[2015] UKUT 0023 (TCC)

Appeal number: FTC/89/2013

VAT – exemption - financial services – Art 13B(d)(3), Sixth Directive – Group 5, Sch 9 VATA 1994 – booking fees on concert ticket purchases – whether for "card processing services" — effect of Scottish Court decision on English tribunal

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

NATIONAL EXHIBITION CENTRE LIMITED **Respondent**

TRIBUNAL: THE HON MR JUSTICE ROTH
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, London EC4 on 7 November 2014

Nigel Pleming QC and Alan Bates, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Jonathan Peacock QC, instructed by Deloitte LLP, for the Respondent

DECISION

Introduction

1. This is the appeal of HMRC against the decision of the First–tier Tribunal (Judge Kempster and Mr Bayliss) ("the FTT") released on 7 May 2013 allowing the appeal of National Exhibition Centre Limited ("NEC") against HMRC's decision to refuse to repay value added tax ("VAT") that NEC considered had been overpaid on the booking fees it charged to customers in cases where the customers purchased tickets for concerts by means of debit or credit cards. NEC had paid VAT on the assumption that the transactions involved a standard rated supply but by its claim contends that they constituted an exempt supply.

2. In its decision, which is reported at [2013] UKFTT 289 (TC), the FTT determined that the booking fees which NEC charged to customers who booked tickets in the period 1 August 1999 to 30 April 2002 ("the relevant period") were, first, consideration for supplies of "card processing services", and secondly that those supplies were exempt from VAT pursuant to the exemption in respect of financial services in Article 13B(d)(3) of the Council Directive 77/388/EEC of 17 May 1977 ("the Sixth Directive") (now Article 135(1)(d) of the Principal VAT Directive; Council Directive (EC) 2006/112/EC of 28 November 2006).

3. With permission granted by the FTT, HMRC have appealed against the decision of the FTT in both of those respects. This decision is concerned only with the first, which has been described as "the Supply issue". The second, "the Exemption issue", arises only if we dismiss HMRC's appeal on the Supply issue and find, in common with the FTT, that the booking fees were consideration for card processing services. In that event, the parties submitted, and we have indicated that we accept, that the Exemption issue should be referred to the Court of Justice of the European Union ("ECJ") for a preliminary ruling. In the light of that, neither side addressed us on the Exemption issue.

4. There is a further limitation on the scope of this appeal. It was argued for HMRC before the FTT that the booking fees were not, as NEC claimed, consideration for a supply made by NEC separate from the supply by the concert promoter, for whom NEC acted as agent, of the ticket, but that there was only a single supply of the ticket and the booking fee represented part of the consideration for that supply. The FTT rejected HMRC's case in that respect, finding that the booking fees were charged by NEC on its own account as principal and not as agent for the promoter. There is no appeal from that decision of the FTT.

5. Although this appeal relates solely to the relevant period, similar questions arise in respect of decisions of HMRC on claims by NEC for other periods. The position of the parties before the FTT was that the conclusions reached in the appeal before it should be treated as determining all those claims. The FTT expressed concern at the propriety of seeking to determine factual matters for periods for which it had no, or incomplete, evidence. It accordingly confined itself to determining the appeal for the

relevant period only and offering limited observations as to other periods. That, in our view, was the proper course for the FTT to have adopted. The jurisdiction of the tribunal is limited to the particular appeal before it. It is of course open to the parties, by agreement, to resolve matters for other periods by reference to a decision of the tribunal in respect of a particular period, and that may, under s 85 of the Value Added Tax Act 1994, have the same effect as a decision of the tribunal. But that is a matter for the parties and does not empower the tribunal to determine matters outside the scope of the particular appeal before it.

The facts

6. The FTT made findings of facts based on those facts which were agreed by the parties, evidence of witnesses from NEC and documentary evidence. One witness, Mr Afzal, who had made a witness statement, did not give oral evidence but his statement was confirmed by two other witnesses, Mr Mead and Mr Monks, who gave evidence in their own right and who were cross-examined.

7. NEC is owned by Birmingham City Council. It owns and operates the National Exhibition Centre and other venues in Birmingham, which are used to stage a number of trade, cultural and entertainment events. NEC typically hires the venues to third party promoters and through its own box office sells tickets for the promoters' events. It also sells tickets for events at other venues, but the claim for overpaid VAT related only to concerts at NEC's own venues.

8. NEC runs its own call centre with a national rate ticket hotline number. It sells tickets online via its website. Customers can also buy tickets by post or over the counter at the box office.

9. NEC's box office related income is generated in three ways:

(1) "Facility Fees" are charged by NEC to the promoter of the event for which NEC is selling tickets on the promoter's behalf in consideration for NEC's agency services to the promoter.

(2) "Booking Fees" are charged to the ticket-buying public by NEC in relation to certain ticket sale transactions which we describe in more detail below. Those fees are set at around 10% of the price of the ticket, or higher for events where the market would bear a higher amount.

(3) "Transaction Fees" were not charged in the relevant period, but only from November 2002. As described on NEC's website, the transaction fee is "a one-off charge per order. It covers the administration costs and overheads associated with each ticket sale."

