



Neutral Citation: [2024] UKUT 284 (TCC)

Case Number: UT/2023/000044

**UPPER TRIBUNAL
(Tax and Chancery Chamber)**

Rolls Building
London EC4A 1NL

Value Added Tax – paragraph 4 Schedule 6 VAT Act 1994 – whether services supplied on terms allowing a discount for prompt payment - appeal dismissed

Heard on: 10 and 11 June 2024
Judgment date: 12 September 2024

Before

JUDGE GREG SINFIELD

Between

TALKTALK TELECOM LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Andrew Hitchmough KC and Quinlan Windle, counsel, instructed by PricewaterhouseCoopers LLP

For the Respondents: Kieron Beal KC and Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant ('TalkTalk') supplies fixed and mobile telephone, pay TV and broadband internet access services to retail and commercial customers. This appeal is only concerned with supplies to retail customers.

2. Between 1 January and 30 April 2014, TalkTalk offered most of its retail customers a 15% discount on certain services if they paid their bills within 24 hours of receiving them. This was called the Speedy Payment Discount ('SPD').

3. Until 30 April 2014, paragraph 4 of Schedule 6 of the VAT Act 1994 ('VATA') provided:

“(1) Where goods or services are supplied for a consideration in money and on terms allowing a discount for prompt payment, the consideration shall be taken for the purposes of section 19 as reduced by the discount, whether or not payment is made in accordance with those terms.

(2) This paragraph does not apply where the terms include any provision for payment by instalments.”

4. TalkTalk considered that, in relation to services supplied to customers to whom the SPD was offered, VAT was only chargeable on the amount billed to those customers less the SPD, whether or not the customers paid quickly enough to receive the SPD. Only around 3% of customers actually received the SPD during the period. The other 97% of customers did not pay their bills within 24 hours and paid TalkTalk the full amount billed, typically by direct debit. Between 1 January and 30 April 2014, TalkTalk accounted for VAT on the discounted amount in all cases and regardless of whether the customers had actually paid within 24 hours of receiving their bills.

5. It was common ground that if TalkTalk were correct in their reading of paragraph 4(1), the UK would have failed to implement Articles 73 and 79(a) of Directive 2006/112/EC (the 'Principal VAT Directive' or 'PVD') correctly.

6. Paragraph 4 was amended with effect from 1 May 2014. The amendment applied to relevant supplies which included the services supplied by TalkTalk. From that date, the consideration for a supply on terms which allowed a discount for prompt payment was only treated as the discounted amount where, among other conditions, payment was made in accordance with the terms that allowed the discount. As a result of the amendment, the SPD only reduced the value of TalkTalk's supplies where the customers paid their bills within 24 hours and obtained the SPD.

7. The Respondents ('HMRC') did not agree that paragraph 4 applied to services supplied by TalkTalk to all customers to whom the SPD was offered between 1 January and 30 April 2014 and issued two appealable decisions, namely:

(1) a decision, in a letter dated 9 February 2015, that the SPD offer only reduced the consideration for VAT purposes where customers had actually paid the reduced amount, and that there was no reduction when the discount was not taken up; and

(2) an assessment for £10,606,226 to recover the VAT underpaid during the relevant period.

8. TalkTalk appealed against HMRC's decision and the related assessment to the First-tier Tribunal (Tax Chamber) ('FTT'). At the hearing, there were two issues for the FTT, namely:

(1) whether paragraph 4(1) had the meaning contended for by TalkTalk; and

(2) whether, on the facts of the case, paragraph 4(1) applied to TalkTalk.

9. In a decision released on 21 December 2022 with neutral citation [2023] UKFTT 12 (TC) ('the Decision'), the FTT dismissed TalkTalk's appeal. References to paragraphs in the Decision are in the form "[*]*".

10. In relation to the first issue, the FTT held at [80] that:

"Para 4(1) means what it says, namely that where goods or services are supplied on terms allowing a discount for prompt payment, consideration is deemed to be reduced by the amount of the discount, whether or not the customer obtains the discount as the result of paying promptly ... [and] it is not possible to construe Para 4(1) so that it is consistent with the PVD, because to do so would go entirely against the grain of the provision, and would 'cross the boundary between interpretation and amendment'."

