



TC02285

Appeal number: TC/2011/05062

VAT – output tax – supply of goods with charge for postage – whether a single supply – whether supplier acts as agent for customer in contracting with Royal Mail - Customs & Excise Commissioners v Plantiflor Ltd considered – single supply by appellant – no agency established – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ORCHARDCROWN LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 18 July 2012

Ms Angela Strettle, director for the Appellant

Ms Pat Roberts of HM Revenue & Customs for the Respondents

DECISION

Introduction

1. The appellant trades as a retailer of novelty goods. This appeal is against a decision of HMRC that sums paid by customers in relation to postage of goods purchased are subject to VAT at the standard rate. I understand that there has not been any assessment issued to the appellant but that following an assurance visit on 19 January 2011 HMRC contended that the sums received were subject to VAT. A decision on the liability of those sums was given by the visiting officer, Ms Fiona Richardson. The appellant asked for a review of that decision and it was confirmed in a letter dated 16 June 2011. The appeal is against that review decision.

2. I heard evidence from the visiting officer, Ms Richardson, and also from the directors of the appellant, Ms Angela Strettle and Mr William Strettle. I set out below the legal framework in relation to the treatment for VAT purposes of postage charges in such circumstances.

3. The broad issue which arises in the present case is whether sums paid to the appellant by its customers in respect of Royal Mail postage fall to be treated as disbursements on the basis that the appellant was acting as the agent of its customers. Alternatively whether they are part of the consideration for a supply of delivered goods made by the appellant to its customers. In the former case the sums are not subject to VAT because in general terms postal services provided by Royal Mail are exempt. In the latter case they are subject to VAT but there is no input tax credit because the supply of postal services to the appellant is exempt.

Legal Framework

4. The treatment of postage charges for VAT purposes has been a matter of contention going back to at least 1980 when the issue came before the VAT & Duties Tribunal in *BSN (Import & Export) Limited v HMCE (Decision 998)*. Since then the issue has been considered by the House of Lords in *Customs & Excise Commissioners v Plantiflor Ltd [2002] UKHL 33* and most recently by the High Court in *Osborne's Big Man Shop v HMRC [2006] EWHC 3172 (Ch)*.

5. During the course of the hearing I was referred to a number of HMRC publications and notices dealing with the treatment of postage charges for VAT purposes. I have not felt it necessary to refer to those notices because it was not suggested that they had the force of law in relation to the matters in issue.

6. I was also referred to summaries considering the treatment of postage charges in various other Member States. Again, I have not referred to that material in this decision because it is not in the form of binding authority. I concentrate instead on the terms of the Principal VAT Directive (*Council Directive 2006/112/EC*) and those authorities which define the principles to be applied in resolving the present issue. In particular the decision of the House of Lords in *Plantiflor*.

7. By article 73 of the Principal VAT Directive the taxable amount for VAT purposes is, subject to exceptions, *"everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party"*.

8. By article 78 the taxable amount shall include *"incidental expenses, such as commission, packing, transport and insurance costs, charged by the supplier to the customer"*.

9. By article 79:

"The taxable amount shall not include the following factors:

...

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account."

10. By article 132 Member States shall exempt certain transactions including *"the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto"*.

11. Article 132 is implemented in UK law by *Group 3 Schedule 9 Value Added Tax Act 1994*. At the time of the assurance visit in the present appeal Group 3 exempted from VAT the following supplies:

"1. The conveyance of postal packets by the Post Office company.

2. The supply by the Post Office company of any services in connection with the conveyance of postal packets."

12. Following a decision of the Court of Justice of the European Union in *Case C-357/07 TNT Post UK Limited v HMRC*, and in order to comply with that decision, the exemption in Group 3 was narrowed. With effect from 31 January 2011 it applies to exempt the following supplies:

"1. The supply of public postal services by a universal service provider.

...

NOTES ...

