TC02695

Appeal number: MAN/2004/33

VAT – financial services – exemption – Article 13B(d)(3) Sixth VAT Directive - Group 9 sch 5 VATA 1994 - booking fees on concert ticket purchases – identity of supplier - nature of services supplied – whether for processing of payment by credit and debit cards - whether debt collection service

FIRST-TIER TRIBUNAL
TAX CHAMBER

NATIONAL EXHIBITION CENTRE LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE PETER KEMPSTER
MR TERENCE BAYLISS

Sitting in public at Birmingham on 20-23 June 2012

Mr Jonathan Peacock QC, instructed by Deloitte LLP, for the Appellant

Mr Alan Bates of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("NEC") appeals against a decision ("the Disputed Decision") dated 27 February 2003 by the Respondents ("HMRC") to refuse to repay output tax allegedly overpaid in the period 1 August 1999 to 30 April 2002. NEC contends that the output tax is repayable because certain charges it made to its customers in relation to ticket booking fees were correctly exempt supplies, being the provision of financial services.

Facts

2. The following facts were either formally agreed between the parties or are uncontentious.

3. NEC is owned by Birmingham City Council. NEC owns and operates the National Exhibition Centre and other venues in Birmingham (the LG Arena, the NIA and the ICC), which are used to stage trade and public exhibitions, sporting events (athletics, tennis etc), concerts (pop, rock, classical etc) and other events including comedy, ballet and worship.

4. NEC typically hires its venues to third party promoters and sells tickets to customers for the promoters' events on behalf of the promoters through its box office. Since 2007, NEC's box office has been branded as "The Ticket Factory".

5. NEC operates in direct competition with other box office businesses (e.g. Ticketmaster) for allocations of event tickets. Its operations are not restricted to its own venues, and on occasion, it will seek or be offered the opportunity to sell tickets for events at other venues. Equally, other box office businesses may seek allocations of tickets to events held at NEC's venues.

6. In selling tickets through its Ticket Factory brand, NEC acts as a ticket-selling disclosed agent for events held at its own venues. For tickets that it sells for events at other venues, it acts either as disclosed agent or as principal. When it acts as agent, NEC does not take title to the tickets, and the money from ticket sales is collected on behalf of the principal, the promoter. The claim before the Tribunal in these proceedings relates only to events held at NEC's own venues.

7. NEC runs its own call centre with a national rate ticket hotline number. NEC also sells tickets via its website. Alternatively, customers can buy tickets over the counter, or by post.

8. 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 the 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 ticket sale transactions carried out over the telephone and the internet. They are set at around 10% of the price of the ticket, or higher for events where the market will bear a higher amount. The only method of payment accepted by NEC for sales by telephone or internet is credit card or debit card.

(3) "Transaction Fees" are also charged to the ticket-buying public by NEC, in addition to the Booking Fee. NEC describes this charge as follows on its website: "A transaction fee is a one-off charge per order. It covers the administration costs and overheads associated with each ticket sale."

9. The claim before the Tribunal in these proceedings relates only to Booking Fees in cases of credit card and debit card payments.

10. When a ticket is purchased over the counter then the Booking Fee is only ever levied when payment is made by credit card or debit card, including where the credit or debit card is used as part payment.

11. When a ticket is purchased by post by cheque or postal order, a Booking Fee was charged until 2007, but has not been charged since then. When a ticket is purchased by gift voucher (which can be done over the counter or by post), no Booking Fee is charged.

12. NEC generates the tickets at its head office and sends them by post or electronically to the customer, having included any additional promotional material. If there are fewer than three days to the event, NEC will arrange for the non-electronic tickets to be collected by the customer. Special arrangements may also be made for the tickets to be collected on the day of the event. There is no reduction in any Transaction Fee charged to take account of the tickets not being posted. NEC’s staff will be at the event venue in order to assist those with lost tickets, those that have turned up at the incorrect venue, and to issue the tickets for collection that day (as described above). These after-sales services are identical for the purchases of tickets incurring a Booking Fee and those that do not, and are extended to holders of tickets purchased through other box office suppliers.

13. NEC has always treated all of Facility Fees, Booking Fees and Transaction Fees as consideration for standard-rated supplies for the purposes of its VAT returns. However, NEC now considers that the Booking Fees levied in respect of credit card and debit card payments are consideration for a supply of payment processing services which is exempt from VAT. NEC has submitted claims for repayment of overpaid output tax in respect of the Booking Fees as detailed in the table below. HMRC disagree and have refused to pay those claims.

Period	Date of claim	Amount of claim (£)
1 February 1976 to 31 July 1996	22 January 2008	1, 785,115.50
1 August 1999 to 30 April 2002	**27 November 2002**	**636,911.74**
1 May 2002 to 30 April 2004	31 May 2005	608,518.86
1 May 2004 to 30 April 2006	24 July 2007	630,991.28
1 May 2006 to 31 October 2007	2 April 2008	554,641.39
1 November 2007 to 31 October 2009	14 April 2010	838,307.85

14. The claim before the Tribunal in these proceedings relates only to the Disputed Decision, which is the second claim above. However, the parties consider that the conclusions reached in this appeal should be treated as determining all of the claims listed in that paragraph. The parties do not ask the Tribunal to rule on issues of quantum, as the parties believe they should be able to resolve those issues between themselves.

15. During the hearing NEC confirmed (in a letter from its Chief Operating Officer) that the amounts covered by the VAT claim before the Tribunal related to VAT on Booking Fees for concerts, and not for exhibitions, in the period 1999 to 2002. Also, that its claims in respect of other periods also related to VAT on Booking Fees for concerts, and not for exhibitions.

Law

16. Provisions are cited as in force at the dates relevant to the claim in dispute in these proceedings. The exemption from VAT for financial services is contained in Art 13B of the Sixth EC VAT Directive and Group 5 sch 9 VAT Act 1994 ("VATA").

17. Art 13B(d) of the Sixth EC VAT Directive, which has direct effect for the purposes of domestic law, states so far as relevant:

> "Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse;
>
> …
>
> (*d*) the following transactions:
>
> …

> 3 transaction, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring;"

18. Section 31 VATA provides "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …". Item 1 of Group 5 sch 9 VATA specifies "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."

19. In this decision notice the following abbreviations are used for reference to some relevant case law:

Abbreviation	**Court**	**Case**	**Citation**
SDC	ECJ	*Sparekassernes Datacenter v Skatteministeriet*	[1997] STC 932
Bookit (first Tribunal decision)	VAT Tribunal	*Bookit v CCE*	(2004) V18626
Bookit (second Tribunal decision)	VAT Tribunal	*Bookit v CCE*	(2004) V18856
Bookit (High Court)	High Court	*Bookit v CRC*	[2005] STC 1481
Bookit (CA)	Court of Appeal	*Bookit v CRC*	[2006] STC 1367
SEC	Inner House of the Court of Session	*Scottish Exhibition Centre Ltd v RCC*	[2008] STC 967
Secret Hotels	Upper Tribunal	*Secret Hotels2 Ltd (formerly Med Hotels Ltd) v RCC*	[2011] STC 1750
T-Mobile (Tribunal decision)	VAT Tribunal	*T-Mobile (UK) Ltd*	(2007) V20521
T-Mobile (ECJ)	ECJ	*Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v CRC*	[2011] STC 316
Nordea	ECJ	*Nordea Pankki Suomi OyJ*	[2011] STC 1956
AXA (High Court)	High Court	*RCC v AXA UK plc*	[2008] STC 2091
AXA (CA)	Court of Appeal	*RCC v AXA UK plc*	[2012] STC 754

Evidence

20. As well as considering several bundles of documents we took witness evidence as follows:

(1) Mr Phillip Mead adopted and confirmed a witness statement dated 29 February 2008 and gave oral evidence. Mr Mead was appointed managing

director of NEC in 2007, thus his appointment post-dated the events relevant to the Disputed Decision. However, Mr Mead had previously been an executive at the Scottish Exhibition and Conference Centre which had been the subject of a similar VAT dispute during his time there (and which company was the taxpayer in one of the main case law authorities relevant to these proceedings). He had also been chairman of The Arenas Association – the trade association for large arena operators. Mr Mead was thus able to speak as to the general position of arena operators in relation to the matters in dispute. Mr Mead also confirmed that he agreed with the contents of a witness statement dated 29 February 2008 by Mr Saadat Afzal. Mr Afzal was general manager of NEC from 1990 until recently. NEC had decided not to require Mr Afzal to attend as a witness, as he now held a new appointment unconnected with NEC and was busy with the affairs of his new employer. NEC acknowledged and accepted that this denied HMRC the opportunity to cross-examine Mr Afzal.

(2) Mr Peter Monks adopted and confirmed a witness statement dated 30 May 2012 and gave oral evidence. Mr Monks is currently assistant general manager of NEC and has worked there since 1998. Like Mr Mead, Mr Monks confirmed that he agreed with the contents of Mr Afzal's witness statement.

(3) For HMRC, Mr Ian Chalmers adopted and confirmed a witness statement dated 22 August 2011 and gave oral evidence. Mr Chalmers was one of the HMRC officers dealing with NEC's VAT affairs.

Documents

21. In evidence there were screen-prints of pages from NEC's website showing the content of a "FAQ" page on several dates. As established in oral evidence (described below) the exact wording of this page varied over time – and HMRC suggested such variations might be material - but we take as typical that available to users on 10 March 2002 (being a date within the period of the claim in the Disputed Decision under appeal):

> **"The Cost of Booking**
>
> *Ticket Prices*
>
> Ticket prices are set by the (independent) Promoters and Organisers of the concerts and events which are staged at the venues of The NEC Group. The Promoters and Organisers distribute tickets for sale through various Ticket Agents and in effect The NEC Group Box Office simply acts as another one of these Agents.
>
> *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."

22. In evidence there were "terms & conditions" published at the box office and online. Although the version in evidence was dated June 2003, Mr Monks believed it was similar to earlier versions. It included:

"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"

23. In evidence there was a "phone script" given to box office staff to assist them in answering questions from customers – NEC was unsure of the date this was issued:

> "Booking Fee FAQ and Phone Script
>
> Customers can often find booking fees and transaction fees confusing when purchasing tickets. When breaking down the fees associated with a booking and you are asked by a customer to explain what these fees are for, please use the below explanations to assist with this. Please also reassure the customer that we regularly review our booking and transaction fees to ensure The Ticket Factory offers customers better value than other ticket agents and our policy is to always clearly identify any applicable fees.
>
> Information regarding our booking and transaction fees is also available for customers on The Ticket Factory website.
>
> *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."

24. In evidence there were examples of typical contracts between NEC and promoters. Different forms of contract had generally been used for (i) concerts, and (ii) exhibitions and other events.

25. A typical contract for a concert contained the following provisions:

> "The above [concert] is being promoted at the National Exhibition Centre. The purpose of this Agreement is to appoint NEC as an agent for the sale of all tickets for the event, The appointment is made and accepted subject to the following terms and conditions:-

1 NEC will arrange for the production of the tickets to the standard specification decided by NEC as detailed in the Licence Agreement and including NEC's terms and conditions of sale as from time to time in force. The ticket prices will be inclusive of VAT and any booking fee the promoter may wish to make (as made known in writing)

2 NEC does not have any liability to account for VAT on gross tickets sold through NEC Limited. The Promoter is responsible for the accounting of VAT to HM Customs & Excise on the value of gross tickets (excluding booking fee charges that NEC levy's under clause 3 of the agreement)

3 NEC reserves the right to charge a booking fee on all tickets sold and to appoint subagents. The number of tickets sold will be limited to six per person. The booking fee will be as follows:-

Ticket Prices	Phone Booking Fee (Per ticket)
£9.99 & under	£1.00
£10.00 - £19.99	£2.00
£20.00 - £29.99	£3.00
£30.00 and over	10% of ticket price or as advised

The Booking Fee will only apply to telephone, credit card and postal bookings and tickets purchased through sub-agents.

…

10 The Promoter agrees to keep NEC fully indemnified in respect of all claims, proceedings, demands, costs and expenses brought or made against NEC or born or incurred by NEC and which in any way arise out of the printing and sale of tickets by NEC in accordance with this Agreement including, but not limited to, any postponement or cancellation of the event and dishonouring of cheques, postal orders and other methods of payment, provided that this indemnity shall not apply to matters which are caused by negligence on the part of NEC or by a failure by NEC to observe its obligations under this Agreement."

26. A typical contract for an exhibition/event contained the following provisions:

"2.1 The Ticket Factory [ie NEC] is appointed by the Organiser [ie the promoter] irrevocably to act as agent for the Organiser to offer for sale and sell tickets for the Event in accordance with the terms of this Agreement and on the basis that all such tickets sold evidence a contract as between the purchaser of the Ticket ('Customer") and the Organiser ("Customer Contract"), and not as between the Customer and the Ticket Factory. The Ticket Factory shall collect the proceeds of sale of all such Tickets on behalf of the Organiser and account to the Organiser therefor in accordance with Clause 8.

…

> 4.2 The Organiser hereby authorises The Ticket Factory to collect the Booking Fee and the Transaction Fee for The Ticket Factory's own account in addition to any funds collected by The Ticket Factory on behalf of the Organiser in relation to Ticket Sales."

27. "Chargebacks" occur where a credit or debit card issuer returns a transaction as unpaid to a merchant acquirer. NEC's merchant acquirer was Streamline (part of the NatWest group) and its written guidance included the following explanation:

> "**Why does a chargeback occur?**
>
> Chargebacks can arise for many reasons some of which are detailed below: -
>
> - errors in processing or procedure e.g. an invalid account number was quoted on the transaction receipt
> - fraud-related e.g. the genuine cardholder did not participate in the sale
> - cardholder disputes e.g. the goods delivered differed from the goods ordered
> - documentation-related e.g. failed to respond to a Request for Information letter within the stated timescales
> - authorisation-related e.g. a valid authorisation code was not obtained and the transaction is over the floor limit of which you have been advised
>
> Credit card and debit cards do not offer a guaranteed form of payment for goods or services. Every transaction undertaken can be subject to return by the card issuer even where authorisation had been obtained and all standard sales procedures, outlined in your Streamline contract, have been followed. The chargeback process is regulated by the Card Schemes; Visa International and MasterCard International. Liability for the chargeback must be accepted unless it can be proven that the chargeback is invalid in accordance with the Card Scheme rules.
>
> Where a chargeback has occurred due to a dispute between you and your customer (the cardholder) and no resolution between the two parties can be reached via the Member Banks, the Card Scheme has overall authority to decide with whom the liability for the transaction will lie. At this point we would have no further recourse to the Card Issuer via the Card Scheme rules."

Mr Afzal's evidence

28. As already stated, both Mr Mead and Mr Monks confirmed that they agreed with the contents of Mr Afzal's witness statement, and both were cross-examined on the contents thereof (as well as their own statements) by Mr Bates for HMRC. We cite in the Appendix to this decision notice the relevant part of Mr Afzal's witness

statement. Also as already stated, NEC accepted that Mr Afzal's nonappearance denied HMRC the opportunity to cross-examine Mr Afzal.

Mr Mead's evidence

29. Before joining NEC Mr Mead had been with the Scottish Exhibition and Conference Centre ("SECC") for ten years, including responsibility for the SECC box office. Prior to that he had also worked for GMEX in Manchester and the Cardiff International Arena. He had also been chairman of The Arenas Association.

30. Mr Mead stated there was a common business model for all arena operators. The operator would hire a venue to a promoter; the promoter would pay for the venue and bear the other costs of the event (eg paying the acts appearing); the promoter received the ticket receipts; thus the promoter took the risk on the event. The operator would secure an allocation of tickets from the promoter; this was important for the operator's successful marketing of the venue to its customer base of people who attended events at the venue; there would be a contract between the promoter and the operator governing sale of tickets. The operator would generate income from hiring the venue (the Facility Fees charged to the promoter) and from Transaction Fees and Booking Fees charged to the customer. NEC provided two separate distinct services to two separate categories of people, namely to promoters and to customers.

