1 April 2020

PRESS SUMMARY

Zipvit Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2020] UKSC 15
On appeal from [2018] EWCA Civ 1515

JUSTICES: Lord Hodge, Lady Black, Lord Briggs, Lord Sales, Lord Hamblen

BACKGROUND TO THE APPEAL

The case concerns whether Zipvit, a trader selling vitamins and minerals by mail order, is entitled when accounting for VAT on its sales to make deductions of input VAT (the tax paid by the trader on goods and services purchased in connection with its business, as opposed to output VAT, which is the tax charged to the consumer by the trader on its goods or services) in respect of the price of postal services supplied to it by Royal Mail.

Under Royal Mail's terms and conditions, Zipvit was required to pay the commercial price for the supply plus such amount of VAT (if any) as was chargeable. At the time of supply, both Royal Mail and Zipvit understood that the supply was exempt from VAT, so Zipvit was only charged and only paid a sum equal to the commercial price for the supply. Royal Mail's invoices treated the supplies as exempt. However, the Court of Justice of the European Union ("the CJEU") subsequently held that such a supply of individually negotiated mail services should in fact have been treated as standard rated for VAT. If that had been appreciated at the time of the supplies, Royal Mail would have charged Zipvit VAT and would have accounted for this to HM Revenue and Customs ("HMRC"). The present proceedings are a test case in respect of supplies of services by Royal Mail where the same mistake was made.

Zipvit now claims that under article 168(a) of the Principal VAT Directive (2006/112/EC) ("the Directive") it is entitled to deduct as input VAT the VAT due in respect of these supplies or a VAT element deemed by law to be included in the price paid to Royal Mail for each supply. HMRC contend that on the proper interpretation of the Directive: (a) there was no VAT due or paid for the purposes of the Directive; and/or (b) since Zipvit at no point held invoices which showed that VAT was due and its amount, in compliance with article 226(9) and (10) of the Directive, Zipvit is not entitled to recover input tax.

Zipvit made claims to HMRC for the deduction of input VAT, which were rejected by HMRC. Zipvit appealed against HMRC's decision to the First-tier Tribunal (Tax Chamber), which dismissed the appeal. Zipvit appealed to the Upper Tribunal (Tax Chamber), which dismissed the appeal. The Court of Appeal dismissed Zipvit's appeal from the Upper Tribunal. Zipvit now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously decides that the legal position under the Directive is not clear. It is common ground that at this stage in the process of the UK's withdrawal from the EU, in a case involving an issue of EU law which is unclear, the Supreme Court is obliged to refer that issue to the CJEU to obtain its advice on the point. Therefore, the Supreme Court makes an order for a reference and sets

out the questions for the CJEU. Lord Briggs and Lord Sales give the judgment, with which all other members of the Court agree.

REASONS FOR THE JUDGMENT

Zipvit appealed on two issues: first, the "due or paid" issue, and second, the invoice issue. The Court has decided that neither issue can be regarded as *acte clair* (so obvious as to leave no scope for any reasonable doubt) and that a reference should be made to the CJEU.

The "due or paid" issue arises out of article 168(a) of the Directive, which provides that a trader who is a taxable person has an entitlement to deduct from VAT which he is liable to pay "the VAT due or paid…in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person". Zipvit contends that the commercial price it paid Royal Mail for the supplies of postal services must be treated as having contained an element of VAT, even though the invoice purported to say that the services were exempt from VAT. Alternatively, even if this embedded element of VAT is not to be regarded as having been "paid", it should be regarded as being "due" **[26]-[27]**. HMRC contend that there is nothing in the Directive which requires or justifies retrospective re-writing of the commercial arrangements between Royal Mail and Zipvit. Royal Mail did not issue further invoices to demand payment of VAT, cannot be compelled to issue such further invoices, and has not accounted to HMRC for any VAT in respect of the services. HMRC could not take action to compel Royal Mail to account for any VAT in respect of the supply of services. As the courts below found, if Zipvit were to succeed it would gain an unmerited financial windfall at the expense of the taxpayer **[31]-[32]**.

On the invoice issue, Zipvit submits that CJEU case law indicates that there is an important difference between the substantive requirements to be satisfied for a claim for input tax and the formal requirements that apply in relation to such a claim. The approach is strict for the substantive requirements, but departure from the formal requirements is permissible if alternative satisfactory evidence of the VAT which was paid or is due can be produced. Zipvit contends that it has produced alternative satisfactory evidence of the VAT paid, in the form of payment of the embedded VAT **[36]-[38]**. Against this, HMRC submit that the regime in the Directive requires particular importance to be attached to the requirement of the production of an invoice showing that VAT is due and in what amount. A valid claim for the deduction of input tax cannot be made in the absence of a compliant VAT invoice **[39]-[40]**.

The Supreme Court refers four questions to the CJEU. The first asks whether, in circumstances like those of Zipvit, the effect of the Directive is that the price actually paid by the trader is to be regarded as the combination of a net chargeable amount plus VAT thereon, thus allowing the trader to claim to deduct input tax under article 168(a) of the Directive in the amount of VAT which was in fact so "paid" by it in respect of that supply **[42(1)]**. The second asks whether, in those same circumstances, the trader can claim to deduct input tax under article 168(a) as VAT which was "due" in respect of that supply **[42(2)]**. The third asks whether, where a tax authority, the supplier, and the trader misinterpret European VAT legislation and treat a taxable supply as exempt, resulting in a non-compliant VAT invoice which stated that no VAT was due, the trader is entitled to claim to deduct input tax under article 168(a) **[42(3)]**. Finally, in answering the prior three questions, the Court asks whether it is relevant to investigate whether the supplier (Royal Mail) would have a defence to any attempt by the tax authority to issue an assessment requiring it to account for a sum representing VAT in respect of the supply, and whether it is relevant that the trader (Zipvit) knew at the same time as the tax authority and the supplier that the supply was not in fact exempt, and could have offered to pay the VAT due, but omitted to do so **[42(4)]**.

References in square brackets are to paragraphs in the judgment

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html