(4) Services are not 'public postal services' if-

(a) ..., or

(b) any of the other terms on which the services are provided are freely negotiated."

13. As a result of that amendment the issue which arises on this appeal will not affect the appellant in relation to future supplies. Since the amendment to *Group 3* the

appellant has entered into a negotiated contract with Royal Mail. However the issue will still affect the appellant's liability to VAT in respect of transactions prior to that negotiated contract being implemented.

14. The terms of the Sixth Directive, which was replaced without material amendment by the Principal VAT Directive, were considered by the House of Lords in *Plantiflor*. In that case the taxpayer sold horticultural products by mail order. Most customers did not collect the goods ordered but used a delivery service offered by the taxpayer. The contract terms between the taxpayer and its customers provided that postal charges would be advanced to Parcelforce on behalf of the customers. The taxpayer also had a service agreement with Parcelforce to deliver goods at an agreed price.

15. The House of Lords held by a majority (Lord Mackay dissenting) that postage charges did form part of the consideration for a taxable supply.

16. The Commissioners in their case before the High Court had conceded that there were two supplies. A supply of goods by the taxpayer and a supply of services by the taxpayer in arranging delivery of the goods via Parcelforce. The Commissioners wished to argue that there was a single supply of delivered plants but the Court of Appeal refused permission for the Commissioners to withdraw their concession. Lord Slynn was clearly troubled by the concession and stated as follows:

“23. If, as I considered in Customs and Excise Comrs v British Telecommunications plc [1999] 1WLR 1376, 1382 - 1383, and as I still consider, the appropriate question is whether one act (here arranging the delivery) is "ancillary or incidental to another" (here the supply of bulbs) or is "a distinct supply", it seems to me on the contractual documents between Plantiflor and the customer which are before the House that these arrangements constituted a single supply. What the customer wanted and what Plantiflor agreed to provide was bulbs delivered to the home.

24. There was a separate supply consisting of the delivery of the bulbs from Plantiflor to Parcelforce, under a distinct contract. However, under the contract between the customer and Plantiflor arranging the delivery is ancillary to the making available of the bulbs. I do not consider that the answer to this question will vary according to, or depend on, the precise event or time when as a matter of English contract law the property in the bulbs passed to the customer. The reality is that Miss Brierley paid one total sum for one supply of delivered bulbs.”

17. Having said that, Lord Slynn went on to consider the position on the basis that there were two supplies by the taxpayer. He put the question in the following terms at [25]:

“...the question arises whether the money received by Plantiflor for postage can constitute consideration received by Plantiflor or whether it is simply money that is channelled through Plantiflor but never became Plantiflor's property so that it cannot amount to consideration passing to Plantiflor.”

18. The taxpayer had argued that it collected the postage charge and conveyed it to Parcelforce as agent. He dealt with this argument as follows:

“27. As to the agency argument Plantiflor of course relies on the provision of the catalogue "We will arrange delivery on your behalf ... We will then advance all postage charges to Royal Mail on your behalf." They insist that for this reason no consideration moved from Plantiflor to Parcelforce.

28. The tribunal [1977] V & DR 301, 322 accepted that "the role of Plantiflor in relation to delivery was that of agent or other intermediary"

29. This conclusion however does not take into account the terms of the agreement between Plantiflor and Parcelforce. It is plain from the terms of that agreement to which I have referred that Parcelforce was to deliver parcels "for Plantiflor". Parcelforce was to "charge Plantiflor" and Parcelforce was to pay invoices from Parcelforce by direct debit transfer. There is nothing in that agreement to express or even indicate that the two contracting parties were not acting as principals, in other words that Plantiflor was acting as agent for its customers. There is no link between Parcelforce and the customer. Since all that Parcelforce knew was the name of the addressee on the parcel (or perhaps even only the address), it might well not know the identity of the customer. Plantiflor agreed to pay postal charges; Plantiflor and not the customer was liable to pay Parcelforce. Even though Parcelforce supplied the service for delivery of the goods there was no consideration passing from the customer to Parcelforce. Plantiflor agreed to arrange delivery including paying Parcelforce for the postage and the customer paid Plantiflor for that.”

