[2018] UKUT 0383 (TCC)

Case number: UTJR/2012/002

JUDICIAL REVIEW – Claimant providing credit card handling services – claimant followed HMRC's current published guidance and treated services as exempt from VAT – HMRC issued assessments on the basis that services were taxable – whether claimant had legitimate expectation that it would be taxed in accordance with the terms of the published guidance – if so whether HMRC entitled to resile from the guidance

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN

THE QUEEN
on the application of
VACATION RENTALS (UK) LIMITED
(formerly known as THE HOSEASONS GROUP LIMITED)

Claimant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Defendants

TRIBUNAL: The Hon Mr Justice Fancourt
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 24 October 2018

David Scorey QC, instructed by Fieldfisher LLP, Solicitors, for the Claimant

Michael Jones, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

Introduction

1. Item 1 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 ("VATA") provides an exemption from VAT on services which consist of 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.

2. At the relevant time for the purposes of these proceedings (that is between 2007 and 2009) the Claimant acted as a booking agent between holidaymakers and property owners. That role included collecting payment from holidaymakers on behalf of the property owners. When payment was made by credit or debit card, the Claimant charged an additional fee to reflect the extra work and extra costs involved in effecting such payments by the banking system. We refer to those extra services in this decision as "Card Handling Services".

3. Historically, the proper VAT treatment of Card Handling Services was somewhat unclear. Initially, HMRC accepted that such charges were exempt from VAT pursuant to the terms of the exemption set out above, but they subsequently contended that such supplies were taxable, a position that was disputed by a number of taxpayers. As the jurisprudence developed, HMRC amended and publicised their position.

4. The Court of Appeal's judgment in *Bookit v HMRC* [2006] STC 1367 clarified the position at that time. In that case it was held that the supply by the taxpayer of Card Handling Services was exempt from VAT. It was found in that case that the supply comprised the following four components:

- obtaining the card information with the necessary security information from the customer;
- transmitting that information to the card issuers;
- receiving the authorisation codes from the card issuers; and
- transmitting the card information with the necessary security information and the card issuers' authorisation codes to the intermediary bank (known as the "merchant acquirer") which liaises between the card issuer and the taxpayer.

5. The basis of the Court of Appeal's judgment was that the fourth component of the service provided (the "Fourth Component)" did have the effect of transferring funds and therefore entailed a change in the legal and financial situation of the parties. The reasoning in that case was followed by the Inner House of the Court of Session in *SEC v HMRC* [2008] STC 967.

6. Following these decisions, HMRC issued Business Brief 18/06 ("BB 18/06"). That document identified the four components to the card handling supply which were

present in the supplies made by the taxpayer in *Bookit* and stated that if an agent, acting for the supplier of the goods or services, makes a charge to the customer over and above the price of the actual goods or services, for a separately identifiable service of handling payment by credit or debit card, and that service includes the Fourth Component "then the additional charge will be exempt under item 1, Group 5 of Schedule 9 to the VAT Act 1994".

7. The Claimant read and applied the terms of BB 18/06 to its Card Handling Supplies and thereafter treated those supplies as exempt from VAT. However, HMRC later disagreed and in a decision dated 27 July 2010 ("the Decision") refused to apply the terms of BB 18/06 to the Claimant's Card Handling Services made during the quarterly periods from June 2007 to September 2009 and issued assessments to the Claimant in the sum of £329,929 (plus interest) (the "Assessments").

8. The Claimant contends that BB 18/06 is an unequivocal policy statement on behalf of HMRC prescribing how agents should treat credit and debit card handling services following the judgments in *Bookit* and *SEC*. The Claimant contends that the policy is expressed in a way that is clear, unambiguous and devoid of relevant qualification. Consequently, the Claimant says, HMRC's actions entail a retrospective rewriting of BB 18/06 which is improper because the Claimant had a legitimate expectation that HMRC would comply with its own published policy regarding the Claimant's supply of Card Handling Services. Accordingly, the Claimant contends that HMRC was not entitled to defeat that legitimate expectation by assessing its supplies of Card Handling Services as standard rated supplies and challenges the Decision, by way of judicial review. The Claimant seeks an order that the Decision should be quashed and that HMRC be prohibited from collecting the VAT under the Assessments.

9. In their grounds of resistance to the Claimant's challenge, HMRC accept that the guidance contained in BB 18/06 is capable of giving rise to a legitimate expectation but contend that, for the exemption to apply, in accordance with the terms of the four components, the agent itself must obtain the authorisation code from the card issuer and transmit it to the merchant acquirer, together with the card details and necessary security information. This envisages, HMRC contend, the agent, not the merchant acquirer, obtaining the authorisation code from the card issuer so that the merchant acquirer does not have the authorisation code until it is transmitted to it by the agent. HMRC contend that the supplies made by the Claimant did not satisfy the requirements of BB 18/06 because the Claimant transmitted the card information and security information to its merchant acquirer, and it received the authorisation code from its merchant acquirer.

10. HMRC contend that on no reading of BB 18/06 does it unambiguously support or cover the Claimant's position and it follows that the essential requirement to found a legitimate expectation of a promise which is "clear, unambiguous and devoid of relevant qualification" is not met. Furthermore, HMRC contend that taking all of the circumstances into account, including the fact that the Claimant is a very sophisticated taxpayer with access to high quality advice and that BB 18/06 only sought to summarise publicly available court decisions, HMRC's conduct in applying its view

of the law as a result of those decisions was not so outrageously unfair that it should not be allowed to stand.

11. These proceedings were commenced in the Administrative Court on 26 October 2010 and Davis J granted permission on the papers on 14 February 2011. The proceedings were transferred to the Upper Tribunal pursuant to section 31A Senior Courts Act 1981 (as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007) on 12 April 2012. The proceedings were then stayed pending resolution of the underlying tax liability in other litigation concerning Card Handling Services, which was then before the domestic courts and the Court of Justice of the European Union ("CJEU").

