95TACD2021

BETWEEN/

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

[**1**] This appeal relates to a refusal of the Revenue Commissioners on claims for a refund of value-added tax in respect of the following:

Taxable Period	Amount of Claim	Amount of Claim Allowed	Amount of Claim Refused
August 2011 to October 2014	€675,100	€301,072	€374,028
November 2014 to December 2015	€410,604	€166,529	€244,075
January 2016 to December 2016	€370,494	€167,514	€202,980
January 2017 to June 2017	€419,403	€191,824	€227,579
TOTAL	**€1,875,601**	**€826,939**	**€1,048,662**

[**2**] The issue in the appeal is whether volume-based discounts granted/rebate payments made by [redacted] ('the Appellant') to private health insurance companies constitute a reduction in the consideration received by the Appellant in respect of the supply of the [redacted] product and, consequently, whether the Appellant is entitled to relief by a repayment of value-added tax (VAT) in accordance with section 39(2) of the Value-Added Tax Consolidation Act, 2010.

Background

[**3**] The Appellant is a [redacted]. [redacted] ('the medical product') is a product supplied by the Appellant. In [redacted], the medical product was authorised for use in the treatment of [redacted]. In [redacted], the indicated use for the medical product was extended to include [redacted]. The medical product is an ongoing treatment (rather than a once-off treatment) which is administered [redacted]. The medical product is supplied by the Appellant to [redacted] ('the wholesaler'). The wholesaler distributes the medical product to hospitals. The medical product is administered [redacted] to patients by clinicians in the hospitals.

[**4**] The Appellant entered into various agreements with private health insurance companies. For the purposes of this appeal, the relevant agreements presented were:

(A) Volume Based Discount Agreement [redacted];
(B) Rebate/Discount Agreement [redacted];
(C) Rebate Agreement [redacted];
(D) Volume Based Discount Agreement [redacted].

[**5**] The Volume Based Discount Agreement between the Appellant and [redacted] dated [redacted] provides:

"*The purpose of this letter is to set out the terms and conditions on which we ( ) agree to provide with volume discounts for our product, in return for the agreement to provide full reimbursement cover:*

- under all of its relevant health insurance policies,

- for up to of per patient, , per year under all health insurance policies…

1. Volume Discounts

1.1 *agrees to provide with the following volume based discounts in respect of reimbursement of during the Term…*

…

1.3 *The discounts will be calculated by reference to the average ex-factory price of in the relevant year, exclusive of VAT and other applicable taxes…*

1.4 *This agreement (and the attendant entitlement of to volume based discounts and related rebates) will apply to reimbursements of Products during the Term, which Products are supplied to relevant hospitals and treatment centres by authorised wholesaler (which at the Effective Date is). The discounts will not apply to products which are the subject of a parallel product authorisation or dual pack registration.*

…

1.6 :-

(a)

[redacted]

(b) [redacted]

...

2. Mechanism for applying volume based discounts

2.1 Discounts due to [redacted] *under this agreement will be applied by* [redacted] *retrospectively on a rebate basis, within 60 days of receipt of the relevant invoice from* [redacted]*, which invoice should be sent by* [redacted] *within 80 days of the end of the relevant year, and subject to the provision of all required information by* [redacted] *to* [redacted]*. In accordance with paragraph 3 of this agreement, the agreement will commence on* [redacted] *...*

2.2 [redacted] *will collate and calculate the discounts due, based on the volume of* [redacted] *reimbursements of* [redacted] *Products in each year.* [redacted] *will provide to* [redacted] *all information which* [redacted] *may reasonable request to enable it to confirm, check and/or audit* [redacted] *claims and/or entitlements to discounts…"*

[**6**] The Appellant also presented a Purchase Agreement Offer with [redacted] ([redacted]) for the term [redacted].

Evidence

[**7**] The witnesses gave evidence at the hearing and were subject to examination and cross-examination. I have carefully considered the transcript of the evidence of the witnesses.

[redacted]

[**8**] The witness joined the Appellant in [redacted] and has held the position of [redacted] since [redacted].

[**9**] The witness stated that the medical product is distributed by the wholesaler to public and private hospitals. The Appellant has agreements with [redacted] private health insurance companies. The witness presented documents which he extracted from the financial system of the Appellant. By reference to documents relating to [redacted], the witness stated that [redacted] provides information to the Appellant which includes the number of [redacted] of the medical product for which a rebate payment is sought by [redacted]. Based on this information, the Appellant calculates the rebate for [redacted] in accordance with the Volume Based Discount Agreement and raises a requisition for payment. The witness referred to a daily sales report provided by the wholesaler which shows the medical product sales to the various public and private hospitals. The witness stated that information provided by [redacted] other than the number of [redacted] of the medical product was not information of interest to the witness. The witness stated that the required information was information to validate the calculation of the rebate. The validation process would also involve checking the daily sales report provided by the wholesaler to verify that the medical product was distributed by the wholesaler and not sourced from outside Ireland.

[**10**] The witness stated that the product flow of the medical product was the Appellant providing the product to the wholesaler, the wholesaler providing the product to private hospitals and clinicians administering the product to patients in the hospitals. The funds flow of the medical product was the wholesaler making payments to the

Appellant, the private hospitals making payments to the wholesaler and the private health insurance companies making payments to the private hospitals. The witness stated that, as regards payments made by the Appellant, the Appellant makes payments to the wholesaler for the distribution service, rebate payments to the private hospitals and rebate payments to the private health insurance companies. The witness stated that, as regards the financial records of the Appellant, there is no difference between the rebate payments to private hospitals and the rebate payments to private health insurance companies. The rebate payments are shown as a sales deduction against the medical product sales.

[**11**] Under cross-examination, the witness stated that the product flow was simply showing the movement of the product and the funds flow was simply showing the movement of the funds. Neither were intended to reflect any underlying contractual arrangements that may apply.

[**12**] The witness stated that the Appellant supplies the medical product to the wholesaler at the ex-factory price. This is the price of a product in Ireland which is established in accordance with the framework agreement of the Irish Pharmaceutical and Healthcare Association. The mechanism in Ireland to establish a price is to calculate at no more than the average of a certain number of countries. The ex-factory price is realigned every year. The Appellant informs the wholesaler of the ex-factory price. The wholesaler pays the ex-factory price to the Appellant for the product. The private hospitals pay the ex-factory price to the wholesaler for the product. The wholesaler does not impose a mark-up. The wholesaler receives payments from the Appellant for the distribution service.

[**13**] The witness stated that more checking for inconsistencies could be undertaken if more details are included in the information provided to the Appellant. The witness stated that the Appellant will consider whatever methodology to validate the calculation of the rebate. The witness stated that a requisition for payment is generated by the Appellant to make the rebate payments. There are no formal invoices. The witness

stated that the accounting treatment described in a document prepared by the witness did not reflect the position.

[**14**] The witness stated that the arrangements with private health insurance companies are not sales promotion of the medical product by the insurance companies with the Appellant claiming input VAT on invoices. [redacted].

[**15**] In re-examination, the witness stated that the Appellant operates within a strict regulatory regime and any discussions between the Appellant and the hospitals or private health insurance companies would not influence the independent judgment exercised by clinicians on the appropriate treatment for patients. The witness stated that the Appellant does not engage in sales promotion of the medical product. The discussions with the private health insurance companies may explore affordability from the viewpoint of patient access to treatment.

[**16**] The witness stated that the wholesaler pays the ex-factory price to the Appellant. The private hospitals pay the ex-factory price to the wholesaler. The private health insurance companies reimburse the ex-factory price to the private hospitals. The Appellant then makes payments to the wholesaler for the distribution service, rebate payments to the private hospitals and rebate payments to the private health insurance companies. The witness stated that the rebate payments would be made if he has received sufficient information to validate the calculation of the rebate, regardless of whether other information is also provided by the private health insurance companies. The witness stated that the daily sales report provided by the wholesaler includes the names of the private hospitals which is sufficient information to validate the calculation of the rebate for private hospitals.

[**17**] The witness holds the position of having held the positions of from and in . The witness stated that his role was to ensure patient access to innovative treatments.

[**18**] The witness stated that the medical product is innovative as it is a treatment that can restore for a patient with rather than slow the progression of the disease. The medical product was authorised for use in . The indicated use for the medical product evolved over time and now includes . The witness stated that the Appellant operates in a highly regulated industry and sales promotion is prohibited. For the witness, patient access is at the centre of the work.

