Indirect tax: key court judgments in 2023

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In this Q&A article, Neil Warren reflects on important VAT decisions reached in the courts during the last 12 months and the practical issues that can be learned.

Key Points

What is the issue?

Tribunal decisions can give an important steer to resolving complex VAT issues, even though First-tier Tribunal decisions are only binding on the appellant and HMRC. For example, the case of *All Answers Ltd* is helpful to decide if a website owner is acting as an agent or principal in arranging deals.

What does it mean to me?

If any clients offer promotional incentives to their customers, it is important to be clear whether a financial incentive represents a discount on their bill which is not subject to VAT, or a non-monetary consideration which is VATable. The article analyses the case of *Simple Energy Ltd,* where the verdict was consistent with HMRC's published guidance.

What can I take away?

The allocation of input tax into the partial exemption categories of taxable, exempt or residual is often complicated. The case of *KRM Finance Ltd* again emphasises the importance of an expense having a direct and immediate link with a source of income as far as input tax allocations are concerned.

What was your favourite case in 2023?

I like cases that produce a practical message from which we can all learn. The two cases about the VAT liability of skin care treatments – both lost by the taxpayers – gave an important reminder to all business owners that zero-ratings and exemptions in the legislation have to be earned and justified; they are not an automatic right. Even though HMRC carries out fewer compliance checks nowadays, it is important that the basic record keeping rules are met by all business owners – for example, keeping export evidence to prove that goods have left the UK and are zero-rated.

In the case of *Illuminate Skin Clinic Ltd* [2023] UKFTT 547, the director was registered as a doctor and the services provided by her clinic mainly related to aesthetic, skincare and wellness treatment for women. HMRC issued an assessment on the basis that the services were standard rated as cosmetic treatment, whereas the taxpayer claimed that they qualified for exemption as medical care. She failed to provide evidence to the tribunal

that the supplies had a medical basis and the appeal was dismissed.

The same issues about providing supporting evidence were relevant in the case of *Epem Ltd* [2023] UKFTT 627.

The internet and modern technology have made VAT more complex, particularly where three parties are involved in a deal. Were there any significant cases about online sales?

VAT enthusiasts have enjoyed the long-running case of *All Answers Ltd* [2023] UKFTT 737, about whether the company was supplying completed essays, dissertations and written coursework to students, rather than the self-employed writers who were given the task of writing the work by All Answers. The company retained two-thirds of the fees paid by students, with the writers getting a third.

All Answers Ltd lost appeals in 2018 and 2020 because the judges dismissed its argument that it provided an agency service to the writers. HMRC and both tribunals agreed that All Answers was the principal rather than the agent and output tax was payable on the full fee paid by the students.

The 2023 appeal focused on a revised contract between All Answers and the writers. The company claimed that this changed both the legal relationship and commercial reality of the deal because the contract stated that the writer retained the copyright of all work supplied to customers and therefore All Answers could only be acting as agent.

The tribunal agreed with HMRC that the contractual amendment did not affect the reality of the deal: ‘All Answers delivered the academic works and not the writer.’ The appeal was dismissed.

The important learning point is that advisers must emphasise to clients the importance of reviewing the VAT position for website arrangements where a site links a supplier and a customer. Is the website host acting a principal or agent?

The case of *Yorkshire Agricultural Society* [2023] UKFTT 00389 considered the liability of admission fees to an annual farming show and produced an interesting debate about UK and EU law. What are your thoughts?

The taxpayer Yorkshire Agricultural Society claimed that admission fees qualified for exemption as a fundraising event organised by a charity. HMRC’s view was that the primary purpose of the show was to act as an educational event about the latest developments in farming and did not qualify as a fundraiser.

The legislation for exemption requires an event to pass three tests – all must be met because Value Added Tax Act 1994 Group 12 Item 1 uses the word ‘and’ rather than ‘or’:

- It must be organised by a charity for a charitable purpose (part (a) of item 1) – all parties accepted this had been met.
- Its primary purpose must be to raise money (part (b) of item 1).
- It must be promoted as being primarily for raising funds (part (c) of item 1).

The judge decided that part (c) about promotion being ‘primarily for the raising of money’ was not compatible with the EU VAT Directive, which only required that an event ‘is not likely to cause distortion of competition’. He removed the word ‘primary’ from his analysis of part (c) in accordance with EU law and accepted that Yorkshire Agricultural Society had passed this test. The appeal was allowed – Yorkshire Agricultural Society

had fully met the conditions of the exemption for fundraising events.

