



TC02470

Appeal number: TC/2011/01002

VALUE ADDED TAX — discounted price sales — customers paying monthly fee for right to buy at discounted price — whether fee taxable if no goods bought — yes — appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NETTEXMEDIA.COM LIMITED

Appellant

- and -

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

Respondents

**Tribunal: JUDGE COLIN BISHOPP
MS REBECCA NEWNS**

Sitting in public in London on 24 September 2012

Mr Charles Apthorp, counsel, instructed by Prince Croft Willis, Chartered Accountants, for the appellant

Mr Bruce Robinson, officer of HMRC, for the respondents

DECISION

Introduction

1. The appellant, Nettexmedia.com Limited, is an internet-based retail supplier
5 of goods, using the trading name “Redsave”. A prospective customer viewing its
website, redsave.com, for the first time is offered a choice between paying what is
described as the normal retail price, or a lower “Redsave” price. A customer who
chooses to buy goods and elects to pay the lower price is offered a “Redsave
10 pass”, at no cost for the first 30 days, and thereafter at a price of £19.95 per
month. Even though the customer has benefited, free of charge, from the lower
price as many times as a purchase has been made in the 30-day period the
RedSave pass may be cancelled, during that period, without penalty. Once the 30
days have expired the monthly fee of £19.95 is charged automatically to the
customer’s credit card or bank account until the customer cancels the
15 arrangement, again without penalty. The Redsave pass may be used, so as to
access the lower price, as many times as the customer chooses during the first
month and during every month thereafter in respect of which the fee has been
paid.

2. It is agreed by the parties that the monthly fee charged to a customer who
20 makes a purchase during the month in respect of which that fee has been paid
represents the consideration for a taxable supply, the right to buy goods at a lower
than “normal retail” price. It seemed to us that they arrived at that conclusion by
different routes, but we do not need to explore the differences for present
purposes. They disagree about the VAT treatment of the monthly fee when no
25 purchase is made in the month in respect of which it has been paid.

3. Formally, the appeal is against a ruling of the respondents, HMRC, that
those fees are taxable at the standard-rate, and against an assessment for additional
tax of £1,049,703 for which, considering the supply to be exempt, the appellant
had not accounted between its starting to trade on 1 September 2006 and March
30 2010. We are not concerned with the detail of the assessment but only with the
underlying principle.

4. Before us, the appellant was represented by Mr Charles Apthorp, counsel,
and the respondents by one of their officers, Mr Bruce Robinson. We heard the
oral evidence of Mr Max Walker, the appellant’s projects manager, and of Mrs
35 Vicky Williams, the HMRC officer responsible for the disputed assessment. Mrs
Williams’ evidence dealt with the chronology of the matter, and with the
calculation of the assessment, but as neither of those matters are in issue before us
we shall not deal with Mrs Williams’ evidence below. We intend her no disrespect
in those circumstances.

40 5. Mr Walker explained that the appellant’s trading method was designed to
provide a different way of shopping in what was, at least at the time the appellant
started trading, a buoyant market. The monthly fee gave the subscriber a real
benefit, he said, since the Redsave price left the appellant with a very small mark-
up of only 2 to 5%, whereas the ordinary, higher, price was similar to that the

customer would pay on the high street. The discounted price was intended to be very attractive to customers, so much so that they would pay the monthly fee and continue to use the website to make further purchases. All they obtained in exchange for the fee was access to the Redsava price; the appellant provided no
5 magazine or other marketing material, or even email updates, and this was not a shopping club as that concept is generally understood.

6. Exhibited to Mr Walker's witness statement was a copy of the terms and conditions of the agreement between the appellant and a subscribing customer. Mr Apthorp drew our attention in particular to clause 28, which provides:

10 "28. If You have chosen to purchase goods at our low 'Redsave price', You will be automatically subscribed to a unique personal monthly electronic voucher, (known and described below as 'the Redsava Pass') which will grant you the low redsave price option, with the electronic voucher becoming activated during your shopping purchase. Each monthly
15 electronic voucher will be prepaid, but not be activated until the point when you return to purchase from Redsava following your initial 30 day free trial period...."

7. At clause 30 of the conditions appears the provision dealing with cancellation of the agreement by the customer after at least one month's fee has
20 been paid:

"Your cancellation will take effect at the end of the Monthly electronic voucher Billing Period ... which You are in when We receive Your cancellation form. We do not provide refunds for cancellations part-way through the Monthly Billing Period. If You have prepaid for the Redsava
25 Pass monthly electronic voucher for one or more months but have not shopped with Redsava.com since your first order, and then chose [*sic*] to cancel, there will be no refund for the correctly billed recurring monthly vouchers, even when expired, as these accumulated monthly fees will act as a compensation fee for redsave.com, having managed your monthly account,
30 ready to offer the low Redsava price options."

8. It was that clause, Mr Apthorp said, which was critical. When a customer used the Redsava pass in order to buy goods at a reduced price, the monthly fee was the consideration for the right, which the customer had exercised, to buy
35 goods at that reduced price. In other words it was part of the consideration for a supply of goods which had actually taken place. When, however, no purchase was made the customer had received no supply of goods; he had merely received, as the conditions indicated, the exempt service of the management of his account.

