16TACD2020

APPELLANT

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This appeal concerns four consolidated appeals against the following determinations and assessments made by the Respondents:

   (i) Non-EU Roaming Charges

   Section 104 of the Value Added Tax Consolidation Act 2010 (the "VATCA") provides for a refund of VAT where 'telephone cards' are used outside of the EU. The Respondent takes no issue with the Appellant making a claim for a refund of VAT where the claim relates to 'pre-pay' customers accessing international roaming outside the EU. However, the Respondent asserts that such a claim may not be made in respect of 'bill-pay' customers. Furthermore, it is also necessary to determine whether the distinction between the 'pre-pay' and 'bill-pay' customers constitutes a breach of fiscal neutrality to the extent that the Appellant is entitled to a refund of VAT also in respect of bill-pay customers. The tax at issue in this aspect of the appeal is €2,230,048;

   (ii) Cancellation Charges

   This issue relates to cancellation fees charged by the Appellant to its customer where the customer terminates a fixed term contract prior to the end of contract date and whether the cancellation fee is subject to VAT. The tax at issue in this aspect of the appeal is €1,680,083,

   (iii) Bill Pay Broadband

   This issue relates to arrangements whereby the Appellant's customer enters into a contract for access to a gigabyte of data for the sum Amount Redacted per month. The issue

for consideration relates to the customers who do not exhaust their entire data allowance in any given month and whether the amount of consideration is proportionate to the unused data remains subject to VAT. The tax at issue in this aspect of the appeal is €16,034,473, and

(iv) Time Limits

This issue relates to whether the limitation periods for a reclaim of VAT in the sum of €409,237 for the period of March 2012 to February 2013 are outside the time-limit provided for in VATCA, section 99. The issue for determination is whether VATCA, section 99 breaches the EU law principle of equivalence.

Background

2. The Appellant is a telecommunications and internet service provider operating in Ireland as a subsidiary of Parent Name Redacted, operating under a Global Brand Redacted and has been operating 3G and 4G services in the State since Date Redacted.

3. The Appellant's commercial arrangements with its customers can be classified as falling into two categories:

(a) "pay as they go" or "pre-pay", which requires customers to pre-pay for a specific amount of credit; and

(b) "'bill-pay'" where customers are billed at the start of each month for the fixed sum due for that month (and for the out-of-bundle use for the previous month).

The Appellant supplies telecommunications services to both its pre-pay and bill-pay customers, whilst they are physically inside and outside of the EU. When one of the Appellant's customers consumes the services in another jurisdiction and referred to as "roaming", although customers are in a position to avail of roaming "bundles" which allow them to avail of telecommunications services at a lower rate when roaming

Legislation

4. The definition of a "*taxable person*" is contained in section 2 VATCA as meaning "*a person who independently carries on a business in the Community or elsewhere*".

5. Section 2 VATCA also provides the following definitions:

"Telecommunication services" means services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, and includes—

(a) the related transfer or assignment of the right to use capacity for such transmission, emission or reception, and
(b) the provision of access to global information networks;"

"telephone card" means a card, or a means other than money -

(a) that confers a right to access a telecommunications service and, in cases where the supplier of the telecommunications service so agrees with another supplier (in this definition referred to as a "contracted third party supplier"), a right to receive other services or goods from that contracted third party supplier, and

(b) that, when the card or other means is supplied to a person other than for the purpose of resale, entitles the supplier to a consideration for the supply under circumstances that preclude the user of the card or means from being liable for any further charge for access to the telecommunications service or for the receipt of services or goods from a contracted third party supplier;"

6. The charge to VAT is pursuant to section 3 VATCA which provides:

"Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions:

…

(c) the supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State;"

8. The general rules regarding the place of supply are set out by section 34 VATCA and provide as follows:

"*The following rules apply to determine the place where, for the purposes of this Act, services are supplied:*

……

(b) except as provided by paragraphs (c) to (n), the place of supply of services to a non-taxable person is –

(i) subject to subparagraph (ii), the place where the supplier's business is established,"

…..

(m) if the supply of services consists of a supply of services specified in section 33(5) and the supply is to a non-taxable person—

(i) who is established outside the Community,
(ii) whose permanent address is outside the Community, or
(iii) who usually resides outside the Community,

the place where the person is established, has a permanent address or usually resides;

9. The services specified in section 33(5) VATCA include *inter alia*, telecommunication services and provides:

"The following services are specified for the purpose of section 34(m):

(a) .....

(b) ....

(i) telecommunications services;

10. Section 35(3) VATCA provides that:

"Where, in the case of a supply of services that consists of the provision to a non-taxable person of a telecommunications service, a radio or a television broadcasting service or a telephone card, the place of supply of the service or card would, apart from this subsection, be outside the Community but the service is in effect used and enjoyed in the State, the place of supply is nevertheless taken to be the State for the purposes of this Act."

11. Section 104(2) VATCA, which was in force at the time relevant to this appeal, provided as follows:

(a) Subject to paragraph (b), where the supply of a telephone card is taxable within the State and that telephone card is subsequently used outside the Community for the purpose of accessing a telecommunications service, then—

(i) the place of supply of that telecommunications service shall be deemed to be outside the Community, and

(ii) the supplier of that telephone card shall be entitled, in the taxable period within which that supplier acquires proof that that telephone card was so

used outside the Community, to a reduction of the tax payable by that supplier in respect of the supply of that telephone card, by an amount calculated in accordance with paragraph (c).

(b) Where the supply of a telephone card is taxable in the State and—

(i) the person liable for the tax on that supply is a person referred to in section 12 (1) or (2) who—

(I) is not entitled to a deduction, in accordance with Chapter 1 of Part 8, of all of the tax chargeable in respect of that supply, or

(II) is entitled to a deduction, in accordance with Chapter 1 of Part 8, of the tax chargeable in respect of that supply because that card was acquired for the purposes of resale,

and

(ii) that telephone card is subsequently used outside the Community for the purpose of accessing a telecommunications service,

then—

(A) the place of supply of that telecommunications service shall be deemed to be outside the Community, and

(B) the person who is taxable in respect of that supply of that telephone card shall be entitled, in the taxable period within which that person acquires proof that that telephone card was so used outside the Community, to a reduction of the tax payable in respect of that supply of that telephone card to the extent that that telephone card was so used."

12. Article 59 of Directive 2006/112/EC (the Principal VAT Directive or "PVD") provides a rule for the place of supply of telecommunications services to non-taxable persons by reference to the place where the recipient has his permanent address or usually resides. Section 104(2) VATCA is an implementation of Article 59(a) and states:

"In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56 and 59:

(a) *consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community;*

(b) *consider the place of supply of any or all of those services, if situated outside of the Community, as being situated within their territory if the effective use and enjoyment of the services takes place within their territory."*

13. Those provisions survived the adoption of Directive 2008/8/EC which amended the PVD as regards the place of supply of services' rules.

14. Finally, the general provision for refunds of VAT is set out in VATCA, section 99 and provides, *inter alia*:

(1) Subject to subsections (2) and (3), where in relation to a return lodged under Chapter 3 of Part 9 or a claim made in accordance with regulations, it is shown to the satisfaction of the Revenue Commissioners that, as respects any taxable period, the amount of tax (if any) actually paid to the Collector-General in accordance with Chapter 3 of Part 9 together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8, the Commissioners shall refund the amount of the excess less any sums previously refunded under this subsection or repaid under Chapter 1 of Part 8 and may include in the amount refunded any interest which has been paid under section 114.

(2) .....

(3) .....

(4) A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates.

Appellant's Evidence

Witness employed by the Appellant- Name Redacted

15. *Name Redacted* gave evidence as follows:

(a) she is currently the Operations Manager with the Appellant and has worked for the company for 10 years. Her role involves responsibility for everything from an operational perspective, including *inter alia* ensuring systems work, ensuring the

right material is available, organising staff training in relation to product/service and how to sell same and introducing changes in programmes to bring changes to stores;

(b) prepay customer paid in advance to have access to the Appellant's telecommunication services;

(c) post-pay or 'bill-pay' could be used interchangeably in relation to customers who sign up to a contract. Such customers pay some advance payments, with payment made retrospectively for access to other services. Such customers would be charged extra if they exceeded their quota;

(d) she explained that roaming services related to access to telecommunications service outside of Ireland and that such services were identical to the services provided to customers in Ireland. Customers had various price plans available to them and that they could avail of different packages or bundles depending on their level of usage. Add-ons were additional to price plans and allowed customers access to additional telecommunication services over and above those supplied as part of the price plan, for example, insurance;

(e) customers decided themselves what payment options they chose. The pre-pay option gave financial autonomy to customers and that younger customers and some older customers preferred this method of payment for that reason. However, regardless of whether the customer choses bill-pay or pre-pay, everything they get, quality of service and access to service is exactly the same. In reality the only distinction between bill-pay and pre-pay was the method of payment;

(f) credit vetting was required in relation to certain bill-pay options which might be a deterrent to some customers. However, 'bill-pay' was the preferred choice of certain business people who used their phone for work;

(g) it was primarily financial concerns which influenced customer choices in selecting pre-pay as opposed to 'bill-pay' options. The necessity to top up pre-pay options either online or by voucher could be frustrating for some customers;

(h) credit vetting was done for certain types of 'bill-pay' price plans, for example where the customer got access to a handset. She confirmed that if a customer failed the credit vetting, they might get access to a 'bill-pay' price plan by paying a deposit or they might select a pre-pay option;

(i) customer profiling process was a very important step in the sales journey and it involved identifying the customers' needs in terms of offerings in relation to

budget, price plan and handset functionality. The service offered to customers was the same, albeit tailored to the specific usage requirements of the customer. Also the service was identical but the choice of price plan could vary;

(j) in relation to roaming, there were additional costs incurred as the Appellant had to pay overseas network providers for access to local networks. There were agreements set up with different partners globally to support the Appellant's customers in relation to incoming and outgoing calls. The Appellant did not get advance notice that a customer was going abroad. If for example a customer was going to the US, the Appellant would search for the customer on the mast and find them and connect them to the local network;

(k) a pre-pay customer would lose service when their credit was used up, but with roaming there were sometimes delays, where records were received late from abroad. Notwithstanding this, while the service was available, the service for both pre-pay and 'bill-pay' customers was identical;

(l) for pre-pay customers, as soon as the Appellant got records of usage, the customers' credit was reduced. The customer could check their balance when abroad. In relation to 'bill-pay' customers, payment was made at the end of the billing cycle, but in the interim period a customer could check on an APP as to their usage;

(m) customers while abroad could pay for a roaming add-on such as Plan Redacted. Roaming services were available to all pre-pay customers and that such services were charged at rates different to domestic rates. There was no difference in the customer's experience in using their phone in Ireland or the USA. The roaming services were available to pre-pay and 'bill-pay' customers. Credit vetting was undertaken in relation to 'bill-pay' customers;

(n) as regards roaming, both pre-pay and 'bill-pay' customers were notified by text from the Appellant the means whereby they could pick up the local network and they were informed of the relevant rates applicable during the period abroad. There were credit limits both for pre-pay and 'bill-pay' customers to prevent bill shock for customers. This was more prevalent in relation to 'bill-pay' customers. Both for pre-pay and 'bill-pay' customers there were different rates for domestic services and for roaming services;

(o) the effect of the EU roaming regulation, which came into effect in 2016, was to reduce roaming charges in the EU. As a result, the volume of traffic in relation to EU roaming charges increased significantly in 2017, as customers became aware that they could use their price plan units to pay for roaming services;

(p) when a device was purchased at the same time of signing a contract, the price of the device would be factored into the contract price;

(q) it was more likely that 'pre-pay' customers would be cut off when credit had expired in relation to domestic calls rather than roaming calls. When questioned as to whether 'bill-pay' customers had more choice in selecting various prices plans, she confirmed that pre paying customers could achieve the same flexibility by means of add-ons. Hence, the greatest factor influencing the method of payment was the desire for financial control;

(r) Both pre-pay and 'bill-pay' customers received warning texts when their credit limit was near expiry. However, she acknowledged that 'bill-pay' customers could ignore the warning and keep on roaming, whereas for pre-pay customers roaming services were not available once the credit limit was exceeded, until the customer topped up again;

(s) customers could interface with the Appellant *via* the website, phone or by attending a store. There was a staff handbook which navigated sales assistants through the customer journey in terms of budget, price plan and handset functionality. In relation to 'bill-pay' customers, she explained an identity verification process was required as the customer was entering into a contract with the Appellant. This was followed by a credit vetting process. The terms and conditions of the Appellant's services were set out in the Document Name Redacted which is in the SIM pack to which the customer is directed and which they sign up to;

(t) the agreement with the customer was subject to a minimum term and the agreement could be terminated on 30 days' notice within this term, subject to payment of outstanding charges and recurring monthly charges for the remainder of the minimum term. In the event of non-payment of a bill or non-compliance with certain terms of the agreement, the Appellant could terminate the agreement, again subject to payment of outstanding charges and monthly charges for the remainder of the minimum term. She confirmed that there was no cancellation outside the minimum term.

(u) cancellation charges were not applicable to pre-pay customers;

(v) with regard to 'bill-pay' monthly charges, if the customer did not use their monthly allowance, they could lose it and the unused Package Option Redacted would not be carried over to the next month. The balance of unused data was not refunded to the customer and it was not consideration for supply. The customer was paying for the right to use up the allowance every month without incurring additional charges but they were also paying for access to the network

and for their connectivity within the price plan selected by them. Add-ons were not subject to terms and conditions;

(w) in relation to pre-pay customers there was no contract and no connection fee and the customer could plug in and start immediately on purchase of the modem. The four Package Option Redacted were only available to bill-pay customers. In relation to pre-pay plans, a price plan was activated on payment of 20 euros and lasted for 28 days. Under the Plan Redacted option, roaming services were available to both pre-pay and bill-pay customers;

(x) The Appellant was constantly expanding its network as usage increased, particularly in relation to data as there had been an explosion of usage over the last number of years;.

(y) In relation to out of bundle usage *Name Redacted* agreed that the costs were higher than in relation to in bundle usage;

(z) with regard to infrastructure costs, costs were incurred in relation to the provision of telephone masts, spectrum costs, staff costs, payments to overseas third-party network providers and interconnect fees.

Witness employed by the Appellant- Name Redacted

16. *Name Redacted* gave evidence as follows:

(a) he is a solicitor with The Appellant and has worked for the company for 10 years

(b) he spoke about statutory regulation and mentioned the supervision exercised by ComReg;

(c) The Appellant was also regulated by the Competition and Consumer Protection Commission (CCPC). Penalty clauses such as cancellation fees were unenforceable under common law if the penalty exceeded the loss. This was copper fastened by the Unfair Regulations of 1995. When the CCPC issued guidelines for mobile phone operators in 2017, the Appellant conducted investigations internally to satisfy itself that its cancellation fees were proportionate and justifiable;

(d) he was not aware there was any consultation process with or CCPC prior to November 2017, specifically re cancellation charge. Prior to 2017, he was aware of the possibility of penalty clauses being unenforceable;

(e) The Appellant could suspend or disconnect its service in the event of a breach of conditions by a customer or non-payment of a bill;

(f) the price plan was incorporated into the contract. He agreed that a customer would not have to pay a cancellation charge in the event the Appellant changed the terms of the contract. The contract did not cover the supply of a device.

(g) The Appellant could end the agreement on 30 days' notice outside the minimum term;

(h) the cancellation fee did not apply to add-ons or to insurance and was only confined to monthly charges in relation to the customer's price plan;

(i) the credit limit was to protect the Appellant from customers who buy a device using counterfeit ID and then clock up big bills. The credit vetting exercise was to ensure that The Appellant could be satisfied in relation to a customer's prior payment history;

(j) the service supplied by the Appellant for pre-pay customers took place immediately on connection, unlike bill-pay customers who had to sign a contract. There was no cancellation charge when a customer ended a contract due to a variation in its terms. If a customer continued with the contract post variation, they were deemed to have accepted the varied terms. Where a customer terminated the agreement post variation of its terms, they could retain the phone;

(k) the 30-day notice period in relation to termination was not always adhered to for example then the customer ported out their number to another operator and is such circumstances the number of months left in the minimum term if calculated from the date of porting out;

(l) the charges for access to the Appellant's service laid out in the Price Plan include fixed periodic charges, usage charges, administration fees, connection fees and the debt collection costs which are payable in accordance with the Price Plan unless the customer pays by direct debit. A lot of customers paid by direct debit and were encouraged to do so;

(m) the prices in the Price Guide were the prices for services and that it was not possible to sue under this agreement for the price of the phone in the event of non-payment. The Price guide referred to the charge multiplied by the number of months remaining and that the handset cost was not set out separately or factored in a specific amount.

Witness employed by the Appellant- Name Redacted

17. *Name Redacted* gave evidence as follows:

(a) he is the Head of Consumer Care for the Appellant and that he was with the company for 8 going on 9 years;

(b) there were Number of Customers Redacted with the Appellant, of which Number of Customers Redacted were under his management with the balance being the Appellant's business base. He had a small team in Dublin and that the majority of the team are spread across the Appellant's Location Redacted contact centre. There was an operation in Location Redacted which is an external provider that The Appellant outsources;

(c) debt collection was within the remit of his responsibilities and that this reflected The Appellant's focus on retention of customers. The Appellant recognised that occasionally customers got into trouble but that the Appellant would use its best endeavours to retain the customer as otherwise they could lose them to competitors. There were targets for staff in relation to customer retention. If a client contacted customer care expressing a wish to leave, the customer would be persuaded to stay by offer of an upgrade or a new.

