Neutral Citation Number: [2016] EWCA Civ 1294

Case No: A3/2015/3123

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**
**Decision of Mrs Justice Rose**
**FTC/74/2014**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2016

**Before :**
**Lord Justice Longmore**
**Lord Justice Floyd**
and
**Lord Justice David Richards**

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**Between :**

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| **(1) Wiltonpark Limited**<br>**(2) Secrets (Promotions) Limited**<br>**(3) Secrets (Holborn) Limited**<br>**(4) Secrets (Euston) Limited**<br>**(5) Secrets (St Katherine's) Limited** | **Appellants** |
| **- and -** | |
| **The Commissioners for HM Revenue & Customs** | **Respondent** |

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**Andrew Hitchmough QC and Barrie Akin**
(instructed by **Hill Dickinson LLP**) for the **Appellants**
**Hui Ling McCarthy** (instructed by **The General Counsel and Solicitor for HM Revenue and Customs**) for the **Respondent**

Hearing dates: 5 and 6 October 2016

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# Approved Judgment

## Lord Justice David Richards:

### *Introduction*

1. The appellants operate table and lap dancing clubs in London. The dancers are self-employed and are paid directly by customers either in cash or by vouchers. The vouchers are sold by the appellants to customers and are encashed at the end of an evening by the appellants. On encashment the dancers pay a commission of 20% of the face value of the vouchers to the appellants.

2. The appellants contend that the commission is paid for the provision and operation of the voucher scheme, including the encashment of the vouchers, and that this is an exempt supply on which VAT is not payable. The Commissioners for Her Majesty's Revenue and Customs (HMRC) argue that more services than just the voucher scheme are supplied, so that VAT is payable on the commission at the standard rate.

3. The First-tier Tribunal (Tax Chamber) (Judge David Demack and Derrick Speller FCA) (the FtT) held that the commissions were subject to VAT at the standard rate. It dismissed appeals against the rejection of claims for the repayment of VAT totalling £506,980 for return periods between May 2006 and May 2009 and appeals against assessments, totalling £42,278, for periods in 2009. This decision was upheld on appeal by the Upper Tribunal (Tax and Chancery Chamber) (Rose J) (the UT). This appeal is brought with permission granted by the UT.

### *The facts*

4. The relevant facts are clearly summarised in the UT's Decision at [2]-[4]:

> "2. Each of the Appellants operates as a licensed lap dancing or table dancing club in London where drinks and refreshments are served and dancers perform for club patrons. The dancers are self-employed and pay a fee to gain entry to the club each night when they are booked to perform. The entry fee is about £80 though this varies from club to club and may be waived at the discretion of the person in charge of the club on the night. Dancers perform either to the general audience on a stage at the club or for particular customers close to the table where the customers are sitting. The dancers generally do not get paid anything for dances performed on the stage, though customers may give them a tip to show their appreciation. If a patron invites a dancer to perform a dance particularly for him at his table then she expects to be paid a 'gratuity' by the customer. The Secrets companies suggest to patrons that they should pay a gratuity for each dance performed at their table. The gratuity is either £10 or £20 per single music track. The clubs have no knowledge of the precise terms of the dancers' transactions with patrons and do not assist in enforcing payment by patrons.
>
> 3. If a customer invites the dancer to join him at his table for any long period of time, it is usual practice for a customer to offer a gratuity for 'table company'. The club suggests that the

> dancer should receive £250 per hour or part thereof for the time that she is seated with customers at their table. If the customer has agreed to give the dancer a £250 gratuity for table company, the club suggests to the dancer that she includes as many dances as the customer requests during that time.
>
> 4. The issue that has generated this dispute arises from the way in which the dancer is paid for some of her work at the club. The customer can give the dancer cash for tips, dances or table company. But often patrons run out of cash before the evening is over and wish to continue to spend money on entertainment and refreshments. The dancers do not themselves have the means to accept credit or debit card payments in return for their work at the club. In order therefore to enable customers to pay for things without cash, Secrets clubs have established what is called 'Secrets money'. At any point in the evening, the patron can use a debit or credit card to purchase from the waiters or bar staff at the club vouchers which constitute Secrets money. Secrets money vouchers are printed on coloured paper and are sequentially numbered. Each voucher has its value printed on it in both words and figures. Presently vouchers are issued in denominations of £10, £20 and £250. In the period covered by the present appeals, each of the Appellant companies issued its own Secrets money and accounted for its issue and redemption, vouchers only being valid in the issuing club. The terms and conditions of issue have varied over time, as has the transferability of vouchers."

