

The Boots Company plc v The Commissioners for Her Majesty's Revenue and Customs

Decision 20644

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**First published by De Voil Indirect Tax Intelligence,
Issue 145, June 2008**

In this Decision, the Tribunal was required to address both the technical aspects of a bespoke retail scheme, as well as the effect of the administrative process whereby the appellant had engaged with the Commissioners over the appropriate treatment for the scheme and the reliance that could be placed upon that communication.

The appellant, the Boots Company plc ("Boots") accounted for VAT by reference to a bespoke retail scheme. In 2002 and 2003 it ran five promotional schemes called "vouchers". For each purchase of goods for at least £15 ("the qualifying goods"), customers were given a voucher (the "voucher") entitling them to a £5 reduction on certain subsequent purchases ("the redemption goods").

The promotions were advertised under the slogan "Free £5 voucher when you spend £15 or more at Boots." Only one voucher was given to the customer by Boots in each transaction, regardless of the total amount over £15 spent by the customer and there was no possibility to take a price reduction on the qualifying goods rather than taking the voucher. The voucher had to be used within a specified promotional period: after the end of that period it was not redeemable and was therefore worthless.

Initially, Boots accounted for VAT on the full value of the qualifying goods and on the reduced value of the redemption goods. On 28 November 2003, the Commissioners decided that for the relevant accounting periods in 2002 and 2003 Boots could account for VAT on the reduced value of the qualifying goods and the full value of the redemption goods. On this basis, on 11 December 2003 the Commissioners repaid an amount of some £3,354,4354 to Boots.

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On 10 January 2005, the Commissioners withdrew their decision of 28 November 2003 and on 23 March 2005 issued an assessment under section 80(4A) Value Added Tax Act 1994 ("VATA 1994") seeking recovery of some £2,006,794 of the sum repaid on 11 December 2003. Boots appealed against both the decision of 10 January 2005 and the assessment of 23 March 2005.

In its appeal, Boots raised four alternative arguments. Three of these were technical arguments arising from the proper interpretation and application of VATA 1994 and notices issued by the Commissioners while the remaining argument was essentially administrative, namely whether there had been a binding agreement to amend Boots's bespoke retail scheme in the manner contended.

The Tribunal proceeded to determine firstly whether the repayment had been made on the correct view of the law. Boots made two principle submissions. First, it argued that as the voupon was only given if a customer paid more than £15 for the qualifying goods, it was not given for free. There was therefore a direct relationship between the consideration paid for the qualifying goods and the receipt of the voupon. Consequently, the consideration for the qualifying goods should be apportioned between those goods and the voupon and VAT should be payable on the part of the payment apportioned to the qualifying goods, with VAT being accounted on the face value of the voupon when it was redeemed. Second, Boots argued in the alternative, on the basis of principles in Case C-349/96 *Card Protection Plan Limited v Customs and Excise Commissioners* [1999] STC 270 that the voupon was part of a multiple supply comprising the qualifying goods and the voupon.

The Tribunal accepted neither argument. Referring to Article 11A 1 (a) of the Sixth Directive, it held that the taxable amount paid for the qualifying goods was the full price of the goods. When a customer purchased the qualifying goods, the whole purchase price was paid for those goods and no part of the consideration related to the voupon. Consequently, the voupons could not affect the tax treatment of the goods supplied when those free vouchers were handed over. In relation to the redemption goods, it held that the taxable amount was the normal price of those goods less the £5 reduction provided by the voupon. Finally, in relation to Boots's alternative argument, the Tribunal held that there was a supply of qualifying goods to the customer for the normal price of those goods. That was a single supply of goods since the gift of a free voucher was not a supply to which any consideration related.

The Tribunal then considered whether the repayment was in accordance with paragraph 7.18 of Notice 727/4 which provides in its fourth box that "if you include gift vouchers with other products for a single charge... the supply of goods and voucher is treated as a single supply. This means VAT is only due on the portion of the payment which relates to the goods..."

Boots argued it was entitled to rely on this provision. However, the Tribunal determined that the correct interpretation of this provision was that it only applied to vouchers sold for consideration, which was not the case with the voupons. Moreover, even if the fourth box could be interpreted as Boots contended, it could not avail itself of its effect since it only applied to retailers who used a standard scheme. By virtue of its turnover, Boots was obliged to account for VAT in accordance with a bespoke retail scheme and could only rely on the provisions of paragraph 7.18 of Notice 727/4 if they were agreed with the Commissioners to form part of that bespoke scheme.

The third argument advanced by Boots was that the Commissioners' letter of 28 November 2003 constituted an agreement to amend the previously agreed bespoke scheme retrospectively and that Boots could rely upon that agreement. Here the Tribunal accepted Boots's submission that, on the authority of *GUS Mercantile Corp Limited v Customs and Excise Commissioners (No 2)* [1993] STC 738, if the correspondence between and conduct of the parties when taken as a whole evidenced an agreement, such agreement was binding and could not be resiled from.

As the Tribunal pointed out, some of the dealings between the Commissioners and Boots were relatively informal and none of the contemporary correspondence indicated any intention of the parties to agree a binding amendment. Nonetheless, following a detailed review of the evidence, the Tribunal concluded that overall there was a meeting of minds between the parties in November

2003 and that a binding amendment to the agreement was made for the relevant periods under consideration.

Having determined in Boots favour on the third argument, there was formally no need for the Tribunal to consider the fourth argument, namely whether the assessment should have been made under section 73 VATA rather than section 80 (4A) VATA 1994, in which case it would be out of time. Nonetheless, the Tribunal proceeded to consider this point and concluded that the assessment had been made under the appropriate provision.

Accepting arguments advanced by the Commissioners, the Tribunal determined that recovery assessments for periods where a net sum had been paid to the Commissioners was governed by section 80 (4A) and those where a net sum was due from the Commissioners under section 73. Although one of the accounting periods in question was a repayment period, it had not been included in the assessment, which had therefore been properly raised under section 80 (4A) and was in time. The Tribunal also expressed sympathy for the Commissioners' submission that even if the assessment should have been made under section 73, it should be treated as so made.

Boots's success before the Tribunal was therefore founded not upon technical arguments relating to the operation of the VAT regime, but on the nature and effect of its communications with the Commissioners. Whether agreement has been reached in other cases where the question of purported acquiescence by the Commissioners to a change of treatment arises would of course require similarly close factual analysis to that undertaken by the Tribunal in this case. However, it is presumably to be expected that the Commissioners will be more circumspect in their communications with taxpayers in relation to changes of treatment within the scope of a bespoke retail scheme in the future.

Melanie Hall QC and Tim Ward represented Boots plc.

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