Société Internationale de Télécommunications Aéronautiques v Customs and Excise Commissioners

[2003] EWHC 3039 (Ch)

CHANCERY DIVISION
SIR ANDREW MORRITT V-C
25 NOVEMBER, 11 DECEMBER 2003

Value added tax – Exemptions – Services to meet direct needs of aircraft – Provision of telecommunications network and other businesses in air industry – Whether supply sufficiently connected to needs of aircraft – EC Council Directive 77/388, art 15(9).

Valued added tax – Zero-rating – Transport – Making of arrangements for transport of passengers in aircraft – Provision of telecommunications network to airlines and other businesses in air industry – Whether supply 'for' transport– Value Added Tax Act 1994, Sch 8, Group 8, item 10.

The appellant, a non-profit making co-operative established under Belgian law, provided a telecommunications network to its members who were airlines or other businesses in the air transport industry. The members used that network in relation to the use of airport facilities, making passenger and baggage reservations and handling arrangements and dealing with maintenance and associated administrative matters, but not in relation to communications with or flight operations of aircraft. The members of the society were charged for that service in accordance with use and on the basis of an agreed tariff. In 1973 the VAT and Duties Tribunal (the tribunal) made a ruling agreed between the appellant and the commissioners that the services supplied by the appellant were zero-rated for the purposes of VAT. By a letter dated 18 November 1997 the commissioners ruled that as from 1 July 1997 such services would be treated as standard-rated. The appellant appealed to the tribunal contending that its services continued to be zero-rated because they came within (i) the terms of art 15(9)[a] of EC Council Directive 77/388 as 'the supply of services ... to meet the direct needs of aircraft ...', and /or (ii) item 10[b] of Group 8 of Sch 8 to the Value Added Tax Act 1994 as 'the making of arrangements for (a) the supply of, or of space in, any ship or aircraft, [or] (b) the supply of any service included in items [4(a) or (c)]', namely 'transport of passengers (a) in any ... aircraft designed or adapted to carry not less than 10 passengers; [or] (c) on any scheduled flight'. The tribunal found that the appellant's supplies might or might not be used by its members to meet the direct needs of the aircraft or their cargos and if they did so use them it was at the members' initiation and not at the appellant's and therefore the connection was too remote to conclude that the appellant provided for their 'direct' needs within art 15(9). The tribunal further concluded that while the shared telecommunications network provided by the appellant was essential to the operations of the air transport community, the appellant really functioned as a facilitator since it neither initiated messages nor generated the information transferred nor received them nor took any action on receipt. The appellant's function was to process the information fed into the system by its members which it did without altering the content of the

a Article 15(9), so far as material, is set out at [11], post
b Item 10, so far as material, is set out at [19], post

messages or its information and accordingly it made no arrangements for any of the supplies referred to item 10. The appellant appealed contending: (i) that the exemption in art 15(9) depended on the nature of the service rather than the identity of the supplier or recipient, that as the aircraft and cargos were inanimate objects the direct needs contemplated by art 15(9) were its operational needs and that as the aircraft under consideration was one used by airlines operating for profit chiefly on international routes such direct needs included those associated with the carriage of passengers; and (ii) that its provision of the network, was antecedent and directly led to the transport of passengers in either an aircraft designed to carry more than 10 passengers or a scheduled flight and therefore should be regarded as 'the making of arrangements' for such supplies as that term had been interpreted in the context of an exemption from VAT.

Held – (1) The provisions of art 15 conferred exemptions from the normal regime of liability to tax at the standard rate and as such they were to be construed strictly. The services which were exempted under that article were those which were directly related to the needs of aircraft or their cargo, i e services necessary to the operation of the aircraft. The tribunal's findings demonstrated clearly that such a condition was not satisfied by the telecommunications network supplied by the appellant. The restriction on the type of aircraft under consideration to those used by airlines operating for reward chiefly on international routes, could not extend the direct needs of the aircraft, to those of the airlines who operated the aircraft or the passengers who were carried in them. The restriction was to the direct needs of the aircraft and its cargo. It was clear that the tribunal had been well aware that what mattered was the nature of the service rather than the supplier or recipient. Accordingly, the tribunal had not erred in law in concluding that the appellant's supplies were not exempt pursuant to art 15(9). *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* (Case 168/84) [1985] ECR 2251 applied.

