**IN THE TAX COURT OF SOUTH AFRICA**

**(CAPE TOWN)**

Case No.: VAT 1390

Before: The Hon. Mr Justice Binns-Ward (President)
Prof. P. Surtees (Accountant Member)
Ms. K. Hofmeyr (Commercial Member)

Dates of hearing: 30-31 May 2016

Date of judgment: 14 June 2016

In the matter between:

**D** Appellant

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** Respondent

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**JUDGMENT**

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**BINNS-WARD J:**

[1] This matter concerns the question whether value-added tax falls to be paid on the taxpayer's delivery charges. The question arose in consequence of the findings made pursuant to an audit of the taxpayer's tax affairs during the 2009 to 2011 assessed tax periods. The audit findings resulted in the taxpayer being assessed for unpaid value-added tax on the basis of its understatement of output tax in its returns for the relevant periods. The taxpayer objected to the assessment on the basis that it was not accountable for the tax on the delivery charges. The question was decided against the taxpayer on appeal by it to the tax board after the disallowance of its objection. The taxpayer is dissatisfied with the tax board's decision

and the appeal was consequently referred to this court in terms of s 115 of the Tax Administration Act 28 of 2011 for hearing *de novo*. The parties have agreed on the amount of tax that will be payable by the taxpayer in the event of this court deciding the question in favour of the Commissioner.

[2] The taxpayer, which is duly registered as a vendor in terms of the Value-Added Tax Act 89 of 1991, carries on a fast foods delivery business. The fundamental issue that falls to be determined in this appeal is whether the delivery of food orders to the taxpayer's customers constitutes a service supplied by it (within the meaning of that word as defined in the Act[1]) for consideration[2] in the course, or in furtherance, of its enterprise. To that end it is necessary to describe in some detail just how the taxpayer's business is conducted. The facts are uncontentious.

[3] The taxpayer contracts with fast food outlets and takeaway restaurants to advertise their menus in a booklet or catalogue, which it has printed and distributed to households in the areas in which it makes deliveries. The booklet is apparently referred to by the taxpayer as its 'menu guide'. For obvious reasons, the guide needs regular updating to keep abreast of changes to menus, prices, participating food outlets, delivery prices and the like. The taxpayer therefore produces fresh editions of the booklet periodically.

[4] An example of a pro forma contract used by the taxpayer for the purpose of its agreements with participating food outlets was put in evidence (at p. 12 of the trial bundle). Its material content provided as follows:

> [The Taxpayer] and [the participating restaurant] hereby agree on the following conditions:
>
> 1. [The Taxpayer] will act as a delivery agent for [the participating restaurant] in XXX and Surrounding areas.
> 2. 20% (twenty percent) + vat (equals 22.8%) of the retail selling price of the products purchased for deliveries will be paid over to [The Taxpayer] on a monthly basis.
> 3. This agreement is only valid for the duration of [The Taxpayer's] Table View's 11th edition menu guide due June 2010.
> 4. [The participating restaurant] will pay [The Taxpayer] R4 000 LESS R 1000 = R 3 000 + vat = R 3 420 for their advertisement in the [The Taxpayer's] menu guide.
> 5. Payment; Due on artwork approval
>
> Advert size. Single Page

[1] See paragraph [15], below.
[2] Ibid.

Physical address:

[xxx]

Store phone & fax number: ph xxx Fax. _____

Cell _____ e-mail _____

Name: xxx Signature:_____[signature of representative of of participating restaurant]

Capacity: OWNER [of the participating restaurant]

[Taxpayer's name] _____[Taxpayer's representative's signature]

[5] Customers wishing to order fast food from any of these outlets for off-site consumption are able to place a telephonic order for the food with the taxpayer. The taxpayer's booklet contains a guide on 'how to order'. It also sets out, immediately under the 'how to order' instructions, certain terms of business, which include the provision: '[The Taxpayer] delivers goods for a 3rd party and are (sic) not responsible for quality and quantity of such goods'. The '3rd party' is obviously any of the fast food outlets or restaurants with which the taxpayer has contracted. There is a table in the booklet in which are set out the 'Delivery areas and charges'. The information in the table is subject to a qualification stating that 'Delivery charges may fluctuate with petrol increases'. All the aforementioned information - together with an index reflecting the names of the fast food outlets and takeaway restaurants, categorised by food type or cuisine, from which food may be purchased - is set out in a single page in the example of the booklet introduced in evidence (at p. 56 of the trial bundle).

[6] The customer is thus able to determine from the booklet how much he will have to pay for any food order delivery. The amount will be the sum of the indicated menu price of the food ordered and the indicated 'delivery charge' for deliveries to addresses in the area in which the customer resides, or wishes the food to be brought to. The booklet produced in evidence indicates that an additional charge of R4 per additional outlet would be levied if any order placed by a customer included food to be purchased from more than two food outlets. The evidence suggested that the operator at the taxpayer's premises that takes a customer's order over the telephone would, in the course of the telephone conversation, confirm the total amount that the customer would be charged.

[7] Upon receipt of an order from a customer, the taxpayer's staff pass on the details to the relevant fast food outlet and despatch a driver to that outlet to collect and pay for the food that has been ordered. The driver is provided by the taxpayer with a cash float for this purpose. The driver then takes the ordered food to the taxpayer's customer and collects

payment, which can be made by cash or credit card. The driver is required to wear clothing specially branded to identify him or her with the taxpayer's business. The driver purchases the clothing (referred to as 'the uniform') from the taxpayer. The taxpayer undertakes to repurchase the uniform from the driver upon termination of the driver's contract 'depending on the condition of the uniform'. The drivers are required to convey the food delivered by them to the taxpayer's customers in a hotbox container, which is also branded to identify the taxpayer's business. Cold foods are required to be carried in a branded 'six pack bag'.