19. Lord Slynn then referred to what is now article 79 of the Principal VAT Directive and stated at [31]:

“In the present case it is not possible to say that £1.63 was paid out "in the name and for the account of the customer" even if the moneys here can be treated as entered in Plantiflor's books as a separate account. Even if, by the time Parcelforce got the periodic direct credit for all parcels delivered during the relevant period, it knew the name and address of the customers from the parcels or even from a list, it would not be sufficient to constitute each part of the global direct debit or credit as being in the name or for the account of the individual customer.”

20. Lord Millett gave the other reasoned opinion of the majority. He referred to the arrangements in place and stated:

“59. To this end [Plantiflor] worded its agreement with the customer to make it appear that it is merely the customer's agent in relation to the delivery of the goods. If this were truly the case, Parcelforce would make an exempt supply to the customer of the service of delivery, and the consideration for the delivery would pass from the customer to Parcelforce with Plantiflor acting merely as the customer's agent for payment. There would also be a supply of agency services by Plantiflor to the customer, but the consideration for these services would not include the postal charge.”

61. ...The difficulty with this analysis, however, is that it does not fit the facts. As Laws J correctly held, Parcelforce does not deliver the goods pursuant to any contract with the customer or his agent. It makes delivery pursuant to its contract with Plantiflor, which both parties entered into as principals.

...

63. ... The customer's acceptance of Plantiflor's terms does not authorise Plantiflor to bring him into a direct contractual relationship with Parcelforce ...

...

65. ... It is not enough that the recipient is bound by his contract with his customer to make the payment and that the amount in question is entered in his books in a suspense account. The payment must be made "in the name of and for the account of" the customer, and this has regard to the payment from the perspective of the recipient. It requires that the payment should discharge a pre-existing indebtedness of the customer, not merely of the person making the payment. Otherwise the description of the payment would mean nothing to the recipient.”

21. It is clear from the judgment of the House of Lords and in particular Lord Slynn that it is necessary firstly to consider the nature of the supply or supplies. In particular whether there is a single supply of delivered goods. Even if there are two supplies by a taxpayer, namely a supply of the goods and a supply of the service of arranging delivery, it is still necessary to consider whether the contractual arrangements are such that each customer constitutes the taxpayer as its agent. That is as agent for the purpose of contracting for the delivery of the goods by Royal Mail and also for the purposes of making payment in satisfaction of the obligation of the customer to make payment to Royal Mail.

Findings of Fact

22. The appellant sells novelty goods. Customers purchase the goods either online or by calling direct at the appellant's shop premises. In the latter case the customer will collect the goods themselves hence the issues in relation to postage concern online sales only.

23. Online sales are made either through eBay, Amazon or through the appellant's own website. The appellant's own website is based on eBay. Whichever platform is used a customer will have various options as to delivery. The customer can opt either to collect the goods personally, have the goods sent by courier or have the goods sent by Royal Mail. Charges for goods sent by courier are standard rated for VAT purposes. This appeal is concerned with goods sent by Royal Mail, either first or second class post.

24. At the point of ordering the goods the appellant sets out on the website the cost to the customer of the various delivery options. In relation to Royal Mail delivery the cost may be for first class mail (including for some items recorded delivery) or second class mail.

25. Where a customer has ordered via eBay, or the appellant's own website, the order will be subject to eBay's standard terms and conditions. The appellant also sets out its own terms and conditions. I had an opportunity together with the parties during the course of the hearing to look at the terms and conditions. Ms Strettle accepted that if an item was damaged in the post then, whilst it was what she described as a "grey area", the appellant would be obliged to refund the customer. If goods are lost or stolen in transit then the appellant would not be responsible.