5. The way in which the "Secrets money" voucher scheme worked is summarised in the Decision at [7]:

> "Secrets earn money from operating the Secrets money scheme in two ways. First, when the patron buys Secrets money, he pays an additional 20 per cent over the face value of the vouchers. Thus it costs the patron £120 to buy £100 worth of Secrets money or £300 to buy £250 worth. Secondly, if a dancer accepts money as payment for her work, she can redeem the Secrets money by presenting the vouchers to the club at the end of the evening. When she redeems the vouchers the dancer receives the face value less a commission retained by the club of 20 per cent of the face value of the Secrets money. Thus for every £100 worth of Secrets money vouchers used at the club, Secrets will receive an aggregate commission of £40. The 20 per cent commission on redemption of the voucher back into cash is charged regardless of how the voucher has been acquired by the dancer. Thus there was evidence before the tribunal that dancers redeemed vouchers on behalf of waiters or bar staff who had received them as tips or that they use the vouchers to settle debts between themselves. Also some clubs will allow patrons on occasion to change unused Secrets money

> back into cash at the end of the evening. In every case, a 20 per cent commission is deducted from the face value of the vouchers on encashment."

6. In the Decision at [11], Rose J observed that, as customers pay for vouchers with a credit or debit card, the club takes on no greater credit risk than any other retailer accepting a credit or debit card in exchange for goods or services. Although there was evidence that on occasions customers disown items appearing on their credit or debit card bills, perhaps because they have spent far more than they intended or to avoid giving embarrassing explanations at home or at work, the scale of these challenges is very small. The total of all chargebacks suffered by the appellant companies in the period April 2006 to April 2009 was £15,162 out of a total of a little over £22.5 million of Secrets money used to buy food or drink or encashed by dancers.

7. The dancers are self-employed and there is no written contract between a dancer and a club. The appellants do, however, issue a code of conduct with which the dancers must comply. It states that dancers are expected to remain in the club until closing time which, as the FtT found, was usually about 3 am. Subject to this, there is no prescribed pattern of working hours nor are dancers required to work a minimum number of hours or nights each week. The FtT also found that there was no requirement that dancers must accept vouchers but, should they refuse to do so, it would affect their earning potential, particularly towards the end of the evening.

### *The legislation*

8. The parties were agreed that the commission would be subject to VAT at the standard rate, unless it was paid for an exempt supply falling within Item 1 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 which exempts from VAT:

> "the issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money."

9. Note 4 to Group 1 states:

> "This Group includes any supply by a person carrying on a credit card, charge card or similar payment card operation made in connection with that operation to a person who accepts the card used in the operation when presented to him in payment for goods or services."

10. Item 1 of Group 5 gave effect to article 13B(d)(2) of the Sixth VAT Directive, which was replaced (in identical terms, with effect from 1 January 2007) by article 135(1)(c) of the Principal VAT Directive.

### *The FtT's Decision*

11. There were two principal issues before the FtT. HMRC's "primary contention" was that a voucher was not a "security for money" for the purposes of Item 1 of Group 5 so that the encashment of a voucher was not an exempt supply. The FtT held that the

vouchers were securities for money, a decision that was upheld by the UT. HMRC have not sought to appeal that decision.

12. The second and alternative submission of HMRC was recorded by the FtT in its Decision at [5]:

> "Alternatively, they claim that the economic reality is that the Secrets companies are not dealing with securities for money, but are providing the dancers with a corporate [*sic*: composite] supply of the opportunity and resources to supply their services to a wider market than would otherwise be available to them, and Secrets money is the means by which they can supply that market. HMRC maintain such a supply may be characterised as performance facilitation services and is taxable."

13. The FtT dealt with the alternative submission of HMRC in its Decision at [72] -[89]. It summarised the submissions made on behalf of the appellants at [72]-[76] and the submissions on behalf of HMRC at [77] – [86].

14. It is important to note that the FtT recorded at [79] that:

> "Miss McCarthy [counsel for HMRC] observes that it is not HMRC's case that the 20% charged to dancers represents further consideration for the right to enter the clubs, access the facilities and perform to customers in general (i.e the "entry supply" claimed by Secrets). Rather their case is that the 20% charge is consideration for access to a wider market than the dancers would otherwise have – namely the non-cash customer market – and, critically, for facilitating the dancers' exploitation of that market."

