TC07711

VALUE ADDED TAX – exemption – card payment fees – travel agent charging fees to customers using debit and credit cards – whether exempt as transactions concerning transfers – Article 135(1)(d) Principal VAT Directive – Bookit Limited, DPAS Limited and Target Group Limited considered – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/01021

BETWEEN

ULOOK UBOOK LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Leeds on 14 January 2020

Mr Mark Hetherington of UNW LLP for the Appellant

Ms Joanna Vicary (instructed HM Revenue and Customs' Solicitor's Office and Legal Services) for the Respondents

DECISION

INTRODUCTION

1. At all material times the appellant was in business as a travel agent, selling holidays, hotel rooms and flights through the internet and via a telephone call centre. It acted as an agent on behalf of travel providers including hotel "bed banks" and tour operators. Upon sale of a holiday it received a commission from the travel providers for agency services. For VAT purposes those commissions were consideration received by the appellant for the services it supplied to the travel providers.

2. Individuals who booked holidays through the appellant, who I shall call "customers", made payment for their holidays to the appellant. The appellant would then make payment to the travel providers. Where a customer made payment to the appellant by way of credit card or debit card, the appellant made a charge to the customer which I shall call a "Card Payment Fee". It is the VAT treatment of Card Payment Fees which is in issue in this appeal. The appellant contends that such fees are consideration for an exempt supply of payment services to Customers. The respondents contend that they are consideration for standard rated payment services.

3. The decisions under appeal are as follows:

   (1) A decision dated 3 March 2011, subsequently upheld on review in which the respondents refused a claim for repayment of VAT on Card Payment Fees and certain other booking fees in the sum of £131,746 for VAT periods 08/07 to 02/10.

   (2) An assessment to VAT dated 21 May 2012 charging of VAT of £25,635 in relation to Card Payment Fees received in VAT periods 05/10 to 11/11.

   (3) A decision dated 29 January 2016 in which the respondents refused a claim for repayment of VAT on Card Payment Fees in the sum of £7,901 for VAT periods 02/12 to 02/13.

4. The appellant's case is that Card Payment Fees are paid in relation to services comprising payments or transfers of money and are exempt pursuant to Article 135(1)(d) Directive 2006/112 ("the Principal VAT Directive" or "PVD"). Article 135(1)(d) PVD 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. Article 135(1)(d) is enacted in UK domestic law by Item 1 Group 5 Schedule 9 Value Added Tax Act 1994 ("VATA 1994"). Item 1 provides for exemption of the following supplies:

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

6. Subject to one short point mentioned below, it was not suggested that there is any difference between Article 135 and Schedule 9 for these purposes and I shall focus on Article 135.

7. The appellant's case is that card payments by a customer for a holiday through the appellant involved two distinct transfers of money:

   (1) A transfer to the appellant from the customer's card issuing bank effected by the appellant's merchant acquirer, who was Barclays Bank (described as "Payment A").

(2) A bank transfer by the appellant to the travel provider according to the agency terms of business between the appellant and the travel providers (described as "Payment B").

8. The appellant says that Payment B takes place before Payment A. In other words, the appellant makes payment to the travel provider on behalf of the customer prior to receiving the funds from its merchant acquirer. This is because the terms of the agreement between the appellant and its merchant acquirer provide for a settlement period of approximately 14 days. Payment A involves the merchant acquirer obtaining an authorisation code from the customer's issuing bank. If it turns out that the card has been used fraudulently without the knowledge of the true card holder, the merchant acquirer has a charge back facility which entitles it to recoup from the appellant sums which must be repaid to the card issuing bank. In practice, charge backs will not be applied until after the appellant has made Payment B. Effectively therefore, the appellant takes a risk in making Payment B that it will have to refund Payment A.

9. The Appellant says the Card Payment Fee which it charges to customers covers that financial risk. It says that it makes Payment B from its own funds in consideration of the Payment Card Fee. As such, the Card Payment Fee is consideration for a transaction concerning a transfer of money and therefore exempt from VAT.

10. The VAT in issue in this appeal is approximately £100,000, following agreement that certain booking fees with which this appeal is not concerned were properly zero rated. I was invited to decide the issues in principle so that the parties can then agree the final figures. That is the approach I have taken.

