[2011] UKFTT 743 (TC)

TC01580

Appeal number TC/2009/16528

VAT. Zero rating. Aircraft for use of disabled persons. Care. Palliative care. Designed for use of handicapped persons (whether ab initio or subsequent to manufacture). Personal use.

FIRST-TIER TRIBUNAL

TAX

THE BRITISH DISABLED FLYING ASSOCIATION **Appellant**

- and -

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

TRIBUNAL: GERAINT JONES Q. C. (JUDGE)
DR. CAROLINE SMALL (MEMBER)

Sitting in public at 45 Bedford Square, London WC1 on 29 September 2011.

Mr. Beal, counsel, for the Appellant

Miss Shaw, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. In 2008 the appellant purchased two light aircraft one of which had been adapted for use by disabled persons prior to purchase and the other being adapted subsequent to purchase. In respect of the aircraft that was adapted subsequent to purchase we should say immediately that we accept the evidence to the effect that the only reason why it was not adapted prior to purchase is that, understandably, the vendor did not want the aircraft adapted prior to completion of the contract of sale, for rather obvious reasons. Nonetheless, the evidence satisfies us that it was the appellant's intention at the time when it negotiated the purchase to have the aircraft adapted immediately upon becoming its owner and, in fact, did so. The fact that the adaptations were to take place were, we find as a fact, in the contemplation of all relevant parties at the time of purchase.

2. The appellant brings this appeal against a decision of HMRC of the 14 October 2009 whereby it decided that the supply to the appellant of aircraft adapted for the carriage and use of disabled persons is a standard rated supply for the purpose of the Value Added Tax Act 1994. The appellant argues that it should have been zero rated.

3. The British Disabled Flying Association is a registered charity regulated by the Charity Commission. The charity was established in 1994. Its Objects are set out at section C of its Constitution. They are admirably concise, being : *"To promote and provide education, recreation and leisure time activities for disabled persons in particular by providing opportunities in aviation with the object of improving the conditions of life."*

4. The two aircraft are Piper single engine aircraft, one having been bought on or about 19 February 2008 for £26,500 with VAT of £4637.50 paid and the other having been bought on or about the 23 June 2008 for £37,500 with VAT of £6562.50 being paid. It is those two VAT sums that are in contention in this appeal.

5. At tab 4/36-38 in the Trial Bundle appears a document headed "Joint Statement of Agreed Facts". It recounts that on the 1 July 2008 Aviation Rentals wrote to the respondents requesting approval for zero rating of the supply of the aircraft with the index number G-BSYY (which had been modified prior to purchase), being the aircraft purchased on or about the 23 June 2008. The respondents rejected that request and said that the aircraft did not fall within the meaning of a motor vehicle or (unsurprisingly) the definition of a boat substantially and permanently adapted for use by handicapped persons; and thus was not eligible for zero rating. The appellant had not argued that its aircraft was a boat. A reconsideration of that decision was undertaken but was determined against the appellant.

6. It should be noted that one of the Agreed Facts is as follows:*"The BDFA provides free and subsidised flying lessons for terminally and chronically ill and disabled persons. It has been accredited as a registered training facility by the Civil Aviation Authority and to the best of the BDFA's knowledge is the only charity in the United Kingdom, which works with people who have disabilities in the aviation field."* We

think that that means that it is the only charity in the aviation field that works with people who have disabilities.

7. The statement of Agreed Facts also sets out that the appellant has incurred associated maintenance and repair costs for the aircraft on which VAT has been paid. Invoices are mentioned in that paragraph, being paragraph 8 of the statement of Agreed Facts. It was common ground between Miss Shaw and Mr. Beal that if the appellant succeeds in its primary case, concerning the VAT paid upon purchasing the aircraft, it must follow that it succeeds in respect of any VAT paid on maintenance costs. For that reason, we will not hereafter refer to the maintenance costs again, it being agreed that they stand or fall with our decision relating to the purchase of the aircraft.

