[2017] UKFTT 0424 (TC)

# TC05888

**Appeal number: TC/2015/03094**

***VAT – Provision of system to enable customers of utility and other services to pay bills at shops and other retail outlets – Whether standard-rated or exempt supply – Standard-rated – Appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**(1) PAYPOINT COLLECTIONS LIMITED**
**(2) PAYPOINT NETWORK LIMITED** **Appellants**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS**
**RUTH WATTS DAVIES**

**Sitting in public at the Royal Courts of Justice, Strand, London on 27, 28, 29 March 2017**

**David Milne QC and Zizhen Yang, instructed by PayPoint Plc, for the Appellant**

**Kieron Beal QC instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The appellants, PayPoint Collections Limited ("Collections") and PayPoint Network Limited ("Network"), are wholly owned subsidiaries of PayPoint plc, an international provider of payment solutions and other services. PayPoint operates a payment scheme which enables customers (the "Customers") of utility companies, mobile telephone companies and others (the "Clients") to make credit top-ups, eg for mobile phone services, and charge up pre-payment devices for electric or gas to be supplied by the Clients, ("pre-payment" transactions or services) and/or pay invoices or bills issued by the Clients ("post-payment" transactions or services), over the counter at shops or other retail outlets (the "Agents").

2. Collections and Network appeal against the decision of HM Revenue and Customs ("HMRC") of 30 December 2014, which was upheld on 10 April 2015 following a review, that:

(1) post-payment services supplied by Network are exempt under Item 1 of Group 5 of schedule 9 to the Value Added Tax Act 1994 ("VATA");

(2) pre-payment services supplied by Network are standard-rated; and

(3) services supplied by Collections constitute debt collections and are standard-rated on that basis.

The decision took effect from 2 March 2015 and is prospective only. To date no assessments for VAT have been raised by HMRC.

3. Mr David Milne QC and Ms Zizhen Yang appear for the appellants. Although they question the reasoning behind the decision, they agree with HMRC that the supplies made by Collections to its clients and Network's pre-payment services are standard-rated. However, they contend that the supplies relating to post-payment transactions made by Network to its clients are not exempt but standard-rated. For HMRC, Mr Kieron Beal QC contends that as Network is providing a payment system to its clients its post-payment supplies are exempt.

4. The issue between the parties, therefore, is whether Network's supplies to its Clients, in relation to its post-payment transactions, should be standard-rated or exempt. Although we have referred to the respondents throughout this decision as HMRC, this should be read, where appropriate, as a reference to HM Customs and Excise.

### *Evidence and Facts*

5. We heard oral evidence from Mr Timothy Watkin-Rees who, in 1996, was a founder director of PayPoint. He is now the Business Development Director of PayPoint plc which has had a premium listing on The London Stock Exchange since October 2004. Mr Watkin-Rees leads the commercial function at PayPoint and is responsible for the commercial activities of Network and Collections. He is also a member of the board of directors for both Network and Collections.

6. In addition, we were provided with documentary evidence including correspondence between the parties, copies of contracts between Network and selected Clients, copies of contracts between Collections and selected Clients, draft sample contracts between Network and Clients, Collection and Clients, the PayPoint Handbook July 2012, PayPoint Agent Retail Agreement Pack Sign Up Documents including the PayPoint Retail Agent Master Agreement, sample Retail Agent Agreement and Financial Statements of both Network and Collections for the year ended 28 March 2010, 27 March 2011 and 25 March 2012.

7. On the basis of this evidence we make our findings of fact on which, although there was not a statement of agreed facts, there is little, if any, dispute between the parties.

8. PayPoint plc, as already mentioned, is an international provider of payment solutions and other services. Mr Watkin-Rees described it as "fundamentally a network of retail locations" with systems that operate within that network "to facilitate the payments that happen" through it. He explained that PayPoint had terminals at Agents premises through which payments are entered:

> "Then we have host computer systems to bring the transaction data in centrally. Then we have a sorting and clearing operation that takes the payments that have come in and divides them up between the different Clients and then we send transaction files to the Clients. [Who] … will receive those into their billing systems and post them to their Customer ledgers."

9. PayPoint's Clients include major consumer service organisations in the utility, housing, water, telecoms, media, financial services, transport, retail, e-commerce, gaming, postal and public sectors for which PayPoint provides services and processes consumer payments through its retail networks, internet and mobile phone channels. Annually, it handles over £9 billion from over 540 million transactions for more than 1,500 Clients. Customers of its Clients are able to use the PayPoint network for a wide range of services which include paying bills, topping up mobile telephones, collecting parcels and transferring money although, for present purposes, we are concerned with post-payment service or transactions such as the payment of utility bills through PayPoint's retail network of Agents.

10. This retail network of Agents comprises approximately 29,000 local shops across the United Kingdom. These include the Co-op, Spar, McColls, Costcutter, Sainsbury's Local, Tesco Express, One Stop, Asda, Londis and thousands of independent retailers. PayPoint terminals, which are prominently branded with point of sale material provided by PayPoint, are located within an Agent's premises. A Customer wishing to use a PayPoint facility to pay a utility bill is required to bring either a magnetic swipe card that identifies his or her utility identification number or a bar coded bill (which contains the same information as that on the swipe card) and hand it to an Agent together with the amount to be paid in cash. The Agent scans the bill or swipe card on the terminal which prints a receipt that is issued to the Customer.

11. Originally the PayPoint business was carried on by one company. However, as the result of a corporate restructuring in 1998 the business was divided between Network and Collections both of which are wholly subsidiaries of PayPoint plc.

12. Network is the provider of the retail network infrastructure encompassing the Agents and comprising the terminals or software on Agents' till systems. These are linked via the internet or PSTN to Network's data centre. Network also provides the Agents with a barcode scanner, till rolls, external and internal hanging signs, door signs and other PayPoint branded point of sale material free of charge and, in some cases, also bears the cost of a PSTN line on behalf of an Agent. Additionally, Network provides a call centre for Agents to handle operational issues as well as replacement of faulty terminals and training for Agents.

13. Its sales force assists Agents to optimise the use of the infrastructure and monitor performance and its operational staff deal with processing transactions carried out by the Agents on infrastructure including claims in respect of transaction errors. Network also handles the roll out of new network sites, change in ownership of retail sites and monitors network performance 24 hours a day 365 days a year. It plans the coverage of Agents to ensure that in rural areas Customers are within five miles of a PayPoint Agent and within one mile of an Agent in urban locations. As Network is responsible for most of the PayPoint operations and infrastructure it, rather than Collections, is the major employer of those employed by PayPoint.

14. In Network's Financial Statements for the year ended 28 March 2010 it is stated that:

> "The company's principal activity is operating an electronic payment system, mainly for energy prepayments, utility bills and mobile telephone top ups. There have not been any significant changes in the company's principal activities in the year under review."

The principal activity of Network in similarly described in its Financial Statements for the year ended 27 March 2011 although in the Financial Statements for the year ended 25 March 2012 its principal activity is described as:

> "… operating an electronic transaction processing system, for payments and services."

15. Mr Watkin-Rees confirmed in evidence that the statement of the Network's principal activity in its Financial Statements accurately summarised its core underlying activity and that nothing should be read into the change the description in 2012 which he thought may have come about because of the addition of parcel services being provided by the company.

