[2017] UKFTT 537 (TC)

TC05986

Appeal number: TC/2016/02696

VALUE ADDED TAX – whether supplies of ambulance services exempt or zero rated as transport services – held exempt

FIRST-TIER TRIBUNAL
TAX CHAMBER

JIGSAW MEDICAL SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
JO NEILL

Sitting in public at The Royal Courts of Justice, London on 28 June 2017

Dario Garcia, Mishcon de Reya, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. This was an appeal against a decision of HMRC set out in a letter dated 28 April 2016 which was issued following a review of a decision set out in a letter dated 9 March 2016 stating that the supply of emergency ambulance services supplied by Jigsaw Medical Services Ltd ("Jigsaw") were exempt supplies for VAT purposes.

2. Jigsaw was incorporated on 24 February 2012 and its registered office is in Tarporley, Cheshire. It has been registered for VAT from 1 April 2012 and its intended activities at the time of registration were stated to be First Aid training, event medical cover and ambulance services.

3. Following the submission of its VAT return for the period 10/15 a large repayment was made to Jigsaw in the sum of £32,792.59. Shortly thereafter, around 10 December 2015, Jigsaw informed HMRC that it had taken on a large contract with the NHS to provide ambulance services and had therefore purchased a number of vehicles to supply the intended ambulance services.

4. When Jigsaw filed its VAT return for the period to 01/16 this showed a repayment claim of £100,954.64, which prompted a visit by HMRC to Jigsaw's premises.

5. At the visit Jigsaw explained to HMRC that they had been advised that the supply of ambulance services could be zero-rated whereas HMRC were of the view that they should be exempt. HMRC duly issued their formal decision to this effect on 9 March 2016. Jigsaw then requested a statutory review and the HMRC review confirmed the original decision in a letter dated 28 April 2016, and it is that letter which is the subject of this appeal.

Facts

6. In accordance with Directions issued by Judge Roger Berner, sitting in the First-tier Tribunal, on 19 April 2017, the parties had agreed a joint statement of facts as follows:

> (1) Under agreements entered into with NHS Trusts and Clinical Commissioning Groups the appellant provides transportation of persons in both emergency and non-emergency circumstances.
>
> (2) The said transportation is provided in the following types of vehicle
>
> (a) Renault Master LM 35 H2 2.2 HDI 130HP
>
> (b) Citroen Relay 35 L3 H2 2.2HDI 130HP 6-Speed Enterprise Model
>
> (3) Renault vehicles are purchased by the appellant from Blue Light Services Ltd and Citroen vehicles from PH Conversions Ltd. In each case the vehicles are purchased following and in accordance with mutually agreed design and build adaptations having been carried out by Blue Light or PH Conversions

(4) The said design and build adaptations include permanent features for the lawful carriage of persons in wheelchairs

(5) Blue Light and PH Conversions each purchase base vehicles from the manufacturer on which the agreed adaptations and build are then carried out to meet the agreed design.

(6) Vehicles in base state have two seats, the driver plus another front seat passenger, and are the subject of a range of designs, adaptations and build to meet a wide variety of requirements for many different users, including but not limited to the appellant.

(7) Base vehicles of the kind mentioned above are routinely the subject of design, adaptation and build to produce a vehicle capable of carrying ten or more persons for other users.

(8) Vehicles of the said types already purchased with the design and build adaptations mentioned in para 4 above could be the subject of further design, adaptation and build for the lawful carriage of ten or more persons.

7. We also received witness statements from Ann Price, Officer of HMRC who had made the initial visit to Jigsaw, and was the original decision maker, Chris Percival, Chief Executive of Jigsaw, and Darren Sharman, National Sales Manager for Blue Light Services Ltd. These witness statements were accepted as read by both parties and are effectively incorporated into the joint statement of facts set out above.

8. In addition, Mr Percival gave oral evidence to the effect that during the VAT accounting period ending 01/16 Jigsaw only operated ambulance type vehicles and not those containing primarily seats, although such vehicles were purchased at a later stage.

