TC04209

Appeal number: TC/2013/06985

VAT – zero rating – Group 16, Schedule 8 VATA – Snugglebundl baby wrap – whether "article designed as clothing for young children" – examination of what constitutes clothing – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SNUGGLEBUNDL LTD **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MR TERRY BAYLISS FFA

Sitting in public in Priory Court, Bull Street, Birmingham on 7 October 2014

Michael Edwards, director, for the Appellant

Rita Pavely, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal considers whether an item called a "Snugglebundl" qualifies for zero rating for VAT purposes as an article "designed as clothing or footwear for young children and not suitable for older persons". The Snugglebundl was variously described before us as (amongst other things) a "baby lifting blanket" and a "hooded baby wrap". A more detailed description is given in the main part of this decision.

The facts

Introduction

2. We received a bundle of documents and were provided with a specimen of the product in question.

3. The appellant applied to be registered for VAT on 8 January 2013. Its application was accepted and its first VAT return was in respect of the period up to 28 February 2013. It claimed a repayment of VAT, based in part on treating its supplies of Snugglebundls as zero rated. HMRC disagreed with this treatment and proposed a corresponding adjustment to the appellant's VAT return. There followed various correspondence between the parties, resulting in a formal decision of HMRC dated 14 June 2013 in which they confirmed their decision that the Snugglebundl should be standard rated for VAT purposes as a baby blanket. The appellant requested a formal review of this decision and it was confirmed in a review letter dated 12 September 2013. The appellant then appealed to the Tribunal.

A description of the Snugglebundl

4. The Snuggglebundl (for which a patent has apparently been applied, though we were unclear whether it had been granted) is made of soft cotton in two layers – a slightly more hardwearing outer layer with attractive decoration and a plain white inner layer of soft brushed cotton. Before manufacture, it consists mostly of a slightly bulging square of these two layers, measuring roughly 80cm along each side. In the course of manufacture, a padded hood is inserted on the inner face, half way along one side. When in use, this serves to protect and support the baby's head, as well as providing extra warmth. Whilst the hood's design generally makes it stand proud by about 10cm, there are two poppers by which it can be attached to the edge of the main fabric; the result of doing so when in use is that the hood is effectively folded back and away from the baby's face, whilst still providing a measure of support and warmth. The product is intended for use with babies up to about six months of age.

5. During manufacture, each of the two "side" edges (adjacent to the edge where the hood is located) is effectively bunched together and a short strip of padded cotton, approximately 3cm wide and 10cm long, is sewn across the two ends of this bunching. The result is to provide an effective handle on each side through which an adult hand comfortably fits. When a small baby (up to six months of age) is placed face up with his or her head in the hood, the bottom edge of the Snugglebundl is

folded up over his or her feet and legs and then the two sides (with the handles) are folded across each other over the top and there is a fabric tie by which the upper handle, after being folded over, can be secured in place. The baby is then comfortably, securely and warmly wrapped.

6. The bunching of the fabric has the effect of creating a hammock shape to the overall article. If the tie is undone and the handles unfolded, they can be used together to lift the baby in the Snugglebundl, providing comfortable support to the whole of the head and body whilst doing so. This means that the baby can be moved from place to place without having to be disturbed.

7. It is quite clear from the design (for example the overall strength and ruggedness of the materials used) that the ability to move the baby in the Snugglebundl using the handles is not its sole or main purpose. It is quite apparent that it is also designed for keeping the baby warm and comfortably wrapped.

Presentation of the Snugglebundl

8. An extract from the appellant's website in February 2014 refers as follows to the invention of the Snugglebundl:

> "The idea for the Snugglebundl lifting baby wrap came from necessity for David Solomons when his daughter was first born. His wife Suzi had some serious complications during the birth, which resulted in her being very limited in her movement and unable to bend or lift without extreme discomfort. At the same time David's back problem meant that he struggled to bend and lift as well! Between the two of them they found lifting up, laying down and manoeuvring their new baby in and out of pushchairs and car seats extremely awkward.
>
> To help the problem David would lay his daughter on a blanket and gather it up in a bundle around her and then simply pick her up! That was for him the 'Eureka' moment. And from that point be began to think about the concept of a safe lifting idea for babies."

