TC01965

Appeal number: TC/2009/13596

VAT – fee paid by passengers to appellant – whether consideration for a supply – yes – whether supply zero rated as "making of arrangements" for the supply of transport of passengers in an aircraft designed to carry at least 10 passengers – no – whether exempt as a supply to meet the direct needs of aircraft or its cargo – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORWICH AIRPORT LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MARK BUFFERY

Sitting in public at Bedford Square, London on 13 & 14 March 2012

Mr M Patchett-Joyce, Counsel, instructed by JTK Associates LLP, for the Appellant

Mr S Singh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Norwich Airport Limited ("NAL") appeals against a review decision of HMRC dated 22 July 2009 refusing to repay output tax of £164,622.61 accounted for by NAL in respect of VAT periods 05/07 – 08/08 inclusive.

The facts

Norwich Airport Ltd

2. The primary facts were uncontroversial. Evidence was given by Mr Andrew Bell who is Chief Executive of NAL and Finance Director of its holding company, Omniport Holdings Ltd.

3. NAL is the licensed operator of Norwich Airport. It provides facilities and services to airlines to enable them to operate passenger flights to and from Norwich airport. The standard of the facilities and services it offers is governed in part by the terms on which it holds its licence from the Civil Aviation Authority and in part by the terms of its contracts with the airlines.

4. We were shown a copy of NAL's terms and conditions in its contracts with airlines (but not helicopter operators) with effect from 1 April 2007. Under these NAL permitted the airlines to use the airport and the facilities offered by NAL. In return the airlines were liable to pay various fees, such as landing charges, passenger charges, and ground handling charges.

5. We were also shown an example of a contract between NAL and one particular airline. This was dated after the matters the subject of this appeal but there was no suggestion that it was materially different to one that would have been in force at that time. In it the airline committed to a certain number of flights from the airport and NAL guaranteed a sliding scale of fees per departing passenger. The agreement contained a great many other terms as one might expect in a commercial agreement but which were not relevant to this appeal.

The airport development fee

6. In late 2006 NAL decided to introduce a levy on passengers using the airport to depart on flights. The purpose of the levy was to raise funds to enable NAL to carry out improvements and enhancements to its infrastructure and passenger facilities at Norwich Airport.

7. The decision to charge the levy, known as the airport development fee ("ADF"), was publically announced on 12 March 2007. The levy was charged with effect from May 2007. The levy was payable by all persons departing from Norwich Airport on a flight other than:

(a) Persons on airlines diverted to land at Norwich Airport;

(b) airline crew; or

(c) passengers of light aircraft charter operators.

8. NAL refunded the levy to anyone:

(a) who had booked a flight before the announcement that the charge would be introduced; or

(b) whose flight was cancelled.

9. The ADF was originally payable at the rate of £3 per adult, £1 per child aged 2-15 years, and £0 for babies. The rates have changed since introduction but nothing turns on that for this appeal.

10. At the time of events the subject of this appeal approximately 10% of the passengers leaving from the Airport left on helicopter flights and were transported to oil and gas installations. These persons did not go through the same check-in and security processes as the ordinary passengers on chartered and scheduled aeroplane flights. Once checked-in helicopter passengers did not proceed to the ordinary departure lounge but went to a separate briefing room. The ADF was paid by the helicopter operator in respect of these passengers on their helicopter flights. NAL invoiced the helicopter operator monthly for ADF per passenger carried by the helicopter operator and the helicopter operator paid the invoice.

11. For the other 90% of passengers, travelling by aeroplane, the process was that once they had checked in, they had to go through a compulsory security check and then move into the departure lounge. Only from the departure lounge could they board their flight.

12. Since the introduction of the ADF, in order to get to the area where the compulsory security checks were carried out and then to access the departure lounge, the passengers first had to pass through some gates. Those gates were opened automatically on presentation of a bar-coded ticket. The tickets could be purchased from NAL in advance via travel agents, at check-in, or from machines situated in the check-in hall. The tickets were described as an "Airport Development Fee ticket" on a board above the automatic gates.

13. There was no other way to reach the security checks area and departure lounge other than to pass through these gates. And the only way to open the gates was to present an ADF ticket.

14. We mention for completeness that, although disabled passengers had to purchase the ADF ticket, they had a separate route to security which did not involve passing through the automatic gates. It was not suggested that anything turned on this in the appeal: we find that disabled passengers, like able-bodied passengers, needed to hold an ADF ticket to reach security.

15. The VAT at issue in this appeal was accounted for by NAL on the fees paid for these ADF tickets and on the ADF fees charged on the invoices to the helicopter operators.

Recalcitrant passengers

16. Apart from the passengers mentioned at paragraph 7 above, not all passengers on airlines paid the ADF. Some passengers refused to pay it. Refusal to pay meant that they did not have the ticket necessary to open the gates and proceed through security to the departure lounge and board their flight. In such a case it was (and remains) the policy of NAL for a member of staff to speak to the passenger. The member of staff found out why the passenger did not wish to pay the fee. The reasons given varied. It might be through lack of money or it might be obstinate refusal. The member of staff took a note of the name and address of the passenger.

17. Whatever the reason for the non-payment, the member of staff would also give the non-paying passenger a free ticket which would allow him to pass through the gates and proceed on to the security checks and departure lounge. The numbers of persons refusing to pay the fee was very small in proportion to the numbers of persons passing through the airport, about 1 in 1,000. Mr Bell's evidence was that the larger proportion of these "non-payers" were those who would not have been expected to pay in any event, such as persons who had booked the tickets unaware that the ADF would be charged.

18. Later, depending on the reason for the non-payment, NAL may have sent a letter to the non-paying passenger regretting the non-payment and suggesting that the person should not book flights from Norwich Airport if they did not wish to pay the fee. Mr Bell said so far as he was aware no one had refused to pay the ADF on a second occasion.

19. We find that the reason why NAL adopted this policy of giving free tickets to passengers refusing to pay was goodwill: NAL has contracts with the various airlines who operate out of Norwich Airport. NAL did not wish to refuse passengers the right to board their flight as this could risk difficulties in NAL's relationship with its main customers, the airlines.

Whether compulsory

20. It was originally NAL's case that the ADF was a compulsory fee, although in front of the Tribunal it was not entirely consistent on this. On the first day of the hearing Mr Patchett-Joyce put the case that the ADF was represented to the public as a compulsory levy but in practice it was not compulsory because NAL waived the fee if anyone refused to pay it.

21. On the second day of the hearing, Mr Patchett Joyce submitted that the ADF was compulsory as NAL had the right (as owner and occupier of the land) to charge fees for entering onto their land. Nevertheless, for commercial reasons, NAL sometimes chose to waive the compulsory charge.

