Case No: A3/2015/3061

Neutral Citation Number: [2016] EWCA Civ 1105
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
The Hon Mrs Justice Rose
[2015] UKUT 0378 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2016

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVIS
and
LORD JUSTICE BEATSON

- -

Between :

FINMECCANICA GLOBAL SERVICES Spa (formerly FINMECCANICA GROUP SERVICES SpA)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

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- -

Mrs Penny Hamilton (instructed by Mishcon de Reya LLP) for the **Appellant**
Mr Michael Jones (instructed by the General Counsel and Solicitor to HM Revenue and Customs,) for the **Respondent**

Hearing date : 11 and 12 October 2016

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Judgment

Lord Justice Patten :

1. Finmeccanica Global Services SpA ("FGS") is part of a group of mainly Italian companies ("the Group") which are leading suppliers of aeronautical, aerospace, defence and security equipment. Its products include aircraft (they have a participation in the Eurofighter Typhoon project), helicopters, space stations and security systems. To promote the sale of their products they set up displays at major aeronautical and aerospace events including the Farnborough air show. FGS is the Group service company and it purchases the goods and services necessary to mount those displays. This includes cleaning, transport and security as well as the construction and organisation of the display enclosure.

2. The Farnborough air show is an annual event. It includes flying displays and is a public show. But it also provides space and an opportunity for aircraft and aerospace manufacturers to showcase their products and to provide meeting rooms and hospitality for would-be customers, the press and other selected invitees including high level guests such as government representatives and senior military personnel. At most, a negligible part of the FGS enclosure was open to the general public.

3. The First-tier Tribunal (Judge Hellier) made the following findings of fact about how the Group's enclosure at the air show was organised:

> "36. In 2010 the group's enclosure at Farnborough air show consisted of a pavilion covering about an acre (4,280 m²) which included two chalets, and a static display of about 1½ acres (7,630 m²). The total cost associated with the enclosure was some €14 million in 2010 (€12m for 2008). It was a very substantial exercise. In the open area were displayed a large number of helicopters and fighter aeroplanes; in the pavilion there were areas devoted to particular sister companies' products, meeting rooms etc. The 2008 event was on a similar scale.
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> 37. I have used "enclosure" to describe the area involved and there was indeed a ring fence around the area described above, but the 2010 brochure "Finmeccanica at Farnborough" shows that in addition to the main enclosure there were other Finmeccanica buildings including a Eurofighter chalet. By far the dominant area is the main enclosure. I have used "enclosure" to refer to the totality unless the contrary is indicated.
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> 38. The arranging of the enclosure is the responsibility of FGS. The central administrative function of the group sets the budget for the occasion and specifies an outline the requirements for the overall appearance, themes and the space required for each sector of the group: thus, much oversimplified, its requirements might include a requirement to display eight helicopters and five fixed wing aircraft, to have a lecture theatre with say 200 seats, a separate security systems chalet as part of the enclosure, five meeting rooms and 40 display screens. FGS

then discusses this with its sister companies and engages architects to design the pavilion and the enclosure. It discusses the designs with the group companies involved and then, once it has settled on the design, sets about renting space from Farnborough International, the organisers of the airshow, the building of the enclosure, and the organisation of the event.

39. The planning of the event takes about a year. In the course of that year FGS organises and monitors the implementation of contracts for the building works, electricity, gas, plumbing, IT, safety equipment, signage (in particular the display of the "tag" for the year), security, catering, travel and cleaning of the enclosure. It makes arrangements for a press reception and tickets for invitees. It produces a brochure. It arranges speakers. It arranges recordings of the event for the group companies.

40. People wishing to enter the enclosure must have (at least) two passes – one permitting them to enter the airshow and one permitting them to enter the Finmeccanica enclosure. In 2010 there were two separate chalets within the enclosure which required distinct passes, one of which was for Westland. FGS's sister companies indicate whom they wish to invite to the enclosure and FGS obtains passes for them from Farnborough International, the organiser of the air show, and issues separate passes for the enclosure. These invitees are known customers and potential purchasers of the group's equipment and will include military, government and institutional figures.

41. The air show maintains a list of those people other exhibitors have invited, and FGS or its sister companies may offer invitations to customers of other exhibitors they see on the list.

42. Invitations and passes are issued to the press. FGS organises a press reception in conjunction with the show. This is the only part of the event which takes place outside the enclosure. Mr Napolitano was not willing to say why the press were invited – it was a decision made by the marketing and external relations functions in the group. It seemed to me that they were invited to preserve and enhance the external reputation of the group companies.

…..

44. The airshow lasts a week. In such a week some 200 high-level guests (ministers and senior military figures) would be expected to attend the enclosure and more than 1000 potential customers altogether (Mr Napolitano could not be certain how many: he did not dissent from 1000 and was able to say it was less than 10,000). There is a programme for the week -

> organised by FGS - which includes debates, and talks by outside speakers and speakers from the group.
>
> 45. Some 120 group employees are present in the enclosure. Of these about 15 are FGS staff concerned with ensuring that the event runs smoothly - monitoring and servicing the infrastructure, security, catering for staff and the guests and cleaning, and arranging meeting rooms (where presentations are made to specific guests). The remainder are employees of group companies – marketing, external affairs, technical and IT support people. FGS arranges the hotel accommodation and the flights for all the group's staff."