10. Customers could purchase tickets by a variety of means. Tickets could be purchased in person, by telephone, online via NEC's website or by post. Payment could be made in cash, by cheque or postal order, by debit card, by credit card, using an NEC gift voucher, or combinations of those methods.

11. Booking fees were chargeable only in certain circumstances. We can summarise the position in the following way:

(a) No booking fee was charged for cash payments, which could only be made in person.

(b) No booking fee was charged for payments by cheque or postal order in person or, since September 2007, by post. Until that time a booking fee was charged for payments by cheque or postal order through the post.

(c) For debit cards, a booking fee was charged in all circumstances, for both full and part payment by debit card, except in the case of payments by debit card in person. In that case a booking fee was not charged until August 2003. Since then a booking fee has applied to all payments wholly or partly by debit card whether the ticket is purchased remotely or at the box office.

(d) For payment wholly or partly by credit card, a booking fee has been charged at all times on purchases through all means.

(e) No booking fee was charged on the purchase of an NEC gift voucher, by any payment method including by debit or credit card, or on the purchase of tickets by redemption of such a voucher, either in whole or partly by voucher and partly by other means.

(f) Booking fees were not charged to customers paying by debit or credit card, where those customers also purchased car parking.

12. All methods of payment could be employed by a customer buying tickets in person at the box office. Postal booking could be paid for by all methods other than cash. Telephone and online bookings could only be made by debit or credit card.

13. NEC provides certain information to prospective purchasers of tickets such as information on event availability, seat availability, seat pricing, programming and timing information. Following a ticket purchase, NEC generates the tickets at its head office and sends them by post or electronically to the customer, having included any additional promotional material. In certain cases arrangements can be made for the collection of tickets by the customer. NEC also provides after-sales services, such as the provision of staff at venues to assist those who have lost tickets.

14. The FTT considered a number of documents. We set out here material extracts from: (i) NEC's terms and conditions published at the box office and online; (ii) a FAQs (frequently asked questions) page taken from NEC's website; and (iii) a "phone script" given to box office staff to assist them in answering questions from customers.

(i) Terms and conditions

15. The version considered by the FTT was dated June 2003 (i.e. after the date on which transaction fees were introduced). Subject to that, it was accepted as representative of earlier versions:

"Tickets may be subject to a booking fee and/or postage fee.

BOOKING FEE CHARGES

Ticket Price	Telephone Booking Fee (per ticket)	Credit Card Counter Sales (per ticket)
£0 - £9.99	£1	£1
£10.00 - £19.99	£2	£2
£20.00 - £29.99	£3	£3
£30.00 plus	10% of ticket price or as advised	10% of ticket price or as advised

Please check your tickets before leaving the counter as mistakes cannot always be rectified.

Some concerts and events may be subject to a 'transaction fee' instead of a booking fee. This fee is charged per transaction, irrespective of the number of tickets bought per transaction. Postage fees will still apply.

Coach companies and groups of 20 or more people usually pay 50% of the telephone booking fee whether by telephone or counter sales. Mixed payments ie credit cards/cheque and credit card/cash will be subject to booking fee for credit card counter sales.

Cheques can only be accepted up to the value of the accompanying cheque card.

ATTENTION IS DRAWN TO THE TERMS AND CONDITIONS PRINTED ON ALL TICKETS. A COPY OF THE TERMS AND CONDITIONS IS AVAILABLE ON REQUEST"

(ii) FAQs

16. The FAQs page was accepted by the FTT as typical of that which had been available to users on 10 March 2002 (within the relevant period). It stated, materially:

"**The Cost of Booking**

…

Booking Fees

Booking fees are charged by The NEC Group Box Office to help offset operational costs such as postage, credit card commission, labour, telephony and IT maintenance charges. The NEC Group regularly reviews the level of booking fees in order to remain as competitive as possible with other comparable venues across the UK.

PLEASE NOTE: For concerts and events staged at the venues of The NEC Group, the Group chooses to waive the booking fee if tickets are purchased at a Group venue Box Office using cash, cheque or debit card (eg Switch or Visa Delta).

Booking Online

> The NEC Group has invested significant resources in The Online Box Office and booking fees are charged to help offset the on-going maintenance and development costs of the Internet Booking facility, as well as the usual operational costs. The NEC Group regularly reviews the level of booking fees and is currently evaluating the case for charging lower booking fees to Customers booking via the internet."