22. Mr Bell's evidence was that he considered it a compulsory levy payable by all passengers departing Norwich Airport.

23. As mentioned above we were shown copies of NAL's leaflets about the ADF issued at the time of and shortly after its introduction. Most of the text is devoted to detailing the improvement works to the airport which the levy was intended to help fund. But the leaflets also say:

> "All passengers departing from Norwich International will be required to pay the development fee."
>
> "…You must purchase your [ADF] ticket before proceeding through Security to Departures in order to be able to fly."

24. We were shown a copy of NAL's current entry on its website dealing with the ADF. It says:

> "The airport reserves the right to refuse to handle any passengers who do not pay the ADF. All departing passengers must pay the fee and be in possession of a valid ADF ticket to enter the departure lounge at the airport. Your ADF ticket will be checked by security staff as you enter the search area."

The 2010 version merely said, reflecting the earlier leaflets, that:

> "You must purchase your ticket before proceeding through security to Departures in order to be able to fly."

25. Mr Bell's evidence was that the change in wording by 2011 did not reflect any change in the position. All that had happened is that the fee had increased to £10 per adult and decreased to £0 for all children. In order to prevent adult passengers evading the levy by obtaining the free tickets for children from the ticket machines and using these children's tickets to open the automatic gates, NAL introduced a new check on the ADF tickets by the security operatives. That extra check was not in place at the time of the events at issue in this appeal.

26. HMRC's view was that the fee was compulsory.

27. Whether the fee was compulsory is inextricably linked to the question of whether it was paid in consideration of a supply. We reach a conclusion on this below in paragraph 49-50.

The purpose of the ADF

28. NAL published the existence of the ADF charge on its website, through leaflets and by erecting signage in the terminal building. One sign said "Your Airport Development Fee has helped contribute towards the £15m spent on new facilities at Norwich International Airport. Thank you for supporting the growth of your local airport."

29. We find that the monies raised by the ADF were used to help fund various projects at Norwich Airport, such as improving the apron (for parking of aircraft), improving the radar room, new plasma information screens, car park extensions and extending the passenger terminal and improving its facilities.

30. We move on to apply the law to the facts.

Was there a supply?

31. The Value Added Tax Act 1994 ("VATA") provides at Section 5:

> "5(2)(a) "supply" …includes all forms of supply, but not anything done otherwise that for a consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration (including, of so done, the granting, assignment or surrender of any right) is a supply of services."

32. The appellant's primary case is that the ADF was outside the scope of VAT because the departing passengers did not receive any service in consideration for their payment of ADF. Merely because a payment was made, said Mr Patchett-Joyce, did not mean that the passengers received anything in return for it.

33. It is the appellant's case that the payment of the fee was not a payment for being allowed to access the security process or the departure lounge. Only the boarding pass issued at check in allowed a passenger through the security process and on board a flight.

No nexus between improvement works and payment of fee

34. The appellant likened the ADF to the levy considered by the CJEU in the case of *Apple & Pear Development Council v C&E Comms* C- 102/86 [1988] STC 221. In that case the Council had powers under a statutory instrument to raise a levy on apple and pear producers to enable the Council to meet administrative and other expenses incurred in the exercise of its functions to research and promote the apple and pear industry. HMRC claimed that the levy raised was subject to VAT.

35. The CJEU did not agree. It found that the mandatory charge was not in consideration of the exercise of the council's function to promote the apple and pear industry: there was no direct link from one to the other. It said:

> [11] …. for the provision of services to be taxable…., there must be a direct link between the service provided and the consideration received.
>
> [12] It must therefore be stated that the concept of the supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received.
>
> [13] The question then arises whether there is a direct link between the exercise of its functions by the Council and the mandatory charges which it imposes on growers.
>
> [14] It is apparent …that the Council's functions relate to the common interests of the growers. In so far as the Council is a provider of services, the benefits deriving from those services accrue to the whole

> industry. If individual appeal and pear growers receive benefits, they derive them indirectly from those accruing generally to the industry as a whole…..
>
> [15] Moreover no relationship exists between the level of the benefits which individual growers obtain from the services provided by the Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the Council, whether or not a given service of the Council confers a benefit upon him.
>
> [16] It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive."

36. The appellant's view was that the situation with the ADF was identical. NAL raised a compulsory levy to fund development works, the benefit of which would be too remote to any individual passenger to be consideration for the payment of the ADF.

37. We agree with this as far as it goes. Indeed, HMRC did not suggest otherwise.

38. There was no direct link because the benefit of the improvement works would be for airlines and passengers generally and the payment of the levy by each individual passenger had no direct relationship to the level of benefit, if any, he might receive. A person could pay the levy and never use the airport again and therefore entirely fail to benefit from any of the improvements. As a matter of English law, there was not even a contract for the improvement works because the explanation of what the ADF would be used for was no more than a statement of intent by NAL and far too vague to amount to an enforceable contract with the passengers paying the ADF.

Motive

39. Further, we are unable to agree with the appellant's case that the ADF was a compulsory payment made by passengers into NAL's airport development fund. The VAT treatment of a payment does not depend on its characterisation by the recipient of the fee. While it is clear to the Tribunal that, whether for public relations or otherwise, NAL characterised the fee charged as an "airport development fee", we have found there was no direct link between the payment being made and the airport improvement works.

40. We drew to the attention of counsel the case of *BLP Group PLC v Comrs of Customs & Excise* C-4/94. In this case, the question was whether BLP was entitled to recover the input tax it incurred on professional services which enabled it to sell

shares it owned. Its purpose in selling the shares was to realise capital to fund its taxable business activities. The sale of the shares was exempt. The CJEU ruled the VAT irrecoverable:

> "where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid, even if the ultimate purpose of the transaction is the carrying out of a taxable transaction."

41. Although the factual issue was quite different, it is clear that the CJEU considered motive to be irrelevant. It said at [24] that requiring enquiries to be made of a trader's intention when making a supply would be contrary to the objective of legal certainty. So we would say here, NAL's *motive* for raising the levy is irrelevant. It is irrelevant that NAL used the monies raised to fund infrastructure improvements: the question is whether the ADF was paid in consideration of a service.

Why was the levy paid?

42. There was a very real difference between the *Apple & Pear* case and this one: the apple and pear council was able to raise the levy under its statutory revenue raising powers. NAL did not have any statutory revenue raising powers. So why did passengers pay the levy?

43. The recital of facts above makes this clear. The passengers did not pay a levy. They bought a ticket. Without the ticket the passengers could not pass through the automatic gates, and from there go through the security checks and on to the departure lounge. If they did not buy the ticket, effectively they would be unable to board their flight.

44. Although the appellant appeared to accept at the start of the second day of the hearing that the ADF was an admission fee, as reported in paragraph 21 above, otherwise it maintained the position that the ADF was not in consideration of a supply. We deal with its arguments below.