(2) Ultimately the phrase 'making of arrangements for [a supply]' in item 10 was to be interpreted in its context to give effect to the intention of Parliament as indicated by the 1994 Act as a whole. The purpose of that part of the 1994 Act was to designate those services which, unlike the generality, were to benefit from an exception from VAT at the standard rate. The exception, however, should be interpreted restrictively. Moreover, the interpretation of the phrase 'the making of arrangements for [a particular supply]' in the context of a different exemption provision was not determinative of the meaning of the phrase in item 10. In the instant case the facts as found by the tribunal demonstrated the provision of a dedicated communications network for the benefit of the appellant's members. But that did not lead to the conclusion that because the network was provided for the use of members in their businesses and because those businesses were engaged in the transport of passengers by air, so the network had to be treated as being provided 'for' that transport and therefore regarded as the making of arrangements 'for' that supply within the meaning of item 10. The service provided remained a means of communication and nothing more. Accordingly, the tribunal had not erred in concluding that the appellant's supplies were not exempt pursuant to item 10. *Customs and Excise Comrs v Civil Service Motoring Association* [1998] STC 111 distinguished.

Notes

For the Value Added Tax Act 1994, Sch 8, Group 8, item 10, see De Voil Indirect Tax Services, Division V13.1.

For EC Council Directive 77/388, art 15(9), see De Voil Indirect Tax Services, Division V15.3.

For zero rating of transport supplies, see De Voil Indirect Tax Services, V4.251.

Cases referred to in judgment

Berkholz v Finanzamt Hamburg-Mitte-Altstadt (Case 168/84) [1985] ECR 2251, ECJ.

Customs and Excise Comrs v Civil Service Motoring Association Ltd [1998] STC 111, CA.

Sparekassernes Datacenter (SDC) v Skatteministeriet (Case C-2/95) [1997] STC 932, [1997] ECR I-3017, [1997] All ER (EC) 610 ECJ.

Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën (Case 348/87) [1989] ECR 1737, ECJ.

Appeal

Société Internationale de Télécommunications Aéronautiques (the appellant) appealed from a decision of the Value Added Tax and Duties Tribunal (Chairman: Stephen Oliver QC) of 29 January 2003 ((2003) VAT Decision 17991) dismissing its appeal from a decision of the Commissioners of Customs and Excise that its supply of a telecommunications network to its members who were airlines or other businesses in the air transport industry was standard rated, and not within the exemption in art 15(9) of EC Council Directive 77/388 or zero rated within item 10 of Group 8 of Schedule 8 to the Value Added Tax Act 1994. The facts and grounds of appeal are set out in the judgment.

Francis Fitzpatrick (instructed by *Maxwell Batley*) for the appellant.

Peter Mantle (instructed by the *Solicitor for the Customs and Excise*) for the commissioners.

Cur adv vult

SIR ANDREW MORRITT V-C.

INTRODUCTION

[1] Société Internationale de Télécommunications Aéronautiques (SITA) is established under the law of the Kingdom of Belgium as a non-profit making co-operative with limited liability. Membership of SITA is open to anyone operating aircraft for the transport of passengers, mail or cargo and to other organisations whose primary business is in the air transport industry. There are now about 728 members of which 581 are airlines. SITA supplies services to its members by the provision and maintenance of a telecommunications network. The members use that network in relation to the use of airport facilities, making passenger and baggage reservations and handling arrangements and dealing with maintenance and associated administrative matters, but not in relation to communications with or flight operations of aircraft. The members of SITA are charged for this service in accordance with use and on the basis of an agreed tariff.

