Neutral Citation: [2024] UKFTT 00948 (TC)

Case Number: TC09329

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Taylor House, London

Appeal reference: TC/2021/02828

VALUE ADDED TAX – Article 90(1) Directive 2006/112/EC – whether payments to the Department of Health and Social Care by a supplier of medicines under voluntary price control schemes reduced the consideration obtained by the supplier and the taxable amount of the supplies – if consideration is reduced by payments under the schemes, whether the supplier would be unjustly enriched by a repayment of overpaid VAT – appeal allowed

Heard on: 13 - 16 May 2024
Judgment date: 21 October 2024

Before

TRIBUNAL JUDGE GREG SINFIELD

Between

BOEHRINGER INGELHEIM LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Kieron Beal KC, instructed by PricewaterhouseCoopers LLP

For the Respondents: John Brinsmead-Stockham KC with Sarah Black, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION AND ISSUES

1. Boehringer Ingelheim Limited ('BIL') supplies branded pharmaceutical products ('health service medicines') to the National Health Service ('NHS'). In this decision, 'NHS' includes NHS trusts, retail pharmacies and NHS healthcare entities. BIL supplies health service medicines to the NHS either directly or indirectly through wholesale distributors. The majority of BIL's supplies are to wholesale distributors in the UK. The supplies of health service medicines to wholesalers in the UK are chargeable to VAT at the standard rate. The amount of VAT chargeable is calculated by reference to the 'taxable amount' in respect of the supply. Article 73 of Directive 2006/112/EC (the 'Principal VAT Directive' or 'PVD') defines 'taxable amount' as including "everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party".

2. Between 2014 and 2020, BIL made payments to the Department of Health and Social Care ('DHSC') under two voluntary schemes. The voluntary schemes were the Pharmaceutical Price Regulation Scheme ('PPRS') and the Voluntary Scheme for Branded Medicines Pricing and Access ('VPAS'), (together the 'Schemes'). The payments were calculated as a percentage of net sales and were made after the supplies of health service medicines had been made. The purpose of the Schemes was to control the prices of the health service medicines.

3. Article 90(1) of the PVD provides that "… where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly …". In 2018, BIL took the view that the amounts paid to the DHSC should have been treated as reducing the price of its supplies of health service medicines to the NHS and thus the VAT chargeable. As BIL had accounted for VAT on the full price of the medicines, BIL considered that it had a claim under section 80 of the Value Added Tax Act 1994 ('VATA94') for repayment of overpaid output tax. BIL submitted five error correction notices claiming repayments of VAT charged between 1 April 2014 and 30 September 2020. The total amount claimed was £21,488,166.66.

4. In January 2021, the Respondents ('HMRC') rejected BIL's claim on the ground that the payments made to the DHSC under the Schemes did not reduce the consideration obtained by BIL for the supply of the health service medicines. That decision was reviewed and confirmed in July 2021. BIL appealed to the First-tier Tribunal (Tax Chamber) ('FTT').

5. The first issue in this appeal is whether the amounts paid by BIL to the DHSC under the Schemes reduced the price obtained by BIL in return for the supplies of health service medicines and therefore the taxable amount of those supplies. BIL contends that Article 90(1) applies and the value of its supplies should be reduced by an amount equal to the payments to the DHSC. HMRC submit that Article 90(1) cannot apply in the circumstances of this case because:

(1) the DHSC was not the final consumer of the health service medicines supplied by BIL;

(2) even if the DHSC was or could be regarded as the final consumer, there is not a sufficient link between the payments under the Schemes and the supply of the health service medicines; and

(3) reducing the taxable amount of supplies by BIL which were subsequently used to make zero-rated supplies would lead to a distortion of the principle of fiscal neutrality.

6. If I reject the first and second points above but accept HMRC's third argument, I can only give a decision in principle and leave the parties to try to agree the quantum of BIL's surviving claim with permission to return for a further hearing on quantum if they cannot reach agreement.

7. If BIL succeeds on the first issue, HMRC had an alternative argument. HMRC contended that BIL would be unjustly enriched by any repayment and thus HMRC would have a defence to the claim by virtue of section 80(3) VATA94. BIL said that section 80(3) was not engaged because, although it uses the words "unjustly enrich", it is actually a defence of passing on and this is a refund or rebate case.

8. For the reasons set out more fully below, I have decided that the payments made by BIL to the DHSC under the Schemes reduced the value of the consideration received by BIL for its supplies of health service medicines and thus also reduced the taxable amount of such supplies. I have also decided that any repayments of VAT would not unjustly enrich BIL. Accordingly, BIL's appeal is allowed.

EVIDENCE

9. There was no material dispute as to the facts in this case and the parties produced a helpful statement of agreed facts. I also had witness statements and heard evidence from three witnesses:

(1) Benjamin Moynihan, Finance and Administration Director of BIL;

(2) Ben Day, a member of the NHS England Strategic Finance and Planning team; and

(3) Stephen Hennigan, a member of the DHSC Medicines Pricing Team.

10. Mr Moynihan gave evidence for BIL while Mr Day and Mr Hennigan were called by HMRC. In all cases, the witnesses' statements stood as their evidence in chief and they were cross-examined. I found all the witnesses to be credible and fully accept their evidence as to the facts although I have not found it necessary to refer to every aspect of their testimony in this decision. I was also provided with a 1,315 page bundle of documents for the hearing.

11. On the basis of the agreed facts, the witness evidence and the documents, I find the facts relevant to this appeal to be as set out below.

LEGAL AND REGULATORY FRAMEWORK FOR PRICE CONTROL OF HEALTH SERVICE MEDICINES

12. The National Health Service Act 2006 (the 'NHS Act') imposes a duty on the Secretary of State for Health and Social Care to provide a comprehensive health service designed to ensure improvement in the health of people in England and the prevention and diagnosis of illness. The National Health Service (Wales) Act 2006 and the National Health Service (Scotland) Act 1978 impose equivalent duties on the Welsh Ministers and the Scottish Ministers, but the pricing of health services medicines is a matter reserved to the UK Government.

13. The DHSC is the government department established to assist the Secretary of State in managing and delivering a comprehensive health and social care service. The Secretary of State presides over the DHSC and is responsible for its work. The Secretary of State and the DHSC are responsible for overseeing the pricing of health service medicines supplied to the NHS.

14. The sections of the NHS Act which are relevant to this appeal are found in sections 260 to 266, which are headed "Price of medical supplies". Section 271(1) of the NHS Act states that the functions of a Minister of the Crown under the NHS Act are exercisable only in relation to England. However, section 271(3)(i) provides that section 271(1) does not apply

to sections 260 to 266. Accordingly, sections 260 to 266 of the NHS Act apply equally to the health service medicines supplied to the NHS in Northern Ireland, Scotland and Wales.

15. Section 261 of the NHS Act applies where there is a "voluntary scheme" for one or more of the following purposes:

> (1) limiting the prices which may be charged for the supply of health service medicines by any manufacturer or supplier to whom the scheme applies;
>
> (2) limiting the profits made on the supply of health service medicines by any manufacturer or supplier to whom the scheme applies; and
>
> (3) requiring any manufacturer or supplier to whom the scheme applies to pay to the Secretary of State, ie the DHSC, an amount calculated by reference to sales or estimated sales of any health service medicines.

16. Section 261(8) also provides that the Secretary of State may prohibit any manufacturer or supplier to whom the scheme applies from increasing the price of any health service medicine without the Secretary of State's approval and, where this is contravened, for payment of any increase to the Secretary of State.