(d) The Appellant was concerned with customer retention in light of the fact they obtained the cancellation without the necessity to perform the services. The Appellant would lose out on additional products and services to that customer. In the event of a lost customer there was loss of insurance revenue, add-on revenue, bundle charges, revenue from mobile operators using the service and roaming charges associated with the account closed. The Appellant wanted to keep customers as long as possible;

(e) in the period January 2016 to April 2017, the value of the monthly recurring charge was €Million while the value of the domestic voice and SMS use for January was €Thousands, the value of domestic out of bundle daily usage was €Thousands the value of international calls was €Thousands per month, the value of roaming was €Thousands per month and the value of premium rate service and add-on value were €Thousands. The out of bundle charges was €Thousands where the customer exceeded their monthly allowance, and that other revenue related to add-ons;

(f) the cost of defaulting customers, the Appellant paid €Amount Redacted per annum to the debt collection centre in Location Redacted. The costs did not a hundred percent relate to early termination charges as certain customers dipped into default. From 2011 to 2016, The Appellant paid €Thousands per annum to third party debt collection agencies. About €Million was spent on an annual basis chasing default

debt. There were expenses in relation to onboarding of customers. The Appellant needed to keep its retail footprint in operation as well as franchises and operations, so acquiring new customers was more expensive than retaining existing customers;

(g) defaulting customers were given advance notification of the discontinuance of services in the absence of full payment within 7 days. Customers were made aware of the early termination fee and how this would be calculated. They would be advised that in the event of non-payment the matter would be referred to a debt collection agency and that if judgement was obtained it would be published with consequent impact on the customer's credit rating.

(h) The Appellant had an extensive collection process, broken down into a number of segmentations tailored to a customer's debt risk profile. If there was no history of default a softer approach would be taken and a more aggressive stance would be taken in relation to repeat defaulters. The collection process was also broken down by voice and mobile broadband and also by business and consumer. In some instances, payment arrangements were made with customers. The sequence of texts and calls made to a client prior to disruption of services. The cancellation charge kicked in when the debt was sent to a debt collection agency. In some instances, legal proceedings were instituted but that some debts were written off;

(i) in relation to medium risk customers, the process was faster. A softer approach was taken with new customers. Customer could be reinstated possibly on a pre-payment plan. Customers on the network for less than 3 months, there could be a fraud risk, which the Appellant dealt with by way of direct debit in relation to the customer's first bill;

(j) the loss of the monthly recurring charge did not cover the amount of income that would have been made from that customer if the contract went full term. It was highly likely that during the contract duration there would be out of bundle charges;

(k) he did not know the number of customers who exceeded their monthly spend or who had stayed within their monthly recurring charge. He did not have numbers of the clients in default who were likely to expand. Each customer's behaviour was different and that based on the figures reviewed, it showed a high proportion of revenues from non-monthly recurring charges. There were also some customers in default that did not go to a debt collection agency;

(l) the reinstatement of customers who had previously defaulted would never be refused outright, but after going through a credit vetting process, the customer may have to pay a deposit or they could be encouraged to go pre-pay;

(m) the final fee would include the cancellation charge, out of bundle charges and any outstanding amount. The cancellation fee was simply the monthly fee. The debt collection costs were not directly included in the cancellation fee, but they were included in the operation cost of the company in relation to its customer services. The overall running cost of the business was built into the monthly recurring fee, but that someone from finance would have to establish the numbers. He was not providing a legal view as to the meaning of the legal agreement;

(n) he could not verify the amount of income earned other than monthly recurring charges. In relation to the claim for repayment of VAT for customers not using all their data, he had no knowledge of the claim;

(o) a lot of the customers who had cancellation charges left the network early as the market was highly competitive. Defaulting customers were not people in the habit of not paying bills or who did not incur out of bundle usage. The number of customers going into default on a monthly basis would be in the region of Number of Customers Redacted. However, he said he could not confirm the number of customers who ultimately left. He said that 97% of default was resolved internally;

(p) the cancellation charge was related to the remainder of the contract. Unless the client was reinstated, no services were provided after disconnection of the service;

Witness employed by the Appellant- Name Redacted

18. *Name Redacted* gave evidence as follows:

(a) he is Head of Radio Access Networks for the Appellant and that he had worked for the Appellant for 18 years. He is an electronic engineer and that he worked in telecoms for 22 years;

(b) the mobile phone networks buy spectrum or radio waves from the government and they are licensed to use that spectrum to provide services to customers using technologies 2G, 3G and 4G on different frequencies;

(c) The Appellant built infrastructure to provide coverage for customers and that each of the masts broadcast spectrum so phones can get reception. The bars on phones showed what signal level a phone is getting;

(d) the radio spectrum is finite in terms of radio frequencies. ComReg licenses radio waves, some of which is used for air traffic control, some for taxis and some for broadcasting TV. The frequencies were standard across the world to enable travellers to use their phones in difference jurisdictions. Once the licence ends

there is a spectrum auction and it is necessary to bid for spectrum. Thereafter, an annual fee is payable, even if the base station is never turned on. There was a lease on the spectrum reserved for a party and there was a limitation of use on the spectrum reserved;

(e) records were created during the use of the network due to regulatory requirements and also for security reasons. Records were kept for 6 months;

(f) in relation to mobile broadband, there was a subscription to provide access to data service, whereas with regard to mobile telephone subscription, access is provided to voice, text and data services. Dongles could receive texts but that as far as he was aware, dongles could not send text;

(g) The Appellant routes its customer traffic through a data centre to be routed to its destination. There was a joint connection to the internet but that prior to connection it was necessary to establish whether the customer was pre-pay or bill-pay and was in credit to access the network. There were significant security measures to preserve the integrity of customers' data;

(h) in relation to the status of devices, such as dongles, there were 3 states, turned off, idle and active. Dongles got power from computers when the device is turned on and within range of a network. The connection between the device and the network remained in place if there was coverage and the device was turned on. The customer is not charged for this connection and is not using data so it is said to be in an idle state. In this period, telecommunication services are not being provided to the customer. If there is a faulty device there is no signal or coverage;

(i) with regard to the Appellant's different states of dongles: turned off, idle and active, a comparison could be made with a phone which was turned off. Data was constantly being transmitted but if data is turned off the phone it is not receiving data, which is why when people go aboard data is typically switched off to pre-empt big bills;

(j) the turn off and idle states are the same for mobile phones and dongles and that even if the phone is off it pings to let the network identify its location. Due to different levels of usage, for example, between urban and rural locations, it was necessary to plan the network accordingly, as a network can only support a finite amount of data for all customers. Usage changed continually and that previously five o'clock in the evening was the busiest time, but currently 9 or 10 in the evening was busiest as that was when people are watching the news or YouTube or Netflix. Both the capacity and the coverage elements had to be managed and that a number of idle sites provided coverage for idle elements. Some licences had a minimum population coverage

(k) a session was automatically terminated when a pre-pay customer reached a certain limit, whereas, for 'bill-pay' customers, they could be charged out of bundle charges which could rack up quickly. Once a certain level was reached data was stopped to pre-empt bill shock for customers;

(l) when a data session was not initiated, no data is being transmitted. He said that once a dongle is plugged into a computer, the computer would be initiating data sessions. If a software update came in the dongle would go from idle to active, regardless of activation by the customer.

(m) there is a site on the roof of the building but that data is not being consumed until a device is turned on. He said that from an engineering perspective, not a legal perspective, that until a customer commences and maintains a data session by requesting data from the network, no telecommunications service is supplied to it. The dongle is the connection to the network and is the pipe through which data is transmitted;

(n) with regard to the commencement of a session, the customer's account status must be established. The Appellant used a system called Redacted to check in real time how much data is being consumed by customers. 'bill-pay' and pre-pay customers were managed separately but the principle was the same. Once a customer commenced a data session the device transmits radio frequency signals to the nearest base station and then the signal is sent from the base station to the core network on fibre optic cables or transmission network. The network determines whether the customer is within its date limits and if so, the data is transmitted onwards. When the session finishes the connection is broken and no further data is transmitted.

(o) The Appellant was aware on a real time basis of the amount of data being supplied to the customer and the session terminated automatically when the usage limit was exceeded. Since the 2016 EU Roaming Regulation came into effect, there was a huge increase in data consumption;

(p) in relation to price plans, if you obtained a price plan in Ireland, that to the best of his knowledge, this plan was replicated for roaming.

Witness employed by the Appellant - Name Redacted

19. *Name Redacted* gave evidence as follows:

(q) he is a technology consultant in the Appellant's Technical Strategy Group. He is in the telecoms industry for 39 years and that he has been with the Appellant for nine years. He is a qualified technical technician and that he has a science degree. He has had worked for many operators all over the world;

(r) he was involved technically in the implementation of telephone card services. The product is something that would give the user an opportunity to use the services at a cheaper rate or in a more convenient manner. The user would get a list of numbers to access the service, one for Ireland and another for locations abroad;

(s) roaming is possible as a result of reciprocal arrangements between the Appellant and other telecom operators in other jurisdictions where the parties agree to allow each other's customers to access the host network in return for payment;

(t) when a customer makes a call from a hotel room abroad, before the call is initiated the phone is an idle state. Once the user left the plane, he/she could turn the phone on and be connected with the local radio network. Thereafter, if a call was initiated, a verification check is done to see if the user could make the call and the call would be connected. In some instances, the networks would be in dialogue to ensure this happened. In other cases, the traffic would be routed home whereas in other circumstances, it could be routed directly. The telecommunication service was identical for both pre-pay and bill-pay customers;

(u) prior to the proliferation of mobile phones, a person abroad or who wished to make telephones calls from Ireland to a foreign country could do so by means of a telephone card from a provider which could be used as a means for the payment of telecommunications services. Typically, the card would show a freephone number which the customer dialled to provide an access and a pin code unique to each card. The user would enter these details and dial the phone number to which they wanted connection. The card could be used from a mobile phone but that certain operators would charge for it. Telephone cards were historic due to the use of smartphones;

(v) the similarity between roaming services for pre-pay and bill-pay customers were identical. It is not possible to differentiate between a pre-pay and a bill-pay customer simply by looking at the phones or by using them or my making or receiving calls, unless they were under credit, or some accounting event happened. The service was identical from an engineering perspective. There was a distinction in terms of the method of access to roaming between pre-pay and bill-pay customers;

(w) there was a distinction between pre-pay and bill-pay in terms of access to local services while abroad, but that in both cases, a preliminary step had to be taken. In

relation to bill-pay customers, the preliminary step was turning on the phone and for pre-pay customers this involved contacting the operator of the card by phone call. This involved a choice to make calls in a particular way using a particular product as opposed to using the Appellant's plan;

(x) people generally avoided using mobile phones to access local services as there is a danger that unexpected charges would be incurred, and hence they typically used the hotel phone. A pre-pay phone could be cut off and a bill-pay phone would continue to be used until the credit limit was exceeded. The Appellant did not supply phone cards;

Contractual Documentation

20. As explained by *Name Redacted* in her evidence, the document entitled the Document Redacted is the terms and conditions for the Appellant's services and is provided to every customer in the SIM pack. The relevant aspect of that document are as follows:

[redacted]

[redacted]

[redacted]

[redacted]

Appellant's Submissions

I. Non-EU Roaming Charges

21. Roaming services are made available to customers as a result of reciprocal arrangements entered into between the Appellant and telecom operators in other jurisdictions.

22. In all cases, the nature of the services supplied to customers are identical irrespective of whether the customer has or has not purchased a bundle, and the services meet precisely the same needs from customers' perspectives.

23. It is understood to be common ground that the Appellant's supplies of telecommunications services to its "Prepay" customers come squarely within the provisions of Section 104(2) VATCA outlined below.

24. The supply of roaming services to "'bill-pay'" customers falls into one of two categories, depending upon the timing of billing /invoicing to the customers. In some cases, the customer has made an advance purchase of "in-bundle" roaming services and in others the customer is simply getting charged / billed / invoiced for "out-of-bundle" roaming services on an ad hoc basis. In both cases, the roaming charges, whether "in-bundle" or "out-of-bundle" are in addition to the monthly fee which is billed to each customer in advance.

25. The "in-bundle" option offered by the Appellant allows a customer to roam outside of the EU without incurring a further charge, subject to set usage limits. Those customers with this bundle benefit from precisely the same service, in precisely the same way as those without it. The only difference is that customers who have not purchased this type of bundle get charged for their non-EU roaming services in arrears rather than in advance though those customers are charged their normal monthly payment in advance.

26. As usage limits apply to the bundles, a customer who has purchased a bundle may also pay for roaming services out-of-bundle.

27. The Appellant submits that it has an entitlement to a repayment of VAT arises in respect of both "in-bundle" and "out-of-bundle" non-EU roaming services supplied to and consumed by 'bill-pay' customers. It is submitted that both of these charges are outside the scope of Irish VAT as they are in respect of telecommunications services "*used and enjoyed"* outside the EU.

28. It is also important that Article 59a PVD permits the application of the use and enjoyment provisions to, *inter alia*, services governed by Article 59 PVD, namely telecommunications services. It does not provide a legal basis for adjusting the place of

supply of vouchers or telephone cards. It is the place of supply of telecommunications services which are involved. It does not permit the application of differing place of supply rules to telecommunications services based upon the means by which they are remunerated.

29. It was pursuant to this provision that the State introduced and maintained measures to ensure that telecommunications services used and enjoyed outside the EU were not taxable in the State when those services were paid for in advance.

30. The Appellant submits that the place of supply of its non-EU roaming services is outside the EU in accordance with Section 104(2) VATCA and, in the alternative, if its services do not fall within the wording of Section 104(2) VATCA it is nonetheless, as a matter of EU law, entitled to that treatment as a result of the principles of fiscal neutrality and/or equal treatment.

31. It is clear from the above that Article 59a(b) PVD was transposed into Irish law in a manner which is compliant with EU law. It does not discriminate between whether or not an initial step (such as a telephone card) is involved.

Telephone Card

32. Section 104 VATCA only applies where there is a telephone card, the supply of which has been taxed in the State and which is subsequently used outside the Community. It is necessary to consider, therefore, whether the Appellant is supplying telephone cards.

33. In all cases, the intrinsic nature of the services supplied to customers are identical irrespective of whether the customer has or has not purchased a bundle, and the services meet precisely the same needs from customers' perspectives. However, customers get charged for those services in three different ways; 'pre-pay, 'bill-pay' "in-bundle" roaming and 'bill-pay' "out-of-bundle" roaming. The timing or means of being billed/charged for a service should not alter the intrinsic nature of the services being provided in return for that charge.

34. First, a 'pre-pay' customer can purchase credit which is manifested by way of a voucher whether that be physical or electronic which can then be activated using a device. Once activated, that credit can be used to pay for a variety of services, including telecommunications services. The supply of the credit to a customer is self-evidently a telephone card for the purposes of Section 2 VATCA in that it is a "*means other than money… that confers a right to access a telecommunications service…"*.

35. It is understood to be common ground that the Appellant's supplies to its 'pre-pay' customers come within and benefit from the provisions of Section 104(2) VATCA.

"In-bundle" roaming

36. In-bundle roaming permits 'bill-pay' customers make an advance purchase of roaming services. The Appellant accounts for VAT on the supply of the in-bundle roaming upfront at the point of billing.

37. As with the Appellant's supply of services to 'pre-pay' customers, the supply of "in-bundle" services come squarely within the definition of a telephone card being a "*means other than money… that confers a right to access a telecommunications service…*".

38. To the extent that such roaming services are received whilst the 'bill-pay' customer is located outside of the EU, the Appellant is entitled to make an adjustment to the VAT which had been originally accounted for.

39. The quantum of that adjustment is calculated by reference to the formula contained in Section 104(2)(c) VATCA. The adjustment reflects the level of non-EU consumption. Moreover, it would be a breach of the well-established EU principle of fiscal neutrality if the adjustment, which is provided in respect of supplies to 'pre-pay' customers, was not also applicable to supplies of precisely the same services to 'bill-pay' customers.

"Out-of-bundle" roaming

40. In relation to "out-of-bundle" roaming, 'bill-pay' customers do not make an advance purchase of roaming services per se but through their recurring monthly charge they are charged, in advance, for telecommunications services. In addition to the monthly recurring charge, the customer incurs additional roaming charges whilst consuming telecommunications services in a non-EU jurisdiction. The invoicing/billing of the roaming charge is made in arrears and after the service has been supplied.

41. The nature of the "in-bundle" and "out-of-bundle" services supplied to 'bill-pay' customers are identical, and they meet precisely the same needs from customers' perspectives.

42. This is best illustrated by a practical example which would arise frequently in practice. A 'bill-pay' customer has purchased a roaming bundle in advance of consuming telecommunications services outside of the EU. Where that customer exceeds the number of call minutes set in the bundle during a phone call, the remainder of that call would be considered to be 'out-of-bundle' usage. That being the case, in a scenario where it is accepted that 'in-bundle' usage benefits from the provisions of Section 104(2) VATCA but 'out-of-bundle' usage does not, an Irish VAT liability does not arise for the portion of the call which is 'in-bundle' but the portion of the call made 'out-of-bundle' gives rise to an Irish VAT liability for the Appellant. It is submitted that the supply made

to the customer during the initial minutes of the call is patently identical to the supply made during the latter minutes of the call.

