

Neutral Citation Number: [2006] EWCA Civ 1455

Case No: C3/2006/0190

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE CHANCERY DIVISION**  
**MR JUSTICE COLLINS**  
**CH/2005/APP/4255**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/11/2006

**Before:**

**LORD JUSTICE PILL**  
**LORD JUSTICE RIX**  
and  
**LADY JUSTICE ARDEN**

**Between:**

**INTERNATIONAL MASTERS PUBLISHERS LTD**

**Appellant**

**And**

**HM REVENUE & CUSTOMS**

**Respondent**

## **Judgment**

**John Walters QC** (instructed by **Royds Solicitors**) for the **Appellant**

**Nicola Shaw** (instructed by **HM Revenue & Customs**) for the **Respondent**

Hearing date: 26 July 2006

## **Lady Justice Arden:**

1. This appeal is about mixed supplies of goods or services for the purpose of value added tax (“VAT”). In some circumstances they will be treated as a single supply but in other circumstances they will be treated as separate supplies of the individual components consisting of the mixed supply. If there is a single supply, the tax treatment of the principal supply will govern all the elements of the supply. The issue raised by this case is as follows: in a case where the taxpayer contends that both possibilities are open, does a finding by the tribunal that the supply consists of a principal element and an ancillary element conclude the issue whether there are separate supplies? My answer, in summary, is in para. 2 below. In formulating the issue, and elsewhere in this judgment, I have used the terms “principal” and “ancillary” for convenience, although Lord Walker has pointed out, in an important passage to which I refer below, that these terms are not always determinative of the circumstances in which multiple supplies should be treated as a single supply for VAT purposes.
2. In my judgment, for the reasons given below, for the purpose of determining the correct treatment for VAT purposes of mixed supplies, the question that has to be answered is not simply whether one of the elements of the supply is the principal element of a single supply, and the other element the ancillary element of that supply. There is another analysis possible in the case of multiple supplies and that is that there are two separate supplies. In the present case, however, the tribunal was satisfied for reasons which it gave that the two elements of the supply in issue were the principal and ancillary elements of a single supply. That conclusion logically excluded the possibility of separate supplies and accordingly, while it would have been preferable for that issue to have been addressed separately as it had been the subject of a submission by the taxpayer, the tribunal did not make an error of law by not dealing with that possibility as a separate issue.

### *Background*

3. The facts are set out in the decision of the London VAT Tribunal (Dr John F. Avery Jones CBE and Rosalind Rudd JP):

“2. Mr David Moncur, legal affairs manager of the Appellant provided a detailed witness statement with exhibits and gave evidence. We find the following facts:

(1) The Appellant is a direct marketing company supplying products directly to the customer which are advertised through personally addressed mailings, media inserts, telemarketing, direct response television, websites and email marketing.

(2) The Appellant’s business is that of distributing ‘continuity products.’ The product is a series entitled ‘the Classic Composers’ comprising 63 ‘CD books’ each devoted to a single composer (except for one which is a compilation of the works of various composers), 156 cards.

(3) The method of supplying the product is to send a person a 'gift' certificate inviting him to apply for an introductory package which is free apart from postage and packing of £3.95 if he keeps it. If he pays this sum he then receives two CD books, a bookshelf for displaying the complete series, a binder to hold the cards of which two packs of four cards are sent, and a promotional item, such as a small clock. The customer had 10 days in which to decide to return the items. Approximately every three weeks thereafter he receives a further instalment of a CD book and a packet of four cards for £9.99 on the same 90-day approval or return basis until the series is complete. Cancellation can be made at any time. At various stages the customer is given the option of receiving three CD books and packets of cards at a discount on the standard price (£26.97 instead of £29.97), which completes the set in 20 shipments (13 shipments for the cards which have a smaller number of total packages) over 15 months; this option is taken by about 55 per cent of customers. Alternatively those opting to take one at a time receive 60 shipments (39 shipments for the cards) over a 45-month period. Only about 5 to 10 per cent complete the whole series without cancelling.

