



Neutral Citation Number: [2010] EWHC 120 (Ch)

Case No: CH/2008/APP/0167

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2010

Before :

MRS JUSTICE PROUDMAN

Between :

**AMERICAN EXPRESS SERVICES EUROPE
LIMITED**

Appellant

- and -

**THE COMMISSIONERS FOR HM REVENUE
AND CUSTOMS**

Respondents

Roderick Cordara QC (instructed by the solicitor for American Express) for the **Appellant**
Peter Mantle (instructed by the Solicitor to HMRC) for the **Respondents**

Hearing dates: 5, 6, 7, 8, 9 October 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mrs Justice Proudman:

Preliminary

1. This appeal is one in point of law from a decision released on 16th July 2008 of the London Value Added Tax and Duties Tribunal, which itself upheld a decision dated 21st January 2003 by the Respondents, HMRC. The effect was to uphold an assessment of VAT in the sum of £607,749 for the period 1 May 2000 to 31 December 2002. However VAT has been paid under protest since the original decision so that the amount at stake is in the region of £2m.
2. The appeal concerns the place of supply of services provided by the appellant, American Express Services Europe Limited (“Amex Europe”). If and so far as the place of supply is outside the European Union, no VAT is payable. Conversely, VAT is payable if and so far as the place of supply is within the European Union.
3. American Express Corporation is the parent company in the multi-national financial services group popularly known as Amex. It owns American Express Travel Related Services Company Inc (“AETRSCo”) a company established and operating in the United States and based in the same building in New York as the group headquarters. AETRSCo is itself the parent company of a United Kingdom holding company which is the immediate parent of Amex Europe, a company also established in the UK.
4. Amex Europe is based in the European Union. AETRSCo is not. Amex Europe’s case is that it made multiple supplies to AETRSCo and that the supplies fall within the rules attributing the place of supply to the location of the customer. Alternatively, its case is that the supplies are made in connection with land and they fall within the rules attributing the places of supply to the location of the land so that properties situated outside the UK do not fall within the VAT net. HMRC’s case is that the Tribunal correctly found that there was a single supply and that the supply fell within the rule attributing the place of supply to the location of the supplier with the result that all the supplies were taxable to VAT.
5. I am told that the place of supply rules for VAT purposes are being changed so that the location of the customer will be the usual point of reference for the location of the provision of supplies save for supplies relating to land. Mr Cordara QC (for Amex Europe) points out that his case is therefore in line with the current policy view.
6. Although the court may consider matters of rationality and competition in accordance with the purpose of the legislation it is not for an appeal court to consider whether a different result would be more appropriate in policy terms. The appeal is confined to points of law. The issue whether a contract involves the provision of one or more supplies for VAT purposes and other issues relating to place of supply are issues of legal evaluation and therefore issues of law: see **Dr Beynon & Partners v. Customs & Excise Commissioners** [2005] STC 55 at paragraph 26, and the observations of Sir Andrew Morritt C in **Zurich v. HMRC** [2007] STC 156 at paragraph 34. As Patten LJ (with whom the other members of the Court of Appeal agreed) said in **David Baxendale v. Revenue & Customs Commissioners** [2009] EWCA Civ 831:

“On an appeal the court is concerned to decide what are the correct VAT consequences of the contractual arrangements which the parties have entered into having regard to such of the background facts as are material for that purpose. The Tribunal’s findings of fact are therefore relevant to this exercise but any challenge to their conclusions on the law is not limited to **Edwards v. Bairstow** principles. The appeal court must decide what is the correct legal outcome by applying to those facts the relevant principles of European law in relation to Article 2 of the Sixth Directive. It is not required to find that the Tribunal has misdirected itself.”

7. I bear in mind that the legal evaluation may require “a multi-factorial assessment based on a number of primary facts” so that “the appeal court should be slow to interfere with that overall assessment-what is commonly called a value judgment”: per Jacobs LJ in **Proctor & Gamble UK v. HMRC** [2009] STC 1990 at 1993-5, and see per Lord Hoffmann in **Beynon** at paragraph 27.
8. Although in order to intervene the court is not confined to the grounds expounded by Lord Radcliffe in **Edwards (Inspector of Taxes) v. Bairstow and Another** [1956] AC 14, it should not re-open primary findings of fact. The Tribunal’s findings of fact, as set out in paragraphs 12-36 of the decision, ought not to be disturbed unless they are so perverse as to be insupportable. This is an appeal in point of law, not a re-hearing. I also accept Mr Mantle’s submission that inferences drawn from primary facts should not be interfered with (save on the **Edwards v. Bairstow** principle) if they are comprised within a number of possible inferences that could be made: see **Furniss v. Dawson** [1984] STC 153 at 167.
9. I must deal with the allegations that the Tribunal misdirected itself. If it did not do so, I am nevertheless required to consider the question whether the Tribunal came to the right conclusion as a matter of law. However I approach the substitution of my own judgment for that of the Tribunal with circumspection in circumstances where, as here, an experienced Tribunal heard and saw a considerable amount of first hand evidence. Particular circumspection is needed where, as here, I was invited by the appellant in the course of argument selectively to consider small portions of a large body of evidence which had been before the Tribunal. It is one thing to review the conclusions of law reached by the Tribunal on the basis of the facts which it found; it is another to substitute one’s own conclusions for the “multi-factorial assessment” or value-judgment reached by the Tribunal, having heard a large body of evidence, as a matter of inference from those facts.

