

## ***Zipvit v HMRC [2018] EWCA 1515***

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It is often easy to get VAT law wrong. Both parties to a transaction, each registered for VAT, take good advice and consider that a supply made for both sides' business purposes is exempt. No VAT is charged or accounted for and no VAT invoice is issued. But, a year or two later, a court decides that the supply is standard-rated.

Unpicking the consequences of such mistakes has generated a rich seam of case-law, of which the Court of Appeal's judgment in *Zipvit* (a single judgment given by Henderson LJ) is the latest instalment. The effect of *Zipvit* is that the key requirement is a VAT invoice, and without that, the purchaser is in trouble.

### **The facts**

*Zipvit* was one of those cases where the parties' mistake is particularly excusable, because the domestic implementation (on which the parties relied) failed correctly to implement the Principal VAT Directive. The exemption wrongly thought to apply was the postal services exemption, *Zipvit* being a mail order company and large user of Royal Mail services. However, after Case C-357/07 *TNT* [2009] STC 1438 it became tolerably clear that Royal Mail's Mailmedia service, being individually negotiated, was not exempt (I say "tolerably" because some residual arguments were run before, and disposed of by, the First-tier Tribunal in *Zipvit*).

Unusually, the full facts of *Zipvit* emerged only after the Court of Appeal hearing, when the terms of the contract between *Zipvit* and Royal Mail were produced to the Court and written submissions made about them. The contract made it clear that the price charged for the services supplied was exclusive of VAT. It seems that *Zipvit* itself was not aware of that term until that late stage (the term being contained in Royal Mail's general conditions rather than in any individual contract documentation), and until that point the arguments were run on a somewhat uncertain basis as to the underlying contractual position.

A further background fact that emerges from the First-tier Tribunal's decision, but is left unexplored by the Court of Appeal, is that HMRC appears to have taken a policy decision not to assess Royal Mail for VAT due on the supplies. It does not seem that any reason for that approach was provided to the FTT: but it may be that the reason was that any such assessments would have been offset by corresponding input tax claims by customers. In any event, Royal Mail was never asked to account for VAT: and (presumably in consequence) it made no attempt to recover any VAT from *Zipvit* and, critically, never issued *Zipvit* with a

corrected invoice showing VAT.

Undeterred by HMRC's quiescence in assessing Royal Mail for the VAT due, or by the fact (of which it was apparently unaware) that the contractual price was in fact exclusive of VAT, Zipvit made a claim to HMRC to deduct the corresponding input tax on the supply. Given that HMRC had decided not to assess Royal Mail for the corresponding amount of output tax, it can be seen why HMRC were unenthusiastic about that claim.

Given that it had no VAT invoice, that claim had to be made under regulation 29 of the VAT Regulations 1995, which permits HMRC to accept alternative evidence in lieu of a VAT invoice. Although the Court of Appeal does not discuss the reasons given by HMRC at that stage, the FTT decision records that the refusal was on the basis that (a) the supply was not in fact taxable (a point abandoned after the FTT decision) and (b) that Zipvit had not borne the burden of VAT.

Progress through the FTT and Upper Tribunal was somewhat confused, though Zipvit lost (for different reasons) at both stages.

By the time the case reached the Court of Appeal, there were two issues to be determined: (1) was there input tax "due or paid" which Zipvit was entitled to deduct and (2) even if the answer to (1) was "yes", was its claim to deduct defeated by its lack of a VAT invoice?

### **Was there input tax "due or paid" for the purposes of Article 168 of the PVD?**

Article 168 of the PVD provides that a taxable person has the right to deduct VAT "*due or paid ... in respect of supplies to him of goods or services*". In the FTT, Judge Mosedale went off on a tangent of her own by holding that that provision was not satisfied because Royal Mail had not accounted for VAT. However, both sides agreed that that was wrong and that you needed to look at the position of Zipvit, regardless of whether Royal Mail had accounted for VAT on the supply or not. Since the underlying contractual position was at that stage still confused, it is not surprising that the Upper Tribunal's answer was itself somewhat confused. But the Court of Appeal was in a rather better position.

The Court of Appeal saw the answer to that question as depending on whether the underlying contract was, on its true construction, exclusive or inclusive of VAT. (That question may, of course, be difficult to answer precisely because the issue before the court arises only when the parties both originally thought that no VAT needed to be paid and hence may well not have thought about the possibility that the supply could be taxable when drawing up their contract.) Take a contract where a supply is purchased for a price paid of £12. Where the

contract is inclusive of VAT, then the purchaser would be regarded as having paid VAT (i.e., the contractual price of £12, would be regarded as, really, a price of £10 with £2 VAT): in that case, basing himself on Joined Cases 249 and 250/12 *Tulică* EU:C:2013:722, Henderson LJ concluded that the purchaser would have the right to deduct the £2. However, where the contract is exclusive of VAT (i.e. where the contractual price of £12 was regarded as being £12 with £2.40 VAT payable in addition – the facts as they actually turned out to be in *Zipvit*) then Henderson LJ regarded the position as highly uncertain: had he needed to resolve the issue, he would have made a reference to the CJEU.