(4) The CD book is 15 cm high and 13.3 cm wide (which is different in size from a normal CD in a case). It comprises a hard-back cover in which a plastic CD case is fixed to the inside front cover plus 12 bound pages comprising a contents page, a four page biography of the composer, two pages of historical context, and 5 pages containing a brief description of the musical extracts contained on the CD. In the case of the sample we saw devoted to Mozart after the four page illustrated biography, there are two pages listing some facts and dates during his lifetime and some text and pictures of other contemporary items, such as George III buying Buckingham House in 1761 in which Mozart played in 1764. The listener's guide, comprising the remaining five pages, contains a half a page (or on one page one-third of a page) piece on each (including an illustration) of the 11 tracks on the CD. The last page (headed 'in depth' comprises two sections from a single work (here Mozart's requiem) dealt with on a whole page also containing an illustration. The back cover has acknowledgements inside the cover and a list of the tracks on the CD on the outside. The CD consists of 11 separate tracks of excerpts from the composer's music totalling 73 minutes and 36 seconds of music. Each track consists of single movement extracts, such as the overture to the Marriage of Figaro, the first movement of the clarinet concerto, and the second movement of Piano Concerto No.21. The music is chosen to give an overview of the composer and

the essential elements of his work, rather than to be a series of 'greatest hits.'

(5) The cards in our sample shipment comprised card 6 entitled 'Towards a New Art' of a series of cards on early music, card 38 on the Bach dynasty in the classical section, card 17 on the trombone in the orchestral instruments section, and card 16 of a glossary of musical terms. The cards have printed material on both sides and have punched holes for inserting into a ring binder. The Commissioners accept that this part is zero-rated.

(6) The CD accounts for 29.5 per cent of the cost of goods (which includes also the housing for the CD) but when packing, invoicing and postage is added this becomes 12.1 per cent of the total cost of the supply. A CD containing similar extracts could be obtained on its own for £4.99 to £5.99."

4. The tribunal held as follows:

"6. The guidance by the European Court in *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270 starting at paragraph 26 on "whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately" includes the following (a) that regard must first be had to all the circumstances in which the transaction takes place (paragraph 28); (b) a supply which consists of a single service and this must also apply to goods, as adopted in *Kimberley-Clarke v Customs and Excise Comrs* [2004] STC 473; [we substitute goods for services throughout the following summary] from the economic point of view should not be artificially split but the essential features of the transaction must be ascertained to determine whether the taxable person is supplying the typical customer with several distinct principal goods or with a single supply of goods (paragraph 29); (c) there is a single supply in cases where one or more elements are to be regarded as constituting the principal goods, whilst one or more elements are to be regarded as ancillary goods (paragraph 30); (d) a supply of goods is ancillary to a principal supply of goods if it does not constitute for customers an aim in itself, but a means of better enjoying the principal goods supplied (paragraph 30); (e) a single price is not decisive but may suggest a single supply; but if the circumstances indicate that the customer intends to purchase two distinct goods an apportionment should be made (paragraph 31). In *Dr Benyon and Partners v Customs and Excise Comrs* [2005] STC 55 Lord Hoffmann at [31] said in relation to the test summarised at (b) above 'In my opinion the level of generality which corresponds with social and economic reality is to regard the

transaction as the patient's visit to the doctor for treatment and not to split it into smaller units.'

7. Applying these tests is a matter of impression. We look at the supply as a whole and regard this as consisting of two elements, the CD book on one hand and the cards, which give information unrelated to what is on the accompanying CD, and which are agreed to be zero-rated, on the other. Even when consisting of part of this whole, we consider the CD book to be a separate supply having two elements, the CD and the written material which we agree is a book or booklet when looked at on its own. In spite of Mr Walters' persuasive arguments we regard the CD as being the principal supply and the written material as ancillary. The CD provides over 73 minutes of music compared to which the written material is slight. Including a small amount of written material with a CD is common in our experience. We consider that a typical customer buying a series on the classic composers will be interested in listening to the CD and will regard the written material as an aid to enjoying the music, rather than wanting to read about composers and as an ancillary matter to listen to some of a composer's music. We regard the introductory leaflet as conveying this priority:

'Take a look at the sample we have enclosed for you. It is a compact disc and a hard-back book all in one! You can listen to the superb digitally recorded disc of Mozart, and at the same time read the Listener's Guide—a track by track description of the music and find out the composer's life and what inspired his music.'

The written material in the CD book does not constitute an aim in itself but as a means of enjoying the CD. Five of the 12 pages refer to the content of the CD and the rest is related as being the biography of the composer concerned or notes on the historical content of the composer's life. We regard the supply as very different from the typical case of a magazine supplied with a CD. The purchaser will want the magazine anyway and if there is a free CD he will regard it as an extra. We do not think that a purchaser here can be regarded as buying a book (or booklet) and treating the CD as an extra. He is buying a CD with the written material as an extra.