[8] The customer is presented with an invoice by the driver when the food order is delivered and payment collected. Specimen invoices were presented in evidence at the hearing. The invoice that is presented describes itself as a 'Tax Invoice'. It bears the taxpayer's business logo in the top left corner and its VAT registration number in the top right corner. The other information set out in the invoice includes the customer's name and address, the name(s) of the fast food outlet(s) from which the food was purchased and the particulars of the items of food delivered, including the price. The invoice reflects an amount, given as the 'Vatable total', which equates to the total of the individually indicated prices of the items of food delivered as per the menu(s) from which they were selected. It also includes an item indicated as 'Drivers Petrol Money'. The pertinent monetary amounts are summarised at the bottom right of the invoice as follows:

| | |
|---|---|
| Vatable total | Rx |
| **Drivers Petrol Money** | Ry |
| Total due to Driver | Rz (being the sum of Rx and Ry) |

'Ry' in the above example would correspond with the pertinent delivery charge advertised in the booklet that the taxpayer distributes to solicit custom for its business.

[9] It is quite clear then that the contracts entered into by the taxpayer with its customers entail the service of purchasing items from the menus of participating food outlets at their behest and having the food delivered to them. The taxpayer does not mark up the price of the food it purchases for its customers. It negotiates a commission with the food outlets and takeaway restaurants that advertise in its booklet. The commission is calculated as an agreed percentage of the price of the food purchased by it for its customers.[3] Value added tax is

[3] This is illustrated in the pro forma contract set forth in paragraph [4], above.

accounted for by the taxpayer on those commissions. The commission plainly constitutes consideration received by the taxpayer for a service supplied by it to the participating restaurant. The service consists of soliciting and executing orders for food for off-site consumption from the participating restaurants. The collection and delivery of the food constitutes a separate service, which is supplied to the taxpayer's customers.

[10] The drivers who collect and deliver the food ordered by the taxpayer's customers are engaged by the taxpayer in terms of a pro forma contract entitled '*Memorandum of Agreement for the Provision of Services by an Independent Contractor*'. It might be useful to set out those various terms of the contract which the parties considered of sufficient relevance to draw to our attention in the course of the evidence:

1. **INTRODUCTION**

1.1 The Company operates a fast food delivery business whereby:

1.1.1 Members of the public (CLIENTS) order certain prepared foods and/or services ("PRODUCTS") from various restaurants and/or fast food outlets ("VENDORS") via the COMPANY.

1.1.2 The COMPANY places the CLIENT's order with the selected VENDOR;

1.1.3 The COMPANY collects the PRODUCT from the VENDOR and delivers the same product to the CLIENT's premises.

1.2 The COMPANY out sources its delivery services to drivers who specialize in the delivery of goods in and around the Table View area.

1.3 The COMPANY wishes to utilize the services of an INDEPENDENT CONTRACTOR on a limited term, contractual basis.

1.4 The COMPANY and the CONTRACTOR wish to record the terms and conditions on which the CONTRACTOR will render such services to the COMPANY.

3. **THE SERVICE**

3.1 The SERVICE will include the following:

3.1.1 Collecting the PRODUCTS from the VENDOR when notified to do so by the COMPANY;

3.1.2 Paying for the PRODUCTS when collecting them from the VENDOR;

3.1.3 Delivering these PRODUCTS to the CLIENT'S premises;

3.1.4 Obtaining payment for the PRODUCTS on delivery to the CLIENT;

3.1.5 Any other delivery related duties as may be requested of the CONTRACTOR from time to time.

3.2 The CONTRACTOR shall exclusively perform the SERVICE for the company during the Contractor's hours of work in terms of paragraph seven (7) below.

4. CONSIDERATION FOR THE SERVICE

4.1 The COMPANY does not remunerate the Contractor for providing the service as the client will pay a delivery fee directly to the Contractor.

4.2 The CONTRACTOR is not an employee of the COMPANY, is not therefore eligible for any employment benefits and is responsible for his own medical aid, pension fund and payment of any tax;

4.3 Should there be any comebacks or returns from VENDORS or CLIENTS in relation to the SERVICE performed by the CONTRACTOR for the COMPANY, they will be attended to by the CONTRACTOR at his/her own expense.

4.4 The CONTRACTOR will pay the COMPANY R1,00 for every order that he/she delivers. The COMPANY will use this fee for any losses that may occur that is not related to negligence of the Company's members. The extra funds will be used for the good of the staff's environment (TV, Games, Chill area etc.) and is not, in any way, due back to the CONTRACTOR.

5. OBLIGATIONS OF THE CONTRACTOR

5.4 The CONTRACTOR undertakes to ensure that any PRODUCT collected from a VENDOR correctly reflects what is on the order form submitted by the COMPANY to the VENDOR is of a satisfactory quality for sale to the CLIENT and is delivered to CLIENT in the same condition as it was on receipt from the VENDOR. The CONTRACTOR indemnifies the COMPANY for any loss or damage arising to any person or entity in the above regard.

5.5 The CONTRACTOR undertakes to ensure that there shall be no undue delay in the collection and delivery of the PRODUCT to the CLIENT.

7. HOURS OF WORK

7.1 The CONTRACTOR'S hours of work will be based on the following shift system:

Mondays to Sundays- 10h00 to 17h00 Dayshift

17h00 to 23h00 Nightshift

7.2 The CONTRACTOR shall work hours in addition to a shift, which are necessary to ensure the proper performance of his duties.

