[2020] UKUT 25 (TCC)

Appeal number: UT/2018/0049

VALUE ADDED TAX – sale of lift pass at indoor ski and snowboard centre – whether supply of transport chargeable at reduced rate (yes) or supply of right to use ski slope chargeable at standard rate (no) – VATA 1994, Schedule 7A, Group 13, Item 1 – appeal allowed.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

SNOW FACTOR LIMITED

Appellant

v

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD TYRE
JUDGE ANDREW SCOTT

Sitting in public at George House, 126 George Street, Edinburgh on 4 November 2019

Philip Simpson QC, instructed by Johnston Carmichael, Chartered Accountants, for the Appellant (Snow Factor Limited)

David Thomson QC, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

Introduction

1. The appellant operates a snow dome and conference centre within the Intu Braehead leisure complex in Glasgow. The leisure facilities in the snow dome include an indoor ski slope. At the sides of the ski slope are two drag lifts used by customers to convey them to the top of the ski slope in order to ski down. The issue in this appeal is the correct VAT treatment of the consideration paid by customers who use the lifts. The appellant contends that the supply attracts the reduced rate of VAT applicable, in terms of VATA 1994, Schedule 7A, Group 13, Item 1, to "the transport of passengers by means of a cable-suspended chair, bar, gondola or similar vehicle designed to carry not more than 9 passengers". The respondents contend that the supply to the customers is properly characterised as a right to make use of the ski slope, which is chargeable to VAT at the standard rate.

2. By a decision dated 24 January 2018, the First-tier Tribunal (FTT) decided the issue in favour of the respondents and dismissed the appellant's appeal. The appellant now appeals, with the leave of the Upper Tribunal, against the decision of the FTT. Following an oral hearing, the appellant was given leave to argue a ground not insisted upon before the FTT, namely that the principle of fiscal neutrality precluded treating the supplies made by the appellant differently from those made by the five outdoor Scottish ski resorts.

Description of the snow dome

3. The FTT made extensive findings in fact, of which the following is an abbreviated version containing the material most relevant to this appeal.

4. The appellant operates what it describes as an "indoor snow sport resort", whose primary components are a main ski slope, a nursery ski slope, an ice wall, and a sledging area. The building in which the snow dome is located also contains bars, restaurants, retail outlets, a cinema and other leisure facilities. Entry to the building, including the snow dome, is free of charge. Rental of all equipment including skis, ski boots, snowboards, helmets and ski clothing is also free of charge; if a customer uses his or her own equipment there is no discount in the cost of a lift pass or lesson. Lockers can be rented for £1, but this is not linked to the cost or timing of a lift pass or lesson.

5. The main ski slope is 168 metres long and 35 metres wide. On either side of the slope there is a "poma" or drag lift consisting of metal poles with button seats attached to a cable. The lifts allow customers to be conveyed to the top of the slope with minimum effort; they cannot be used to descend. With the exception of peak periods, only one of the two lifts is operative, while the other is receiving maintenance.

6. At second floor level there is a bar with a long viewing window overlooking the skiing area. It is accessible by members of the public without passing the ski reception. The bar opens on to a balcony that is utilised as a viewing area. The balcony can also be accessed by skiers, by means of a linking bridge from the middle of the main slope. Access to the slope via the bridge is restricted to skiers. A customer could, technically, access the slope via the bridge using his or her own equipment without passing the ski reception or utilising the lifts, but this possibility is not publicised.

Lift passes

7. The lift passes sold by the appellant permit access only to the drag lifts on the main slope. The pass specifies the date and window of time within which the pass can be used. It must be shown before using the lift. Skiers are, however, free to remain and ski on the slope after the time has expired. Pre-booking of lift passes is available and encouraged. Offers allowing purchase of lift passes at a discount often run at off-peak times when the slope is quiet.

8. It is possible to access the main slope without a lift pass, although this fact is not advertised by the appellant. A very small percentage of those who use the snow dome, perhaps 1%, choose to walk up the main slope without using the lifts. This is because it is physically tiring to wade through snow at a gradient of 15 degrees while carrying ski or snowboard equipment. Some customers will do this once or twice, but the vast majority choose to use the lifts. The customers who walk up the slope are primarily (i) Nordic skiers who use special skins on their skis to allow them to move uphill, and (ii) park and freestyle customers who tackle jumps, bumps and berms created for them on the slope.