15. The essence of the submission for HMRC was summarised at [81]:

> "Miss McCarthy submits that Secrets is not merely providing the dancers with redemption or encashment services, it is also providing the dancers with access to the non-cash customer market and the facility to exploit that market because, unlike the arrangement in *Kingfisher*, the dancers are making their supplies not from their own premises using their own resources, but from Secrets' premises and using its resources. When viewed from this perspective, she claims there is self-evidently a direct link between the 20% charge to the dancers and the package of services supplied by Secrets."

The relevant supply was "one comprising a number of interwoven elements – the overarching supply being one which supplies dancers with greater commercial opportunities and facilitates the dancers' exploitation of those opportunities": see [83].

16. The FtT stated its conclusion and reasons shortly at [88]:

> "Although considered individually, the VAT liability at each step of the process would appear to support the appellant companies' case, in our judgment the various steps which occur with regard to Secrets money cannot be separated in practice. It is plain to us that the Secrets companies' situations are analogous with those considered by the courts in the *Faaborg-Gelting* and *Byron (Salon 24)* cases, and lead to the same conclusions as those to which the respective courts in those cases came. We accept the submissions of Miss McCarthy in respect of this aspect of the appeal in their entirety, and hold that there is a single supply of services by the Secrets companies to the dancers which is paid for by means of (1) entrance fees, and (2) the premium in Secrets' money. It follows that we dismiss the appeals."

17. It will be immediately apparent that this conclusion in favour of HMRC did not reflect the case put by HMRC to the FtT, as its own summary of the submissions for HMRC at [79] made clear. Miss McCarthy, who appeared before us on behalf of HMRC as she had in the FtT and UT, suggested that by their express acceptance of her submissions, recorded by the FtT in [88], the FtT was deciding the appeal on this issue on two grounds, the case put forward by HMRC and, as an alternative, the single supply of services for which the dancers paid by means of both the entrance fees and the commission. I find it difficult to read paragraph 88 in this way. It seems to me that the FtT based its decision on there being a single supply of services.

***The UT Decision***

18. The parties repeated their submissions before the UT, but HMRC made clear its position on the alternative ground for the FtT's decision, as summarised by the UT at [35]:

> "35. HMRC argue that the Tribunal was right to find that the services provided in return for the 20 per cent commission was a composite supply of services which enable the dancer to gain access to the non-cash market available from the customers the club. They do not go so far as to say that one should treat the entry fee and the 20 per cent commission as one overall consideration for all the facilities provided at the club. That was not their submission before the Tribunal and it was not their primary submission on appeal because they do not need to go that far. However, their alternative submission is that if the Tribunal was right to treat all the money paid by the dancer during the course of the evening as one payment, then clearly the services she receives for that payment from the club are taxable supplies and cannot fall within Item 1."

Accordingly, as an alternative to their primary case, HMRC adopt the alternative basis on which the FtT reached its decision.

19. A significant part of the argument before the UT focused on the decision of Neuberger J in *Kingfisher plc v Customs and Excise Commissioners* [2000] STC 992. That case concerned the commission payable on the encashment of vouchers sold by a third party credit provider (Provident) to customers for use in retail stores, including those operated by Kingfisher plc. It was held that the supply for which the commission was paid fell within Item 1 of Group 5. Neuberger J accepted that the commission paid by Kingfisher to Provident was for more than simply the encashment of vouchers tendered in payment by customers and included the benefits of inclusion in Provident's scheme, such as Provident informing customers that vouchers could be used at Kingfisher's stores and the right of those stores to advertise that the vouchers would be accepted in payment for purchases. Moreover, as stated by Neuberger J at [59], there were further benefits:

> "First, it is able to sell goods to a customer who might otherwise not have the cash to purchase goods, or who might not purchase goods from the retailer if the retailer were not part of the scheme. Secondly, the retailer has relative certainty of payment from Provident, rather than having to take the risk of customers' credit, which is almost certain to be significantly less good than that of Provident."

20. Notwithstanding these benefits, Neuberger J, applying *Customs and Excise Commissioners v Diners Club Ltd* [1989] 1WLR 1196, held that these additional benefits did not detract from the essential nature of the supply, which constituted an exempt supply by virtue of Item 1 of Group 5.

