[2015] UKUT 378 (TCC)
Appeal number: FTC/89/2014

VAT – place of supply – organisation of enclosure at Farnborough Airshow – whether advertising services or services relating to activities similar to cultural, artistic, sporting etc activities.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

FINMECCANICA GROUP SERVICES SpA

Respondents

TRIBUNAL: The Hon Mrs Justice Rose, President of the Upper Tribunal, Tax and Chancery Chamber

Sitting at the Rolls Building, London EC4 on 3 June 2015

Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Timothy Brown, instructed by the VAT Consultancy for the Respondents

DECISION

1. The Appellants ('HMRC') appeal against the decision of the First-tier Tribunal Tax Chamber (Judge Hellier) released on 27 February 2014 ([2014] UKFTT 224 (TC). The issue decided by the Tribunal and the sole issue before me in this appeal concerns the application of the rules for identifying where the supply of the Respondent's services takes place for the purposes of identifying in which Member State value added tax (VAT) is payable.

2. This issue arises because the Respondent ('FGS'), a company established in Italy, made claims under the Refund Directive[1] (and its predecessor) for the repayment of the VAT charged to it by the suppliers of the goods and services it used in connection with the provision of an enclosure at the Farnborough International Airshow. The services provided by FGS using those inputs were supplied by FGS to other companies in the Finmeccanica group also based in Italy. The VAT refund is only available if the taxable person claiming the refund does not make any supply in the United Kingdom. The Tribunal found that the supply of services by FGS was made in Italy so that FGS was entitled to the refund. HMRC contend that the supply is made in the United Kingdom at the Airshow so that FGS is not entitled to the refund.

Background

3. The Finmeccanica group of companies is a leading supplier of aerospace, defence and security equipment. In 2009 the group's turnover was some €18 billion. Their range of goods includes their participation in the Eurofighter Typhoon, helicopters, space stations, communications and security systems. FGS is a group service company. Its activities include acting as a central purchasing entity for products and services which are not critical to production equipment. These services include cleaning, transport, security, property and organising meetings and events.

4. The Farnborough International Airshow takes place every other year. It is possibly the world's premier show of its type. It involves a public show but also provides a forum for major aerospace companies to display their products to potential buyers from around the world. The Finmeccanica group's marketing strategy involves having an enclosure at each Farnborough Airshow. In 2010 the group's enclosure consisted of a pavilion covering about an acre (4,280 m²) which included two chalets and a static display of about 1 ½ acres (7,630 m²). The total cost associated with the enclosure was some €14 million in 2010 (€12m for 2008). Putting it together and operating it was a very substantial exercise. In the open area were displayed a large number of helicopters and fighter aeroplanes; in the pavilion there were areas devoted to particular sister companies' products, meeting rooms etc. The 2008 event was on a similar scale.

5. The Tribunal described the services provided by FGS to its sister companies at the Airshow in the following terms.

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[1] Council Directive 2008/9/EC of 12 February 2008, OJ L 44 20.2.2008 p 23.

"38. The arranging of the enclosure is the responsibility of FGS. The central administrative function of the group sets the budget for the occasion and specifies [in] outline the requirements for the overall appearance, themes and the space required for each sector of the group: thus, much oversimplified, its requirements might include a requirement to display eight helicopters and five fixed wing aircraft, to have a lecture theatre with say 200 seats, a separate security systems chalet as part of the enclosure, five meeting rooms and 40 display screens. FGS then discusses this with its sister companies and engages architects to design the pavilion and the enclosure. It discusses the designs with the group companies involved and then, once it has settled on the design, sets about renting space from Farnborough International, the organisers of the airshow, the building of the enclosure, and the organisation of the event.

39. The planning of the event takes about a year. In the course of that year FGS organises and monitors the implementation of contracts for the building works, electricity, gas, plumbing, IT, safety equipment, signage (in particular the display of the "tag" for the year), security, catering, travel and cleaning of the enclosure. It makes arrangements for a press reception and tickets for invitees. It produces a brochure. It arranges speakers. It arranges recordings of the event for the group companies.

40. People wishing to enter the enclosure must have (at least) two passes - one permitting them to enter the airshow and one permitting them to enter the Finmeccanica enclosure. In 2010 there were two separate chalets within the enclosure which required distinct passes, one of which was for Westland. FGS's sister companies indicate whom they wish to invite to the enclosure and FGS obtains passes for them from Farnborough International, the organiser of the air show, and issues separate passes for the enclosure. These invitees are known customers and potential purchasers of the group's equipment and will include military, government and institutional figures.

