



TC03318

Appeal number: TC/2003/00872

Lead appeal consolidated with TC/2003/1237, TC/2008/0501 & TC/2008/1100

Value added TAX – Treatment of supplies by primary ticket agent – Whether “Booking Fee” exempt? - On facts – Yes – Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAY AHEAD GROUP LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT
GILL HUNTER**

Sitting in public at 10 Alfred Place, London 15 - 18 April 2013

K.P.E. LASOK QC, instructed by Deloitte for the Appellant

**ANDREW MCNAB, Counsel and ELIZABETH KELSEY, Counsel, instructed by the
General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

- 5 1. This decision concerns appeals by the Appellant (“WAG”) against a number of decisions by the Respondent (“HMRC”) connected with the characterisation of certain payments concerning arrangements for the supply of tickets in the circumstances set out below.
2. There are four appeals involved here. Details of these appeals are set out below under the heading “Procedural History”.
- 10 3. The parties requested that matters relating to penalties and interest shall be stood over until the other matters have been decided. We were happy to agree to this and so stand such matters over.
4. This decision is a decision in principle as the parties requested relating, as requested, essentially to the characterization of the supply or supplies in question.

The Issue

- 15 5. The issue, in essence, in this case is whether certain payments (“the Booking Fee”) described below are consideration for a standard rated supply or an exempt supply? Does WAG make exempt supplies of credit/debit card handling or processing services or standard rated supplies of ticket booking services?
- 20 6. This needs to be put in a factual context. A useful brief starting point is WAG’s description of the position in its skeleton argument. This read as follows, “...WAG is a ticket selling agency. It acts for event organisers and promoters and others (“the Promoter”). When it takes a booking (on behalf of the Promoter), it has to handle the payment made by the purchaser of the ticket. To that end, WAG (acting as principal) has entered into financial services contracts so as to enable WAG to operate payment systems using debit and credit
- 25 cards, thereby enabling the purchaser of the ticket to effect the payment. When a purchaser of tickets pays by means of such a card, WAG operates the payment system, the payment is then made, and WAG exacts a charge from the purchaser. The issue between the parties concerns that charge (“the [Booking] Fee”) and the supplies for which the [Booking] Fee is the consideration”.
- 30 7. The use of the extract above from WAG’s skeleton argument is for convenience only and is not to be taken as implying we necessarily accept or agree with everything in it or in any other extracts from it subject of course to the context.
8. The decision here involves consideration of a number of questions including the following.
- 35 (a) What is the supply or are the supplies in question?
(b) Who is/are the supplier(s)?
(c) What is the supplier supplying to whom?
(d) Who is the recipient?
(e) How should this be characterised for VAT purposes?
- 40 9. After the hearing WAG drew our attention to the decision in *NEC*.
10. We asked both parties to provide such submissions, if any, on this as they wished.
11. In essence, WAG argued that *NEC* supported its case whilst the respondent considered it distinguishable factually from the present case and at any rate wrongly decided.
- 45 12. In *NEC* the taxpayer not only owned the venue but operated in direct competition with other box office businesses. *NEC* did this for itself but also for other venues. The decision concerns the treatment of Booking Fees where there were credit or debit card payments. The payment for these card payments was treated by *NEC* as the supply of payment Processing Services which were exempt from VAT. The tribunal upheld *NEC*’s appeal.

Structure of this Decision

- 50 13. The structure of this decision is as follows.

- (a) Introduction
- (b) The Issue
- (c) Structure of the decision
- (d) Abbreviations and Dramatis Personae
- 5 (e) The Procedural History
- (f) The Law
- (g) The Evidence
- (h) Findings of Fact
- 10 (i) Submissions of the parties
- (j) Discussion
- (k) Conclusion and disposal

Abbreviations and Dramatis Personae

14. The following abbreviations and references to persons are used in this decision but as ever are subject to the requirements of the context.

15	“the AGA”	WAG’s Amended Grounds of Appeal
20.	“BMS”	Barclays Bank PLC trading as Barclaycard Merchant Services
	“the Appellant”	WAG and where appropriate including the VAT Group of which it is the representative member
20	“the Booking Fee”	the fee described in paragraph 69, sometimes called the service fee or charge
	“CJEU”	The Court of Justice of the European Union
	“the Customer”	the person wanting a ticket
	“Events”	events of the type referred to in paragraph 76
25	“the First Decision”	the decision referred to in paragraph 20
	“the Fourth Decision”	the decision referred to in paragraph 27
	“HMRC”	the Respondent
	“the OFT”	the Office of Fair Trading
30	“the OFT Report”	the report produced by the OFT (OFT762) entitled “Ticket agents in the UK” January 2005
	“Primary Agent”	Ticket sellers that obtain allocations of tickets directly from Event Promoters, Theatrical Producers and/or Venues. (Glossary the OFT Report page 83)
35	“the Promoter”	an event organiser, a promoter or other person organizing Events for whom WAG acts as agent
	“RAGA”	HMRC’s Response to the AGA
	“the Respondent”	HMRC
40	“Secondary Agent”	Ticket sellers who obtain tickets, often from other ticket sellers for entertainment events, to resell to consumers, usually at a premium. (Glossary the OFT Report page 83)
	“the Second Decision”	the notice of assessment referred to in paragraph 23
45	“See”	the group of companies (in a business sense) of which WAG is a member. “See” is the trading name of the group.
	“the Sixth Directive”	Council Directive 77/388/EEC of 17 May 1977 (where appropriate as amended)
	“the Third Decision”	the notice of assessment referred to in paragraph 26
	“the Transaction Fee”	the fee described in paragraph 67
50	“VAT”	Value Added Tax

“VATA”	Value Added Tax Act
“the VAT Directive”	Council Directive 2006/112/EC of 28 November 2006
“WAG”	Way Ahead Group, the Appellant

