VAT focus

The *CPP* principle: lessons from *Brockenhurst* and *Colaingrove*

Speed read

The principle laid down by the CJEU in *CPP* – that a transaction comprising two (or more) items is treated as a single composite supply with a single VAT treatment where one item is the principal component to which the others are ancillary – is well-known. Two judgments delivered on the same day in May – the Court of Appeal judgment in *Colaingrove* and the CJEU judgment in *Brockenhurst College* – consider the interaction between this principle and certain specific legislative provisions, namely VATA 1994 s 29A and Sch 7A Group 1 and PVD article 132, respectively. *Colaingrove* confirms that the *CPP* principle prevails unless there is specific wording in the national legislation dual-rating a single composite supply which includes an ancillary component that is normally reduced-rated. *Brockenhurst* suggests that the *CPP* principle is capable of applying to transpose the VAT treatment of a principal supply to an ancillary supply, even where the two supplies are made to different recipients.

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In the VAT world, *CPP* is almost as well-known an acronym as PVD and VATA. Few even refer to the case by its full name – *Card Protection Plan* (Case C-349/96) – where the principle was laid down by the CJEU that a transaction comprising two (or more) items would be treated as a single (composite) supply with a single VAT treatment – even where the items in question, if supplied on their own, would each have a different VAT treatment – provided that one of the items is the principal component to which the others are ancillary.

This principle was referenced in two recent judgments – the judgment of the Court of Appeal in *Colaingrove* [2017] EWCA CIv 332 and the judgment of the CJEU in *Brockenhurst College* (Case C-699/15) – both delivered on 4 May 2017. Neither is a case on the principle as such; rather, they look to the interface between the principle and specific provisions of VAT law – VATA 1994 s 29A and Sch 7A Group 1 in *Colaingrove* and article 132 of the PVD in *Brockenhurst College*.

Colaingrove

Colaingrove runs holiday parks and resorts, providing accommodation to holidaymakers in caravans and chalets owned by it (as well as pitches for caravans owned by the holidaymakers themselves). A major tabloid newspaper publishes promotions from time to time, offering its readers the opportunity to stay in the caravans and chalets owned by Colaingrove at heavily discounted prices. Although the discounted prices relate to accommodation only, and electricity is paid for separately by way of a daily fixed charge, all payments by a holidaymaker are regarded as payments for a single commercial package comprising both accommodation and electricity.

The supply of accommodation on its own is standard rated for VAT purposes, whereas the supply of electricity on its own is reduced-rated where the electricity is for domestic use (VATA 1994 s 29A and Sch 7A Group 1).

In *Colaingrove*, both are supplied as part of the same commercial package (with accommodation being the principal service to which the provision of electricity is ancillary), and the question is whether the single package should be treated – as one might expect – as a single composite supply (of accommodation, the principal service) with a single VAT treatment (being standard rating, the treatment that applies to accommodation) or whether the *CPP* principle could be displaced with the reduced rate applying to the electricity component.

That it might be possible to segregate the electricity component in this way derives from *EC v France* (Case C-94/09) – the so-called *French Undertakers* case. The case concerns supplies by undertakers to the families of deceased persons. Although it was open to France to reduced rate the entire package (PVD article 98(2) and item 16 Annex III), it chose to reduced rate one element of such package only – the transportation of a body by vehicle – with the standard rate applying to the rest. The European Commission took issue with this, and brought infraction proceedings against France, arguing that the supplies constituted a single complex transaction that must be subject to a single rate of VAT – invoking the *CPP* principle, essentially. This approach was rejected by the CJEU, which held that a member state could, by way of national legislation, apply the reduced rate selectively, provided that the selected item is a 'concrete and specific [aspect] of the category of supply at issue', and reduced-rating it would not offend against the general EU principle of fiscal neutrality.

In other words, a transaction that would normally be treated as a single composite supply with a single VAT treatment under the *CPP* principle may have two VAT rates applying to it instead of one where one of the items comprised in it is eligible for reduced-rating, provided that:

- the item in question is a concrete and specific element of the single composite supply; and
- there is 'domestic legislative warrant for the application of different rates of VAT to [the] single supply' in such circumstances (as per Hildyard J in the Upper Tribunal in *Colaingrove* [2015] UKUT 0080).

By the time *Colaingrove* was in the Upper Tribunal, HMRC had accepted that the provision of electricity was indeed a concrete and specific element of the single commercial package supplied to the holidaymakers. The issue was whether s 29A and Sch 7A Group 1, properly construed, provide in such circumstances for the electricity component to be reduced-rated notwithstanding that it forms part of a wider (standard rated) supply.

The Upper Tribunal held that they did not and found in favour of HMRC.

The Court of Appeal also found in favour of HMRC, accepting their construction of the relevant provisions, namely that: 'the plain meaning of section 29A is that VAT shall be charged at the reduced rate on any supply that is of a *description specified* in Schedule 7A. In this case, the supply was of serviced holiday accommodation, which is not in the Schedule'.

The provision of electricity for domestic use is not, therefore, reduced-rated where it forms part of a wider composite supply of some other service (that is not itself reduced-rated). The *CPP* principle prevails unless there is specific wording in the national legislation that provides for

dual-rating a single composite supply which includes an ancillary component that is normally reduced-rated (as in *Colaingrove*).