The law

10. Both parties have proceeded on the basis that the relevant provisions for present purposes are the provisions of European law. Art 2(1) of EC Council Directive 77/388 on *the harmonisation of the law of member states relating to turnover taxes-Common system of value added tax: uniform basis of assessment* (known as the Sixth Directive) has direct effect in the UK. It requires member states to subject to VAT:

“the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.”

11. It is common ground that the domestic provisions of the Value Added Tax Act 1994 (s. 7(10) and Schedule 5) and the Value Added Tax (Place of Supply of Services) Order 1992 SI No 3121 have to be construed consistently with the European law provisions. It is also common ground that I should follow the lead of the Tribunal and focus in particular on Article 9 of the Sixth Directive.
12. The relevant recital to the Sixth Directive, which applied to supplies of goods as well as services, is as follows:

“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 cost of the goods.”

13. The relevant provisions of Article 9 are as follows,

“1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However -

(a) the place of supply of services connected with immovable property including the services of estate agents and experts, and of services for preparing and awarding and co-ordinating construction works, such as the services of architects and of firms providing on site supervision, shall be the place where the property is situated;

...

(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 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:

...

[third indent] services of consultants, engineers, consultancy bureaux, lawyers, accountants and other similar services, as well as data processing and of the supplying of information..."

14. Mr Mantle submitted that at all times material to this appeal, the basic rule was that the place of supply of services was the place where the supplier and not the customer was established or where the services are physically carried out. However I would make the preliminary observation that Art 9.1 does not take precedence over Art 9.2: see e.g. **Dudda v. Finanzant Bergiseh Gladback** [1996] STC 1290.
15. I also note that the recital states that the place of supply is to be the place where the customer is established "in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the cost of the goods." The present case is not concerned with the supply of goods but only with the supply of services.
16. There are two limbs to the appeal. One is whether there was a single or multiple supply. Amex Europe challenges the Tribunal's decision that there was a single supply. The second limb is whether the place of the supply or supplies was wholly or partly outside the United Kingdom. Under this limb Amex Europe challenges the Tribunal's conclusions that neither Article 9(2)(e) nor Article 9(2)(a) applied.

Single or multiple supply?

17. The issue of single or multiple supply must logically be determined as a pre-requisite to addressing the issue of place of supply: see **Card Protection Plan** at 293.
18. Amex Europe carried on AETRSCo's business in the UK, including the Amex Group's card, travel, merchant and network business here. Other companies carried out those aspects of AETRSCo's business in the Americas, in Europe, the Middle East and Africa ("EMEA") and in Japan, Asia and Australia ("JAPA"). The Amex Group also has significant interests in real estate worldwide. This is not investment property as such but the functional premises used by group companies as offices and branches. This appeal is concerned with services provided by Amex Europe to AETRSCo in relation to this aspect of the Amex Group's activities.
19. The operational structure relating to real estate is set out in detail in the Tribunal's decision at paragraphs 12-36. It was reformulated (with different emphases) by Mr Cordara in the course of argument. AETRSCo was the head office tier. It oversaw all real estate matters, receiving reports and granting approvals where required. It carried out its real estate functions through a division called the Global Real Estate Group ("GREG"), which divided its responsibilities into the regions: the Americas, EMEA and JAPA. Amex Europe, through its Real Estate Group ("REGUK") carried out the

functions of GREG in EMEA (and in 2004-5 also some of the finance functions of GREG in JAPA). REGUK employed nine members of staff, four in relationship and project management and five in Finance. Five members of Trammel Crow Savills Limited (to which certain activities were outsourced, as explained below) were seconded to work full time at REGUK. The structure had a third, and lower, corporate tier which dealt directly on the ground with the property issues.

20. HMRC adopted the wording of one of the REGUK Vice Presidents in recording an overview of REGUK's functions:

“We act as a buffer between the AMEX core business and the property industry, in all its forms. We are an ‘intelligent client’ for the agents, brokers, architects and other professionals who execute the strategies which we produce. Our role is to extract information from the business units in terms of their forecast needs, advise them of their options, and then synthesize that information into a strategy which the relevant external professionals can execute at minimum cost to Amex.”

However:

“the actual hands-on relationships with buildings (transactional constructional or operational) are handled by people other than the regional team, which acts for head office. In many ways, the mandate of my (small) team is summarised by the concept that ‘we give our business customers not what they want, but what they need’. We interpret what the business units say they need into what property professionals can deliver. Having established a scope, and developed a brief, the execution of the project is then tasked to an external party.”

