



TC05413

Appeal number: TC/2015/06774

VALUE ADDED TAX – zero rating – transport – transport of passengers – whether supply of yacht and skipper related to the transport of passengers within item 4(a) of Group 8, Schedule 8 Value Added Tax Act 1994 – yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAILING PROJECTS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ROBIN VOS
DAVID BATTEN**

Sitting in public at Southampton Magistrates Court on 21 September 2016

Mr Mark Burke of Abbey Tax for the Appellant

Mr Les Bingham, officer of HM Revenue and Customs for the Respondents

DECISION

Background

1. The appellant, Sailing Projects Limited (SPL) is appealing against HMRC's decision that its supply of a yacht and skipper to an associated company, Adventures At Sea Limited (AAS) does not relate to the "transport of passengers" within item 5 4(a) of Group 8, Schedule 8 to the Value Added Tax Act 1994 (VATA) and therefore is not zero rated and should instead be standard rated.

Late appeal

2. HMRC originally notified its decision to the appellant on 24 August 2015. The appellant requested a review and the result of the review was notified to the appellant 10 on 16 October 2015. The appeal should therefore have been lodged by 15 November 2015. In fact, the appeal was submitted on 19 November 2015.

3. The fact that the appeal was late was principally as a result of the appellant's agent omitting to attach HMRC's decision letter and review letter to the notice of appeal which meant that it was returned and had to be resubmitted. 15

4. HMRC did not object to the appeal being lodged out of time.

5. Given the very short delay and the reasons for it, we decided to allow the late appeal.

The evidence and the facts

6. The evidence consisted of a bundle of documents and correspondence produced 20 by the appellant, a witness statement of Mr Paul Stringer, the owner and director of SPL together with oral evidence given by Mr Stringer at the hearing. On the basis of this evidence, we find the following facts.

7. Mr Stringer incorporated SPL on 11 October 2013. SPL was registered for 25 VAT on 24 February 2015 with effect from 1 December 2013.

8. Mr Stringer incorporated a second company, Adventures At Sea Limited on 13 November 2013. AAS is a company limited by guarantee. Although it is not a registered charity, it is not run to generate a profit. AAS is not registered for VAT.

9. AAS provides a number of activities revolving around sailing ranging from the 30 Duke of Edinburgh Award Gold Residential standard to "milebuilding" – i.e. building up experience and sailing miles. Although, in the past, it offered the possibility of obtaining specific qualifications such as the International Certificate of Competence, this was not its main focus and is not something which it continues to offer today.

10. SPL contracted with a third party for the use of a yacht. SPL then entered into 35 an agreement with AAS to supply the yacht and a skipper to AAS. In return, AAS agreed to pay SPL a monthly fee.

11. Mr Stringer gave evidence that SPL retained responsibility for operating the yacht, ensuring the safety of all those on board and complying with any other relevant shipping regulations. This evidence was not challenged and we therefore find as a fact that SPL did indeed carry out these responsibilities.

5 12. Any element of sailing training is carried out by AAS and not SPL.

13. The yacht has a carrying capacity of ten or more passengers. It is not a “qualifying ship” within the meaning of item 1, Group 8 of Schedule 8 VATA.

10 14. The appellant provided some sample entries from the yacht’s log. These are examples of two five-day trips which show a planned itinerary involving various stops along the Hampshire coast or at the Isle of Wight for lunch or to berth overnight. We accept that this is representative of a typical voyage undertaken by SPL for its customer, AAS.

The law

15 15. The question for the tribunal is whether the supplies made by SPL should be zero rated. This will be the case if the supplies fall within any of the descriptions in Schedule 8 VATA.

16. Item 4 of Group 8, Schedule 8 VATA identifies the following as qualifying for zero rating:

“4 Transport of passengers –

20 a) in any ... ship ... designed or adapted to carry not less than 10 passengers”

17. It is agreed by the parties that the yacht in question is designed to carry not less than 10 passengers. The only question therefore is whether the activities of SPL can be described as the “transport of passengers”.

