# TC03972

**Appeal number: TC/2010/01490**

***VALUE ADDED TAX – financial transactions – exemption – Article 135(1)(d) Principal VAT Directive – card handling services – nature of services – whether transactions concerning payments – scope of exemption – questions to be referred to the CJEU for a preliminary ruling – whether in any event to be excluded from exemption as debt collection – abuse of rights***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BOOKIT LTD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Manchester on 10-12 February 2014**

**Andrew Hitchmough QC and Zizhen Yang of counsel instructed by Ashurst LLP for the Appellant**

**Kieron Beal QC and Alan Bates of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents**

## DECISION

*Background*

1. Bookit Limited ("the appellant") appeals against four decisions of HM Revenue & Customs concerning the VAT treatment of certain supplies. The supplies in question are credit and debit card handling fees charged by the appellant to customers making advance bookings for cinema tickets at Odeon cinemas. The appellant contends that the supplies are exempt from VAT pursuant to article 135(1)(d) of Council Directive 2006/112/EC ("the Principal VAT Directive"). HMRC contend that the supplies are not exempt and should be standard rated. In the alternative, if the supplies would otherwise be exempt HMRC rely on an argument that the arrangements involving the appellant's supplies amount to an abuse of rights.

2. The decisions under appeal are as follows:

(1) A decision dated 24 December 2009 that the card handling fees are not exempt from VAT,

(2) An assessment to VAT dated 20 January 2010 in the sum of £755,966 covering VAT periods 07/07 to 01/09.

(3) A decision dated 15 August 2012 refusing a claim for repayment of VAT in the sum of £1,296,041 in respect of card handling fees for the period 1 February 2010 to 30 April 2012.

(4) A decision dated 27 December 2012 refusing a claim for repayment of VAT in the sum of £410,664 in respect of card handling fees for the period 1 February 2009 to 31 January 2010.

3. The appellant has previously litigated the issue of exemption of card handling fees. In 2006 it successfully argued in the Court of Appeal that the card handling fees then being charged were exempt from VAT - see *Bookit Limited v Revenue & Customs Commissioners [2006] EWCA Civ 550* ("Bookit"). The same issue arises on the present appeal, albeit by reference to different facts as appears below.

4. Article 135(1)(d) Principal VAT Directive exempts from VAT:

> "… *transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection* …"
>
> (emphasis added)

5. The issue on this appeal, as it was before the Court of Appeal in 2006, is whether a card handling fee is a "*transaction concerning payment*". If it is, and is therefore prima facie exempt, there is an issue as to whether it is excluded from exemption by virtue of being debt collection.

6. The appellant is a wholly owned subsidiary of Odeon Cinemas Holdings Limited ("Odeon"). It is that fact, and the circumstances in which the appellant was incorporated and has carried on business, that gives rise to HMRC's assertion that

even if the card handling fee is exempt, the arrangements are abusive within the principles set out by the Court of Justice in *Halifax plc v Customs & Excise Comrs Case C-255/02*. There are two limbs to the concept of abuse described by the ECJ at [74] and [75] as follows:

> *"… in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions" (**"the first limb"**);*
>
> *"Secondly, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. … the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages" (**"the second limb"**)."*

7. In this appeal the appellant accepts that the second limb of Halifax is satisfied. The appellant was established with the essential aim of securing a tax advantage, namely the benefit of exemption on the card handling fee. The issue in relation to abuse is whether the first limb is satisfied, namely whether the tax advantage accruing to the appellant is contrary to the purpose of the Principal VAT Directive.

8. In the light of that brief background I can summarise the issues to be determined as follows:

> (1) Are the card handling fees charged by the appellant transactions concerning payments so as to fall within the scope of the exemption?
>
> (2) If so, do the card handling services supplied by the appellant amount to debt collection so as to be excluded from exemption?
>
> (3) If the card handling fees are exempt, are the arrangements involving the appellant contrary to the purpose of the Principal VAT Directive?

9. The facts were largely agreed, save in one respect referred to below. I was provided with a Statement of Agreed Facts and a Statement of Supplemental Agreed Facts. I also heard evidence from Mr Colin Birnie, a director of the appellant.

*Findings of Fact*

10. I shall make findings of fact in the same way in which the evidence was presented by the parties. Firstly considering the nature of the services provided by the appellant. Those facts are relevant to the exemption issues. I shall then consider the relationship between the appellant and Odeon and the circumstances in which Odeon set up the appellant. Those facts are relevant to the abuse issue. Save where otherwise appears my findings of fact relate to the position during the VAT periods in issue on this appeal.

*(1) Services Provided by the Appellant*

11. The income of the appellant is derived solely from transactions involving Odeon group companies and customers visiting Odeon cinemas. Odeon ticket sales are made through the following channels:

(1) Counter and automatic ticket machine ("ATM") sales at cinemas;

(2) Telephone sales via a telephone contact centre; and

(3) Internet sales

12. Counter sales are made by Odeon employees at cinemas. The involvement of the appellant is limited to card processing services provided to Odeon. No card handling fee is charged to Odeon or to customers in respect of counter sales or ATM sales.

13. Telephone sales are made by the appellant through a contact centre which it operates in Stoke. The appellant occupies the contact centre pursuant to a licence from Odeon. The contact centre deals with telephone sales and other customer service enquiries. Telephone sales are made to customers by the appellant as agent for Odeon.

14. Internet sales are made via a website at www.odeon.co.uk. Odeon provides the appellant with access to the website and the appellant updates the website pursuant to an agreement with Odeon. Tickets sold through the website are sold by the appellant as agent for Odeon.

15. Payment for a telephone sale or an internet sale is made to the appellant's bank account from the customer's account. The appellant accounts to Odeon for the sales value of the ticket and retains an additional amount paid by the customer as a card handling fee.

16. At all material times the appellant had 55 employees based in Stoke and 6 directors.

17. In the periods covering the decisions under appeal the card handling fee has varied between 65p and 75p per transaction. That is the fee paid by a customer to the appellant. The appellant did not charge Odeon any fee for processing payments in respect of counter sales or ATM sales.

18. Odeon and Odeon cinemagoers have been the appellant's only customers. The appellant did at one stage try to obtain business from another cinema chain but without success.

19. Credit and debit cards are issued to customers by banks known as card issuers. Retailers which accept payment by credit or debit card must have a bank account with a "merchant acquirer". The merchant acquirer processes the card payments in conjunction with the relevant card issuers and levies merchant fees on the retailer for doing so.

20. When a cardholder uses a payment card to purchase goods or services from a retailer, the retailer receives from the merchant acquirer the retail price less a merchant service charge. The merchant acquirer is also obliged to account to the card issuer for a separate fee, called an interchange fee. In practice, the card issuer usually pays the merchant acquirer the retail price less the interchange fee. The card issuer deducts the retail price it has paid from its account with its customer. The merchant service charge is the price a retailer must pay for accepting credit or debit cards as a means of payment.

21. The merchant acquirer acting on behalf of the appellant has changed over time. Prior to 2004 it was Girobank Plc. Girobank provided merchant services pursuant to a Merchant Services Agreement ("MSA"). Girobank later sold its interest in the MSA to euroConex Technologies UK Ltd. In March 2010 the appellant changed its merchant acquirer from euroConex to Streamline. In August 2011 Worldpay (UK) Limited acquired the Streamline business.

