defendants for withholding payment. In my judgment justice does not require me to listen to the complaint of B.C.L. about being kept out of their money, and in this respect the debenture holders who take from B.C.L. the benefit of the defendants' debt without submitting to set off are in no better position. I am not disposed to award any interest.

Order accordingly.

Solicitors: *Herbert Smith & Co.; Victor Mishcon & Co.*

[COURT OF APPEAL]

* BRITISH RAILWAYS BOARD *v.* CUSTOMS AND EXCISE COMMISSIONERS

1977 Jan. 27, 28; April 1

Lord Denning M.R., Browne L.J. and Sir John Pennycuick

Revenue—Value added tax—Zero-rating—"Transport of passengers"—Card issued to student on payment for rail travel at half-fare—Whether service provided eligible for zero-rating—Whether question of law—Finance Act 1972 (*c.* 41), *s.* 12 (1) (2), *Sch.* 4, *Group* 10, *items* 4 (*a*), 10 [1]

British Railways Board introduced a student card scheme whereby on payment of £1·50 and any tax chargeable thereon the student was issued with a card which, upon its presentation at ticket offices within a specified period, entitled the student to tickets at reduced prices, normally half the second class ordinary adult fare for the required journey. A university student went to a student organisation and upon payment of £1·65, £1·50 plus 15p value added tax, she was issued with a student identity card and a booklet specifying her entitlement to a special reduced price of tickets upon the presentation of the card at the board's ticket offices and the conditions on which the card was issued.

The Divisional Court upheld the decision of a value added tax tribunal that the student did not make the payment for the supply of the service of transport in a train but for the right to obtain supplies of such a service at reduced prices and that since the supply of such a right was not for the service of "transport of passengers," within item 4 of Group 10 of Schedule 4 to the Finance Act 1972, it was not a supply of services zero-rated for the purposes of value added tax.

On appeal by the board: —

Held, allowing the appeal, that the £1·50 paid by the student for the card was to be regarded as part payment in advance for the supply of "transport of passengers" within item 4 (*a*) of Group 10 of Schedule 4 to the Finance Act 1972 and fell to be zero-rated under section 12 (1) and (2) (post, pp. 592E–F, 598D, 599E–F).

Per curiam. The legal effect of the transaction considered in relation to the words of the statute is a question of law: it does not depend on the state of mind of the parties (post, pp. 591F–G, 595E–F, 597H—598A, F, 599H).

[1] Finance Act 1972, s. 12: see post, p. 590G.
Sch. 4, Group 10, item 4 (*a*): see post, p. 590H.
Group 10, item 10: see post, p. 600A.

Dicta of Finlay J. in *Attorney-General* v. *Arts Theatre of London Ltd.* [1933] 1 K.B. 439, 455, 457–458, 460 and Lord Widgery C.J. in *Customs and Excise Commissioners* v. *Automobile Association* [1974] 1 W.L.R. 1447, 1454, 1455, 1458, D.C. doubted.

British Airports Authority v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 302, C.A. considered.

Per Lord Denning M.R. and Browne L.J. The basic question is, what was supplied in consideration of the student's payment of £1·50 (post, pp. 592E, 597F)?

Per Sir John Pennycuick. The card was an integral part of the consideration for which transport was supplied (post, p. 599F). *Quaere.* Whether the transaction did not fall within item 10 of Group 10 of Schedule 4 to the Act of 1972 (post, p. 600A–B).

Decision of the Divisional Court of the Queen's Bench Division reversed.

The following cases are referred to in the judgments:

Attorney-General v. *Arts Theatre of London Ltd.* [1933] 1 K.B. 439 Finlay J. and C.A.

British Airports Authority v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 302; [1975] 3 All E.R. 1025; [1977] 1 All E.R. 497, D.C. and C.A.

Customs and Excise Commissioners v. *Automobile Association; Barton* v. *Customs and Excise Commissioners* [1974] 1 W.L.R. 1447; [1974] 1 All E.R. 1257; [1974] 3 All E.R. 337, D.C.

Trewby v. *Customs and Excise Commissioners* [1976] 1 W.L.R. 932; [1976] 2 All E.R. 199, D.C.

The following additional cases were cited in argument:

Bracegirdle v. *Oxley* [1947] 1 K.B. 349; [1947] 1 All E.R. 126, D.C.