9. The website also included various references to the product as, for example, "the award winning baby blanket with handles", a "baby-lifting baby wrap", a "baby wrap blanket", a "baby wrap", a "snug wrap garment", a "baby lifting blanket", a "travel wrap/shawl".

10. The basic instructions given for use of the Snugglebundl on the website are as follows:

> "Roll the hood back before laying your baby centrally on the Snugglebundl (BUNDL) wrap. Note – Always lay your baby on its back and never in the prone position when using the Snugglebundl. Fold any excess material over your baby's feet if required. Wrap your baby by folding the left side over the right and tying the ribbon through the top handle. The hood should always be rolled back when the baby is horizontal in the Snugglebundl. Also roll and fold the material away

> from the face. Note – Always ensure that your baby is not too hot when fully wrapped. Adjust accordingly to the surrounding conditions and temperatures. Always ensure you can see your baby's face."

11. The appellant's website also refers to other advantages of the Snugglebundl, such as helping with baby sleep problems, back/hip/leg pain after birth, recovery from caesarean sections, discrete breastfeeding and lifting babies easily into and out of car seats.

The law

12. Under section 30 Value Added Tax Act 1994 ("VATA"), zero rating is applied to "goods of a description for the time being specified in Schedule 8" of VATA.

13. The relevant item in Schedule 8 VATA is item 1 in Group 16 ("Clothing and Footwear"), which reads as follows:

> "Articles designed as clothing or footwear for young children and not suitable for older persons."

14. The only relevant note to assist in interpretation of this item is note (1):

> "'Clothing' includes hats and other headgear."

15. This provision is one of the "pre 1991" permitted derogations from the general rule that all supplies of goods and services should attract VAT, currently governed by Article 110 of the Principal VAT Directive 2006/112/EEC. The decision whether or not this provision applies is therefore to be taken purely on the basis of domestic UK law (see the ECJ decision in *Talacre Beach Caravan Sales Ltd v HMRC* [2006] 5 CMLR 31, at [22]). It is also clear from paragraph [23] of the same ECJ decision that such provisions, constituting exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by taxable persons, are (as such) to be interpreted strictly.

16. The parties are agreed that the only point in issue between them is whether the Snugglebundl is "designed as clothing for young children".

17. We were referred to two cases of the old VAT Tribunal, *Mothercare Limited v CCE* (LON/76/177) and *Little Rock Limited v CCE* (LON/77/121). Neither case is binding on us as a matter of precedent, but some of the comments made in the cases were useful.

18. In *Mothercare*, the appeal concerned a product called a "Cosy Toes", a two-legged leg warmer for a child's push chair, which it was possible for the child to wear also while it was out of the push chair. Unlike an earlier one-legged version, it had no shoulder straps to enable the child to be removed from the chair without also sliding out of the Cosy Toes. The Tribunal said this:

> "At first sight the two legged 'Cosy Toes' does have the appearance of a kind of romping suit and it could be said to look like clothing. But on closer investigation, although we accept that "Cosy Toes" has a limited user as clothing in that a child can be taken in it and carried about by the mother when she goes shopping, the true test is the purpose of the design, and we hold that 'Cosy Toes' was not designed as clothing. It is a development of an earlier kind of 'Cosy Toes', but it had no shoulder straps and, if the child got out of the push chair it would tend to fall off, and it could not really be said that a child could readily walk in it for more than a very short distance. It is true that 'Cosy Toes' keeps the child warm when in the push chair but that does not make it clothing, and still less does it lead us to the conclusion that it was so designed, and we hold that the two legged 'Cosy Toes' was not designed as clothing for young children."

19. *Little Rock* was concerned with a product called an "Easy Rider", which was described as follows by the Tribunal:

> "'Easy Rider' has a head support and a body which is elasticated to fit snugly around a baby, and the baby puts its legs into it. It has long straps which are designed to be tied round its mother. One of the main objects of 'Easy Rider' is that it enables the baby to be attached in this manner to its mother. This is particularly suitable in relation to breast feeding, bottle feeding and spoon feeding, and also for carrying the baby about."

