

CA on appeal from QBD (Mr Justice Sedley) before Hobhouse LJ; Pill LJ; Mummery LJ. 25th November 1997.

LORD JUSTICE MUMMERY:

The Appeal

On 12 August 1993 the Civil Service Motoring Association Limited (CSMA) appealed to the Value Added Tax and Duties Tribunal against a standard rate assessment to VAT dated 3 March 1993 in the sum of £29,248. In their decision dated 13 March 1996 the Tribunal allowed the appeal, holding that CSMA were entitled to the benefit of an exemption from VAT under Schedule 6 to the VAT Act 1983 (the 1983 Act).

On 24 January 1997 Sedley J dismissed the appeal by the Commissioners of Customs and Excise (the Commissioners) against the Tribunal's decision. The Commissioners now appeal to this Court, seeking a re-instatement of the original assessment. An appeal from the Tribunal lies only on a point of law. The point of law on this appeal is whether the Tribunal correctly interpreted and applied to the facts of this case the exemption from VAT for "*the granting and the negotiation of credit and the management of credit by the person granting it*" in Article 13 B (d) 1. of the Sixth EC Directive (77/388) and for "*the making of arrangements for any transaction for the granting of any credit*" in the 1983 Act, Schedule 6, Group 5-Finance, Items 2 and 5. The issue arises from the supply of services by CSMA in connection with an "*affinity*" credit card scheme of a kind which is increasingly common. A considerable number of claims have been made for the benefit of this exemption. The Commissioners submit that the point of construction is of "*great practical importance*" and contend that this Court should not reject their contentions on the construction of the scope of "*negotiation of credit*" in Article 13 B of the Sixth Directive without making a reference to the European Court of Justice under Article 177 of the Treaty of Rome.

Factual Background

The relevant facts, which can be gathered from the twenty one page decision of the Tribunal and the Appended documents, can be summarised briefly. In my view, it was unnecessary for the Tribunal to include in their decision as much detail as they conscientiously did about the oral evidence, the correspondence, the legislation, the case law and the competing arguments. The duty of the Tribunal is to make relevant findings of fact on the oral and documentary evidence, preferably as clearly and concisely as possible; to identify and then apply the relevant legislative provisions to those facts; and to state short reasons for the conclusion so reached on the appeal. It is usually unnecessary to set out in the decision the detailed evidence and the rival submissions extensively or to embark on a discursive review of the decisions of Tribunals and courts in other cases.

- (1) CSMA is a non-profit making, non-charitable voluntary association incorporated as a company limited by guarantee with the object of providing to its 300,000 subscribing members motoring, leisure, financial and related services, including access to third party credit card facilities on favourable terms.
- (2) CSMA negotiated with Frizzell Banking Services (FBS) for the introduction of its members to the benefits of the FBS Credit Card Scheme on favourable terms, in substitution for a scheme operated with the Royal Bank of Scotland on terms and conditions laid down by that bank between 1986 and 1991. In consideration of supplying a service to FBS (described by Mr K Parker QC, on behalf of the Commissioners, as that of "*co-operating with FBS to produce a credit product*") CSMA, from 1 July 1991, received commission calculated on the basis of 0.25% of all credit transactions concluded between members of CSMA and FBS. It is common ground that, unless exempted under Schedule 6, the services supplied by CSMA to FBS fall within Section 3 (2)(b) of the 1983 Act.
- (3) A formal agreement between CSMA and FBS was concluded on 22 November 1990 when CSMA accepted the proposal of FBS to replace the Royal Bank of Scotland in 1991 as the supplier of the CSMA Master Card. That acceptance covered a proposal submitted by FBS with a letter dated 8 October 1990, read in conjunction with subsequent correspondence. The thirteen page proposal submitted by FBS to CSMA set out the respective requirements of the members of CSMA, of CSMA and of FBS; sought to establish what is described in the proposal as "*The partnership*"; and identified what the members, the CSMA and FBS would bring to that partnership. The partnership is described in the following terms on page 5 of the proposal:
"It is important to stress the need to approach this development on a joint basis. The success or failure of the payment card will stand on the clear understanding of each other's needs and requirements.
FBS propose to set up a joint team to deal with the development of the card up to launch, this would necessarily involve, technical, marketing and management input. We would seek the involvement of the CSMA in this development, particularly on the marketing front and as may be required by the Club. On a perpetual basis, regular meetings would need to take place to consider the performance and proposed peripheral marketing activities that related to the payment card, as well as the principal marketing approach to selling the card itself. This meeting, to be attended by appointed operational and marketing representatives of both organisations.
By these means regular reviews can take place in order to "freshen up" the product and the marketing activities on a proactive basis in order to ensure maximum economic utilisation of the payment card."
The proposal form described what CSMA would bring to the partnership by reference to the following list:
"Members
Membership communications
Knowledge of members needs
An existing cardholder portfolio
A good understanding of the Frizzell approach
Existing involvement in offering affinity cards to members."