17. Sections 262 to 264 of the NHS Act enable the Secretary of State to make a statutory scheme or schemes to limit the price that may be charged by any manufacturer or supplier for health service medicines and for payment of any excess to the Secretary of State. Section 262(2) provides that a manufacturer or supplier of health service medicines which has joined a voluntary scheme cannot be required to make a payment under a statutory scheme. Since the statutory scheme was originally introduced on 1 January 2009, the mandatory payment has fluctuated between 3.9% and 15% of net sales.

18. This appeal is not concerned with any of the statutory schemes that were in place during the period from 1 April 2014 to 30 September 2020 and so, although I was provided with details of the statutory schemes in place between 2008 and 2020, I do not need to consider them in any detail. The objectives of the statutory scheme and the voluntary schemes were broadly the same, but the statutory scheme was more administratively onerous and generally required a higher prescribed annual rebate. For example, in 2020, manufacturers and suppliers of health care medicines subject to the statutory scheme were required to make a payment equal to 7.4% of the net sales income. Under the voluntary scheme, the prescribed annual percentage for 2020 was 5.9%. It was, therefore, often preferable for a manufacturer or supplier of health service medicines to join the voluntary schemes rather than be subject to the statutory scheme.

19. The relevant voluntary schemes during the period from 1 April 2014 to 30 September 2020 were the PPRS and the VPAS. BIL was a member of the PPRS and VPAS in turn throughout the period relevant to this appeal. For the purposes of this appeal, nothing turns on any fine distinction in the ways the two schemes operated. The parties agreed that the PPRS and VPAS were essentially the same and operated in materially the same way. Members of the voluntary schemes were required to make payments to the DHSC if and to the extent that the annual growth of their net sales income from health service medicines exceeded a specified percentage. The payment was calculated, in simple terms, by multiplying the relevant percentage under the voluntary schemes by the sales within the scope of the scheme (ie the net sales of health service medicines). These payments were made in quarterly instalments to the DHSC, at the same time as submission of quarterly sales reports under the voluntary schemes.

20. The PPRS came into force on 1 January 2014. The parties to PPRS were the DHSC (acting on behalf of the UK Government and the governments of Scotland, Wales and

Northern Ireland), NHS England, the Association of the British Pharmaceutical Industry ('ABPI') and various manufacturers of branded health service medicines which joined the scheme.

21. The specific terms of the PPRS were set out in guidance published by the DHSC on 17 December 2013 titled "The Pharmaceutical Price Regulation Scheme 2014" (the 'PPRS Guidance Document'). The PPRS Guidance Document explained that:

> "… scheme members will make percentage payments. The percentage will be derived from the difference between allowed percentage growth and actual percentage growth in NHS expenditure on branded medicines."

22. The "allowed percentage growth" was predetermined by the PPRS and the "actual percentage growth" was calculated by reference to the scheme member's profit on health service products supplied to the NHS. The PPRS Guidance Document refers to the scheme as a "portfolio wide profit regulatory scheme", the purpose of which was to prevent scheme members from supplying health care medicines to the NHS at prices in excess of what the Secretary of State (acting through the DHSC) considered to be a reasonable price.

23. The PPRS Guidance Document stated at paragraph 1.4.1:

> "The scheme is a single, holistic, UK pricing agreement covering all the relevant key issues that underpin the pricing of NHS branded medicines."

24. The VPAS came into force on 1 January 2019 following the expiry of the PPRS. The parties to the VPAS were the DHSC (acting on behalf of the UK Government and the governments of Scotland, Wales and Northern Ireland), NHS England, the ABPI and various manufacturers or suppliers of branded pharmaceutical products who joined the scheme.

25. The details of the scheme and its operation were set out in a paper titled "The 2019 Voluntary Scheme for Branded Medicines Pricing and Access" dated December 2018 (the 'VPAS Policy Paper'). The VPAS Policy Paper incorporated an "Affordability Mechanism" (the PPRS adopted a similar approach but did not use the term "affordability mechanism"). The Affordability Mechanism was:

> "… designed to cap branded medicines' Sales at an agreed level of growth. Any growth in Sales above this level results in payments made by the Scheme Members, determined as a percentage of Sales."

FACTUAL BACKGROUND

26. BIL is established and registered for VAT in the United Kingdom. In the course of its business, BIL supplied health service medicines to the NHS either directly or indirectly through wholesale distributors. The vast majority of BIL's supplies were to wholesale distributors in the UK and the majority of the health service medicines supplied were used by the NHS. BIL's supplies of health service medicines were chargeable to VAT at the standard rate. BIL supplied some products for direct export to wholesalers in Ireland, Gibraltar and Malta but these were excluded from the Schemes. Some of the UK wholesalers would export the health service medicines but Mr Moynihan said that the volume would be low, perhaps 1% or 2%. In some instances, the final supply of pharmaceutical products to the patient by the NHS was a zero-rated supply of drugs in accordance with Item 1 of Group 12 of Schedule 8 to the VATA94.

27. As a member of the Schemes, BIL was required to review its net sales made on a line-by-line basis and submit a return to the DHSC and make payments in accordance with the Schemes. The payments were based on BIL's UK-wide sales. BIL was responsible for ensuring that the return accurately reflected the value of its net sales to the NHS. BIL's data was audited annually by an independent auditor and BIL was liable to make a lump sum

payment in the event that an under-payment was identified or, alternatively, a lump-sum payment would be made to BIL where it had overpaid.

28. Mr Moynihan said that BIL booked rebate payments made under the Schemes as a discount against the 'sales' line in its accounts. The rebate payments were booked against this line on a monthly basis at an average rate (which was possible given the certainty of the rates under the Schemes) with adjustments as required when quarterly returns were prepared.

29. BIL paid the amounts due under the Schemes to the DHSC and not direct to the NHS. Payments made to the DHSC went into the DHSC's overall budget. The DHSC made payments to the devolved administrations for their share of the payments. NHS England received its share through the government's mandate to NHS England. The majority of the DHSC's budget was directly transferred to NHS England. For example, in 2019/20, the total allocated budget for the DHSC was £138 billion, of which £121 billion was transferred to NHS England.

30. Mr Day's evidence was that the expectation was that the income received by the DHSC in respect of England for the relevant financial year would be allocated to NHS England. The income generated by the Schemes and the statutory schemes was not ringfenced and not separately identified in the Financial Directions to NHS England.

31. BIL charged and accounted for VAT at the standard rate on its supplies of health service medicines in the period from 1 April 2014 to 30 September 2020. During that period, BIL made a number of payments under the Schemes. Between June 2018 and December 2020, BIL submitted a series of error correction notices claiming repayments of output tax that it had paid in respect of supplies of health service medicines during the relevant period. The repayment claims were made on the basis that Article 90(1) PVD applied and the payments made to the DHSC under the Schemes reduced the price of the supplies for VAT purposes.

32. On 29 January 2021, HMRC rejected the claim on the sole ground that the payments made by BIL to the DHSC under the Schemes did not reduce the price of the health service medicines or the VAT due on such supplies. That decision was reviewed and confirmed in a letter dated 1 July 2021. On 29 July 2021, BIL appealed to the FTT under section 83(1)(t) VATA94 (ie an appeal with respect to a claim for the crediting or repayment of an amount under section 80).

VAT LEGISLATION ON VALUE OF SUPPLY

33. Section 28(2) of the Finance Act 2024 provides that section 4 of the EU (Withdrawal) Act 2018, as variously amended, continues to have effect for the purpose of interpreting VAT law notwithstanding section 2 of the Retained EU Law (Revocation and Reform) Act 2023 (subject to an immaterial exception). This means that UK VAT and excise legislation will continue to be interpreted in the same way as it was before 1 January 2024 save that the principle of direct effect (which is not relied on in this case) no longer applies.

34. For VAT purposes, Article 73 PVD states that the "taxable amount" in respect of a supply of goods or services shall include:

> "... everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."