41. The air show maintains a list of those people other exhibitors have invited, and FGS or its sister companies may offer invitations to customers of other exhibitors they see on the list.

42. Invitations and passes are issued to the press. FGS organises a press reception in conjunction with the show. …"

6. The Airshow lasts a week. The evidence before the Tribunal was that over 1000 people visited the Finmeccanica enclosure during that week, including about 200 senior military figures. Some 120 group employees worked in the enclosure performing a range of tasks to make sure the event runs smoothly by providing security, catering for the staff and the guests, cleaning and arranging meeting rooms where presentations are made to specific guests. FGS arranges hotel accommodation and flights for all the group's staff. FGS invoices its sister companies for its services, charging the costs incurred with no mark-up. It included, and accounted for, Italian VAT on its invoices to its sister companies.

7. Having set out these facts, Judge Hellier concluded:

> "47. It was clear to me that the sole object of the provision of the enclosure and associated services by FGS to its sister companies was to enable those companies to sell their products."

The applicable law and relevant authorities

8. The period covered by FGS's refund claims is 1 May 2008 to 31 December 2010. The applicable law changed during this period.

9. So far as the provisions relating to the payment of refunds is concerned, the relevant articles were found in the Eighth Directive[2] for the period between 1 May 2008 and 1 January 2010. These provisions were replaced by provisions to the same effect in the Refund Directive as from that date. It was common ground between the parties that the effect of these provisions was that FGS is only entitled to a refund of the VAT it paid to suppliers at the Airshow if the services supplied by FGS to its sister companies are treated as supplied in Italy rather than in the United Kingdom.

10. The identification of the place of supply of services for VAT purposes, was governed for the whole period under consideration by the Principal VAT Directive, that is Directive 2006/112/EC (OJ L347 11.12.2006 p. 1). However, that Directive was amended as from 1 January 2010. The amendments, although material, do not affect the application of law to this case. In both versions of the provisions, the structure was the same. A general location rule is laid down which applies unless one of the exception rules then set out applies for the specific services described in the exception. The provisions prior to 1 January 2010 mirrored those of the Sixth VAT Directive,[3] the predecessor to the Principal VAT Directive. The relevant provisions were further amended as from 1 January 2011 but those amendments are not relevant to the period covered by this appeal.

Prior to 1 January 2010

11. In the Principal VAT Directive prior to 1 January 2010, the position was as follows. The general location rule was set out in article 43. That mirrored former article 9(1) of the Sixth VAT Directive. The general location rule was that the place of supply of services was deemed to be the place where the supplier had established its business. That would be Italy so far as FGS is concerned. The specific exceptions to the general location rule were set out in articles 44 to 56 of the Principal VAT Directive. These mirrored what had been provided by article 9(2) of the Sixth VAT Directive.

12. There were two specific exceptions that the Tribunal considered were relevant to this case. The first was the exception relating to the supply of services at fairs and exhibitions in article 52 of the Principal VAT Directive ('the fairs exception'). It

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[2] Eight Council Directive 70/1072/EEC of 6 December 29179 OJ L331 27.12.1979 p. 11.

[3] Sixth Council Directive 77/388/EEC of 17 May 1977 OJ L145 13.6.1977, p.1.

mirrored the wording in former article 9(2)(c) of the Sixth VAT Directive. Article 52 provided, so far as relevant:

> "The place of supply of the following services shall be the place where the services are physically carried out:
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> (a) cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities and, where appropriate, ancillary services."

13. The second exception was that for advertising services in article 56 of the Principal VAT Directive ('the advertising exception'). This mirrored the former article 9(2)(e) of the Sixth VAT Directive. Article 56 provided so far as relevant:

> "The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:
>
> … (b) advertising services;"

Between 1 January 2010 and 1 January 2011

14. Following the amendments to the Principal VAT Directive as from 1 January 2010, the position was as follows. The general location rule was set out in articles 44 and 45. The general location rule, for our purposes, was that the place of supply of services was taken to be: (a) the place where the recipient has established its business if the recipient is a 'taxable person' and (b) the place where the supplier has established its business if the recipient is a 'non-taxable person'. Since the recipients here are the sister companies in the Finmeccanica group and are taxable persons, the place of supply would also be Italy if the general location rule applied.

15. The specific exceptions to the general location rule for the supply of particular services are set out in articles 46 to 59 of the amended Principal VAT Directive. The fairs exception was then found in article 53 of the Principal VAT Directive and included an express reference to fairs and exhibitions. It provided:

> "The place of supply of services and ancillary services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs and exhibitions, including the supply of services of the organisers of such activities, shall be the place where those activities are physically carried out."