4. For the purposes of this appeal it is common ground that each of the relevant Group companies was established and registered for VAT in Italy. One of the operational companies in the Group is Westland, an English company, but this can be ignored for present purposes. It is also accepted that the supplies made by FGS to the other Group companies were not made to a fixed establishment outside Italy and that the enclosure at the Farnborough air show was not a fixed establishment of FGS. FGS therefore invoiced the Group companies for the cost of the services it supplied and included and accounted for Italian VAT. It then sought to recover the UK VAT which it had paid in respect of the goods and services which it purchased in connection with the establishment and operation of the Farnborough enclosure. Under the Refund Directive (Council Directive 2008/91EC of 12 February 2008) and its predecessors, the UK VAT is not recoverable if FGS made any supply in the UK. The issue therefore on this appeal is whether the supplies it made to other Group companies in connection with the enclosure were made in the UK for VAT purposes.

5. The claims for refunds of UK VAT relate to three different periods during which the relevant EU and UK legislation on the place of supply has changed. The first claim was made in respect of the period from 1 May to 31 December 2008. The two other claims relate to each of the two succeeding 12 month periods. For the period from 1 January 2007 to 1 January 2010 the general (and default) rule was that the place of supply of a service was the place of establishment or residence of the supplier. This rule was contained in Article 43 of the Principal VAT Directive ("PVD") which replaced Article 9(1) of the Sixth Directive that was to like effect.

6. For the period from 1 January 2010 to 1 January 2011 a new Article 44 of the PVD changed the default rule (in the case of supplies made to a taxable person) to the place of establishment or residence of the customer. Where the supplies were made to a non-taxable person, the default rule remained unchanged: see PVD Article 45. These provisions remained in force for the period from 1 January 2011 onwards.

7. What I have referred to as the general or default rule on the place of supply which was originally contained in Article 9(1) of the Sixth Directive was always qualified and took effect subject to the provisions of Article 9(2). Article 9(2) contained a list of specific types or categories of services whose deemed place of supply was governed by separate rules. In *Dudda v Finanzamt Bergisch Gladbach* (Case C-327/94) [1996] ECR I-4618 the ECJ confirmed that the categories of supplies specified in Article 9(2) were subject to specific rules governing the deemed place of supply that with Article 9(1) were intended to avoid conflicts of jurisdiction and double taxation:

> "21. It follows that, when Article 9 is interpreted, Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1)."

8. In the present case the only provisions of what was Article 9(2) which are relied upon by the parties as displacing the general rule are Article 9(2)(c) and 9(2)(e) which, so far as material, provided:

> "(c) the place of the supply of services relating to:
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> - cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organizers of such activities, and where appropriate, the supply of ancillary services,
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> - ancillary transport activities such as loading, unloading, handling and similar activities,
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> - valuations of movable tangible property,
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> - work on movable tangible property,
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> shall be the place where those services are physically carried out;
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> …..
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> (e) the place where the following services are supplied when performed for customers established outside the Community or for taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually resides:
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> - …..
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> - advertising services,
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> - ….."

9. Article 9(2)(c) was replaced first by PVD Article 52(a) (for the period 1 January 2007 to 1 January 2010) and then by PVD Article 53 and PVD Article 54 for the two later periods I have mentioned. Article 52(a) was in the same terms as Article 9(2)(c) but in Article 53 and later Article 54 of the PVD the wording was changed to read:

> "The place of supply of services and ancillary services relating to cultural, artistic, sporting, scientific, educational, entertainment or similar activities, such as fairs or exhibitions,

> including the supply of services of the organisers of such activities, shall be the place where those activities are physically carried out."

10. In each case, however, the deemed place of supply has remained the place where the services or (post 1 January 2010) the place where the activities are carried out. In relation to the supplies of services in connection with the Group enclosure at the Farnborough air show, this would be England.

11. The wording of what was Article 9(2)(e) ("advertising services") has remained unchanged throughout the relevant periods but the deemed place of supply has been either the place where the customer is established or resides or the place specified under the default rule for the time being depending on whether the supply was made to customers in the same or a different member state as the supplier or (after 1 January 2010) on whether the supply was made to a non-taxable person outside the EU. For the purposes of this appeal these complications can be ignored because in all of the periods in which a claim for repayment was made the application of Article 9(2)(e) and its successors would result in Italy being treated as the place of supply of the services provided by FGS to the other Group companies. HMRC are only entitled to refuse payment under the Refund Directive if the case falls within what was Article 9(2)(c) and FGS has therefore made supplies in the UK.

12. Although, as I have explained, the relevant place of supply rules are now to be found in the PVD, I propose for simplicity of treatment to refer to the relevant provisions in this judgment as Articles 9(1) and (2). The provisions of Article 9 have been transposed into domestic legislation by s.7 and Schedule 5 to the VAT Act 1994 ("VATA") and by the Value Added Tax (Place of Supply of Services) Order 1992. For the period from 1 January 2010, the relevant rules can be found in Schedule 4A and 5 VATA. As is conventional in these cases, the appeal has been argued by reference to the EU legislation and I will adopt that approach in this judgment.

13. The First-tier Tribunal and, on appeal, the Upper Tribunal (Rose J) reached different conclusions as to which of the provisions of Article 9(2) governed the supplies made by FGS. Part of that disagreement stems from a difference of approach in relation to deciding which of two of the possible Article 9(2) categories best fits the supplies in question. In the First-tier Tribunal Judge Hellier (after a consideration of the relevant ECJ authorities) took the view that the categories of activities contained in Article 9(2) are mutually exclusive. If the supplies fell within Article 9(2)(e) as advertising services, they could not fall within Article 9(2)(c) as events. He accepted that Article 9(2)(e) does not apply to the supplies in this case because the Group companies were established "in the same country as the supplier". But because the nature of the supplies were such, he held, that they would otherwise have qualified as "advertising services", it followed that they could not also qualify as "events" under Article 9(2)(c). The place of establishment of the Group companies (whilst disqualifying FGS from relying on Article 9(2)(e)) did not affect the scope or nature of the activities which constituted "advertising services":

> "71. I have no doubt that the services which FGS supplied to its sister companies were: (1) designed and used for the purposes of the dissemination of messages intended to inform potential buyers of the existence or quality of the products offered by

> those companies with a view to increasing the sales of such products, and (2) formed an inseparable part of the centrally coordinated advertising campaigns of the group companies by contributing to and conveying their marketing messages: the presence at the enclosure of employees of the group companies indicated that integration."