31. Mr Mead endorsed the explanation given by Mr Afzal in his witness statement concerning the rationale and operation of the Booking Fees. In Mr Mead's experience the charging of booking fees was clear-cut: at all of Manchester, Glasgow and Birmingham the fee was charged only if a card was used for payment – a customer could buy a ticket for cash without paying a booking fee. While some customers might feel the fee was high for processing a card payment, that related to the level of the fee not what it was charged for. The level of the fee was set at what the market would bear.

32. NEC did for its Booking Fees exactly what SECC did for its booking fees. The only small differences he could identify were (i) SECC's booking fee revenue from group bookings was even smaller than that of NEC; and (ii) SECC did not charge a booking fee for payments by cheque (or postal order) through the post.

33. Mr Mead estimated that at SECC around 70% of SECC ticket sales was accounted for by credit or debit card payments in 2001, rising to 90% by 2006. SECC is a competitor of NEC and if SECC enjoyed exemption from VAT on its booking fee income but that was denied NEC then that would distort competition between the two box offices. Mr Mead considered that there is almost no difference in the operation of the Booking Fee payments and processes between NEC and SECC, including the interaction between the card issuer, merchant acquirer and box office. In particular, the way in which NEC obtained authorisation codes from issuing banks (ie via its merchant acquirer, Streamline) and then transmits those codes to the banks with transaction details (again, via Streamline) is exactly the same as the way SECC has always done that. SECC obtained authorisation codes from the merchant acquirers,

not from the card issuers direct; such a link was practically impossible and HMRC had misunderstood the process followed by SECC, which Mr Mead was clear on.

34. Transaction Fees had been introduced by NEC in 2002. It was standard business practice at other venues and he was surprised that NEC had not done it before – NEC was missing a trick by not charging Transaction Fees. Transaction Fees were charged for fulfilment and postage of tickets – putting the correct tickets into addressed envelopes and posting them. If a customer lost a ticket and it had to be reissued then usually no charge would be made, on customer care grounds, but if a charge was made then it would be a Transaction Fee. The box office had to be manned to cope with queries for other events, so the provision of staff on the day of the event was not tied to that particular service.

35. In cross-examination Mr Bates for HMRC asked why, during the period under appeal, Booking Fees were also charged to customers paying by cheque – how could that relate to card processing services? Mr Mead replied that only a tiny minority of customers were affected and that small element of the Booking Fees had been excluded from the claim. So few customers used this route that it was stopped around 2007. It was charged to persuade customers not to use cheques.

36. Also in cross-examination Mr Bates for HMRC asked why the FAQ described several services covered by the Booking Fee as including labour and postage? Mr Mead replied that the public perception was that a booking fee was expected. The typical Transaction Fee was around £2 to £25 per transaction, while the Booking Fee was around £6 to £50 per ticket. The fees were set at what the market would bear and what competitors charged. The relationship between the level of fee and the service provided would vary across shows. There were proposals to place statutory controls on the levels of booking fees.

Mr Monks' evidence

37. Mr Monks confirmed that he could speak as to events since 1998 when he joined NEC. In relation to events before 1998, he confirmed that his impression was that past procedures were no different from the way things were done in 1998.

38. Mr Monks agreed with the description of the Booking Fees given by Mr Afzal in his witness statement.

39. He was in no doubt that the Booking Fee was income of NEC, not an amount collected on behalf of the promoter. Also, that position was generally understood by customers – for example, the advice given by the consumer organisation "Which" on its website was as below, and specifically advised to pay cash to avoid a fee for use of credit cards:

> "**Ticket service charges**
>
> Official ticket sellers generally act on behalf of event promoters, venues or performers. The typical way that most ticket sellers and secondary websites earn money is through the additional service fees

they charge customers. These extra service charges create a contract between you and the ticket seller, so they're obliged to get you your tickets in time.

It's not only ticket agents that charge service fees. Theatres can also add a service charge if you use their online or phone services to book tickets. The same applies for many major event venues.

Ticket seller charges

There are typically two types of extra fees charged by ticket sellers on top of a ticket's face value:

- A booking fee or service charge for every ticket in your order.
- A postage charge for each complete order.

There is no standard way to calculate a service charge for particular tickets. Promoters and agents agree on the fees for each individual event.

Even opting to collect your tickets at a venue's box office rather than having them delivered to your door often attracts a charge from official ticket sellers, as does email delivery of tickets where you print them out yourself, such as Ticketmaster's Ticketfast service.

Avoid ticket service charges

Often, the first a consumer hears about a ticket seller's service charges is when they go through to a sales site or phone line to book the tickets, so don't rely on promotional advertising to give you the full price you'll pay when you buy tickets.

There should always be an option to buy tickets at face value without paying extra service charges. For many events the only way to avoid paying any extra charges is to turn up at the venue's box office. Even then, pay cash to avoid a service charge, as some venues will charge you a fee for paying by credit card.

The term used to describe extra charges caries among different ticket sellers. For example, a booking fee or service charge can also be a 'processing fee' or 'commission'. The delivery fee can also be known as a "transaction fee' or 'order processing fee'."

40. The level of the fees was determined by market conditions. The Booking Fee was not linked to the costs of obtaining payment by card – in particular, there was no connection between the Booking Fee and the charges made by Streamline. The Transaction Fee was introduced in 2002 as a method of generating additional income. For tickets for "hot" events some customers would not care about the level of fees.

41. The suggestion by HMRC that the Booking Fee covered certain services other than card processing was incorrect:

(1) *Providing information on ticket availability, performance times and ticket pricing and seating* – This information was all available free-of-charge on the website or over the phone, even if the customer decided not to proceed to a ticket booking. The Booking Fee was not charged for this.

(2) *Allocating available seats to the customer* – this service was provided also to a person buying tickets for cash at the box office. The Booking Fee was not charged for this.

(3) *Issuing the tickets* – this was covered by the Transaction Fee. The Booking Fee was not charged for this.

(4) *Making arrangements with the promoter for taking and passing on payments* - The Booking Fee was not charged for this.

42. For telephone bookings the fees would be mentioned when the customer said they wanted the tickets, as it was necessary to state the full amount payable. There was a recorded message that referred customers to the website for FAQs on fees and other matters, but Mr Monks had no knowledge on how many customers used that information.

43. Although there was no direct statement to the customer that the Booking Fee related to card processing, it was clear that a customer could avoid the Booking Fee by appearing in person and paying in cash.

44. In cross-examination by Mr Bates for HMRC Mr Monks replied:

(1) He accepted that the wording on the webpage varied over time but felt that the terms and conditions were broadly the same for all customers.

(2) He did not accept that the reference on the website to internet development implied that the purpose of the Booking Fee was to cover internet costs.

(3) The reference to a "postage fee" in the Terms & Conditions was to extra costs such as special form of delivery, not just ordinary postage.

(4) The practice on charging fees on group bookings varied from promoter to promoter.

(5) He acknowledged that until 2007 Booking Fees were charged on cheque payments.

(6) It was correct that Transaction Fees were charged per transaction while Booking Fees were levied per ticket, but that was general industry practice and the customer expected this.

(7) The "CC Admin Charge" provided for in the typical exhibition contract was just part of the charge made to the promoter by NEC, designed to recoup some of the costs of providing the card terminals and so on. It was broadly equivalent to the charge made to NEC by Streamline.

(8) In the past Booking Fees had been charged where tickets were sold through a subagent – an example would be a Tourist Information Centre. It would not be feasible for subagents to sell for cash and remit to NEC – a card would have to be used by the customer.

(9) The reference to a "booking fee" for the promoter in the typical concert contract was just a way for the promoter to carve out a fee before monies were split with the artiste. It was not related to NEC's Booking Fees.

(10) The reference in the terms & conditions to different rates of fees between phone and counter bookings reflected the fact that counter booking customers collected the tickets in person and so NEC did not incur postage costs. When the Transaction Fee was introduced later, this covered this aspect.

(11) The rationale for waiving the Booking Fee if car parking was purchased was simply to promote "upselling" to customers while they were receptive – it was good business to sell car parking in advance. The rationale for waiving the Booking Fee on purchases and redemptions of gift vouchers was to encourage uptake of gift vouchers.

(12) On the mechanics of card processing, it was correct that there was no direct link between NEC and the customer's card issuer. NEC's booking system (Audience View) was linked to NEC's merchant acquirer (Streamline) by an interface called Servebase. If NEC had wished to know the identity of a customer's card issuer then that was apparent from the first four digits of the card number. Transactions were batched and sent to Streamline. Streamline would electronically transfer funds to NEC's bank account (less its own fees).

(13) The risk of chargebacks was real and substantial. Card fraud was an everyday risk for all businesses. Assuming a typical booking fee of 10%, the exposure on a £30 ticket was £33 as against a Booking Fee of £3. While the strict contractual position between the promoter and NEC might be that NEC was liable to chargebacks only if it was negligent, in practice promoters never accepted liability for chargebacks and would expect NEC to bear the full costs.

Mr Chalmers' evidence

45. Mr Chalmers confirmed that HMRC's consideration of NEC's claim and the decision to refuse the claim were determined in accordance with the contents of HMRC Business Brief 18/06. BB/18/06 was issued in 2006 after the decisions in *Bookit* and *SECC* and had replaced earlier guidance (in BB/17/98). BB/18/06 included the following:

> **"Summary**
>
> The House of Lords has refused HMRC's petition to appeal the Court of Appeal judgment in *Bookit* … and HMRC will not be seeking leave to appeal the judgment of the Court of Session in the case of *SEC* …
>
> The effect of the end of litigation in these two cases is that debit and credit card handling services provided by agents are VAT exempt where a key identified component is present in the service.
>
> Claims held pending the outcome of these cases will now be reviewed for payment and any assessments raised by HMRC for under-declared tax will be withdrawn where appropriate.
>
> **Background**

The *Bookit* case concerned the supply of Odeon cinema tickets. Customers wishing to purchase cinema tickets remotely, eg by phone or Internet, were redirected to Odeon's agent, Bookit, who charged the customer an additional fee over and above the price of the ticket for their service. Bookit contended this fee was for credit or debit card handling services and was VAT-exempt as a transaction concerning payments or transfers.

The tribunal found that Bookit was providing a taxable card handling service to the customer in return for the additional fee. The High Court, in overturning the tribunal's decision, found that Bookit was carrying out an exempt card handling service.

The Court of Appeal, in upholding the High Court judgment, found that the supply by Bookit to the customer included the following components—

— obtaining the card information with the necessary security information from the customer;

— transmitting that information to the card issuers;

— receiving the authorisation codes from the card issuers; and

— transmitting the card information with the necessary security information and the card issuers' authorisation codes to Girobank.

The Court found that the tribunal had been correct in finding components (i) to (iii) to be taxable, but because the fourth component was part of Bookit's service to the customer, and had the effect that funds were transferred to its account with Girobank, exemption was available to Bookit.

The *SEC* case concerned the supply of tickets to events held in the Scottish Exhibition and Conference Centre in Glasgow. SEC acted as agent of the promoter in the selling of tickets and charged an additional fee to customers on tickets that were paid for by credit and debit card. SEC contended this fee was for card handling services and was VAT exempt.

The tribunal found in HMRC's favour, stating that SEC was providing a single taxable booking service, with the taxable card handling service representing an ancillary aspect enhancing the main service. The Court of Session overturned the tribunal decision, finding that SEC was carrying out an exempt card handling service. The Court based its judgment on the decision of the Court of Appeal in *Bookit* and on an assumption of similar facts. HMRC do not therefore draw a distinction between the two judgments.

Implications of the judgments

The judgments have provided further guidance on when a service of credit or debit card handling by an agent is VAT-exempt. If an agent, acting for the supplier of the goods or services, makes a charge to the customer over and above the price of the actual goods or services, for a separately identifiable service of handling payment by credit or debit card, and that service includes the fourth component listed above, then the additional charge will be exempt under VATA 1994 Sch 9, Group

5, item 1. However, where an agent provides some or all of the first three components without providing the fourth, the charge is taxable at the standard rate of VAT.

Charges levied on the cardholder for payment by credit and debit card in any other circumstances will not fall within the exemption for financial services and the normal VAT treatment will apply.

The judgments do not alter the general principle that the taxable amount for a supply of goods or services includes all payments which the supplier requires the customer to make as a condition of receiving the supply. If, for example, a supplier of goods or services requires a customer to pay an additional charge, above that of the price of the actual goods or services, for payment by credit or debit card, that charge is further consideration for the purchase of those goods or services and VAT is payable on that amount in accordance with the VAT treatment of the goods or services.

Information on making claims or adjustments

Agents supplying card handling services that meet the criteria set out above, and who have been treating the charge as taxable at the standard rate, should exempt such services from the date of this Business Brief.

…

There is no requirement to make adjustments in respect of earlier supplies. However, where businesses wish to make a claim to HMRC for a repayment of output tax incorrectly paid, they may do so, subject to the conditions set out below, …

HMRC will review claims by businesses for exemption of supplies of debit and credit card handling services, and businesses can expect requests to be challenged vigorously where there is evidence of underlying artificiality or abuse."

46. In particular, Mr Chalmers had examined (i) whether NEC carried out the four actions specified in BB/18/06 when processing card payments; and (ii) whether NEC carried out any activities other than processing of payments from customers booking tickets. He had ascertained that NEC received authorisations for the use of the credit card being used from NEC's own merchant acquirer bank (the Streamline division of NatWest) and not by contacting issuers of the credit card directly and receiving the relevant authorisation information from them. He understood that direct contact with the customers' card issuers was one of the four necessary components found by the *Bookit* case; he accepted that was not stated in terms in BB/18/06.

NEC's case

47. Mr Peacock for NEC submitted as follows.

48. The Booking Fees are consideration for a payment handling service, being the processing by NEC on behalf of the customer of the customer's payment to the promoter for the ticket. That was an exempt supply pursuant to Article 13B(d) Sixth Directive. It is settled law that the activity of transferring information to banks and/or

merchant acquirers for onward transmission to credit card companies to call for the transfer of money from bank accounts or credit card companies to the bank account of a service provider falls within that exemption – regardless of whom the person transferring the information is acting for.

49. In their amended statement of case HMRC advanced three alternative arguments why the Booking Fees are consideration for standard rated supplies.

> (1) *Direction of Supply Issue*: HMRC argue the Booking Fees are charged for a taxable supply made by the promoter to the customer, with NEC acting merely as an agent of the promoter in the collection of the sums charged; to the extent that NEC retains Booking Fees from the sums it accounts for to the promoter, such sums are for a single supply by NEC to the promoter or, at least, not an exempt supply.
>
> (2) *Single Supply Issue*: HMRC argue there is a taxable supply by NEC to the customer which is an overall (ie single) ticket booking service.
>
> (3) *Exemption Issue*: HMRC argue the Booking Fees are consideration for a separate supply by NEC to the customer but such supply does not fall within the scope of the exemption from VAT.

Direction of Supply Issue

50. There were two supplies – one by the promoter for the ticket price (which NEC collected as agent) and a second by NEC (on its own behalf) for the various fees including the Booking Fees.

51. All the evidence received by the Tribunal pointed to the fact that NEC collected the Booking Fees for itself, not as agent for the promoter. The FAQ webpage of NEC's website as displayed in March 2002 (see [21] above) clearly distinguished "Ticket prices" from "Booking fees" and stated, "Booking Fees are charged by The NEC Group Box Office …". There was similar or identical wording on the FAQ webpage of NEC's website as displayed in December 2003 and July 2004. That alone clearly informed the customer of the correct position. Although the wording on the website had changed from time to time, HMRC had not produced anything to show that customers had been led to believe that NEC collected the Booking Fees as agent for the promoter; there was no such material because that would never have been stated to a customer as it was clearly not NEC's understanding of the position.