8. We were taken to section 12 of the Trial Bundle, particularly pages 81-89 thereof, as Mr Beal wanted to make it clear to us that part of what the appellant delivers to disabled persons is properly to be seen as (palliative) care. We have read each of the references in the pages mentioned above. We note that at page 82, the Press Pack put out by the appellant indicates that "last year," over 300 disabled people experienced 45 minute trial flights, nine disabled people went solo and five completed pilots' licenses. The charity has four centres across the United Kingdom with Lasham being its main base. At page 83 the following statement or comment, which we entirely accept, appears:*"For a disabled person it can seem impossibly beyond their reach to do something as extraordinary as handling the controls of an aircraft in flight. Aerobility is run by people who know too well about the frustrations and challenges of living with a disability. The charity turns the dream of flying into an exhilarating and fulfilling reality and in doing so makes a genuine impact on people's lives."* Page 84 sets out various facts and chimes with the evidence given by Messrs Catchpole and Miller-Smith. Mr Catchpole gave evidence about the availability of flying experiences and learning to fly doing a great deal for the confidence of many people, including badly injured ex-servicemen undergoing a convalescent period. Mr Miller-Smith gave evidence in accordance with his witness statement and went on to say that the users of the facilities made available by the charity almost invariably increase in self esteem and that during the week prior to the hearing he had been working with soldiers wounded in Afghanistan, where he found it palpable that they gained great benefit from the experience of flying. He emphasised that the fact that the opportunity was there for them to fly, given their level of disability, was itself a matter of wonderment to many of them. We were impressed by his evidence when he said that such people often *"develop in front of you."* He emphasised that it plays a part in motivating people to realise the things that they can do, notwithstanding a disability or disabilities, rather than thinking about the things that they cannot do. In that sense there can be little doubt that the facilities and opportunities provided by the charity are properly to be characterised as palliative care and as care beneficial to the psychological condition of disabled people and, we suspect, particularly so in respect of people who have suffered substantial injuries or disablement at a comparatively young age, for example, ex-servicemen injured in combat and people involved in life changing accidents.

9. We were taken to the contractual documents in respect of the purchase of the aircraft. The main distinction is that the aircraft with the index number G-BRFM was adapted shortly after purchase (see above), whereas the aircraft with the index number G-BSYY had been modified or adapted prior to purchase. Although we do not consider that anything significant turns upon the precise technical nature or extent of the modification or adaptation, we should nonetheless mention it. The modification is, in engineering or technical terms, comparatively simple. It does not extend to modifying these small aircraft so that a wheelchair can enter the aircraft or be positioned where the pilot would sit. The aircraft are simply too small to allow that to happen. Instead, if a wheelchair-bound person is to be carried in or to fly the aircraft, a hoist mechanism is used to allow that person to enter the aircraft. The actual modification allows those without proper use of their legs to use their hands instead to control the aeroplane by using hand controls in the place of the controls normally activated by the use of legs or feet. The adaptation can be removed so that the aircraft can be flown by an able bodied pilot but, we were told in evidence, and accept, that does not happen except when the aircraft is being flown by an engineer, perhaps when being serviced or being tested after the service. Some (if not all) of the instructors used by the appellant are themselves disabled.

10. The reality of this appeal is that there have been virtually no facts in issue. We heard evidence from Mr Catchpole whose witness statement appears at tab 15 in the Trial Bundle. It stood as his evidence in chief. He was not cross examined. The next witness was Mr Steve Rogers, whose witness statement appears at tab 17 in the Trial Bundle. His statement stood as his evidence in chief. He was cross examined and said that there is no aircraft manufacturer who produces aircraft specifically for disabled people and, moreover, there is no factory modification that can be requested whilst an aircraft is being manufactured, so as to make it suitable for flying by disabled people. He emphasised that the modification work has to be undertaken post manufacture and that it is not undertaken by Piper, the aircraft manufacturer. He described the nature of the modification undertaken more eloquently than I have summarised it above. The witness statements of Mr Regnart, Mr Albon and Mr Williams at tabs 13, 14 and 16 respectively, were read and form part of the evidence.

11. The next live witness was Mr Miller-Smith, whose witness statement appears at tab 12 of the Trial Bundle. His witness statement stood as his evidence in chief. In supplemental answers he said that the appellant aims to make flying accessible to as many disabled people as possible and in respect of people who are unable to pay for trial flights, the charity is able to offer a number of such flights free of charge. He was cross examined not in the sense that anything that he had said was challenged, but simply to elicit further information. It was then that he said that the modifications to the aircraft are not undertaken by its manufacturer and that the modifications do not extend to allowing a wheelchair to enter the cockpit. He said that experience showed that those taking up the facilities provided by the appellant were an equal mix of experienced and novice aviators.

