HMRC - VATSC81200 - There Is More Than One Supplier

In summary: the UK courts have held that, in the absence of abuse or sham, supplies made by two entities cannot be combined into a single supply. An example is where a TV listing magazine supplied by one company is separate from the TV services provided by a different company (see the decision in Telewest).

It is therefore important to consider whether there are indications of artificiality where it appears that a supply has been split between two entities. Advice should be sought from counter-avoidance colleagues.

The leading precedent for this indicator is Telewest (Court of Appeal 2005) VATSC82150. In Telewest, ARDEN LJ said at para 39 ‘It is not appropriate to ask whether the supply was ancillary to the principal supply of services by Telewest because the doctrine of ancillary supply in VAT law applies only where there is only one supplier (‘the CPP argument’)’.

Other relevant sections of this decision include:

Para 55 - ‘The judge relied on two dicta of Millett LJ (as he then was) in Customs and Excise Comrs v Wellington Private Hospital Ltd [1997] STC 445 that supplies made by different suppliers cannot be fused together to make a single supply’.

Para 70 - ‘the expectation of the customer is relevant to the question whether two contracts constitute, for VAT purposes, principal and ancillary contracts, but not to the question of whether there is more than one supplier’.

Para 72 - ‘there is no suggestion…that the concept of principal and ancillary contracts can apply where there is more than one supplier’.

However, in the case of Part Service VATSC82190 the ECJ indicated in its judgment that the criteria identified in single/multiple supply precedent cases may still be applied where two or more entities are involved in order to assess whether there is evidence of a single supply. However, the ECJ also indicated that the tests for an abusive practice (from the Halifax case) may also need to be applied. Part Service therefore provides support for a single supply involving more than one supplier when all the circumstances of the transaction and the economic reality are indicative of a single supply and there is evidence that the tests for an abusive practice are met (i.e. ‘contrary to purpose’ and ‘essential aim’).

In the Part Service judgment the ECJ drew attention to certain facts in that case which they listed as characteristics of the transactions (at para.57).

“the two companies taking part in the leasing transaction are part of the same group;

the service supplied by the leasing company (IFIM) is subject to a division, the financing element is entrusted to another company (Italservice) to be split into a credit service, an insurance service and a brokerage service;

the service of the leasing company is therefore reduced to a service for renting a vehicle;

the lease payments made by the customer are of an amount which is only slightly higher than the purchase cost of the vehicle;

that service, considered in isolation, therefore seems to be economically unprofitable, so that the viability of the business cannot be ensured solely by means of contracts concluded with the customers;

the leasing company receives the consideration of the leasing transaction only through the cumulative lease payments made by the customer and the amounts transferred from the other company of the same group”.

With regard to the first test for abuse (‘contrary to purpose’) the ECJ commented that the result of separation ‘would appear to be contrary to the objective of Article 11A(1) of the Sixth Directive, namely the taxation of everything which constitutes consideration received or to be received from the customer’ (para 60).

Also at para 62 of the judgment the ECJ said, with regard to the second test for abuse (‘essential aim’), ‘the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (Halifax and Others, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations’.

In The Lower Mill Estate Limited VATSC82220 the Upper Tribunal held (at para 43): ‘In our judgment, apart from any abuse or sham, it is not possible to combine supplies by two suppliers under two contracts so as to result in one supply for VAT purposes’.

Therefore, it will be necessary to consider whether there is evidence of abuse or sham in circumstances where it appears that a single supply is being made by more than one supplier.

If you suspect a single supply has been artificially split, you should seek advice from the TAPE Team and VAT Policy. If abuse is then being considered Counter-Avoidance will need to be contacted.

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