[2020] UKFTT 509 (TC)

TC07979

VAT - goods despatched from warehouse in Netherlands delivered to UK customers – Article 33 of the PVD – whether goods despatched or transported "by or on behalf of the supplier" – CJEU judgment in* KrakVet *applied to the facts – goods supplied by or on behalf of Appellant – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/04972

BETWEEN

HEALTHSPAN LIMITED (2) **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ANNE REDSTON

Decided on the papers after: the hearing in public on 19 and 20 February 2018; the issuance of a decision on 27 April 2018; the making of a reference to the Court of Justice of the European Union; the receipt of the judgment in *KrakVet Marek Batko sp.k. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* and the consideration of the parties' subsequent submissions

Ms Nicola Shaw QC, instructed by PricewaterhouseCoopers LLP, represented the Appellant at the hearing, and that firm made the subsequent submissions

Mr Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, represented the Respondents at the hearing and made the subsequent submissions

DECISION

Summary

1. Healthspan Limited ("Healthspan" or "the Appellant") sells non-prescription health products to retail customers, who place orders by phone ("phone sales"), by internet or by post. Most of the goods are delivered by post, but some are delivered by courier. Between 1 April 2012 and 31 January 2016 ("the relevant period"), the overwhelming majority of Healthspan's products were despatched from a warehouse in the Netherlands and delivered to customers in the UK.

2. On 24 May 2016, HM Revenue & Customs ("HMRC") decided ("HMRC's Decision"):

   (1) that during the relevant period the goods had been delivered "by or on behalf of the supplier" and so came within Article 33 of the Principal VAT Directive ("the PVD"), implemented in the UK by Value Added Tax Act 1994 ("VATA"), s 7(4), and that the goods had therefore been supplied in the UK; and

   (2) to register Healthspan for VAT retrospectively, with effect from 1 April 2012.

3. HMRC's Decision was upheld on review. Healthspan appealed to the Tribunal on the basis that its customers had contracted with a separate company for delivery of the goods, and as a result Article 32 of the PVD applied. That company was "Wial Computer and Data Services" ("Wial CDS"), trading as "PostDirect"; it was a subsidiary of a Netherlands company called Wial BV ("Wial").

4. On 16 January 2017, HMRC issued the Appellant with a Notice of Assessment; this was followed on 25 January 2017 by a detailed assessment for £27,399,190, subsequently reduced to £27,303,658 (together, "the Assessment"). The Appellant appealed to the Tribunal against the Assessment. On 3 March 2017 the Tribunal consolidated the two appeals.

5. On 27 April 2018, I issued a decision which was published under reference [2018] UKFTT 0241 (TC) ("*Healthspan 2018*"). In that decision I made findings of fact about all the supplies, but was only able to determine the VAT position of (a) the phone sales, and (b) the goods delivered by courier. The Appellants asked for and received permission to appeal that judgment to the Upper Tribunal ("UT"), and their appeal is currently stayed.

6. In relation to goods which had been both (a) ordered by internet or by post and (b) delivered by post, I found that the legal position was not *acte claire* and made a reference to the Court of Justice of the European Union ("the CJEU"). On 13 February 2020 the CJEU stayed the reference behind *KrakVet Marek Batko sp.k. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (Case C-276/18) ("*KrakVet*").

7. On 18 June 2020 the CJEU issued its judgment in *KrakVet,* and subsequently asked whether I wished to maintain the Healthspan reference. I decided that there was no need for the CJEU to make a separate decision in relation to Healthspan. This was also the view of both parties. I therefore withdrew the reference.

8. This second Healthspan judgment therefore decides whether to goods ordered by internet and by post, which were delivered by post, are within Article 32 or Article 33 in the light of:

   (1) the findings of fact set out in *Healthspan 2018* (there are no new findings of fact in this decision); and

(2) the guidance provided by *KrakVet.*

9. Having applied the guidance in *KrakVet* to the facts of this case as determined in *Healthspan 2018,* I decided that goods ordered by internet and by post, which were delivered by post, are within Article 33. As a result, the remaining part of the Appellant's appeal is dismissed. When taken together with *Healthspan 2018* it follows that I confirm HMRC's Decision and the Assessment of £27,303,658.

