HMRC - VATSC82080 - British Telecommunications Plc (House Of Lords 1999 STC 758)

This was the first post-CPP appeal to be heard in the House of Lords who commented it was ‘a good example of the kind of case…which the court [ECJ] had in mind when it referred…to a service which did not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied…’ when ruling a delivery charge was ancillary to a supply of goods.

BT purchased motor cars annually directly from various car manufacturers and the cars were transported to BT’s premises by transport companies. BT sought to recover the input tax on the delivery services, claiming the purchase and delivery of the car were two supplies - goods (the car) and services (the delivery) - which had the effect of reducing irrecoverable input tax under the cars blocking provisions.

The point at issue was whether the supply of the services of transportation and delivery was incidental or ancillary to the supply of the motor cars or a distinct and independent supply which could be regarded as separate from the supply of the cars.

The Tribunal found that the supply of delivery services were different and distinct from the supplies of the cars and allowed the BT’s appeal. Customs appealed to the High Court and won, but BT’s further appeal to the Court of Appeal was upheld. Customs then appealed to the House of Lords.

In applying the CPP tests, the Lords decided that the contract was for a single supply of a delivered car.

Lord Hope commented that before the supply can be regarded as a separate and distinct supply - rather than incidental or ancillary to it - it must, at least to some degree, be physically and economically dissociable from the other supply. However, this was not the sole criterion and regard must be had to all circumstances of a transaction.

The decision commented that no single factor provides the sole test as to whether a supply is independent or is incidental or ancillary to a principal supply and the fact that separate prices could be identified for the car and delivery was ‘not the right test’ to make that decision.

Para 11A 2(b) of the Sixth Directive stated that the taxable amount shall include:

“incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States.”

Lord Hope concluded that this helped to show that the supply of services such as transport of goods from the factory to the purchaser’s premises can be treated as incidental or ancillary to the supply of the goods by manufacturer to purchaser, although this need not be so, and accordingly is not deemed to be so, in all cases.

The essential feature of the sample transactions was the purchase by BT from the manufacturer of a delivered motor car with property and risk remaining with the manufacturer until delivery. BT could have gone to the factory to take delivery but for convenience got the manufacturer to deliver the car. This was considered by the Court to be a good example of a service which did not constitute for customers “an aim in itself, but a means of better enjoying the principal service supplied.”

In this case, BT was able to deal directly with the manufacturer rather than dealers due to their purchasing power. The sole purpose of obtaining and paying for the transport and delivery services was to enable BT to complete the purchase taking physical delivery of the cars at a place of their own choosing for their convenience.

The commercial reality was that they were obtaining the equivalent level of service as if they purchased the cars from an authorised dealer. The dealer would have recovered from them the cost of transporting and delivering the cars to its premises from the factory, together with the price paid to the manufacturer, all as part of the cost of the supply of the motor cars to the customer. In that case there would plainly have been only one transaction, not two. The substance and reality of the matter is that that is also true of the transactions which were entered into between BT and the car manufacturers.

A further factor which supported the view that the supply of the transport and delivery services were incidental or ancillary to the purchase of the motor cars was that if BT were able to recover the VAT charged by the manufacturers on the service of transporting and delivering the cars to their premises from the factory, they would be obtaining more favourable treatment than that available to others for the purchase and delivery from authorised dealers of the same motor cars.

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