22. At all material times, payments received by the appellant from customers by debit and credit cards have been processed by the merchant acquirer under the terms of the relevant MSA in force at any particular time.

23. At all material times, the relevant MSA contained a clause in the following or substantially similar terms:

> " *3.1.1 Girobank shall … credit Bookit with the amount of all … Advanced Card Transactions effected by Odeon and in respect of which the relevant Card Transaction Data is presented to Girobank in accordance with the terms of this Agreement by crediting a Girobank account within the United Kingdom, nominated by Bookit or such other account as may be agreed between the parties …*";
>
> "*4.2.2 Bookit shall … ensure that Girobank is provided with Advanced Card Transaction Data in respect of Transactions within the time period, if any, stipulated by Girobank …*"
>
> "*4.3 In accordance with the relevant procedure guide or Operating Manual, Odeon or Bookit, as applicable, shall:*
>
> *4.3.1. obtain authorisation from Girobank at the time for a Card Transaction if the Cardholder in question requires Supplies: -*
>
> *4.3.1.1. the value of which (in the case of Advanced Card transactions being the amount due to Odeon for the Supplies plus the amount due to Bookit as Handling Fee) is in excess of the Floor Limit; or*
> *4.3.1.2. for an amount falling within a range notified by Girobank to Odeon from time to time.*

*4.3.2. ensure that the authorisation code provided to Odeon Limited/Bookit Limited by Girobank pursuant to clause 4.3.1. shall be included in the Card Transaction Data; "*

24. In the periods relevant to this appeal the floor limit for transactions requiring an authorisation code was zero. An authorisation code was therefore required for all transactions conducted by the appellant. The MSA required Odeon or the appellant to obtain an authorisation code before completing any sales transaction.

25. An authorisation code generally signifies that the card number is valid, that the card has not been reported lost or stolen and that the customer's account has credit available for the sales transaction in question.

26. In May 2004 Odeon and the appellant entered into a separate services agreement with DataCash Limited ("Datacash"). Under the agreement Datacash provided "standard bank card services". This included the provision of a service whereby authorisation requests would be submitted by Datacash to the merchant acquirer and responses received. In 2007 the services provided by Datacash were defined as follows:

" *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. The bank card services provided to you by Your Acquiring Bank may comprise credit card/debit card authorisations and where available, address and security code (such as AVS/CV2) checking.*"

27. Datacash also agreed to "*store all positive Authorisation Responses in a batch file for settlement with your Acquiring Bank*".

28. The process for remote booking from the time when a cardholder provides the card information to the appellant to when the appellant receives payment of the ticket price and the card handling fee from its merchant acquirer includes the following steps with appropriate simplification:

(1) The customer provides the appellant with relevant card details including the name on the card, address of cardholder, card number and security number on the back of the card. This information is sent via Datacash to the merchant acquirer which transmits it to the card issuer. Assuming it is accepted the card issuer ring fences the money and transmits an authorisation code to the merchant acquirer. The merchant acquirer then transmits the authorisation code to the appellant via Datacash.

(2) The role of Datacash in Step 1 includes obtaining the authorisation codes for and on behalf of the appellant. This is done by Datacash formatting the card data into a form recognised within the card payment system and forwarding the information to the appellant's merchant acquirer for onward transmission

through the card payment system. Datacash subsequently reformats the authorisation code provided by the card issuer via the merchant acquirer into a form that is transmitted to and can be accessed by the appellant.

(3) Once the appellant receives the authorisation code it determines via the Odeon ticketing system whether the cinema seats are still available and if so the tickets are allocated to the customer and the transaction is confirmed. Mr Hitchmough suggested that the customer at this stage has an opportunity to confirm or cancel the transaction. The evidence however was not clear on that point and it is not significant for present purposes. The transaction is only completed when the appellant has confirmed the tickets are available. The appellant must not complete a transaction until it has obtained an authorisation code.

(4) As far as a customer is concerned the transaction is now complete, although the customer will appreciate that the funds have not yet left his account with the issuing bank.

(5) As part of each cinema's "end of day" process, the appellant transmits the payment information it has collated to Datacash. This is done by means of settlement files which include for each transaction the card transaction data including security information and the card issuer's authorisation code.

(6) Datacash then sends a batch file of all the transactions concluded in the day comprising the card transaction data to the merchant acquirer for onward transmission to the various card issuers. This triggers payment by the card issuers to the merchant acquirer. Without the settlement files the merchant acquirer would not know that the transactions had been completed.

(7) The merchant acquirer then credits the appellant's bank account with the relevant funds including the card handling fee, less the merchant service charge.

(8) The appellant accounts to Odeon for the value of ticket sales less the merchant service charge and also retains the card handling fees charged to customers.

29. The role of the appellant in these processes involves in part a supply as agent for Odeon in selling tickets to customers, and in part a supply to customers of card handling services. The card handling services comprise obtaining the card information from the customer, transmitting that information to the merchant acquirer, obtaining the authorisation code and then re-transmitting the card data information to the merchant acquirer as part of the settlement process.

30. The appellant would not be able to process card payments without the services of both a merchant acquirer and Datacash. It requires a merchant acquirer because it is not possible for the appellant to provide the necessary card information to the card issuer directly so as to obtain authorisation codes. It requires the services of Datacash to format the card information received from customers into a form recognised by the merchant acquirer and the payment system generally.

31. The processes described above also interface with the Odeon ticketing system which confirms and records the tickets issued for a particular showing at a particular cinema. Once a transaction is confirmed, Datacash builds a batch file throughout the day, including details of whether the supplier is Odeon, for counter and ATM sales, or the appellant for internet and telephone sales. Until March 2008 the batch file was processed automatically at midnight each day, generating payment to either the appellant or Odeon depending on the type of transaction. Since March 2008 the process has varied so that each cinema carries out its own end of day process but still using Datacash.

32. When a transaction is confirmed the customer will receive a booking confirmation from Odeon, stating that an amount for the tickets has been or will be deducted from his card, together with a specific amount payable to the appellant as a booking fee. The relationship between Odeon, the appellant and the customer are explained in the terms and conditions applicable to the transaction and the FAQs contained on the Odeon website.

33. I am satisfied that at all relevant times customers can be taken to be aware that they were entering into a separate agreement with the appellant for the supply of card handling services in consideration of a card handling fee.

*(2) Relationship between the Appellant and Odeon*

34. In July 2001 Odeon or its advisers first identified an opportunity to restructure what were then called booking fees to achieve a VAT saving. It was anticipated that this would require booking fees to be channelled through a new company to be formed for the purpose. In due course this was the appellant. It was also anticipated that subject to confirmation from HM Customs & Excise the fees would be exempt from VAT.

35. At that time Odeon made a charge of 40p per transaction for advance bookings by telephone where payment was made by card. The income from such booking fees was £1.5m per annum.