14. He therefore concluded that the supplies made by FGS could not fall within Article 9(2)(c) and that the place of supply therefore fell to be determined by the general rule under Article 9(1). In the event that he was wrong about the Article 9(2) categories being mutually exclusive, he gave reasons why the activities in this case were not "events" and I shall return to some of those later in this judgment.

15. In the Upper Tribunal Rose J considered that the First-tier Tribunal had fallen into error by excluding the possibility that the services were supplied in connection with activities falling within Article 9(2)(c) on the basis that, but for the place of establishment of the Group companies, they would have fallen within "advertising services" under Article 9(2)(e):

> 32. … It may well be the case that, as the case law cited by the judge indicates, the exceptions to the general location rule are mutually exclusive. But it was common ground that the advertising exception did not apply here because FGS and its recipient sister companies are all established in Italy. The issue of overlap does not arise.
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> 33. Although the CJEU in *Inter-Mark* did first address the question whether the services there fell within the advertising exception before considering the fairs exception, the situation which the CJEU was considering in that case was different from the situation here. *Inter-Mark* planned to provide its services to customers established in other Member States or outside the Union. In those circumstances, the advertising exception would be engaged if the services fell within the definition of advertising services. *Inter-Mark* is not therefore authority for the proposition that whenever services could fall within definition of advertising services they must be regarded as falling outside any other specific exceptions regardless of whether the advertising services exception is actually engaged.
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> 34. If one approaches the question whether a supply falls within one exception by considering first every other kind of supply described in all other exceptions, regardless of whether the other exceptions can apply or not, one risks arriving at too narrow a definition of the services falling within any particular exception. The first step should be to consider the case law on the scope of the fairs exception. By approaching the case in the way it did, the Tribunal here effectively excluded from the scope of the fairs exception any fair or exhibition which had a trade or commercial purpose but without first considering

> whether the case law on the fairs exception justified such a conclusion."

16. The Upper Tribunal went on to consider the case law relating to Article 9(2)(c) and (contrary to the view of the First-tier Tribunal) concluded that the supplies in this case did fall within the "events" category. Article 9(1) did not therefore apply and no refund of the UK VAT was payable.

17. A convenient starting point is to consider the purpose of the place of supply rules. The Sixth Directive recognised at the outset that without a set of rules to determine the geographical location of supplies of goods and services between taxable persons (or even non-taxable persons) in different member states and for some purposes outside the EU, there would inevitably be conflicts between the taxing authorities in the relevant member states about who was entitled to the VAT payable and who (if anyone) was liable to make refunds of any relevant input tax. In order to avoid conflicts of this kind and the possibility of double taxation, the seventh recital to the Sixth Directive stated:

> "Whereas the determination of the place where taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards supplies of goods for assembly and the supply of services; whereas although the place where a supply of services is effected should in principle be defined as the place where the person supplying the services has his principal place of business, that place should be defined as being in the country of the person to whom the services are supplied, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods."

18. It is common ground that the last word in the recital ("goods") should be read as including services.

19. For present purposes the seventh recital is principally relevant to Article 9(2)(e) which throughout its various formulations has always maintained the place of establishment or residence of the customer as the deemed place of supply in preference to the place of residence or establishment of the supplier or (in the case of Article 9(2)(c)) the place where the supply or the relevant activities occurred. But Mrs Hamilton for FGS submitted that the recital also confirmed more generally that the rationale for the treatment of certain supplies as taking place in the customer's place of residence or establishment was the identification in such cases of the cost of the relevant services being passed on to the final consumer as part of the price of the goods or services he acquires. This, she says, has an obvious application to advertising services because the cost of those services will usually be a component of the price which the final consumer pays to the taxable person for the product which is advertised. The "events" category, by contrast, is designed to capture services supplied in connection with activities (e.g. a fair or exhibition) which involve the participation of all recipients of the services, whether direct or indirect (including final consumers), in transactions which take place at a single, identifiable geographical location.

20. In *Commission v France* (Case C-68/92) [1993] ECR I-5881 the ECJ was concerned with proceedings brought against France by the Commission alleging that France had introduced domestic VAT rules which did not adequately give effect to Article 9(2)(e). In his Opinion Advocate General Gulmann said that:

