

## BPP: VAT and printed materials connected with services

Supplies of printed course materials were not excluded from zero-rating in circumstances where those materials were available from separate suppliers and were bought and used in significant numbers independently of the course concerned.

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The First Tier Tribunal (FTT) has held that supplies of printed educational materials supplied with professional courses (but by a separate entity) were not excluded from zero-rating on the facts: *BPP University College of Professional Studies Ltd v HMRC* (FTT, 21 June 2018). The FTT considered that, even if the supplies of printed materials and course had been provided by the same supplier, they would not have been treated as a single supply since they could, and often were, supplied independently of each other.

Quite apart from the decision on the application of the anti-avoidance provisions introduced in 2011, which were designed to prevent taxpayers separating supplies of associated printed materials into a different entity to obtain zero-rating, the decision is of interest for the FTT's approach to the management of the case, in which HMRC were barred from further involvement. Given some of the uncertainties surrounding HMRC's entitlement to appeal, it seems unlikely that we have seen the last of this case!

### Background

The case involves a long running dispute between BPP and HMRC concerning the VAT treatment of printed materials supplied by BPP in connection with professional courses. From 2006, BPP's service structure was such that printed materials were supplied by a separate group member (LM), which was not registered as part of the same VAT group as the course provider. BPP claimed that the supplies of printed materials were not part of a single supply of education in these circumstances, but represented a separate supply that was zero-rated under VATA 1994 Sch 8 Group 3.

HMRC disagreed and argued that the printed materials formed part of a single taxable supply, notwithstanding the general rule confirmed by the Court of Appeal in *Telewest Communications plc* [2005] EWCA Civ 102 that two supplies made by different suppliers cannot be treated as a single supply for VAT purposes.

The dispute between BPP and HMRC encompassed periods both before and after mid-July 2011 when notes (2) and (3) were added to Sch 8 Group 3. The effect of these notes was, in essence, to override the *Telewest* position. HMRC originally contended that the supplies of printed materials by BPP, both before and after July 2011, were chargeable to VAT at the standard rate. However, they later accepted that the pre-2011 supplies qualified for zero-rating, leaving the dispute over the application of the anti-*Telewest* provisions from 2011 onwards.

However, due to HMRC's failure to comply with the directions of the Tribunal, HMRC were barred from taking further part in the proceedings. HMRC's appeal against the barring order was eventually upheld by the Supreme Court, as to which see "[Supreme Court upholds barring order against HMRC](#)". The case has now returned to the FTT for determination of the legal issues involved.

## Effect of the barring order

The FTT (Barbara Mosedale J) noted that Rule 8(8) entitled the Tribunal to "summarily determine" the issues against HMRC. However, given that HMRC had in this case served a statement of case and reply (albeit inadequate) and provided a skeleton argument, before it was barred, the FTT considered that it was not appropriate to simply give summary judgment for BPP in this case. In any event, BPP had not invited the Tribunal to give summary judgment, wishing to obtain a substantive decision on the provisions in question to enforce its VAT reclaims.

The FTT also noted that Rule 8 provides that "the Tribunal need not consider any response or other submissions made by the respondent" where the respondent is barred. The FTT considered that this did not give the Tribunal a discretion to allow HMRC to make representations notwithstanding the barring order. Instead, it gave the Tribunal discretion as to whether to take into account submissions made before a party is barred. In this case, the FTT decided to take into account the submissions made by HMRC before it was barred including its skeleton argument (to the extent it dealt with submissions of law) and the statement of agreed facts.

## Decision on zero-rating

The addition of notes (2) and (3) to Sch 8 Group 3 in 2011 removed from zero-rating a supply which is connected with services made by a different supplier, where (in essence) had the supplies been made by the same supplier, they would have been treated as a single taxable supply of services or a single exempt supply. The question in this case was whether the supplies of course materials by LM would have been treated as part of a single supply of exempt education if they had been supplied by BPP, such that the exception to zero-rating in Notes (2) and (3) applied.

As regards the well-established legal principles on single supplies, the FTT stressed the importance of the focus on the typical customer perception, including the question whether it is possible and financially practical for the customer to buy the elements separately.

In that regard, the FTT noted that a student purchasing a tuition course from BPP would almost invariably purchase learning materials to accompany that course, but would not necessarily buy them from LM. BPP did not require a student to buy the materials from LM and they could be purchased from Amazon and Waterstones for the same price or a student might buy second hand copies on Ebay or Amazon. In addition, the printed learning materials were often purchased without a tuition course. The price of the materials was unaffected by whether they were bought with a course and in 2012/13 approximately 40% of LM's turnover was derived from sales of materials to persons who had not also purchased a course.

Based on these facts, the FTT accepted that the supplies by BPP and LM should not be seen as a single supply from an economic point of view, even if they were supplied by the same taxpayer. Looked at from the point of view of a typical consumer, a significant number of LM's customers bought the printed material without buying tuition from BPP. Therefore, it was clear that, so far as the transaction between LM and the typical consumer is concerned, for a significant number of them the printed material was an end in itself.

As such, the supply of tuition and the supply of the printed materials were independent of each other. A student could take a BPP course without making a purchase of printed materials from LM and consumers could purchase LM's printed

materials without purchasing a course from BPP. While it was true that LM's printed material appeared to be intended specifically to support BPP's tuition course so that purchasing both would allow the consumer to pass an exam or gain a qualification this was not enough by itself to mean they were a single, indivisible economic supply which it would be artificial to split. In this case, the consumer could buy the course from BPP without the printed material from LM, or s/he could buy the printed material from LM without the course from BPP.

Accordingly, the FTT concluded that if LM had supplied both the tuition and the printed materials, under exactly the same conditions as they were supplied by BPP and LM, there would have been two separate supplies, one of tuition and one of printed materials. Therefore, for the purposes of Notes (2) and (3) of Sch 8 Group 3, the supply of the printed materials by LM was not 'connected' with the supply of tuition by BPP because, if those two supplies had been made by a single supplier they would not have been treated as a single supply of services.

## Rights of appeal

Finally, the FTT addressed the difficult question of whether barring also removed HMRC's right to appeal the decision, HMRC having made it clear that they intended to apply for permission to appeal if they lost. However, the FTT decided that, in the absence of any detailed arguments on the matter, it would be premature to pre-judge the matter.

## Comment

The decision is a useful application of the single supply principles, emphasising customer choice and illustrating that the mere fact that two elements are intended to work together does not mean that are inevitably part of a single supply where each element can be obtained from separate, independent suppliers at no additional cost.

From a case management perspective, the decision throws up some fascinating questions around the effect of a barring order on a party, including whether barring effectively removes that party's right of appeal. Given HMRC's unhappiness over its barring from this case, we are unlikely to have seen the last of these issues in this case.

*(BPP were advised and represented by Simmons & Simmons (Nick Skerrett and Heather Rowlands) in this important case.)*

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