

VAT: When you have overpaid your welcome.

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The National Car Parks decision

1. Taxable 'consideration' has an autonomous meaning in the context of assessing the amount of VAT payable on it. It: (i) presupposes a direct link between its value, and the service provided in return; and (ii) is identified subjectively, *i.e.*, by reference to the sum *actually received* by the supplier: National Car Parks Ltd v. HMRC [2019] EWCA Civ 854, at [8]-[9].
2. Where a car park customer makes an overpayment because (for example) the ticket machine does not give change, the element of overpayment satisfies those requirements and, therefore, constitutes consideration that is subject to VAT.

3PB's Analysis

3. **Introduction.** NCP operate car parks around the country. Their pay and display ticket machines readily accept coins however, to the likely annoyance of many customers, if one feeds in more than the set hourly tariff, no change is given. The question before the Court of Appeal was whether the unrefunded excess is subject to VAT as consideration for a supply of services, or were NCP entitled to a repayment
4. **Background.** In October 2013 (or 2014 according to the UT and EWCA), NCP made a claim for overpaid VAT in respect of car park overpayments for the periods of June 2009 to December 2012 in the sum of £488,699.09. HMRC issued a decision and review letter stating that the overpayments "*should be regarded as consideration and are therefore taxable*". An appeal was brought to the FTT in February 2014 on the grounds that the overpayments were *ex-gratia* payments outside the scope of VAT.
5. The FTT concluded that the customer decides to overpay as part of a bad bargain and that the overpayment leads to the contract. They held that

the full amount paid amounted to consideration for the supply of parking services, thereby dismissing the appeal. The UT agreed with the FTT stating that the hourly tariff is essentially a 'not less than' figure that includes overpayments in the price on a banded-price model. They concluded that consideration for VAT purposes is the value actually given by the customer, and received by the supplier, for the right to park for up to X hours and therefore the appeal was dismissed.

6. **The Court of Appeal.** In the Court of Appeal, Newey, Patten and Males LLJ utilised a hypothetical example found in both the previous decisions which is essentially as follows:
 7. A customer wishes to park for one hour in an NCP car park. The prices are stated on a tariff board next to the ticket machine as: Parking for up to one hour - £1.40; Parking for up to three hours - £2.10. It further warns that change is not given but overpayments are accepted. The customer, rifling through his/her bag, finds only a pound coin and a fifty pence piece (£1.50) which they feed into the coin slot. Upon pressing the green button, the customer receives a sticky-back parking permit valid for one hour.
 8. The court referred to the Principal VAT Directive 2006/112/EC. Article 2(1)(c) incorporates supplies of services for consideration by a taxable person into the purview of transactions that are subject to VAT. Article 73 clarifies the taxable amount as including everything which constitutes consideration obtained by the supplier, in return for the supply, from the customer. In domestic law, Section 5(2)(a) of the VAT Act 1994 stipulates that a 'supply' includes all forms of supply, but not anything done otherwise than for a consideration. Consideration in this sense is unique to EU VAT law but has been clarified in CJEU case law as the reciprocal performance between the supplier and recipient; the remuneration received by the provider of the service constituting the value actually given with a direct link to, and in return for, the service



supplied to the recipient (C-16/93 Tolsma [1994]).

9. **NCP argued two points.** First, that the test for a direct link between supply and consideration was not only causal (*i.e.* the payment of *X* leads to the provision of *Y*) but also had a quantitative aspect such that the value of the consideration must correlate with the supply. In the hypothetical, the extra 10p was inconsequential to the supply of parking and was, in a sense, voluntary.
10. Second, NCP submitted that the customer was contractually obliged to pay no more than £1.40 as was clear by the tariff. The reference to “*overpayments being accepted*” demonstrated that the 10p was outside of the contractual sum; it cannot be both the price and an overpayment.
11. **In opposition**, HMRC maintained that the contractual price was £1.50 as that was the amount the customer, knowing that there would be no change provided, paid for the parking ticket. As was argued in the FTT, the contract was formed upon the depressing of the green button as acceptance of an hour’s parking for the price paid into the machine.
12. **Decision.** The Court of Appeal agreed with HMRC’s contention: the consideration was the price as fed into the machine. Although slightly different to the “*not less than*” bracketed approach of the UT, the court found that the price of parking for an hour would vary between customers but was not “*uncertain*” in any individual case as it would be whatever the customer fed into the machine. The appeal was therefore dismissed.
13. **Analysis.** As above, NCP proffered two arguments. However, the Court of Appeal only really concerned themselves with the contractual position despite the UT holding that there was “*no need to analyse the supplies using English contract law [and] what is shown on the machine [...] is of only limited relevance.*”
14. Consideration in the context of VAT is somewhat *sui generis*. Even if the conclusion is that £1.50 was the contractual payment, it may still be the case that only part of that sum is attributable to the supply of the service (N.B. attribution can be