52. Mr Mead's evidence was that NEC operated in relation to Booking Fees in the same way as had SECC when he was at that venue. SECC was the taxpayer in *SEC* and there had been considerable scrutiny of the operations of SECC. The taxpayer's appeal was dismissed by the VAT Tribunal but that was reversed by the Inner House of the Court of Session. The Inner House stated (at [28]) that on the basis of the evidence in that case:

> "Both in fact and in law the appellant provides two separate services to customers who pay for tickets by credit card or debit card. The appellant acts as agent for the promoter in selling the ticket, and as

> principal in charging the booking fee for taking the steps necessary to effect payment by credit card or debit card. While the customer might not be aware of the detail by which this might be effected, he or she is aware that there are two charges, one for the price of the ticket and the other for the facility of payment by credit card or debit card."

53. Although it was accepted that *Secret Hotels* said that one contract could not be judged by reference to another that was unknown to a party to the first contract, it was important to note that the contracts between the promoters and NEC also maintained the same position – there was no contradiction. Further, there was no discord with commercial realty - the witness evidence was unequivocal that all arena operators followed the same pattern with the same result. This also accorded with the findings of the court in *SEC*. The incorrect analysis proposed by HMRC was artificial and distorted the economic reality.

Single Supply Issue

54. The evidence before the Tribunal as to what was supplied by NEC supported NEC's contention that the Booking Fees were consideration for a payment handling service.

55. The correct approach to be adopted was given by Lord Rodger in *College of Estate Management v RCC* [2005] STC 1597 (at paragraph 12):

> "The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some over-arching single supply. According to the Court of Justice in *Card Protection* (at para 29), for the purposes of the directive the criterion to be applied is whether there is a single supply 'from an economic point of view'. If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the VAT system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction."

56. While it was accepted that the levying of a separate fee was not determinative (see ECJ in *Card Protection Plan v CCE* [1999] STC 270 at paragraph 31), it was highly relevant and pointed to there being a separate service. While it was accepted that the Transaction Fees were not introduced until 2002, that was no help in looking at what was the nature of the service performed for the Booking Fee – merely that prior to 2002 the services covered later by the Transaction Fee were absorbed as an overhead.

57. On the facts of the current case it was artificial to say that the Booking Fees and the Transaction Fees should all be treated as consideration for a single standard rated

supply. HMRC chose to ignore those facts and argue instead that NEC provides a single overall booking service given for both the Booking Fees and the Transaction Fees. HMRC had run the very same argument unsuccessfully in *Bookit* and *SEC*.

58. The Booking Fees were charged where customers chose to pay by card. Other services were provided by NEC as part of its ticket booking service but those were either provided free or were charged for separately. An example of free services would be answering telephone queries as to seat availability, mailing event details, or allocating seats for a specific performance. Where other services were charged for – for example, posting of tickets - a separate Transaction Fee was levied. So the Booking Fees must relate to the financial service of effecting payment; there was no greater multiple or composite supply by NEC to the customer.

59. It was accepted that there were minor instances where Booking Fees had, at least at some points in time, been charged other than on card payments – for example, on certain cheque payments – or had not been charged on card transactions – for example, where a gift voucher was being redeemed. Those exceptions had been explained fully in the witness evidence, and were in any event immaterial.

60. Again, Mr Mead's evidence was that NEC operated in relation to Booking Fees in the same way as had SECC when he was at that venue. In *SEC* the Inner House stated (at [1]) the relevant question on this issue to be "whether, on a proper view of the evidence, the booking fee is charged for the facility of paying by credit card or by debit card, and not for some other facility". After reviewing the evidence received by the VAT Tribunal, the Inner House held that the VAT Tribunal had erred in its conclusions. The VAT Tribunal's view as summarised (at [13]) by the Inner House was:

> "The primary issue for determination is the extent of the agency in terms of which the appellant acted for its promoter customers … The "box office" and telephone booking service maintained by the appellant is extensive. The contractual relationship with the promoter does not require this … The reason for this service in our view is the appellant's eagerness to promote itself as a popular venue and anxiety to develop a "customer loyalty" and "customer base" to better enable it to sell to promoters space for concerts and other entertainment … We note that the cost of this service as represented by the fee exceeds substantially the credit card charge on the transaction … It follows in our view that the range of services provided by the appellant at the box office and by telephone extends well beyond its role as agent of the promoter which is (simply) for the sale of tickets. These services are undertaken by the appellant as a principal and in its own interests … In the present case there is a booking service offering extensive customer support with a view to promoting the appellant's business and with the credit card facility representing an ancillary aspect enhancing the main service."

61. The Inner House (at [14]) stated:

> "In our opinion the tribunal erred in reaching this conclusion. … The tribunal gave no reason why it apparently rejected Mr Sharkey's evidence, that the booking fee was paid for the facility of booking by credit card or debit card. There is some indication that the tribunal confused the booking fee charged by the appellant to a customer with the booking fee the appellant was entitled to charge, but did not in practice charge, to the promoter in terms of para 4(b) of the ticket sale agreement. The tribunal took into account the evidence about the giving of certain information by telephone operators, without recognising that there was no evidence that the giving of any such information constituted any part of any supply made for a consideration by the appellant. It was held in *Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (Case C-154/80) [1981] ECR 445, para 12 of the judgment, that there must be a direct link between the consideration and the supply; see also ss 4(1) and 5(2)(a) of the 1994 Act. The tribunal erroneously took into account the fact that the cost of the service exceeded the booking charge on the transaction. The use made by the appellant of the proceeds of the fee charged was irrelevant to its proper characterisation. The tribunal also erred by taking into account the role of the appellant as agent of the promoter. Supplies consisting of sales of tickets were made not by the appellant, but by the promoter through the appellant as agent. These supplies were therefore irrelevant in the characterisation of the nature of the supply made by the appellant in its own right. Most importantly, the tribunal 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 box 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. In these circumstances, in our opinion the tribunal based their decision upon matters which they ought not to have taken into account and disregarded matters which they ought to have taken into account. Having regard to the tribunal's findings in fact and to Mr Sharkey's uncontroversial evidence, the only conclusion reasonably open to the tribunal was that the booking fee charged by the appellant was charged in consideration of the facility of booking by credit card or debit card. In our opinion, no reasonable tribunal could have reached the conclusion which the tribunal reached. ..."

62. In NEC's case, there was similarly no charge made for supplying box office information; nor was it relevant that there was a disparity between the Booking Fee and the charge from Streamline to NEC; also, apart from the small examples described above, the Booking Fee was levied only where a customer paid by card. It followed that in NEC's case also, "the only conclusion reasonably open to the tribunal was that the booking fee charged by the appellant was charged in consideration of the facility of booking by credit card or debit card".

Exemption Issue

63. The exemption was conferred by Art 13B(d)(3). The correct approach to interpreting exemption provisions was that they should be construed strictly, but so as to give effect to their purpose – see the ECJ in *Kingscrest Associates Ltd v CCE* [2005] STC 1547 (at paragraph 29).

64. In *SDC* the ECJ considered a reference from the Danish courts concerning exemption of services provided by a data-handling centre. *SDC* had resolved any doubts that there was any relevance in matters such as chains of computers, or the number of parties, or whether a bank was involved. The result was that one should ask what service was performed for the fee, and whether such service effects payment. The ECJ stated in relation to Art 13B(d):

> "[16] By its questions the national court is asking in effect whether points (3), (4) and (5) of art 13B(d) of the Sixth Directive are to be interpreted as exempting from VAT supplies of services made to banks and their customers by a data-handling centre set up to serve the common interests of banks where those services contribute to the execution of transfers, to the provision of advice on, and trade in, securities, and to management of deposits, purchase contracts and loans and in the main are performed wholly or partly by electronic means.
>
> …
>
> [19] Amongst those aspects it is important to distinguish (i) the persons effecting the transactions, (ii) the way in which they are effected, (iii) the contractual links between the provider of the services and the person to whom they are provided, and (iv) the nature of the service provided by the data-handling centre.
>
> …
>
> [38] … points (3) and (5) of art 13B(d) of the Sixth Directive are to be interpreted as meaning that the exemption is not subject to the condition that the transactions be effected by a certain type of institution, by a certain type of legal person or wholly or partly by certain electronic means or manually.
>
> …
>
> [59] … the exemption provided for by points (3) and (5) of art 13B(d) is not subject to the condition that the service be provided by an institution which has a legal relationship with the end customer. The fact that a transaction covered by those provisions is effected by a third party but appears to the end customer to be a service provided by the bank does not preclude exemption for the transaction.
>
> …
>
> [66] In order to be characterised as exempt transactions for the purposes of points (3) and (5) of art 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers',

> the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions.
>
> [67] It is for the national court, which is acquainted with all the facts of the case, to determine whether the operations carried out by SDC have such a distinct character and whether they are specific and essential.
>
> [68] … point (3) of art 13B(d) of the Sixth Directive … is to be interpreted as meaning that transactions concerning transfers and payments include operations carried out by a data-handling centre if those operations are distinct in character and are specific to, and essential for, the exempt transactions."

65. The reason why the current appeal had taken so long to come before the Tribunal (the first voluntary disclosure having been filed in late 2002) was that both parties agreed that the litigation in the cases of *Bookit* and *SEC* was highly relevant, and the current appeal should be stood behind those cases.

66. In *Bookit (first Tribunal decision)* the VAT Tribunal considered (at [1]) "the treatment for VAT of fees of 50 pence per ticket charged by Bookit Ltd to persons buying seats for Odeon cinemas by telephone or website and paying by debit or credit card.". On the evidence the VAT Tribunal found (at [66]) "In our judgment when accepting payment by card for a ticket Bookit is acting as agent for Odeon" and stated:

> "67. It is to be noted that although Bookit was not paid by Odeon for its services as agent, the agency gave Bookit the opportunity to charge customers for card handling and to benefit from telephone revenue sharing arrangements.
>
> 68. The customer who rings the call centre will normally be unaware of the fact that he is telephoning Bookit rather than Odeon until after he has pressed the advanced bookings button. Even then there is nothing to tell the customer that the involvement of Bookit as principal extends beyond card handling.
>
> 69. When Bookit is finding out the customer's requirements and checking the availability of seats in accordance with those requirements, it is not in our judgment performing any service for a consideration for the customer. The recording by Mr Barnett included the employee as referring to "taking bookings", see paragraph 24. This was a preliminary to a sale on behalf of Odeon. Odeon received nothing unless the ticket was sold. Bookit received nothing unless the card transaction followed. If matters had stopped at that point there

would have been no question of any consideration being paid by the customer any more than if a retailer shows goods to a customer who after asking questions does not make a purchase.

70. The next step in Mr Barnett's transaction was that Bookit obtained the customer's card details together with his telephone number and postcode. At that point Bookit was expressly involved and Mr Barnett, the customer, by proceeding agreed to a charge by Bookit in addition to the ticket price. By providing his card details Mr Barnett agreed to his account with the issuer of the card being debited and to the payment being credited to Odeon and Bookit in satisfaction of the price of the ticket and Bookit's fee.

71. It is most unlikely that a customer would be aware of the settlement mechanism under which Girobank received payment from the card issuer and paid Bookit which in turn paid the ticket element to Odeon. The customer would however know that the transaction involved the provision of credit by the card issuer, unless the card was a debit card, and involved the transfer of money from his account with the card issuer to discharge his liability for the ticket and Bookit's fee.

72. It was not suggested by Mr McKay for Customs that when Bookit takes the customer's card details and transmits them to Girobank it is not performing a service for the customer, see paragraph 9 of the amended Statement of Case. The dispute was rather as to whether those services form part of a package described as “cinema seat booking services.”

73. We have already concluded that in providing information prior to the customer's decision to book tickets for a specific performance Bookit is acting as agent for Odeon on whose behalf it is selling the tickets. We have also concluded that when accepting payment by means of the customer's card for the tickets Bookit is also acting as agent for Odeon. As a matter of contract, Bookit is accepting the payment offered by the customer, it being a term of the contract that payment would be by card.

74. The final component of the booking services on which Mr McKay relied is sending notification to Odeon's computer system that the seats have been taken and informing the customer that the booking has been confirmed.

75. In our judgment both of those functions are performed by Bookit as agent for Odeon and neither constitutes a service supplied by Bookit to the customer. Odeon cannot properly sell a seat for a cinema performance without taking steps to ensure that the seat is kept available. If Odeon is not informed by Bookit that the seat has been sold and that payment has been made by card, Odeon's automatic machine at the cinema will not issue the ticket. Similarly Odeon cannot charge a customer for an advanced booking without informing the customer that the booking has been accepted.

76. The result is that the only supply by Bookit to the customer is of card handling services and the submissions as to application of *Card Protection Plan* do not fall to be considered. The fact that the card handling services would if made by Odeon be ancillary to the sale of

the tickets is not relevant since the card handling services were supplied by Bookit as principal."

67. The VAT Tribunal then considered whether the supplies by Bookit fell within Item 1 Group 5 sch 9 VATA:

> "80. It is necessary to focus upon the specific services provided by Bookit to customers for the 50 pence fee. These services start with obtaining the customer's card number and details including postcode. This information is transmitted to Girobank which gives authorisation where this is required as exceeding a specified limit. The processing by Girobank of the transaction is not part of any supply by Bookit to the customer. Nor in our judgment is either the confirmation by Bookit that the card payment is accepted, this being on behalf of Odeon, or the notification to Odeon of the purchase, this again being part of the agency service to Odeon. Again we do not consider that the act of informing the customer that he should collect the ticket from an automatic machine using the card is part of the supply by Bookit to the customer, this again being a service performed as agent for Odeon, the vendor of the ticket.
>
> 81. The actual components of the supply by Bookit to the customer are therefore limited to obtaining the card information with the necessary security information and transmitting this to Girobank. It does not even include any decision by Bookit whether to transmit that information, since in deciding whether to accept a payment by card not requiring authorisation from Girobank Bookit is not performing a service for the customer but is acting as agent for Odeon.
>
> …
>
> 86. The mere transmission of details to Girobank is essential to the completion of the transfer or payment by Girobank or the issuer, but that does not bring Bookit within item 1. The Appellant company has not satisfied us on the evidence that Bookit in transmitting on behalf of customers the required card information is itself transferring funds or bringing about changes of a legal and financial character. The transfers and financial changes are effected by Girobank and the payments are effected by the bank issuing the card."

68. The VAT Tribunal invited the parties to adduce further evidence but having considered such remained of the same view – see *Bookit (second Tribunal decision)* at [12], "While the transmission of the authorisation is an essential step, it does not itself bring about the payments or transfers. These are effected by Girobank."

69. The taxpayer successfully appealed to the High Court (*Bookit (High Court)*) where (at [5]) the Vice-Chancellor summarised the steps involved in a typical transaction:

> "There are four parties to the relevant series of events, namely (1) the Customer, (2) Girobank plc, (3) Bookit and (4) Odeon. In a typical transaction there are the following steps:

> 1. The Customer contacts Bookit by, say, telephone to ask if there are any seats available for a particular film in a particular cinema at a particular time on a particular day.
>
> 2. Bookit checks such availability with Odeon.
>
> 3. Odeon confirms to Bookit the availability of the required seats.
>
> 4. Bookit informs the Customer of such availability, the cost of the tickets and that it will make an additional charge for handling payment by debit or credit card.
>
> 5. Bookit takes the Customer's card details ('payment information') and verifies its right to use the card ('security information').
>
> 6. Bookit transmits the payment information and security information to Girobank.
>
> 7. Girobank processes the payment for the seats by means of the Customer's debit or credit card and credits Bookit with the aggregate of the price for the seats and the card handling charge.
>
> 8. Bookit confirms the purchase of the tickets to Odeon.
>
> 9. Bookit confirms the booking and payment to the Customer and informs him that the tickets may be collected from the relevant cinema.
>
> 10. The Customer collects the tickets.
>
> 11. Odeon admits the Customer to the relevant showing.
>
> 12. Bookit accounts to Odeon for the sums received for the tickets but retains the card handling charge.
>
> 13. Bookit pays Girobank for the services it provides out of the card handling charges it has retained."