Not admission fee?

45. The appellant said the ADF was not an admission fee to access the airport's security area or for access to the departure lounge. Only the boarding pass could give the passenger the right to pass through security, into the departure lounge and onto the aeroplane.

46. We accept the appellant's point about the boarding card, as did HMRC, but it is irrelevant. The passenger would not even be able to reach security unless it first used an ADF ticket to open the automatic gates. The passengers needed both the ADF ticket and the boarding pass in order to fly.

Gates were convenient method of collection?

47. Mr Patchett Joyce also described the levying of the fee at the point of movement from the check-in hall to the departure lounge as merely a convenient method of collection. It was also his case that passengers paid the ADF through moral compulsion and not because NAL had any legal power to compel payment of it.

48. Our view is that it does not matter that the ADF ticket could be purchased in advance or immediately before going through the authomatic gates. The point is that unless ADF was paid a passenger did not obtain the necessary ticket to open the automatic gates. The automatic gates were not merely a convenient method of collection. They were the only way to collect the fee. There is no evidence that any passenger would have paid the fee if the gates had not been there. As a matter of common sense, we find no one would have paid the fee if they had not perceived the necessity of paying it in order to proceed to the compulsory security check. It was necessity and not moral compulsion.

Not compulsory?

49. Mr Patchett-Joyce's view was that the ADF fee could not be in consideration of a supply unless it was compulsory and it was not compulsory because passengers who refused to pay obtained a ticket without payment.

50. We do not agree. The fee was represented (by the existence of the gates barring entrance and by NAL's literature) as compulsory. Although NAL had a policy of waiving the fee for persons unwilling to pay it, this was to preserve its goodwill with its main clients (the airlines) and not because the fee was optional. And the fact that NAL had a policy to waive the fee was not general knowledge: the only persons who discovered it were those who made a fuss and refused to pay it. We find that it was, as Mr Patchett-Joyce said at the start of the second day's hearing, NAL's prerogative to waive the fee in some cases if it chose to do so, but that did not make the fee optional on the part of the passengers. We find that the levy was compulsory although NAL chose to waive it rather than bar entry.

Helicopter passengers

51. Helicopter passengers did not pass through the automatic gates in order to board their flight and therefore did not need an ADF ticket.

52. We consider that even if the ADF payment made in respect of the helicopter passengers was paid for a different reason, or a different supply, it would not affect the nature of the supply made to the approximately 90% of passengers who had to buy the ADF ticket to pass the automatic gates. We deal with the helicopter passengers below.

53. For the 90%-odd aircraft passengers, it was apparent that the only way to reach the compulsory security checks was to pass through the automatic gates. And the only way to do this was to hold an ADF ticket. A disabled passenger had a different, presumably easy-access route, but were still required to hold an ADF ticket.

Conclusion on ADF paid by airline passengers

54. The ADF ticket was the only means of reaching the compulsory security checks as the automatic gates had to be opened in order to get there. There was a direct link between the consideration paid for the ticket and the ability to pass through the gates.

55. NAL had no statutory revenue raising powers, but it did have the right to prevent entry on to the whole or part of its land and in erecting these gates we find it exercised that right.

56. For the aircraft passengers there was a direct link between the payment of the ADF and passage through the automatic gates placed immediately in front of security. They paid the fee in order to access security and thereafter be in a position (assuming they also held the correct boarding pass) to depart on their flight.

57. The passengers paid the fee to access the security and departures section of the airport. Permitting a person to access land is a supply. Such a supply is subject to VAT. It cannot be exempt under Group 1 of Schedule 9 VATA as it is not a right to *occupy* land.

Was the supply ancillary to zero rated transport?

58. In his skeleton argument Mr Patchett Joyce briefly suggested that the fee might be (if in consideration for anything) in consideration for a supply that was ancillary to an overall supply of transport to the passenger zero rated under Item 10(b) Group 8 Schedule 8 VATA. An ancillary supply within the meaning of *Card Protection Plan C-349/96* takes its VAT status from the supply to which it is ancillary.

59. We are unable to agree. A supply can only be ancillary where it is between the same parties: any supply by NAL to passengers could not be ancillary to any supply made by the airlines to the passengers any more than it could be ancillary to a supply by NAL to the airlines.

60. NAL did not supply passenger transport. Therefore, the supply of the right to access the security and departures section of the airport could not be a supply ancillary to the supply of transport made to the passenger. NAL supplied the former and the airline the latter.

61. Mr Patchett-Joyce considered that NAL made supplies zero rated by virtue of Item 10(b) of Group 8 of Schedule 8: the making of arrangements for passenger transport. However, we had no evidence that NAL made any supplies to the passengers other than its supply in consideration of the ADF. If, apart from the ADF itself which we consider below, NAL made Item 10(b) supplies, they were made to the airlines. A supply to the passengers could not be ancillary to a supply to airlines.

62. So we conclude that the ADF (in respect of aircraft passengers) was paid in consideration of the right for the passengers to enter the security and departures area of the airport. That supply was not ancillary to any other supply and therefore its VAT status is determined independently of any other supply. And a right to enter (but

not occupy) land is a standard rated supply unless there is an applicable exemption or zero rating.

Helicopter passengers

63. The reason why the helicopter operators paid the ADF is less obvious. We were given virtually no evidence on this.

64. It was the appellant's case that the fee was compulsory. We find the invoice clearly demonstrates that NAL considered the ADF as due and payable and not in any way voluntary. It states "all accounts for airport services are payable within 14 days…" Another note requires interest to be paid on any overdue invoices. We find that payment of the ADF in respect of helicopter passengers by the helicopter operators was compulsory.

65. The reason the helicopter operator paid the ADF is not apparent from the face of the invoice we were shown which refers only to the "airport development fee" . Nor were we shown any contract between NAL and the helicopter operators. Nevertheless we find it was clear that NAL provided services to the helicopter operators. It clearly gave the helicopter operator, its staff and passengers the right to come on to Norwich Airport and use its facilities. No doubt it provided some other services to the helicopter operators, some of which may well have been zero rated under Group 8 of Schedule 8.

66. Nevertheless it was also clear that the ADF was a new charge and that the ADF imposed on helicopter passengers was imposed at the same time as ADF on airline passengers. It was charged per passenger. It was NAL's view that it was a disbursement paid by the helicopter operator on behalf of its client, the employer of the passengers. Whether or not it was a disbursement, it is clear NAL viewed it as a charge raised in relation to the passengers.

67. We find on the balance of the evidence in front of us that this ADF, by analogy with the ADF charged to airline passengers, was charged for the right for the passengers to access the helicopter departure section of the airport.

Was the supply ancillary to zero rated transport?

