

# VAT focus

## Books versus e-books

**SPEED READ** What makes a book a book? What should determine how it is treated for VAT purposes – should content trump medium or vice versa? Three recent CJEU cases on e-books highlight the issue. The CJEU reinforced the focus on medium and delivery, but the story is not yet over.

In a speech on 6 May 2015, European Commission President Jean-Claude Juncker declared – as a self-professed expert on the VAT Directive – that the VAT rules must be ‘technology neutral’. When he was still prime minister of the country, Luxembourg had applied the reduced rate not only to print books, but to e-books as well. The Commission considered this an infringement of the VAT Directive, and the CJEU agreed. The Commission prevailed over Mr Juncker and e-books had to be brought under the standard rate in Luxembourg. If at first you don’t succeed ... run for president.

**K Oy:** *Commission v Luxembourg* (C-502/13) was the third in a series of CJEU cases on e-books, following *K Oy* (C-219/13) and *Commission v France* (C-479/13). All three concerned whether the reduced rating regime (provided for under art 98 of the VAT Directive) applied to e-books.

The reduced rate only applies to the prescribed categories of goods and services in Annex III of the VAT Directive, paragraph 6 of which refers to ‘books on all physical means of support’.

In *K Oy*, the taxpayer published audiobooks (on CD and CD-ROM) and e-books (on CD or USB), as well as general literature and textbooks. In Finland, the reduced rating was restricted to books published on paper only. The taxpayer argued that this was contrary to the principle of fiscal neutrality, and the reduced rate should be extended to books published on other physical supports (such as CDs, CD-ROMs and USBs).

Fiscal neutrality is inherent in the common VAT system (see recital 7 of the VAT Directive), and precludes ‘similar’ items that are in competition with each other from being treated differently for VAT purposes. Two items are ‘similar’ where they have similar characteristics and meet the same needs from the point of view of the consumer (see *The Rank Group* (C-259/10)). The issue with whether books and e-books are ‘similar’ is that the point of view of the average consumer in different member states may differ, depending on the relative levels of technological penetration in those states and the different levels of access to the necessary technical equipment. For a tax that is supposed to have a uniform application across all member states, this is hardly ideal.

Nevertheless, the CJEU considered that if what mattered for the consumer was essentially the similar content of a book, regardless of the medium in which it was published, the reduced rate should apply to the book across all such media. It did not, however, actually rule on whether the Finnish rules on the subject of the referral were contrary to the principle of fiscal neutrality; it simply referred the question back to the domestic courts.

**France and Luxembourg:** If the taxpayer in *K Oy* had been established in France or Luxembourg (rather than Finland), the case would not have arisen. This is because both France and Luxembourg applied the reduced rate to e-books, not only where they were supplied on physical media, but also where they were supplied by way of download.

The Commission considered the extension to downloads a breach of the reduced rating regime, and,



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on referral, the CJEU agreed, holding that the need to read an e-book on physical equipment (such as a computer, smartphone or tablet) did not characterise e-books as ‘books on [a] physical means of support’. Although physical support was required, it was only a means of enjoying the e-book; it did not form part of the supply itself.

The rulings were hardly surprising. Article 98(2) specifically precludes the application of the reduced rating regime to ‘electronically supplied services’, and the supply of an e-book by way of download is clearly an ‘electronically supplied service’. The rules specifically provide for different treatment based on media (or means of delivery) and not content. Irrespective of whether that represents the best conceptual approach, the rules are the rules.

Fiscal neutrality was invoked by both France and Luxembourg, but to no avail. The principle was simply incapable of extending the scope of reduced rating in the absence of unequivocal provisions to that effect in applicable law.

### Aftermath

As Mr Juncker said on 6 May, ‘Digital is the growth engine of the future, the new growth engine of Europe.’ The current VAT treatment of digitised products, however, is anything but satisfactory. The supply of an e-book may be reduced rated where it is supplied on USB, but not where it is supplied by way of download. This does not make sense.

The Commission is now expected to bring e-books within the reduced rating regime. Subject to timing, such a move should placate France and Luxembourg (and other member states of like mind). However, without more, it is unlikely to be enough for the UK, where print books are zero rather than reduced rated. Unless e-books could be zero rated in the UK – which is highly unlikely – e-books would continue to be treated differently from print books. The alternative, of course, would be for the UK to finally abandon the zero rating of (print) books it had secured by way of derogation way back when the tax was first introduced, and move them to the reduced rate, but (politically) that is even more unlikely.

Whatever the final outcome, it is not expected that the proposed changes will resolve the content versus medium debate, although it is hoped that it would at least make it (more) academic. ■

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**Q&A: VAT on e-books and the CJEU judgment in *K Oy*** (Jonathan Gordon, 18.9.14)

**Cases: *K Oy*** (17.9.14)

**Cases: *European Commission v French Republic* and *European Commission v Grand Duchy of Luxembourg*** (11.3.15)