10. References in this judgment to *Healthspan 2018* are shown by the prefix §, and internal cross-references are shown by the prefix ¶.

Articles 32 and 33

11. Article 32 of the PVD provides that a supply takes place where the goods are located at the time of despatch. It reads:

> "Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins."

12. Article 33 provides an exception to that rule. So far as relevant, it reads (emphasis added):

> "By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:
>
> (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;…"

13. It was common ground that each of Healthspan's customers was a "non-taxable legal person", so that condition (a) was met. It was also common ground (see §21) that the question for the Tribunal was the meaning and application of Article 33 to the facts as found.

Outline findings of fact and law made in *Healthspan 2018*

14. These findings are a summary of those made in *Healthspan 2018.* For the avoidance of doubt, they do not in any way replace those findings: they are included here only to provide the context for this second decision.

15. Healthspan is a Guernsey registered company founded in 1996 by a resident of that island. It sells vitamins and health food supplements to retail customers (§43)

16. Prior to 1 April 2012, Healthspan sold its goods from the Channel Islands under the Low Value Consignment Relief ("LVCR") provisions, as a result of which no VAT was due on importation to the UK as long as the value of each consignment was below a prescribed limit (§44).

17. In November 2011, the UK Government announced that LVCR would be withdrawn in relation to goods supplied from the Channel Islands (§49). Healthspan decided that the Netherlands was the best relocation option and that it would work with an existing fulfilment house in that country (§49). As part of the process of selecting a fulfilment house, Deloitte

Belastingadviseurs BV ("Deloitte") devised a template setting out the proposed arrangements ("the Briefing Paper"); this was issued to each of five fulfilment houses (§50).

18. Healthspan decided to award the contract to PostDirect; the name was chosen to make it more user-friendly for UK customers (§58, §56). On 28 March 2012, PostDirect signed two contracts with Healthspan, the Payment Agreement and the Warehouse Agreement (§58). The Recitals to the former read (§59):

> "(A) The Fulfilment House (trading under the name PostDirect) offers a transport of goods service ('vervoersdienst') to buyers of products sold by Healthspan. Healthspan does not offer a transport of goods service to buyers of its products (the 'Products');
>
> (B) when contracting with Healthspan for the purchase of Products, a buyer ('the Buyer') is also offered the option of contracting with the Fulfilment House for transport of those products;
>
> (C) if the Buyer enters into a transport of Products agreement…with the Fulfilment House (the 'Transport of Products Agreement') then the Fulfilment House wishes Healthspan to act on behalf of the Fulfilment House in collecting from the Buyer the payment for the transport of products by the Fulfilment House…"

19. Clause 1.1 of the Warehouse Agreement read (§63):

> "The Fulfilment House shall provide certain services to Healthspan under the Agreement, including without limitation receipt, putting away, storage, order selection, picking, packing, labelling, administrative functions, granting access to the Warehouse, maintaining Equipment and having and maintaining insurance (collectively, the 'Services')."

20. Customers contacted Healthspan by phone, internet and by post (ie, by mail order), and goods were delivered either by post or by courier. The overwhelming majority (97%) of its customers were in the UK (§43), and HMRC's Decision and the Assessment only concerns sales to those customers.

The decision about phone sales and courier deliveries

21. In relation to goods which were ordered by phone, and those which were delivered by courier, the customers' only contracts were with Healthspan (§127, §159 and §169). I therefore found that the related goods were "dispatched or transported by or on behalf of the supplier", namely Healthspan, and so came within Article 33 (§129, §160 and §169). It followed that the goods were supplied at "the place where the goods are located at the time when dispatch or transport of the goods to the customer ends", namely the UK.

22. Healthspan was therefore required to be registered in the UK, and I therefore refused Healthspan's appeal against HMRC's Decision. Because the supplies to phone customers and DHL customers were made in the UK, I also refused Healthspan's appeal against the Assessment in so far it related to those supplies (§280).

Goods ordered by internet or by post, delivered by post

23. In relation to customers who ordered by internet or by post, for delivery by post, I found that they had entered into a contract with PostDirect for the delivery of the goods (§148 and §167). It was therefore arguable that the goods were despatched or transported "by or on behalf" of the customers, by virtue of their contracts with PostDirect.