21. Having accepted, by reference to the decision in the *Kingfisher* case, that the services provided for the commission in the present case went beyond the simple encashment of vouchers, the UT stated at [43]:

> "The next question is, if the services provided go beyond the encashment of the voucher at the end of the evening, what is the precise scope of the composite service? That must be established before one can consider whether the nature of the service is that of an exempt service or not. Mr Hitchmough [counsel for the appellant] argues that if I find that the service provided for the 20% commission is a composite service and not just the pure encashment of the voucher, then the elements of the composite service are no more than were provided by the credit card company in *Diners Club* or by Provident in *Kingfisher*."

22. At [44], the UT pointed to a significant difference between the circumstances of the voucher scheme in the present case and a credit card service or the Provident vouchers scheme:

> "However, there is a significant difference between the Secrets voucher scheme and the credit card service or the Provident vouchers service. In a credit card scheme, the retailer provides the goods to the consumer who presents the voucher at the retailer's premises without any further assistance from the

> issuer of the vouchers or credit card. The retailer is solely responsible for providing the infrastructure, ambiance etc to attract the consumers to come and spend their vouchers in his store. In the present case, the retailer, that is the dancer, cannot provide the service for which she receives the voucher from the patron without the facilities of the club. It is the club which attracts the patrons and provides them and her with the facilities needed for her to perform table dances and offer table company to non-cash customers. For the dancer to make money from the non-cash customers she not only needs Secrets money scheme but the rest of the facilities that are provided by the club to her and to the patrons as the environment in which she can earn money."

23. At [45], the UT continued:

> "It is necessary then to consider whether these services provided to the dancer by the club when she performs dances etc for non-cash customers should be regarded as distinct and independent supplies or are, together with the encashment of the vouchers at the end of the evening, so closely linked that they form a single and divisible economic supply which it would be artificial to split."

That it was correct to pose this question is clear form the decision of the House of Lords in *College of Estate Management v Revenue and Customs Commissioners* [2005] UKHL62, [2005] 1 WLR 3351.

24. The UT continued at [46]:

> "46. It is true that the dancer does not have to accept Secrets money and that she pays separately for entrance to the club. However it was not suggested that there are many, if any, dancers who refuse to accept Secrets vouchers and it is difficult to see why any dancer would choose to limit her earning ability in this way. Looking at the matter from her point of view, she will only agree to accept Secrets money if she makes use of the rest of the club's facilities to perform dances for non-cash customers. The club provides a bundle of services to the dancer all of which are important for her to be able to make the best use of the facilities at the club to earn her living. It is artificial to split the Secrets vouchers scheme from the other services provided by the club to the dancer to be able to provide dances and table company to non-cash patrons."

25. At [47], the UT accepted HMRC's submission that the size of the commission was an indication that the dancer was paying for much more than encashment of the vouchers or the narrow composite service of access to the voucher scheme, given that the appellants were taking virtually no credit risk. Rose J said that she agreed "that the 20% charge reflects the fact that the dancer cannot provide her services to the non-cash customers without the much wider bundle of facilities and services provided by

the clubs to create the environment in which the dancer can earn the Secrets money. That it what she is paying for."

26. On the basis of this reasoning, Rose J stated her conclusion at [49]:

> "49. I therefore hold that the 20 per cent commission payment charged by the club on redeeming the Secrets money is a payment in return for services which go significantly beyond the simple receipt or dealing with security for money for the purposes of Item 1. The services provided can accurately be described as the provision of the means whereby the dancers can exploit the opportunity to make more supplies to a wider market thereby increasing their turnover by facilitating the dancers' performances to the non-cash customer base."

27. At [48], Rose J observed that her conclusion was not undermined by the fact that vouchers were also redeemed by dancers on behalf of waiters or in settlement of debts owed by one dancer to another. That was not the purpose for which the scheme was operated and it would be difficult to police a differential commission rate.

28. Finally, at [51], Rose J referred to paragraph 88 of the FtT's decision:

> "I do not consider it is necessary for me to consider whether the tribunal went further than it needed to in referring in paragraph 88 to the supply to the dancers comprising a bundle of services supplied in return for both the entrance fee and the 20 per cent commission. Even if one disregards the entrance fee and looks only at the 20 per cent commission, the services supplied in return for that payment constitute, in economic reality, a taxable and not an exempt supply."

***The case for the appellants***

29. On this appeal, the appellants accept that the service provided in return for the commission was more than mere encashment of the vouchers and included facilitating access by the dancers to the non-cash customer market but submit that this does not take the supply outside the exemption provided by Item 1 of Group 5. The supply was overall a single supply falling within the exemption.

