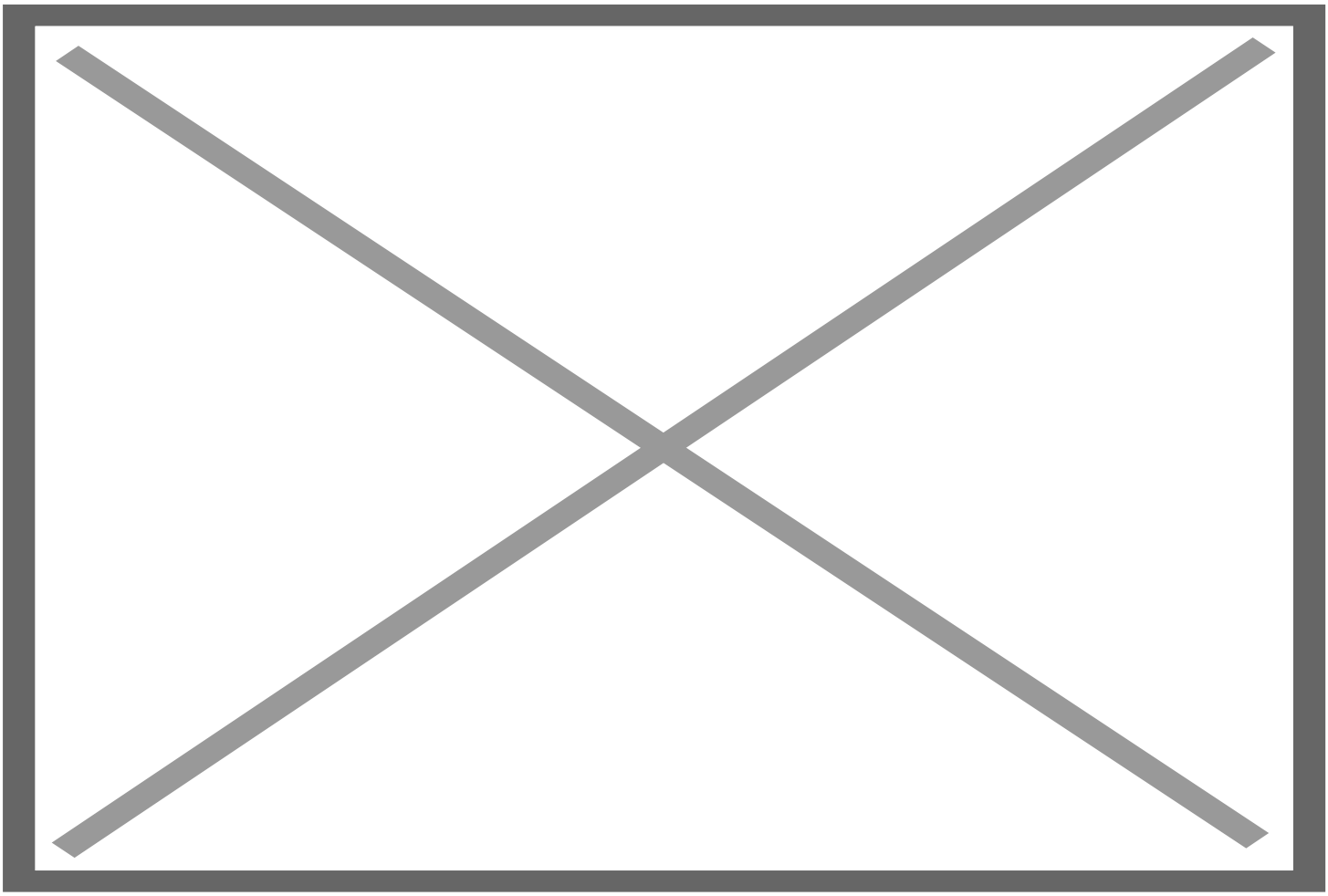
Special vs General

Indirect Tax



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Eile Gibson reviews a case which looked at whether consideration is regarded as inclusive or exclusive of VAT

Key Points

What is the issue?

There are two issues: if there is no reference in a contract in respect of VAT, the price should be treated as inclusive of VAT; and where transferring non-residential property, the parties' advisers need to ask whether VAT is payable on transfer

What does it mean for me?

Best practice is that all references to consideration payable within contract documentation should state whether it is inclusive or exclusive of VAT

What can I take away?

Always review standard form documentation that are part of contractual terms to ensure there are no contradictory provisions

Oh dear! A case involving a dispute over VAT of £22,750 was eventually decided in the Court of Appeal, where legal costs must surely have far exceeded the disputed amount in question. This case was not only about VAT, but a reminder that contractual terms should be clearly expressed between the parties to avoid litigation.

CLP Holding Company Ltd v R Singh & P Kaur [2014] EWCA Civ 1103 involved transferring the freehold of 72 Rolfe Street in Smethwick (the property) for £130,000 in 2006, from CLP Holdings Company Ltd (CLP) to two individuals, Rajinder Singh and Parvinder Kaur (the purchasers and also the defendants and respondents in the Court of Appeal). CLP was registered for VAT and in 1989 opted to waive exemption from VAT on the property. This issue was crucial to the case but appears never to have been raised between the parties and their legal advisers.