8. Since we regard the CD book as a single supply principally of the CD no question of apportionment arises. In case we are wrong on this we record in relation to the concession that the Commissioners concede that the CD is not supplied separately from the book and that the cost of the CD is no more than £5 excluding VAT. We have made findings on the proportion of the cost of the CD with and without postage and packing. We do not propose to say anything on the

interpretation of the concession or whether postage and packing should be included in calculating the percentage.”

5. The taxpayer appealed to the judge, Collins J sitting in the Administrative Court. There was also an application for judicial review of the refusal by the Commissioners of HM Revenue & Customs to extend an extra-statutory concession to the taxpayer. We are not concerned with that application. On the appeal from the tribunal, the judge rejected the taxpayer’s case on the following grounds:

“36. It seems to me, in all the circumstances, that the Tribunal was entitled to conclude, as it did, in regard to the nature of the product on offer. It also referred to the introductory leaflet and, again, that introductory leaflet points in the direction of the predominance of the CD. As I indicated at the outset, unless I can be persuaded that that decision is an irrational one or clearly was one which was taken without regard for a material consideration, it must stand because no error of law is identified. In so far as there has been a failure to refer to cost, that could not in my judgment have made any difference. First, of course, the Tribunal was not referred to cost for the purposes of ascertaining the question of predominance. It was not given the means to identify the correct comparison between the cost of the items for that purpose. Secondly, although, of course, the cost to the supplier is a relevant consideration, the overall economic reality must also include what the consumer is expecting to get in the transaction and therefore the expectation of the consumer, which may not relate directly to the cost of the individual items, is itself a material consideration. Thirdly, it is clear, as I have indicated, that the relative cost, because of the somewhat superficial material which was before the Tribunal on cost, has to be modified and the modification must be in the direction of recognising that the CD element does bear a higher proportion to the booklet alone, having regard to packing, et cetera, and perhaps also to questions of royalties than was apparent from the material put before the Tribunal.”

#### *Discussion and Conclusions*

6. There are two fundamental rules in the VAT treatment of mixed supplies. The first rule is that each supply should be treated as a separate supply but there is a second rule, namely supplies must not be artificially split. Thus a mixed supply of legal services would not be a supply of legal advice and a supply of the paper on which it is written. The basic rules for mixed supplies were laid down by the Court of Justice of the European Communities (“the Court of Justice”) in *Card Protection Plan Ltd v Customs and Excise Commrs.* (Case C-349/96), [1999] AC 601. The Court of Justice held:

“29. In this respect, taking into account, first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent

and, secondly, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.”

7. Mixed supplies should in general not be split into separate supplies where there is a principal supply and an ancillary supply of several articles, or of services and goods. Thus the Court of Justice in the *Card Protection Plan* case went on to hold:

“30. There is a single supply in particular in cases where one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. *Customs and Excise Commissioners v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined Cases C-308/96 and 94/97 [1988] S.T.C. 1189, 1206 para. 24.

31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paragraphs 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this: see, to that effect, *Madgett and Baldwin*, at p. 1208, paras. 45 and 46.”

8. As the Court of Justice there makes clear, in deciding whether there is a mixed supply or a single supply, the court or tribunal must examine all the relevant circumstances.
9. Different types of mixed supply occur. For example, a supply of services, with an incidental service that the supplier would not normally supply, may require to be treated as two separate supplies. Thus, in *Customs and Excise Commissioners v Madgett and Baldwin (trading as Howden Court Hotel)* C-308/96 and c-94/97, [1998] STC 1189, where a hotelier provided a service of collecting guests from their homes, the Court of Justice held as follows:

“23. It must therefore be held that the scheme under art 26 of the Sixth Directive applies to traders who organise travel or tour packages in their own name and entrust other taxable persons with the supply of the services generally associated

with that kind of activity, even if they are not, formally speaking, travel agents or tour operators.

24. However, as the Advocate General notes in para 36 of his opinion, traders such as hoteliers who provide services habitually associated with travel frequently make use of services bought in from third parties which take up a small proportion of the package price compared to the accommodation and are among the tasks traditionally entrusted to such traders. Those bought-in services do not therefore constitute for customers an aim in itself, but a means of better enjoying the principal service supplied by the trader.

25. In such circumstances the services bought in from third parties remain purely ancillary in relation to the in-house services, and the trader should not be taxed under art 26 of the Sixth Directive.

26. Where, however, a hotelier habitually offers his customers, in addition to accommodation, services which go beyond the tasks traditionally entrusted to hoteliers, and which cannot be carried out without a substantial effect on the package price charged, such as travel to the hotel from distant pick-up points, such services are not to be equated with purely ancillary services.