16. The advertising exception was then found in article 59(b) of the Principal VAT Directive and read:

"The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community shall be the place where that person is established, has his permanent address or usually resides:

…

(b) advertising services;"

17. It is common ground that the advertising exception does not actually apply in the present case because it was limited prior to January 2010 to situations where the recipient of the services was either outside the EU or established in a different Member State from the supplier and post January 2010 to situations were the recipient of the services was outside the EU. Since here both Finmeccanica and its sister companies are established in Italy, it can have no application.

18. The scope of the fairs exception has been considered by the Court of Justice of the European Union in a number of cases. Case C-327/94 *Dudda v Finanzamt Bergisch Gladbach* [1996] ECR I-4618 concerned a preliminary reference from the German court in relation to the application of the fairs exception to the business of supplying technical acoustic services for concerts and similar events. Mr Dudda's business was established in Germany but most of the events for which he provided sound engineering took place in other Member States. Mr Dudda was generally engaged and paid by the organiser of the concert. The German Government argued that there were at the very least serious doubts as to whether Mr Dudda's services fell within the exception – his services made it possible for artistic and entertainment activities to take place but they did not themselves constitute artistic or entertainment or similar activities since 'the culturally creative factor is missing'.

19. The Court held first that the general location rule does not take precedence over the specific exceptions. In every situation, the question which arises is whether the supply is covered by one of the exceptions; if not, it falls within the general location rule. The Court held that the overall purpose of the exceptions was to 'establish a special system for services provided between taxable persons where the cost of the services is included in the price of the goods'. The Court then explained the application of the fairs exception as follows:

"24 There is a similar purpose underlying the [fairs exception] which lays down that the place of the supply of services relating *inter alia* to artistic and entertainment activities and ancillary services is the place where those services are physically carried out. The Community legislature considered that, in so far as the supplier provides his services in the State in which such services are physically carried out and the organizer of the event charges the final consumer VAT in the same State, the VAT charged on the basis of all those services the cost of which is included in the price of the complete service paid for by the final consumer must be paid to that State and not to the State in which the supplier of the service has established his business.

25 As regards the criteria according to which a specified service is to be regarded as being covered by the [fairs exception], no particular artistic level is

required, and it is not only services relating *inter alia* to artistic and entertainment activities but also services relating to merely similar activities that fall within its scope.

26 Where, as in the circumstances mentioned in the first question, the artistic or entertainment nature of the principal activity is not in dispute, it remains to be considered whether a service such as that at issue in the main proceedings constitutes a supply of ancillary services within the meaning of the [fairs exception].

27 Having regard to the findings made in paragraphs 24 and 25 of this judgment, any services supplied which, although not themselves constituting *inter alia* an artistic or entertainment activity, are a prerequisite for its performance, must be regarded as a supply of services ancillary to that activity.

28 The services in question are, therefore, ancillary to the principal activity from an objective point of view, irrespective of the person providing them."

20. The Court therefore held that since the provision of sound engineering for an artistic or entertainment event is a prerequisite for the staging of that event, it must be regarded as an ancillary service within the meaning of the fairs exception. In that case, however, there was no doubt that the concerts were cultural activities.

21. The judgment on which HMRC rely in the instant case is that in Case C-114/05 *Ministre de l'Économie, des Finances et de l'Industrie v Gillan Beach Ltd.* [2006] ECR I-2427 ('*Gillan Beach*'). Gillan Beach Ltd, a company established in the United Kingdom, claimed a refund of the VAT which it paid on purchases of goods and services in France in connection with the organisation of two boat shows in Nice in 1993. At the boat show Gillan Beach supplied exhibitors with inclusive services comprising, amongst other things, setting up stands and supplying telecoms services, providing staff to welcome visitors, and renting and arranging surveillance of mooring areas for the boats on display. The question arose whether the services had been provided in France - if so, no refund was available. The Court described the fairs exception as a provision that "lays down that the place of the supply of services relating, inter alia, to artistic, sporting and entertainment activities and ancillary services is the place where those services are physically carried out" (paragraph 18). Citing *Dudda*, the Court said that as regards the criteria for determining whether a service is covered by the fairs exception, no particular artistic or sporting level is required and it is not only services relating, inter alia, to artistic, sporting and entertainment activities, but also services relating merely to similar activities that fall within its scope.