12. We are entirely satisfied that each of the witnesses was honest and reliable and that we can rely upon the evidence of fact given by them and each of them. Miss Shaw did not submit otherwise.

13. This appeal turns, in reality, upon the legal arguments that were advanced by each side. We have been provided with a bundle of authorities. Some of those cases are said to establish legal principles whereas others, in the strict sense, are not authorities in any way whatsoever, but are examples of the way in which different Tribunals or Courts have decided particular cases, on the facts specific to each such case. Some of them are no more than examples of which side of a sometimes very fine dividing line, specific factual situations fall.

14. Each counsel has provided a detailed Skeleton Argument, each seemingly as persuasive as the other. In one sense that has made our task harder, but we are grateful to counsel for the detailed and well reasoned arguments set out therein.

15. So far as domestic legislation is concerned the appellant's case can be summarised by saying that the appellant submits that the aircraft are subject to zero rating because they fall to be categorised as an "exempt supply" by reason of Groups 7, 8, 12 and/or 15, of Schedules 8 or 9 to the 1994 Act. Alternatively, argues the appellant, given that the United Kingdom is obligated to carry into effect the Council Directive (EC) 2006/112/EC of 28 November 2006, effect must be given to that Directive, insofar as the domestic legislation, purporting to give effect to it, fails to do so. We did not understand the respondents to dispute that proposition; their dispute was with the proposition that the applicable domestic legislation fails to implement the requirements of the Principal VAT Directive.

16. Mr Beal's Skeleton Argument mentions item 9, group 7, Schedule 9 to the 1994 Act on the basis that it might be an applicable provision that assists the appellant. We disagree. It is perfectly clear that item 9 applies only to supplies made by a charity and not to a charity. Thus, it has no application.

17. Next, Mr Beal relied upon item 11, group 7, Schedule 9 to the 1994 Act, which reads as follows : *"The supply of transport services for sick or injured persons in vehicles specially designed for that purpose."*

18. In respect of this item the respondents did not argue, through Miss Shaw, that an aircraft is not a vehicle. Rather, the argument was that if the appellant provides transport services for sick or injured persons in vehicles specially designed for that purpose, it is that supply of transport services that is zero rated and thus item 11 has no bearing upon whether or not zero rating applies to the supply of the aircraft to the appellant. We consider there to be force in that argument given the way in which Group 7 is framed, because Group 7 is all about zero rating when specified services are provided to certain categories of person who provide such transport services. It is not about the supply of hardware to the persons providing those services. In our judgement, it has no application on the facts of the present case.

19. Next, Mr Beal argued that Group 12 of Schedule 8 to the 1994 Act applies to *"The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of ..... (g) equipment and appliances not included in paragraphs (a) to (f) above, designed solely for the use by a handicapped person."*

20. The argument advanced on behalf of the appellant is that the subject aircraft come squarely within the expression "*equipment*", are not included in the preceding paragraphs, and are designed solely for use by handicapped persons.

21. Miss Shaw's response to that argument was that for an item of equipment to be designed solely for use by a handicapped person, it must be so designed prior to, or at the point of, its manufacture and that Group 12, item 2(g) cannot include any equipment that is designed solely for use by a handicapped person by reason of an adaptation or modifications made to it, subsequent to the manufacture of that equipment. It was also argued that this item does not apply because the appellant charity does not make the equipment available to handicapped persons for their personal use.

22. We were intuitively or the view that item 2(g) does apply to equipment designed solely for the use by a handicapped person regardless of when it became so designed. In our judgement any other reading on this provision would be unrealistically restrictive. There can be no good reason, either as a matter of statutory construction or common sense, for an item not to be designed solely for use by a handicapped person simply because a factory manufactured item, not so designed, has then been subject to modifications to make it designed for use by handicapped person. In our judgement the statutory saving from VAT made by item 2(g) does not look to the time of design, but to the fact of design. It looks to whether a particular item of equipment is designed, not whether it was historically designed, for use by a handicapped person. It looks to the quality of the item as used by the handicapped person, not the quality of that item when it left the factory.