16. Collections collects the cash from Agents that they have collected from Customers for onward settlement to its Clients. The Agents having collected cash from Customers, eg those who have paid their utility bills, bank it in their accounts. This is collected by Collections by way of a direct debit instruction to an Agent's bank account. The sum collected are deposited into a general trust account at Barclays and subsequently transferred into an individual account, either in trust for the Client

or into a PayPoint account (in accordance with the contractual arrangements with the Client) and settles funds to the Clients, under the agreement it has with them, from the fourth working day after the transactions.

17. Mr Watkin-Rees explained this process in further detail as follows:

> "**Day 0:** transaction eg Customer pays a utility bill
>
> Network polling of Agents for details of all transactions begins
>
> Network sorts data by Client and by Agent to provide totals which can be used by Collections to recover the cash collected by Agents.
>
> **Day 1:** Network advises Client of details of transactions in a file which allows Clients to update their Customer accounts and prepares, on behalf of Collections, a Bankers Automated Clearing file for Collections to direct debit the Agents.
>
> Collections runs the direct debit file to collect into the General Settlement Account (GSA) the sums collected by its Agents the previous day.
>
> **Day 2:** Direct debit file in process.
>
> **Day 3:** Settlement from direct debit file run by Collections is paid into the GSA and transferred either to a Client beneficiary account, a Client settlement account or a PayPoint settlement account.
>
> **Day 4 onwards:** Settlement to Clients via CHAPS."

The polling of Agents, referred to above, or polling of the terminals is, as Mr Watkin-Rees explained, the term used by Network for extracting the data from the terminals into its central system.

18. In addition to the activities described above, Collections is responsible for the credit Control of Agents including the instigation of legal proceedings where necessary.

19. Although he is responsible for the commercial arrangements with Clients Mr Watkin-Rees is not responsible for drafting the contracts entered into with Clients by Network and Collections. However, he has oversight of the contractual engagement process which he was able to describe. Network sales managers handle all contracts for new Clients and Network account managers are responsible for the contractual arrangements for new services for existing Clients. In the process, both the sales and account managers are assisted by the PayPoint legal team.

20. Generally, Network and Collections each enter into separate contracts with their Clients for the provision of their respective services. These reflect the distinct operational roles played by Network and Collections although, as a standard generic template is used and adopted accordingly, there is an element of duplication between the contracts especially in relation to matters such as confidentiality, force majeure, dispute resolution, law and jurisdiction in accordance with the general policy of PayPoint. If, on the insistence of a Client there is a tri-partite contract between the Client, Network and Collections there will, in addition to generic provisions, be

specific clauses in relation to the network infrastructure applicable solely to Network and in relation to the collection of cash etc., applicable to Collections only.

21. Many contracts with Clients, particularly in the utility sector which is subject to stringent supplier procurement rules, are secured following a competitive tendering process. However, the tendering process does not have any impact on the distinction of the services provided by Network and Collections although the standard terms may be need to adapted to address the particular policy requirements of an individual Client. Mr Watkin-Rees explained that under the terms of Network's contract Clients were charged on a fee per transactions whereas Collections' contract is generally priced on the basis of its own fee plus Agent commission. Collections enter into a contract with an Agent under which there is a commission, often as a capped percentage of the Customer payment. Collections self-bills the Agent commission.

22. The contractual arrangements with Agents differs between those that are independent shops owned by sole traders, small partnerships or companies with single low figure store numbers ("Independents") and multiples and, what Mr Watkin-Rees described as "symbol groups" with multiple sites ("Multiples").

23. In the case of Independents the agreement entered into the "PayPoint Retail Agent Master Agreement". This includes, in addition to the Master Agreement itself, the Schedules, the Handbook and the Documentation and is a contract between an Agent and Network, Collections, and, PayPoint Retail Solutions Ltd on standard terms which include the following:

> "**2 Rights Granted**
>
> …
>
> Insofar as it is applicable to the Service, the Company [Network] or Solutions (as appropriate) hereby grants to the Agent, a non-exclusive, revocable licence to operate as an agent on behalf of the Company or Solutions (as appropriate), the System as described in the Handbook
>
> **4 Agent's Obligations**
>
> 4.1 The Agent shall, at its own cost and insofar as it is applicable to the Service: -
>
> (a) operates the System and use the Hardware and Materials, only in accordance with the terms of the Agreement; and
>
> (b) fully train a sufficient number of staff (and further ensure that such training is kept up to date) in the adherence to procedures as set out in the Handbook and in the operation of the System with the Hardware in accordance with and to the level of the Service Standards; and
>
> (c) on behalf of Clients, provided all of the Services to the customer in accordance with and to the level of the Service Standards and, in order to do so, ensure that it has sufficient number of appropriately trained staff on site at all times; and
>
> …

(k) reimburse the cost of replacement of any stolen Hardware (or part thereof); and

(j) in accordance with Clause 3.1(c) … [payment of charges where fault due to act of omission by Agent etc.] reimburse/pay the Company or Solutions (as appropriate) the relevant charges and;

…

(n) ensure that the Hardware is in full operation and capable of performing the relevant Service during the opening hours of the Authorised Outlet throughout the full term of the relevant Schedule (including for the avoidance of doubt, during any notice period); and

(o) where requested by PayPoint install and maintain a dedicated telephone line or other suitable line (as advised and previously approved in writing by the Company or Solutions, as appropriate) for use with the Hardware and pay the installation, rental, call, and any other charges in connection with such a line. Where requested provide to PayPoint polling or journal uploads. …; and

…

(y) accept that the Agent has no rights whatsoever to the sums collected on behalf of the Clients and may not use the sums collected (whether in part or in whole) for any purpose whatsoever, other than to make the said sums are available to Collections for onward payment to Clients. It is a further accepted by the Agent that the sums so collected never form any part of the assets of the Agent and are held solely and exclusively for the purposes of performance of the Agreement.

…

**6 Agent's Banking Obligations**

6.1 The Agent shall, at its own cost:–

"(a) open a bank account ("the Bank Account") with facilities to pay Collections via the Banks Automated Clearing Services ("BACS") at a bank which is approved by Collections. Collections may, at its absolute discretion, permit the Agent to use an existing account as the Bank Account; and

…

**10. Agent's Commission**

10.1 Where expressly stated in a Schedule that commission is due to the Agent the following provisions shall apply with respect to the commission payable

(a) Collections shall generate and make available or send to the Agent, or, dependent upon the nature of the Service and Hardware involved, issue to the Agent from such Hardware a billing invoice at such frequency as stated in the relevant Schedule. Such billing invoice shall contain a statement of transactions for which payment of commission is due to the Agent in the period covered by the billing invoice. In order to simplify and expedite administrative matters, Collections shall

> issue these invoices under a self-billing arrangement for VAT purposes.
>
> …
>
> **14. Relationship of the Parties**
>
> 14.1 The Agent is an agent of PayPoint the latter having been authorised to provide payment and collection services on behalf of Clients for the benefit of their customers.
>
> 14.2 the Agent shall not accept any liability on behalf of PayPoint and/or any of the Clients.
>
> 14.3 The Agent shall not make any representations which either suggest or imply any authority or relationship other than expressed in this Clause 14."

24. In the PayPoint Retail Agent Master Agreement "Agreement" is defined as "together the Master Agreement, the Schedules, the Handbook and the Documentation"; "Clients" are defined as "the third parties that PayPoint has entered or enters into an agreement with to provide customer payment and collection facilities"; "PayPoint" is defined as "PayPoint Network Ltd, PayPoint Collections Ltd and PayPoint Retail Solutions Ltd or any one or combination of those parties (as appropriate)"; and "Service" is defined as "that as described in a Schedule to this Master Agreement", which includes accepting payments for various utilities, mail order, and telephone card top-ups.