70. The Vice-Chancellor disagreed with the VAT Tribunal's reasoning (at [53]) and allowed the taxpayer's appeal:

> "In my judgment the Tribunal arrived at the wrong conclusion. They did so because, having admitted further evidence, they did not sufficiently revisit their earlier conclusion. In particular whilst they recognised that their conclusions in paras 80 to 81 of the First Decision required some modification they did not spell it out. Similarly the conclusion set out in para 12 of the Second Decision assumes that the question is whether Bookit effected the payments. I do not think it is so limited. The service Bookit provided to the Customer constituted a transaction concerning such a payment, it was separately remunerated and it was not performed as agent or subcontractor of the Customer, Odeon or Girobank. As such, in my judgment, it came within art 13B(d)(3)."

71. HMRC appealed to the Court of Appeal (*Bookit (CA*)) but the Court of Appeal upheld the High Court. Chadwick LJ stated:

"[35] It is clear, reading the first and second decisions together, that the tribunal found that the supply by Bookit to the customer included the following components: (i) obtaining the card information with the necessary security information from the customer, (ii) transmitting that information to the card issuers, (iii) receiving the authorisation codes from the card issuers and (iv) transmitting the card information with the necessary security information and the card issuers' authorisation codes to Girobank. But the tribunal did not make a positive finding that the supply was limited to those components.

[36] The Vice-Chancellor pointed out that the effect of the supply by Bookit to the customer of services having the fourth of the components identified by the tribunal—the transmission of the card information, the security information and the card issuers' authorisation codes to Girobank—was that the price of the ticket and the card handling fee was transferred from the customer (in the case of a debit card transaction), or from the card issuer (in the case of a credit card transaction), to Bookit's account with Girobank. That is what cl 3.1.1 of the MSA required Girobank to do on receipt of the card transaction data. It was, I think, the tribunal's failure to appreciate that that was a necessary incident of the supply of services having the components which the tribunal had identified which led the Vice-Chancellor to observe ([1995] STC 1481 at [53]), that 'having admitted further evidence, [the tribunal] did not sufficiently revisit their earlier conclusion'. In making that observation the Vice-Chancellor clearly had in mind the reason which the tribunal had given at para 12 of their second decision, for holding that the conclusion which they had reached in para 85 of the first decision—'that Bookit in transmitting on behalf of customers the required card information is [not] itself transferring funds or bringing about changes of a legal or financial character'—remained unaltered. The reason given was that:

'85 … while the transmission of the authorisation is an essential step, it does not itself bring about the payments or transfers. These are effected by Girobank.'

[37] In addressing the first head of challenge—that the Vice-Chancellor was wrong to depart from the tribunal's finding that the actual components of the supply made by Bookit to the customer (or cinemagoer) were limited to the receipt and transmission of information—the short question, as it seems to me, is whether the Vice-Chancellor was entitled to have regard to the fact that it was a necessary incident of the supply of services having the fourth of the components which the tribunal had identified that the price of the ticket was transferred to Bookit's account with Girobank. In my view that was a fact properly to be taken into account.

[38] … this is not a case in which the judge departed from the findings of fact which the tribunal had made, or made additional findings of fact which the tribunal had declined to make. The fact that it was a necessary incident of the supply of services having the fourth of the components which the tribunal had identified that the price of the ticket was transferred to Bookit's account with Girobank is inherent in the findings of fact which the tribunal did make in their first decision—

> that the mutual obligations of Girobank and Bookit were to be found in the MSA. In analysing the nature of the services supplied by Bookit to the customer—in the light of the further evidence available to them at the date of the second decision—the tribunal failed to take that fact into account. That, as it seems to me, was an error of law which the Vice-Chancellor was entitled to correct."

72. Chadwick LJ also stated:

> "[46] It was submitted on behalf of the Commissioners that the transfer of funds to the credit of Bookit's account with Girobank was a matter of no importance to the customer; and, in particular, that the customer was unlikely to be aware of—and would probably be indifferent to—whatever arrangements or obligations might exist between Bookit and Girobank under the MSA. I accept that the machinery by which payment would be effected is unlikely to have been in the mind of the customer when he requested and accepted services from Bookit. But, as it seems to me, there can be no doubt that, in requesting and accepting Bookit's services, the customer contemplated and intended that some payment would be made which would enable him, on his attendance at the cinema of his choice, to collect the tickets which he needed; and intended that Bookit would arrange for that. The services which Bookit supplied—as identified by the tribunal—did have the effect which the customer contemplated and intended that they would have. The fact that the customer was indifferent to the machinery by which that effect was achieved seems to me irrelevant. The relevant questions are (i) what services were supplied by Bookit to the customer and (ii) did those services attract the exemption for which art 13B(d)(3) provides. As I have said, I am of the view that the answers which the Vice-Chancellor gave to those questions were correct."

73. The 13 step process outlined by the High Court in *Bookit* (quoted at [69] above) was materially identical to the process followed by NEC. Similarly, the four components highlighted by the Court of Appeal (quoted at [71] above) - the fourth component was particularly significant: once the card details with the authorisation were processed then there was an automatic debit and credit of the accounts. The supplies by Bookit and NEC *effected payment*. Just as the supply by Bookit to its customers qualified for exemption under art 13B(d)(3), so did that by NEC to its customers.

74. Similar conclusions had been reached by the High Court in *AXA (High Court)* (see Henderson J at [76]). The Court of Appeal referred a question to the ECJ relating to the application of 13B(d)(3), and the ECJ answered the point taking into account the exclusion of "debt collection" from 13B(d)(3). As Rimer LJ stated (*AXA (CA)*):

> "[58] In my view, the substance of what the Court of Justice (see [2010] STC 2825) was saying in the last sentence of para 28 of its judgment was simply that, if the Denplan service was not debt collection or factoring, it would be within the art 13B(d)(3) exemptions. What the court then proceeded to do was to apply its case

> law to the facts relating to that service as found by the Value Added Tax and Duties Tribunal. The outcome was that it held that their correct characterisation was that of 'debt collection', a concept that, for the purposes of art 13B(d)(3), is an autonomous one for the purposes of European Union law. The making of that characterisation was properly a matter for the Court of Justice.
>
> [59] I can understand Axa's dismay about the course of events that unfolded in Luxembourg. The suggestion that Denplan's service was 'debt collection' had not been uttered in the domestic proceedings. Whilst Axa had asserted that Denplan's service fell within the exemptions and HMRC had argued the contrary, it was no part of HMRC's case that that was because it was a 'debt collection' service. I can, however, see no reason why the Court of Justice was not entitled, as it did, to hold that the true legal nature of Denplan's service was in fact 'debt collection' within the meaning of the carve out."

75. In the current proceedings HMRC did take this point, and contended (as one of their alternative arguments) that the service provided by NEC in consideration for the Booking Fees was one of "debt collection". That argument must fail for two reasons.

(1) In *AXA* Denplan acted for dentists and charged the dentists for its service of collecting payments from patients and transferring the payments to the dentists – see Arden LJ at [11] and [12]. Thus Denplan acted for the creditor. However, in the current case NEC charge the customer a fee for facilitating payment due from the customer – thus NEC acts for the debtor (not the creditor). That cannot constitute "debt collection", and that had been confirmed by the Tribunal in *Paymex Limited v HMRC* [2011] SFTD 1028 (at [142]): "Debt collection by its nature can only be performed for the creditor." *Paymex* had been cited to the Court of Appeal in *AXA* (see [29] and [36] of *AXA (CA)*), and the Court had not disapproved or qualified the views of the Tribunal.

(2) In *AXA* the patients entered into an annual contract, so there was a pre-existing obligation to pay and that was the debt being collected by Denplan. In the current case there was no obligation to pay until the customer bought the tickets, and payment was then almost instantaneous with the purchase.

76. There was no need for any question to be referred to the ECJ. The relevant principles had already been clearly established through the courts.

HMRC's case

77. Mr Bates for HMRC submitted as follows.

78. The burden of proof as to both facts and law is on NEC. The selection of contracts submitted in evidence was made by NEC, and it did not cover the entire period of the claim under examination. That period was 1999 to 2002 and, as the appeal was lodged in 2004, NEC should have been able to access and preserve appropriate documentation. There were some points of difference between the contracts submitted and the witness evidence on, for example, clawbacks. NEC had led no evidence as to what customers were told about Booking Fees and Transaction

Fees. On subagents, the contracts stated that sales by subagents would attract Booking Fees; Mr Monks had accepted that he was speculating on why this was done. On chargebacks, some of the contracts make the promoter liable for chargebacks, unless the problem was due to NEC's negligence. Many of the witnesses' recollections were unreliable. It had been said that Transaction Fees were charged since 2002, but the website confirmation screens from 2004 do not refer to Transaction Fees. Mr Monks referred to a lead time in introduction of the Transaction Fees but from 2002 to March 2004 was a long lag – it seems that at least for some events until 2004 there were Booking Fees without Transaction Fees. There was no reliable evidence on the situation going back to 1976; the Tribunal was right to have expressed its concern on being asked to go back to 1976 on the basis of the evidence it had heard, and it should confine itself to the evidence that had been produced.

Direction of Supply Issue

79. The Booking Fees constitute part of the consideration for a supply to the customer by the promoter, not by NEC. It would be artificial to split the "service "of accepting payment from the single overall supply of the ticket providing the right to attend the relevant concert.

80. It is necessary to look at what the customer knew of his contract with NEC. The Upper Tribunal in *Secret Hotels* had stated in relation to construction of written agreements:

> "[88] When construing a written agreement, the court has regard to all of the provisions of the contract. The court construes the agreement against the relevant background. The material which is admissible in relation to that background is everything which a reasonable man would regard as relevant and which would have affected the way in which a reasonable man would have understood the language used in the document: *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 at 912–913. The relevant material is restricted to the material which would have been available to the parties. At the risk of stating the obvious, this last proposition means that the court cannot be influenced, when construing a written agreement, by material which would not have been available to the parties when they entered into that agreement.
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> …
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> [117] As I explained when I referred to the contracts which were made by the holidaymaker, there are essentially two relevant contracts. One is a contract between the holidaymaker and Med relating to the use by the holidaymaker of Med's website. The other contract is the relevant one, providing for a supply of hotel accommodation to the holidaymaker. As the holidaymaker enters into these two contracts at around the same time, the terms of these two contracts can be referred to as part of the relevant background when construing either contract.

> [118] There does not appear to be any other relevant background which is admissible as an aid to construing the contracts with the holidaymaker. In particular, the terms of the agreement between the hotel operators and Med are not admissible for this purpose because those terms would not be available to the holidaymaker. Further any course of dealing between the hotel operators and Med prior to the relevant holidaymaker contract would similarly not be available and not admissible. There does not appear to be any relevant course of dealing between Med and every holidaymaker after the holidaymaker contract is entered into. Even if there was some conduct in relation to a particular holidaymaker, for example, the making of a complaint and the settlement of that complaint by the payment of compensation, that information would not be available to other holidaymakers and would not be admissible as an aid to construction of those other holidaymakers' contracts. Even in relation to the holidaymaker who, in the example given, made the complaint and received the compensation, that conduct which is subsequent to that holidaymaker's contract is not admissible to construe the contract and the FTT made no finding that the original contract was superseded by a different contract for the supply of hotel accommodation, although there might have been a subsequent contract dealing with the payment of compensation. In this way, the true construction of the contracts with the holidaymakers turn upon the wording of the contracts themselves without the addition of any other material and they are not to be construed by reference to 'the behaviour' of Med as the FTT suggested."

81. In the current case, the contracts between NEC and the promoters could offer no assistance as to who is making a supply to the customer. One must concentrate on what was known to the customer. The customer expected to pay more than the face value of the ticket. The customer knew that NEC was selling the ticket as agent of the promoter. The customer could conclude that the fees were also being collected by NEC as agent for the promoter. The webpage produced by NEC that did date from the claim period before the Tribunal was marked "16 June 2001" and stated, "Tickets are issued on behalf of the organisation responsible for the performance/event as displayed on the face of the ticket, subject to the following Terms and Conditions" and "These terms contain the entire agreement between you and NEC Group relating to your purchase". There was no reference to any fees. There was nothing to suggest that a customer would regard fees payable as belonging to anyone other than the promoter, being the person "responsible for the performance/event as displayed on the face of the ticket". There was nothing to indicate to the customer that the fees related to a supply by a person different from the person providing the ticket. It was reasonable to infer that the customer would understand the fees were being collected by NEC as agent of the promoter, just as the ticket price was. As far as the customer was concerned, there was a single supply being made by the promoter, via its agent NEC. NEC's position could be distinguished from that of the taxpayer in *Bookit* – there customers heard a recorded message stating that fees would be charged by Bookit, whereas NEC's customers were not told this.

82. Even if one did look at the contracts between NEC and a promoter, that did not assist NEC. The exhibition contract put forward by NEC envisaged the possibility of sharing between NEC and the promoter of both Booking Fees and Transaction Fees, and made provision for allocation of the VAT liabilities in those circumstances.

83. If the Tribunal accepted HMRC's contention that the Booking Fees were in fact charged by the promoter then the VAT position was clear: there was a single supply by the promoter and, given that the predominant purpose was the ticket sale, that supply was wholly standard-rated. On that basis the appeal failed.

Single Supply Issue

84. If the Tribunal did not accept HMRC's first argument that the Booking Fees were in fact charged by the promoter then, alternatively, the Booking Fees (together with the Transaction Fees, where charged) were consideration for a single overall service of ticket booking by which customers were able to book tickets sold by a promoter, and to receive those tickets by a particular method (whether by post, by printed ticket provided by the box office, by electronic means or otherwise). NEC was supplying a single overall service and the fees charged were consideration for a standard-rated supply. The taking of payment by credit or debit card cannot properly be regarded as a separate supply; any such service was ancillary to the service of booking the tickets.

85. It was impossible to separate the Booking Fees and the Transaction Fees in the manner proposed by NEC. In the bulk of the claim period before the Tribunal, Transaction Fees were not even charged by NEC (they were not levied until 2002).

86. In *Birkdale School, Sheffield v RCC* [2008] STC 2002 a school fees protection plan was considered, as to whether the price paid was part of the school fees, or instead a separate supply. Henderson J summarised (at [26] to [35]) the relevant case law, and then stated:

> "[37] It is fair to say, I think, that the general trend of the recent authorities has been away from artificial splitting of transactions, and (where possible) towards a unitary or single classification which corresponds with the objective business reality of the transaction. The matter is looked at from the perspective of the average customer, not from the point of view of the supplier: see the reference to 'a typical consumer' in *Levob* at para 22, and compare the opinion of the Advocate General (Kokott) at para 69. One reason for looking at the question from the perspective of the customer is no doubt that it is the consideration provided by the customer for the supply which forms the taxable subject matter.
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> …
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> [43] … the authorities clearly indicate that the charging of a separate price for one element of a composite supply is not of itself decisive: see in particular *Levob* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433, para 25 and the ECJ in *Card Protection Plan* (Case C-349/96) [1999] STC 270, [1999] 2 AC 601, para 31. In my judgment, this is

> just the kind of formalistic distinction which will usually have little, if any, part to play in the characterisation of a composite supply."