Carlton Lodge Club v. *Customs and Excise Commissioners* [1975] 1 W.L.R. 66; [1974] 3 All E.R. 798, D.C.

Customs and Excise Commissioners v. *Guy Butler (International) Ltd.* [1976] Q.B. 106; [1976] 3 W.L.R. 370; [1976] 2 All E.R. 700, C.A.

National Transit Insurance Co. Ltd. v. *Customs and Excise Commissioners* [1975] 1 W.L.R. 552; [1975] 1 All E.R. 303, D.C.

Rowe & Maw v. *Customs and Excise Commissioners* [1975] 1 W.L.R. 1291; [1975] 2 All E.R. 444, D.C.

APPEAL from Divisional Court.

A London value added tax tribunal on August 28, 1975, dismissed an appeal by the British Railways Board under section 40 of the Finance Act 1972 against a decision of the Customs and Excise Commissioners and held that the supply by the board of a student identity card to Patricia Mary Owen on March 13, 1974, was a supply of services chargeable with value added tax at the standard rate.

On March 22, 1976, the Divisional Court (Lord Widgery C.J., Thompson and Kenneth Jones JJ.) dismissed the board's appeal.

The board appealed on the grounds that (1) the Divisional Court wrongly held that (a) the question whether the supply fell to be chargeable at the zero-rate or at the standard rate was a question of fact for the tribunal and/or (b) the determination of the tribunal was one which a reasonable tribunal properly directed as to the law could possibly have reached; and that (2) the Divisional Court ought to have held that the question was one of law and that as a matter of law the supply fell to be zero-rated, or that the only reasonable conclusion on the facts was that the

supply fell to be zero-rated and that therefore the decision of the tribunal should be reversed.

The facts are stated in the judgments of Lord Denning M.R. and Browne L.J.

Barry Pinson Q.C. and *John Gardiner* for the board.
Harry Woolf and *Duncan Matheson* for the commissioners.

Cur. adv. vult.

April 1. The following judgments were read.

LORD DENNING M.R. (read by Browne L.J.). Value added tax is a new thing. It was introduced in England so as to bring us into accord with the taxing system in the common market. It was imposed by the Finance Act 1972, which contains all the principles relating to it. It is imposed, not only on goods, but also on services. Everything which is not a supply of goods is a supply of services: see section 5 (8). It is charged as a percentage (25 per cent. or 10 per cent. or 8 per cent.) of the price or charge and is added to it: and the trader is accountable to the revenue for it. The statute provides, however, for some goods and services to be "zero-rated," that is, to be charged nothing: see section 12; and for others to be "exempt" from the charge altogether: see section 13.

We are here concerned with a claim that a particular supply of services should be zero-rated. It arises out of the special arrangement for student travel. In 1973 the British Railways Board found that many students were travelling by coach rather than by rail: because the coaches were cheaper—indeed almost half the fares on the railway. In order to meet this competition the board in 1974 promoted a scheme by which a student should pay £1·50 down and in return get a right to travel half-fare for the next six months. The question is whether value added tax is chargeable on the £1·50, or not.

The statutory provisions are as follows. Section 9 (1):

> ". . . tax shall be charged at the rate of 10 per cent., and shall be charged—(*a*) on the supply of goods or services, by reference to the value of the supply . . ."

Section 12:

> "(1) Where a taxable person supplies goods or services and the supply is zero-rated, then . . . (*a*) no tax shall be charged on the supply; . . . (2) A supply of goods or services is zero-rated . . . if the goods or services are of a description for the time being specified in Schedule 4 to this Act or the supply is of a description for the time being so specified."

Schedule 4:

> "Zero-rating . . . Group 10—Transport . . . Item No. 4. Transport of passengers—(*a*) in any vehicle, ship or aircraft designed or adapted to carry not less than 12 passengers; . . ."

The particular facts are these. Miss Patricia Mary Owen had her home in Bridgwater, Somerset; but she was a third-year student at a college in London University. She went to the office of a student organisation in Euston Road, and asked for a student travel-ticket. She was

charged £1·65, including value added tax. Of this sum £1 plus 10p value added tax was paid to the British Railways Board and 50p plus 5p value added tax was retained by the student organisation as commission. Miss Owen was issued with a student identity card and a booklet specifying the conditions. The first one said:

> "Upon presentation of a valid Student Identity Card . . . together with a properly completed request form . . . at station ticket offices, single/return tickets are issued to the student named on the card at a special reduced price, which will normally be half the second-class ordinary adult price appropriate to the required journey. . . ."

