[2016] UKUT 373 (TCC)

Appeal number FTC/13/2014

VALUE ADDED TAX - exemption - whether dental payment plan administration services supplied to patients for consideration from 1 January 2012 exempt transactions concerning payments or transfers – whether services excluded from exemption as debt collection – CJEU decisions in Bookit II and NEC - whether to refer questions to CJEU - yes

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

DPAS LIMITED

Respondent

Tribunal: The Hon Mr Justice Warren
Judge Greg Sinfield

Further decision on remaining issues determined on written submissions

Kieron Beal QC and Alan Bates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

John Walters QC and Conrad McDonnell, counsel, instructed by Wilsons Solicitors LLP, for the Respondents

DECISION

Introduction

1. This is our further decision in relation to the appeal by the Appellants ('HMRC') against a decision of the First-tier Tribunal ('the FTT') released on 22 November 2013, [2013] UKFTT 676 (TC). In our first decision released on 5 November 2015, [2015] UKUT 585 (TCC) ('the First Decision'), we allowed HMRC's appeal in part but reserved our decision on two of the grounds of appeal until the Court of Justice of the European Union ('CJEU') had given judgment in Case C-607/14 *Bookit Ltd v HMRC* ('*Bookit II*') and Case C-130/15 *HMRC v National Exhibition Centre Ltd* ('*NEC*').

2. The Respondent ('DPAS') had appealed to the FTT against HMRC's decision that supplies of services by DPAS to the patients of dentists for whom DPAS provides practice-branded dental plans under new contractual arrangements introduced with effect from 1 January 2012 were not exempt for the purposes of VAT. The factual background to the appeal to the FTT is set out in [6] to [21] of the First Decision and we do not repeat them here. The FTT decided that, with effect from 1 January 2012, DPAS made exempt supplies of services, namely transactions concerning payments or transfers, to the patients.

3. HMRC appealed on five grounds. In their grounds of appeal, HMRC contended that the FTT had made the following errors of law in its decision:

> (1) holding that DPAS made a supply of services to the patients for a consideration;
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> (2) deciding that DPAS's supply of services to the patients fell within the exemption in Article 135(1)(d) of the Principal VAT Directive;
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> (3) deciding that DPAS's supply was not 'debt collection' and thus excluded from exemption;
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> (4) holding that the £10 registration fee was an ancillary part of the exempt supply; and
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> (5) holding that DPAS's changes to its contractual arrangements from 1 January 2012 did not amount to an abusive practice.

4. In the First Decision, we held that the FTT had erred in deciding that DPAS made a supply of services to patients ('existing patients') who had contracts with their dentists before 1 January 2012 and who did not sign and return the DPAS Acceptance Form to indicate that they agreed to the changes to the contractual arrangements from that date. We dismissed HMRC's appeal in so far as it related to:

> (1) existing patients who had signed and returned the DPAS Acceptance Form; and
>
> (2) new patients who had entered into dental plans and signed the DPAS Authorisation Form after 1 January 2012.

We held that the FTT had not erred in concluding that, from that date, DPAS made supplies of services for a consideration to such patients.

5. We made no decision in relation to grounds 2 and 3 of HMRC's grounds of appeal. HMRC invited us to make a reference to the CJEU so that the issues raised by those grounds could be considered together with those in *Bookit II* and *NEC* which were

already before the CJEU. We refused to make a reference to the CJEU primarily because we considered that, although it could not be guaranteed, it was highly likely that the rulings of the CJEU in relation to the *Bookit II* and *NEC* references would determine one or both of Ground 2 and Ground 3 in this appeal. Accordingly, we did not reach any conclusion in the First Decision on the issue of whether the services supplied by DPAS to the patients, who signed and returned the DPAS Acceptance Form and patients who entered into dental plans from 1 January 2012, were "transactions … concerning … payments [and] transfers" exempt under Article 135(1)(d) of the Principal VAT Directive. Instead, we directed that final determination of the VAT liability of the supplies made by DPAS to those patients should be reserved until after the CJEU had given its judgment in *Bookit II* and *NEC*. At paragraph 80 of the First Decision, we directed that the parties should make submissions in writing as to the determination and disposal of the issue of the VAT liability of the supplies by DPAS to those patients who signed and returned the DPAS Acceptance Form and patients who entered into dental plans from 1 January 2012 within 28 days of the issue of the judgment of the CJEU in *Bookit II* and *NEC*.