68. In respect of the helicopter passengers, a different position pertains. Here the ADF was charged to the helicopter operator. It was implicit in the evidence in front of us that NAL makes other supplies to the helicopter operators, such as giving them the right to operate their helicopters out of the airport. Clearly the other rights granted by NAL to the operator would be useless unless the operator's passengers could actually board their flight from the airport.

69. While this might suggest that the ADF charged to the helicopter operators could be ancillary to other supplies made by NAL to the operators, we were given virtually no evidence on what other supplies NAL made to the helicopter operators. As mentioned above, we had no evidence of a contract between NAL and the helicopter

operator and virtually no evidence on this point from Mr Bell. The contracts with the airlines indicated that separate charges were made for separate facilities. Therefore we have to conclude that NAL has not made out its case that this supply for which the ADF was paid in respect of helicopter passengers was ancillary to another supply.

70. We note that in any event, even were it to succeed in such a case, it would need to show that the supplies were ancillary to VAT-free supplies, such as supplies within Group 8 of Schedule 8 or article 148(g) PVD. These supplies are limited in nature and NAL gave no evidence of any supplies it made to helicopter operators which were within these provisions: it has therefore failed to make out its case that the supply for which ADF was paid by the helicopter operators was ancillary to any such VAT-free supply.

Overall conclusion on appellant's primary case

71. In conclusion, we find the ADF paid by passengers and helicopter operators was paid in consideration of a taxable supply of the right for the passengers to access the departures part of the airport. It was the appellant's secondary case that, *if* contrary to its primary case, NAL made a supply, then that supply was free of VAT under either or both:

(1) Item 10 of Group 8 of Schedule 8 as the "making of arrangements for… the supply of any service included in [item 4]"; and/or

(2) Article 148(g) Principal VAT Directive as a supply "to meet the direct needs of the aircraft …or of their cargos".

We go on to consider this.

<u>Making of arrangements for transport of passengers by air?</u>

The law

72. Group 8 of Schedule 8 (the zero rating schedule) of VATA provided in so far as relevant:

> Item 4
>
> Transport of passengers –
>
> (a) in any vehicle, ship or aircraft designed or adapted to carry not less than 10 passengers;…..
>
> Item 10
>
> The making of arrangements for –
>
> (a) the supply of, or of space in, any ship or aircraft;
>
> (b) the supply of any service included in items 1 and 2, 3 to 9 and 11; or
>
> (c) the supply of any goods of a description falling within items 2A or 2B, or paragraph (d) of item 3

73. The appellant considered that if NAL made a supply it would be within Item 10. Mr Patchett-Joyce's view was that if the Tribunal found there to be a supply it would be because of the link between the improvements to Norwich Airport and the payment of the ADF. If this were the case, then he saw NAL as providing in return for the ADF a service of the necessary facilities for aircraft to land and take off and this would be within Item 10. It would be within item 10 either as the "making of arrangements" or as the supply of a "service included in items 1 and 2, 3 to 9 and 11" specifically within item 4 being "the transport of passengers… in any …aircraft designed …to carry not less than 10 passengers". For short we will refer to this as a "service included in [item 4]"

74. Of course the appellant has won the case (which was in any event not disputed by HMRC) that there was an insufficient link between the improvements to Norwich Airport and the payment of the ADF for the former to be a supply in consideration of the latter.

75. But it has also lost its case that there was no supply. This is because we have found that the ADF was consideration for a supply of a right to enter onto land. Nevertheless, it is still NAL's case that this supply would be within item 10 either as the "making of arrangements" or as the supply of a "service included in [item 4]".

76. So we have to consider the meaning of both:

(a) the "making of arrangements" and

(b) "service included in ….."

Meaning of 'making of arrangements'

77. "Making of arrangements" appears to be a phrase used in UK domestic legislation and not used in the EU legislation which the UK domestic legislation implements. The phrase "making of arrangements" was used in a number of places in UK VAT legislation.

Insurance exemption

78. The Sixth VAT Directive provided (as does the Principal VAT Directive 2006/112 EC ("PVD") which has replaced it) for exemption, not only of "insurance…transactions" but also of "related services performed by insurance brokers and insurance agents". Originally, Parliament implemented this into UK legislation with the phrase "the making of arrangements for the provision of any insurance or reinsurance in items 1 and 2" (Item 3 of Group 2 of Schedule 5 to the Finance Act 1972). After 19 March 1997 the legislation was amended and the phrase "making of arrangements" disappeared.

79. There were a number of Tribunal cases on the meaning of the phrase before it disappeared from the insurance exemption. In *Barclays Bank plc* [1991] VATTR 466 the Tribunal held that the taxable person was making arrangements for the provision of insurance where it mail-shot selected customers with offers of an insurance product

and earned commission if the customer subsequently entered into an insurance contract. In *Countrywide Insurance Marketing Ltd* [1993] VATTR 277 the Tribunal held that the taxable person was making arrangements for the provision of insurance when it negotiated policies with insurance companies which were then available to be sold by its members to their customers. Similarly in *Curtis Edington & Say Ltd* (1994) VTD 11699 the Tribunal found the negotiation of a policy with the insurer in advance was the making of arrangements for the provision of insurance even though the taxable person did not actually negotiate the sale of the individual insurance contracts to the customers.

80. The thread underlying these cases is that the Tribunal saw the "making of arrangements for the provision of … insurance" as applying to the services of broking or something similar to it. The taxable person, to be entitled to exemption, needed to show that in some way, directly or indirectly, it was instrumental in bringing about a contract of insurance being entered into by an insurance company and a person seeking insurance.

Finance exemption

81. Similarly the original version of the finance exemption (contained in Item 3 of Group 5 of Schedule 5 to the Finance Act 1972) included exemption for "the making of arrangements for any transaction comprised in item 1 or 2."

82. In the case *Customs & Excise Comrs v Civil Service Motoring Association Ltd ("CSMA")* [1998] STC 111, the Association promoted a branded credit card to its members. In return the bank issuing the credit card paid the Association commission calculated by reference to the value of the transactions charged to the cards by the association's members. The Association considered that its services were exempt financial services as the making of arrangements for the grant of credit (under what was by then Item 5 of Group 5 of Schedule 6 VATA but which had been item 3).

83. The UK legislative provisions implemented (if imperfectly) what was then Article 13B(d)(1) of the Sixth VAT Directive which included exemption for the "negotiation of credit". All parties in the case agreed that "making of arrangements" referred to negotiations for the grant of credit: they were divided on whether it had to be negotiations for a specific grant of credit to a specific debtor or more generally arranging credit for a large group of persons. Mummery LJ said at page 118:

> "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'…."

The supply was held to be exempt.