(iii) Phone script

17. It was unclear at what date the phone script available to the FTT had been issued, although it must have been after the introduction of transaction fees and indeed after NEC's box office was branded as "The Ticket Factory" (2007). It is therefore significantly later than the relevant period but the FTT found, at [114], that it fairly set out the answers and explanations that would have been given to customers in the relevant period. It included the following:

> "Booking Fee FAQ and Phone Script
>
> …
>
> *Why do I pay a booking fee?* In order to facilitate the processing of credit/debit card payments for bookings, ticket agents charge per ticket booking fees for the services they provide. It is also the ticket agent (not the Promoter) that accepts the risks associated with processing transactions by credit/debit card and, in cases of fraud for example, is required to refund the full ticket price as well as the booking fee to the Customer even when obliged to pay the Promoter as though the sale were genuine.
>
> *Why is the booking fee separated?* With regard to the prices and fees charged for tickets there is understandably a common misconception that events are promoted by the NEC Group venues they are staged at. Events are in fact brought to venues by independent Promoters and Organisers who are responsible for all aspects of the production including setting ticket prices. The ticket income belongs to the Promoter and is calculated to take into consideration the costs of staging the event and payments to the participants/artists etc. The Promoter distributes tickets for sale through ticket agents and The Ticket Factory, as the official box office for the venues of The NEC Group, simply acts as one of these ticket agents.
>
> *Why do I pay a transaction charge?* Other additional transaction fees, performance fees or delivery fees including special delivery, are charged per order to help offset other operational costs and overheads associated with ticket sales e.g. event administration including inventory control, ticket stock/stationery, access control systems, collection facilities and postage and/or packaging costs as applicable."

The law

18. We set out, if only for completeness, the relevant law. The application of that law is highly material to the Exemption issue, but it has no direct impact on our consideration of the Supply issue.

19. Article 13B(d) of the Sixth Directive, which was the provision in force in the relevant period, provided as follows:

> "Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purposes of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …
>
> (d) the following transactions:
>
> …
>
> 3 transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;"

20. By way of implementation of the Sixth Directive, Item 1 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 provides exemption in respect of:

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

Grounds of appeal

21. HMRC put forward two grounds of appeal:

(1) HMRC contends that the FTT, in reaching its conclusion that the booking fees charged by NEC in the relevant period were consideration for a "payment card processing service" (rather than for the service of remote booking and delivery of tickets), asked itself the wrong question and adopted a legally unsustainable approach.

(2) HMRC contends (further and in the alternative to the first ground) that the FTT, in reaching that conclusion, in any event reached a conclusion which was not one that was reasonably and properly open to it based on the evidence before it and/or its own analysis of the facts. The conclusion therefore amounts to an error of law on *Edwards v Bairstow* [1956] AC 14 principles.

Jurisdiction

22. As has been stated many times, this Tribunal has jurisdiction, on an appeal of this nature, only on questions of law. It is the First-tier Tribunal which is the fact-finding tribunal, and an appeal to this Tribunal is not a general opportunity to re-address factual findings made by the First-tier Tribunal. There are, nonetheless, limited circumstances in which the fact-finding tribunal may be found to have made an error of law in respect of those findings of fact.

23. The position has recently been summarised in this Tribunal by Henderson J in *Revenue and Customs Commissioners v Lok'nStore Group Plc* [2014] UKUT 0288 (TCC). Having rejected an argument in that case that the First-tier Tribunal had

misdirected itself as to the correct test to be applied, Henderson J, at [50], turned to a further argument that there was an error of law in the First-tier Tribunal's findings of fact or in its evaluation of the facts. He said:

> "51. The need for caution and restraint by an appellate court or tribunal when faced with a challenge of this nature has often been emphasised, not least by Etherton LJ in the passages from *London Clubs*[1] at [73] and [74] which I have already cited (see paragraph 29 above). Mr Hitchmough QC also reminded me of what Mummery LJ said in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 (the well- known case about the classification for VAT purposes of Regular Pringles, the savoury snack product), at [74]:
>
> > 'For such an appeal to succeed it must be established that the tribunal's decision was wrong as a matter of law. In the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the tribunal's decision that Regular Pringles are "similar to" potato crisps and are "made from" the potato ought not to be disturbed on appeal. I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: as a matter of law, was the tribunal entitled to reach its conclusions? It is a misconception of the very nature of an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the selfsame issue that was decided by the tribunal.' (Mummery LJ's emphasis)
>
> See too the observations of Jacob LJ at [9] to [11] and [19] and Toulson LJ at [48] and [60] to [62].
>
> 52. Of equal importance is the principle that, where an appeal lies only on law, and the tribunal has not made an overt error of law, a finding of primary fact, or an inference drawn from the primary facts, may only be challenged on the limited grounds explained by the House of Lords in *Edwards v Bairstow* [1956] AC 14: see in particular the speech of Lord Radcliffe at 35-36. It was in relation to such challenges that Evans LJ (with whom Saville and Morritt LJJ agreed) said in *Georgiou and Another (trading as Marios Chippery) v Customs and Excise Commissioners* [1996] STC 463 at 476:
>
> > 'It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong.'

[1] *Revenue and Customs Commissioners v London Clubs Management Ltd* [2012] STC 388.

