



# Case alert

## Marks & Spencer PLC

May 2018

### Summary

This case concerns the “Dine in for £10 with free wine” promotional offer by Marks & Spencer PLC (M&S).

M&S operated a promotion whereby customers could purchase three items of food (a starter, a main and a dessert) and also claim a bottle of wine. The promotion was marketed by M&S on the basis that the three items of food (zero-rated) cost £10 and the bottle of wine was free. However, HMRC considered that the reality of the deal was that customers in fact bought four items for £10 and that, as a result, M&S was required to account for VAT on the element of the £10 that was attributable to the wine. According to HMRC, in reality, there was no ‘gift’ item of the wine. A customer wishing to take up the offer of the wine had to purchase the other three items.

The FTT considered the Supreme Court’s judgment in *Secret Hotels 2* and adopted a “commercial common sense” approach. The term “free” was being used by M&S in a marketing sense but the economic and commercial reality was that M&S was offering a package of items at an attractive discount to their aggregate shelf price if bought separately. Accordingly, the wine was not free and the £10 paid by the customer should be apportioned and VAT paid on the element attributable to the wine.

### First-tier Tax Tribunal

This is yet another business promotion scheme that has caused difficulties from a VAT accounting perspective. M&S – the well-known high street retailer – had a promotional offer known as “Dine in for £10 with free wine”. It claimed that it provided the wine free of charge to customers who took up the offer. As such, the three food items – a starter, a main and a dessert were all zero-rated. Ordinarily, the supply of a bottle of wine would be liable to VAT at the standard rate but M&S claimed that, as it was supplied ‘free’ (ie for no consideration), no VAT was due.

HMRC, on the other hand, took the view that the Dine In promotion is a ‘purchase four items for £10’ offer and there is no ‘gift’ element. It is a single promotional deal and is not a sale of food items for £10 plus a supply of wine for nil consideration. HMRC also considered that the fundamental principles of the system of VAT would be offended if, as here, M&S was entitled to reclaim the VAT incurred on purchasing the wine without accounting for any VAT on the supply of it to customers. HMRC argued that the economic reality and the objective characteristics of the transaction must be considered. Moreover, the promotional offer at issue was substantially the same as a previous Dine in for £10 offer where M&S had accepted that the value attributable to the wine element was subject to VAT. All that had happened in the latest offer was that M&S had changed the labels but, in reality, the offer was materially the same offer and should be apportioned for VAT purposes.

The FTT, (Judge Thomas Scott), considered the evidence and submissions of the parties. In the end, he concluded that the proper construction of the promotion based on the available terms was that it was an offer with a conditional element. Under that offer, the consideration would always be precisely £10. The wine was offered conditionally: a customer could obtain it only by satisfying the condition that he had paid £10 and taken the food items. The overt terms of the offer made by M&S to its customers should be established by reference to all of the circumstances but the wording of the offer (the labels) and the stated terms of it cannot be overridden by factors such as what the till receipt shows or the refund policy in relation to the offer. When account is taken of the terms and conditions of the promotion, the customer pays £10 to receive the three food items and the wine. In addition, when a commercial common sense approach is adopted, the term ‘free’ was clearly being used in a marketing sense, but the economic and commercial reality of the offer was that M&S was offering a package of four items for £10 so the price must be allocated across all four items for VAT purposes. – Appeal dismissed.

**Comment – on the facts found by the Tribunal and, on the evidence presented to it, the Tribunal preferred HMRC’s analysis in relation to this promotional offer. The case emphasises the difficulties surrounding the correct determination of the appropriate VAT liability of such offers. Here, the Tribunal adopted the approach of the Supreme Court and took the ‘commercial common sense’ approach by examining the economic reality of the offer. It concluded that, in light of that reality, M&S’ appeal should be dismissed. However, given the amounts of VAT at stake, it is possible that M&S will seek leave to appeal to the Upper Tribunal.**

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