Procedural Background

- 5 15. The procedural background to these appeals is complicated.
16. The Appellant helpfully set out the procedural history of this matter in the Appellant’s skeleton argument. What follows in this section is based on that. It was not disputed by HMRC.
- 10 17. By letter dated 30 October 2002, WAG made a voluntary disclosure in respect of the prescribed accounting period covering 1 July 1999 to 30 September 1999, during which (WAG claimed) VAT was mistakenly accounted for as output tax (the claim was for £74,029.81 and took into account the restriction on input tax recovery that arose as a consequence of the claim that the supplies in question were properly to be treated as exempt). The voluntary disclosure was based upon Business Brief 17/98.
- 15 18. By letter dated 18 December 2002), WAG made another voluntary disclosure, on the same basis, in respect of the period covering 1 October 1999 to 31 December 1999. The amount in question was £76,979.20.
19. By letter dated 28 July 2003, WAG made a voluntary disclosure on the same basis as before in respect of the period covering 1 April 2000 to 30 June 2000. The amount in question was £127,724.
- 20 20. By a decision contained in a letter dated 11 August 2003 ("the First Decision"), HMRC rejected the claim made by voluntary disclosure in the letter dated 30 October 2002. WAG appealed against that decision (the appeal number is LON/2003/087).
- 25 21. In the meantime, in respect of the periods running from the point at which WAG had reviewed the position, WAG had submitted VAT returns on the basis of Business Brief 17/98. By letter dated 19 February 2003 which concerned the quarter ending on 31 December 2002, WAG reminded HMRC of that fact and asked HMRC for confirmation that that letter would be treated as a voluntary disclosure in the event that it was ultimately determined that there had been an error. Similar letters were written in respect of the VAT returns for later periods.
- 30 22. By letter dated 3 September 2003, HMRC responded to the two letters referred to in the preceding paragraph, stating that, in the light of the First Decision, HMRC disputed the position adopted by WAG and intended to correct the position (as stated on the VAT returns) by assessment. The letter went on to say that WAG's earlier letters would nonetheless be treated as voluntary disclosures. The amounts in dispute for the two periods in question were
- 35 £320,173 (12/02 return) and £302,414 (06/03 return).
23. By a Notice of Assessment dated 4 December 2003 ("the Second Decision") HMRC assessed WAG to VAT in respect of the periods 12/02, 03/03, 06/03 and 09/03 (that is, in respect of the calendar period from 13 June 2002 to 30 September 2003). The amount of the assessment was £1,000,028 plus interest of £30,379.66. WAG appealed against that
- 40 assessment (the appeal number is LON/2003/1237).
24. By letter dated 18 January 2006, WAG reviewed the position as it then stood, listing in an annex to the letter the retrospective and current claims based on Business Brief 17/98, which then totalled £1,507,625. At that stage, *Bookit* had been decided in the High Court and
- 45 an appeal to the Court of Appeal was pending. HMRC had accepted that card handling fees were exempt and that output tax paid in respect of the supplies of card handling services could be recovered.
25. In the event, after protracted correspondence, the parties were not able to resolve the dispute.

26. By a Notice of Assessment dated 31 January 2008 ("the Third Decision"), which covers the periods 03/06, 06/06, 09/06, 12/06, 03/07, 06/07 and 09/07 (that is, the calendar period from 1 January 2006 to 30 September 2007), HMRC made a mixture of assessments to VAT and adjustments for overdeclared VAT. The assessments to VAT came to a total of £140,856 (as a result of the adjustments made for overdeclared VAT, a net amount of £1,533.08 was due to WAG). That assessment was appealed (LON/2008/0501).
27. By an Assessment of Misdeclaration Penalty contained in a letter dated 11 February 2008 ("the Fourth Decision"), HMRC imposed a misdeclaration penalty of £55,953 by reference to an amount of £373,024 in respect of the 12/05 return. The Fourth Decision was appealed (LON/2008/1100).
28. The appeals in respect of the First to Fourth Decisions have been consolidated with LON/2003/0872 as the lead appeal.
29. WAG provided Amended Grounds of Appeal ("AGA") dated 17 February 2012 to bring matters up to date to that date as had been directed.
30. HMRC provided a Response to the Amended Grounds of Appeal ("RAGA") dated 30 March 2012.
31. We were told that on the matter of costs it had been agreed that each party is to bear its own costs. Accordingly, they are not considered in this decision and we make no award of costs.
32. The parties, as noted above, requested that we make a decision in principle on the characterization point. This is a decision in principle.
- 33. The Law**
34. *Introductory*
35. The law in this area is found in the European directives, UK domestic primary and secondary legislation and decisions of the CJEU and UK courts and tribunals.
36. *European directives*
37. The exemption for financial matters is currently found in Article 135(1) (d) of the VAT Directive. It provides (so far as relevant):
- “1. Member States shall exempt the following transactions...
- (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection...”
38. This was previously in Article 13 B of the Sixth Directive
39. Article 13 of the Sixth Directive provided (so far as relevant):
- “B. Other exemptions
- 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) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring ...”
40. The supplies in question here straddle the introduction of the VAT Directive.
41. The parties agreed that there was no material difference between the relevant provisions of the Sixth Directive and the VAT Directive for the purposes of this appeal.
- UK legislation*
42. Section 31 VATA is headed “Exempt supplies and acquisitions”. It provides so far as is relevant:

“(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9... “

43. Schedule 9 VATA provides so far as is relevant:

“GROUP 5— FINANCE

5 Item No.

1. 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.

5The provision of intermediary services in relation to any transaction comprised in item 1, 2, 3, 4 or 6 (whether or not any such transaction is finally concluded) by a person acting in an
10 intermediary capacity.

Notes: ...

(2)This Group does not include the supply of a coin or a banknote as a collectors’ piece or as an investment article.

15 (2A)This Group does not include a supply of services comprising the management of credit, other than such a supply made by the person granting the credit.