6. The CJEU handed down its judgments in *Bookit II* and *NEC* on 26 May 2016. DPAS made written submissions on the outstanding issues on 22 June. HMRC provided written submissions in response on 27 June. On the basis of those submissions (and submissions made for the purpose of the hearing in May 2015), we now consider the remaining issues in this appeal.

Bookit II

7. In *Bookit II*, the issue was whether a card handling service supplied by Bookit was exempt as a transaction concerning payments or transfers within Article 135(1)(d) of the VAT Directive. Bookit, acting in the name of a cinema operator ('Odeon'), sold cinema tickets to customers who paid by debit or credit card. Bookit charged the customers the price of the tickets plus a card handling fee. Bookit obtained the relevant card details from the purchasers and transmitted them, via another company (DataCash), to a merchant acquirer which, in turn, sent them to the relevant card issuer. Subject to checks, the card issuer provided an authorisation code to the merchant acquirer which provided it to Bookit, thus authorising the sale. At the end of each day, Bookit sent a settlement file, containing details of all card transactions during the day, to the merchant acquirer. The merchant acquirer sent these details to the relevant card issuers who transferred payments to the merchant acquirer. The merchant acquirer transferred the funds to Bookit's account. Bookit subsequently transferred the ticket sales revenue to Odeon and retained the card handling fees for itself.

8. Having described the card handling service supplied by Bookit in [31], the CJEU noted, in [33] and [34], that the exemptions in Article 135(1) of the Principal VAT Directive are autonomous concepts of EU law designed to avoid divergences in the application of the VAT system between Member States and, as exceptions to the general rule that VAT is chargeable on all services supplied for consideration by a taxable person, are to be interpreted strictly. Whether a service is exempt is determined by the nature of the service and not the type of person supplying it. As authority for this last proposition, the CJEU referred to [26] of Case C-175/09 *AXA UK Plc v HMRC* [2010] STC 2825 ('*AXA*').

9. In [38], the CJEU observed that it had 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. In particular, it involves a change in the legal and

financial situation so as to transfer funds between accounts. 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. The CJEU held in [39] that, while it is not inconceivable that the exemption may extend to services which are not transfers per se, the fact remains that the exemption can relate only to transactions which form a distinct whole, fulfilling in effect the specific, essential functions of such transfers. At [40], the CJEU observed that,

> "… in order to be characterised as a transaction concerning transfers, the services 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. 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."

10. The CJEU provided guidance on distinguishing exempt and non-exempt transfers at [41]:

> "… 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 …, 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 …"

11. The CJEU made it clear that the focus is not on what is done by the supplier but the effect of what is done, ie whether there is a transfer of funds, in [42]:

> "… while the fact that the service provider concerned may directly debit and/or credit itself an account, or again act by means of accounting entries in accounts belonging to the same account holder, allows, in principle, the conclusion that that condition is met and that the service under consideration is exempted (see, to that effect, judgment of 13 March 2014, *ATP PensionService*, C-464/12, EU:C:2014:139, paragraphs 80, 81 and 85), the mere fact that that service does not directly involve such a task does not however mean that the possibility of its being within the scope of the exemption at issue should be immediately ruled out, given that the interpretation described in paragraph 38 of this judgment does not presuppose any particular method for effecting transfers …"

12. Before turning to the facts of *Bookit II*, the CJEU stated, in [43], that the same considerations as apply to transactions concerning transfers also apply to transactions concerning payments.

13. The CJEU stated in [44] and [45] that a card handling service has the effect of leading to the execution of a payment or transfer and may be regarded as essential to that execution but the mere fact that the service is essential for completing an exempt transaction does not warrant the conclusion that the service is itself exempt.