The revenue admit that no value added tax is payable on the half-fares which Miss Owen pays for her rail tickets when she travels. These half-fares are zero-rated because they are for the "transport of passengers" by the British Railways Board. They claim that the value added tax is payable on the £1·50 which she pays for her student identity card.

The value added tax tribunal held that value added tax was payable on the £1·50. They regarded it as a question of fact which they formulated in this way:

> ". . . for what, in substance and as a question of fact, did Patricia Mary Owen pay her £1·50 plus 15p tax? Was it for the right to travel by rail or was it for the right to obtain tickets to travel by rail at the reduced prices . . .? . . . there can only be one answer . . . [it was not] for the supply of the service of transport in a train, but for the right to obtain supplies of such a service at reduced prices. The supply of such a right is a supply of services but does not . . . fall within item 4 of Group 10. . . ."

The Divisional Court upheld that decision, saying: "This is a matter of fact for which the tribunal below is the final authority."

I do not myself think that it is a matter of fact for the tribunal. We are told that some tribunals hold that value added tax is payable on these sums of £1·50 paid by students: and that other tribunals hold that is not payable. That will never do. Either value added tax is payable on all these sums of £1·50, or on none of them. It cannot depend on the state of mind of any individual student by asking him or her: what did you pay the £1·50 for? It must depend on the legal effect of the transaction considered in relation to the words of the statute. And that is a question of law.

The error can, I think, be traced back to the first cases to come before the Divisional Court about value added tax. The decisions themselves are perfectly good, but the observations have given rise to difficulties. They are *Customs and Excise Commissioners* v. *Automobile Association* and *Barton* v. *Customs and Excise Commissioners* [1974] 1 W.L.R. 1447. In each case an association had many members. Each member paid a subscription each year. Let us say £5. In return he became entitled to several publications free of charge, such as, the handbook of the association and the quarterly bulletin. He also got other benefits, such as the right to use the club premises and to attend meetings arranged by the association. Now the literature was zero-rated. It came under Schedule 4, Group 3, headed "Books, etc." But the other benefits were not zero-rated. They were liable to value added tax. The revenue argued that

the whole of the £5 subscription was liable to value added tax. It was paid for membership of the association—as a separate right in itself—and not for the literature. The Divisional Court rejected that contention. They held that the £5 was paid for the supply of the composite services—the literature which was zero-rated—and other benefits which were liable to value added tax. And that there should be an apportionment of the £5 so as to ascertain how much of the subscription was to be zero-rated and how much was liable to value added tax. For instance, £4 might be zero-rated as being paid for the literature and £1 would be liable to value added tax, being paid for the other benefits.

I see no reason to doubt the correctness of those two decisions: but the difficulty arises from the way it was put. The tribunal had posed this question: What does a member get for his subscription? Lord Widgery C.J. said, at p. 1455E: ". . . that is a perfectly appropriate approach, and clearly gives rise to a question of fact. There is no law in that at all." Now I quite agree that when it comes to apportioning the £5—between the payment for literature and the payment for other benefits—that apportionment is a question of fact. But the earlier question: "What does a member get for his subscription? " is not a question of fact. It is a question of law. It does not depend on the personal situation of any particular member. One member of the Automobile Association may get a lot out of the other benefits and little out of the literature: or vice versa. The proper question is: what is the consideration for the payment of the subscription? The answer in the case of these associations is: it is the supply of the literature and the other benefits. In so far as literature is supplied, it is zero-rated. In so far as other benefits are supplied, they are liable to pay value added tax. Apportionment is necessary to decide how much to each.

Other cases were cited to us, but I find them of little help.

I come back to the real question in this case. What did the British Railways Board supply in consideration of the £1·50 they received? Did they supply transport by rail? or only an option to buy tickets? To my mind they supplied transport by rail: and the £1·50 was part-payment for it. It is not correct to separate the £1·50 as if it was a separate payment for a separate service—separate from the travel by rail. The £1·50 is really part and parcel of the payment which the student makes for travelling on the railway. Just as a season ticket is payment in full in advance for travelling on the railway (whether the passenger uses it or not), so also this £1·50 is part-payment in advance. It is similar to the two-part tariffs which are so common nowadays for electricity, telephones, and so forth. There is a down-payment in advance, followed by subsequent payments in respect of the actual amount used. Sometimes the down-payment is a large proportion. At other times it is a small proportion. But, whichever it is, it is a part-payment in advance for the electricity or telephone, or as the case may be.