21. Throughout EMEA there were over 200 members of staff with direct responsibility for the daily management of specific premises in their respective countries. No work was done directly by Amex Europe to or in connection with individual properties, nor was any work commissioned from third party providers. Those functions were left to the local subsidiaries, the costs of whose activities were charged locally and subjected to tax accordingly.
22. The appeal concerns the monthly payments that were made to Amex Europe for the services performed by REGUK. These services were based on cost plus a 10% uplift. The charges were debited to AETRSCo and credited to Amex Europe monthly in the inter-company accounts. No invoices were separately delivered enumerating the various types of services provided. The payments were allocated and recharged by Amex Europe to four costs centres for accounting purposes.
23. Mr Cordara's principal contention was that there were five “streams of supply” which were run by separate, independent, and economically dissociable teams and therefore that it was wrong to bracket them together when deciding on their tax treatment.
24. The five streams relied on by Mr Cordara were as follows: Finance Management, which operated daily; Project Management and Transaction Management, which were

both ad hoc; Facilities Management, which was ongoing, and so-called Blue Sky Thinking. I would briefly summarise the respective activities of these streams as follows:

- The Finance team's area of responsibility was cost control and forecasting. It carried out budgeting, forecasting, accounting, analysis and cost control for the EMEA region. It maintained a database with lease payment terms and renewal dates, suppliers' invoices and financial reserves. It provided reports, information and analysis to GREG, to regional and business units on the ground and also to the other REGUK teams.
- The Transaction Management team was mainly concerned with variations of leases, extensions, rent reviews, terminations and new leases. Transaction Management was outsourced by Amex Europe to Trammel Crow from 2001 onwards.
- The Project Management team was concerned with improving the standard of buildings by overseeing and giving advice on the means whereby refurbishments and similar projects were undertaken. The projects themselves were procured and paid for by the relevant business units.
- Facilities Management was concerned with the delivery of facilities such as mail services, food services, cleaning and maintenance. The actual work was again organised and procured locally and the costs were borne locally. A company called Johnsons Controls Limited made certain supplies direct to local businesses, apparently without any direct recharge by Amex Europe to AETRSCo for its services. The Facilities Management team's remit (to which the charge applied) was to advise on and oversee the manner of procurement by local management, ensuring consistency and compliance with Amex Group standards.
- Finally there was the Blue Sky team. It never had a separate costs centre. Its costs were first accommodated in the Transaction Management cost centre and from 2001 onwards in the Facilities Management cost centre. It was concerned with strategic leadership and in particular with aligning the strategic policy direction of the group with the needs of the local business units. The Blue Sky team was engaged in what was described in evidence as forward thinking in identifying opportunities in various locations, analysing potential costs and maintaining the integrity of the Amex brand.

25. I start from the position that every supply of goods and services must normally be regarded as distinct and independent: see **Tellmer Property sro v. Finančni reditelstvi v. Usti nad Labem** [2009] STC 2006, **Card Protection Plan** paragraph 29 and **Levob** at paragraph 20. The characterisation of a particular transaction as a single supply gives to what otherwise would be separate supplies a different tax treatment from that which they would have if they were separate: see the decision of the ECJ in **Ministero dell'Economia e delle Finanze v. Part Service Srl** [2008] STC 3132 at paragraphs 48-51. Nevertheless the position should not be distorted by artificially splitting what is from an economic point of view in substance a single service.

26. The relevant transactions must be analysed with due regard to all the circumstances in which they take place without over-zealous analysis: see **Card Protection Plan** paragraphs 28-9 and [2002] 1 AC 202 at paragraph 22; see also **Tumble Tots (UK) Ltd v. Revenue and Customs Commissioners** [2007] STC 1171 at 1174-5. The essential features of the transactions must be considered at a level of generality which corresponds to economic reality: see **Dr Beynon v. Customs & Excise Commissioners** [2005] STC 55 at 63.
27. Neither the Sixth Directive nor the domestic provisions of the Value Added Tax Act 1994 furnish any guidance as to how to identify whether there is a single supply consisting of a number of elements or several distinct supplies. That guidance must be found in the case law. I have been referred to very many cases of high authority on the issue of single or multiple supply and place of supply. The principal domestic cases are **Dr Beynon (above)** and **College of Estate Management v. Customs & Excise Commissioners** [2005] STC 1597, both in the House of Lords, and **Bophuthatswana National Commercial Corp Ltd v. Customs & Excise Commissioners** [1993] STC 702, **Customs & Excise Commissioners v. Wellington Private Hospital Ltd** [1997] STC 445, **HMRC v. Zurich (above)**, **Customs & Excise Commissioners v. FDR** [2000] STC 672, **HMRC v. Weight Watchers (UK) Ltd** [2008] STC 2313, **Proctor & Gamble UK v. HMRC (above)** and **David Baxendale Ltd v. HMRC** [2009] EWCA Civ 831, all in the Court of Appeal. Cases in the European Court of Justice included **Dudda (above)**, **Faaborg-Gelting Linien A/S v. Finanzamt Flensburg** [1996] STC 774, **Customs & Excise Commissioners v. Madgett and Baldwin** [1998] STC 1189, **Card Protection Plan Limited v. Customs & Excise Commissioners (Case C-349/96)** [1999] STC 270 **Customs & Excise Commissioners v. Zoological Society of London** [2002] STC 521, **d'Ambrumenil and another v. Customs & Excise Commissioners** [2005] STC 650, **Finanzamt Heidelberg v. ISt Internsationale Sprach-und Studienreisen GmbH** [2006] STC 52, **Levob Verzekeringen BV and another v. Staatssecretaris van Financien** [2006] STC 766, **Aktiebolaget NN v. Skatteverket** [2008] STC 3203 and **Tellmer (above)**.
28. The case law is, as Mr Cordara said, formidable. However, in view of the observations of Lord Hoffmann in **Beynon** at paragraph 19, little benefit is obtained from any minute consideration of cases which preceded **Card Protection Plan**. In any event, all the cases are simply applications of principle to the transaction in issue in the particular case.
29. As a matter of general principle, it is common ground that the test originating in **Card Protection Plan** and definitively enunciated in **Levob** is applicable. There has been a great deal of argument as to how to interpret and apply that test in the present case and it is therefore worth setting out the words of the European Court in the judgment in the **Levob** case. Those words are to be found in paragraph 22 and replicated in paragraph 30 of the judgment:
- “22. [There is a single supply] where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

...