22. The Court then went on to consider what activities are 'similar' to the listed activities. In approaching this the Court stressed that that the phrase is a Community concept that must be interpreted uniformly across all Member States. One must consider not only the wording but also the context in which the phrase occurs and the objects of the rules of which it is part. The Court went on:

‘22. In view of the objective sought by the Community legislature, …, which is to fix the place of taxable transactions in the Member State in the territory of which the services are physically carried out, wherever the person providing the service has established his business, an activity must be regarded as similar, within the meaning of the [fairs exception] where it includes features that are also present in the other categories of activities listed in that provision and which, in the light of that objective, provide justification for the application of that provision to those activities.

23. In that regard, there are grounds for stating, … that the features common to the various categories of services referred to in the [fairs exception] originate in the complex nature of the services concerned, which are various services, and in the fact that those services are generally provided for a number of different recipients, that is to say, all the people taking part, in a variety of capacities, in cultural, artistic, sporting, scientific, educational or entertainment activities.

24. Those various categories of services also have the common feature that they are usually provided for specific events, and the place where those complex services are physically carried out is easy to identify, as a rule, since such events take place at specific locations.

25. A show or a fair, whatever its theme, seeks to provide to a number of different recipients, as a rule in a single place and on a single occasion, a variety of complex services, with the purpose, in particular, of presenting information, goods or events in such a way as to promote them to the visitors. In those circumstances, it must be possible to regard a show or a fair as being covered by the similar activities referred to in the [fairs exception].

26. The services relating to the activities listed in the [fairs exception] include services provided by the organisers of such activities and of activities which must be treated in the same way as those activities.

27. It follows that the inclusive service provided to exhibitors by the organiser of a fair or a show must therefore be regarded as being one of the services referred to in the [fairs exception].

28. In the light of the interpretation of that provision given in paragraph 25 above, which is sufficient to determine the place where the service at issue in the main proceedings is provided, there is no need to adjudicate on whether that service can fall within any other category of services mentioned in [the specific exceptions].

29. The answer to the question referred should therefore be that the [fairs exception] must be interpreted as meaning that an inclusive service provided by an organiser to exhibitors at a fair or in an exhibition hall falls within the category of services referred to in that provision.’

23. By contrast, FGS relies on what the Court said more recently in Case C-530/09 *Inter-Mark Group sp. z o.o. sp. Komandytowa v Minister Finansów* [2011] ECR I-10675, a reference for a preliminary ruling from the Polish court. Inter-Mark had sought a ruling from the Polish tax authority in respect of a business it proposed to set up. That business would be the temporary provision of stands to clients presenting their goods or services at fairs and exhibitions. The service would include the drawing up and visualisation of the design, the transportation of the components of the stands and assembly at the place where the fair or exhibition was being organised. The stands in question would be provided to customers within Poland, in other Member States and would also be provided to customers in third countries. At the end of the contract, the clients would return the stands to Inter-Mark. Inter-Mark argued that its services were advertising services but the tax authority took the view that they were ancillary to the organisation of fairs or exhibitions.

24. The Court first considered whether the services fell within the advertising exception. The Court referred to the wide definition of the activities that fall within the scope of that exception. It held that the supply of services consisting of the design and temporary provision of a fair or exhibition stand must be considered to be a supply of an advertising service, within the meaning of the advertising exception, in the case where that stand is used for the dissemination of a message intended to inform the public of the existence or the qualities of the product or service offered by the hirer with a view to increasing the sales of that product or service or where it forms an inseparable part of an advertising campaign and contributes to conveying the advertising message. If the stand does not fulfil those conditions then one must consider whether it falls within the fairs exception. Referring to *Gillan Beach* the Court said:

> '24. It follows that a supply of services such as that referred to in the question submitted for a preliminary ruling can be characterised as a supply of ancillary services, within the meaning of [the fairs exception], when it relates to the design and the temporary provision of a stand for a specific fair or exhibition on a cultural, artistic, sporting, scientific, educational, entertainment or similar theme or a stand corresponding to a model in respect of which the organiser of a specific fair or exhibition has prescribed the form, size, material composition or visual appearance.
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> 25. As all the parties concerned which have submitted observations to the Court agree, in such a case the design and the temporary provision of a stand used for purposes of a specific fair or exhibition must be regarded as constituting a supply of services which is ancillary to the activity carried on by the organiser of that fair or exhibition, coming within the scope of [the fairs exception].
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> 26. It is necessary in this regard that the stand should be provided for a fair or an exhibition which takes place, whether on one occasion or repeatedly, in a specific location. As [the fairs exception] requires the charging of VAT at the place where the service is physically carried out, the application of that provision to the supply of a stand which is used at a multitude of fairs or

exhibitions taking place in several Member States would risk being excessively complex and would thus jeopardise the reliable and correct charging of VAT.'