11. On the second issue, the FTT held at [162], that none of the supplies made by TalkTalk came within paragraph 4(1) because, in summary:

"(1) In relation to services billed in advance, there were no terms 'allowing a discount for prompt payment'. This was because the contract was only varied (so that the customer paid a lower amount for a particular month) if the customer accepted the SPD offer for that particular month by making the payment within 24 hours. The variation of the terms happened simultaneously with the payment, and there was no term allowing for a discounted payment to be made on a future date.

(2) In relation to services billed in arrears, the SPD was an offer by TalkTalk to accept a lower sum with an earlier payment date to discharge a pre-existing contractual obligation, and was thus a post-supply rebate of the consideration already due. Again, Para 4(1) did not apply."

12. With the permission of the FTT, TalkTalk appealed to the Upper Tribunal ('UT') against the FTT's conclusions on the second issue on three grounds:

(1) The FTT erred in concluding that in order for paragraph 4(1) to be engaged, the option to pay a discounted sum had to exist in the context of a pre-existing contractual relationship.

(2) Further and alternatively, even if the FTT was correct about the need for a pre-existing contractual relationship, the FTT erred in law by holding that the option to pay a discounted sum under the SPD payment offer did not exist in the context of a pre-existing contractual relationship.

(3) Further, the FTT erred in law by holding that the time of supply was set by the basic time of supply rules in section 6(3) and 6(4) VATA and therefore that the time of supply for services billed in arrears was when the services were performed.

13. HMRC served a Respondents' Notice in which they sought to uphold the FTT's decision for the reasons relied on by the FTT in relation to the second issue and on the following further grounds:

(1) Paragraph 4 must, as far as it is possible to do, be given a conforming construction to read consistently with Articles 73 and 79(a) of the PVD so that it only applies where the customer actually pays the discounted sum.

(2) Where the customer was contractually obliged to accept supplies of services from TalkTalk for a minimum term, the payments made by the customer throughout that term were payments by instalments with the result that para 4(1) was disapplied by paragraph 4(2).

14. TalkTalk was represented by Mr Andrew Hitchmough KC with Mr Quinlan Windle. Mr Kieron Beal KC and Mr Andrew Macnab appeared for HMRC. I am grateful to counsel for their clear submissions, both written and oral, on behalf of the parties. Although I have reviewed and considered them when writing this decision, I have not found it necessary to refer to each and every argument advanced or all of the authorities cited in setting out my decision in this appeal.

15. For the reasons set out below, I have decided that TalkTalk's appeal must be dismissed.

FACTUAL AND CONTRACTUAL BACKGROUND

16. The FTT set out their findings of fact at [86] – [117]. The FTT's findings are not challenged in this appeal. For the purposes of this decision, the relevant background may be summarised as follows.

17. TalkTalk supplied retail customers with the following services: line rental services, call services, TV services and broadband services. Customers could select a bundle of services to suit their own requirements.

18. TalkTalk's contracts with its customers were governed by terms and conditions ('Ts&Cs') which were published on its website. The Ts&Cs relevantly provided that:

- (1) TalkTalk billed customers monthly in advance for all services except for those relating to calls made by customers and TV Transactional Charges which were both billed in arrears (clauses 10.5 and 10.17);
- (2) customers were required to pay all bills for the services provided by TalkTalk by direct debit and TalkTalk would collect the bill payments from the customers' bank accounts on the payment due date shown on the bill (clause 10.6);
- (3) TalkTalk were entitled to amend their charges and such changes would be notified to customers by making the amended list of charges available on the TalkTalk website (clause 10.16);
- (4) customers who wished to cancel a service had to give TalkTalk written notice either 15 or 30 days in advance depending on the service (clauses 11.1 and 11.4).
- (5) some of the services were subject to a minimum period of 12, 18 or 24 months after which they continued until they were terminated in accordance with clause 11 (clause 1.4, 11.2 and 11.3);
- (6) if a customer terminated their contract during the minimum period, they had to pay TalkTalk an additional charge as compensation for losses for each month until the end of the minimum period (clauses 11.2 and 11.8);
- (7) TalkTalk could unilaterally change the Ts&Cs by giving its customers notice in writing and/or publishing the changes on the TalkTalk website (Clause 16.1); and
- (8) the Ts&Cs set out the whole agreement between TalkTalk and its customers for the provision of the services (Clause 16.2).

19. The SPD was not mentioned in the Ts&Cs and no amended version of them was sent to customers who accepted an SPD offer. Before the FTT, TalkTalk's witness, Ms Lorraine Harper, accepted that customers who wanted to access the SPD "had to go through a separate process" under which they were "redirected to a website to make a separate payment".