[**19**] The witness stated that the medical product is included in the schedule of benefits of the private health insurance companies. This means that if a clinician decides that the appropriate treatment for a patient is the medical product, the private health insurance companies will reimburse the private hospitals for the product. The medical product was included in the schedule of benefits of the insurance companies without intervention from the Appellant. The witness stated that it is a matter for the private health insurance companies to decide whether to include a product in the schedule of benefits. If the private health insurance companies include a product in the schedule of benefits, the insurance companies generate a code and provide that coding information to the hospitals and the Appellant. The witness stated that if a product is not included in the schedule of benefits, generally the product will not be used in private hospitals.

[**20**] The witness stated that the Appellant explored how to facilitate patient access to the medical product and established that volume-based discounts, which were operating in the public hospitals, would ensure patient access to the product if a clinician decides that the appropriate treatment for a patient is the medical product. Given the evolving indicated uses for the medical product, and the ongoing nature of

the treatment, the volume-based discounts provided a cost containment measure for the private health insurance companies while safeguarding patient access.

[**21**] The witness stated that the ex-factory price is part of the framework agreement between the Irish Pharmaceutical and Healthcare Association and the Department of Health. The ex-factory price is the maximum price that can be charged for a product. It is the average price of a certain number of countries. It is revised downwards every year.

[**22**] The witness stated that the information sought from the private health insurance companies, as reflected in Clause 1.6 of the Volume Based Discount Agreement with [redacted] dated [redacted], was to track the product to ensure adequate supply and to forecast the potential rebate payments for the following year.

[**23**] Under cross-examination, the witness stated that access to a product means an available supply of the product and the product being included in the schedule of benefits of the private health insurance companies. The witness stated that he was focussed on ensuring every patient had access to the medical product which is the reason for all health insurance policies being included in the volume-based discounts.

[**24**] The witness stated that the discounts would not apply to products which were the subject of a parallel product authorisation because the same mechanism to establish the ex-factory price in Ireland may not operate in other countries meaning the medical product may be cheaper in those other countries. The Appellant did not wish to make rebate payments for products which were not supplied by the Appellant. This applied to private hospitals and to private health insurance companies.

[**25**] In re-examination, the witness stated that it is a matter for clinicians to decide on the appropriate treatment for patients and simply because the medical product is included in the schedule of benefits does not influence the independent judgment exercised by clinicians. The witness stated that the volume-based discount model was adopted as it was a risk-sharing rather than a risk-shifting approach. The witness stated

that he had discussions with the private health insurance companies because those companies were making the payments for the medical product.

Legislation

[**26**] Article 73 of Council Directive 2006/112/EC (the VAT Directive) provides:

"*In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply*."

[**27**] Article 79 of Council Directive 2006/112/EC provides:

"*The taxable amount shall not include the following factors:*

(a) price reductions by way of discount for early payment;
(b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;
(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

[**28**] Article 90(1) of Council Directive 2006/112/EC provides:

"*1. In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.*"

[**29**] Section 37(1) of the Value-Added Tax Consolidation Act, 2010 provides:

"*(1) The amount on which tax is chargeable by virtue of section 3(a) or (c) shall, subject to this Chapter, be the total consideration which the person supplying goods or services becomes entitled to receive in respect of or in relation to such supply of goods or services, including all taxes, commissions, costs and charges whatsoever, but not including value-added tax chargeable in respect of that supply*."

[**30**] Section 39 of the Value-Added Tax Consolidation Act, 2010 provides:

"*(1) Where the consideration actually received in relation to the supply of any goods or services exceeds the amount that the person supplying the goods or services was entitled to receive, the amount on which tax is chargeable shall be the amount actually received (excluding tax chargeable in respect of the supply).*

(2) Subject to subsection (3), where, in a case not coming within section 38, the consideration actually received in relation to the supply of any goods or services is less than the amount on which tax is chargeable or no consideration is actually received, such relief may be given by repayment or otherwise in respect of the deficiency as may be provided by regulations.

(3) Subsection (2) shall not apply in the case of the letting of immovable goods which is a taxable supply of goods in accordance with section 95.

(4) Where, following the issue of an invoice by an accountable person in respect of a supply of goods or services, the accountable person allows a reduction or discount in the amount of the consideration due in respect of that supply, the relief referred to in subsection (2) shall not be given until he or she issues the credit note required in accordance with section 67(1)(b) in respect of that reduction or discount."

[**31**] Section 67(1) of the Value-Added Tax Consolidation Act, 2010 provides:

"*(1) Where, subsequent to the issue of an invoice by a person to another person in accordance with section 66(1), the consideration as stated in that invoice is increased or reduced, or a discount is allowed, whichever of the following provisions is appropriate shall have effect:*

(a) if the consideration is increased, the person shall issue to that other person another invoice in such form and containing such particulars as may be specified by regulations in respect of the increase;

(b) if the consideration is reduced or a discount is allowed –

(i) the person shall issue to that other person a document (in this Act referred to as a "credit note") containing particulars of the reduction or discount in such form and containing such other particulars as may be specified by regulations, and

(ii) if that other person is an accountable person, the amount which the accountable person may deduct under Chapter 1 of Part 8 shall, in accordance with regulations, be reduced by the amount of tax shown on that credit note."

[**32**] Section 67(5) of the Value-Added Tax Consolidation Act, 2010 provides:

"*(5) Notwithstanding subsection (1) but subject to subsection (6), where, subsequent to the issue to a registered person of an invoice in accordance with section 66(1), the consideration stated in that invoice is reduced or a discount is allowed in such circumstances that, by agreement between the persons concerned, the amount of tax stated in the invoice is unaltered, then –*

(a) paragraph (b) of subsection (1) shall not apply in relation to the person by whom the invoice was issued,

(b) the reduction or discount concerned shall not be taken into account in computing the liability to tax of the person making the reduction or allowing the discount,

(c) section 69(1) shall not apply, and

(d) the amount which the person in whose favour the reduction or discount is made or allowed may deduct in respect of the relevant transaction under Chapter 1 of Part 8 shall not be reduced."

[**33**] Regulation 9 of the Value-Added Tax Regulations, 2010 provides:

"*(1) Paragraphs (2) to (4) apply where, in a case in which section 39(2) of the Act applies and section 67(5) of the Act does not apply, by reason of the allowance of discount, a reduction in price or the return of goods other than the return of goods in an early termination of a hire purchase agreement –*

(a) the consideration exclusive of tax actually received by an accountable person in respect of the supply by the accountable person of any goods or services is less than the amount on which tax has become chargeable in respect of such supply, or

(b) no consideration is actually received.

(2) The amount of the deficiency in respect of any supply shall be ascertained by deducting from the amount on which tax has become chargeable in respect of such supply, the consideration actually received exclusive of tax.

(3) (a) Subject to subparagraph (b), the sum of the deficiencies ascertained in accordance with paragraph (2), incurred in each taxable period and relating to consideration chargeable at each of the various rates of tax (including the zero rate) specified in section 46(1) of the Act, shall be deducted from the amounts ascertained in accordance with Chapter 1 of Part 5 of the Act which would otherwise be chargeable with tax at each of those rates, and the net amounts as so ascertained shall be the amounts on which tax is chargeable for the taxable period during which the deficiencies are ascertained.

(b) For the purposes of subparagraph (a), where the sum of the deficiencies as ascertained in accordance with that subparagraph in relation to tax chargeable at any of the rates so specified in section 46(1) of the Act exceeds the amount on which, but for this Regulation –

(i) tax would be chargeable at that rate, or

(ii) no tax is chargeable at that rate,

then, the tax appropriate to the excess or to the sum of the deficiencies, if no tax is chargeable, shall be treated as tax deductible in accordance with Chapter 1 of Part 8 of the Act for that taxable period.

(4) (a) Where, in accordance with Chapter 2 of Part 9 of the Act, a credit note is issued by an accountable person in respect of an adjustment under this Regulation, then the accountable person to whom the credit note is issued shall reduce the amount which would otherwise be deductible under Chapter 1 of Part 8 of the Act for the taxable period during which the credit note is issued (in this paragraph referred to as the "tax deduction") by the appropriate amount of tax shown thereon (in this paragraph referred to as the "tax reduction").