35. Article 78(a) provides that the taxable amount includes "taxes, duties, levies and charges" but not the VAT chargeable on the supply.

36. Article 79 provides that the taxable amount does not include, among other things, "price discounts and rebates granted to the customer and obtained by him at the time of the supply".

37. Article 90(1) deals with post-supply adjustments to the taxable amount and provides that:

> "... 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."

38. The above provisions of the PVD are implemented in the UK by section 19 and paragraph 4 of Schedule 6 to the VATA94. Both parties agreed that it is not necessary to refer to the provisions of the VATA94 which do (or must be taken to) conform with the PVD.

CASE LAW ON ARTICLE 90(1)

39. The parties' submissions focused on Article 90(1), which has been considered by the European Court of Justice ('ECJ') and the Court of Justice of the European Union ('CJEU') on several occasions. It is useful to summarise the main authorities and the principles to be derived from them before turning to the parties' submissions in this case.

40. In Case C-317/94 *Elida Gibbs Limited v Customs and Excise Commissioners* [1996] STC 1387 ('*Elida Gibbs*'), the ECJ decided that a manufacturer operating money-off coupon and cash back sales promotions could reduce the value of its taxable supplies by an amount equal to the amount of the money-off or cash back. The ECJ also held that the value of supplies to and by wholesalers, distributors and retailers between the manufacturer and the consumer remained unchanged. The ECJ set out the principles to be applied at paragraphs 26 - 31 of its judgment as follows:

> "26. By virtue of art 11A(1)(a) of the Sixth Directive [now Article 73 PVD], 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 (…).
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> 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.
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> 30. That interpretation is borne out by art 11C(1) of the Sixth Directive [now Article 90(1) PVD] 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."

41. Relying on the reference in paragraph 31 to "the first link in a chain of transactions which ends with the final consumer", Mr Brinsmead-Stockham submitted that *Elida Gibbs* was specifically concerned with leapfrog payments in a single chain of supply. Building on this and a passage from the Court of Appeal's judgment in *Total UK Ltd v HMRC* [2007] EWCA Civ 987 ('*Total*') and the CJEU's decision in Case C-300/12 *Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH* [2014] STC 991 ('*Ibero Tours'*), Mr Brinsmead-Stockham contended that the *Elida Gibbs* analysis only applies where there is a single chain of supply and a manufacturer or supplier higher up the chain pays a discount or rebate in relation to a specific supply to a person lower down the supply chain or regarded as in the supply chain. I return to this after I have considered *Total* and *Ibero Tours* below but, in brief, Mr Beal submitted that the ECJ was not saying in paragraph 31 that the principle of neutrality only applied where a taxable person was the first link in a chain of transactions which ends with a final consumer, with whom the taxable person had no contractual relationship but to whom the taxable person grants a discount or rebate in relation to specific supplies. In his view paragraph 31 was simply setting out how the principle applied on the facts of that case. He contended that must be so as, in *Elida Gibbs*, it was not possible to pinpoint specific supplies to specific customers claiming refunds and yet Article 90 was held to apply. I agree with Mr Beal's reading of paragraph 31 of *Elida Gibbs*.

42. Case C-427/98 *Commission v Germany* [2003] STC 301 ('*EC v Germany*') concerned the effect of a manufacturer's money off coupon promotion scheme on the value for VAT purposes of supplies by the manufacturer. The case arose because the EC Commission considered that Germany had not properly implemented the Sixth Directive as interpreted by the ECJ in *Elida Gibbs* in that German law did not provide for the taxable amount of the original supplier to be reduced where that supplier compensated a retailer for accepting a money off coupon from a customer in part payment for the goods. In *EC v Germany*, the Advocate General (Jacobs) made it clear in paragraph 28 of his opinion that the case was treated as a re-opening of the issues in *Elida Gibbs* before a Full Court of eleven judges (only three judges had given the decision in *Elida Gibbs*).

43. The ECJ, following the opinion of the Advocate General, affirmed the decision of the Court in *Elida Gibbs* and summarised the principles established by that case in paragraph 30 as follows:

> "… the concept of consideration in art 11A(1)(a) of the Sixth Directive had to be interpreted as the 'subjective' value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria. The court concluded that it would not be in conformity

> with that 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."

44. In *EC v Germany*, Germany and the UK argued that payment by the manufacturer as a third party should not lead to an adjustment of the value of the supply by the manufacturer to the retailer. The ECJ rejected the argument stating at paragraph 45 that:

> "… although the manufacturer may in fact be regarded as a third party as regards the transaction between the retailer who receives reimbursement of the value of the voucher and the final consumer, that reimbursement entails a corresponding reduction in the amount finally received as consideration for the supply by him and that consideration constitutes, pursuant to the principle of VAT neutrality, the basis for calculating the tax for which he is liable …"

45. The ECJ held that there was no contradiction between, on the one hand, including the value of the money-off coupon in the consideration paid by the final consumer to the retailer and, on the other, the reduction in the manufacturer's taxable amount. On the contrary, including the voucher amount in the value of the retailer's supply and reducing the value of the manufacturer's supply meant that the amount represented by the voucher was subject to VAT only once.

46. The ECJ concluded that, by not adopting the measures necessary to allow adjustment of the taxable amount of the taxable person who had effected reimbursement where money-off coupons were reimbursed, Germany had failed to fulfil its obligations under Article 11 of the Sixth VAT Directive.

47. The ECJ also held in *EC v Germany* at paragraph 64 that:

> "In particular, as regards normal intracommunity transactions the reason why the manufacturer using sales promotion schemes such as those at issue in the main proceedings is authorised subsequently to reduce his taxable amount is that the price paid by the final consumer includes VAT, and accordingly any reduction in that price likewise includes a VAT element. Conversely, where, owing to an exemption, the value stated on the money-off coupon is not chargeable to tax in the member state from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage, includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer."

48. Mr Brinsmead-Stockham submitted that the last sentence of paragraph 64 showed that, where the final supply in the transaction chain is zero-rated (or exempt), a rebate or discount from the manufacturer in respect of that final supply cannot include an element of VAT (in contrast to a discount or rebate in respect of a final supply that is standard rated). Such a discount or rebate therefore cannot have the effect of reducing the manufacturer's liability to account for output tax. Mr Beal said that the ECJ in *EC v Germany* was looking at intra-Community supplies and exports which were zero-rated (or exempt with refund) and not what happened in this case where certain supplies of NHS medicines by the NHS to patients were zero-rated. Mr Brinsmead-Stockham countered by saying that there was no reason why the ECJ's reasoning would not apply to domestic zero rated transactions as well as intra-Community supplies and exports.

49. I do not accept Mr Brinsmead-Stockham's submission that the *Elida Gibbs* analysis cannot apply wherever the final supply in a chain is zero rated or exempt. The key words in paragraph 64 are "where … the value stated on the money-off coupon is not chargeable to tax in the member state from which the goods are despatched, no price invoiced at that stage of the distribution chain, or at a later stage…". The money-off coupon is value given by the manufacturer to the consumer and, under Article 90(1), is a reduction in the "price invoiced at that stage of the distribution chain", namely the price invoiced by the manufacturer to the wholesaler or retailer next in the distribution chain. As the manufacturer has not charged VAT on its supply, any subsequent rebate given by the manufacturer cannot include VAT even if other suppliers, eg a retailer, charge VAT at a later stage of the supply chain. It seems to me that what the ECJ said in paragraph 64 of *EC v Germany* was simply that where the manufacturer has not charged or invoiced VAT, eg because the goods are exported or despatched to another Member State, the price does not include any VAT in relation to the manufacturer's supply at that stage of the supply chain or subsequently and thus any discount or rebate cannot reduce the value of the manufacturer's supply for VAT purposes. In my view, *EC v Germany* is not authority for the proposition that where a manufacturer has charged VAT, any discount or rebate to a final consumer does not reduce the value of the manufacturer's supply if the supply by the retailer to the final consumer was exempt or zero rated. In such a case, the manufacturer's supply still included VAT at their stage of the supply chain notwithstanding that VAT was not chargeable on the final supply. It would be contrary to the principle of fiscal neutrality, as explained by the ECJ, if the manufacturer were unable to reduce the value of its supply, which at all times remained taxable, by the amount of any discount or rebate simply because another supply further down the chain was exempt or zero rated. Such a result would mean that the manufacturer was required to account for VAT on more than it had ultimately received and retained for the supply.