25. Similar provisions are included in the "Retail Agent Agreement", between Collections, Network and Multiples.

26. The PayPoint Handbook under the heading "Making your PayPoint business a success" includes the following instructions for Agents:

> "**4. PayPoint transactions must only take place when a customer is at the counter and you have taken their cash payment.**
>
> Always take the customer's cash payment before you complete a transaction. If you receive a phone call asking you to carry out a PayPoint transaction please ring our Contact Centre immediately. **NEVER process a transaction over the phone**. You are direct debited for all successful transactions so don't be out of pocket – take the customer's cash payment first.
>
> …
>
> **7. Bank the cash you collect via your PayPoint terminal every banking day!**
>
> We direct debit you every day to collect the money that customers have paid using PayPoint so make sure the funds are available by banking your PayPoint monies every day!"

27. Mr Watkin-Rees explained that the purpose of these instructions was to protect the Agent. If a transaction had been completed before payment had been handed over a Customer could "do a runner" without handing over the cash. He said that such a

warning was necessary because the Agent needed protecting as he or she could be dealing with someone who was very short on money and could be quite desperate. Similarly, with the telephone, Mr Watkin-Rees, explained that any financial system could be susceptible to attempts to probe any perceived weakness and could be subject to hoax telephone calls. He also explained that it was necessary for the Agents to be aware that PayPoint run a timely collection system.

*Approach to be adopted*

28. As the contractual arrangements between Network and its Clients are contained wholly in written agreements it is common ground that the approach to be adopted is that approved by the Supreme Court in *HMRC v Secret Hotels2 Ltd (formerly Med Hotels Ltd)* [2014] STC 937 and *Airtours Holiday Transport Ltd v HMRC* [2016] STC 1509.

29. In *Secret Hotels2* Lord Neuberger said, at [32]:

> "When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> > "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.""

And in *Airtours* he said, at [47]:

> "… as I said in *Secret Hotels2 Ltd v HMRC* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

30. The Upper Tribunal (Morgan J and Judge Falk) which adopted such an approach in *ING Intermediate Holdings Ltd v HMRC* [2017] STC 320 observed, at [37]:

> "In our view the correct approach is clear from *Newey* and *Secret Hotels2*. The test is an objective one (see also on that European Commission v Finland (Case C-246/08) [2009] ECR 1-10605 (at para 37). The contractual terms must be considered. It is also necessary to consider the 'economic and commercial reality'. If the terms reflect the economic and commercial reality then it is not necessary to go any further."

31. The parties have agreed that this appeal should be determined by reference to draft sample contracts between Network and Client (the "Network Contract") and, if appropriate, sample contracts between Collection and Client (the "Collections Contract") and agreements with Agents entered into by Network and Collections respectively which, as the evidence of Mr Watkin-Rees confirmed, essentially reflect the economic and commercial reality. It is therefore necessary to consider the relevant contractual terms to determine the relationship between the parties and, having done so, decide how the rights and obligations under these contracts should be classified for VAT purposes.

*Network Contract*

32. Reference was made to the following provisions of the Network Contract ie between Network (defined as the "Company" in the agreement) and the Client, which, after identifying and defining the parties continues:

> **WHEREAS:**
>
> (A) The Company manages a network of Agents and provides facilities for the Client to enable its Customers who wish to make cash payments to the Client over a counter to do so using the PayPoint Network.
>
> (B) The Client has made separate arrangements to have such case payments made by Customers collected and transmitted to the Client.
>
> **IT IS AGREED** that:
>
> **1 <u>Purpose and Definitions</u>**
>
> 1.1 Purpose
>
> This Agreement sets out the terms and conditions upon and subject to which the Company agrees to provide the Services to the Client
>
> 1.2 Definitions
>
> In this Agreement unless it is stated or the context otherwise requires:
>
> "**Agents**" means the collection agents retained by the Company and any other Group Company of the Company from time to time interface with and collect payments on behalf of the Client and others from Customers (and "**Agent**" means any one of them);

"**Agent Outlet**" means an outlet with a Terminal maintained by an Agent which is part of the PayPoint Network;

"**Annual Liability**" means the total fees paid by the Client to the Company in accordance with Schedule 2 less any fees paid to the Agents by the Company or any other Group Company of the Company ("Total Fees") for the 12 months preceding the date of a claim or where the date of a claim is less than 12 months after the Commencement Date the Total Fees paid to date;

…

"**Central Processing Facility**" means all of the Company's equipment which polls Terminals to extract and assemble Transaction data and forward relevant information to the Client;

…

"**Customers**" means customers of the Client from time to time who make cash payments due to the Client by any over the Counter method;

…

"**Free**" means an over the counter payment facility that is made available to Customers without the Customer being charged for using such facility at the point of payment;

…

"**PayPoint Network**" means the Central Processing Facility and all Terminals connected from time to time to the Central Processing Facility;

…

"**Receipt**" means a written receipt issued by a Terminal as part of the Services;

…

"**Services**" means the services to be provided by the Company to the Client as set out in Schedule 1 and any additional services requested by the Client and agreed by the Company in accordance with clause 3.3;

"**Service Users**" means the Client and others who have retained the Company to provide a network of Agents and facilities to enable their customers who wish to pay their bills to such service user over a counter to do so using the PayPoint Network;

…

"**Systems**" means any electronic processing equipment used in the provision of the Services for the handling and or transmission of Data including those operated directly between the Company and the Client or the Client's contractors or agents in relation to the Services;

"**Terminal**" means each of the multi-function terminals used to process Transactions and which are located at outlets operated by Agents;

"**Transaction**" means the submission of a payment medium to the Agent, the registering of such payment medium on the Terminal and the consequential issue of a Receipt by the said Terminal;

…

…

**3 <u>Obligations of the Company</u>**

3.1 With effect from the Commencement Date the Company shall:

(a) provide the Services; and

(b) subject to the Client providing such support as may be reasonably requested by the Company, promote and market the Service to Customers.

3.2 The Company may perform its obligations under this Agreement by employing sub-contractors and agents and performance of any obligation by any such person will constitute performance by the Company. Such performance shall not diminish the Company's obligations under this Agreement.

3.3 …

3.4 In providing the Services the Company agrees to:

(a) provide a national PayPoint Network within the United Kingdom; and

(b) maintain, audit and monitor the PayPoint Network; and

(c) provide a Terminal and arrange for installation and, where necessary, a telephone line in each Agent's premises; and

(d) provide a terminal replacement facility in the event of a Terminal failure; and

(e) establish training procedures and ensure the implementation of appropriate training procedures for the Agent; and

(f) operate the Central Processing Facility; and

(g) provide Agent's with a managed supply of all consumables for Terminals on request; and

(h) transmit Transaction Data to the Client sufficient to enable the Client to arrange for collection of payments is such manner as the Client shall determine; and

(i) …

3.5 The Company's obligations shall be limited to the provision of Services and the Company shall have no obligation to provide any other services including, without limitation, a payment collection service.

…

**4 Obligations of the Client**

4.1 With effect from the Commencement Date, until the termination of this Agreement the Client shall:

(a) …

…

(f) ensure that all information provided by or on behalf of the Client for processing on the PayPoint Network shall be in a form suitable for use on the PayPoint Network and in such condition for processing as the Company may specify from time to time provided that the Company has provided the Client with any information necessary for the Client to comply with this obligation; and

(g) ensure that the Company is offered as a method of payment for all schemes where over the counter payments are a Customer option; and

…

…

4.4 The Client shall ensure that all forms of Payment Media provided to Customers are configured in such a way to enable Transactions to be processed via the PayPoint Network. In the event that the Client makes any alterations to the Payment Media provided to Customers, the Client shall inform the Company in advance of the alteration and ensure that such alternation has not affected the ability of the Company to process Transactions.