25. Having given that guidance, the Court concluded that it was for the national court to assess the facts to establish the essential characteristics of the supply of services in order to classify it under the Directive.

The Decision

26. The Tribunal set out the facts and the parties' submissions and referred to the relevant passages from *Gillan Beach*. The Tribunal acknowledged at para [61] that the advertising exception could not apply and that the only question was whether the supplies fell within the fairs exception. However, the judge held that this did not make the consideration of the scope of advertising services irrelevant. That was because the exceptions to the general location rule were mutually exclusive so that a service which would, but for the place of establishment of its supplier or customer, fall within the advertising exception, could not be regarded as falling by default as within the fairs exception.

27. The judge therefore first considered whether the services which FGS supplied to its sister companies were advertising services within the meaning of the advertising exception. He referred to the judgment of the CJEU in Case C-68/92 *Commission v France* [1993 ECR I-5881 where a very wide description of advertising services was set out, namely the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales.

28. He then posed the question whether the services which FGS supplied to its sister companies were (a) designed and used for the purposes of the dissemination of messages intended to inform potential buyers of the existence or quality of the products offered by those companies with a view to increasing sales of such products and (b) whether they formed an inseparable part of the centrally coordinated advertising campaign of the group companies by contributing to and conveying their marketing messages. He had no doubt that they were. Hence as a result of the mutually exclusive nature of the exceptions to the general location rule, the supply by FGS could not fall within the fairs exception. The general location rule therefore applied and the location of supply was Italy.

29. The judge then went on to consider whether the supply would have fallen within the fairs exception in the event that he was wrong in holding that it could not do so because it fell within the definition of advertising services. He held that the supply could not fall within the fairs exception because it did not relate to the listed activities namely 'cultural, artistic, sporting, scientific, educational, entertainment .. activities'. In construing the fairs exception he held:

> '75. I do not regard the words "such as fairs or exhibitions" as meaning that anything which could be called a fair or exhibition falls in this provision. The comma proceeding it and the words "such as" make clear to me that such fairs or exhibitions must relate to the specified or similar activities. The words indicate that the fact an activity is a fair or exhibition will not prevent it from

being similar to, or one of, the specified activities, but they do not indicate the intention to create a new free standing category of activity.'

30. He then considered whether this conclusion was inconsistent with *Gillan Beach*. He held it was not. The boat show in *Gillan Beach* was an event to which one could assume the public had access for entertainment or education or, alternatively, it might be similar to a sporting event. He referred to the fact that in *Inter-Mark* the CJEU 'specifically limited the nature of the exhibition or fair to one which was on a specified or similar "theme"'.

31. Judge Hellier went on to consider what were the features of the listed activities which would determine whether another activity was 'similar' to them. In para [81] he identified two features in addition to the fact that they took place at an easily identifiable place of physical performance. These were that the theme of the activity was something similar to the listed activities and that it involves supplies for a number of people who are final consumers, that is to say, for non-taxable persons who bear the cost of the tax. He held that the services provided by FGS do not possess those qualities.

Discussion

32. In my judgment, the Tribunal fell into error in its initial approach to the issue in this case. It was not right to consider first whether the services supplied by FGS fell within the definition of 'advertising services' for the purpose of the advertising exception and then to conclude that because they did, they could not fall within the fairs exception. It may well be the case that, as the case law cited by the judge indicates, the exceptions to the general location rule are mutually exclusive. But it was common ground that the advertising exception did not apply here because FGS and its recipient sister companies are all established in Italy. The issue of overlap does not arise.

33. Although the CJEU in *Inter-Mark* did first address the question whether the services there fell within the advertising exception before considering the fairs exception, the situation which the CJEU was considering in that case was different from the situation here. Inter-Mark planned to provide its services to customers established in other Member States or outside the Union. In those circumstances, the advertising exception would be engaged if the services fell within the definition of advertising services. *Inter-Mark* is not therefore authority for the proposition that whenever services could fall within definition of advertising services they must be regarded as falling outside any other specific exceptions regardless of whether the advertising services exception is actually engaged.