[11] The engagement contract incorporates an attachment ('Attachment "AA"'), which includes the following provisions:

- INTRODUCTION

  We would like to welcome you as a member of the [Taxpayer] team and appreciate your thoughts and suggestions on any circumstances to improve our service. You are given the opportunity to work as an independent contractor until such time as either party cancels service. You are the first and last person the customer sees and represents (sic) the image of [The Taxpayer]. Make sure it is a good one!

- ALL Drivers are to have this template on their phones Stating (sic)

*Hi there. I am ..... your* [Taxpayer's] *driver. I have your hot meal for you. :-). I am outside your premises now. Please open.*

- I, the undersigned will in terms of my employment wear the full [Taxpayer] *uniform* whilst on shift. I will at all times report with my [Taxpayer] hot box, six pack bag and pen when arriving for a shift. I understand that both the customers and the restaurants are my sole suppliers of income and if fair complaints are listed about any disrespect to a customer, restaurant employee or other staff member, I will be dismissed.
- I [driver's name] gladly donate R1 to [the Taxpayer] for every order that I take. I understand that the money collected will be used in the best interest of the staff at [the Taxpayer], as the management seems (sic) fit.

[12] The evidence adduced by the taxpayer indicated that the driver would retain that part of the payment received from the customer that comprised the 'drivers petrol money', less the R1.00 that the driver was committed to contribute to a kitty that the taxpayer says it administers as a sort of welfare fund for drivers. This obviously does not apply in cases in which the payment is made by credit card or through an intermediary service such as SnapScan. In those cases the taxpayer pays the cash amount of the petrol money to the driver at the end of the driver's shift. The taxpayer also pays the commission charges incurred by the use of credit cards and SnapScan. No part of these commission charges are apportioned to the drivers' petrol money component of the payment received by the taxpayer. The amount of the 'drivers petrol money' is fixed by the taxpayer. It is reviewed from time to time primarily to take account of the price of fuel. The taxpayer takes into account the representations of its contracted drivers in determining the 'petrol money', but the member of the taxpayer close corporation indicated during the course of his evidence that the amount determined in respect of delivery charges bears on the taxpayer's competitiveness. In other words, if the amount of the petrol money were fixed too generously, the taxpayer would expose itself to the risk of losing business to competing food delivery businesses. This is unsurprising because it is evident that the 'drivers petrol money' is the variable that determines its pricing to its customers. The food prices are determined by the restaurants and would be applicable if the customer chose to order and collect the food itself, instead of availing of the delivery service offered by the taxpayer through its distributed booklets.

[13] In its grounds of appeal the taxpayer contended that the 'service' of collecting the food from food outlets and delivering it to callers is rendered by independent drivers, who are not employed by it. It contended that the delivery of the food is not a supply made *by it* as contemplated in s 7(1)(a) of the Value Added Tax Act. The taxpayer maintains that the only

supply that it makes is 'the administrative service of receiving the phone call, placing the order with the food outlet and communicating the order to independent drivers'. It does not render a delivery service to callers who place food orders by phoning it. The callers are not its clients. Its clients are the food outlets from which the food is ordered. The commission it earns from the food outlets is the only income that the taxpayer is entitled to for the service that it renders. It emphasised that it does not earn income from the callers who order the food. It contends that no part of the amount reflected on the invoices presented to the customers and paid by them to the drivers is received by the taxpayer for its benefit, least of all the 'Driver's Petrol Money'. To the extent that it handles any such petrol money, it does so as agent. In the written summary of its representative's opening address at the hearing, the taxpayer's position was stated as follows:

> [The taxpayer's] view is that the delivery service is rendered by the driver as an independent contractor, and that [the taxpayer's] service is that of soliciting and taking the customer's food order and arranging for the supply and delivery of the food by independent enterprises, with all the administration and responsibility that this entails.

[14] The Commissioner contends that the taxpayer's enterprise is to deliver food and that in order to be able to do that it needs drivers to make the deliveries, which are to *its* customers. He contends that the amounts which the customers pay by way of the 'drivers petrol money' in terms of the invoice presented upon delivery of the food constitute consideration for the supply of the delivery service. The Commissioner's position was summarised as follows in his counsel's heads of argument:

> In the light of the … facts, [the Taxpayer]:
>
> - Makes a supply, which supply is the delivery of fast food;
> - Such supply is done in the furtherance of [the Taxpayer's] enterprise which is a "fast food delivery service company";
> - A consideration is charged by [the Taxpayer] for the delivery of the fast food.

[15] It is convenient at this point to set out the primarily applicable provisions of the legislation.

1. The pertinent provisions of s 7(1)(a) and 7(2) of the Value-Added Tax Act provide for the establishment of value-added tax and the payment thereof as follows:

   > Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(b) …; and

calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

(Underlining supplied.)

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph,

2. The provisions of s 7(1) fall to be construed with reference to the following definitions given in s 1 of the Act:

**'supply'** includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly;

**'services'** means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph *(c)* of the definition of 'goods;

**'enterprise'** means-

*(a)* in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club

[the further provisions of the definition of '*enterprise*' are not relevant in the context of the current matter].

3. The value of supplies for the purposes of the Act is regulated by s 10, which, insofar as relevant for present purposes, provides:

**10 Value of supply of goods or services**

(1) For the purposes of this Act the following provisions of this section shall apply for determining the value of any supply of goods or services.