24. However, it was also arguable that the goods were despatched and transported by or on behalf of Healthspan because of the nature and extent of the arrangements between those two companies, together with a number of other factors. In other words, the meaning of "by or on behalf of" was not *acte claire.* I therefore made the reference to the CJEU, and this was stayed behind *KrakVet.* Having received the judgment in that case, I withdrew the Healthspan reference.

The parties' submissions following *KrakVet*

25. I then invited the parties to provide representations as to how *KrakVet* applied to the Appellant's internet and postal sales where the goods were delivered by post, on the basis of the facts as already found by the Tribunal and set out in *Healthspan 2018*.

HMRC's submissions

26. In response, HMRC made a straightforward and clear submission, referring to the facts found in *Healthspan 2018* and submitting that it was clear from those facts that Article 33 applied, that the remaining part of the appeal must therefore be refused, and the Assessment confirmed in full.

PwC's submissions on behalf of the Appellant

27. PricewaterhouseCoopers LLP ("PwC") on behalf of the Appellant said that, following *Healthspan 2018:*

> "…it remains to be determined whether there was a contract between PostDirect and the customer in respect of goods ordered by phone and goods delivered by courier."

28. PwC went on to say that these were "mixed questions of fact and law"; that "all the facts" have "not yet been determined", and that determining those remaining facts was a necessary step before the Tribunal could apply *KrakVet*.

29. This was a surprising submission, given that *Healthspan 2018* had already decided that there was no contract between the customer and PostDirect in relation to phone sales (see §127); or between the customer and DHL in relation to deliveries by courier following internet or postal sales (§159 and §169); the Appellant had already appealed that decision to the UT; and that one of its grounds of appeal was that:

> "the FTT erred in law in concluding that there was no contract between PostDirect and the customer in respect of goods delivered to phone customers and goods sent by courier and that accordingly such supplies were dispatched or transported 'on behalf of. the Appellant."

30. On the (incorrect) basis that issues remained to be determined in relation to the phone sales and the courier deliveries, PwC then applied for this appeal to be stayed pending the UT's judgment in *Healthspan 2018*. I was unable to understand that submission, given that:

(1) it is only possible to appeal "decisions" of this Tribunal to the UT;

(2) the Appellant has sought and obtained permission to appeal *Healthspan 2018* to the UT, *inter alia* on the basis set out above;

(3) the Appellant therefore accepted that *Healthspan 2018* was a final decision in relation to phone sales and courier deliveries; and

(4) when the UT decide the appeal, they will be deciding whether or not I was right to decide "there was no contract between PostDirect and the customer in respect of goods delivered to phone customers and goods sent by courier".

31. In other words, PwC were not only now submitting (wrongly) that no final decision had been made in relation to the VAT status of the phone sales and courier deliveries; at the same time appealing that final decision to the UT, but *also* asking the Tribunal to delay making a final decision on the VAT status of the phone sales and courier deliveries pending the UT judgment on whether the Tribunal's final decision on those same sales was correct. The submissions were therefore fundamentally flawed.

32. PwC also informed me that, after the publication of *Healthspan 2018*, HMRC had issued a further decision, on the basis that Healthspan was also supplying transport services to customers who had ordered goods by phone; that this new assessment had been appealed to HMRC and notified to the Tribunal, and had been stayed. PwC applied for that new appeal to be joined to or consolidated with this appeal, on the (incorrect) basis that issues remained to be determined in relation to the phone sales and courier deliveries.

33. As no facts remain to be found about any of the supplies, and no issues remain to be determined in relation to phone sales and courier deliveries, and as the subsequent HMRC decision appeared to be a consequence of *Healthspan 2018,* I decided it was not in the interests of justice further to delay resolution of this appeal.

KrakVet

34. In *KrakVet* the CJEU judgment answers five questions, of which only the fourth is relevant to this appeal. That question was summarised at [54] of the judgment:

> "whether Article 33 of Directive 2006/112 must be interpreted as meaning that, when goods sold by a supplier established in one Member State to purchasers residing in another Member State are delivered to those purchasers by a company recommended by that supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported 'by or on behalf of the supplier'."