50. Mr Brinsmead-Stockham relied on *Total* and *Ibero Tours* in support of the submission that the *Elida Gibbs* analysis does not apply where a taxable person makes a payment to another person in respect of a separate transaction (ie to a person that is not part of the relevant transaction chain). That proposition is not controversial but the facts of both cases were very different to the facts in this case so that, in my view, the comments of the Court of Appeal and the CJEU are of very limited assistance.

51. *Total* concerned a sales promotion scheme called the Total Oil Promotion Scheme ('TOPS'). Customers who joined the scheme obtained vouchers when they bought fuel at Total filling stations which could be used to pay for goods or services at certain retailers. Total argued that the value of the vouchers scheme reduced the taxable amount of its sales of fuel and claimed a repayment of VAT. In the Court of Appeal, Richards LJ, with whom the other LJJ agreed, held that the TOPS vouchers did not reduce the value of Total's supplies of fuel because they were not a discount or rebate but, on proper analysis by reference to the facts, a further supply of "something extra for the price … paid for the fuel". In [63], Richards LJ stated that:

> "The court's approach to that issue [in *Elida Gibbs*], however, was still premised on the fact that the discounts served to reduce the price paid by consumers for specific items purchased by them."

52. Mr Brinsmead-Stockham emphasised the words "the discounts served to reduce the price paid by consumers for specific items purchased by them" but, in my view, they must be read with care. At [61], Richards LJ said:

> "I find it helpful to talk in terms of what the customer pays even though the ultimate question under art 11A(l) [of the Sixth Directive, now Article 73 PVD], as [counsel for Total] 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);"

53. In my view, in [63], Richards LJ was not setting out a limitation to the *Elida Gibbs* principle but simply using language that reflected the facts of Total when discussing *Elida Gibbs*. The focus of the ECJ in *Elida Gibbs*, applying the Sixth Directive, was always on the consideration obtained by the supplier. In neither *Elida Gibbs* nor *EC v Germany* did the ECJ refer to discounts or rebates reducing the price paid by consumers for specific items or supplies. In my view, there is no requirement for the rebate to be linked to specific items purchased by consumers. What is required is that the rebate reduces the consideration finally received and retained by the supplier for the supplies of goods and services.

54. In *Ibero Tours*, a travel agent arranged for travel services to be provided by tour operators to customers. Ibero Tours' services did not fall within Articles 306 to 310 of the PVD (what is known in the United Kingdom as the Tour Operators' Margin Scheme). Ibero Tours provided intermediary services to the tour operators and, in return, the tour operators paid an agreed commission to Ibero Tours. In order to promote its business, Ibero Tours, on its own initiative, gave the customers a discount on the price of the travel service provided by the tour operator which Ibero Tours funded from its commission. Having first accounted for VAT on the whole of the commission, Ibero Tours applied to the German tax authorities for an adjustment so that the price reduction granted to the customers would be deducted from the taxable amount. This was refused, Ibero Tours appealed and the matter ultimately came before the CJEU.

55. The referring court had asked whether the principles established in *Elida Gibbs* applied in the case of Ibero Tours to allow it to reduce the price of its services. Unsurprisingly in my view, the CJEU held that they did not. That is because, as set out by the CJEU in paragraph 27, Ibero Tours granted a discount to the customers but the customers had not paid the commission on which Ibero Tours had accounted for VAT. Ibero Tours did not give any discount to the tour operator to whom it supplied intermediary services and from whom it received the commission on which it accounted for VAT. The fact that Ibero Tours paid the discount out of its commission had no impact on the price of the services it provided to the tour operator.

56. Mr Brinsmead-Stockham referred me to paragraphs 29 and 30 of *Ibero Tours*, the relevant parts of which are as follows:

> "29. … In the case which gave rise to the judgment in *Elida Gibbs*, the consideration received by the taxpayer, who was at the head of a chain of operations, was, in fact, actually reduced by the reduction granted by that taxpayer directly to the final consumer.
>
> 30 However, in the circumstances at issue in the main proceedings, the tour operator is not at the head of a chain of operations, as it provides its services directly to the final consumer, with Ibero Tours intervening as an intermediary in that single transaction only. Ibero Tours, however, provides a service, namely as an intermediary, which is totally separate from that provided by the tour operator."

57. From that, Mr Brinsmead-Stockham developed his submission that Article 90(1) only applies where a price discount or reduction is granted to a person or entity that was part of the transaction chain. I accept, of course, that Article 90(1) cannot reduce the taxable amount of a supply where the supplier makes a payment to another person that is not linked to that supply. That is the basis of the decision in *Ibero Tours*. The travel agent granted a discount to the customer which reduced the cost to the customer of the travel services supplied by the tour operator. It did not, however, reduce the amount received by the tour operator for its

supply and it did not reduce the amount paid by the tour operator and received by Ibero Tours for its supply of the intermediary services. The taxable amounts for both supplies remained unaffected by Ibero Tours' separate decision to reduce the price paid by the customer for the travel services. I do not accept that it follows from *Ibero Tours* that Article 90(1) only applies where the person giving the discount or price reduction and the person receiving it are part of a single transaction chain. That is clear, in my view, from the next case that I discuss and those that follow it.

58. I now consider two decisions of the CJEU which relate to other members of the Boehringer group. The first is Case C-462/16 *Finanzamt Bingham-Alzey v Boehringer Ingelheim Pharma GmbH & Co* [2017] EU:C:2017:1006 ('*Boehringer 1*'). Like BIL, Boehringer Ingelheim Pharma ('BIP') is a manufacturer of pharmaceutical products. It supplied the products to wholesalers who, in turn, supplied them to pharmacies in Germany. The pharmacies issued BIP's pharmaceutical products to:

(1) persons with statutory (public) health insurance provided by public health insurance funds; and

(2) persons with private health insurance pursuant to individual contracts with private health insurance funds.

59. The products provided to persons with statutory (public) health insurance were supplied by the pharmacies under a framework agreement concluded with the national association of public health insurance funds. For VAT purposes, the products were regarded as supplied by the pharmacies to the public health insurance funds and by those funds to the persons insured by them. Under the framework agreement, the pharmacies granted a discount on the price of the products supplied to the public health insurance funds. Under German law, BIP was required to pay the pharmacies (or, where wholesalers were involved, the wholesalers) an amount equal to the discount that they had given in respect of its products. In such cases, the German tax authority treated the amount paid by BIP as a reduction in the price of its products for VAT purposes.

60. The pharmacies also issued pharmaceutical products to persons with private health insurance pursuant to individual contracts with them. Unlike the public health insurance funds, the private health insurance funds were not the recipients of the supplies of the medicinal products but merely reimbursed the insured persons for the costs incurred when they purchased the products. Under German law, BIP was required to pay the private health insurance funds a 'discount' calculated on the price of the products. The German tax authority did not regard this discount as a reduction in the price of those products for VAT purposes. BIP challenged this and the matter eventually reached the CJEU.