(2B) For the purposes of this Group a person makes “a supply of services comprising the management of credit” if he performs any one or more of the following in relation to a credit, a credit card, a charge card or a similar payment card, operation—

20 (a) credit checking;

(b) valuation;

(c) authorisation services;

(d) taking decisions relating to a grant or an application for a grant of credit;

(e) creating and maintaining records relating to a grant or an application for a grant of credit on behalf of the credit provider; and

25 (f) monitoring a creditor’s payment record or dealing with overdue payments...

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

30 (5) For the purposes of item 5 “intermediary services” consist of bringing together, with a view to the provision of financial services—

(a) persons who are or may be seeking to receive financial services, and

(b) persons who provide financial services,

35 together with (in the case of financial services falling within item 1, 2, 3 or 4) the performance of work preparatory to the conclusion of contracts for the provision of those financial services, but do not include the supply of any market research, product design, advertising, promotional or similar services or the collection, collation and provision of information in connection with such activities.

40 (5A) For the purposes of item 5 a person is “acting in an intermediary capacity” wherever he is acting as an intermediary, or one of the intermediaries, between—

(a) a person who provides financial services, and

(b) a person who is or may be seeking to receive financial services,

45 unless the financial service in question is the grant of credit and he is also making supplies of services comprising the management of credit to the grantor, or prospective grantor, of the credit.

(5B) For the purposes of notes 5 and 5A “financial services” means the carrying out of any transaction falling within item 1, 2, 3, 4 or 6”.

Case law

50 44. We were provided with copies of the following decisions which we have carefully read.

- (1) *Grunwick Processing Laboratories Ltd. v CEC* [1987] SDC 357
- (2) *Tolsma Case C – 16/93* [1994] STC 509
- (3) *BLP v CCE* [1995] STC 424
- (4) *Sparekassernes Datacenter v Skatteministeriet (Case C-2/95)* [1997] STC 932
- 5 ("SDC")
- (5) *Card Protection Plan v CCE* [1999] 2 AC 601 and [2002] 1 AC 202
- (6) *Commissioners for Customs & Excise v FDR* [2000] STC 672
- (7) *CEC v Plantifor* [2002] UK HL 33
- (8) *Cantor Fitzgerald Case C-108/99* [2002] QB 546
- 10 (9) *CSC Financial Services v CCE Case C-235/00* [2002] STC 57
- (10) *Maierhofer Case C -315/00* [2003] SDC 564
- (11) *Tesco plc v CEC* [2003] EWCA Civ 1367
- (12) *Debenhams Retail plc v CCE* [2005] SDC 115
- (13) *Bookit Ltd. Decision 18626*, [2005] STC 1481, [2006] STC 1367
- 15 (14) *Levob Case C-41/04* [2006] STC 766
- (15) *Scottish Exhibition Centre v HMRC* [2008] 1 AC 561
- (16) *Sempra Metal v HMRC* [2007] UK HL 34 [2008] SDC 967
- (17) *Tierce Ladbroke v Belgium* Joined Cases C – 231/07 and C – 232/07
- (18) *AB NN* [2008] STC 3203
- 20 (19) *Velvet & Steel Case 455/05* [2008] ECR I – 336
- (20) *David Baxendale Limited* [2009] EWCA Civ 831 [2009] STC 2578
- (21) *Everything Everywhere Limited Case C – 276/09* [2011] STC 316
- (22) *HMRC v AXA Case C – 175/09* [2010] STC 2825
- (23) *LMUK and Baxi* Joined Cases C – 53/09 and C – 55/09 [2010] STC 2651
- 25 (24) *Finanzamt Burgdorf v Manfred Bog* [2011] STC 1221
- (25) *Nordea Pannkii Suomi Oy Case C -350/10* [2011] STC 1956
- (26) *Deutsche Bank AG Case C- 44/11* [2012] STC 1951
- (27) *Purple Parking Limited Case C -117/11* [2012] STC 1618
- (28) *Rank Group plc v RCC* Joined Cases C -259/10 and C – 260/10 [2012] STC 23
- 30 (29) *HMRC v Aimia Coalition UK Ltd (formerly LMUK)* [2013] UKSC 15

45. We have also carefully read the *NEC* decision.

Evidence

46. There were a number of volumes (five in all) of agreed documents produced. Documents were also produced during the course of the hearing. The documents were all admitted in evidence no objection having been taken to any of them.

47. We heard oral evidence from:

- (1) Rob Wilmshurst;
- (2) Martin Fitzgerald; and
- (3) James Condliffe.

40 48. Witness statements were provided for these witnesses and they were all cross examined.

49. We were also provided with a witness statement for Leanne Lipscombe which was admitted in evidence. She did not give oral evidence and she was not cross examined as HMRC considered this unnecessary.

Findings of Fact

45 50. From the evidence we make the following findings of fact.

WAG

51. WAG was the representative member of a VAT Group.

52. The Way Ahead Group Limited (“WAG”, including where appropriate the VAT Group) was incorporated in 1998.

50 53. The main operating companies are WAG and See Group Limited.

WAG's Business and Group

54. WAG, it was said in the Statement of Case, is "... engaged in the supply and management of computerised ticketing systems and retail sales of tickets for theatrical, sporting and other events. It supplies tickets to customers as agent for the principal event promoters and operates booking services through websites, call centres and a number of "box office" retail outlets".

55. The parties accepted this description.

56. Mr Wilmshurst told us (which we accept) that the core business is as a ticketing agent for promoters of events in the UK. "As a ticketing agent our core service is to sell tickets on behalf of promoters to customers".

57. Sales were traditionally carried out through the group's call centres in London and Nottingham. Bookings are also accepted online and this side of the business has expanded significantly over recent years.

OFT

58. The OFT produced a report (OFT762) entitled "Ticket agents in the UK" in January 2005("the OFT Report")

59. We were provided with a copy of the OFT Report. This made interesting reading and provided useful background. It was not directed at the particular circumstances under consideration here but WAG did have dealings with the OFT as did other members of the ticketing industry.