12. It was finally determined by the CJEU in *National Exhibition Centre v HMRC* [2016] STC 2132 that Card Handling Services consisting of the four components referred to in BB 18/06 were in fact taxable rather than exempt. The CJEU stated at [41] of its judgment that none of the four components identified in *Bookit* individually, or taken together, could be considered to be carrying out a specific, essential function of a payment or transfer transaction within the meaning of the exemption.

13. It is common ground, however, that that later decision has no bearing on the question which is the subject of these judicial review proceedings. In essence, the issues that arise in these proceedings are :

(1) whether the circumstances of the Claimant fall within the terms of BB18/06, as those terms would be understood by an ordinarily sophisticated taxpayer ("Issue 1"); and

(2) if so, whether it would be unfair and an abuse of power for HMRC as a public authority to seek to resile from the guidance in the case of the Claimant ("Issue 2").

Factual Background

14. There was no dispute as to the relevant facts. The process by which credit card payments are made and the manner in which the Claimant provided Card Handling Services during the relevant period are described in the witness statement of Mr David James filed in these proceedings. Mr James was at the relevant time the VAT manager for the corporate group of which the Claimant forms part. His evidence was not challenged by HMRC and HMRC filed no witness evidence. Both Counsel provided helpful summaries of Mr James's evidence which we gratefully adopt as follows.

15. In order to put Mr James's evidence into context it is helpful to bear in mind the various parties involved in a credit card transaction, namely:

(1) the issuer of the card, such as a High Street bank;

(2) the operator of the credit card scheme, such as Visa or Mastercard, of which scheme the various card issuers are members;

(3) the intermediary bank, such as Barclays who acted in that capacity for the Claimant, known as the "merchant acquirer", who liaises with the scheme operators and the card issuers;

(4) the retailer who wishes to obtain payment via a credit card; and

(5) the customer / cardholder who wishes to make payment using the card.

16. When the Claimant sought to take payment from a holidaymaker via credit card (whether online or by telephone), the following stages took place:

(1) The Claimant obtained the relevant details from the cardholder and inputted that data into its internal 'TourRes' computer system. This included a facility called the Electronic Funds Transfer ('EFT'), which listed the types of accepted credit cards and the information needed in respect of such cards to effect payment (i.e., issue number, expiry date, etc.). When this information was collated on the EFT, an algorithmic formula confirmed that the details were appropriate for a credit card of that type.

(2) At this stage, the information on the EFT was insufficient to obtain payment. In addition, an authorisation code had to be provided by the issuer of the credit card.

(3) The authorisation code was obtained by the Claimant from the card issuer via its merchant acquirer, Barclays. That was effected as follows:

(a) The data from the TourRes system was sent to the Claimant's CCAuth server (a system designed to transmit and receive securely credit card data);

(b) This sent the credit card details to Barclays *qua* merchant acquirer;

(c) Barclays then sent that information to the scheme operator, such as Visa or Mastercard;

(d) In turn, the scheme operator transmitted the request to the individual card issuer; and

(e) Assuming that the credit card was valid and had sufficient credit, the card issuer provided an authorisation code which was transmitted down the chain of communication, via the scheme operator and merchant acquirer, to the Claimant's CCAuth server and its TourRes system.

(4) Following completion of the first three steps set out above, which only took a matter of seconds, the customer's booking was confirmed but at that point no payment had in fact been effected and no monies debited from the cardholder or collected by the Claimant on the property owner's behalf.

(5) Payments effected by credit card were obtained by the Claimant nightly when the CCAuth server collated into a "settlement file" the details of all payments to be made by credit card arranged that day. This settlement file contained not only the credit card details and the debit amount, but also the authorisation codes that the Claimant had received during the course of that day.

(6) It was only when this 'settlement file' was securely transmitted by the CCAuth server to the merchant acquirer that payment was triggered to the Claimant. This was settled a number of days later.

17. As Mr Scorey QC on behalf of the taxpayer submitted, Mr James's evidence shows that if the Claimant did not transmit the settlement file, no payment would have been made by the cardholder, despite the fact that the Claimant had previously obtained an authorisation code. It was necessary for the authorisation code to be utilised by the Claimant through the transmission of the settlement file in order for the transfer of funds to be effected.

18. As Mr Scorey summarised the position, there were in essence two stages to the process: an "authorisation" stage where the relevant card was verified and an authorisation code was obtained (but no payment made); and a "clearing" stage when the authorisation code was presented and payment triggered. Thus, the system operated by the Claimant obtaining an authorisation code via the usual banking system. However, it was only when the Claimant then sent back that authorisation code, via the CCAuth server, together with all the card details and debit amount, that payment was effected, i.e., the payments were "cleared."

19. There was a slight difference with payment by American Express cards, because American Express acted not only as the card issuer but also the scheme operator and the merchant acquirer. As such, the Claimant liaised directly with American Express in order to obtain the authorisation codes. Once in receipt of the authorisation code from American Express, payment was likewise effected via the secure transmission by the Claimant of the settlement file at the end of the day.

20. HMRC did not take issue with the above analysis and filed no witness evidence of its own. However, in support of their case, HMRC put much emphasis on the fact that the settlement file includes information that the merchant acquirer had previously obtained itself from the card issuer and passed on to the Claimant, namely the authorisation code. As a result, HMRC regard it as an important point of distinction that the merchant acquirer did not obtain the authorisation code for the first time from the Claimant, unlike the position in *Bookit* where the findings were that the authorisation code was obtained by Bookit directly from the card issuer and transmitted to the merchant acquirer at a later stage in the process.

The decisions in *Bookit* and *SEC*

21. As mentioned above, BB 18/06 was issued in response to the Court of Appeal's judgment in *Bookit* and the judgment of the Inner House of the Court of Session in *SEC*.

22. In view of that HMRC contends that the situation in which it was envisaged that the guidance in BB 18/06 applied was one where the agent, not the merchant acquirer, obtains the authorisation code from the card issuer and the merchant acquirer does not know the authorisation code until it is transmitted to it by the agent. It is necessary to examine the facts and conclusions in *Bookit* in some detail, starting with the findings of fact made by the VAT and Duties Tribunal (the "Tribunal").