30. The principal criticism of the UT's Decision was that it was wrong to take into account the provision of a club's facilities, as set out in the Decision at [44] and [46], in circumstances where a dancer obtained the right to use those facilities by the payment of the entrance fee. Having paid the entrance fee, she was entitled and expected to remain at the club until closing time. Throughout that time, she was entitled to use the club and its facilities and was not required to pay any extra fee for doing so. Assuming, as HMRC's principal submission does, that the dancer received separate supplies in return for, first, paying the entrance fee and, secondly, paying the

commission, it was essential to identify the service provided for each such payment. Given that the use of the club's facilities was available throughout the evening on payment of the entrance fee, it cannot be the service for which the commission was paid. Accordingly, the only services paid for by the commission were the inclusion of the dancer in the operation of the voucher scheme, thereby enabling her to access the non-cash market, and the encashment of the vouchers given to her by customers. On this basis, the present case is indistinguishable from the *Kingfisher* case. The additional benefits identified by Neuberger J in that case as provided to Kingfisher under the terms of the Provident scheme were the same as those received by a dancer in return for the commission. Like Kingfisher, she was entitled to participate in the scheme and thereby provide services to non-cash customers who might not otherwise have the cash to pay them and enjoy certainty of payment from the appellants on encashment of the vouchers.

31. The appellants also seek to meet the alternative basis on which the FtT reached its decision. They accept that if the FtT was correct in its conclusion, the appeal must fail, but they submit that separate supplies were made in return for the entrance fee and for the commission. They submit that the FtT's conclusion is contrary to the basic principles established in a number of decisions of the CJEU and summarised by the Upper Tribunal in *The Honourable Society of Middle Temple v Revenue and Customs Commissioners* [2013] STC 1998 at [60]. A similar, though not identical, summary of factors, with helpful references to the underlying authorities, is contained in the decision of the Upper Tribunal (Roth J) in *Revenue and Customs Commissions v Bryce* [2011] STC 903 at [23].

32. Mr Hitchmough QC for the appellants submits that the starting point must be that every supply is normally to be regarded as distinct and independent. In the present case, in return for the entrance fee, the dancers were permitted to enter the clubs, use the facilities and perform dances for the customers. In return for the separate charge of the commission, they were given the opportunity to convert vouchers into cash and the ability to generate income from non-cash customers. These supplies were not so closely linked as to form a single, indivisible economic supply. This must, in accordance with the authorities, be judged from the standpoint of the dancer as the person to whom the services were supplied, and from their point of view it cannot be said that the several elements covered by these two charges were so closely linked as to be equally inseparable and indispensable.

33. Reliance was placed on the decision of the CJEU in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951. In that case, the provision by a bank of discretionary portfolio management services, comprising both investment advice and the execution of purchases and sales of securities, was held to be a single supply, notwithstanding that it was possible to supply the two constituent elements separately. This was so because, from the point of view of the bank's customers, the provision of discretionary management services comprising those two elements was a single supply. Mr Hitchmough submitted that the same could not be said in the present case, where a dancer needed to pay the entrance fee in order to have access to the club premises but did not need to accept vouchers in order to trade in the club. Although Rose J had said at [46] that "it was not suggested that there are many, if any, dancers, who refuse to accept Secrets vouchers and it is difficult to see why any dancer would choose to limit her earning ability in this way", there was no

relevant finding by the FtT save that there was no requirement that dancers must accept vouchers. It was pointed out that dancers might accept cash only, precisely in order not to suffer the 20% deduction on encashment of vouchers.

34. The appellants criticised the observations made by Rose J in [47] and [48] on the grounds that they were speculation, not supported by the evidence or findings made by the FtT.

### *The case for HMRC*

35. Miss McCarthy for HMRC identifies the issue under appeal as the nature of the supply from the appellants to the dancer in return for the 20% commission paid on redemption of vouchers. HMRC submit that "the economic reality is that in return for the 20% fee the Appellants provide dancers with the opportunity and, critically, the facilities and resources needed for the dancers to supply their services to a wider market than would otherwise be available i.e those of the Appellants' customers who have run out of cash but can pay by credit or debit card." In addition to the encashment service, the appellants are "providing services comprising the following additional elements:

a) Access to a wider market –i.e the opportunity to make more supplies and thereby increase their turnover…: and

b) The means by which the dancers can exploit that market – i.e the Appellants actively facilitate the dancers' performances to the non-cash customer base because dancers make their supplies to customers not from their own premises using their own facilities but from Secrets' clubs, using Secrets' facilities.