9. Alternatively the monthly fee represented a deposit, to be offset against a possible future supply of goods; but a deposit becomes consideration only when it is applied against the price of a supply of goods or services, or when the deposit is
40 forfeited. That approach is necessary because of the uncertainty as to its application when a deposit is received. Mr Apthorp referred us in this connection to the judgment of the European Court of Justice in *Société thermale d'Eugénies-Bains v Ministère de l'Économie, des Finances et de l'Industrie* (Case C-277/05) [2008] STC 2470. In that case the taxpayer, a hotelier, collected deposits
45 from guests reserving rooms. If the guest honoured the reservation, the deposit was used in part payment of the room charge. If he did not, the deposit was

forfeited. The Court held that the deposits so forfeited were not sums paid in consideration for the supply of services, and were accordingly not liable to VAT. The retention of the deposit was triggered by the client's exercise of the cancellation option made available to him, and the forfeited deposit served to
5 compensate the hotelier following the cancellation. Such compensation did not constitute the fee for a service and formed no part of the taxable amount for VAT purposes.

10. Similarly, said Mr Apthorp, the Federal Court of Australia had decided in *Qantas Airways Ltd v Commissioner of Taxation* [2011] FCAFC 113 that when an
10 intending passenger paid for a flight but then cancelled it in circumstances when he was not entitled to a refund, the fare which he had paid did not represent the consideration for the supply of travel, since he had not received such a supply.

11. The position here, said Mr Apthorp, was the same: the customer obtained in exchange for his monthly payment what Mr Walker described as a "passive electronic voucher waiting to be used and redeemed". At the point of purchase the
15 Redsave pass is "opened" and the lower price applied; in that situation the monthly fee forms part of the consideration for the taxable supply of goods. Where, however, the customer makes no purchase there is no supply and the monthly fee must represent something other than the consideration for a taxable
20 supply.

12. The respondents' case, as Mr Robinson put it, is that the monthly fee is nothing more nor less than the payment for the taxable supply of the right to purchase goods at discounted prices. It was immaterial whether the customer took advantage of that right; it was available to him, and therefore supplied, whether or
25 not he chose to use it. The position here is different from that in *Société thermale d'Eugénie-les-Bains* and in *Qantas Airways* since, there, what the customer paid was part or the whole of the consideration for the supply of the room or the flight. Since the room or the flight was not supplied, the payment became the consideration for something else. Here, the monthly fee did not represent the
30 whole or part of the payment for an intended supply of goods nor, despite Mr Walker's evidence, could it be described as payment for a voucher. The monthly fee was not offset against the price of any goods, it merely entitled the customer to buy such goods as he chose at a preferential price.

13. In our judgment Mr Robinson is right, and broadly for the reasons he gave.
35 The monthly payment, quite clearly, was not part payment for goods; it was of the same amount irrespective of the value of goods bought, and was payable (if the customer did not cancel) even if he bought no goods. No part of the payment was appropriated to the cost of the discounted goods; moreover, if the customer had already bought goods of such value that the difference between the ordinary retail
40 price and the Redsave price exceeded the value of the monthly fee, he was nevertheless able to continue buying at the Redsave price without having to pay an additional fee. The fee was not a payment made in order to reserve something and in our view it cannot be regarded as a deposit, as in *Société thermale d'Eugénie-les-Bains*, nor as full payment, as in *Qantas Airways*, since it was not
45 and could never constitute payment or part payment for the goods.

14. The forfeited payments in those cases could properly be considered to represent compensation to the hotelier or airline since they lost the opportunity of selling the room or the flight to another customer. The same cannot be said of the monthly payment here; however it is described in the terms and conditions it cannot realistically be regarded as compensation for a lost opportunity. The description of it in the terms and conditions as “a ... fee for redsave.com, having managed your monthly account, ready to offer the low Redsave price options” is a fair description of what it truly is, a fee paid in exchange for making available to the customer the right to buy at reduced prices. The insertion of the word “compensation” in place of the ellipsis does not alter the character of the payment, and does not turn it into compensation in the sense in which that word was used in *Société thermale d’Eugénie-les-Bains* and *Qantas Airways*.

15. Clause 28 of the conditions describes what the customer acquires in exchange for the fee as an “electronic voucher”, activated during a purchasing visit. Plainly it is not a face-value voucher within the meaning of Sch 10A to the Value Added Tax Act 1994, as it is not a voucher “that represents a right to receive goods or services to the value of an amount stated on it or recorded in it”, the definition of a face-value voucher which appears in para 1(1). It is, rather, a voucher (if it is a voucher at all) which entitles the customer to buy goods at a preferential price, but which has no pre-set value of its own. We see no material difference between what the customer receives in this case from what he received in *Leisure Pass Group Ltd v Revenue and Customs Commissioners* [2008] STC 3340, that is a pass which has no finite monetary value but may be used as often as the customer wishes during the period of its validity. Indeed, the pass provided in that case (which entitled the holder to free entry to a number of London attractions) was subject to some limitations, particularly a single use at each attraction, whereas the “voucher” in this case has no equivalent limitation.

16. As in *Leisure Pass Group*, the fee paid in this case represents the consideration for the taxable supply of the right to purchase goods at a preferential price. Whether or not the customer chooses to exercise the right is immaterial; he has paid for it. No part of what he pays is the consideration for the inchoate supply of the goods which he may or may not choose to buy. It follows that the appeal must be dismissed.

17. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision 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 that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

COLIN BISHOPP
TRIBUNAL CHAMBER PRESIDENT

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RELEASE DATE: 9 January 2013

