

Compass Contract Services UK Ltd v HMRC – HM Revenue & Customs guidance

Following the Court of Appeal decision in favour of the taxpayer in the Compass case (reported in Catering supplies article 11.07.06), HM Revenue & Customs (HMRC) have issued Business Brief 12/06 giving further guidance on the VAT position going forward.

The issue

Compass Contract Services Limited (Compass) had a catering contract to provide food services at BBC sites. Part of this contract included the sale of sandwiches at six outlets within the BBC Television Centre, to visitors and staff. Two questions were looked at - were the sandwiches supplied in the course of catering, and were they supplied for consumption 'on the premises where they were supplied'? Supplies in the course of catering are standard rated and the definition of 'in the course of catering' includes any supply of food consumed on the premises where it is supplied and hot food consumed off the premises where it is supplied. Cold food taken away for consumption off the premises is however zero rated.

The VAT Tribunal found that the supplies of sandwiches were not supplies in the course of catering and that they were not consumed on the premises where they were supplied, so were zero rated. HMRC appealed and the case went straight to the Court of Appeal.

All three Court of Appeal judges concluded that the sandwiches were not consumed on the premises, in that the definition of premises in this case was solely the retail units where the sandwiches were sold - i.e., the area that Compass controlled, cleaned and maintained, and not the entire Television Centre site. The situation and physical extent of these areas under Compass' control was capable of identification and the fact Compass paid no rent (and indeed received payment for opening at unsocial hours) had no bearing on the matter.

Two out of the three also agreed that the supply was not in the course of catering, stating that the fact that the supplies were made under a global catering contract could not in itself change a zero rated supply into a standard rated one. Other factors made it clear the supply of the sandwiches was not in the course of catering. It was distorting and wrong to apply different VAT liabilities to a sandwich bought in a supermarket and one bought in a Compass unit at Television Centre when the economic reality of both supplies was the same. Catering involves the provision of services associated with food such as preparation, service, delivery, and the supply of crockery and cutlery. The question of whether an event or function is taking place at which the food is consumed may also be relevant. Whether something is in the course of catering or not is an objective matter and the parties' intentions and states of mind are of no assistance.

Why is this important?

The supply of cold food will still be standard-rated for VAT purposes where it falls within the definition of 'in the course of catering', including where it is supplied for consumption on the premises. The decision in Compass provides clarification as to how this test should be applied in practice. Office workers buying sandwiches from a canteen in their building and taking them back to their desks should not be paying VAT on those sandwiches, where that canteen area is separate from the rest of the building and is under the control of someone other than their employer - fiscally they are in the same position as if they walked out of the building to a sandwich shop to buy them. The majority of the judges were not swayed by the contractual position and looked at the reality of what is actually happening to determine the VAT treatment.

HMRC guidance

In Business Brief 12/06 HMRC set out changes to their guidance following the Court of Appeal decision. They will apply a changed definition of 'premises' in line with the Court's findings.

Previously, the definition applied in determining 'the extent of a particular premises' depended on whether it was deemed a restricted or unrestricted access site. Unrestricted access sites (sites to which the general public have free access) were (and continue to be) defined as being the outlet itself and any associated

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facilities (e.g. outdoor tables). Prior to the decision in Compass, restricted access sites (where access to the general public is controlled) were defined as including the whole of the site (so, in the Compass case the whole of Television Centre) rather than just the area where the supply of food took place. The Business Brief confirms that, following Compass, in considering restricted access sites the relevant area is the unit occupied by the retailer and from which supplies are made (and includes any seating areas or similar for the consumption of food where these are within or adjacent to the retail unit) and not the whole of the site.

HMRC's view here diverges from that of the Court of Appeal. The Court had considered that a seating area adjacent to one of the Compass units in Television Centre did not form part of the Compass premises as Compass had no control over it. Rather than follow this view, HMRC have brought their guidance into line with the existing position on unrestricted access sites (where associated seating areas are included regardless of whether they are controlled by the retailer or not).

The Business Brief also confirms that where a retailer cannot accurately identify whether a supply of cold food should be standard rated or zero-rated (for example, because they cannot identify at the point of sale whether the food is to be consumed in an associated seating area or taken away by the purchaser to eat at his or her desk) then a fair and reasonable method of apportionment should be used.

What now?

The new guidance included in the Business Brief confirms that HMRC are not seeking to appeal on this issue to the House of Lords. Many caterers have submitted claims for VAT overpaid on sandwiches and other cold items which, following the Compass Tribunal decision, qualified for zero rating. Any claims not already pursued after the Court of Appeal decision should be taken forward now following the publication of the Business Brief, and businesses which have not yet made a claim should consider whether one is appropriate.

Suppliers should either be able to reduce their prices for these supplies going forward (which may make them more competitive if they have rival sandwich outlets nearby) or increase their profits by the VAT element. Employers who pay caterers a subsidy for the provision of food to staff may be able to negotiate a reduction in the subsidy to take account of the VAT savings so that these are shared between the caterer and the employer.

Not every business will have the same fact pattern as Compass and the BBC - it may not always be clear whether the caterer has control over a defined and definite area within a larger restricted access building for instance. At present any claims will be subject to the three-year cap (though the validity of that in some circumstances is being challenged in other cases and litigation is still ongoing). HMRC may also cite 'unjust enrichment' as a defence against making repayments. 4 Eyes Ltd can help with claim negotiations, with the lodging of protective claims going back for more than three years, in the light of the capping disputes, and with a review of existing arrangements so that even if there is no scope for a back claim the judgment may be used to generate savings going forward.