35. At [61] the CJEU said that "consideration of the economic and commercial realities forms a fundamental criterion for the application of the common system of VAT". In the following paragraph, the Court said (emphasis added):

> "In the light of that economic and commercial reality, as the Advocate General observed in point 102 of her Opinion, goods are dispatched or transported on behalf of the supplier <u>if it is the supplier, rather than the customer, that effectively takes the decisions governing how those goods are to be dispatched or transported.</u>"

36. At [63] the CJEU continued (again, emphasis added):

> Therefore, it must be held that a supply of goods falls within the scope of Article 33 of Directive 2006/112 where <u>the role of the supplier is predominant in terms of initiating and organising the essential stages</u> of the dispatch or transport of the goods."

37. The CJEU then said that it was for the referring court to decide whether or not that was the position in any particular case, taking into account all the factors in issue. It also rejected

the applicant's submission that Article 33 could not apply where the customer had contracted with the delivery company, saying:

> "[66] As regards the importance of contractual terms in categorising a taxable transaction, it should be borne in mind that, in so far as the contractual position normally reflects the economic and commercial reality of the transactions, the relevant contractual terms constitute a factor to be taken into consideration (see, to that effect, judgment of 20 June 2013, *Newey*, C-653/11, EU: C: 2013: 409,paragraph 43).
>
> [67] It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions (judgment of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraph 44).
>
> [68] In the present case, contractual terms such as those at issue in the main proceedings cannot be regarded as reflecting the economic and commercial reality of the transactions at issue if, by means of those terms, the purchasers merely endorse the choices made by the supplier, which it is for the referring court to verify through an overall analysis of the circumstances of the dispute in the main proceedings."

38. The CJEU continued by setting out further guidance as to the factors to be taken into account when considering whether or not the role of the supplier was predominant, so that Article 33 applied. That guidance was divided into the four parts set out below.

(1) the significance of delivery in the context of the supplies being made;

(2) the choices available to the customer;

(3) the burden of risk in relation to the delivery; and

(4) the payment arrangements.

39. The CJEU said that courts "must" take the first factor into account, and that it was "necessary" for the other three to be considered. It follows that I am required to take all four factors into account when deciding whether the supplies fall within Article 32 or Article 33.

40. In the next part of this decision, I consider each of those four factors in the light of the facts already found and set out in *Healthspan 2018.*

The significance of delivery

41. The relevant part of the CJEU's decision is as follows:

> "[69]…account must be taken, first, of the significance of the issue of delivering those goods to the purchasers in the light of the commercial practices which characterise the activity carried on by the supplier concerned. In particular, it may be considered that, if that activity consists in actively offering goods for consideration to purchasers residing in a Member State other than that in which the supplier is established and in whose territory it does not have an establishment or warehouse, the organisation by that supplier of the means enabling the goods concerned to be delivered to their purchasers constitutes, in principle, an essential part of that activity.
>
> [70] In order to assess whether the supplier actively offers goods to purchasers residing in a Member State, the referring court may, inter alia, take into account the extension of the address of the website on which the goods concerned are offered and the language in which that site is accessible."

42. The following findings are relevant to this factor:

(1) Healthspan is based in the Channel Islands, but sold only 1% of its products via its shop on Jersey (§99). The appeal does not relate to supplies made via the shop (§100).

(2) The supplies with which this appeal is concerned all had to be delivered to customers, 97% of whom were in the UK (§43).

(3) The goods were actively marketed into the UK (§161).

(4) Healthspan's website was in English, not Dutch (§96).

(5) Before the introduction of the arrangements involving the use of a warehouse in the Netherlands, the goods had been supplied without a delivery charge (§44), and when the arrangements came to an end, the goods were again supplied without a delivery charge (§105).

(6) During the relevant period, the goods were sent from the Channel Islands to the Netherlands, where PostDirect was responsible for all warehousing and selection of the ordered goods (§73). However, PostDirect was required to follow Healthspan's instructions as to labelling (§76) and the key machine needed to sort the goods was rented to PostDirect by Healthspan, which continued to take responsibility for quarterly checks of that equipment (§64).

(7) The goods were sent from PostDirect's warehouse to customers' addresses, not to any Healthspan warehouse or depot in the UK (§60, §67).

(8) Although customers were given the option of collecting the goods in person from PostDirect's warehouse in the Netherlands if a collection time was arranged by phone or by email, this never happened (§101).