> "15. The most important reason for my rejection of any attempt to resolve the problem of interpretation by means of the natural understanding of the term "advertising services", however, is that substantial interpretative assistance can be found in the objectives of the provision when considered in the light of the fundamental principles of the system of VAT.
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> It should be recalled that the preamble to the directive states that the *country of the person to whom the services are supplied* should be the place of supply and consequently the country where the tax is chargeable "in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods".
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> In its reply in the case against Spain, the Commission has also pointed out that the provision should be interpreted in the light of that recital in the preamble.
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> 16. The fundamental principle governing VAT is that it must ultimately be borne by *the end consumer*, that is to say, the person purchasing the product in question, whether that product be in the form of goods or services.
>
> While it is of course correct to point out that the system of VAT contains a number of exceptions to this principle, the principle must determine the interpretation of provisions which do not unequivocally constitute such exceptions.
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> 17. In accordance with the abovementioned recital in the preamble to the directive, Article 9(2)(e) designates the country of the person to whom the services are supplied as being the country where the tax is chargeable, subject to the specific condition that the services in question are supplied between taxable persons and that the *cost of the services is included in the price of the goods*.
>
> Services which are designed to promote the sale of goods or services to the *end consumer* are supplied by the *person supplying the service* (advertising agency) to *the trader* (manufacturer or dealer) who wishes to sell a product to the end consumer.
>
> The present cases involve transactions between *taxable persons* (the trader is not the end consumer) and *costs which are included in the price which the end consumer is required to pay*

> *for the supplied product* and on which he will be required to pay VAT in the country where that tax is ultimately paid."

21. In its judgment the ECJ largely endorsed this description of the rationale behind treating advertising services as provided in the place of establishment of the customer:

> "15. As may be seen from the seventh recital in the preamble to the Sixth Directive, defining the place of taxation of advertising services as the place where the person to whom the services are supplied has his principal place of business is justified by the fact that the cost of those services, supplied between taxable persons, is included in the price of the goods. The Community legislature therefore considered that, in so far as the person to whom the services are supplied customarily sells the goods or supplies the services advertised in the State where he has his principal place of business, and charges the corresponding VAT to the final consumer, the VAT based on the advertising service should itself be paid by that person to that State. This reasoning is one of the factors which must be taken into account in interpreting the term 'advertising services' in Article 9(2)(e) of the Sixth Directive.
>
> 16. The concept of advertising necessarily entails the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales. Although that message is usually spread, by means of spoken or printed words and/or pictures, by the press, radio and/or television, this can also be done by the partial or exclusive use of other means.
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> 17. In order to determine, where other means are used exclusively, whether the transaction concerned is an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive, it is necessary in each case to take account of all the circumstances surrounding the service in question. One such circumstance, enabling a service to be characterized as 'advertising', exists where the means used have been procured by an advertising agency. However, for a service to be so characterized, it is not an essential condition that the supplier be an advertising agency. It is always possible that an advertising service may be supplied by an undertaking which is not exclusively, or even mainly, engaged in advertising, although this is an unlikely eventuality."

22. This is of course a case in which the relevant supplies were made not by an advertising agency but by FGS and did not take the conventional form of an advertisement placed in a newspaper or magazine or in the form of a poster or brochure distributed at the trader's place of business. The products marketed by the Group companies are highly specialised and are not susceptible of being marketed and sold in the same way as everyday goods such as a washing machine or even a car. We are also concerned only with the activities carried on by the Group at its enclosure

at the Farnborough air show and not with any wider marketing strategy or campaign. The findings made by the First-tier Tribunal indicate that, as one would expect, potential customers are treated to presentations and discussions designed to explain the technical and other advantages of the Group's products and to hospitality designed to promote and maintain cordial relations with the invited guests. The market for new jet fighters and similar equipment is necessarily limited by governmental and other restrictions on their supply and their purchase is unlikely to be concluded on the basis of a single visit to the Group stand. Judge Hellier did not find that the Farnborough air show could be identified as the geographical point of sale to end consumers. But he did say:

> "47. It was clear to me that the sole object of the provision of the enclosure and associated services by FGS to its sister companies was to enable those companies to sell their products."

23. In *Commission v France* it was accepted by the ECJ (see [18]) that hospitality in the form of a cocktail party or banquet could form part of the means used to increase sales of the customer's products and this would therefore have to be taken account of in any consideration of whether the services could be characterised as advertising. Mrs Hamilton emphasised the First-tier Tribunal's acceptance that the enclosure was part of the Group's overall marketing strategy and not simply a shop window. But it is clear from the judgment in *Commission v France* that the further one moves away from conventional advertising as such, the more marginal the case may be for treating the supplies as falling within Article 9(2)(e) particularly if the promotional events such as the cocktail party are not themselves an integral part of a recognisable advertising campaign.

24. This is, I think, made clear by the judgment of the ECJ in the linked case of *Commission v Luxembourg* (Case C-69/92) [1993] ECR 1-58 where the court said:

> "19. It is therefore sufficient that a transaction, such as the sale by the supplier to the recipient, in the context of an advertising campaign, of movable tangible property distributed free to consumers or sold to them at a reduced price, or the organization of a cocktail party, a press conference, a seminar, a recreational function or other forms of public relations, should involve the conveying of a message intended to inform the public of the existence and the qualities of a product or service which is the subject-matter of the activity, with a view to increasing the sales of that product or service, for the activity to be characterized as an advertising service within the meaning of Article 9(2)(e) of the Sixth Directive.
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> 20. The same applies to any activity which forms an inseparable part of an advertising campaign and which thereby contributes to the conveying of the advertising message. This is the case with regard to the sale by the supplier to the recipient, in the context of an advertising campaign, of movable tangible property or services provided in the course of various public-

> relations events, even if those goods and services, considered in isolation, do not involve conveying an advertising message."

25. Cocktail parties, press conferences and other similar activities can compositely amount to advertising services held as part of a recognisable advertising campaign.

26. Judge Hellier in [71] of the First-tier Tribunal decision quoted earlier obviously expressed his conclusions in terms of [20] of the judgment in *Commission v Luxembourg* but it is not clear to me from his earlier findings of fact what he relied on as constituting the advertising campaign, of which the activities at the Farnborough enclosure formed part. In the Upper Tribunal Rose J did not really address this question because, on her approach, the non-availability of Article 9(2)(e) meant that the question of whether the supplies in this case constituted advertising services did not arise.