20. Customers could access their accounts with TalkTalk by using a system called "My Account". This allowed customers to view their bills, change the particular services in their packages and manage their payments. It was accessed via TalkTalk's website. Information

about the SPD was provided on a dedicated page on TalkTalk’s website. The SPD was made available to customers with an active My Account in respect of payments for line rental, calls, broadband and TV services (but not mobile packages). Customers were notified by email when a new bill had been posted on their My Account. The email stated “Pay quickly and save 15% with Speedy Payment Discount” and provided a link to the bills and payment page from which the customer could pay their bill. If the customer accessed the page within 24 hours of receiving the email, they would see their account balance and a message informing them that the SPD was available. The customer could then follow the prompts to pay the discounted amount by credit or debit card, in which case TalkTalk would not request the customer’s direct debit payment for that month. After 24 hours, the page stated that that the customer had missed the period for obtaining the SPD that month but that it would be available again next month.

21. Customers who did not have an active My Account received paper bills. The paper bills included a text box which informed the customer that they could save 15% every month with the SPD if they set up a My Account online.

22. Exceptionally, the SPD was offered to customers without an active My Account by call centre agents (for example, where a reasonable adjustment for disability was required or because a customer did not have broadband access). The FTT found, at [98] and [99], that very few SPD offers were made on this exceptional basis and neither party made separate submissions about them. The FTT did not distinguish between the VAT treatment of supplies made to the vast majority of active My Account customers and those made to the very few exceptional cases, and neither do I in this decision.

RELEVANT LEGISLATION

23. So far as material, the PVD provided:

“Article 62

For the purposes of this Directive:

(1) ‘chargeable event’ shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become ‘chargeable’ when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

Article 63

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

...

Article 65

Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

Article 66

By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

...

(b) no later than the time the payment is received;

...

Article 73

In respect of the supply of goods or services ... the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.

...

Article 79

The taxable amount shall not include the following factors:

- (a) price reductions by way of discount for early payment;
- (b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;

...

Article 90

“(1) ... where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

...”

24. The above provisions of the PVD are implemented in United Kingdom legislation by the provisions of the VATA and the Value Added Tax Regulations 1995 (‘the VAT Regs’). Articles 62, 63, 65 and 66 of the PVD are implemented by section 6 of the VATA which relevantly provides:

“(1) The provisions of this section shall apply ... for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

...

(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

(4) If, before the time applicable under subsection ... (3) above, the person making the supply ... receives a payment in respect of it, the supply shall, to the extent covered by the ... payment, be treated as taking place at the time ... the payment is received.

...

(14) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding subsections (2) to (8) ...) a supply is to be treated as taking place in cases where—

- (a) it is a supply of ... services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period, or

...

and for any such case as is mentioned in this subsection the regulations may provide for ... services to be treated as separately and successively supplied at prescribed times or intervals.”

25. The relevant regulation made under section 6(14) VATA in this case is Regulation 90 of the VAT Regs which states:

“...where services ... are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times—

- (a) each time that a payment in respect of the supplies is received by the supplier, or
- (b) each time that the supplier issues a VAT invoice relating to the supplies.”

26. In this case, TalkTalk did not issue VAT invoices so only regulation 90(a) is relevant. It follows that, whether section 6(4) or regulation 90 applies, the time of the supply of services billed by TalkTalk in advance of them being performed was the time that the customer pays TalkTalk. Where services are billed in arrears, the time of the supply would be when the services are performed unless regulation 90 applies in which case the time would be when the payment is received.

27. Articles 73 and 79 of the PVD are implemented by section 19 of and Schedule 6 to the VATA. Section 19(1) provides that the value of any supply of goods or services must be determined in accordance with that section and Schedule 6 unless otherwise provided by or under the VATA. Section 19(2) provides that where a supply is made for consideration in money, the amount of money is treated as including the VAT. Paragraph 4 of Schedule 6 is set out at [3] above.

DISCUSSION

28. I begin by considering TalkTalk’s appeal against the FTT’s conclusion on the second issue. The FTT held that paragraph 4(1) did not apply because, in the case of services billed in advance, there were no terms ‘allowing a discount for prompt payment’ and, in the case of services billed in arrears, the SPD was a post-supply rebate of the consideration already due. TalkTalk contended that the FTT erred in law as set out in the three grounds of appeal reproduced at [12] above.