(b) Where the tax reduction exceeds the tax deduction, then the excess shall be carried forward and deducted from the tax deductible under Chapter 1 of Part 8 of the Act for the next taxable period and so on until the tax reduction is exhausted."

Submissions on behalf of the Appellant

[**34**] The Appellant submits that discounts granted to private health insurance companies constitute a reduction in the consideration received by the Appellant for the supply of the medical product and, consequently, the Appellant is entitled to relief by a repayment of VAT. The Appellant makes rebate payments to private hospitals, which payments are made after the supply of the medical product. For VAT purposes, the Revenue Commissioners have allowed discounts granted to private hospitals as a reduction in the consideration received by the Appellant for the medical product. The Appellant makes rebate payments to private health insurance companies, which payments are made after the supply of the medical product. The Revenue Commissioners have not allowed discounts granted to private health insurance companies as a reduction in the consideration received by the Appellant for the medical product. While the medical product is administered [redacted] to a patient, the VAT

position is determined by the link between the product supplied ( ) and the consideration actually received by the taxable person (the Appellant). The link between the product and the consideration may become more complex in complicated situations. However, if it is established that discounts granted to private health insurance companies reduce the consideration actually received by the Appellant for the supply of the medical product, then the rebate payments should not be included in calculating the taxable amount for VAT purposes.

[**35**] Insofar as the interpretation of the agreements between the Appellant and the private health insurance companies are concerned, the Appellant referred to the Supreme Court judgment of ***Analog Devices B.V. -v- Zurich Insurance Company*** [2005] 1 IR 274 wherein Geoghegan J. endorsed the principles enunciated by Lord Hoffman in ***ICS -v- West Bromwich*** [1998] 1 WLR 896. In brief, the general principles of contractual interpretation are to interpret the agreement by the ordinary meaning the words in the agreement, viewed in the context of the whole agreement, would convey to a reasonable person having all the background knowledge reasonably available to the parties at that time. The Appellant referred to the CJEU judgment of ***État belge -v- Temco Europe SA*** [Case C-284/03] wherein the Court held that it is the contract as performed that is examined. The Court stated:

"*22 In any event, it is not essential that that period be fixed at the time the contract is concluded. It is necessary to take into account the reality of the contractual relations (Blasi, paragraph 26). The period of a letting may be shortened or extended by the mutual agreement of the parties during the performance of the contract.*

...

27 It is also a matter for that court to establish whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorized in a different way."

[**36**] The Appellant submits that the agreements convey to a reasonable person having all the background knowledge reasonably available to the parties at that time that the agreements are volume-based discount agreements for the supply of the medical product. There may be references to information being provided to the Appellant, however, the evidence shows that the information required by the Appellant was information to validate the calculation of the rebate. If other information was not provided, this did not impact on making the rebate payments. The evidence shows that the agreements between the Appellant and the private health insurance companies were performed in this manner.

[**37**] In ***Elida Gibbs Limited -v- Commissioners of Customs and Excise*** [Case C-317/94] the Court held that if a price discount or rebate was granted to a customer, then, notwithstanding that there was no contractual relationship between the manufacturer (Elida Gibbs) and the customer given that the product was supplied from manufacturer to retailer and from retailer to customer, there was a link between the product supplied and the consideration received such that the price discount or rebate granted should not be included in the taxable amount. The factual background was that Elida Gibbs operated a money-off coupon scheme and a cash-back coupon scheme. The money-off coupons were redeemed from Elida Gibbs by retailers. The cash-back coupons were redeemed from Elida Gibbs by customers. Elida Gibbs considered that the reimbursement of the coupons constituted a price discount and should not be included in calculating the taxable amount for VAT purposes. The Court stated:

"*26 By virtue of Article 11(A)(1)(a) of the Sixth Directive, the taxable amount for supplies of goods and services within the territory of a state comprises all sums which make up the consideration which has been or is to be obtained by the supplier from the purchaser.*

27 According to the Court's settled case-law, that consideration is the 'subjective' value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria…

28 In circumstances such as those in the main proceedings, the manufacturer, who has refunded the value of the money-off coupon to the retailer or the value of the cash-back coupon to the final consumer, receives, on completion of the transaction, a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons. It would not therefore be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with.

29 Consequently, the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons.

...

31 It is true that that provision refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently. The fact remains, however, that the provision is an expression of the principle, emphasized above, that the position of taxable persons must be neutral. It follows therefore from that provision that, in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through retailers or by direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person.

32 That interpretation is not invalidated by the arguments advanced by the United Kingdom, German and Greek Governments to the effect that deduction from the taxable amount of reductions granted directly, or of refunds made directly, to the consumer by the initial supplier after delivery to a wholesaler or retailer would upset the functioning of the VAT machinery and render the system unworkable because it would require each

wholesaler or retailer in the chain retroactively to adjust the price and, consequently, the amount of VAT they had paid to their own supplier and would require the latter to issue amended invoices.

…

34 In view of all the foregoing considerations, the answer to the first question submitted must be that Article 11(A)(1)(a) and Article 11(C)(1) of the Sixth Directive are to be interpreted as meaning that where (a) a manufacturer issues a money-off coupon, which is redeemable at the amount stated on the coupon by or at the expense of the manufacturer in favour of the retailer, (b) the coupon, which is distributed to a potential customer in the course of a sales promotion campaign, may be accepted by the retailer in payment for a specified item of goods, (c) the manufacturer has sold the specified item at the 'original supplier's price' direct to the retailer and (d) the retailer takes the coupon from the customer on sale of the item, presents it to the manufacturer and is paid the stated amount, the taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded. The same applies if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer."

[**38**] The Appellant submits that the value actually received by the Appellant for the medical product is a value less the rebate payments to private health insurance companies, in the same way that the rebate payments to private hospitals reduces the value actually received by the Appellant for the product. The Revenue Commissioners have allowed discounts granted to private hospitals as a reduction in the consideration received by the Appellant. It would breach the principle of fiscal neutrality if the taxable amount attributable to the Appellant as a taxable person was not also reduced by the rebate payments to private health insurance companies. The rebate payments to private health insurance companies should not be treated differently to the rebate payments to private hospitals.

[**39**] In ***Finanzamt Bingen-Alzey -v- Boehringer Ingelheim Pharma GmbH*** [Case C-462/16] the Court held that there was a link between the manufacturer (Boehringer) and the private health insurance funds to conclude that the discount granted to the

private health insurance funds should not be included in calculating the taxable amount for VAT purposes. The nature of the question submitted by the national court was whether it was compatible with EU law for the tax administration to allow Boehringer to take into account a discount in calculating the taxable amount for VAT purposes for the supply of pharmaceutical products in the context of public health insurance but not private health insurance. Under German law, Boehringer was required to reimburse pharmacies for the discount granted by the pharmacies to public health insurance funds on the price of pharmaceutical products supplied to public health insurance funds. The public health insurance funds made the products available to persons with statutory (public) health insurance. For VAT purposes, the discount granted to public health insurance funds was treated by the tax administration as a reduction in remuneration. Under German law, Boehringer was required to grant a discount to private health insurance funds on the price of pharmaceutical products supplied to persons with private health insurance. The products were supplied to the insured persons who would pay the pharmacies for the products. The insured persons then sought a reimbursement from the private health insurance funds for the cost incurred in purchasing the pharmaceutical products. If insured persons did not seek a reimbursement, then no rebate payment was made by Boehringer to the private health insurance funds. For VAT purposes, the discount granted to private health insurance funds was not treated by the tax administration as a reduction in remuneration.

[**40**] In the Opinion of Advocate General Tanchev (which was followed by the Court), the Advocate General concluded that Boehringer was entitled to a reduction of the taxable amount in respect of the discount granted to private health insurance funds. The Advocate General stated:

"*34. I take the view that the essence of the development of the law in Elida Gibbs lay solely in the finding that it is unnecessary for a taxable person to be contractually linked to the direct beneficiary of a discount before that discount can amount to a price reduction after supply takes place for the purposes of Article 90 of Directive 2006/112. The absence, then, of a contractual link between Boehringer and the private insurance funds to whom it is required to afford, under German law, a post-purchase discount*

indexed to price is equally irrelevant in the main proceedings to the applicability of Article 90 of Directive 2006/112.