THE LAW

11. I was referred to various authorities concerning the extent of the exemption in Article 135(1)(d) PVD, which for present purposes is identical to the exemption under Article 13B(d)(3) of the Sixth Directive. It is well established following various decisions of the CJEU that for services to be exempt under Article 135(1)(d), those services must have the effect of transferring funds. The CJEU has considered cases including data handling services in the context of bank transfers (*Sparekassernes Datacenter v Skatteministeriet* (Case C-2/95) ("SDC")), card handling services supplied to consumers (*Bookit Limited v HM Revenue & Customs* Case C-607/14 ("Bookit") and *National Exhibition Centres Limited v HM Revenue & Customs* C-130/15 ("NEC")) and payment collection services (*HM Revenue & Customs v DPAS Limited* C-5/17 ("DPAS")).

12. SDC provided data handling services to banks. In considering whether those services were exempt as being transactions concerning transfers, the CJEU held that exemption depended on the nature of the service and not the status of the person supplying or receiving the service. The exemption was not limited to financial institutions. As to the principal issue it said as follows:

> "66. In order to be characterized as exempt transactions for the purposes of points 3 and 5 of Article 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions."

13. Bookit provided card handling services to customers of Odeon cinemas. The focus in that case was Bookit's role in card transactions where cinema tickets were being purchased, and in particular its relationship to the merchant acquirer. The CJEU referred to previous decisions and stated as follows:

> "38. In that regard, the Court has previously held that a transfer is a transaction consisting in 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, on the one hand, between the person giving the order and the recipient and, on the other, between those parties and their respective banks; and, in some cases, between those banks. Moreover, the transaction which produces the 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 within the meaning of Article 135(1)(d) of the VAT Directive (see, to that effect, the judgments of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 53, and of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 25).
>
> 39. Further, the wording of Article 135(1)(d) of the VAT Directive does not in principle preclude a transfer from being broken down into separate services which then constitute 'transactions concerning' transfers within the meaning of that provision (see, to that effect, judgment of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 64). While it is not inconceivable that the exemption at issue may extend to services which are not transfers per se, the fact remains that that exemption can relate only to transactions which form a distinct whole, fulfilling in effect the specific, essential functions of such transfers (see, to that effect, judgment of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraphs 66 to 68).
>
> 40. It follows from the foregoing that, in order to be characterised as a transaction concerning transfers within the meaning of Article 135(1)(d) of the VAT Directive, the services at issue must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a transfer and, therefore, having the effect of transferring funds and entailing changes in the legal and financial situation. In that regard, a service exempted under the VAT Directive must be distinguished from the supply of a mere physical or technical service. To that end, it is relevant to examine, in particular, the extent of the liability of the supplier of services, in particular the question whether that liability is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions (see, to that effect, judgments of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 66, and of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 24).
>
> 41. It must also be stated that, since the functional aspects are decisive to the determination of whether a transaction concerns a transfer for the purposes of Article 135(1)(d) of the VAT Directive, the test that makes it possible to distinguish a transaction that has the effect of transferring funds and bringing about changes in the legal and financial situation within the meaning of the case-law cited in paragraphs 38 to 40 of this judgment, which falls within the scope of the exemption concerned, from a transaction that does not have such effects and therefore, is outside its scope, is whether the transaction under consideration causes the actual or potential transfer of ownership of the funds concerned, or fulfils in effect the specific, essential functions of such a transfer (see, to that effect, judgment of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 33)."

14. The CJEU stated that the card handling services did not fall within the scope of the exemption. The reasoning for this conclusion appears at [51] – [57] as follows:

> "51. It follows from all the foregoing that the provider of a card handling service, such as that at issue in the main proceedings, plays no specific and essential part in achieving the changes in the legal and financial situation that are the result of a transfer of ownership of the funds concerned and that, according to the Court's case-law, can be said to be characteristic of a transaction

concerning payments or transfers that is exempted under Article 135(1)(d) of the VAT Directive, but does no more than provide technical and administrative assistance for the obtaining of information and the communication of that information to its merchant acquirer, and to receive, by the same means, the communication of information that enables it to effect a sale and to receive the corresponding funds.

52. In that regard, it must be recalled that the fact that such a service is provided by electronic means, and in particular the fact that the transmission of the settlement file entails the automatic triggering of the payments or transfers under consideration, cannot alter the nature of the service provided and, therefore, does not affect the application of the exemption at issue (see, to that effect, judgment of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 37).