87. In the current case, one must take a realistic view of the transaction. NEC's services were not genuinely independent of one another. Telephone callers would pay remotely and then the tickets would be sent. There was just one service. If the customer wanted postage by special delivery then they would pay extra for that. The fact that the price could vary was not conclusive of separate supplies. *Birkdale School* was clear that one must consider the position from the customer's perspective – what the customer was told about the Booking Fees, what they were for, and whether they were specifically for card processing. The NEC ticket office provided a booking service and the customer paid a single overall charge to cover the ticket and the fees. It was not the case that payment by card was an aim in itself – it was just a part of the customer's desire to obtain a ticket. NEC offered different ways to pay for the tickets but there was only one service, being the ticket booking service. As Henderson J concluded in *Birkdale School*:

> "[42] ... What matters in the present context is not the education provided by the school to the child, but the supply of educational services by the school to the parent. The parent is paying the school to educate his child. Participation in the scheme affects the price which he pays for that service, and entitles him to a refund, or to a full remission of fees, in certain specified circumstances. However, it is still the child's education that the parent is paying for. The economic reality of the matter, in my judgment, is that the parent is provided by the school with two payment options for the same educational service. That is how a typical parent would view the matter, and that is the appropriate level of social and economic reality at which to examine the question. The parent is offered two different ways of paying for the child's education. In my judgment it really is as simple as that."

88. In *NV Nederlandse Spoorwegen v Secretary of State for Finance* (126/78) [1979] ECR 2041, [1980] 1 CMLR 144 the ECJ considered the VAT treatment of a fee charged by a goods carrier to a consignor for also providing a cash collection service, and concluded that there was only a single supply:

> "[14] … if a carrier has undertaken, in addition to the transport of the goods, to collect the price of the goods before delivering them to a consignee (cash-on-delivery system) the collection of that price is a service ancillary to the transport…"

89. In *Muys' en De Winter's Bouw-en Aannemingsbedrijf BV v Staatssecretaris van Financiën* [1997] STC 665 the ECJ considered whether the grant of deferred payment terms fell within art 13B(d)(1) and concluded (at [19]) that it was merely part of the main supply:

> "…art 13B(d)(1) of the Sixth Directive must be interpreted as meaning that a supplier of goods or services who authorises his customer to defer payment of the price, in return for payment of interest, is in principle making an exempt grant of credit within the meaning of that provision. However, where a supplier of goods or services grants his customer deferral of payment of the price, in return for payment of interest, only until delivery, that interest does not constitute consideration for the grant of credit but part of the consideration obtained for the supply of goods or services within the meaning of art 11A(1)(a) of the Sixth Directive."

90. In *CEC v British Telecommunications plc* [1999] STC 758, considering the VAT treatment of car delivery charges, Lord Hope stated (at 766-767):

> "As regard must be had to all the circumstances, no single factor will provide the sole test as to whether the supply in question is a distinct and independent supply or is incidental or ancillary to another principal supply. The fact that the price for the supply in question has been or can be separately identified as having been charged for additionally, as the tribunal held after considering the sample transactions in this case, is not the test. Nor is the fact that the supply in question is an optional one which the taxable person could have provided for himself, and so did not need to take when as a matter of convenience he took the other supply to which it is said to have been ancillary. The Court of Appeal ([1998] STC 544 at 547 per Nourse LJ) attached considerable importance to this point, as also did the tribunal (see p 16) and Dyson J (see [1997] STC 475 at 480). But in my opinion it is just one of the factors to be taken into account in the examination of all the circumstances.
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> …
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> It may be said that before the supply can be regarded as a separate and distinct supply it must, at least to some degree, be physically and economically dissociable from the other supply. But it would not be right to take this factor as the sole criterion as to whether the supply was separate and distinct from the other supply or was merely incidental or ancillary to it. If that were so, it would mean that in every case where it was possible to dissociate the two economically and physically (for example, because one supply was of goods and the other supply was of services and the price for each supply could be separately identified) the two supplies would have to be treated as separate supplies for VAT purposes. That would not be consistent with the guidance which the Court of Justice gave in *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270 at 293, para 29 that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system."

91. NEC's best point (which HMRC did not accept in any event) is that no Booking Fees are charged if a card is not used. But the above cases show that is irrelevant –

the fact that a charge is made for an optional service does not lead to the conclusion of a separate supply. The service supplied is the administration of a booking – there would be services such as confirmation emails for web bookings or dealing with telephone enquiries. There were different payment methods available to customers, and credit cards attracted higher charges. NEC could add charges if that was commercially possible and convenient, but there was still just one overall fee for a ticket booking and fulfilment service. There was no clear link between the services said to be provided and the costs incurred; as stated by NEC's witnesses, it was just a matter of what the market would bear, and could vary from event to event. If the mere labelling of the fee as "Booking Fees" instead of "Transaction Fees" could determine the VAT liability then there was the opportunity to shift the level of those fees so as to gain a VAT advantage.

92. Although the background to *SEC* was superficially the same as the current case, there were two important distinctions (see para [28] of *SEC*). First, in *SEC* the booking fee was only ever charged on card payments. Secondly, the customer was aware of that.

93. NEC admitted that they had charged Booking Fees to some customers who did not pay by card, and also that they did not charge Booking Fees to some customers who did pay by card. In the former category were customers who sent cheques by post; in the latter category were customers who purchased gift vouchers. The Booking Fee was not consideration for a card processing service – that was just an *ex post* rationalisation to achieve a VAT advantage. The wording on the webpage had been modified in early 2004, after the launch of the VAT appeal.

94. It was artificial to attempt to split the supply of administering ticket sales (which NEC accepted was standard rated – as with the Transaction Fees) and the supposedly separate supply of processing of payments for the same tickets. The fact that the overall price paid by the customer may be higher in circumstances where payment is made by card (which is the most common payment method used by customers) because a particular charge is levied only in such cases does not elevate one aspect of the overall service into a separate supply – see *Birkdale School* quoted at [86] above (and the authorities cited there)

95. The evidence did not support NEC's contentions.

(1) The customer terms and conditions stated they constituted the entire agreement, so comments in the FAQs webpage could not be imported as argued by NEC. But even looking at the FAQs, they stated the Booking Fee was charged to offset IT development costs. The average customer would not conclude that the Booking Fee was for credit card processing. Also, the FAQs stated that the Booking Fees were "waived" for non-NEC venue events – that implied that charging the Booking Fee was the default position.

(2) NEC referred to the box office call script but could not give details of dates or how it was used. Also it was of no assistance in relation to online bookings. What was clear, and Mr Monks had confirmed this, was that a customer was not told what the Booking Fee was for, unless they asked. That

was different from *Bookit* where customers listened to a recorded message which gave the relevant details.

(3) Before 2007 Booking Fees were charged on certain cheque payments. The customer could not believe that the Booking Fee related to non-existent card handling services. There was a retrospective assertion that this was done to discourage cheque payments but that was without contemporaneous evidence and could have been steered by NEC's interest in its tax appeal. In any event, NEC's rationale was irrelevant – the important factor was what was in the customer's mind (per *Secret Hotels* and *Birkdale School*).

(4) There was a contradiction in the evidence concerning chargebacks. The promoter contracts were clear that (absent negligence) NEC was not responsible, but the witnesses had stated that NEC bore the risk of chargebacks.

(5) Booking Fees had been charged on subagent bookings regardless of the method of payment. Mr Monks' evidence on the reasons for this was speculative.

(6) No Booking Fee had been charged where car parking was also purchased by card. Also no Booking Fee had been charged where gift vouchers were purchased by card.

(7) Although HMRC accepted that the actual cost of providing card facilities did not determine the nature of NEC's supply, the fact that the Booking Fee bore no relation to such costs implied that the customer would not conclude that the Booking Fee related to the alleged card processing service.

96. The correct approach was that given by Lord Slynn in *Card Protection Plan Ltd v CEC* [2001] STC 174:

> "[22] It is clear from the Court of Justice's judgment that the national court's task is to have regard to the 'essential features of the transaction' to see whether it is 'several distinct principal services' or a single service and that what from an economic point of view is in reality a single service should not be 'artificially split'. It seems that an overall view should be taken and over-zealous dissecting and analysis of particular clauses should be avoided."

Exemption Issue

97. Alternatively, even if the Booking Fees were consideration for a separate service of processing payments by credit or debt card, that supply did not have the necessary characteristics to come within the exemption in art 13B(d)(3). Further, the supply came within the express exclusion of "debt collection" from that provision.

98. HMRC regarded the law on this point as not yet fully resolved, and it may in due course be necessary to make a reference to the ECJ. The Court of Appeal decision in *Bookit* had been considered by the Court of Appeal in *AXA* and a reference made to the ECJ – however, that reference was decided on the issue of the debt collection exclusion from art 13B(d)(3), rather than exploring the general scope of art 13B(d)(3). *Bookit* had also been considered by the High Court in *T-Mobile* – again, the reference

to the ECJ determined the issue without looking at the general scope of art 13B(d)(3). There was an unresolved issue over the Court of Appeal's understanding of the facts in *Bookit*. The Court had understood that Bookit had agreed with its merchant acquirer (Girobank) that certain tasks, including the acquisition of authorisation codes, that would normally be performed by the merchant acquirer would be done by Bookit. Thus certain tasks had been outsourced and Bookit was performing tasks on behalf of the bank. That was similar to *SDC* where the taxpayer performed tasks on behalf of banks (executing orders) and similarly in *CCE v FDR* [2000] STC 672 (debiting and crediting ledgers). NEC had accepted that it did not do what Bookit had done. NEC's witnesses maintained that authorisation codes would *always* be obtained by the merchant acquirer – if that was correct then the Court of Appeal had misunderstood the position and that undermined the authority of *Bookit*. HMRC considered that the understanding of the Court of Appeal was probably correct, at least in relation to the tasks Bookit performed. It was still desirable for the scope of the exemption conferred by art 13B(d)(3) to be confirmed by the ECJ. *Bookit* and *SEC* were national decisions and were informative but not of the same weight as an ECJ ruling. HMRC considered that if a reference was required in these proceedings then the appropriate time at which to make it would be after the fact-finding role of the Tribunal was complete.

99. On this issue it was first necessary for NEC to show that the service provided for the Booking Fees met the criteria laid down by *SDC* for exemption under art 13B (d).

100. In *T-Mobile* customers were offered a number of methods of payment. Customers choosing to pay other than by direct debit or BACS transfer were charged a "separate payment handling charge". The ECJ decided that charge was not consideration for a separate supply of services, and thus it was part of the principal supply of telecommunications services. The ECJ did not address the other referred questions concerning whether the charge fell within art 13B(d)(3). However, the art 13B(d)(3) point had been explored by the VAT Tribunal, which had considered in depth the manner in which authorisation codes were acquired by T-Mobile. It made a finding (*T-Mobile (Tribunal decision)* at [21]):

> "It appears that when the authorisation code is received by T-Mobile, T-Mobile does not know if it comes from the bank [ie the card issuing bank] or from Barclays [ie the merchant acquirer] Mr Steller did not know if the settlement files which were batched up by Solve/SE and sent to BMS included the authorisation code or not. It appears that all T-Mobile is doing is giving back to Barclays the authorisation codes which Barclays has obtained. No transfer of funds has taken place at this stage, it being assumed by T-Mobile that the transaction will proceed. It is only when the information has been sent to the issuing banks that money is received."

101. The VAT Tribunal then considered (at [57]):

> "It was held in *Bookit* that by obtaining authorisation codes direct from the card issuers, Bookit was doing something that normally a bank would do, as in the cases of *SDC* and *FDR*. This was not the case with

> T-Mobile. Bookit was not just transmitting the information, but was also obtaining the authorisation codes. The Court of Appeal in *Bookit* upheld the finding of the Vice Chancellor in the High Court that Bookit's card processing transactions did come within the exemption by reason of the crucial fact that Bookit, having obtained authorisation codes directly from the relevant credit and debit card issuing banks, then transmitted those codes on to its merchant acquirer bank (Giro bank), which had the effect of making a transfer of funds inevitable. Accordingly the Court of Appeal held that Bookit's transactions have the two essential characteristics of an exempt financial transaction: they had "the effect of transferring funds" and "entail[ed] changes in the legal and financial situation". In the present case Barclays obtains the authorisation codes, and confirms this is done by copying the code to T-Mobile. When T-Mobile collects up the data, including the authorisation codes, that information has not been obtained by T-Mobile, but obtained by Barclays. We accept the Commissioners' argument that *Bookit* may be distinguished from the present case in that it was performing a task which Giro bank was obliged under its standard Merchant Services Agreement to carry out. Bookit had secured a significant discount on Giro bank's merchant acquirer charges by agreeing itself to obtain authorisation codes directly from the issuing banks and to pass those codes onto Giro bank. Giro bank was, therefore, outsourcing an element of its merchant acquirer services with the customer, and remunerating that customer by way of a discount on the charges which that customer had to pay. In the present case T-Mobile has no direct contact with the card issuer banks at all, and is not, unlike Bookit, performing a job which the banks would otherwise be performing. The fact that Bookit had secured a discount on Giro bank's merchant acquirer charges shows that Giro bank was outsourcing an element of its merchant acquirer services to Bookit, and giving Bookit a discount for so doing. In the present case T-Mobile gave Barclays the job of obtaining the authorisation codes and it is Barclays which is in the position of Bookit, not T-Mobile. In *Axa* the tribunal expressed surprise that where in relation to a debit card transaction the customer's bank rejected the debit, for example because the account was in overdraft, and Girobank re-credited the card issuer and charged back the debit to Bookit, the court held that this potential reversal of payments did not mean that Bookit had not made the transfer. In the present case when a payment method goes wrong T-Mobile has to perform a number of administrative tasks which fall outside the exemption."

102. The position of NEC was the same as that of T-Mobile, not that of Bookit. The VAT Tribunal concluded (at [60]) that T-Mobile was not entitled to exemption for the charge it levied:

> "T-Mobile was doing nothing of substance different from that which other traders with significant turnovers do as a matter of course: receiving payments from their customers by a number of methods, including cash, cheque, and credit or debit cards, or directly or through an agent (such as Post Office Ltd or Pay point). The "payment handling services" provided by T-Mobile were not, therefore, "by their

> nature, financial services, nor were the transactions carried out by T-Mobile transactions relating "to the sphere financial transactions". They neither have the effect of transferring funds, nor do they effect changes in the legal and financial situation. We do not consider it to be the fact that T-Mobile is `negotiating payment terms between two parties' as per HMRC Business Brief 30/2003. It is simply accepting a payment which it has previously agreed with its customer. …"

103. Unfortunately, this point was not examined by the ECJ as part of the questions referred to it by the High Court. In HMRC's view the VAT Tribunal's analysis in *T-Mobile* was correct and *Bookit* was at least distinguishable on its facts, if not mistaken as to its facts.

104. The Court of Appeal in *AXA* had concluded that the scope of the exemption in art 13B(d)(3) should be "normal retail banking activities" (per Arden LJ):

> "[51] As to the effect of the ruling in the present case, in my judgment, it is clear that the Court of Justice concluded that the words 'debt collection' in the carve out have a meaning capable of being applied to 'transactions concerning payments' within the exemption in art 13B(d)(3) (see [2010] STC 2825, para 28 of the judgment, last sentence). It then has to be decided whether the actual transaction in question falls within the exemption or the carve out, and this will depend on its precise facts. If it falls within the exemption it will fall outside the carve out, and vice versa (see final sentence of para 28). The Court of Justice does not define the purpose of the exemption. It is unnecessary to decide on this appeal what the full scope of the exemption might be. However, for the purposes of this judgment it may hypothetically be taken to be normal retail banking activities (and indeed that is one way of reading paras 24 to 27 of the judgment of the Court of Justice in *Nordea* ([2011] STC 1956)). On that hypothesis, the carve out takes out of the scope of the exemption any separate supply of services which is more properly regarded as a service of debt collection."