- (4) The activities of CSMA under the "partnership" agreement were described to the Tribunal by Mr Michael Sayer, Group Financial Controller, whose evidence was accepted, and in documents produced to the Tribunal in the form of minutes of regular meetings between CSMA and FBS on the CSMA credit card and in correspondence. Senior executives of CSMA and FBS met regularly to discuss ideas and decide on the strategy for the benefits and services to be provided by FBS to CSMA. A variety of matters were discussed and negotiated at the meetings: level of annual fee, rates of interest, running costs, benefits to customers, design and nature of advertising, discount schemes, plus points schemes for new business, promotions, arrangements for vetting individual card applications, contributions by CSMA to promotional costs and card fees. The position was that CSMA and FBS worked together in the "partnership". There was more than simply a grant by CSMA to FBS of the right to develop, market and issue an affinity card bearing the CSMA logo with the object of encouraging the CSMA members to take up that card. CSMA were not acting simply as an introducer, but were involved in customer handling, marketing, setting prices, discussing interest rates, negotiating the provision of benefits, providing an arbitration service and holding joint discussions on operational and market issues for the protection of its members.

There was no finding by the Tribunal that CSMA acted as an intermediary between their members and FBS for the purpose of bringing them together in particular transactions for the specific grant of credit.

The Relevant Law

There is no dispute between the parties on the relevant provisions of European Union and domestic law or on the general principles relevant to the application of those provisions to the facts of this case.

A. Sixth EC Directive

Article 13 B provides under the heading "Other exemptions":

"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 the exemptions and of preventing any possible evasion, avoidance or abuse;

(d) the following transactions:

- 1. the granting and the negotiation of credit and the management of credit by the person granting it;"*

The Commissioners accept that "negotiation" in this context is not used in the specialised sense of negotiating bills of exchange, promissory notes, cheques or other instruments transferable by one person to another by endorsement or delivery. This point was impressively demonstrated to the Court by Mr Parker's reading of relevant parts of the different language texts of the Sixth Directive.

B. The 1983 Act

The provisions intended to implement the obligation imposed on Member States by Article 13 B of the Sixth EC Directive are contained in Schedule 6 Group 5 setting out exemptions from Value Added Tax in relation to "finance" under the following items (judicially described in an early case as "a statutory jigsaw puzzle"):

"Item No

1.
2. *The making of any advance or the granting of any credit*
3.
4.
5. *The making of arrangements for any transaction comprised in items 1, 2, 3 or 4....."*

C. Case Law

In the approach to construction of the exemption provisions in the 1983 Act it is common ground that:

- (1) *".... it is for a United Kingdom Court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down by the European Court of Justice, if that can be done without distorting the meaning of the domestic legislation."* Per Lord Keith in **Webb -v- Emo Air Cargo Limited** [1993] 1 WLR 49 at 59 E-G.
- (2) If the words of exemption in Group 5 of the Sixth Schedule to the 1983 Act are so clear and unambiguous that they are capable of only one meaning and that meaning fails to give effect to the provisions of Article 13 B of the Directive, it is not open to the Commissioners to rely on the provisions of the Directive, since to do so would be to allow the State to rely on its own failure to fulfil its obligations under the Directive. See, for example, **National Smokeless Fuels Limited -v-IRC** [1986] STC 300.
- (3) The exemptions provided for in Article 13B and in the implementing provisions of the 1983 Act are to be interpreted strictly: **Muys' en de Winter -v- Staatsecretaris van Financien** (Case C - 281/91) [1993] ECR I -5405, paragraph 13 on page 5431; though the court should not adopt an interpretation of Article 13 B (d) which "would restrict the exemption in a way which is not supported by the wording of the provision in question". See **Sparekassernes Datacenter -v- Skatteministeriet** [1997] STC 933 at 954, paragraph 56.
- (4) If a question is raised before this Court on the interpretation of Article 13B, the court may "if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon": Article 177 of the Treaty. It is not necessary for a reference to be made if this Court considers that the correct interpretation of the provisions is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised would be resolved. In coming to such a conclusion, this Court must be convinced that the

matter is equally obvious to the courts of other Member States and the Court of Justice: *CILFIT -v- Italian Ministry of Health* [Case 283/81] 1982 ECR 3415.