24. In some cases, the dividing line between what is on the one hand a pure question of fact, and on the other hand a pure question of law may be clear. In others it may be less so. That is particularly the case where findings of fact are directed towards the application of particular legal concepts such as those provided by the EU directives governing the VAT system. Thus, in *Revenue and Customs Commissioners v Zurich Insurance Co* [2007] STC 1756 it was held by the Court of Appeal that in determining the place of supply for VAT purposes, the evaluation of the primary facts and the application to those facts of the relevant provisions of the Sixth Directive was a matter of law. It had thus been open to Park J, in the High Court on an appeal from the VAT Tribunal, to find that the tribunal had made an error of law. Sir Andrew Morritt C said, at [34] - [35]:

> "… three recent decisions of the House of Lords indicate that at least in some areas a classification of goods or services for the purposes of VAT is a question of legal evaluation and therefore of law. Thus in *Customs and Excise Comrs v British Telecommunications plc* [1999] STC 758 at 764–765, [1999] 1 WLR 1376 at 1381 Lord Slynn of Hadley referred to the categorisation of a supply as single or split into two or more separate supplies as a matter of law. In *Dr Beynon and Partners v Customs and Excise Comrs* [2004] UKHL 53 at [26] and [27], [2005] STC 55 at [26] and [27], [2005] 1 WLR 86 Lord Hoffmann agreed with the Court of Appeal (see [2002] EWCA Civ 1870, [2003] STC 169) that the categorisation of the supply as one of services or of goods and services was a question of law. To the like effect is the speech of Lord Walker of Gestingthorpe in *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62 at [35] and [36], [2005] STC 1597 at [35] and [36], [2005] 1 WLR 3351.
>
> [35] In both the latter cases Lords Hoffmann and Walker of Gestingthorpe emphasised the need for the appellate court to show circumspection before interfering with the decision of the tribunal, even though it was on a point of law, 'merely because it would have put the case on the other side of the line'. As in the case of the supply of goods and services so, in my view, in the case of the place of supply, the evaluation of the primary facts and the application to them of the provisions of art 9 of the Sixth Directive as interpreted by the ECJ in cases such as *Berkholz*, *DFDS* and *RAL* is a matter of law. The appellate court is entitled to interfere but should show circumspection before doing so."

25. With respect to the argument of Mr Pleming, we do not consider that the conclusion reached by the FTT on the Supply issue falls into the same category as the issue of place of supply in *Zurich Insurance*, or the other conceptual issues of classification or categorisation of a supply to which the Chancellor referred. There is no doubt that the classification for VAT purposes of the supply made by NEC is a question of law, which is addressed in the Exemption issue. But the first question that needs to be addressed in the Supply issue is simply what was provided by NEC for the consideration which it received in the form of the booking fee. The answer to that question, which we consider is a purely factual one, assuming that the FTT has applied the correct legal test, may then lead to questions of law as to whether what was provided was a single or multiple supply and will then feed into the legal

question to be addressed in the Exemption issue. But the conclusion of the FTT that what was provided by NEC in return for the booking fee was a card processing service was itself a finding of fact.

Discussion

26. As the FTT observed, the question of the correct VAT treatment of booking fees of the nature at issue in this appeal is by no means unique to NEC. As Mr Peacock also reminded us, the question whether such fees are for a service of handling or processing payments and, if so, whether such a service is exempt for VAT purposes has been considered by the UK domestic courts on a number of occasions. However, on the issue addressed in this decision, we consider that the most relevant prior decision is that of the Inner House of the Court of Session in *Scottish Exhibition Centre Ltd v Revenue and Customs Commissioners* ("*SEC*") [2008] STC 967.

27. In *SEC*, the appellant owned and operated an exhibition and conference centre. One of its trading divisions acted as a ticket selling agent for events held at the centre. Booking fees were charged in addition to the price of the ticket. Members of the public could obtain tickets from SEC by calling in person at the box office or at a retail unit, by telephone or over the internet. The large majority of ticket purchases were by telephone, using a credit card. A booking fee was charged to customers using a credit card, and also to customers using a debit card, except in the latter case when the purchase was made at the box office or at the retail unit. No booking fee was charged for payment by any other method.

28. In deciding that the booking fee was consideration for "a booking service offering extensive customer support with a view to promoting [SEC's] business and with the credit card facility representing an ancillary aspect enhancing the main service", the tribunal in *SEC* had regard, first, to the fact that, after certain sums had been paid by SEC to Cardnet Merchant Services, the balance of the booking fee had been used to meet SEC's costs of maintaining the box office and its general infrastructure such as staff, telephone system, information technology expenses and so on, and secondly that SEC's staff provided information to prospective purchasers of tickets on seat availability, layout and seat pricing, and dealt with other enquiries as well as reserving and issuing tickets.

29. The Court of Session, at [14], held that the tribunal had erred in law. The evidence concerning the provision of information had been taken into account despite there having been no evidence that the giving of such information constituted any part of any supply made by SEC for a consideration. The use made by SEC of the proceeds of the fee charged was irrelevant to its proper characterisation. The Court stated:

> "Most importantly, the tribunal had erred by failing to take into account the undisputed evidence that a fee was charged whenever, and only whenever, a booking was made by credit card or debit card. The tribunal failed to take into account the fact that a booking fee would be incurred by a customer paying by credit card in person at the booking office, and the fact that no fee would be

> incurred by a telephone booking in which the customer paid by cheque rather than by credit card."

On that basis, the Court held that the only reasonable conclusion open to the tribunal was that the booking fee was charged by SEC in consideration of the facility of booking by credit card or debit card.