[2] In 1973 the Value Added Tax and Duties Tribunal (the tribunal) made a ruling agreed between SITA and Commissioners of Customs and Excise (the commissioners) that the services so supplied by SITA were zero-rated for the purposes of Value Added Tax (VAT). By a letter dated 18 November 1997 the commissioners ruled that as from 1 July 1997 such services were to be treated as standard-rated. SITA appealed to the tribunal. SITA contended that its services continued to be zero-rated because they came within (1) the terms of art 15.9 of the Sixth Directive (EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of member states relating to turnover taxes—common system of value added tax: uniform basis of assessment) as 'the supply of services ... to meet the direct needs of aircraft ...' and/or (2) item 10 of Group 8 contained in Sch 8 to the Value Added Tax Act 1994 (the 1994 Act) as '[t]he making of

arrangements for—(a) the supply of, or of space in, any ship or aircraft; [or] (b) the supply of any service included in items [4(a) or (c)]', namely '[t]ransport of passengers—(a) in any … aircraft designed or adapted to carry not less than 10 passengers; [or] (c) on any scheduled flight'. By its decision made on 29 January 2003 (see VAT Decision 17991) the tribunal (Stephen Oliver QC and Praful Davda FCA) rejected both those submissions. This is the appeal of SITA. It contends that the tribunal was wrong on both those points and contends that the ruling of the commissioners dated 15 November 1997 should be set aside.

[3] Thus there are two issues for my determination namely whether the services provided by SITA to its members are zero-rated for the purposes of VAT pursuant to (a) art 15.9 of the Sixth Directive and/or (b) VAT Act 1994 Sch 8 Group 8 item 10. Before considering those issues it is necessary to refer to the factual findings of the tribunal in more detail.

THE FACTUAL FINDINGS OF THE TRIBUNAL

[4] The evidence before the tribunal included substantial witness statements of Mr Bryan Wilson, a senior Vice-President of SITA concerned with its application services and based in its office in Geneva, M Jean-Pierre Gaudard, an executive Vice-President of SITA concerned with major program development and M Jean Roworth, a Vice-President of SITA responsible for taxation. I do not understand that any of this evidence was disputed by the commissioners but it was necessary for the tribunal to synthesise and summarise it.

[5] Paragraphs 5–33 contain what are described as 'Findings of relevant facts'. It is unnecessary to set them out in full. In paras 5–11 the tribunal described the constitution and membership of SITA. Its relevant objects are:

> '(a) to foster all telecommunication and information processing matters directly or indirectly connected with the transmission and processing of all categories of information required in the operation of the air transport industry and to study the problems relating to them with the aim of promoting in all countries safe and regular air transport;
>
> (b) to develop, acquire, use and operate in all countries telecommunications and information processing means, and to provide efficient telecommunications, data processing and information transmission services;'

SITA consults the air transport community in order to develop solutions to their networking and data processing requirements. It is governed by a board of directors representing its most extensive users with a chairman appointed from amongst the airline members. The membership is restricted to those I have already mentioned but the respective shareholdings depend on usage of the facilities provided by SITA in the previous year.

[6] In para 12–27 the tribunal described SITA's activities. In paras 12 and 13, so far as relevant, they state:

> '12. SITA operates as a single lessee of leased circuits (leased in from the public telecommunications organizations). It acts as the single provider providing a permanently available telecommunications network to its members, all of whom are participators in the air transport community …
>
> 13. The telecommunications network services supplied by SITA to members enable members to transmit messages either within the particular member's organization or between different members. The messages will typically relate to passenger and freight reservations, baggage handling enquiries, aircraft handling and maintenance and associated administration matters. A great majority of them will be concerned with passenger and freight reservations. SITA's role as network provider includes the manipulation, routing,

conversion and switching of data to enable the safe, secure and efficient transmission of these.'

Paragraphs 14–22 describes how the technology used by SITA has developed over the years and is, as counsel agreed, irrelevant to anything I have to decide.