Terms and conditions

9. The FTT was provided with three sets of terms and conditions that have been issued by the appellant from time to time. The terms and conditions apply regardless of whatever product is booked or purchased. It was not submitted that anything turned on any differences between the versions. The third and most recent version includes the following conditions in relation to main slope use:

> "Access to all public areas on the main slope are unrestricted, with the use of the lifts and tows accessible to those with a valid lift pass or lesson booking. To avoid any misunderstandings, please ensure that your lift pass is visible to our staff…
> …
>
> **Risk to safety of others:** where in our opinion we believe that a person may be causing a risk to the safety or security of the site or impairing the enjoyment of others, we reserve the right to remove that person's Lift Pass and ask them to leave the premises.
> …
>
> The Lift Pass is sold subject to the user compliance with the FIS Snowsport Safety Code, specifically that you can:
>
> - **Fit your boots correctly**
> - **Use the POMA/Button Lift safely and appropriately**
> - **Link turns with confidence**
> - **Control your speed**

You will be assumed to have declared yourself of this standard when purchasing a lift pass. If you are unsure about your ability or of any questions regarding minimum competency standards please ask for advice before booking."

VAT legislation: the reduced rate

10. Section 29A of the 1994 Act provides that VAT shall be charged at the rate of 5% on any supply that is of a description for the time being specified in Schedule 7A to the Act. Group 13 of Schedule 7A has the heading "Cable-Suspended Passenger Transport Systems". Item 1 (the only item) of Group 13 is:

    "1. Transport of passengers by means of a cable-suspended chair, bar, gondola or similar vehicle designed or adapted to carry not more than 9 passengers."

    Note 1 to Item 1 states, however:

    "1. Item 1 does not include the transport of passengers to, from or within—

        (i) a place of entertainment, recreation or amusement; or

        (ii) a place of cultural, scientific, historical or similar interest,

        by the person, or a person connected with that person, who supplies a right of admission to, or a right to use facilities at, such a place."

11. HMRC accept that the lifts in the snow dome fall within the description in Item 1. They contend, however, that if the supplies made by the appellant fall within Item 1, they also fall within the exception in Note 1 and are therefore excluded from the benefit of the reduced rate.

The decision of the FTT

12. The FTT's reasons for finding in favour of HMRC are set out in paragraphs 108-110 of the decision, as follows:

    "108. Having looked at all of the facts, which are set out at length, I find that the supply made by the appellant when selling a lift pass is access to the lift for the duration specified on the pass. Anyone can access the slope but clearly someone purchasing a pass, in doing so, acquires an ancillary contractual right to use the slope provided they behave safely.

    109. However, although both parties focussed on the characterisation of the supply, that is not [the] end of the matter. The wording of Schedule 7A Group 13 is absolutely crucial. There is no doubt that a customer purchasing a lift pass is entitled to transport on that lift, or lifts, within 'a place of entertainment, recreation or amusement' but the crucial point is that that transport is provided by the appellant. It is the appellant who, in the wording of the latter part of this provision '… supplies a right of admission to, or a right to use facilities at, such a place'.

110. It is the appellant who permits customers, whether paying or not, to enter the Snow Dome and who has the right to exclude any such customer or indeed passer-by. It is the appellant who extends the right to use the facilities, whether for payment or not, within the Snow Dome. Although Mr Simpson was ingenuous [sic] in arguing the case for the appellant, the wording of the legislative provision is very clear."

Argument for the appellant

13. On behalf of the appellant it was contended that the FTT had erred in basing its decision on a finding that the appellant supplied a right to use the facilities at the ski slope, because the term "supply" encompassed only goods and services provided for a consideration. Admission to the appellant's facilities was provided free of charge: accordingly, there was no reciprocal performance in relation to admission, there was no remuneration and therefore no consideration. The supplies in question did not fall within the exception in Note 1. Although it was accepted that the reason why customers came to the main slope was to ski down, the only service for which consideration was paid was transport on the lifts. Reference was made to *Tolsma v Inspecteur van Belastingdienst Leeuwarden* [1994] ECR I-743 and *HMRC v Findmypast Ltd* 2018 SC 24.

14. It was further submitted that the principle of fiscal neutrality required the appellant's facility to be treated for VAT purposes in the same way as the outdoor ski resorts, which benefited from the reduced rate: *Purple Parking Ltd v HMRC* [2012] STC 1680 (ECJ). The service, namely a pass to use the lifts, was not materially different; it was irrelevant that the appellant's facility was located within a building with a roof and not on a mountain. "Similarity" was to be assessed at a high level of abstraction.