Disposal of the dead

84. The phrase "making of arrangements" is still used in Group 8 of Schedule 9 where there is an exemption for the "making of arrangements for or in connection with the disposal of the remains of the dead". It is interpreted as including many services ancillary to burials and cremations, such as in *CJ Williams' Funeral Service of Telford v C & E Comrs* (1999) VAT Decision 16261.

85. We find the use of the phrase "making of arrangements" in this exemption is of far less relevance to the question in front of this Tribunal, as unlike its use in the old insurance and financial exemptions or in the current transport zero-rating, it is not used in the context of the making of arrangements *for another supply to take place*. It refers to making arrangements "….for or in connection with the disposal of the remains of the dead".

86. In contrast, in the old insurance exemption it referred to making arrangements "for the provision of insurance"; in the old finance exemption it referred to making arrangements "for any transaction comprised in item 1 or 2" and in the current transport zero rating it refers to making arrangements "for - …the supply of any service included in items ……". These three provisions contrast with those for the burial of the dead which exempts making arrangements "for or in connection with the disposal of the remains of the dead" which is explicitly not limited to the making of arrangements for another supply.

87. Our conclusion is that there is a real distinction, and so far as this case is concerned the appellant (to be within Item 10) must show that it makes arrangements for another supply, specifically one being within the items recited in Item 10. The only relevant item is item 4 "transport of passengers".

Transport zero-rating:

88. The meaning of the phrase "making of arrangements" in the context of Item 10 of Group 8 of Schedule 8 has been considered a number of times.

89. In the case of *Thamesdown Transport Ltd v HMRC* (2005) VTD 19386 the appellant claimed that the payment to it by an NHS trust to purchase three buses in return for which it agreed to run a bus service on a particular route was zero rated as "the making of arrangements" for the supply of (zero rated) passenger transport. The Tribunal ruled against it on the basis that it acted as principal in the supply the zero rated passenger transport and therefore could not be making the arrangements for such a supply.

90. The cases discussed above were not considered at the hearing. Of much greater relevance was the case of *Société Internationale de Télécommunications Aéronautiques SC v C & E Comrs, ("SITA")* [2003] EWHC 3039 (Ch) [2004] STC 950 which we did bring to the attention of counsel at the hearing.

91. The appellant provided a telecommunications network to its clients who were airlines and others in the air transport industry. The network was used for communications connected with passenger and baggage reservations, aircraft maintenance, and use of airport facilities. It was not used to communicate with aircraft or in connection with the flight of the aircraft. HMRC issued a ruling that SITA's supplies were standard rated and SITA appealed. The Tribunal ruled in favour of HMRC and SITA appealed to the High Court.

92. On the question of whether SITA's services were the "making of arrangements for …the supply of any service included in [item 4]" there was a dispute between the parties on the meaning of "making of arrangements for". The Tribunal (2003) VTD 17991 said:

> "[48]…SITA's supplies begin and end with affording access to this telecommunications network. SITA's supplies, as we have already observed, were essential to the running of the business of its members and they were supplies made antecedent to SITA's members' suppliers of air transport services. But that is not the same thing as to say that SITA were making arrangements for supplies referred to in Group 8. Unlike the association [referring to the Association in *CSMA*] , SITA does not seek to achieve the supply of the particular services referred to in item 10…."

93. In other words, the Tribunal saw the "making of arrangements" as referring to the actions of an intermediary bringing together a person who is making the relevant supply with the person who wishes to receive it. In its view it was not enough to facilitate the fulfilment of that supply by the person who is to provide it.

94. SITA disagreed with this conclusion and appealed. In particular SITA referred to the above extract from Mummery LJ's decision in the *CSMA* case (see paragraph 83 above) where he referred to "the doing of things antecedent to, and directly leading to, the results sought to be achieved…". SITA argued this meant "making of arrangements" was not limited to an intermediary bringing together the parties to a supply within the relevant Item but included supplies which enabled the supplies in the relevant Item to be made .

95. At paragraph [26], the High Court in *SITA* ruled that the words of Mummery LJ should not be taken out of context and they did not apply in the context of item 10 and in particular the question of whether the "making of arrangements" applied to more than intermediary services. In *CSMA* there was no question that CSMA's services were intermediary services and the only question was whether the exemption extended to general rather than specific intermediary services. The High Court Judge went on to say at [27] that the exemption should be interpreted narrowly and at [28] rejected the argument that merely because it was essential for the conduct of the business of those persons making the principal supply that the supply at issue was the making of arrangements for it. He approved the reasoning of the Tribunal in paragraph [45] where the Tribunal said SITA functioned as a "facilitator" and did not make any arrangements for any of the principal supplies.

96. On behalf of the appellant Mr Patchett Joyce distinguished the *SITA* case as "merely" a means of communication. We cannot agree. It is clear SITA's services were essential to the zero rated supplies being made: it lost its case because it did not act as an intermediary in bringing into existence the agreement for those zero rated supplies to be made. So here it is not enough that allowing the passengers access to security and departures was essential for the airlines to make their supply of zero rated passenger transport: NAL did not act as an intermediary in bringing about the agreement for those zero rated supplies to be made.

BAA

97. We were referred by Counsel to the Tribunal decision of *British Airports Authority v The Commissioners* (1975) VATTR 43. BAA managed Heathrow airport and granted a concession to a retail company to occupy space at the airport and sell goods to passengers. HMRC considered that BAA was making two supplies: one of an exempt licence to occupy land and another of a standard rated licence to sell merchandise. BAA considered that its supplies were zero rated under provisions that were very similar to what is now Item 6 and 10 of Group 8 of Schedule 8. The Tribunal ruled that BAA made a single exempt supply of a licence to occupy land.

98. The Tribunal rejected BAA's case that its supplies were within item 6 or 10. Item 6, which zero rates the handling of goods to be carried in aircraft, is not relevant to this appeal. BAA's next position was that its supplies were within item 10 as the "making of arrangements" for a supply within item 6: in other words they said they were making arrangements for a supply by someone else of the zero rated service of handling goods to be carried in an aircraft

99. The Tribunal also rejected this. They said at page 49:

> "'Handling' in our opinion, in time 6 refers to 'handling' in the sense in which freight is 'handled', for example, by loading and unloading. Secondly, in relation to such item 10, if 'handling' in item 6 is to be read as aforesaid, the Authority is not, by the Concession Agreement 'making … arrangements for' the provision of such services of 'handling'. Further, in our view, the words in such item 10 'the making of arrangements for' should not be construed widely but restricted to the making of arrangements by an agent or like person for a principal who himself makes, or is the recipient of, a supply falling within the relevant items 1 to 9."

100. Mr Patchett-Joyce's view is that the Tribunal found item 10 did not apply because the recipient of BAA's service was not itself providing a zero rated service. BAA could not therefore make zero rated arrangements for a supply that could not be zero rated.