43. The repayment for which section 104(2) VATCA provides only applies where there is "*a means other than money*" which "*confers a right to access a telecommunications service"*. Clearly, a classic telephone card which is itself purchased using money is the archetype example of this. The supplies made to the Appellant's 'pre-pay' customers and those who purchase a roaming bundle are also squarely within the terms of section 104 VATCA. However, where a customer is billed for roaming after the fact the position is less clear because such customers have paid a monthly fee in advance which allows them to access telecommunications services for that month but will also be billed for an additional charge specific to their roaming activity after the fact. Therefore, a call which is placed by a 'bill-pay' customer who does not have a roaming bundle will have been partly billed in advance and partly billed in arrears.

44. However, it is impermissible to apply conflicting rules to the place of supply of telecommunications services simply by reference to the means by which those services are billed for, and therefore, in the circumstances of this case, telecommunications services which are used and enjoyed outside the EU must be treated as not subjected to VAT in Ireland irrespective of the timing of billing or payment for those services.

45. The Appellant accepts that the foregoing distinction being made by the Respondents is, on its face, provided for in VATCA, however, does not accept that such a distinction is one which has any basis in PVD, and is in breach of the principle of fiscal neutrality and equal treatment in circumstances where the supplies in question are identical.

Equal Treatment and Fiscal Neutrality

46. It is essential that regard be had to the principles of fiscal neutrality and equal treatment when (a) construing Section 104(2) VATCA and (b) in considering whether the Appellant is entitled to the repayment sought as a matter of EU law.

47. The principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes.

48. At paragraph 20 of the CJEU's Judgment in *Jennifer Gregg and Mervyn Gregg v Commissioners of Customs and Excise* (C-216/97), the Court held:

> "*The principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the*

establishments or organisations referred to in Article 13A(1)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity."

49. By parity of reasoning, the means by which the taxpayer chooses to be charged for the service – whether in advance or in arrears – can logically have no effect on the VAT treatment of the service being supplied in return for that charge.

50. At paragraphs 32 to 35 of the CJEU's Judgment in Joined Cases C-259/10 and C-260/10 (*Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc*), the Court held:

> *32. According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 Commission v France [2001] ECR I-3369, paragraph 22; Case C-498/03 Kingscrest Associates and Montecello [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 Marks & Spencer [2008] ECR I-2283, paragraph 47, and Case C-41/09 Commission v Netherlands [2011] ECR I-0000, paragraph 66).*
>
> 33. *According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.*
>
> *34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, Case C-109/02 Commission v Germany [2003] ECR I-12691, paragraphs 22 and 23, and Joined Cases C-453/02 and C-462/02 Linneweber and Akritidis [2005] ECR I-1131, paragraphs 19 to 21, 24, 25 and 28).*
>
> *35. That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition (see, to that effect, Case C-404/99 Commission v France [2001] ECR I-2667, paragraphs 46 and 47, and Case C-363/05 JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies [2007] ECR I-5517, paragraphs 47 to 51)." [emphasis added]*

51. Accordingly, it is not necessary that a distortion of competition be proven; the existence of such a distortion follows from the similarity of the supplies themselves.

52. Not only is it clear that fiscal neutrality is an important principle of EU law but it is also clear that Member States which are introducing discretionary measures must do so in compliance with that principle. At paragraphs 34 to 36 of the CJEU's Judgment in *Christiane Urbing-Adam and Administration de l'enregistrement et des domaines* (C-267/99), the Court held:

> *"34. Since the question which arises in the main proceedings is whether such an activity is to be treated, for the purposes of the application of VAT, in the same way as the liberal professions which are subjected to a reduced rate rather than the normal rate of VAT, it should first be explained that Article 12(4) of the Sixth Directive, in its version prior to Directive 92/77, allowed the Member States to apply reduced rates to certain supplies of goods and services and that Article 28(2)(e) of the Sixth Directive, in its version resulting from Directive 92/77, authorised those Member States which, on 1 January 1991, were applying a reduced rate to supplies of goods and services other than those mentioned in Annex H, to continue to apply that rate on condition that it was not lower than 12%. It is an accepted fact that Annex H does not mention the liberal professions as such.*
>
> *35. It follows that the determination and the definition of the transactions to which a reduced rate may be applied under those provisions of the Sixth Directive are matters for the Member States concerned.*
>
> *36. Nonetheless, in exercising that power, the Member States must respect the principle of fiscal neutrality. That principle precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate (see, to that effect, Case C-481/98 Commission v France [2001] ECR I-3369, paragraph 22)."*

53. At paragraphs 19 and 20 of the CJEU's Judgment in Commission of the European *Communities v Federal Republic of Germany* (C-109/02), the Court held:

> *"19. As regards the German Government's first plea in defence, it should be noted that the third subparagraph of Article 12(3)(a) of the Sixth Directive permits the Member States to apply a reduced rate of VAT to certain goods and supplies of services referred to in Annex H to that directive. The decision whether to exercise that right therefore lies within the Member States' competence.*
>
> *20. None the less, in exercising that power, the Member States must respect the principle of fiscal neutrality. As is apparent from the Court's case-law, that*

principle precludes in particular treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes, so that those goods or supplies must be subjected to a uniform rate (see Case C-267/99 Adam [2001] ECR I-7467, paragraph 36).”

54. At paragraph 27 of the CJEU’s Judgment in *Karlheinz Fischer and Finanzamt Donaueschingen* (C-283/95), the Court held:

> *“In that regard, it must be pointed out that the exemptions provided for by Article 13(B) are to be applied in accordance with the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, Case C-45/95 Commission v Italy [1997] ECR I-3605, paragraph 15). That requirement also applies when the Member States exercise their power under Article 13(B)(f) to lay down the conditions and limitations of the exemption. In according that power to the Member States, the Community legislature did not authorise them to undermine the principle of fiscal neutrality which underlies the Sixth Directive.”*

55. The case-law cited above covers various situations in which Member States have the authority to take optional measures under the Directive and the decisions make it clear that when a Member State does so it must comply with the requirements of fiscal neutrality.

56. In any event, even if the foregoing were not clearly established, it is clear from Article 59a PVD itself that the measures adopted are only permissible in order to prevent double taxation, non-taxation or distortion of competition; if the provisions are interpreted as discriminating between identical supplies then they in fact create rather than remove distortions of competition.

57. In the event that it is determined that section 104 VATCA mandates a differing treatment of telecommunications services based upon the time of billing, the CJEU has explained precisely what must be done in circumstances where there is discriminatory treatment in the *Marks & Spencer plc v Commissioners of Customs and Excise* (C-309/06) at paragraphs 62 and 63:

> “62. In *the course of that assessment, the national court must comply with Community law and, in particular, with the principle of equal treatment, as stated in paragraph 51 of this judgment. The national court must, in principle, order the repayment in its entirety of the VAT payable to the trader who has suffered discrimination, in order to provide compensation for the infringement of the general principle of equal treatment, unless there are other ways of remedying that infringement under national law.*

> *63. In that regard, as the Advocate General observed in point 74 of her Opinion, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the favoured category."*

58. The CJEU has held that, in situations such as that in which the Appellant finds itself, as a victim of legislative discriminatory treatment, it is entitled to be refunded tax in the same manner as competitors even if the law cannot be interpreted in a compliant manner.

59. It should be noted that this issue is now historic as the relevant provisions of Section 104 VATCA were deleted by Finance Act 2018 with effect from 1 January 2019.

60. None of the refund claims or assessments covered by any aspect of this consolidated appeal relate to periods starting on or after 1 January 2019.

II. Bill Pay Broadband and III. Cancellation Charges

61. Issues II and III, Bill Pay Broadband and Cancellation Charges, are conceptually distinct. Issue II concerns the amount of VAT for which the Appellant must account for in respect of amounts billed to 'bill-pay' broadband customers who do not use their full data allowance in any given month and Issue III concerns the question of whether a charge paid by a customer who cancels their contract with the Appellant is subject to VAT.

62. Notwithstanding the fact that these two issues are factually and conceptually distinct they do both involve consideration of a common question, namely, what is the nature of the supply being made by the Appellant to its customers? This then raises a second related question, namely, how is the nature of that supply to be identified?

63. Accordingly, while it is necessary to consider the specifics of both issues, there is understood to be a difference between the parties as how to approach that task. Accordingly, it is proposed to first address these differences of approach before then applying that approach to each Issue.

The Relevance of the Contract

64. VAT is a tax on the supply of goods and services. In the seminal case of *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden (C-16/93)*, the Court confirmed that at paragraph 14:

"…a supply of services is effected 'for consideration' within the meaning of Article 2 (1) of the Sixth Directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

65. Accordingly, for VAT purposes it has always been essential that the parties identify the relevant legal relationship. It is essential, in particular, that the parties and the courts be able to identify who is paying what to whom and for what. These are, of course, matters which will be particularised in the agreement between the parties.

66. In *Société thermale d'Eugénie-les-Bains V Ministère de l'Économie, des Finances et de l'Industrie* (C-277/05), at paragraph 28 the Court held:

"contracting parties are at liberty – subject to the mandatory rules of public policy – to define the terms of their legal relationship"

67. It has been held, in that context, that parties are (subject to principles such as the abuse of rights) at liberty to structure their affairs in such a way as to limit his tax liability (see *Halifax*, paragraph 73; *RBS Deutschland* ECLI:EU:C:2010:810 at paragraph 54 and *GMAC UK plc* ECLI:EU:C:2014:2131 at paragraph 48). Of course, the ability to structure one's affairs in this matter presupposes that it is possible to arrange one's affairs at all i.e. that it is possible to control the legal effect of the arrangements which are made.

68. In *MEO – Serviços de Comunicações e Multimédia SA v Autoridade Tributária e Aduaneira (C-295/17)*, a case we will refer to in further detail below, the CJEU emphasised the importance of the concept of economic reality. It is respectfully submitted that it is not clear what import that concept had for the case before it – or whether it was said that the contracts did not reflect economic reality - but it is submitted that if the arrangements were taxed according to their economic reality rather than the parties' respective legal rights and obligations this was a fundamental error of approach and the CJEU simply misunderstood and misapplied its own previous case law in relation to this issue.

69. In order to identify the law as it stood prior to *MEO* one need look no further than the UK Supreme Court Judgment in *Airtours* [2016] STC 1509, where that Court described the CJEU jurisprudence as follows:

"47. *…This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of WHA Ltd v Revenue and Customs [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907 where at [27], Lord Reed said that '[t]he contractual position is not conclusive of the taxable supplies being*

made as between the various participants in these arrangements, but it is the most useful starting point'. He then went on in paras [30]–[38] to analyse the series of transactions, and in para [39], he explained that the tribunal had concluded that 'the reality is quite different' from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs [2014] UKSC 16, [2014] STC 937, [2014] 2 All ER 685 (at [35]), when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts.

48. *The same approach was adopted by the Court of Justice in paras 39 and 40, where they stated, citing previous judgments, that 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT', and added that that issue involved consideration of 'the nature of the transactions carried out' in the particular case. To much the same effect, in Tolsma v Inspecteur der Omzetbelasting Leeuwarden (Case C-16/93) [1994] STC 509, [1994] ECR I-743 (at para 14), the Court of Justice said that 'a supply of services is effected "for consideration" only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance', which it explained as meaning 'the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. In the context of the supply of goods, the court made the same point in Primback Ltd v Customs and Excise Comrs (Case C-34/99) [2001] STC 803, [2001] ECR I-3833 (at para 25), where it described 'the determining factor' as 'the existence of an agreement between the parties for reciprocal performance, the payment received by the one being the real and effective countervalue for the goods furnished to the other'.*

49. *In Revenue and Customs Comrs v Newey (trading as Ocean Finance) (Case C-653/11) [2013] STC 2432 (at para 40), the Court of Justice again emphasised that 'that a supply of services is effected "for consideration", within the meaning of art 2(1) of [the Sixth] directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. In para 41, the court went on to explain that 'the supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to*

> *determine the intention of the taxable person'. The court then observed in paras 42–43 that 'consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT' and that 'the contractual position normally reflects the economic and commercial reality of the transactions'. An exception to the normal rule that* the contractual relationship is central was then identified by the court as being where 'those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions' (para 45)." [emphasis added]

70. In Her Majesty's Commissioners of Revenue and Customs v Paul Newey (C-653/11), the CJEU had held:

> "*Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a "supply of services" within the meaning of arts 2(1) and 6(1) of [*the Sixth Directive*]. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."*

71. Indeed, subsequent to the referral from the CJEU the *Newey* matter has been the subject of significant litigation in the UK on the question of whether the arrangements were 'wholly artificial' but the Court of Appeal's Judgment records that "*HMRC now accept that 'unless the scheme can be characterised as an abuse of law, these supplies were made in accordance with the contractual arrangements entered into by Alabaster and the loan brokers and advertising agency' (paragraph 3 of the grounds of appeal dated 17 August 2015).*"

72. The issue, therefore, of economic and commercial reality is, effectively, one of sham. If the contractual arrangements are not a sham then they can only be set aside if there is an abuse of rights. It is not and has never been a principle of EU law that arrangements are taxed in accordance with their net economic or commercial effects rather than the legal rights and liabilities of the parties. This is unsurprising given that the Court has held for decades that there must be reciprocal performance arising from the existence of legal obligations in order for a supply to be subject to VAT under the VAT Directives.

A Supply or a Supply of a Right to a Supply?

73. It is submitted that the fundamental difference between the parties in this case is between the taxation of the supply of telecommunications services for consideration versus the supply of the right to receive telecommunications services.

74. Whilst the jurisprudence of the CJEU was concerned for thirty years with the taxation of supplies of goods and services in *Air France-KLM, Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics* (C-250/14 and C-289/14) and then more recently in MEO the Court has for the first time analysed the transactions before it as the supply of a right to receive a supply.

75. In *Air France* the question which arose was whether Air France was liable to account for VAT on payments received from customers who did not present for travel. There the Court accepted that VAT was only due on the supply of services for consideration and that the chargeable event, for VAT services, only occurs when the service is performed, however, the Court held (at paragraph 28 of Air France) that, in the case of an airline ticket:

> *"…the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services." [emphasis added]*

76. Accordingly, for VAT purposes, Air France was supplying the right to avail of airline travel and not, *per se*, airline travel itself. The Court justified this conclusion, inter alia, on the following basis:

> 33. *Thirdly, the applicants in the main proceedings can also not rely on the case-law of the Court relating to the exemption from VAT of sums paid by way of deposit. In the main proceedings, first, the price paid by the 'no-show' passenger corresponds to the full price to be paid. Secondly, where the passenger has paid the price of the ticket and the company confirms that a seat is reserved for him, the sale is final and definitive. Moreover, it should be noted that airline companies reserve the right to resell the unused service to another passenger, without being required to reimburse the price to the first passenger. It follows therefrom that the grant of compensation, in the absence of harm, would be unjustified.*
>
> *34. It must therefore be held that the sum retained by the airline companies is not intended to compensate for possible harm suffered by them as a result of a passenger's 'no-show', but constitutes remuneration, even where the passenger did not benefit from the transport.*

77. It is submitted that this Judgment is impossible to reconcile with the Court's earlier Judgment in *Eugénie-les-Bains* and, with respect, confuses the payment of the consideration and the supply of the service. If, for instance, the flight in question had been unable to depart and the customer sourced an alternative flight, is it seriously

suggested that, nonetheless, there has been a supply of a service by Air France because, at the time of the payment, the right to travel was supplied? This, is the inevitable consequence of the Court's Judgment but clearly, cannot be correct. It is submitted that the Court is looking at the original transaction, in retrospect, knowing that the customer did not show and that the aircraft departed on its scheduled route but the VAT due at the time of the supply cannot await the outcome of these events and those events were not inevitable.

78. It is also worth bearing in mind that capacity is not specifically reserved for a customer on the Appellant's network. Accordingly, there is no equivalent of the reserved bedroom or the reserved seat. It is the equivalent of a supply of electricity. The customers are connected to the Appellant's network in the same way that an ESB customer is connected to the electricity grid but unless and until they use that network or grid they do not receive any supplies of telecommunications or electricity.

79. We know that the place of supply of passenger transport services is the place where the transport is physically carried out (see Section 34(d) VATCA). If, however, Air France is supplying not passenger transport but the right to avail of passenger transport, what is the place of supply of such a service? We also know that the supply of passenger transport is exempt in the State and, in certain circumstances, a 'qualifying activity'. Is the supply of the right to avail of passenger transport exempt? If so, is it also a qualifying activity?

80. It cannot be said that they are the same supply since, the whole point of the *Air France* Judgment is that there was no supply of passenger transport but there was, according to the Court, a supply of the right to receive passenger transport. Clearly, therefore, these supplies are not the same.

81. If we look at the contradictions between *Air France* and *Eugénie-les-Bains* we see first the obvious incongruity between decisions dealing with no show customers of a hotel and no show customers of a flight. The similarity in the suppliers' situations is striking; both have agreed to reserve space for the customer. However, in *Eugénie-les-Bains*, the Court held that even though the hotel has to reserve a room, a hotel customer who does not show up does not receive any service from the hotel and the deposit paid towards the hotel by the no show customer was not liable to VAT. In *Air France* the Court held that because the airline had reserved a seat for the customer a no show customer received a service from the airline and the payment made by the customer towards the flight was liable to VAT for the service of the right to occupy the seat.