36. Odeon instructed Deloitte & Touche to advise on the opportunity and in August 2001 Deloitte & Touche produced a presentation on the proposed structure which was in essence the structure that was later implemented. They advised that it wasn't simply a matter of "re-routing contracts" but that the new corporate structure should have real substance to it. A more detailed analysis was produced in September 2001. This identified that input tax would not be fully recoverable by the new company, but that recovery could be improved substantially by increasing the amount of taxable supplies made by the new company. Overall, it was identified that the additional profit generated by the proposed structure could be up to £187,000 pa.

37. At a board meeting on 17 October 2001 Odeon Limited resolved to proceed with the proposal and the appellant was incorporated.

38. The agreement between Odeon and the appellant was intended to be the subject of a Ticket Sales and Credit Card Handling Agreement, but that agreement never

came into existence. There was a letter of understanding dated 21 March 2002. Essentially the appellant had agreed to provide card handling services to Odeon's customers together with certain other services to Odeon. There was also a Data Services Agreement dated 27 June 2002 whereby the appellant agreed to provide Odeon with data handling services in respect of "at cinema" card transactions.

39. In 2008 the agreements between Odeon and the appellant were superceded by two Intercompany Services Agreements dated 8 March 2008. Odeon provided to the appellant a licence to access certain Odeon software, and also the services of the appellant's directors and other administrative employees. The appellant provided to Odeon services which included acting as agent for the purpose of ticket sales and answering customer queries and complaints.

40. Pursuant to the agreements the directors of the appellant have always been paid by Odeon, with a recharge being made to the appellant.

41. The appellant has been profitable but has not paid dividends to Odeon. Instead it makes inter-company loans to Odeon. As at 31 December 2012 those loans stood at some £22 million. They are non-interest bearing and repayable on demand.

42. The evidence before me included the response of Odeon and the appellant to the Consumer Rights (Payment Surcharges) Regulations 2012 ("the 2012 Regulations") which came into force on 6 April 2013. In relation to certain contracts the 2012 Regulations essentially prevent a trader from charging excessive fees for accepting a particular form of payment, such as credit card or debit card. The fees charged may not exceed the cost borne by the trader for processing that method of payment. The 2012 Regulations do not apply to "*services of a banking, credit, insurance, personal pension, investment or payment nature*".

43. On 25 January 2013 Pinsent Masons provided Odeon and the appellant with an "advice memorandum" on regulatory aspects of the card handling fees, including the 2012 Regulations. Pinsent Masons advised that it was "*risky to maintain the current charging arrangements and seek to rely on an argument that the way these arrangements are structured with Bookit takes them outside the scope of the Surcharge Regulations*". They set out the potential difficulties in seeking to rely on exclusion from the 2012 Regulations on the basis that Bookit was providing services of a "*payment nature*". Pinsent Masons expressed the opinion that even if that argument was successful, it was likely that the 2012 Regulations would be quickly amended. They also identified the risk of enforcement action, reputational damage and a repayment liability.

44. In April 2013 as a result of the 2012 Regulations Odeon and the appellant changed the structure and contractual basis for card handling fees. The appellant continued to act as an agent for Odeon in supplying tickets to customers. However the appellant did not charge a card handling fee to customers. Instead, Odeon made a payment to the appellant. Effectively the appellant supplied its card handling services to Odeon, rather than to customers. The parties were able to re-arrange their relationship relatively easily to ensure that the appellant remained profitable.

45. In October 2013 the appellant re-introduced a card handling fee to customers. The present fee is 21p per transaction. This is sufficient to cover the appellant's direct costs of providing a card handling service, but not its overheads or a profit margin.

46. Mr Birnie was involved in lengthy discussions about the 2012 Regulations which were introduced following a campaign by Which and an OFT investigation in relation to transaction charges. Odeon and the appellant were concerned about reputational damage if the card handling fee was not reduced. Mr Birnie maintained that the appellant voluntarily reduced the fee. He did not accept that the reduction implied recognition on the part of the appellant that it was caught by the 2012 Regulations. That in turn could imply acceptance that the appellant was not providing services of a payment nature.

47. The 2012 annual accounts of the appellant state as follows:

> "*In line with the regulatory changes from the UK Government's early adoption of the EU Payment Surcharges Regulations, Bookit has restructured its Card Handling Fee charge. It has also taken the opportunity to renegotiate the terms of business with the Odeon Group of companies to establish a sustainable future operating framework.*"

48. Similarly, the FAQ section of Odeon's website in February 2014 stated:

> " *The Card Handling Fee you pay to Bookit is levied in consideration for Bookit processing your credit/debit card transaction. The level of the Card Handling Fee has been set to comply with the Consumer Rights (Payment Surcharges) Regulations…*"

49. Mr Hitchmough QC on behalf of the appellant invited me to find that in 2012/13 the appellant considered the card handling fee was excluded from the 2012 Regulations by virtue of being a service of a payment nature. Mr Beal QC on behalf of the Respondents invited me to find that the appellant considered it was not excluded from the 2012 Regulations because it was not providing a service of a payment nature.

50. I find as a fact that Odeon and the appellant were primarily concerned with reputational damage in considering the impact of the 2012 Regulations. At the same time they acknowledged the following risks:

(1) That the appellant's card handling fee might not be excluded from the 2012 Regulations by virtue of being a service of a payment nature, and

(2) That if it was excluded, then the 2012 Regulations might in any event be amended to catch such a card handling fee.

51. I do not accept that the removal of a card handling fee between April and October 2013 and thereafter the re-introduction of a fee at 21p per transaction was simply an act of voluntary compliance with the 2012 Regulations. It was a commercial decision taking into account the risks described above and possible reputational damage.

*Reasons*

52. In the light of my findings of fact I must now consider the three issues identified above. In considering those issues I take into account the detailed and comprehensive submissions made by Mr Hitchmough and Mr Beal.

*(1) Do the Card Handling Fees fall within the Scope of the Exemption?*

53. The first issue can be stated in deceptively straightforward terms. Do the card handling fees amount to transactions concerning payments?

54. Mr Hitchmough's submission for the appellant was essentially that the decision of the Court of Appeal in Bookit in 2006 remains good law and applies to the facts on this appeal.

55. Mr Beal's submission for the respondents was that the services provided by the appellant were merely preparatory to the payments and did not satisfy the requirements of Article 135(1)(d) Principal VAT Directive.

56. Article 135(1)(d) quoted above sets out the terms of the exemption. It replaced what was Article 13B(d)(3) of the Sixth Directive in identical terms. It is the Sixth Directive that is quoted in much of the case law to which I was referred. The exemption applies to what may generally be described as "financial transactions".

57. In domestic law the exemption was introduced by Item 1 Group 5 Schedule 9 VAT Act 1994. Note 1A provides that services preparatory to the carrying out of a transaction in Item 1 are not exempt. That reflects the case law which is described below. It was not suggested that for present purposes there is any material difference between the Principal VAT Directive and domestic law. In their submissions both parties concentrated on the terms of Article 135(1)(d) and I shall do the same in this decision.

58. It is well established that exemptions from VAT are to be construed strictly.

59. The scope of the exemption was first considered by the Court of Justice ("CJEU") in *Sparekassernes Datacenter (SDC) v Skatteministeriet Case C-2/95*. The court was considering 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 contributed to the execution of transfers.