There is, of course, no apportionment available or possible. The £1·50 is either paid in consideration of transport by rail, or it is not. Seeing that the £1·50 is part-payment in advance for "transport of passengers," it falls to be zero-rated.

I would allow the appeal, accordingly.

BROWNE L.J. I agree that this appeal should be allowed. There is no dispute about the facts. The British Railways Board, of course,

A operates the railways in this country. In 1971 the board carried out a survey of the use made of the railways by students, and as a result introduced two schemes designed to attract students to railway travelling. The schemes were not successful and, in January 1974, the board introduced another scheme which is the subject of this case. This scheme was run by the board under an agreement with the National Union of
B Students and the British Student Travel Centre. Under the scheme, the student bodies issued student identity cards (supplied by the board) to full-time students on payment of £1·65, i.e., £1·50 plus 15p value added tax. The card bore a photograph of the student to whom it was issued, and was valid until June 30 or December 31 following the date of issue. The card entitled the student to the benefits set out in a booklet issued with it. The essential benefit is set out in the part of paragraph 1 of the booklet
C which Lord Denning M.R. has already quoted—that is, the reduced price of tickets.

The value added tax tribunal found that

> "Before introducing the scheme the board carefully costed it out treating both the fixed sums of £1·50 plus tax received on the issue of student identity cards and the reduced fares paid thereunder as
D payments made by students for travelling by rail and, since the student card scheme was introduced, all such payments have been credited to a passenger receipt account. We accept the evidence of Mr. Eric Jones that, from a commercial point of view, the board regards the fixed amounts of £1·50 plus tax paid by students on being issued with student identity cards and the reduced fares paid by students under the scheme as a 'two-part tariff' charge made to
E students for travelling by rail."

The question is whether the "supply" made to students by the issue of the student identity card was "zero-rated" for value added tax under the Finance Act 1972.

A student identity card issued to a Miss Owen on March 1974, was
F taken as a test case.

The relevant provisions of the Finance Act, 1972 are sections 1 (1); 2 (1) and (2); 5 (1), (2) and (8); 9 (1); 12 (1) and (2); and Schedule 4, Group 10, items 4 and 10. I need not re-read the provisions to which Lord Denning M.R. has already referred, but I think I should read section 5 (8):

G
> "Subject to the preceding provisions of this section, anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of the whole or part of any right) is a supply of services."

The board accepts that the conditions laid down by section 2 are satisfied, and that it did "supply" a "service" to Miss Owen: the crucial question
H in this case is what that "service" was. The commissioners accept that the board's trains are "vehicles . . . designed to carry not less than 12 passengers," within item 4 of Group 10 of Schedule 4.

The value added tax tribunal held that this supply was not zero-rated. They said:

> "Accordingly the question for us to decide is whether or not on March 13, 1974, in exchange for the sum of £1·50 plus 15p tax Patricia Mary Owen obtained a supply of transport in a train. . . .

Now, in our view, we must approach the question for decision on the basis laid down in the judgments of the Divisional Court in *Customs and Excise Commissioners* v. *Automobile Association* [1974] 1 W.L.R. 1447. . . . In his judgment Lord Widgery C.J. stated [at p. 1454]: 'So one has in the end two alternative solutions to this problem, one favourable to the commissioners and one favourable to the association. The central question which has to be decided between those issues is which as a matter of fact is right. Matters of law having been disposed of, that which remains is a question of fact, substance and degree, and I think that the proper way to approach the matter at this last stage is to ask oneself or for the tribunal of fact below to ask itself: what as a matter of substance and reality is the right answer? As a matter of substance and reality is the subscription paid simply for the husk of membership, or is it paid for the benefits to which under the contract in my view the member is entitled to share? If that is the right approach, then I should have thought looking at it afresh for the moment, that there could only be one answer. It seems to me quite unarguable that anybody would be said to be paying his subscription simply for the husk of membership and without regard to the individual benefits which would follow. And not only is that the view which I would take if it were proper for this court to decide questions of fact, but it is the approach which the tribunal of fact adopted '."