30...Article 2(1) of Sixth Directive must be interpreted as meaning that where two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT... ”

30. I shall call this “the **Levob** test”. Patten LJ said in **Baxendale** (at paragraph 21, 22 and 24):

“All these cases including **Tellmer** are simply applications of a now well-established principle to the transaction in issue in the particular case. Where the transaction under consideration prima facie involves more than one identifiable supply neither of which can be regarded merely as ancillary to the other the correct tax treatment will still depend on whether, from an objective view, they form a single indivisible economic supply which it would be artificial to split.

The determination of this question will depend upon a global assessment of all facts relevant to the transaction under which the supply or supplies took place. That is the taxable event. This will obviously include a consideration of the terms upon which the supply or supplies were made; how they were invoiced for; and what the consumer in fact acquired under the contract.

...What also emerges from this analysis is that the court’s inquiry as to whether a composite transaction is a single indivisible economic supply must be both fact and transaction specific...”

31. In applying the **Levob** test all the circumstances must be looked at objectively from the perspective of the typical customer rather than the supplier, and the extent of the linkage between the supplies must be considered from an economic point of view rather than a physical, moral or other standpoint. Both these propositions clearly emerge from the analysis in **Weight Watchers** at paragraph 17 of the judgment of Sir Andrew Morritt C, with which the other members of the Court of Appeal agreed.
32. Mr Cordara submitted that the first step is to identify, as in **Card Protection Plan**, whether there is a principal or predominant element in the supply to which other elements are merely subsidiary. In this case, it is common ground that the Tribunal correctly concluded that there was no predominant element in the supply.
33. However Mr Cordara went on to submit that such a finding colours the **Levob** test in the present case. He said that the Tribunal found (for the purposes of considering Article 9 (2)(a) and (e)) that management functions predominated. Why, he asked, should something not be predominant enough for the **Card Protection Plan** test but

suddenly become sufficiently predominant as to the overall fiscal label to attach to the supplies of services for the purposes of considering whether the case falls within the categories specified in Art 9(2)? On the facts of the present case, there ought to be multiple supplies if there is no predominant supply.

34. This approach does not bear scrutiny. First, (and it is worth stressing the point) it is open to the Court to decide that it would be artificial to split the categories of supply even though there is no predominant supply within **Card Protection Plan**. That is plain from many cases including **Card Protection Plan** itself, from **Levob** (at paragraphs 21-22), and from the speeches of Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe in **College of Estate Management** at paragraphs 11 and 30 respectively. Thus Lord Rodger:

“But the mere fact that the supply of the printed materials cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes. One still has to decide whether, as a matter of statutory interpretation, the College should properly be regarded as making a separate supply of the printed materials, or, rather, a single supply of education, of which the provision of the printed materials is merely one element. Only in the latter event is there a single exempt supply ... The answer to that question is not to be found simply by looking at what the taxable person actually did since *ex hypothesi*, in any case where this kind of question arises, on the physical plane the taxable person will have made a number of supplies. The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some over-arching single supply. According to the Court of Justice in **Card Protection** (at para 29), for the purposes of the directive the criterion to be applied is whether there is a single supply ' from an economic point of view '. If so, that supply should not be artificially split, so as not to distort (*altérer*) the functioning of the VAT system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. ... The key lies in analysing the transaction. ”

And Lord Walker:

“In the course of this appeal there has been much discussion of Para 30 of the ECJ's judgment [in **Card Protection Plan**]. In my opinion it is clear that this paragraph (which uses the introductory words ' in particular ') is dealing with a particular case exemplified by **Madgett and Baldwin**. It is not asserting that every distinct element of a supply must be a separate supply for VAT purposes unless it is 'ancillary'. 'Ancillary' means ... subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in **British Telecommunications** (where the delivery of the car was subordinate to its sale) and in **Card Protection Plan** itself

(where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including **Faaborg**, **Beynon** and the present case) in which it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (**Faaborg**). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (**Beynon**). ”