26. When making an online order and checking out the customer identifies the postage required. The customer can also change the delivery address so that goods can be purchased for delivery to a third party. Payment is made online directly to the appellant.

27. Where a customer has ordered goods via Amazon, it is Amazon's terms and conditions which apply and the appellant cannot set any different terms. If goods are lost or damaged in transit then the customer will make a claim to Amazon which will itself make a refund and either stand the loss itself or set it off against the seller's account. The procedure on checking out is similar to that of eBay save that the customer makes payment to Amazon which, after deducting its percentage, credits the appellant's Amazon account.

28. In each case, where a customer chooses Royal Mail delivery the goods are sent via the appellant's local Post Office. The appellant has shop premises at 586 Blackpool Road, Preston. The local Post Office is at 592 Blackpool Road.

29. When the appellant receives an online order it will receive electronic notification of the order details including the customer's name and the delivery address. The appellant packs the goods and produces a sticky label which is attached to the parcel. The parcels which are to be sent by Royal Mail are placed in a shopping

trolley. An employee of the local Post Office comes to the shop periodically through the day and takes the shopping trolley with parcels back to the Post Office. Each item is weighed by the Post Office, postage stamps are attached and the parcel is accepted by them for delivery. For each parcel the Post Office produces a standard form receipt showing the date, time, weight and postage cost. An employee at the Post Office also hand writes on each receipt the name and postcode of the recipient. Some items are sent by recorded delivery but otherwise the system is the same.

30. The Post Office provides all the separate receipts to the appellant on a daily basis at which stage the appellant makes payment to the Post Office. The appellant then attaches the relevant receipt to each order form. They are retained by the appellant in its records as proof of posting.

31. There have been isolated incidents where for one reason or another no stamps have been put on a parcel. In those circumstances the recipient pays on delivery of the parcel and will inevitably complain to the appellant which refunds the postage.

32. The Post Office is not specifically made aware of the identity of the customer. It is only made aware of the name of the recipient and the delivery address to which the goods are being sent. The recipient of the goods may or may not be the appellant's customer.

Decision

33. It is clear from the decision in *Plantiflor* that it is necessary to focus on the contractual relationships between each of the parties.

34. Ms Roberts for the respondents submitted that postage charges are ancillary to the supply of goods. There is a single supply of delivered goods and the principal supply is the goods, which are standard rated. The fact that postage charges are separately itemised or invoiced to customers does not affect that analysis.

35. This submission is based on the approach that Lord Slynn would clearly have preferred to take in *Plantiflor* but which was not available because of the concession made by the Commissioners earlier in those proceedings. However each case must be decided on its own facts and so the first question is whether on the facts of the present case there is a single supply of delivered goods or two separate supplies, one of standard rated goods and one of agency services in contracting with Royal Mail on behalf of the customers.

36. Ms Strettle for the appellant identified what she described as "3 huge differences" between the present case and *Plantiflor*:

- (1) *Plantiflor* had an individually negotiated contract with Parcelforce.
- (2) The appellant obtains a separate receipt from Royal Mail for each individual customer showing the customer's name and address. Each payment is made separately.

(3) If no postage stamps are placed on the parcel, the customer would be liable to pay Royal Mail on delivery of the parcel.

37. In my view the facts establish a single supply by the appellant of delivered goods. In reaching that conclusion I have had regard to the principles set out by the ECJ in *Card Protection Plan v C & E Case C-251/05 [1999] STC 270* (“*CPP*”). The ECJ was concerned with the question of the distinction between single and multiple supplies. In deciding whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be taxed separately, regard must first be had to all the circumstances in which that transaction takes place, taking into account:

"29... first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

"30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied: Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel) (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24."

38. It would be possible, depending on the facts, for there to be separate supplies of agency services by a trader such as the appellant to its customers. However that is not the position on the facts of the present case. I do not consider that the factual differences identified by Ms Strettle establish a separate supply of agency services or indeed postage stamps.