The tribunal concluded its decision as follows:

" Accordingly we pass to consider for what, in substance and as a question of fact did Patricia Mary Owen pay her £1·50 plus 15p tax. Was it for the right to travel by rail or was it for the right to obtain tickets to travel by rail at the reduced prices in accordance with the conditions of the student card scheme? We consider that, on applying such test, there can only be one answer. When the payment was made the student identity card was issued, Patricia Mary Owen obtained the right until June 30, 1974, to obtain tickets to travel by rail on and subject to such conditions, that is to say, for less than the amounts which otherwise she would have had to pay therefor. But merely by the payment of the fixed sum and the issue of the student identity card she did not obtain any right to travel at all. In order to obtain a supply of transport she would still have had to obtain a ticket upon making such payment for that ticket as was required by the conditions. Therefore, in our view, in substance, Patricia Mary Owen did not make the payment for the supply of the service of transport in a train, but for the right to obtain supplies of such a service at reduced prices. The supply of such a right is a supply of services but does not, in our view, fall within item 4 of Group 10 aforesaid. As a result we dismiss this appeal."

In the Divisional Court, Lord Widgery C.J., with whom Thompson and Kenneth Jones J.J. agreed, held (applying the *Automobile Association* case [1974] 1 W.L.R. 1445) that the question to be decided in this case was one of fact, on which the decision of the tribunal was final. Lord Widgery C.J. said

" There are already a few cases on this subject, and the leading authority is still a decision of this court in *Customs and Excise Commissioners* v. *Automobile Association* [1974] 1 W.L.R.

A 1447. . . . The principle which is to be applied in such cases was laid down in the *Automobile Association* case, and it was held that what one must examine and look for is what, as a matter of substance and reality, was the true consideration for the making of the payment in question. The matter was treated as a question of fact, and, the points of law having been otherwise disposed of, this court expressed the principle to be applied as an obligation upon the tribunal to ask B itself for what, as a question of substance and reality, was the payment made. The value added tax tribunal in the present instance had the advantage of seeing the judgments in the *Automobile Association* case and, directing themselves correctly upon that judgment, asked themselves the proper question. One finds it . . . expressed in these terms. . . ."

C Then he quotes the extract from the decision of the tribunal to which I have already referred. Then he went on:

> " I would not for a moment maintain that these questions in general, and this question today in particular, is a wholly easy one to answer. But the answer is to be found primarily by the tribunal which is the final judge of fact in this particular form of litigation."

D Later Lord Widgery C.J. said: ". . . this is a matter of fact for which the tribunal below is the final authority."

I think the first question in this case is whether the value added tax tribunal and the Divisional Court were right in treating the question to be decided as simply a question of fact. In my opinion they were not. E Of course, the tribunal has the duty and responsibility of deciding all questions of fact and an appeal to the Divisional Court and this court lies only on questions of law. In some cases, there may be a dispute as to the primary facts, on which the decision of the tribunal cannot be challenged on appeal. But in this case there is no dispute as to the primary facts. The question is whether, on the true construction of the Finance Act 1972 as applied to the undisputed facts and documents, this F was a zero-rated supply. This is a question of law.

Although both counsel criticised them, I do not think it is necessary or desirable to consider in this case the correctness of the actual decisions in the *Automobile Association* case [1974] 1 W.L.R. 1447 and the Alpine Garden Society case (*Barton* v. *Customs and Excise Commissioners* [1974] 1 W.L.R. 1447, 1456), and I do not wish to throw any doubt on G them. Those cases related to apportionment under section 10 (4) of the Act, which has no application or relevance to the present case. But I cannot agree with Lord Widgery C.J. that " the principle which is to be applied " in this case is that " laid down in the *Automobile Association* case." This " principle " is stated in the passage from the judgment of Lord Widgery C.J. [1974] 1 W.L.R. 1447, 1454, which was quoted and applied by the tribunal in the present case. Lord Widgery C.J. also H said, at p. 1455:

> ". . . the tribunal had posed this question: what does a member get for his subscription? I pause to say that in my judgment that is a perfectly appropriate approach, and clearly gives rise to a question of fact. There is no law in that at all."