60. The court held that the decisive criterion in order to benefit from exemption is the type of transaction effected and not whether it is effected by a bank or other financial institution. Nor is exemption affected by the specific manner in which the service is performed, whether it is performed electronically, automatically or manually. The reasoning of the court appears in the following paragraphs:

> "*37. … the mere fact that a service is performed entirely by electronic means does not in itself prevent the exemption from applying to that service. If, on the other hand, the service entails only technical and electronic assistance to the*

*person performing the essential, specific functions for the transactions … it does not fulfil the conditions for exemption. That conclusion follows, however, from the nature of the service and not from the way in which it is performed…*

*53. … a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another. It is characterised in particular by the fact that 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 and, in some cases, between the banks. Moreover, the transaction which produces this change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer for the purposes of the Sixth Directive…*

*65. However, since point 3 of Article 13B(d) of the Sixth Directive must be interpreted strictly, the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt…*

*66. In order to be characterised as exempt transactions … 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.*

*70. It is apparent from the actual wording of … the Sixth Directive that none of the transactions described by those provisions concerns operations involving the supply of financial information. Such operations cannot therefore be covered by the exemption provided for by that provision.*"

(emphasis added)

61. The paragraphs from SDC referred to above have been extensively quoted and applied in numerous authorities since 1997. The principles outlined by the CJEU have remained essentially unchanged although the CJEU has given further guidance as to the application of those principles.

62. In *CSC Financial Services Ltd v C & E Commissioners Case C-235/00* the CJEU was concerned with the similar exemption for transactions in securities. It applied the same reasoning as appeared in SDC to the services of a call centre for financial institutions dealing with customers in relation to a particular investment product.

63. In a domestic context the Court of Appeal considered SDC in *C & E Commissioners v FDR Ltd [2000] STC 672* and addressed the question of what is meant by a transfer of money. Laws LJ stated as follows:

> "*37. … a transfer of money means no more nor less than the entry of a credit in the payee's account and the entry of a corresponding debit in the payor's account. There may be - will be - problems in cases of error or fraud in the posting of entries to the accounts. But however those may fall to be resolved, there is no further, elusive, event by which the money is really transferred: no Platonic Form, of which day-to-day transfers are only shadows…*
>
> *38. If this reasoning is right it is, I think, very significant for a sensible and intelligent understanding of SDC. It demonstrates that what the Directive imports by the term "transfer" inheres in the notion of a "**change in the legal and financial situation**" - an expression used in both paragraphs 53 and 66 - where that is a reference to the effects of the corresponding credit and debit entries in the accounts of the paying and receiving parties…*"

64. The Court of Appeal in FDR also accepted HMRC's submission that "*a 'transfer' is constituted by the execution of an instruction that the transfer should take place, and never merely by the instruction itself …*". Mr Beal submitted that this was directly applicable to the present case. The appellant was merely giving instructions for the payments.

65. It is clear from FDR that the involvement of a data processing agency such as Datacash in the present case in no way affects the analysis or the entitlement to exemption. Both parties agreed that was the case. To that extent therefore it is necessary to treat everything done by Datacash as being done for and on behalf of the appellant.

66. In FDR the role of the taxpayer in "netting off" the debit and credit entries between various issuing banks and merchant acquirers gave rise to the conclusion that it actually executed the transfers.

67. It was principally SDC that the Court of Appeal applied in Bookit. It is not necessary for me to rehearse in this decision the findings and reasoning of the VAT Tribunal and the High Court in Bookit. At [35] Chadwick LJ identified the following four factual components from the decisions of the VAT Tribunal:

> "*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.*"

68. Having identified those four components, Chadwick LJ went on to apply the reasoning in SDC to the facts of the case. At [44] and [45] he stated as follows:

"*44. … It was the failure [of the Tribunal] to appreciate that the fourth component of the services which they had identified, in the light of further evidence, did have the effect of transferring funds and did entail changes in the legal and financial situation – or, perhaps, the failure to appreciate that the transfers of funds which that component of the services provided by Bookit did not need to be a transfer of funds by Bookit itself – which led the tribunal to err in the conclusion which they reached in paragraph 12 of their second decision. And, further, it is made clear, at paragraph 66 of the judgment in the SDC case, that services provided by a data-handling agency can attract the exemption. The question – which is for the national court in each case – is whether the services supplied by the data-handling agency are restricted to "a mere physical or technical supply [of information]" or whether the services extend to "specific, essential aspects of the transaction".*

*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 – in accordance with the obligations of Girobank under clause 3.1.1.of the MSA – 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.*"

69. The fourth component, which was crucial to the decision of the Court of Appeal, was transmitting the card information including the card issuers' authorisation codes to the merchant acquirer.

70. It is not disputed that there are factual differences between the involvement of the appellant in providing the card handling services in this appeal and its involvement as considered by the Court of Appeal in Bookit. In Bookit, it was found as a fact that the appellant obtained authorisation codes directly from the card issuers without any involvement of the merchant acquirer. Both parties accept that is not the position in the present appeal. It seems likely that the finding in Bookit came about because the evidence before the Tribunal was incorrect, but I do not need to consider the reasons. The finding of fact I have made is that the merchant acquirer obtains the authorisation code from the card issuer and provides it, via Datacash, to the appellant.

71. Mr Hitchmough submitted, on the basis of what are essentially agreed facts as found above, that the essential fourth component identified by the Court of Appeal in Bookit is still present. The appellant transmits the authorisation codes and other transaction details to the merchant acquirer as part of the end of day processes. They

are then transmitted by the merchant acquirer to the card issuers and it is this that triggers payment from the customers' accounts to the appellant's account. The MSA requires the appellant to transmit the authorisation codes and other card information to the merchant acquirer. He submitted that it was irrelevant how they had first been obtained.

72. Mr Hitchmough emphasised that if the appellant did not transmit the authorisation code to the merchant acquirer then nothing would happen. That is undoubtedly correct, but it appears to reduce SDC to a "but for" test. In other words, but for the appellant transmitting the authorisation codes to the merchant acquirer the payment would not be made. It is clear from the authorities that it is not a "but for" test.

73. Mr Beal submitted that the present factual situation is fundamentally different to the facts before the Court of Appeal in Bookit. The appellant did not obtain the authorisation codes directly from the card issuers. When it transmitted the authorisation codes and other card information in the end of day processes the merchant acquirer already had the authorisation codes because it had obtained them from the card issuers in the first place.

74. The question is whether it would have been significant to the Court of Appeal judgment that Bookit had not itself obtained the authorisation codes directly from the card issuers.

75. It does not seem to me that the means by which Bookit first obtained the authorisation codes was relevant in the reasoning of the Court of Appeal. They applied SDC by reference to the effect of the fourth component.

76. Similar issues arose in *Revenue & Customs Commissioners v Axa UK plc [2008] EWHC 1137 (Ch)* which concerned payment plans where patients agreed to pay dentists a fixed monthly sum for dental care. The taxpayer, Denplan provided payment handling services. It argued that the monthly fee charged by Denplan to dentists fell within the exemption as consideration for payment handling services.