…

**6 Agents**

6.1 The Company shall maintain a network of Agents appointed in accordance with the Company's criteria. The Agent selection criteria is open to review by the Company to allow for changing circumstances save that the Company shall at all times act as a Reasonable and Prudent Operator in this respect. The Company shall from time to time disclose to the Client its Agent selection criteria.

6.2 The Company shall use reasonable endeavours to ensure that there will be at least one Agent within the United Kingdom, within 1 mile of Customers within urban areas and at least one Agent within 5 miles of Customers in rural areas for 95% of Customers.

…

**8 Service Charges**

8.1 The Company shall charge the Client for the Services in accordance with Schedule 2.

…

**9 Invoicing and Payment**

9.1 The Transaction fees, as detailed in Schedule 2, shall be invoiced by the Company weekly and shall [(i) be set-off from the monies due to the Client by the Group Company of the Company (weekly/monthly in arrears). If the Company Group does not hold sufficient funds for the Client on the due date to facilitate payment of the Service Charges due to the Company Group by way of set-off, then the Company Group shall be entitled to set-off, on the days following the due date, the balance owed by the Client against any sums owed to the Client by the Company Group until such time as the balance on the outstanding invoice has been reduced to nil.

**In the event of non-payment by the Client of the Committed Volume the Company reserves the right to deduct the Committed Volume from the monies due to the Client by the Group Company of the Company.**

…

**12 Limitation of liability**

…

12.3 The liability of the Company to the Client in contract, tort (including, without limitation, negligence) or for breach of Statutory Duty or otherwise arising by reason of or in connection with this Agreement or howsoever otherwise shall be limited to an amount equating to the Annual Liability for any incident or series of incidents related or unrelated in any period of 12 months but so that, for the purposes of ascertaining whether such monetary limitations apply, the liability of the Company shall be aggregated with the liability of any other Group Company of the Company to the Client for such aforementioned breach arising by reason of or in connection with any arrangements and the Company shall have no liability to the Client to the extent that such aggregate exceeds the aforementioned monetary thresholds.

…

12.6 In no circumstances shall the Company be liable to the Client for Agent insolvency, fraud or dishonesty.

…

**20 Counterparts**

This Agreement may be entered into in the form of two or more counterparts all of which taken together shall constitute but one and the same instrument.

**21 Law**

This Agreement shall be governed by and construed in accordance with English law

## SCHEDULE 1 – The Services

**(a) Facilities**

The following are the facilities to be provided by the Company:

(i) Taking payment from Customers

The Company will provide facilities to enable the collection of case payments for Customers via Agents who are handed swipe magnetic stripe cards in order to register details relating to the Customer's account with the Client. The Agent will then be able to enter the amount to be paid and the Terminal will capture the Customer reference details, register the cash payment and issue a legible Receipt in respect of the payment made by the Customer.

(ii) Taking payments against an invoice.

The Company will provide facilities to enable collection of cash payments from Customers via Agents who are handed an invoice containing a bar code or a magnetic stripe card containing their customer reference details. The Agents will be able to register details from an invoice containing a bar code or a magnetic stripe card containing their customer reference details. The Agent will be able to enter the amount paid and the Terminal will capture the customer reference details, register the cash payment an issue a legible receipt in respect of payment by that Customer.

**(b) Transaction Values**

The Company will provide to the Client or any collection agent nominated by the Client, all Customer reference and Transaction details captured.

All Transactions shall be subject to a minimum and maximum Transactions value of £00 and £00 respectively.

## SCHEDULE 2 – Charges for Services

**1. VAT**

All fees below are quoted exclusive of VAT

**2 Set Up Fee**

A set up fee of £[ ] is chargeable for the Services payable by the Client to the Company at the time of entering into this Agreement.

Such set up fee shall be invoiced and become due and payable in accordance with clause 9.

**3 Transactions Fees**

The Transaction fees charged to the Client shall be [ ] pence per Transaction.

Such Transaction fees shall be invoiced and become due and payable in accordance with clause 9.

**4 Communications**

> The Company will recharge to the Client the total costs of establishing and operating any communication links including but not limited to service charged, all necessary hardware plus sundry costs related thereto, between the Company and the Client subject to agreement with the Client.
>
> **5 <u>Agent Claims</u>**
>
> The Client acknowledges that, occasionally, Agent(s) may inadvertently enter payment details in to a Terminal inaccurately, which cannot be corrected at that time and may lead to an Agent being over-debited and submitting a claim to the Company Group ("**Agent Claims**"). The Client agrees to refund the value of any reasonable Agent Claims and correct any such mistakes in the following circumstances:
>
> (a) the Agent can prove such error occurred; and
>
> (b) the credit applied to the Card to which the error relates has not yet been used.
>
> …

33. Mr Milne, referring to the recitals, clauses 1.2, 3.1, 12.6 and Schedule 1 of the Network Contract, submits that Network supplies the Client with the facilities and infrastructure (including a network of Retailers) to enable Customers to make payments to the Client over the counter at the Agents' premises which stops short of being an electronic payment system. He says that this is consistent with clause 3.4, by which Network agrees to provide various equipment and hardware (clauses 3.4(a), (c), (d) and (g)); to maintain, audit and monitor the equipment and hardware (clause 3.4(b)); to provide personnel training (clause 3.4(e)); to operate of the equipment and hardware (clause 3.4(f)); to transmit information to the Client "to enable the Client to arrange for collection of payments in such manner as the Client shall determine" (clause 3.4(h)); and provide performance data (clause 3.4(i)).

34. He points out that the Network Contract also makes it clear that the Client has made "separate arrangements" to have cash payments made by Customers collected and transmitted to the Client (recital (B)) and that Clause 3.5 expressly provides that "The Company [Network's] obligations shall be limited to the provisions of the Services and it shall have no obligation to provide any other services including, without limitation, a payment collection service."

35. Mr Milne also refers to Clause 1.2, where it defines 'Agent', and provides that payments made by Customers over the counter are collected by the Agent "on behalf of the Client". Consequently, he contends, the payments belong to the Client when they are handed by the Customers to the Agent. This, he says, is consistent with the Clauses 4.1(c) and (y) and 6.1(a) of the PayPoint Retail Agent Master Agreement set out above (see paragraph 23) in relation to Independents and the similar provisions contained in the Retail Agent Agreement made with Multiples.

36. Mr Beal contends that the relevant supply by Network is of a payment system to its Clients in return for fees.

37. He refers to the definition of Agents in Clause 1.2 of the Network Contract as being “retained by Network and any other Group Company from time to time” (with emphasis on the and) contending that this is inconsistent with the suggestion that it is only Collections that retains the Agents. Accordingly, although accepting that the Agents operate on a dual capacity and have separate obligations to Collections to bank funds received, he argues that the Agents receive payments from Customers as it is this that leads to the registration on the PayPoint terminal of the credit of the Customer with the Client.

38. Mr Beal also refers to the responsibilities of Network under the Network Contract under which Network is responsible for selecting and maintaining a network of Agents, providing them with PayPoint terminals and monitoring the performance of the PayPoint Network (clause 3). This, he says, is more than simply supplying the physical infrastructure to Clients and is effectively a combination of a netting-off procedure and a recognition and registration that payment has been made for cash by a Customer. He contends that the combination of taking cash in discharge of the debt that is due to the Client, coupled with registration of that fact of payment over the electronic network and recording at the Client's end of that discharge of that debt, amounts to a comprehensive electronic system with Network operating the electronic side of the payment registration process.

