



TC04411

Appeal number: TC/2013/03590

VAT – provision of written promotional materials and of various related services – whether a single supply and standard-rated – Yes – Section 30 and Schedule 8 VATA 1994 – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE MARKETING LOUNGE PARTNERSHIP LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: DEREK ROBERT, JP**

Sitting in public at Manchester on 2 and 3 February 2015

Appellant:- Paul J R Bendel, ATII, CTA

Respondents:- James Puzey, of Counsel

DECISION

Preliminary

1. This appeal relates to an assessment to VAT of £395,157 for the Periods 1/09 to 10/12. The decision of HMRC giving rise to this assessment is set out in the letter of their officer, Mr Hegarty, of 7 December 2012 (docs 40 and 154). It is in respect of certain supplies made by the appellant company to its clients. The business of the appellant is that of sales promotion and the assessment relates to five promotional campaigns by Halifax Insurance Services, Lloyds TSB, Zurich Insurance plc, Sainsbury's Bank plc, and Esure trading as "Sheilas' Wheels". These campaigns offered various incentives to existing customers to retain their business and also to obtain new customers. These incentives included "one night free" hotel offers, offers of free spa and beauty treatments, free subscriptions to Love Film, and various other savings on leisure activities.

2. The appellant's stance is that it provides two supplies (which at least) fall to be treated independently, *viz* a zero-rated supply of printed materials, such as guide-books listing hotels and, secondly, a standard-rated supply of "fulfilment services", including distributing the documentation provided, administering the offers and benefits, and providing general assistance to qualifying customers.

3. It is in respect of the former supply, which the appellant has treated as zero-rated, that the disputed assessment has been made, and that on the basis that HMRC maintains that a single comprehensive supply has been made, taxable at the standard rate.

4. The Tribunal observes that in the appellant's Skeleton Argument (paras 33 and 38) it is suggested as an alternative (no doubt preferable) that the printed material is the principal supply, and accordingly that the supply of "fulfilment services" is ancillary, and that both should be zero-rated. While Mr Bendel focused his address on the earlier argument (ie two supplies, one zero-rated and the other standard-rated) he did invite us to consider treating the entirety as qualifying for zero-rating.

The Law

5. Reference was made to Section 30 of the Value Added Taxes Act 1994 which provides for zero-rating of certain goods and services. The categories of goods and services affected set out in Schedule 8. In Group 3 therein "books, booklets, brochures, pamphlets and leaflets" are noted as qualifying for zero-rating. Additionally, in the course of the hearing extensive reference was made to case-law, as itemised in the Schedule appended hereto.

Appellant's introductory argument

6. Helpfully both Mr Bendel and Mr Puzey lodged in advance Skeleton Arguments which they adopted respectively and referred to in their oral submissions.

7. In his opening address Mr Bendel submitted crucially that there were two distinct components, viz printed directories and pamphlets and, also, optional “fulfilment services”. Each, he explained was capable of being used independently of the other, and each represented a separate provision. They were two separate principal supplies.

8. The disputed assessment relates to supplies to five clients, viz Halifax Insurance Services, Lloyds TSB, Zurich Insurance plc, Sainsbury’s Bank plc, and Esure t/a Sheilas’ Wheels. The rewards to each client’s customers varied, including a free night’s hotel accommodation, spa or beauty treatments, free film subscriptions, and combinations of discounts. Typically the client would contact its own customers to confirm whether they qualified for the offer, say by the renewal of their insurance policy, or their obtaining another customer for the client. Thereafter lists of eligible customers would be sent to the appellant. The appellant would then set out the offer, providing information by way of printed matter, e-mail, and the provision of websites and telephone enquiry lines, all to enable the client’s customers to enjoy the incentives.

9. The guides or lists of hotels were designed and edited by the appellant. Printing was sub-contracted. Payment (calculated by reference to the number of qualifying customers) was made by the client to the appellant, out of which it would pay the hotel. There was no financial contribution by the hotels. The cost of spa and beauty treatments was met similarly, with the appellant making payment to the provider. By contrast in the case of free film subscriptions, their cost was usually re-charged by the appellant to its clients.

10. Mr Bendel then noted the arrangements between the appellant and its corporate clients. (Here, of course, and as Mr Puzey reminded us, the actual terms of the individual agreements must prevail, but we note Mr Bendel’s comments in summary.) In the case of Halifax he stated that it had the option of purchasing the “directories” with or without the “fulfilment services”. Halifax itself contacted its customers to determine who qualified for the incentive. Then it notified the appellant of the qualifying customers, and the appellant undertook all further administration including handling hotel bookings and customer queries. The arrangements with other clients were roughly similar except that where discount vouchers formed the incentive, the client would issue these directly.