Background

The background facts relating to the parties' understanding of what was to be the purchase price are important. In 2002 they agreed a price of £130,000 for the property and a draft contract was initially sent to the purchasers by CLP's solicitors in early 2003. After a delay, negotiations resumed between the parties in December 2005. CLP's solicitors were notified by the purchasers' solicitors that it was their understanding that the price remained £130,000 – which they described as the whole of the consideration – and that it had been paid to the purchasers. The purchase monies were returned to the buyers in summer 2006 with the intention that they would be transferred back to CLP on completion. There was no evidence that the issue of VAT was ever raised and whether a transfer of the property would be subject to VAT.

On 2 March 2006, CLP's solicitors confirmed in writing to the purchasers' solicitors that the contract had been signed by CLP at a sale price of £130,000 and they had received 'all the sale monies of £130,000 'subject to contract'. Shortly afterwards, the purchasers' solicitors sent to the other side the standard requisitions on title that asked for the exact amount payable on completion, to which CLP's solicitors replied 'balance of purchase monies'. Exchange and completion took place on 29 August 2006. The deed of transfer stated that CLP had received £130,000 by way of consideration.

The contract in question was in conventional form and included both special and general conditions. The purchase price in the special conditions was defined as £130,000 and nothing was included in the definition of any 'other payments/allowances'. The agreement incorporated the standard conditions of sale, the 'general conditions', and stated that, where there was a conflict between the general conditions and the agreement, the terms of the agreement would prevail. Such a clause is impossible to ignore and was to prove determinative in the Court of Appeal.

Absence of VAT reference

The absence of any reference to VAT in the special conditions in the definition of the purchase price contrasted with clause 1.4 in the general conditions. Under this there was an obligation to pay any VAT chargeable on the

payment and that all sums made payable by the contract were exclusive of VAT. It would appear that CLP had not considered that VAT was due at completion, but that it was protected and could rely on clause 1.4. In the absence of the information that any transfer of the property was subject to VAT, the purchasers were clearly relying on the special conditions.

HMRC notified CLP in late 2007 that VAT was due on the transaction and CLP's solicitors informed the purchasers' solicitor in March 2008 that, under clause 1.4 of the general conditions, the purchasers were liable for the VAT, which they disputed. It wasn't until August 2012 that CLP issued proceedings and applied for summary judgment against the purchasers.

The courts' views

CLP was successful in Birmingham County Court, with the deputy district judge concluding that the purchasers had no prospect of successfully defending the claim. He rejected the proposition that the purchase price was inclusive of VAT, based in part that this would conflict with clause 1.4 of the general conditions.

On appeal to the High Court, the judge came to the opposite conclusion – that there was indeed a conflict between the special conditions and the general conditions, but in which case the special conditions must prevail. The appeal was allowed and there was a judgment for the purchasers. CLP took the case to the Court of Appeal where Lord Justice Kitchin referred to *Lancaster v Bird* (1998) 73 ConLR 22 which involved the same issue. In this, the judge confirmed that if a supplier, in this case a builder, fails to make clear that VAT is chargeable in addition to the contract price, the supplier will be left to account for the VAT out of the price which he receives, as required under VATA 1994 s 19(2). This provision states:

> 'If the supply is for a consideration in money, its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.'

In other words, the consideration is a tax-inclusive amount comprising two elements: the value of the goods and the tax, if any. Thus, the rule is that, if a contract states that the price is exclusive of VAT, the tax is payable in addition to the price. If a contract makes no mention of VAT, the price should be treated as inclusive of it. This principle should be well known among lawyers, regardless of whether they are tax specialists.

In the Court of Appeal, CLP relied on clause 1.4 of the general conditions, stating that it made it abundantly clear that the purchase price of £130,000 was exclusive of VAT. The purchasers argued that clause 1.4 was inconsistent with the special conditions when properly interpreted in the light of the relevant background. Lord Justice Kitchin made these points about the correct approach to the interpretation of a contract:

- the court must have regard to the circumstances of the parties' relationship and the relevant facts surrounding the transactions; and
- the contract must be construed as a whole and every effort must be made to give effect to all its clauses.

He went on to say that there was only one reasonable interpretation of clause 1.4 of the general conditions, namely that any liability for VAT should fall on the buyer, namely the purchasers.

However, he also stated that the contract must be interpreted as a whole in the light of all the circumstances, which included the fact that there was no suggestion that CLP had ever told the purchasers that it had exercised the option to tax on the property. His second point was that there was never any suggestion that the purchasers, who were individuals, were aware or had any reason to suppose that the transaction might be subject to a VAT charge. Third, the purchase price had been agreed in principle a considerable time before completion, the

£130,000 having been paid over by the latest in 2005 and with no suggestion that VAT might be payable by the purchasers. He pointed out that the special conditions specified that the purchase price was £130,000 and that no other sum was due
on completion.

Lord Kitchin's final point was that clause 2 of the special conditions state that they prevail if there is any conflict with the general conditions. He said it was reasonable to conclude that the parties intended that nothing was, or could become, payable by the purchasers over and above the specified purchase price of £130,000. Therefore, it was held that the special conditions must prevail.

It is assumed that the seller's side had not realised or remembered that there was an option to tax on the property – otherwise a VAT invoice would have been issued at the time of the sale. Is it possible that no one properly read the contract and the parties relied on legal advisers who failed to cross-check the various conditions? Learning points from the case are that, when transferring non-residential property, best practice is to ask whether an option to tax has, or will be, exercised and, if not, ensure the contract excludes any VAT liability on the purchasers.