HMRC - VATSC82150 - Telewest (Court Of Appeal [2005] STC 481)

Telewest set up a subsidiary company, outside its VAT group, to provide a magazine, which formed part of the overall subscription for its cable television services.

A single magazine was produced by a separate company - Telewest was the majority shareholder. It was published monthly at a set price for which it could be purchased from newsagents, but the vast majority of copies were distributed by regional companies to their customers without any charge above the monthly subscription price for the television services. In summary the monthly subscription was paid in return for a package consisting of the television services and the magazine.

HMCE allowed Telewest to account for VAT on the supplies by attributing part of each monthly subscription to the magazine and treating it as consideration for a zero-rated supply. The balance of each monthly subscription was attributed to the television services and treated as consideration for a standard-rated supply.

VAT was due by the regional company at the standard rate on the television programmes. But the magazine, if separately supplied was zero-rated. Customs accepted that the sum payable by the customers could be divided between that part attributable to the goods and services supplied in the provision of TV programmes, and that part attributable to the magazines. Only the former was taxable; the magazines, as publications, were zero-rated.

Existing customers saw no change to their payment obligations when a contract change resulted in the new company rather than Telewest providing the magazine.

The Court agreed with Telewest that, while the television services remained standard-rated, the magazine was separately supplied by a subsidiary set up to provide the magazine under a separate contract and so was properly zero-rated.

Customs queried why the supply of the magazine should be zero-rated when, if it had been supplied by Telewest, would have been a taxable supply. The court concluded that the concept of supply in VAT law turned on the Sixth VAT Directive rather than their assessment of fairness, but secondly, that the magazine was separately supplied by Telewest’s subsidiary according to the contractual documentation.

When ruling there were two separate supplies, the Court of Appeal made comments such as

‘in our judgment little in the way of acquiescence is needed before the customer will have assented to the change’ (para 21)

‘the CPP case (referred to in para 2 and 3 of the judgment of Sir Christopher Staughton) would not have applied if there had been a separate contract between the customer and Publications, because that case only applied where there was a single supplier’ (para 38)

‘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’)’ (para 39).

‘there is no suggestion in this part of the judgment of the Court of Justice that the concept of principal and ancillary contracts can apply where there is more than one supplier’ (para 72)

This judgment set an important precedent concerning the treatment of supplies made by separate entities. In The Lower Mill Estate Ltd VATSC82220 the judge referred to Telewest and stated “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” (para.43). However, you should also take into account the ECJ’s decision in Part Service VATSC82190 and the possibility that the abuse principle might apply.

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