in most variants of the company's two schemes I do not see how the precise terms of Article 11C(1) ("where the price is reduced after the supply takes place") can be made to fit the facts. For example, if (as in the second scheme) Elida Gibbs received a price from a wholesaler and later had to pay an amount of money to a customer who bought the

goods from a retailer, the price payable by the wholesaler was not reduced.

30. As it appears to me the CJEC was concerned, not to decide a relatively narrow point about Article 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 to be reduced by the amount so paid away.
31. I believe that that can clearly be seen to be the thrust of the decision from the discussion in the critical paragraphs 26 to 31. Those paragraphs are of sufficient importance to this appeal for me to set them out in full:

“26. By virtue of art 11A(1)(a) of the Sixth Directive, the taxable amount for supplies of goods and services within the territory of a state comprises all sums which make up the consideration which has been or is to be obtained by the supplier from the purchaser.

27. According to the court's settled case law, that consideration is the 'subjective value', that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria [references are given].

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 a 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, grant the consumer a reduction through retailers or by direct repayment of the value of the coupon. 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.”

32. I point out that the paragraphs begin by referring to Article 11A(1)(a), and in paragraph 29 have already reached the conclusion that the consideration liable to VAT is reduced by the value of the coupons. That is before there is any mention of Article 11C(1). Further, the first two sentences of paragraph 31 acknowledge that there is a wider principle than the particular application of it which is expressed in Article 11C(1). The wider principle must, as it seems to me, be derived from Article 11A(1)(a). In this connection it is worth noting an observation of the Advocate General in paragraph 46 of his opinion in the *Kuwait Petroleum* case. [See [1999] STC at 503]. Having referred to a number of decisions of the CJEC, including *Elida Gibbs*, he said:

“The common element in these cases is the willingness of the court to take a broad and flexible approach to the ascertainment of the 'subjective value' of the consideration actually received, namely the amount actually received by the supplier.”

In the context of a case where the supplier initially receives one amount but then has to pay something away the Advocate General's reference to “the amount actually received by the supplier” must in the context mean the net amount which remains after deduction of what the supplier pays away.

33. **(2) *Kuwait Petroleum GB Limited v CCE; Case C48/97; [1999] STC 488.***

In the above heading I have given the references to the case in the CJEC. After the decision of the CJEC the case reverted to the VAT Tribunal and then to the High Court. The judgment of Laddie J in the High Court is reported at [2001] STC 62. Kuwait Petroleum, like Total, marketed petrol and other fuels in the United Kingdom. It operated a sales promotion scheme which was similar to Total's in many respects. But whereas Total's customers who have accumulated sufficient points receive from Total vouchers of leading retailers, Kuwait Petroleum's customers could exchange their “stamps” (the equivalent of points in Total's scheme) for goods selected from a catalogue. The goods were transferred to the customers by Kuwait Petroleum which had bought them from outside suppliers. Mr Walters, who has appeared for Total before me, appeared for Kuwait Petroleum in that case. He told me that a television set was one example of the kinds of goods available.

34. The original issue which arose in the VAT Tribunal and which the Tribunal referred to the CJEC was completely different from the issue which arises before me in the present case. Suppose that a customer of Kuwait Petroleum chose a television set from the catalogue. Kuwait Petroleum bought a television set from an outside supplier, or may already have bought sets in advance with a view to satisfying claims from participants in its promotion scheme. Kuwait Petroleum then delivered the television to its customer.
35. So there were two transfers of the television set: one by an outside supplier to Kuwait Petroleum, and another by Kuwait Petroleum to its customer. The first transfer, the one to Kuwait Petroleum, was a supply within the scope of VAT. The outside supplier was liable to pay output tax on the price paid by Kuwait Petroleum. If the price was £117.50, then £17.50 of it was VAT and the outside supplier accounted to Customs and Excise for £17.50 of output tax. Further, Kuwait Petroleum no doubt received a tax invoice showing it as having paid £17.50 of input tax; it claimed and received credit against Customs and Excise for the £17.50 accordingly. I pause at this point to observe that Total's scheme is different in that respect. For reasons which I explained earlier (see paragraph 20 above), when Total purchases vouchers from retailers such as Boots, the issue of the vouchers to it is not a taxable supply by the retailer. The retailer is not liable to account for output tax and Total has no entitlement to, and does not claim, any credit for input tax.
36. For completeness I add that, if and when Total's customer purchases goods from the retailer and uses his voucher to pay for them in whole or in part, there is at that time a taxable supply by the retailer of whatever the goods may be, and the retailer will be liable to pay output tax then unless the goods are exempt or zero rated. Total is no longer involved at that stage.
37. Reverting to the Kuwait Petroleum scheme, the second transfer of the goods (for example a television set) is the transfer by Kuwait Petroleum to its customer. The customer makes no specific payment for the goods, but Customs and Excise contended that under provisions both of the VATA (Schedule 4 paragraph 5(1) and Schedule 6 paragraph 6) and of the Sixth Directive (article 5(6)), the transfer was treated as a supply by Kuwait Petroleum for a consideration equal to the market value of the goods. Customs and Excise assessed Kuwait Petroleum to output tax upon such supplies of goods, thereby effectively neutralising the deductions for input tax which Kuwait Petroleum had obtained in respect of its purchase of the goods from outside suppliers.
38. Kuwait Petroleum appealed. Under article 5(6) of the Directive the critical question was whether the goods were supplied by Kuwait Petroleum to customers "free of charge". If they were, Kuwait Petroleum fell to be treated as having supplied them for a consideration,

and it was liable to pay output tax on an amount equal to the cost of the goods to it (see the Directive, article 11A(1)(b)).

