

No separate supply of exempt payment handling services

[Everything Everywhere \(formerly T-Mobile UK\) \(C-276/09\)](#)

The ECJ has ruled that charges made by a telecoms business to its customers for the processing of cheque and similar payments, where the customers choose to use those payment methods rather than more 'automated' payment methods such as direct debits, are consideration for taxable telecoms services and not for a separate exempt supply of payment handling services.

Background

The Taxpayer provides mobile telephone and other services. It charges those customers on contracts a 'separate payment handling charge' where they pay by means other than direct debit or BACS. HMRC rejected a voluntary disclosure for overpaid output tax relating to this charge and the Taxpayer appealed.

The Taxpayer considered that the charge was consideration for an exempt supply of financial services either as the transfer, receipt or dealing with money or related negotiation (under art 13B(d)(3) EC Sixth VAT Directive, now art 135(1)(d) Principal VAT Directive) and the related UK legislation in Group 5, Schedule 9 VAT Act 1994. This exempt supply was separate from the supply of telecommunications services and made for a separate payment. There were further detailed submissions regarding the processes by which the payments were effected, including the role of the Taxpayer in obtaining authorisation codes from the banks and the transmission of those codes to effect payments by the customer. The Taxpayer submitted that its actions could not be distinguished from the actions of the taxpayer in *Bookit Ltd* [2006] EWCA Civ 550, in which the Court of Appeal had held that Bookit's services fell within the exemption.

HMRC argued that the charge was not consideration for a distinct supply but part of the consideration for a package of mobile telephone services. In the alternative HMRC argued that, in the event that there was a separate supply for the charge paid by customers, that supply was not within the financial services exemption.

The VAT and Duties Tribunal decided that there was no separate exempt supply of payment processing services. On appeal, the High Court decided to refer the following questions to the ECJ for a preliminary ruling:

"1. What are the characteristics of an exempt service that has "the effect of transferring funds and entails changes in the legal and financial situation"? In particular:

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- a. Is the exemption applicable to services which would not otherwise have to be performed by any of the financial institutions which (i) make a debit to one account, (ii) make a corresponding credit to another account, or (iii) perform an intervening task between (i) or (ii)?
 - b. Is the exemption applicable to services which do not include the carrying out of tasks of making a debit to one account and a corresponding credit to another account, but which may, where a transfer of funds results, be seen in retrospect as having been the cause of that transfer?
2. Does the exemption in Article 13B(d)(3) of the Sixth Directive for "transactions concerning payments [or] transfers" apply to a service of obtaining and processing payments by credit and debit cards, such as those performed by the taxpayer in the present case? In particular, where the transmission of settlement files at the end of each day by the taxpayer has the effect of automatically causing the customer's account to be debited and the taxpayer's account to be credited, will those services fall within the scope of Article 13B(d)(3)?
 3. Does the answer to Question 2 depend on whether the taxpayer itself obtains authorisation codes for onward transmission or obtains those codes through the agency of its acquiring bank?
 4. Does the exemption in Article 13B(d)(l) of the Sixth Directive for "the negotiation of credit" apply to services such as those offered by the taxpayer in the present case in relation to credit card payments, whereby as a result of those services the customer's credit card account is debited with further amounts of credit?
 5. Does the exemption for "transactions concerning payments [or] transfers" apply to services of accepting and processing payments made using third party agents, such as those offered by the taxpayer through the Post Office and PayPoint in the present case?
 6. Does the exemption for "transactions concerning payments [or] transfers" apply to services of obtaining and processing payments made by cheque sent to the taxpayer or his agent, which payments have to be processed by the taxpayer and its bank?
 7. Does the exemption for "transactions concerning payments [or] transfers" apply to services, such as those offered by the taxpayer in the present case, of receiving and processing payments made over the counter at a bank for credit, through the banking system, to the taxpayer's bank account?

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8. What particular factors have to be taken into account when deciding whether a charge (such as the payment handling charge in the present case) that is applied by a taxpayer to its customer in respect of the customer's choice to make payment to the taxpayer using a particular payment method, and which is individually identified in the contractual document and separately itemised in invoices issued to customers, is a separate supply for VAT purposes?"

Held

The ECJ summarised its judgment as follows:

"For the purposes of collecting value added tax, the additional charges invoiced by a provider of telecommunications services to its customers, where the latter pay for those services not by Direct Debit or by Bankers' Automated Clearing System transfer but by credit card, debit card, cheque or cash over the counter at a bank or authorised payment agent acting on behalf of that service provider, do not constitute consideration for a supply of services distinct and independent from the principal supply of services consisting in the supply of telecommunications services."

In the light of its answer in respect of the single v. multiple supply issue it was not necessary for the ECJ to provide answers to questions 1 to 7 concerning the interpretation of the financial services exemption regarding payments and transfers.

Implications

The issue of whether multi-element transactions constitute a single supply or multiple supplies is one of the most difficult questions that taxpayers can face. Whilst there have been historic cases where two separate considerations were in respect of separate supplies, this case is a reminder that separate consideration does not equate to separate distinct supplies.

For businesses that are charging separate consideration for use of credit cards or cheques or any other form of payment, this case indicates that they need to review their arrangements if they are relying upon the payment and transfers exemption. There was an aged policy of HMRC publicised in Business Brief 17/98 which allowed taxpayers to exempt such charges in certain defined situations where the person charging for the payment and transfer service was not the supplier of the goods or services for which the payment was made. In situations where the payment handling business was acting as agent for the supplier of the goods or services (such as

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a travel agent) HMRC at that time considered that accepting payment in the form of a credit card was within the exemption. This policy was considered in the course of the Debenhams retail litigation, when the existence of this policy was raised in argument by Counsel for the taxpayer. Later, following the Bookit and Scottish Exhibition Centre cases, and the refusal of the House of Lords to grant leave for HMRC to appeal, HMRC published a revised policy in Business Brief 18/06 which withdrew Business Brief 17/98 and replaced it with a policy that, in order to fall within exemption, an agent needed to make a separate charge and transmit the card information with the necessary security information and the card issuers' authorisation codes to Girobank.

For businesses that have similar arrangements using a separate company, the key issues will be whether there is a separate service provided to the customer and whether that service constitutes the provision of a comprehensive financial service of a type provided typically by financial services businesses. Any such arrangements may also need to take due regard of the developing case law on abuse of rights, although this of course would depend on the individual circumstances of the arrangements in place.

The ECJ did not need to answer the questions relating to the scope of the financial services exemption. Therefore, this case has not restricted any further the scope of the payments and transfers exemption following the recent AXA case. The ECJ noted that the financial services exemption should be seen in the context of the provision of financial services as distinct from attempts to 'carve out' an exempt element of an otherwise taxable service. Financial services businesses, and those providing outsourced and other VAT-exempt services to them, will need to review existing contracts, VAT liability decisions and any HMRC rulings to assess whether changes are needed to maintain VAT efficiency.

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