82. The Court in *Eugénie-les-Bains* carefully analysed the contractual position of the hotel and hotel customer in paragraphs 21 to 26 and it is very useful to look at these paragraphs in detail. The following paragraphs deal with an argument by the French

authorities that the retention of the deposit was payment to the hotel for reserving the hotel room for the guest:

"21. *The conclusion of a contract and the resulting existence of a legal link between the parties do not usually depend on the payment of a deposit. Since a deposit is not a constituent element of a contract for accommodation, it seems to be no more than an optional element within the parties' freedom of contract.*

22. Thus, a client may make a request by mail, or even orally, for the reservation of accommodation, which can be accepted by the hotelier – depending on its contractual practice – by mail, or even orally, without a deposit being required. The acceptance in such a manner of a booking request gives rise no less to the existence of a legal link between the parties, entailing an obligation for the hotelier to open a file in the name of that client and to reserve the accommodation for him.

23. Moreover, the payment of a deposit by the client, on the one hand, and the obligation of the hotelier, on the other, not to contract with anyone else in such a way as to prevent it from honouring its undertaking towards that client cannot – contrary to the French Government's submission – be classified as reciprocal performance, because the obligation in those circumstances arises directly from the contract for accommodation, not from the payment of the deposit.

24. In accordance with the general principles of civil law, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder. The obligation to fulfil the contract does not therefore arise from the conclusion, specifically for that purpose, of another agreement. Nor does the obligation of full contractual performance depend on the possibility that otherwise compensation or a penalty for delay may be due, or on the lodging of security or a deposit: that obligation arises from the contract itself.

25. Thus when, following a reservation, the hotelier provides the agreed service, he does no more than honour the contract entered into with his client, in accordance with the principle that contracts must be performed. Accordingly, the fulfilment of that obligation cannot be classified as consideration for the payment of a deposit.

26. Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received (Apple and Pear Development Council, paragraphs 11 and 12;

Tolsma, paragraph 13; and Kennemer Golf, paragraph 39). The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service." [emphasis added]

83. In these paragraphs the Court is making the critical distinction between rights obtained from the contract itself and supplies of services by the hotel to the guest. The Appellant would draw particular attention to the conclusions in the last sentence of paragraph 26 where the Court opined if the services are carried out, the deposit is paid against the cost of the room and cannot be consideration payable for the reservation of the room. In other words, the Court is making the eminently sensible observation that if the contracting parties have agreed that the deposit is to be applied against the cost of the room, the parties cannot simultaneously have agreed that it was a discrete payment for a completely different service of reserving the room.

84. In an attempt to reconcile this judgment with what the Court held in *Air France* it can be seen that the Court in *Air France* did precisely what the Court indicated could not be done in *Eugénie-les-Bains*. It saw no difficulty in transferring what the customer and airline had clearly contracted for as the consideration payable for the passenger transport on the flight to a 'service' entailing the 'right of the passenger to get on the flight'. Because, quite clearly, all rights derive from the contract this finding also directly contradicts the Court's findings in *Eugénie-les-Bains* at paragraphs 23 and 24 to the effect that the respective rights obtained by parties under a contract do not constitute separate independent contracts between the parties concerned. Obviously if the Court was correct in *Eugénie-les-Bains* and the rights obtained under a contract do not consist of independent contracts for consideration, as seems likely, *Air France* was wrongly decided.

85. In *MEO*, a case to which we will return in further detail below, the CJEU adopted and developed the *Air France* approach, categorising the supply made by the telecoms operator in that case as the supply of a right to receive telecoms services rather than the supply of telecommunications services themselves.

86. The Court held at paragraph 40 in *MEO*:

"the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract …that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right…" [emphasis added]

87. And later at paragraph 45 in *MEO*:

> *"the consideration for the amount paid by the customer to MEO is constituted by the customer's right to benefit from the fulfilment, by MEO, of the obligations under the services contract, even if the customer does not wish to avail himself or cannot avail himself of that right for a reason attributable to him. In the present case, MEO enables the customer to benefit from the service within the meaning of the case-law cited in paragraph 40 of this judgment and the cessation of that service is not imputable to it."*

88. The Court dealt with the objections to this approach, *inter alia*, as follows:

> *"46. It should be added, in that regard, that if that amount were characterised as damages to make good the loss suffered by MEO, the nature of the consideration paid by the customer would be changed, depending on whether or not the customer decides to use the service in question during the period provided for in the contract.*
>
> *47. Thus, a customer who benefited from services for the entire commitment period stipulated in the contract and a customer who terminated the contract before the end of that period would be treated differently for the purposes of VAT.*
>
> *48. Consequently, it must be held that the amount payable for non-compliance with the minimum commitment period is payment for the services provided by MEO, regardless of whether the customer exercises the right to benefit from those services until the end of the minimum commitment period."*

89. With respect, this is a *non-sequitor*. The Court is here saying that it would be wrong that a customer who pays for and receives a service be treated differently from a customer who pays but receives no service. Accordingly, and in order to avoid this consequence, the Court holds that the contract must be regarded as one for the right to receive telecommunications services rather than the supply of telecommunications services themselves.

90. The Court is here admitting that which would otherwise have been suspected, namely that its reasoning is driven by the result which is sought to be achieved rather than the application of well-established VAT principles. The charge to VAT self-evidently arises only where there is a supply of goods or services for consideration and where the service is performed. Recognising that no telecommunications services were supplied in return for the payment of the cancellation fee, the Court took the step of categorising the supply as the provision of a right to receive a supply.

91. It is submitted that such an approach is in breach of the CJEU's own established jurisprudence and leads to unpredictability, uncertainty and the possibility of double taxation in a manner which would appear not to have been appreciated by the Court and was perhaps not explained to it by the parties.

92. The first and most obvious point to record is that the supply of a thing and the supply of the right to receive a thing are self-evidently different supplies. Indeed, it is precisely because there was no supply of telecommunications services or air transport services that the Court classified the supply as a supply of the right to receive such supplies in *Air France* and *MEO*. According to the Court, those supplies were complete when the contract was concluded.

93. What is the place of supply of a right to receive a supply of transport services? If airlines are supplying the right to receive a supply of transport services, is that a taxable service although the transport services themselves are exempt (albeit with a right to input deduction where such services constitute a qualifying activity) in the State?

94. If a 12 month magazine subscription is sold for 12 monthly set payments (with a cancellation fee calculated by reference to the unpaid element of that minimum subscription) is this no longer the supply of reduced-rated printed material but rather the standard-rated supply of the right to receive such material? What happens if a purchaser of the magazine subscription cancels his subscription after 12 months? Is the fee paid for cancelling that subscription taxable at 23% even though the magazines themselves are taxable at 9%? In the alternative, where a customer does not cancel their subscription and honours the agreement, how is the consideration allocated between a supposed right and the supply of the magazines themselves and what VAT rates are applicable?

95. It is submitted that in an effort to ensure the taxation of the cancellation payments in *MEO* and to ensure taxation of the customer payments in *Air France* that the CJEU has conjured a new concept of supplying the right to receive a supply without appreciating the extraordinary consequences of such a construct.

96. The CJEU in *MEO* does not deal with the Judgment in *Société thermale d'Eugénie-les-Bains V Ministère de l'Économie, des Finances et de l'Industrie (C-277/05)* although it does refer to same in the earlier Judgment of *Air France*. At paragraph 19 of *Eugénie-les-Bains*, the Court cites the requirement that the service contracted for between the parties must be supplied before VAT can be applied.

> *"It follows from the case-law of the Court that a reply in favour of the first approach outlined in the question referred for a preliminary ruling may be given only if there is a direct link between the service rendered and the consideration received, the sums paid constituting genuine consideration for an identifiable service supplied in the*

context of a legal relationship in which performance is reciprocal (see, to that effect, Case 102/86 Apple and Pear Development Council [1988] ECR 1443, paragraphs 11, 12 and 16; Case C-16/93 Tolsma [1994] ECR I-743, paragraph 14; Case C-174/00 Kennemer Golf [2002] ECR I-3293, paragraph 39; and Case C-210/04 FCE Bank [2006] ECR I-2803, paragraph 34).”

97. It seems beyond all reasonable argument that any party would contract only for the right to receive a good or service and to agree to pay full consideration to such a supply when they clearly wish to obtain the good or service itself.

98. Whilst the *Eugénie-les-Bains* Judgment is analysed again below in the specific context of cancellation charges the key point is that the Judgment in *Eugénie-les-Bains* is irreconcilable with *Air France* and *MEO* for the simple and sufficient reason that the customer in *Eugénie-les-Bains* had a room reserved for him/her. The customer, thereby, received the right to receive a supply of accommodation. Applying the *Air France* and *MEO* approach, the supply in *Eugénie-les-Bains* must have been taxable and yet it was held not to be taxable precisely because there was no supply.

99. Ultimately, the Court held in *Eugénie-les-Bains* at paragraph 36 that:

“…a sum paid as a deposit, in the context of a contract relating to the supply of hotel services which is subject to value added tax, is to be regarded, where the client exercises the cancellation option available to him and that sum is retained by the hotelier, as a fixed cancellation charge paid as compensation for the loss suffered as a result of client default and which has no direct connection with the supply of any service for consideration and, as such, is not subject to that tax.”

100. The CJEU’s decision in that case is clearly referable to the present case as the customer is exercising their right under the contractual agreement to terminate it prematurely, and, by doing so, agrees to pay a cancellation charge as compensation. That termination marks the immediate end of both parties’ obligations under the contract, and no further services are supplied by the Appellant.

101. It is submitted, therefore, that the contracts must be the starting point for the analysis and that the contractual analysis can only be ignored if those contracts do not reflect the economic reality i.e. if they are, in general terms, abusive. It is not a principle of VAT that one can simply overlook the contracts and apply economic realities in substitute for the contractual position; if there were, it would render the abuse of rights principle meaningless and would make the application of VAT entirely unpredictable.

102. In any event, the early termination of the agreement exposes customers in this case to additional financial liabilities over and above the monthly charges to which they would have been liable had the agreement not been terminated.

103. It is submitted that the Appellant is not supplying customers with the right to receive telecommunications services, it merely supplies telecommunications services when it, for example, connects calls or transmits data. Unless and until it does so, there is no supply.

The Bill Pay Broadband Issue

104. As part of its service offering, the Appellant enters into contracts with customers for supplies of broadband services. Such services relate to the transmission of data to and from the Appellant's customers. This is distinct from and separate to the supply of telecommunications services to customers more generally.

105. The Appellant sells a range of broadband data plans or bundles to both Prepay and 'bill-pay' customers.

106. It is common ground that the 'bill-pay' customers pay a fixed sum to the Appellant on a monthly basis but the precise nature of that payment and the precise nature of the agreement to which it is paid is in dispute.

107. The agreements entered into between the Appellant and its broadband customers provide that the Appellant supplies data to its customers on a megabyte by megabyte basis. This price charged by the Appellant is calculated on a per megabyte basis and is recorded on the Appellant's billing system and presented on a customer's bill as such.

108. By way of an example at a certain point in time, historically the Appellant's Plan Redacted was Amount Redacted per month which permitted the customer to download or upload one gigabyte ("GB") of data. The agreed price per megabyte (MB) for in-bundle usage under this plan is Amount Redacted.

109. The contracts entered into between the parties has expressly stipulated the per MB price for the broadband services supplied thereby emphasising the pre-existing practice.

110. The data is only supplied to and consumed by the customer once the customer commences and maintains a data session. Data is not specifically reserved for a customer on the Appellant's network, and if the customer does not commence and maintain a data session there is no data supplied. The Appellant's Outline of Technical Factual Evidence, prepared by the Appellant's staff, provides further details in relation to the technical nature of how the services are supplied.

111. In its consideration of this issue, it is necessary to consider, first, the relevance of the contractual documentation and, thereafter, the precise nature of the supply made by the Appellant to its data customers. In particular, it is necessary to consider the importance of the contract and the nature of the supply being made by the Appellant. In

particular, is the Appellant supplying a right to receive a supply of data or as the Appellant submits, is it supplying data itself?

112. The principles to be applied in the consideration of those issues are the same for the 'bill-pay' Broadband and the cancellation charges issue and it is for that reason that they have already been dealt with above.

113. Nonetheless, it must be emphasised that the very nature of VAT is that it is a consumption based tax. This has been echoed in a substantial body of the jurisprudence of the CJEU. The Court has held that it is the supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies. In paragraph 50 of its Judgment in *BUPA Hospitals Ltd, Goldsborough Developments Ltd v Commissioners of Customs & Excise (C-419/02):*

> *"In that connection, it must also be borne in mind that it is the supplies of goods or services which are subject to VAT, rather than payments made by way of consideration for such supplies (see Case C-108/99 Cantor Fitzgerald International [2001] ECR I-7257, paragraph 17). A fortiori, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT."*

114. In the context of the supplies made by the Appellant, for a charge to VAT to arise in accordance with Section 3(c) VATCA, there must be "*a supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State".*

115. It has been clarified by the CJEU on numerous occasions that there must be reciprocal performance for any transaction to be subjected to VAT. In other words, there must be a supply of goods or services by one party to a contract and a reciprocal obligation to pay for that supply by another party to the contract in order for the supply concerned to be subject to VAT. Furthermore, as VAT is a tax on consumption, the supply must be performed.

116. The contracts entered into by the Appellant and its customers do not stipulate that there is a supply of a right to access services. In addition, under the terms of those contracts, its customers do not agree to pay any sum for reserving a set amount of capacity on the Appellant's network, they pay to send and receive data and, it is submitted, the amounts paid are only chargeable to VAT to the extent that they relate to services actually supplied.

117. In *MEO* the Court said this, at paragraph 40, about its previous Judgment in *Air France*:

> *"As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has already held, as regards the sale of air*

tickets that passengers have not used and for which they could not obtain repayment, that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract, irrespective of whether the customer uses this right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right (see, to that effect, judgment of 23 December 2015, Air France-KLM, and Hop! Brit-Air, C-250/14 and C-289/14, EU:C:2015:841, paragraph 28)."

118. As regards the supply made by MEO, the CJEU held, at paragraph 45 that:

"…the consideration for the amount paid by the customer to MEO is constituted by the customer's right to benefit from the fulfilment, by MEO, of the obligations under the services contract…"

119. Clearly, therefore, an examination of the contract entered into between the Appellant and its broadband customers is essential in order to ascertain the supply which is made by the Appellant. It is submitted, that even assuming that the Judgments in *MEO* and *Air France* are beyond reproach, the right which the broadband customers derive from the contract is no more than the right to purchase up to a set amount of data at an agreed per MB rate. They do not, on any view, purchase, in block, a right to a set amount of data. However, that the contractual arrangements between the Appellant and its broadband customers differs from those entered into with its phone customers and, therefore, Issue II arises in respect of the former only and not the latter.

120. Given the distinctions between the Appellant's broadband and telephone contracts, it is not disputed that contracts entered into between the Appellant and its customers could be written in different ways and could, if so written, give rise to different VAT outcomes. It is submitted that this is precisely what the CJEU had in mind when it said that taxpayers are at liberty to arrange their tax affairs so as to limit their tax liability. There is no allegation in this case of an abuse of rights and it is submitted that any arguments based on economic and commercial reality cannot override the terms of the contracts entered into between the parties who operate at arm's length. Indeed, it is clear from *Air France* and *MEO* that the identification of the rights under the contract are key.

121. In addition to the legal and contractual issues which arise in the context of the foregoing, the manner in which the data is in fact made available to the customer is of importance.

122. It is submitted that the Appellant is required to account for VAT on the supply of data only to the extent of the data supplied and that VAT cannot be due in respect of supplies of data which were not but could have been made.

123. Finally, with regard to Issue II, in the event that it is considered that the Judgments in *MEO* and *Air France* to be counter to the Appellant's arguments in respect of this issue, the Appellant relies on the arguments set out below to the effect that those cases are contrary to the Irish statutory position and, in the alternative, wrongly decided. If a decision that the principles set out in *MEO* and *Air France* are inapplicable in this jurisdiction or require further consideration by the CJEU, then this would likely impact also upon the consideration of the Appeal Commission of the Bill Pay Broadband issue.

The Cancellation Charges Issue

124. The Appellant enters into contracts with customers pursuant to which the Appellant agrees to provide, and the customer agrees to pay for, the supply of telecommunications services for a defined period usually 12, 18 or 24 months.

125. The agreements entered into between the Appellant and its customers provide that, in the event of the Appellant terminating a customer's contract due to that customer's conduct, or where a customer terminates the contract before the end of the agreement period, a cancellation fee is payable by the customer. Customers are fully aware of this from the outset.

126. No services are supplied by the Appellant to the customer from the date of termination of the contract and indeed it is a condition precedent to the payment of the cancellation charge that the contract has been cancelled. In other words, it is only when both parties agree that (a) no further telecommunications services will be provided (b) the customer will not pay for any further supplies and (c) therefore that a contract no longer exists, that the cancellation charge is payable. If *MEO* is correctly decided, VAT is due on a payment in the absence of any contract for the supply of goods or services for consideration.

127. For the reasons outlined below, the Appellant contends that the cancellation charges, which are payable after the termination of the agreement and by reference to a period during which no services are provided, are outside the scope of VAT since they are not and simply cannot logically be consideration for a supply.

128. It is right that the Appellant acknowledges the existence of a Judgment of the CJEU in *MEO* which related to cancellation charges payable to a Portuguese telecoms operator, is, on its face, fatal to the Appellant's arguments in this case. However, on the other hand the Judgment of the Court in *Eugénie-les-Bains* has not been overturned and its

findings are equally binding upon the TAC and that Judgment is fatal to the Respondents' case.

129. Furthermore the Appellant submits that the Judgment in *MEO* does not apply to the facts of this case or that, in the alternative, that the Judgment in *MEO* was simply wrong or must be reconciled by the CJEU with *Eugénie-les-Bains* and all of its previous case-law on the requirement for contractual obligation for liability to VAT to exist.