[7] In para 23 the tribunal pointed out that precisely what use the members make of the network is unknown to SITA as it does not initiate or read any of the messages which its members choose to transmit via its telecommunications network. In para 24 the tribunal described how SITA invoices its members monthly for amounts based on actual usage as either agreed between SITA and the member in question or based on a general pricing structure.

[8] In paras 28–33 the tribunal set out the use made by members of SITA's services. For present purposes I need only quote paras 28 and 29. They read as follows:

> '28. SITA's members are all members of the air transport community. They are all connected to SITA's network using compatible systems. They are competitors within their particular spheres of activity. They nevertheless have to co-operate. They have certain common requirements. These requirements include the need for a quick, reliable and cost-efficient transmission of messages and data, the ability to communicate with different parts of their own businesses as well as with other members of the air transport community, a network coverage that covers all destinations served by airlines and a neutral service provision to all members of the air transport community.
> 29. "Interlining" is one essential function that makes use of SITA's facilities. Different airlines serve different routes and different countries. Passengers' journeys often require the use of different airlines, different ticketing and reservation facilities, baggage handling facilities and customs and immigration handling activities. This calls for a system by which airlines, agents, freight forwarders and other members of the air transport community can communicate so as to co-ordinate, for example, bookings and reservations, dealings between airlines and their agents, baggage and passenger handling at airports, emergency procedures, catering and freight arrangements and baggage and passenger transfers. SITA's facilities are also used to enable co-operation between members in the use of limited airport, air terminal and air space facilities. There is a priority message system operated by SITA that enables safety messages to be given priority. The telecommunications system is also used to give members access to spare parts pools which are located in different parts of the world.'

Paragraphs 30–33 deal with the use by members of particular services provided by the network for passenger reservations, airport services and back office support which do not require any separate consideration.

[9] The tribunal set out what it described as its 'Conclusions on the facts' in paras 34–36 in the following terms:

> '34. SITA provides and maintains a telecommunications network system. All supplies with which this appeal is concerned are to SITA's members. The structure and capacity of the network system have been designed for SITA's members with whom it is continuously consulting. As things are SITA's telecommunications network meets the needs of its members for, for example, interlining, making shared use of airport facilities, safety procedures, making passengers and baggage reservations and handling arrangements and dealing with maintenance and associated administrative matters. It meets those needs by providing the means for transmission and receipt of messages and other information. The system processes the messages and other information transmitted through the network and does so to the highest standards of

accuracy, speed and reliability. Moreover we can safely infer that the great majority of the messages passing through SITA's network deal with the transportation of passengers and their baggage on commercial airlines. Without SITA's system its members would not, save for the local activities of some large airlines, be able to carry out their air transport businesses; they would have to find some acceptable alternative. We conclude that SITA provides an essential facility with which its members carry on their air transport and air transport-related businesses.

35. At the same time it is evident that SITA has nothing to do with the content of the messages, data and information transmitted and received through the network. Those matters are confidential to the users. The content of particular messages is not disclosed to SITA nor does SITA generate the information or messages transmitted on the system.

36. We heard no evidence that the services in issue in this appeal are used in the communications with or navigation or flight operations of aircraft.'

[10] The tribunal considered the contentions of the parties in relation to item 10, Group 8 of Sch 8 to the 1994 Act before considering the provisions of art 15.9 of the Sixth Directive. This seems to me to be the wrong order because although the taxpayer is entitled to rely on either or both of those provisions the Sixth Directive is the background against which to interpret the 1994 Act. Accordingly, in accordance with the different order in which counsel made their submissions, I shall consider the provisions of the Sixth Directive first.

ARTICLE 15.9 SIXTH DIRECTIVE

[11] The Sixth Directive was made by the Council of the European Community on 17 May 1977 for the purpose of harmonising the laws of the Member States relating to turnover taxes, to provide a common system of value added tax and a uniform basis of assessment. Title 10 provided for exemptions and includes arts 13 and 15. The latter provides for exemptions in relation to exports and like transactions and international transport. So far as relevant it provides:

'[Article 13] Without prejudice to other Community provisions, member states shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse— ...