In this case, the ultimate question to be decided is how the Finance Act 1972 applies to the transaction in question, which is a question of law.

It is, of course, first necessary to decide what the " transaction " was. In some cases this will depend entirely on decisions on questions of fact, as the Divisional Court thought it did in the *Automobile Association* case, which are a matter entirely for the tribunal. In others it will be a question of law, as I think it is in the present case, the facts being undisputed. In others it will no doubt be a mixed question of fact and law, as Bridge J. seems to have contemplated in *Barton*'s case [1974] 1 W.L.R. 1447, 1457F. In *British Airports Authority* v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 302 this court treated the question to be decided as one of law, depending on the construction of the Finance Act 1972, and of the contract between the authority and the person to whom the " supply " was made. All three members of the court (including me) used the " substance and reality " tag from the *Automobile Association* case, but on further consideration I think this may be dangerous if it suggests that one can go behind a written contract, in spite of what Scarman L.J. said, at p. 312H.

In both the *Automobile Association* case and the present case Lord Widgery C.J. relied on the judgment of Finlay J. in *Attorney-General* v. *Arts Theatre of London Ltd.* [1933] 1 K.B. 439 as supporting his view that the question to be decided was one of fact. That case related to entertainments duty under the Finance (New Duties) Act 1916. The relevant section of that Act (section 1 (1) and (4)) provided as follows:

> " (1) There shall as from [May 15, 1916] be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an excise duty (in this Act referred to as ' entertainments duty ') . . . (4) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments duty shall be paid on the amount of the lump sum, but where the commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment, or covers admission to an entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

Those provisions are, of course, very different from the provisions which we have to consider in this case. The Customs and Excise Commissioners took the view that part of the subscription paid by members of the Arts Theatre Club represented payment for admission to the theatre run by the club, and apportioned the subscriptions under section 1 (4). Members had to take tickets and make a further payment for admission to the theatre. Finlay J. said several times in the course of his judgment that the question whether any part of the subscription was a payment for admission to the theatre was one of fact, or " largely one of fact ": see pp. 455, 457–458, 460. I confess that I find this puzzling. The case came before the court on a special case purporting to state a question of law (see p. 440); the question stated in paragraph 18 (p. 448) was:

> " The question for the opinion of the court was whether the said payments made by full members and associate members of the club

A for annual subscriptions or any part thereof were legally chargeable with entertainments duty under section 1 of the Finance (New Duties) Act 1916."

Further, I think that the question to be decided must at least have been a mixed question of fact and law, depending largely on the construction of the rules of the club. Once it had been decided that the subscriptions B should be apportioned, the figures were, of course, a question of fact. Finlay J. decided in favour of the commissioners and the club appealed. In the Court of Appeal the argument on their behalf was based on the construction of the statute; it was argued that as a matter of construction section 1 (4) only applied where the *whole* of the payment for admission to an entertainment was made by way of the subscription and not where C only part of it was so made, and a further payment had also to be made. This argument (which of course raised only a question of law) was rejected by the Court of Appeal, and it was not necessary for the court to consider whether Finlay J. had been right in regarding the question he had to decide as one of fact. I cannot regard his judgment as laying down any general principle which supports the view that the questions which had to be decided in the *Automobile Association* case [1974] 1 D W.L.R. 1447 and the present case are questions of fact.

I come back to the present appeal. As I have said, it is accepted by the board that there was a " supply " of a " service " by them to Miss Owen. The difference between them and the commissioners is that they say that they did in fact supply a " service " to Miss Owen—the service of " transport of passengers," which falls within item 4 of Group 10 of Schedule 4, and so is zero-rated under section 12 (1) and (2); they say that E the £1·50 paid by Miss Owen was the first part of a " two-part tariff " in respect of transport of passengers, the second part being the reduced fare paid by Miss Owen if and when she later took a ticket for a railway journey. The commissioners say that the " service " supplied to Miss Owen was not a " supply " of transport but the grant of a right to buy railway tickets at a reduced rate, which was the " supply " of a " service " F only by virtue of section 5 (8) of the Act. The board have not at any stage placed any reliance on item 10 of Group 10 of Schedule 4, and before us disclaimed any such reliance, in spite of doubts expressed by the court.