27. In view of the foregoing, the answer to the questions referred by the High Court must be that art 26 of the Sixth Directive applies to a hotelier who, in return for a package price, habitually offers his customers, in addition to accommodation, return transport between certain distant pick-up points and the hotel and a coach excursion during their stay, those transport services being bought in from third parties.”

10. Circumstances can arise where, as a matter of common sense, the more substantial element of the supply in terms of cost or value falls to be treated as ancillary to the other item of the mixed supply. This was the case in *College of Estate Management v C&E Commrs.* [2005] 1 WLR 3351, where the provision of comparatively costly educational materials was treated as part of a supply of education. Lord Walker considered para. 30 of the judgment of the Court of Justice in the *Card Protection Plan* case. He held:

“30. In the course of this appeal there has been much discussion of para 30 of the judgment of the Court of Justice. In my opinion it is clear that this paragraph (which uses the introductory words ‘in particular’) is dealing with a particular case exemplified by the *Madgett and Baldwin* case. 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 (as Ward LJ [2004] STC 1471, 1482, para 39 rightly observed) subservient, subordinate and ministering to

something else. It was an entirely apposite term in the discussion in the *British Telecommunications* case (where the delivery of the car was subordinate to its sale) and in the *Card Protection Plan* case itself (where some peripheral parts of a package of services, and some goods of trivial value such as label, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including the *Faaborg-Gelting* case (Case C-231/94 [1996] ECR I-2395, *Beynon's* case [2005] 1 WLR 86 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 (the *Faaborg-Gelting* case). 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's* case).

### *Conclusions*

31. This is the only point on which I can find any significant error in the approach of the tribunal. The evaluative findings which the tribunal made at paras 60-63 of its decision, set out above (para 23) were conclusions which were open to it on the evidence. The only error was the addition, in para 67, of the statement that the written materials were ancillary to the provision of education. The tribunal may have thought that authority required it to make this additional finding. In my view it was not necessary, nor (on any sensible use of the word 'ancillary') was it correct. But it did not invalidate the tribunal's earlier conclusions, which were determinative of the matter."

11. Both parties to this appeal draw attention to the need to have regard to the commercial or economic reality of the situation when considering whether supplies having more than one element constitute a single supply. The respondent ("HMRC") relies on the following passage from the speech of Lord Slynn in *Customs & Excise Commissioners v British Telecommunications plc* [1999] 1 WLR 1376:

"In my view here if the transaction is looked at as a matter of commercial reality there was one contract for a delivered car: it is artificial to split the various parts of the transaction into different supplies for VAT purposes. What B.T. wanted was a delivered car; the delivery was incidental or ancillary to the supply of the car and it was only on or after delivery that property in the car passed. The fact that delivery could have been arranged differently under a separate contract between B.T. and the transporter or by B.T. collecting the car itself does not mean that when there is a contract for a

delivered car the two supplies must be kept separate. Of course B.T. had the option to make other arrangements as is argued but the fact is that B.T. did it this way as part of one contract and in my view as part of one supply. The fact that individuals buying a car or small companies buying a few cars cannot have the same arrangement which B.T. has and may have to buy from a dealer does not make the arrangement with B.T. so different that the supply must, like the provision of long distance pickup in the *Madgett and Baldwin* case [1998] S.T.C. 1189, be regarded as not ancillary but as a distinct supply.”

12. Likewise, the taxpayer relies on the decision of the Court of Justice in *Levob Verzekeringen BV, OV Bank NV v Staatssecretaris van Financien* (Case C-41/04 [2006] STC 766, which was delivered after decision of the tribunal in this case. The Court of Justice held:

“19. According to the Court’s case law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774, [1996] ECR I-2395, paras 12 to 14, and *Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, paras 28 and 29).

20. Taking into account, firstly, that it follows from art 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *Card Protection Plan* [1999] STC 270, [1999] 2AC 601, para 29).

21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, which one or more elements are to be regarded, by contrast, as ancillary supplies which have the tax treatment of the principal supply (*Card Protection Plan* [1999] STC 270. [1999] 2AC 601, para 30, and *Customs & Excise Comrs v Primback Ltd* (Case C-34/99) [2001] STC 803, [2001] 1 WLR 1693, para 45).