39. The VAT and Duties Tribunal referred certain questions to the CJEC. Before that court Kuwait Petroleum's central argument was that, when it transferred (for example) a television set to a customer, it did not make the transfer "free of charge", because, so it contended, some part of the money which the customer had paid for fuel should be regarded as paid for the television set.
40. The CJEC did not itself decide whether Kuwait Petroleum's argument was correct, but it gave guidance by reference to which the United Kingdom courts should decide the question. The guidance can, I think, fairly be summarised as follows: whether the goods were supplied to customers free of charge was for the national court to decide, but on the facts it was very hard to see how the national court could decide anything other than that the goods were supplied free of charge.
41. When the case returned from the CJEC to the VAT and Duties Tribunal, and (on appeal from the Tribunal) to the High Court, that is what both the Tribunal and Laddie J decided. Kuwait Petroleum did, as Customs & Excise contended and contrary to its own submission, supply the goods free of charge to customers who had made sufficient purchases of fuel from it. It followed that the assessments made on Kuwait Petroleum to output tax were correct, and the appeals against them failed.
42. Pausing there, the present case does not raise the questions which, on the account that I have given so far, were dealt with in *Kuwait Petroleum*. No VAT has been claimed from Total on the basis that, when it transferred retailer vouchers to customers, it thereby made taxable supplies on which it was liable to account for output tax. For reasons which I explained earlier (see paragraphs 21 and 22 above) it is common ground that there is no such tax on Total's transfers of vouchers. The present case is about the amount of output tax on Total's supplies, not of vouchers, but of fuel. It follows that, in considering the present case, I find no assistance in the decision of the CJEC in *Kuwait Petroleum*, or in the decisions of the Tribunal and of Laddie J so far as they were directed to Kuwait Petroleum's appeal against the output tax assessments.
43. However, before the Tribunal and before Laddie J Kuwait Petroleum advanced a wholly new argument. The argument was that the transfers of goods which it made free of charge to customers who had purchased fuel from it in the past operated to reduce the consideration for those earlier supplies of fuel, and therefore reduced the output tax payable in respect of them. There is an obvious affinity between that argument and Total's argument in the present case that the transfers of retailer vouchers by it to customers under the TOPS scheme operated to reduce

the consideration for Total's earlier supplies of fuel to them, and therefore reduced Total's output tax in respect of those supplies.

44. Both the Tribunal and Laddie J rejected Kuwait Petroleum's new argument, encapsulated by Laddie J as "the price reduction argument". I have not seen the Tribunal's decision but I do of course have a report of Laddie J's judgment; the price reduction argument is considered at pages 75 to 76 of [2001] STC.
45. The best course for me to take in this judgment is to record at this stage the result of Laddie J's judgment - that Kuwait Petroleum's price reduction argument was rejected - but to postpone until a later stage an analysis of his reasoning and an explanation of why it does not deflect me from allowing Total's appeal in this case. I address those matters in paragraphs 81 to 85 below.
46. I should however add this: Kuwait Petroleum gave notice of appeal against Laddie J's decision on the price reduction argument. When the appeal came before the Court of Appeal, that court held that the argument was not available to Kuwait Petroleum, given the course that the case had previously taken. The Tribunal and Laddie J ought not to have permitted the argument to be advanced. The Court of Appeal struck out Kuwait Petroleum's appeal and gave no decision on the merits or lack of merits of the price reduction argument.

The Tribunal's Decision In The Present Case

47. The principal point which Mr Walters makes about the Tribunal's decision is that the President misunderstood a critical aspect of Total's submissions. Mr Walters says that the President addressed and rejected an argument which Total did not make: namely an argument that Total's payments to Boots and other retailers to purchase vouchers from them constituted reductions in the taxable consideration for Total's supplies of fuel to customers. However, Total's case was and is that it was not its payments to acquire the vouchers which constituted those reductions, but rather its subsequent transfers of the vouchers to the customers, transfers which *ex hypothesi* could be made only after Total had purchased the vouchers.
48. It is true that Total quantifies the reductions to the consideration for the fuel as being equal to the cost it had incurred in acquiring the vouchers, but it remains the case that it is the transfer of the vouchers, not the purchase of them before they are transferred, which in Total's submission reduces what it has received for its earlier supplies of fuel.
49. In my view this is probably a fair point for Mr Walters to make. The Tribunal may, however, have been misled by the formulation of Ground 1 of Total's grounds of appeal to the Tribunal:

“The cost to [Total] of the vouchers ... operates as a retrospective discount to the consideration for the supply of fuel under Article 11C(1) of the EC Sixth VAT Directive.”

