



Case alert

Upper Tribunal – News Corp UK & Ireland Limited (News UK)

7 January 2020

Summary

This significant - and importantly - binding decision from the UK Upper Tribunal (UT) concerns the zero rating of electronic editions of newspapers.

News UK sought to argue that the electronic versions of its printed newspapers should be zero rated as newspapers. News UK were unsuccessful at the First-tier Tribunal (FTT), the FTT determining that the digital versions could not be considered 'newspapers' as envisaged by the UK VAT legislation.

On appeal to the UT, the decision of the FTT has been overturned, the UT agreeing with News UK that the supply of digital editions of its newspapers is correctly zero rated.

The key points in reaching this decision were that the UK retains its zero rates by virtue of Article 110 of the VAT Directive. Only this Article is concerned with zero rating. Thus, in this context, EU provisions concerning reduced rates (not zero rates) supplies were not relevant.

In the absence of material changes to the UK's legislation, it should be interpreted on an 'always speaking' basis, i.e., it must recognise the purpose and historical context of the provision and take into account technological and similar changes that did not exist at the time the original legislation was enacted.

The FTT had considered the relevant facts in reaching its decision (HMRC argued that it had not) but had drawn the wrong conclusion.

The UT ruled in favour of News UK.

Upper Tribunal

The principal question in this appeal was whether digital versions of newspapers published by the appellant, News UK, are "newspapers" within the meaning of the UK's VAT law and are therefore zero rated for VAT purposes.

A key feature leading to the appellant's success in this case is that the only provision of the VAT Directive which deals with zero-rating is Article 110. The purpose of Article 110 is, in essence, a 'standstill' provision which allows the UK (and other member states) to retain those zero (and reduced) rates that were in force as at 1 January 1991. This was intended to be a temporary measure, pending introduction of "definitive arrangements". As no definitive arrangements have as yet been put in place it was agreed by both parties that in this respect, the UK's VAT legislation has not changed materially since 1972.

Both parties agreed that the supplies in question, being digital newspapers, were supplies of services. HMRC's contention was that only goods could be zero rated and that on this basis alone, digital newspapers could therefore not be zero rated. Simply put, the FTT agreed with HMRC, effectively quashing News UK's appeal.

The UT also agreed that the supply of digital newspapers is one of services. However, it determined that the UK law, which deals with zero rating, includes reference to both goods and services and that the FTT was, therefore, incorrect in its decision that zero rating could only apply to goods.

The UT went on to consider the FTT's determination that Art.110 of the VAT Directive must be strictly construed and that, to allow News UK's appeal would extend zero rating beyond the scope allowed by law. It concluded that a strict interpretation should not be so restrictive as to deprive the legislation of its intended effect. The purpose and historical context of the legislation could still be considered. In this case, both parties agreed that the purpose of the legislation was to promote literacy, education etc. With this in mind, the UT considered that the FTT was wrong in concluding that the 'always speaking' doctrine should not apply. Having reached this conclusion, it remained to decide whether the digitised versions were sufficiently similar to the 'newspapers' as envisaged when the legislation was written. As the FTT had previously determined that there was no material difference (other than the medium of delivery) between the digital and print versions, there being both a shared purpose and shared characteristics (both were edition-based, editorially curated news) the FTT's decision was incorrect. Accordingly, the UT determined that digital editions are newspapers and are correctly zero rated.

Comment – this is a substantial victory for the Appellant with potentially wide-reaching implications for the publishing industry. By allowing the appeal, the UT has set out the importance of considering, not only the precise wording of the legislation but also the purpose and intention of the legislators. It also positions in clear terms the UK's retention of its zero rates and the role of the 'standstill' provisions. Worthy of note is the fact that member states have, since April 2016, had the option to apply a reduced rate of VAT to electronic publications (or a zero rate where the equivalent print publication was zero rated), a provision not enacted by the UK to date.

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