77. Henderson J considered SDC, CSC, FDR and Bookit in detail. At [55] he recorded HMRC's submission that Bookit turned on its own special facts because Bookit "*had effectively stepped into the banking system by performing tasks [ie obtaining the authorisation codes from the card issuers] that would normally have been carried out within that system* ". That submission was rejected in the following trenchant terms:

> *71. … 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 paragraph 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 paragraph 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 that Bookit cannot sensibly be distinguished on the basis that Bookit was performing an "outsourced" banking function … 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.*

78. Whilst Henderson J refers to a test of causation he is plainly referring to the effective cause of the transfer, and not simply to a "but for" test. He found that the payment handling services fell within the exemption. In doing so he endorsed at [30] the following propositions to be derived from SDC:

(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;

(5) whether a transaction constitutes a transfer for these purposes is a functional test – has the transaction in question effected the movement of money and changed the legal and financial situation of the parties.

79. Mr Beal submitted that the French text of SDC at [66] suggested that the CJEU required a much more direct relationship between the operations or services carried out and the transfer itself. I am not persuaded that the French text adds anything to the English language version.

80. Mr Beal also relied on [70] of SDC and submitted that the supply of financial information is not exempt even if that financial information is the cause of the transfer or payment taking place.

81. The Court of Appeal in Bookit found that the fourth component, namely transmission of the card details and the authorisation code had the effect of transferring funds from the customers' accounts to the appellant's account. It entailed changes in the legal and financial situation so as to satisfy the test for exemption laid down by the court in SDC. I do not consider that the facts in this appeal are distinguishable from Bookit. The critical fourth component remains the same.

82. That does not necessarily deal with this aspect of the appeal. Mr Beal submitted that in any event the law has moved on since the judgment of the Court of Appeal in Bookit. He maintained that subsequent case law of the CJEU gives rise to a real doubt as to the correctness of the decision in Bookit.

83. The Court of Appeal in Axa, with the agreement of the parties, referred various questions to the CJEU for a preliminary ruling. Those questions included the following:

> "*(1) What are the characteristics of an exempt service that has "the effect of transferring funds and entail[s] changes in the legal and financial situation"? In particular:*
>
> *(a) Is the exemption applicable to services which would not otherwise have to be performed by any of the financial institutions which (i) make a debit to one account, (ii) make a corresponding credit to another account, or (iii) perform an intervening task between (i) [and] (ii)?*
>
> *(b) Is the exemption applicable to services which do not include the carrying out of tasks of making a debit to one account and a corresponding credit to another account, but which may, where a transfer of funds results, be seen as having been the cause of that transfer?*"

84. In making that reference the Court of Appeal (Rix, Jacobs and Lawrence Collins LJJ) must have concluded that it could not with complete confidence resolve the issue itself (See *R v International Stock Exchange, ex parte Else (1982) Ltd [1993] 1 All ER 420*). At that stage in the Axa litigation the issue was whether the collection of sums by Denplan from patients' bank accounts by direct debit was a transaction concerning payments (see [15] of the decision of the CJEU in *Revenue & Customs Commissioners v Axa UK plc C-175/09*).

85. In the event the CJEU in Axa did not specifically answer the questions referred. It appears to have found that in principle the services were exempt but at [28] the court said:

> "*28. As regards the service in question in the main proceedings, it is appropriate to point out that its purpose is to benefit Denplan's clients, namely*

*dentists, by the payment of the sums of money due to them from their patients. Denplan is, in return for remuneration, responsible for the recovery of those debts and provides a service of managing those debts for the account of those entitled to them. Therefore, as a matter of principle, that service constitutes a transaction concerning payments which is exempt under Article 13B(d)(3) of the Sixth Directive, unless it is 'debt collection or factoring', a service which that provision, by its final words, expressly excludes from the list of exemptions.*"

86. The CJEU gave judgment without an Advocate General's opinion which suggests that the case involved a straightforward application of established principle. It found that the services were transactions concerning payment but that they fell within the debt collection carve out and so were not exempt.

87. What was clear to the CJEU was that the debt collection carve out would apply in any event. At the time of the reference no-one involved in the domestic proceedings had considered whether the debt collection carve out applied on the facts.

88. Mr Hitchmough relied on [28] as authority for the proposition that the CJEU were plainly satisfied that apart from the exclusion for debt collection, the services supplied by Denplan would be transactions concerning payments and therefore exempt. He said that the appellant's position was not materially different.

89. I was also referred to *Everything Everywhere Ltd v Revenue & Customs Commissioners C-276/09*. The taxpayer in that case made a separate payment handling charge for certain types of payment methods. The High Court must have concluded that the scope of the exemption required clarification from the CJEU. It referred an identical question to that in Axa. Foreshadowing the issues in the present appeal the High Court included within the reference the following questions:

" *(2) Does the exemption in Article 13B(d)(3) of the Sixth Directive for "transactions … concerning … payments [or] transfers" apply to a service of obtaining and processing payments by credit and debit cards, such as those performed by the taxpayer in the present case? In particular, where the transmission of settlement files at the end of each day by the taxpayer has the effect of automatically causing the customer's account to be debited and the taxpayer's account to be credited, will those services fall within the scope of Article 13B(d)(3) [of the Sixth Directive]?*

*(3) Does the answer to Question 2 depend on whether the taxpayer itself obtains authorisation codes for onward transmission or obtains those codes through the agency of its acquiring bank?*"

90. The High Court also referred a question in relation to the identification of separate supplies. The CJEU answered only the question in relation to separate supplies. Having done so it had no need to answer any of the questions relating to exemption.

91. When Axa came back before the Court of Appeal at [2011] EWCA Civ 1607 Arden LJ said at [50]:

> "*50. It is apparent that the precise scope of the exemption and 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.*"

92. It does seem to me that Arden LJ was at least suggesting that the scope of the exemption itself was unclear. She was not simply concerned with the application of Article 135 to transactions which prima facie fall within the exemption but might also fall within the scope of the carve out for debt collection.

93. Rimer LJ may have taken a different view. At [55] he stated:

> "*I regard the theory of the operation of article 13B(d)(3) as clear although how it applies to any particular transaction may in practice raise questions of some difficulty. The theory must be that any particular transaction will either be within or outside the exemptions; and that will depend upon its correct characterisation.*"

94. In support of his submission that the law has moved on since Bookit, Mr Beal also relied on a judgment of the CJEU in *Tierce Ladbroke v Belgium C-232/07* which involved independent commission agents in Belgium acting on behalf of bookmakers. They took bets in the name of the bookmakers and paid out winnings in return for a commission. It was argued that their services were exempt under Article 13B(d)(3). The CJEU said that there was a single supply of services which was the acceptance of bets. Even if the collection of bets was the main service, that service did not fall within the exemption. At [24] it stated:

> "*24. These exemptions exist to avoid the difficulties linked with determining the basis of assessment and the deductible amount of VAT, and to avoid a rise in the costs of consumer credit (Velvet & Steel judgment, cited above, point 24). The absence of these difficulties is clear, given that VAT is applied, in the present cases, on the remuneration received by the agents.* "

95. Both parties accepted that the purpose of exempting certain financial transactions was to avoid difficulties in calculating the tax base and a desire not to increase the cost of consumer credit. The difficulties in calculating the tax base arise from the need to avoid tax on the transfer of money when tax has already been accounted for on the underlying transaction to which the transfer of money relates.

96. There was clearly no difficulty in Tierce Ladbroke in applying VAT to the remuneration of the agent. Mr Beal argued that the same was true in the present case. Mr Hitchmough submitted that the underlying transaction, the supply of the ticket, has already borne tax.