34. If one approaches the question whether a supply falls within one exception by considering first every other kind of supply described in all other exceptions, regardless of whether the other exceptions can apply or not, one risks arriving at too narrow a definition of the services falling within any particular exception. The first step should be to consider the case law on the scope of the fairs exception. By approaching the case in the way it did, the Tribunal here effectively excluded from the

scope of the fairs exception any fair or exhibition which had a trade or commercial purpose but without first considering whether the case law on the fairs exception justified such a conclusion. I discuss the *Inter-Mark* case further below. Here is it enough to say that I do not regard it as authority for the proposition that any services provided at a fair or exhibition must fall outside the fairs exception if they include an element of promoting the sale of the customer's products or service to those attending the fair. The question posed by the Polish court stated that the services under consideration were to enable clients to present their goods and services at fairs and exhibitions. As Advocate General Bot described in paragraph 53 of his Opinion (which was not in the event followed by the Court), the arrangement of the stands provided by Inter-Mark had 'the purpose of awakening the intent of potential purchasers and becomes part of an operation to promote the products and services offered by the exhibitor'. If that were enough to take the services outside of the scope of the fairs exception, the Court would have made that clear. But neither the Advocate General nor the Court regarded that fact as ruling out the possibility that the service might fall within the fairs exception. That was still an outcome that it was open to the national court to reach depending on the facts. I turn therefore to consider what the case law says about the scope of the fairs exception itself.

Does a fair or exhibition need to have a cultural etc theme?

35. HMRC argued that *Gillan Beach* holds that there is no need for the fair or exhibition to have a similar theme to the listed activities in the fairs exception – the important thing is that it has an easily identifiable physical location at which one can say that the supply takes place. In any event, they argue that if there is a need for such a theme, then the Farnborough Airshow has a sufficiently similar theme to fall within the exception.

36. Mr Jones appearing for HMRC accepted that there is an inconsistency in the language used by the CJEU in *Gillan Beach* and *Inter-Mark*. In *Gillan Beach* the CJEU said in paragraph 19:

> 'As regards the criteria according to which a specified service is to be regarded as being covered by the [fairs exception], **no particular artistic or sporting level is required**, for example, and it is not only services relating, inter alia, to artistic, sporting and entertainment activities, but also services relating merely to similar activities that fall within its scope (see, to that effect, *Dudda,* paragraph 25).' (emphasis added)

37. Again, at paragraph 25 the Court held that a show or a fair, 'whatever its theme' was capable of being covered by the similar activities referred to in the fairs exception.

38. By contrast in *Inter-Mark* the Court said at paragraph 24 that the supply of services referred to in the Polish court's question can be characterised as an ancillary service within the meaning of the fairs exception 'when it relates to the design and the temporary provision of a stand for a specific fair or exhibition 'on a cultural, artistic,

sporting, scientific, educational, entertainment **or similar theme** …" (emphasis added).

39. However, I consider *Gillan Beach* is authority for the proposition that the theme of the fair or exhibition is irrelevant to the question whether it falls within the fairs exception and *Inter-Mark* is not authority for the contrary proposition. My reasons for so concluding are as follows. In *Gillan Beach* the Court was directly addressing the question: what are 'similar activities' within the meaning of the fairs exception? To put it another way, the Court was considering what characteristics do all the listed activities have in common which must also be a characteristic of the proposed other activity in order for that other activity to be 'similar' to the listed activities. What jumps out from the listed activities is that they are all things which are not trade or business. Must an activity therefore be some other kind of non-trade activity in order to be 'similar'? The Court rejected that approach. It held that when one is considering what characteristics the listed activities share that must also be shared by a 'similar' activity, one must look at the purpose of list. Here the purpose of listing these activities is to identify where the services are supplied. Since the purpose of the test is to identify the place of supply, there would be no logic in tying the exception to activities which share the characteristic of being 'non-trade' or of satisfying some socially beneficial or elevated purpose as all the listed activities seem to. The Court therefore held in paragraphs 23 and 24 of its judgment that the characteristics that the listed activities share for this purpose are not that they are all 'not trade' but rather that:

> (i) the services concerned are complex in nature and comprise various services;
>
> (ii) they are generally provided for a number of recipients that is all the people taking part in a variety of capacities in the activities;
>
> (iii) the services are usually provided for specific events; and
>
> (iv) the place where those complex services are physically carried out is easy to identify as a rule since such events take place at specific locations.

40. Further, because fairs and exhibitions share all these characteristics, they should be regarded as 'similar' to the listed activities regardless of their theme.

41. Mr Brown for FGS argued that the factual matrix against which the CJEU was considering the question was a boat show which was clearly similar in theme to a sporting or educational theme. Mr Jones countered by pointing to paragraph 8 of the judgment in *Gillan Beach* where the Court referred to the Administrative Instruction from the French Directorate General of Taxes saying that a complex package of services to an exhibitor in the context of a *trade* fair or similar event fell within the domestic provision implementing the fairs exception.