105. In *Nordea* the ECJ stated:

> "28. In order to determine whether swift services satisfy that criterion it is necessary to examine, first, whether the provision of those services is capable of giving rise to changes of a legal and financial character similar to those resulting from interbank payments or transactions in securities themselves and, second, whether SWIFT's responsibility towards its clients is limited to technical aspects or whether it extends to specific, essential aspects of those financial transactions."

106. The ECJ concluded that the services did not satisfy the test:

> "32. It is also not disputed that, although orders for transfers of funds or those which are intended to effect certain transactions in securities must be transmitted via computer systems approved by SWIFT in order to guarantee their security, ownership rights as regards those funds or, as the case may be, those securities is transferred only by the

> financial institutions themselves in the context of legal relations with their own clients.
>
> 33. It is also clear from the case law cited in paras 24 to 26 of this judgment that the legal and financial changes which are such as to characterise a transaction exempt from VAT result only from the transfer of ownership, actual or potential, in funds or securities, without it being necessary for the transaction thereby performed to be effective against third parties.
>
> 34. Accordingly, if swift services are electronic messaging services which are simply intended to transmit information, they do not by themselves perform any of the functions of one of the financial transactions referred to in art 13B(d)(3) and (5) of the Sixth Directive, that is to say those which have the effect of transferring funds or securities, and do not therefore possess the character of such transactions."

107. NEC's communications with its merchant acquirer constituted the transmission of requests or instructions, but it was the merchant acquirer and the relevant card issuer banks who together carried out the transactions; their actions effected the transfers between accounts and thus provided a service that came within the scope of art 13B(d)(3). NEC stood at least one stage removed from those parties who together provided the exempt service. NEC was the person seeking or requesting a transfer; it was the other parties who actually effected the transfers, thereby executing the order that had been given.

108. Turning to the second issue, the services purportedly supplied by NEC for the Booking Fee constituted "debt collection" and thus fell within the carve out from art 13B(d)(3).

109. The debt collection point was decisive in *AXA* but was raised by the ECJ and had not been explored by the domestic courts. Accordingly, there was no guidance for the Tribunal on how much of the detail of the transactions in *AXA* was relevant to the point in issue. NEC gave two arguments why the Booking Fee was not for debt collection services.

(1) First, that there was no pre-existing debt – but there was nothing in the ECJ judgment in *AXA* to state that was essential. It was not clear from *AXA* whether the direct debits were in advance or in arrears. There was no guidance as to whether collection of an "immediate debt" (as termed by NEC) was debt collection for the purposes of art 13B(d)(3).

(2) Second, that debt collection could be performed only on behalf of a creditor - again, there was nothing in the ECJ judgment in *AXA* to that effect. Although the Upper Tribunal decision in *Paymex* had been cited to the Court of Appeal in *AXA*, it had not been approved. Rather, the Court of Appeal had specifically acknowledged (at [51] – quoted at [104] above) that the scope of the debt collection carve out was unclear and required further input from the ECJ. In looking at the *purpose* of the debt collection carve out, the ECJ's decision in *Tierce Ladbroke v Belgium* (Joined Cases C-231/07 & C-232/07 – available

only in French but translated by HMRC) was that this was "to lessen the difficulties connected with determining the tax base as well as the amount of VAT which is deductible, and to avoid an increase in the cost of consumer credit." In the present case there was no difficulty in calculating the VAT in relation to the various charges levied by NEC, and to do so would not affect the cost of consumer credit.

Consideration and Conclusions

The Appeal and the Evidence

110. It was an agreed position between the parties that "the parties consider that the conclusions reached in this appeal should be treated as determining all of the claims listed in [paragraph [13] of this decision notice]". During the hearing we expressed our reservations at being asked to make findings on factual matters that fell outside the VAT periods that were the subject of the appeal before us (being August 1999 to April 2002 ("the Appeal Period")). In particular we have concerns regarding, (i) that the entire range of the claims made is from February 1976 to October 2009 (ie a period of over 33 years); (ii) the earliest date covered by any of the evidence was Mr Afzal's recollection of matters since 1990 (ie 14 years after the start date of the claims); and (iii) the typical contracts and example webpages put in evidence appear to date from no earlier than 2001. While we understand the desire of the parties to have the Tribunal effectively determine all aspects of the dispute between them (and would normally support that as a businesslike approach), it would be inappropriate for us to determine a complex dispute (involving several millions of pounds of VAT) by going beyond the evidence presented to us. We consider the most we can achieve is (i) to determine the appeal before us (being the claim covering the Appeal Period); and (ii) to make certain limited comments on the periods preceding and succeeding the Appeal Period (see paragraphs [144-149] below).

111. In relation to the Appeal Period, we accept Mr Afzal's evidence as to how the NEC box office operated and how Booking Fees were treated. We have taken into account the fact that HMRC were unable to cross-examine Mr Afzal on the contents of his witness statement; however that statement was effectively adopted by both Mr Mead and Mr Monks, and HMRC did cross-examine both those witnesses. Mr Monks' experience of NEC dates from 1998 (ie before the start of the Appeal Period) and Mr Mead has considerable experience of the business affairs of other arena operators during the Appeal Period. There were no significant contradictions between the evidence of those three witnesses and so we feel confident that Mr Afzal's witness statement correctly records the operation of the NEC box office during the Appeal Period.

112. In relation to the webpages presented in evidence (see [21] above) – effectively the FAQ pages – Mr Bates for HMRC submitted that the exact wording on the various webpages varied slightly over time, and that NEC could not identify conclusively when the various pages were on show on the website. Having carefully scrutinised the relevant pages we conclude that the wording of the FAQ pages was substantially

the same throughout the Appeal Period, and was substantially as quoted in paragraph [21] above. We note that the wording did change after the Appeal Period - indeed Mr Bates for HMRC put it to Mr Monks in cross-examination that the wording may have been amended as a result of NEC's voluntary disclosure in relation to the Booking Fees – but we are here confining ourselves to consideration of the Appeal Period.

113. In relation to the terms & conditions presented in evidence (see [22] above), we accept Mr Monks' evidence that these were similar (or the same) during the Appeal Period.

114. In relation to the phone script presented in evidence (see [23] above), there was no conclusive evidence on when this wording started to be used. We have borne in mind that this script may not have been used in the same form in the Appeal Period, but we consider it fairly sets out the answers and explanations that would have been given to questions from customers in the Appeal Period.

115. In relation to the promoter contracts presented in evidence (see [24-26] above), the exact contents do vary, of course, from event to event, but we are satisfied that the extracts quoted at [25-26] above are typical of the contracts entered into between NEC and promoters in the Appeal Period.

Approach

116. Chadwick LJ in *Bookit* (at [46]) put forward two questions for determination:

> "The relevant questions are (i) what services were supplied by Bookit to the customer and (ii) did those services attract the exemption for which art 13B(d)(3) provides."

117. Those questions are similar to those identified by the Inner House in *SEC* (at [1]):

> "(1) whether, on a proper view of the evidence, the booking fee is charged for the facility of paying by credit card or by debit card, and not for some other facility; and (2) if so, whether the booking fee falls within the scope of the exemption from value added tax … provided for by the legislation ..."

118. For the current appeal we ask:

(1) What services were supplied by NEC to the customer for the Booking Fees? This has two components:

(a) the Direction of Supply Issue (as described at paragraph [49] above); and

(b) the Single Supply Issue (ditto).

(2) Do the Booking Fees attract the exemption provided by art 13B(d)(3)? This is the Exemption Issue (as described at paragraph [49] above) and also has two components:

(a) whether the criteria in *SDC* were met; and

(b) whether the "debt collection" carve out from art 13B(d)(3) applies.

First question: What services were supplied by NEC to the customer for the Booking Fees?

Component One: Direction of Supply Issue

119. We have considered carefully the arguments advanced by HMRC to support their contention that the Booking Fees are charged for a (taxable) supply made by the promoter to the customer, with NEC acting merely as an agent of the promoter in the collection of the sums charged. We find that the evidence does not support that contention. It is certainly the case that a customer buying a ticket is unlikely to engage in a legal analysis of the contractual relationship they were entering into – they just want to buy a ticket. However, it would be clear to the customer that they were being charged not just the face value of the chosen ticket but also other charges. If they chose to investigate those other charges further then a telephone query to the ticket office would receive the answer evidenced by the phone script (see [23] above), "ticket agents charge per ticket booking fees for the services they provide." Similarly, an online customer could access the FAQ webpage reading, "Booking fees are charged by The NEC Group Box Office". We conclude that the monies paid by a customer comprised both a ticket price collected by NEC as agent for the promoter, and other charges collected by NEC on its own behalf as principal. We note that, on the evidence produced in that case, a similar conclusion was reached by the Inner House in *SEC* (at [28]):

> "Both in fact and in law the appellant provides two separate services to customers who pay for tickets by credit card or debit card. The appellant acts as agent for the promoter in selling the ticket, and as principal in charging the booking fee for taking the steps necessary to effect payment by credit card or debit card. While the customer might not be aware of the detail by which this might be effected, he or she is aware that there are two charges, one for the price of the ticket and the other for the facility of payment by credit card or debit card."

120. Because of the comments of the Upper Tribunal in *Secret Ho*tels concerning what documents may be construed in formulating the customer's view of the contract, we have not taken into account the promoter contracts (the terms of which the customer would be unaware of). We would note, however, that there is nothing in the promoter contracts to cast doubt on our conclusion. For example, clause 4.2 of the contract quoted at [26] above states unequivocally, "The [promoter] hereby authorises [NEC] to collect the Booking Fee and the Transaction Fee for [NEC's] own account in addition to any funds collected by [NEC] on behalf of the [promoter] in relation to Ticket Sales." Thus even if the promoter contracts were relevant, they support the conclusion we have reached.

Component Two: Single Supply Issue

121. One matter of particular importance arising from our approach to the Appeal Period concerns the Transaction Fees. We heard substantial evidence and submissions referring to the Transaction Fees. These were not charged by NEC until after the Appeal Period (from November 2002) and so, obviously, were not part of the charges made by NEC to its customers in the Appeal Period. The evidence of both Mr Monks and Mr Mead was that the Transaction Fees were just another method of raising revenue that was already employed by other arena operators and – in Mr Mead's words – NEC was missing a trick by not having previously charged them. We make a finding that when the Transaction Fees were introduced they were an additional charge for services already being provided by NEC; in other words, the Transaction Fee was not levied for any additional service provided by NEC from November 2002.

122. Confining ourselves to the Appeal period, there was a Booking Fee but no Transaction Fee; so what service did NEC supply for the Booking Fee? Mr Peacock for NEC submitted that prior to the introduction of the Transaction Fees the costs of the services subsequently remunerated by the Transaction Fees were simply part of the general overhead (ie costs of operation) of the NEC box office. The alternative, put forward by HMRC, is that the Booking Fee was charged in part for the order fulfilment service provided by NEC. The evidence of the material on the FAQ website page does not, in our view, resolve this point. It states: "Booking fees are charged … to help offset operational costs such as postage, credit card commission, labour, telephony and IT maintenance charges…. Booking fees are charged to help offset the ongoing maintenance and development costs of the Internet Booking facility, as well as the usual operational costs." That does support Mr Peacock's submission but it also implies that the Booking Fee covers, in part, items (such as postage) which the witnesses stated were subsequently covered by the Transaction Fees.

123. What we do conclude from the evidence is that a large part of the box office work carried out by NEC was not specifically remunerated. Many of the services suggested by HMRC as being covered by the Booking Fee were available to (potential) customers whether or not they proceeded to a ticket purchase: for example, information on event availability, seat availability, seat pricing, programming and timing information. Thus it is not correct, in our view, to conclude that part of the Booking Fee was in consideration of some or all of those services. Accordingly, we consider the correct approach is to put to one side those box office functions which were made available to all potential customers, regardless of whether they proceeded to buy a ticket. Further, a customer buying a ticket in person for cash did not incur a Booking Fee, even though the box office must print the tickets and register the sale on the system – and even though the customer may have read all the concert publicity provided by NEC, studied the relevant pages on the website, perhaps taken considerable time at the box office choosing suitable seat locations and enquiring about performance times, and so on. So we do not consider that the Booking Fee can be construed as being charged for those services. We note that a similar rationale was followed by the VAT Tribunal in *SEC* (quoted at [60] above).

124. In *SEC* there was a clear finding of fact "that the booking fee is charged to a customer only when payment is made by credit card or debit card" (see [10] of *SEC*). That was not the case with NEC in the Appeal Period; NEC accept that and the instances where a Booking Fee was charged (or not charged) are summarised in the table in paragraph 20 of Mr Afzal's witness statement (quoted in the Appendix). Mr Peacock submitted that the general position was that the Booking Fee was levied when tickets were purchased by card, and the occasions when a Booking Fee was charged without a card transaction did not cast any light on why the Booking Fee was charged generally. While we accept that those occasions were exceptions to the general practice followed by NEC, we consider it is important to examine them to determine whether they materially detract from the general position. We have identified the following five occasions as exceptions to the general practice followed by NEC:

(1) *Booking Fees were not charged where customers purchased (or redeemed) gift vouchers, paying by card.* We accept the witness evidence that this was done to enhance sales of gift vouchers. We analyse this as being an instance where strictly a Booking Fee was due but for good marketing reasons it was effectively waived or foregone.

(2) *Booking Fees were not charged where customers purchased tickets at the box office (ie in person), paying by debit card.* This practice changed in August 2003 (ie after the Appeal Period). On the FAQ webpage this was described as a waiver of the fee: "For concerts … staged at venues of The NEC Group, the Group chooses to waive the booking fee if the tickets are purchased at a Group venue box office using … debit card." Again, we analyse this as being an instance where strictly a Booking Fee was due but it was waived.

(3) *Booking Fees were not charged where customers also purchased car parking, paying by card.* We accept the witness evidence that this was done to encourage car park booking at the time of ticket purchase. Again, we analyse this as being an instance where strictly a Booking Fee was due but for good marketing reasons it was effectively waived or foregone.

(4) *Booking Fees were charged where customers purchased tickets via subagents.* We accept the witness evidence that subagents such as tourist offices could only deal with NEC via customer credit/debit cards, as collecting cash or cheques and accounting later would be too cumbersome. Accordingly, this was not really an exception – all subagent transactions were card transactions.

(5) *Booking Fees were charged where customers paid by cheque by post - but not if they paid at the box office by cheque.* This practice changed in September 2007 (ie after the Appeal Period). The witness evidence was that the number of tickets paid for by cheque by post was very small (around 1% of transactions); we accept that but we are here more concerned with whether the fact of the Booking Fee being charged on some cheque purchases materially detracts from NEC's contention that the Booking Fee was consideration for card processing services.

125. Of the above occasions we consider only the last (fee for cheques by post) could be described as an important anomaly – the first three are all waivers of the Booking Fee explained simply by good business reasons, and the fourth is not truly an exception. The explanation from the witnesses for the policy of charging a Booking Fee where customers paid by cheque by post was that it acted as a deterrent to customers paying by cheques by post, which was inconvenient for NEC to process. We accept that was one effect of the practice but we are not convinced it was the rationale for the practice. Processing cheques presented at the box office would presumably have involved as much administrative inconvenience as processing postal cheques, but no Booking Fee was charged on box office cheques purchases. We conclude this practice was an anomaly but we do not consider it undermines the general position: that (with the exceptions discussed above) the Booking Fee was charged only to customers who paid by card.

126. It is true that the amount of the Booking Fee is much higher than the charge made to NEC by Streamline – however, the high amount of the Booking Fee reflected what the ticket consumer market would bear, rather than implying that the fee covered services other than the card processing facility. We accept Mr Monks' evidence that NEC's agreeing to accept payment by card did carry commercial risks, particularly the risk of chargebacks. We also accept his evidence that promoters regarded chargebacks as being NEC's problem and thus a risk to be borne by NEC, even where (as in the case of the typical concert contracts) the strict contractual position was that NEC were liable only if they were negligent. We note that this is also borne out by the findings in *SEC* – see [11] of *SEC*. However, it is not necessary for NEC to justify the level of the Booking Fee – see *SEC* at [13]. All the evidence was that NEC set the level of Booking Fees to what the competitive market would bear.