The Decision of the Tribunal

The Tribunal accepted the submission of CSMA that the consideration received by them from FBS for the supply of services to FBS was exempt from VAT. The services in question fell within the "negotiation of credit" in the Sixth Directive, as CSMA "did negotiate the global terms on which its members would be eligible for the credit card". The services also fell within items 2 and 5 of Group 5 of the Schedule 6 to the 1983 Act, as CSMA "made arrangements" with FBS for granting credit to its members on favourable terms. The Tribunal held that CSMA's submissions were justified on the facts. The Tribunal said at page 21 of their decision:

"The arrangement which the Appellant reached with FBS had the object of enabling the members of the Appellant to have access to credit on advantageous terms. There was, without doubt, on the facts a close relationship, "a nexus" in the arrangement between the Appellant and FBS and the granting of credit. The whole purpose of the arrangement with FBS was the ultimate granting of credit, and the granting of the credit was the immediate consequence of that arrangement. The evidence does not lead to the conclusion that the Appellant was a passive partner, concerned only with promotion and allowing access to its list of members. The Appellant did negotiate, did assist in supervision at regular meetings, did express views, apparently with success on important issues such as the fee for the card. The fact that the members of the Appellant benefitted was the natural consequence of the negotiation.

In simple terms it could be said that the Appellant said to FBS "we wish to arrange with you for our members to have access to credit on terms advantageous to them and we will enter into a partnership with you which involves regular contacts and negotiation for that purpose", and that this purpose was accomplished.

That seems to the Tribunal on the facts of this appeal to satisfy both terms of the directive and the terms of Items 5 and 2 of group 5."

The Decision of Sedley J

Sedley J dismissed the appeal and rejected the main submission advanced on behalf of the Commissioners that the exemption contained in the Directive and in the Sixth Schedule was confined to the supply of services by an intermediary who is rewarded by the lender specifically for bringing together the borrower and the lender and establishing the terms and conditions upon which the credit would be granted. He held that the arrangement between CSMA and FBS was an arrangement for the granting of credit to CSMA's members and so fell within the exemption. Although he accepted the Commissioners' contention that the exemption was to be narrowly construed, he acceded to the submission of Counsel for CSMA that the construction of the exemption could not be as narrow as the Commissioners suggested. He said (page 9 B-E): *"It cannot, for example, be such that the meaning of "any transaction" limits exemption to arrangements for issuing single credit cards to individuals. To do so would be to dislocate the statute from the Directive which requires the generic exemption of "the granting and negotiating of credit" (albeit this features in a list of what the Directive calls "transactions"). Accepting this, Mr Parker nevertheless submits that the exemptions still stop short of a general arrangement of the kind in issue here: where the line comes it may be impossible to say a priori, but it must on any view exclude as remote and general an arrangement of the present one."*

The judge concluded at page 11 A that:

"While the approach which Mr Parker argues for is not unknown in law, it has the drawback of being impressionistic to a point which may defeat the principle of legal certainty. It would certainly defeat the Directive's requirement that Member States are to lay down conditions for the purpose of ensuring the correct and straightforward application of the exemptions. I prefer Mr Milne's submission that the unqualified effect of items 2 and 5 of Group 5 in the Schedule is to exempt the making of arrangements for the granting of any credit. Upon the facts found by the Tribunal, which it is not open to this court to revise or impugn, the arrangement between CSMA and FBS was an arrangement for the granting of credit to CSMA's members and so fell within the scheduled exemption."

Submissions of the Commissioners

Mr Parker QC made the following submissions on behalf of the Commissioners in support of his contention that the appeal should be allowed or that, alternatively, it should not be finally determined without a reference to the Court of Justice on the interpretation of Article 13 B.

- (1) The exemption should be narrowly construed.
- (2) The reference in Article 13 B of the Directive to "the negotiation of credit" is limited to the case of an intermediary bringing together the principals to a transaction and arranging particular exempt transactions between them for the specific grant of credit. It does not extend to the supply of "support services" of a broad kind, such as a general preparatory marketing arrangement, whereby the parties agree jointly to devise, develop and market credit products. The fact that such an arrangement includes discussion of, and agreement on, the terms and conditions governing and leading to specific grants of credit following the making of such an arrangement is not sufficient to bring it within the exemption for the "negotiation of credit".
- (3) On similar reasoning the exemption in Group 5 of the Sixth schedule, with its reference to "transaction", is confined to the case where an intermediary arranges a transaction for a specific grant of credit by a creditor to a borrower, a feature not present in the supply of services by CSMA to FBS.
- (4) Mr Parker accepted that this construction of the Directive and of the Sixth Schedule meant that the exemption might not in practice have much scope for application to credit cards. In the case of credit cards there would not appear to be an identifiable group of intermediaries performing the function of arranging specific grants of credit under

particular transactions to card holders. He submitted that, nevertheless, the exemption for "negotiation of credit" did not have to be applicable to every type of credit and that, on the Commissioners' construction, the exemption would still retain "a very wide scope of application".