35. Similarly, Mr Cordara’s submission that the correct interpretation of the **Levob** test is that there can only be a single supply where one element of the transaction can have no practical use without the other has been rejected by the Court of Appeal: see **Weight Watchers** at paragraph 36 and **Baxendale** at 21-24.
36. Secondly, in considering the categories in Article 9 (2) the Tribunal was not in my judgment applying the **Card Protection Plan** principal/ancillary test. I will deal with that matter in due course.
37. The issue in relation to the question whether there was a single or multiple supply in the present case is therefore the **Levob** test, in which the concept of predominance does not feature.
38. Mr Cordara pointed out that both goods and services were supplied in all the cases of high authority in which the Court has found a single supply. In all the services-only cases heard by the ECJ such as **Madgett and Baldwin**, (dealing with coach services to ferry guests to and from their homes), **Heidelberg** (dealing with tours which had both an educational and a vacational function) and **Tellmer** (dealing with cleaning services and apartment lettings) the Court held that there was a multiple supply. Mr Cordara asked the Court to conclude from this that if services fail the **Card Protection Plan** predominance test they ought only to be subjected to the **Levob** test in an exceptional case. Indeed he went so far as to submit that it would be brave (because wrong) for me to so subject them in the present case.
39. It is true that in cases where both goods and services were in issue, the Court finding a single supply will have had to decide whether the supply was one of goods or services and that may involve (as in **Levob** itself) finding a predominant supply. That is because different rules apply in establishing the place of supply for goods and services respectively, namely Article 8 and Article 9 of the Sixth Directive.
40. However it seems to me that Mr Cordara’s submission is a leap too far. The **Levob** test falls to be applied according to its terms without any more or less rigour merely because services only and not both goods and services have been provided.
41. Mr Cordara further identified what he submitted were three manifest errors in findings of fact made by the Tribunal which were not reasonably open to it to find on the

evidence before it. It seems to me that there is an element of nit-picking in these criticisms and that when the decision is considered as a whole, any errors that were made do not have the effect for which Mr Cordara contends.

42. The first such alleged error is the Tribunal's finding that "Project management appears to have been separated from transaction management as a cost centre in 2002." He says that the evidence shows that it was always a separate cost centre. However, whatever the truth of that matter, (and the evidence relied on is a letter from Amex Europe's accountants stating its case), it is undoubtedly the case that in the relevant period (2000-2002) AETRSCo was only charged in one year (2002) for services derived from the Project Management cost centre.
43. The second alleged error is contained in paragraph 24 of the decision which is said to contain a misconception as to the functions of the REGUK staff which were in fact outsourced to Trammell Crow. However it is evident that this paragraph merely recites the contents of a letter from Janet Taylor of HM Customs. It is plain from paragraph 67 of the decision that the Tribunal was aware of, and took into account, the outsourcing to Trammel Crow.
44. The third alleged error relates to the function of Johnson Controls. The relevance of this is said to be that the error diluted the role of Trammel Crow to which functions were genuinely outsourced. It does not seem to me that a finding that matters were outsourced to Johnson Controls (if there was such finding, since paragraph 18 of the decision is again merely a narration of Janet Taylor's draft overview of the business) is adverse to Amex Europe, whose case is that outsourcing is in itself an indicator of multiple supplies.
45. Accordingly none of those matters is in my view susceptible to attack on the decision on **Edwards v. Bairstow** principles.
46. The Tribunal recognised the **Levob** test and purported to apply it. There was no misdirection as to the correct test. However the application of the test to the facts found is a question of law and I therefore go on to consider whether, as Mr Cordara submits, the Tribunal failed to apply the **Levob** test correctly. I am bound by the decisions of the Court of Appeal in **Weight Watchers** and **Baxendale** to consider the question for myself.

Application of the Levob test to the facts as found by the Tribunal

47. Mr Cordara submitted that the Tribunal's approach to the application of the test was wrong in law. He took the court in detail through the authorities, in particular **Faaborg** (dealing with a restaurant meal), **Beynon** (dealing with an injection), **Levob** (dealing with a programmed CD-ROM) and **NN** (dealing with a cable laid under the sea). He pointed out that in each of these cases the activities were very tightly knit, single event situations where there was a clear beginning, middle and end and which it was obviously unattractive and artificial to subdivide. In order to find a single supply there would have to be, he submitted, the same tight singularity of economic character.
48. Mr Cordara adverted to a number of matters which he said point away from there being a single supply. He elaborated on these matters in great detail. I would

summarise his submissions as follows. There was nothing in the evidence and nothing in the decision of the Tribunal to suggest that the five teams were, conceptually or in their activities, anything other than distinct and separate or that they did anything other than provide distinct and separate services to AETRSCo. Each stream was complete with its own internal logic and commercial significance and any one could be removed without affecting the existence, function or quality of the others. This was, he maintained, underscored by the fact that some of the activities were outsourced.

49. He relied in particular on the following matters:

- The skills and experience of the personnel in each team were distinct and appropriate to the services provided.
- All the teams with the exception of Blue Sky had separate costs centres which represented genuine commercial demarcations.
- The work of each team could have been split from REGUK and moved elsewhere without affecting the integrity of the whole. Individual functions could have been directly carried out by AETRSCo without delegating them at all.
- Each team had what Mr Cordara described as a different ‘rhythm’ of work, with different fluctuations in the work for each team in each year. There was no moment when someone could say ‘job over’.
- At any one time each team could be dealing with issues in different portfolios in different countries.
- There was nothing to suggest a web of interdependence in relation to information as the issues looked at by each team were entirely discrete.
- From 2001 the work of the Transaction Management Team was largely outsourced to Trammel Crow under a written agreement, leaving only an internal supervisory and strategic role for internal staff. Trammel Crow had economic independence and authority. The outsourcing could have been directly effected by GREG. In this context I bear in mind the words of Patten LJ in **Baxendale** at paragraph 24, where he said,

“The fact that the same or similar goods or services could be provided separately from different sources is irrelevant in my view to the question whether, in the particular transaction under consideration, their combination produced a different economic result.”