127. We must examine matters from the point of view of the typical customer – see Henderson J in *Birkdale School* (at [37], quoted at [86] above) – and the typical customer would conclude simply that the Booking Fee was charged if he chose to pay by card (although waived in the instances detailed above) but not if he paid in cash (which would entail a visit to the box office). We must be satisfied on the evidence that the service provided by NEC and remunerated by the Booking Fee relates to provision of card processing services, and we do so find.

Second question: Do the Booking Fees attract the exemption provided by art 13B(d)(3)?

First Component: whether the criteria in SDC were met

128. The criteria for a service to fall within art 13B(d)(3) were definitively stated in *SDC* (quoted at [64] above). In *AXA (High Court)* Henderson J (at para [30]) drew five propositions from *SDC* (with which we respectfully concur):

> (1) A transfer is the execution of an order for the transfer of a sum of money from one bank account to another;

(2) it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks;

(3) there is no requirement for the supplier to be a bank;

(4) there is no requirement for a direct contractual link between the person executing the transfer and the ultimate customer of the bank; and

(5) the test whether a transaction constitutes a transfer for the purposes of the Sixth Directive is a functional one, which asks whether the transaction in question is one which has effected the movement of money and changed the legal and financial situation of the parties - the cause of the transaction is not in itself a relevant consideration.

129. Subject to the important point we make in the next paragraph, we are satisfied that the service performed by NEC was materially the same as that performed by Bookit. The transaction steps summarised by the Vice-Chancellor in *Bookit (High Court)* (at [5] - see [69] above) are a close description of NEC's transactions, if one adjusts for the fact that NEC performed the roles of both Bookit and Odeon (and, of course, substituting Streamline for Girobank). Similarly, the four supply components described by Chadwick LJ (at [35] – see [71] above). Thus, subject to the point in the next paragraph (and also the debt collection carve out discussed below), we consider it follows directly from *Bookit* that the Booking Fees are consideration for exempt supplies of card processing services.

130. However, HMRC lay great weight on the fact that NEC did not obtain authorisation codes direct from the customers' card issuer banks, which was what Bookit did (it is the third of Chadwick LJ's supply components). In his evidence Mr Chalmers stated this difference was the main reason why NEC's claim had been rejected. In *Bookit* the VAT Tribunal understood (and so recorded) that the authorisation codes were obtained by Bookit from the card issuers. That was also how the Court of Appeal reported the Tribunal's findings (at [35]): "… receiving the authorisation codes from the card issuers…". The evidence of all of Mr Afzal, Mr Mead and Mr Monks in the current case was, that was not how retailers operated in practice. They said it would be practically impossible for a retailer to deal directly with the numerous card issuers; instead the retailer would simply deal with the merchant acquirer – that was part of the role of the merchant acquirer. Certainly, NEC received the authorisation codes from its merchant acquirer, not from the card issuers. For current purposes we take it that (despite the evidence in the current case that this was very unlikely) Bookit *did* obtain authorisations from the card issuers themselves (as recorded by the VAT Tribunal); and that NEC received the authorisation codes from its merchant acquirer, not from the card issuers. Does that difference matter for the purposes of art 13B(d)(3)?

131. In *AXA* HMRC submitted that the fact that Bookit obtained the authorisation codes from the card issuers was relevant and made *Bookit* a special case, because that fact effectively made Bookit a part of the banking system. As recorded by Henderson J:

> "[55] With regard to the tribunal's reasoning, HMRC first submit that the authorities do not support the proposition distilled from them by the tribunal in para 21 of the decision. The only authority which did not involve a party which was clearly within the banking sphere was *Bookit*, but *Bookit* was a case that turned on its own special facts. Girobank had outsourced certain of its own functions to Bookit (namely, the functions of obtaining, in respect of each transaction, an authorisation code from the relevant card issuer bank). Accordingly, Bookit was not simply giving instructions to Girobank, but had effectively stepped into the banking system by performing tasks that would normally have been carried out within that system. In consideration for performing those tasks, Bookit received a discount on its merchant acquirer fees."

132. The VAT Tribunal in *T-Mobile* took the view that the obtaining of the authorisation codes from the card issuer banks was an essential requirement for services to fall within art 13B(d)(3) – see the passages quoted at [100-101] above – and that without that T-Mobile was not "doing something that normally a bank would do". Mr Bates for HMRC submits that the ECJ decision in *Nordea* and the comments of Arden LJ in *AXA* - see respectively [106] and [104] above – also suggest that the scope of art 13B(d)(3) is limited to normal banking activities.

133. Taking those three authorities in turn, in considering *T-Mobile* (which in any event is not binding on this Tribunal) it is important to note the chronology of the surrounding decisions, and we are grateful to Mr Peacock for highlighting this point.

(1) The decision of the Court of Appeal in *Bookit* was released in May 2006.

(2) *T-Mobile* was heard by the VAT Tribunal in September 2007, with decision released in January 2008.

(3) *AXA* was heard by the High Court in April 2008, with decision released in May 2008.

Accordingly, the VAT Tribunal reached its decision in *T-Mobile* prior to (and thus without the benefit of) the views of the High Court in *AXA*, which we describe fully below. We consider that *Nordea* concerns a very different factual situation; all SWIFT did was to communicate messages (it could not even access the content of those messages – see [30] of *Nordea*) and the ECJ held that was not a service within the scope of the exemption. Finally, Arden LJ's comment in *AXA* was explicitly a hypothetical adopted for the purposes of her ladyship's judgment on a point which it was (again, explicitly) unnecessary to decide on that appeal. Accordingly, we do not consider that any of those three authorities is conclusive on this point.

134. We understand the attraction of the view that the VAT exemption for financial services (which like any exemption must be construed strictly) should be restricted to persons who are participants in the financial services sector. However, we are satisfied that, unfortunately for HMRC, that is not the correct interpretation as adopted by the courts. *SDC* is clear ECJ authority that (as summarised in the third of Henderson J's propositions) there is no requirement for the supplier to be a bank. Nor

is it necessary for the supplier to be analogous to a bank or to be performing outsourced banking functions – we consider that was exhaustively considered and dismissed by Henderson J in *AXA (High Court)*:

> "[47] … the decision in *Bookit* does not in my judgment depend on Bookit itself having actually 'made' the transfer. It is enough that the information and other material transmitted by Bookit to Girobank had the effect of causing a transfer to be made by Girobank to Bookit in accordance with the provisions of the MSA."
>
> …
>
> **[69]** HMRC argue for a narrow interpretation of the exemption in art 13B(d)(3) which would confine its ambit, in cases where the supplier of the service in question is not itself a bank or other institution, to a person which supplies services analogous to those supplied by a bank or financial institution. In my judgment, however, this approach is too narrow and is not warranted by the authorities. In particular, it does not do justice to the potential width of the reasoning of the ECJ in *SDC*, or to the decisions of the High Court and the Court of Appeal in *Bookit*.
>
> **[70]** I have already set out (see at [30] above) some of the main principles which are in my view established by *SDC*. One of those principles is that it does not matter who provides the service, and the judgment provides three examples of cases where a transfer is effected (or caused to be effected) without any direct involvement of a bank at all (see [1997] STC 932, [1997] ECR I-3017, para 54 of the judgment). Another of those principles is that the test of what constitutes a transfer is a functional one, the crucial ingredient being that a transfer consists of the execution of an order for the transfer of a sum of money from one bank account to another (para 53 of the judgment). Execution of such an order will entail a change in the legal and financial situation existing between the person giving the order and the recipient, and between those parties and their respective banks (ibid).
>
> **[71]** It is important to remember at this point that the exemption under art 13B(d)(3) is not confined to transactions which themselves constitute transfers or payments of money. On the contrary, the exemption extends to transactions 'concerning' transfers or payments. The degree of connection which must exist between the transaction for which exemption is claimed and the underlying transfer or payment was explored in paras 61 and following of the judgment of the ECJ in *SDC*, and the answer given in para 66 was that the services provided must 'form a distinct whole' which fulfils 'the specific, essential functions' of a transfer. Thus to qualify as a transaction concerning transfers, the service provided must 'have the effect of transferring funds and entail changes in the legal and financial situation'. Whether the services in any particular case have such an effect is in my judgment essentially a question of causation. In the interests of clarity, I would stress that the question is *not* what has caused the transaction which effects the transfer, which is irrelevant (see [1997] STC 932, [1997] ECR I-3017, para 53 of the judgment, 'irrespective of its cause'), but whether the transaction carried out by the service provider has truly effected, in the sense of brought about, a transfer. The causal

> nature of the test is brought out both by the use of the verb 'effect', which has a strong causal connotation, and by the reference in para 54 to cases where a customer '*causes* a transfer to be effected' (my emphasis).
>
> **[72]** *Bookit* seems to me to be a good example of a case where the causal test was applied and answered in the taxpayer's favour, even though the taxpayer operated wholly outside the banking system, and even though it was not the taxpayer itself which actually made the transfer. What mattered was that the information supplied by Bookit to Girobank inevitably brought about (although it did not itself constitute) a transfer of sums of money from Girobank to Bookit. The person who actually made the transfer was Girobank, pursuant to its obligations under the MSA. It did not make the transfer as agent or on behalf of Bookit. Nevertheless, Bookit effected the transfer, because within the contractual framework established by the parties the information transmitted by Bookit to Girobank was all that was needed to trigger the making of the transfer by Girobank to Bookit.
>
> **[73]** I agree with Mr Peacock QC [counsel for the taxpayer] that *Bookit* cannot sensibly be distinguished on the basis that Bookit was performing an 'outsourced' banking function (I confess that I share the dislike of Laws LJ for that 'barbarous expression'—see *FDR* ([2000] STC 672, para 11)—useful though it may be as shorthand for procuring from an outside source). Not only is clear evidence for this outside procurement lacking, but any attempt to marginalise *Bookit* on this basis as a case turning on its own particular facts would in my view be an unprincipled exercise in damage limitation."

135. Thus the critical test is "whether the transaction carried out by [NEC] has truly effected, in the sense of brought about, a transfer". We conclude that "[NEC] effected the transfer, because within the contractual framework established by the parties the information transmitted by [NEC] to [Streamline] was all that was needed to trigger the making of the transfer by [Streamline] to [NEC]". Despite the weight placed on the authorisation codes by HMRC (and we acknowledge that the VAT Tribunal in *T-Mobile* also considered that factor was important) nothing turns on whether the codes were obtained from the issuing banks. NEC did all that was needed to trigger the transfer of funds.

136. We draw support for this conclusion from the decision of the Inner House of the Court of Session in *SEC*. Although that decision – as a Scottish authority – is not strictly binding on this Tribunal when determining an appeal by an English company, it is highly persuasive. After extensively reviewing the relevant authorities including *Bookit* (the Court of Appeal decision post-dated the VAT Tribunal's in *SEC*), *SDC, FDR, CSC Financial Services,* and *Card Protection Plan*, the Inner House concluded:

> "[29] While there is less detailed information in the tribunal's findings in fact in the present case about the means by which information is transmitted by the appellant to Cardnet and by which Cardnet transmits payment to the appellant than there was in *Bookit*, there is no reason to think that the mechanism in its main features is any different in the two

> cases. The facility for payment by credit card or debit card effects a change in the legal and financial situation, whereby money is transferred from the customer to the appellant, within the meaning of *SDC*, as further explained in *FDR*. The four components referred to by Chadwick LJ in *Bookit* [2006] STC 1367 at [35] appear to us to be present in this case, mutatis mutandis. To adapt what he said (at [46]) there can be no doubt that, in requesting and accepting the appellant's services, the customer contemplates that some payment will be made which will enable him or her to obtain the tickets which are requested, and intends that the appellant will arrange for that. In some respects, the present case is a fortiori of *Bookit*, because the appellant and the promoter are not part of the same corporate group and the relationship between them is solely contractual. As a result of the transaction between the appellant and the customer there is a change in the legal and financial situation existing between them: *SDC*, as explained in *FDR*. Further, whereas in *Bookit* the underlying contractual arrangement to enable payment to be made by credit card (the Merchant Services Agreement) was entered into by Odeon (and its subsidiary, Bookit) with Girobank, in the present case the appellant itself entered into the necessary underlying agreement (with Cardnet) in order to provide customers with the relevant payment facilities (for which facilities the relevant charges were, as we have found, made). It is thus perhaps even more difficult to describe the service provided as a mere physical or technical supply. In any event, even if this is wrong, it appears to us that the actings of the appellant constitute negotiation, as that concept was explained in *CSC*.
>
> [30] For these reasons the second question falls to be answered in the affirmative; the booking fee falls within the scope of the exemption as constituting a transaction concerning transfer, and in any event negotiation concerning transfer."

137. We acknowledge that the Inner House recorded that all four of Chadwick LJ's supply components were present – ie including the third, receiving the authorisation codes from the issuing banks - but we do not read the Inner House's conclusions as turning on the third component. Even if it had not been present in *SEC*, it would still have been the case that "As a result of the transaction between the appellant and the customer there is a change in the legal and financial situation existing between them". We conclude that exactly the same position applies to NEC's dealings with its customers.

138. Having, for the reasons set out above, concluded that the details of the obtaining of the authorisation codes is not critical, we consider that it follows directly from *Bookit* and *SEC* that the services provided by NEC for the Booking Fees are exempt supplies.

Second Component: whether the "debt collection" carve out from art 13B(d)(3) applies

139. Our conclusion on the Direction of Supply Issue ([119] above) was that the Booking Fees are received by NEC as principal. Thus it is receiving sums properly due to itself from the customer for services immediately performed by itself. We do not consider that the action of a supplier receiving monies due from its own customer can constitute "debt collection".

140. Although NEC's factual situation is different from that of the supplier in *Paymex*, we agree with the Upper Tribunal in *Paymex* (at [142]) that debt collection is a service performed on behalf of a creditor. That was the position in *AXA* – Denplan acted on behalf of the dentists in collecting amounts due to the dentists from the dentists' patients. We consider the effect of HMRC's contention is that NEC would be charging its customers to collect monies due to it from its own customers. We consider that to describe that as a service of debt collection is an artificial analysis of a straightforward situation.

141. We should, however, record the comments of Arden LJ in *AXA*:

> "[50] It is apparent that the precise scope of the exemption and [debt collection] carve out is unclear, and will require further definition in the future. However, the authoritative determination of what falls within the exemption and the carve out is within the jurisdiction of the Court of Justice. If there is any ambiguity, therefore, it can be cured by a further reference to the Court of Justice in a future case. …"

Summary of Conclusions

142. To summarise our conclusions above:

(1) The Booking Fees were received by NEC on its own behalf for services it provided (not as agent for the promoter) – see [119] above.

(2) The Booking Fees were consideration for a card handling service – see [127] above.

(3) The Booking Fees satisfy the requirements of art 13B(d)(3), as detailed in *SDC* – see [138] above.

(4) The Booking Fees were not consideration for "debt collection" - see [139] above.

143. It follows that the Booking Fees in the Appeal Period were exempt supplies pursuant to art 13B(d)(3).

Earlier and Later Periods

144. As stated at paragraph [110] above, we confine our determination to the claim in respect of the Appeal Period. Here we make certain limited comments on the periods preceding and succeeding the Appeal Period.

145. *Box office operation* – Mr Ahmed's witness statement speaks to the period since he joined NEC in 1990. In relation to claim periods before 1990 it would be for NEC to produce appropriate evidence of the conduct of the box office operations generally and the charging of Booking Fees in particular, if necessary.

146. *Transaction Fees* – In relation to claim periods after the Appeal Period, see our comments at [121] above.