39. While Mr Beal correct to say that Network is responsible, under clause 3 of the Network Contract, for monitoring of the PayPoint Network it is necessary to distinguish between the PayPoint Network, defined in clause 1.2 as “the Central Processing Facility and all Terminals connected from time to time to the Central Processing Facility” and the monitoring of Agents which is the responsibility of Collections under the terms of its contractual arrangements with its Clients. The obligations of Network to Clients, as stated in clause 3 of the Network Contract is, in essence, to ensure that the PayPoint Network works and that the required information is passed to Clients.

40. Also, as Mr Milne submits, although clause 14.1 of the PayPoint Retail Agent Master Agreement refers to an Agent is being “an agent of PayPoint” (which includes, for the purpose of that agreement both Network and Collections) it is clear from clauses 4.1(y) and 6.1(a) of that agreement that any obligations to PayPoint in respect of the collection and transfer of monies received from Customers are on behalf of the Clients are to Collections and not Network.

41. Having carefully considered the provisions of the Network Contract and the submissions of Mr Milne and Mr Beal in relation to it, we agree with Mr Milne that when a Customer hands over his or her cash payment for a utility bill it is received by the Agent, in accordance with clause 1.2 of the Network Contract, on behalf of the Client and not Network. It therefore follows any cash belongs to the Client once it has been accepted by the Agent on behalf of the Client and cannot pass through Network.

42. The role of Network is to extract information from the PayPoint terminals (polling) on a daily basis which it transmits to Clients to enable them to net off their Customer accounts as appropriate. Any “netting off” is therefore undertaken by the

Client and not Network. As such, and in accordance with the description in its Financial Statements, although Network does provide its Clients with a system through which payments are effected and a network of Agents to operate that system, it does not provide the service of receiving, collecting or transferring payments either functionally by netting off accounts or otherwise from Customers. That service is supplied by Collections.

*VAT Classification*

43. Having identified the rights and obligations of Network to its Clients under the Network Contract it is necessary to consider how these should be classified for VAT purposes.

44. The applicable EU provisions are contained in Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of VAT, the Principal VAT Directive ("PVD"). Article 2(1)(c) of the PVD provides that VAT shall be payable on "the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

45. Exemptions "for other activities" are set out in Title IX of the PVD. Article 131 provides that the exemptions provided for in Chapters 2 to 9 shall apply:

> … without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

46. Article 135(1) states:

> "1. Member States shall exempt the following transactions:
>
> …
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;
>
> …

47. Article 135(1)(d), the financial services exemption, was previously contained in Article 13B(d)(3) of the Sixth Directive (Council Directive 77/88/EEC)

48. The financial services exemption, has been transposed into United Kingdom domestic law by s 31(1) and Item 1 of Group 5 of Schedule 9 VATA.

49. Section 31(1) VATA provides:

> **31. Exempt supplies and acquisition**
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 and an

> acquisition of goods from another member State is an exempt acquisition if the goods are acquired in pursuance of an exempt supply.

50. Item 1 of Group 5 'Finance' of Schedule 9 states:

> The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.

Under s 96(9) VATA the provisions of Schedule 9 "shall be interpreted in accordance with the Notes contained" in it. The Notes relevant to Item 1 provide:

> (1A) Item 1 does not include a supply of services which is preparatory to the carrying out of a transaction falling within that item.
>
> …

51. The scope of the exemption was summarised by the the Court of Justice of the European Union ("CJEU") in *Skandinaviska Enskilda Banken AB Momsgrupp v Skatteverket* (Case C-540/09) [2011] STC 1125 ("*SEB*"), a case concerning whether the supply of an underwriting guarantee fell within the scope of the relevant financial services exemption, in which the Court stated:

> "18. Before analysing the legal basis of any exemption of an underwriting guarantee such as that at issue in the main proceedings, it is appropriate to state that that guarantee falls within the scope of the Sixth Directive inasmuch as it constitutes a supply of services effected for consideration within the meaning of Article 2(1) of that directive, having regard to the fact that there is a legal relationship between the issuer and the guarantor and that the commission received by the latter from the issuer represents the value actually given in return for the guarantee supplied to the issuer by the guarantor (see, to that effect, Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387, paragraph 26; and Case C-270/09 *MacDonald Resorts* [2010] ECR I-0000, paragraph 16).
>
> 19. It must be borne in mind that, in accordance with the settled case-law of the Court, the exemptions referred to in Article 13 of the Sixth Directive constitute independent concepts of European Union law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another (see, in particular, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 15, and Case C-473/08 *Eulitz* [2010] ECR I-0000, paragraph 25 and the case-law cited).
>
> 20. As regards whether such an underwriting guarantee can be exempted from VAT under Article 13B(a) or (d)(1), (2) or (3) of the Sixth Directive, it must be borne in mind that the terms used to specify the exemptions in Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal

> neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see *Eulitz*, paragraph 27 and the case-law cited).
>
> 21. Finally, with regard to the reasons underlying the adoption of VAT exemptions for the transactions set out in Article 13B, it is apparent from the case-law of the Court that the purpose of those exemptions is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 24).

The CJEU concluded that the guarantee was an exempt transaction as:

> "32. In the light of the criterion thus applied by the Court in the judgment in *CSC Financial Services*, that is to say, the amendment, even potential, of the legal and financial situation as between the parties concerned, it must be found that, in the present case, as the Advocate General noted in point 53 of his Opinion, the underwriting guarantee at issue in the main proceedings meets the requirements laid down in that case-law.
>
> 33. Even if the share issue were ultimately to be entirely covered by market investors, so that the purchase of the remaining shares by the guarantor were no longer necessary, conclusion of a contract for an underwriting guarantee, such as that at issue in the main proceedings, would be liable of itself to create, alter or extinguish rights in ownership of shares, such a possibility being alone sufficient to classify such an underwriting guarantee as a transaction in securities within the meaning of that case-law."

52. In *Sparekassrnes Datacenter v Skatteministeriet* (Case C-2/95) [1997] STC 932 ("*SDC*") the CJEU emphasised, at [20] that:

> "… according to settled case-law of the court, the terms used to describe the exemptions envisaged by art 13 of the Sixth Directive are to be interpreted strictly since these constitute exceptions to the general principle that turnover tax is to be levied on all services supplied for consideration by a taxable person (judgment in Case 348/87 Stichting Uitvoering Financiële Acties [1989] ECR 1737, paragraph 13)."

The CJEU continued, at [66], having held at [65], that "the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt":

> "In order to be characterized as exempt transactions for the purposes of points 3 and 5 of Article 13B, the services provided by a data-handling centre must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For `a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. A service exempt under the

> Directive must be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. In this regard, the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions."

53. In *Customs and Excise Commissioners v FDR Ltd* [2000] STC 672 ("*FDR*") the Court of Appeal considered the application of the exemption in relation to the supplies of a business that consisted of providing credit card services to banks, effectively acting as a clearing house for credit card transactions for those banks which issue credit cards to cardholders and those contracting with merchants (normally retailers) to acquire vouchers accepted by those merchants in payment for goods or services.