53. A card handling service, such as that at issue in the main proceedings, which accordingly consists, in essence, in an exchange of information between a trader and its merchant acquirer, with a view to receiving payment for a product or service offered for sale, cannot fall within the scope of the exemption provided in Article 135(1)(d) of the VAT Directive for transactions concerning payments and transfers.

54. It may be added, first, that such a service cannot be deemed to be, by its nature, a financial transaction for the purposes of Article 135(1)(b) to (g) of the VAT Directive, unless the view is taken that any trader that takes steps necessary for the receipt of payment by debit card or credit card is undertaking a financial transaction for the purpose of those provisions, which would render that concept meaningless and would be contrary to the requirement that VAT exemptions must be interpreted strictly.

55. Second, if the exemption provided for in Article 135(1)(d) of the VAT Directive were to be granted to a card handling service, such as that at issue in the main proceedings, that would be at odds with the purpose of the exemption for financial transactions, which is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (judgment of 19 April 2007, *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, paragraph 24, and order of 14 May 2008, *Tiercé Ladbroke and Derby*, C-231/07 and C-232/07, not published, EU:C:2007:332, paragraph 24).

56. If a card handling service, such as that at issue in the main proceedings, is subject to VAT, there are no such difficulties. In particular, the tax base, which corresponds to the consideration received in exchange for that service, namely the fee charged to the purchaser of the ticket for that service, can readily be determined, and such a transaction does not involve the provision of any credit to the purchaser by the provider of that service. Such a service cannot therefore properly be the subject of an exemption under Article 135(1)(d) of the VAT Directive.

57. In the light of all the foregoing, the answer to the questions referred is that Article 135(1)(d) of the VAT Directive must be interpreted as meaning that the exemption from VAT provided there for transactions concerning payments and transfers is not applicable to a 'card handling' service, such as that at issue in the main proceedings, supplied by a taxable person, the provider of that service, where an individual purchases, via that service provider, a cinema ticket which the service provider sells for and on behalf of another entity, and which the individual pays for by debit card or by credit card."

15. NEC was a similar case, where it provided a card processing service for individuals who used cards to purchase tickets for events run by third parties at the NEC. The conclusion was summarised at [46]:

"46. …the provider of a payment card processing service, such as that at issue in the main proceedings, does not participate specifically and essentially in the legal and financial changes giving rise to a transfer in the ownership of the funds concerned and permitting, in accordance with the Court's case-law, the transaction to be characterised as a transaction concerning payments or transfers which is exempt under Article 13B(d)(3) of the Sixth Directive, but merely applies technical and administrative means which enable it to collect information and

communicate that information to the merchant acquirer bank and to receive, by the same means, the information which enables it to make a sale and receive the corresponding funds."

16. In DPAS, the taxable person managed dental plans which were supplied to dentists. The dental plans involved arrangements between dentist and patient under which the dentist agreed to provide dental care to the patient. The patient agreed in return to pay a specified monthly amount, agreed between the dentist and his patient. The plans also included other services such as insurance cover. DPAS collected the monthly payment from patients by direct debit and then paid sums to the dentist less an amount it retained as the charge for its services. There was a contract between DPAS and the dentist for the provision of dental payment plan services, which was subject to VAT, and a contract between DPAS and the patient for the provision of dental payment plan 'facilities' which DPAS treated as exempt.

17. The CJEU stated that the services supplied by DPAS to patients were not exempt as transactions concerning payments. The conclusion was stated as follows:

> "41. DPAS does not itself carry out the transfers or the materialisation in the relevant bank accounts of the sums of money agreed in the context of the dental plans at issue in the main proceedings, but asks the relevant financial institutions to carry out those transfers...
>
> 42. As the Advocate General has also observed in point 51 of his Opinion, a supply of services such as that at issue in the main proceedings is merely a step prior to the transactions concerning payments and transfers covered by Article 135(1)(d) of the VAT Directive.
>
> …
>
> 51. In the light of all of the foregoing considerations, the answer to the first question is that Article 135(1)(d) of the VAT Directive must be interpreted as meaning that the VAT exemption which is provided for therein for transactions concerning payments and transfers does not apply to a supply of services, such as that at issue in the main proceedings, which consists for the taxable person in requesting from the relevant financial institutions, first, that a sum of money be transferred from a patient's bank account to that of the taxable person pursuant to a direct debit mandate and, second, that that sum, after deduction of the remuneration due to that taxable person, be transferred from the latter's bank account to the respective bank accounts of that patient's dentist and insurer."