That, read in isolation, does seem to focus on Total's purchase of the vouchers. It would have been better if it had began, “An amount equal to the cost ...”. However that may be, Mr Walters tells me, and of course I accept, that the argument which he believes he advanced to the Tribunal focused on Total's transfers of the vouchers to the qualifying customers, not on its purchases of the vouchers from the retailers. Certainly that was the argument which he advanced to me.

50. In the circumstances the Tribunal's decision may or may not be right in the end - that is the issue I have to consider in the remainder of this judgment - but the foremost reason which the Tribunal gave for rejecting Total's case does not really meet the argument advanced. In paragraph 14 of the decision, the President formulates what he saw as the issue:

“14. The issue in this case is whether the amount spent by Total in purchasing face value vouchers to be provided to the customer as part of the redemption process under the TOPS scheme ranks, as Total contends, as a reduction in the price of the road fuel after the supply of that road fuel has taken place, thereby reducing the taxable amount obtained by Total for that supply.”

This is plainly directed to the purchases by Total of the vouchers, not to the subsequent transfers of them by Total to fuel customers.

51. I add that the significance of the Tribunal having concentrated on the earlier stage (the purchase of the vouchers) is heightened by the feature (which I have pointed out earlier – see paragraphs 6(7) and 7 above) that, contrary to the Tribunal's summary of a "typical scenario", Total does not buy the vouchers after purchasers have made claims under the TOPS scheme, but rather has bought stocks of them in advance to meet anticipated future claims. When Total pays the retailers for the vouchers, the vouchers are assets beneficially owned by it. Total could not possibly argue, and does not argue, that by paying for assets of which at that stage it is the absolute owner it has reduced the consideration previously received by it for supplies of fuel.
52. In paragraph 19 of the Tribunal decision, the President writes this:

“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. 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, ie £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 analysed for VAT purposes as either a cash payment or as a virtual cash payment, as an assignment of a chose in action, as the physical handing-over of the Boots voucher or as a 'nothing' for VAT purposes.”

I agree that the £5 spent by Total bought it a Boots voucher, and that at that stage (words which the President does not use but which I interpolate) the consideration for supplies of fuel to A remained exactly as it had been before. It does not follow that the consideration for those supplies still remains exactly as it had been before when Total later transfers the voucher to A, thereby ceasing to be the owner of an asset which had cost it £4.50. That is all the more so given that it is by reason of one of the terms on which Total had made the supplies of fuel to A that it ceases to be the owner of the voucher.

53. The President in his decision moves on to consider *Elida Gibbs*, and he derives conclusions from a concept referred to by the CJEC in that case, namely “a chain of transactions”. The CJEC's point was that the money payments which Elida Gibbs made to retailers under one of the schemes and to ultimate purchasers under the other were parts of chains of transactions that included supplies of toiletry products by Elida Gibbs. Reverting to the Tribunal's decision, the President said in paragraph 24 that in the present case there were two chains of transactions:

“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 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, eg. 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.”

The expression “cost components” is, I believe, generally encountered in cases concerned with input tax, where it is derived from article 2 of the first VAT Directive. If I understand the President correctly, I think his point is that a supply of fuel by Total is part of one supply chain and that the supply by a retailer of a voucher is part of the other supply chain. I can see that Total's purchase of the voucher is part of a chain where a supply which attracts VAT is a supply of goods by the retailer.

But I do not see that therefore Total's transfer of the voucher to the customer is not part of a chain of transactions in which a supply which attracts VAT is a supply of fuel by Total. In my view it plainly is. If the customer is a participant in the TOPS scheme, Total supplies fuel to him for money prices and on terms that, if he purchases enough litres, Total will transfer to him a voucher with a nominal value of £5. When the customer satisfies the condition, Total transfers the voucher to him. It does so because of the purchases of fuel which he has made. In those circumstances, it appears plain to me that the transfer of the voucher is a part of the supply chain which includes Total's supplies of fuel. The transfer of the voucher may also be part of the supply chain which ends with the retailer's supply of goods, but even if it is, it is certainly also part of the chain which includes the supply of fuel.

54. Accordingly, I do not think that the reasons which the President gives in the course of his decision are sufficient to support it. His conclusion might nevertheless be right, and Mr Macnab, counsel for HMRC, submits that it is. (Mr Macnab, I should make clear, also says that the reasons which the President gives are correct and in themselves are sufficient to justify his conclusion. I cannot agree with him in that respect.)
55. I must therefore discuss and analyse the issues myself, come to my own conclusion and explain my reasons for it.