60. The amount that could be charged for credit card payments and the like became subject to regulation in April 2013.

61. The Booking Fee charged by WAG to the Customer substantially exceeded any related merchant service charge WAG had to pay to BMS. That there was an excess was not disputed. The size of the excess was not agreed. Whilst it is interesting to note that there is a profit involved, the essential issue remains what was it paid for? Here it was for card handling and Payment Processing Services.

Fees

62. WAG charges the Customer two fees. The Customer pays these in addition to the price on the face of the ticket.

63. The system is set up to prompt the call centre operator to "... remember to inform customer of any booking fee & postage charges".

64. There are also online prompts for internet customers. These are described below.

65. Mr Fitzgerald said in his witness statement:

"[12.] [WAG] tends to make its money from a combination of the booking fee and the separate transaction fee received from customers. The transaction fee is charged to cover the cost of printing tickets, sourcing stock, packing and customer service elements of the transaction, such as ensuring the right customer receives the right tickets. [WAG] does not combine the two fees together because they are each subject to individual margins.

[13.] The profit received from the booking fee must cover the costs of the e-commerce infrastructure, credit card commissions, marketing and staff and the costs of keeping the booking facility open 24 hours a day 7 days a week. These are the costs of keeping the booking facility going and making the ticket sales happen".

66. We accept this from a business point of view but the legal analysis may be more complicated. The FAQs show this. What the fee is used by WAG to cover is not necessarily what it is paid for by the Customer. Essentially the Customer pays it for Payment Processing Services when paying the Booking Fee, as that is what is left to cover. As WAG asked, what else could it be for? The face value of the ticket and the Transaction Fee for delivery etc. did not leave anything really other than Payment Processing. This is what the Booking Fee was essentially paid for and we so find.

The Transaction Fee

67. A transaction fee is charged. This covers “postage and packaging” and in the past this is what it was known as according to Mr Wilmshurst’s evidence.

68. This fee is standard rated by WAG and this treatment is not in dispute before us.

5 *The Booking Fee*

69. Customers have always been charged a booking fee according to Mr Wilmshurst.

70. The booking fee tends to be about 10% of the face value of each ticket sold.

71. As the Promoter has an interest in the level of the booking fee it may be dealt with in the agreement between WAG and the Promoter.

10 *WAG, History and the Booking Fee*

72. Mr Wilmshurst told us that the booking fee “... came about as a supplement for credit card purchases made via [the Group’s] retail outlets”. Seemingly this was to cover the merchant costs. There was nothing to corroborate this but it seems a likely origin. We do not think anything turns on the origin of the Booking Fee. It merely gives a context to it.

15 73. The group now only accepts payment by card (other than American Express and Diners Club) at its call centres and online.

WAG’s Website Terms and Conditions

74. WAG had the usual policies, terms and conditions in place for use of the website. These did not affect anything in respect of the Booking Fee.

20 *WAG’s arrangements with Promoters*

General

75. WAG entered into arrangements with a number of Promoters during the period in question. We were not provided with full details of all the arrangements but a sample. Nothing seems to turn on this.

25 76. Various persons set up events which require tickets to be sold to be successful. These include events such as sporting events like the Ryder cup, musical performances and theatrical performances and other similar occasions (“Events”). The people who set up such events are referred to here as “Promoters”.

30 77. WAG entered into contractual arrangements with Promoters. These contractual arrangements could be on standard or bespoke terms. WAG had its own standard terms and conditions (see below).

78. Under the standard terms agreements WAG would not be paid or remunerated by the Promoter but would have contractual obligations to the Promoter.

35 79. We were told that under a bespoke agreement WAG would often be paid a fee by the promoter. This was not disputed and we have assumed it to be accurate for the purposes of this decision. We do not consider anything turns on this.

Standard arrangements

40 80. The important terms of the WAG standard model includes the following matters. We remind ourselves that this is an agreement between WAG and the Promoter. The Customer is not a party to this agreement.

81. By clause 1.1, the Promoter appoints WAG “on a non-exclusive basis to sell Tickets during the Term *as an agent* on the [Promoter’s] behalf and [WAG] hereby accepts such appointment”. [emphasis supplied]

45 82. Clause 2 is headed (“Charges”) and provides:
“2.1 In consideration of the Ticket sales services to be provided by [WAG] pursuant to this Agreement, the [Promoter] agrees that [WAG] shall be entitled to apply the charges set out in this Clause 2 (the “Charges”).

2.2 [WAG] shall be entitled to charge the customer a booking fee (the “Booking Fee”) in respect of 10% of the face value of each ticket sold by [WAG].

2.3 [WAG] shall be entitled to charge the Customer for the first class postage of Tickets to the Customer or for special delivery of Tickets to the Customer where duplicate Tickets are not made available by the [Promoter] (the “Transaction Fees”) as follows:

Delivery Method	Charge per Order
First Class Postage	£2.25
Special Delivery	£4.95
Collection Orders	£2.25

83. Clause 3 is headed “Accounting” and provides:

5 “[WAG] shall account to the [Promoter] in respect of all receipts for the Ticket Price [face value excluding charges in clause 2] on completion of an event (together with full reconciliation details of such monies and a VAT analysis) and such sums shall be paid to a bank account notified by the [Promoter] ... For the avoidance of doubt, [WAG] shall be entitled to retain any Booking Fee, Transaction Fees or Ticket Printing Fee payable by the
10 Customer”.