18. Most recently, these decisions of the CJEU have been considered by the Upper Tribunal in *Target Group Limited v HM Revenue & Customs* [2019] UKUT 340 (TCC). That case concerned loan administration services supplied by Target to Shawbrook Bank Limited. The services included giving instructions to BACS to transfer funds from a borrower's account to Shawbrook's account and maintaining Shawbrook's ledger account for each borrower's loan. Target contended that these services "effected" the transfer of funds and were exempt as transactions concerning payments or transfers. The Upper Tribunal reviewed various authorities including SDC and DPAS. It stated at [74] and [75]:

> "74. The decision of the CJEU in *DPAS* is, in our judgement, clear and unambiguous. Where the relevant service at issue involves the giving of an instruction to a financial institution to effect a payment, it does not constitute an exempt supply even though it may be a necessary step in order for the payment to be made.
>
> 75. In the present case, every transfer of funds made by a borrower to Shawbrook is effected by the borrower's financial institution debiting the borrower's account by the relevant amount and Shawbrook's bank crediting a matching sum to Shawbrook's account (together with matching debits and credits effected by other banks sitting between one or other of the borrower's and Shawbrook's bank and the Bank of England, as explained by Laws LJ in *FDR* at [37]). Target's role is limited to passing the necessary information to BACS to enable it to give the relevant instructions to the borrower's bank and Shawbrook's bank so that the transfer of funds can take place. That is indistinguishable from the role played by Denplan – so far as

payments made by the patients are concerned – in giving the relevant instruction to the patient's bank pursuant to the direct debit mandate in order for patient's bank to cause the payment to be made to Denplan's bank."

19. The Upper Tribunal went on to consider the Court of Appeal's decision in *Customs & Excise Commissioners v FDR Limited* [2000] STC 672. Target submitted that it effected the transfer of funds in the same way as FDR. In FDR, the taxpayer supplied credit card services to issuing banks and acquiring banks. It maintained accounts, posting credit and debit entries on each, effecting payments to merchants and reconciling accounts between issuers and acquirers under a netting-off procedure. The Court of Appeal held that 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". It then referred to SDC as follows:

> "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…"

20. The Court of Appeal held that FDR did effect the transfers and its supplies were exempt. The Upper Tribunal rejected Target's submission that its services were similar to those of FDR at [80]:

> "80. …We consider that the loan account was no more than a ledger, recording the effect of payments made by customers to Shawbrook but not effecting such payments. It is true that most financial transactions are effected by entries in one or more bank account (it being rare indeed for financial transactions to involve an in specie transfer of money), but that is materially different to the inputting of accounting entries by Target in this case."

21. I was also referred to a decision of the Upper Tribunal in *HM Revenue & Customs v Coinstar Ltd [2017] UKUT 0256 (TCC)* and a decision of the CJEU in *Cardpoint GmbH* C-42/18. The decision in Coinstar does not take the principles outlined above any further. In Cardpoint, the CJEU held that a company which operated cash dispensers on behalf of banks did not make exempt supplies to the banks. Those operations included installing the necessary hardware and software for their proper operation, which in turn included dealing with authorisation requests for individual withdrawals, executing the cash withdrawal and providing data to the bank in connection with the transaction. The CJEU held that the services did not directly cause the transfer of funds or the necessary legal and financial changes.

FINDINGS OF FACT

22. I heard evidence from Mr Stephen Campion who has been a director of the appellant since 2002. He provided a witness statement and was cross-examined. Based on his evidence I make the following findings of fact.

23. At all material times the appellant has traded as a travel agent, although it no longer does so. It had agreements with, and acted as an agent on behalf of travel providers such as bed banks, who themselves acted on behalf of hotels, and tour operators. It received commission for its agency services from the travel providers. The appellant did not have high street premises, but operated through the internet and through a call centre selling travel packages to customers. The appellant had separate contractual arrangements with travel providers on the one hand and with customers on the other. The appellant would also book flights for customers directly with low cost airlines, although in doing so it did not act as an agent for the airlines.

24. The evidence before me included an agreement between the appellant and Hotels4u.com Limited from January 2011. The agreement appointed the appellant as a non-exclusive agent for the sale of hotel accommodation. Rather confusingly, it also appeared to have a section headed "Agent Booking Conditions" stating that the appellant was acting as the agent of the customer when making a booking, and certain provisions in the agreement appeared to be addressed to the customer. However, it was not disputed and I am satisfied that the appellant was the agent of Hotels4u.com.