20. After stating that the statutory words "should be construed in the normal sense of the words used", and accepting that the 'Easy Rider' had "some of the attributes of clothing in that it is made of material which is suitable for some kinds of clothing and that it could be said to be designed partly to keep the back of the child warm when its front is in close contact with the mother", nonetheless:

> "… we have reached the conclusion that the real purpose of 'Easy Rider' is to enable the infant to be attached to its mother in a convenient manner so that its main purpose is that of a sling or harness rather than clothing, and that it was designed primarily for that purpose and not as clothing."

21. In both these cases, the Tribunal was referred to, and accepted, the "well known case of *Brutus v Cozens*" [1973] AC 854 (a case concerned with whether a particular disruptive demonstration at the Wimbledon Tennis tournament amounted to "insulting behaviour"), in which Lord Reid said in the House of Lords (at p 861):

> "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what the unusual sense is. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage cover or apply to the facts which have been proved."

22. It can readily be seen that in both cases, the Tribunal considered the "purpose" of the item in question to be crucial. The Cosy Toes, whilst having some similarities to trousers, lacked a crucial element of such a garment – wearability whilst walking; and whilst the Easy Rider did provide some warmth to the back of the infant, that was so inconsequential compared to the obvious main purpose of attaching the infant to its mother that it was insufficient to amount to clothing.

Submissions of the parties

Submissions of the appellant

23. On behalf of the appellant, Mr Edwards submitted that the Snugglebundl was clearly "clothing", and clearly designed as such. He referred to the fact that babies would spend the entire day in it, but only be lifted in it for seconds at a time. The appellant had never marketed it as a baby carrier, the handles simply added an extra occasional function. He referred to the fact that HMRC's own Notice 714 confirmed that "towelling bathrobes designed with a hood or sleeves enabling the baby to be wrapped in them as a garment" were accepted as amounting to clothing, and he provided pictures of some such items, showing them as amounting to little more than a baby bath towel with a hood sewn into one corner which allowed for them to be "worn" in the loosest way imaginable. This, he submitted, looked and felt far less like "clothing" than the Snugglebundl.

24. Babies shawls were also included in HMRC's own Notice 714 as being "considered to be articles of clothing", which showed that specific holes for arms and legs were not required before something could be "clothing". He likened the Snugglebundl to a shawl, in that it wrapped the body from the back to the front (unlike a blanket, which would wrap from the front).

25. He also referred to paragraph VCLOTHING2200 in HMRC's internal manuals, which stated that "a garment could be designed primarily for another purpose, but could also fulfil a clothing function, and thus qualify for zero-rating". He was effectively submitting that even if the "carrying" function supplied by the handles were regarded as significant, it should still not preclude us from finding that the product was designed as clothing. By way of an example, he pointed to the fact that HMRC Notice 714 endorsed zero-rating for "hooded rain covers for push chairs, provided they are suitable for the baby to wear as a rain cape when out of the push chair". We also noted that HMRC's Notice 714 states their view that "items… primarily designed as safety aids, such as cyclists' tabards or sailors' lifejackets, still have the form and function of clothing".

Submissions of HMRC

26. In their decision letter dated 14 June 2013, HMRC had distinguished the Snugglebundl from the hooded bath towel on the basis that the towel "does not in any way support or cushion a baby's head and neck, its sole purpose appears to be to provide warmth while a baby is moved from a bath and dried. The addition of a hood to what is essentially a towel, does appear to have been enough to classify this product

as a garment." The Snugglebundl, on the other hand had apparently been described on its packaging as "the world's first baby lifting blanket", and the appellant's website appeared to emphasise the product's function of assisting with "safely lifting and manoeuvring babies in and out of pushchairs and car seats".