54. Laws LJ (with whom Ward LJ and Bell J agreed) said:

> "34. Mr Paines [counsel for Customs and Excise Commissioners] submits that a 'transfer' is constituted by the *execution* of an instruction that the transfer should take place, and never merely by the *instruction* itself (see para 53 of the judgment in *SDC* ([1997] STC 932 at 954, [1997] ECR I-3017 at 3058)). In line with this is his submission appearing in his skeleton argument—
>
> > '... the distinction drawn by the ECJ in paragraphs 65 and 66 of the judgment is between a service which is indispensable for the performance of an exempt supply by another (which is *insufficient* for exemption) and a service which itself contains the essential elements of an exempt supply defined in article 13B(d) and thus *is* an exempt supply. It is only the latter service which qualifies for exemption. In particular, a "transaction concerning transfers" is one that has the effect of transferring funds.'
>
> Mr Paines was concerned to emphasise that there may be many commercial and professional services which on the face of it seem well within some or other part of the art 13B(d)(3) rubric: thus general accountancy services such as negotiation on a client's behalf with the Inland Revenue would, as a matter of ordinary language, readily fall within 'transactions, including negotiation, concerning ... payments, transfers'; but it is beyond contest that such services are not exempt. Something altogether more intimate to the actual process of moving money is required.
>
> 35. In general terms, I agree with this. It is plain that ordinary accountancy services are not exempt from VAT, and that the exemptions granted by the provisions contained in art 13B(d) are much more narrowly confined. It is well recognised that commercial transactions whose essence involves the movement of money are in many cases, for conceptual reasons, ill-suited for the application of the VAT regime, and it seems likely that this is what lies behind the art 13B(d) exemptions. Mr Paines was in my judgment right to submit that

while the court's reasoning in *SDC* relating specifically to 'transfers' implies a narrow approach to the exemption's reach, it would be no less inappropriate to open the statutory exemptions to services which are distant from the actual movement of money merely by reference to other words in the provision, such as 'transactions, including negotiation, concerning deposit and current accounts ... debts, cheques and other negotiable instruments'. In particular I think he was right to submit that FDR's instructions to BACS would not constitute a transaction concerning a current account: if FDR does not effect transfers through BACS, it enjoys no other route (vis-à-vis BACS) to exemption under art 13B(d)(3). But all this, I conceive, is no more nor less than the consequence of the well-established requirement to read the statutory exemptions strictly; and I do not suppose that Mr Cordara [counsel for FDR] would disagree. I must test what FDR actually do against the reasoning in *SDC*, and do so in three areas, (a) transfers and BACS, (b) transfers and netting-off, and (c) transfers and the cardholder/merchant accounts.

…

**(b) Do FDR make transfers by means of the netting-off process?**

43. The tribunal held (see p 45, para 183):

> 'The fact is that the daily netting off procedure involves an account being struck of the debits and credits of each client bank. The netting off procedure involves a credit in that daily account and in economic terms clearly involves both a payment and a transfer. In any event on any normal use of language the satisfaction of the Issuer's obligation to the payment system or the Acquirer is clearly a transaction involving the debt (or créance) to which the creditor is entitled. It would be wholly illogical if netting off fell within point 3 when viewed from the creditor's side but not when viewed from the debtor's.'

44. The pooled arrangements by which FDR net off the mutual liabilities of issuers, acquirers and payment systems were described by Mr Paines in his reply as amounting to no more than a 'calculation'. Their eventuation in day-to-day practice was 'merely declaratory of what the true legal and financial situation is'. In his skeleton argument he had submitted that netting-off 'is simply the striking of an account of mutual debits and credits. It avoids pro tanto the need to make a transfer or payment'. Mr Paines' submissions upon this point are very elegant but entirely misconceived. They depend upon a hidden premiss, namely that for a transfer to take place something has to happen *over and above* a change (to put the matter in summary form) in the relevant parties' legal relationship constituted by corresponding credit and debit entries in their respective bank accounts: there has to be, in some sense, a *real* transfer, which must, presumably, be different in kind from the change in parties' bank account entries. But the premiss is false. There is, as I have explained in para 36, no such extra happening. It is not unlike the story of the Emperor's New Clothes, in

> which the little boy realised that what everyone else said they saw—the Emperor's supposed finery—was not there at all.
>
> 45. The reality is that the netting-off process achieves precisely the same result as would be attained—unspeakably more laboriously—if, as between all the acquirers, issuers and payment systems, each debt owed by any one to any other were the subject of individual credit and debit entries in the bank accounts of the two of them. If FDR effected such transactions, then subject to his argument about BACS Mr Paines would as I understand it accept that FDR indeed made transfers. But that is wholly unreal. It cannot be right that the most inefficient way of doing X constitutes an exempt supply, but the most efficient way of doing it constitutes a taxable supply. On this issue the tribunal was in my judgment entirely right."

55. In conclusion Laws LJ said, at [64]:

> "… For what it is worth I would have categorised the essential commercial activity here in very simple terms. It consists in the movement of money between cardholder, merchant, issuer and acquirer, for the convenience of the cardholder and the profit of the other three parties. Under the contractual arrangements which the tribunal examined at great length, that activity is essentially (with variations) 'outsourced'—a word not to be used without quotation marks—to FDR. So regarded, the supplies which FDR makes plainly fall within art 13B(d)(3)."

56. The CJEU in *ATP PensionService A/S v Skatteministeriet* (Case C-464/12 [2014] STC 2145 ("*ATP*"), which concerned, inter alia, the provision of services relating to payments into and disbursements from pension funds, held, for similar reasons as the Court Appeal in *FDR*, that a functional transfer leading to a change in the legal and financial position between the parties, effected by means of accounting entries came within the exemption stating:

> "77. By its third and fourth questions, which it is appropriate to examine together, the referring court asks whether, on a proper construction of art 13B(d)(3) of the Sixth Directive, the VAT exemption laid down in that provision for transactions concerning payments or transfers covers a service, such as that at issue in the main proceedings, which relates to contributions paid into a pension fund, and whether a service of that kind must be regarded as a single service or as a group of separate services, each of which must be assessed independently.
>
> 78. It should be borne in mind that the transactions exempted under art 13B(d)(3) of the Sixth Directive are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service (see *SDC*, paras 32 and 56, and *Revenue and Customs Comrs v Axa UK plc* (C-175/09) [2010] STC 2825, [2010] ECR I-10701, para 26). Accordingly, the exemption is not subject to the condition that the transactions be effected by a certain type of institution or legal person where the transactions in question relate to

the sphere of financial transactions (see, to that effect, *SDC*, para 38, and *Axa UK*, para 26).

79. The court has held that a transfer is a transaction consisting in the execution of an order for the transfer of a sum of money from one bank account to another. It is characterised in particular by the fact that it involves a change in the legal and financial situation existing, on the one hand, between the person giving the order and the recipient and, on the other, between those parties and their respective banks; and, in some cases, between those banks. Moreover, the transaction which produces the change is solely the transfer of funds between accounts, irrespective of its cause (see, to that effect, *SDC*, para 53, and *Proceedings brought by Nordea Pankki Suomi Oyj* (Case C-350/10) [2011] STC 1956, [2011] ECR I-7359, para 25).

80. That interpretation does not presuppose any particular method for effecting transfers, which may be done using accounting entries. That is so in the case of transfers between customers of a single bank, or between accounts of a single individual who acts as both the person giving the order and the recipient. At the hearing, ATP stated that, although the transfer of sums from a current account to a savings account belonging to the same account holder does not alter either the creditor or the amount of the debt, the terms and conditions relating to the debt owed to the bank will, by contrast, be altered. A transfer between two accounts belonging to the same account holder will be carried out using accounting entries, from which point new terms and conditions will apply to the debt in question.