35. In addition to this, I am unable to draw from the ruling of the Court in Ibero Tours any express finding or necessary implication that the Elida Gibbs rule only applies when the recipient of a discount is the final consumer in a supply chain beginning with the taxable person providing the discount. Indeed, the Court has held that there is no indication in the Elida Gibbs ruling that it was intended to be interpreted restrictively, and that the judgment supports the wording of Article 11C(1) of the Sixth VAT Directive 24 (now Article 90 of Directive 2006/112) which presupposes that subsequent modification of contractual relations is not necessary.

36. Ibero Tours, the taxable person in that case, was a travel agent that provided services as an intermediary between tour operators and the tour operator's clients ('travellers'). Unlike the case to hand, which involves a chain of supply, this entailed a single supply. Ibero Tours received a commission from tour operators for its services as an intermediary in this single supply, and used some of this commission to effectively subsidise travellers, so that the amount received by the tour operator was higher than that paid by travellers. Ibero Tours argued on the basis of Elida Gibbs that the price reductions it afforded travellers should be deducted from the commission Ibero Tours received from the tour operators for the purposes of calculating the taxable amount of Ibero Tours transactions.

37. In essence Ibero Tours' claim was rejected because it was held by the Court to be an intermediary to a single transaction only, rather than part of a chain of transactions. The Court pointed out in Ibero Tours that the consideration received by the taxpayer at the head of the supply chain in Elida Gibbs was actually reduced by the reduction it granted directly to the final consumer via a voucher scheme, while Ibero Tours was bound to pay the tour operator the agreed price for its travel services, regardless of any discount that Ibero Tours elected to give to the travellers. Nor was there any impact on the consideration received by Ibero Tours for their intermediation service. Accordingly, pursuant to Article 11 A(1)(a) of the Sixth Directive (now Article

73 of Directive 2006/112), such a price reduction did not lead to a reduction of the taxable amount either for the principal transaction or for the supply of services by the travel agent.

38. I read therefore the reference in the judgment in Ibero Tours to the tour operator 'not being at the head of a chain of operations, as it provides services directly to the final consumer' simply as underscoring the fact that, in that case, Ibero Tours provided only an intermediary service to a single transaction. Manifestly, Boehringer is not in the same position.

39 Moreover, neither the taxpayer in Elida Gibbs nor Ibero Tours were providing price discounts as a consequence of legislative intervention that bound them to do so, and which was, moreover, indexed to the price of the supply. This appears from the case file to be the case, however, with respect to Boehringer.

40. I am therefore of the view that, in accordance with the Court's case-law, Boehringer has not had 'freely at its disposal the full amount' of the price received at first sale of its products to pharmacies or wholesalers. At most, Boehringer is a 'mere temporary custodian' of the part of the amount received that it is bound to pay later to public and private health funds as a rebate and which, importantly, is indexed to the price of the pharmaceutical products supplied.

41. The Court reached a conclusion of this kind in International Bingo Technology, in the context of legislative intervention on the amount paid as winnings for a bingo card game. The Court held that since 'the proportion of the card price which is paid as winnings to players is fixed in advance and is mandatory, it cannot be regarded as part of the consideration received by the organiser of the game for the supply of the service provided to players'.

42. Since both Article 73 and Article 90 of the VAT Directive address the components of 'taxable amount', I can see no reason why the ruling made in the context of the meaning of 'consideration' under Article 73 in International Bingo Technology

cannot be applied to the interpretation of 'where the price is reduced' under Article 90. Nor, I would add, does any question arise as to whether Boehringer makes payments to private health funds as consideration for some sort of service. This is clearly not the case.

…

44. Indeed, casting privately insured persons as the final consumers in the supply chain, rather than their private health funds, might be viewed as a legal fiction, particularly when the VAT paid by such persons to pharmacies is paid back to them as part of the reimbursement provided by private health funds. After all, the Court has held that 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT'.

45. Thus, payments, made at point of purchase might be viewed as consideration provided by a third party pursuant to Article 73 of Directive 2006/112, when such third parties seek reimbursement from private health insurance funds and Boehringer becomes liable under German law to provide the rebate set by paragraph 1 of the AMRabG. On this analysis, a private health insurance fund can be viewed as the final consumer of a supply made by Boehringer as the taxable person, so that, the amount of VAT to be collected by the tax authority will correspond exactly to the amount of VAT declared on the invoice and paid by the final consumer. The fact that a private insurance fund is not the direct beneficiary of the medicinal products supplied by Boehringer does not break the direct link between the supply of those goods and the consideration received.

46. The approach I am advocating will avoid a situation in which the tax authorities charge an amount that exceeds the tax paid by Boehringer as the taxable person. It will, moreover, respect the fundamental principle of VAT to the effect that the basis of assessment is the consideration actually received, which translates with respect to Article 90 of Directive 2006/112/EC into a requirement to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person."

[**41**] The Court stated:

"*30 By its question, the referring court asks, in essence, whether, in the light of the principles defined by the Court in the judgment of 24 October 1996, Elida Gibbs (C-317/94, EU:C:1996:400, paragraphs 28 and 31), regarding the determination of the taxable amount for VAT and having regard to the principle of equal treatment under EU law, Article 90(1) of the VAT Directive must be interpreted as meaning that the discount granted, in accordance with national law, by a pharmaceutical company to a private health insurance company results, for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, when it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures.*

31 In order to reply to that question, it must be pointed out first of all that Article 73 of the VAT Directive states that the taxable amount, in respect of supplies of goods and services, is everything which constitutes the value of 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 including subsidies directly linked to the price of such supplies.

32 Next, it must also be recalled that Article 90(1) of the VAT Directive, which relates to cases of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment of 15 May 2014, Almos Agrarkulkereskedelmi, C-337/13, EU:C:2014:328, paragraph 22 and the case-law cited).

33 Finally, the Court has held that one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain (judgment of 24 October 1996, Elida Gibbs, C-317/94, EU:C:1996:400, paragraph 20).

34 In the present case, the order for reference states that the pharmaceutical company is required, under national legislation, to grant to private health insurance companies, in respect of prescription only medicinal products the cost of which the latter have reimbursed the insured persons in part or in full, discounts according to the sharing of the costs in the same proportions as provided for statutory health insurance companies. The tax authority does not regard this discount as a reduction of the taxable amount.

35 Thus, as a result of that legislation, Boehringer Ingelheim Pharma could dispose of a sum corresponding to the price of the sale of those products to pharmacies, reduced by that discount. It would not therefore be in conformity with the VAT Directive for the taxable amount used to calculate the VAT chargeable to the pharmaceutical company, as a taxable person, to exceed the sum finally received by him. If that were the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the pharmaceutical company is one, would not be complied with (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C-317/94, EU:C:1996:400, paragraph 28).

36 Consequently, the taxable amount applicable to Boehringer Ingelheim Pharma as a taxable person must be made up of the amount corresponding to the price at which it sold the medicinal products to pharmacies, reduced by the discount made to private health insurance companies when they reimbursed the expenses incurred by their insured persons when purchasing those products.

37 It is true that the Court held, in paragraph 31 of the judgment of 24 October 1996, Elida Gibbs (C-317/94, EU:C:1996:400), that Article 11C(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member

States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), which corresponds to Article 90 of the VAT Directive, refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently.

38 However, in that regard, it must be held, first, that, also in paragraph 31 of that judgment, the Court stated that that provision is an expression of the principle of neutrality and, consequently, its application must not undermine the achievement of that principle (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C-317/94, EU:C:1996:400, paragraph 31).

39 In the second place, it is clear from the case-law of the Court that Article 90(1) of the VAT Directive does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. In principle, it requires the Member States to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. Moreover, there is no indication that in its judgment of 24 October 1996, Elida Gibbs (C-317/94, EU:C:1996:400), the Court wished to restrict the scope of application of Article 11C(1) of the Sixth Directive which corresponds to Article 90 of the VAT Directive. On the contrary, it is apparent from the facts of the Elida Gibbs case that there had been no modification of the contractual relations. Nevertheless, the Court held that Article 11C(1) of the Sixth Directive was applicable (see, to that effect, the judgment of 29 May 2001, Freemans, C-86/99, EU:C:2001:291, paragraph 33).

40 Furthermore, the fact that, in the case in the main proceedings, the direct beneficiary of the supplies of the medicinal products in question was not the private health insurance company which reimbursed the insured persons but the insured persons themselves, is not such as to break the direct link between the supply of services made and the consideration received (see, by analogy, the judgment of 27 March 2014, Le Rayon d'Or, C-151/13, EU:C:2014:185, paragraph 35).