23. In the Bookit litigation, the relevant potential exemption from VAT was eventually identified as being paragraph 3 of Article 13(B)(d) of EC Council Directive 77/388 ("the Sixth Directive"), which was directly applicable to Member States, so that Item 1 in Group 5, Schedule 9 VATA, which implemented the exemption, added nothing to and subtracted nothing from Article 13(B)(d)(3) of the Sixth Directive. That provision required member states to exempt "transactions including negotiation, concerning deposit on current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring." The relevant question in *Bookit* was therefore whether the payment of an additional fee for payment by credit card was a transaction concerning payments or transfers.

24. Bookit Limited was a subsidiary of a cinema operator, Odeon, and ran a seat reservation service through which customers could book seats in Odeon cinemas in advance and pay using a credit or debit card. A customer was charged a fee for this service. A typical transaction involved four parties: (1) the customer; (2) the bank (being Girobank, acting as merchant acquirer); (3) Bookit; and (4) Odeon. As found by the Tribunal, it involved the following steps:

> (1) Bookit gave information to the customer as to availability of seats, costs of tickets, times of performances etc, and took details of customers' cards, transmitting information to the merchant acquirer;
>
> (2) The merchant acquirer processed the payment and, pursuant to a merchant agreement between Bookit, Odeon and itself, credited Bookit with the amount paid by the customer;
>
> (3) Bookit then confirmed to the customer the booking and payment and then paid the price of the seat to Odeon, retaining the handling charge for itself.

25. In a decision in principle, the Tribunal ([2004] V&DR 421) initially found that the actual components of the supply made by Bookit were limited to obtaining the card information with the "necessary security information" (which appeared to be further details about the customer such as his address and the 3 digit security code on the back of the card) and transmitting that information to the merchant acquirer. On the basis of that finding the Tribunal concluded, at [85], that:

> "The mere transmission of details to Girobank is essential to the completion of the transfer or payment by Girobank or the issuer, but that does not bring Bookit within item 1 [of Group 5]. The Appellant company has not satisfied us on the evidence that Bookit in transmitting on behalf of customers the required card information is itself transferring funds or bringing about changes of a legal and financial character. The transfers and financial changes are effected by Girobank and the payments are effected by the bank issuing the card."

26. However, at [92] the Tribunal observed that the actual means of transmission of information between Bookit and Girobank had not been clearly explained and therefore gave the parties liberty to adduce further evidence on that issue.

27. Following receipt of such evidence, the Tribunal made a second decision (2004 VTD 18626) in which it made further findings of fact. In particular, at [5] of its second decision, the Tribunal found that early in the morning on the day after particular bookings had been made, Bookit's card transactions were batched together on Bookit's computer system. These batched transactions were then sorted by reference to separate card issuers concerned and the details were transmitted on a secure line to each relevant card issuer to seek authorisation for the transactions, understood to be in the form of an authorisation code for each transaction. The Tribunal found at [7] that Bookit then collated the authorised transactions for transmission to the merchant acquirer and delivered them in a single file by secure line, observing that at this point no sums had been debited to customers' accounts with card issuers and no sum had been credited to Bookit. The Tribunal found at [8] that within one or two days the merchant acquirer credited Bookit with the ticket price plus the handling fees, debiting the card issuer which in turn debited the account of the customer in question. It was further found by the Tribunal at [9] that, by obtaining the card authorisation from the card issuers, Bookit was able to negotiate lower charges by the merchant acquirer.

28. We observe at this point that, according to these findings, unlike the position with the Claimant in this case, Bookit obtained the authorisation codes directly from the relevant card issuer rather than via the merchant acquirer. It would appear that because Girobank did not have the responsibility of obtaining the authorisation code it charged a lower fee to Bookit than would otherwise have been the case. Therefore, according to the Tribunal's findings at [10], Girobank only received the authorisation codes when they were submitted in the single file referred to by the Tribunal at [7] of its second decision.

29. Despite acknowledging at [10] of its second decision that its original findings omitted the obtaining by Bookit of authorisation codes from card issuers, the Tribunal did not change its conclusions in relation to the application of either items 1 or 5 of Group 5. It said at [12] of its second decision, that whilst the transmission of the authorisation was an essential step, it did not itself bring about the payments or transfers which were effected by Girobank.

30. On appeal in the High Court the Vice-Chancellor reversed the Tribunal's decision. At [51] of his judgment (which is reported at [2005] STC 1481) he said this in relation to the payment from the card issuer to the account of Bookit with Girobank:

> "….that payment was made to Bookit for and on its own account. It was a payment by or on behalf of the Customer. It did alter the legal and financial situation. The card handling services provided by Bookit to the Customer were more than technical or electronic assistance but were the essential preliminaries to any remote payment by the Customer being effected. They were not rendered as a party to the contract between the Customer and Odeon, nor as the sub-contractor of either of them. They were separately remunerated by the card handling fee paid by the Customer. They constituted activities distinct from those of any other party."

31. He then gave his reasons for allowing the appeal at [53] as follows:

> "In my judgment the Tribunal arrived at the wrong conclusion. They did so because, having admitted further evidence, they did not sufficiently revisit their earlier conclusion. In particular whilst they recognised that their conclusions in paragraphs 80 to 81 of the First Decision required some modification they did not spell it out. Similarly the conclusion set out in paragraph 12 of the Second Decision assumes that the question is whether Bookit effected the payments. I do not think it is so limited. The service Bookit provided to the Customer constituted a transaction concerning such a payment, it was separately remunerated and it was not performed as agent or subcontractor of the Customer, Odeon or Girobank. As such, in my judgment, it came within [the exemption]."

32. When the case came before the Court of Appeal, Chadwick LJ, who gave the sole judgment, summarised the effect of reading the Tribunal's findings in both of its decisions together. He said at [35] that the Tribunal had found that the supply by Bookit to the customer included the following components: (i) obtaining the card information with the necessary security information from the customer, (ii) transmitting that information to the card issuers, (iii) receiving the authorisation codes from the card issuers and (iv) transmitting the card information with the necessary security information and the card issuers' authorisation codes to Girobank.