23. We are supported in our judgement that Mr Beal's argument on the foregoing issue is to be preferred when we refer to the judgement of Sir Stephen Oliver Q.C. in *The Cirdan Sailing Trust (2004/18865* where the Tribunal specifically had to consider whether a ship was a "qualifying ship" for the purpose of Item 1 of Group 8 of Schedule 8 of the 2004 Act. It is clear from his judgement that in that case HMRC had argued that because neither of the ships then in question had been designed or adapted for use for pleasure or recreational use, the exemption did not apply. It is equally clear from the judgement that HMRC argued that for that particular zero rating provision to apply the ships needed to have been originally designed for the relevant use. The appellant in that case had argued that the question was to be answered by reference to the then physical status of the ship or boat, with the contrary argument being that that interpretation would render the words "or adapted" redundant.

24. The Tribunal decided that for a boat or other item to be "designed" for a particular purpose one does not look at the original design or the original purpose of its manufacture but, rather, at its physical condition at any given time. The Tribunal placed some emphasis on the fact that the provision that it was then considering was framed in the present tense. The Tribunal considered that the vessel under consideration in that case had to be looked at in its then current state rather than its state or condition the moment that it left the ship builder's yard.

25. When we return to item 2 of Group 12 we note that 2(g) is also framed in the present tense and does not look historically at the purpose for which the item was originally designed or manufactured. Thus, we do not consider that the first objection to the applicability of item 2(g), argued by Miss Shaw, defeats the claim for zero rating put forward by the appellant.

26. Miss Shaw's second argument was that the supply by the charity making the equipment or item available to a handicapped person must be for that person's domestic or personal use. She argued that it was certainly not for domestic use; a proposition with which Mr Beal did not disagree. The real issue is whether the supply, by the charity to the handicapped person, is for his personal use.

27. The expression "personal use" could refer, as was argued by Miss Shaw, to an item of equipment that is made available to a given handicapped person for his exclusive use. In other words, it is argued that it applies to an item that is made available to a handicapped person and which he can, in ordinary language, claim to be his own item of property even though he may not have a proprietary interest in it. In our judgement if Parliament had intended this provision to be that restrictive, it would have said so by expressly providing that any item so provided had to be for the exclusive use or substantially for the exclusive use of the handicapped person to whom the equipment has been supplied. In our judgement, we have to give the words used by Parliament their plain and ordinary meaning absent any compelling argument that Parliament intended them to have some other, more artificial, meaning.

28. The evidence, which we accept, is that when an aircraft is used by a handicapped person, that person has to enter into an agreement with the appellant, whether or not that involves the payment of a fee. Our understanding is that those who have the ability to pay, will pay an appropriate fee whereas, on occasions, some people will be provided with the use of the equipment without any fee being payable. Upon any analysis each person so permitted to use an aircraft, enters into either a contractual or gratuitous licence giving him the right to the temporary possession and use of a chattel. The use may, by reason of provisions in that licence, be restricted or circumscribed as one might expect when a piece of equipment requiring specialist skill for its safe use, is involved. Nonetheless, that is simply a restriction upon what the licensee can do and, maybe, the circumstances in which he can do it, whilst that item of equipment is licensed to him.

29. The issue then becomes whether that is personal use within the meaning of this provision. We are in no doubt that it does amount to personal use. Item 2(g) does not refer to permanent or even semi-permanent personal use. It simply refers to use that is personal, without providing that such personal use must inure for any particular period of time. If we were not considering aircraft we think the position would be plainly beyond argument. For example, if the item of equipment under consideration was a kidney dialysis machine, rather than an aeroplane, we have no doubt that it would properly be said that whilst that machine is being used by any given individual, it is being provided or licensed to that individual for his or her personal use. The antithesis of "personal" is "impersonal" or "non-personal". If the matter is looked at from that perspective, there can be no doubt that the use is personal, even though it

may be temporary or even brief (in the sense that a person may be a contractual licensee with possession of the aeroplane for only 45 minutes or one hour at any one time).