50. Mr Cordara was very critical of the Tribunal’s reasons for deciding that there was a single supply. Those reasons as he sees them were information interdependence, difficulty in outsourcing management functions and the cost ineffectiveness of splitting away any of the teams. He submitted that none of those elements was in fact present and in any event none of them came anywhere near close to establishing economic indivisibility. The case is very far, he submitted, from the type of single event situation exemplified in **Faaborg, Beynon, Levob** or **NN**. He took issue with

the Tribunal's finding that no rational basis for splitting the functions of Amex Europe had been identified.

51. However a crucial part of the Tribunal's approach was to consider the supplies objectively from the perspective of what the customer obtained rather than the cost structures of the supplier: see paragraphs 57-59 and 67 of the decision. Of course there was no "typical" consumer in the present case, as all supplies were made to AETRSCo. AETRSCo was not merely the typical consumer, it was the only consumer. However, it does not seem to me that this alters the requirement, correctly identified by the Tribunal, to analyse the supplies objectively from the consumer's standpoint rather than that of the supplier.
52. The Tribunal considered that the supplies could be categorised differently by AETRSCo as consumer from the internal classification adopted by Amex Europe: delegated management functions, compliance with Amex Group policy, provision of advice, information and support to local business units and provision of reports, information and recommendations to AETRSCo. It was, as I have said, an important part of the decision that the separation of functions was a matter of the internal administration of Amex Europe.
53. Mr Cordara's only substantial response to this point was to say that supplies which tend to an overall outcome, such as 'a well-run property portfolio', take the standpoint of the customer to too high a level of abstraction. He submitted that one had to see how the supplies were treated by the supplier as this was the only way that the services could produce any outcome of value to the consumer.
54. I agree with Mr Cordara that the mere fact that a general description could be given to the totality of services does not constitute them a single supply. On the other hand I agree with Mr Mantle that the fact that they were dealt with by the supplier in separate streams does not make them separate supplies.
55. It seems to me that the crucial issue is the question of what the typical customer was paying the consideration for. If a house owner engages the services of a builder, is he taken to have paid the builder to do whatever is required (including subcontracting where necessary) to complete the building to his specifications, to be an overall 'Mr Fixit'? Or is he taken to have paid the builder to provide a package of distinct building, roofing, plastering, decorating, electrical and plumbing services? It seems to me that discretion is important in finding the answer to this question. If the supplier is given discretion to supply whatever it takes to provide and allocate expertise in the provision of an efficient service it is difficult to say that the customer is, objectively speaking, buying a package of discrete services. This discretion is a separate issue from independence.
56. I take into account the following factors as relevant to the analysis of the transaction, although none is decisive in itself:
 - Payment to Amex Europe by AETRSCo was not made according to the apportionment between costs centres, but simply by means of an overall monthly sum. Amex Europe recharged the payment between the various costs centres as a matter of internal accounting.

- The group was tightly controlled from New York in relation to real estate matters and approval was required for any transactions involving more than \$.5m. However Amex Europe had authority up to that sum. Budgeting information, as well as other information, reports and recommendations, was passed up to AETRSCo. However, Amex Europe decided for itself how its services were to be allocated and provided internally.
 - The Head of REGUK led all the personnel. Oversight was unified, demonstrating a real link between the teams' activities.
 - There was no separate costs centre for the Blue Sky team. Its costs were at first dealt with within Transaction Management and then within Facilities Management. This reflected the fact that maintaining the Amex Group standards and policy was a feature common to all the teams.
 - There was close physical proximity between the personnel at Amex Europe. They shared an office in which all employees in all the teams worked together to perform REGUK's functions.
 - The Trammel Crow members were largely sourced from ex Amex Group personnel. They worked out of the same offices as the directly employed Amex Europe staff. The Tribunal accepted that there was outsourcing under a contract but it plainly inferred that in practical terms the Trammel Crow personnel were seconded to Amex Europe as part of the Amex Europe team. There was a continuing need for information input and liaison which was satisfied because of this special type of outsourcing.
 - There were several findings of fact by the Tribunal as to interrelationship between the activities across the whole of REGUK. Task approval was given across the teams. All the teams had to ensure compliance with Amex Group policy. Facilities Management and Transaction Management managed and oversaw the local units, ensuring that local units complied with the standards and policies set by the Amex Group. The Finance team provided financial information required in relation to all the other teams. It supported the whole of REGUK with cost control functions, cost allocation functions and payment functions. Capital projects required input both from Facilities Management and Project Management as well as Finance. The teams worked with the local business units with some overlap as to who did what.
57. The Tribunal said that it was difficult to see how management functions and approval of lease transactions, provision of advice, information and support to the local business units and the provision of reports, information and recommendations to AETRSCo, could have been outsourced to a company outside the group. If Project Management had been outsourced or left to a different entity, the Finance team would have needed information from the outsourced unit. Splitting off any of the elements entirely would have added to overall costs.
58. Under this head Mr Cordara particularly objected to the characterisation of the teams' role as including significant management functions which could not be delegated and to the Tribunal's conclusion that it would have added to the costs to split away the functions of any one team. It seems to me that the Tribunal's conclusions were

inferences drawn on the basis of all the evidence which it saw and heard; the kind of multi-factorial value-judgment mentioned by Jacob LJ in **Proctor & Gamble**. The Court should be slow to re-assess the evidence on the basis of an analysis of selective extracts adduced for the purposes of this appeal.