The vital question is, therefore, what was the board supplying to Miss Owen in consideration of her payment of £1·50? I think it may be G misleading to put the question in the form—" What did Miss Owen get for her payment?," or " For what did she make the payment? " (see the *Automobile Association* case [1974] 1 W.L.R. 1447, 1454F–G, 1455D–E; *Barton* v. *Customs and Excise Commissioners* [1974] 1 W.L.R. 1447, 1457D–E; and the decisions of the tribunal and the Divisional Court in the present case, ante, pp. 594D–F, 595A–B. Of course, properly interpreted, the two questions are the same question looked at from the opposite H points of view, as Geoffrey Lane L.J. put them in delivering the judgment of the Divisional Court in *Trewby* v. *Customs and Excise Commissioners* [1976] 1 W.L.R. 932, 937E–F. But in the form in which they were put in the *Automobile Association* case and *Barton's* case [1974] 1 W.L.R. 1447, and in this case, they might suggest that the motive or intention of the person receiving the service is a relevant factor, which in my view it is not. Equally, the motive or intention of the person supplying the service is in my view irrelevant, and the board is therefore

not helped by the finding of the tribunal that the board regarded the scheme as a two-part tariff. In my judgment, the transaction must be looked at objectively in order to decide whether or not the "supply" involved in it does or does not fall within item 4 of Group 10, Schedule 4.

I agree with Lord Denning M.R. that the question is (as I have said)—What did the board supply in consideration of the £1·50 they received from Miss Owen? I confess that my mind has fluctuated, but in the end I have come to the conclusion, in agreement with Lord Denning M.R., that what they supplied was transport by rail. I think that counsel for the board was right in saying that the mistake which the tribunal made was to concentrate too much on what happened on March 13, 1974, when the card was issued to Miss Owen and not take into account enough what happened when she later took a ticket. As I have said, I do not think that the tribunal's finding as to the motives or intentions of the board in itself helps the board, but it does establish (what is anyhow obvious) that when Miss Owen came to take a ticket for a journey by railway she paid less than she would have paid if she had not previously paid £1·50 for her card. If the transaction on March 13, 1974, is looked at in isolation, there is a lot to be said for the tribunal's view that the consideration for Miss Owen's payment of £1·50 was the grant of a right to obtain tickets in the future at a reduced rate. But I think that this is too narrow a view, and that the transaction should be looked at as a whole, including both the issue of the card and the later taking of a ticket. Looked at in this way, I agree with Lord Denning M.R. that the £1·50 should be regarded as part payment in advance for the supply of transport by rail. Accordingly, I agree that it is zero-rated under item 4 of Group 10, Schedule 4, and that the appeal should be allowed.

SIR JOHN PENNYCUICK. I too agree that this appeal should be allowed. The question to be determined is whether, upon the proper construction of section 12 (1) and (2) of, and Schedule 4, Group 10, item 4 (*a*) to, the Finance Act 1972, as applied to the undisputed facts of the present case, the issue of the card by British Railways Board to Miss Owen constituted the supply of a service of the description "Transport of passengers . . . in any vehicle, . . . designed or adapted to carry not less than 12 passengers; . . ." That is a question of law.

The case has had rather an unfortunate history. The tribunal chairman, after a careful review of the facts, stated the question for decision to be whether in exchange for the sum of £1·50 Miss Owen obtained a supply of transport in a train; and, after quoting the decision of the Divisional Court in *Customs and Excise Commissioners* v. *Automobile Association* [1974] 1 W.L.R. 1447, treated the question for decision as one of fact. In this he was, I think, in error.

In the *Automobile Association* case the Divisional Court was concerned to determine in return for which of the various benefits derived from membership of the association the members paid their annual subscription, and rightly treated this as a question of fact, substance and degree. Here, no similar question arises. It is not in doubt for what consideration Miss Owen paid £1·50. The question is whether the supply of that consideration by the board falls within item 4 (*a*). That is a question of law.

The Divisional Court accepted the decision of the tribunal as being one of fact and, for this reason, a decision with which the court could not

A interfere, although Lord Widgery C.J. says that he would not necessarily have come down on the same side as the tribunal. He expresses the principle to be applied in the following passage:

> "The principle which is to be applied in such cases was laid down in the *Automobile Association* case, and it was held that what one must examine and look for is what, as a matter of substance and reality, was the true consideration for the making of the payment in question. The matter was treated as a question of fact, and, the points of law having been otherwise disposed of, this court expressed the principle to be applied as an obligation upon the tribunal to ask itself for what, as a question of substance and reality, was the payment made."