30. All such cases are, by their nature, dependent on their own particular facts. But the approach of the Court of Session in *SEC* to the proper legal basis for the factual analysis is instructive. We raised with the parties at the hearing the question whether, as the Upper Tribunal sitting in England, we were bound by *SEC*, as a judgment of the Inner House of the Court of Session. Surprisingly, there was no immediate straightforward answer to that question, and we are grateful for the subsequent work by counsel which resulted in an agreed note on the position. Essentially, whilst it is the case that the English and Scottish courts (including tribunals forming part of their respective judicial systems) are not bound to follow the judicial decisions of the other, regardless of the hierarchy level of the prior decision, it has long been the position that the interpretation of tax legislation ought, so far as possible, to follow the decisions of the cross-border court. Tax law generally applies to England and Wales and Scotland alike and should therefore be applied in the same way in both jurisdictions.

31. In *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, which concerned the meaning of the expression "charitable purposes" in a provision for allowances against tax in a statute of 1842 that applied in both Scotland and England, Lord Watson referred (at 557) to the principle that the tax statute "must, if possible, be so interpreted as to make the incidence of taxation the same in both countries"; see also per Lord Halsbury LC at 548. This approach was followed by Lords Macmillan and Wright and Viscount Simon LC in *Income Tax Commissioners for City of London v Gibbs* [1942] AC 402. There, at 414, Viscount Simon LC expressed the view that:

> "… in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries."

32. These observations appear to apply particularly to questions of interpretation of the statutory wording. But on the question of precedent within the judicial hierarchy, the decision of the Court of Appeal in *Abbott v Philbin (Inspector of Taxes)* [1960] Ch 27 is very pertinent. There the issue concerned the year in which an option should be regarded as giving rise to a perquisite for the purpose of assessment to income tax. Lord Evershed MR, with whose judgment Sellers and Harman LJJ agreed, said, at 49:

> "I ask myself, therefore, having expressed such doubts as I have, with all respect to the judges in Scotland, ought this court now to answer those two questions in a precisely opposite sense? It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance

> Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a Law for England in respect of this not unimportant matter which would be completely opposite to the law which was applied, on exactly the same statutory provisions, north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision."

33. Although the House of Lords reversed this decision on appeal and overruled the relevant Scottish decision as wrongly decided, Viscount Simonds approved the approach taken by the Court of Appeal, stating that "the Court of Appeal were constrained to decide this case in favour of the Crown in deference to the decision of the Court of Session": and that "they took the proper course in following it" [1961] AC 352 at 367-368. Lord Reid observed similarly, at 373:

> "In the present case the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session … I say very properly, because it is undesirable that there should be conflicting decisions on revenue matters in Scotland and England."

34. Accordingly, we consider that, whilst not formally bound by the decision of the Inner House of the Court of Session in *SEC*, in the absence of conflicting authority we should follow it. This means that the approach to be adopted in this case to the factual analysis is that employed by the Court in *SEC*.

The identification of the supply

35. It was common ground that the proper approach to the identification of the supply emanated from the decision of the ECJ in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270. Although that decision and subsequent decisions such as *Levob Verzekeringen BV and another v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766 are directly applicable to cases where, as Henderson J described it in *Birkdale School, Sheffield v Revenue and Customs Commissioners* [2008] STC 2002, at [26], it is necessary to determine whether a composite package of goods or services is a single supply or multiple supplies, the principles are equally applicable to the initial determination of what it is that is provided for the consideration.

36. The essential enquiry is as to the economic and commercial reality of the transaction. All the circumstances are to be taken into account. That includes the contractual relationship between the parties, but that will not necessarily reflect the economic reality (see, e.g., *Tesco plc v Customs and Excise Commissioners* [2003] STC 1561, per Jonathan Parker LJ at [159] and *Revenue and Customs Commissioners v Paul Newey (t/a Ocean Finance)* (Case C-653/11) [2013] STC 2432). The enquiry is an objective one, the reference point being the typical consumer.

37. The relevant principles were applied by the ECJ in *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v Revenue and Customs Commissioners* (Case C-276/09) [2011] STC 316. In that case, the company provided mobile telephone services. One of the methods by which a customer could pay for those services was by settling a monthly bill. If the customer chose to settle the bill either by debit or credit card or at a bank or through an authorised payment agent (rather than through direct debit or BACS transfer) then they would have to pay an additional charge described by the company as a "separate payment handling charge".

38. The ECJ held that the invoicing activity, and the making available of an infrastructure to pay bills, did not constitute an aim in itself for customers. There was an intrinsic link to the supply of mobile telephone services. From the customer's point of view, the supply of payment handling services had to be regarded for VAT purposes as being ancillary to the principal supply of telecommunications services. The charges paid, although by way of a separate price, did not constitute consideration for a supply of services distinct and independent from that principal supply.