29. In broad terms, the first and second grounds require me to consider whether the FTT erred in deciding whether paragraph 4(1) applied on the facts as found by the FTT. In [128] of the Decision, the FTT adopted Mr Beal’s analysis that, for paragraph 4(1) to apply, the following six conditions must be satisfied:

- (1) there has to be a supply of services;
- (2) that supply has to be for consideration in money;
- (3) there must be terms on which the supply is made;
- (4) those terms must allow a discount;
- (5) the discount must be for prompt payment; and
- (6) the terms must not include any provision for payment by instalments.

30. I agree with this analysis of the requirements which must be met before the consideration for a supply can be regarded as reduced by a discount for prompt payment. Before me, Mr Hitchmough did not disagree with the formulation of the conditions but contended that the FTT’s legal analysis and conclusions were wrong. He submitted that the first five of the points above were satisfied in this case and the sixth point was not relevant as the payments in this case were not instalments. Mr Beal submitted that the FTT had correctly analysed the contractual and VAT positions in relation to services billed in advance and in arrears.

31. HMRC submitted that the time of supply should be determined under section 6(2) of the VATA or, alternatively, regulation 90 of the VAT Regs and, on that basis, did not contend that TalkTalk was paid in instalments. If, contrary to that analysis, TalkTalk's supplies were considered to be a continuous and rolling supply of telecommunication services for a specific and limited duration then HMRC submitted that payments by customers during a minimum period were payments by instalments. In view of my conclusions below, the issue of instalment payments does not arise in this case and I do not consider it further.

32. As to the conditions in [29] above, there was no dispute that TalkTalk supplied services for consideration in money pursuant to an agreement with its customers. The first three conditions were therefore satisfied. The dispute in this case concerned the fourth and fifth conditions, i.e. whether the agreement between TalkTalk and the customers included terms that allowed a discount for prompt payment.

33. Mr Hitchmough submitted that:

(1) there is no need for the prompt payment discount to exist in the context of a pre-existing contractual relationship; and, if that is wrong,

(2) the SPD payment option formed part of a pre-existing contractual relationship.

34. He contended that the requirement that goods or services are supplied on terms allowing a discount for prompt payment means no more than that the customer has the option of paying less if they pay earlier. That was the case with the SPD. In all cases, the customer had the option of paying a reduced amount for the services they would receive in the month ahead if they paid within 24 hours of receiving their bill or a higher amount if they paid later. The same services were being supplied for the same period and on precisely the same terms save as to payment. It followed that the services were supplied on pre-existing terms allowing for the SPD and paragraph 4(1) was engaged.

35. Mr Beal submitted that services were supplied under the terms agreed for that particular supply. The offer and acceptance of the SPD was a supervening agreement, which was wholly outside the written terms of the agreement contained in or evidenced by the Ts&Cs and which supplanted the customer's obligation to pay by direct debit for that month's services. Services billed in advance were supplied when TalkTalk received payment from the customer. Where the SPD offer was accepted, there were no terms allowing a discount for prompt payment because there was only one payment under the amended Ts&Cs which had to be made within 24 hours of receipt of the bill.

36. For paragraph 4(1) of Schedule 6 to the VATA to apply, a supply must be made "on terms allowing a discount for prompt payment". It is, therefore, crucial to identify the supply which is made and the terms on which it is made (see *Virgin Media Limited v HMRC* [2020] UKUT 100 (TCC) at [46] et seq). In this case, there is no difficulty in identifying the supplies made by TalkTalk. There is no doubt that the services were supplied on the terms contained in the Ts&Cs. The issue is whether there were any terms allowing a discount for prompt payment.

37. I consider that terms that allow a discount for prompt payment must provide for, at least, two payment dates: a standard due date for payment and an earlier optional payment date. The terms must then allow a discount if payment is made on the earlier date. I take this view because paragraph 4(1) implements (if only imperfectly) Article 79(a) of the PVD which provides that the taxable amount shall not include price reductions by way of discount for early payment. Accordingly, I interpret "discount for prompt payment" in paragraph 4(1) as referring to a discount for early payment.