33. We observe that since Chadwick LJ was doing no more at this point than summarising the findings of fact by the Tribunal, inevitably those findings reflected the situation where the authorisation codes had been obtained directly from the card issuers. He was clearly concerned with the question of whether the Tribunal had given proper effect to its further findings of fact, because the challenge to the Vice-Chancellor's decision that he is addressing at that point was whether the Vice-Chancellor was wrong to depart from the Tribunal's findings as to the effect of the further evidence. At [37] he says:

> "…the short question, as it seems to me, is whether the Vice-Chancellor was entitled to have regard to the fact that it was a necessary incident of the supply of services having the fourth of the components which the tribunal had identified that the price of the ticket was transferred to Bookit's accountant with Girobank. In my view that was a fact properly to be taken into account."

34. He then turned to the second head of challenge at [39], namely that when properly identified by reference to its components, the supply did not fall within the exemption. After referring to relevant CJEU authority he said at [44] that the

conclusion reached by the Tribunal at [85] of its first decision was correct on the basis of the findings of fact that it had made at that point, namely that Bookit's services were limited to obtaining the card information with the necessary security information and transmitting it to the merchant acquirer. As Mr Jones submitted, if Bookit's services were so confined, the transfers and financial changes were effected by the merchant acquirer and payments were effected by the card issuer.

35. Chadwick LJ went on to say in the same paragraph that it was the failure of the Tribunal to appreciate that the fourth component of the services which they had identified, in the light of further evidence, did have the effect of transferring funds and did entail changes in the legal and financial situation, albeit not by Bookit itself, which led the Tribunal to err in the conclusion which they reached at [12] of their second decision.

36. Therefore, at [45] of the judgment Chadwick LJ said that it was because the fourth component of the service supplied by Bookit to the customer does have the effect that funds are transferred to Bookit's account with Girobank that the Vice-Chancellor correctly reached the conclusion that the services in question were exempt from VAT.

37. It was therefore critical to the decision in *Bookit* that Bookit sent to Girobank the authorisation code that it had obtained from the card issuer, which in turn (together with the other data contained in the daily settlement file) triggered the financial adjustment. In other words, the presence of the fourth component in the process was decisive and the existence of the other three components enabled Bookit to put itself in a position where it could perform the steps comprised in the fourth component.

38. As we have observed, it was assumed (on the basis of the findings of fact made by the Tribunal) that Bookit obtained the authorisation code directly from the card issuer itself rather than from the merchant acquirer, although we have some scepticism as to whether in fact that was the case, bearing in mind the inherent difficulty of Bookit being able to communicate directly with a potentially large number of card issuers, some of which may have been situated abroad. However, there is no indication that either of the courts or the tribunal regarded the fact that the authorisation code came directly from the card issuer was of any significance at all to their respective decisions, save that the fact that Bookit had possession of the authorisation code explained why Bookit was in a position to do what it did at stage four of the process.

39. In *SEC*, the facts were slightly different in that the merchant acquirer, Cardnet, obtained and forwarded the necessary codes and payments from the card issuer. There did not appear to be any finding that the booking agent communicated directly with the card issuers.

40. Lord Nimmo Smith, giving the judgment of The Inner House of the Court of Session approved the following submissions of the appellant at [26]:

> "The components identified by Chadwick LJ in *Bookit* existed also in the present case: (1) the service supplied by the appellant to the customer included the transmission of the card information, etc to Cardnet which, as the tribunal found, operated as an intermediary between the retailer and the card issuer; (2) it was a

> necessary incident of the supplier's services having that component that the price of the ticket was transferred to the appellant's account and became payable by the customer to the customer's credit card issuer; and (3) the credit to the appellant's account was a payment or transfer for the purposes of art 13B(d)(3) of the Sixth Directive. It was thus equally the case that the service supplied by the appellant had the effect of transferring funds and of effecting a change in the legal and financial situation."

41. Lord Nimmo Smith then observed at [29] of his judgment that there was no reason to think that the mechanism for processing payments "in its main features" was any different in this case. It is clear, therefore, that the Inner House did not consider that the fact that Bookit communicated directly with the card issuer rather than through an intermediary was of any significance for the decision in that case.

42. Furthermore, in *HMRC v Axa UK plc* [2008] EWHC 1137 (Ch) Henderson J commented on *Bookit* when considering the causal test required under Article 13B (d) (3). He emphasised at [72] that what mattered was that the information supplied by Bookit to Girobank inevitably brought about (although it did not itself constitute) a transfer of sums of money from Girobank to Bookit. He said at [73] that any attempt to marginalise Bookit as a case turning on its own particular facts would be "an unprincipled exercise in damage limitation".

Issuance of BB 18/06

43. As a result of these cases, HMRC revised its policy on the VAT liability of credit and debit card handling services supplied by agents. The revised policy was set out in BB 18/06 which was issued on 30 October 2006.

44. BB 18/06 so far as material reads as follows:

> "This Business Brief article announces HMRC's revised policy on the VAT liability of credit and debit card handling services supplied by agents, following the end of litigation in the cases of Bookit Ltd (Bookit) and Scottish Exhibition Centre Ltd (SEC). It replaces item 2 of Business Brief 21/05 and item 1 of Business Brief 17/98, both of which are now withdrawn. Public Notice 701/49, Finance, will be updated in due course.
>
> …
>
> **Background**
>
> …
>
> The Court of Appeal, in upholding the High Court judgment, found that the supply by Bookit to the customer included the following components:
>
> - obtaining the card information with the necessary security information from the customer;
>
> - transmitting that information to the card issuers;

- receiving the authorisation codes from the card issuers; and

- transmitting the card information with the necessary security information and the card issuers' authorisation codes to Girobank.

The Court found that the tribunal had been correct in finding components (i) to (iii) to be taxable, but because the fourth component was part of Bookit's service to the customer, and had the effect that funds were transferred to its account with Girobank, exemption was available to Bookit.

The SEC case concerned the supply of tickets to events held in the Scottish Exhibition and Conference Centre in Glasgow. SEC acted as agent of the promoter in the selling of tickets and charged an additional fee to customers on tickets that were paid for by credit and debit card. SEC contended this fee was for card handling services and was VAT exempt.