43. From the foregoing, I conclude that delivery of the goods was a significant part of what the customers required and was an essential part of the supply of those goods.

The choices available to the customer

44. The CJEU's guidance on this factor was as follows:

> "[71] …it is necessary to assess to whom, the supplier or the purchaser, the choices relating to the methods of dispatch or transport of the goods concerned may in fact be attributed.
>
> [72] In that respect, dispatch or transport of the goods concerned on behalf of the supplier cannot be inferred on account of the mere fact that the contract concluded by the purchasers for the purposes of delivering those goods is concluded with a company which collaborates with that supplier for activities other than the sale of the latter's goods.
>
> [73] The position would, however, be different if, by that contract, the purchasers merely acquiesce to the choices made by the supplier, whether they concern the designation of the company responsible for delivering the goods concerned or the manner in which those goods are dispatched or transported.
>
> [74] An assessment to that effect could be inferred, in particular, from factors such as the reduced choice of companies, or even choice limited to a single company, recommended by the supplier for the purposes of delivering the goods concerned, or the fact that the contracts relating to the dispatch or transport of those goods may be concluded directly from that supplier's

> website without the purchasers having to take independent steps to contact the companies responsible for that delivery."

45. In relation to the factor in paragraph [72], PostDirect collaborated with Healthspan, not only in relation to the delivery of the goods, but was also responsible for all warehousing and selection of the ordered goods (§73). That is, however, an insufficient basis for make an adverse inference against Healthspan in relation to the "choice" factor.

46. However, the following findings are also relevant:

(1) It is clear from §78-80, §130-136 and §161-4 that the customer had only two choices:

(a) a postal service using PostDirect; and

(b) a more expensive courier service provided by DHL. However, I have already found in *Healthspan 2018* that these courier services were provided "by or on behalf of" Healthspan, see §158-160.

(2) The customer had no direct contact with PostDirect, either at the time of ordering; if he wished to change his delivery address (§80), or when there were any issues about delivery, see further ¶51;

(3) PostDirect's Terms and Conditions ("T&Cs") were made available on Healthspan's website, see §131-133.

(4) In an internal document Healthspan referred to PostDirect as providing "our own delivery service" (§95).

47. From the above I find that the customer "merely acquiesce[d] to the choices made by the supplier", and the choice of delivery company was to be attributed to Healthspan.

The burden of risk

48. The CJEU gave this guidance on the burden of risk:

> "[75] … it is necessary to examine which economic operator bears the burden of risk in relation to the dispatch and supply of the goods at issue.
>
> [76] In that regard, the applicant in the main proceedings claims that the contractual terms binding the purchaser and the transport company indicate that such burden is borne by the latter and infers therefrom that the goods at issue in the main proceedings were not dispatched or transported on its behalf. However, it must be noted that the fact that the burden of risk in relation to the delivery of the goods concerned is borne by the transport company does not, in itself, affect the question whether the transport of those goods is carried out on behalf of the supplier or on behalf of the purchaser.
>
> [77] That being so, it could be considered that, notwithstanding the contractual terms placing the burden of risk on the company responsible for the delivery of those goods, their dispatch or transport is carried out on behalf of the supplier if the latter in fact ultimately bears the costs relating to compensation for damage occurring during that dispatch or transport."

49. It is clear from the findings of fact that PostDirect bore no commercial risk. That is because it had been agreed between PostDirect and Healthspan before the inception of the arrangements, that the former would make a 6% profit margin (§57).

50. As a result, when a delivery charge was quoted to customers, this was calculated "taking into account the costs incurred by PostDirect and with the intention of PostDirect remaining at a profit level of 6%, a margin which was agreed in advance with Healthspan", see §57, a finding which was made on the basis of evidence given by Mr Jackson, Healthspan's Operations Director. In other words, PostDirect did not bear any risk because increases in postage costs were recovered by adjustments to the delivery charge so as to maintain the same level of profits (§85).

51. The following further findings are also relevant:

(1) PostDirect's T&Cs contained only minimal remedies for delivery problems, with contractual compensation being well below the value of goods lost or damaged (§182-183 and §193).