Discussion And Analysis

56. In this section of my judgment I will consider the matter apart from the judgment of Laddie J in *Kuwait Petroleum*. I will set out my views on that judgment in the last main section of this judgment.
57. Laddie J's judgment apart, I accept and agree with the submissions of Mr Walters. In my view the principle expounded by the CJEC in *Elida Gibbs* covers this case. It is worth adding that in *EC Commission v Germany*, Case C-427/98 [2003] STC 301, the CJEC reaffirmed the full force and ambit of the decision in *Elida Gibbs*. The *Germany* case concerned infraction proceedings brought by the Commission on the ground that Germany had left in force as part of its domestic VAT law certain provisions which the Commission considered to be incompatible with *Elida Gibbs*. The United Kingdom Government intervened in the case in support of Germany. It appears from paragraph 26 of the Advocate General's opinion that the German and United Kingdom governments invited the court to reconsider its judgment in *Elida Gibbs*, either overturning it or in some way limiting its effects. It is clear from the judgment of the court that the invitation was rejected.
58. Earlier in this judgment (at paragraph 30 above) I have described the principle of *Elida Gibbs* as follows: where a trader supplies goods (or, no doubt, services) for a stated consideration, but under a sales

promotion arrangement 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 to be reduced by the amount so paid away. I believe that that principle covers this case. It is true that what is paid away is in the form of a voucher rather than money. For reasons which I give later, I do not believe that that changes the result. And, repeating an important point which I have made already, it is clear that the transfers of vouchers which Total makes are made because of the terms on which fuel was supplied to the customer.

59. When a customer who has joined the TOPS scheme fills up his car with fuel at a Total station (or at a dealer station supplying Total fuel) he does so on terms that he will pay the full price charged at the pumps but will be entitled to receive a voucher from Total if the current fuel purchase and other purchases which he makes are large enough to qualify. Conversely, Total is committed to transfer vouchers to customers as part of the terms on which it supplies fuel to them (or on which dealers supply fuel to them at dealer sites).
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 provide 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. HMRC's case is that it should be liable to pay VAT by reference to £1,000.
62. On behalf of HMRC, Mr Macnab submits that *Elida Gibbs* does not apply to this case. If I understand him correctly, he says that that is the result of two reasons taken in combination: first that there is nothing in Total's publicity material or in other documents relating to the TOPS

scheme which says that the vouchers operate as reductions of the prices already paid. I will call that "the absence of reduction labelling point". Second, Mr Macnab says that what Total provides to qualifying customers is not money but vouchers. I will call that "the vouchers, not money, point".

63. It is, I think, confirmed by answers which Mr Macnab gave to questions from me that he relies on these two points in combination, not separately. One question I asked was this: suppose the scheme had said that for every 5,000 points which a customer accumulated, Total would reimburse him £5 against the prices which he had already paid, but the reimbursements would take the form of £5 vouchers issued by leading retailers, not money. What would have been the VAT position? While Mr Macnab did not specifically accept that in that case the amount on which Total would be liable to output tax should be, not £1,000, but £995 or £995.50, he stopped short of submitting positively that it should be £1,000. He acknowledged that there was a possible argument that it should be the lower figure. Total's documents would have expressly said something which labelled the vouchers as being reductions of Total's receipts from sales of fuel, and there was at least a case to be made that therefore the consideration subject to VAT was reduced correspondingly.
64. A second question I asked was this: suppose that the scheme had been exactly as it was except that it provided for Total to "pay" (not using words like "refund" or "reimburse" or "repay") £4.50 in money to a customer for every 5,000 points, what would the VAT position be? Mr Macnab's answer was that Total would be liable to pay VAT by reference to £995.50, not by reference to £1,000. It would be obvious that the £4.50 reduced Total's receipts from sales of fuel, so the point did not need to be specifically spelt out.
65. Thus on HMRC's case, there is at least an argument that Total does not fail to secure the treatment it wants merely because the scheme is a voucher scheme, not a money scheme, as long as the scheme is labelled in some way as a refund or repayment or reimbursement scheme. Nor does Total fail to secure that treatment merely because the scheme is not labelled as a refund or repayment or reimbursement scheme, as long as it is a money scheme rather than a non-money scheme like a voucher scheme. But if it is a voucher scheme and nothing expressly labels it as a refund or repayment or reimbursement scheme, Total must pay VAT by reference to £1,000, not by reference to £995.50.
66. I am unattracted by Mr Macnab's submissions in those respects. I appreciate that he relies upon the two points (the non-reduction labelling point and the vouchers, not money, point) in combination, but I think that in the first instance I need to consider each point separately. The absence of reduction labelling point places reliance on the absence of anything which specifically says that the vouchers operate as partial

refunds to customers of what they have paid, or, for that matter, which specifically says that the vouchers operate as partial reductions of what Total has received. But, as it seems to me, the vouchers cannot realistically be viewed as anything else. The only reason why Total is willing to transfer a £5 voucher to a customer without receiving any further payment from the customer is that the customer has already bought and paid for 1,000 litres of fuel. In the case of a Total site, the customer has paid Total for 1,000 litres. In the case of the dealer site, the customer has not paid Total, but the fuel for which the dealer has paid Total includes the 1,000 litres which the dealer sold on to the customer.