39. Although Mr Pleming sought to place reliance on *Everything Everywhere*, there is an essential difference between that case and the circumstances of NEC's case. In *Everything Everywhere*, the critical finding was that there was no distinct and independent payment handling service, because that service was merely ancillary to the principal supply of telecommunication services. By contrast, as the FTT found, and which is not the subject of appeal, the service for which the booking fee is paid is distinct and independent from the supply of the tickets, as that supply is made by the promoter and not by NEC. There is thus no question of the supply made by NEC in return for the booking fee being regarded as ancillary to the supply of tickets. It is simply the nature of the supply for which the booking fee is the consideration that is in issue. For essentially the same reason, we do not derive any assistance from *Customs and Excise Commissioners v British Telecommunications plc* [1999] STC 758. That too was a case where a principal supply by a trader was identified, to which another supply by the same trader was regarded as ancillary. The question in this case, by contrast, is to determine what it is that NEC is supplying for the consideration of the booking fee. Questions of the identification of a single or multiple supply would be relevant only if a number of services were so identified, so that it would be necessary to determine whether those services should be regarded as separately and independently supplied or as a single supply.

Wrong question or wrong approach?

40. As its first ground of appeal, HMRC submit that the FTT asked itself the wrong question and/or adopted a legally unsustainable approach. HMRC argued that there were two errors on the part of the FTT in this respect.

41. The first concerns the way in which the FTT approached the question of the introduction, in 2002, of transaction fees. The FTT noted, at [121], that it had heard substantial evidence and submissions in respect of those fees. On the basis of the evidence of witnesses, the FTT found that when the transaction fees were introduced

they were "an additional charge for services already provided by NEC; in other words the Transaction Fee was not levied for any additional service provided by NEC from November 2002."

42. At [122], the FTT considered the relevant period, for which the booking fees applied but not the transaction fees. It asked itself the question "so what service did NEC supply for the Booking Fee?" It concluded, at [123], on the basis of the evidence, that a large part of the box office work carried out by NEC was not specifically remunerated. It reasoned that, since many services were available to "(potential) customers" whether or not they proceeded to a ticket purchase, giving as examples information on event availability, seat availability, seat pricing, programming and timing information, it could not be concluded that part of the booking fee was in consideration for some or all of those services. It applied the same reasoning in the case of customers who paid cash at the box office, and thus did not incur a booking fee, since those customers too would have had the benefit of the box office services without making any payment.

43. Mr Pleming argued that the FTT erred in asking itself whether any of the tasks that NEC carried out in connection with supplying tickets to customers who were charged booking fees in the relevant period were tasks that NEC claimed to have supplied free of charge, at least until it introduced transaction fees in 2002, and excluding those tasks from being with the scope of the supply made by NEC in consideration for the booking fee. He submitted that the starting point for identifying the supply that had been made was what the customers actually received in return for the consideration they provided in the form of the booking fees.

44. We have no doubt that this is the correct approach. But we have no doubt too that it was the approach adopted by the FTT, and that the FTT accordingly made no error of law in this respect. The FTT asked itself, at [122], what it was that NEC supplied for the booking fee. It was mindful of the fact that it was required to consider the question from the viewpoint of the typical customer: it said as much at [127]. Its analysis of the box office services provided by NEC also demonstrates that it considered the question from the viewpoint of customers, including those who received such services but did not pay the booking fee.

45. It is evident that, as part of its evaluation of the essential features of the transaction, the FTT considered the inferences, if any, to be drawn from the fact that the transaction fees were payable from 2002 in respect of services that were already provided by NEC before that time. In that regard, the FTT had to determine whether this meant that those services were at all times remunerated, with the result that in the relevant period, for which the only remuneration was the booking fees, the booking fees were accordingly consideration for those services, or whether those services had simply been provided without remuneration. In addressing this question, we do not consider that the FTT was doing any more than dealing with an aspect of the proper enquiry into what the customers received in return for the booking fee.

46. The second error of approach which Mr Pleming submitted was made by the FTT relates to the FTT's conclusion, at [127], that "the typical customer would

conclude simply that the Booking Fee was charged if he chose to pay by card (though waived in [certain] instances …) but not if he paid by cash (which would entail a visit to the box office)." Mr Pleming argued this was based on a process of reasoning that was not legally sustainable in that it confused correlation with causality. He submitted that the FTT's reasoning involved the following steps: (i) if the customer visited the box office and paid in cash, he would not incur the booking fee; (ii) if the customer booked remotely (over the telephone or online), he would have to pay by card and would incur the booking fee; (iii) therefore the typical customer would conclude that, except in the waiver cases, the booking fee was charged if he chose to pay by card, but not if he paid by cash; and/or that (iv) the service provided by NEC and remunerated by the booking fee relates to the provision of card processing services.

47. Mr Pleming argued that this reasoning is flawed. He said that visiting the box office (and paying by cash) was not the same as booking remotely over the phone or online and that the two methods were not comparable. He submitted that this ability to book remotely, and not the facility of paying by card, was the reason the customer would pay NEC more than the face value of the ticket. His argument was that the fact that the customer had, when booking remotely, (a) to pay by card, and (b) to pay the booking fee, did not mean that the customer was paying the booking fee for the ability to pay by card: payment by card was a practical necessity for remote booking, not an end in itself for which the customer paid. Hence, the booking fee was the consideration for the service of facilitating the remote booking of tickets, including the subsequent provision of the tickets, e.g. by post.