101. We do not agree that the Tribunal's comments are obiter but it is the case that they are not binding on us. Nevertheless, we consider that they are right.

Conclusions on meaning of "making of arrangements"

102. Looking at the Tribunal cases cited above (3 on the insurance exemption and 3 on the transport zero rating), we find this Tribunal (or at least its predecessor), has only considered a taxpayer to be making arrangements *for another supply* where directly or indirectly the taxpayer has facilitated an agreement between two other parties for a supply to take place. In *SITA* and *CSMA*, where higher courts, whose decisions are binding on us rather than merely persuasive, have considered the meaning of making arrangements *for another supply* similarly they have taken it to mean that the taxpayer facilitated an agreement between two other parties for a supply to take place. There is a consistent theme running through these cases. And that theme is that the "making of arrangements" for another supply to take place means acting like an agent or broker, however described, in bringing together the parties to a supply for consideration. It is not given a wider meaning and in particular it does not mean merely facilitating the fulfilment of a supply by another person.

103. The quotation from Mummery LJ in the *CSMA* case (paragraph 83 above) about "things antecedent to" might be taken to mean, as it was suggested by counsel in the *SITA* case, that the making of arrangements has a wider meaning than merely acting as an intermediary. But we agree with, and more to the point are bound by, the High Court decision in *SITA* that this is not what Mummery LJ meant. Mummery LJ's comment must be seen in the context that it was accepted (in paraphrase) that the taxpayer making the arrangements had to be some sort of intermediary bringing about a finance supply: the question in that case was merely about whether the intermediary had to be involved in bringing into existence each individual supply.

104. In particular, "making of arrangements" for another supply does not include supplies which facilitate or enable another person to make a supply of the transport of passengers which has already been agreed upon. If such a meaning had been intended, the zero rating provision in Item 10 would have been worded similarly to the exemption for the disposal of the remains of the dead. It would have read as "making of arrangements for the transport of passengers…" rather than (as it does) "making of arrangements for…*the supply of* any services included in …transport of passengers…" We find as a matter of law to be within "making of arrangements… for the supply of…" a person must be facilitating an arrangement for a supply to be made.

Whether appellant's supplies the making of arrangements?

105. Even had the Tribunal taken the view, contrary to both that of the appellant and HMRC, that there was a supply of the airport improvements works in consideration for the ADF, this would not have been the making of arrangements "for …the supply of" the transport of passengers as it is not an intermediary supply. Carrying out airport improvement works does not bring about an agreement for a supply of air transport between the airlines and passengers.

106. We have found that the ADF was consideration for a supply of a right to enter onto land. Similarly, this is not a supply of a service that is an intermediary service: it does not bring about the agreement for the supply of air transport between the

airline and the passengers. It may facilitate (or at least not prevent) the completion of that contract by the airline but it most certainly does not facilitate the agreement for that supply coming into existence.

107. For this reason, the ADF was not in consideration of a supply which was the "making of arrangements for… the supply of" zero rated passenger transport.

Services "for" zero rated passenger transport

108. Mr Patchett-Joyce's alternate case on Item 10 was that, irrespective of the meaning of "making of arrangements", the appellant's supplies were "for" passenger transport because "for" meant the same as *in relation to*, and *in relation to* was apt to apply to NAL's supplies.

HMRC's explanatory memorandum

109. In support of his position on this Mr Patchett-Joyce referred the Tribunal to an Explanatory Memorandum provided by HMRC to the Fourth Standing Committee on Statutory Instruments which on 2 May 1990 considered the amendments to this zero rating provision (then Group 10 of Schedule 5 to the Value Added Tax Act 1983). Mr Patchett-Joyce did not produce the Explanatory Memorandum to the Tribunal but merely referred us to the extracts from it contained in the judgment of Mummery LJ in the case of *EB Central Services* [2008] EWCA Civ 486. In particular, he referred us to paragraph [39] of Mummery LJ's decision where he reported that HMRC's Explanatory Memorandum said:

> "Services ancillary to the transport of passengers are treated for tax purposes in the same way as services of transport of passengers."

Mr Patchett-Joyce's view is that it is therefore clear that Item 10 applied to zero rate any services ancillary to, in sense of related to, the transport of passengers.

110. We note that this quotation is divorced from its context. Mr Patchett-Joyce did not produce the whole of the report, but just referred to the three extracts quoted by Mummery LJ. *EB Central Services* was about the treatment of passengers' luggage, and the above quotation was used in the context of Item 11 which zero rates (in summary) certain handling and storing of passenger goods. It is quite possible that the view expressed by HMRC was intended to be limited to the context of passenger luggage.

111. In any event, the quotation does not explicitly say *all* services ancillary to the transport of passengers are zero rated: it is clear on the face of the legislation that *some* services ancillary to the transport of passengers are zero rated, and if that is all that was meant, it is clearly right. But it does not help the appellant's case unless it could only be interpreted as meaning *all* such ancillary services are zero rated.

112. In any event, if HMRC here used the word "ancillary" in the sense it was later used in *Card Protection Plan Ltd*, and in the sense we used it in paragraphs 58-62 and 68-70, being ancillary to a principal supply, then clearly the extracted quotation is

quite correct but useless to the appellant's case. We have already explained in those paragraphs why the service provided in return for the ADF was not ancillary to a principal VAT-free supply.

Statutory construction

113. And even if HMRC's explanatory memorandum did show that HMRC considered that the legislation meant that all essential services ancillary to (in the sense of related to) zero rated passenger transport should be zero rated, this does not help the appellant. Tribunals and courts should refer to the intention of Parliament in cases of ambiguity in statutory construction. But here the views expressed are those of HMRC and not those of Parliament; and in any event we do not consider that there is any ambiguity in the meaning of "making of arrangements for… the supply of" zero rated passenger transport" at least in the context of whether it applies to related services.

114. We have dealt with the meaning of "making of arrangements" but this part of the appellant's argument centres on the meaning of "for the supply of any service included in [named items]". A normal reading of "for …the supply of" could not be taken to include the concept of *supplies to facilitate the supply of*. Similarly, a normal reading of "any service included in items 1 and 2, 3 to 9 and 11"" is that it is simply shorthand for enumerating the supplies in those numbered items. By itself the use of the words "included in" could not be taken to mean something like *related to* the numbered services. This is not the natural meaning of "included in" but almost its opposite.

115. Yet unless we were to give these words something other than their natural meaning, the appellant could not succeed in its case on this. And there is no reason to give an unnatural meaning to the words when the meaning of the language used is unambiguous.

116. And we find the meaning of the words unambiguous. Item 10 is clearly an expansion of Item 4. Its purpose is to say that not only are services within item 4 zero rated but certain services which relate to item 4 should also be zero rated. And item 10 achieves this expansion by the use of the new phrase the "making of arrangements for".