The tribunal found in HMRC's favour, stating that SEC was providing a single taxable booking service, with the taxable card handling service representing an ancillary aspect enhancing the main service. The Court of Session overturned the tribunal decision, finding that SEC was carrying out an exempt card handling service. The Court based its judgment on the decision of the Court of Appeal in Bookit and on an assumption of similar facts. HMRC do not therefore draw a distinction between the two judgments.

Implications of the judgments

The judgments have provided further guidance on when a service of credit or debit card handling by an agent is VAT-exempt. If an agent, acting for the supplier of the goods or services, makes a charge to the customer over and above the price of the actual goods or services, for a separately identifiable service of handling payment by credit or debit card, and that service includes the fourth component listed above, then the additional charge will be exempt under item 1, Group 5 of Schedule 9 to the VAT Act 1994. However, where an agent provides some or all of the first three components without providing the fourth, the charge is taxable at the standard rate of VAT. Charges levied on the cardholder for payment by credit and debit card in any other circumstances will not fall within the exemption for financial services and the normal VAT treatment will apply.

Information on making claims or adjustments

Agents supplying card handling services that meet the criteria set out above, and who have been treating the charge as taxable at the standard rate, should exempt such services from the date of this Business Brief. Conversely, agents supplying card handling services that do not meet the criteria set out above, and have been treating those services as exempt, should now charge tax."

45. It is clear from the wording of BB 18/06 that HMRC did not draw a distinction between the judgment in *Bookit* and that in *SEC*. In our view, that indicates that at the time of publication of BB 18/06 they could not have regarded it as essential to the

availability of the exemption that the supplier communicated directly with the card issuer to obtain the authorisation codes.

46. The rehearsal of the basic facts of *Bookit* is part of the background section of BB 18/06. The explanation of the facts makes it clear that it is the Fourth Component that has the effect of making the service exempt; it says that the court found that the tribunal was correct in holding that, absent the Fourth Component, the service was taxable. All this is set out under the heading "Background". It appears to us that the purpose of the background section is to set the scene for the specific guidance on the following page, under the headings "Implications of the judgments" and "Information on making claims or adjustments".

47. The wording of the specific guidance again makes it clear that where an agent makes a charge over and above the price of goods or services for a separately identifiable service of handling payment by credit or debit card *and that service involves the Fourth Component*, then the additional charge will be exempt; but where some or all of the first three components are provided without the fourth the charge is taxable at the standard rate. The guidance therefore distinguishes between those cases where the Fourth Component is present and those where it is not. There is then an explanation of the position where it is the supplier himself who levies the additional charge rather than an agent for the supplier.

48. Agents are then directed that if they "meet the criteria set out above", they should treat the services as exempt going forwards; and if they do not meet the criteria they should charge tax. In context, in our view "the criteria" are clearly the criteria for exemption, as summarised in the previous section of the document. The four components of the findings in *Bookit* are referred to in BB 18/06 as "components", not as "criteria".

49. Mr James explained in his witness statement that, following the issue of BB 18/06, the Claimant prepared its VAT returns on the basis that the supplies of credit card handling services it made to holidaymakers were exempt from VAT.

Relevant case law relating to legitimate expectation

50. The legal principles applicable to a judicial review based upon an infringement of a substantive legitimate expectation were largely common ground between the parties.

51. The relevant principles were summarised by Leggatt J. in *R (GSTS Pathology LLP & Ors) v Revenue and Customs Commissioners* [2013] EWHC 1801 (Admin) ("GSTS").

52. In that case a claim of infringement of legitimate expectation was brought on the basis that HMRC, having at the taxpayer's request given a ruling that certain supplies would be treated as taxable, subsequently wrote to the taxpayer informing it that contrary to that earlier ruling the supplies would be treated as exempt.

53. Leggatt J. summarised the applicable law at [72] as follows:

> "The principle that legitimate expectation should be protected is now well established as a ground for judicial review. For this principle to apply, the general requirements are: (1) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority; (2) the authority has caused the claimant to have that expectation by words or conduct; (3) the claimant's expectation is legitimate; (4) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation. Although it has sometimes been said to be a requirement also that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance is not essential but is relevant to the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation (see, eg, *R (On Application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2)* [2009] AC 413 , paragraph 6, per Lord Hoffmann)."

54. The judge held that the change in the interpretation of the law by HMRC was not the result of any change in legislation or a subsequent court ruling but all that had happened was that HMRC had changed their view of how the law should be interpreted because of a change in the personnel dealing with the matter: [95]. He then said at [96] to [99]:

> "96. What is the claimants' legitimate expectation or what does fairness require from HMRC in these circumstances? On the one hand, it can be said that if tax treatment stated by HMRC in a ruling to be correct can change - not as a result of any change in the law but just because HMRC has changed its view - the value of such rulings and the practice of giving them will be very substantially undermined. The taxpayer is surely entitled to expect consistency and not that a public authority will change its mind without any objective change in circumstances.
>
> 97. The counter argument is that HMRC cannot reasonably be obliged to perpetuate indefinitely what is now considered to be a mistaken interpretation of the law. To do so would be inconsistent with its duty to collect what it believes to be the correct amount of tax required by law.
>
> 98. Where the balance is struck between these competing arguments may depend on the particular facts of the case. A number of features in the present case - in combination - have led me to conclude that HMRC cannot, without unfairness to the claimants, impose a different tax treatment from that stated in the rulings without any objective change in circumstances.
>
> 99. These features are: (1) the extent of the reliance which the claimants have placed on the rulings in setting up and investing in their business and the very serious and damaging consequences the proposed change in tax treatment will have if implemented; (2) the fact that the extent of the reliance which would be placed on the rulings was made clear to HMRC when the rulings were sought; (3) the fact that the rulings were and remain consistent with the general published guidance issued by HMRC in VAT Notice 701/31; (4) the fact that the point on which the rulings were given was and remains, in my view, an arguably correct interpretation of the law; (5) the fact that it is very unlikely on the current state of the law that the claimants will be entitled to recover compensation for losses suffered as a result of their reliance on the rulings if they are now

> subjected to a different tax treatment; (6) the fact that if the claimants are required to adopt the new tax treatment before the issue on which the rulings were given has been authoritatively determined by the tribunal they may feel compelled to restructure their affairs in a way which would be costly and detrimental and, in practice, irreversible and yet to turn out to have been unnecessary if the tribunal finds that the rulings were legally correct."