97. In relation to credit card payments generally it has long been established that where payment to a retailer is made by credit card, the taxable amount is the total price payable rather than the net sum received by the retailer from the card issuer after deduction of their charges (see *Chaussures Bally SA v Belgian State Case C-18/92* and *Dixons Retail Ltd v Revenue & Customs Commissioners Case C-494/12*).

98. There was no danger in Tierce Ladbroke of raising the cost of credit. Mr Hitchmough submitted that in the present appeal there would be a rise in the cost of credit. The price paid by the customer varies according to the method of payment. However in my view the increase is in the cost of using a particular method of payment rather than the cost of credit as such. The card handling fee applies to debit cards as well as credit cards.

99. Mr Beal relied heavily on a judgment of the CJEU in *Nordea Pankki Suomi Oyj C-350/10*. This case concerned the services of the Society for Worldwide Interbank Financial Communication ("SWIFT") which manages a worldwide electronic messaging service for financial institutions. In particular SWIFT processes messages concerning inter-bank payments and transactions in securities in a secure and reliable manner. The question for the CJEU was whether SWIFT services were exempt on the basis that they were used in payment transaction and security transaction settlements between financial institutions. The CJEU held that the services were not exempt. At [34] and [39] it said:

> *" 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 Article 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…*
>
> *39. Consequently, it must be held that, in the case in the main proceedings, SWIFT's responsibility is limited to technical aspects and does not extend to specific, essential elements of the financial transactions at issue in the main proceedings.*"

100. Mr Hitchmough submitted that Nordea involved the application of well established principles and concerned a supply of merely technical services. Mr Beal did not dispute that analysis. He submitted that Nordea was not just transmission of information, but transmission of the payment order itself and the CJEU found that was a merely technical supply.

101. Mr Beal's case was that the appellant in the present case was doing nothing more than transmitting information in a way analogous to the position of SWIFT. It was not executing an instruction that the transfer should take place but merely giving instructions for the transfer.

102. The decision in Nordea was later in time than the High Court hearing in Axa plc. Mr Beal submitted that the judgment of Henderson J in Axa plc could not be

reconciled with Nordea. It was clear from Nordea that it was the functional transfer of funds which is the key to exemption. Whilst I accept that proposition, I do not accept that Nordea is necessarily inconsistent with the judgement of Henderson J in Axa plc. Whilst the transfer in Nordea would not take place but for the services of SWIFT, the services of SWIFT were not the effective or functional cause of the transfers. Indeed it appears from [30] of the judgment of the CJEU that SWIFT could not even access the content of the messages.

103. On Mr Hitchmough's case, Nordea was simply the transmission of an order. It could not be said that SWIFT was executing an order. More significantly it could not be said that the legal and financial situation to which SWIFT was a party was changed. SWIFT enabled the legal and financial situation between two quite separate parties to change. In the present case in executing the customers order the legal and financial situation between the customer who gave the order and Bookit which executed the order was changed. Sums were credited to Bookit's account.

104. Mr Beal submitted that the decision of the Court of Appeal in Bookit could be consistent with Nordea, but not on the basis of the appellant's analysis. In particular, if it was simply the transmission of authorisation codes which triggered the exemption then that was inconsistent with Nordea. However, if it was the obtaining of authorisation codes from the issuing bank and the transmission of those codes together with other data to the merchant acquirer that gave rise to exemption then that was entirely consistent with Nordea.

105. Bookit is binding on me, unless it is contrary to subsequent CJEU authority. I cannot say that it is inconsistent with subsequent authorities. Nor for the reasons given above can it be distinguished on its facts from the present appeal.

106. Whilst Mr Beal submitted that Bookit was not determinative of the first issue, to use his words, the height of his ambition before me was to invite a reference to the CJEU on the basis that the EU landscape had changed since Bookit. There was now real doubt as to whether Bookit was correct.

107. In his submissions Mr Hitchmough relied on a decision of the F-tT in *National Exhibition Centre Ltd v Revenue & Customs Commissioners [2013] UKFTT 289 (TC)*. This involved very similar issues to the present appeal, both factual and legal. The F-tT found that the services supplied by NEC were materially the same as those supplied by Bookit. It concluded that NEC effected the transfer of funds and its services fell within the exemption.

108. Mr Hitchmough obviously fully supported the decision of the F-tT in NEC. Mr Beal contended that it failed to take into account that the decision of the Court of Appeal in Bookit had to be looked at in the light of subsequent CJEU decisions and the only basis to reconcile it with those decisions was as outlined by Mr Beal above.

109. The decision in NEC, and a subsequent decision of the F-tT to the same effect in *The Way Ahead Group Ltd v Revenue & Customs Commissioners* [2014] UKFTT 178 (TC), are not of course binding on me. In both cases permission has been granted

to appeal to the Upper Tribunal. As I understand it the F-tT was not invited in either case to make a reference to the CJEU as HMRC have done in this appeal. In both appeals HMRC will be inviting the Upper Tribunal to make a reference.

110. In light of the authorities since Bookit Mr Beal made the following submissions:

(1) A transaction concerning payment cannot be construed so broadly as to deprive the exemption of the essential requirement that it has to perform the specific function of a transfer or payment. That is to be contrasted with supplies which are preparatory to the transfer or merely comprise technical or electronic assistance.

(2) The appellant does not transfer funds and it doesn't execute an order for the transfer of funds. It is not functionally involved in the transfer of payments or the transfer of funds. Its involvement in the transactions is preparatory and technical and designed to assist the ultimate payment which takes place through the payment card system. The fact that it receives funds into its account is irrelevant. It does so, as to the ticket price as agent for Odeon and as to the card handling fee as consideration for the card handling service to customers. The payment of the consideration for a service cannot be a separate exempt transfer of funds. Further, the service provided by the appellant did not alter the legal or financial situation of the customer or of Odeon.

(3) Where a financial institution employs a third party to execute operations relating to the transfer of funds then there would be a supply of services attracting VAT. If the third party is acting for the customer rather than the bank then the same would hold true.

(4) Transactions concerning payments in the present context are limited to transactions within the card payment system itself, in other words between the issuing bank and the merchant acquirer. Effectively the appellant was operating outside the card payment system and therefore its services were not exempt.

111. Mr Beal suggested that the CJEU, having set out the principles in SDC, had given a consistently narrow interpretation to the exemption. In contrast the UK domestic tribunals and courts had given a consistently wider interpretation. I am not sure that the position can be stated so simply. I must consider whether I can resolve the first issue with complete confidence. A reference to the CJEU would not be justified simply because it is difficult to apply an established principle to the facts of the present case. That is the role of the national courts and tribunals.

112. In my view Mr Beal's submissions in the light of Nordea are at least reasonably arguable. With respect to the careful and cogent submissions of Mr Hitchmough I am not satisfied that I can identify the scope of the exemption with complete confidence.

113. It is not clear to me as a matter of principle what factors distinguish:

(1) the provision of financial information without which a payment would not be made but which do not fall within the exemption (such as Nordea), from

(2) data handling services which functionally have the effect of transferring funds and which the CJEU in SDC at [66] identified could fall within the scope of the exemption.