[Article 15] ... 6. [t]he supply, modification, repair, maintenance, chartering and hiring of aircraft used by airlines operating for reward chiefly on international routes, and the supply, hiring, repair and maintenance of equipment incorporated or used therein;

7. the supply of goods for the fuelling and provisioning of aircraft referred to in paragraph 6; ...

9. [t]he supply of services other than those referred to in paragraph 6, to meet the direct needs of aircraft referred to in that paragraph or of their cargoes; ...'

[12] The question for the determination of the tribunal was whether the services provided by SITA came within the terms of para 9 as '[t]he supply of services ... to meet the direct needs of aircraft ...'. The tribunal concluded that they did not. They considered (para 54) that the references in para 9 to para 6 restricted the type of aircraft under consideration but did not widen the scope of the exempted services. They relied (para 55) on the decision of the Court of Justice of the European Communities in *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* (Case 168/84) [1985] ECR 2251 to the effect that the terms of para 15.8, which is in the same terms as para 15.9 but applies to sea-going vessels, did not exempt the provision of gaming machines for the amusement of passengers because such

provision was not 'directly connected with the needs of sea-going vessels or their cargoes, that is to say services necessary for the operation of such vessels.'

[13] In para 56 the tribunal concluded that—

> '... The essential quality of the services supplied by SITA is, as we have already observed, that of a telecommunications network facility for use by its members. The recipients of the supplies are the airlines, the ticket sales businesses, the baggage handlers, the airports, the spare parts depots and so on. It is their needs that are being met by SITA. The members may or may not use them to meet the direct needs of the aircraft or their cargoes; and if they do use them for those purposes, it is at the members' initiation and not at SITA's. Only at one remove, at the least, are the needs of the aircraft and baggage being met. The connection is too remote for us to be able to say that SITA provides for their "direct" needs. For that reason we are against SITA on the art 15 point.'

[14] In para 57 the tribunal reiterated, by reference to the decision of the Court of Justice in *Sparekassernes Datacenter (SDC) v Skatteministeriet* (Case C-2/95) [1997] STC 932, [1997] ECR I-3017 that (paragraph numbering added):

> '[1] Relevant to the present question is the conclusion of the Court that it is the nature of the services provided that engages the exemption, not the type of legal persons supplying or receiving them. That is equally applicable to art 15.9 ...
> [2] SITA's transmission services, essential though they are, are merely the means by which the airline meets the direct needs of its aircraft. The message which may cater for those direct needs is not SITA's message, and anyway SITA will probably be unaware of it ...
> [3] Borrowing the words of the Court, SITA's services do not effect the specific essential functions of the services described in Article 15.9. SITA's services do not meet the direct needs of aircrafts or their cargoes. As already explained, our view is that SITA's service facilitates the provision of services by its members who in their turn may use them to provide for the direct needs of aircraft and their cargoes.'

[15] Counsel for SITA contends that the tribunal were wrong. In summary he submits that the exemption depends on the nature of the service rather than the identity of the supplier or recipient, that as the aircraft and its cargoes are inanimate objects the direct needs contemplated by para 15.9 are its operational needs and that as the aircraft under consideration is one used by airlines operating for reward chiefly on international routes such direct needs include those associated with the carriage of passengers. In those circumstances he argues that the provisions of art 15.9 alone include services relating to the needs of passengers but if there is any doubt about that it is laid to rest by the terms of art 15.6.

[16] This is disputed by counsel for the commissioners. In summary he contends that not only can an inanimate object have needs but that the provisions of art 15.9 predicate that an aircraft or its cargo do. In the case of the aircraft the needs are for whatever is required to make it work for the purposes for which it was made. He contends that whilst the provisions of art 15.6 restrict the type of aircraft they do not extend the scope of the services under consideration. He points out that although the tribunal correctly reminded themselves that what mattered was the nature of the service in deciding for whose need the service in question catered some consideration of the supplier and recipient was necessary and correct in law.