130. The gravity of arguing that the CJEU, as the ultimate arbiter of EU law, has erred but such arguments is acknowledged, though unusual are not unprecedented and it is not unheard of for the CJEU to overturn a previous Judgment (see, for instance, *Jennifer Gregg and Mervyn Gregg v Commissioners of Customs and Excise (C-216/97)* (paragraph 15) where the Court overturned its decision in Case *C-453/93 Bulthuis-Griffioen* v *Inspecteur der Omzetbelasting* [1995] ECR I-2341.)

131. It is submitted that the Judgment in *MEO* is, properly analysed, irreconcilable with the Court's seminal Judgment in *Eugénie-les-Bains* and, left uncorrected, will entirely undermine the cohesion of the VAT system.

132. It is accepted, however, that the Tax Appeals Commission is bound to apply the Judgments of the CJEU and accordingly, in the event that the Tax Appeals Commission is persuaded by the Appellant's arguments in respect of the *MEO* Judgment and *Eugénie-les-Bains*, it will be necessary for it to refer questions to the CJEU in respect of these issues.

The Judgment in MEO

133. In *MEO* the CJEU considered circumstances which are broadly similar, but not identical, to those in issue in this case.

134. The facts of *MEO* are set out as follows by the CJEU:

> "*10. MEO, a company established in Lisbon, has as its main activity the provision, on Portuguese territory, of telecommunications services. It thereby carries out an economic activity within the meaning of the second subparagraph of Article 9(1) of the VAT Directive and is thus liable to VAT.*
>
> *11. As part of its activity, MEO concludes contracts with its customers for the supply of services in the fields of telecommunications, internet access, television and multimedia, some of which provide for minimum commitment periods, while offering its customers favourable terms, particularly in the form of lower monthly subscription fees.*

12. These contracts also stipulate that, in the case of deactivation of the goods and services referred to therein before the expiry of the agreed minimum commitment period at the request of customers or for a reason which is attributable to them, MEO is entitled to compensation corresponding to the amount of the agreed monthly subscription fee multiplied by the difference between the duration of the minimum commitment period provided for in the contract and the number of months during which the service was provided.

13. According to the referring court, the amount payable by the customer to MEO in case of early termination of the services contract is therefore made up of the amount of the subscription fee that corresponds to the full amount of the minimum commitment period, even if the service is not supplied to the customer up to the end of that period.

14. It is also apparent from the order for reference that the customer is liable to pay that amount where services are deactivated before the end of the minimum commitment period, in particular if the customer fails to pay the agreed monthly subscription fee."

135. Whilst the full details of the precise contractual arrangements in place in MEO are not available and there was a significant dispute in that case as to the particular facts (see paragraphs 32 to 37 of the Court's Judgment), the Appellant accepts that, from the available facts, the two cases do appear broadly similar but with one significant distinction, namely that the cancellation fee to which the Appellant's customer is liable is not inevitably limited to the amount of the monthly payments for the unexpired term. "Cancellation Fee" is defined in the terms and conditions as:

"a fee charged if we end the agreement due to your conduct or if you end your agreement within the Minimum Term. This fee will be set out in your Price Guide and may cover (without limitation) your fixed periodic charges for the Minimum Term, our administrative costs, costs incurred by us in Connecting and Disconnecting the Appellant Services and our payments to operators, network providers, stores and agents."

136. As is clear from the CJEU's Judgment the Court laid considerable emphasis on the extent of a customer's contractual exposure. At paragraph 44:

"Inasmuch as MEO has a right under the agreements at issue in the main proceedings, in the event of failure to observe the minimum commitment period, to payment of the same amount as it would have received as payment for services which it undertook to supply in the event that the customer had not terminated his contract, a matter which it is for the referring court to ascertain if necessary, the early termination of the contract by the customer, or its termination for a reason

attributable to that customer, does not alter the economic reality of the relationship between MEO and its customer."

137. It is submitted that no commercial business that has lost a customer is in "economic reality" the same position as one that has not lost that customer. Nor is a customer who is making a payment in the absence of a service in the same position as one who is paying for and receiving a service.

138. It is clear that pursuant to the agreements entered into by the parties in the Appellant's case that the early termination of the contract does alter the economic reality of the relationship since the customer thereby in addition becomes exposed to the possibility of payment of the Appellant's internal administrative costs for which he / she is not otherwise liable. Moreover, the Appellant has lost the ability to obtain further income from that customer through, for example, out of bundle usage and cross-selling opportunities. Indeed, it is not clear whether, in the case of *MEO*, the customers were supplied with an unlimited right to telecommunications services.

139. Leaving aside this significant factual distinction, it is clear that the CJEU in *MEO* followed the same approach as it adopted in *Air France*, namely construing the arrangements as the supply of a right to receive telecommunications services rather than a supply of telecommunications services themselves.

140. It is submitted that, in the event that the *MEO* Judgment is considered to be of direct application to the facts of this case, that the Judgment is wrong for the reasons outlined earlier.

141. Moreover, the CJEU's reliance on the fact that the customer's liability was the same whether or not the supplies were terminated is directly at odds with its approach in *Eugénie-les-Bains*. There the Court held, at paragraph 33, that:

"That conclusion is not undermined, contrary to the Portuguese Government's submission, either by the fact that, in most cases, the amount of the loss suffered is not the same as the amount of the deposit retained or by the fact that the vacancies brought about by the cancellation may be filled by new clients. Given that the compensation is fixed, it is only to be expected that the amount of that loss may be higher or lower than the amount of the deposit retained by the hotelier."

142. In this context, it should be noted that on 24 January 2019, a further reference was made by the Portuguese Courts regarding the taxability of cancellation charges (*see Case C-43/19 Vodafone Portugal*) asking whether amounts payable by way of a cancellation charge are taxable when, following the termination of the contract, the operator no longer supplies services to the customer and there is no specific act of consumption which has occurred since the contract was terminated. Whilst, at present, only the

questions referred are available, it seems clear that the CJEU is being asked to reconsider its analysis in *MEO* or, at least, to explain its analysis in further detail.

143. If and to the extent that the TAC considers that the Judgments in *MEO* and *Air France* are incompatible with the principles applicable in *Eugénie-les-Bains,* it is submitted that not only is the analysis in *Eugénie-les-Bains* to be preferred but that it is important to note that the *Eugénie-les-Bains* principles have been put on a domestic statutory footing upon which the Appellant is entitled to rely.

144. Section 74(4) VATCA provides as follows:

> *"Where a person accounts in accordance with section 76 or 77 for tax referred to in subsection (2) on an amount received by way of a deposit from a customer before the supply of the goods or services to which it relates, and —*
>
> *(a) that supply does not subsequently take place owing to a cancellation by the customer,*
> *(b) the cancellation is recorded as such in the books and records of that person,*
> *(c) the deposit is not refunded to the customer, and*
> *(d) no other consideration, benefit or supply is provided to the customer by any person in lieu of the refund of that amount,*
>
> *then the tax chargeable under section 3 (a) or (c) shall be reduced in the taxable period in which the cancellation is recorded by the amount of tax accounted for on the deposit."*

145. This provision was introduced in Finance Act 2008 by the insertion of Section 19(2B) into the then VAT Act 1972.

146. It is submitted that the section clearly codifies the *Eugénie-les-Bains* principles in Irish law.

147. If the charge to tax on an amount paid in advance of a supply by way of a deposit is retrospectively removed when the supply with respect to which the deposit was paid is cancelled, it must follow, as a matter of Irish law, that a sum paid after the event by way of a cancellation sum is not chargeable to VAT. Were it otherwise, the retrospective adjustment of the output tax accounted for on the deposit would not be possible; there is a retrospective adjustment because the payment does not ultimately relate to an activity.

148. Put simply, if the customer had made a lump sum payment in respect of the supply of telecommunications services over a 24 month period in advance, Section 77(4) VATCA would clearly require that the VAT accounted for on that prepayment is retrospectively

removed from the charge to VAT by way of an adjustment to the taxable person's output tax for the period. It must follow, therefore, that as a matter of domestic law a sum paid after cancellation in respect of that cancellation is not chargeable to VAT.

149. Whilst it might legitimately be asked whether *Eugénie-les-Bains* remains good law in the wake of *Air France* and *MEO*, clearly those Judgments do not supersede the provisions of the Irish VAT Act which, in effect, place the *Eugénie-les-Bains* principles on a statutory footing.

150. In the event that the Section 77(4) VATCA does not itself entail the consequences that the cancellation sum paid to the Appellant is outside the scope of Irish VAT, that provision breaches the principle of fiscal neutrality since it treats the payment of sums in respect of supplies which are cancelled (and therefore not performed) differently depending upon the time at which the payment in respect of those cancelled supplies are made.

Equal Treatment and Legitimate Expectation

151. Moreover, the Respondents have specifically acknowledged in their practice notes and VAT rates' database that contractual compensation payments are not subject to VAT.

152. The Respondents' leaflet "Treatment for VAT Purposes on Forfeited Deposits and Cancellation Charges" provided (at paragraphs 3.1 and 3.2 on page one) that:

> *3.1 "The ruling affects the VAT treatment of forfeited deposits, owing to a cancellation by the customer, not only in the hotel services sector but also in relation to the supply of other services and goods.*
>
> *3.2 A charge levied by a supplier when a customer makes a cancellation ("cancellation charge") and a supply does not take place, is to be treated as falling outside the scope of VAT by virtue of it being regarded as compensation and not a payment in respect of a taxable supply."*

153. The same point is reiterated at paragraph 5.4 on page two of the same document, as follows:

> *5.4 "Where a supplier levies a charge on a customer in the event of the customer cancelling an order or request for a supply of goods or services and the supply does not take place, VAT is not due on the "cancellation charge" as set out in paragraph 3.2 above."*

154. Notwithstanding the fact that the Respondents' guidance was withdrawn, it does not detract from the fact that such a statement existed and was acted upon by the Appellant. It is submitted that the imposition of VAT in the circumstances of this case

would breach the Appellant's legitimate expectations and its right to equal treatment both of which are general principles of EU law.

IV. Applicable time-limit for VAT refunds

155. The VAT refund claims filed for the taxable periods covering the timeframe 1 March 2012 – 28 February 2013 relate to the same underlying technical matters as outlined at I. and II. above i.e. "the Non-EU Bill Pay Issue" and "the Cancellation Charges Issue". However, in addition to the technical objections discussed above, these repayment claims have been refused on the basis that the claims were not made in time.

156. The issue at dispute under this heading concerns a disparity between the four year look-back period for direct tax purposes and that applicable to VAT.

157. In accordance with Section 865(4) of the Taxes Consolidation Act 1997 ("TCA 1997"), the direct tax look-back period for repayments of tax is up to four years after the end of the chargeable period to which a claim relates. Per Section 865(1) TCA 1997, "chargeable period" for direct tax purposes is defined in accordance with Section 321(2) TCA 1997. Due to the length of a chargeable period for Corporation Tax purposes, this provides taxpayers with an effective period of as much as five years within which to reclaim overpaid tax.

158. Pursuant to Section 99(4) VATCA an accountable person can only recover a refund of VAT within four years of the end of the taxable period to which it relates (Section 99(4) VATCA refers). "Taxable period" for VAT purposes is defined in Section 2 VATCA.

159. The effect of this is that a person has as much as five years to reclaim overpaid income tax but has only four years to recover overpaid VAT.

160. The Appellant contends that this disparity between the look-back period for repayments of direct taxes and that applicable to VAT breaches the well-established EU Law principle of equivalence.

161. The CJEU has repeatedly declared, in many cases and over many years, in that particular context, that time limits applicable to taxes applied by EU law cannot be less favourable than those applied to national taxes in similar situations.

162. In *Weber's Wine World Handels-GmbH, Ernestine Rathgeber, Karl Schlosser, Beta-Leasing GmbH and Abgabenberufungskommission Wien* (C-147/01), at paragraph 38, the Court held:

> *"For reasons of legal certainty, the Member States are in principle permitted to limit, at national level, the repayment of taxes which have been levied though not due.*

Such restrictions should, however, satisfy the principle of equivalence, which requires that the national provisions apply in the same way to purely domestic cases and to those arising under Community law, and to the principle of effectiveness, which requires that the exercise of the rights conferred by the Community legal order is not rendered impossible in practice or excessively difficult.

163. In Joined Cases C-95/07 and C-96/07: *Ecotrade SpA v Agenzia delle Entrate – Ufficio di Genova* 3, in paragraph 46, the CJEU held:

"It must be added that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of input tax by making him forfeit his right to deduct cannot be regarded as incompatible with the regime established by the Sixth Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on Community law (principle of equivalence) and, second, that it does not render virtually impossible or excessively difficult the exercise of the right to deduct (principle of effectiveness) (see, Case C-327/00 Santex [2003] ECR I-1877, paragraph 55, and Case C-241/06 Lämmerzahl [2007] ECR I-8415, paragraph 52)." [emphasis added]

164. At paragraph 35 of the CJEU's Judgment in *ADV Allround Vermittlungs AG, in liquidation, v Finanzamt Hamburg-Bergedorf* (C-218/10), the Court held:

"However, in accordance with settled case-law, in the absence of European Union rules in the area, it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible and to lay down detailed procedural rules for safeguarding rights which individuals derive from European Union law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see, inter alia, Case C-228/96 Aprile [1998] ECR I-7141, paragraph 18, and Case C-472/08 Alstom Power Hydro [2010] ECR I-623, paragraph 17)." [emphasis added]

165. Accordingly, the Appellant is, at least, entitled to rely directly on EU law to vindicate its right to avail of equivalent time limits, for VAT purposes, to those applicable to national taxes. In making its claims for repayment of VAT (which have been refused by the Respondents), it was exercising that right. The Appellant contends that the claims made should be considered as valid under EU law, and (subject to the Appellant establishing the amounts ought not to have been paid) are repayable in accordance with the principle of equivalence.

166. In summary, the Appellant contends that:

(a) in keeping with a body of settled CJEU case-law, the time limits applicable to taxes applied by EU law cannot be less favourable than those applied to national taxes in similar situations;

(b) the disparity between the look-back period for repayments of direct taxes and that applicable to VAT breaches the well-established EU law principle of equivalence;

(c) it can, under direct effect of EU law, set aside the offending provision of Irish law (in this case Section 99(4) VATCA so as to vindicate the Appellant's right to recover VAT beyond the four year period.

(d) therefore the claims for the taxable periods covering the timeframe 1 March 2012 – 28 February 2013 are not out of time as a result of the EU law principle of equivalence.

167. In the event that Section 99(4) VATCA is found to be incompatible with EU law, it is accepted that payment of the refund claims for the timeframe 1 March 2012 – 28 February 2013 will be dependent on the outcome of the substantive dispute in relation to the underlying technical matters as outlined at I. and II. above i.e. "the Non-EU Bill Pay Issue" and "the Cancellation Charges Issue".

Respondents' Submissions

(i) Non-EU Roaming

168. The relevant legislation is contained in Articles 58 and 59(a) of the PVD, as well as in sections 2 and 104(2) VATCA.

169. Article 58 provides: -

> *"The place of supply of the following services to a non-taxable person shall be the place where that person is established, has his permanent address or usually resides: -*
>
> *(a) Telecommunication Services;*
> *(b) Radio and Television Broadcasting Services;*
> *(c) Electronically supplied services, in particular those referred to in Annex II…"*

170. Article 59(a) provides: -

> "*In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply which is governed by Articles 44, 45, 56, 58 and 59: -*
>
> *(a) Consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community, if the effective use and enjoyment of the services takes place outside the Community;*
>
> (b) *Consider the place of supply of any or all of those services, if situated outside the Community, as being within their territory if the effective use and enjoyment of the services takes place within their territory*."

171. Ireland availed of the option contained in Article 59(a) PVA by way of section 2 VATCA, by the insertion of the definition of "telephone card" to mean "*a card, or a means other than money …. that confers a right to access a telecommunications service"*

172. The Respondent accepts that section 104(2) VATCA applies to pre-pay customers accessing international roaming services outside of the EU. It also appears to be common ground between the parties that the Appellant's supplies of telecommunications services to its pre-pay customers come squarely within the provisions of Section 104(2) VATCA.

173. The Appellant alleges that, by a supposed parity of reasoning, that the means by which the taxpayer chooses to be charged for the service, whether in advance or in arrears, can logically have no effect on the VAT treatment of the service being supplied in return for that charge. In a similar vein, it refers to paragraphs 32 to 35 of the CJEU's Judgment in Joined Cases C-259/10 and C-260/10 *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc*.

174. The Appellant alleges that it is not necessary that a distortion of competition be proven, the existence of such a distortion follows from the similarity of the supplies themselves, and, it further alleges, that, from the point of view of its customers, the supply being made by it is the same regardless of whether it is supplied under a bill-pay or a pre-pay contract. Accordingly, the Appellant contends that its bill-pay and pre-pay customers/consumers should be treated the same for VAT purposes, and that to do otherwise would amount to a breach of the principle of fiscal neutrality.