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.
68. My view on this point is, I believe, supported by a concession which Customs and Excise made in *CCE v Euphony Communications Limited* [2004] STC 301. The company provided telecommunications services, and had a network of consultants to whom it paid commissions for business introduced by them to the company. Most of the case was about the VAT treatment of commissions paid by reference to sales by Euphony to third parties introduced by the agents. But sometimes the agents made purchases from Euphony for themselves. In those instances, Euphony invoiced the agents in full for the normal price of the goods or services, but then made payments to the agents which it labelled as "commissions". In the High Court, Customs and Excise conceded that, despite the label, the payments were not commissions at all. Rather they were post-supply reductions of the consideration paid by the agents for the supplies to them. In my opinion the concession was correctly made, and is consistent with Total's proposition that its transfers of vouchers to customers should be analysed by reference to their inherent nature, not by reference to whether there is any particular label attached to them.
69. I turn to the vouchers, not money, point. Mr Walters submitted that the vouchers were sufficiently close to being money for it to make no difference. I take the point that the vouchers are different from the goods, like television sets, which could be claimed by customers under the Kuwait Petroleum scheme. Nevertheless the vouchers are not money. They are choses in action. Mr Macnab said in his skeleton that a £5 Boots voucher "entitles a customer to obtain £5 worth of goods and/or services to be supplied by Boots". That is almost correct but not precisely so, and it may be important in a case like this one to be

precise. A voucher is not a right to obtain goods or services from Boots: Boots provides that right (or, as a jurisprudential student of Hohfeld might express it, that 'liberty') to all and sundry, whether they have vouchers or not. Rather a Boots voucher is a right to have the price payable to Boots for goods or services satisfied in whole or in part by an amount equal to the face value of the voucher.

70. Even on that formulation, I agree with Mr Macnab that a voucher is not itself money. But in my judgment, 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 that is so if there is some element clearly expressed in monetary terms within the 'kind' which operates as a reduction in the taxable consideration.
71. Consider the converse situation where the question is whether any taxable consideration is received in the first place. Suppose that a trader supplies goods or services and is willing to accept for them payment in kind as well as in cash. A customer offers payment in vouchers which give rights against a third party and the trader accepts the vouchers. Is the trader liable to account for VAT on an amount representing the value of the vouchers? The answer is obviously yes.
72. If the trader in that example later, for whatever reason, makes a refund to the customer and the refund is made in money, not in vouchers, will the taxable consideration for the trader's supply be reduced by the amount of the refund? Again I say: obviously yes, and I would be very surprised if HMRC said anything different. That would be a case in which the trader makes a supply of goods or services for a consideration in kind, not in money, and later makes a partial refund in money, not in kind. I assert that the consideration upon which the trader is finally liable to account for output tax in respect of his taxable supply is the value of the consideration in kind less the amount of the refund in money.
73. The present case is the converse. The trader (Total) makes a supply of goods (fuel) for a consideration in money, not in kind. A condition of the supply is that Total may later be liable to make, in kind and not in money, a transfer which would be in effect a partial refund of the consideration previously received. I believe that the consideration upon which Total is finally liable to account for output tax in respect of the taxable supply of fuel which it had made is the amount of the consideration in money less the value of the refund in kind. In some cases of that sort there could be questions about how the value of the refund in kind should be quantified. In this case, however, there is no difficulty. In respect of one voucher the only possibilities are £5 or £4.50. Total claims only the lower of the two figures (see paragraph 14(1) above), so there is no quantification issue to which HMRC could take exception.

74. Hitherto, I have evaluated the vouchers, not money, point as a matter of principle. The views which I have expressed are supported by authority. There are two cases to which I will refer. The first is *Goldsmiths (Jewellers) Limited v CCE*, Case C-330/95, [1997] STC 1073, a decision of the CJEC about a point arising mainly under article 11C(1) of the Sixth Directive. That provision is mentioned by the CJEC in *Elida Gibbs*, although I have expressed the view earlier that the true basis of the decision in that case is article 11A(1)(a), not article 11C(1).
75. The facts of the *Goldsmiths* case are different from the facts of this case. Nevertheless, it arises in an area of VAT law which has affinities to the issues in this case, and, as the quotation which I am about to give shows, the court had in mind article 11A(1)(a) as well as article 11C(1). The CJEC, rejecting submissions of the United Kingdom Government, said, among other things, the following (see paragraph 23 of the decision):

“Second, no distinction between consideration in money and consideration in kind is drawn in either article 11A(1)(a) or article 11C(1), as is apparent from the judgment in *Naturally Yours* [reference] ... for those provisions to apply it is sufficient if the consideration is capable of being expressed in money (see also *Empire Stores Limited v Customs and Excise Commissioners* [references]). Since the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way.”

I would only add that the same principle of treating considerations in money and considerations in kind in the same way should surely apply just as much where what is in issue is whether an amount ranks as a reduction in consideration already received as it does in determining the amount of the consideration initially received in the first place.

76. The second case is the decision of Laddie J in *Kuwait Petroleum*, the case which I have described earlier and to which I will return before I conclude this judgment. Kuwait Petroleum was seeking to argue that the transfers by it of goods (for example television sets) to customers who had made enough purchases of fuel operated under article 11C(1) to reduce the taxable consideration for supplies of fuel which it had made. (In my view the argument could have been, and possibly was, based on article 11A(1)(a) as well as on article 11C(1).) The argument did not succeed in the end, but one challenge to it which the Judge rejected was that, if the original consideration had been money, only a repayment of money could count as a reduction for VAT purposes. He describes the argument in somewhat unsympathetic terms in paragraph 40 of his judgment, to which I refer an interested reader of this judgment although I will not reproduce it myself. Laddie J rejects the argument in paragraph 41, which is as follows:

“There is nothing in the legislation which requires this narrow construction of article 11C and in my view there is nothing to

commend it. What article 11C requires is a price reduction. That can be achieved either by reimbursement of money or, in accordance with *Goldsmiths*, money's worth.”

