

## Nettexmedia.com Limited v. Revenue & Customs Commissioners

[2013] UKFTT 50 (TC)

A recent First-tier Tribunal decision upheld HM Revenue & Customs' decision that the price charged to customers by Nettexmedia.com to enable them to access discounted retail prices was, for VAT purposes, consideration for a taxable supply.

### The 'Redsave pass'

Nettexmedia.com Limited runs an online retail business, trading as 'Redsave,' and offers first time customers a choice between paying what is described as the 'normal retail' price or a lower 'Redsave' price. If the customer opts to buy goods at the lower price, they are offered a 'Redsave pass,' which is free for the first 30 days and thereafter charged at £19.95 per month. Customers can use that pass during the first 30 days as many times as they wish and can cancel at any time during that period without penalty. However, once the 30 day period has expired, the monthly fee is automatically charged to the customer's credit card or bank account until the customer formally requests cancellation. The pass can be used in order to gain access to the lower Redsave prices as many times as a customer chooses during each month.

Nettexmedia.com and HMRC agreed that, where a customer actually makes a purchase during the month in respect of which the £19.95 has been paid, the fee represented consideration for a taxable supply (namely the right to purchase goods at a lower than 'normal retail' price) and therefore VAT was due on that amount. However, the parties disagreed as to the VAT treatment of the monthly fee when no purchase is made in the month in respect of which the fee has been paid.

HMRC had ruled that all fees, regardless of whether the customer made a purchase during that month, were taxable at the standard rate and therefore issued an assessment for additional VAT in excess of £1m (which related to a period from Nettexmedia.com's commencement of trade in September 2006). The Tribunal was asked to consider Nettexmedia.com Limited's appeal

against that ruling in respect of monthly fees charged to customers who do not then go on to make purchases.

### Nettexmedia.com's view

Nettexmedia.com informed the Tribunal that all a customer would obtain in exchange for the monthly fee was access to the lower prices - there wasn't the provision of a magazine or other marketing material. There weren't even any email updates as is sometimes the case with other online discount providers. Nettexmedia.com submitted a copy of the terms and conditions that would bind a subscribing customer, which clearly stated that there would not be a refund for the monthly 'vouchers' as they acted 'as a compensation fee for Redsave.com having managed your monthly account.' This, Nettexmedia.com argued, suggested that, where the customer had not made a purchase, he hadn't received a supply of goods and had instead merely received a supply of management of his account (which would be exempt for VAT purposes).

In the alternative, Nettexmedia.com argued that the monthly fee was in fact a deposit which was to be offset against the possible future supply of goods. In such cases, a deposit only becomes a VATable consideration when it is applied against the actual price of goods or services that are supplied or, alternatively, when the deposit is forfeited. Nettexmedia.com relied upon this forfeiture position, and drew the Tribunal's attention to previous cases where a hotelier and an airline had successfully argued that deposits (to be used in part payment of the room charge and full payment for a flight) were, when forfeited, not liable to VAT.

Nettexmedia.com suggested that the same was true in this particular case, namely that the customer

obtained a 'passive electronic voucher waiting to be used and redeemed' and, at the point of purchase, that pass would open the door to the lower prices. Where, however, the customer didn't make a purchase, there couldn't be a supply and therefore the monthly fee must represent something other than the consideration for a VATable supply.

### HMRC's position

HMRC believed that the monthly fee was nothing more nor less than a payment for the VATable supply of the right to purchase goods at the discounted prices. It was immaterial whether the customer took advantage of that right; it was available to them and therefore supplied whether or not they chose to use it.

HMRC maintained that the position on the Redsave pass was different from hoteliers and airlines since, in those cases, the customer paid either part or the whole of the consideration for the supply of either the room or the flight. At the time the deposit was forfeited, neither the room nor the flight was supplied and therefore the consideration was something else. Here, however, the monthly fee never represented the whole or part of the payment for any goods and was not offset against the price of any purchases. It simply entitled the customer to purchase goods, if they indeed wished to do so, at a preferential price.

### The Tribunal's decision

The Tribunal agreed with HMRC that the monthly payment was 'quite clearly' not part payment for any of the goods. It was the same amount irrespective of the value of goods bought and was payable (assuming the customer didn't cancel) even if they didn't buy any goods in that particular month. As a consequence, the monthly fee

wasn't a payment that was made in order to reserve something and, in the Tribunal's view, couldn't be regarded as a deposit or as full payment.

Notably, the Tribunal didn't see a material difference between what the Redsaver customer had received and what customers had received in the Leisure Pass Group Limited v. Revenue and Customs Commissioners [2008] STC 3340. In the latter case, the holder of such a pass was entitled to free entry to a number of London attractions but, ultimately, the pass had no finite monetary value and could be used as often as the customer wished during its period of validity, although that particular pass was subject to some limitations (for example, a single use at each attraction), whereas the Redsaver pass had no such limitations.

As in Leisure Pass Group, the fee paid for the Redsaver pass represented the consideration for the VATable supply of the right to purchase goods at a preferential price. Whether or not the customer chose to exercise that right was immaterial and therefore the appeal was dismissed.

#### Comment

Nettsexmedia.com will no doubt be interested to see that Leisure Pass Group subsequently amended its terms and conditions in an attempt to ensure that the passes were face value vouchers, the issue of which, it has been established, would be outside the scope of VAT. Under those new terms, the passes were given maximum monetary values (for example, a one day pass was given a maximum value of £70, and a two day pass was given a maximum value of £140). In a separate decision, those amended terms (which had been contested by HMRC) were reviewed by a Tribunal, which held they were

effective and realistic limits, and therefore no VAT was due on the face value vouchers.

It's worth noting that other discount operators already view their 'membership fees' as liable to VAT, regardless of whether the customer makes any purchases. For example, Costco's individual membership is clearly advertised as costing £25 plus VAT annually (and then even goes on to do the maths, and states this is therefore £30 including VAT).

Nettsexmedia.com may appeal the Tribunal's decision to the Upper-tier Tribunal and/or (if it has not already done so) it may follow the route taken by the Leisure Pass Group in amending the terms and conditions applicable to customers. However, amending the current terms will of course not affect the previous assessment for £1m of unpaid VAT, and it is arguable that the monthly payment is more akin to a membership fee (like Costco) than a voucher (like Leisure Pass Group). Given the substantial amount owed, it may be that this VAT bill itself becomes the biggest issue for the business and its survival. Whatever the outcome for Nettsexmedia.com, the decision serves as another reminder of the need to obtain comprehensive tax advice during the very early stages of formulating a business plan.

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