114. In reaching that conclusion I am fortified by the fact that the Court of Appeal in making a reference in Axa, Arden LJ when Axa came back before the Court of Appeal and the High Court in Everything Everywhere all appear to have had the same reservations as to the scope of the exemption.

115. Even in those circumstances I have a discretion whether or not to make a reference. I am conscious that these same issues will in due course be before the Upper Tribunal in NEC and The Way Ahead Group. However it does not appear from the decisions of the F-tT in those appeals that the question of a reference was fully argued. If a reference is to be made then it should be made at the earliest opportunity once all the relevant facts have been found.

116. In all the circumstances I consider that I should refer questions to the CJEU for a preliminary ruling at this stage. The precise scope of the questions can be determined in due course with assistance from the parties. I shall give directions accordingly.

*(2) Do the Card Handling Services amount to Debt Collection?*

117. Notwithstanding my decision on the first issue I must continue to deal with the second issue.

118. It is well established that exclusions from exemption must be construed broadly in order to give the exemption itself a strict construction.

119. Mr Hitchmough's principal submission in relation to the second issue was that the supply by the appellant of card handling services was made to customers who were paying for their tickets. If there was a debtor then it would be the customer and debt collection services could not be supplied to the debtor. He submitted that it is clear that the creditor pays for the service of debt collection.

120. In support of that submission Mr Hitchmough relied on the CJEU judgment in Axa plc at [33] where it was said:

> " *33. In fact, the object of that service is to benefit Denplan's clients, namely dentists, by payment of the sums of money due to them from their patients. That service is therefore intended to obtain the payment of debts. By undertaking the recovery of debts for the account of those entitled to them, Denplan frees its clients of tasks which, without its intervention, those clients, as creditors, would have to perform themselves, tasks consisting in requesting the transfer of the sums due to them, via the direct debit system.*"

121. Axa plc was concerned with a specific factual situation where the services of Denplan were supplied to the creditors. I do not consider it to be authority that such

services can only be supplied to creditors, although it is at least consistent with such a proposition.

122. Mr Beal submitted that, as with the exemption generally, the identity of the parties performing the service was not relevant. What mattered was the nature of the service being provided - see *Finanzamt Grob-Gerau v MKG Case C-305/01* at [64]. In the same case the CJEU described the term debt collection as referring to transactions "*designed to obtain payment of a pecuniary debt*".

123. Mr Beal drew an analogy with mortgages, where the terms of a mortgage might require the mortgagor to be responsible for the third party costs of debt recovery. I do not consider that to be a good analogy. In that situation the debt recovery services are supplied by the third party to the mortgagee who is the creditor. They are not supplied to the mortgagor.

124. Submissions to the same effect as those made by Mr Hitchmough have been accepted by the F-tT on 3 occasions – in *Paymex Ltd v Revenue & Customs Commissioners [2011] UKFTT 350 (TC),* in *NEC* and in *DPAS Ltd v Revenue & Customs Commissioners [2013] UKFTT 676 (TC).*

125. In Paymex, Judge Berner summed up the position at [142] as follows:

> "*Debt collection by its nature can only be performed for the creditor.*"

126. These decisions are not binding, but I respectfully adopt their conclusions in relation to debt collection. The services provided by the appellant to customers of Odeon do not amount to debt collection.

127. I accept that the exclusion from exemption does not refer to the identity of the party providing the service. However in my judgment the description of "debt collection" necessarily implies collection on behalf of the creditor. In other words it implies a service being provided to the creditor.

128. The broad construction put forward by Mr Beal is in my judgment inconsistent with the language of the Directive. I am satisfied that the debt collection carve out does not apply to the card handling services supplied by the appellant.

129. I was invited by the respondents to make a reference to the CJEU in relation to the second issue. In the light of my conclusion on the second issue no reference is required.

*(3) Are the Tax Advantages Contrary to the Purpose of the Directive?*

130. The third issue only arises if the services supplied by the appellant are eventually found to be exempt pursuant to Article 135(1)(d). Whilst the third issue does not necessarily arise, I shall deal with the parties' submissions.

131. I have set out above the two limbs relevant to the abuse argument derived from Halifax. This appeal is concerned only with the first limb. It is important not to

conflate the two limbs. The first limb is concerned with the purpose of the Principal VAT Directive. The second limb is concerned with the aim of the transaction, namely the obtaining of a tax advantage.

132. In considering whether the arrangements are abusive it is necessary to have regard to the well established principle that taxpayers may choose to structure their business so as to limit their tax liability. This was recognised by the CJEU in Halifax at [73]. The principle of abuse effectively defines the extent to which a taxpayer can exercise such a choice.

133. Mr Hitchmough submitted that the burden was on the respondents to satisfy the tribunal that the arrangements were abusive and contrary to the purpose of the Principal VAT Directive (see *Lower Mill Estate Ltd v Revenue & Customs Commissioners [2010] UKUT 463 (TCC)* at [137]). For present purposes Mr Beal accepted that proposition.

134. Mr Beal submitted that the arrangements put in place by Odeon were both artificial and contrary to the purpose of the Principal VAT Directive. In particular that it was not legitimate to "hive off" to a separate entity part of what would otherwise be a single supply and dress it up as a payment transaction.

135. Mr Beal relied on the analysis of the Court of Appeal in *Debenhams Retail plc v Revenue & Customs Commissioners [2005] STC 1155*. That case concerned retail shop sales where 2 ½ % of the sales value of a transaction was treated as payable to a subsidiary of Debenhams for card handling services. The Court of Appeal looked at the contractual position and found that the consideration for the taxable supply made by Debenhams was the whole of the amount paid by customers. There was no contract between customers and the subsidiary. Even if there had been a separate contract, the supply by the subsidiary was made to Debenhams rather than the customer.

136. In the light of those findings the Court of Appeal's reasoning on the abuse issue was not necessary for its decision. It said that there was no other economic justification for interposing the subsidiary but the creation of a tax advantage. That is the second limb of Halifax which is accepted in the present appeal. The Court of Appeal did not consider the first limb of Halifax. At the time of judgment it was only the Advocate General's opinion in Halifax that was available. As such I do not consider that it assists in the issue I have to determine.

137. More pertinent for present purposes is *Ministero dell' Economia v Part Service Srl Case C425/06* which involved the leasing of motor vehicles with ancillary services of insurance and guarantees being provided by a company in the same group. At [59] and [60] the CJEU said:

> " *59. As regards the first criterion [ie the first limb], that court can take into account that the anticipated result is the accrual of a tax advantage linked to the exemption, pursuant to Article 13B(a) and (d) of the Sixth Directive, of the services entrusted to the co-contracting company of the leasing company.*

*60. That result would appear to be contrary to the objective of Article 11A(1) of the Sixth Directive, namely the taxation of everything which constitutes consideration received or to be received from the customer.*"

138. Mr Hitchmough submitted that Part Service was distinguishable from the present case. It was akin to Debenhams and involved what both parties described as value shifting. There was an overall price, but the abuse concerned shifting part of that price to an exempt supply. That was not the case here. There is a price for the tickets, and if you want to pay by card over the internet or by telephone then an additional consideration is payable for card handling services. I accept that is a material distinction on the present facts.