117. Mr Patchett-Joyce's argument, however, would require the Tribunal to accept that Item 10 expands item 4 (and the other numbered items) not only in relation to the "making of arrangements for" services included in such items, but by including services *related to* services included in such items. Had Parliament intended to expand the zero rating to related services, we would have expected it to do so by creating a separate item for *related services to*, in the same way that it had created Item 10 for the "making of arrangements for".

118. And lastly on statutory construction, were Mr Patchett-Joyce's reading of Item 10 correct it would make the words "making of arrangements for" otiose, as the appellant would achieve zero rating for making supplies "for ….the supply of any

service any service included in [item 4]" without reference to the words "making of arrangements". Had this been intended, why would Parliament have included the words "making of arrangements"?

Conclusion on services "for" zero rated passenger transport

119. So in conclusion we reject the appellant's case that 10 zero rates any essential service related to the actual zero rated passenger transport. Where item 10 says "any service included in items 1 and 2, 3 to 9 and 11" it is referring to any service zero rated by items 1-9 and 11. It is not referring to services related to such services: if it was intended to do that it would have said so. It does not.

120. Having rejected the appellant's primary and secondary cases, we move on to consider its third case.

Exempt under s148(g) PVD?

121. NAL considered that if it made a supply in return for the ADF and that supply was not zero rated under Schedule 8 then it was exempt under Article 148(g) PVD.

122. Article 148(g) provides as follows:

> "Member states shall exempt the following transactions:
>
> ….
>
> (g) the supply of services, other than those referred to in point (f), to meet the direct needs of the aircraft referred to in point (e) or of their cargos."

123. It was not in dispute that point (f) did not apply and that the aircraft at NAL were those referred to in point (e) (in other words aircraft chiefly operating for reward on international routes). So in paraphrase the question for this Tribunal was whether the supplies in consideration for the ADF were

> "to meet the direct needs of the aircraft…or of their cargos".

124. So we consider:

(a) The meaning of "direct needs of the aircraft";

(b) The meaning of "cargos";

(c) The application of 148(g) to the facts of this case.

Meaning of "direct needs of the aircraft"

125. We considered four cases on the meaning of "direct needs".

Berkholz

126. Article 148(d) is the equivalent to Article 148(g) but for ships. *Gunter Berkholz v Finanzampt Hamburg-Mitte-Alstadt* C-168/84 was a case about the

installation of gaming machines on ferries and the meaning of "direct needs", if rather more frequently quoted in the context of the place of supply rules. Not surprisingly, the CJEU's view was that gaming machines did not meet the direct needs of the *ship*, and the predecessor to article 148(d) was found not to apply.

127. Mr Patchett Joyce referred us to the views on "direct needs" expressed by the Advocate General at paragraph 21. We had two different translations in front of us. HMRC produced the report at [1985] CMLR 667 which rendered Mr Mancini's words as follows:

> "I must however accept….only the inherent needs of shipping can be described as *direct* and that therefore only services necessary of operations such as piloting, towing manoeuvres, the use of port equipment, unloading of goods etc can be exempted. The amusement of passengers – who, in particular, do not form part of the 'cargo' – merits every consideration, but is certainly not analogous to these activities."

128. The version from the Official Journal, produced by Mr Patchett Joyce, read as follows:

> "However, I am bound to admit….that the only needs which can be said to be *direct* needs of the vessels are those relating to navigation, and hence the only services qualifying for exemption are those needed for operations such as piloting, towing, the use of port facilities, unloading of goods and so forth. The entertainment of the passengers – who, moreover, are not part of the 'cargo' - deserve every attention but is in no way comparable."

129. We consider the Official Journal report to be more authoritative. Certainly we are satisfied that the CMLR one is not authoritative as its own footnotes states "The opinion of the Advocate General …have been translated by us, as the court's own translation was not available when we went to press – Ed."

130. Mr Patchett Joyce's view is that the "port facilities" referred to by Mr Mancini should be compared to the terminal building at an airport. We are unable to agree. The reference to "port facilities" is in a list the other members of which are "piloting", "towing" and "unloading of goods". These three items clearly relate very directly to the movement and docking of a vessel: it is unlikely the Advocate General meant, by his use in Italian of whatever words which were translated as "port facilities", to encompass something like a passenger terminal. The use of a passenger terminal is largely nothing to do with the movement or docking of a vessel or the loading or unloading of cargo. It is more likely that he was referring to other port facilities which actually are necessary to the operation and docking of a vessel. In any event, the Advocate General's view is not by itself binding unless adopted by the CJEU and it was not.

131. In conclusion, we find nothing in *Berkholz* to suggest that the meaning of "direct needs" extends beyond facilities which directly serve the flight, landing, and parking of an aeroplane or the loading or unloading of its cargo.

Cimber Air

132. Mr Patchett-Joyce then referred us to *Cimber Air* C-382/02. The case was about the meaning of "chiefly on international routes" used in what was then Article 15(6) of the Sixth VAT Directive and now article 148(e) PVD as referred to above in paragraph XXX. However, the Advocate General included comments on the meaning of what was then Article 6(9) and is now article 148(g) PVD. He said at paragraph 36:

> "…the supply of provisions and services to meet the direct needs of aircraft and their cargo (for example, cleaning, take-off and landing fees, the use of facilities for receiving passengers or goods, for parking and accommodating aircraft or for handling luggage) are transactions which may be attributed to a particular flight…"

133. The reference to the "use of facilities for receiving passengers" may be a reference to a passenger terminal building, in which case the view of the Advocate General appears to have been that provision of the terminal building is part of the direct needs of an aircraft. However, this statement formed no part of his proposed answer to the question to the court which was to the extent an airline operating a domestic route could rely on the exemption within Article 148(g). His view was not repeated or considered by the CJEU, nor is it clear whether the parties had made submissions on this point. His views are not binding on this Tribunal.

134. In any event, he may merely have meant a reference to steps or a tunnel by which passengers embark and disembark aircraft by his reference to "facilities for receiving passengers".

135. In conclusion, there is nothing in the CJEU decision in *Cimber Air* to suggest that the meaning of "direct needs" extends beyond facilities which directly serve the flight, landing, parking of an aeroplane or the loading or unloading of its cargo. Nor are we persuaded that the Advocate General considered that a passenger terminal building and similar facilities were for the "direct needs" of the aircraft or its cargo, or, if he did, that he was right to do so.