175. The Respondents consider these arguments to be unfounded and the Appellant's underlying construction of the *Gregg* and *Rank* case-law to be misplaced. The Respondent considers that the principle of fiscal neutrality cannot be and is not, breached. The supply of the bill-pay, on the one hand, and pre-pay services on the other are not identical from the point of view of the consumer, as the same needs of consumers are not met by the two services. In *Hutchison 3GUK Limited* [2018] UK FTT289, the UK FTT found that there were significant differences between pre-pay and bill-pay customers, in particular at paragraphs 43 to 47 where the UK FTT found that there were significant differences between pre-pay and bill-pay customers and is encapsulated below:

> "*43. But other than when an add-on was purchased, I do not accept that a PAYG [pay as you go] customer was in the same position as a PM [pay monthly] customer in all respects. However, the distinction between them was not in the level of commitment. A 1-month SIM-only customer has no more commitment to H3G than a PAYG customer: neither had an obligation to pay H3G any more money than they had already paid. It seems to me the difference between a PM and PAYG customer was in the obligation owed by H3G.*
>
> *44. A PM customer was entitled within the contractual period to an agreed amount of calls, texts and data downloads. H3G had no such obligation to a PAYG, nor did the PAYG have any rights to an agreed amount of calls, texts and data downloads within an agreed period. His right was, over an indefinite period, to allocate the amount standing to his credit with H3G to such calls, texts and data downloads*

as he chose at the prices H3G charged until his or her credit was all used up or expired.

45. The PAYG customer, in that sense, had better rights than the PM customer. Unlike the PM customer, he could allocate his credit between calls, texts and data as he saw fit. A PM customer, on the other hand, only had his allocated allowance and could not swop unused portions of allowance for one of the 3 types of airtime to one of the other allowances. So, for example, a PM customer who had used all his phone allowance before the expiry of the billing period would have to pay OOA [out of allowance] charges on any further calls within that billing period even if he had not used up his allowance of texts and data downloads.

46. Moreover, the PAYG customer's credit was indefinite (within certain limits). In complete contrast, a PM customer's allowance expired, whether used or not, at the end of the billing period. A PAYG customer's credit would only expire, as I have said, if there was no activity on the account for 6 months: it was open to a PAYG to ensure that his unused credit lasted indefinitely by ensuring that there was a minimal amount of activity on his account every 6 months. A PM customer could do nothing to keep the unused portion of his airtime allowances: they expired automatically at the end of every billing period. He had to use them within the month, or lose them.

47. It was implicit in the evidence that a PAYG customer in effect 'paid' for his greater freedom because the effective per call rates charged by H3G would be greater for a PAYG customer than a PM customer, whose rates were effectively discounted to reflect his agreement in committing to pay a MRC [monthly recurring charge] …".

176. It should be noted that the issues in that case were slightly different but very similar arguments to those being made in this case by the Appellant were made by Name Redacted, all of which were rejected by the said Tribunal. The Respondent submits that the Appellants' argumentation in this appeal be rejected.

177. The Respondent takes no issue with the fact that fiscal neutrality is an important principle of EU law and that that Member States which are introducing discretionary measures must do so in compliance with that principle. However, the Respondent is firmly of the view that the principle of fiscal neutrality cannot be and is not breached, as is alleged in this case, as the supply of the bill-pay or pre-pay services are not identical from the point of view of the consumer and the same needs of consumer are not met by the two services. As has been observed above, the Respondent refers to the case of

Hutchison 3GUK Limited [2018] UK FTT289, where the UK FTT found that there were significant differences between pre-pay and bill-pay customers.

178. Thus, although the issues in that case were slightly different, a similar argumentation in respect of the supply of the bill-pay and pre-pay services being identical from the point of view of the consumer was made by Name Redacted, which was categorically rejected by the said Tribunal.

(ii) Bill Pay Broadband Light

179. The Appellant alleges that it is required to account for VAT on the supply of data only to the extent of the data supplied and that VAT cannot be due in respect of supplies of data which were not (but could have been) made. The Appellant appears to rely on *BUPA Hospitals Ltd, Goldsborough Developments Ltd v Commissioners of Customs & Excise* (C-419/02). The Respondents disagree with the Appellant's assertion and considers that the Appellant's customers are paying for the right to access a measured amount of data for a monthly fee.

180. The Respondent deny that there is any inconsistency between the CJEU's interpretation of the PVA and the VATCA. In any event, the latter manifestly falls to be interpreted consistently with the PVA, as construed by the CJEU.

181. The Appellant also seeks to rely upon the principle of fiscal neutrality in relation to this issue as well as in relation to the non-EU roaming issue below). The Respondent rejects this contention and refers particularly to *Rank PLC* (C-259/10 and C-260/10). Furthermore, the Respondent again refers to *Hutchison 3GUK Limited* [2018] UK FTT289, where the UK First Tier Tribunal ("UK FTT") found albeit in a slightly different context that there were significant differences between pre-pay and bill-pay customers, as described above at paragraphs 43 to 47 of that decision.

182. Although the issues in that case were slightly different, a similar line of argument regarding the supply of the bill-pay or pre-pay services being allegedly identical from the point of view of the consumer was made by Name Redacted. Notably, it was decisively, and the Respondents submit correctly, rejected by the UK FTT.

183. The Appellant has postulated various arguments over its lengthy course of correspondence with the Respondent in respect of this issue. In addition to the legal and contractual issues which are alleged to arise regarding this issue, the manner in which the data is in fact made available to the customer is of importance.

(iii) Cancellation Fees

184. The Appellant contends that cancellation charges, which are payable after the termination of the agreement between the Appellant and its customers by reference to a period during which no services are provided, are outside the scope of VAT, since they are not and simply cannot logically be consideration for a supply. However, in the *MEO* case, C-295/17, wherein the CJEU held clearly at paragraph 71, in a reference arising in very similar circumstances, that: -

> "*Article 2(1)(c) of the [PVC] must be interpreted in such a way as the pre-agreed amount received by an economic operator in the case of early termination by their customer, or for reason attributable to them, of a contract for the provision of services subject to a minimum commitment period, which amount corresponds to the amount the operator would have received during the rest of the period had the termination not occurred … must be considered as the remuneration for a provision of services in return for a fee and subject to tax, as such."*

185. The Respondent submits that the Appellant claim is patently unsustainable. Although the Appellant suggests apprehensively that *MEO* does not apply to the facts of this case, or that, in the alternative, that judgment was wrongly decided by CJEU, it accepts and appreciates the gravity of seeking to argue that the CJEU, as the ultimate arbiter of EU law, has erred in law. The Respondent stresses that the judgment in *MEO* is clear and definitive.

186. In this regard, the Respondent submit that is simply not open to the Appellant to question the correctness of the principles of law interpreting the PVA laid down in a judgment of the CJEU. As noted above, if, having considered the principles laid down by the CJEU in the *MEO* case, there are doubts as to how those principles should be applied, it would be a matter for a preliminary reference to be made to the CJEU with regard thereto. Otherwise, the interpretation of the PVA made by CJEU in *MEO* should be applied which is clearly fatal to the Appellant's claim.

187. The Respondent, as noted above, submits that the principles enunciated by the CJEU in the *MEO* case are clear and beyond doubt. Furthermore, they are not inconsistent with the CJEU's previous case-law. In reality, they deal with issues which are strikingly similar to the issues arising in this case and in so doing, clearly articulate an interpretation of the PVA that is plainly inconsistent with that which is being proposed by the Appellant. Accordingly, it is important to have careful regard to the reasoning of the CJEU in *MEO*.

188. By its first question in that case, the CJEU observed that the referring court was asking whether a predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its

customer, or for a reason attributable to that customer, which corresponds to the amount that the operator would have received for the remainder of that period, should be regarded as payment for supply of services for consideration within the meaning of Article 2(1)(c) of the VAT Directive, and, as such be subject to VAT. In responding to that question in paragraph 39 of its judgment, the CJEU recalled that, "*a supply of services is carried out 'for consideration', within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient …*". The CJEU then proceeded to hold that, if there is a direct link between the service supplied and the consideration received, this will be the case. In so doing it expressly referred, amongst other cases, to the *Air France-KLM* case.

189. The CJEU then proceeded to observe that it had already held in *Air France-KLM* (and *Hop!Brit-Air*, C-250/14 and C-289/14) "*as regards the sale of air tickets that passengers have not used and for which they could not obtain repayment, that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract, irrespective of whether the customer uses this right*" and that: "*Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right*".

190. Turning then to the condition relating to the direct link between the consideration received and the service supplied, the CJEU held (paragraph 41) that it must be established "*whether the amount due for failure to comply with the minimum commitment period, in accordance with the terms of the contracts at issue in the main proceedings, corresponds to the payment for a service, in the light of the case-law cited in paragraphs 39 and 40 of this judgment*". It then turned to applying those principles to the specific facts of the *MEO* case. It is submitted that it is clear from this analysis in particular paragraphs 42 to 50, how similar the issues that arose in that case were to those arising in the present case. As in that case, "*the amount payable for non-compliance with the minimum commitment period is payment for the services provided by [here the Appellant], regardless of whether the customer exercises the right to benefit from those services until the end of the minimum commitment period*" (see paragraph 48).

191. With regard to the issue whether the requirement that the sums paid constitute actual consideration for an identifiable service, the CJEU noted in *MEO* (paragraph 49) that the service to be provided and the amount invoiced to the customer in the event of termination of the contract during the minimum commitment period are already identified at the time of the conclusion of the contract. Therefore, it was satisfied that the "*the amount due for non-compliance with the minimum commitment period must be*

considered an integral part of the total price paid for the services, divided into monthly instalments, which amount becomes payable immediately in case of failure to pay" (at paragraph 50). The Respondent submits that there is no distinction of note with regard to the contractual terms at issue in this case, such as would justify not applying the same interpretation of the PVA.

192. Alternatively, the Respondent considers, in any event, that the Appellant's acceptance of the customer's termination of the contract is a toleration of an act or a situation within the meaning of Article 25, indent (b), of the PVD. Article 25, indent (b) clearly provides that a supply of services may consist, *inter alia*, in one of the following transactions: "*the obligation to refrain from an act, or to tolerate an act or situation*".

193. The Appellant further argues that the Respondents have specifically acknowledged in their practice notes and VAT rates' database that contractual compensation payments are not subject to VAT. The Appellant cites "*Treatment for VAT Purposes on Forfeited Deposits and Cancellation Charges*" and alleges that:

> "*notwithstanding the fact that the Respondents' guidance was withdrawn, it does not detract from the fact that such a statement existed and was acted upon by the Appellant. It is submitted that the imposition of VAT in the circumstances of this case would breach the Appellant's legitimate expectations and its right to equal treatment both of which are general principles of EU law*".

194. The Respondent contends that persons in whom a statutory power or discretion vested ought to be able freely to exercise that power or discretion properly, and to find otherwise would amount to an impermissible fettering of future decision-making involving the exercise of a statutory power, (see G*lencar Exploration plc* [2002] IR 84). The Respondent also contends that an alleged legitimate expectation cannot prevail against a statute. It cannot operate to confer upon a statutory authority a power which that authority does not have under the terms of the relevant statute, (see *Cork Opera House v the Revenue Commissioners* [2007] I.E.H.C., 388; High Court, unreported, 21 November, 2007). The Respondent further contends that the Appellant cannot pursue, based on an alleged legitimate expectation, a remedy which would involve the Respondent carrying out activities which it was not empowered to carry out, (see *Wiley v Revenue Commissioners* 1994 2IR 160). The Respondent refers to *Lett & Company Limited v Wexford Borough Corporation*, *the Minister for Communications, etc. & Anor.* [2007] I.E.H.C. 195 and submits that the withdrawal of the confirmation arises from the fact that the original confirmation was not underpinned by any statutory provision, and was, accordingly, subject to the usual restriction in that regard. The Respondent will further refer, in this respect, on *Centra Infraestructuras Internacional S.L.U. –v- The Revenue Commissioners* [2016] 2 IR 314.

195. Finally, in relation to the Appellant's alleged legitimate expectation argument's, the Respondent respectfully contends that the TAC does not have jurisdiction to determine matters such as entitlement to rely upon the doctrine of legitimate expectation, (see Citywest Logistical Ltd. v. The Revenue Commissioners High Court 12 January 2018 and *Menolly Homes Limited v The Appeals Commissioners & Anor* [2010] IEHC 49). The Respondent also refers to Revenue and Customs Commissioners V Noor [2013] STC 998 and *Clare Gore v HMRC* [2014] UKFTT 904 (TC), wherein it was held that the UK FTT did not have jurisdiction to hear a claim based on legitimate expectation.

(iv) ***Time Limit Issue***

196. On the 28 April 2017, the Appellant made a claim for repayment of VAT in respect of the period of 1 March 2012 to 28 April 2013. The reclaim of VAT was related to "cancellation charges" and "bill-pay and non-EU roaming" issues. This claim was refused by the Respondent, in the first instance, on the basis that the claim was made outside of the four-year time limit provided for in section 99(4) VATCA.

197. It appears that, although the Appellant accepts that the reclaim of VAT was outside the four-year time limit, it contends that section 99 VATCA breaches of the EU principle of equivalence, in that it is, in effect, a shorter time limit than that permitted for claims of income tax, which is set out in section 865 Taxes Consolidation Act 1997. The Appellant seeks to rely directly on EU law to vindicate its right to avail of what it contends should be equivalent time limits, for VAT purposes, to those applicable to national taxes and that, in making its claims for repayment of VAT, it was exercising that right. The Appellant contends that the claims it has made should be considered as valid under EU law, and subject to the Appellant establishing the amounts ought not to have been paid that those claims are repayable in accordance with the EU law principle of equivalence. The claim fails, in the Respondents' view, because the principle is inapplicable as it is not based on a comparison of comparable taxes having regard to their essential scope and area of operation.

198. The Respondent refers to *T.D v The Minister for Justice Equality and Law Reform* [2014] 4 I.R. 277, the leading domestic case applying the well-established CJEU case-law on equivalence) wherein the Supreme Court summarised that case-law. The Supreme Court relied on the CJEU's judgment in *Preston v Wolverhampton NHS Trust* C-78/98, and in particular on paragraphs 55, 56 and 60 to 63, which state as follows: -

> "*55. The principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of community law or national law, where the purpose and cause of action are similar…*
>
> *56. In order to determine whether the principle of equivalence has been*

complied with in the present case, the national court – which alone has direct knowledge of the procedural rules governing actions in the field of employment law – must consider both the purpose and the essential characteristics of allegedly similar domestic actions…

60. Thus, in paragraph 51 (of Levez), the Court stated that the principle of equivalence would be infringed if a person relying on a right conferred by community law were forced to incur additional costs and delay by comparison with a claim and whose action was based solely on domestic law.

61. More generally it observed that whenever it failed to be determined whether a procedure for provision of national law was less favourable than those governing similar domestic actions, the court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any specific features of that procedure before a different national court…

62. It follows that the various aspects of the procedural rules cannot be examined in isolation but must be placed in the general context. Moreover, such an examination may not be carried out subjectively by reference to circumstances of fact but must involve an objective comparison, in the abstract of the procedural rules at issue.

63. In view of the forgoing, the answer must be that in order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar considering the role played by those rules in the proceedings, as well as the operation of that procedure and any special feature of those rules."

199. In *T.D.*, Fennelly J., in delivering the majority judgment of the Supreme Court, held as follows: -

"258. I would interpret the references by the [CJEU] to cause of action and special characteristics as referring to the subject matter of claims. When referring to judicial review, the subject matter could be broadly defined so as to encompass all claims for review of administrative decisions of every type or it could relate to the underlying subject matter of the decisions which may be challenged.

259. The decisions of the [CJEU] do not make any distinction on these grounds. The court must, it is clear, take a broad view and examine the system in its entirety. The subject matter of an application for judicial review is related to both the underlying area of law to which the decision relates … and the relief

sought in the claim, such as certiorari of an administrative decision. Judicial review concerns both the decision under challenge and whatever the decision is about.

260. It is easy, at one level to show lack of equivalent treatment. An asylum decision is subject to the fourteen-day time limit and is a challenge to any administrative decision where no special limit is laid down, was six months at the relevant time. But that analysis is insufficient and it is not required by EU law. As the [CJEU] has repeatedly stated … national law is not required to accord its most favourable time limit to EU law claims. Regard must be had to the essential nature of the subject matter of the claim.

261. The court should look at the substance of the rule of whose compatibility is under scrutiny to see whether it is discriminatory. One looks at its essential scope and area of operation."

200. The Respondent submit that it would be very difficult to see how there is, as a matter of fact or law, any lack of equivalence in circumstances where the time limits contained in section 99 VATCA arise from a distinct and separate taxation structure, namely that found in section 865 TCA 1997. VAT is a transactional tax that seeks to tax the end consumption of goods and services, and in respect of which returns are made bi-monthly. Contrariwise, income tax is an annual tax on assessed income/profits, where returns are made annually. It is therefore submitted that the Appellant's contention that there is a breach of the EU principle of equivalence is plainly unfounded.

201. Having regard to the essential nature of the subject-matter, VAT on the one hand and income tax on the other, it is clear that their essential nature, scope and area of operation to use the terminology of Fennelly J. are not comparable. The claim fails, in brief, because in advancing it, the Appellant seeks to compare apples with oranges.

Analysis

Issue 1 - Non-EU Roaming Charges

202. The Appellant has sought a refund of VAT pursuant to section 104(2) VATCA with reference to the provision of mobile phone services that were consumed outside of the EU. The Appellant primarily argues that there is no difference between the services used by the "prepay" customers purchasing a 'telephone card' and 'bill pay' customers who have specifically pre-purchased "in-bundle" Non-EU roaming telecommunication services. In the alternative, the Appellant submits that it would be a breach of the well-established EU principle of fiscal neutrality if the reduction in tax payable pursuant to section 104(2) VATCA, which is provided to 'prepay' customers, was not also applicable to supplies of precisely the same services to 'bill pay' customers.