77. Before I leave the two points which I have called the absence of reduction labelling point and the vouchers, not money, point, there is one other thing to say. I have evaluated each point by itself and concluded that in itself it does not refute Total's case. As I have said Mr Macnab relies on the two points together, but in my judgment they have no greater force in combination than they have separately. Mr Walters refrained from saying “nought plus nought still equals nought”, but that proposition often has validity, forensic cliché though it may sometimes be. In my judgment it is fully applicable to this case.
78. I need to consider another submission which Mr Macnab made. He submitted that in this case there were two economic transactions, not one, and that therefore Total's transfer of vouchers to customers who had made purchases of fuel could not operate to reduce the taxable consideration for the supplies of fuel. The reference to two economic transactions comes from the decision of the CJEC in the *Kuwait Petroleum* case. In paragraph 28 of the decision, the court says:

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

As I have mentioned earlier (see paragraph 42 above), the CJEC was not concerned with the VAT consequences of Kuwait Petroleum's supplies of fuel to customers. It was concerned with whether VAT consequences attached to Kuwait Petroleum's supplies of goods like television sets to customers who had accumulated sufficient stamps upon earlier purchases of fuel. That question turned on whether the goods were transferred to customers “free of charge”. Kuwait Petroleum was arguing that they were not transferred free of charge because the prices originally paid for fuel should be apportioned and part of those prices regarded as having been paid, not for the fuel, but for the goods (eg television sets) obtained under the scheme. As part of Kuwait Petroleum's argument it was submitting that an earlier purchase of fuel and a later transfer of goods like a television set should be wrapped up together and treated as one global transaction whereby, in return for money paid by the customer to Kuwait Petroleum, the customer got both fuel and, for example, a television set. That was the argument which the CJEC was rejecting by making the point that there were two economic transactions.

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. (What I have said on this “two economic transactions” argument has affinities to my comments in paragraph 53 above on the Tribunal's observations about there having been “two chains of supply” in this case.)

80. For all of the foregoing reasons I conclude that, apart from Laddie J's judgment in the Kuwait Petroleum case, the Tribunal's decision was incorrect, and that the appeal should be allowed.

Laddie J in Kuwait Petroleum

81. As I have said, most of Laddie J's judgment is directed to an unsuccessful attempt by Kuwait Petroleum to argue that, despite discouraging observations of the CJEC, part of the price paid by customers for the fuel was in truth paid for what were called “redemption goods” (like television sets). Thus most of the judgment related to article 5(6) of the Directive and its application to Kuwait Petroleum's supplies of redemption goods. It did not relate to article 11 of the Directive, and to that article's application to Kuwait Petroleum's supplies of fuel.
82. Laddie J deals with Kuwait Petroleum's article 11 argument comparatively briefly towards the end of his judgment in paragraphs 36 to 44. Paragraphs 36 to 39 describe the argument. Paragraphs 40 and 41 reject one response to it. I have already dealt with this point (see paragraph 76 above). It was the unsuccessful submission by counsel for Customs and Excise that, if the original consideration from the customer to Kuwait Petroleum was money, only a payment of money by Kuwait Petroleum to the customer could operate as a reduction of that consideration.
83. Kuwait Petroleum's general submission was that the redemption goods operated pursuant to article 11A(1)(a) or article 11C(1) to reduce the taxable consideration for its supplies of fuel. The reasons why Laddie J did not accept the submission are in paragraphs 42 to 44 of the judgment. I will not reproduce the paragraphs here. They can be read in the report. The extent to which I regard them as persuasive upon me is diminished by the feature, which I have mentioned earlier, that the Court of Appeal later held that the Judge ought not have dealt with the

argument at all. However, I find that in any case I cannot agree with the reasons which the Judge gives.

84. He makes three principal points.

(1) In paragraph 42 and again at the end of paragraph 43 he says that Kuwait Petroleum's argument that article 11 applied would be inconsistent with article 5(6), which he had already held to have applied to the supplies of the redemption goods which Kuwait Petroleum had made. I have two points to make in relation to this.

(a) The TOPS scheme does not involve Total making any supplies to which article 5(6) applies. Total transfers vouchers, not goods, to customers who have accumulated enough points, and, for reasons which I explained earlier (see paragraph 22 above), article 5(6) does not apply to the transfers of vouchers.