81. Such transactions, whether carried out by means of a physical transfer of funds or by means of accounting entries, are services which are covered by the exemption provided for in art 13B(d)(3) of the Sixth Directive.

82. As mentioned in para 70 above, some of the services in respect of which eligibility for VAT exemption is contested in the case before the referring court, such as transactions crediting contributions paid into pension customers' pension scheme accounts, are not of a purely technical nature but appear to establish the rights of pension customers vis-à-vis pension funds by

[2014] STC 2145 at 2176transforming the claim held by a worker vis-à-vis his employer into a claim held by that worker vis-à-vis the pension fund of which he is a member.

83. However, it is for the referring court, which has before it all the information it needs to analyse each of the transactions in question, to assess whether those services are covered by the exemption provided for in art 13B(d)(3) of the Sixth Directive, as interpreted in the present judgment.

84. It is also for that court to assess whether, pursuant to the case law referred to in para 58 above, the other services provided by ATP are so closely linked to transactions crediting contributions paid into pension customers' pension scheme accounts that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

> 85. In the light of the foregoing, the answer to Questions 3 and 4 is that, on a proper construction of art 13B(d)(3) of the Sixth Directive, the VAT exemption laid down in that provision for transactions concerning payments and transfers covers services by means of which an undertaking establishes the rights of pension customers vis-à-vis pension funds through the creation of accounts for those customers within the pension scheme system and the crediting to those pension customers' accounts of the contributions paid, and any transactions which are ancillary to those services or which combine with those services to form a single economic supply."

57. In *Nordea Pankki Suomi Oy* (Case C-350/10) [2011] STC 1956 ("*Nordea*") the CJEU considered the SWIFT worldwide electronic messaging service used in payment transactions between financial institutions and whether it was exempt from VAT. After summarising the relevant principles from its case law the CJEU stated:

> "28. In order to determine whether swift services satisfy that criterion it is necessary to examine, first, whether the provision of those services is capable of giving rise to changes of a legal and financial character similar to those resulting from interbank payments or transactions in securities themselves and, second, whether SWIFT's responsibility towards its clients is limited to technical aspects or whether it extends to specific, essential aspects of those financial transactions.
>
> 29 As regards the first aspect, Nordea maintains, first, that, without swift services, international payments or cross-border transactions in securities would be impossible in practice and, second, that only the registration of securities in the client's securities account affords protection against third parties, although the ownership of the securities has already been transferred at the time the transaction is made on the stock exchange, before the transmission of messages sent in the SWIFT network, with the result that those services implicitly affect the legal and financial situation of financial institutions and that of their clients.
>
> 30 However, as indicated by the referring court, all the Member States who have submitted observations and the European Commission, without being challenged by Nordea, swift services are electronic messaging services by means of which payment orders and orders concerning transactions in securities are transmitted from one financial institution to another in a secure and reliable manner, and SWIFT does not have access to the actual content of the messages thereby transmitted.
>
> 31 Even if it were accepted that, as Nordea submits, swift services are, on a number of markets, essential and the only services available, the mere fact that a constituent element is essential for completing an exempt transaction still does not warrant the conclusion that the service which that element represents is exempt (*SDC*, paragraph 65).
>
> 32 It is also not disputed that, although orders for transfers of funds or those which are intended to effect certain transactions in securities must be transmitted via computer systems approved by SWIFT in order to guarantee their security, ownership rights as regards those

funds or, as the case may be, those securities is transferred only by the financial institutions themselves in the context of legal relations with their own clients.

33 It is also clear from the case-law cited in paragraphs 24 to 26 of this judgment that the legal and financial changes which are such as to characterise a transaction exempt from VAT result only from the transfer of ownership, actual or potential, in funds or securities, without it being necessary for the transaction thereby performed to be effective against third parties.

34 Accordingly, if swift services are electronic messaging services which are simply intended to transmit information, they do not by themselves perform any of the functions of one of the financial transactions referred to in Article 13B(d)(3) and (5) of the Sixth Directive, that is to say those which have the effect of transferring funds or securities, and do not therefore possess the character of such transactions.

35 As regards the second aspect, Nordea submits that SWIFT's very extensive financial responsibility for the correct and secure transmission of financial messages, which has an annual ceiling of EUR 75 million per incident and EUR 150 million per year, and SWIFT's role as the guarantor of the regularity of the financial transfers mean that swift services are not purely technical services.

36 However, the importance of the financial consequences of SWIFT's responsibility cannot be relevant in order to determine whether that responsibility extends to specific, essential elements of the financial transactions at issue in the main proceedings.

37 Furthermore, as the Belgian Government submitted, according to point 4 of the Swift General Terms and Conditions of 1 January 2010, available on the SWIFT website, the contractual obligations of that undertaking are limited to the technical aspects of the messaging service, in particular, implementation, activation, connection, maintenance and software licences, and SWIFT is thus only responsible for the proper transmission of financial messages via the approved computer system.

38 Therefore, as is clear from the conclusions drawn in paragraph 34 of this judgment and as argued by all the Member States which have lodged observations and the Commission, SWIFT's contractual responsibility to Nordea concerns only the obligation to ensure the security and legibility of the data transmitted and the obligation to make good any damage caused by a defective or delayed transmission of data.

39 Consequently, it must be held that, in the case in the main proceedings, SWIFT's responsibility is limited to technical aspects and does not extend to specific, essential elements of the financial transactions at issue in the main proceedings.

40 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 13B(d)(3) and (5) of the Sixth Directive must be interpreted as meaning that the exemption from

> VAT under that provision does not cover swift services such as those at issue in the main proceedings."

58. In *Tiercé Ladbroke SA and Derby SA v Belgium* (Cases C-231/07 and C-232/07) [2008] ECR 1-00073 the CJEU held, at [25], that the exemption did not include:

> "… the supply of services by an agent [a "*buraliste*"] acting on behalf of a client which carries out the activity of accepting bets on horse races and other sporting events, consisting of acceptance by the agent of bets on behalf of the client, registration thereof, confirmation to the client, by presentation of the betting slip, that a bet was made, collection of funds, payment of winnings, the sole assumption of liability as regards the client for the management of the funds collected and for thefts and/or losses of money and where the agent receives remuneration in the form of commission from the client in return for that activity."

59. *Revenue and Customs Commissioners v AXA UK plc* (Case C-175/09) [2010] STC 2825 ("*AXA*") concerned the proper VAT treatment of supplies by Denplan Ltd which operated dental payment plans on behalf of dentists under which payment was made by patients via direct debit from their bank accounts to Denplan which accounted to the dentist for payments received. The service of "collecting payments" was described by the ECJ, at [19] as comprising of:

> "… the collection, processing and onward payment of sums of money due from third parties, namely patients, to Denplan's clients, namely, dentists. That service consists, in particular, in transmitting information to the third party's bank calling for the transfer of a certain sum of money from the third party's bank account to the service supplier's bank account in reliance on a standing authorisation given by that third party to his or her bank, and subsequently giving an instruction to the service supplier's own bank to transfer funds from its account to the client's bank account. Meanwhile, the service supplier sends to its client a statement of the sums received and contacts third parties from whom it has not received a transfer of the sum requested."

60. The Court held, at [32], that those services were specifically excluded from the exemption in Article 13B(d)(3) as "debt collection" and were therefore liable to VAT at the standard rate ruling, at [36], that:

> "Article 13B(d)(3) ... is to be interpreted as meaning that the exemption from VAT provided for by that provision does not cover a supply of services which consist, in essence, in requesting a third party's bank to transfer to the service supplier's account, via the direct debit system, a sum due from that party to the service supplier's client, in sending to the client a statement of the sums received, in making contact with the third parties from whom the service supplier has not received payment and, finally, in giving instructions to the service supplier's bank to transfer the payments received, less the service supplier's remuneration, to the client's bank account."