25 18. The only authority we were referred to was the decision of the VAT tribunal in the *Cirdan Sailing Trust v The Commissioners of Customs and Excise* (VTD 18865; [2004] V.&D.R. 501 – there was an appeal to the High Court but this dealt with a different point).

30 19. Cirdan provided sailing trips/training for groups of young people. The tribunal in that case found that the supplies made by Cirdan were of passenger transport. This was principally on the basis that the young people were passengers and not crew.

20. There are no significant legal principles to be drawn from this case, which is in any event not binding on us. The tribunal did however set out [at 6] its approach to the question it had to decide as follows:

35 “What is Cirdan and what activities does it carry on? To whom does Cirdan make its supplies? What is the nature of those supplies?”

21. These are of course all questions of fact and we have made findings in relation to certain of those facts.

22. Both parties draw support from comments made by the tribunal in Cirdan and so we turn now to the parties submissions.

5 **The appellant's case**

23. Mr Burke's primary submission on behalf of the appellant is that the nature of the activities carried on by AAS is irrelevant to the VAT treatment of the supplies made by SPL. Whilst there may be an element of education/training involved in AAS's activities, SPL's job is simply to transport AAS's customers along the route required by AAS. The supply of the boat and the skipper by SPL is solely for this purpose – i.e. the transport of passengers.

24. Although the agreement between SPL and AAS only refers to the supply by SPL of a "sailing vessel with crew" and the invoices issued by SPL to AAS refer to a "skippered yacht charter", with neither document referring to the transport of passengers, neither the supply of a sailing vessel with crew nor a skippered yacht charter is, says Mr Burke, inconsistent with the transport of passengers.

25. Mr Burke referred us to a number of pieces of guidance produce by HMRC as support for his position:

(1) VTRANS110340 states:-

20 "however, where a yacht is chartered with crew for the transport of passengers (for instance, a supply on charter by a yacht owner or operator to a holidaymaker for a holiday cruise), we accept that the supply amounts to a supply of passenger transport services."

25 (2) VATPOSS11400 provides:-

"Hire with Crew

30 Where the supply is of a ship or aircraft with a crew under a charter contract the supply is first and foremost a supply of the hire of a means of transport; however, we will permit the supply to be treated as transportation if the parties to the charter wish it to be.

35 Where transport is hired along with a driver, pilot, crew or operator other than under a charter contract this is normally regarded as a supply of passenger transport or freight transport services."

(3) VTRANS030500 tell us that:-

"round trips or excursions by boats, without other facilities, on the open sea or other waterways to which the public have free

and unrestricted access are zero rated, providing the general conditions of item 4 are met.”

26. Mr Burke also drew attention to the similarities between the services being provided by Cirdan and the services being provided by SPL and in particular the following:-

- (1) SPL’s main income is the charter fees it receives from AAS.
- (2) SPL is responsible for the safety of the participants.
- (3) SPL is required to have the yacht ready and available at an agreed place in time.
- (4) The charter group/AAS chooses the destinations.

27. The main difference between Cirdan and the present case identified by Mr Burke is that Cirdan undertook responsibility for all aspects of the sailing trip including education whereas, in the case of SPL, it was only responsible for the transport of the passengers. AAS was responsible for the other aspects such as any education or training.

28. Even if the activities of SPL and AAS were carried out together (which Mr Burke says they should not), Mr Burke contends that the position would be similar to Cirdan in that AAS’s objective is not just to train people in sailing but also to develop skills such as teambuilding.