84. Under the “Standard Terms” Schedule, WAG agreed to provide the following services (inter alia) in respect of ticket sales:

- (a) to offer tickets for the events for sale to customers from a date agreed between WAG and the Promoter (Term 2.1);
- 15 (b) to use its best endeavours to make tickets available for sale as soon as possible once notified by the Promoter (Term 2.4(a));
- (c) to provide a 24 hour live operator call centre service for ticket sales, event information and customer services enquiries (save on 25 December of any year) (Term 2.4(b));
- (d) to appoint a client services representative in respect of each Event to liaise with the
20 Promoter (Term 2.4(c));
- (e) to store securely the ticket stocks it holds (Term 2.6); and
- (f) to use its expertise and knowledge to limit the possible exposure to both parties of credit card fraud and fraudulent transactions (Term 2.7).

85. Under the “Standard Terms”, the Promoter agrees:

- 25 (a) to provide tickets to WAG on a sale or return basis (Term 2.2);
- (b) to provide WAG with accurate and up to date event information in respect of Events, including detailed seating plans and information relating to capacity and, where relevant, seating configuration and pricing (Term 2.3(a));
- (c) to market and promote the event(s) (Term 2.3(b)); and
- 30 (d) to ensure all advertising and promotional material for an event includes WAG’s “Booking Information” (telephone bookings number and website address) (Term 2.3(c)), displayed no less prominently than other such information (Term 2.3(d)).

86. The Schedule also makes provision in respect of force majeure and termination.

87. The Schedule provided that the agreement was not assignable. It also had entire
35 agreement and no partnership provisions.

88. The agreement was to be governed and construed in accordance with English Law (Term 7.8).

Bespoke arrangements

89. WAG does not always contract with Promoters on WAG’s standard form. Agreements
40 are also negotiated on an individual basis or on a client Promoter’s standard terms. This depends on the commercial circumstances.

90. The Bundle of Documents contained documents relating to a number of ticketing agreements, both standard form and “bespoke”. They were a sample and somewhat varied.

91. We note as HMRC said “...The one common feature of all documents is that none
45 contains any term or representation to the effect that any “booking fee” or “transaction fee” to be made by WAG to the Customer is to be, or is to be described as, a “payment handling

charge” or similar”. This may not be thought surprising bearing in mind that the Customer was not a party to the agreements.

92. Agreements may provide for payment of commission by the Promoter to WAG or for sharing of the Booking Fee between the Promoter and WAG. Some individual agreements provide for a rebate on the booking fee to be payable by WAG to the Promoter according to Mr Wilmshurst. However, these circumstances are not in issue before us.

93. Mr Wilmshurst’s evidence was that while booking fees are typically charged to customers on ticket sales for musical and theatrical events, the charge of booking fees is “atypical” for exhibitions. Mr Wilmshurst further explained that for exhibitions and some theatrical productions, WAG “will be paid a commission [by the Promoter] from the ticket price for each ticket sold”.

WAG’s FAQs

94. Two questions from the FAQs on WAG’s website were the subject of much debate.

95. These read:

“Why do I have to pay a service charge?”

The price of a ticket is set by the event organizer. They don’t pay us anything to sell their tickets so in order to function See [WAG] has to charge on top of the face value of the ticket. We do this on a per ticket basis to allow us to provide 24/7 bookings service and order processing. This also covers our staff, customer services, credit card commissions and all the other costs associated with running our business. The actual amount we charge is negotiated with the venue or promoter for each individual event and is non-refundable in the event of its cancellation.

What is the transaction fee for?

The transaction fee covers the cost of processing orders, printing, packaging and delivering the tickets to you. This fee also applies to tickets arranged for collection at the venue. The transaction fee applies per order not per ticket. If you purchase six tickets you only pay one transaction fee. The transaction fee will vary depending on what type of postage we are being asked to use by the event organiser and these costs are reflective of the amount that See is charged by despatch companies. First class post and courier delivery prices will vary accordingly. See only send tickets securely for events that do not issue duplicate tickets in the event that tickets get lost in the post”.

96. The heading was later changed to “Why oh why do I have to pay a service charge?”

The following wording was not significantly changed.

The Booking Process

97. Bookings may be made online or by telephone. The significance of online booking has increased markedly over the years.

98. The Booking Fee and the Transaction Fee are charged whether the booking is made by phone or online.

99. If the booking is made online then tickets are selected via the appropriate screen.

100. When the selection has been made a screen appears setting out the selection. The screen provides (inter alia) that “All ticket prices are subject to a booking fee. An additional transaction fees is charged per order”.

101. The amount of the face value of the ticket with booking fee is displayed on screen. The references to booking fee are displayed on the following screens.

102. The Customer then enters details in respect of the card the customer is to use for payment.

103. The screen tells the customer that “all orders are subject to the terms and conditions of See”.

104. The Customer is told that the site is secured with the best encryption standards.

105. Terms and conditions and FAQs are available on the website. Agreement to the Terms and Conditions has to be confirmed by ticking a box.

106. A 3D secure screen may be displayed whilst card payment is authorized. A password may often be required. It is not obvious to the customer how the verification process takes place.

107. We were provided with a flowchart end of the various stages summarised above. It is understood that the flow charts were produced by HMRC. Item 6 on the flowchart read "The merchant acquirer obtains authorisation from the customer's card issuer via the card scheme (e.g. visa and MasterCard) and transmits an authorisation code to the appellant via secure data link".

108. WAG noted that this was a factual difference from *Bookit*.

Authorisation of payment

109. WAG entered into a merchant agreement with Barclays Bank PLC trading as Barclaycard Merchant Services.

110. WAG also had a services agreement with Data Cash Limited. Under this, services were provided to WAG in respect of authorisation requests including facilities to store all positive authorisation responses in a batch file the settlement with your acquiring bank.

111. That agreement provided (inter alia) that "DataCash acts as an intermediary in providing bank card services through its provision for exchanging Authorisation Request and Authorisation Response messages with and settlement batch file delivery to your acquiring bank..."

112. Under the merchant agreement payment was to be sent by Barclaycard on a daily basis.

113. The terms and conditions varied over the period but not significantly. Changes were made to reflect the introduction of "Chip and Pin" in February 2006.