55. Leggatt J. then went on to consider whether it was just to allow HMRC to resile from its earlier indication because "even where a claimant has a legitimate expectation, which it would be unfair to the claimant for the public authority which produces that expectation to frustrate, it is nevertheless permissible for the authority to do so if there is an overriding public interest that requires it." (para 103). He held that there was no such justification.

56. In the leading case of *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1989] STC 873 ("MFK") the Divisional Court noted that it was accepted that a proper part of HMRCs function was when possible to advise the public of their rights as well as their duties; but for such advice to be relied on the taxpayer must make full disclosure of all the relevant facts and circumstances when seeking a ruling and the ruling or statement relied on must be unequivocal. Bingham LJ said this at page 892 c to h:

> "… in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. … No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forego any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification."

57. The other member of the Divisional Court in *MFK* was Judge J., who said that these principles applied not only to requests for specific individual guidance but also to general statements of policy. He stated at pages 896 to 897:

> "In the present case the Revenue promulgated a number of guidelines and answered questions by or on behalf of taxpayers about the likely approach to a number of given problems. The Revenue is not bound to give any guidance at all. If however the taxpayer approaches the Revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be treated for tax purposes if implemented, the Revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to Revenue statements of policy. …"

58. *Cameron & Others v HMRC* [2012] EWHC 1174 (Admin) is an example of a case where a statement of general policy issued to the public by HMRC was held to be capable of giving rise to substantive legitimate expectations. HMRC had issued a publication which stated how HMRC would determine the number of days on which seafarers would be treated as performing their employment duties outside the UK when they were on board ship. Wyn Williams J. relying inter alia on *MFK*, held that the publication concerned contained an unequivocal statement of how the determination in question would be made, unqualified by anything else in the publication, with the result that claims for judicial review were successful.

59. In this case, HMRC do not dispute that Business Briefs, as statements of HMRCs policy, are capable of giving rise to a legitimate expectation. We therefore proceed on the basis that BB 18/06 is, depending on how it is expressed, capable of giving rise to a substantive legitimate expectation.

60. Whether in this case the terms of BB 18/06 did in fact do so depends, as HMRC contend, on whether the statements contained in it are clear, unambiguous and devoid of relevant qualification. In dealing with that question, one considers how on a fair reading, the promise would have been reasonably understood by those to whom it was made: see *Paponette & others v Attorney General of Trinidad and Tobago* [2010] UK PC 32 at [30].

61. Furthermore, guidance is not to be dissected with the rigour appropriate to an exercise in statutory construction or interpretation of a deed or contract: see *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 00561 (IAC) at [56].

62. The question of to whom a publication might have been said to have been addressed was considered by the Supreme Court in *R (Davies & James) v HMRC* [2011] UKSC 47, where Lord Wilson said at [29] that the clarity of a representation depends in part upon the identity of the person to whom it is made, and that the hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice.

63. However, in the same case, Lord Mance, who delivered a dissenting judgment, expressed at [71] a tentative view that the particular circumstances of a taxpayer, including any knowledge and advice possessed by or available to him, might be material to the question whether the taxpayer was entitled to rely on a legitimate expectation. It should be noted that Lord Mance's statement was made in a case where the subject matter was much broader guidance given to assist taxpayers in assessing whether or not they were resident or ordinarily resident in the UK, and where the guidance itself stated that whether it was appropriate in a particular case depended on all the facts of the case.

64. Even when no legitimate expectation is generated by a statement by HMRC, there may be exceptional cases where HMRC's conduct towards the taxpayer makes it wrong for HMRC to attempt to impose an assessment to tax on a basis contrary to what applied in the past. In *R (Unilever) v IRC* [1996] STC 681 the Court of Appeal held that HMRCs conduct in allowing late claims to be made over a long period of time did not amount to the making of representations that resulted in the taxpayer acquiring a legitimate expectation. Nevertheless, the court held that to refuse to accept further late claims in those circumstances without clear advance notice of a change in policy was so unfair as to amount to an abuse of power and so to be irrational.

65. There can come a time when a legitimate expectation ceases because the taxpayer's reliance on HMRC's representations ceases to be reasonable. This issue was dealt with in *Cameron*, where it was held that HMRC would remain bound by the broad concession that they had granted until they had given notice to all taxpayers potentially able to claim the benefit of the concession that the concession was to be withdrawn or altered. It was held that effective notice of a change could be given only if there was publication in some form to the whole class of potentially eligible taxpayers: see [70] of the judgment.

66. That issue does not arise in this case because the Claimant does not seek any prospective relief. Its challenge is limited to the periods covered by the Decision and which occurred before HMRC evidenced their intention to resile from BB 18/06.

Issue 1: Whether the circumstances of the Claimant fall within the terms of BB 18/06

Basis of the Claimant's legitimate expectation claim

67. It is the Claimant's case that BB 18/06 constituted clear and unequivocal guidance from HMRC to treat as exempt card handling services which included the Fourth Component. Mr Scorey submits that the Claimant was entitled to rely upon (and, indeed, was required to follow) this guidance. During the relevant period covered by the Assessments, BB 18/06 was not revoked, nor was it qualified in any way. In those circumstances the Claimant had a legitimate expectation that it would be taxed in accordance with the terms of BB 18/06. In support of this case, the Claimant says:

(1) The guidance focuses on the Fourth Component as being the key component. The first three components are simply background circumstances

that explain the context in which the Fourth Component may arise. The guidance is not given by reference to the words of the first three components but uses a more general description of the agent's function and services, as set out at [46] above.

(2) The only natural reading of BB 18/06 is that for an agent, acting for a supplier, who makes an additional charge over and above the price of the goods or services for handling payment by a credit or debit card, it is the Fourth Component that is crucial in deciding whether a supply is taxable or exempt. The guidance focuses only on that component and there is no specific guidance on the other three components.