29. We have already mentioned the extracts from the yacht’s logbooks. Mr Burke submitted that HMRC had not given these logs sufficient weight as, in his view, they clearly show that SPL was required to transport the participants from one place to another. He also pointed out that, following the production of the logs, HMRC appeared to change its view in that it dismissed the logs on the basis that:

“the supply by Sailing Projects is an artificial construct”

and

“the role played by Mr Stringer – that of both yacht skipper and training provider – removes the need for Sailing Projects to exist”

30. At that point, HMRC was effectively trying to say that SPL should be ignored and that there was a single supply by AAS. Mr Bingham however confirmed that this was not the basis on which HMRC’s case was put to us at the hearing.

HMRC’s submissions

31. Mr Bingham invites us to find that the supplies made by SPL are not of passenger transport. He relies in particular on the agreement between SPL and AAS which refers only to the supply of a sailing vessel with crew and does not mention the

transport of passengers. He says that this written agreement should not be ignored, particularly as it was the basis on which SPL applied for VAT registration.

32. Mr Bingham also referred us to the insurance certificate for the boat. This was amended in July 2015 (i.e. during the course of the enquiries) to insert a sentence stating that Sailing Projects provides “passenger transport services to Adventures At Sea who in turn provides sail training”. The previous insurance certificate which was issued on 8 June 2015 did not contain such a statement and indeed did not refer to passenger transport at all.

33. In Mr Bingham’s view, the participants (for want of a better word) should, (unlike in Cirdan) be treated as crew and not passengers. This is on the basis that, in Cirdan, it was clear that the main reason why the Tribunal concluded that the young people were not “crew” was that the participants were under no obligation to participate in any sailing training activities whereas, Mr Bingham argued, the participants in the activities provided by AAS clearly signed up with sail training as their main purpose and it was therefore very unlikely that they would not be participating in these activities from the moment they stepped abroad.

34. In support of this, Mr Bingham referred to the description contained on AAS’s website of the services it provides, as follows:

“Duke of Edinburgh Award Gold Residential

A five day course from Sunday evening to Friday afternoon. Participants sail the full extent of the beautiful Solent staying aboard overnight. A lovely way to achieve Gold Residential. Inexperienced participants can take the ‘Introduction to Yachting’ course, those with a solid background in sailing can go for the International Certificate of Competence.

International Certificate of Competence (ICC)

Increasingly required in the Mediterranean and elsewhere. We offer this qualification on an ‘ad hoc’ basis to suit the needs of the individual sailor, it is not a scheduled course – it happens to suit your timings. We can offer one day to as long as it takes at the rate of £350/day. Solent based.

Boat Handling/pre-flotilla brush-up

Everyone gets rusty – this is a chance to polish up your boat handling and sailing skills when it suits you at a realistic cost. Solent based.

Milebuilding Club

A wonderful opportunity to sail with a regular group to build experience and miles. Based on the Hamble we sail the Solent and surrounding waters.”

35. On the basis of this, Mr Bingham invites us to find that what SPL in reality supplied was a yacht with a skipper in order to enable AAS to carry out the sail

training it had undertaken to provide to its customers – i.e. the supply is the hire of a boat with crew and not passenger transport.

36. As far as the ship's logs evidencing the various stops made are concerned, Mr Bingham's view was that these showed only where the vessel went and do not alter the fact that the purpose of the entire voyage was still training.

What activities does SPL carry on and to whom does it make its supplies

37. During the period in question, SPL's only activities consist of renting the yacht from its owner and then making it available with a skipper to AAS. SPL had responsibility for operating the boat, ensuring the safety of those on board and otherwise complying with all shipping regulations.

38. SPL's obligation was to sail the yacht (with AAS's customers on board) along a particular course determined by AAS. During the voyage, AAS provided training and instruction on sailing and, at the various planned stops, provided other activities for its customers.

39. There was no contractual or other relationship between SPL and AAS's customers. Indeed, Mr Burke made the point that AAS's customers are probably unaware of the existence of SPL. It therefore seems clear to us that any supplies made by SPL are to AAS and not to AAS's customers.