48. However, we have already observed that the FTT asked itself the correct question, i.e. what did NEC supply in return for the booking fee? The fact that the FTT could arguably have adopted the answer put forward by Mr Pleming does not disclose an error of law in the reasoning it did adopt. Although presented as an argument that the FTT adopted a legally unsustainable approach, it seems to us that this submission amounts to nothing more than that the FTT was wrong to reach the conclusion it did on the evidence. We can discern no error of principle in the approach adopted by the FTT. Indeed, it seems to us that the FTT was doing no more than adopting the process of reasoning which was favoured by the Court of Session in *SEC*.

Conclusion not reasonably open to FTT?

49. We turn therefore to HMRC's second ground, i.e. that the conclusion that the FTT reached as to the nature of the services provided by NEC in return for the booking fees was not one that a reasonable tribunal could have reached. That is the *Edwards v Bairstow* hurdle and it is a high one.

50. Mr Pleming argued that, although the FTT properly directed itself that matters had to be examined from the point of view of the typical customer, it reached its conclusion notwithstanding the absence of any evidence from the relevant period that customers were informed that the booking fee was consideration for a "card processing service".

51. Mr Pleming drew our attention to [21] of the FTT's decision, setting out the FAQs available from NEC's website, which represented what Mr Pleming described as the only relevant evidence dating from the relevant period of what customers were told. Mr Pleming argued that the list of operational costs which the booking fee was stated to help to offset demonstrated what facility was being provided for the fee, and that the list notably did not include card processing or card handling. He said that the nearest the FAQs got to such costs was a reference to "credit card commission", which he said would have been readily understood by the reader as a reference to the commission which might be charged by the credit card companies to NEC, and that cost was only one of various overhead costs associated with providing a ticket booking service, or a remote ticket booking service.

52. There is no doubt, as the FTT found, that NEC provided a service which can be described as a ticket booking service, both at its box office and remotely via the internet. It incurred overheads in the provision of those services. It needed to recover those overheads, at least, in the fees that it charged. But the nature of the overheads that are recovered does not in itself delineate the services which are supplied for the fee. For example, the price for which goods are sold in a store has to cover the overheads incurred in operation of the store, such as rent, staff salaries and so forth. But the supply made to the customer in consideration of his payment of the price of purchased goods is of the goods themselves, not of the services of the staff who may answer his queries or the facilities of the premises as a place in which to inspect the choice available.

53. Moreover, although Mr Pleming placed great emphasis on the FAQs, that was only one of the several sources of information available to the customer. The telephone script, which we have noted was found by the FTT to reflect the answers that would have been given to questions from customers during the relevant period, specifically explains the booking fee as being charged in order "to facilitate the processing of credit/debit card payments for bookings" (and the attendant credit risks): see at [17] above. The information about the charge that the customer would receive would depend on how he sought to investigate this.

54. Moreover, we agree with the FTT that the explanation or justification that may be offered by NEC to customers is not determinative; the focus is on the overall commercial reality. Hence, the FTT noted, at [123], that many of the services which HMRC suggested were covered by the booking fee were available to potential customers whether or not they proceeded to purchase a ticket: e.g. information on seat availability, pricing, programming and timing information. As the FTT observed, that demonstrates that it is not correct to regard the booking fee as being in consideration of some or all of those services.

55. The FTT rightly referred in this regard to the *SEC* case. There, the Court of Session emphasised the importance of distinguishing the circumstances when a booking fee was and was not charged. Looking at the matter objectively, from the perspective of the hypothetical typical customer, this seems to us the most relevant issue and the FTT rightly gave this detailed consideration at [124]-[127].

56. If the customer being charged a booking fee when making a remote booking by telephone or over the internet inquired whether he could avoid the fee by coming to the box office to purchase the tickets in person, he would be told that if he sought to pay in the same way by credit card at the box office he would be charged the same booking fee. In our view, that is a very significant factor pointing against the booking fee constituting a charge for remote booking services.

57. Nonetheless, the FTT proceeded to consider the various exceptions to what it described as the "general practice" that a booking fee was charged when tickets were purchased by card. Of those, we think the most relevant are, first, the fact that a booking fee was not charged when a customer purchased a ticket at the box office paying by debit card (i.e. as opposed to credit card) but was charged a booking fee when using a debit card to pay remotely; and, secondly, that a booking fee was charged when a customer purchased a ticket remotely and paid by cheque by post, but not if they paid by cheque at the box office.

58. As to the first (payment by debit card), the FTT noted that this practice changed in August 2003, after the end of the relevant period. Thereafter a booking fee was charged also for payment by debit card at the box office. The FTT analysed the situation in the relevant period as being one where strictly a booking fee was due but was waived. That analysis was based on the FAQs.

59. As to the second (payment by cheque), the FTT noted that this affected only a very small number (around 1%) of transactions, but regarded it as an anomaly which in its view did not undermine the overall position.