59. Nevertheless, analysing the legal position afresh on the basis of the primary facts found by the Tribunal, it seems to me that objectively speaking AETRSCo looked to Amex Europe to formulate and execute strategies to make sure that the local units operated efficiently and to ensure the maximum utilisation of their real estate in accordance with Amex group policy. In short, Amex Europe's remit was to assist the local units to find space for people to work, of the right quality, in the right location and on the right terms. The division of this remit into streams was merely the way in which Amex Europe itself decided to organise its operations to provide those services. There was considerable overlap between the teams in terms of the work done.
60. I am driven back to REGUK's Vice President's own analysis of its functions, quoted in paragraph 20 above, namely as a buffer vehicle between AETRSCo and the local tier, acting as an intelligent client for external professionals executing strategies in respect of Amex Group properties. It seems to me that the streams of supply overlapped and were not economically dissociable other than by means of an accounting exercise performed by and on behalf of the supplier.
61. I agree with the inference drawn by the Tribunal that the transaction could have been split in a number of different ways. To my mind it is not at all obvious where the lines between functions could or should be drawn from the objective viewpoint of the customer. Again it is a leap too far to say that the business of Amex Europe was complex and therefore there had to be multiple supplies, whether in accordance with each of the streams contended for or in accordance with the three broad categories specified in paragraph 66 of the Tribunal's decision.
62. I have considered and reconsidered Mr Cordara's attractive submissions but ultimately it is my view that the Tribunal was correct in its assessment. There was a single indivisible economic supply which it would be artificial to split.
63. Having established that there was a single supply I therefore turn to the place of supply.

Place of supply

64. It has been established since at least **Dudda** that the proper approach is to look at the supply to see whether it falls within the categories specified in Art 9(2). If it does not, it falls within Art 9(1).
65. An overarching contention advanced by Mr Cordara was that it was irrational for Amex Europe's supplies to be taxed where the supplier was established because so much of the work was done in relation to local units outside the United Kingdom. He gave examples of building in Spain and the Middle East. However it must be remembered that his primary submission was that Article 9(2)(e) applied, and if that were successful the place of supply would be the United States. Amex Europe had no remit in respect of real estate in the US. The argument that the place of supply is the place where the buildings are situated is the argument under Article 9(2)(a). This is

Mr Cordara's fallback argument for the obvious reason that if the argument were successful it would not exempt Amex Europe from VAT altogether.

66. Although Mr Cordara necessarily relies principally on Article 9(2)(e), I detected a shift in his oral argument to the position, "If this is a single supply, the place of supply is governed by Article 9(2)(a); or if it is a multiple supply, it is either in the nature of consultancy or accountancy supply within Article 9(2)(e)." It seems to me that logically I ought to deal with Art 9(2)(a) first.

Art 9(2)(a)

67. I make the preliminary observation that there would be difficulties in the application of Article 9(2)(a), since Amex Europe's services would have to be apportioned between properties in various different countries. The tribunal found that the Amex Group owned over 350 properties, spread as far afield as Abu Dhabi and Kiev. There were seven major facilities in European countries outside the UK and seven within the UK, resulting in the possibility of at least eight places of supply within Europe. It is notable that Amex Europe's costs centres did not seek to break down Amex Europe's costs on a property by property basis. Supplies falling within both Article 9(2)(a) and Article 9(2)(e) might create even more difficulties: see the observations of the ECJ in **EC Commission v. French Republic** [2001] STC 156 at paragraphs 40-47.
68. It seems to me that Article 9(2)(a) requires a connection with specific properties. Amex Europe's function was, as the REGUK Vice-President said, to act as a buffer between the companies which dealt with the properties and Head Office. "Having established a scope, and developed a brief, the execution of the project is then tasked to an external party". In my judgment the services provided were only "connected with immovable property" very loosely and not in the sense required by Article 9(2)(a).
69. It is true that Amex Europe did consider problems in relation to specific properties. One example given was wheelchair access to an identified building in Scotland. However Amex Europe's services were admittedly not "transactional, constructional or operational" (again I return to the Vice-President's summary) as those functions rested with the lower tier of management at local unit level. Looked at overall, it is evident that the single supply was not one relating to specific properties. Nor was there the kind of direct transactional relationship required by Art 9(2)(a) since Amex Europe's middle tier of responsibility related to managing the operations of the local tier and reporting back up to AETRSCo. Amex Europe's supplies were no more connected with immovable property than the supplies of a lawyer advising on standard lease terms.
70. That is what the Tribunal meant by its reference to "no dominant element of the composite supplies, although parts of the supplies clearly did relate to specific property". It was not considering whether one supply was principal and another was ancillary. I do not therefore consider that the decision can be criticised as reviving the **Card Protection Plan** dominant supply test in the context of Art 9(2)(a).