40. However, in our view, this does not help to answer the question as to whether the services supplied by SPL consisted of the transport of passengers. It is perfectly possible for one person to contract with another to transport passengers on behalf of the other person. For example, a school may hire a coach to take its pupils on a school outing. There is no contractual relationship between the coach company and the pupils but it is still clearly providing passenger transport services.

41. In practice, where a boat is made available with a crew (as in this case), it is very difficult to distinguish between the supply of a boat (which is standard rated) and the supply of passenger transport services (which is zero rated). HMRC recognises this difficulty in its VAT manual (VTRANS 110310) which states that:

“The main area of difficulty is the borderline between the supply of a ship...under a “wet” (with crew) charter and the supply of transport services. HMRC will also accept that supplies that are technically charters of ships...with a crew may, at the option of the contracting parties, be treated as supplies of transportation as long as transportation takes place”

42. We agree that this is the correct approach to take in this sort of situation. There is nothing to be gained from debating whether what has been supplied is a ship with crew as distinct from passenger transport services. The key question is whether the taxpayer's activities constitute the transport of passengers (as required by item 4(a) of

Group 8, Schedule 8 VATA). If so, zero rating will be available even if, looked at another way, the taxpayer could be said to have supplied a ship with crew.

43. We therefore need to consider whether, in this case, the participants are passengers and, if so, whether SPL is transporting them.

5 **Are the participants passengers?**

44. The words “passenger” is not defined in the VAT legislation. It must therefore have its ordinary meaning.

45. The Oxford English Dictionary tells us that the usual meaning of the word is:

“a person in or on a conveyance other than its driver, pilot or crew.”

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46. The Tribunal in *Cirdan* had to consider whether the participants in that case were “passengers”.

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47. The Tribunal approached this question by drawing a distinction between passengers on the one hand and crew on the other. Although not specifically mentioned, this is consistent with the Oxford English Dictionary definition of the word “passenger”.

48. In that case, the Tribunal decided that the participants were not members of the crew. This was principally based on the following findings:

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(1) None of the participants had any duty to perform in relation to the running of the boat.

(2) Whilst each of them was encouraged to participate in the on-board activities, they were under no compulsion to do so and indeed had no responsibility to do so.

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49. Although it is possible that the element of training or instruction of AAS’s customers may be greater than was the case in *Cirdan*, it is in our view clear that the participants were not part of the crew of the yacht. This is for the following reasons:

(1) The boat is capable of being sailed by the skipper alone and so the involvement of the participants is unnecessary.

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(2) Although, in many cases, the participants would no doubt be eager to get involved, as in *Cirdan*, there was no obligation on them to do so.

(3) The Tribunal in *Cirdan* identified what they described as “crew-like features” (at 44):

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“a member of a crew of a boat has, we think, a specific role, performing a function in relation to the running of that boat; and he has the responsibility to perform it.”

The customers of AAS had no such role, function or responsibility.

50. On the basis of the definition in the Oxford English Dictionary, the fact that AAS's customers are not members of the crew is enough to make them passengers.

51. Mr Bingham also drew a distinction between passengers and crew and, in effect, invited us to find that the participants were members of the crew rather than passengers. He did not expressly suggest that there might be an intermediate category of individual who is neither a passenger nor a member of the crew although he implied that this might be the case given his argument that the fact that the individuals were only on the boat for sailing training was enough to prevent them from being passengers.

52. Mr Burke referred us to a code of practice issued by the Department of Transport in 1985 following the decision of the High Court in *Secretary of State for Trade v Booth* [1984] 1 W.L.R. 243. That case explored the difference between a passenger and a "person employed or engaged in any capacity on board the vessel on the business of the vessel" for the purposes of the Merchant Shipping legislation in force at the time. The court in that case held that young people involved in sailing training were "passengers" for the purposes of the Merchant Shipping Acts even though the vessel in question could not be sailed without their participation.