114. For certain cards the agreement provided that the same price was to be charged as if they were cash payments. These were essentially debit cards (see e.g. Clause 3.3 (c) of the June 2004 Merchant Terms and Conditions).

115. Clause 3.4 of the June 2004 terms was headed "Authorisation". It provided:

"(a) You must get authorisation through us from the relevant Card Issuer for all Card Payments above your Floor Limit and (if we ask you to) for certain Card Payments below your Floor Limit.

(b) You must cancel any authorisation for a Card Payment if you or the Cardholder decide not to go ahead straight away with the Card Payment.

(c) When you ask us for authorisation, we contact the Card Issuer to approve the Card Payment. Authorisation is not a guarantee of payment and it does not prevent us from charging the Card Payment back to you if any of the reasons set out in condition 4.1 apply.

(d) In particular, you should be aware that accepting Card Not Present Payments is done so at your own risk and the Card Issuer will not offer any guarantee of payment".

Clause 3.7 provided that WAG were not acting as Barclaycard Merchant's agent except when holding back a card.

116. The Bundle contained the following document concerning Card Payment Processing. This document was part of the agreed bundle and was not challenged. It provided:

"The Wayhead [sic] Group Limited – Card Payment Processing

[1] Obtaining the card information (card number, expiry date and security number) from the customer:

(a) Through the call centre: the card information is entered into a booking form on the ticketing system by an operator

(b) On the Internet: the card information is entered into a web form by the customer

[2] Transmitting the information to the card issuers:

Card information and value of transaction is entered by the system into a simple text file which is saved on to our server. This information is automatically picked up by our WINTTI software (provided by third party) and then transferred directly to Barclays Merchant Services (our merchant acquirer) via a BT private circuit.

5 [3] Receiving the authorisation codes back from the card issuers:

Once the information has been sent to the MS, via the WINTTI software, our system automatically locks the returned file with authorisation codes. When the file appears, the software analyses the results and relays the information to the operator (if the tickets had been booked over the phone) or to the customer (if the tickets have been booked via the
10 Internet).

The processes, detailed in points 2 &3, happen within a few seconds.

[4] Charging the cardholders and receiving the money into our BOS bank account:

At one minute past midnight the system automatically performs an End of Day process which puts all the transactions from that day into a file. This file is then pulled to Barclays
15 Merchant Services during the night for the previous day's credit card transactions. We receive a response from VMS which confirms that file has been received and is without error. BMS then transfer the funds into a designated bank account.

117. It is to be noted that the flowchart (which was in the bundle and not objected to) said at
20 6 "The merchant acquirer obtains authorisation from the customer's card issuer via the card scheme (e.g. Visa and MasterCard) and transmits an authorisation code to the appellant via secure data link".

Submissions of the Parties

WAG's submissions in outline

118. *General*

25 119. In essence, WAG argued that that the matter provided by the Appellant as principal to the Customer was the payment facility ("Payment Processing Service"). As a matter of contract everything else was done qua agent for the Promoter. The payment facility supply was an exempt supply of an exempt Payment Processing Service.

120. In more detail WAG contended that:

30 (1) There was a single distinct supply of an exempt Payment Processing Service by WAG as principal;

(2) Any other characterisation of the supply was incorrect;

121. The supply in question is the Payment Processing Service for which the consideration is the Booking Fee.

35 122. As the payment is for the service of a Payment Processing Service it falls within the exemption in Item 1 Group 5 Schedule 9 VATA interpreted in the light of the Directive.

123. HMRC are wrong to attempt to treat the card processing fee as part of a composite supply consisting of ticket services.

124. The supply in question is a separate supply as principal by WAG to the Customer.

40 125. The Booking Fee is not part of the consideration for a single standard rated supply of advance booking services.

126. The Booking Fee is not consideration for multiple services none of which are exempt.

127. HMRC have failed to apply the relevant case law in particular *Tolsma* and *Bookit*.

128. The appeal must be allowed as:

45 (1) WAG makes a single supply of a Payment Processing Service to the Customer;

(2) WAG receives the Booking Fee from the Customer for this service;

(3) The Payment Processing Service falls within the exemption so WAG is not required to account for VAT on it.

129. The approach to be taken is:

(1) Identify the components which the customer engages WAG to perform as principal as required by *Tolsma*;

(2) Here there are only two items, namely:

(a) Card processing; and

(b) Delivery;

(3) Delivery is paid for via the Transaction Fee and so is standard rated;

(4) The Booking Fee is the consideration for a card processing service, a Payment Processing Service, which is exempt in the light of *AXA*, *Bookit* and *SDC*.

130. Accordingly, the Tribunal must decide that the proper characterization of the supply for which the Booking Fee is the consideration is as an exempt supply falling within Item 1 Group 5 Schedule 9 VATA interpreted in the light of European Law.

131. WAG contended that the case law such as *Bookit* must be considered in the light of all other relevant case law.

132. Although the condition of “obtaining authorisation codes directly from the card issuer” was considered an important factor in *Bookit*, the later case law of the CJEU has made it clear that it is not a relevant requirement to fall within the exemption.

133. WAG also noted that the CJEU set out a test for the application of the exemption in *SDC*. The CJEU considered that for a service to fall within the exemption the “service must, viewed broadly, form a distinct whole, fulfilling in effect the specific, or 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. The service exempt under the directive must be distinguished from a mere physical or technical supply...”

134. Here the payment Processing Service for which WAG receives the fee from the customer meets the *SDC* test as the processing of payments on the facts and entails a change in the legal and financial situation of the customer. This is not a “technical” supply.

135. WAG also referred to *AXA* which the taxpayer said was distinguishable on the facts. The CJEU treated the collection of fees by *AXA* as agent for various dentists as a of a debt collection service and so taxable. The supply there was to the creditors i.e. the dentists.

WAG’s supply was to the debtor ie the customer. It therefore cannot be a debt collection service as it is done for the customer not the promoter.