### **The requirement for a VAT invoice**

It will be recalled that HMRC had not given the lack of a correct VAT invoice as a justification for refusing to grant a regulation 29 waiver. That was perhaps unsurprising, since regulation 29 only arises where there is no correct VAT invoice held. However, by the time of the appeal, HMRC were claiming that the lack of a correct VAT invoice was fatal to Zipvit's claim. The Court agreed.

Henderson LJ first accepted that Zipvit did have VAT invoices, in that they set out all the matters required to be set out in regulation 14 of the VAT Regulations 1995. However, they were incorrect in that they failed to set out any amount chargeable as VAT.

Henderson LJ then considered Case C-516/14 *Barlis* EU:C:2016:690, where the CJEU held that the customer was entitled to deduct input tax even though the invoices failed to record the nature of the supplies made, as long as the customer was able to provide sufficient alternative evidence of the taxable nature of those supplies. That case appeared to be strong support for Zipvit's claim. However, Henderson LJ distinguished it on the basis that Zipvit was unable to provide sufficient alternative evidence that Royal Mail had accounted for any VAT on the supply to HMRC.

### **Comment**

Henderson LJ's reasoning on the invoice point appears to the present writer to be highly questionable.

The formal requirements for a VAT invoice, as set out in Article 226(9) and (10) of the PVD, include requirements that the invoice show the VAT applied and the VAT amount payable. It was not disputed that the correct VAT due on the supply was 20%. Zipvit was therefore able to show – indeed had shown – that either it had paid VAT of 20% or that it was due to pay an additional 20% to Royal Mail (depending on whether the contract was VAT-inclusive or VAT-exclusive). In the VAT-inclusive case, Henderson LJ accepted in the first part of the judgment that VAT was "due or paid": and in the VAT-exclusive case, he accepted that it was

well arguable that it was “due” (and for the purposes of this part of the argument was proceeding on the basis that it was “due”).

In either case, one would have thought that Zipvit had provided sufficient alternative evidence that VAT at the appropriate amount was “applied” and that the appropriate amount was “payable” for the purposes of Article 229(9) and (10). But Henderson LJ rejected that conclusion. Why did he do so?

Henderson LJ tells us that it is because Zipvit could not show that Royal Mail had accounted for VAT. But that, it is submitted, is simply to fall right back into Judge Mosedale’s original error under a different heading: if it is wrong for the purposes of Article 168(a) of the PVD to read “due or paid” as meaning “paid by the supplier to HMRC”, why is it not equally wrong to read “applied” and “payable” in Article 226(9) and (10) as having anything to do with whether the supplier has made any payments to HMRC?

The reason why Henderson LJ accepted what (it is submitted) is an unconvincing distinction between Articles 168 and 229 appears to have been that, as he points out in §117, the effect of allowing Zipvit to deduct would have been that HMRC were out of pocket: they would have paid out Zipvit’s claim for input tax without being able to recover from Royal Mail the corresponding amount of output tax. But that factor looks much less persuasive when it is recalled that HMRC had chosen not to assess Royal Mail for the missing output tax: if it was too late for HMRC to recover that output tax, that was the consequence of a choice by HMRC not to assess for tax that was due. It is, it is submitted, unfortunate that the revenue consequences caused by HMRC’s own decision not to collect output tax due appear to have driven an unsatisfactory limitation on the fundamental right of taxpayers to deduct input tax on taxable supplies made to them.

That that limitation is indeed unsatisfactory emerges when one thinks about what a customer in Zipvit’s position should do, on the basis of the law as declared by Henderson LJ, to recover the input tax to which it is legally entitled. If the contract is VAT-exclusive it probably will not bother, given that a claim for input tax will spark a corresponding claim by the supplier for payment of the additional VAT due (unless the supplier is actually chasing it for the money, in which case the supplier will have issued a VAT invoice and paid HMRC). But if the contract is VAT-inclusive, the supplier will presumably refuse to issue a VAT invoice unless and until HMRC chase it for the VAT due (and the facts of *Zipvit* show that HMRC cannot always be relied on to assess suppliers for VAT, even where it is plainly due). In such a case, the regulation 29 route has been blocked by *Zipvit*. That leaves only, it appears, the option of seeking an order in the High Court or County Court that the supplier issue a VAT invoice: an option that carries substantial costs risks and results in VAT issues being decided by the non-specialist general courts and not the specialist tax tribunals. None of

that looks like a sensible result: and it is unfortunate that the Court of Appeal judgment that produces that result shows that it is not only commercial parties who find it easy to get VAT law wrong.

***The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.***