(2) However, that had no consequences for the customers, because where there was a problem with the original delivery:

(a) customers complained to Healthspan, not PostDirect (§94 and §135);

(b) they were instructed on the packaging to return any goods damaged during delivery to Healthspan's UK office and not to PostDirect (§55, §67);

(c) if goods were damaged during delivery, replacement goods were provided by Healthspan (§135, §184);

(d) Healthspan always refunded the related delivery costs to the customer, and was contractually bound to do so until 26 October 2015, and after that date it continued to bear those costs (§195-200);

(3) The costs of dealing with delivery problems were almost all borne by Healthspan rather than PostDirect. Specifically:

(a) no clause in the contracts between PostDirect and Healthspan allowed the latter to recover the cost of replacement goods and related delivery from PostDirect (§187-188); and

(b) where customers were refunded rather than being provided with replacement goods, Healthspan were entitled to recover these costs from PostDirect, but after the first six months of the relevant period no recharges were in fact made (§186-192).

(4) In its marketing material Healthspan held itself out as responsible for ensuring that the goods arrived with the customers, see §96-98.

(5) The normal position is that when legal title to goods passed to the customer, the customer is then responsible for the goods. Here, the contractual provisions on when title passes are inconsistent and confused, see §202ff. But those terms were irrelevant, because Healthspan dealt with any problems arising up to the point the goods were received by the customer.

52. There is no doubt that it is Healthspan, and not PostDirect, which bears the burden of risk, both generally and in relation to "the costs relating to compensation for damage occurring during that dispatch or transport".

The payment arrangements

53. The CJEU gave this guidance on payment arrangements:

> "[78] … it is necessary to assess the payment arrangements relating both to the supply of the goods concerned and to their dispatch or their transport. If, while purchasers are formally linked to the supplier and the transport company by separate contracts, the acquisition of those goods and their dispatch or transport are the subject of a single financial transaction, such a circumstance must be regarded as indicative of the significant involvement of the supplier in the delivery of those goods.
>
> [79] In that regard, as the applicant in the main proceedings acknowledged at the hearing before the Court, it is common practice for purchasers to pay, on receipt of the goods concerned and to the carrier of those goods, both the amount for those goods and the amount for their transport.
>
> [80] Such involvement of the supplier would also be found, bearing in mind the economic and commercial reality of the transactions at issue, if it were established that, as a matter of principle or subject to the fulfilment of certain conditions, such as reaching a minimal purchase amount, the amount of the dispatch or transport costs is merely symbolic or that the supplier grants a discount on the price of the goods which has the same effect."

54. I have taken this heading as embracing both the pricing of the delivery, and the mechanics of making the related payment. The following findings are relevant:

(1) The customer paid a single amount which included delivery (§135).

(2) The customer had no control over the pricing of the delivery or its timing; these were both agreed in advance between Healthspan and PostDirect under a contract to which the customer was not a party (§68).

(3) Any changes to the delivery price were similarly agreed between Healthspan and PostDirect (§69).

(4) The delivery charge (owed to PostDirect) was eliminated by the discount (granted by Healthspan), and the two juxtaposed, so that the customer was encouraged to view the total price of the delivered goods as being the same as if there had been no delivery charge (§82-89).

(5) Healthspan was contractually responsible for ensuring that the customer paid the delivery charge, and for transferring that money to PostDirect (§60).

(6) Although PostDirect's T&Cs gave PostDirect the right to levy extra delivery charges:

(a) that provision conflicted with Clause 5.16 of the Payment Agreement, which provided that "In order that the costs payable by the Buyer for transport shall be known to the Buyer in advance they will be set out on Healthspan's website and will be at the prices set out in Schedule 5 per Product"; and

(b) no such further charges were levied (§141):.

(7) As already noted above, PostDirect had a fixed 6% profit, irrespective of delivery problems or delivery price changes.

(8) Customers were told that delivery times would be the same as when Healthspan delivered the goods (§79).

55. Given those findings, it is abundantly clear that not only is the delivery charge paid as part of a single transaction with the cost of purchasing the goods, but that the discount had the effect of making "the amount of the dispatch or transport costs…merely symbolic". As a

result, this factor shows that there was "significant involvement" by Healthspan in the delivery of the goods.