53. Although the judges were dealing with a different statutory provision, Kerr LJ did however say (at 250G) that:

"we are not intending to indicate any view that they could not properly be regarded as "passengers" in any event"

54. What the judge was trying to convey in saying this is that, despite the statutory definition which treats everybody as a passenger if they are not employed or engaged on the business of the vessel, he might well have considered the young people in that case to be passengers in the ordinary sense of the word rather than falling into some intermediate category.

55. In this context, Kerr LJ referred to the decision of the High Court in *the Hanna* L.R. 1 A.&E.283. Again, the question was whether an individual was a passenger for the purposes of the Merchant Shipping Acts which were in force at the time. There was, however, no definition of that word in the relevant part of the Merchant Shipping Act.

56. The master of the *Hanna* had agreed to give an individual passage to London without any charge on the understanding that he would "do what he could" to help out with the running of the ship. The judge, Dr Lushington, decided that the individual was not a passenger but was a "nondescript", possibly being a seaman (and therefore presumably a member of the crew) or possibly just being a friend of the master.

57. In the context of the VAT legislation, we do not think that the decision in the *Hanna* provides support for the existence of an intermediate category of individuals who are neither passengers nor crew. The individual in that case may well have been treated as a member of the crew for this purpose given that he was expected to work

his passage even though his duties and responsibilities were not clearly set out or defined.

58. We have therefore come to the conclusion that AAS's customers were passengers on the boat on the basis that, for the reasons set out above, they were not members of the crew.

Did SPL "transport" passengers?

59. In order for SPL's supplies to be zero rated, it must be possible to describe them as the transport of passengers (section 30(2) VATA; item 4(a) in Group 8, Schedule 8 VATA).

60. As is the case with the word "passengers", the word "transport" is also not defined in the VAT legislation.

61. The Oxford English Dictionary defines "transport" as:

"the action of carrying or conveying a thing or persons from one place to another"

62. This definition was relied on by the High Court in *Customs & Excise Commissioners v Blackpool Pleasure Beach Co* [1974] 1 W.L.R. 540 where the High Court decided that the iconic "Big Dipper" rollercoaster (and other similar rides) at Blackpool Pleasure Beach did not involve "transport". Lord Widgery C.J. said (at 543C-F):

"In my view the essence of transport of passengers is the carriage of a passenger from A to B, and perhaps from B to C. I am fully conscious of the fact that there are such things as return tickets and round trips, and that a person setting out to go from A to B may nevertheless retrace his steps or continue his journey in such a way as to end up in the end at A again. But the essence, as I see it, of transport of passengers is that the passenger is taken from A to B because he wants to be at B or because there is some purpose in being at B, and if he then goes on from B to C his carriage may still be transport of a passenger because he wants to be at C and so on. I cannot accept that a person who in effect remains on one spot all the time is on any view to be considered under the head of being transported as a passenger, and I think as a matter of reality and common sense the movement of patrons upon the Big Dipper, or any of its associated installations, is in effect movement upon one spot. None of those who patronise these entertainments desire that the track should be constructed so that they shall visit a particular point. The actual construction of the track is a matter of indifference to them as long as it contains the necessary gradients and corners. In no kind of sense is the patron, in my view, being taken from one place to another, and I think that using the words of the Schedule in their ordinary meaning it must necessarily exclude movement which in effect is confined to a single

point and does not involve the deliberate movement or transfer of a passenger from one point to another.”

5 63. Mr Bingham did not rely on this decision or on Lord Widgery’s comments in order to argue that the services supplied by SPL did not constitute “transport”. His principle arguments were that the supply consisted of the supply of a boat with crew and that AAS’s customers were not “passengers”.

10 64. However, having decided that it is not profitable to examine too closely the distinction between the supply of a boat with crew and the transport of passengers and that AAS’s customers were in fact passengers, we do need to come to a conclusion as to whether those passengers were in fact being transported by SPL.

15 65. The key element of the Blackpool Pleasure Beach decision is that a person is not being transported if his or her movement “is in effect movement upon one spot”. That Lord Widgery’s comments about travelling from A to B to C are purely illustrative is clear from his acceptance that “there are such things as return tickets and round trips”.