41 As the Advocate General observed in points 44 and 45 of his opinion, the payments made at the point of purchase of the medicinal products must be regarded as consideration provided by a third party within the meaning of Article 73 of the VAT Directive when those third parties, namely insured persons, requested reimbursement by the private health insurance companies and the latter obtained, in accordance with the national law, the discount owed to them by the pharmaceutical company. Therefore, having regard to the facts at issue in the main proceedings, the private health insurance companies must be regarded as being the final consumer of a supply made by a pharmaceutical company, which is a taxable person for the purposes of VAT, such that the amount payable to the tax authority may not exceed that paid by the final consumer (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C-317/94, EU:C:1996:400, paragraph 24).

42 Consequently, in must be held that, in the case in the main proceedings, since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place, in accordance with Article 90(1) of the VAT Directive.

43 Moreover, as regards the discount at issue in the main proceedings, it must be held that that discount is fixed by the law and that the pharmaceutical company is obliged to grant it to private health insurance companies which have reimbursed the persons they insure for the expenses incurred by those persons when purchasing medicinal products. As has been stated in paragraph 35 above, in those circumstances, the pharmaceutical company was not able freely to dispose of the full amount of the price received on the sale of its products to pharmacies or to wholesalers (see, to that effect, the judgment of 19 July 2012, International Bingo Technology, C-377/11, EU:C:2012:503, paragraph 31).

44 In that regard, the Court held, in paragraph 28 of the judgment of 19 July 2012, International Bingo Technology (C-377/11, EU:C:2012:503), concerning a legal requirement for the payment of winnings in a bingo game, that since the part of the sale

price of the cards which is distributed as winnings to players is fixed in advance and is mandatory, it cannot be regarded as forming part of the consideration received by the organiser of the game for the supply of the service provided to players.

45 As the Advocate General observed in point 42 of his opinion, even though, in that judgment, the Court's analysis concerned the interpretation of Article 73 of the VAT Directive, the interpretation that the judgment provided of the notion of 'consideration' laid down in that provision may apply in respect of the words 'where the price is reduced' used in Article 90 of the directive, given that both that provision and Article 73 of the directive address the components of the taxable amount."

[**42**] The Appellant submits that, for VAT purposes, the focus must be the consideration actually received by the taxable person. The Appellant submits that the economic reality is that the Appellant has freely at its disposal an amount less the rebate payments to private health insurance companies for the medical product. Similar to the private health insurance funds in ***Boehringer***, the private health insurance companies are not taking ownership of the medical product as the product is administered [redacted] to patients but the insurance companies are making payments for the product. The patients do not make payments to the private hospitals for the medical product and subsequently seek a reimbursement from the private health insurance companies as was the case in ***Boehringer***, rather the private health insurance companies make reimbursement payments to the hospitals because the medical product is included in the schedule of benefits of the insurance companies. In ***Boehringer***, there was a statutory obligation to grant a discount. The Appellant submits that there is no difference between a statutory obligation and a contractual obligation to grant a discount. A contract is voluntarily entered into by the parties, however, once a contractual obligation exists then it has the same force and effect as a statutory obligation. In ***Elida Gibbs***, it was a contractual obligation and the Court held that the price discount or rebate granted by Eilda Gibbs should not be included in calculating the taxable amount for VAT purposes. The Appellant submits that as the Revenue Commissioners have allowed discounts granted to private hospitals as a reduction in the consideration received by the Appellant, which are contractual obligations between the Appellant and the private

hospitals rather than statutory obligations, the Revenue Commissioners should not succeed in distinguishing ***Boehringer*** on the basis that it relates to a statutory obligation rather than a contractual obligation. The arrangements between the Appellant and the private hospitals are volume-based discounts. The arrangements between the Appellant and the private health insurance companies are volume-based discounts. The evidence shows that the volume-based discount model was adopted as it provided a cost containment measure while safeguarding patient access.

[**43**] The Appellant submits that, as established in the case-law, there is no break in the link between the medical product supplied and the consideration received simply because the patient receives [redacted] of the product. In this appeal, similar to ***Boehringer***, '*the private health insurance companies must be regarded as being the final consumer of a supply made by a pharmaceutical company*' and that '*since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place*'. The Appellant '*was not able freely to dispose of the full amount of the price received on the sale of its products to pharmacies or to wholesalers*'. The Appellant submits that Article 73 refers to '*the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party*'. Then Article 90 ensures that '*where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly*'. This means that a price reduction post-supply reduces the taxable amount. This position prevails regardless of whether the price reduction is by statute or by contract.

[**44**] The Appellant submits that ***Boehringer*** is authority for the proposition that the economic and commercial reality must be examined. In ***MEO – Serviços de Comunicações e Multimédia SA -v- Autoridade Tributária e Aduaneira*** [Case C-295/17] it was stated:

"*43 As regards the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court*

according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, judgment of 20 June 2013, Newey, C-653/11, EU:C:2013:409, paragraph 42 and the case-law cited)."

In this appeal, there is one product – [redacted] – and the economic reality is that the private health insurance companies bear the cost of the product by making payments to the private hospitals; and the Appellant grants discounts to the private health insurance companies in respect of the medical product meaning the Appellant has freely at its disposal an amount less the rebate payments to private health insurance companies for the medical product.

[**45**] In short, there is a link between the goods supplied and the consideration received. The medical product is supplied by the Appellant and the discounts granted to private health insurance companies reduces the consideration actually received by the Appellant. The taxable amount is the consideration actually received by the Appellant. In those circumstances, it would breach the principle of fiscal neutrality if the taxable amount attributable to the Appellant as a taxable person was not reduced by the rebate payments to private health insurance companies. The economic reality is that the private health insurance companies pay for the product and, according to the case-law, are the final consumer of the supply made by the Appellant. Furthermore, there is no difference in the position of the private hospitals and the private health insurance companies, however, the Revenue Commissioners have not afforded equal treatment as regards the arrangements; the Revenue Commissioners have allowed rebate payments to private hospitals as a reduction in the consideration received by the Appellant but have not allowed rebate payments to private health insurance companies as a reduction in the consideration received by the Appellant. The agreements with the private hospitals and the agreements with the private health insurance companies are similar in format and structure when those agreements are granting discounts on a value basis wherein the discount percentage increases as the value increases. The agreements include a similar 'discount matrix'. However, the Revenue Commissioners have not afforded equal treatment as regards these similar arrangements. The Appellant submits

that the volume-based discount agreements are not sales promotion agreements as suggested by the Revenue Commissioners as this is prohibited in the regulated environment within which the Appellant operates.

[**46**] At no time prior to the hearing of the appeal have the Revenue Commissioners sought to treat the agreements between the Appellant and the private health insurance companies as agreements for the supply of services. In any event, the agreements are clearly not agreements for the supply of services. The agreements refer to payments for of the medical product and price discounts for the medical product supplied to the private hospitals. In the agreements, the requirement to provide information is under the heading 'Volume Discounts'. This is followed by the heading 'Mechanism for applying volume based discounts' which refers to the private health insurance companies providing the Appellant '*all information which [the Appellant] may reasonable request to enable it to confirm, check and/or audit [the insurer's] claims and/or entitlements to discounts*'.

[**47**] Accordingly, the Appellant submits that payments made by the Appellant to private health insurance companies constitute a reduction in the consideration received by the Appellant for the supply of the medical product and, consequently, the Appellant is entitled to relief by a repayment of VAT.

Submissions on behalf of the Revenue Commissioners

[**48**] The Revenue Commissioners submit that the issue is whether the consideration received by the Appellant from the wholesaler should be reduced, after the supply of the medical product from the Appellant to the wholesaler, by payments made by the Appellant to private health insurance companies, on various conditions being satisfied (including the supply of information). The Revenue Commissioners submit that the question is whether the conditional payments to the private health insurance companies should be considered as reducing the taxable amount for the supply of the medical product from the Appellant to the wholesaler. The Revenue Commissioners submit that

the payments made by the Appellant to private health insurance companies do not constitute a reduction in the consideration received by the Appellant.

[**49**] The Revenue Commissioners submit that the supply chain of the medical product is the supply from the Appellant to the wholesaler, which is charged to VAT at 23%; and the subsequent supply from the wholesaler to the private hospitals which are '*engaged in VAT exempt activities and not required to register for VAT in respect of its supplies*'. The Revenue Commissioners allowed rebate payments to private hospitals as a reduction in the consideration received by the Appellant for the supply of the medical product on the basis of the principles enunciated in ***Elida Gibbs*** and relief was given by a repayment of VAT.