(2) The value to be placed on any supply of goods or services shall, save as is otherwise provided in this section, be the amount of the consideration for such supply, as determined in accordance with the provisions of subsection (3), less so much of such amount as represents tax: Provided that-

(i) there shall be excluded from such consideration the value of any postage stamp as defined in section 1 of the Post Office Act, 1958 (Act 44 of 1958), when used in the payment of consideration for any service supplied by the postal company as defined in section 1 of the Post Office Act, 1958;

(ii) where the portion of the amount of the said consideration which represents tax is not accounted for separately by the vendor, the said portion shall be deemed to be an amount equal to the tax fraction of that consideration.

(3) For the purposes of this Act the amount of any consideration referred to in this section shall be-

(a) to the extent that such consideration is a consideration in money, the amount of the money; and

(b) to the extent that such consideration is not a consideration in money, the open market value of that consideration.

(Underlining supplied.)

4. 'Consideration' is defined in s 1 of the Act:

**'consideration'**, in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain: Provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited.

[16] The taxpayer invested considerable effort during the hearing in seeking to establish that the drivers were independent contractors, and not its employees. Drawing the distinction between an employee and an independent contractor is a question not infrequently encountered in law. Making the distinction entails a factual enquiry, in which the most important factor is the degree of control that is exercised by the engaging party over the engaged party in the execution of the work the engaged party is contracted to undertake for the engaging party. A high degree of control is indicative of an employer-employee relationship. There is no need, however, to be distracted by that enquiry in the current case. The characterisation is irrelevant. As noted earlier, the pertinent question is does the taxpayer in the course of, or in furtherance of, its enterprise supply the service of delivering food to the customers for consideration? The answer is fundamentally a matter of fact; cf. e.g. *Customs*

*and Excise Commissioners v Plantiflor Ltd* [1999] STC 51, at 57-58, where Laws J quotes extensively from his earlier judgment in *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588. The manner in which the parties involved in the supply of a service formulate their contractual relationships, while it is something that needs to be taken into account, is not necessarily dispositive of how the statutory questions fall to be answered on the facts. As Laws J noted, the enquiry is usually simple when the transaction in issue involves two parties, but can become complicated when there are more. At 595 of the judgment in *Reed Personnel*, he remarked in this respect:

> There may be cases, generally (perhaps always) where three or more parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory questions, what supplies are made by whom to whom.[4]

If the pertinent question stated above is answered affirmatively, it does not matter whether the taxpayer has used an independent contractor or an employee to carry out the deliveries; it is liable to account for VAT on the consideration.

[17] The *Plantiflor* case supra, involved a similar argument to that advanced by the taxpayer in the current case. That matter, which wound its way, with different results at each stage, from the London VAT and Duties Tribunal[5] through the High Court[6] and Court of Appeal[7] to the House of Lords,[8] is closely analogous in material (albeit not all) respects to the current case, and the statutory context was in most respects equivalent to that which obtains in South Africa.[9] It is therefore useful for present purposes to pay it detailed attention, if only to illustrate the different ways in which the pertinent question might be answered.

[18] In *Plantiflor*, the taxpayer, Plantiflor Ltd ('Plantiflor'), sold plants and garden products to customers who ordered the goods by selecting their purchases from a catalogue published by the taxpayer. The ordered goods were then procured by the taxpayer from its parent company in the Netherlands and transported to England. It was open to the customer to collect the goods from the taxpayer's warehouse at Spalding, but virtually all of them took

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[4] Quoted by Lord Mackay of Clashfern in his dissenting opinion in *Commissioners of Customs and Excise v Plantiflor Limited* [2002] UKHL 33 (25 July 2002), [2002] STI 1093 and [2002] WLR 2287, at para 44.
[5] [1997] V&DR 301.
[6] [1999] STC 51.
[7] [2000] EWCA Civ 26.
[8] See note 4, above.
[9] We were referred to only the High Court judgment in *Plantiflor* by counsel for the Commissioner; we assume that the omission of any reference by them to the appellate court judgments was an oversight.

advantage of the mail order service offered in the catalogue. That service was described in Plantiflor's catalogue as follows:

> Orders collected incur no handling charges. If you require delivery by carrier then a nominal charge is made to cover mail order packing and handling. We will happily arrange delivery on your behalf via Royal Mail Parcelforce if requested. In which case please include the postage and handling charge on your order. We will then advance all postal charges to Royal Mail on your behalf.

Plantiflor's order form contained spaces to indicate (a) 'Total Order Value', (b) 'Goods in Transit Insurance (Cross out if not required) 0.25p', (c) 'Contribution Towards Post and Packing £2.50" and (d) "Final Total'. Thus, customers wishing to avail of the offered mail delivery service would add £2.50 to the amount paid in respect of the VAT-inclusive quoted price of the goods ordered. Customers would indicate their wish to use the mail delivery service by ticking a box provided for that purpose on the order form.

[19] Unbeknown to its customers, Plantiflor had concluded a standing contract with Parcelforce, which was a division of the Royal Mail. It is not necessary to describe the terms of that contract in detail. In simplified terms Plantiflor bound itself to use Parcelforce exclusively for the purpose of its mail deliveries to customers, and also to send a minimum volume of parcels per annum. Against that, Plantiflor obtained a preferential postage rate per parcel and a commitment by Parcelforce to deliver the parcels within three days of despatch. Plantiflor settled Parcelforce's invoices by direct debit transfer. It was common ground in the case that Parcelforce's rate for the parcel in terms of its standing contract with Plantiflor was £1.63 and Plantiflor charged 87p for packaging each parcel. That was how the advertised £2.50 'contribution towards post and packing' was accounted for. Plantiflor accounted for VAT on the price of the goods that it sold and in respect of the packaging charge, but not in respect of Parcelforce's postage charge.