38. In relation to services billed in advance, the FTT found, at [129], that the SPD offer was not a unilateral variation of the Ts&Cs but an offer by TalkTalk to vary them in relation to (a) the charges for the services; (b) the timing of payment; and (c) the payment method used by customers made on a month by month basis. The FTT held that the Ts&Cs were only varied for that month if the customer actually accepted the SPD offer for that month by paying 85% of the amount due within 24 hours of receiving the bill. Where that happened, the FTT concluded in [131] that the Ts&Cs were varied when the customer made the payment in accordance with the SPD offer which was also the time of supply of the services. The FTT found in [136] that the Ts&Cs did not contain any term under which a lesser amount was payable if payment were made earlier, i.e. allowing a discount for prompt payment. The FTT held in [144] that there was no contractual term allowing a discount for prompt payment unless and until the customer accepted the SPD offer by paying for the services within 24 hours of receipt of the bill. I agree with the FTT's contractual analysis.

39. In the case of customers who took up the SPD offer, the Ts&Cs were varied, for that month only, to reduce the amount payable for the services if payment of 85% of the amount billed was made within 24 hours of receipt of the bill, which act signified acceptance of the offer. Paragraph 4(1) only applied to reduce the value of supplies to the customers who did not accept it if the offer of the SPD was itself a variation of the Ts&Cs to allow all customers to obtain a discount for prompt payment if they paid the bill within 24 hours. Although TalkTalk could unilaterally change the Ts&Cs by giving its customers notice in writing and/or publishing the changes on the TalkTalk website, I do not consider that the SPD offer was a unilateral change to the Ts&Cs because it did not purport to make any changes to them and no revised Ts&Cs were sent to the customers or published on the website which incorporated the SPD offer. TalkTalk simply offered each month, and for that month only, to accept a lower payment than was due under the Ts&Cs if certain conditions were met. If the SPD offer was not a unilateral variation of the Ts&Cs, they remained the same unless and until the SPD offer was accepted by the customer making the payment in accordance with the offer. For those customers who did not accept the offer of the SPD, the Ts&Cs did not change. They were required to pay the billed amount in full and the payment was collected by TalkTalk by direct debit.

40. The Ts&Cs did not include any provision for a discount for a prompt payment unless and until they were amended by acceptance of the SPD offer. That means that the supplies of services to the (majority of) customers who did not accept the SPD offer were not supplied on terms allowing a discount for prompt payment. The services were supplied at the time when the payment was received by TalkTalk. For those customers who did not pay within 24 hours, the supplies were made on the terms of the original, i.e. unamended, Ts&Cs which did not include any term allowing a discount for earlier payment. It follows that TalkTalk was required to account for VAT on the full amount received from customers who did not accept the SPD offer. It is, of course, not suggested that TalkTalk should account for VAT on the full amount billed where the customer accepted the SPD offer and TalkTalk only received 85% of the amount billed.

41. I can deal with the services billed in arrears quite briefly. Section 6(3) and (4) provides that services are supplied on the earlier of when they are performed and when the supplier receives payment. Under Article 90, the time of supply is the date the supplier receives payment. The FTT held that section 6(3) applied and the services had already been supplied by the time that the SPD offer was made. It was accordingly not a discount for early payment but an offer to accept a lower sum than was due under the Ts&Cs. The FTT characterised that as a post-supply rebate and not a discount for prompt payment.

42. The same analysis of paragraph 4(1) and the contractual position applies to services billed in arrears as applies to services billed in advance. Whether the time of supply of the services billed in arrears falls to be determined under section 6(3) and (4) or regulation 90 is not determinative. The key point is that the services supplied to customers who did not take up the SPD offer were not supplied on terms allowing a discount for prompt payment.

43. For completeness, I record that I heard submissions on the interaction between the timing of the contractual variation and the time of supply, whether paragraph 4(1) applies where the terms allow for a lower sum to be paid immediately (for example, when the contract is made and before an invoice is issued and the services are performed) and also whether no prompt payment discount can attach where payment and supply were simultaneous. I have not found it necessary deal with those points because, on my view of the legislation and the facts, those points are not relevant in this case.

44. As I am dismissing the appeal against the decision of the FTT, it is not necessary for me to consider the points raised in the Respondents' Notice. Although I heard full argument in relation to those points, I have concluded that it would not be appropriate to engage in what would be only an obiter discussion of them.

DISPOSITION

45. For the reasons given above, TalkTalk's appeal is dismissed.

COSTS

46. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Upper Tribunal Judge Greg Sinfield

Release date: 13 September 2024