Non-EU "in-bundle" roaming

203. Article 58 of the PVD provides that the place of supply of telecommunications services to a non-taxable person "*shall be the place where that person is established, has his permanent address or usually resides*". However, this general rule is subject to a discretion granted to Member States in Article 59a of the PVD which states:

> *"In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services the place of supply of which is governed by Articles 44, 45, 56, 58 and 59:*
>
> *(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community if the effective use and enjoyment of the services takes place outside the Community …"*

204. As such, Article 59a PVD has been adopted into Irish law by amending section 2 VATCA to include the concept of a '*telephone card'* defined as "*a means other than money … that confers a right to access a telecommunication service".* As such, the implementing Irish provision deviates from the wording of Article 59a PVD to the extent that the Irish provision provides for "*a right to access*" as opposed to "*use and enjoyment*" of a telecommunication service as provided for in Article 59a PVD.

205. A similar wording to Article 59a PVD, was adopted by the UK legislators at paragraph 8(3) of Schedule 4A UK VATA 1994 which states:

> *"Where –*
>
> *(a) a supply of services to which this paragraph applies would otherwise be treated as made in the United Kingdom; and*

(b) the services are to any extent effectively used and enjoyed in a country which is not a Member State, the supply is to be treated to that extent as made in that country."

206. As such, paragraph 8(3) of Schedule 4A UK VATA 1994, draws no distinction between supplies made to 'prepay' and 'bill pay' customers. The issue in the UK is whether the telecommunications services are effectively '*used and enjoyed*' outside the EU. Accordingly, there is no question of the UK legislation discriminating between 'prepay' or 'bill pay' customers as the '*telephone card*' issue does not arise.

207. The reduction in tax payable in respect of a pre-purchased entitlement to access telecommunications services outside the EU is pursuant to section 104(2) VATCA and provides:

(a) Subject to paragraph (b), where the supply of a telephone card is taxable within the State and that telephone card is subsequently used outside the Community for the purpose of accessing a telecommunications service, then—

(iii) the place of supply of that telecommunications service shall be deemed to be outside the Community, and

(iv) the supplier of that telephone card shall be entitled, in the taxable period within which that supplier acquires proof that that telephone card was so used outside the Community, to a reduction of the tax payable by that supplier in respect of the supply of that telephone card, by an amount calculated in accordance with paragraph (c).

208. The Respondent accepts that the refund entitlement pursuant applies to the Appellant's 'prepay' customers accessing international roaming services outside of the EU. However, no statutory distinction was drawn by the Respondent between the supply of non-EU roaming telecommunications services to the Appellant's 'prepay' and 'bill-pay in-bundle' customers. Rather, the Respondent submits that the principle of fiscal neutrality cannot be and is not breached as the supply of the 'prepay' and 'bill-pay' services are not identical from the point of view of the consumer and the same needs of the consumer are not met by the two services.

209. However contrary to the Respondent's submissions, '*telephone card*' is defined in section 2 VATCA as "*a means other than money … that confers a right to access a telecommunication service".* I therefore agree with the Appellant that it is not possible to discern from that definition that the type of telecommunication services could only be limited solely to 'prepay' customers and not to "in-bundle" roaming option by 'bill-pay" customers for Non-EU roaming services as both type of customers have purchased in advance the entitlement to use such services.

210. I also agree with the Appellant that the pre-purchase of the "in-bundle" roaming option by 'bill-pay" customers for Non-EU roaming telecommunication services confers on a customer a credit or a right to access such services up to a specified limit and therefore comes within the meaning of "*telephone card"*. There is no difference between the services used by its 'prepay' customers purchasing a '*telephone card*' and 'bill-pay' 'in-bundle' customers who have specifically pre-purchased a right to access such services as an 'in-bundle' roaming option.

211. Therefore, the purchase of an 'in-bundle' roaming option for Non-EU roaming telecommunication services that permits 'bill-pay' customers make an advance purchase of roaming services falls with the definition of "*telephone card"*. As such there can be no distinction between 'prepay' and 'bill-pay in-bundle' options for Non-EU roaming telecommunication services. Therefore, as the Appellant is entitled to a reduction in tax payable in respect of a "*telephone card*" for its 'prepay' customers in respect of telecommunication services consumed outside the EU, a corresponding right of tax reduction also applies to the VAT charged to its 'bill-pay in-bundle' customers in respect of the roaming telecommunication services where those services are used outside the Community.

Fiscal Neutrality

212. I have found that the 'bill-pay' 'in-bundle' Non-EU roaming option constitutes "*a means other than money … that confers a right to access a telecommunication service"* and therefore falls within the definition of a "*telephone card"*. Therefore access to such services must be acquired by way of pre-purchase before the service can be used. As such, the entitlement to a refund to VAT in respect of Non-EU telecommunications, pursuant to section 104(2) VATCA only applies to the supply of a telephone card which is then "*subsequently used outside the Community for the purpose of accessing a telecommunications service".* It is therefore necessary to consider whether the tax treatment of the 'bill-pay' 'out-of-bundle' customers who have used and have paid for Non-EU roaming telecommunications services after the service has been supplied constitutes a breach of fiscal neutrality

213. The principle of fiscal neutrality precludes Member States from treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes. In *Jennifer Gregg and Mervyn Gregg v Commissioners of Customs and Excise* (C-216/97), the CJEU held at paragraph 20:

> *"The principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned."*

214. The principle was further developed in the Joined Cases C-259/10 and C-260/10 (*Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc*), where the CJEU held:

> *"32. the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes ….*
>
> *33. According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.*
>
> *34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer…*
>
> *35. That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition"*

215. The Respondent argued that the principle of fiscal neutrality is not breached as the supply of the 'bill-pay' and 'prepay' services are not identical from the point of view of the consumer, as the same needs of consumers are not met by the two services. In support of that assertion, the Respondent relied on *Hutchison 3GUK Limited* [2018] UK FTT289, where the UK FTT found that there were significant differences between 'prepay' and 'bill-pay' customers.

216. However, that case can be distinguished as the principle of fiscal neutrality, while mentioned, was not considered. The issue in that case was whether the taxpayer was liable to account for VAT on the full monthly recurring charge at the time of payment, subject only to a repayment of VAT to the extent that there was actual usage of the phone outside the EU or whether no VAT liability arose on any of the monthly recurring charge at the time it was paid, but only on the value of the units actually used within the EU at the time of that use.

217. As such, Hutchison 3G UK Limited claimed that VAT does not arise until the telecommunications services are used because the conditions precedent to a supply taking place are not met, namely, one does not know the place of supply of the services since it is based on use and enjoyment.

218. In contrast, HMRC asserted that the place of supply should be regarded as being in the UK until such time as non-EU usage occurs, and that a retrospective adjustment to reflect the level of non-EU consumption should then be made.

219. In considering the issue, the FTT identified differences between certain category of customers, at paragraph 43 and concluded that "*the difference between a PM and PAYG customer was in the obligations owed by H3G."* In this appeal, however, the evidence of the witnesses gave no discernible differences between the services provided to 'prepay' and 'bill-pay' customers.

220. Therefore, contrary to the Respondent's submissions, I agree with the Appellant that the key issue in determining the principle of fiscal neutrality is to establish the services supplied. As outlined in evidence, the communications services supplied by the Appellant to its customers comprises the ability to make and receive phone calls, access, use and enjoyment of an assortment of data services and the ability to send and receive electronic communications.

221. The test for fiscal neutrality as set out in *Rank "precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes".* Furthermore, there is a breach of the "*principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer".*

222. As confirmed by the Appellant's witness, *Name Redacted*, the roaming services for 'prepay' and 'bill-pay' services were identical.

223. Therefore, if a customer having pre-purchased an 'in-bundle' non-EU roaming option makes a call outside of the EU and during that call proceeds to exceed the pre-purchased credit, that customer is billed in arrears for the remaining time for that call.

224. As such the nature of the "in-bundle" and "out-of-bundle" services supplied to 'bill-pay' customers are identical and meet precisely the same needs from the customers' perspectives. Therefore, while the same telecommunication service could be consumed during the currency of the same 'in-bundle' and 'out-of-bundle' call where the Price Plan tariff has been exceeded, to apply a different VAT treatment for the identical services would be contrary to the principle of fiscal neutrality.

225. I therefore agree with the Appellant that it is impermissible to apply conflicting rules to the place of supply of telecommunications services simply by reference to the means by which those services are billed. Therefore, in the circumstances of this case, identical telecommunications services which were used and enjoyed by 'in-bundle' and 'out-of-bundle' customers outside the EU cannot be treated differently irrespective of the timing of billing or payment for those services.

226. As a consequence, the Appellant is also entitled to a reduction in tax payable in respect the 'bill-pay' 'out-of-bundle' option for Non-EU roaming telecommunication services to customers where that service is used outside the Community.

Issue 2 - Cancellation Charges

227. The Cancellation Charge issue relates to whether a charge paid by a customer who cancels the contract with the Appellant within the minimum commitment period was chargeable to VAT.

228. The Appellant contends that the Cancellation Charges payable after the termination of the agreement within the commitment period and during a period when no services are provided, are outside the scope of VAT since there can be no consideration for a supply.

229. In her evidence, *Name Redacted* confirmed that each customer choses a Price Plan and the minimum commitment period. The customer is also provided with the Appellant's terms and conditions, '*Document Redacted*'. Thereafter the customer signs the agreement "*to accept the terms and conditions of the Appellant's Services"* for the appropriate 12, 18 or 24 commitment period as set out in the Price Plan. An assortment of signed agreements of varying contract length were produced in evidence.

230. *Name Redacted* evidence was that a customer pays for access to the network and connectivity within the chosen Price Plan with the ability to use up to a certain threshold without incurring any additional charge. *Name Redacted*, a witness also employed by the Appellant, confirmed that the subscription paid to the Appellant was in consideration for the provision of access to telecommunication services.

231. Paragraph 5.5 of *Document Redacted* document details the undertaking of the Appellant "*to provide you with access to our Services*". There is also a reference to "*access*" to the Appellant's services in *Document Redacted* which places the obligation to discharge all charges in respect of all services "*accessed using the SIM(s) we supply you or which are accessed using your Device(s) whether the Appellant Services are accessed by you or by another person, with or without your permission*."

232. Paragraph 6.15 sets out the billing arrangements to "*include your fixed Charges for the next period and any administration fees along with Charges for your use of the Appellant Services in Ireland in the last period and outside Ireland in prior periods*." 'Charges' are defined in '*Document Redacted'* as "*access to, and use of, the Appellant Services laid out in the Price Plan".*

233. The Appellant argued that the contract entered into by the Appellant and its customer does not stipulate that there is a supply of a right to access telecommunication services.

In addition, under the terms of those contracts, the customers do not agree to pay any sum for reserving a set amount of capacity on the Appellant's network but rather to commit to pay for sending and receiving data. As such, the amounts paid are only chargeable to VAT to the extent that they relate to services actually supplied.

234. Having considered the evidence and the submissions of the parties, I have found that the Appellant's business model as applied to 'bill pay' phone customers requires an upfront monthly payment for "*access"* to the Appellant's services "*for the next period*" together with a retrospective charge "*for your use of the Appellant's Services in Ireland in the last period and outside Ireland in prior periods."* Therefore, the monthly charge for telecommunication services could be made up of 2 components. Access to use the services within the customer's agreed Price Plan is the standard charge and any additional cost for use of the telecommunication services that are outside the customer's Price Plan, is charged with reference to the actual use of services in excess of that Plan.

235. Therefore, I disagree with the Appellant's assertion that the contract between the Appellant and the customer does not stipulate that there is a supply of a right to access to telecommunication services. On the contrary, it is not only clear from the contractual documentation but also the evidence of both *Name Redacted* and *Name Redacted* that the commitment provided by the Appellant to a 'bill pay' customer in accordance with the agreed Price Plan consists of the right to access the telecommunication services. It is only the additional costs incurred by the customer in respect of telecommunication services enjoyed outside of the Price Plan that constitutes consideration for the actual use of telecommunication services.

236. Therefore, where a customer enters into an agreement for telecommunication services as stipulated in the Price Plan for a specified period of time, the customer agrees to pay for access to those services for that period. As such the customer has agreed to pay for access to those services and any additional costs that may arise when the usage by the customer exceeds the quota specified in the Price Plan. Therefore, it is irrelevant that the customer does not use the entire monthly quota within the Price Plan as the contract between the parties provides the customer with access up to a prescribed limit for the duration of the specified period or commitment period.

237. In relation to the application of the relevant jurisprudence of the CJEU, I am not in a position to agree with the Appellant's submissions that there are purported contradictions between *Eugénie-les-Bains* and *Air France.* Both judgements considered the VAT implications of no-show customers of a hotel and no-show customers of a flight respectively.

238. In *Eugénie-les-Bains,* the CJEU held that where a customer reserves a hotel room and subsequently does not show up, no service is supplied and the deposit paid by that

customer is not liable to VAT. However, in *Air France,* the CJEU determined that because the airline had reserved a seat for a no-show customer, a service was supplied by the airline and the payment made by the customer towards the flight was liable to VAT for the service of the right to occupy the seat.

239. In light of such distinctions, I do not agree that an appropriate comparison can be made between *Air France and Eugénie-les-Bains*. The CJEU held in *Eugénie-les-Bains* that the payment of a deposit related to cancellation payments to compensate the owner for the failure to complete a contract rather than remuneration for the supply of any service. As no services were supplied in *Eugénie-les-Bains*, the payments were outside the scope of VAT.

240. Furthermore, in that case, the contractual position of the hotel and the customer was carefully analysed at paragraph 26 of the judgment as set out below:

> *"Since the obligation to make a reservation arises from the contract for accommodation itself and not from the payment of a deposit, there is no direct connection between the service rendered and the consideration received (Apple and Pear Development Council, paragraphs 11 and 12; Tolsma, paragraph 13; and Kennemer Golf, paragraph 39). The fact that the amount of the deposit is applied towards the price of the reserved room, if the client takes up occupancy, confirms that the deposit cannot constitute the consideration for the supply of an independent and identifiable service."*

241. However, in *Air France*, the CJEU determined at paragraph 28 that:

> *"…the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services."*

242. Furthermore, in an implicit reference and as a consequence a consideration of the judgment in *Eugénie-les-Bains,* the CJEU held in *Air France* at paragraph 33 that:

> *"the applicants in the main proceedings can also not rely on the case-law of the Court relating to the exemption from VAT of sums paid by way of deposit. In the main proceedings, first, the price paid by the 'no-show' passenger corresponds to the full price to be paid. Secondly, where the passenger has paid the price of the ticket and the company confirms that a seat is reserved for him, the sale is final and definitive."*

243. Therefore, it is not appropriate to compare *Eugénie-les-Bains* which dealt with compensation for the failure to complete a contract whereas in *Air France*, the CJEU held that a service had been performed and that the right to avail of air travel constituted the relevant service that was subject to VAT.

MEO Judgement

244. *MEO – Serviços de Comunicações e Multimédia SA v Autoridade Tributária e Aduaneira*, Case C-295/17 concerned the VAT treatment of telecommunication services provided by a Portuguese telecommunications company to customers under contracts of a minimum commitment period. The contract was breached when a customer failed to make a payment of the monthly fees and as a consequence, MEO was entitled to receive payment of the monthly fee for the remainder of the minimum commitment period. MEO did not account for VAT on this amount as it considered that it was compensation for the customer breaching the terms of the contract.

245. The Appellant accepts that the facts in the *MEO* and the facts in this appeal are broadly similar but with one significant distinction, namely that the cancellation fee to which the Appellant's customer is liable is not inevitably limited to the amount of the monthly payments for the unexpired term. However, it is not clear the basis for such an assertion as the full details of the precise contractual arrangements in *MEO* are not available.

246. Notwithstanding that uncertainty, the evidence of the Appellant's employed witness, *Name Redacted*, confirmed that the actual charge imposed on the customer on the cancellation of the agreement was the remaining outstanding monthly charge and no extra charges were imposed. *Name Redacted* further clarified that those charges are however included in the operational costs of the company.

247. In a radical submission, the Appellant asserts that the judgment in *MEO* was wrong and irreconcilable with *Eugénie-les-Bains* and all of the previous case-law of the CJEU on the requirement for a contractual obligation for liability to VAT to exist. However, such an assertion is misplaced as the CJEU, in a consideration of its jurisprudence, proceeded to make the following observations:

> 39. *"In that respect, a supply of services is carried out 'for consideration', within the meaning of that provision, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient (see, to that effect, judgments of 18 July 2007, Société thermale d'Eugénie-les-Bains,C-277/05, EU:C:2007:440, paragraph 19 and the case-law cited, and*

of 23 December 2015, Air France-KLM and Hop!Brit-Air, C-250/14 et C-289/14, EU:C:2015:841, paragraph 22). This is the case if there is a direct link between the service supplied and the consideration received (see, to that effect, judgment of 23 December 2015, Air France-KLM, and Hop! Brit-Air,C-250/14 and C-289/14, EU:C:2015:841, paragraph 23 and the case-law cited).

40 As regards the direct link between the service supplied to the recipient and the consideration actually received, the Court has already held, as regards the sale of air tickets that passengers have not used and for which they could not obtain repayment, that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract, irrespective of whether the customer uses this right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right (see, to that effect, judgment of 23 December 2015, Air France-KLM, and Hop! Brit-Air,C-250/14 and C-289/14, EU:C:2015:841, paragraph 28)."

248. As such there can be no justification for assertion that *MEO* is irreconcilable with *Eugénie-les-Bains* and all of the previous case-law of the CJEU on the requirement for a contractual obligation for liability to VAT to exist, as the CJEU in *MEO* conducted an analysis of its jurisprudence including *Eugénie-les-Bains*.