I respectfully think that this passage is not an accurate statement of the proper principle. In the *Automobile Association* case and similar cases, a member received a variety of benefits and the first question to be determined was indeed which of these benefits should in substance be regarded as the goods or services supplied by the society or association to its members in return for their subscriptions. Once that question is out of the way, and in the present case it does not arise at all, the applicability of section 12 (1) and Schedule 4, Group 10, to the particular services found as a fact to be supplied is one of law.

I turn now to the present case. Summarily, Miss Owen paid to the board £1·50 for the issue of a student identity card. That card conferred upon her the right over the current half-year to make any journey on the board's system second-class at half the standard second-class fare. In my judgment that right represents the supply of transport within the natural meaning of item 4 (*a*). It is, of course, true that the card did not of itself alone entitle Miss Owen to make any journey at all. But equally the payment of half the standard fare for any particular journey, e.g., from London to Bristol, would not of itself alone have entitled her to make that journey. It was the card and the payment of half the standard fare which together enabled Miss Owen to travel half-price between London and Bristol. It seems to me that the card was an integral part of the consideration for which transport was supplied and as such its supply fell to be zero-rated under section 12 (1) and (2).

The view which commended itself to the tribunal and was presented before us was that the card merely conferred upon Miss Owen a right to obtain tickets at half-price and that the board in conferring that right did not thereby supply her with transport. I do not think it is legitimate so to treat the issue of the card and the sale of the ticket as two distinct and isolated transactions. Contrast the position of an ordinary option whereby in consideration of a given payment the grantee receives the right to purchase property at its full value. And compare the position of a deposit which operates as part-payment if the contract is completed.

We were referred to various other instances of two-part tariffs. The incidence of value added tax in such cases must depend upon their particular facts and I confine my decision to this particular transaction. But obviously our decision will have a strong bearing on closely comparable transactions and there can be no question of different tribunals reaching different decisions upon the same question of law.

I agree, indeed it is obvious, that the question must be determined objectively upon the facts of the transaction and that nothing turns on the motives either of the board or of Miss Owen.

In conclusion I should mention item 10 in Group 10, viz., "The making of arrangements for the supply of . . . any service included in items 1 to 9." This item is, we are told, addressed to travel agents, and counsel for the board virtually disclaimed reliance upon it. But I am not myself at all clear that when the board, through its agents the National Union of Students and the British Student Travel Centre, issued a card to Miss Owen it was not making an arrangement with her for the supply of transport within the literal meaning of item 10. I need not pursue the point.

I would allow the appeal.

BROWNE L.J. I would like to say that I agree with what Sir John Pennycuick has said about the effect of our decision in relation to other instances of two part tariffs.

Appeal allowed with costs in Court of Appeal and below.

Determination that supply to Miss Owen was supply of services zero-rated for value added tax under section 12 and item 4 of Group 10 of Schedule 4 to the Finance Act 1972.

Leave to appeal refused.

Solicitors: *D. H. Regnier*; *Solicitor for Customs and Excise Commissioners.*

A. H. B.

[COURT OF APPEAL]

* REGINA *v.* PARKER (DARYL)

1976 June 17

Scarman and Geoffrey Lane L.JJ. and Kenneth Jones J.

Crime—Criminal damage to property—Recklessness—Persistence in deliberate act with risk of resulting damage—Telephone damaged by slamming down handset—Whether "reckless"—Criminal Damage Act 1971 (*c.* 48), *s.* 1 (1)

On a charge of destroying or damaging property contrary to section 1 (1) of the Criminal Damage Act 1971,[1] a person is "reckless" in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act (post, p. 604D).

Reg. v. *Briggs* (*Note*) [1977] 1 W.L.R. 605 considered.

The following case is referred to in the judgment:

Reg. v. *Briggs* (*Note*) [1977] 1 W.L.R. 605; [1977] 1 All E.R. 475, C.A.

No additional cases were cited in argument.

APPEAL against conviction.

On February 6, 1976, at St. Albans Crown Court before Judge Hickman the appellant, Daryl Clive Parker, was convicted on an indictment charging

[1] Criminal Damage Act 1971, s. 1 (1): see post, p. 602F.