61. It is clear from the Opinion of Advocate General Tanchev, at paragraphs 25, 28 and 29, that both Germany and the United Kingdom submitted that *Elida Gibbs* and *Ibero Tours* showed that, while there does not have to be a contractual relationship between the supplier giving the discount and the final consumer who benefits from it, the supplier must be within a chain of transactions ending with the final consumer for that discount to be viewed as a reduction in price after the supply takes place under Article 90(1) of the PVD. The Advocate General rejected this submission in paragraph 35 of his Opinion, where he said:

> "… I am unable to draw from the ruling of the Court in *Ibero Tours* any express finding or necessary implication that the Elida Gibbs rule only applies when the recipient of a discount is the final consumer in a supply chain beginning with the taxable person providing the discount."

62. The Advocate General also said at paragraph 45 that the fact that a private insurance fund was not the direct beneficiary of the medicinal products supplied by BIP did not break the direct link between the supply of those goods and the consideration received.

63. The Advocate General also noted at paragraph 30 that the United Kingdom had submitted that Article 90(1) of the PVD could not apply to a situation where a national law requires a supplier to pay a contribution, charge, or levy (for example, to help support the private provision of health care). However, the Advocate General did not address that proposition directly.

64. The CJEU held, in paragraph 32 of *Boehringer 1*, that Article 90(1) "… embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received." The CJEU explained that, as a result of German law, BIP could only retain the price of the products it supplied to pharmacies after deduction of the discount. The CJEU stated that, in those circumstances, requiring BIP to account for VAT on the full amount charged to the pharmacies would be contrary to the principle of neutrality as explained in *Elida Gibbs*.

65. The CJEU also held in paragraphs 39 and 40 that Article 90(1) applies broadly and does not require the supplier and the final consumer to be in the same transaction chain:

> "… Article 90(1) of the VAT Directive does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. In principle, it requires the Member States to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. …
>
> 40. Furthermore, the fact that, in the case in the main proceedings, the direct beneficiary of the supplies of the medicinal products in question was not the private health insurance company which reimbursed the insured persons but the insured persons themselves, is not such as to break the direct link between the supply of services made and the consideration received …"

66. The reference in paragraph 40 to "the supply of services" seemed puzzling as pharmaceutical products are goods, not services. However, the working language of the CJEU is French and the French language version of the judgment uses the term "livraison de biens" (supply of goods). It is, therefore, clear that "supply of services" in paragraph 40 of *Boehringer 1* must be read as "supply of goods". The translation error was, unfortunately, carried over into the next case where the English language version of the judgment refers to a supply of services when it should say goods.

67. In paragraph 41 of *Boehringer 1*, the CJEU followed paragraphs 44 and 45 of the Advocate General's opinion and held that the insured persons who claim reimbursement of the cost of the products from the private health insurance companies are third parties and the companies must be regarded as being the final consumer of the supply. Applying the principle that the taxable amount for VAT purposes may not exceed the amount paid by the final consumer, the CJEU held in paragraph 42 that the discount granted by BIP to the private health insurance companies was a reduction in the price after the time of the supply and reduced the taxable amount in accordance with Article 90(1) of the PVD. In paragraph 43, the CJEU held that the discount was fixed by law and, therefore, BIP was not able freely to dispose of the full amount of the price received on the sale of its products to pharmacies or to wholesalers. Accordingly, the CJEU ruled that a discount granted, under national law, by BIP to the private health insurance companies was a reduction of the taxable amount of BIP's

supplies via wholesalers to pharmacies which supplied persons covered by private health insurance that reimbursed them for the cost of the medicines.

68. It seems clear to me that what matters is that there is a direct link between the supply of the goods and the consideration received (see paragraph 40 of the CJEU's judgment in *Boehringer 1* above). In that case, the fact that the insurance companies were not part of any contractual chain of supply and did not purchase the products did not prevent them from being considered to be final consumers of the supplies of the medicinal products. The CJEU regarded the private health insurance companies as final consumers because, in economic reality, they bore the cost of the medicines supplied by BIP. In paragraph 41, the only fact that is mentioned in justifying the conclusion that the private health insurance companies are final consumers is that they reimbursed the insured persons who had bought BIP's products from the pharmacies. That fact also established the necessary direct link between the supply of goods and the consideration received by BIP in that case.

69. The second decision relating to another member of the Boehringer group is Case C-717/19 *Boehringer Ingelheim RCV GmbH & Co. KG Magyarországi Fióktelepe v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* [2021] EU:C:2021:818 ('*Boehringer 2*'). The facts of *Boehringer 2* are very similar to *Boehringer 1* save that the case concerned discount payments made under an agreement entered into voluntarily rather than in compliance with a legal requirement.

70. In Hungary, Boehringer Ingelheim RCV ('BIRCV') supplied subsidised medicinal products to wholesalers who supplied them to pharmacies which sold them to patients. The Hungarian State Health Insurance Agency ('NEAK') operated a 'purchase price subsidy' scheme for certain medicinal products provided by pharmacies on prescription. The pharmacy was paid an amount by the NEAK and the difference between that amount and the full price of the product was paid by the patient. The taxable amount of the supply by the pharmacy for VAT purposes was the sum of the subsidy paid by the NEAK and the 'subsidised price' paid by the patient. In order to ensure that its medicinal products could be supplied at subsidised prices on the Hungarian market, BIRCV voluntarily entered into 'funding volume agreements' with the NEAK. Under the agreements, BIRCV made payments to the NEAK of a percentage of the gross funding from the NEAK for each product sold up to a maximum of 100% of the amount paid by the NEAK where the funding it provided for certain products exceeded a maximum amount in a year.

71. BIRCV claimed a repayment of VAT on the basis that the payments to the NEAK under the funding volume agreements reduced the taxable amount of its supplies. The Hungarian tax authority disagreed. BIRCV appealed this and the matter eventually reached the CJEU. The CJEU decided to proceed to give its judgment without an Advocate General's Opinion.

72. The CJEU noted, in paragraph 41, that:

> "Article 90(1) of the [PVD] … embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received."

73. In paragraph 44, the CJEU stated that, by entering into the agreements, BIRCV had waived part of the consideration it received from the wholesaler for the medicinal products. In paragraph 45, the CJEU held that the fact that the patients (and not the NEAK) were the direct beneficiaries of the supplies of the medicinal products did not break the direct link

between the goods supplied by BIRCV and the consideration received. The CJEU then stated in paragraphs 46 and 47:

> "46 In so far as the pharmacy must pay VAT on the amount paid by the patient and on the amount paid to it by the State health insurance agency for the subsidised medicinal products, the State health insurance agency must be regarded as being the final consumer of a supply made by a pharmaceutical company, which is a taxable person for the purposes of VAT, such that the amount payable to the tax authority may not exceed that paid by the final consumer (see, to that effect, judgment of 20 December 2017, *Boehringer Ingelheim Pharma*, C-462/16, EU:C:2017:1006, paragraph 41).
>
> 47 Given that part of the consideration obtained from the sale of the medicinal products by the pharmaceutical company has not been received by the latter because of the contribution it pays to the State health insurance agency, which refunds part of the price of those medicinal products to the pharmacy, it must be found that there has been a reduction in the price of the medicinal products after the supply took place within the meaning of Article 90(1) of the VAT Directive."