249. The Appellant also asserts that the CJEU in *MEO* did not deal with the judgment in *Eugénie-les-Bains*. However, it is not clear how the Appellant makes such an assertion when there is explicit reference to that judgement at paragraph 39 cited above.

250. Therefore I am of the view that the issue in *Eugénie-les-Bains* can be clearly distinguished from the issues that arose in *Air France* and *MEO* to the extent that in *Eugénie-les-Bains,* the issue concerned a compensation payment whereas the facts in *Air France* and *MEO,* the issues concerned the appropriate VAT treatment of transactions arising from completed contracts.

251. In light of the above, it is appropriate to set out the specific factual circumstances in *MEO* as set out at paragraphs 11 - 14:

11. As part of its activity, MEO concludes contracts with its customers for the supply of services in the fields of telecommunications, internet access, television and multimedia, some of which provide for minimum commitment periods, while offering its customers favourable terms, particularly in the form of lower monthly subscription fees.

12. *These contracts also stipulate that, in the case of deactivation of the goods and services referred to therein before the expiry of the agreed minimum commitment period at the request of customers or for a reason which is attributable to them, MEO is entitled to compensation corresponding to the amount of the agreed monthly subscription fee multiplied by the difference between the duration of the minimum commitment period provided for in the contract and the number of months during which the service was provided.*

13. *According to the referring court, the amount payable by the customer to MEO in case of early termination of the services contract is therefore made up of the amount of the subscription fee that corresponds to the full amount of the minimum commitment period, even if the service is not supplied to the customer up to the end of that period.*

14. *It is also apparent from the order for reference that the customer is liable to pay that amount where services are deactivated before the end of the minimum commitment period, in particular if the customer fails to pay the agreed monthly subscription fee."*

252. In this regard and based on all of the evidence adduced, I agree with the Respondent that there is factual similarity in *MEO* and in this appeal. As such I am obliged to follow the judgement in *MEO* where the CJEU ultimately held at paragraph 57:

> *"In the light of the foregoing, the answer to the first question is that Article 2(1)(c) of the VAT Directive must be interpreted as meaning that the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer, or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination — a matter which it is for the referring court to determine — must be regarded as the remuneration for a supply of services for consideration and subject, as such, to VAT.*

253. Therefore, as the judgment in *MEO* is binding on me specifically in light of the identical factual circumstances, I can only conclude that where a customer enters into an agreement for telecommunication services as stipulated in the Price Plan for a specified period of time, a charge to VAT arises with reference to the agreed contractual right to use those services for that period irrespective of whether the customer uses those services.

Interesting Observation

254. Notwithstanding the above, the Appellant noted that the supply of a service and the supply of the right to receive a service are different supplies. On this basis, the Appellant asserts that as there was no supply of telecommunications services or air transport services in *MEO* and *Air France* respectively, the CJEU classified the supply as a supply of the right to receive such supplies. Accordingly, it was held those supplies were complete when the contracts were concluded.

255. Furthermore, the Appellant questions the location of the place of supply of a right to receive a supply of transport services. If airlines are supplying the right to receive a supply of transport services, is that a taxable service although the transport services themselves are exempt albeit with a right to input deduction where such services constitute a qualifying activity in the State?

256. As such the Appellant concludes that in an effort to ensure the taxation of the cancellation payments in *MEO* and to ensure taxation of the customer payments in *Air France,* the CJEU conjured a new concept of supplying the right to receive a supply without appreciating the extraordinary consequences of such a construct.

257. Notwithstanding such observations, in determining this appeal my role is to apply the law to the facts. As such, I have found that the Cancellation Charges arise from the contractual obligations between the Appellant and its customers whereby the customer has agreed to pay for "*access*" to the Appellants services for an agreed period of time. As such, the service supplied by the Appellant is the access or the right to use its telecommunication services for the agreed contract period. Such services come within the charge to VAT pursuant to section 3 VATCA as services for a "*supply for consideration of services by a taxable person acting in that capacity when the place of supply is the State"* and therefore within the charge to VAT.

258. For the periods prior to 1 January 2015, the place of supply of the telecommunications services made by the Appellant to a non-taxable person established within the Community was ordinarily determined by where the Appellant was established in accordance with section 34(b) VATCA 2010 which states:

> *"except as provided by paragraphs (c) to (n), the place of supply of services to a non taxable person is –*
>
> *(i) subject to subparagraph (ii), the place where the supplier's business is established,"*

259. For supplies made on or after 1 January 2015, the place of supply rules changed for supplies of such services to a non-taxable person. From that date, the place of supply of

the telecommunications services made by the Appellant to a non-taxable person is determined by where the Appellant's customer is established, has a permanent address or usually resides, in accordance with Section 34(kc) VATCA 2010. Supplies of services to non-taxable persons are referred to as "B2C" supplies.

260. In a B2C context, where both the Appellant and its non-taxable customer are established in Ireland, the same VAT treatment will apply to supplies of the Appellant's service before and after 1 January 2015.

261. Therefore, as the Appellant's business is established in the State and the services are supplied to non-taxable persons in the State, a charge to VAT arises.

Issue 3 - Bill Pay Broad Band

262. This issue relates to arrangements whereby the Appellant's customers enter into a contract for access to a gigabyte of data for the sum of Amount Redacted per month and do not use the full monthly allowance, and whether a charge to VAT arises on the proportion of the data that is not used.

263. As apparent from the evidence and subsequently confirmed at a case management conference on 14th November 2019, the terms and conditions governing the broadband services are also governed by *Document Redacted*.

264. Therefore, having considered the evidence and the submissions of the parties, I have found that the Appellant's business model as applied to ''bill-pay' Broad Band customers requires an upfront monthly payment for "*access"* to a gigabyte of data per month. As in *MEO*, I have concluded that the provision of the right of access to a gigabyte of data for monthly consideration constitutes a "*direct link between the service supplied to the recipient and the consideration actually received."*

265. Furthermore, I have found the contractual commitment between the Appellant and its customers is the same as that described in *MEO*, at paragraph 40 to the extent:

> *"that the consideration for the price paid at the time of the signing of a contract for the supply of a service is formed by the right derived by the customer to benefit from the fulfilment of the obligations arising from the contract, irrespective of whether the customer uses this right. Thus, that supply is made by the supplier of services when it places the customer in a position to benefit from the supply, so that the existence of the abovementioned direct link is not affected by the fact that the customer does not avail himself of that right (see, to that effect, judgment of 23 December 2015, Air France-KLM, and Hop! Brit-Air, C-250/14 and C-289/14, EU:C:2015:841, paragraph 28)."*

266. Therefore, I can only conclude that where the Appellant's customers enter into a contract for access to a gigabyte of data for the sum of Amount Redacted per month, a charge to VAT arises with reference to the agreed contractual right to use that amount of data irrespective of whether the customer uses those services.

267. As such, it is irrelevant that the customer does not use the entire monthly quota within the Price Plan as the contract between the parties provides the customer with access up to a prescribed monthly limit.

Issue 4 - Time Limits

268. The Appellant made a claim for repayment of VAT in respect of the period of 1 March 2012 to 28 April 2013. The reclaim was related to "cancellation charges" and "bill-pay and non-EU roaming" issues and was refused by the Respondent on the basis that the claim was made outside of the four-year time limit provided for in section 99(4) VATCA.

269. The Appellant argued that there is a disparity between the four year look-back period for direct tax purposes and that applicable to VAT. The direct tax look-back period for repayments of corporation tax, in accordance with Section 865(4) of the Taxes Consolidation Act 1997, is up to four years after the end of the chargeable period to which a claim relates. Due to the length of a chargeable period for Corporation Tax purposes, corporate taxpayers are provided with an effective period of as much as five years within which to reclaim overpaid tax.

270. However pursuant to Section 99(4) VATCA, an accountable person can only recover a refund of VAT within four years of the end of the taxable period to which it relates. As such a person has as much as five years to reclaim overpaid corporation tax but has only four years to recover overpaid VAT.

271. It was argued that the Appellant is entitled to rely directly on EU law to vindicate its right to avail of equivalent time limits, for VAT purposes, to those applicable to national taxes. In making its claims for repayment of VAT, which have been refused by the Respondents, it is exercising that right. The Appellant contends that the claims made should be considered as valid under EU law, and are repayable in accordance with the principle of equivalence.

272. The principle of equivalence was considered in *Weber's Wine World Handels-GmbH, Ernestine Rathgeber, Karl Schlosser, Beta-Leasing GmbH and Abgabenberufungskommission Wien* (C-147/01), where at paragraph 38, the CJEU held:

> *"For reasons of legal certainty, the Member States are in principle permitted to limit, at national level, the repayment of taxes which have been levied though not due.*

Such restrictions should, however, satisfy the principle of equivalence, which requires that the national provisions apply in the same way to purely domestic cases and to those arising under Community law, ……"

273. Joined Cases C-95/07 and C-96/07: *Ecotrade SpA v Agenzia delle Entrate – Ufficio di Genova* 3, in paragraph 46, the CJEU held:

"It must be added that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of input tax by making him forfeit his right to deduct cannot be regarded as incompatible with the regime established by the Sixth Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on Community law (principle of equivalence) .."

274. At paragraph 35 of the CJEU's Judgment in *ADV Allround Vermittlungs AG, in liquidation, v Finanzamt Hamburg-Bergedorf* (C-218/10), the Court held:

"However, in accordance with settled case-law, in the absence of European Union rules in the area, it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible and to lay down detailed procedural rules for safeguarding rights which individuals derive from European Union law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence)"

275. In *Totel Ltd v Revenue and Customs Commissioners*, [2018] STC 1642, the UK Supreme Court considered the principle of equivalence between VAT and wholly domestic taxes such as income tax, capital gains tax and stamp duty land tax. Under the UK VAT legislation, a registered taxpayer was required to make payment of disputed VAT before an appeal to the First-tier Tribunal could be entertained. Totel submitted that appeals against assessment to income tax, capital gains tax and stamp duty land tax were claims which were similar to appeals against assessment to VAT and that, because a VAT appeal was subjected to the pay-first requirement whereas those other appeals were not, the UK's procedural rules for VAT appeals were less favourable than those governing similar domestic claims.

276. The Court held that the principle of equivalence required that the procedural rules of member states applicable to claims based on EU law should be no less favourable than those governing similar wholly domestic claims. As such a review of the jurisprudence was undertaken at paragraph 6:

"The principle of equivalence and its qualifying Proviso are creatures of the jurisprudence of the CJEU (and its predecessors), and take effect within the general

context that it is for each member state to establish its own national procedures for the vindication of rights conferred by EU law: see Edilizia Industriale Siderurgica Srl (EDIS) v Ministero delle Finanze (Case C-231/96) EU:C:1998:401, [1998] ECR I-4951 at paras 19 and 34 of the judgment. Further, it has been repeatedly stated by the CJEU that it is for the courts of each member state to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis: see Palmisani v Istituto nazionale della previdenza sociale (INPS) (Case C-261/95) EU:C:1997:351, [1997] ECR I-4025 at para 38, and Levez v TH Jennings (Harlow Pools) Ltd (Case C-326/96) EU:C:1998:577, [1999] IRLR 36, [1999] ICR 521, para 43."

277. In the identification of a "*true comparator*", the Court, at paragraph, 7 made the following observation:

"The principle of equivalence works hand in hand with the principle of effectiveness. That principle imposes a purely qualitative test, which invalidates a national procedure if it renders the enforcement of a right conferred by EU law either virtually impossible or excessively difficult. By contrast, the principle of equivalence is essentially comparative. The identification of one or more similar procedures for the enforcement of claims arising in domestic law is an essential pre-requisite for its operation. If there is no true comparator, then the principle of equivalence can have no operation at all: see the Palmisani case, at para 39. The identification of one or more true comparators is therefore the essential first step in any examination of an assertion that the principle of equivalence has been infringed."

278. In distinguishing VAT from other taxes, the Court found at paragraph 23 that:

"VAT is a tax of which the economic burden falls upon the ultimate consumer, but which is collected by the trader from the consumer, and accounted for by the trader to HMRC. By contrast, taxpayers seeking to appeal an assessment to income tax, CGT and SDLT are being required to pay, from their own resources, something of which the economic burden falls on them, and which they have not collected, for the benefit of the Revenue, from anyone else. It is therefore no less than appropriate that traders assessed to VAT should be required (in the absence of proof of hardship) to pay or deposit the tax in dispute, which they have, or should have, collected, while no similar requirement is imposed upon the taxpayers in those other, and different, contexts."

279. The Court ultimately determined at paragraph 48:

"I would therefore dismiss this appeal, on the ground that there has not been shown to be any true comparator among domestic claims sufficient to engage the principle of equivalence in relation to the imposition of a pay-first requirement upon traders seeking to appeal assessments to VAT."

280. As such the Court found that income tax, capital gains tax and stamp duty land tax are not comparable with VAT because the economic burden of VAT falls on the ultimate consumer and is being collected by the trader from the consumer and accounted for to HMRC. By contrast, taxpayers seeking to appeal an assessment to income tax, capital gains tax and stamp duty land tax are being required to pay, from their own resources, something which they have not collected from anyone else.

281. Notwithstanding that the issue in *Totel* concerned the disparity in the procedure for VAT appeals and appeals against other UK domestic taxes, the judgement, in reviewing the jurisprudence of the CJEU, confirmed the necessity for the identification of a "*true comparator*".

282. In this appeal, there is no dispute that the time afforded to seek a repayment of tax is more favourable for corporation tax purposes. However, the time limit for VAT refunds is possibly more favourable than Stamp Duty purposes which is both a domestic and indirect tax. The comparative repayment provision in the Stamp Duty Consolidated Act 1999, section 159A(1), applies a time limit of 4 years for the making of a valid claim for repayment of stamp duty and provides:

"Without prejudice to any other provision of this Act containing a shorter time limit for the making of a claim for repayment, no stamp duty shall be repaid to a person in respect of a valid claim (within the meaning of section 159B), unless that valid claim is made within the period of 4 years from, as the case may be, the date the instrument was stamped by the Commissioners, the date the statement of liability was delivered to the Commissioners, the date the operator-instruction referred to in section 69 was made or the date the person achieves the standard within the meaning of section 81AA(11)(a)."

283. Therefore and notwithstanding that in *Totel*, the UK Supreme Court held that there was no suitable comparator for VAT in the UK domestic tax code in determining the right of appeal, I am of the view that Stamp Duty can be regarded as a "*true comparator*" with VAT in relation to the time limit for claims for the repayment of taxes, and in this regard, I disagree with the Appellant and find that the principle of equivalence has not been breached by the Respondent in refusing to entertain a claim for a repayment of VAT on the basis that the claim was made outside of the four-year time limit provided for in section 99(4) VATCA.

Determination

284. Having considered the evidence and the submissions of the parties, I have made the following determinations:

Non-EU Roaming

(a) The purchase of an 'in-bundle' roaming option for Non-EU roaming telecommunication services that permits 'bill-pay' customers make an advance purchase of roaming services falls with the definition of "*telephone card*". As such there can be no distinction between 'prepay' and 'bill-pay in-bundle' options for Non-EU roaming telecommunication services. Therefore, as the Appellant is entitled to a reduction in tax payable in respect of a "*telephone card*" for its 'prepay' customers in respect of telecommunication services consumed outside the EU, a corresponding right of tax reduction also applies to the VAT charged to its 'bill-pay in-bundle' customers in respect of the roaming telecommunication services where those services are used outside the Community.

(b) As a consequence of my finding at (a) above, it is not possible to apply conflicting rules to the place of supply of telecommunications services simply by reference to the means by which those services are billed. Therefore, in the circumstances of this case, identical telecommunications services which are used and enjoyed by 'in-bundle' and 'out-of-bundle' customers outside the EU cannot be treated differently irrespective of the timing of billing or payment for those services. As a consequence, the Appellant is also entitled to a reduction in tax payable in respect the 'bill-pay out-of-bundle' option for Non-EU roaming telecommunication services to its customers where those service are used outside the Community

Cancellation Charges

(c) As the judgment in *MEO* is binding on me specifically in light of the similarity in factual circumstances, I can only conclude that where a customer enters into an agreement for telecommunication services as governed by the Price Plan for the commitment period, a charge to VAT arises with reference to the agreed contractual right to use those services for that period irrespective of whether the customer uses those services.

Bill Pay Broad Band

(d) As with the Cancelation Charge issue, I can only conclude that where the Appellant's customers enter into a contract for access to a gigabyte of data for the sum of Amount Redacted per month, a charge to VAT arises with reference to the agreed contractual right to use that amount of data irrespective of whether the customer uses those services. Therefore, it is irrelevant that the customer does not

use the entire monthly quota within the Price Plan as the contract between the parties provides the customer with access up to a prescribed monthly limit.

Time Limits

(e) Notwithstanding that in *Totel*, the UK Supreme Court held that there was no suitable comparator for VAT in the UK domestic tax code in determining the right of appeal, I am of the view that Stamp Duty can be regarded as a "*true comparator*" with VAT in relation to the time limit for claims for the repayment of taxes, and in this regard, I disagree with the Appellant and find that the principle of equivalence has not been breached by the Respondent in refusing to entertain a claim for a repayment of VAT on the basis that the claim was made outside of the four-year time limit provided for in section 99(4) VATCA.

285. This appeal is therefore determined in accordance with TCA, section 949AK.

Conor Kennedy
Appeal Commissioner
6th December 2019