22. The same is true 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.”

13. As the Court of Justice there held, transactions must not be artificially split. In the *Levob* case, there was a supply of customised computer software. The Court of Justice held there was a single supply because the uncustomised software would objectively be useless to the customer and so it would be artificial to say there was a separate supply of the uncustomised software.
14. In this case, the taxpayer submits that the supply of the CD and accompanying book has to be viewed from an economic point of view. Below, the taxpayer argued that the CD should be treated as part of a single supply of which the predominant element is the provision of a book, which is zero-rated, or alternatively as two separate supplies. Before this Court, the taxpayer argued that the CD and the book were two separate supplies. Reliance is placed on the recent *Talacre Beach Caravan Sales Ltd v Commissioners of Customs & Excise* (case C-251/05, 6 July 2006). There the Court of Justice was concerned with the supply of caravans and their contents, for example sinks, stoves and beds. The supply of caravans is zero-rated but the contents are not. The United Kingdom wished to levy VAT on the contents and the question for the Court of Justice was whether the fact that the contents constituted part of an ancillary supply prevented the United Kingdom from levying VAT on them. The Court of Justice held, although there was a single supply of the caravan with contents, the consideration for the supply could be apportioned between the contents and the shell and VAT levied on the consideration for the contents. In my judgment, this case demonstrates that, as the law on multiple supplies is derived from the jurisprudence of the Court of Justice, and not from any specific provision of the Sixth VAT Directive, it is open to the Court of Justice to develop and refine its jurisprudence as it thinks appropriate in the light of the principles and purposes of that Directive in new situations which come before it. This case does not directly assist, therefore, on the question arising on this appeal.
15. The taxpayer submits that the tribunal did not consider the economic nature of the transaction. It relies on the cost of the various elements of the supply. It also relies on the fact that this was a “continuity” product, that is, the fact there were cards which were supplied with the CD did not relate to the CD being supplied. The purpose of this feature was to induce the customer to carry on and obtain the whole series. (We are not concerned with the cards as HMRC accepts that they are the subject of a separate supply, and that that supply should be zero-rated). It is said that the special features of the transaction, namely the relative cost of the CD and the written material (the accompanying book) and the fact that the supply was a continuity product were not taken into account in paragraph 7 of the tribunal’s decision. The taxpayer submits these matters were crucial to the decision from an economic point of view. The court has to consider the independent usefulness of the two items and the proportionality between the two elements: see per Lord Hope in the *British Telecommunications* case at p. 1386C. This was the situation in the *Levob* case. Here, on the taxpayer’s submission, the written materials were so much a major part of the product as to make it incorrect to regard those materials as ancillary to the CD. The CD amounted to some 30% of the cost. When account is taken of packing, invoice and posting, this fell

to about 12% of the total cost. The remainder of the cost was required to be allocated between postage and packing, the written material and the cost of the bookshelf.

16. The taxpayer submits that the judge also fell into error. To reach the conclusion that a mixed supply consisted of principal and ancillary elements does not necessarily mean (on the taxpayer's submission) that the tribunal must have considered the question whether there were separate supplies. The court or tribunal has to consider that question separately. On the taxpayer's submission there are two distinct tests laid down in para 29 of the *Card Protection Plan* case. Moreover, on the taxpayer's submission, it must follow that if the tribunal finds that the transaction is not artificial there must be two separate supplies.
17. The taxpayer further submits that the CD in this case can be used separately. The written material contained information which is not normally supplied with a CD. That sort of information takes the reader through the separate phases of the movements and does not tell the user about the performer. Here, in the case of a CD entitled "Mozart – Musical Masterpieces", for example, there were seven pages about the life and times of Mozart, and five pages about the pieces on the CD. The taxpayer seeks to distinguish the *Madgetts* case. There the guest would normally buy a train ticket separately. So the cost of that part of the service was to be treated as a separate supply. Likewise, a table can be used separately from chairs. That is said to be the situation in this present case. The taxpayer's case is therefore that there are two supplies and not one, and that the tribunal were in error because they did not consider this preliminary question.
18. HMRC submits that it is important to look at the ultimate conclusion and not to go through the various stages with a toothcomb. HMRC submits the conclusion that the transaction consisted of a single principal and ancillary element "extinguished" the possibility of a multiple supply. Cost was not a circumstance of great importance because the customer would not be concerned with the underlying cost components to the supplier. The question remains why a customer would pay more for a CD like this than one he could buy normally. HMRC submits the book is virtually useless without the CD and that it is a relevant circumstance.
19. In my judgment, the tribunal dealt with the question of whether there was a single supply or two separate supplies. This is clear from paragraphs 6 to 8 of its decision, set out above. The tribunal starts by setting out the guidance in the *Card Protection Plan* case which is directed to "whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately". The tribunal applied these tests and concluded in paragraph 7 (third sentence) that the CD book was to be regarded "as a separate supply having two elements". The reasoning for this conclusion is to be found later in the same paragraph where it is made clear that the tribunal took the view that the CD could not be enjoyed separately from the book.
20. In these circumstances, the relative cost of the CD and the written material (as to which the tribunal had made findings in para. 2(6) of its decision) was by implication a factor of subsidiary importance. I would accept that there could be other situations in which the book was the dominant or by itself a separate supply. The question whether it was, or was not, a separate supply was a question for the tribunal to determine on the facts before it. The tribunal was clearly not saying that its view was

