Press Summary

11 May 2022

Zipvit Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) (No 2)
[2022] UKSC 12
On appeal from: [2018] EWCA Civ 1515

Justices: Lord Hodge, Lady Black, Lord Briggs, Lord Sales, Lord Hamblen

Background to the Appeal

Zipvit is a business which supplied vitamins and minerals by mail order using a specialised bespoke service offered by Royal Mail. Royal Mail should have charged Zipvit VAT in relation to the service. However, at the time it was mistakenly believed by all concerned, including the tax authorities (Her Majesty's Revenue and Customs - "**HMRC**"), that this service was, like other services provided by Royal Mail, exempt from VAT under European law. Therefore the invoices issued by Royal Mail to Zipvit contained no sum attributable to VAT. Royal Mail therefore did not account to HMRC for any sum relating to VAT in respect of the supply of the services.

In 2009, however, the Court of Justice of the European Union ("**CJEU**") held in *R (TNT Post UK Ltd) v Revenue and Customs Commissioners* ("***TNT***") that the VAT exemption for postal services under the Principal VAT Directive ("**the Directive**") applied only to supplies made by a public postal service like Royal Mail when acting as such, and not to supplies of services for which the terms had been individually negotiated. As a result, the services supplied to Zipvit should have been standard rated for VAT purposes.

Where VAT is charged, it is possible for the person charged to reclaim it as input VAT in relation to any supply of goods or services it provides to others on which VAT is chargeable (as, here, it was chargeable on Zipvit's supplies to its customers). Although Zipvit had not been charged VAT by Royal Mail, Zipvit relied on the judgment in *TNT* to argue that the sums it paid Royal Mail as the contract price for its service should be treated as if they did include an element of VAT. Thus, if the contract price was £120, Zipvit said that £20 of that should be regarded as VAT. On the basis of this contention Zipvit made two claims against HMRC for repayment of input VAT for a total sum of £415,746 plus interest in respect of the services it had purchased from Royal Mail. HMRC rejected these claims, maintaining that since Zipvit

had not in fact paid VAT it should not now be able to claim a tax rebate based on an alleged notional payment of VAT.

Zipvit's appeal against HMRC's decision was dismissed by the First-tier Tribunal (Tax Chamber) ("**the FtT**") and subsequently by both the Upper Tribunal (Tax Chamber) and the Court of Appeal. Zipvit then appealed to the Supreme Court which determined in 2020 that a reference to the CJEU was required as the case turned on matters of European law. The reference procedure remained available at that time because the UK was in the transition period following Brexit.

The reference dealt with two issues in particular: (1) whether Zipvit was entitled under Article 168(a) of the Directive to deduct as input VAT part of the sum that it had paid to Royal Mail, on the basis that VAT had been "*due or paid*" within the meaning of the Article because the sum charged by Royal Mail must be treated as containing a notional element of VAT ("**the due or paid issue**"); and (2) if Zipvit did in principle have a right to deduct under Article 168(a), whether there is an additional condition to be fulfilled before it could make a claim for a deduction, namely that it holds VAT invoices evidencing its claim to have actually paid input VAT ("**the invoice issue"**).

In addition to those issues of European law, Zipvit also maintained that HMRC had a discretion under domestic law pursuant to regulation 29(2) of the Value Added Tax Regulations 1995 ("**regulation 29(2)**") to accept other evidence of payment of VAT, even if not recorded in an invoice, and to repay the notional element of tax, which it should have exercised in Zipvit's favour (**"the discretion issue"**).

These proceedings are a test case in respect of supplies of services by Royal Mail where the same mistake regarding VAT exemption was made. The total value of claims against HMRC is estimated at between £500m and £1 billion.

Judgment

The Supreme Court unanimously dismisses the appeal. Lord Briggs and Lord Sales give a joint judgment with which the other members of the Court agree.

Reasons for the Judgment

In January 2022, the CJEU delivered its judgment answering the questions posed in the reference (Case C-156/20). The judgment is clear in its effect and enables the Supreme Court to determine the appeal without the need for a further hearing [**2**].

Issue 1: The due or paid issue

The CJEU concluded on the first issue that Zipvit could not claim to deduct an amount of VAT for which it had not been charged and which as a result had not been charged to the consumer. As a result, VAT could not be regarded as having been included in the price paid by Zipvit to Royal Mail in return for the services, and therefore had not been "paid" within the meaning of Article 168(a) of the Directive [**29**].

The CJEU also found that VAT could not be regarded as being "due" within the meaning of Article 168(a), since no request for payment of VAT had been sent to Zipvit by Royal Mail [**30**].

Issue 2: The invoice issue

In view of its definitive ruling on the first issue, the CJEU did not find it necessary to answer the question referred to it in relation to the invoice issue [**32**]. As the claim must fail due to Zipvit having no entitlement under Article 168(a), it was not necessary or appropriate for the Supreme Court to determine whether Zipvit's appeal should fail for an additional reason based on the invoice issue [**33**].

Issue 3: The discretion issue

The FtT found that HMRC had not considered whether to exercise its discretion under regulation 29(2) to accept alternative evidence of payment of VAT in place of a tax invoice and to repay tax. However, the FtT found that had HMRC considered whether to exercise this discretion, they would inevitably and rightly have decided not to accept Zipvit's claim [**22**]. The Supreme Court agrees, finding that there was no sound basis on which it would have been appropriate to use public monies to make a payment to Zipvit in the circumstances of this case. To do so would be to give Zipvit an unmerited windfall in circumstances where it had not been charged VAT [**35**]-[**36**].

References in square brackets are to paragraphs in the judgment

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: Decided cases - The Supreme Court