This is a bundle of services going beyond the scope of Item 1 and the overall composite supply is therefore taxable."

36. HMRC's primary case treats the entrance fee and the commission as payments for distinct supplies. In return for the entrance fee, the dancer receives the right to enter the club, the custom of cash customers and the right to use the club's premises and facilities to earn money from the cash customer market. From the dancer's perspective, these services form an economic whole and give her the ability to make money from cash customers. In return for the commission paid on encashment of vouchers, HMRC contends that the dancer receives the following services or benefits from the appellants: the setting up and running of the voucher scheme, the right to be included in the scheme, the custom of non-cash customers, promotion and advertising of the scheme in the club, the use of the club's premises and facilities to make money from the non-cash customer market, and payment of the vouchers on encashment. From the perspective of a dancer, these services also form an economic whole, giving her the ability to earn money from non-cash customers. This single supply of services should be classified as taxable because the services comprise a complex of elements with no one element predominating over the rest. It goes well beyond the services

comprised within Item 1 of Group 5 and cannot be classified as a single supply falling within that item.

37. In particular, and critically, HMRC submit that it is artificial to carve out a dancer's use of the club premises and facilities to perform for the non-cash customer market from the other services supplied in return for the commission and allocate them to the services supplied in return for the entrance fee. Without the voucher scheme, the opportunity to use the club's premises and facilities to dance for customers who are not able or willing to pay in cash is commercially pointless from the dancer's perspective. HMRC rely on the decision of the CJEU in the *Deutsche Bank* case as showing that, in the present case also, there is a single economic supply.

38. As regards the *Kingfisher* case, HMRC submit that if it is accepted that use of the club's premises and facilities to perform for the non-cash customer market was provided in return for the commission, it followed that the case could be distinguished from the facts and decision in *Kingfisher*.

39. Alternatively, HMRC adopt, in this court as they did in the UT, the analysis set out in the conclusion on this issue of the FtT. On that analysis, there was one overarching, composite supply of all the various services and benefits provided to dancers in return for consideration comprising both the entrance fee and the commission.

***Discussion***

40. I have earlier said that in my view the FtT's decision can be read as finding for HMRC only on what is now the alternative ground. That is clearly stated in the Decision as their conclusion and, given that it is not consistent with HMRC's primary case, it can have been the only basis for the FtT's decision. By contrast, the UT very clearly reached its decision on the basis only of HMRC's primary case. This creates the unusual position that both tribunals have concluded in favour of HMRC, but on inconsistent grounds. In reaching its decision the UT did not purport to exercise its jurisdiction conferred by section 12 of the Tribunal Courts and Enforcement Act 2007 to "remake the decision" and "make such findings of fact as it considers appropriate". This jurisdiction may be exercised if, but only if, it finds that the FtT's decision involved the making of an error on a point of law.

41. This is not therefore a case in which the UT substituted findings of fact for those made by the FtT. Instead, it came to a different evaluative judgment on the basis of the FtT's findings of primary facts which were not challenged on the appeal to the UT. HMRC accept as much. They do not contend, as might have suited their purposes, that either or both of the decisions below were findings of fact with which this court could not interfere save on *Edwards v Bairstow* grounds. They state in their skeleton argument:

> "Whilst HMRC accepts that the classification of a supply for VAT is ultimately a question of law, this sort of evaluative assessment of the facts that the Appellants seek to challenge is precisely the type of multi-factorial evaluation carried out by specialist tribunals with which non-specialist appellate courts should be slow to intervene."

I do not understand the appellants to take issue with this approach, which is in any event fully supported by statements in a number of leading authorities: see for example *Beynon and Partners v Customs and Excise Commissioners* [2004] UKHL 53, [2005] 1 WLR 86 at [27] and *College of Estate Management v Revenue and Customs Commissioners* at [36].

42. In considering the decision of the UT, the critical point in my judgment is whether it is right to treat, as part of the services supplied in return for the commission payable on encashment of vouchers, the provision of the club's facilities to the dancer to enable them to obtain income from non-cash customers. If that is not, properly considered, part of the consideration for the commission, it seems to me that the services provided by the appellants for the commission go substantially no further than those provided in *Kingfisher*. It would follow that the supply was exempt and VAT was not payable on the commission.