25. The evidence also included an agreement with Jet2holidays Limited from 2009 appointing the appellant as a non-exclusive agent for the sale of travel services. There was provision for the appellant to hold all sums paid to it by customers (described as "clients") on trust as agent for Jet2holidays Ltd. In fact, the appellant did not operate any form of trust account and payments made by customers to the appellant were paid into its general bank account. Clause 4.17 made provision for the appellant to be liable to Jet2holidays for monies which it failed to collect in accordance with the terms of the agreement.

26. The evidence also included terms and conditions of an agreement with Key Resorts Ltd trading as getabed, and an agreement with Beds With Ease Ltd. The latter agreement included an obligation on the part of the appellant to make payment to Beds With Ease Ltd of all deposits and balances for bookings.

27. I was not taken in detail to the terms of these agreements because there was no real dispute as to the nature of the contractual arrangements in place. I am satisfied that the appellant was typically under a contractual obligation to the travel providers to pay them weekly in relation to bookings made by customers. Where a customer paid by card, the merchant acquirer would pay the appellant about 14 days after the date in which the transaction was authorised. The risk of a charge back being raised by the card issuing bank of a customer could last for up to 6 months. Customers paying the appellant by card were not present when the card transaction was processed. The appellant therefore obtained details of the card and the customer either over the internet or over the telephone. Those details were passed to the merchant acquirer and in turn to the card issuing bank which would authorise the transaction. The precise mechanics are not relevant for present purposes.

28. The appellant's merchant acquirer at all material times was Barclays Bank ("Barclays"). Barclays would charge the appellant a fee for processing each card transaction. The level of fee depended on the type of card and the identity of the card issuer. In some cases, it was a fixed fee per transaction, for example 25p per transaction in relation to some debit cards. In other cases, it was a percentage of the transaction value, between 1.1% and 1.9% in relation to credit cards.

29. Where a customer paid for travel services by debit card or credit card, the appellant charged a Card Payment Fee. Customers who paid the appellant by cash, cheque or bank transfer did not pay any fee. Only a very small number of customers living locally to the appellant's offices would pay by cash. Mr Campion said and I accept that there were three reasons why the appellant charged a Card Payment Fee:

(1) Because of the risk the appellant took in making payment to the travel providers (Payment B) before it had received payment from the customer's issuing bank via its merchant acquirer (Payment A). When Payment A was received there was still a risk of charge back, typically where a card had been used fraudulently without the knowledge of the card holder. In those circumstances, the appellant remained obliged to pay the travel providers.

(2) Because of the fees charged to the appellant by its merchant acquirer for processing card payments.

(3) Because the appellant incurred administrative costs in taking payment by card, rather than cash, cheque or bank transfer. These included making identity checks to the customer's name and address including cross-referencing to the electoral roll or other proof of address.

30. The Card Payment Fee charged by the appellant to customers using cards was between 1½ and 2½% of the transaction value. The amount charged was driven by the three factors referred to above, and also by the level of similar charges made by competitors.

31. Mr Campion gave evidence of several examples of cases where the appellant had suffered a loss because of charge backs. The examples all followed a similar pattern and I can describe one of those examples: Customer L booked a hotel which the appellant arranged through Med Hotels for a sum of £864.65. The booking date was 17 May 2011. The departure date was 26 May 2011. The appellant paid Med Hotels on or about 20 May 2011. The customer's card transaction was authorised on 17 May 2011 and the appellant received payment from Barclays on 31 May 2011. On 25 July 2011 the appellant was notified by Barclays of a charge back on the basis that the card holder had confirmed to the card issuing bank that he or she did not authorise or participate in the transaction. In the absence of a signed card receipt or chip and pin sales receipt Barclays could not defend the charge back. No refund could be obtained from Med Hotels because the room had already been used.

32. Mr Campion estimated that the appellant might take 50 bookings a day, of which 5 might involve fraud. This would often involve criminals using stolen card details to purchase holidays and then selling the holidays to people for cash. The appellant would identify most of these attempted frauds. Those that slipped through the net were generally because staff had failed to follow procedures requiring reliable evidence of the customer's identity. In about 25% of cases the appellant was able to recover a charge back from the travel provider, typically where a customer did not use the hotel room.