60. We have some doubt as to whether the position when payment was made by debit card at the box office should properly be regarded as a waiver, since that places great emphasis on the FAQs, as opposed to being characterised as another anomaly that was corrected in August 2003. Moreover, we note that the position was the same in *SEC*: there, too, customers who paid by debit card at the box office, as opposed to remotely, were not charged a booking fee: see *SEC* at [9]. That did not undermine the conclusion of the Court of Session in that case that the booking fee constituted a charge for card processing services.

61. In view of the situation regarding cheques, the position here was not as clear as in *SEC*, but the parallel is nonetheless very close. In NEC's case, certain purchases were not charged the booking fee even though they were made by card, and certain others, not made by card, incurred the booking fee. The question for the FTT was whether those instances where purchases were made by card and not charged a booking fee, and where purchases incurred a booking fee although not made by card, should lead it to conclude that the booking fee was not paid in return for the card processing services, but for remote booking services as Mr Pleming contended. Either analysis would have to acknowledge exceptions.

62. We agree that there was evidence which, had the FTT been minded to do so, could have entitled it to conclude that the booking fee was charged for the use of a remote booking facility. But that was far from the only conclusion the FTT could

properly reach. Any conclusion would have had to take into account all the evidence. The position cannot be analysed solely from the perspective of the choice of payment method in one particular example of remote booking, i.e. postal booking. Such an analysis would ignore the levying of the charge on virtually all credit card purchases, however made, and from August 2003 virtually all debit card purchases. In those circumstances, the charging of the booking fee on remote transactions can equally, and in our judgment more naturally, be analysed as being a charge on card transactions, subject to exceptions, and with a separate (but identical) charge being made on certain cheque transactions. That was the conclusion reached by the FTT. It was one that was open to it on the evidence, and it cannot be characterised as unreasonable or perverse. It is consistent with the judgment of the Court of Session in *SEC*. Indeed, although not directly relevant to our disposal of the appeal, we would ourselves have reached the same conclusion.

63. For completeness, there are a few further points on which we should add our observations.

64. First, the fact that throughout the relevant period the fee was described as a "booking fee" and not as a "card processing fee" cannot affect the position. It is clear that the label attached to a transaction, or to the consideration for a transaction, cannot be decisive of its nature (see *Bophuthatswana National Commercial Corp Ltd v Customs and Excise Commissioners* [1993] STC 702). Nor does it have any material weight in an economic analysis of a transaction.

65. Secondly, the fact that the same term, "booking fee", was used to describe the standard-rated fee charged by NEC for taking group bookings, which fee was levied irrespective of the payment method used, is no indicator of the nature of the booking fee at issue in this appeal. It is properly regarded as a separate fee for group bookings. The coincidence of the label attached to it does not give it any significance in the analysis of the nature of the fee at issue here. The evidence was that the fee was levied on group bookings, not only irrespective of the payment method used but also irrespective of whether the booking was remote or in person. It was for the use of a specialised service, not accorded in other cases.

66. Thirdly, the fact that there was no relationship between the amount of the booking fee and the cost to NEC of processing the relevant card payments, and that NEC simply charged what the market could bear, is not relevant to the analysis. As the Court of Session in *SEC* concluded, the nature of a service provided for the consideration cannot be determined by reference to the level of correlation between the costs incurred in running a business and the fee charged. We do not accept that a typical consumer or customer would form a view of the nature of what was supplied to him or her by reference to a comparison of the amount of the fee against an assumed cost of the supplier providing the service. The presence or absence of correlation between costs and consideration is not a material factor. What is required is a direct link between the consideration and the supply: see *Staatssecretaris van Financiën v Coöperative Aardappelenbewaarplaats* (Case C-154/80) [1981] ECR 445.

67. Finally, we should mention that Mr Pleming sought to place some reliance on the current version of NEC's publicly accessible website. Such material is not of course referable to the relevant period, and it was not before the FTT. It reveals that NEC no longer charges booking fees or transaction fees, but instead charges an administration fee on each ticket purchased and a fulfilment fee on the entire order, regardless of the number of tickets purchased. The fulfilment fee is expressed as contributing towards the cost of delivering the tickets, and is not charged if a ticket is purchased and collected at the box office at the same time.

68. It appears (but we did not of course receive any evidence in this respect) that the charging structure now adopted by NEC may be in response to the introduction, from 6 April 2013, of the Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012 No 3110), which generally, but subject to certain exceptions, limits charges for means of payment to the trader's cost in that respect. Whatever the reason for its introduction, it represents a different business model to that operated by NEC in the relevant period, and in other periods in which the booking fee was charged. It has no relevance to the question before the FTT, and cannot cast doubt on the conclusion reached on the facts as applicable at the material time.

Decision

69. We accordingly dismiss HMRC's appeal on the Supply issue.

Direction

70. We are satisfied on the basis of the parties' written submissions that it is therefore appropriate to make a reference to the ECJ for a preliminary ruling on the Exemption issue. This appeal is now stayed for not more than 28 days from the date of release of this decision to enable the parties to reach agreement, so far as possible, on the form of the proposed questions for reference and accompanying Schedule. A hearing will be provisionally listed at the end of that period, in case of disagreement, although we would anticipate that we shall be able to settle the final form of the Order for reference on the papers.

THE HON MR JUSTICE ROTH

UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 20 January 2015