

## **R (TNT Post UK Ltd) v HMRC**

### **Case C-357/07**

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#### **The factual background**

This case concerned the interpretation of an exemption from VAT in relation to postal services. Proceedings were brought by TNT Post UK Limited ("**TNT Post**") against Her Majesty's Revenue and Customs ("**HMRC**") and Royal Mail Group Limited ("**Royal Mail**") intervened as an interested party. The dispute in part raised the issue of whether the liberalisation of the postal sector effected by Directive 97/67 altered how the exemption set out in Article 13A(1)(a) of the Sixth Directive ("**Article 13A(1)(a)**") should be interpreted..

Postal service providers in the United Kingdom operate under licences granted by the State. In the licence granted to Royal Mail the company is designated as the sole universal postal service provider and specific obligations are imposed on it. In particular Royal Mail is required to provide the UK with a universal postal service, including at least one delivery to every address every working day and one collection from every 'access point' within the UK at prices which are both uniform and affordable throughout the UK. The Royal Mail are also obliged to ensure that there is a sufficient number and density of access points throughout the UK. TNT Post has a licence to convey any letter within the UK but it is not a universal postal service provider and is not under any particular service obligations.

HMRC relying on the provisions of the Value Added Tax Act 1994, based on Article 13A(1)(a), allowed Royal Mail to be exempt from paying VAT on *all* the postal services it supplied, not just the services it was obliged to provide under its licence agreement. By contrast HMRC did not allow TNT Post to claim the exemption in relation to the provision of *any* of its postal services. TNT challenged HMRC's decision on how Article 13A(1)(a) should be interpreted. Firstly they argued that either none of the postal services provided by the Royal Mail should be exempt or that all postal services should be exempt from VAT regardless of who supplied them. Secondly they argued that if it was correct that the exemption only applied to postal services provided by the Royal Mail as the universal postal service provider that the exemption should only extend to those services the Royal Mail were obliged to supply due to their status as the universal postal service provider.

## The legislation

Article 13A(1)(a) of the Sixth Directive provides:

*"A. Exemptions for certain activities in the public interest*

1. Without prejudice to other Community provisions, Member States shall exempt...

(a) the supply by the public postal services other than passenger transport and telecommunications services, and the supply of goods incidental thereto;"

Recital 15 in the preamble to Directive 97/67 provides:

"...the provisions of this Directive relating to universal service provision are without prejudice to the right of universal service operators to negotiate contracts with customers individually."

Article 3 (1) of Directive 97/67 provides:

"Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users."

Article 7(1) of the Directive 97/67 provides:

"To the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s)....."

## The referred questions

The High Court essentially referred three questions to the European Court of Justice ("**ECJ**"). The first question was how the term "public postal services" in Article 13A(1)(a) of the Sixth Directive should be interpreted. The second question was should the exemption apply to all services provided by the "public postal services". The third question was that if the exemption did not apply to all the services provided by the "public postal services" to which services did it apply.

## The meaning of "public postal services"

The ECJ held that the exemption in Article 13A(1)(a) only applied to services which were provided by a body which could be described as 'the public postal service' in the organic sense of that expression. They based this interpretation of the wording of Article 13A(1)(a) itself. The court added that there was nothing to suggest this interpretation had changed in light of the liberalisation of the postal sector and this was confirmed by the fact that Article 13A(1)(a) had been reproduced in exactly the same form in Article 132(1)(a) of Directive 2006/112, which was drafted after the liberalisation of the postal sector.

The court acknowledged that exemptions had to be interpreted strictly but said that Article 13A(1)(a) should not be construed in such a way as to deprive the exemption of its intended effect. The exemptions provided for in Article 13A of the Sixth Directive were intended to encourage activities in the public interest and Article 13A(1)(a) was specifically designed to encourage the offering of postal services which meet the essential needs of the population at a reduced cost. This objective was the

same as that set out in Article 3(1) of Directive 97/67 and an interpretation should not be adopted which thwarted this aim. The court also said that this interpretation was not contrary to the principal of fiscal neutrality as an operator such as the Royal Mail, with its status as the universal service provider, supplied postal services under a legal regime which was substantially different to that under which an operator such as TNT Post provided such services.

Consequently the Court held that 'public postal services' must be regarded as operators, whether they are public or private, who undertake to supply postal services which meet the essential needs of the population and therefore to provide all or part of the universal postal service in a Member State, as defined in Article 3 of Directive 97/67.

### **The scope of the exemption**

The ECJ held that it could not be inferred from Article 13A(1)(a) that all supplies of services by the public postal services, which were not expressly excluded from the scope of that provision, ought to be exempted regardless of the nature of those services. Article 13A(1)(a) as an exemption had to be interpreted strictly and should be understood as only covering those services which were carried out by the public postal services in that capacity.

The court said this conclusion was reinforced by the need to ensure fiscal neutrality. Where Royal Mail was under an obligation to provide specific services its situation was different from that of TNT Post and it was justifiable to treat the two companies differently in relation to VAT. However where the Royal Mail supplied postal services outside its role as the universal service provider it was not in a different position to TNT Post and should be treated in the same way as that company in relation to VAT. The ECJ also commented that it flowed from the nature of the objective pursued by Article 13A(1)(a), which is to encourage an activity in the public interest, that the exemption should not to apply to specific services dissociable from the service of the public interest, for example, services which meet the special needs of economic operators. The court said this was confirmed by Recital 15 in the preamble to Directive 97/67, which demonstrated that the option to negotiate contracts with customers individually did not correspond with the concept of the universal service provision.

As a consequence the court concluded that the exemption in Article 13A(1)(a) only applied to the postal services which the public postal services supplied in that capacity and did not apply to supplies of services for which the terms were individually negotiated.

Paul Lasok QC was instructed by Slaughter and May for the Royal Mail Group Limited.

Christopher Vajda QC and Melanie Hall QC were instructed by the Treasury Solicitor for the United Kingdom Government.

**For more information on Paul Lasok QC, Christopher Vajda QC, Melanie Hall QC and Anneliese Blackwood, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section at [www.monckton.com](http://www.monckton.com).**