20 66. We agree that, in order for there to be transport, there must be a desire to move from one place to another (as is evident from the Oxford English Dictionary definition). However, we do not think it is necessary or indeed appropriate to imply into this a requirement that the person in question wants to be at a specific place for a specific purpose.

25 67. In this case, we have evidence of the sort of voyage which would be undertaken for the purposes of the Duke of Edinburgh Gold Residential. It is clear from this that the yacht is being sailed from one place to another. We heard evidence that the stops were chosen partly based on the tides but also because they would be convenient places to stop for lunch, to anchor for the night or to go ashore to carry out other activities which form part of the trip. One example we were given was for the participants to row ashore and buy ice-creams and get back to the boat before they melted.

30 68. Whilst there are no doubt a number of places which could have been chosen as the relevant stops and whilst there is no evidence that the places which were chosen were identified because there was some particular desire to stop in that specific place as opposed to another place, there is no doubt in our minds that, in the words of the Oxford English Dictionary, SPL was carrying persons from one place to another.

35 69. We note that HMRC’s guidance referred to by Mr Burke (VTRANS 030500) confirms that “round trips or excursions by boats, without other facilities, on the open sea or other waterways to which the public have free and unrestricted access are zero rated, providing the general conditions of item 4 are met”. The idea that a round trip can constitute “transport” even though it may not involve travelling to a particular place for a particular purpose is consistent with our interpretation of the comments in
40 Blackpool Pleasure Beach (i.e. that the key question is whether the person “in effect

remains on one spot all the time”) and is in our view a correct interpretation of the law.

70. It also does not seem to us to make any difference that part of the purpose of the voyage was for AAS to provide sailing training or instruction. SPL’s job was to transport the passengers. AAS’s role was to provide the training along with the other elements of the activities it had promised to lay on for its customers.

71. We do not consider that the agreement between SPL and AAS, the terms of the insurance certificate or the invoices issued by SPL provide any help one way or the other in determining the nature of the supplies provided by SPL. We agree with Mr Burke that they are not inconsistent with services which consist of the transport of passengers.

Mr Stringer’s dual role

72. Although the point was not argued before us and only passing reference was made to it by Mr Burke, we have considered whether Mr Stringer’s role as the skipper of the yacht and also the person providing any instruction/training affects our analysis. This is the basis on which HMRC, in correspondence with Mr Burke claimed that SPL is “an artificial construct” and that Mr Stringer’s role “removes the need for SPL to exist”.

73. Mr Burke made the point that, if we were dealing with a larger operation with separate individuals responsible for operating the boat and providing the training, this would simply not be an issue. We agree with this.

74. Given HMRC’s acceptance that SPL should not be ignored and that there are in fact two separate supplies, it is in our view irrelevant that Mr Stringer is involved in both supplies. Although we accept that the separation of the supplies has some elements of artificiality, once that distinction is accepted, Mr Stringer must be taken as acting in his capacity as a director of SPL when he sails the yacht and ensures the safety of the people on board but as a director of AAS when he provides training or instruction or supervises other activities provided for AAS’s customers.

75. We express no view as to whether it could be argued that there is in reality a single supply by a single entity as that was not the case put to us.

Conclusion

76. We have decided that SPL’s supply relates to the transport of passengers. It is accepted that the boat is designed or adapted to carry not less than 10 passengers and so the supply is zero rated as it falls within item 4(a) in Group 8, Schedule 8 VATA.

77. This appeal is therefore allowed. Although this was not framed as an appeal against the assessments issued by HMRC as a result of its decision that SPL’s supplies should be standard rated, HMRC will no doubt withdraw those assessments unless it chooses to appeal this decision.

78. 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.

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**ROBIN VOS
TRIBUNAL JUDGE**

RELEASE DATE: 14 OCTOBER 2016

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