136. WAG also noted that in paragraph 28 of *AXA* the CJEU commented that if the service was not a debt collection service it would have been exempt. WAG is not supplying a debt collection service so the supply must be exempt.

137. The evidence before us was that WAG was sent the codes (see paragraph 115[3] above).

138. ***HMRC’s submissions in outline***

General

139. In essence, HMRC argued that what the Customer wanted was a ticket acquired remotely. This was what the consideration paid by the Customer was for. The sum of the booking fee and the transaction fee was the consideration paid by the Customer to WAG for WAG to supply the services which allowed the Customer to obtain remotely a delivered ticket in the Customer’s hand

140. What the Customer gets from WAG is a single complex supply for which the Customer pays two fees. What the Customer gets, is the pre-booked ticket delivered to him before the event so the Customer can get in to the event.

141. The fall-back position is that the booking fee, i.e. viz the per-ticket fee, on its own, is consideration for a single complex standard-rated supply.

142. HMRC did not suggest that there was a package that consists of the ticket, the booking, the delivery, which was a complex supply by the Promoter and WAG.

143. In more detail it was argued on behalf of HMRC as follows.

(1) The Appellant starts from the wrong place. It is not just a card-handling service; the Customer is being supplied with but a ticket-booking and ticket-delivery service by a Primary Ticket Agency.

5 (2) The Customer wants to use the booking and ticket-delivery service to obtain a pre-booked, delivered ticket and to do so remotely.

(3) The Customer accepts (but does not necessarily like) that a fee in addition to the face price of a ticket has to be paid for the remote pre-booking and delivery service. And you get to that by looking at all the relevant circumstances and, most particularly, the evidence.

10 (4) Looking at all those circumstances, there is a single standard-rated supply of a booking service consisting of a remote ticket-booking and delivery service which has the features included in paragraph 5 of the Commissioners' submissions. These are:

15 “(i) a remote booking facility, enabling tickets for a wide range of events to be selected, booked and purchased by WAG’s customers without their having to leave their home or workplace, and at any time of the day or night which is convenient for them;

(ii) a telephone booking facility, available 24 hours a day, 7 days a week, providing callers with an opportunity to book tickets for theatrical performances and other events, in conjunction with the provision of a wide range of information to assist them in booking the tickets which best suit their requirements, including information regarding performance dates and times, the availability of seats at different locations within the event venue and of different price brackets, and any restrictions affecting the views which can be enjoyed from those seats;

20 (iii) an interactive website incorporating information about events, the availability of tickets for those events, ticket prices and related matters, in conjunction with a remote booking service and an order tracking facility enabling customers to track the progress of their tickets from the moment of order to delivery;

(iv) the acceptance of payments by credit or debit card and the processing of those payments; and

25 (v) postage of tickets to home addresses or advising the customer as to where and how tickets are to be collected”.

30 (5) The consideration for this single composite supply consists of the booking fee and/or the transaction fee. All of this is consideration for the standard-rated supply of the service. This is how the Customer perceives the position.

35 (6) There is no evidence that the Booking Fee was consideration for the supply of card processing. The evidence shows that the Booking Fee, together with the Transaction Fee, was consideration for a service of ticket booking and ticket delivery having the features set out in the terms and conditions and the FAQs. There is not a separate, identifiable supply of card-processing.

40 (7) The Booking Fee is considerably more than the BMS charge which is relevant to demonstrate that, whatever the origins of the fee, it cannot now be said that it has anything to do with merely covering the charges made by the merchant acquirer.

144. A pithy description of what is supplied is it is a ticket-booking and ticket-delivery service with a pre-booked and remotely booked delivery of that ticket. That is what "booking not banking", means which had been an earlier version of a pithy description.

45 145. HMRC rely on *Bookit* to say that the Booking Fee is standard rated as it does not fall within Group 5 Schedule 9 VATA.

146. HMRC contend that the services supplied by WAG for the additional fees do not satisfy the essential criteria identified by the Court of Appeal in *Bookit* as WAG does not obtain the card authorisation codes direct from card issuers. At any rate the present case is distinguishable on the facts from *Bookit*. Further “regrettably the Appellant fails to

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elaborate on how [it] is made clear” that the Court of Appeal’s Bookit “authorisation” is not relevant.

147. Further the services cannot be exempt as they are services comprising the collection of debts. This is supported by AXA. HMRC contend that it does not matter that the fee is received from the Customer rather than the Promoter (paragraph 6 RAGA). The service is the collection of money from a Customer which is the service of debt collection.

148. The appeal must be dismissed.

Discussion

Introduction

149. We set out at the start of this Decision our view of the issue and some questions relevant to deciding the case.

150. As noted above the essential issue in this case is whether certain payments (“The Booking Fee”) are consideration for a standard rated supply or an exempt supply? Does WAG make exempt supplies of credit/debit card handling services or standard rated supplies of ticket booking services?

151. We consider this raises a number of questions

- (a) What is the supply or are the supplies in question?
- (b) Who is the supplier?
- (c) What is the supplier supplying to whom?
- (d) Who is the recipient?
- (e) How should this be characterised for VAT purposes?

152. We have found the contractual arrangements were between WAG and the Promoter with the exception of card processing and postage and packaging which was between WAG and the Customer.