27. I would differ from the approach of both Tribunals to the issue of whether this case falls within Article 9(2)(e). I am inclined to the view that Rose J was wrong to regard the question as out of bounds and irrelevant merely because Article 9(2)(e) is of no application due to the common place of establishment of FGS and the Group companies. It seems to me that the scope and content of what constitutes "advertising services" remains constant and is therefore a relevant factor when assessing whether the supplies made by FGS should be treated as falling within Article 9(2)(c). As I think both counsel were ultimately minded to accept, there may be features of the supplies in question which could qualify under more than one of the Article 9(2) categories, although the Directive dictates that as a matter of law the supplies can only fall into one of the Article 9(2) categories or, failing that, be dealt with under the general rule. The categories are in that sense mutually exclusive but the Court's determination of their correct tax treatment does, I think, involve a comparative consideration in this case of both Article 9(2)(c) and Article 9(2)(e) in order to determine their relative areas of operation and with which of the two categories the supplies in question have the closest connection. The First-tier Tribunal did not really perform this exercise on Judge Hellier's first approach to the case.

28. The services supplied and the activities to which they relate are those carried out at or in connection with the Group enclosure. I make this point to emphasise that the correct tax treatment of the supplies made by FGS is not determined by a consideration of whether the Farnborough air show as a whole constituted a scientific, educational or other activity within Article 9(2)(c). The focus is on the Group enclosure and nothing else.

29. The original wording of Article 9(2)(c) is a little cumbersome even in the form it takes under PVD Article 52. It seems to elide the services with the activities. But in the formulation which applied for the first time in PVD Article 53, it is made clear that the supply of services must be one relating to the activities there described and that the place where the activities are carried out is to be treated as the place of supply. This, I think, is a better formulation of what Article 9(2)(c) was intended in substance to provide and neither counsel suggested that the Article 53 version introduced a substantive change in the scope of the provision other than to recognise that fairs and exhibitions would be included in the category of similar activities.

30. This latter change in the wording of Article 9(2)(c) was undoubtedly made to reflect the decision of the ECJ in *Ministre de l'économie, des Finances and de l'Industrie v Gillan Beach* (Case C-114/05) [2006] ECR 1-2427 ("*Gillan Beach*") which forms a substantial plank in HMRC's case that the supplies made by FGS fall within Article 9(2)(c).

31. I want, however, to start, where Mrs Hamilton did, with the earlier decision in *Dudda*. This concerned the imposition of German VAT on the sound-engineering services supplied by Mr Dudda in connection with concerts and similar events. His business was established in Germany but he supplied his equipment and services (including the personnel to operate the equipment) to the organisers of such events many of which took place abroad. He contended that his supplies fell within Article 9(2)(c) and were not therefore taxable in Germany.

32. The ECJ was asked to give a preliminary ruling as to whether the planning by Mr Dudda of what sound equipment was required to meet the client's needs and his supply of that equipment and personnel to the site of the concert or other event fell within Article 9(2)(c). This involved a consideration of whether the relevant services could be regarded as ancillary to artistic or entertainment activities or "similar activities". The court's view was that they could. It said:

> "[24] There is a similar purpose underlying the first indent of Article 9(2)(c) which lays down that the place of the supply of services relating *inter alia* to artistic and entertainment activities and ancillary services is the place where those services are physically carried out. The Community legislature considered that, in so far as the supplier provides his services in the State in which such services are physically carried out and the organiser of the event charges the final consumer VAT in the same State, the VAT charged on the basis of all those services the cost of which is included in the price of the complete service paid for by the final consumer must be paid to that State and not to the State in which the supplier of the service has established his business.
>
> [25] As regards the criteria according to which a specified service is to be regarded as being covered by the first indent of Article 9(2)(c), no particular artistic level is required, and it is not only services relating *inter alia* to artistic and entertainment activities but also services relating to merely similar activities that fall within its scope.
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> ….
>
> [27] Having regard to the findings made in paragraphs 24 and 25 of this judgment, any services supplied which, although not themselves constituting *inter alia* an artistic or entertainment activity, are a prerequisite for its performance, must be regarded as a supply of services ancillary to that activity."

33. In the case of a single event like a concert, there is no difficulty in applying the rationale of the final consumer bearing VAT in the same state on the cost of the services acquired from the taxable person. Tickets are likely (in most cases) to be purchased domestically from the concert organiser to whom the relevant supplies are made. But, in the present case, taking the enclosure rather than the air show as the relevant event, there was no admission of the general public; there were no ticket sales; and there is no finding of any significant sales of the equipment to final consumers taking place at the enclosure during the show.

34. *Gillan Beach* concerned the organisation of the Nice boat show. The company was established in the UK but purchased goods and services in France in connection with its organisation of two boat shows in Nice in 1993. It sought repayment of the French VAT on the inputs and, as in the present case, the question was whether it had made supplies in France. The Conseil d'Etat referred to the ECJ for a preliminary ruling the question whether "the inclusive service provided by an organiser to exhibitors at a fair or in an exhibition hall" fell within the scope of the first indent of Article 9(2)(c) or any other of the categories of supply under Article 9(2).