42. I do not consider that I need to rely on such gleanings from the judgment about the precise nature of the Nice boat show in order to ascertain what the Court held in *Gilllan Beach*. In the dispositif, the Court answered the question posed by the French court by saying that the fairs exception must be interpreted as meaning that:

> ‘an inclusive service provided by an organiser to exhibitors at a fair or in an exhibition hall falls within the category of services referred to in that provision.’

43. It said nothing about the similar activity needing to have a similar theme. In the paragraphs of the judgment to which I have referred, the Court set out exhaustively what characteristics, shared by the listed activities, must also be found in the ‘similar’ activities.

44. I do not agree, therefore, with the Tribunal’s conclusion in paragraph [76] of the Decision that the Court in *Gillan Beach* must have assumed that the public had access to the Nice boat show for the purpose entertainment or education. If the Court had intended to hold that the theme of the fair or exhibition was relevant, it would have mentioned this both in the body of the judgment and in the dispositif. The absence of any such reference means that there is no such requirement.

45. The *Inter-Mark* case was not considering what activities are similar to the listed activities at all but was considering the dividing line between services that are ancillary to activities covered by the fairs exception on the one hand and services which are advertising services or fall within one of the other specific exceptions on the other. The Court cited *Gillan Beach* as authority for the relevant common features of the listed activities. Certainly I accept that the reference to the ‘similar theme’ rather than ‘similar activities’ was repeated in the dispositif in *Inter-Mark* as well as in paragraph 24 of the judgment. But there was no indication in *Inter-Mark* as to whether the themes of the fairs for which Inter-Mark planned to provide its services would be cultural or sporting or any other particular theme. There is no certainly no indication that Inter-Mark was only going to provide services to non-trade fairs or exhibitions.

46. I therefore conclude on the state of the authorities that there is no need for the Farnborough Airshow to have any particular theme in order to fall within the fairs exception. What matters is whether it has the four characteristics described in paragraphs 23 and 24 of the Court’s judgment in *Gillan Beach* as set out in paragraph 39 above. There is no doubt that the Airshow has the characteristics described in (i), (iii) and (iv). The Tribunal held that it did not share the second characteristic so I turn now to consider whether the Tribunal erred in arriving at that conclusion.

A supply to a number of people who are final consumers

47. In paragraphs [86] of the Decision onwards, the Tribunal considered the criterion I have referred to in paragraph 39(ii) above, namely that the services are generally provided for a number of different recipients all taking part in the specified activities in a variety of capacities. The Tribunal had earlier made findings that at most a negligible part of the Finmeccanica enclosure was open to the general public; almost all those attending were invitees of the group: paragraph [43].

48. Judge Hellier referred to the judgment of the Court of Justice in Case C-222/09 *Kronospan Lielec sp. z oo v Dyrektor Izby Skarbowej w Rzeszowie* [2010] ECR I-9277 (‘*Kronospan*’) as establishing that where services are supplied to only one

recipient, they do not fall within the fairs exception. He went on to hold that the activities to which the exception relates are those primarily attended by final consumers, that is, non-taxable persons. The absence of such persons as consumers of the event in question is not determinative but will generally suggest that the event is not of the type intended by the reference to 'events' in the fairs exception.

49. He went on to hold in paragraph [105] that FGS's services did not fall within the fairs exception not only because they did not have a cultural etc theme but because:

(a) FGS as an organiser did not make a charge to any final consumer in the UK and could not be regarded as making a supply to the organiser of the Airshow;

(b) all nine of the sister companies to which FGS provided services took part in the event in the same capacity, namely that of an advertiser and the activity they took part in was marketing and selling, not something similar to any of the listed activities;

(c) other people took part in the event such as Finmeccanica, caterers and invitees to the Finmeccanica enclosure but FGS's services were not provided to them; and

(d) even if it was possible to say that FGS provided services to those other people, they were not consumers of the services because they did not pay for them and as such they were not relevant to the categorisation of the supply.