there were two supplies but that they had to decide which supply was principal and which was ancillary, and treat them as a single supply. I further note that in the *Card Protection Case*, the Court of Justice did not specifically ask as a preliminary question whether there were two separate supplies.

21. In the circumstances, for the reasons given above which differ from those of the judge, I would dismiss this appeal.

**Lord Justice Rix:**

22. I agree.
23. Before the VAT tribunal the appellants' primary argument was *not* that the CD and the booklet were separate supplies, but that there was *only one* supply in which the booklet was principal and the CD was ancillary. That was, as it seems to me, a most difficult argument to sustain and I am not at all surprised that it failed before the tribunal, who found, on the basis that there was only one supply in terms of the CD booklet, that it was the CD that predominated.
24. However, even before the tribunal, the appellants did have a subsidiary argument, that the CD and booklet were separate supplies, and on appeal to Collins J and again to this court it is that argument that has been promoted to pride of place. It is accompanied by the submission that the tribunal failed to consider and to give effect to that argument and that therefore it is open to this court to find that there are two supplies and to remit the matter to the tribunal for an apportionment.
25. For the reasons given by Arden LJ, however, it seems to me that that argument must fail. The tribunal did consider the subsidiary argument, albeit briefly. It was common ground that the cards were a separate supply: in that respect therefore the concept of a separate supply was before the tribunal. As for the CD booklet, the tribunal expressly found that it contained "two elements" – "the CD and the written material which we agree is a book or booklet when looked at on its own" (at para 7). The tribunal had a little earlier used a similar expression, of a supply "consisting of two elements", with regard to the "supply as a whole", viz the "CD book on one hand and the cards" (*ibid*). Thereafter, the tribunal concluded that the CD book was merely ancillary, and that the written material did not constitute an aim in itself as distinct from being a means of enjoying the CD. Therefore, in context, in finding that the booklet was subsidiary to the CD the tribunal rejected the subsidiary submission that the booklet survived as a separate supply in its own right. The tribunal said so: "we regard the CD book as a single supply principally of the CD" (at para 8). The tribunal came to these conclusions conscious of the economic factors, which it had recorded earlier under its para 2.
26. Therefore this appeal must fail. Nevertheless, I have a little sympathy for the appellants. I conceive that when regard is had to the fact that the retail cost of the CD booklet was nearly twice that of a standard comparable CD by itself, a possible conclusion is that the consumers to whom this continuity series was marketed were those who were unfamiliar, or relatively so, with classical music, but were willing, even at a fairly high cost (reflecting the cost of the booklet), to be led into it through the more familiar medium of the printed word and the illustrated booklet. In a real

sense the completed series was a “library” not only of classical music but also of (admittedly popular) musicology, arranged not so much by individual works but by categories, placed within an overall historical setting. I see in this a possible means of supporting the case that the booklet was not merely ancillary (as the written musical notes are in the case of an ordinary CD), but a separate and equal principal supply of its own. However, I do not think that that was how the matter has been argued at any level, and in any event, the appellants chose, before the tribunal, to stake their primary bet on the argument of a single supply dominated by the booklet. It is for the tribunal, not for the courts, to evaluate these matters: and if the subsidiary argument became overshadowed by the primary argument, the tribunal cannot be faulted for that. That was the way that the appellants had structured their submissions. So my little sympathy does not avail the appellants.

**Lord Justice Pill:**

27. I agree. The tribunal was entitled to conclude on the evidence, and did conclude, both that there was a single supply and that the CD was the principal element in that supply. While I do not dissent from Rix LJ’s view that a different conclusion might be possible upon publications such as this, I find the tribunal’s reasoning upon the second of those issues, at paragraph 7 of its decision, to be entirely convincing on the facts of the present case.