27. In their review letter dated 12 September 2013, HMRC again took the view, based largely on the description on the appellant's website, that "it is clear that this is a baby lifting/carrying blanket and not an item of clothing". Whilst accepting that items with "dual purpose" could benefit from zero rating, they referred specifically to the "baby shawl" and "hooded bath robes" referred to in their own Notice 714, but said the Snugglebundl could not benefit from such treatment because it was "neither of these things, it is not held out for sale as a shawl and it is not a hooded bathrobe".

28. Following the structure of the guidance given in Notice 714, Mrs Pavely submitted that the product did not give the initial impression of clothing, and did not fulfil the function of clothing. It was advertised as a "baby lifting wrap", having originally been marketed as "a blanket with handles". The strength of the handles was stated to be "paramount", and it had to be "functional and durable". Detailed instructions for use were provided (which would not be expected for an article of clothing).

29. She submitted that the existence of handles pointed away from the Snugglebundl being an item of clothing – she said HMRC were not aware of any item of clothing that had handles, or required handles to aid its usage.

30. She also pointed to the marketing material issued by the appellant which stated the Snugglebundl could help with various problems associated with childbirth such as difficulty lifting the baby because of back problems or caesarean section after effects. All of this pointed towards a real function which was very different from mere clothing. She went so far as to submit that "if a baby did not need to be moved, the baby would not be kept in the Snugglebundl and as such the baby does not wear the Snugglebundl".

31. The history of the product's development, as recounted on the appellant's website, also pointed (in her submission) to it having been designed "to aid the movement of babies", and not as an article of clothing. It also appeared, from various customer comments appearing on the appellant's website, that users of the product saw it more as an aid to moving their baby than as an item of clothing.

Discussion and decision

Introduction

32. In deciding whether the Snugglebundl is "designed as clothing…for young children", we consider it appropriate, following the decision in *Brutus*, to consider whether, as a matter of ordinary usage, those words are apt to describe it.

33. In considering the statutory wording, it would appear that the word "designed" is intended to refer collectively to the phrase "as clothing or footwear for young

children", rather than simply to the phrase "for young children". If the draftsman had intended otherwise, it would have been easy to say so by using the formulation "articles of clothing or footwear designed for young children", thus leaving out any requirement for the articles to have been "designed" as "clothing or footwear" and making it a matter of objective assessment as to whether the items in question were "clothing or footwear" without any reference to the purpose (actual or inferred) of their design.

34. In the present case, whether the Snugglebundl is "designed as clothing" or not, it is clearly "designed" for young children and is not suitable for older persons. The key question before us, therefore, is whether the Snugglebundl is "designed as clothing". This is to be decided in accordance with the meaning of that phrase in "ordinary usage".

35. In the Oxford English Dictionary, "designed" is defined simply as meaning "planned, intended", and "clothing" is defined simply as "clothes collectively, apparel, dress". In turn, "clothes" is defined as "covering for the person; wearing apparel; dress, raiment, vesture."

36. In deciding whether an item is "designed" (or planned/intended) as clothing, an assessment is clearly therefore required of the designer's intentions or purpose when conceiving and finalising its design. This may largely (or even entirely) be inferred from an examination of the item in question, but whatever the item's objective characteristics, the strict requirement of the legislation is to decide what the designer intended it to be, not what it objectively is.

37. In deciding whether an item has been "designed as clothing", however, it is obviously first necessary to examine, in more detail than the OED definition, what is meant by "clothing".

What is "clothing"?

38. In ordinary usage, it seems to us that "clothing" refers to items (generally made of fabric, but sometimes of some other largely flexible membrane) that are *worn* (see [40] below) with the purpose of covering (or assist in covering) some part or parts of the body, either for practical reasons (physical comfort in the face of cold, heat, rain, etc) or for other personal (including religious) reasons (such as the preservation of modesty by the Muslim hijab, the "outward sign" of the Sikh's turban or the wish to enhance attractiveness with the fashionable designer dress).

39. It is clear that clothing may also serve some other purpose (including some purpose more important than its "clothing" purpose) without thereby ceasing to be clothing – HMRC's Notice 714 acknowledges this, by referring to items which are primarily safety aids (such as sailors' lifejackets) as still being clothing – see [25] above. This is an important point when considering the phrase "designed as clothing" – see [43] below.