SITA

136. We have referred to this case above in relation to the appellant's secondary case. On the question whether the supply of the telecommunications network was a supply for the direct needs of the aircraft or its cargo, the Tribunal found that:

> "….SITA's transmissions services, essential though they are, are merely the means by which the airline meets the direct needs of its aircraft. The message which may cater for those direct needs is not SITA's message, and anyway SITA will probably be unaware of it… Borrowing the words of the Court, SITA's services do not effect the specific essential functions of the services described in Article 15.9…"

137. The High Court also ruled that SITA's services were not for the direct needs of the aircraft. The Vice Chancellor gave 5 reasons:

> "…First, the provisions of art 15 confer exemptions from the normal regime of liability to tax at the standard rate. As such they are to be construed strictly….Second, in *Berkholz*…the Court of Justice emphasised in relation to the comparable wording of art 15.8 that the exempted services are 'those which are directly related to the needs of sea-going vessels or their cargo, ie services necessary to the operation of the ships.'….such a condition is not satisfied by the telecommunications network supplied by SITA. Third, the restriction on the type of aircraft under consideration to those used by airlines operating for reward chiefly on international routes cannot extent the direct needs of the aircraft to those of the airlines who operate the aircraft or the passengers who are carried in them. …For completeness I would add that it was not suggested that the passengers are cargo. Fourth the restriction is to the direct needs of the aircraft and its cargo. The use of the word 'direct' is a clear prohibition on any extension of the relevant direct need. Fifth, it is clear, …that what matters is the nature of the service rather than the supplier or recipient…."

138. We take from this that the exemption is to be narrowly construed and restricted to services directly necessary to the operation of the aircraft.

EB Central Services

139. This case was about the VAT treatment of left luggage facilities on the "landside" of the airport. In other words, the facilities were available for use by anyone. Mummery LJ said:

> "[45] The storage services supplied by EBC do not meet 'the direct needs' of aircraft. 'Direct needs' of aircraft refer to services necessary to the operation of the aircraft. …The direct needs met by the taxpayer's services are …those of the passengers…"

140. He went on to say that the service did not meet the direct needs of cargo either, because unless and until checked in luggage was not cargo.

141. Dyson LJ agreed with Mummery LJ. He said that *Berkholz* which applied to sea-going vessels applied also to aircraft and expressly approved the Vice Chancellor's view on this point in *SITA*. Lindsey LJ agreed with both Dyson and Mummerly LLJ. His made the point that a landside left-luggage facility was not a "need" of the aircraft let alone a direct need of the aircraft. Direct need should be interpreted strictly as it was in *Berkholz*.

142. Again we take from the Court of Appeal's decision that the exemption is to be narrowly construed and restricted to services directly necessary to the operation of the aircraft.

Conclusion on case law

143. The appellant considered that Article 148 should be given a wide interpretation in order to carry out its purpose of encouraging travel by air. We do not agree. On the contrary we consider that "direct needs" should be interpreted narrowly. It should

be interpreted narrowly because it is an exception to the general rule that supplies are standard rated; because if the intention of the European Council was otherwise they would not have used the word "direct" to qualify "needs"; and lastly because we are bound to do so by the authority of the Court of Appeal in *EB Central Services* and the High Court in *SITA*. And in any event we do not think that it is right to say that the purpose of Article 148 was to encourage travel by air: its purpose was clearly more limited else the exemptions contained within it would not have been couched in such specific terms.

144. We reject the appellant's case that the views of the Advocate Generals in either *Berkholz* or *Cimber Air* should lead us to a different conclusion. Neither made a statement that direct needs extended beyond the immediate operational needs of the ship or aircraft: and even if they had done so, such views were not endorsed by the CJEU and could not therefore be taken as good law.

145. In particular, as stated in *EB Central Services*, services for the direct needs of the passengers are *not* services for the direct needs of the aircraft. We consider "direct needs" of the aircraft refers to the services required to operate the aircraft and cannot be extended to the needs of the passengers.

Meaning of cargo

146. Neither party suggested that the passengers could be "cargo" and indeed although the point has not apparently been expressly decided upon, there are many dicta (such as quoted in *SITA* above) that passengers are not cargo. They are certainly not cargo in the ordinary meaning of the word and we conclude that services rendered to or for passengers could only be exempt within article 148(g) if they were for the direct needs of the aircraft or its cargo.

Application to facts

147. As with the appellant's secondary case, it considers that the ADF was paid in consideration for the infrastructure improvements at Norwich Airport. It considers all these infrastructure improvements were for the direct needs of the aircraft.

148. But we have found that there was an insufficient link between the improvements to Norwich Airport and the payment of the ADF for the former to be a supply in consideration of the latter. Mr Patchett Joyce's view was that even were we to make such a finding (as we have) nevertheless he considered that the passengers who paid the ADF might have a tortious if not contractual remedy if NAL did not use the ADF for the advertised purposes of improvements to Norwich Airport and that therefore the purpose in raising the ADF (the improvement works) should still dictate whether the ADF was for the direct needs of aircraft.

149. We do not agree. The question of whether the service provided by NAL to the passengers was for the direct needs of the aircraft depends on for what it was, as a matter of EU law, provided in consideration. We have found it was provided in consideration for the right of access and *not* for the improvements works. Therefore,

the question is whether the provision of the right of access was exempt. It has nothing to do with the improvement works. (Although irrelevant, we also disagree with Mr Patchett Joyce's suggestion that the payers of the ADF would have had some kind of tortious right to enforce the use of the ADF fund for improvement works).

150. And even had we found the infrastructure improvements were in consideration for the ADF the appellant would not succeed in its case. We do not find the infrastructure improvements were for the "direct needs" of the aircraft. While some of the improvements, listed in paragraph 29 above, did relate to improvements to facilities used by aircraft (eg upgrading the apron), many of them related to the needs of the passengers rather than the aircraft (improving the passenger terminal, upgrading the information boards, car parking and the washroom facilities). Even those that related to the operation of the aircraft, were only indirectly related in the sense that they were improvements or extensions to existing facilities and could not in our view be regarded as directly relating to the needs of aircraft.

151. Further, although the recipient of the supply does not dictate the nature of it, we note that this putative service would have been supplied to the passengers and not the operators of the aircraft. But if the putative services were meeting the direct needs of the aircraft then no doubt the airlines would have required the service to be made to them. That they were not supplied to the aircraft operators strongly suggests the putative services would not have been for the direct needs of the aircraft.

152. We have found that the ADF was in consideration for the right of the passengers to pass through the ticket barriers and access that part of the airport (security and departures) necessary in order to board their flights. It was the appellant's case that this supply was for the direct need of the aircraft.

153. We cannot agree. The aircraft could physically fly with or without passengers (although clearly it would not be economically viable to fly them without passengers). The ability of passengers to board their flight did not meet a direct need of the aircraft, though no doubt it met a direct economic need of the airline.

154. In conclusion the appellant fails in its third case too.

155. The appeal is dismissed.

156. 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.

157.

Barbara Mosedale

TRIBUNAL JUDGE

RELEASE DATE: 20 April 2012