139. *Commissioners for HM Revenue & Customs v Weald Leasing Case C-103/09* concerned tax planning in the context of leasing transactions. A trader making largely exempt supplies of insurance services adopted an asset leasing structure involving a third party. The aim was to spread the amount of non-deductible VAT over the life of assets being purchased thereby deferring the trader's VAT liability. The CJEU identified at [39] that such arrangements may be contrary to the Sixth Directive if rentals paid to the third party did not reflect economic reality. The CJEU did not suggest that the structure might otherwise be contrary to the purpose of the Directive which was a matter for the national court.

140. The adoption of an artificial contractual structure which disguises or misrepresents commercial reality is an abusive practice (see *Revenue & Customs Commissioners v Newey (t/a Ocean Finance) Case C-653/11*).

141. Mr Hitchmough framed the issue in the present appeal in terms of whether the arrangements, whilst being commercial in nature and operating in accordance with the underlying contractual framework, nevertheless produced a VAT result which could not have been intended by the Directive.

142. In Newey the question before the CJEU was whether the contractual terms in place between various parties were decisive for the purpose of identifying the supplier and the recipient of a supply of services. If not, under what circumstances could those contractual terms be re-characterised? In brief, Mr Newey had entered into various contractual arrangements with a view to avoiding the non-recovery of input tax on advertising services supplied to his business.

143. The CJEU (at [42] to [46]) referred to previous case law to the effect that consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT. Normally contractual terms would reflect economic and commercial reality. However they would not do so where those terms constituted a purely artificial arrangement which did not correspond with the economic and commercial reality of the transactions. In those circumstances there would be an abuse of rights where the arrangements were set up with the sole aim of obtaining a tax advantage. At [52] the CJEU concluded:

"*52. In the light of the foregoing considerations, the answer to the first to fourth questions is that contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' within the meaning of Articles 2(1) and 6(1) of the Sixth Directive. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine.*"

144. I accept Mr Hitchmough's submission that artificiality is generally only relevant to the first limb of the abuse principle in so far as the contractual arrangements do not reflect the underlying economic and commercial reality. Such artificiality offers an example of a tax advantage which would be contrary to the purposes of the Principal Vat Directive.

145. The contractual arrangements described in my findings of fact accord with economic and commercial reality. The appellant had contracts in place which enabled it to effect the transfer of funds from card issuers to its bank account. It had the contact centre premises in Stoke, the employees and the contractual relationships necessary to carry on business including the provision of card handling services to customers. Similarly, the relationship between Odeon, the appellant and customers was drawn to the attention of customers at the time of booking. In that sense there was nothing artificial about the arrangements.

146. Card handling fees provided by third parties are not at all artificial. NEC is an example of a taxpayer providing card handling services to the customers of third party promoters to which it had hired its venues.

147. I accept that it was relatively easy for the appellant to re-negotiate its contractual arrangements with Odeon in April 2013. As a result card handling services were supplied to Odeon itself rather than to Odeon customers. However I do not consider that makes the arrangements in any way artificial in the sense described in Newey. It remained the case that the appellant still had to perform the functions it had carried out previously. What changed was the direction of the supply. Instead of supplying services to customers, the same services were supplied to Odeon.

148. I do not accept that the contractual arrangements in the present appeal are artificial. They do reflect economic reality. They do not in any way disguise or misrepresent commercial reality.

149. The remaining question so far as abuse is concerned is whether the arrangements otherwise defeat the purposes of the Principal VAT Directive.

150. It is clear, and Mr Beal did not argue to the contrary, that one cannot treat separate supplies by separate VAT registered entities as a single supply for VAT purposes (see Lower Mill Estate at [43]). The reason Odeon's tax planning might prima facie attain its objective in the present case is because the appellant is not part

of Odeon's VAT group. If it had been, Odeon would have been treated as making all the supplies and there would have been a single supply of cinema tickets by Odeon.

151. Mr Hitchmough's argument was that such a result could not be inconsistent with the purpose of the Principal VAT Directive if it turned on a choice given to taxpayers, namely whether to exclude the appellant from Odeon's VAT group. This was a typical example of a situation where taxpayers can choose to structure their business so as to limit their tax liability.

152. Article 11 of the Principal VAT Directive provides that:

> *" … each Member State **may** regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links."*

153. The UK in implementing Article 11 has put VAT grouping within the discretion of the taxpayer. Hence VAT grouping requires an application to be made by the taxpayer to HMRC pursuant to section 43B VAT Act 1994.

154. The only other domestic provisions which treat separate persons as a single taxable person are Paragraphs 1A and 2 Schedule 1 VAT Act 1994 which apply where there has been "*artificial separation of business activities … resulting in an avoidance of VAT*". In those circumstances HMRC can issue a direction treating the separate persons as a single taxable person. However they can only do so prospectively and not retrospectively.

155. Accordingly, Mr Hitchmough submitted that it cannot be said that the sort of arrangement at issue in these proceedings produces a result that is contrary to the purpose of the Principal VAT Directive. The Directive itself envisages that save where Member States make provision to the contrary, which is not the case in the UK, supplies by separate entities will be treated as separate supplies.

156. In Lower Mill Estate the Upper Tribunal was concerned with a tax planning arrangement where a supply of land was made by one taxpayer and a supply of constructions services was made by another connected taxpayer. The supply of land was standard rated and the supply of construction services was zero rated. If a single supply had been made it would have been standard rated. The customer ended up with a second or holiday home. At [130] the Upper Tribunal said:

> *" … it cannot be contended that the result is anti-purposive: there is no scope for the application of the Halifax principle. It is also to be accepted, in our view, that JMP had genuine commercial reasons unconnected with tax for adopting the self-build model. If it is not anti-purposive for a purchaser to acquire a completed holiday home from two unconnected traders as a result of separate supplies, we do not consider that it is anti-purposive either for the purchase to acquire his completed holiday home as a result of separate supplies from LME and CBL in circumstances where there are genuine commercial*

*reasons having nothing to do with tax saving for the supplies to be made available to the purchaser only as separate supplies.*"

157. Mr Hitchmough did not suggest that there were genuine commercial reasons for Odeon to set up the appellant other than a saving of tax. However in a case such as the present where the arrangements themselves are not artificial that is only relevant to the second limb of Halifax which it is accepted is satisfied.

158. It seems to me that Mr Beal's submissions on the third issue conflate the two limbs of Halifax. The arrangements put in place by Odeon make best fiscal use of the domestic legislation. They are not in my judgment contrary to the purposes of the Principal VAT Directive.

159. In the circumstances I am not satisfied that the arrangements undertaken by Odeon fall to be redefined by reference to principle of abuse.

160. I was invited by the respondents to make a reference to the CJEU in relation to the third issue. In the light of my conclusion on the third issue no reference is required.

*Conclusion*

161. For the reasons given above I propose to refer questions to the CJEU for a preliminary ruling as to the scope of the exemption under Article 135(1)(d).

162. Notwithstanding that reference, I am satisfied that the appellant's card handling services would not fall within the exclusion from exemption for debt collection. I am also satisfied that the arrangements involving the appellant do not fall within the principle of abuse.

163. 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.

**JONATHAN CANNAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 1 September 2014**