40. To be *worn*, it seems to us that the item in question must be appropriately shaped to fit the contours of the body and accommodate its flexibility, though the

degree to which this is necessary (and, in particular, the degree to which such shaping needs to be inherent in the design and manufacture of the item itself) will depend upon the nature of the item in question and the way in which it is intended to be used. A shawl is just as much an item of clothing as a carefully tailored suit, though the one may be simply a triangle of plain fabric wrapped around the shoulders and the other is tailored to fit the whole body closely from neck to ankle. By way of contrast, a sleeping person may be covered with a blanket to keep them warm, but they could not be said to be "wearing" the blanket and it does not thereby become an article of clothing.

41. But just because something is worn, that does not necessarily make it clothing. A brooch or a climbing harness are both worn, but clearly neither of them is clothing, as neither of them provides any significant element of coverage for the body.

42. Finally, it is fair to say that what constitutes "clothing" can depend on the context. In particular (in the present case) it is appropriate to bear in mind that what constitutes "clothing" for a baby is likely to be quite different from what constitutes "clothing" for an adult, in particular because babies have no need for their clothing to accommodate irrelevant activities such as walking, but instead have their own special requirements (for example, easy access for nappy changing).

"Designed as clothing"

43. To qualify for zero rating, an item must be "designed" (in the sense of "planned or intended") as "clothing" within the meaning of that word as explored above.

44. Thus an item which is designed with two purposes in mind, one of them as "clothing" and one of them as something entirely different (such as "prevention of drowning" or "enhancing portability") will still be "designed as clothing", even if the other purpose is significant or even preponderant (as in the case of the sailor's lifejacket referred to at [25]). For this reason, we discount as irrelevant Mrs Pavely's submissions to the effect that the Snugglebundl cannot be an item of clothing because its primary purpose is as a baby carrier (though in any event we do not agree with her assessment of its primary purpose).

45. When we examine the product itself, it is apparent that it was not solely designed as a baby carrier. If it were, certain of its current features would be redundant and there are certain other features which are currently lacking which would certainly improve it. It would not need sufficient fabric to wrap the baby warmly and securely, nor would the tie be necessary; and stronger and more rigid materials would render it far better suited to a pure "baby carrier" role.

46. Thus if (as we consider to be the case) the Snugglebundl can be seen as having been designed for a combination of purposes, including moving a baby around with minimal disturbance, the crucial question is whether, as a matter of ordinary usage, it could also properly be said to be "designed as clothing". We consider the answer to this question can only be found by an examination of the product itself. It has been

designed to be what it is, and if, as a matter of fact, it is clothing then nothing in the evidence before us or in the arguments of either party suggests we should find it was not designed as such.

Other products

47. In passing, we should say that we can see no valid reason why the hooded bath towels pictured in the documents before us should qualify for zero rating if the Snugglebundl does not. They appear to consist of little more than shaped bath towels with hoods (albeit with the facility to attach them additionally to the adult). By their nature, they are likely to be used only at bath time, and mainly to dry the baby, rather than throughout the day or night. A baby can certainly be wrapped in them, in much the same way he or she can be wrapped in the Snugglebundl, but they did not appear to include any method of fastening them around the baby (nor does HMRC notice 714 make any mention of any such requirement), whereas the Snugglebundl does. The fastening of an otherwise open wrap appears to us to be more consistent with the idea of "clothing" than simply wrapping the baby in what appears to be mainly a bath towel.

48. Be that as it may, we are conscious that in this appeal we must reach our decision based on our view of the Snugglebundl rather than on the basis of a comparison of it with some other product.

Conclusion

49. Taken overall, and in the light of the above examination of the meaning of "clothing", we consider the Snugglebundl does amount to an item of clothing, in accordance with the ordinary usage of that word. Whilst it clearly has other functions as well, this is sufficient for us to consider that it should be regarded as "designed as clothing for young children".

50. The appeal is therefore ALLOWED.

51. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 31 December 2014