14. In [46], the CJEU set out the services provided by Bookit (namely, obtaining the card details from the customer; transmitting the card data to the merchant acquirer; receiving the authorisation code provided by the card issuer; retransmitting an end of day settlement file, including the authorisation codes for that day's sales, to the merchant acquirer) before concluding that those activities "cannot, taken individually or together, be regarded as performing a specific and essential function of a payment or transfer transaction for the purposes of Article 135(1)(d) of the VAT Directive." The CJEU observed, in [47], that Bookit did not directly debit or credit the accounts concerned, it did not act by accounting entries and it did not even instruct such debits or credits, since it is the purchaser who, by using his or her payment card to make a purchase, decides that his or her account will be debited in favour of a third party. Further, the retransmission of the settlement file at the end of each day was no more than a request to receive a payment electronically and obtaining and retransmitting the authorisation code is not a specific function essential to the transfer of the ownership of the funds but only an authorisation to proceed with the sale - see [48] and [49]. Finally, in [50], the CJEU observed that the assumption of liability as regards the achievement of the changes in the legal and financial situation are characteristic of the existence of an exempt transaction of transfer or payment under Article 135(1)(d) of the VAT Directive and it was not apparent from the order for reference that Bookit assumed any such liability.

15. Accordingly, the CJEU held at [51] and [53]:

> "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.
>
> …
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> 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."

NEC

16. NEC operated the National Exhibition Centre and other venues in Birmingham which it hired to third party promoters who staged exhibitions and events at such venues. NEC sold tickets on behalf of the promoters. When customers paid for the tickets by debit card remotely or credit card in any case, NEC took payment of the ticket price and a booking fee which it retained. NEC accounted to the promoter for the ticket price as its agent. The steps taken by NEC to process the card payments were essentially the same as in *Bookit II*. There were two issues for the CJEU, namely whether the service of processing a payment by debit or credit card fell within Article

13B(d)(3) of the Sixth Directive, now Article 135(1)(d) of the VAT Directive, and, if so, whether the service provided by NEC was 'debt collection' within that provision and thus excluded from the exemption.

17. Having made some preliminary observations about the contractual arrangements between the parties at [17] to [24], the CJEU in *NEC* adopted the same approach as it had done in *Bookit II*. Save for immaterial differences of wording in the English language version and the recording, in [50] of *Bookit II*, of a submission by Bookit not made by NEC, [28] to [52] of *NEC* are identical to [33] to [57] of *Bookit II*. Accordingly, the CJEU in NEC reached the same conclusion as it had done in *Bookit II*, namely that the processing of payment by debit or credit card, such as in *NEC*, is not an exempt transaction concerning payments and transfers. Given its conclusion on the question of exemption, the CJEU did not consider it necessary to answer the second referred question on whether the services supplied by NEC constituted 'debt collection' and were thus excluded from the exemption for transactions concerning payments and transfers.

Was DPAS's supply of services to the patients a transaction concerning payments or transfers within Article 135(1)(d)?

18. DPAS submits that the CJEU's decisions in *Bookit II* and *NEC* have not provided any definitive answer to the issues in this appeal. Further, DPAS submits that nothing in *Bookit II* and *NEC* casts any doubt on the CJEU's conclusion in *AXA* that the services provided by Denplan in that case were transactions concerning payments and, in principle, exempt but were excluded from the exemption because they constituted debt collection. The services provided by Denplan were materially indistinguishable from those provided by DPAS save for the fact that Denplan supplied its services to the dentists, which is why they could be characterised as debt collection whereas DPAS supplies its services to the patients. DPAS further submits that, as a direct debit originator, it actually effects transfers of funds unlike Bookit and NEC which merely provided information that caused others, the merchant acquirers, to make payments.

