

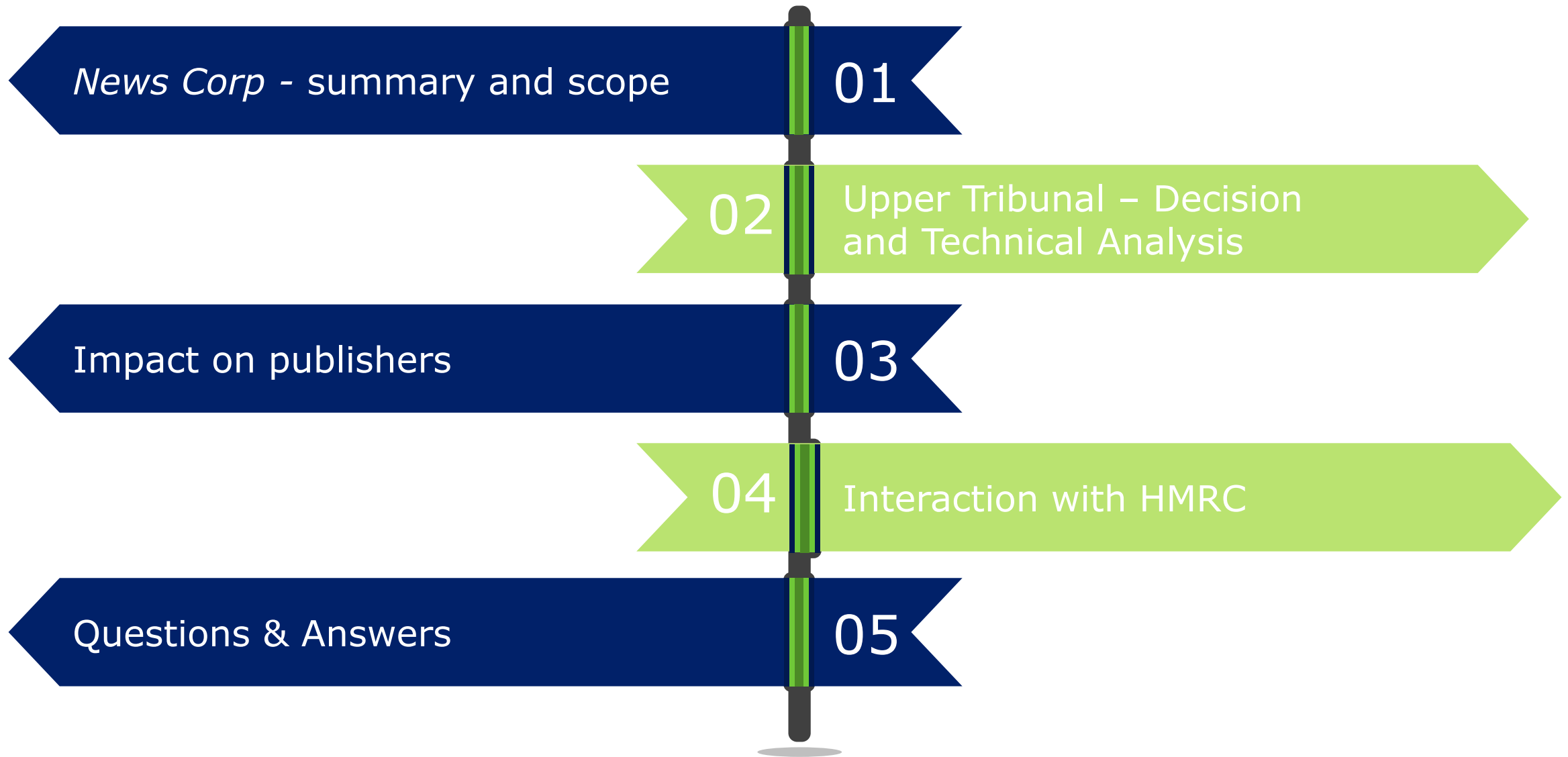


***News Corp* UK Upper Tribunal Decision: Professional Publishers Association**

Case summary and possible next steps for publishing businesses

18 February 2020

Agenda



News Corp: Summary and scope

Case summary and scope



News Corp wins zero-rating VAT digital newspaper case appeal at the Upper Tribunal (UT)

- In summary, the UT released its decision on 24 December 2019 in the case of *News Corp*, **finding for the taxpayer that its supplies of digital newspapers are capable of being zero-rated for UK VAT purposes** under Item 2, Group 3, Schedule 8 of the Value Added Tax Act (VATA) 1994.
- This binding decision presents a **significant opportunity** for taxpayers that supply digital publications such as e-books, e-newspapers, e-journals, e-magazines and other forms of digital publications, to consider whether the same technical and legal arguments can apply to its supplies.
- **Consider making a protective claim for over-declared VAT** to HMRC over the past 4 years.