39. What the customers want and what they are paying for is the goods delivered to the relevant delivery address. They make a single payment for the delivered goods, albeit with the cost of delivery separately identified.

40. There is no evidence to suggest that when payment was received by the appellant it became the property of the Post Office or that it was paid to the Post Office by the appellant in satisfaction of an obligation on the part of the customer to the Post Office. In particular there is no evidence before me that the appellant accounted for the sums received from customers by way of postage in any different way to its turnover generally.

41. A typical customer would consider that it was paying the appellant for both the supply and delivery of the goods. Not that the appellant would itself deliver the goods, but that it would in return for the total sum paid supply the goods delivered to the relevant delivery address by the agreed method of delivery. From the customer's perspective he or she is entering into one contract with the appellant. There is nothing in the order process or in the terms and conditions of sale which states that the appellant will collect postage charges and forward them to Royal Mail as agent of the customer or in order to satisfy an obligation of the customer to Royal Mail. Similarly there is nothing to indicate that the customer has authorised the appellant to bring him into a direct contractual relationship with Royal Mail. Ms Strettle indicated that the reason such terms are not included, at least in the case of Amazon, is because Amazon does not allow specific terms above and beyond its own standard terms. It was not clear why the appellant's terms on eBay did not reflect the alleged agency argument being put forward by Ms Strettle.

42. I am not satisfied that payment was made by the appellant to Royal Mail "*in the name of and for the account of*" the customers. That is the requirement of article 79 which forms the basis of the appellant's disbursement argument. The Post Office was aware only of the recipient of the goods and the delivery address. It did not know the identity of the customer unless the customer happens to be the addressee.

43. The reality is that there was no agreement between the Post Office and the appellant's customers. Indeed there was no real agreement between the appellant and the Post Office beyond the appellant agreeing to pay for the postage of parcels collected and accepted by the Post Office. Once the Post Office had stamped and accepted the parcels for postage and then presented the receipts for payment the obligation to make payment lay with the appellant and not its customers. In the light of the contractual arrangements it is fanciful to suggest that in making payment the appellant was at that stage merely acting as agent for its customers and satisfying an obligation of its customers.

44. There is no indication that the Post Office was entering into contractual relations with anyone other than the appellant. Identifying a name and delivery address on the proof of posting does not itself indicate that the Post Office was contracting with the identified recipient. It simply acted as confirmation for the benefit of the appellant as much as anyone else that goods ordered for delivery to that person had in fact been posted at the date and time recorded.

45. The various contractual terms as to loss or damage in transit are to some extent inconsistent. However it is clear that those terms seek to allocate the risk of loss or damage in transit as between the seller and buyer. Such terms would not be necessary if the customers had a direct contractual relationship with Royal Mail. In those circumstances it would be clear that the obligations of the appellant cease for all material purposes when parcels are collected by Royal Mail.

46. Taking all these factors into account I am satisfied that there is a single supply of delivered goods. The appellant was not acting as the agent of its customers for the purpose of entering into a delivery contract with Royal Mail.

Generally

47. There is some suggestion in the course of correspondence leading to the decision under appeal that the visiting officer viewed the appellant as a postal operator. Ms Richardson accepted that she had misunderstood the significance of this term. She also accepted that she was not fully aware of the arrangements between the appellant and the local Post Office for collection of parcels. However I am concerned on this appeal with the ultimate decision that sums paid by customers in relation to postage are standard rated. I have considered that issue on the basis of all the evidence before me, rather than the incomplete picture which Ms Richardson had at the time of her decision.

48. Ms Strettle also suggested that it would be illegal for the appellant to charge VAT in addition to the price of a postage stamp that it was selling to a customer. On the facts of the present case I do not accept that is the case. For the reasons given above the supply made by the appellant is of the goods delivered to the address given by the customer. The appellant is not supplying postage stamps to its customers.

49. For the reasons given above I must dismiss the appeal.

50. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 28 September 2012