11. Finally, Mr Bendel referred to the relevant case-law. Firstly, he argued that the appellant’s publications were not advertising. (He distinguished the commentary in *France* at paras 16, 17 and 18.) Their purpose was simply to set out the “reward”. The appellant acted as a contact for the client’s customers enabling them to enjoy the benefit. Mr Bendel then turned to the relevant authorities in relation to the main issue viz whether there was a single or a multiple supply. *Card Protection Plan*, he suggested, stressed that every supply must be regarded as distinct and independent, and that a single service should not be artificially split (paras 29 and 30).

12. Mr Bendel then referred to *Field Fisher Waterhouse LLP* and *The Middle Temple* and suggested key principles set out therein. He responded that the

5 appellant's two supplies were distinct and separate, naturally not artificially. The
client (if not the retail customer) was aware of two distinct supplies. The printed
matter and "fulfilment services" were independent: each was an aim in itself, he
claimed. *Esto* there were a single supply, then arguably the printed matter was the
principal and the fulfilment services were ancillary. Thus, he continued, the whole
supply could be zero-rated (see paras 33-36 of the appellant's Skeleton). On the view
that these are two supplies, each was an aim in itself, one was not a better means of
enjoying the other. The option to purchase the printed material was real and genuine.
The fulfilment service could be tailored to meet an individual client's needs. If both
10 supplies were viewed together, Mr Bendel claimed, the nature of the whole supply
changed.

Evidence

13. Mr Bendel then called the only witness at the hearing, **Christopher Paterson**, a
15 director and the majority shareholder of the appellant company. His background is in
marketing. He has been a director of the company from 2010 and previously acted as
a consultant. He read out and adopted the terms of his Witness Statement (docs p487-
499) and elaborated on it in certain respects.

14. In summary he explained that he ran the company during the material period.
20 Professional accountants were engaged to advise. The vast majority of the company's
supplies were standard-rated, although exempt supplies were made to insurers. The
appellant company's clients were major "blue chip" companies, which had their own
compliance departments and were heavily regulated. The appellant company had
considered with HMRC the application of Section 30 and Schedule 8, Group 3,
25 VATA anent zero-rating of books and publications. Where directories and guides
were provided, these were zero-rated but other supplies were standard-rated. This
was not challenged by HMRC from 2008 to early 2011. After a routine VAT
inspection in March 2011 HMRC sought to charge the publications as part of a single
supply of promotional services. Also HMRC had sought to charge to VAT cash paid
30 as customer inducements, but this was later withdrawn. Similar arguments had arisen
in relation to "free" MoT's for motor insurance customers and food hampers. In
certain instances the appellant company had acted as an "agent" and then it could re-
charge its clients costs of vouchers provided as incentives and that inclusive of VAT.
This has been approved by HMRC.

35 15. The effect of a "blanket" standard-rate charge has been to make the appellant
company uncompetitive. Mr Paterson complained of inconsistencies in HMRC's
attitude. If the appellant charges VAT to clients, it runs the risk of jeopardising its
business. If not, it may have to bear the VAT itself. Mr Paterson maintained that
there were two distinct elements in their campaigns. The first, a book, was zero-rated;
40 and the second, a service, was liable to standard-rate VAT. The hotel guide, in
Mr Paterson's view, required substantial editorial content. It had to be updated in
respect of the hotels. A promotion was of value to the hotels in filling empty rooms.
The hotels do not have to pay for the advertising in the guides. They benefit by
selling food and drink to new customers and, perhaps, extra nights' accommodation
45 too. In Mr Paterson's view his company's guides resembled the Michelin, AA and

RAC hotel guides, which were sold as separate publications. The “hotel” model was adapted for spa, beauty treatment and discount lists.

16. In amplification of his “Witness Statement” Mr Paterson explained that the appellant company had a staff of 25 to 40, dealing in four departments with production, design, and management of campaigns. He was insistent that the hotel directory was a “guide book”. He agreed that he personally had connection with other companies in the promotion and marketing sector. He considered that there was a separation of the “reward” and its delivery. He observed that sales promotion had overtaken advertising in recent years. Cash vouchers were the main form. “Fulfilment costs” were always separated. Goods and fulfilment services were always invoiced separately.