33. I am satisfied from Mr Campion's evidence that in 2010 and 2011 the value of charge backs of this nature resulting in financial loss to the appellant was £27,528 and £72,834 respectively.

34. Where the appellant booked a holiday with a travel provider on behalf of a customer, the agreement between the appellant and the customer provided for an initial deposit and payment in full at least 12 weeks before the date of departure. This would involve customer payments by way of an authorised card transaction, bank transfer, cheque or cash. In the case of cheque payments for last minute bookings this could cause difficulties. The appellant's terms and conditions did not make provision for this, but in practice the appellant did not accept cheque payments for such bookings.

35. Where a customer paid by cash or cheque, Mr Campion's evidence was that Payment A, that is payment by the customer to the appellant, and Payment B by the appellant to the travel provider, would occur on or about the same date. Hence, in those circumstances the appellant was not exposed to any risk that Payment A would not be made. The risk of loss only arose in cases where the customer paid by debit or credit card.

36. For the sake of completeness, I should add that where the appellant booked flights with a low-cost airline on behalf of a customer, in most cases it would make a booking in the name of the customer and use the customer's card details to make a direct card payment to the airline. In those cases, no Card Payment Fee was charged by the appellant because it did not run any risk of a charge back and it did not incur any fee payable to the merchant acquirer. In some cases, the appellant would use its own company credit card to purchase flights for a customer. The appellant did not receive any commission from low-cost airlines and therefore it would charge a booking fee to customers booking flights only. HMRC has accepted that this booking

fee was part of a single, zero rated supply of transport. In cases where a customer was also purchasing accommodation from a hotel provider the appellant would probably waive the flight booking fee because it was receiving commission from the hotel provider.

DISCUSSION

37. The appellant and HMRC agree that Card Payment Fees are made in respect of a supply of services for VAT purposes made by the appellant to customers. It is also agreed that that is the only relevant supply which the appellant makes to customers. There is no issue therefore as to whether it amounts to a single supply or is part of a single composite supply. The supply is described by the appellant as "payment services", but more important is the nature of the supply, rather than the label attached to the supply.

38. Mr Hetherington on behalf of the appellant accepts that the appellant's involvement in Payment A, where it receives funds from a customer, does not give rise to any exempt supply to customers. The appellant does no more than Bookit or NEC in relation to Payment A. Instead, Mr Hetherington focussed on Payment B and submitted that the services provided by the appellant in relation to Payment B are exempt.

39. Mr Campion's evidence, which I have accepted, is that the Card Payment Fee is charged in respect of three matters:

(1) In consideration for the risk the appellant takes that funds for Payment A will be the subject of a charge back after the appellant has made Payment B.

(2) In consideration for accepting card payment so as to recover the fees the appellant incurs to the merchant acquirer for processing the card payment.

(3) In consideration for the administrative costs incurred by the appellant associated with accepting card payments.

40. Mr Hetherington submitted that in making Payment B, the appellant's activities involved far more than what he described as the "back office functions" undertaken by Bookit and NEC. The appellant itself was effecting a transfer of money within the ordinary and straightforward meaning of that term. The risk associated with making that transfer was significant. In 2011 the appellant suffered losses of some £73,000 in relation to customer card payments as a result of taking that risk.

41. Ms Vicary on behalf of the respondents submitted that the appellant was providing a "payment handling service" which was not exempt. She submitted as follows:

(1) The functions performed by the appellant were no different to the functions performed by Bookit, DPAS and Target and the services were not exempt.

(2) Services in connection with Payment B should not be considered in isolation, but even in isolation those services are not exempt supplies.

42. I am satisfied that the appellant charged customers for the cost of holidays sold which the customers were liable to pay the appellant according to the terms and conditions of the agreements between the appellant and customers. The appellant was liable to pay the same amounts to the travel providers in accordance with the terms of its agency agreements with the travel providers. These contractual arrangements were the same whether the customers paid by cash, cheque back transfer, debit card or credit card. However, I am satisfied that the terms and conditions on which the appellant contracted with travel providers meant that it did take on the risk of any charge backs applied by Barclays in respect of card payments. That is part of the context in which Card Payment Fees were charged, but it is not the full context. The Card Payment Fees were also charged to recover fees paid by the appellant to Barclays and also its

own administrative costs in checking the identity of customers to minimise the risk of charge backs.