74. The fact that there was no legal requirement for BIRCV to pay the NEAK was not relevant to the CJEU's analysis (see paragraphs 48 and 49). The Hungarian Government had submitted that payments by BIRCV of 100% of the amount paid by the NEAK could not be considered to be 'price reductions' because they did not relate to the consideration for the products but to the amount paid by the NEAK as a subsidy during the relevant period. The CJEU rejected that submission in paragraphs 51 and 52 as follows:

> "51 In that regard, it should be noted that … it matters only that the taxable person has not received all or part of the consideration for the medicinal products. In the present case, Boehringer Ingelheim was not able to dispose of the full amount of the price received on the sale of the products, but only part of the final amount paid by wholesalers to which it sold its products, after deduction of the amounts paid to the State health insurance agency.
>
> 52 Furthermore, where the price is reduced after the supply has taken place, Article 90(1) of the VAT Directive provides that the taxable amount is to be reduced accordingly under conditions to be determined by the Member States."

75. In *Boehringer 2,* the CJEU's position on what qualifies as a price reduction for the purposes of Article 90(1) is stated in the simplest terms: it is any amount of the price that is not received or has been received but cannot be disposed of by the supplier.

76. On the second day of the hearing, Mr Beal produced a decision of Ms Justice Emily Egan in the Irish High Court on an appeal from the Tax Appeal Commission: *Revenue Commissioners v Novartis Ireland Limited* [2022] IEHC 632 ('*Novartis*'). The issue in the case was whether rebate payments made by Novartis to private health insurers were a reduction in the consideration received by Novartis for its supply of a specific pharmaceutical product to a wholesaler which supplied them to private hospitals for use in the medical treatment of insured persons. The rebates were paid pursuant to contractual volume-based discount agreements between Novartis and the insurers. Novartis claimed a repayment of VAT which was refused by the Irish Revenue. Novartis appealed and the Tax Appeal Commission decided that the rebate payments reduced the consideration received by Novartis for the supply of the product and it was entitled to a repayment of VAT. The Irish Revenue appealed.

77. In *Novartis*, the Irish Revenue made submissions based on *Ibero Tours* that Novartis was not the first link in a chain of transactions which ends with the final consumer because the rebates were made under a discrete contractual relationship which was not directly linked to the relevant supply. Ms Justice Egan rejected that argument on the ground that it was unsustainable following the CJEU's decision in *Boehringer 2*.

78. The Irish Revenue further argued, as HMRC do in this case, that the situation in *Novartis* was not the same as in *Boehringer 1* or *Boehringer 2* but equivalent to the position in *Ibero Tours*. They contended that the relevant supply chain was from Novartis to the wholesaler and then from the wholesaler to the hospitals. The Irish Revenue argued that the insurers were not part of that supply chain and that the rebates paid to the insurers were extraneous to that supply chain and arose under discrete contractual agreements in a manner analogous to the payments considered in *Ibero Tours*. Ms Justice Egan, noting that consideration of economic realities is a fundamental criterion for the application of VAT, rejected the Irish Revenue's argument and held that the contractual agreements between Novartis and the insurers were not separate from the supply chain but were integral to it.

79. The Revenue also contended that the chain of supply was broken and so did not include the insurer. They submitted that the supply of the pharmaceutical products, a supply of goods, ended with the supply by the wholesaler to the hospital because the hospitals used the products to make a separate (VAT exempt) supply of medical services to their patients. Ms Justice Egan held that the fact that the products (goods) were subsumed into a supply of services did not end the chain of supply which started with Novartis. She held that the interposition of a separate supply of services or of mixed goods and services did not change the *Boehringer* analysis. In dealing with a linked submission that the hospitals were the final consumers, Ms Justice Egan held as follows at [57] to [59]:

> "57. … In *Boehringer 1*, the European Court concluded that the private insurance funds were the final consumers, essentially because they paid for the medicinal product. This was despite the fact that, unlike the public health insurance funds, the private insurance funds never purchased the product. The private insurance funds were held to be the final consumers despite the fact that, on Revenue's analysis, they also did not take part in a supply of goods. The European Court did not find that the final consumer was the party acquiring ownership in the medicinal product, but rather the party paying for same.
>
> 58. There is therefore no particular reason to treat the hospitals, rather than the insurers as the final consumers in this case. It matters not that in the present case, as in *Boehringer 1*, the medicinal product is supplied directly to the ultimate beneficiary of the product, the patient, by another party, (in *Boehringer*, the pharmacy and in the present case, the private hospital). In *Boehringer*, the Court found that the final consumer in the supply chain was the private health insurance fund as this accorded more with the economic realities of the case. The same may be said of the private health insurers in the present case.
>
> 59. In any event, it can be seen that at a higher level of principle, the identity of the final consumer is not in any event crucial. This is of course because … the crucial issue is not the identification of the final consumer or the amount paid by that person, but rather the amount actually received by Novartis."

80. Ms Justice Egan also rejected a submission by the Irish Revenue that it made a difference that the supply of the products ended with an exempt supply of medical services by the hospitals. She held that the fact that the hospitals made supplies of VAT exempt

services was irrelevant to the VAT treatment of the rebate paid by Novartis to the insurers. She concluded that the rebate meant that Novartis did not freely have at its disposal the full amount of the price received in respect of the supply of the product and that was sufficient to reduce the taxable amount in accordance with Article 90.

81. Ms Justice Egan also considered other submissions in *Novartis* which do not arise in this case and to which I do not refer. She declined to make a reference to the CJEU and dismissed the Irish Revenue's appeal.

82. For completeness, I should state that Mr Beal also provided me with translations of decisions of the Versailles Court of Administrative Appeals and the Conseil d'État concerning discounts paid by pharmaceutical companies to insurers. In both cases, the court followed *Boehringer 1* and held that Article 90(1) applied and the discounts reduced the taxable amount. Unfortunately, the decisions described the facts, arguments and reasons in such succinct terms that I have not found them of any assistance in this case.

83. Finally, on the third day of the hearing, Mr Beal drew my attention to another reference to the CJEU from Hungary which raised issues similar to those considered in *Boehringer 2*. The case is Case C-248/23 *Novo Nordisk AS v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* [2024] EU:C:2024:735 ('*Novo Nordisk*'). Novo Nordisk made payments to the NEAK under price volume agreements which were identical to those in *Boehringer 2*. In addition, the company was legally required to make additional payments of 20% and 10% "of a part of the social security subsidy" for medicinal products benefiting from any kind of public funding sold by it through pharmacies. These additional payments were collected by the State tax authority, which immediately transferred them to the NEAK. Novo Nordisk sought to reduce the taxable amount of its supplies for VAT purposes under Article 90(1) by the amount of the additional payments. The Hungarian tax authority refused the reduction on the ground that the additional payments were not price reductions but a special tax payable under a mandatory statutory provision. The reference by the Hungarian court asked whether, in the circumstances, the additional payments reduced the taxable amount of Novo Nordisk's supplies.

84. Advocate General Capeta issued her Opinion on 6 June 2024. In her Opinion, the Advocate General proposed that the CJEU should hold that the additional payments should be considered to be a price reduction within Article 90(1). The Advocate General took a broad view of the application of Article 90(1) (and Article 79). She stated in paragraph 22:

> "If a taxable person, for whatever reason, reduces the price of a good or service it supplies, such a reduction is deductible from the taxable amount on the basis of which the VAT is calculated. Price reductions can be offered at the moment of supply, in which case Article 79 of the VAT Directive is applicable. However, prices can also be reduced after the supply takes place. In that case, Article 90(1) of the VAT Directive provides for the reduction of the taxable amount."

85. The Advocate General considered that the amount paid by Novo Nordisk to the NEAK was a reduction of the price of the products granted after the supply took place within the meaning of Article 90(1) because it was calculated on the basis of the price of the products supplied and was paid to the NEAK which was a final consumer because it had paid part of the price of the products. Thus far, the position of Novo Nordisk was the same as that of BIRCV in *Boehringer 2*. The crucial difference was that the payments in *Boehringer 2* were paid to the NEAK under a voluntary agreement. Whether Article 90(1) applied in *Novo Nordisk* turned on whether the additional payments made under a statutory obligation and collected by the tax authority should be regarded as a tax.