17. In cross-examination Mr Paterson acknowledged that the appellant’s business was a promotions agency, which managed incentive campaigns. It was also involved in direct marketing. In the five campaigns concerned in the appeal, the appellant’s clients bore responsibility for their delivery and promotion. The appellant’s role was that of “back-end” support. There were, he explained, two aspects of that role *viz* (i) providing the “directory”, and (ii) the “fulfilment service”. The appellant would receive a spread-sheet from its clients, listing details of qualifying customers. The appellant would then process the reward by issuing “directories” of hotels, spas and beauty parlours, setting up a website and telephone helplines. Mr Paterson agreed that both elements furthered the goal of delivering the benefit.

18. While Mr Paterson conceded that these five campaigns shared common features, he insisted that they were bespoke for each client. He accepted that the directories or guides were reprinted and updated. Print costs varied: where only small production runs were required, costs could be up to £3 per copy. The appellant, Mr Paterson confirmed, paid the hotel for the first “free” night. It did not recharge the benefit to the client in that type of campaign. The payment in respect of each qualifying customer to the appellant was inclusive of hotel costs.

19. Mr Paterson was referred to the Agreement between the Halifax and the appellant (docs 285 *et seq*). This, he described, as a master agreement, adapted by using different schedules for various promotions. The directory used in the Halifax promotion bore the appellant’s logo. Its provision by the appellant was made clear. While the cover promised a list of over 100 hotels, the directory contained only about 51. Mr Paterson explained that the list was supplemented on the website.

20. Mr Paterson was then invited to consider the Agreement between Lloyds TSB and the appellant (agreement at docs 349 and brochure at docs 338). One of the benefits there was a free film subscription. By contrast with the hotel and spa and beauty treatment arrangements, the cost of this could be re-charged to the client. He noted especially at p361 that “ONF and SPA price was subject to VAT rulings if applicable”. He explained that this related to hotel “one night free” and spa benefits and crucially protected the appellant’s interests if a charge to that were levied (our emphasis).

21. In considering the other hotel directories it was suggested to Mr Paterson that these were no more than re-badging of the same brochure. The hotels were (more or less) the same. While the frontpiece of the guide promised over 100 hotels, they contained only about 50. The content was common. In effect, it was suggested in cross-examination, these were re-badgings of the same document. (This, we considered on reflection, was not satisfactorily explained away by Mr Paterson.)

22. Mr Puzey then referred Mr Paterson to the agreement with Sainsbury's Bank (p374 *et seq*). The relative book of vouchers was noted (p383 *et seq*). Mr Paterson explained that the appellant would make an agreement with each venue and fund discounts provided to client customers. Similarly, in terms of the agreement with Sheilas' Wheels the appellant company would pay the various establishments providing beauty treatments etc for client's customers. The venues were fully listed on the appellant's website (p413). The Zurich brochure at p420 *et seq* was noted. At p420 a copy of the "customer letter" is produced. The website supplemented the information there.

23. In a brief re-examination Mr Paterson explained that there was a group of companies in which he was involved bearing the "MLP" designation, each of which dealt in certain specialties in business marketing. He was also involved in a property company owned by his family.

20 Respondents' submissions

24. At the outset of his oral submissions Mr Puzey disputed the appellant's contention that there were two separate and distinct supplies *viz* of printed directories and also of the optional "fulfilment services". Mr Puzey considered that on the basis of the terms of the agreements and Mr Paterson's evidence this was one supply, and that of promotional services. The pamphlets, website, telephone lines could not be separated: taken together they represented a supply of promotional services.

25. Mr Puzey submitted that the matter of determining the nature of the supply was a question of law. Having regard to Mr Hegarty's decision set out in his letter of 7 December 2012 (doc 40) Mr Paterson had agreed that the appellant specialised in promotions (see para 2). The appellant was not, Mr Puzey submitted, a bookseller or a contract publisher. The directories produced in respect of the promotions were different from a Michelin-type guide: they were not sold separately to the public. The purchasers were the large concerns such as the Halifax, Lloyds TSB, who gave them to their customers. The directories or guides were essentially booklets, part of the mechanism for delivering the incentives. Indeed, they were incomplete in form given that reference to the website was necessary to view all the options.

26. The role of the appellant was more extensive than that of supplying written material. It received information in the form of customer lists from its clients. It sent letters to the customers, issued the directories, handled bookings, and dealt with telephone enquiries and complaints. None of these elements, Mr Puzey suggested, were "stand-alones": they were all parts of **one** co-ordinated supply.

27. Mr Puzey stressed that a proper scrutiny of the contracts between the appellant and their clients was crucial. Copies of these were produced in Part 4 of the Bundle. He referred us to paras 6, 7 and 8 of his Outline of Case. There it is stressed that the printed material is only one element of a campaign: additionally there are websites and telephone lines. The appellant, not its clients, procures the package of benefits forming the incentive. It would be artificial to dissect the totality.