Argument for HMRC

15. On behalf of HMRC it was submitted that the FTT had been correct to conclude that the appellant's supplies fell within the exception in Note 1, although the FTT's reasoning was not supported in its entirety. The principal service supplied by the appellant was a right to access and make use of the ski slope within the appellant's premises, which were admittedly a place of entertainment, recreation or amusement. The provision of use of the ski lifts was ancillary to that principal service: cf *Card Protection Plan v C&E Commrs* [1999] 2 AC 601. It was obvious that the reason why customers made use of the appellant's facilities was to ski or snowboard down the slope and not to make use of the lifts up it. The single supply made by the appellant, which ought not to be artificially split, was a supply of a right of admission to, or a right to use the facilities at, the indoor ski slope. The fact that it was physically possible to access the slope by walking up it without paying was irrelevant; this case was concerned with the characterisation of the supply made to customers who *did* pay. If this was a supply within Item 1, then it was excluded by Note 1. If the service provided by the appellant were to be characterised as containing more than one supply, the principal supply was of the right to use the ski slope.

16. As regards the argument founded on fiscal neutrality, which had not been insisted upon before the FTT, the appellant could not succeed on the basis of the FTT's findings in fact.

The focus required to be from the point of view of the consumer, and the FTT's decision contained no findings as to whether the supplies were sufficiently similar from this point of view, or whether they met the same needs. Such findings as there were suggested that the supplies were very different, and that the appellant's business was complementary to, and not in competition with, that of the outdoor ski resorts. In any event, if HMRC's argument on the first point were to be accepted, there could not be the necessary degree of similarity for the fiscal neutrality argument to succeed.

Decision

17. It is common ground between the parties that the word "supply", where it appears in Note 1, must be given its technical VAT meaning of something done for a consideration. The need for reciprocity between payment on the one hand and the provision of a supply on the other is well established: in *Tolsma* (above), the Court of Justice emphasised (at paragraph 14) that a supply of services is effected for a consideration only if there is a legal relationship between the provider and recipient pursuant to which there is reciprocal performance, with the remuneration constituting the value given in return for the service supplied.

18. The decision of the Inner House in *HMRC v Findmypast Ltd* is of assistance because it too concerned the provision of services some of which could be obtained by a customer without payment. Delivering the opinion of the court, Lord Drummond Young referred to statements of principle in *Tolsma* (as more recently reiterated in *Lebara Ltd v HMRC* [2012] STC 1536 (ECJ)), and in *Card Protection Plan*. Lord Drummond Young concluded (paragraph 18):

> "In applying the principle of reciprocity, the court must in our opinion apply the general approach found in cases such as *Card Protection Plan*; consequently it is necessary to examine the whole of the taxpayer's relationship with its customers, and to do so in context, in order to discover the true nature of the supply…"

On application of the principle of reciprocity to the facts of *Findmypast*, the court held (paragraph 31) that a search function that was available free of charge to the general public as well as to paying customers could not be said to be part of the consideration for the payments made by those customers, because there was no link between the payments and the use of the search facility.

19. In the present appeal, HMRC do not, as already mentioned, seek to support the reasoning of the FTT in its entirety. At paragraph 108, the FTT decided that the supply made by the appellant to its customers was access to the lifts for the duration of the pass, with an ancillary contractual right to use the ski slope provided they behaved safely. HMRC describe this analysis as "other worldly" and not reflecting the economic reality of the supply that was made. For its part, the appellant took issue with the FTT's finding in paragraphs 109 and 110 that the appellant supplied a right to use the facilities within the snow dome, on the ground that access to the facilities, other than the lifts, was free of charge and was not therefore "supplied" for VAT purposes.

20. In our opinion there is force in the appellant's criticism. The FTT made clear findings in fact not only that it was theoretically possible for a person to use the main slope for skiing or snowboarding without purchasing a lift pass if he or she were prepared to walk to the

top, but also that this was actually done, albeit by a very small percentage of those using the slope. On the facts found by the FTT there is nothing fanciful about use of the slope without use of the lifts, especially as special features apply to some of those who may choose not to use the lifts: Nordic skiers need not carry their equipment up, and freestyle skiers are not concerned to get all the way to the top of the slope. These possibilities afford a strong indication that there is an absence of reciprocity between access to the slope and the payment made by a customer in exchange for a lift pass. On the other hand, there is no doubt, as is emphasised by the appellant's terms and conditions, that purchase of a pass is an absolute requirement for use of the lifts. That, in our view, is where the reciprocity required by *Tolsma* and *Lebara* is to be found.