[20] The commissioners assessed Plantiflor on the basis that since the taxable amount in terms of the relevant legislation[10] was the entire consideration obtained by the supplier of the

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[10] Article 11A(1)(a) of European Community Council Directive 77/388 (the Sixth Directive) on VAT, which was incorporated in English domestic law in terms of ss 2 and 19 and Sch. 6 to the Value Added Tax Act 1994. The relevant provisions of article 11A are set out in the High Court's judgment in *Plantiflor* supra, at p.56, as follows:

*1. The taxable amount shall be:*

*(a) in respect of supplies of goods and services ... everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies ...*

*2. The taxable amount shall include:(a) ...*

goods or services from its customer, Plantiflor was liable to account for VAT on the whole amount received by it from its customer, including the £1.63 paid by it to Parcelforce to effect the delivery. The taxpayer successfully appealed against the assessment to the London VAT and Duties Tribunal. The commissioners went on appeal against the Tribunal's decision to the High Court.

[21] The issue distilled for determination by the High Court was whether the £1.63 represented consideration for any supply by Plantiflor to its customer; see *Plantiflor* supra, at 56h. The equivalent question in the current case is whether the 'drivers' petrol money' represents consideration for any supply by the taxpayer to its customers. It was accepted in argument by the commissioners' counsel that Plantiflor might be taken on the facts to have made two supplies to its customers, namely a supply of goods and a supply of services constituted by arranging for the delivery of the goods; and that Parcelforce made a supply by actual delivery of the goods. Counsel argued that the £2.50 paid by the customer to Plantiflor represented the consideration for the supply of arranging delivery and thus attracted VAT. The opposing submission on behalf of the taxpayer was that the £1.63 did not constitute consideration passing from the customer to Plantiflor, but rather consideration for Parcelforce's supply of the service of delivery. Laws J held that the 'critical question' was 'whether the £1.63 paid over to Parcelforce forms part of Plantiflor's turnover'. In analysing the position the learned judge regarded the absence of any privity of contract between Parcelforce and the customer as material. He considered that that excluded any basis to cogently characterise Plantiflor as the customer's agent. The effect of this was Plantiflor could not rely on the provisions of article 11A3(c) of the Sixth Directive.[11]

[22] Plantiflor also relied on the principle established in what might for convenience be referred to as the jurisprudence in *Glawe*[12] and *Nell Gwynn*.[13] Laws J adopted Plantiflor's

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*(b) incidental expenses such as commission, packing, transport and insurance cost charged by the supplier to the purchaser or customer. ...*
*3. The taxable amount shall not include:*
*(a) ...*
*(b) ...*
*(c) the amounts received by a taxable person from his purchaser or customer as repayment for expenses paid out in the name and for the account of the latter which are entered in his books in a suspense account. The taxable person must furnish proof of the actual amount of this expenditure and may not deduct any tax which may have been charged on these transactions*

[11] See note 10, above.

[12] *H J Glawe Spiel-Und Unterhaltungsgeräte Aufstellungsgesellschaft mb H & Co KG v Finanzamt Hamburg - Barmbek - Uhlenhorst* [1994] STC 534.

[13] *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1999] STC 79.

counsel's description of that principle as holding 'that where, as a matter of commercial reality, sums paid to a supplier could not be treated by him as his own so as to take them and use them as he pleased, they did not form part of his taxable turnover'.[14] After considering various other judgments in which the *Glawe* principle had been referred to, the learned judge proceeded as follows: (at 63h-64g);

> I have dealt at some length with these authorities out of respect for Mr Cordara's [Plantiflor's counsel] contention (to which I have already referred) that where the sums claimed by the commissioners … form part of the consideration received by the taxpayer for his supplies fall to be 'paid away', they must be treated as taken out of the taxpayer's turnover and thus in truth no part of the consideration. So stated the submission seems to me to be wrong. It proves too much. It would on the face of it apply to any case where the taxpayer was obliged to make payments to third parties out of sums received from his customers; and thus at least as a matter of practical reality would often include the everyday situation, to which I have referred earlier, in which the trader meets his sub-contractors' bills out of money his customers have paid to him. If there is a principle here, it must be stated more narrowly. It is important to see whether in truth there *is* any such principle: that is, whether there exists an overall category of case, capable of being articulated as a matter of law, in which money received by the taxpayer and then paid out by him does not form part of his consideration. The answer will throw critical light on the primary question in the present case to which I have yet to come, and may offer some assistance in similar cases hereafter.
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> Mr Paines [counsel for the commissioners] submitted that *Glawe, Fischer,* and *First National Bank* all involve what he called 'the mutual exchange of money', and as such fall to be distinguished from the present case. Nor are they instances of the kind of problem arising here, where there are three parties to the relevant transaction. While I think these points are well taken, they do not catch the true nature of the distinction – if it exists in terms that can be defined – between those cases where money received by the taxpayer forms part of his consideration and those where it does not.
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> I remind myself that the question what the taxpayer obtains as consideration for the supplies he makes is primarily one of fact. This puts an important brake on any attempts to divine a principle of law by which such a question may be judged. … Where a supplier receives money or kind from a customer which for whatever reason he will pay away to a third party (or back to the customer), and an issue is raised whether in the circumstances the money forms part of the consideration for his supply, the determinative question, I think, will be whether he has received it and holds it *on behalf of* the party to whom it will be paid. That may be a matter of fact or of law. It will not be enough that the taxpayer merely owes the money to the customer or third party. That is quite a different situation. What must be shown is that the common intention of the parties to any relevant transaction is that *the specific fund in question* should belong to someone other than the taxpayer. Such a state of affairs, where it applies, serves to distinguish the case from the ordinary situation where the taxpayer pays his sub-contractor or

[14] *Plantiflor* supra, at 60j-61a.