[**50**] There is a multiplicity of transactions involved in the overall process. For example, the supply of medical services by the private hospitals which is an exempt transaction; the supply of insurance services by the private health insurance companies which is an exempt transaction. However, in this appeal, the relevant supply is the supply of the medical product from Appellant to wholesaler to private hospitals. The price for the supply is the ex-factory price which is established under the framework agreement. In the circumstances, the consideration actually received by the Appellant for the supply of the medical product is the ex-factory price less the discounts granted to the private hospitals.

[**51**] The Revenue Commissioners submit that, accepting that the Appellant operates within a regulated environment, the agreements between the Appellant and the private health insurance companies are, broadly speaking, incentive type arrangements as discounts are granted based on volume. There is a commercial motivation for the Appellant to negotiate volume-based discount agreements with the private health insurance companies. Article 24(1) of Council Directive 2006/112/EC provides that a "'*supply of services' shall mean any transaction which does not constitute a supply of goods*." The arrangements between the Appellant and the private health insurance companies must be considered a supply of services because the agreements do not provide for a supply of goods. The agreements provide for payments in return for

reimbursement cover under all insurance policies and the provision of commercial data. For VAT purposes, can the discrete arrangements between the Appellant and the private health insurance companies constitute a reduction in the consideration for a separate transaction involving the supply of goods? The answer is no. It may be, from an economic perspective, that the Appellant is making payments to private hospitals and private health insurance companies, however, this does not determine the VAT position. VAT is a transactional tax and the transaction between the Appellant and the private health insurance companies must be examined to determine the VAT position.

[**52**] The Revenue Commissioners submit that the agreements between the Appellant and the private health insurance companies are separate from any agreements for the supply of the medical product, are not a condition of the making of any such supply and do not affect the consideration which the Appellant is entitled to receive for the supply of the medical product. The Revenue Commissioners submit that the fact that payments may be made from the private health insurance companies to the private hospitals thereby dispensing with the requirement for the insured persons to make payments, does not have an impact on the VAT position, because this administrative convenience does not alter that it is the insured persons, and not the private hospitals, that are entitled to receive payments from the private health insurance companies by virtue of their insurance policies. The Revenue Commissioners submit that these payments from the private health insurance companies to the private hospitals must be considered as payments for supplying services as the private hospitals are not supplying goods to the insured persons. The medical product must be administered [redacted] by clinicians which shows that the insured persons are receiving medical services from the private hospitals and it is in respect of that service that the private health insurance companies are making payments to the private hospitals.

[**53**] The Revenue Commissioners submit that '*the supply*' must be identified. Article 73 refers to '*the supply*' and Article 90 refers to a reduction in price after '*the supply*'. In this appeal, '*the supply*' is the supply of the medical product from Appellant to wholesaler to private hospitals. The reference in ***Elida Gibbs*** to '*the sum finally received*' refers to the sum received in relation to '*the supply*' made by the taxable

person. The private health insurance companies are not part of the supply chain of the medical product. In a broad sense, there may be an economic link between the supply chain and the arrangements between the Appellant and the private health insurance companies. The arrangements are mutually beneficially. However, for VAT purposes, there is no link between the supply of the medical product and the consideration received by the Appellant.

[**54**] The Revenue Commissioners submit that ***Elida Gibbs Limited -v- Commissioners of Customs and Excise*** [Case C-317/94] can be distinguished from this appeal. It was established in ***Elida Gibbs*** that if there is no contractual relationship in the various transactions in the supply chain of a product but there is a mechanism which reduces the price of the product, then the taxable amount should be reduced. The Revenue Commissioners referred to the basic principles of the VAT system enunciated in ***Elida Gibbs***:

"*19 The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.*

20 ... one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.

21 That basic principle clarifies the role and obligations of taxable persons within the machinery established for the collection of VAT.

22 It is not, in fact, the taxable persons who themselves bear the burden of VAT. The sole requirement imposed on them, when they take part in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, is that, at each stage of the process, they collect the tax on behalf of the tax authorities and account for it to them.

23 In order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT. As the Court held in its judgment in Case 15/81 Schul v Inspecteur der Invoerrechten en Accijnzen [1982] ECR 1409, paragraph 10, a basic feature of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the cost of the various price components of the goods and services. The procedure for deduction is so arranged that only taxable persons are authorized to deduct from the VAT for which they are liable the VAT which the goods and services have already borne.

24 It follows that, having regard in each case to the machinery of the VAT system, its operation and the role of the intermediaries, the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer."

[**55**] The Revenue Commissioners submit that the final consumer in the supply of the medical product is the private hospitals. On that basis, the Revenue Commissioners have allowed discounts granted to private hospitals by the Appellant as a reduction in the consideration received by the Appellant for the supply of the medical product. The private hospitals then supply medical services to patients, which may include the medical product. The supply of medical services is an exempt transaction. The Revenue Commissioners submit that the private health insurance companies are not the consumer of the medical product but merely receive payments from the Appellant in certain circumstances. No discounts are granted by the Appellant to the insured persons who hold insurance policies with the private health insurance companies and who consume the medical product.

[**56**] The Revenue Commissioners referred to ***Finanzamt Düsseldorf-Mitte -v- Ibero Tours GmbH*** [Case C-300/12] wherein the nature of the question submitted by the national court was whether the principles laid down in ***Elida Gibbs***, concerning the determination of the taxable amount for VAT purposes, are applicable where a travel

agent, acting as an intermediary for tour operators, grants to the final consumer, on its own initiative and at its own expense from the commission received from tour operators, a price reduction on the principal service provided by the tour operators to the final consumer. The Court stated:

"*28 The principles established in Elida Gibbs do not affect the determination of the taxable amount in a situation such as that at issue in the main proceedings.*

29 It should be recalled in that regard that the Court held in that judgment that when a manufacturer of a product who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with that final consumer, grants the final consumer a price reduction using discount coupons received by retailers and reimbursed by the manufacturer to those retailers, the taxable amount for VAT purposes must be reduced by that reduction (Elida Gibbs, paragraphs 31, 34 and 35). In the case which gave rise to the judgment in Elida Gibbs, the consideration received by the taxpayer, who was at the head of a chain of operations, was, in fact, actually reduced by the reduction granted by that taxpayer directly to the final consumer.

30 However, in the circumstances at issue in the main proceedings, the tour operator is not at the head of a chain of operations, as it provides its services directly to the final consumer, with Ibero Tours intervening as an intermediary in that single transaction only. Ibero Tours, however, provides a service, namely as an intermediary, which is totally separate from that provided by the tour operator.

31 Furthermore, the tour operator, in the case in the main proceedings, gives no discount since Ibero Tours is, in any event, bound to pay the tour operator the agreed price, regardless of any discount that Ibero Tours gives to the traveller.

32 In those circumstances, the financing by a travel agent, in the situation of Ibero Tours, of a part of the travel price which, with regard to the final consumer of the travel, takes the form of a price reduction for that travel, affects neither the consideration

received by the tour operator for the sale of that travel nor the consideration received by Ibero Tours for its intermediation service. Accordingly, pursuant to Article 11A(1)(a) of the Sixth Directive, such a price reduction does not lead to a reduction of amount either for the principal transaction or for the supply of services by the travel agent."

[**57**] The Revenue Commissioners submit that the payments made by the Appellant to private health insurance companies are extraneous to the supply chain of the medical product which is from Appellant to wholesaler to private hospitals. The medical product is administered [redacted] to patients by clinicians in the hospitals as part of the supply of medical services by the private hospitals. The payments made by the Appellant to private health insurance companies are analogous to an outside the supply chain payment similar to those in ***Ibero Tours***. In this appeal, separate to the supply of the medical product to the private hospitals as the final consumer, the Appellant has voluntarily decided to make arrangements with private health insurance companies which results in the Appellant making rebate payments to the insurance companies. The Appellant may have made the arrangements to facilitate patient access, however, for VAT purposes this does not constitute a reduction in the consideration received by the Appellant for the supply of the medical product.