86. The Advocate General pointed out that Article 401 of the PVD does not preclude the maintenance or introduction of any taxes, duties or charges provided that they cannot be characterised as turnover taxes such as VAT. Article 401 provides:

> "Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers."

87. The Advocate General concluded that the additional payments in that case could not be characterised as turnover taxes because the additional payments were not collected at each stage of the production and distribution process but were paid only once by Novo Nordisk to the NEAK. However, that only meant that the payment was not a turnover tax prohibited by the PVD. It could still be a tax.

88. The Advocate General noted that, to be a tax, a payment has to be based in law and compulsory as well as clear and foreseeable. The additional payments had some of the characteristics of a tax but they also had some characteristics of a price reduction. She noted that the Hungarian legislation did not call the additional payments a tax, but rather referred to them as 'an obligation to pay'. The Advocate General held that the obligation to pay the additional payments did not meet the criteria of clarity and foreseeability which must be met before it could be regarded as a tax.

89. The Advocate General proposed that the CJEU should hold that the additional payments in *Novo Nordisk* were not a tax but should be seen as a statutory price reduction within the meaning of Article 90(1) of the PVD. She specifically noted, however, that it did not prevent a Member State enacting, in a more explicit manner, a fiscal measure which would fulfil a similar objective of financing the public health policy.

90. On 12 September 2024, the CJEU issued its judgment in *Novo Nordisk*. The CJEU repeated and affirmed paragraph 41 of *Boehringer 2* (see [72] above).

91. Having summarised the question asked by the referring court, the CJEU set out how Article 90(1) must be applied in the same broad terms as it had done in *Boehringer 1* (see[65] above) and *Boehringer 2* (see [73] above) in paragraph 30:

> "In accordance with Article 90(1) of the VAT Directive, in the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the Member States are required to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person."

92. The CJEU then considered whether the additional payments were a tax within Article 78(a) of the PVD. In paragraph 35, the CJEU explained that:

> "… in order for taxes, duties, levies and charges to be included in the taxable amount for VAT, even though they do not represent any added value and do not constitute the financial consideration for the supply of goods or services, they must have a direct link with that supply, and the question whether the chargeable event for the tax, duty, levy or charge concerned coincides with that for VAT is a decisive factor for the purposes of establishing the existence of such a direct link …"

93. The CJEU decided that, subject to confirmation by the national court, the payments had the characteristics of a tax within Article 78(a), namely that they did not constitute added value, were not financial consideration for the supply, and the chargeable event coincided with that for VAT on the products. Accordingly, the additional payments could be included within the taxable amount for the medicinal products by virtue of Article 78(a).

94. In paragraph 44, the CJEU held that the fact that the payments were tax revenue in nature was irrelevant to the question of whether Article 90(1) applied because the actual beneficiary of the payments was the NEAK and not the tax authority that collected them. It was equally irrelevant that the payments were made under an *ex lege* obligation, ie as a matter of law, and that they were collected by the tax authority (see paragraphs 46 – 48 and 50 - 52).

95. In paragraph 53, the CJEU held:

> "The fact that Member States may maintain or introduce certain taxes, duties or charges under the conditions laid down in [Article 401 PVD] does not, in any way, prevent such taxes, duties or charges from being taken into account, pursuant to point (a) of the first paragraph of Article 78 of that directive, for the purposes of determining the taxable amount for VAT, as a price reduction, within the meaning of Article 90(1) of that directive."

96. The CJEU set out its view on the facts and law in paragraphs 55 – 57 (citations removed):

> "55 It would not be consistent with the principle of fiscal neutrality … for the taxable amount on which the VAT, for which the pharmaceutical company is liable, as a taxable person, is calculated to be higher than the amount which it ultimately received. If this were the case, that principle would not be complied with.
>
> 56 Thus, since a portion of the consideration obtained from the sale of the medicinal products by the pharmaceutical company has not been received by the latter because of the contribution it pays to the State health insurance agency, which refunds part of the price of those medicinal products to the pharmacy, it must be found that there has been a reduction in the price of the medicinal products after the supply took place within the meaning of Article 90(1) of the VAT Directive.
>
> 57 The pharmaceutical company was not able to freely dispose of the full amount of the price received on the sale of its products to wholesalers."

97. Accordingly, the CJEU ruled that the Hungarian legislation which prevented Novo Nordisk from reducing the taxable amount of its supplies by the amount of its *ex lege* payments was contrary to Article 90(1) of the PVD.

PRINCIPLES AND FACTORS DERIVED FROM EUROPEAN CASES

98. Having reviewed the relevant cases, it seems to me that the relevant principles to be applied and factors to be considered when deciding whether Article 90(1) requires the taxable amount in respect of a supply to be reduced where the price is reduced after the supply has taken place may be summarised as follows:

(1) The taxable amount for supplies of goods and services is everything which constitutes consideration for the supply obtained or to be obtained by the supplier from the customer/purchaser or a third party. (Article 73 PVD)

(2) The taxable amount includes taxes, duties, levies and charges but not the VAT chargeable on the supply. (Article 78(a) PVD)

(3) There must be a direct link between the supply and the consideration received. (*Boehringer 1* paragraph 40, *Boehringer 2* paragraph 45 and *Novo Nordisk* paragraph 35)

(4) 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. (*Elida Gibbs* paragraph 27 and *EC v Germany* paragraph 30)

(5) The taxable amount serving as the basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer. (*Elida Gibbs* paragraph 19 and *EC v Germany* paragraph 29)

(6) The taxable amount used to calculate the VAT chargeable cannot exceed the sum finally received by the taxable person (*Elida Gibbs* paragraph 28, *EC v Germany* paragraph 30, *Boehringer 1* paragraph 32 and *Boehringer 2* paragraph 41).

(7) The tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received. (*Boehringer 1* paragraphs 32, *Boehringer 2* paragraph 41 and *Novo Nordisk* paragraph 30)

(8) VAT is intended to tax only the final consumer. (*Elida Gibbs* paragraphs 19, 22 and 23, *EC v Germany* paragraph 29, *Boehringer 2* paragraph 39 and *Novo Nordisk* paragraph 32)

(9) As VAT is intended to tax only the final consumer, it follows that the taxable amount for VAT purposes may not exceed the amount paid by the final consumer. (*Elida Gibbs* paragraph 31, *Boehringer 1* paragraph 42, *Boehringer 2* paragraph 46 and *Novo Nordisk* paragraph 50)

(10) The final consumer does not have to be a participant in the contractual chain of supply. (*Boehringer 1* paragraph 39)

(11) The final consumer may be a person other than the purchaser or direct beneficiary of the supply. (*Boehringer 1* paragraphs 40 and 41, *Boehringer 2* paragraphs 45 and 46 and *Novo Nordisk* paragraphs 49 and 50)

(12) The final consumer is the person who, in economic reality, bears the cost of the supply at the stage of final taxation. (*Boehringer 1* paragraph 41 and *Boehringer 2* paragraph 46)

(13) The position of taxable persons involved in the production and distribution process prior to the stage of final taxation should be neutral, regardless of the number of transactions involved. (*Elida Gibbs* paragraph 31)

(14) Whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person, the taxable amount and, consequently, the amount of VAT payable by the taxable person must be reduced. (Article 90(1), *Boehringer 1* paragraphs 32 and 39, *Boehringer 2* paragraph 41 and *Novo Nordisk* paragraph 30)

(15) A price reduction need not be voluntary but can result from an obligation imposed by law. (*Novo Nordisk* paragraphs 46 – 48 and 50 - 52)

(16) The taxable amount of a supply is not reduced where the supplier makes a payment to another person that is not linked to that supply. (*Ibero Tours*)

(17) The taxable amount of a supply and, consequently, the amount of VAT payable by the taxable person is not reduced where the price invoiced at that stage of the distribution chain, or at a later stage, does not include VAT as any reduction or partial

reduction of that price cannot in turn include a VAT element. (*EC v Germany* paragraph 64)

99. Although not expressly stated in any of the cases considered above, it seems to me that, as there must be a direct link between the supply and the consideration received, it follows that there must also be a direct link between any price reduction and the consideration given for the supply.