Article 9(2)(e)

71. It is common ground that if the supplies fell within Art 9(2)(e) the relevant provisions are the third indent. Again, Mr Cordara submitted that the Tribunal's approach was fatally flawed in that in considering the categories there specified, the Tribunal elevated management functions to a predominance which was at odds with its finding that there was no predominant type of supply within the **Card Protection Plan** test.
72. However that is not at all what the Tribunal said. It correctly accepted that the taxpayer did not have to show that the composite supply fell within any one of the specific heads of the third indent. Again correctly, it held that the composite supplies had to fall within one or more of the activities listed.
73. It then went on to hold that the activities went beyond those listed in the indent "in that the Appellant was clearly involved in management and in taking decisions...In view of the evidence, we consider that [the names Transaction Management, Project Management and Facilities Management] were not mere labels but were a proper description of various aspects of the supplies to AETRSCo." Again, it was not considering whether one supply was principal and another ancillary within the **Card Protection Plan** test.
74. The ECJ has provided guidance on the application of the third indent. In **von Hoffmann v. Finanzamt Trier** [1997] STC 1321 it was said that the professions there mentioned were used as a means of defining the categories of services to which it refers. It is the services which are relevant, not the label applied to the professionals. Thus the indent does not apply to all services which are performed by a person who happens to be a lawyer or accountant.
75. The right approach (see **von Hoffmann** at paragraphs 16 and 20-21) is to ask whether the services under consideration,

"fall within the category of those principally and habitually carried out as part of the professions listed..."
76. The services listed are disparate activities and the only common feature of the first five is that they all come under the heading of "the liberal professions": see **Maatschaap MJM Linthorst v. Inspecteur der Belastingdienst** [1997] STC 1287. However the third indent was not intended to cover the activities of all liberal professions, or to cover "all activities carried on in an independent manner": see **Linthorst** at paragraph 20. Thus the services of veterinary surgeons and arbitrators do not fall within the third indent, even as "similar services". Nor do the services of estate agents and architects, who are expressly mentioned in Art 9(2)(a).
77. Although the words "and similar services" in the third indent broadens the scope of the included services, that scope is limited. In **von Hoffmann** (at paragraphs 20-21) the ECJ said,

"...the expression 'other similar services' does not refer to some common feature of the disparate activities mentioned in art 9(2)(e), third indent, of the Sixth Directive, but to similar services to each of those activities, viewed separately..."

A service must be regarded as similar to those of one of the activities mentioned... when they both serve the same purpose.”

78. It is not enough that the services should be of an intellectual nature, drawing on expertise, or have something in common with the listed categories. It is necessary to have close regard to the specific provisions of the third indent. I do not accept Mr Cordara’s submission that the third indent should be construed in the widest possible way as a single gateway of intellectual services from the liberal professions.
79. The question for this Court is whether the Tribunal was correct to hold that, on the facts which it found, the composite supplies did not fall within Art 9(2)(e).
80. Mr Cordara relied heavily on the category of consultancy services. A consultant gives advice based on a high degree of expertise. It seems to me that Amex Europe’s activities went well beyond the habitual activity of a consultant (or consultancy bureau) in giving expert advice to a client. Plainly Amex Europe did provide advice to local business units. However the description of Amex Europe as ‘an intelligent client’, ascertaining and executing the needs of the local business units in accordance with group policy, was in my judgment properly characterised by the Tribunal as a management function going much further than consultancy activities. Consultants give advice, they do not make decisions. The Tribunal was right to give weight to the fact that Amex Europe either gave approval to lease and other transactions conducted by local business units or participated in the approval process when the approval of AETRSCo was also required. These were executive not consultancy functions. ‘Management’ is a concept of Community Law and (as Advocate-General Jacobs said in **Customs & Excise Commissioners v. Zoological Society of London** [2002] STC 521 at paragraph 32) is characterised by the taking of decisions rather than the mere implementation of policy.
81. If I am wrong and there was a multiple supply along the lines of the streams contended for by the appellant, it still seems to me that the services were not consultancy services. Mr Cordara relied on the outsourcing of Transaction Management to Trammel Crow. However Trammel Crow operated as part of the Amex Europe team rather than as external consultants in the true sense. They were part of the management and executive structure. Again, while the Blue Sky team, if considered separately, could to some extent be regarded as providing consultancy services, it seems to me plain that they were a branch of middle tier management and that the Tribunal was right to so hold. Their role was one of strategic direction, again an activity and a function over and above mere consultancy.
82. It was also submitted that the services fell within “supplying of information” in the third indent. In my judgment the services in reporting to AETRSCo and in directing the local units went far beyond the mere provision of information.
83. Thirdly, it is said that the Finance team’s activities constituted services habitually provided by accountants. If I am wrong and the Finance team provided a discrete supply for VAT purposes it seems to me that this team provides the strongest basis for saying that services fell within the third indent as services habitually provided by accountants. However the Finance team also took decisions as to cost controls, maintaining financial reserves for lower tier companies and other matters which, on balance, seem to me to fall outside the remit of an independent accountant.

84. In short, whether considered as a single or multiple supply, the services of Amex Europe were not services habitually supplied by any one or more of the professionals specified in the third indent, whether consultants, or consultancy bureaux, or accountants, or engineers, or similar to those services, nor were they data processing services nor the supply of information.
85. In my judgment the Tribunal was accordingly correct in its assessment that the services supplied by Amex Europe went beyond those specified in the third indent. The argument that the services did not comprise management functions outside the indent fails. In so far as it is said that the indent should be interpreted so widely as to comprise such management functions, that argument fails also.
86. I would therefore dismiss the appeal.