> other suppliers of goods or services to him (or his customer) out of money received from the customer. Its application will not necessarily depend upon how the relevant fund is dealt with in the taxpayer's books or accounts. It may arise out of what I may call a hard legal relationship, as in the case of a trust or agency, or it may arise out of an appreciation of no more nor less than the factual reality, as in *Emap* and the gambling cases. And where it applies, the case is by no means necessarily collapsed into an instance of art 11A(3)(c) of the Sixth Directive, which takes money received by the taxpayer out of his turnover under stricter conditions.

Laws J concluded as follows (at 65a-b):

> No reasonable tribunal could have concluded on the facts that the £1.63 was held by Plantiflor in the sense I have described. Once agency is ruled out, there is in truth nothing left in the evidence here to lift the case out of the ordinary situation where the taxpayer incurs debts in the course of his business which, of course, he has to pay.

[23] The Court of Appeal unanimously overturned Laws J's judgment in *Plantiflor* [2000].[15] That court placed importance on what it considered to be the plain import of the description of the mail order service given by Plantiflor in its catalogue and quoted in paragraph [18], above. It accepted that Plantiflor had acted as the customer's agent in paying Parcelforce the postage for the delivery. Ward LJ held in that connection 'It is probably too simple for a VAT analysis but it seems to me fairly obvious that if the customer requests the supply of delivery to him, if the customer includes an ascertainable amount to cover the cost of that supply, and if the supply is made by Parcelforce to him, then the consideration for the supply is that ascertainable sum revealed in the "invoice". It moves from the recipient of the supply, the customer, to the supplier, Parcelforce. If £1.63 is the consideration for the supply by Parcelforce to the customer, then, once it has been extracted from the £2.50, it cannot also be part of the consideration of any service by Plantiflor to the customer [i.e. in respect of arranging the delivery]. The same sum from the customer cannot serve as consideration for separate supplies by separate suppliers'. The appeal court refused to allow the commissioners to withdraw a concession by their counsel before the High Court that two supplies had been involved, and declined to entertain the argument that counsel sought to advance on appeal that there had in point of fact been a single supply composed of different elements.

[24] The appeal court agreed with Laws J's conclusion that the so-called *Glawe* jurisprudence found no application on the facts, but rejected the High Court judge's

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[15] See note 7, above.

conclusion that what had to be shown, if Plantiflor were not to be liable for output tax on the postal charge, was 'a common intention of the parties to … [the] transaction … that the *specific fund in question* should belong to someone other than the tax payer' (italics in the original).

[25] The House of Lords, by a majority of four to one, set aside the Court of Appeal's decision and reinstated the judgment of the High Court.[16] There were three principal opinions. The majority view was expressed in the opinions of Lord Slynn of Hadley and Lord Millett, in which Lords Hobhouse of Woodborough and Scott of Foscote concurred; Lord Mackay of Clashfern dissented.

[26] Lord Slynn, reiterated the opinion he had previously expressed in *Commissioners of Customs and Excise v. British Telecommunications Plc* [1999] UKHL 3, [1999] 3 All ER 961 (HL) that where one act is incidental to another act, the former act is part of the supply constituted by the latter act.[17] He thus differed in this respect from the manner in which both of the lower courts had treated the supply of the plants and the arranging for their delivery as distinct supplies by Plantiflor. He remarked in this respect (at para 23-24 ) that –

> '23. …the appropriate question is whether one act (here arranging the delivery) is "ancillary or incidental to another" (here the supply of bulbs) or is "a distinct supply", it seems to me on the contractual documents between Plantiflor and the customer which are before the House that these arrangements constituted a single supply. What the customer wanted and what Plantiflor agreed to provide was bulbs delivered to the home.
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> 24. There was a separate supply consisting of the delivery of the bulbs from Plantiflor to Parcelforce, under a distinct contract. However, under the contract between the customer and Plantiflor arranging the delivery is ancillary to the making available of the bulbs. I do not consider that the answer to this question will vary according to, or depend on, the precise event or time when as a matter of English contract law the property in the bulbs passed to the customer. The reality is that [the customer] paid one total sum for one supply of delivered bulbs.

Lord Slynn would thus have upheld the appeal on the basis of the argument that the court of appeal had declined to permit the commissioners' counsel to advance.

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[16] See note 4, above.

[17] In *British Telecommunications*, Lord Slynn held, in the context of the peculiar contractual arrangements in place in that case, that it would be artificial to treat delivery in respect of the purchase by BT of motor vehicles directly from the manufacturers as a separate supply from the conveyance by the seller tot the purchaser of ownership of the vehicle. He considered that the relevant contract was for a *delivered vehicle*, with the result that, by virtue of an applicable statutory provision (Value Added Tax (Input Tax) Order 1992 (S.I. No. 3222 of 1992)), input tax paid by BT on the delivery charges was not off-settable against its output tax.

[27] Lord Slynn nevertheless considered that even on the approach adopted in the High Court and the Court of Appeal, it was plain on a consideration of the contractual arrangements that Plantiflor acted as principal in its contract with Parcelforce, and not as the agent of the purchaser of the bulbs. Lord Slynn appears, on that basis, to have agreed with the approach adopted by Laws J in the passage from the High Court judgment quoted in paragraph [22], above.