(b) In any case, Laddie J seems to have proceeded on the footing that, if Kuwait Petroleum's article 11 argument was correct, it would apply to the same supplies as were covered by the article 5(6) charge, and would neutralise the effect of article 5(6). That however is not the case. The article 5(6) charge applied to the redemption goods (the television sets and the like). It was intended to neutralise and did neutralise Kuwait Petroleum's deduction of input tax on the supplies to it of those goods by outside suppliers. If Kuwait Petroleum was right in its article 11 argument, that article would not have applied to any supply of the redemption goods, either to Kuwait Petroleum by outside suppliers or by Kuwait Petroleum to purchasers of fuel. Rather it would have applied to the earlier supplies of fuel which Kuwait Petroleum had made to customers who, because of those supplies, were entitled to receive redemption goods. The application of article 11 to those earlier supplies of fuel would have no effect on the way in which article 5(6) applied to the later supplies of redemption goods.

(2) In paragraph 43 of his judgment, Laddie J says:

“If the answer to the first question is that the parties thought that the [redemption] goods were being given away free, it is difficult to see how they could have been of the view that they were being supplied as a form of price reduction of the premium goods [the fuel].”

Respectfully, I cannot agree. In the first place, although the redemption goods were transferred to customers free of charge, it is not really right to think of them as being given away free. I have already expressed my views on this point (see paragraph 14(4) above). The goods were transferred to customers free of charge because Kuwait Petroleum's scheme required Kuwait Petroleum to do that. It was a business matter and a contractual matter. In the second place, if the parties applied their minds to the question of why Kuwait Petroleum had introduced a scheme under which it could be required to transfer goods to customers

without charge, the obvious answer would have been: because the customers who qualified to receive the goods would have bought significant quantities of fuel and would have paid for them at the full prices charged at the pumps.

(3) In paragraph 44 of Laddie J's judgment he said that the CJEC in the *Kuwait Petroleum* case had accepted that the provisions of article 5(6) constituted an exception to the neutrality principle as set out in *Elida Gibbs*. The fault may be mine, but I cannot see that the CJEC accepted anything of the sort. The CJEC, in its judgment in *Kuwait Petroleum*, does not mention *Elida Gibbs* anywhere. Nor can I find any reference to the neutrality principle.

85. Accordingly, Laddie J's judgment in the *Kuwait Petroleum* case does not cause me to change my view that Total's submissions about article 11 and the *Elida Gibbs* case are correct and that the Tribunal's decision was wrong.

Conclusion

86. For the reasons which I have explained in this judgment, I allow Total's appeal.
87. There is one postscript. Each counsel said to me that, if I was unable to accept his submissions, I should refer questions to the CJEC rather than decide the case myself. I am not going to do that. In my view the relevant principles of Community law have already been explained by the CJEC. The question in this case is one of how those principles apply to the particular facts of Total's scheme. I believe that that is a question for the national court to decide. I have decided it. My decision may of course be right or wrong. Obviously I believe that it is right. But I also believe that the issues raised in Total's appeal are for the national tribunal and courts to decide, and that a reference to the heavily burdened CJEC is neither necessary nor desirable.

[END OF JUDGMENT]

That is the end. Thank you to everyone for listening. That took a very long time.

MR WALTERS: My Lord, on behalf of Total, I apply for an order for costs against my learned friend's clients. Could I just mention one slip of the tongue.

SIR ANDREW PARK: Yes, sure. There is probably more than one. Did I omit the word "not" or something?

MR WALTERS: No, no, your Lordship put in exactly enough “not”s and none more than enough. Just before you reached the conclusion, you did in fact say, contrary to what is written in the text, that Total’s decision was wrong. What you meant was that the Tribunal’s decision was wrong.

SIR ANDREW PARK: The Tribunal’s decision was wrong. Yes.

MR WALTERS: I just say that for the transcript.

SIR ANDREW PARK: Thank you very much. Yes. Just about costs: are you applying for costs here and in the Tribunal, or here only?

MR WALTERS: Here and in the Tribunal.

SIR ANDREW PARK: Was there an order for costs made in the Tribunal against Total and in favour of -- it may not make any difference.

MR WALTERS: No, there was not an order for costs made against --

SIR ANDREW PARK: So there was no application for costs made against you in the Tribunal.

MR WALTERS: That is right. That is in accordance with their usual practice in cases of this sort.

SIR ANDREW PARK: Yes. I am sorry, in lots of places – I know perfectly well how you spell your name. I am sorry for getting it wrong.

MR MACNAB: I say no more about that, my Lord. I am obliged to see that your Lordship did get the spelling right in certain places.

SIR ANDREW PARK: Did I get it right at the beginning where I first mentioned it?

MR MACNAB: You did, my Lord. My Lord, I realise that I cannot resist anything in relation to costs.

SIR ANDREW PARK: Including in the Tribunal? I think that probably does follow.

MR MACNAB: That is what normally happens, my Lord. So I cannot resist that.

SIR ANDREW PARK: All right.

MR MACNAB: There is a preliminary point I would like to make for the record and while the tape is running, and I realise this is not going to change your Lordship’s judgment, but I would nonetheless like to have

it somewhere recorded for posterity. On page 51 of your Lordship's manuscript version, you say that:

“It is, I think, confirmed by answers which Mr Macnab gave to questions from me that he relies on these two points in combination, not separately. One question I asked was this: suppose the scheme had said that for every 5,000 points which a customer accumulated, Total would reimburse him £5 against the prices which he had already paid, but the reimbursements would take the form of £5 vouchers issued by leading retailers, not money. What would have been the VAT position? Mr Macnab accepted that in that case, the amount on which Total would be liable to output tax should be not £1,000 but £995 or £995.50.”