9. We accept these witness statements as correct statements of fact.

Legal Framework

10. The relevant provisions for zero-rating are contained within Item 4 and Note 4D of Group 8, Sch 8 of The Value Added Tax Act 1994 ("VATA") as follows:

Item No.4

Transport of passengers -

(a) In any vehicle, ship or aircraft designed or adapted to carry not less than 10 passengers…

Note 4D

Item 4(a) includes the transport of passengers in a vehicle -

(a) Which is designed, or substantially and permanently adapted, for the safe carriage of a person in a wheelchair or two or more such persons, and

(b) Which, if it were not so designed or adapted, would be capable of carrying no less than 10 persons.

11. The relevant VAT exemption is contained within Item 11 of Group 7 of Sch 9 VATA:

Item No.11

The supply of transport services for sick or injured persons in vehicles specially designed for that purpose.

12. It was acknowledged by both parties that, in accordance with s30(1) of the Value Added Tax Act 1994, where a supply may be either exempt or taxable, the taxable rate takes precedence. In this case this means that if the supply can be properly regarded as being both exempt and zero-rated then it is deemed to be zero-rated.

Submissions

13. There were initially two issues between the parties:

(1) Did the vehicles in question fall into Note 4D, and

(2) Did the word "passenger" include ill or injured persons?

14. This second issue was however dropped from HMRC's case before the hearing and they now agreed with Jigsaw that the word "passenger" did indeed include ill or injured persons.

15. The only issue before the tribunal therefore was whether or not the vehicles in question fell into Note 4D.

16. Mr Garcia stated that, in his view, the supplies in question fell into both Item 4 of Sch 8, Group 8, VATA and Item 11 of Sch 9, Group 7, VATA. As such they could be either exempt or zero-rated, but that in such circumstances they would be treated as being zero-rated in accordance with s 30 VATA, as agreed between the parties.

17. In support of this proposition Mr Garcia explained that the vehicles in question were "designed, or substantially and permanently adapted, for the safe carriage of a person in a wheelchair" in that they were fitted with clamps to secure wheelchairs safely in position, and that with these clamps in place they could not carry ten or more persons. They therefore complied with the provisions of Note 4D(a). Again however this was not contentious between the parties.

18. The key question therefore was whether or not they also complied with the provisions of Note 4D(b), ie, if they were not so designed or adapted, would they be capable of carrying no less than 10 persons.

19. Mr Garcia emphasised that in his view the test was not whether the vehicles had started life carrying ten or more persons, and were then adapted, it was whether or not

the vehicles would be capable of adaptation such that they could carry ten or more persons if the adaptations for wheelchairs were taken out or had not been put in in the first place.

20. Mr Garcia also noted that there was no purposive requirement in Note 4D. There was no requirement that the vehicles should actually carry wheelchair bound passengers. Neither was there any requirement as to the purpose of any journeys undertaken. This was in contrast with Item 11, which refers to "the supply of transport services for sick or injured persons in vehicles specially designed for that purpose." Note 4D was therefore potentially much wider in its application, dealing as it did solely with the design and nature of the vehicle, not what it was used for.

21. HMRC's statement of case had referred to the fact that the vehicles had not been designed or adapted to be used as public transport and that prior to their adaptation they had been vans, but Mr Garcia submitted that neither of these was included as a requirement in the legislation and that those points were not therefore relevant.

22. Mr Garcia contended that if the base vehicles could have been converted into mini-buses capable of carrying ten or more persons then they fell within Note 4D(b).

23. It was accepted by HMRC, in the joint statement of facts, that "base vehicles of the kind mentioned above are routinely the subject of design, adaptation and build to produce a vehicle capable of carrying ten or more persons for other users" and this, in Mr Garcia's contention was therefore sufficient to put the vehicles within Note 4D(b).

24. Mr Garcia did suggest that the vehicles could be adapted to carry ten or more passengers without removing the wheelchair clamps and merely by fitting floor rails to secure the additional seats. We did not however have any clear evidence on this and we are not in any case sure that this relevant.

25. Mr Garcia explained that Note 4D(b) did not require the vehicles in question actually to have ten or more seats, and indeed, if they did, then Note 4D would be unnecessary.

26. In support of his arguments Mr Garcia referred us to *Cirdan Sailing Trust v Customs and Excise Commissioners* [2006] STC 185. This held that in considering whether or not a mode of transport, in the case of *Cirdan* this was a boat, was capable of carrying ten or more persons, then it was necessary only to look at the boat itself, not at other factors involved in their use. In fact, in *Cirdan*, one of the boats involved only had nine berths, and it was therefore held that transport on that boat did not qualify for zero-rating, even though it could actually hold more than ten persons on board in practice, because the transportation at issue involved overnight journeys, but the other boats did have ten or more berths and they did qualify for zero-rating.