[28] Lord Millett, like Laws J, declined to be distracted by the wording of Plantiflor's contracts with its customers, which were drafted to give the appearance of Plantiflor acting as the customer's agent in arranging delivery, and looked pragmatically at the facts to determine who was making a supply to whom and at what consideration. He also concluded that Plantiflor could not be characterised as having acted as the customer's agent in arranging for the delivery of the parcels. At para 59-62 of the judgment, Lord Millett put the position as follows:

> 59. … [Plantiflor] worded its agreement with the customer to make it appear that it is merely the customer's agent in relation to the delivery of the goods. If this were truly the case, Parcelforce would make an exempt supply to the customer of the service of delivery, and the consideration for the delivery would pass from the customer to Parcelforce with Plantiflor acting merely as the customer's agent for payment. There would also be a supply of agency services by Plantiflor to the customer, but the consideration for these services would not include the postal charge.
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> 60. The terms of the contract between Plantiflor and the customer naturally support this analysis, as they were intended to do. The customer pays Plantiflor a sum inclusive of (unspecified) postal charges, and Plantiflor undertakes to "arrange delivery *on your behalf* via Royal Mail Parcelforce" and to "advance all postal charges to Royal Mail *on your behalf*" (emphasis added). [Italics in the original.]
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> 61 The difficulty with this analysis, however, is that it does not fit the facts. As Laws J correctly held, Parcelforce does not deliver the goods pursuant to any contract with the customer or his agent. It makes delivery pursuant to its contract with Plantiflor, which both parties entered into as principals. This is plain from the terms of the contract, which was to last for a term of five years, contained an obligation on the part of Plantiflor to deliver a minimum number of parcels in each year, and provided for the annual indexation of postal charges. The minimum volume obligation, for example, which indirectly affects the price per parcel payable by Plantiflor, does not attach to any individual customer or to all the customers collectively. The conclusion is inescapable that neither party entered into the contract as agent for Plantiflor's future customers as undisclosed principals; and the contrary has not been suggested.

> 62. Plantiflor is accordingly contractually liable to Parcelforce to pay the postal charges, and the customer is not. Parcelforce cannot look to the customer for payment. It does not even know his identity unless he happens to be the addressee. When it delivers the customer's goods pursuant to its contract with Plantiflor, therefore, Parcelforce gives credit to Plantiflor, not to Plantiflor's customer.

[29] I would venture that the feature that essentially distinguishes the reasoning in the decisions of the VAT Tribunal and the Court of Appeal from those of the High Court and the majority in the House of Lords is the influence apparent in the approach of the latter of an assessment of the economic realities that were manifest in the factual context of the transactions involved. The UK Supreme Court has recently acknowledged that 'consideration of economic realities is a fundamental criterion for the application of the … system of VAT …, and … where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place'; see *Revenue and Customs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 All ER 719 (SC), at para 56. At para 66 of the judgment, Lord Reed underscored the point stating:

> I would at the same time stress that the speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case [ see *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK Ltd and Baxi Group Ltd (Joined Cases C-53/09 and C-55/09)* [2010] EUECJ C-53/09, [2010] STC 2651], that consideration of economic realities is a fundamental criterion for the application of VAT. Previous House of Lords authority had emphasised the importance of recognising the substance and reality of the matter (*Customs and Excise Commissioners v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, 157; [1993] STC 86, 90), and the judgments in *Redrow* [*Customs and Excise Commissioners v Redrow Group plc* [1999] UKHL 4, [1999] 1 WLR 408, [1999] STC 161] cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, Lord Hope posed the question, "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration …?", and Lord Millett asked, "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions should be understood as being concerned with a realistic appreciation of the transactions in question'.

[30] Considerations of commercial or economic reality palpably also informed the reasoning of Van Zyl J in *National Educare Forum v Commissioner, South African Revenue*

*Service* 2002 (3) SA 111 (TkH) in rejecting a contention by a vendor which was party to a contract with a provincial government 'for the procurement of the supply and delivery of food items to schools' that it did not itself supply the food for consideration and was therefore not accountable for VAT. In that matter the taxpayer had relied on certain terms of its contract with the government, which prohibited it from supplying the food directly and required it to use sub-contractors to do so,[18] to argue that it was not a supplier of the food within the defined meaning of 'supply' in the Value-Added Tax Act, and merely an agent or a conduit of the provincial government in respect of the supply of the food by third parties. The court took a pragmatic view and determined, with reference other provisions of the contract and the evident governmental object in structuring the food supply scheme in the manner provided in the contract, that 'although the applicant did not directly supply food items to the provincial government, it indirectly did so through the employment of subcontractors for the delivery thereof to schoolchildren and for which it was remunerated and which remuneration included VAT'.[19]

[31] Applying the approach that prevailed in *Plantiflor* on the facts of the current case would result in a finding that that the taxpayer is liable for VAT on the delivery charge or 'drivers petrol money'. The consideration falls to be paid in terms of the *contract between the taxpayer and <u>its</u> customer*. The taxpayer acknowledges this in the execution of the contract by requiring the drivers to present themselves as the face of the taxpayer, and not as independent contractors; hence the uniforms and the contractual requirement that the driver must identify him or herself as the taxpayer's driver. Those are the contractual requirements

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[18] The terms relied on by the taxpayer were set forth in the judgment, at p. 130, as follows:

*(a)* *The applicant is under . . . no obligation to supply any foodstuffs in terms hereof and that it may not do so. All foodstuffs shall be supplied by the sub-contractors who shall be small and medium enterprises and women's groups (clause 3); B*

*(b)* *The applicant shall "procure that . . ." the sub-contractors shall supply food ready for immediate consumption which shall be prepared in the community in which the schools to be supplied are situated (clause 6.1);*

*(c)* *Such items stuffs shall be supplied ". . . as individual supplies in whole quantities of loaves of brown bread, peanut butter and vitamin enriched cooldrink or soup or milk . . ." (clause 6.2); C*

. . .