153. We have also found that:

- (a) WAG supplied the service of an available website which could be accessed by the Promoter’s Customers. This was something that Customers could use but was not something done for a monetary consideration between WAG and the Customer. The use of the website would be governed by the website’s terms and conditions and privacy policy etc. However, this is a different matter from the acquisition of tickets for payment.
- (b) WAG acted as the Promoter’s agent in selling tickets to Customers. This was a service supplied to the Promoter as agent.
- (c) Payment for the ticket had to be completed for the sale of ticket to take place. In order to do this WAG had to be able to transfer money from the Customer’s account for the Promoter. For Financial Services Law reasons WAG had to be authorized by the Customer to do this. WAG could not do this as the Promoter’s agent.
- (d) As part of a process the Customer authorised WAG to process the payment.
- (e) This was something WAG did for the Customer and was a supply to the Customer not the Promoter.
- (f) There was a separate consideration for this applied to a Customer i.e. the Booking Fee.
- (g) The Transaction Fee was accepted as VATable but this was not a matter of dispute before us.
- (h) As we consider and find there was a general arrangement between WAG and the Promoter and a specific arrangement as to payment processing between WAG and the Customer, we find that there was not an overall arrangement for the supply of a delivered ticket to the Customer. This is not how the documents released and there is no need to read them differently or implied terms to give them commercial efficacy.
- (i) This was the supply to the customer of a payment processing service not a supply of debt collection to the Promoter.

(j) The Payment Processing Service entails a change in the legal and financial situation of the Customer. It means that the Customer has paid for the ticket which is delivered to the Customer which allows the Customer to get into the Event. This is not a technical supply.

5 154. We also find for completeness that what was done through the Payment Processing Service entails a change in the legal and financial situation of the Customer by reducing the amount in the Customer's account and providing a ticket for the Event in question so that the SDC test is met.

What is the supply or are the supplies in question?

10 155. The arrangements in question involve three things which have to be done. There are at least three supplies here and we so find. There is not one overall supply of ticketing services.

156. The first thing is the supply of tickets to the Customers. This is done by the Promoter to Customers through the agency of WAG.

15 157. The second thing is the delivery of the tickets. This is done through WAG by the post or by courier or electronically. This is paid for by the Transaction Fee. This is implicit in the arrangements and is corroborated by the FAQs.

158. The third thing is what is left which is essentially collecting the money and sending it to the right people. The face value price of the tickets had to be sent to the Promoter. What is left is for WAG. This is how the financial aspect of the arrangements is dealt with.

20 159. The service charge i.e. the Booking Fee is for what is left after the cost of printing, packaging and delivery and/or providing the collection etc. There was also a profit element in this. That the fee was more than the cost involved (i.e. there was a profit on what was done for the fee) does not change what it is a payment for. How the profit is used does not affect that. It is still a fee for the Payment Processing Service.

25 160. Essentially, the Booking Fee is for processing credit card and similar payments and making the onward payments. This involves dealing with money etc. falling within Item 1 Group 5 Schedule 9 VATA and we so find. It involves "payment" and not debt collection as it is done for the debtor or not the creditor and we so find.

161. Accordingly, this third supply is an exempt supply as a matter of UK and European law and we so find.

30 It was not shown that any payment is made for the use of the facilities of WAG. These are open to anyone without payment. It is only when tickets have to be paid for that the payment processing services are engaged and we so find.

Who is the supplier?

35 162. It follows from what we have said above that there are two suppliers in connection with the supplies discussed above.

163. The ticket was supplied by the Promoter through the agency of WAG, the Primary Ticket Agent.

164. "Post and packaging" etc. was supplied through WAG.

40 165. WAG supplied Payment Processing Services as principal to the Customer. It could not do this as agent for the Promoter for Financial Services law reasons.

What is the supplier supplying to whom?

166. We find that WAG supplied Payment Processing Services as principal, the consideration for this was the Booking Fee.

167. This Payment Processing Service was supplied to the Customer.

45 *Who is the recipient?*

168. There are two recipients of services under the arrangements before us. The Promoter receives the services provided for in the agreement between WAG and the Promoter.

169. The recipient of the payment Processing Services is the Customer. As it is the person who owes the money who is receiving the service this cannot be a service of debt collection.

50 It is a service of payment processing.

How should this be characterised for VAT purposes?

170. We have found that the payment of the booking fee is for the payment Processing Service, payment processing is the essential characteristic of the service. The question then is whether the payment is for a service which meets the criteria for exemption is falling within dealings with and/or transfer of money.

171. HMRC argued that it was not within the exception. This was essentially on two grounds. These were:

(1) It was debt collection; and

(2) There was no collection of codes etc. by WAG so that the four conditions referred to in *Bookit* in the Court of Appeal were not met.

172. We find that what was done was not debt collection. It was not something done for the creditor. It was the making of payments by the Customer that was involved here. It was payments not the collection of debts that was involved here. Accordingly we reject that argument.

173. Chadwick LJ (with whom Sedley and Arden LJ agreed) said in *Bookit* in the Court of Appeal:

“[45] It was because the fourth component of the service supplied by Bookit to the customer does have the effect that funds are transferred to Bookit's account with Girobank ... that the Vice-Chancellor reached the conclusion that the exemption for which article 13B(d)(3) provides was available in the present case. In my view he was correct to do so.

[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 ... 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 article 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”.

We respectfully adopt this.

174. We consider and find that the position in this case is the same and that the Payment Processing Services attract the exemption.

175. We have identified the service supplied to the Customer as Payment Processing Services.

176. We are of the view and find that the service attracts the exemption.

177. We are reinforced in this view by what was said in *SDC* (see paragraph 133 et seq above).

The NEC Case

178. We are grateful that the decision in the *NEC* case was brought to our attention.

179. We have reached a similar conclusion on similar grounds to that in the *NEC* case.

180. We gratefully adopt what is said about *Bookit* in the *NEC* case and adopt it as part of our reasoning in this case.

Conclusion and Disposal

181. We have found that:

- (1) There is a supply of Payment Processing by WAG as principal to the Customer;
- (2) This not a supply of ticket booking services or part of a complex supply to do so, remotely or otherwise;
- (3) It is a supply by WAG as principal and not as the Promoter’s agent;
- (4) WAG’s supply for the Booking Fee falls within Group 5 Schedule 9 VATA;
- (5) WAG makes exempt supplies of Payment Processing services.

182. Accordingly, the appeal is allowed.

183. 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.

**ADRIAN SHIPWRIGHT
TRIBUNAL JUDGE**

RELEASE DATE: 10 February 2014