19. HMRC submit that DPAS does not act in a qualitatively different way from either Bookit or NEC. HMRC contend that the functional analysis of the underlying transactions is no different. The fact that DPAS is a direct debit originator, rather than a credit or debit card processor, means no more than that DPAS is authorised to obtain payments by direct debit. DPAS's activity is functionally the same as Bookit and NEC. DPAS requests payments under the authority of a mandate from the patient to the patient's bank. It is the banks that actually effect the transfers. DPAS merely carries out administrative tasks for moving money between bank accounts, and recording what transfers have been made by others. DPAS does not itself debit or credit the respective bank accounts. HMRC submit that the CJEU's judgments make clear that an intermediary which calls on other financial service providers to effect transfers between bank accounts does not thereby make a supply of transactions concerning transfers in its own right. HMRC also contend that DPAS cannot rely on *AXA* because, as we have held, DPAS supplies services to the patients whereas AXA supplied services to the dentists.

20. We do not consider that we can make a judgment between those rival submissions without further guidance from the CJEU. The present appeal is, of course, distinguishable from *AXA* on its facts in that the service in question is, following our previous decision, provided to the patient rather than to the dentist. But it does not necessarily follow that this distinction means that the reasoning in *AXA* is as HMRC

contend. The end result in both *AXA* and the present case is the same in the sense that money passes from the patient to the dentists. The steps which produce that result are the same in each case namely the implementation by the service provider (Denplan or DPAS) of the direct debit mandate with the results described in [9] and [10] of *AXA*, following which the patient's bank transfers funds to the service provider's account with its own bank, followed by an instruction from the service provider to transfer funds to the dentist's account. There is therefore force in DPAS's submissions.

21. However, although the focus is on the effect of what is done and not on what is done by the supplier (see [11] above), it is still necessary to identify the service provided since that is the supply the taxable nature of which is in issue. The service provided by Denplan is different from the service provided by DPAS, not least because the former is provided to the dentist and the latter is provided to the patient. The service provided by Denplan is identified in [28] of *AXA*: Denplan is, in return for remuneration, responsible for the recovery of the debts and provides a service of managing those debts for the account of those entitled to them. DPAS provides a different service to the patient: reflecting the wording of *AXA*, DPAS is responsible for collecting monies from the patient and provides a service of managing and administering the payments to be made by the patient in respect of his or her dental plan: that is the service identified in the Acceptance Form and DPAS Authorisation which we referred to in our first decision. And whereas the purpose of Denplan's service (see the opening sentence of [28] of *AXA*) is to benefit Denplan's clients, namely dentists, by the payment of the sums of money due to them from their patients, the purpose of DPAS's service is to benefit DPAS's clients, namely patients, by the receipt of the sums of money due from them to the dentists for onward transmission.

22. In *Bookit II* and *NEC*, the service provided is described as card-handling services. The steps involved in that service are described in [31] of the judgment in *Bookit II*. The final element of the service is the retransmission by the service provider to its merchant acquirer, at the end of the day, of a settlement file listing all the sales actually effected in the course of the day and containing the relevant data pertaining to the payment cards used, including authorisation codes, to permit its retransmission, by the merchant acquirer, to the various card issuers concerned, who then make payments or transfers to that merchant acquirer, which transfers the funds concerned to the account of that service provider. The actual transfer of funds is effected by the banks concerned. That, however, is equally true in the present case. DPAS does not effect changes to the accounts of the patient or itself or of the dentists. Given the discussion between [38] and [51], we cannot be certain that the fact that the transfer of funds takes place as the result of the operation by DPAS of its direct debit mandate rather than by way of debit or credit card means that the reasoning of the CJEU is not applicable. In particular, what the CJEU says in [50] appears to us to apply with equal force to the present case.

23. We appreciate that this produces a tension with *AXA* and acknowledge that *AXA* certainly lends strong support to DPAS's case. It seems to us, however, that the CJEU could, if the issue were before it, adopt one of these two courses (there may be more: we do not need to consider that): (i) it could say that *AXA* is determinative of the present case and provide an explanation of why the reasoning in *Bookit II* and *NEC* applies only to card services and not direct debit payments or (ii) it could say that the reasoning in *Bookit II* and *NEC* applies equally to a payment by direct debit and distinguish the present case from *AXA* on the basis that the service is provided to the patient rather than the dentist. We are unable to say with certainty which course it would adopt. We

therefore consider that we must seek further guidance from the CJEU about the meaning and effect of Article 135(1)(d).