28. Mr Puzey adopted as supporting his argument of there being a single supply the ECJ decisions in *Card Protection Plan* and in *Levob*. Para 29 of the former indicates that a single economic supply should not be “artificially split”. In the present case there was a single supply, Mr Puzey maintained. Para 22 in *Levob* stresses that where two or more elements are so closely linked that they form a single indivisible economic supply, they should not be split. Applying these dicta to the present case it was strained and artificial to try to separate the directories and booklets from the websites, the telephone lines and other support. None, Mr Puzey submitted, was subordinate to the other. *Weightwatchers (UK) Ltd* followed *Levob*, encouraging scrutiny from the consumer’s viewpoint and determining the economic reality. Mr Puzey submitted that matters of classification of the transaction were questions of law by reference to the opinion of Lord Hoffman in *Dr Beynon & Partners* at paras 26-29.

29. In the present appeal there were different elements in the supply of promotional services, Mr Puzey continued. The printed letter did not dominate. There was not separate pricing of the various elements, except perhaps in the Halifax promotion where the total price of £15 was split between the booklet and the balance. But separate pricing was not in Mr Puzey’s view, sufficient to create two supplies if the economic reality was of one supply. The booklets were not bespoke for individual promotions: there was a degree of commonality particularly in the selection of hotels for “one night free” offers. Even if the booklet were the costliest item, the decision in *College of Estate Management* indicated that this was not decisive: there the supply was held to be of education, not of zero-rated printed materials. Mr Puzey sought to distinguish the decision in *Appleby Bowers* relied upon by the appellant by reference to the decision of Warren J in *Byrom, Kane & Kane t/a Salon 24* in cases of several elements in a supply. (See paras 37 and 38 of the Respondents’ Outline of Case.)

30. In the present case the appellant offered a complex operation. It was not a promotion in a straightforward sense of acquiring a voucher on the premises of the provider to spend there. The package offered delivered in full the reward. It extended to telephone helplines and websites. The appellant was responsible for all aspects of the promotion, relieving their client of this responsibility.

31. The directories indicated prominently that the appellant was the provider of the whole support process. Their status was distinguishable from a Michelin or RAC Guide. The publishers of these Guides did not pay the hotels being featured: in the present case the appellant did.

32. From the viewpoint of the client such as Halifax or Lloyds TSB, this was a single supply. It was artificial to divide it between the provision of the directories and the other support services.

5 33. Under reference to the conclusions in his Outline of Case, Mr Puzey invited us to view the whole promotional service, including the directories, as a single supply for VAT, and that as a matter of law.

Appellant's reply

10 34. In his final submission Mr Bendel stressed that the appellant company operated in the incentives and promotion industry. It did not make supplies of business promotional services. His argument that there were two supplies was not to benefit partially exempt clients: that would be improper. The appellant company engaged accountants to ensure that it was VAT compliant. The brochures in conjunction with the website gave information on over 100 hotels. The brochures were bespoke in that
15 they were adapted for each client's use. Further MLP, the appellant, was a publisher in instances where only a booklet without services was provided. The directory was a stand-alone.

20 35. Finally, under reference to para 33 of his Skeleton Mr Bendel submitted as an alternative argument that if there were a single supply, the principal element was the printed matter, and the fulfilment services ancillary. Thus the whole supply should be zero-rated on that alternative view.

Decision

25 36. Inevitably Mr Paterson's evidence was opinionative in certain respects. We considered it appropriate to regard it with caution, although we do not consider that we were misled in any material respects. We had in any event extensive documentation which we were invited to review. Taking Mr Paterson's oral evidence in conjunction with the relevant documents produced we make the following

30 Findings-in-Fact:-

35 i. The business of the appellant is promotions management and marketing generally. Its clients are mainly major public companies, serving the general public, and having an interest in both maintaining and expanding their existing customer-base. They use promotions as a means of achieving this.

40 ii. These promotions provide rewards and incentives to existing and potential customers of the appellant's clients, commonly in the form of hotel accommodation, spa or beauty treatments, or film-subscriptions, which are provided free of cost to the customer. Discount vouchers are another form of reward used.

