Case alert

Marks & Spencer Plc

June 2019

Summary

The Upper Tribunal has issued its judgment in this VAT case relating to the operation by Marks & Spencer Plc (M&S) of a business promotion scheme known as "Dine in for £10 with free wine". Under the terms of the scheme, customers could purchase a meal consisting of three elements - a main, a side dish and a dessert. In addition, provided these three elements were purchased, the customer was also entitled to a 'free' bottle of wine (or an equivalent non-alcoholic drink).

M&S claimed that, in the circumstances, the £10 paid by each customer under the scheme should only be apportioned to the food and not to the wine. Accordingly there should be no VAT to pay in relation to the 'free' supply of wine.

HMRC took the opposite view. According to HMRC, the customer paid £10 consideration for all four elements of the promotion package and that, as a result, VAT was payable in relation to the wine element. The First-tier Tax Tribunal issued a decision in April 2018 and found in favour of HMRC.

The Upper Tribunal gave M&S permission to appeal and has now issued its judgment dismissing that appeal.

Upper Tribunal

Business promotion schemes have, over the years, proved to be in the 'difficult' box from a VAT accounting perspective. The promotion scheme operated by M&S is no exception. The issue – whether part of the £10 paid by a customer for a 'meal deal' (which included a purported 'free bottle of wine) should be ascribed to the supply of wine and, consequently, whether VAT is due on the amount so ascribed – was heard at the First-tier Tax Tribunal (FTT) in April 2018 and now, the Upper Tribunal has issued its judgment. The outcome being another defeat for M&S.

In simple terms, M&S offered a promotion scheme to customers under the banner 'Dine for £10 with free wine'. This scheme replaced an existing similar scheme. However, under the new scheme, the wine was labelled as being free (or, from a VAT perspective, for no consideration) but HMRC considered that, in reality, a customer taking up the offer paid £10 consideration for all four elements of the promotion, including the wine. Accordingly, the £10 consideration paid by the customer must be apportioned and a value ascribed to the wine element upon which VAT was due.

The FTT agreed with HMRC. The terms of the offer were conditional. To obtain the wine, the customer must purchase the three food elements. The term 'free wine' was used in a marketing sense but, in reality, the wine was not free – part of the £10 paid by the customer was attributable to the wine. M&S was given leave to appeal the FTT's judgment.

M&S claimed that the FTT had fallen into error when it decided that the wine was not supplied free of charge. Nicola Shaw QC for M&S argued that the correct analysis of the offer was to look at the terms of the agreement between the customer and M&S, the signs in the stores, the terms and conditions of the offer displayed online and the in-store till receipts all of which were consistent with the proposition that the £10 was paid solely for the three food items and that no part of that amount was attributable to the wine. The Upper Tribunal (Justice Nugee and Judge Brannan) dismissing the appeal considered that the payment of £10 constituted consideration both for the three food items and also for the wine. There was a direct link between the provision of the wine and the payment of the £10. The wine would not be provided unless the customer paid £10 at the till. Furthermore, there was reciprocal performance between the customer and M&S. In a single simultaneous transaction, the customer paid £10 and M&S supplied the three food items and supplied the wine. Accordingly, the FTT had not fallen into error. M&S was in fact making a conditional invitation to treat as a matter of English contract law. The customer made an offer to buy the food and the wine on payment of £10 at the till. That offer was accepted by M&S when it accepted payment of £10 for the four items. The wine was an integral element of the promotion and it was not possible for a customer to acquire the wine without paying £10.

Comment – Given the Upper Tribunal's judgment, it seems that this particular battle has reached its end although M&S may seek leave to appeal to the Court of Appeal. The case confirms the VAT difficulties arising from the operation of such schemes and the need to ensure that the VAT position is resolved at the outset. Businesses with similar promotion schemes should review this judgment and consider whether any changes to the VAT accounting arrangements should be made. For any assistance with such a review, please contact your usual Grant Thornton VAT advisor.

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