147. *Promoter contracts* - Mr Peacock for NEC invited us to infer that the types of contract exhibited in evidence would also have been used for earlier VAT periods; he pointed out that the form of the various exhibited documents was consistent over time, including the continuation of a typographical error ("levy's" for "levies"). We accept Mr Monks' evidence that the contracts were similar since he joined in 1998 and, so far as he was aware, before 1998. However, we note that the additional claims go right back to 1976 and there is a limit to how far Mr Monks' understanding can be taken back in time. For claim periods after the Appeal Period, some of the contracts included in the hearing bundle dated from this period and were consistent with the contracts quoted at [25-26] above. If necessary, it would be for NEC to produce copies of more recent contracts for the later claim periods.

148. *Webpages* – The only comments we would make on this are (i) in relation to earlier claim periods, use of the internet by customers was presumably more limited before Summer 1999; and (ii) in relation to later claim periods, Mr Bates for HMRC challenged Mr Monks in cross-examination that the wording of the FAQ pages may have been amended as a result of NEC's voluntary disclosure in relation to the Booking Fees.

149. *Terms & conditions and Phone script* – from the evidence we received we do not feel able to comment on earlier and later periods in relation to these two items.

Costs

150. Both parties made submissions concerning costs. Both parties confirmed that they would wish to claim costs if they were successful.

151. These proceedings commenced in January 2004 by a notice of appeal to the then VAT & Duties Tribunal. The relevant provisions as to costs at that time were contained in Rule 29 of the Value Added Tax Tribunals Rules 1986 (SI 1986/590) ("the 1986 Rules"). On 1 April 2009 the VAT & Duties Tribunal was, in effect, replaced by this Tribunal. Proceedings then before the VAT & Duties Tribunal were continued before this Tribunal as "current proceedings": paras 1 & 6 sch 3 Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) ("the Transfer Order").

152. We agreed with the parties that the nature of these proceedings is that, had they commenced after March 2009 – ie before this Tribunal rather than the VAT & Duties Tribunal – then they would qualify for allocation to the Complex category of cases, pursuant to Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber)

Rules 2009 (SI 2009/273) ("the 2009 Rules"). That would trigger a costs shifting regime, subject to the Appellant's right to opt-out – Rule 10(1)(c) of the 2009 Rules refers. We accordingly confirmed that the proceedings should be allocated to the Complex category of cases, pursuant to Rule 23.

153. We are conscious that different views have been taken by this Tribunal on whether a Complex category allocation can be made under Rule 23 in respect of "current proceedings". On the one hand, *Babergh District Council* [2011] UKFTT 341 (TC) and *Everest Limited* [2010] UKFTT 621 (TC) say that allocation is possible. On the other hand, *Surestone Limited* [2009] UKFTT 352 (TC) and *Hawkeye Communications Ltd* [2010] UKFTT 636 (TC) take the opposite view. We note that the Upper Tribunal in *Atlantic Electronics Limited* [2012] STC 931 expressed the view *obiter* (at [14]) that the decision in *Surestone* "might have come as a surprise to some people" but declined to rule whether it was right or wrong. On balance we feel that, for the reasons set out by Judge Clark in *Babergh District Council*, allocation is possible.

154. The Tribunal DIRECTS that this appeal is allocated to the Complex category of cases, pursuant to Tribunal Procedure Rule 23.

155. For completeness we note that this Tribunal may give a direction disapplying any provision of the 2009 Rules and applying any provision of the 1986 Rules to ensure that such proceedings are dealt with fairly and justly (para 7 sch 3 Transfer Order). However, any order for costs may only be made if, and to the extent that, an order could have been made under the 1986 Rules (para 7(7) sch 3 Transfer Order). The Upper Tribunal in *Atlantic Electronics Limited* (at [44]) confirms that any such order requires a formal application by one of the parties. We record that neither party has submitted such an application.

Decision

156. The appeal is ALLOWED.

157. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 7 May 2013

APPENDIX
Extracts from Mr Afzal's Witness Statement

"When The Booking Fee Is Charged

19. The Appellant's Booking Fee income is almost exclusively generated from sales where payment is made by credit or debit cards. Typically the Booking Fee is calculated at the following rates, (although in other cases higher Booking Fees are charged for events where the market will bear it):

Ticket Price	Booking Fee per ticket
0-£9.99	£1
£10-£19.99	£2
£20 - £29.99	£3
£30 plus	10% of ticket price, or as advised

20. For the purchase of a ticket, the Booking Fee was levied in the following circumstances in the periods covered by the claim:

Payment method	**In person**	**Telephone**	**Online**	**Post**
Cash	No Booking Fee	n/a	n/a	n/a
Cheque/postal order	No Booking Fee	n/a	n/a	Booking Fee charged until Sept 2007
Debit card	Booking Fee charged since August 2003	Booking Fee charged	Booking Fee charged	Booking Fee charged
Credit card	Booking Fee charged	Booking Fee charged	Booking Fee charged	Booking Fee charged
Purchase of the NEC gift voucher	No Booking Fee	No Booking Fee	n/a	No Booking Fee
Redemption of the NEC gift voucher	No Booking Fee	n/a	n/a	No Booking Fee
Cash + gift voucher	No Booking Fee	n/a	n/a	No Booking Fee
Cheque/postal order + gift voucher	No Booking Fee	n/a	n/a	No Booking Fee
Debit card + cash	Booking Fee charged since August 2003	n/a	n/a	n/a
Credit card + cash	Booking Fee charged	n/a	n/a	n/a

21. The only method of payment accepted by the Box Office for sales by telephone or internet is credit or debit card.

22. If payment is made over the counter, then the Booking Fee is levied for credit and debit card sales in the same way.

23. A Booking Fee is still charged in full where the credit or debit card is used in part-payment, regardless of how much the balance is and whether it is made up by cash, voucher, cheque or postal order. This is the case irrespective of the value of the payment made by card, i.e. there is no minimum card payment for the Booking Fee to be levied. For example, for a £30 ticket when £20 is paid in cash and £10 by card, a Booking Fee of £3 would be charged.

24. The only ways in which Booking Fees are charged in other circumstances are:

(a) Group Bookings. A group Booking Fee is charged on group bookings, which can be made in person, via telephone or post. It is levied for the use of a specialised service including dedicated hotline staffed by appropriately trained staff, the Box Office not requiring payment at the time of booking (where permitted by the promoter), and for the right to order more tickets than would otherwise be allowed. It is levied regardless of the method of payment and the group is invoiced at a later date if required. This group Booking Fee income is treated as subject to VAT at the standard rate and does not form part of the claim to which this Appeal relates. The amount of this Booking Fee income is very small (currently less than 5% of the Box Office's annual Booking Fee turnover).

(b) Postal Application Paid by Cheque or Postal Order. Broadly, these Booking Fees relate to the sale of tickets for exhibitions where the NEC directly contracts with exhibition organisers for the provision of the Box Office facility. This Booking Fee income does form part of the claim to which this Appeal relates. The Booking Fee income from this method is very small (currently around 1% of the Box Office's annual Booking Fee turnover). Individual cheque payments by post are rare and not encouraged as these are time-consuming and costly to process. For this reason, a charge is made and, to avoid unnecessary complications in the Appellant's pricing model, this is set at the same rate as the Booking Fee for credit or debit card payments. From September 2007, it was decided to stop charging a Booking Fee on this method of payment, as cheque or postal order by post was such a rarely used manner of payment.

25. This means that the Booking Fee arises in relation to debit/credit card payments (over 94% of transactions) while Booking Fees are also charged in relation to group bookings (less than 5% of transactions and not included in the claim) and cheque/postal order payments by post (around 1% of transactions).

26. There is also one circumstance in which a Booking Fee is not charged where a credit or debit card payment is received. That is when a gift voucher is purchased. This is a deliberate business strategy adopted by the Appellant. Partly it is to attract new customers to the venue - someone receiving an NEC gift voucher is likely to attend an NEC Event when they may not otherwise have done so and (assuming it was a positive experience) subsequently purchase tickets by debit or credit card themselves for a future NEC Event. Partly it is because it is bad business sense for anyone to try to charge, say, £11 for something with a "cash face value" of £10. For example, if someone buys a gift voucher or a book token in a store, they expect to pay only the face value of the voucher or token, and no more or no less. By contrast, the public have different expectations when buying tickets, which is why the Booking Fee can be charged in relation to tickets where payment is made using a card, but not in relation to the purchase of gift vouchers.

Booking Fee Rationale

27. The rationale for charging the Booking Fee is that the Appellant is doing something for the customer (essentially processing the customer's payment) which the customer is willing to pay for. Like any business, if the Appellant can charge a fee for doing something for the customer which the customer is willing to and expects to pay for, then it will charge such a fee. The amount of the Booking Fee is set at such an amount to cover particular costs, including overheads such as staff costs, credit/debit card commission charges, fraud risk, and to make a profit.

28. The fraud risk arises as follows. When a ticket is purchased over the telephone or via the internet, the Box Office is unable to record the signature of the cardholder. These types of transaction are known as CNP ("Cardholder Not Present") transactions. The Box Office operates under the risk of fraudulent credit or debit card use, as it is possible for the cardholder to dispute the authorised use of his/her card, typically when the card is used without his/her permission or knowledge. Even if the Box Office is given an authorisation code from the card issuer for the transaction, it is still possible for the transaction to be fraudulent. For instance, someone could phone up and book with a stolen card while pretending to be the card owner: the booking would proceed and an authorisation code would be issued, with the real owner only reporting the card stolen to the card issuer on discovery of the charge, potentially a month or even more later, e.g. on receipt of a credit card or bank statement.

29. When any fraud occurs, the Box Office has no means of proving the sale was authorised as there is no signed sales voucher (in contrast to, say, a high street retailer of goods, where a customer either signs a sales voucher or enters a pin number in person). The Box Office then does not receive payment from the card issuer, or has the previous payment reversed, in all cases when the card is found to have been used fraudulently or the transaction is otherwise challenged by the cardholder.

30. In such circumstances, the Box Office not only suffers the loss of its Booking Fee income but must also fund the cost of the ticket i.e. the loss of the ticket income is not passed onto the promoter, as the promoter does not indemnify the Box Office for any loss. In broad and simplified terms, the Box Office is running a £33 risk every time it accepts a credit or debit card ticket booking for a £30 ticket with a £3 Booking Fee. Rather than fraud occurring on a small scale for each event, it tends to be that fraudsters target a particular event heavily. Therefore if fraud does occur, it is liable to happen on a large scale.

31. Consequently, the amount of the Booking Fee is calculated to cover the financial risk of credit or debit card fraud, to cover overheads such as staff costs and other costs such as credit/debit card commission charges, but predominantly to provide a profit margin in relation to the work involved in the processing of card payments. It remains the case, however, that the Booking Fee is for the provision of the payment handling service to the customer.

Box Office Process

32. A typical booking process would be as follows, taking the example of a customer phoning up to book a ticket by credit or debit card:

(a) Customer contacts the Box Office by telephone to enquire about the availability of tickets for a particular concert or event;

(b) Box Office phone operator (the "Operator") checks on the Appellant's AudienceView software (which is a program that displays the arena seating on screen, with available tickets and prices) to see what tickets are available. Operator describes availability to the Customer.

(c) If Customer wishes to proceed and book a ticket, Operator adds the requested number (and type if applicable) of tickets to the order. Operator informs Customer of the ticket price and the Booking Fee and Transaction Fee for each event / type ofticket in the order;

(d) Operator completes the on-screen account sales form, by taking the following details from the Customer:

- name;
- address;
- contact details (ernail address and/or telephone numbers);
- payment method:
- credit or debit card number;
- security code (the three-digit number on the back of the card); and
- expiry date (and start date and/or issue number if applicable).

(e) These details are immediately processed in the Appellant's system: card details are sent from the AudienceVicw software onto other software used by the Appellant called ServeBase, which allows the secure movement of data for electronic funds transfers ("EFT"). Through the ServeBase software, the Appellant passes the information via Streamline to the relevant card issuer. If the card issuer accepts the transaction, it sends back an authorisation code via Streamline to the Appellant. This pops up onto the screen which the Operator is viewing – the time taken from the moment when the operator clicks to submit the transaction details to the moment this code pops up on screen is typically between five and eight seconds. The operator may use this time to provide marketing information and other promotional details to the Customer.

(f) Once the confirmation has appeared on screen, the Operator notifies the Customer that the transaction has been authorised, quotes a unique sequential reference allocated by AudienceView as the order number for the customer to record and reiterates the delivery arrangement.

(g) The call ends.

(h) Every night at midnight. a file of the all of the day's credit card and debit card transactions along with the relevant authorisation codes are created using ServeBase and then sent to the card issuers via Streamline. Once these are passed to the card issuers, payment is made of both the principal amounts of the tickets and the relevant Booking Fees and Transaction Fees into to the Appellant's bank account, less any commission charged by Streamline. The Appellant holds the amounts paid for the tickets in its capacity as agent for the relevant promoter(s), and holds the Booking Fees and the Transaction Fees for itself.

(i) The next day, or a few days later, the ticket is issued (i.e. is physically printed and placed in the envelope to be sent to the Customer, along with any additional promotional and/or informational material). A ticket will normally be issued within seven days of the call. The Box Office's objective is to maintain a high standard of customer service by issuing the tickets as quickly as possible, which also helps to mitigate

the cost of call centre complaints. If there are fewer than five days until the event, then the Box Office will arrange for the customer to collect the tickets before or, in the vast majority of cases, on the day of the event.

(j) Box Office staff will be at the event venue in order to assist those with lost tickets, those that have turned up at the incorrect venue and to issue the tickets for collection that day (as described above). These after-sales services are identical for tickets incurring a Booking Fee and those that did not and are extended to holders of tickets purchased through other Box Office suppliers.

33. Where a cheque payment is received, the process above will stop at entering the details onto AudienceView. The payment method is selected as cheque payment, and the cheque number added to the form as a reference for payment. At the end of each day, the cheques received are placed into a secure bag and transported to the Appellant's bank where they are paid in to their account. An exercise is regularly undertaken to reconcile the total cleared cheque payments listed on the Appellant's bank statement to the recorded ticket sales where payment was by cheque.

34. …

35. The Appellant has a direct contractual relationship with Streamline. Under the Merchant Services Agreement with Streamline, the Appellant collects information from customers and transmits it to the card issuers via Streamline, receives authorisation codes and then sends the transaction details, together with the codes to Streamline, as a result of which the Appellant's bank account is then credited with the relevant amounts. It is this process, and in particular the transfer of authorisation codes by the Appellant to Streamline, that causes the movement of money between the customer, the Appellant, the card issuer and Streamline.

36. I understand that, following litigation involving Bookit and SECC, the Respondents have expressed the view that for the provision of debit and credit card processing services to be exempt from VAT, there must be a direct connection between the ticket booking function and the Card Issuer, i.e. authorisation codes must pass directly from Card Issuers to the business and not via a Merchant Acquirer such as Streamline. My comments on that are as follows:

(a) In my experience, I have never seen or heard of such a link and I consider it to be commereially unviable, unwieldy and uneconomic.

(b) At the start of the period covered by this claim, there were dozens of card issuers and over the last decade, this number has increased into the hundreds, if not thousands.

(c) Every business involving in credit card and debit card processing can choose to use a Merchant Acquirer, whose systems are already set up to deal with all of the card issuers for relevant card schemes such as VISA or Mastercard: as such, there is no commercial or other rationale for a business instead to decide to deal directly with hundreds of card issuers,

(d) It would be completely unwieldy, increase costs vastly, and would involve the business in liaising with and developing the vast infrastructure to communicate directly with card issuers, which is an area in which Merchant Acquirers, not taxpayers with box office functions, have particular expertise.

(e) This is why, in practice, businesses in general, including box office facilities such as the Appellant's Box Office, always receive their authorisation codes from Card Issuers via a Merchant Acquirer such as Streamline."