- iii. Mr Christopher Paterson is the principal director and shareholder of the appellant company. His background is in marketing. He has been a director of the appellant since 2010 and previously served it on a consultancy basis.
- 5 iv. During the material period *viz* January 2009 to October 2012 the appellant provided promotional services for Halifax Insurance Services, Lloyds TSB, Zurich Insurance plc, Sainsbury's Bank plc and Esure t/a Sheilas' Wheels. Any remaining promotional work undertaken during the material period was of trifling value, and accordingly the assessments relate to the services provided for these five clients.
- 10 v. In each promotion the appellant would publish a directory or guide setting out a list of providers of the incentive or benefit, such as hotels or beauty parlours. These followed a common form with the same providers of incentives or benefits, albeit revised to suit each client. It would distribute copies of these to customers of their clients identified by them as qualifying for the benefits. The appellant would thereafter undertake all aspects of management of the incentive scheme, providing supporting telephone lines for "take-up" of the incentives, and any related queries thereafter. It also set up websites supplementing the information in the lists of providers. Thus the appellant relieved its clients of all practical aspects of administering and managing the promotions.
- 15 vi. The client would pay the appellant a sum to meet all outlays relating to the promotion. A fixed sum would be payable in respect of each customer entitled to take up the "free" benefit. Out of that the appellant would meet the cost of provision of the hotel accommodation or spa or beauty treatment. The appellant would also provide and meet all other costs of enabling the customer to take up the incentive offered. Generally these were not re-charged to the client except for Love Film benefits or the provision of vouchers to be used on the client's premises.
- 20 vii. By letter dated 7 December 2012 (doc 40) an officer of HMRC, Mr Hegarty, indicated that the whole supply made by the appellant to each of its clients should be taxable at standard rate, and the disputed assessment for an additional amount of VAT of £395,157 was issued. This was confirmed after Review dated 26 April 2013 (docs 178/179). It represents a charge to standard-rate VAT on the whole value of the services provided by the appellant, *viz* both printed matter and "fulfilment services". That decision is the subject of this appeal.
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37. Having determined the Findings-in-Fact we now turn to Parties' Submissions on the relevant law. We consider that Mr Puzey's arguments are well-founded. We agree with him that the test of whether there is a single or multiple supplies is a question of law, albeit to be determined in individual factual contexts. We follow the criteria set out by the ECJ in *Card Protection Plan* and in *Levob*. Crucially the economic nature of the supply is to be identified, and the viewpoint of the customer is important. In the present appeal the clients of the appellant company contracted for both the printed matter and the "fulfilment services". We consider that all the

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elements provided by the appellant were integral parts of a whole. It would be purposeless – and probably more costly – to have more than one provider. In effect by engaging the appellant company the client was relieved of the whole responsibility of running its campaign: it could entrust the operation to one “professional”. The
5 Guides and website were truly complimentary. The helplines were a natural support. Any sub-division, we consider, would be artificial and likely to create additional unnecessary expense.

38. In *Appleby Bowers* criticism was made of the Tribunal for not determining whether there was a core or “dominant element”. We note that in reviewing this
10 Warren J in *Byron, Kane & Kane t/a Salon 24* remarked (para 51) –

“... it is now clear that it does not necessarily follow that there cannot be a single supply just because that supply comprises elements, none of which is ancillary to another, and each of which, if taken in isolation, would constitute a separate supply. ... However, once having identified a number of
15 elements as constituting a single supply, it is then necessary to see whether that supply – whether or not it is given a name – falls within any of the exemptions in Schedule 9.”

The purpose and overall nature of the supplies in the present case was the marketing and promotion of the clients’ commercial interests. The printed material was a subordinate and incidental part of the promotion. That material was not individual to
20 each client but followed a common model. Even then it was incomplete inasmuch as it had to be supplemented by reference to a website.

39. We agree with Mr Puzey that the service was not truly bespoke. While there were variations to suit individual customers, the core nature of the service remained
25 similar. Indeed, the same hotels by and large featured in each Guide. The “Guides” were not like tourist (such as the Michelin) guides. They were “tailored” to serve the particular client’s campaign, and that by way of adaptation of an earlier product for another client. The Guides were not sold independently.

40. A single payment for each qualifying customer was made by the client to the
30 appellant company, out of which it would meet all expenditure. There was no “re-charge” to the customer for, for example, hotel bills or beauticians’ fees. (There was an exception in the case of charges made by Love Film.)

41. The status of the appellant company in providing these services was that of an independent contractor, not a mere agent of the client. The management of each
35 campaign was conducted by the appellant without routine involvement or interference by the client.

42. For these reasons, therefore, we consider that the respondents were correct in issuing their assessment. The appellant made a single supply to each of these clients. It follows that we refuse the appeal.

40 43. 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.

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**KENNETH MURE, QC
TRIBUNAL JUDGE**

RELEASE DATE: 13 May 2015

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SCHEDULE

**MARKETING LOUNGE
PARTNERSHIP LIMITED**

&

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

TC/2013/03590

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