35. The ECJ proceeded to determine the reference without seeking an opinion from the Advocate General which is usually an indication that the Court did not consider that the case raised any novel issue of principle. Gillan Beach Ltd was the organiser of the show and supplied its services to the exhibitors. The ECJ in its judgment identified the overall purpose of Article 9(2) (evident from the seventh recital) as being to establish a special system for the treatment of services provided between taxable persons "where the cost of the services is included in the price of the goods". In relation to the "events" category of activities, they said:

> "There is a similar purpose underlying the first indent of Article 9(2)(c) of the Sixth Directive, which lays down that the place of the supply of services relating, inter alia, to artistic, sporting and entertainment activities and ancillary services is the place where those services are physically carried out. The Community legislature considered that, in so far as the supplier provides his services in the State in which such services are physically carried out and the organiser of the event charges the final consumer VAT in the same State, the VAT charged on the basis of all those services the cost of which is included in the price of the complete service paid for by that consumer must be paid to that State and not to the State in which the supplier of the service has established his business (see *Dudda,* paragraph 24)."

36. The Court then turned to consider whether the boat shows constituted "similar activities" and said:

> "A show or a fair, whatever its theme, seeks to provide to a number of different recipients, as a rule in a single place and on a single occasion, a variety of complex services, with the purpose, in particular, of presenting information, goods or events in such a way as to promote them to the visitors. In those circumstances, it must be possible to regard a show or a fair as

> being covered by the similar activities referred to in the first indent of Article 9(2) (c) of the Sixth Directive."

37. It is evident from these passages in the judgment that the ECJ did not consider that the show's purpose of promoting the exhibitors' goods to visitors took the case into the category of advertising services under Article 9(2)(e). In fact the Court declined to decide whether the services in question could fall within one of the other Article 9(2) categories. For the purpose of answering the question posed by the reference, it was enough to decide that the services were related to or were ancillary to the show or fair.

38. HMRC rely upon this elaboration of what can constitute a similar activity as confirmation that the promotional nature of the activities carried on at the FGS enclosure which were identified by the First-tier Tribunal are not sufficient in themselves to take the case outside Article 9(2)(c). Absent the identification and link with some wider and more readily identifiable advertising campaign, the present case fits most obviously into the "events" category despite its possible lack of any cultural or educational element. Their case is that the essential nature of the activity to which the services were provided by FGS was an event and the enclosure was no less a fair or exhibition than the boat show in *Gillan Beach*.

39. This argument gains support from the fact that in the revised form of Article 9(2)(c) contained in PVD Article 53 there is now a reference to "similar activities, such as fairs or exhibitions". On one view, if the FGS enclosure can reasonably be described as an exhibition then it may not be necessary to look further. But in the First-tier Tribunal Judge Hellier rejected this approach and conclusion partly because he considered that there needed to be a similarity between the theme of the activity and that of the services provided:

> "85. As a result it does not seem to me that every fair or exhibition will satisfy this test. In particular provision made for the purpose of persuading attendees to buy something is not similar to the provision of education or entertainment or any of the other specified activities. The purpose of the show or fair considered by the CJEU in *Gillan* was different from the purpose of Finmeccanica's enclosure. It does not seem to me that it had a similar theme."

40. I am not sure that this point is decisive in this case even if it is correct. As mentioned earlier, the First-tier Tribunal did not find that the enclosure was used for the sale of the Group's products as opposed to their promotion and promotion was not an obstacle to the application of Article 9(2)(c) in *Gillan Beach*. It is also difficult to see why the activities carried on at the enclosure were any more or less educational than they were at the Nice boat show. *Gillan Beach* is not in terms a decision that "similar activities" need to be cultural, artistic or have any of the other specific types of characteristics described in Article 9(2)(c) and such a requirement was expressly rejected by the ECJ in [25] of its judgment in *Dudda*. But before attempting to express any concluded view about this I need to refer to the other decision of the ECJ which has featured in much of the argument.

41. This is *Inter-Mark Group sp. z o.o. sp. komandytowa v Minister Finansów* [2011] (Case C-530/09) ECR 1-10675 ("*Inter-Mark*"). It concerned a reference by the Polish

Court for a preliminary ruling as to whether "services consisting in the temporary provision of exhibition and fair stands to clients presenting their goods and services at fairs and exhibitions must be classified as services ancillary to the fair and exhibition services".

42. *Inter-Mark* (rather like the business in *Dudda*) designed stands at exhibitions and provided (on a temporary basis) the equipment necessary to create the stand. After the exhibition the equipment was returned to *Inter-Mark*. At the time when the national court made the reference *Inter-Mark* had not yet commenced its business and the questions referred to the ECJ were entirely hypothetical. The company claimed that the services it intended to provide were advertising services but the Polish tax authority considered that they were ancillary to fair and exhibition activities and so fell within Article 9(2)(c).

43. Advocate General Bot in his opinion noted that *Inter-Mark* (unlike *Gillan Beach*) was not the organiser of the fair or exhibition nor (as in *Dudda*) did it provide its services to the organiser. Its clients were to be the exhibitors themselves who were responsible for constructing and fitting out their own stands. The organisers of the exhibitions charged visitors entry fees to the exhibition none of which was passed to the exhibitors or to Inter-Mark. For this reason, the Commission contended that the cost of Inter-Mark's services would not form part of the price of the services provided by the organisers of the show and should not be taxed at the place where they were carried out. This is the final consumer point which I mentioned earlier based on the seventh recital.

44. The Advocate General rejected inclusion of the cost of the services in the price of the goods as a necessary pre-condition to the application of Article 9(2)(c). Nor did he consider that its application depended on whether the services were supplied to the organiser as opposed to the exhibitors. What was necessary was for the services to be related to activities falling within the Article. What therefore counted was the purpose of the supply.