Case summary and scope

In summary, the UT found that:

- **the digital versions are fundamentally the same or very similar to the print editions** – the UT accepted the First Tier-Tribunal findings of fact. In particular, the FTT was entitled to conclude that the digital editions are effectively the same as or very similar to the print editions. This was upheld by the UT.
- **Item 2, Group 3, Schedule 8 of VAT Act 1994 (VATA) is not limited to goods** – as there is nothing to prevent the zero-rating provisions applying to services. This is mainly because there is no specific provision or wording that excludes supplies of services within the zero-rating group in question.
- **the “always speaking” legal doctrine applies when interpreting the zero-rating provisions** – the UT confirmed that when interpreting the wording of the zero-rating provision in question you are able to take account of relevant changes which have occurred since the legislation was originally introduced (i.e. when digital services were not envisaged).
- **EU law is not relevant to interpreting the UK zero-rating** – HMRC sought to argue that the EU VAT provisions which allow reduced VAT rates to apply to print newspapers (and books etc.), but which specifically didn’t allow reduced-rating of digital newspapers and other electronically supplied services of publications meant that News’ case offended the EU law. HMRC argued this analysis was supported by the CJEU case law precedent in relation to E-books (i.e. specifically allowing for the reduced-rating of physical books but not digital versions). However, the UT confirmed that the EU provisions relating to the reduced rate of VAT are irrelevant when determining the application of the UK’s zero-rating provisions.
- **“rolling news” may not qualify for zero-rating** - the UT did continue to make the distinction between digital newspapers and rolling news websites, for example, and that such offerings might not satisfy the tests related to being a “newspaper”.
- **fiscal neutrality should not be considered** - as the UT found the digital editions to be “newspapers” for the purposes of Item 2, it did not consider the fiscal neutrality argument advanced by the taxpayer.



Impact of *News Corp* for publishers

Impact of *News Corp* for publishers

Key steps – a typical approach



Supply Chain and Product Assessment

- Carefully assess the supply chain for digital products – the legal relationship between the parties; and the nature of the transactions undertaken (e.g. “license to use”).
- Determine which party/parties, if any, are entitled to make the claim(s) and the commercial/contractual implications for other parties.
- Analyse each product in line with the facts and principles established in the *News* decision



Develop and assess the strength of a potential claim

- Highlight any gaps where gathering additional information and data would further support the position and consider the overall strength of the claim before proceeding.
- Anticipate areas where HMRC may seek to challenge and distinguish facts from the *News* case.



If basis exists - Prepare claim and appeal (as necessary)

Key considerations for taxpayers



Some of the key considerations that taxpayers should take into account when assessing this opportunity

- **Claim feasibility and mechanics** – per previous slide, to consider whether the products broadly fit within the *News Corp* fact pattern and decision. Information and data required to make a full and proper claim to HMRC.
- **Supply chain engagement and collaboration** – e.g. is it appropriate and beneficial for publishers to engage with supply chain parties such as online marketplaces and distributors?
- **The legal position** – in relation to contracts with online marketplace distributors, which party is entitled to make the claim for VAT and what does this mean for publishers?
- **Public Relations matters** – e.g. what is the internal appetite for publicity (e.g. in relation to possible litigation)?
- **Internal stakeholder management and managing the expectations** – i.e. a claim will likely take a long time to process and litigation could be on-going. Has the full **corporate group** considered UK sales of e-pubs?
- **Claim position in relation to other territories** – i.e. do other EU and non-EU countries have similar broad provisions to the UK in just stating that “newspapers”, “books” etc. are zero-rated without distinguishing between goods/services, print/digital?

Publisher supply chain considerations – routes to market



Direct sales: distinction between B2C and B2B?

- B2C sales – Pricing impact? Unjust enrichment?
- Entitlement to VAT on B2B sales?