*(e)* *The provincial government would designate the school and the number of children to be fed at each school (clause 6.3);*

*(f)* *The provincial government would specify the days on which the children are to be fed and the applicant undertook to procure delivery for feeding only on those nominated days (clause 8.2); D*

*(g)* *Delivery of the food items shall be effected by the transport contractors on a daily basis and not by the applicant (clause 8.3); and*

*(h)* *The food items so delivered by the transport contractors shall be prepared for consumption by meal servers who are not in the employ of the applicant (clause 9.1).*

[19] At p. 132H.

of a principal, not of a customer's agent. The customers expect delivery to be effected by the taxpayer, not by a third party. The consideration falls to be paid pursuant to the invoice rendered by the taxpayer to the customer, not in terms of an invoice rendered by the driver to the customer. In the absence of contractual privity between the customer and the driver, the customer cannot be regarded as paying the amount to the taxpayer to be passed over on its behalf to the driver. The driver has no legal right to exact payment of the delivery charge from the customer; only the taxpayer does. Recognition of that fact illustrates that the delivery charges are receivable by the taxpayer, not the drivers, even if it has agreed with the drivers in terms of the discrete engagement contracts that they may deduct the amount due to them from the cash receipts physically collected by them from the customers.

[32] The contractual arrangement between the taxpayer and its customers in the current case does not even seek to give the appearance that the taxpayer acts as its customer's agent or intermediary in arranging delivery of the food orders by third party carriers. The Plantiflor judgments illustrate, however, that even if it had sought to word its contracts to give such an effect, the wording would prevail only to the extent that it was consistent with the result of a factual enquiry into the supply and the flow of funds in respect of the consideration paid therefor.

[33] The provision in the drivers' contracts that '*The COMPANY does not remunerate the Contractor for providing the service as the client will pay a delivery fee directly to the Contractor*' is just inconsistent with the facts. The facts are consistent with the acknowledgment in the drivers' contracts that the taxpayer 'outsources its delivery services'. The delivery services are those supplied by the taxpayer. It provides them by using sub-contracted drivers. It finances the delivery by recouping the stipulated charges from its customers. It is irrelevant that the delivery charges do not render a profit.

[34] I also do not think that the so-called *Glawe* principle finds scope for application on the facts of the current case. The 'economic reality' of the taxpayer's business requires it to get the food ordered by its customers delivered to them. The central significance of the delivery service to the taxpayer's business is reflected in its trading name and in the fact that it requires the drivers it engages to identify themselves to its customers as the taxpayer's drivers and to present themselves to the customers looking as if they are an integral part of the business by wearing branded attire and carrying branded hotboxes. If it were not for its delivery service component, the taxpayer's business could not viably function. It is able to

generate the commission income, which is the mainstay of its commercial existence, only by reason of the delivery service it offers, even if that service be characterised as arranging the delivery of the food, rather than actually delivering it.[20] The delivery charges are raised as an incidence of the conduct of the taxpayer's enterprise and the drivers' role in effecting the delivery is an incidence of the supplies made by the taxpayer to its customers. The payments made by the customers in respect of delivery charges or drivers' petrol money are upon a proper analysis of the facts in respect of, or in response to, the service provided by the taxpayer. They are made by the customers to the taxpayer. The drivers' right to appropriate the payments is an incidence of their contracts with the taxpayer, *and not with the paying party*; the taxpayer has in effect renounced in favour of the drivers part of the consideration it has stipulated to receive from its customers for the services it supplies to the latter. The basis upon which the taxpayer, in terms of its contracts with the drivers, disposes of or makes over the consideration does not detract from the character of the payments made by the customers as part of the taxpayer's turnover. Output tax is therefore payable by the taxpayer on the delivery charges.

[35] The other members of the court concur in the aforegoing analysis of the pertinent facts and their effect.

[36] The conclusions reached in this judgment substantially confirm the decision of the tax board. In the circumstances, having regard to s 130(1)(c) of the Tax Administration Act, 2011, the principle that costs ordinarily follow the result should be applied in the absence of any cogent reason to depart therefrom. The Commissioner engaged the services of two counsel. In my judgment the ambit of the matter was such that an award of the costs of only one counsel is warranted.

[37] In the result the following orders are made:

a) The appeal is dismissed with costs.

b) It is declared that the taxpayer is accountable for value-added tax on the delivery charges (also referred to as 'drivers petrol money') raised against its customers in

[20] In this respect the current matter is distinguishable on the facts from Plantiflor, in which the Court of Appeal considered it to be an irrelevant consideration that Plantiflor 'might well have had many fewer customers if it did not itself provide the service of asking Parcelforce to carry out the carriage to the customer'. In the current case the taxpayer's enterprise would have no basis for existence if it did not supply or arrange the supply of the delivery service.

terms of the invoices presented for payment when food orders were delivered during the taxpayer's 02/2008 – 02/2011 tax periods.

c) The matter is referred back to the Commissioner for assessment in accordance with this judgment.

**BINNS-WARD J**

**President**

**Professor P. SURTEES**

**Accountant Member**

**Ms. K. HOFMEYR**

**Commercial Member**