The key message is that UK legislation will continue to be interpreted in compliance with the implementation period (IP) completion day version of EU law – and the principles of EU law – until there is a specific change away from that outcome. That was the original intention of Parliament and therefore UK law; EU retained law became domestic legislation. This is logical because it would be ridiculous if, say, a VAT exempt transaction suddenly became standard rated without there being any move by Parliament to change the law.

Note: this decision has been appealed by HMRC.

Mixed supplies is a complex subject but the case of *GAP Group Ltd* [2023] UKFTT 970 – lost by HMRC – seems to be consistent with other recent decisions. What were the key issues?

This case related to one of the UK's largest suppliers of plant and tool hire. Typical supplies could be for the hire of diggers or dumpers for customers in the construction industry. As well as plant hire, GAP also provides other services, such as delivery charges and red diesel fuel. With the fuel supplies, 5% VAT is usually charged because of the de minimis quantities specified in Value Added Tax Act 1994 Sch 7A Group 1 Item 1 Note 5(c).

HMRC's view was that the taxpayer was wrong to separately itemise the fuel and plant hire supplies on its sales invoices and that there was a single supply of plant with fuel, all subject to 20% VAT.

The taxpayer argued that the terms and conditions of its contracts only quoted rates for plant hire and that 'fuel was not their business'. The purchase of fuel was only relevant if the customer returned the plant with less than the full tank which was supplied at the beginning of the period. In other words, fuel was an 'optional extra' and the customer had 'genuine freedom to choose' whether they purchased it. Each sales invoice where fuel was charged clearly showed the quantity and price charged to the customer.

The judge allowed the appeal – there was a mixed supply of fuel and plant hire taking place and customers only purchased fuel for their own convenience. It was therefore appropriate to split the supplies for VAT purposes.

The case of *Royal Opera House* [2021] EWCA Civ 910 clarified some tricky issues about the allocation of input tax with partial exemption. Were there any similar cases in 2023?

I enjoyed the case of *KRS Finance Ltd* [2023] UKFTT 855 about whether marketing expenditure carried out by a partially exempt business was only attributable to exempt supplies rather than being a business overhead. Basically, the company's main income relates to the sale of equity release products for people, which is exempt from VAT as a financial service; however, it also receives income from estate planning, which is taxable.

The appeal considered if marketing expenditure was wholly relevant to the equity release sales – as claimed by HMRC – or a general overhead because it was intended to 'promote the business as a whole'. Input tax could be partly claimed if the marketing expenditure was residual; i.e. a mixed/overhead cost. No input tax could be claimed if the costs only related to the equity release products.

The taxpayer claimed that its marketing strategy was to 'build a lasting brand in addition to simply driving leads or enquiries' and its 'hero product' marketing was also intended to establish the brand as a whole. Even though customers would usually start their journey with an enquiry about equity release products, this could lead to estate planning services being cross-sold; i.e. generating taxable as well as exempt income.

HMRC’s view was that the adverts, such as TV advertising and pay-per-click online advertising, all focused on the equity release activities and that there was no ‘direct and immediate link’ with the estate planning business. HMRC and the judge focused on the features and wording of the adverts, which included comments such as: ‘Staying in your home for longer and not having to downsize’, which clearly relates to the equity release activity. The appeal was dismissed.

Are there any cases you would recommend our readers to review, perhaps because the decision was a surprise?

The case of *Simple Energy Ltd* [2023] UKFTT 976 considered if credits allocated to customers’ energy accounts for referring new customers represented a discount from their bills – not subject to VAT – or a non-monetary consideration, which is VATable.

Bulb Energy Ltd (Bulb) is a member of a VAT group, of which Simple Energy Ltd is the representative member. In 2016, Bulb introduced the ‘refer a friend’ scheme, which meant that existing customers could click on a referral link to their friends and relatives, to encourage them to change their electricity and gas supplies to Bulb. The reward for a successful new account was a £50 reduction in the bill of the new customer and the same amount for that of the referrer.

The disputed issue was whether the £50 reduction was a discount on the energy bills of the referrer or represented non-monetary consideration towards the payment of their energy bills. In the latter case, the referrer would be deemed to be providing a service to Bulb rather than receiving a discount. The marketing literature of Bulb commented to existing customers that ‘we’ll give you both £50 each to say thanks for going green’ and there were clear terms and conditions published about the scheme.

HMRC’s view was that the £50 credits given to the referrers – but not the new customers – was additional consideration and therefore subject to VAT. The judge agreed, dismissing the taxpayer’s argument that ‘very little was done by the referrer’.

If any clients have similar scenarios, HMRC’s guidance in VAT Notice 700/7 section 5 is very clear and consistent with this decision.

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