The Court of Appeal also accepted HMRC's argument that 'the doctrine of fiscal neutrality does not mandate any different result in [the] case.'

Brockenhurst College

Brockenhurst College runs courses in various subjects, including catering and hospitality and the performing arts. To teach catering and hospitality students practical skills, the college runs a restaurant in which all the catering functions are carried out by students. The restaurant is open to a selective group of third parties, who pay for their meals (as in any restaurant), albeit at heavily discounted prices. Similarly, to help performing arts students, the college stages concerts and performances put on by those students for a paying audience comprised of third parties from substantially the same selective group. The issue is whether the above-mentioned restaurant and entertainment services supplied by the college are exempt (in the same way as the courses delivered by it) or standard rated.

This depends on the scope of article 132.

Article 132(1)(i) exempts:

'the provision of … young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto…'

PVD article 134 provides that the above-cited education exemption is only available where:

- the supply in question is essential to the education being provided; and
- the basic purpose of the supply is not to obtain additional income for the institution in question through transactions that are in direct competition with those of commercial operators.

The CJEU considered that (subject to confirmation by the UK courts) both of the conditions set out in article 134 were satisfied.

The restaurant and entertainment services would, therefore, be exempt, provided they are 'closely related' to the education being provided. On this, the CJEU held that:

- 'a supply of services can be regarded as 'closely related' to [the provision of education] only where they are actually supplied as services ancillary to the education provided by the relevant establishment, which constitutes the principal supply'; and that
- '[i]n accordance with the court's case law, a service may be regarded as ancillary to a principal supply if it does not constitute an end in itself, but a means of better enjoying the principal supply',

applying, in essence, the *CPP* principle.

HMRC's main objection to the restaurant and entertainment services being treated as 'closely related' to the education being supplied revolves around the fact that the restaurant and entertainment services are supplied not to the students themselves, but to third parties. They argued that:

- the students do not benefit from the subject matter of the services, but rather from their involvement in providing them;
- the services are neither received nor consumed, whether directly or indirectly, by the students – they are received and consumed by the third parties, who are not themselves recipients of the principal supply of education;
- taking the third party's point of view, the services do not represent a means of better enjoying any other service, but are instead an end in themselves; and
- taking the student's point of view, the services are not an end in themselves, but participating in supplying them represents a means of better enjoying the principal supply of education.

As the advocate general puts it, an ancillary supply being a means of better enjoying a principal supply 'suggests that the recipients of the principal supply and the ancillary supply must be identical'. And in *Brockenhurst College*, the recipients of the principal supply and the ancillary supply are not identical.

The CJEU did not follow the advocate general's opinion or address the issue expressly. It held simply that the supply of restaurant and entertainment services to third parties (as in the case) may be regarded as 'closely related' to the principal supply of education (on the proviso that the conditions set out in article 134 are satisfied).

It may be that the CJEU considered its judgment in *Horizon College* (Case C-434/05) sufficient guidance on the issue. This is certainly what the Upper Tribunal in *Brockenhurst College* thought ([2014] UKUT 0046). *Horizon College* concerns whether the supply by one educational establishment (the college) of teachers to another educational establishment is 'closely related' to the provision of education. The CJEU held that it was, and stated: '[t]hat conclusion is not altered by the fact … that the [recipient] establishments benefit from the supply … without there being a direct relationship between [the] college and the students of the [recipient] establishments. Similarly, the fact … that the supply of teachers is an activity that is separate from the teaching provided by [the] college on its own account has no bearing on that conclusion. In fact, in order for students of the [recipient] establishments better to enjoy the education provided by those establishments, it is not necessary for services closely related to that education to be supplied directly to those students. Furthermore, any lack of a close connection between the principal activity of the [college] and its secondary activity – the supply of services closely related to education – is, in principle, irrelevant.'

The *CPP* principle would appear, therefore, capable of applying to transpose the VAT treatment of a principal supply to an ancillary supply, even where the two supplies are made to two different persons. It may be that this phenomenon only arises in the context of article 132. But then, one is reminded of the CJEU judgments in *Bookit* (Case C-607/14) and *NEC* (Case C-130/15).

Neither was a case on the *CPP* principle; both concern whether certain card handling or processing services are exempt. In each case, the services supplied by the taxpayer are supplied in connection with the sale of tickets to the public made by a different person, and in both cases, the CJEU suggests that, depending on the economic and commercial reality of the transactions, and notwithstanding the contractual structure underlying those transactions, the card handling or processing services may be treated as ancillary to the sale of tickets, forming with that principal supply a single supply, and sharing with that principal supply the same VAT treatment.

The CJEU did not explore this analysis in any great detail. It is clear, however, that the fact that the supplier of the principal service is a different person from the supplier of the ancillary service was not regarded by it as an obstacle to the application of the *CPP* principle.

The *CPP* principle may, therefore, be well-known, but if the CJEU judgments in *Bookit*, *NEC* and *Brockenhurst College* are but glimmers of something more substantial, we may find that we never knew it that well after all. ■

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- Cases: *Colaingrove v HMRC* (9.5.17)
- Cases: *HMRC v Brockenhurst College* (9.5.17)