Indirect sales: through distributors and online marketplaces

- In what capacity is the marketplace acting (principal, disclosed agent, undisclosed agent/commissionaire) – important to look at the contracts and be clear who is making the supply to the consumer (but this is likely the marketplace for VAT purposes as a result of Article 9a of the 282/2011 VAT Implementing Regulations – i.e. the marketplace provisions):
 - marketplace acting as a disclosed agent – a supply of agency services from the marketplace to the publisher – and a B2C sale from the publisher to the end consumer (unlikely to work for e-services as a result of 9A);
 - marketplace acting as an undisclosed agent/commissionaire (own name agent) – B2B supply to the marketplace and then a B2C supply from the marketplace to the customer.
- Need to also consider: what is being sold to/through the distributor/marketplace? is the marketplace established/based in UK? Mini-One-Stop-Shop? Subscription packages of goods and services?

Next steps: Interaction with HMRC

Next steps: Interaction with HMRC



Any HMRC appeal should not impact a protective claim: HMRC have requested leave to appeal against this decision but this should not prevent taxpayers from taking certain steps to manage a protective claim.

If this UT decision is upheld, the overpaid VAT that can be recovered is time limited. Businesses should consider reviewing the details of their supplies and conduct an analysis to ensure any claim is submitted to HMRC in time.



Submission of protective claim and likely HMRC actions: As HMRC are looking to appeal the decision of the UT to the Court of Appeal, it is likely that HMRC will reject claims. To protect the historical position, it will be necessary to file a protective appeal with the First-tier Tribunal. It is usually possible for a protective appeal to be stayed pending final resolution of a lead case, *News* in this instance.



Agreement with HMRC before applying VAT zero rate to relevant products prospectively:

Businesses could submit protective claims until the legal process has been completed with HMRC either accepting the UT's decision or failing to win the appeal case. Once this stage has been reached, HMRC are likely to clearly establish which products can be zero rated.

However, if the business has certain supplies which remain uncertain, the business could discuss this with HMRC and seek agreement to apply zero rating to the products prior to doing so.

Other considerations

Unjust enrichment



Unjust enrichment

- This occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust. It is a defence used by HMRC in order to prevent unjust enrichment when a claimant makes a claim. The burden of proof is on HMRC to show that payment or crediting of the claim would lead to the unjust enrichment of the claimant because they have passed the economic burden of the tax to their customers.
- Factors to consider include (but are not limited to):
 - customers are VAT registered;
 - customers are mainly businesses;
 - the business effectively charges the net 'market rate' for its supplies of goods or services plus VAT;
 - prices change after it is found that VAT should not have been accounted for;
 - the market in which the taxpayer operates is competitive;
 - the product is price inelastic;
 - product has very few close substitutes; and/or
 - the incorrect treatment has continued over a long period.

Appeals and deadline for appeals

Taxpayers can make a claim for 4 years of VAT accounted for. Deadline is 4 years from the end of the prescribed accounting period.

Should HMRC reject any claim, then an appeal to the First-tier Tribunal would need to be made within 30 days.

Any appeal can include a stay of proceedings pending final resolution of the *News Corp* dispute. No requirement to progress any litigation.

Bundled Supplies - Single v Multiple Issue



Apportionment

- Where the digital version is the same as the print version for VAT purposes, methods of apportionment will be affected.
- May need to revisit any existing agreements with HMRC or re-evaluate current apportionment percentages

Single v Multiple Supply

- How should the digital content supplied be viewed? Where a customer purchases the right to access smartphone, website and tablet editions, should they be seen as receiving a 'fused', single, composite supply of "access to the digital editions" or purchasing multiple single supplies?

Questions & Answers?



This publication has been written in general terms and we recommend that you obtain professional advice before acting or refraining from action on any of the contents of this publication. Deloitte LLP accepts no liability for any loss occasioned to any person acting or refraining from action as a result of any material in this publication.

Deloitte LLP is a limited liability partnership registered in England and Wales with registered number OC303675 and its registered office at 1 New Street Square, London EC4A 3HQ, United Kingdom.

Deloitte LLP is the United Kingdom affiliate of Deloitte NSE LLP, a member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"). DTTL and each of its member firms are legally separate and independent entities. DTTL and Deloitte NSE LLP do not provide services to clients. Please [click here](#) learn more about our global network of member firms.

© 2020 Deloitte LLP. All rights reserved.