- (5) It was clear on facts of this case that CSMA did not arrange for any specific grant of credit under a particular transaction. The CSMA members decided for themselves whether they would take advantage of the arrangements described in the Tribunal's decision.
- (6) Although there was no decision of the Court of Justice to support this interpretation, there was a decision of 12 January 1989 of the highest tax court in Germany (the Federal Court) on the German VAT Law of 1973, holding that the "negotiation of credit" exemption did not include the activities of a person who was merely obtaining the addresses of interested investors for an investment advisor. Mr Parker referred to a passage in the translation of the judgment in FG Munster (EFG 1984, 417) which referred to negotiation as being an activity "with both parties to the contract, in other words with the client and the third party aimed at concluding a contract". "Negotiating" ("Vermitteln") cannot therefore be regarded as someone laying down some condition or other for the contract to be concluded. What is at least required is rather that the "negotiator" ("Vermittler") instigates contacts with the third party and influences the latter to conclude a contract with the client. The plaintiff did not do that. She did not initiate such contact with either the investors or the person disposing of the shares."
- (7) If he was wrong on this point, Mr Parker submitted that there was sufficient ambiguity in the term "negotiation of credit" in Article 13 B to justify a reference, particularly having regard to the practical importance of the issue and the desirability of the uniform interpretation in the European Union of exemptions from VAT.

Conclusion

In my judgment, the Tribunal made no error of law in their construction of the exemption provisions in the Directive and in the Sixth Schedule to the 1983 Act. They were entitled to conclude, on the facts found by them, that the services supplied by CSMA to FBS were exempt, because they could be properly regarded as "the negotiation of credit" and as "the making of arrangements for any transaction for the granting of any credit". Sedley J was right to reject the appeal by the Commissioners.

My reasons for following the same course as Sedley J are as follows:

- (1) It is common ground that-
 - (a) FBS entered into exempt transactions granting credit in the form of credit cards to members of CSMA; but the exemption is not limited to a supply by the person granting credit;
 - (b) CSMA supplied services to FBS in connection with the granting of that credit to its members and, in consideration of those services, received a commission calculated by reference to the total amount of credit granted;
 - (c) There is no express reference in either the Directive or in the Sixth schedule to the 1983 Act to "particular" transactions or to the "specific" grant of credit.
- (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.
- (4) It is unnecessary to refer a question to the Court of Justice on the interpretation of the Directive. Although the European Court of Justice has not given a ruling on this particular point, the above interpretation of the Directive is accurately reflected in the provisions of the 1983 Act and is sufficiently clear to enable this appeal to be determined without the necessity of a reference under Article 177.

For all those reasons I would dismiss this appeal.

LORD JUSTICE PILL:

I agree and I also agree with the Judgment of Lord Justice Hobhouse which I have had the opportunity of reading in draft.

LORD JUSTICE HOBHOUSE:

I agree that this appeal should be dismissed for the reasons given by Mummery LJ. It is however necessary to emphasise the comment that must be made concerning the Statement of Decision of the Tribunal in this case. It runs to 21 pages yet it does not contain any clear findings of fact on the critical issues. It has only been possible to discover the facts

summarised in the judgment of Mummery LJ with the assistance of counsel and an examination of the documents apparently referred to in the Statement. The Tribunal rehearses and comments on the oral evidence which they heard, it may be thought at excessive length. But what they do not then do is to make any clear findings of fact upon that evidence.

It is the duty of a fact finding tribunal to clearly set out the relevant facts and make findings upon the disputed questions of fact. This is necessary for two main reasons. First the parties are entitled to know why they have won or lost. Secondly, where there is a right of appeal, particularly where it is on a point of law only (as is the case from the Value Added Tax and Duties Tribunal), it is essential to the exercise of the right of appeal and its determination that the facts shall have been found by the tribunal from which the appeal is brought.

In the present case it was central to the determination of the appeal to be clear what the service was which CSMA rendered to Frizells in return for which Frizells paid CSMA the commission upon which it was said that VAT was chargeable. Once this had been ascertained, the legal question of applying the legislation to the relevant facts became relatively straightforward as appears from the Judgment of Mummery LJ.

It must be stressed that in every case the Tribunal should distinguish between the recitation of evidence and the finding of facts and be sure to make clear and adequate findings of fact. This it did not do in the present case.

ORDER: Appeal dismissed with costs; leave to appeal to the House of Lords refused. (Order not part of approved judgment)

MR K PARKER QC (instructed by the Legal Department, Customs & Excise, London EC4A 3NJ) appeared on behalf of the Appellant.
MR D MILNE QC and MISS J ANDERSON (instructed by Messrs Crokers, London EC4A 3NJ) appeared on behalf of the Respondent.