exercised for consideration as per s.19(4) of the VAT Act 1994).

15. The UT placed heavy reliance on the case law (e.g. C-285/10 Campsa [2011]) which states that VAT is calculated on the sum actually received rather than an objective, open-market figure. This principle, however, is not disputed. VAT is calculated on the consideration actually received but to be consideration in a VAT sense it must have the requisite reciprocity, otherwise the payment is not a constituent of the consideration.
16. The key issue, therefore, is whether the overpayment—the additional 10p—was directly linked to the supply of parking.
17. The Court of Appeal held that the £1.50 was the agreed price and therefore was the consideration that led to the supply. It is unclear as to how the 10p can simultaneously be the consideration and an overpayment, and must be read as a finding that there was not an overpayment but an individually negotiated bad bargain (similar to the finding of the FTT).
18. Commercial and economic reality was not raised in this case but was utilised as a principle for determining consideration in Lloyds Banking Group v HMRC [2017] FTT concerning redundancy payments. The principle was that the starting point must be the *written agreement* and the *rights and obligations* of the parties. As such, it could be argued that (1) the written terms referred to ‘change’ and ‘overpayment’ so the Court of Appeal’s ruling ignored the terms on the tariff board in finding that the excess was not an overpayment; (2) the variable excess sum had no effect on the proportion of the supply and therefore cannot have the requisite reciprocity (there was no enforceable right from the overpayment); and (3) only £1.40 was enforceable as the contract price (the obligation). Simply, a ticket machine’s lack of ability to give change does not automatically create reciprocity and a direct link.
19. If the reality was that there was an overpayment that had no right to reciprocity, it would likely align closer to the *ex-gratia* VAT treatment. HMRC’s Internal Manual VATSC06170 defines *ex-gratia* payments for VAT. They are outside the scope of VAT provided:



- 19.1. the amount is clearly additional to the price of any supply,
 - 19.2. there is no obligation to make the payment, and
 - 19.3. the supply will be made even if the payment is not given.
20. Applying HMRC's factors to NCP, the 10p overpayment closely conforms with the *ex-gratia* exclusions from the scope of VAT as (1) the amount is called an overpayment and therefore additional to the supply; (2) the contractual obligation is to pay the lesser sum only; (3) the supply would be made if the 10p was not provided (ignoring distracting hypothetical examples of specific coinage). Even if the 10p excess was to have a factual link to the supply of parking, insofar as it formed part of the contractual sum, one has to question whether it can be said to have a direct link to the supply as the reality was that the overpayment amount itself was not causative for the supply of parking services. One can therefore see an arguable case for the excess payment falling outside the scope of VAT.

Impact of the Decision

- 21. The author's experience of car parks is that most now accept payment by way of contactless or by mobile phone apps and, as such, this is unlikely to trouble many parking companies in the future.
- 22. Despite NCP's losses in the FTT, UT and Court of Appeal, the test for consideration and a direct link in VAT is not entirely painless or

unambiguous. In this case, the Court of Appeal has utilised the contractual position rather than conducting an exegesis into the *quid pro quo* of consideration in VAT law. However, I think it is unlikely to be overturned as consideration is often afforded its "*broadest possible meaning*" (C-230/87 Naturally Yours Cosmetics [1988]). To conclude, with the abundance of cases concerning contractual structures and economic reality, VAT advisors should make sure they are aware of different contractual interpretations and interpret consideration broadly. Reading between the lines, *ex gratia* payments may need to show a greater level of disavowal from the provision of a supply.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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