24. Even though we do have our own (undisclosed) view about what the right answer is, it certainly cannot be said that the matter is *acte clair*, although were it not for the debt collection point, we might decline to make a reference and leave the decision whether or not to do so to the Court of Appeal. However, for reasons appearing below, we consider that the debt collection point (Ground 3 of the appeal) is one to which only the CJEU can give an answer. In reality, the two issues are closely connected and it would be desirable for the CJEU to be in a position to adopt a holistic approach rather than being restricted to a single narrow issue. If it considers that the guidance already provided on the first issue is already sufficient, it will say so.

Was DPAS's supply 'debt collection' and thus excluded from exemption under Article 135(1)(d)?

25. DPAS contends that there is no need for a reference to the CJEU in this case because the VAT liability of the services supplied by DPAS has already been determined and is *acte clair* from the CJEU's judgment in *AXA*. In [32] and [33] of *AXA*, the CJEU held that Denplan supplied debt collection and factoring services because the object of the services was to obtain payment of debts due to its clients, namely the dentists. Accordingly, Denplan's services were excluded from the exemption in Article 135(1)(d). A debt collection service involves obtaining a payment due to someone. DPAS submits that it does not supply debt collection services because, by its nature, debt collection can only be performed for the creditor. A debt collection service is not a service provided to the debtor. It follows, says DPAS, that its services are not excluded from the exemption. DPAS also relies on a number of decisions of domestic tribunals that have considered the meaning of debt collection in the EU VAT legislation but none of them involved payment or transfer services provided to the debtor, so the observations were obiter, except for *Paymex Limited v HMRC* [2011] SFTD 1028 which was not appealed further, and *Bookit II* and *NEC*. DPAS further relies on the decisions of the CJEU in *AXA* and *MKG-Kraftfahrzeuge-Factoring* (Case C-305/01) [2003] ECR I-6729 ('*MKG*') but neither concerned services supplied to a debtor.

26. HMRC, also relying on *AXA* at [26] and *MKG* at [64], say that it is the nature of the services provided and not the nature of the person supplying or receiving them which is determinative.

27. We consider that there is real doubt as to the correct application of the term 'debt collection' in Article 135(1)(d). We do not consider that the position is determined by *AXA* and *MKG* as these cases did not concern a situation such as the present case where an activity that was admittedly debt collection arguably ceased to be so because the contractual terms and arrangements changed so that the consideration was provided by the debtor rather than the creditor while the services provided by the supplier remained, essentially, the same on the hypothesis that there is a transaction concerning transfer or payment in the first place. The question which we feel unable to resolve with confidence is what, objectively, is the nature of the services supplied by DPAS, in particular, the question whether the type of activities undertaken by Denplan in providing services to dentists and which constitute debt collection cease to constitute debt collection when undertaken by DPAS in providing services to patients. Even putting to one side the fact that the arrangements changed, we consider that it is not clear that services such as those provided by DPAS to new patients should not be

regarded as 'debt collection'. Accordingly, we consider that we should make a preliminary reference to the CJEU in order to enable us to decide this ground of appeal.

Questions for a preliminary reference

28. The questions to be referred are, ultimately, a matter for us and not the parties. We would, however, be greatly assisted if the parties were able to agree a formulation of the appropriate questions, for us to consider, in the light of this further decision. We would ask that any agreed formulation be with the tribunal by 6 October 2016. If the parties cannot agree a formulation, each party is invited to submit its own formulation for our assistance.

Disposition

29. For the reasons discussed above, the final determination of grounds 2 and 3 is stayed pending the decision of the CJEU on a preliminary reference, the terms of which are to be decided following receipt of suggested formulations from the parties in accordance with the preceding paragraph.

The Hon Mr Justice Warren

Greg Sinfield
Judge of the Upper Tribunal

Release date: 15 August 2016