21. Senior counsel for HMRC placed considerable weight upon the assertion that a customer's use of the ski lifts was not an end in itself but a means to an end, namely the recreational activity of skiing or snowboarding. That is no doubt entirely true, but it does not in our view determine the issue. On HMRC's analysis, the answer to the question "Why does a customer purchase a lift pass?" is that he or she wishes access to the slope in order to ski or snowboard down, leading to an inference that what is truly being supplied for consideration is access to the slope. In our view, the correct answer to the question just posed is that the customer wishes access to the slope in order to ski or snowboard down but without the effort and inconvenience of walking up. Putting the answer in that way leads to a different inference, namely that what is being supplied for consideration is access to the lifts. That analysis, in our view, accords with the findings in fact made by the FTT, and also with the approach described in *Findmypast Ltd* of examining the whole of the appellant's relationship with its customers, in context.

22. At times it was unclear whether HMRC's argument was that the circumstances of the case did not fall within Item 1 at all, or, alternatively, that they fell within Item 1 and also within Note 1. Either way, the argument must in our view fail. Characterisation of the supply as a right to use the ski slope, falling outside Item 1, is inconsistent with the fact that access to the ski slope is not dependent upon the purchase of a lift pass, so that there is an absence of reciprocity. Equally, Note 1 is not applicable because there is no supply by the appellant, for consideration, of a right to use the facilities in the snow dome.

23. Nor, in our view, does it matter whether the supply made by the appellant to a customer purchasing a lift pass is properly analysed as including an ancillary supply of a contractual right to use the slope to ski safely down. On any view the principal supply (determining its VAT categorisation) is the supply of the lift pass, which falls within Item 1. For our part, although we accept that it may be said to be an implied term of the sale of the lift pass that a customer who complies with the appellant's terms and conditions will be permitted to use the main slope to ski or snowboard down, we doubt whether this could be said to amount to an ancillary supply. There was no finding by the FTT that a person who chooses to walk up the slope might arbitrarily be refused permission to ski or snowboard down. Conversely, we have no doubt that if a person who had not purchased a lift pass were to act in a manner that put the safety of others at risk or impaired their enjoyment, the appellant would be entitled to ask them to leave. On balance we do not think that *Card Protection Plan* has any relevance to the circumstances of this appeal, but whether it does or not is not determinative of the outcome.

Fiscal neutrality

24. In the light of our decision on the first ground of appeal, it is not strictly necessary for us to address the appellant's argument based on fiscal neutrality. Leave to argue this ground was granted on application of the test adopted *inter alia* in *Manduca v HMRC* [2015] UKUT 262 (TCC), applying in turn the observations of the Court of Appeal in *Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd* [2008] EWCA Civ 978, namely that there was no prejudice to the other party because it might have adduced other evidence or conducted the first instance proceedings differently.

25. Having received full submissions in relation to this ground, we would not have felt able to uphold it. In our view, the decision of the FTT lacks the findings in fact that would have been necessary for this Tribunal to make a determination as to whether or not the appellant is in competition with the outdoor ski centres in relation to similar supplies. The decision of the FTT does include, at paragraphs 101-106, a general discussion of the similarities and differences between the appellant's business and the mountain ski centres but, unsurprisingly in light of the fact that the issue was not pursued, issues of particular relevance to fiscal neutrality were not specifically identified or addressed. There is, for example, no finding as to whether or not the nature of the supplies were sufficiently similar for the appellant to be (in principle, even if not actually) in competition with any or all of the outdoor ski resorts (cf *HMRC v Rank Group plc* [2011] ECR I-10947). On the contrary, certain potentially significant differences were noted by the FTT at paragraph 106: the need for the appellant to provide free equipment and also lift passes for short as well as long periods, in order to maintain a viable economic model in an urban environment. Accordingly, on the material before us, we are not persuaded that the argument based on breach of fiscal neutrality is made out.

Disposal

26. For the foregoing reasons we allow the appeal.

LORD TYRE

JUDGE ANDREW SCOTT

UPPER TRIBUNAL JUDGES

Decision issued 21 January 2020