

VAT treatment of Agility arrangement – supply of goods or services – reference to the ECJ

Mercedes-Benz Financial Services

Background

This case concerns the treatment of a specific motor vehicle finance agreement called 'Agility' offered by Mercedes-Benz Financial Services (MBFS). The Agility product is recommended to customers who are undecided as to whether they want to own the car or want to keep open the option of whether to purchase or not. MBFS considers that Agility is a rental agreement with an option to purchase that is not contractually binding and, therefore, treated its supplies as services for VAT purposes. HMRC disagreed and considered that because there is the possibility that title to the goods would pass, there is a supply of goods. The original FTT found for HMRC. However, the UT focused on Article 14(2) of the VAT Directive which provides:

Article 14

1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.
2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:
 - (a)
 - (b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;

Noting that the customer is not committed to purchase and that the final balloon payment is optional, the UT found for the taxpayer that there was a supply of services.

At the CoA, HMRC ran a number of grounds of appeal. These included the argument that the economic cause test used by the UT was the wrong tool to use and the UT's interpretation of 'in the normal course of events' was incorrect.

The Court did not give its views on each ground, but reached the view that the UT was wrong not to refer the matter to the ECJ, noting that there is little certainty as to the interpretation of the phrase "in the normal course of events". The Court also made reference to further guidance on the economic purpose of the contract outlined by the AG's opinion in *Mirror Group* (C-409/98).

Whilst inviting the parties to liaise with the court with a view to agreeing the questions, the court added that it envisaged that reference will consider HMRC's argument about timing. This is

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around the point that Article 14(2)(b) catches every hire contract where the customer is able to acquire title by **no later** than the final instalment payment, which the court stated 'seems to us to have some obvious attraction in terms of legal certainty.' To read the decision click [here](#).

Comment

This will be an important case in defining what transactions are a supply of goods and which transactions are supplies of services. Ordinary Hire Purchase (HP) contracts would be services if it was not for Article 14(2) expanding the types of transactions that should be treated as a supply of goods. As has been highlighted during litigation, there is not much of a difference between Agility (services) and an HP contract with a balloon payment (goods). Under Agility there is no requirement for the customer to pay the balance of the purchase price and interest as part of the final instalment. However, under an HP balloon contract, there is a statutory right of cancellation before the balloon payment falls due, which effectively creates the same economic result, of the customer having use of the car but never owning it. Whilst the dividing line may be thin, the VAT impact on cash flow can be significant. The Court's comment around HMRC's 'timing argument' is interesting but not immediately clear. According to the Judgment this argument was raised at FTT but not pursued. However, the court was clearly interested in this and specifically requested inclusion in the reference. If HMRC is right, what does the phrase in the normal course of events add? Is that phrase a purely English phrase as the French text of the Directive just says "normally".

Watch this space!

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