[**58**] The Revenue Commissioners submit that the reliance by the Appellant on the judgment of ***Finanzamt Bingen-Alzey -v- Boehringer Ingelheim Pharma GmbH*** [Case C-462/16] is unfounded. Unlike in this appeal, Boehringer was required by law to grant a discount to private health insurance funds. The Revenue Commissioners submit that it is important to understand the factual context to the question referred by the national court in extrapolating principles from the judgment. The question for preliminary ruling was:

"*On the basis of the case-law of the Court of Justice of the European Union (judgment of 24 October 1996, Elida Gibbs, C-317/94, EU:C:1996:400, paragraphs 28 and 31) and having regard to the principle of equal treatment under EU law, is a*

pharmaceutical company which supplies medicinal products entitled to a reduction of the taxable amount under Article 90 of the VAT Directive in the case where:
– it supplies those medicinal products to pharmacies via wholesalers,
– the pharmacies supply those products, subject to tax, to persons with private health insurance,
– the insurer of the medical expense insurance (the private health insurance company) reimburses the persons insured by it for the costs of purchasing the medicinal products, and
– the pharmaceutical company is required to pay a 'discount' to the private health insurance company pursuant to a statutory provision?"

The Revenue Commissioners submit that it was in those specific circumstances that private health insurance funds were viewed '*as the final consumer of a supply made by Boehringer*'. It can be seen that the specific circumstances included that Boehringer was required by law to grant a discount to private health insurance funds. The background to the preliminary ruling, as appears from the Opinion of the Advocate General, was that the national court had made a finding that public health insurance funds were final consumers in the supply chain of the pharmaceutical products, however, private health insurance funds were found not to be final consumers. The question posed by Advocate General Tanchev was '*does this difference justify the refusal of the Member State tax authority to reduce the taxable amount with respect to the latter type of supply?*'. The Advocate General concluded that the difference in treatment was not justified. The preliminary ruling was focussed on the principle of fiscal neutrality given the difference in treatment between the public health insurance funds and the private health insurance funds.

[**59**] The Revenue Commissioners submit that the Court concluded, in very different circumstances to those at issue in this appeal, by reference in particular to the reasoning in paragraph 44 and paragraph 45 of the Opinion of the Advocate General, that the private health insurance funds must be regarded as being the final consumer of a supply made by Boehringer, and, being a taxable person, the amount payable by Boehringer to the tax administration may not, pursuant to ***Elida Gibbs***, exceed the amount paid by the

final consumer. Consequently, the Court held, "*in the case in the main proceedings, since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place, in accordance with Article 90(1) of the VAT Directive*". [emphasis added]

[**60**] The Revenue Commissioners submit that in this appeal there is no such legal requirement. The arrangements between Boehringer and the private health insurance funds were mandated by law. The arrangements between the Appellant and the private health insurance companies are voluntary. The Revenue Commissioners submit that the arrangements between Boehringer and the private health insurance funds involved a supply of goods. Advocate General Tanchev stated '*Nor, I would add, does any question arise as to whether Boehringer makes payments to private health funds as consideration for some sort of service*'. The supply chain was the supply of pharmaceutical products which included the private health insurance funds by reason of the statutory framework. In this appeal, the arrangements between the Appellant and the private health insurance companies must be considered a supply of services because the agreements do not provide for a supply of goods.

[**61**] The Revenue Commissioners submit that the payments made by the Appellant to private health insurance companies do not reduce the taxable amount for the supply of the medical product by the Appellant, since the private health insurance companies who receive the payments provided certain conditions are satisfied (including the provision of '*full data and information as is within [the insurer's] possession, power or procurement concerning the use, prescription and/or administration of* [redacted]' to the Appellant on a monthly basis, which information must be of high commercial value to the Appellant) are not part of the supply chain of the medical product from Appellant to wholesaler to private hospitals. Therefore, in this appeal, unlike in ***Boehringer***, the payments made voluntarily by the Appellant to the private health insurance companies (but arguably in return for good consideration particularly given the valuable information supplied to the Appellant by the private health insurance companies) do not reduce the consideration received by the Appellant for the supply of

the medical product. The agreements are not linked to a supply of goods. The Revenue Commissioners submit that it is significant that in ***Boehringer***, the manufacturer was cognisant from the outset with regard to its supplies that it would be required by law to make an adjustment by reason of the statutory discount. As a result of the national law, Boehringer never had '*freely at its disposal the full amount of the price received at first sale of its products to pharmacies or wholesalers*' and did not have the autonomy to negotiate a discount with the private health insurance funds.

[**62**] Accordingly, the Revenue Commissioners submit that payments made by the Appellant to private health insurance companies do not constitute a reduction in the consideration received by the Appellant for the supply of the medical product and, consequently, the Appellant is not entitled to relief by a repayment of VAT.

Analysis and Findings

[**63**] The issue in the appeal is whether volume-based discounts granted/rebate payments made by the Appellant to private health insurance companies constitute a reduction in the consideration received by the Appellant in respect of the supply of the medical product and, consequently, whether the Appellant is entitled to relief by a repayment of VAT.

[**64**] In the Value-Added Tax Consolidation Act, 2010, section 37(1) provides that the amount on which VAT is chargeable is the '*total consideration*' which the person supplying goods or services becomes entitled to receive in respect of the supply of those goods or services. Section 39(1) provides that where the consideration actually received in respect of the supply of goods or services exceeds the amount which the person supplying the goods or services was entitled to receive, the amount on which VAT is chargeable is the '*amount actually received*'. Section 39(2) provides that where the '*consideration actually received*' in respect of the supply of goods or services is less than the amount on which VAT is chargeable or no consideration is actually received, relief may be given by a repayment of VAT.

[**65**] In Council Directive 2006/112/EC, Article 73 and Article 90 address components of the taxable amount. Article 73 provides that the taxable amount includes '*everything which constitutes consideration*' obtained by a supplier, in return for a supply, from the customer or a third party. Article 90(1) provides that the taxable amount is reduced '*where the price is reduced*' after the supply takes place. In ***Boehringer*** it was stated that Article 90(1) '*embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received*'.

[**66**] Based on the foregoing, the taxable amount is the '*consideration actually received*' by the taxable person in respect of the supply of goods or services. In ***Elida Gibbs*** it was stated that '*consideration is the 'subjective' value, that is to say, the value actually received in each specific case'*. In light of the case-law, the question could be stated as what amount is freely at the disposal of the taxable person in respect of the supply?

[**67**] In ***Eliba Gibbs*** [CJEU (24 October 1996)], the company operated a money-off coupon scheme and a cash-back coupon scheme to promote retail sales of its products. Elida Gibbs supplied its products to wholesalers and retailers. The retailers supplied the products to customers. The money-off coupons were redeemed from Elida Gibbs by retailers. The cash-back coupons were redeemed from Elida Gibbs by customers. The Court stated that '*the manufacturer* [Elida Gibbs]*, who has refunded the value of the money-off coupon to the retailer or the value of the cash-back coupon to the final consumer, receives, on completion of the transaction, a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons. It would not therefore be in conformity with the directive for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with*'. In referring to the interpretation of Article 11(C)(1) of the Sixth Council Directive 77/388/EEC (corresponds to Article 90(1)), the Court stated '*that the provision is an*

expression of the principle, emphasized above, that the position of taxable persons must be neutral. It follows therefore from that provision that, in order to ensure observance of the principle of neutrality, account should be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with the final consumer, grants the consumer a reduction through retailers or by direct repayment of the value of the coupons. Otherwise, the tax authorities would receive by way of VAT a sum greater than that actually paid by the final consumer, at the expense of the taxable person'.

