HMRC - VATSC70400 - Whether Supplies Are Goods Or Services: Transfer Of Title

The transfer of the whole title in goods means the transfer of ownership of the goods. Unless the terms of the agreement specify otherwise, transfer is effected immediately in a normal sale of goods. It should be apparent whether title in the goods has been transferred, but there may be occasions when the situation is less clear.

A useful example of how tribunals approach such situations is provided in the case of Creditgrade Ltd (LON/89/936Y). Although this involved an alleged supply of goods to an associated company, the agreement between the two parties for the “supply” of the goods was confusing and contradictory because its aim was merely to remove a loan liability from Creditgrade’s annual accounts. The tribunal considered both the construction of the agreement and the intention of the parties, and concluded that title remained with Creditgrade. (This case also gives information on transfer of possession).

During the tribunal hearing, reference was made to the Sale of Goods Act 1979, particularly Section 17:

(1) Where there is a contract for the sale of specific or ascertained goods, the property then is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Where there are doubts about whether title has been transferred, it is important to follow the approach of this tribunal, that is ascertain the intention of the parties by looking at:

the wording of any agreement/contract

the conduct of the parties

the particular circumstances.

The implications of transfer of title and retention clauses on a supply for VAT purposes was addressed in the High Court in Liverpool Commercial Vehicles Ltd [1984] BCLC 587. The court looked at the VAT treatment of repossessed goods and whether the original supply was cancelled or not (see VATSC4700).

This means that once a supply is made it cannot be cancelled if the goods are returned or repossessed. VATSC70600 explains the treatment in more detail.

The ECJ case Aktiebolaget NN v Skatteverket (Case C-111/05) 2008 dealt with the issue of whether for VAT purposes, a transaction for the supply and installation of a fibre-optic cable linking two member states, and sited in part outside community territory was to be considered a supply of goods. The price of the cable itself clearly represented the greater part of the total cost.

The case involved Aktiebolaget NN contracting to supply and lay between Sweden and another EU country, an undersea fibre-optic cable which would be used for the transmission services to different telecommunications operators. In normal circumstances, the cost of materials accounted for up to 85% of the total costs. After installation and preliminary tests, ownership of the cable would be transferred to the purchaser. Thereafter the work would be brought to a close by further testing over about 30 days, when the company would repair any faults. The ECJ ruling held that all the elements of the transaction in issue appeared to be necessary to its completion and were all closely linked, consequently for the purposes of VAT, the supply and installation of the cable had to be regarded as forming a single complex transaction. In order to establish whether that single complex transaction was a supply of goods or services it was vital to identify the predominant elements of the supply. Therefore it had to be determined whether it is the supply of the cable or the laying thereof, which must dominate with regard to classification of the transaction, as either a supply of goods or as a supply of services.

The ECJ concluded, In that regard, it must be recalled that, pursuant to art 5(1) of the sixth Directive (now article 14(1) of directive 2006/112) “supply of goods” shall mean the transfer of the right to dispose of tangible property as owner” It is clear from the information supplied by the national court that the contract envisaged relates to a tangible object, namely a fibre-optic cable, which is bought and laid by the supplier and which, after functionality tests carried out by the supplier, is intended to be transferred to the client, who will dispose of it as owner. The fact that the supply of that cable is accompanied by its installation does not, in principle, preclude the transaction falling within the scope of art 5(1) of the Sixth Directive.

The ECJ were therefore prepared to see the supply as a supply of goods.

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