My Lord, certainly that is not my recollection of the point that I accepted in response to your Lordship. I think this relates to a matter that I put in paragraphs 15 and 16 of my skeleton argument, in which I had said:

“The terms of the TOPS scheme state nothing to suggest that the provision of the Boots voucher was or was envisaged as a reduction in price of past supplies of fuel. Likewise there is nothing in the surrounding facts or circumstances to suggest that the provision of the Boots voucher was or was envisaged as a reduction in price of past supplies of fuel or that the substance in reality of the TOPS scheme was or is any different from its terms.”

My Lord, my recollection of my answer to your Lordship's question was that in the circumstances posited, namely that the scheme says, “If you buy X thousand litres, we will give you a price reduction in the form of a Boots voucher”, that that would be a much more interesting case than the present case, because in those circumstances the substance of the transaction would appear to differ from the form. So, my Lord, I believe that was my response to your Lordship's question.

SIR ANDREW PARK: Well, it was a pretty important question and it seemed to me a pretty important answer. And I remember in Mr Walters's reply, he reminded me of it, and you did not dissent at that stage from what he had said. However, if you would like me -- I will put something in to the effect that I may have misunderstood.

MR MACNAB: I am obliged, my Lord. But certainly my recollection was that my approach to that particular question, my answer to that question was somewhat different, and that that was in effect -- I think that my answer would have been, if it were correct that it was a price reduction, then it would be a price reduction of the amount that is indicated, the £4.50 or whatever, but in relation to the matter of principle, it would be an instance in that case where one would have to consider what the form was of the scheme and then compare it to the substance of the scheme to see whether indeed as a matter of substance it really was a price reduction. My Lord, I believe that all of that submission would tie in with the rest of my submissions.

SIR ANDREW PARK: Well, the thrust of what I was asking was: if what comes back to the customer is not money but a voucher, but somehow or other he is told, "you will get something back but it will be a voucher, not money", does that count, and I think the answer was, "Oh yes, in that case it would count". If you want me to say that that is what I thought but I may have misunderstood and that you did not intend to put it as directly as that, I will happily make an amendment to the transcript.

MR MACNAB: My Lord, I certainly would appreciate that, because I certainly would not accept that --

SIR ANDREW PARK: Yes. You would not be bound by it anyway, if you want to say to the Court of Appeal that whether you said that or not, you do not say it any more, you are fully entitled to do that.

MR MACNAB: I certainly would not accept the proposition as broadly as it is put there, which is: "We will give you a price reduction in the form of a face value voucher that does not in fact -- you cannot redeem with us at all but you have to go to some third party retailer". There may, my Lord, have been a debate as to whether or not, if one hands back a voucher that can be used at Total --

SIR ANDREW PARK: Well, that was not the subject matter of the question I asked. You may have understood it in that sense, but I am quite sure that is not what I asked, because it was not what I was interested in. But I will tinker around in the transcript with the wording of that paragraph. Whether you said it or not, you do not want to be tied to it.

MR MACNAB: I do not want to be tied to it, my Lord, no.

SIR ANDREW PARK: I had better ask Mr Walters whether he wants to say anything about that point, but that is what I will do.

MR WALTERS: My Lord, I do not want to say anything about it.

SIR ANDREW PARK: Do you have any recollection of it yourself?

MR WALTERS: I do have a recollection of my learned friend saying that it would be a more interesting case.

SIR ANDREW PARK: So maybe I have gone too --

MR WALTERS: I do recollect that.

SIR ANDREW PARK: Thank you for that. That makes it all the more appropriate.

MR MACNAB: I am very much obliged to my learned friend. The second matter, my Lord, concerns permission to appeal. I do not have

any chance to ask your Lordship for it, but what I would ask, my Lord, is that the Commissioners be granted an extension of time for seeking permission from the Court of Appeal. Given that the judgment is to be transcribed --

SIR ANDREW PARK: Yes. I suggest that you should ask for a period after the edited version of the judgment is available.

MR MACNAB: My Lord, I would propose 28 days after the edited transcript had been provided.

SIR ANDREW PARK: That is what I thought you would ask for. As far as I am concerned, I would without hesitation give you that. There is presumably no problem over that?

MR WALTERS: No

SIR ANDREW PARK: Yes, of course I will give you that.

MR MACNAB: I am obliged, my Lord.

SIR ANDREW PARK: Which means incidentally that a minute of order will be prepared for this morning, which the Associate will do. You might just between you have a quick look at that particular paragraph and see that it covers that provision.

MR MACNAB: Would you prefer us to submit a minute?

SIR ANDREW PARK: Yes, let us do that.

MR MACNAB: I will leave that to my learned friend.

SIR ANDREW PARK: Anything more?

MR MACNAB: Nothing further, my Lord.

SIR ANDREW PARK: All right.

(12.55 pm)

(The Court adjourned)