45. In relation to the promotional nature of an exhibition and the distinction between services supplied to an exhibitor and services which fell to be treated as advertising services, the Advocate General said this:

> "58. While it is true that the setting-up of a stand by a service supplier contributes to promoting an exhibitor's products and must for that reason be done attractively, I do not think, for all that, that it should be regarded as an advertising service within the meaning of Article 56(1)(b) of Directive 2006/112.
>
> 59. Admittedly, the mere supply of stands for the purposes of a fair is not the same activity as the fair itself. Nevertheless, stands are the essential physical requirement for the accomplishment of that activity. The sole purpose, therefore, of supplying stands is, I believe, to allow people actually to participate in the fair by enabling exhibitors to present their products.

> 60. As such, the provision of stands by a supplier of services other than the organiser of the fair or exhibition is a service ancillary to the activity of organising that fair or exhibition, because it is a prerequisite for the performance of that activity.
>
> …
>
> 63. Promoting the products presented by exhibitors to visitors is the very purpose of the activity of a fair and the arrangement of stands is undoubtedly a contribution to the achievement of that objective. According to the abovementioned case-law of the Court, however, an advertising service must have the purpose of disseminating a message informing visitors of the qualities of the products and services offered by the exhibitors.
>
> 64. On the basis of the information before the Court, that does not appear to be the situation in the main proceedings, the national court simply stating that Inter-Mark takes into account the individual requirements of its customers, in particular as regards the external appearance and functionality of the stands, and may provide transportation and assembly of the parts of the stand at the place where the event is being held."

46. The ECJ in its judgment expressed no view as to which of the Article 9(2) categories the services supplied by Inter-Mark fell into. In the context of a request for a preliminary ruling the Court was only concerned to provide guidance to the national court as to what conditions needed to be satisfied for the case to fall within either Article 9(2)(c) or 9(2)(e). In relation to advertising, it repeated the test set out in *Commission v Luxembourg* (see [24] above) and said:

> "20. It follows that the supply of services consisting of the design and temporary provision of a fair or exhibition stand must be considered to be a supply of an advertising service, within the meaning of Article 56(1)(b) of Directive 2006/112, in the case where that stand is used for the dissemination of a message intended to inform the public of the existence or the qualities of the product or service offered by the hirer with a view to increasing the sales of that product or service or where it forms an inseparable part of an advertising campaign and contributes to conveying the advertising message. This will be the case, in particular, where the stand constitutes an aid for the dissemination of a message informing the public of the existence or the qualities of the products or is used for the organisation of promotional events."

47. In relation to Article 9(2)(c), the Court did not endorse the view that its application was necessarily conditional on the services in question being supplied to the organiser or other entity with a direct relation to the final consumer. Had that been its view Article 9(2)(c) would have been inapplicable for that reason alone in *Inter-Mark*, the

supplies being made only to the exhibitors. Instead it identified the key element to the application of Article 9(2)(c) as being that:

> "… they are usually provided for specific events, and the place where those complex services are physically carried out is easy to identify, as a rule, since such events take place at specific locations (*Gillan Beach*, paragraph 24).
>
> 24 It follows that a supply of services such as that referred to in the question submitted for a preliminary ruling can be characterised as a supply of ancillary services, within the meaning of Article 52(a) of Directive 2006/112, when it relates to the design and the temporary provision of a stand for a specific fair or exhibition on a cultural, artistic, sporting, scientific, educational, entertainment or similar theme or a stand corresponding to a model in respect of which the organiser of a specific fair or exhibition has prescribed the form, size, material composition or visual appearance.
>
> 25 As all the parties concerned which have submitted observations to the Court agree, in such a case the design and the temporary provision of a stand used for purposes of a specific fair or exhibition must be regarded as constituting a supply of services which is ancillary to the activity carried on by the organiser of that fair or exhibition, coming within the scope of Article 52(a) of Directive 2006/112.
>
> 26 It is necessary in this regard that the stand should be provided for a fair or an exhibition which takes place, whether on one occasion or repeatedly, in a specific location. As Article 52(a) of Directive 2006/112 requires the charging of VAT at the place where the service is physically carried out, the application of that provision to the supply of a stand which is used at a multitude of fairs or exhibitions taking place in several Member States would risk being excessively complex and would thus jeopardise the reliable and correct charging of VAT."

48. The Court's reasoning in [26] was a strong reason for rejecting the tax authority's case in *Inter-Mark* that the supplies were ancillary to a fair or exhibition as opposed to being advertising services. But it has no application to the present case where the services provided by FGS to the Group companies only ever related to the Group enclosure at the Farnborough air show. It is also clear from *Inter-Mark* that if this condition is satisfied it makes no difference whether one characterises the Group companies as organisers of the exhibition or merely as exhibitors. The services are still ancillary to the primary activity.

49. I therefore agree with Rose J largely for the reasons she gives that the combined effect of *Gillan Beach* and *Inter-Mark* is to dispose of any argument that "similar activities" must correspond to the categories or themes identified in Article 9(2)(c) or that the promotional purpose of the fair or exhibition is enough to exclude the case from the

"events" category. Nor, for the reasons I have given, is the identification of a direct link between the services supplied and the final consumer a *sine qua non* in respect of the application of Article 9(2)(c). In that connection it is worth noting that the seventh recital refers in terms only to supplies between taxable persons.