61. Clearly this this decision was unexpected as is apparent from the observation of Rimer LJ after *Axa* had returned to the Court of Appeal (reported at [2012] STC 754) where he said, at [59]:

> "I can understand Axa's dismay about the course of events that unfolded in Luxembourg. The suggestion that Denplan's service was 'debt collection' had not been uttered in the domestic proceedings. Whilst Axa had asserted that Denplan's service fell within the exemptions and HMRC had argued the contrary, it was no part of HMRC's case that that was because it was a 'debt collection' service."

62. The issue that arose before the CJEU in *Bookit II v HMRC* [2016] EUECJ C-607/14, in which Bookit had supplied Odeon Cinemas services which included acting as agent for the sale of tickets and made a separate supply to the cinema goer of card handling service payments, was whether the supply of card handling service payments fell within the scope of the exemption. The CJEU said:

> "38. In that regard, the Court has previously held that a transfer is a transaction consisting in the execution of an order for the transfer of a sum of money from one bank account to another. It is characterised in particular by the fact that it involves a change in the legal and financial situation existing, on the one hand, between the person giving the order and the recipient and, on the other, between those parties and their respective banks; and, in some cases, between those banks. Moreover, the transaction which produces the change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer within the meaning of Article 135(1)(d) of the VAT Directive (see, to that effect, the judgments of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 53, and of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 25).
>
> 39 Further, the wording of Article 135(1)(d) of the VAT Directive does not in principle preclude a transfer from being broken down into separate services which then constitute 'transactions concerning' transfers within the meaning of that provision (see, to that effect, judgment of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 64). While it is not inconceivable that the exemption at issue may extend to services which are not transfers per se, the fact remains that that exemption can relate only to transactions which form a distinct whole, fulfilling in effect the specific, essential functions of such transfers (see, to that effect, judgment of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraphs 66 to 68).
>
> 40 It follows from the foregoing that, in order to be characterised as a transaction concerning transfers within the meaning of Article 135(1)(d) of the VAT Directive, the services at issue must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a transfer and, therefore, having the effect of transferring funds and entailing changes in the legal and financial situation. In that regard, a service exempted under the VAT Directive must be distinguished from the supply of a mere physical or technical

service. To that end, it is relevant to examine, in particular, the extent of the liability of the supplier of services, in particular the question whether that liability is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions (see, to that effect, judgments of 5 June 1997, *SDC*, C-2/95, EU:C:1997:278, paragraph 66, and of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 24).

41 It must also be stated that, since the functional aspects are decisive to the determination of whether a transaction concerns a transfer for the purposes of Article 135(1)(d) of the VAT Directive, the test that makes it possible to distinguish a transaction that has the effect of transferring funds and bringing about changes in the legal and financial situation within the meaning of the case-law cited in paragraphs 38 to 40 of this judgment, which falls within the scope of the exemption concerned, from a transaction that does not have such effects and therefore, is outside its scope, is whether the transaction under consideration causes the actual or potential transfer of ownership of the funds concerned, or fulfils in effect the specific, essential functions of such a transfer (see, to that effect, judgment of 28 July 2011, *Nordea Pankki Suomi*, C-350/10, EU:C:2011:532, paragraph 33).

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

The Court Continued:

"47. There is no dispute, given that description, that the provider of such a service does not itself directly debit or credit the accounts concerned, and that it does not act by accounting entries, and that it does not even instruct such debit or credit, since it is the purchaser who, by using his or her payment card to make a purchase, decides that his or her account will be debited in favour of a third party.

…

51. It follows from all the foregoing that the provider of a card handling service, such as that at issue in the main proceedings, plays no specific and essential part in achieving the changes in the legal and financial situation that are the result of a transfer of ownership of the funds concerned and that, according to the Court's case-law, can be

> said to be characteristic of a transaction concerning payments or transfers that is exempted under Article 135(1)(d) of the VAT Directive, but does no more than provide technical and administrative assistance for the obtaining of information and the communication of that information to its merchant acquirer, and to receive, by the same means, the communication of information that enables it to effect a sale and to receive the corresponding funds
>
> …
>
> 53. A card handling service, such as that at issue in the main proceedings, which accordingly consists, in essence, in an exchange of information between a trader and its merchant acquirer, with a view to receiving payment for a product or service offered for sale, cannot fall within the scope of the exemption provided in Article 135(1)(d) of the VAT Directive for transactions concerning payments and transfers."

63. The CJEU adopted the same approach in *HMRC v National Exhibition Centre* (Case C-130/15) [2016] STC 2132 ("*NEC*") as it had in *Bookit II* holding card handling/payment processing services for customers was not an exempt supply.

64. The relevant principles from these authorities can, for present purposes, be summarised as follows:

(1) the financial service exemption is to be construed strictly (*SEM*, *SDC*):

(2) to fall within the exemption the service provided must have the effect of transferring funds and entail changes in the legal and financial situation (*SDC*);

(3) it must also be distinguished form a mere physical or technical supply such as a data-handling system available to a bank (*SDC*);

(4) a functional transfer (eg netting off accounts) leading to the change in the legal and financial position is indistinguishable from a *real* transfer for the purposes of the exemption (*FDR*, *ATP*);

(5) electronic messaging services simply intended to transmit information do not perform any of the functions of one of the financial transactions within the exemption (*Nordea*);

(6) the importance if the financial consequences cannot be relevant (*Nordea*); and

(7) the services in issue must, viewed broadly, form a distinct whole fulfilling the specific essential functions of a transfer and having the effect of transferring funds and entailing changes in the financial and legal situation (*Bookit II v HMRC*, *NEC*).

65. It is clear that when a Customer hands over his or her money to pay a utility bill to an Agent there is a change in the legal and financial position between that Customer and Network's Client in that the Customer no longer owes the Client the amount stated on that utility bill. The Customer, having settled the outstanding amount in accordance with the instructions on the bill would have an absolute defence if the Client were to issue proceedings to recover that sum.

66. It is therefore necessary to consider whether the service provided by Network has the effect of transferring funds from a Customer to a Client, albeit via an Agent.

67. Having concluded that any cash payment handed over by a Customer to an Agent is received on behalf of a Client, not Network, and that any "netting off" is undertaken by a Client, not Network (see paragraph 42, above) it follows that the polling of PayPoint terminals located in an Agent's premises by Network and the transmission of the information extracted to its Clients which enables the Clients to net off the appropriate accounts cannot fall within the exemption.

68. Accordingly, for the above reasons, Network's appeal succeeds and is allowed.

69. With regard to the appeal by Collections, given that it is common ground that the supplies it makes to Clients is standard-rated, either because it does not fall within the exemption or is "debt collection" within the decision of the CJEU in *AXA*, it is not necessary for us come to any conclusion on the matter. Indeed, as the Court of Appeal recently confirmed, in *Hamnett v Essex County Council* [2017] 1 WLR 1155 that although there is a narrow discretion to proceed where the issue between the parties is academic (as in the present case) it is to be exercised with caution—even when a point of public law of some general importance is involved.

70. Therefore, insofar as it is necessary for us to do so, we confirm that the supplies by Collections to its Clients are standard-rated and determine its appeal accordingly.

*Appeal Rights*

71. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 MAY 2017**