(3) The facts in *Bookit* do not limit the exemption in the way that HMRC suggest: the only focus was on satisfaction of Article 13 B (d) (3) of the Sixth Directive by the presence of the Fourth Component and no reliance or significance was placed on the other components.

(4) There is no logical or principled reason to distinguish between circumstances where the authorisation codes were obtained directly and those where they were obtained through an intermediary, such as a merchant acquirer. That distinction had no bearing on the significance of the Fourth Component and would mean that the exemption could not apply in practice, as generally a supplier could not and would not contact the card issuer directly.

(5) A reasonably sophisticated taxpayer with knowledge of how its business operated would assume that a merchant acquirer who had the responsibility of obtaining the authorisation codes would be involved as a matter of routine.

(6) The terms of BB 18/06 are not to be read down by reference to the ratio of *Bookit*. It is clear that the guidance is freestanding and of general application, following the conclusion of the *Bookit* and *SEC* litigation.

HMRC's response

68. HMRC say that BB 18/06 does not clearly, unambiguously and without qualification give rise to the particular legitimate expectation alleged by the Claimant. Mr Jones submitted that it is clear on a fair reading of BB 18/06 that the supplies made by the Claimant do not fall within the description of those which HMRC stated would be VAT exempt for the following reasons:

(1) Properly interpreted, the exemption only applies in a case where all four components are satisfied in the terms in which they are set out in the Background section of BB 18/06, which in turn are taken verbatim from [35] of the judgment Chadwick LJ in *Bookit*.

(2) Properly understood, as they would be understood by a taxpayer, the four components require the card information to have been transmitted directly by the agent to the card issuer and the authorisation codes to have been transmitted directly by the card issuer to the agent, so that when that information is transmitted to the merchant acquirer (in the position of Girobank) it is the first time that the information is passed through that merchant acquirer's electronic systems.

(3) In support of the contentions set out at (1) and (2) above, HMRC say:

(a) BB 18/06 describes exemption as only applying where the supply comprises the four components identified in *Bookit*;

(b) those components state that the information from the cardholder must be transmitted to the card issuer and that the authorisation code must be received from the card issuer;

(c) that only occurs where there is direct transmission between the card issuer and agent, otherwise information is transmitted to and received from the intermediary;

(d) as regards the Fourth Component, the transmission to the merchant acquirer must be transmission of information that has not previously passed through the merchant acquirer because "transmitting" must have the same meaning as that word is used in the other components, so that as in those components the transmissions in question were of information that was received for the first time by the recipient of the transmission and "transmitting" means sending information which has not previously been provided;

(e) the merchant acquirer (Girobank) is only mentioned for the first time in the Fourth Component, so it is to be inferred that it has no part to play in the first three components; and

(f) The guidance in BB 18/06 is to be read in the light of the decisions in *Bookit* and *SEC*, to which it refers and which it summarised, and in *Bookit* the finding that the agent had communicated directly with the card issuers was critical to the application of the exemption.

Conclusion

69. In our judgment, the Claimant is clearly right in its arguments. The guidance in BB 18/06 is clear, unambiguous and unqualified. As we have said at [46], that guidance is to be found principally under the heading "Implications of the judgments" (though we accept that BB 18/06 must be read as a whole) and it focuses on the presence of the Fourth Component as being the key to whether the exemption is available. The distinction that HMRC seek to make between direct and indirect communications between the agent and the card issuer is of no material significance to the guidance, just as it was of no material significance to the decisions in *Bookit* and *SEC*. As we have said, although Chadwick LJ's summary of the facts found in *Bookit* are set out verbatim in BB 18/06, this is done simply as background to the guidance and is used to illustrate that it is the Fourth Component alone that is critical in determining whether the supplies are exempt. The ordinarily sophisticated taxpayer would read the word "criteria" as used in the guidance as being a reference to the criteria for treating a service as exempt, as explained in the paragraph under the heading "Implications of the judgments", rather than as a reference to the four components outlined under the heading "Background".

70. As we have said, no part of the ratio in *Bookit* depended on a conclusion that Bookit communicated with card issuers directly so as to obtain the authorisation

codes. HMRC made it clear in BB 18/06 that it did not draw a distinction between the judgment in *Bookit* and that in *SEC*. This is a clear indication that HMRC were not treating direct communication with the card issuers being a criterion for exemption, there being no specific finding of fact in that respect in the judgment in *SEC*.

71. Furthermore, communicating through a merchant acquirer is in principle within the scope of the first three components, and it would be understood as such by the ordinarily sophisticated taxpayer. As we have said, taxpayers who read BB 18/06 would understand how the payment systems for debit and credit cards operated and that the use of the merchant acquirer through whom the authorisation codes were obtained would be standard practice.

72. As Henderson J found in *Axa*, as referred to at [42] above, the underlying issue is whether what the agent does brings about transfer of sums of money from the merchant acquirer to the agent. Therefore, the suggestion that the availability of the exemption depends on when it is that information was first provided to the merchant acquirer is inconsistent with the basis of the judgment in *Bookit*, namely whether what the agent does is to bring about the transfer of funds.

73. HMRC's analysis is wrong in our judgment for the following reasons.

74. First, they misinterpret the basis of the judgements in *Bookit* and *SEC* as depending crucially on a finding that communication between the card issuer and the agent was direct. Although this was the factual finding in *Bookit*, it was not in *SEC*. Neither was it material to the decision in *Bookit*.

75. Secondly, they treat the "Background" section of BB 18/06 as being the key guidance that needs to be interpreted, when it is in substance only an explanation of the circumstances in which the issue arises and an introduction to "a key identified component" as BB 18/06 describes it, namely the Fourth Component. As we have said, the principal part of the guidance, which sets out HMRCs revised policy on the VAT liability of credit and debit card handling services supplied by agents, is set out in the two sections following the "Background" section.