50. Judge Hellier accepted that the absence or presence of non-taxable persons as the final consumers of the event was not determinative but considered that such absence would generally take the case outside Article 9(2)(c). I think, with respect to him, that this puts the case too high. The cases of *Gillan Beach* and, in particular, *Inter-Mark* seem to me to confirm that the presence of the final consumer (and the supply to him of end services at the fair or exhibition) is not the key to the supplies being ancillary to an "events" activity. The focus is on the nature of the event which justifies tax being levied at the situs of the event rather than in the place of establishment of the taxable person. In one sense, any investigation of the position of the final consumer in this case is likely to be inconclusive whether one treats the services supplied as relating to the exhibition itself or as being part of an advertising campaign by the FGS Group. If one takes the test set out in [15] of the judgment in *Commission v France* (see [21] above) this is not a case where the Group's products were both advertised and sold in the state where the relevant Group is established. Even if the sales subsequently took place in Italy we are concerned with a promotional event in England. Similarly, although final consumers of the products were undoubtedly admitted to the enclosure, they were invited guests rather than paying members of the public and in most cases will probably have made their purchases elsewhere.

51. None of the authorities I have referred to suggests that Article 9 creates any order of priority in relation to the application of the Article 9(2) categories and both counsel were agreed that the court's rôle was to determine which of the various categories provided the best fit or had the closest connection with the supplies in the particular case. Since there is only one legally possible answer, the fact that Article 9(2)(e) is not available for other reasons in this case cannot be determinative.

52. Approaching the matter in this way, it seems to me useful to identify what might be termed the essential purpose of the supplies which were made. This involves a consideration of the nature of the operation or activity comprised in the Group enclosure at the air show. Although promotional (like the boat show in Nice), it was undoubtedly a specific event held in a readily identifiable location at a particular time. It was also in a real sense an exhibition showcasing as it did the Group's products. FGS was not an organisation like Inter-Mark which merely hired out equipment to its customers. It provided bespoke services designed for the enclosure at the Farnborough air show. In my view it therefore satisfied the conditions described in [23] – [26] of the judgment in *Inter-Mark*.

53. Although the supplies can be regarded as composite in the sense that an undoubted function of the enclosure they created can at one level be regarded as the advertising or promotion of the existence or qualities of the Group products, to treat that purpose as defining the essential characteristics of what took place would be to elevate the general over the specific and to ignore what actually took place. The services were supplied to make possible a particular event at a particular physical location and the scale and importance of the event itself is apparent from the description of what took place contained in the findings of the First-tier Tribunal: see [3] above. The case to my mind is indistinguishable from *Gillan Beach*.

54. For these reasons, I would dismiss the appeal.

Lord Justice Davis :

55. The focus here has to be on the services supplied by FGS in relation to the Finmeccanica enclosure at the Farnborough air show. The focus is not on the air show itself, for these purposes, since FGS was supplying no relevant services as such to the organisers of the air show.

56. The findings of primary fact made by the First-tier Tribunal judge do not, on analysis, I agree, compel the eventual conclusion that he reached in favour of FGS by reference to Article 9(2). At the same time, I am doubtful if Rose J sitting in the Upper Tribunal was entitled to conclude that Article 9(2)(e) had no part at all to play in the present case simply because the relevant companies were to be taken as established in the same country (Italy). It is true that ultimately only one categorisation can be selected for the purposes of Article 9(2) (if at all: otherwise the default provision of Article 9(1) applies). Nevertheless it is perfectly possible for potentially relevant characteristics to overlap, as it were, for the purposes of assessing and selecting the best fitting categorisation. It seems to me to be very odd (unless it can somehow be explained by cross-border considerations) that such an assessment is precluded or limited when the relevant suppliers and customers are in one country but not when they are not.

57. Be that as it may, I consider that the overall conclusion of Rose J that these supplies fell within Article 9(2)(c) was correct on the facts of this particular case. In particular, the decision and approach of the court in *Gillan Beach* (see in particular at paragraph 25 of the judgment) make clear, as I read the judgment, that for the purposes of Article 9(2)(c) "similar activities" do not need to have a related cultural, artistic etc. theme or purpose: and this therefore likewise is so for activities such as fairs or exhibitions. (There is in fact, as I see it, no obvious reason why a related cultural, artistic etc. theme should be required.) Although some of the remarks of the court in the subsequent case of *Inter-Mark* contained in paragraph 24 of the judgment are rather cryptic in this respect, I think that the overall tenor and approach of the judgment in that case are also in line with *Gillan Beach*.

58. A wider overview also, in my view, supports the conclusion of Rose J in this case:

    (1) First, the approach inherent in the arguments of Mrs Hamilton as to the ambit of the phrase "advertising services" is extremely broad and, as such, difficult to fit with the decided cases. In truth there are very many business activities which can be said to involve the promotion or marketing of a company's goods or services: be it the shop window display, the smartly dressed and fluent staff, the business pitch made at a meeting and so on. Thus it is evident that not all promotional and marketing activities will correspond, for these VAT purposes, to advertising services.

    (2) Second, adopting as one part of the decision making process what is said at paragraph 23 of the judgment in *Gillan Beach*, the place at which the various complex services were carried out is in the present case readily identified as one specific location: Farnborough.

(3) Third, we were referred to the Guidelines resulting from the meeting of the VAT Committee of 30 March 2015. The agreed, albeit not unanimous, view of the Committee was that where a service is susceptible to be covered by more than one of the particular rules relating to supply "the rule which best ensures taxation at the place of actual consumption of the service shall prevail". In the present case it can readily be said that there was here one place of actual consumption: Farnborough.

59. For these short reasons, and for the much fuller reasons given in the judgment of Patten LJ with which I entirely agree, I too would dismiss this appeal.

Lord Justice Beatson :

60. I agree with both judgments.

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