[17] I have no hesitation in preferring the submissions of counsel for the commissioners. First, the provisions of art 15 confer exemptions from the normal regime of liability to tax at the standard rate. As such they are to be construed strictly, see *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën*

(Case 348/87) [1989] ECR 1737 at para 13. Second, in *Berkholz v Finanzamt Hamburg-Mitte-Altstadt* (Case 168/84) [1985] ECR 2251, the Court of Justice emphasised in relation to the comparable wording of art 15.8 that the exempted services are 'those which are directly related to the needs of sea-going vessels or their cargo, i e services necessary to the operation of the ships'. The finding of the tribunal in para 36 of their decision demonstrates clearly that such a condition is not satisfied by the telecommunications network supplied by SITA. Third, the restriction on the type of aircraft under consideration to those used by airlines operating for reward chiefly on international routes cannot extend the direct needs of the aircraft to those of the airlines who operate the aircraft or the passengers who are carried in them. Put another way the qualification is to the nature of the aircraft not an extension to the range of need. For completeness I would add that it was not suggested that the passengers are cargo. Fourth, the restriction is to the direct needs of the aircraft and its cargo. The use of the word 'direct' is a clear prohibition on any extension of the relevant need. Fifth, it is clear, for the reasons given by counsel for the commissioners, that the tribunal was well aware that what matters is the nature of the service rather than the supplier or recipient. Nevertheless in considering what or whose direct need is being catered for it is inevitable that the identity of the recipient is mentioned. The passages from paras 56 and 57 of the tribunal's decision do not betray any error of law in that regard.

ITEM 10 GROUP 8 SCH 8 TO THE 1994 ACT

[18] It is common ground that the Sixth Directive has direct effect. Equally the provisions of the 1994 Act constitute the domestic law relating to VAT in the United Kingdom. Consequently a taxpayer may rely on either or both those sources of exemption. Further it is clear from art 28 of the Sixth Directive that for a transitional period the United Kingdom is entitled to confer exemptions more extensive than the terms of art 15 permit in the areas of activity specified in the various annexes. Annex F covers passenger transport. Accordingly it cannot be assumed that item 10 is restricted to the area covered by art 15.9 and no more.

[19] The relevant exemption conferred by item 10 is:

> '10. The making of arrangements for—
>
> (a) the supply of, or of space in, any ship or aircraft;
> (b) the supply of any service included in items 1 and 2, 3 to 9 and 11; or
> [(c) ...]'

The items referred to in sub-para (b) which are relied on in this case are:

> '4. Transport of passengers—
>
> (a) in any ... aircraft ... designed or adapted to carry not less than 10 passengers ...
> [(b) ...]
> (c) on any scheduled flight.'

[20] The dispute between the parties arises on the proper interpretation and application for the phrase 'the making of arrangements for'. A similar issue arose in the case of commissioners of *Customs and Excise Comrs v Civil Service Motoring Association Ltd* [1998] STC 111 (CSMA). In that case the Association had arranged for a bank to supply for the benefit of the Association's members a credit card scheme. The bank paid commission to the Association by reference to the value of the transactions paid for by the members with that credit card. The question was whether the Association was liable for output tax on that commission. The association claimed that the services it supplied to the Bank were exempt under item 5 of Group 5 of Sch 6 to VAT Act 1983. The item so exempted was

'the making of arrangements for any transaction comprised in item ... 2 ...'. Item 2 was the 'making of any advance or the granting of credit'. This was against the background of the terms of art 13B(d)(1) of the Sixth Directive exempting 'the granting and the negotiation of credit and the management of credit by the person granting it'.