[**68**] In ***Ibero Tours*** [CJEU (16 January 2014)], the principal service was provided by tour operators to the final consumer. Ibero Tours provided an intermediary service to the tour operators and received a commission from the tour operators. Ibero Tours granted discounts to the final consumer which it financed from part of its commission from the tour operators. Ibero Tours did not grant discounts to tour operators for services provided in connection with its activity as an intermediary. The tour operators were not affected by the existence or amount of the discounts granted by Ibero Tours to the final consumer. The consideration obtained by the tour operators for its service was the total price without reductions. The Court concluded '*In those circumstances, the financing by a travel agent, in the situation of Ibero Tours, of a part of the travel price which, with regard to the final consumer of the travel, takes the form of a price reduction for that travel, affects neither the consideration received by the tour operator for the sale of that travel nor the consideration received by Ibero Tours for its intermediation service. Accordingly, pursuant to Article 11A(1)(a) of the Sixth Directive, such a price reduction does not lead to a reduction of amount either for the principal transaction or for the supply of services by the travel agent.*'

[**69**] In ***Boehringer*** [CJEU (20 December 2017)], the company was required by law to grant a discount to private health insurance funds on the price of pharmaceutical products supplied to persons with private health insurance. Boehringer supplied its products to pharmacies. The pharmacies supplied the products to insured persons who would pay the pharmacies for the products. The insured persons then sought a

reimbursement from the private health insurance funds for the cost incurred in purchasing the pharmaceutical products. If insured persons did not seek a reimbursement, then no rebate payment was made by Boehringer to the private health insurance funds. For VAT purposes, the discount granted to private health insurance funds was not treated by the tax administration as a reduction in remuneration whereas the discount granted to public health insurance funds was treated by the tax administration as a reduction in remuneration. The Court concluded '*In the light of the principles defined by the Court in the judgment of 24 October 1996, Elida Gibbs (C-317/94, EU:C:1996:400, paragraphs 28 and 31), regarding the determination of the taxable amount for value added tax and having regard to the principle of equal treatment under EU law, Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the discount granted, under national law, by a pharmaceutical company to a private health insurance company results, for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, where it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures*'.

[**70**] In this appeal, the agreements between the Appellant and the private health insurance companies refer to volume-based discounts for the medical product. The agreement with [redacted] refers to the Appellant agreeing '*to provide* [redacted] *with the following volume based discounts in respect of* [redacted] *reimbursement of* [redacted]'. The agreement applies '*to* [redacted] *reimbursements of* [redacted] *Products during the Term, which* [redacted] *Products are supplied to relevant hospitals and treatment centres*'. The medical product which is administered [redacted] to patients by clinicians in the hospitals is the product supplied by the Appellant. The discounts are '*calculated by reference to the average ex-factory price of* [redacted]'. The Appellant calculates '*the discounts due, based on the volume of* [redacted] *reimbursements of* [redacted] *Products*'. The agreement provides that if [redacted] reimburses more than the stipulated number of [redacted] of the medical product '*such additional reimbursement will qualify for discounts under this agreement*'. The information

provided to the Appellant by the private health insurance companies refer to the number of [redacted] of the medical product. Having regard to all the circumstances, and the principles of contractual interpretation, I find that the Appellant grants discounts to private health insurance companies in respect of the medical product.

[**71**] In ***Boehringer*** it was stated '*the taxable amount applicable to Boehringer Ingelheim Pharma as a taxable person must be made up of the amount corresponding to the price at which it sold the medicinal products to pharmacies, reduced by the discount made to private health insurance companies when they reimbursed the expenses incurred by their insured persons when purchasing those products*'. In this appeal, the agreements with the private health insurance companies refer to the medical product supplied to the private hospitals. The medical product which is administered [redacted] to patients by clinicians in the hospitals is the product supplied by the Appellant. The private health insurance companies make payments in respect of the medical product. The Appellant grants discounts to the insurance companies in respect of the reimbursement payments to the private hospitals. The discounts are calculated by reference to the ex-factory price of the medical product. The evidence was that the wholesaler pays the ex-factory price to the Appellant; the private hospitals pay the ex-factory price to the wholesaler; and the private health insurance companies reimburse the ex-factory price to the private hospitals in respect of the medical product. In my view, having regard to the facts, I find that the taxable amount attributable to the Appellant as a taxable person should be an amount corresponding to the price at which the medical product is supplied, reduced by the discounts granted to the private health insurance companies. The Appellant does not freely have at its disposal the full amount of the price received in respect of the supply of the medical product because the Appellant makes rebate payments to private health insurance companies by reason of the contractual agreements between the Appellant and the insurance companies. For VAT purposes, it is determining the '*consideration actually received*' by the Appellant and if the rebate payments to private health insurance companies are included in the calculation of the taxable amount, this means the tax administration is collecting '*an amount of VAT exceeding the tax which the taxable person received'*.

[**72**] In ***Boehringer*** it was stated '*the fact that, in the case in the main proceedings, the direct beneficiary of the supplies of the medicinal products in question was not the private health insurance company which reimbursed the insured persons but the insured persons themselves, is not such as to break the direct link between the supply of services made and the consideration received*'. In this appeal, the private health insurance companies are not the direct beneficiary of the supply of the medical product. However, this does not break the link between the product supplied and the consideration received by the Appellant. The agreements with the private health insurance companies refer to the medical product supplied to the private hospitals. The medical product which is administered [redacted] to patients by clinicians in the hospitals is the product supplied by the Appellant. The private health insurance companies make payments in respect of the medical product. The Appellant grants discounts to the insurance companies in respect of the reimbursement payments to the private hospitals. The discounts are calculated by reference to the ex-factory price of the medical product. In considering the economic and commercial reality, which has been described as a fundamental criterion for the application of the common system of VAT, the private health insurance companies ultimately bear the cost of the medical product as the insurance companies '*provide full reimbursement cover*' in respect of the product and the Appellant does not freely have at its disposal the full amount of the price received in respect of the supply of the medical product because the Appellant makes rebate payments to private health insurance companies. On that basis, in line with the analysis in ***Boehringer***, the private health insurance companies can be viewed as the final consumer of a supply made by the Appellant. The arrangements between the Appellant and the private health insurance companies differ to the arrangements in ***Ibero Tours*** in that Ibero Tours, who were providing an intermediary service to tour operators, granted discounts to the final consumer which did not affect the consideration obtained by the tour operators for its service which was the price without reductions; whereas the consideration obtained by the Appellant in respect of the medical product is the price with reductions.

[**73**] In this appeal, the volume-based discounts are granted by reason of contractual agreements between the Appellant and the private health insurance companies. The

Revenue Commissioners submit that ***Boehringer*** must be considered having regard to the factual context therein. The discount granted by Boehringer was required by law and consequently Boehringer never had '*freely at its disposal the full amount of the price received at first sale of its products to pharmacies or wholesalers*'. It did not have the autonomy to negotiate a discount with the private health insurance funds. In this appeal, the Appellant had contractual agreements with the private health insurance companies. The discounts are not required by law. In my view, for VAT purposes, it is determining the '*consideration actually received*' by the Appellant in respect of the supply of the medical product. Article 90(1) refers to the taxable amount being reduced '*where the price is reduced*' after the supply takes place. It would be a restrictive interpretation of Article 90(1) if it were interpreted as a price reduction by reason of a legal requirement only. The price discount in ***Elida Gibbs*** was not granted by reason of a legal requirement. In this appeal, there is a taxable amount capable of being adjusted. The volume-based discounts are granted by reason of contractual agreements between the Appellant and the private health insurance companies. However, this does not mean there is no link between the medical product supplied and the consideration received by the Appellant. The economic and commercial reality remains that the Appellant does not freely have at its disposal the full amount of the price received in respect of the supply of the medical product because the Appellant makes rebate payments to private health insurance companies.

[**74**] The Appellant grants discounts to private hospitals and private health insurance companies. The Appellant and the private hospitals have contractual agreements which provide for volume-based discounts for the medical product. The Appellant and the private health insurance companies have contractual agreements which provide for volume-based discounts for the medical product. For VAT purposes, the Revenue Commissioners have allowed rebate payments to private hospitals as a reduction in the consideration received by the Appellant. The Revenue Commissioners have not allowed rebate payments to private health insurance companies as a reduction in the consideration received by the Appellant. In ***Boehringer***, it was stated '*one of the principles on which the VAT system was based was neutrality, in the sense that within*

each country similar goods should bear the same tax burden whatever the length of the production and distribution chain'.

[**75**] In my view, having regard to the foregoing, the VAT position of the Appellant in relation to the discounts granted to private health insurance companies comes within the conclusion of the Court in ***Boehringer*** that *'since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place'.* In those circumstances, I find that the volume-based discounts granted/rebate payments made by the Appellant to private health insurance companies constitute a reduction in the consideration received by the Appellant in respect of the supply of the medical product. Consequently, the Appellant is entitled to relief by a repayment of VAT.

Determination

[**76**] Based on a review of the facts and a consideration of the evidence, materials and submissions of the parties, I determine that the refusal of the Revenue Commissioners on the claims for a refund of value-added tax shall not stand. This appeal is hereby determined in accordance with section 949AL of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

24 JUNE 2021

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997.