50. Although *Kronospan* was a case on the fairs exception, it did not relate to a fair or exhibition at all. It related to the provision by Kronospan of services in the field of technical investigations and analyses and other research and development work in the fields of natural sciences and technology. The work had been commissioned by a customer in Cyprus. The Polish tax authorities argued that the services were scientific activities within the meaning of the fairs exception and were therefore carried out where Kronospan carried on its business namely Poland. Kronospan argued that the services were covered by another specific exception for engineering work which would mean they were supplied in Cyprus. The Court held that:

> '24 It is important to add that, as is apparent from the case-law of the Court, the services referred to in [the fairs exception] are characterised, inter alia, by the fact that they are provided for a number of different recipients, that is to say, all the people taking part, in a variety of capacities, in cultural, artistic, sporting, scientific, educational or entertainment activities (see *Gillan Beach*, paragraph 23).
>
> 25 In the present case, however, it is clear from the order for reference that the services performed by Kronospan were not provided for a number of different recipients, but were carried out for one single Cypriot recipient which commissioned the research and development work at issue in the main proceedings. The fact that that sole recipient of services might find it necessary to sell, to third parties or to undertakings belonging to the same group as that of which it is part, the results of the work which it has commissioned is irrelevant in that regard. The dissemination, by the recipient of those services in the course

of its business, of those results to a wider public does not allow the conclusion to be drawn that those services have been provided to a person other than that recipient."

51. The Court held that the services must be classified as 'services of engineers'.

52. The facts of *Kronospan* are therefore very different from the facts of the present case because there was no event – there was merely the supply of services by a consultant of a scientific nature commissioned by a single customer. There were no activities in which a variety of people were taking part, as described in paragraphs 23 and 25 of *Gillan Beach* cited earlier. Going back to the cases considering fairs and exhibitions directly, they appear to me to reflect the fact that the kind of activities covered by the exception are those in which a variety of people 'take part'. In my judgment, the class of people 'taking part' in the activities need not be the same as the class of people to whom the services are provided by the taxpayer in question. Even though the services on which VAT is charged may be provided to a single recipient, the requirement of the exception is that those services relate to the listed activities. In the present case, therefore, it is not relevant that FGS provided services only to companies within the group – what matters is that a variety of people attend the Farnborough Airshow and the Finmeccanica enclosure in a variety of capacities.

53. This interpretation of this shared characteristic is confirmed by the judgments in *Dudda* and *Inter-Mark*. In *Dudda* it appears that Mr Dudda only had a single customer for his services, namely the organiser of the event in question: see paragraph 7 of the judgment. The concerts were, of course, events attended by a variety of people. Similarly in *Inter-Mark* the company had only one customer for the particular supply. Inter-Mark may or may not be assisting more than one exhibitor at any particular fair, but the Court does not appear to have considered that to be relevant and in any event all those exhibitors would be acquiring Inter-Mark's services in the same capacity. What matters is that a variety of people attend the fair or exhibition.

54. I conclude, therefore that the Tribunal erred in its application of this criterion. The Farnborough Airshow and the setting up of the Finmeccanica enclosure is the kind of activity in which a variety of people take part and the services provided by FGS relate to that activity. It does not matter that the services themselves are supplied only to a few people or to people all acting in the same capacity.

55. Further, in my judgment, the Tribunal was wrong to impose an additional criterion, namely that the people taking part in the activities, or some of them, have to be non-taxable, final consumers who bear the costs of the tax themselves. Everyone who attends the Finmeccanica enclosure must be provided with a pass to get into the Airshow and someone must pay for that ticket: see paragraph 40 of the Decision. It does not seem to me relevant whether the visitors buy the tickets themselves from the organiser of the Airshow or FGS buys them from the Airshow and provides them to the visitor as complimentary tickets. Again, one must bear in mind that the purpose of the fairs exception is to identify the place of supply in respect of the particular activities. I do not see that the place of supply can or should be different depending on who has paid for the ticket of the person taking part in the activity. What matters is that the people taking part in the activities do so in a particular location which is

easily identifiable such that one can sensibly regard services which relate to those activities as being supplied at that location.

56. Mr Brown raised a further point which was that the fairs exception cannot apply to FGS's services because it covers only the services provided by the organiser of the fair. You cannot, he submitted, have 'a fair within a fair'. On this point I accept Mr Jones' submissions that such a restricted meaning of the fairs exception would be inconsistent with the case law. Neither Mr Dudda nor Inter-Mark was the organiser of the events to which their services related yet this did not preclude the application of the fairs exception. At the least, their services were ancillary services relating to the fair or exhibition. The Court said at paragraph 28 of *Dudda* that the services in question were ancillary to the principal activity from an objective point of view 'irrespective of the person providing them'. Similarly, here, FGS's services are at least ancillary services even if they are not organising the particular fair themselves.

57. In my judgment, the activities to which the services provided by FGS relate are activities which fall within the fairs exception and the place where they are supplied is at the Farnborough Airshow. I therefore allow the appeal.

MRS JUSTICE ROSE
CHAMBER PRESIDENT

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