[21] The argument of counsel for the commissioners, as recorded by Mummery LJ ([1998] STC 111 at 117), was to the effect that the exemption should be narrowly construed and that both art 13B(d)(1) and item 5 of Group 5 was confined to cases in which an intermediary arranged a transaction for a specific grant of credit by a creditor to a borrower so that arrangements for the issue of a credit card would not be comprehended. Mummery LJ, with whom Pill and Hobhouse LJJ agreed, did not accept this submission. He considered (at [1998] STC 111 at 118) that:

> '(2) The critical question is whether the expressions "negotiation of credit" and "making of arrangements for any transaction for granting of any credit" are to be construed as *implicitly* restricted to activities in relation to particular transactions for the specific grant of credit. Neither the purpose nor the context of the exemption justify placing this restricted meaning on the wide general language of the directive and of the 1983 Act. Both the "negotiation of credit" and "the making of arrangements" for the granting of credit refer to the doing of things antecedent to, and directly leading to, the results sought to be achieved by the doing of those things. The result to be attained is of a general rather than a specific nature, namely the "granting of any credit". In some cases intermediaries between principals will be involved in achieving that result. In other cases they will not. It is neither expressly nor impliedly necessary that they should be involved as a condition of the application of the exemption to those who do not actually grant credit.
> (3) The activities of CSMA, in respect of which FBS paid commission, can reasonably and sensibly be described as negotiation of, or making arrangements for any transaction for, the grant of credit. I am unable to detect either in the purpose of the exemptions or in the language and context in which they are expressed any distinction between (a) the negotiation, or making arrangements for particular transactions for the specific grant of any credit, and (b) these negotiations or arrangements planned and designed by joint efforts for the specific purpose of leading directly to the grant of credit by FBS to members of CSMA.'

[22] The tribunal did not consider that the decision of the Court of Appeal in CSMA was of any help to them in the resolution of the issue in this case as to the application of item 10. The tribunal said ((2003) VAT Decision 17991 at para 48)

> 'That case was concerned with a different provision and the EC counterpart hardly corresponds with Article 15.9. The Court of Appeal concluded that the activities of the association, in respect of which the bank paid commission, could reasonably and sensibly be described as negotiation of, or making arrangements for any transaction for, the granting of credit. What the association was doing by offering its members the facility of a credit card scheme in return for the bank's commission was implementing arrangements which sought to achieve the actual granting of credit. They were introducers. Here by contrast SITA's supplies begin and end with affording access to its telecommunications network. SITA's supplies, as we have already observed, were essential to the running of the business of its members and they were supplies made antecedent to SITA's members' supplies of air transport services. But that is not the same thing as to say that SITA were making arrangements for supplies referred to in Group 8. Unlike the association,

> SITA does not seek to achieve the supply of the particular services referred to in item 10. That is the objective of the airlines, their agents and intermediaries and other members of the air transport community.'

[23] Counsel for SITA contends that the tribunal was wrong to have paid so little heed to the proposition enunciated by Mummery LJ that: '"the making of arrangements" for the granting of credit refer to the doing of things antecedent to and directly leading to, the results sought to be achieved by the doing of those things'.

[24] I will deal with that submission in due course. The conclusion of the tribunal on the proper interpretation and application of item 10 of Sch 8 was that in the ordinary use of the English language SITA's supply did not amount to the making of arrangements for, for example, the transport of passengers, rather SITA was supplying something quite different namely a purpose-designed telecommunications network for the use of its members or a facility with which its members carry on their air transport related business. They elaborated on this conclusion on para 45 of their decision in the following terms:

> 'In reaching that conclusion we recognize that the shared telecommunications network provided by SITA is essential to the operations of the air transport community most, if not all, members of which could not provide such a network for themselves. We recognize that it meets the needs of the air transport community arising from the requirements for interlining, sharing limited facilities at airports etc, safety, and to enable interaction between different systems. We accept that the services have been designed for the essential requirements of the air transport community following consultation with SITA's members. We accept that messages sent over the network relate to passenger and freight reservations, baggage handling enquiries, aircraft movements, maintenance and associated administrative matters; and the great majority of these relate to passenger and freight reservations. But those features cannot disguise the fact that SITA really functions as a facilitator. It neither initiates messages nor generates the information transferred nor receives them nor takes any action on receipt. Its function is to process the information fed into the system by its members. It does so accurately and effectively without in any way altering the content of the messages or its information. Shortly stated, it makes no arrangements for any of the supplies referred to in item 10.'