43. It is clear from the authorities that it is necessary to consider the nature of the service being provided for which the consideration is paid. In my view the Card Payment Fee is paid in consideration of the appellant accepting payment of sums due to it under its agreement with customers by way of credit card or debit card. In return for the Card Payment Fee, the appellant effectively agrees to pay the necessary fees to its merchant acquirer in order to process the transaction, carry out the necessary identity checks, and make Payment B to the travel providers whilst at the same time running the risk of any charge backs.

44. I agree with Ms Vicary therefore that it is artificial to treat Payment A as in some way separate from Payment B. It is true that they are separate payments. One is a receipt by the appellant from the customer's card issuer. The other is a payment by the appellant to the travel providers. However, the Card Payment Fee is consideration for services provided to the customer in relation to both payments.

45. In Bookit, the taxpayer acted as agent for Odeon and charged a "card handling fee" to customers paying by card. It took card details from ticket purchasers, information was provided to and from the merchant acquirer which received funds from the card issuing bank and paid those funds to Bookit. Once it had received the purchase price, the funds were paid by Bookit to Odeon, less the card handling fee which it had charged the customer.

46. Ms Vicary submitted that the appellant was entirely on all fours with Bookit. The fact that the Card Payment Fee was charged in part to cover the risk of non-payment was irrelevant to the analysis. It was still necessary to focus on the service being provided, and whether that service effected the transfer. I agree with that submission.

47. Mr Hetherington sought to distinguish the cases of Bookit, DPAS and Target Group on their facts. He submitted that in Bookit the fee charged was solely a card handling fee; in DPAS fees were paid by dentists in consideration for which the taxpayer collected payments from patients; in Target the funds never went through the hands of the taxpayer.

48. I do not consider that these factual differences, even they were made out, affect the application of the principles to the facts of this case. In relation to Bookit, the taxpayer not only collected funds paid by customers but it also paid those funds to Odeon. Bookit was in the same position as the appellant, although I accept that Bookit did not seek to argue that it was also being paid to assume any risk of a charge back. In relation to DPAS the charge was paid by the patients in consideration of DPAS agreeing to "manage and administer" the payments falling due from the patients. DPAS was in the same position as the appellant although again it did not argue that it suffered any risk of non-payment. In relation to Target, it seems to me that it arguably had a much closer involvement in actually effecting the transfers than the appellant in the present case, and the Upper Tribunal still held that its services were not exempt.

49. It is clear that the service being provided by the appellant did not effect any transfer of funds. The appellant received funds from card issuing banks and paid funds to the travel providers. In relation to Payment B it simply instructed its bank to make a transfer. It had no operational involvement in the actual transfer of funds. The CJEU made the same point in DPAS at [41] and [42] quoted above, referred to by the UT in Target at [74] also quoted above. The giving of an instruction to make payment is not the same as carrying into effect an instruction to make payment. Even if Payment B should be looked at in isolation, all the appellant did to make Payment B was to instruct its bank to make the transfer from its account. The bank then executed that instruction. Services involving the execution of an instruction are exempt from VAT. The exemption does not extend to services which involve giving the instruction for payment.

50. The appellant's argument is inconsistent with the reasoning of the CJEU in DPAS and Bookit. The appellant's services, which include making Payment B, are a step prior to the transactions concerning payments carried out by the appellant's bank. If a trader giving instructions for a payment to be made to satisfy its own obligation to make that payment were exempt, then as in Bookit the concept of a financial transaction would be meaningless. The appellant's argument is inconsistent with a strict interpretation of the exemption.

51. Finally, Mr Hetherington relied on the express terms of the UK domestic legislation in Item 1 Group 5 Schedule 9 VATA 1994. He submitted that the final words "or order for the payment of money" was apt to describe the instruction given by the appellant to its bank to transfer funds to the travel providers. That is a misreading of Item 1. The reference to an order for the payment of money, along with references to a security for money and a note for the payment of money is clearly intended as a reference to something which equates to money, such as a negotiable instrument. The term "order" is used in that context and not in the context of giving an instruction for the payment of money.

CONCLUSION

52. For the reasons given above, this appeal is dismissed in principle. If the parties are unable to agree the quantum of the sums properly re-claimed by the appellant and/or assessed by the respondents then either party may apply to the Tribunal to determine that matter within 90 days of the date of released of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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: 15 MAY 2020