DISCUSSION

100. Having already dealt with HMRC's submissions when analysing the case law on Article 90(1) and identifying the relevant principles, I can deal with the application of those principles to the facts of this case quite briefly.

101. In my opinion, the words of Article 90(1) are clear: where the price of a supply is reduced after it has taken place, the taxable amount must be reduced subject to conditions set by the Member State. It is not suggested that the United Kingdom has set any relevant conditions so the only question in this case is whether the price of a supply made by BIL was reduced after it was made. More specifically, did BIL's payments to the DHSC under the Schemes reduce the price, ie the consideration, received for its supplies of health service medicines?

102. HMRC contended that the DHSC was not the final consumer of the health service medicines supplied by BIL and so payments under the Schemes could not reduce the price of BIL's supplies. HMRC submitted that there is no direct link between the DHSC's funding payments to NHS England and supplies of specific pharmaceutical goods manufactured by BIL. HMRC said that it follows that the DHSC cannot be treated as the final consumer of a supply of medicines supplied by BIL. It seems to me that this submission flies in the face of economic reality. It would, in my view, be entirely artificial to distinguish between the DHSC and the NHS for these purposes. The payments made by BIL to the DHSC under the Scheme form part of the DHSC's overall budget. The majority of the DHSC's budget was directly transferred to NHS England and the devolved administrations to fund the costs of (among other things) purchasing and providing health service medicines. Just as the CJEU regarded the private health insurance companies in *Boehringer 1* and the NEAK in *Boehringer 2* as final consumers because they bore the cost of the medicines, I consider that the DHSC is a final consumer of the health service medicines supplied by BIL because, in economic reality, it bore the cost of purchasing them.

103. HMRC also contended that, even if the DHSC was or could be regarded as the final consumer, there was not a sufficient link between the payments under the Schemes and the supplies of the health service medicines. HMRC's submission was that there must be a direct link between the consideration received and the goods supplied which was absent in this case. As I have already stated at [53] above, there is no requirement for the rebate to be linked to specific items purchased by consumers. It is clear from *Boehringer 1*, *Boehringer 2* and *Novo Nordisk* that the fact that the DHSC was not a participant in the contractual chain of supply and was not the purchaser or direct beneficiary of the medicines does not prevent the DHSC from being a final consumer. Those are not the links that are required. What is required is that the payments under the Schemes reduce the consideration received by BIL for the supply of the health service medicines. That the payments reduced the consideration in this case is established by the following facts:

(1) one of the purposes of the Schemes under Section 261 of the NHS Act was to limit the prices charged for the supply of health service medicines by a manufacturer such as BIL;

(2) the prices were limited by requiring BIL to pay the DHSC amounts calculated by reference to sales of the health service medicines by BIL;

(3) BIL submitted quarterly returns of its UK-wide sales and made payments to the DHSC in accordance with the returns; and

(4) the payments under the Schemes were booked as a discount against the 'sales' line in BIL's accounts.

104. As the payments under the Schemes reduced the price received by BIL for the supply of the health service medicines, Article 90(1) requires the taxable amount of those supplies to be reduced. HMRC contended that, even if the taxable amount is required to be reduced as a matter of principle, such a reduction where BIL's supplies were subsequently used to make zero-rated supplies would lead to a distortion of the principle of fiscal neutrality and no reduction should be made in such cases. I do not accept this submission for reasons explained at [49] above.

105. Mr Brinsmead-Stockham also submitted that the payments under the Schemes were functionally similar to a tax or levy paid to the UK Government. He accepted that the payments were not a tax but contended that they were not a payment for anything and therefore fell outside the scope of VAT because BIL does not receive anything in return. I accept that the payments under the Schemes were not for any supply by the DHSC to BIL but that does not change the analysis. The payments were made under the Schemes and, for the reasons given above, had the effect of reducing the consideration received by BIL for the supply of the health service medicines. The fact that the payments were not for anything supports the characterisation of those payments as rebates. If the payments under the Schemes had been consideration for anything done then that would suggest that there was a link to the thing that was done, ie a separate supply, rather than a reduction in the consideration for BIL's supply of the health service medicines.

106. In the event that I decided, as I have, that Article 90(1) applies and BIL has a claim for repayment of VAT, HMRC contended in their Statement of Case that no VAT should be repayable to BIL because it would be unjustly enriched as that term is used in section 80(3) VATA94. Section 80(3) provides a defence to a claim under section 80 if the crediting of an amount would unjustly enrich the claimant. HMRC accepted that they have the burden of proving, on the balance of probabilities, that any VAT repaid to BIL had "for practical purposes, been borne by a person other than [BIL]" (see section 83(3A)(b) VATA94). There were two strands to HMRC's argument on unjust enrichment in their Statement of Case. The first was that "in the case of sales by BIL to wholesale distributors the VAT liability was passed on by BIL to the wholesale distributor, such that BIL would be unjustly enriched if its claims were to be allowed". The second was that, if the DHSC is the final consumer, it was DHSC (and not BIL) that had borne the cost of the VAT charged by BIL.

107. I consider that the arguments on unjust enrichment are misconceived. In relation to the first strand, the wholesalers are in exactly the same position as the wholesalers and retailers in *Elida Gibbs* and *EC v Germany*. There was no suggestion in those cases that the fact that intermediaries in the chain of supply had paid VAT meant that the supplier, who had funded a discount or paid a rebate benefiting the final consumer, was not entitled to reduce the taxable amount of the supply. It is hard to understand HMRC's second argument. If, as I have held, the DHSC is the final consumer and BIL made payments that reduced the price paid by the DHSC then it cannot be said that the DHSC bore the cost of the VAT. At the hearing, Mr Brinsmead-Stockham attempted to persuade me that the payments under the Schemes did not include any amount of VAT and therefore the VAT originally charged remained a cost borne by the DHSC. It seems to me to be impossible to view the payments in

that way. The price charged, ie the consideration received, by BIL included VAT. The payments under the Schemes reduced the price of the health service medicines supplied by BIL. That reduction must also have included VAT otherwise there would be a breach of the principle that the taxable amount for VAT purposes may not exceed the amount paid by the final consumer. Even if the parties had wanted to do so (and I cannot imagine why they would), it would not be possible for BIL to pay a VAT exclusive rebate to the DHSC. It follows that I reject the submission that BIL would be unjustly enriched by any payment or credit in settlement of its claim.

DISPOSITION

108. For the reasons given above, the appeal is allowed.

109. I am very grateful to counsel for their clear submissions, both written and oral, on behalf of the parties but, although carefully considered, I have not found it necessary to refer to each and every argument advanced, all of the authorities cited or all of the evidence before me in reaching my conclusions.

COSTS

110. This case was allocated to the Complex case category under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') and the Appellant has never requested that the proceedings be excluded from potential liability for costs under rule 10(1)(c) of the FTT Rules. Accordingly, the Tribunal has power to award costs on an application or of its own motion. Any application for costs in relation to this appeal must be made in writing within 28 days after the date of release of this decision. As any order in respect of costs in a case such as this will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a detailed schedule of costs claimed with the application as required by rule 10(3)(b) of the FTT Rules.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 21st October 2024