Healthspan's role was predominant

56. Having considered all the factors set out in the *KrakVet* guidance, it clear that Healthspan's role was "predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods" and that as a matter of economic and commercial reality, PostDirect was acting "on behalf of" Healthspan"

Conclusion

57. In *Healthspan 2018* I decided that Healthspan's supplies of goods to phone customers, and all supplies of goods sent by courier, were made "on behalf of" Healthspan and so came within Article 33; that as a result Healthspan was required to be registered in the UK and so that its appeal against HMRC's Decision was refused. Healthspan's appeal against the Assessment was similarly refused in so far it related to the phone customers and the DHL customers.

58. In this second decision I find that supplies of goods ordered by post or by internet, which were delivered by post, were made "on behalf of" Healthspan and so also came within Article 33. Healthspan's appeal against the remaining part of the Assessment is therefore also refused.

59. Taken with the decision in *Healthspan 2018*, I therefore confirm HMRC's Decision and the Assessment of £27,303,658.

Appeal rights

60. This document contains full findings of fact and reasons for the decision as to the VAT status of Healthspan's supplies of goods ordered by post and by internet, which were delivered by post.

61. If the Appellant is dissatisfied with this decision, it has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to the Appellant.

62. At the end of *Healthspan 2018* I said:

> "[279] I have found that Healthspan's supplies of goods to phone customers, and all supplies of goods sent by courier, were made "on behalf of" Healthspan and so came within Article 33.
>
> [280] It follows that Healthspan was required to be registered in the UK. Healthspan's appeal against HMRC's Decision is therefore refused. For the same reason, Healthspan's appeal against the Assessment is refused in so far it relates to the phone customers and the DHL customers. Those are final decisions of this Tribunal.
>
> [281] In so far as the Assessment related to the deliveries by post to online and mail order customers, the final determination of Healthspan's appeal is stayed pending the decision of the CJEU on the reference.
>
> [282] Rule 39(2) of the Tribunal Rules provides that a party who wishes to appeal against a final decision has to do so within 56 days from the date on which that decision is issued. However, Rule 3(a) gives the Tribunal power

> to "extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit".
>
> [283] Since the CJEU's ruling may also be of assistance in the event of an appeal against the final decisions made in relation to the phone sales and the DHL sales, I hereby extend the time for complying with Rule 39(2). When all issues have been finally determined by this Tribunal, I will make further directions as to the time limit for seeking permission to appeal."

63. On 24 May 2018, a month after the publication of *Healthspan 2018*, the Appellant asked me for permission to appeal on four grounds. I gave permission on three of those grounds, but refused permission on Ground (iv), which was entitled "miscellaneous findings of fact", because the threshold set in *Edwards v Bairstow* (1955) 36 TC 207 and the related case law was not met. The UT (Judge Berner) also refused permission to appeal on Ground (iv) following an oral hearing on 23 October 2018. He concluded that decision by saying:

> "For the avoidance of doubt, as regards my refusal to give permission to appeal in respect of Ground (iv), that extends only to Healthspan's present appeal to this Tribunal in respect of the FTT Substantive Decision in relation to the Appeal Category of supplies [phone sales and courier deliveries]. It does not determine any further application for permission to appeal that might arise in the future in respect of that category of supplies in the event, and subject to the present appeal, that the FTT makes a further determination in respect of that category alongside the Reference Category of supplies [internet and postal sales delivered by post]."

64. Also for the avoidance of doubt, this second decision makes no determination as to the phone sales or courier sales. As already stated, those issues were finally determined in *Healthspan 2018.*

65. I did not set a time limit for seeking permission to appeal against *Healthspan 2018*, not because there were any remaining issues to be decided, but because the Appellant might have wanted to wait for the CJEU's judgment before deciding whether or not to appeal, and/or as to its the grounds of appeal.

66. The judgment in *KrakVet* has now been published, and there is no need further to extend the time limit. Should the Appellant wish to make any such further application for permission to appeal *Healthspan 2018,* that application must therefore be received by this Tribunal not later than 56 days after this second decision is sent to the Appellant. Clearly, however, this does not allow the Appellant to repeat its earlier application in relation to Ground (iv) for which permission has already been refused by both this Tribunal and the UT.

67. In relation to any application to appeal against this decision, and any further application to appeal *Healthspan 2018,* the parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 17 December 2020