30. Furthermore the use of the phrase *"personal use"* may be no more than the antithesis of *"business use"*. We can readily understand why there should be no zero rating on equipment made available for business use.

31. Further, use of the equipment does not require exclusive use for it to be personal use. A person has personal use of his motorcar even though he may permit other members of his family to drive it on occasions or if he uses it to transport not only himself, but passengers also.

32. In our judgement this appeal must succeed on the basis that the supply does come within the zero rating provided by item 2(g) of Group 12 in Schedule 8 of the 2004 Act.

33. In deference to the other arguments that were advanced we consider them, albeit more briefly. Mr Beal argued that by reference to Schedule 8, Group 15, item 5 the aeroplanes amounted to the supply of relevant goods to an eligible body which is a charitable institution providing care for handicapped persons. The Notes to Group 15 provide that an "*eligible body*" includes "*a charitable institution providing care or medical or surgical treatment for handicapped persons.*" Note 4B provides that a "*relevant establishment*" means *"(b) an institution which is approved, licensed or registered in accordance with the provisions of any enactment or Northern Ireland legislation."* Mr. Beal points out that the appellant is registered in accordance with the Civil Aviation Act 1982 and the Charities Act 2006. Thus, he argues, it is within that definition so that it is a "*relevant establishment*". It is to be noted that that provision does not use the expression "*establishment*" as synonymous with premises or buildings. In that way the legislature has not used the expression "*establishment*" in what might be considered to be its ordinary meaning, but has preferred to ascribe to it a specific statutory meaning or interpretation.

34. Accordingly, we are persuaded that the appellant comes within the meaning of "*an institution*" and, if it provides care, it does so "*in a relevant establishment*".

35. In our judgement, the more difficult issue is whether the appellant "*provides care or medical or surgical treatment"*. The respondents contend that those words must be read *sui generis*, notwithstanding the use of the disjunctive "or".

36. The appellant's argument is that it provides palliative care which is important to and supportive of people who have suffered psychiatric or psychological harm. The witnesses from whom we heard placed emphasis upon the fact that the provision of equipment for disabled persons to undertake flights, whether flown by a licensed pilot or by flying the aircraft themselves (whether as a trainee or a licensed pilot), provides lifetime experiences and demonstrates to disabled persons that the effect of their respective disabilities may not be to place lifetime limitations upon them, as they may have envisaged. Indeed, part of the exercise is to demonstrate to them that they are

capable, with suitable assistance and adaptations, of undertaking a range of activities that they may have thought were closed to them. We can understand the extent to which that can motivate a disabled person; beneficially affect that person's psychological well-being; and give fresh hope and even expectation concerning actual or potential achievements for the future.

37. The primary question remains : is that "care"? We suspect that 50 years or so ago the answer to that question might have been in the negative. At a time when a more holistic approach is taken to healthcare, which looks not only to physical well-being, but also to mental health and psychological health, we are persuaded that the answer, in 2011, should be in the affirmative. In arriving at that conclusion we were impressed by and accept the evidence from the lay witnesses, albeit not expert medical evidence, concerning the beneficial affects upon disabled persons and, in particular their psychological condition. In one sense the fact that the evidence comes from lay witnesses carries greater weight because if a layperson is aware of and recognises the palliative and psychological benefits obtained by persons using the appellant's facilities, it is likely that those benefits must be more readily apparent and palpable, than if they had simply been noticed by an expert doctor trained to know what he is looking for.

38. Further arguments were advanced. One was that because the European Communities Act 1972, by section 3, enforces European Union rights, the principle of equal treatment and, possibly, fiscal neutrality, requires that aircraft should be treated no less favourably than boats (whether motorised or not) at item 2(i) of Group 12 in Schedule 8. We were not persuaded by that argument, but need say no more about it because, on the basis of our foregoing conclusions, this appeal must succeed. That is not to say that that matter could not be re-visited by way of a Respondent's Notice if this litigation proceeds to a higher Tribunal.

39. 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.

Decision.

Appeal allowed.

The appellant is entitled to recover the VAT paid on the subject aircraft with interest thereon, the supplies having been zero rated.

The appellant is entitled to zero rating upon its costs of servicing, maintaining and repairing the subject aircraft.

TRIBUNAL JUDGE
RELEASE DATE: 15 November2011