43. I should say here that I do not find some of the more general ways in which HMRC have expressed the consideration provided for the commission as helpful, either to HMRC's case or more generally. The FtT in its Decision at [79] referred to the submissions of counsel for HMRC that their case was that the commission was "consideration for access to a wider market than the dancers would otherwise have – namely the non-cash customer market- and, critically, for facilitating the dancers' exploitation of that market." At [83], the submission is recorded that the supply in return for the commission comprised "a number of interwoven elements - the overarching supply being one which provides dancers with greater commercial opportunities and facilitates the dancers' exploitation of those opportunities." Likewise, in the UT's Decision at [49], it is said that the services "can accurately be described as the provision of a means whereby the dancers can exploit the opportunity to make more supplies to a wider market thereby increasing their turnover by facilitating the dancers' performances to the non-cash customer base." Statements such as these do not focus on the precise supply or supplies being made by the appellants. Rather, they describe the commercial opportunities arising from the voucher scheme, which could equally well be said to flow from the provision of any credit scheme.

44. HMRC's case does not rest on such general descriptions. They make clear their case that the relevant supply includes, critically, the provision of the club's facilities to enable the dancers to earn money from non-cash customers.

45. This necessarily involves splitting the provision of the club's facilities to the dancers into two supplies, one paid for by the entrance fee and the other paid for by the commission on the encashment of the vouchers. The justification advanced by HMRC for this division is that, without paying the commission, the dancers cannot, through the use of the club's facilities, exploit the non-cash customer market.

46. HMRC and Rose J were right to emphasise that the dancers trade not from their own premises but at the appellants' clubs. This distinguishes this case from cases such as *Kingfisher* and *Diners Club* where the retailer, equivalent to the dancer in this case, trade from their own premises. Rose J was also right to say at [40] that the reality is that both the club and the dancers are in effect dependent on each other for success and profitability and at [44] that the dancers cannot provide their services in exchange for vouchers without the facilities of the club. For the dancers to make money from

the non-cash customers they need not only the voucher scheme but also the club's premises and facilities. Payment of the entrance fee does not give them access to the non-cash customers but, as a matter of economic reality, enables a dancer to use the club only for the provision of services to cash customers. As Ms McCarthy observed in her submissions, a dancer paying only the entrance fee could dance for a non-cash customer but would receive only valueless pieces of coloured paper in return. This would make no economic sense and would not happen in the real world.

47. I do not regard the criticisms of the judge's observations in the Decision at [47] and [48] as justified.

48. As for [47], a commission of 20% for the encashment of a voucher, even with the benefits of inclusion in the scheme, is on the face of it very high, particularly as the appellants ran, as they knew, a very low credit risk. If they had wanted to demonstrate that it was a fair or market rate for those services, the burden was on them to adduce the evidence to support it. In the absence of such evidence, Rose J was entitled to take the view that the size of the commission suggested that it was charged for more than just those services. Neuberger J adopted a similar approach in the *Kingfisher* case at [46].

49. As regards [48], the services supplied for the commission are to be ascertained from the standpoint of the typical dancer. The judge was clearly correct to say that the encashment of vouchers on behalf of waiters was not a purpose, but an incidental by-product, of the scheme and sheds no light on the services supplied in return for the commission payable under the scheme. Still less does the commission paid on vouchers given by one dancer to another in discharge of a debt. In that case, the appellants will have provided the same services as with any voucher given by a customer to a dancer.

50. In these circumstances, the UT's analysis that the provision of the club's facilities forms part of the consideration for the commission on encashment of the vouchers is a legitimate interpretation of the constituent parts of the services supplied by the appellants in return for the commission. It reflects the economic realities from the perspective of the dancers. It is an analysis that is open on the evidence and it is an evaluative judgment that this court should be slow to overturn. I do not consider that it would be right to do so in this case.

51. It is therefore unnecessary, as it was for the UT, to consider the alternative basis on which the FtT decided the case. I would only say that without evidence of the extent, if at all, to which dancers did not take vouchers, it is difficult to decide whether there was a single composite supply for which dancers paid the entrance fee and the commission. If this had been HMRC's case before the FtT, it would have been for the appellants to lead evidence on this issue but, in the circumstances, they cannot be criticised for not doing so.

52. For these reasons, I would dismiss the appeal.

Lord Justice Floyd:

53. I agree.

Lord Justice Longmore:

54. I also agree.