SITA contends that this conclusion was wrong too.

[25] SITA makes two preliminary points, first the phrase 'making arrangements for' is of wide import, secondly the identity of the supplier or recipient is neither specified nor material; what matters is the nature of the service. SITA contends that the test propounded by Mummery LJ in CSMA is binding or of such persuasive value as to have the like effect. SITA submits that the test propounded by Mummery LJ is satisfied on the facts of this case. It emphasises the finding of the tribunal in para 41 of the decision that the arrangements for the network were planned and designed by the joint efforts of SITA and the airlines. It specifically relies on the objects of SITA, the nature of its management and operation and the conclusions of the tribunal in paras 34 and 35 of the decision. In summary it submits that the arrangements in question, namely the provision of the network, were antecedent and directly led to the result sought to be achieved, namely the transport of passengers in either an aircraft designed or adapted to carry more than 10 passengers or on a scheduled flight.

[26] I do not accept these submissions. The decision of the Court of Appeal in CSMA is deserving of great respect both because it is a decision of the Court of Appeal and because the Court was there dealing with a phrase in the same terms

as that under consideration in this case. But it is not binding authority on the true construction of the same phrase in the different context of item 10. Nor can the exegetical exercise performed by Mummery LJ provide a substitute for the wording of item 10 or preclude another explanation of the same expression in the context of a different issue. The tribunal found, and it could not be disputed, that the network and the service it provides is antecedent to the relevant result, namely the transport of passengers by air. But that leaves for determination the second issue whether the connection between the arrangements and the result is sufficient. The statutory requirement is that the arrangements shall be 'for' the supply of, or of space in, any aircraft. The paraphrase adopted by Mummery LJ, 'directly leading to' indicates why he rejected the argument that only arrangements for the grant of specific credit were exempted but it does not conclude the issue with which the tribunal was concerned either authoritatively or persuasively. Accordingly I agree with the tribunal that the decision of the Court of Appeal in CSMA does not, in that sense, assist in the resolution of this issue.

[27] Ultimately the phrase 'making of arrangements' is to be interpreted in its context to give effect to the intention of Parliament as indicated by the Act as a whole. The purpose of this part of the 1994 Act is to designate those services which, unlike the generality, are to benefit from exemption from VAT at the standard rate. Whilst, for the reasons I have already explained, the UK is entitled to grant exemptions over a wider field than is permitted by art 15 of the Sixth Directive it is still necessary to interpret the exemption restrictively.

[28] I have set out in some detail the facts as found by the tribunal and will not repeat them. To my mind they demonstrate the provision of a dedicated communications network for the benefit of the members of SITA. But that does not lead me to the conclusion that because the network is provided for the use of members in their businesses and because those businesses are engaged in the transport of passengers by air so the network must be treated as being provided 'for' that transport. As counsel for the commissioners suggested, if two parties to a telephone call arrange to meet at a specified time and place it cannot sensibly be suggested that the provider of the telephonic network, whether public or private, made arrangements for that meeting. The service provided is the means of communication; those means are provided so that people may communicate not so that they may meet. The facts that the service is designed in conjunction with the members of SITA, is provided to those members for the purposes of their business in the air transport industry, and is an essential facility for the conduct of that business does not in my view affect the matter. The service provided remains a means of communication and nothing more.

[29] It follows that I agree with the reasoning and conclusion of the tribunal, as expressed in para 45 of their decision, which I have quoted in para 24 above. I detect no error of law in either their reasoning or their conclusion.

CONCLUSION

[30] For all these reasons I do not consider that the services supplied by SITA to its members which are liable to VAT in the UK are exempt (by zero-rating) from output tax under either art 15.9 of the Sixth Directive or item 10, Group 8, Sch 8 to the 1994 Act. Accordingly I dismiss this appeal.

Appeal dismissed.

Stephen Hetherington Barrister.