76. Thirdly, they take an inappropriately technical and rigorous approach to construing the words of the four components, in particular through their interpretation of the word "transmitting", which in our view must be given its ordinary meaning and is not nuanced in the way that HMRC suggest. The authorities that we have referred to at [60] and [61] above (*Mohibulla* and *Paponette*) make it clear that the question is how on a fair reading it would be understood by those to whom it was addressed, in this case the ordinarily sophisticated taxpayer. The guidance is not to be construed as a taxing statute would be.

77. In particular, there is nothing in the guidance to suggest that the exemption only applies if all four components are satisfied according to their strict terms. On a fair reading, the second and third components do not mean that there must be a direct transmission between the agent and the card issuer just because those were the facts found in ***Bookit*** and there is nothing to lead the ordinarily sophisticated taxpayer to

the conclusion that the crucial question is whether at the fourth stage the information being sent by the agent to the merchant acquirer is being sent to the latter for the first time. The arguments advanced by HMRC are a mixture of over-literalism, unjustified by the terms or the purpose of the exemption in question, and reading into the terms of the Fourth Component words that are simply not there, such as "for the first time" after "transmitting".

78. Furthermore, even if HMRC were right in saying that BB 18/06 had to be read by reference to the full judgments in *Bookit* and *SEC* (which we do not accept) those judgments do not lend any support to the argument that the exemption was being limited to the precise facts found in *Bookit*. On our reading of BB 18/06 it would appear that HMRC understood that to be the position when the guidance was issued.

79. In summary, there is no ambiguity in the wording of BB 18/06. On a fair reading by an ordinarily sophisticated taxpayer, it would be understood to mean exactly what is set out in clear terms in the first paragraph under the heading "Implications of the judgments". The reader would not be uncertain to any degree whether the exemption would apply if the authorisation code was acquired from the card issuer via the systems of the merchant acquirer.

80. We therefore determine Issue 1 in favour of the Claimant.

Issue 2: whether it would be unfair and an abuse of power for HMRC to seek to resile from the guidance

81. HMRC contend that on the facts of this case, even if (as we have found) the Claimant had a legitimate expectation arising from the terms of BB 18/06 that its supplies should be treated as exempt, it would not in all the circumstances of this case be unfair or an abuse of power for HMRC to resile from the position expressed in BB 18/06 and therefore the Tribunal should not prevent them from doing so.

82. We have to say that we are surprised that HMRC should seek to advance such a contention in circumstances of a finding that the Claimant had a legitimate expectation that it would be dealt with in the manner described in HMRC's own guidance.

83. The matters relied on by Mr Jones to justify HMRC's contention that it would not be unfair or an abuse of power to resile from the guidance is that the Claimant was a "very sophisticated taxpayer", with access to high quality advice, and that BB 18/06 only sought to summarise publicly available court decisions. Mr Jones submitted that as the Claimant had a substantial business involving services of the kind that were addressed in BB 18/06 it had the ability, and would reasonably be expected, to access external professional advice about its position and that both the Claimant and any professional adviser would have access to the underlying decisions in *Bookit* and *SEC* and so could make up their own mind as to whether the Claimant's affairs fell within the scope of the exemption identified in those cases.

84. HMRC rely on two authorities to support their contention.

85. First, Mr Jones referred to Simon Brown LJ's judgment in *Unilever*, where he said, at page 695a, that unfairness amounting to an abuse of power is unlawful because it is either illogical or immoral or both for a public authority to act with "conspicuous unfairness". Simon Brown LJ drew a distinction at page 697c between conduct which may be characterised as "a bit rich" but nevertheless understandable and a decision "so outrageously unfair that it should not be allowed to stand."

86. Second, Mr Jones relies on the statement of Lord Mance in *Davies & James* referred to at [63] above. He says this was made in the context of considering when it was legitimate for a public authority to resile from a statement which had created a legitimate expectation. It questions whether the knowledge and advice possessed by the taxpayer might be material to that question.

87. As regards Lord Mance's statement, it is right to note that it is both *obiter* and forms part of a dissenting judgment. In any event, it was made in the context of much broader guidance on which it might reasonably be expected that those reading it would seek further advice rather than rely on the specific guidance alone. We therefore do not consider that Lord Mance's observation assists HMRC.

88. As regards *Unilever*, whilst the doctrines of substantive legitimate expectation and abuse of power merge into each other, the principle of "conspicuous unfairness amounting to an abuse of power" identified in that case (now more properly to be regarded as an aspect of irrationality: see *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25; [2018] 2 WLR 1583 at [38] to [40], per Lord Carnwath JSC) is pertinent where there is no express promise, assurance or representation on which the taxpayer can rely. It is not directly applicable where the taxpayer has established a legitimate expectation based on clear guidance by a public authority. In particular, it cannot be used to throw a greater burden onto a claimant than would otherwise exist.

89. In our view, it is only open to HMRC to override the legitimate expectation that it has encouraged in circumstances where there is a sufficient public interest to override it: see *Paponette* at [36]. In that case the Privy Council relied upon the following passage in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 where Lord Woolf MR, giving the judgment of the Court of Appeal, said at [57]:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

90. It is clear that once a legitimate expectation has been established, as in this case, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. If the authority does not place material before the court

to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence of the legitimate expectation created its conduct is so unfair as to amount to an abuse of power: see *Paponette* at [37] and [38].

91. In this case, HMRC has not even begun to discharge that heavy burden. The ability of the Claimant to obtain legal advice on the guidance is irrelevant to that issue. The guidance was meant to be clear and readily understood by the ordinarily sophisticated taxpayer. In any event, the legal advice would almost inevitably have been that the terms of BB 18/06 were clear and that the Claimant's case fell squarely within the guidance.

92. We therefore determine Issue 2 in favour of the Claimant.

Disposition

93. The claim for judicial review is allowed.

(1) We quash the Decision (made by HMRC dated 27 July 2010) not to apply the terms of BB 18/06 to the Claimant's Card Handling Services supplies made during the periods 06/07 to 09/09.

(2) In the circumstances as they exist today, the Claimant accepts that no further relief is necessary.

MR JUSTICE FANCOURT **JUDGE TIMOTHY HERRINGTON**
UPPER TRIBUNAL JUDGES

RELEASE DATE: 22 November 2018