27. We were also referred to *Matthew Davies v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 130 (TCC). This case involved a stretched limousine which could originally carry ten persons but one of the seats had been removed at the time of supply of the services. Again it was held that it was

necessary only to look at the car to determine whether or not it was capable of carrying ten or more persons, and not at any extraneous factors or possibilities.

28. For HMRC Miss Vicary agreed that the only issue between the parties was the interpretation of Note 4D(b). Miss Vicary also referred us to *Cirdan* and *Matthew Davies* but emphasised that we should look at the vehicles in question at the time of supply. She quoted from Judge Howard Nowlan at [20] in *Matthew Davies* where he says "where the vehicle has been adapted, it is the seating capacity following the adaptation alone that is relevant. She did however acknowledge that both *Cirdan* and *Matthew Davies* are concerned with the interpretation of Item 4(a) itself and not the interpretation of Note 4D to Item 4(a). Note 4D(b) clearly requires the reader to compare a differently adapted vehicle with the actual vehicle in its state at the time of supply.

29. The essence of Miss Vicary's argument however was that when making the hypothetical comparison required by Note 4D(b), we should restrict any assumed revisions to the vehicles to the removal of the adaptations required for wheelchairs. These vehicles were also adapted for the fitting of a stretcher and we could not, she argued, assume the removal of the stretcher or the two swing seats used by the paramedics on board an ambulance or the various cupboards on board for storing medical equipment for the purposes of determining whether or not the revised vehicle could carry ten or more persons.

30. It was Miss Vicary's submission that if the vehicle were to be reconfigured such that it could carry ten or more persons, then this would involve the removal of the stretcher, the swing seats and the cupboards and this was not permitted by the theoretical comparison envisaged by Note 4D(b).

31. Miss Vicary also argued that we could not assume the reconfiguration of the vehicle in such a manner that it would no longer be capable if fulfilling its contractual function as an emergency ambulance.

32. In response to Miss Vicary's arguments regarding the stretcher, Mr Garcia explained that the stretcher was not in fact part of the vehicle. It was simply a trolley, which was wheeled into the vehicle and then clamped to the floor in a similar manner to a wheelchair. He also referred us to photographs of the interior of the vehicles without any wheelchairs or the stretcher, showing that the floorplan was essentially clear other than the clamps for retention of wheelchairs, and the much larger clamps for the retention of the stretcher.

Discussion

33. As stated above, the sole issue before us was whether or not the vehicles in question fell within Note 4D(b), which requires us to answer the theoretical question: if the vehicle were not designed or adapted to carry wheelchairs, would it be capable of carrying no less than 10 persons.

34. Mr Garcia argued for a literal and broad interpretation of the question, whereas Miss Vicary argued for a narrower interpretation, in which any assumed changes were restricted to the removal of the wheelchair clamps.

35. Having considered the representations of both parties we decided that we could not accept Miss Vicary's contentions. At the very least, the draftsman of these provision must have envisaged the addition of seats into the revised configuration, and presumably the fittings necessary to attach them firmly to the floor.

36. In addition, the restriction proposed by Miss Vicary that, after the reconfiguration the vehicle should still be capable of fulfilling its contractual functions is simply not contained within the legislation and we can find nothing to support it.

37. In our view, the correct approach is to look at the vehicle itself and to determine whether or not that vehicle can, without complete rebuilding, be converted into a vehicle capable of carrying ten or more persons. It is clear to us from the photographs and other evidence provided to us that these vehicles can be so converted and that indeed, a mini-bus version of these vans is a standard product. This is also accepted by HMRC in the joint statement of facts, see para 6(7) above.

38. We therefore find that the vehicles in question fall within Note 4D(a) and Note 4D(b).

39. It has already been agreed by both parties that ill or injured persons being transported under emergency conditions are still passengers for the purpose of Item 4.

40. We therefore find that the services provided by Jigsaw can be both zero-rated and exempt and, in accordance with s30 VATA they are therefore zero-rated.

Decision

41. For the above reasons therefore the tribunal decided that Jigsaw's appeal should be ALLOWED.

42. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 03 JULY 2017