



Neutral Citation: [2022] UKFTT 00157 (TC)

Case Number: TC08484

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/00736

VAT: whether ground works preparatory to installing flexi vault burial chambers an exempt supply within item 2 of Group 8 of Schedule 9 VAT Act 1994. Yes. Appeal allowed

**Heard on: 26 April 2022
Judgment date: 26 April 2022**

Before

**TRIBUNAL JUDGE Gething
MEMBER Susan Stott**

Between

Hodge and Deery Limited

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Phil Richards of Malcolm Horton & Co, Accountants

For the Respondents: Dermott Ryder, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video). All the parties attended remotely using the Tribunal video hearing system. A face to face hearing was not held because of covid restrictions. The documents to which we were referred are a hearing bundle of 219 pages and an authorities bundle of 85 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

3. The issue in this case was whether a supply of services in connection with the installation of flexible pre-formed burial vaults by Hodge and Deery Limited (“*Hodge*”) to RED Landscapes at the 20 acres burial site known as Elysium Gardens East London was an exempt supply within Item 2 of Group 8 of Schedule 9 to the VAT Act 1994. RED Landscapes had contracted with Elysium Gardens (East London) Limited to provide the flexible burial vaults and landscape services. The issue arises in three VAT quarters ending 06/2020, 12/2020 and 03/2021. The parties understand that if the exemption is available some input tax may be disallowed. The quantification of the disallowed input tax was not in the scope of the hearing.

4. We heard evidence from Mr Hodge, a shareholder of Hodge, to the effect that the vaulting system is installed in graveyards with unstable soil structures which can result in toxins from the decomposition of bodies escaping into the ground water, and in subsidence of an existing grave when another grave is dug in the adjacent plot. The burial plots are ready for use and the element above the plots is landscaped, which was work undertaken by RED Landscapes. We also heard evidence from Officer Watson on the course of his investigation into the returns for the quarters under consideration and his reliance on authorities and on the HMRC Guidance Note 701/32. The facts were not in dispute.

THE LEGISLATION

5. Group 8 provides as follows:

“Burial and cremation

Item No

1 The disposal of the remains of the dead.

2 The making of arrangements for or in connection with the disposal of the remains of the dead.”

THE CASE LAW

6. We reviewed these two decisions relied upon by HMRC concerning the construction of Item 2 of Group 8 namely *Network Insurance Brokers Limited v HM Customs & Excise* (“*Network Insurance*”) [1998] EWHC, STC 742 and *CJ Williams v Telford* (“*Williams*”) [2000] BVC 2111 and set out short details of the facts and what we consider is the ratio in each case.

(a) In *Network Insurance* the issue was whether Network Insurance Brokers Limited provided only financial services in connection with funerals or other services. Network Insurance Brokers Limited was a registered insurance broker, acted on behalf of a hospital fund which provided funeral benefits for its members. Moses J found the Tribunal had erred in its findings of fact. Network Insurance Brokers Limited was providing a wider range of services in connection with the provision of funeral services. They designed the funeral arrangements in such a

manner that they could be purchased with £1,000, the insured amount. There was a dispute about whether the VAT Act could be construed in a manner consistent with the VAT Directive. Moses J considered that Item 2 of Group 8 could be construed in a manner consistent with the Directive by confining exempt services to those normally provided by undertakers or cremation services. Item 1 deals with the services for the disposal of the body. Item 2 covers a wider range of services that are not made merely to dispose of the body but are made in connection with the disposal. Moses J referred to a decision of Charles Potter QC in *Barclays Bank plc v Customs and Excise Commissioners* (“**Barclays**”) [1991] VATTR 466 at 472 where Charles Potter QC adopted a similar approach to the construction of the insurance broking exemption in the VAT Act 1984 and the Directive. The approach was to consider the sort of services an insurance broker might provide. Moses J adopted that approach in *Network Insurance* and considered the type of services that might be provided by an undertaker. He said, “*However, the services supplied must be arrangements for the disposal of the remains of the dead or arrangements in connection with such disposal. It is important to focus on the words ‘disposal of the remains of the dead’. Arrangements which directly lead to the result which the making of those arrangements seeks to achieve, namely the disposal of the remains of the dead, are arrangements for such disposal. Arrangements that do not lead directly to that result but are arrangements made in connection with that result, namely the disposal of the remains of the dead, are also exempt*” The result which Network Insurance Brokers Limited achieved was not the disposal of the remains of the dead. Moses J explained “*The services failed to qualify for exemption not because they were made in advance, not because they do not relate to specific funerals, but because they do not lead to the particular result that the exemption refers to and are not in connection with that result. They are ... a stage removed. They are arrangements made for the arrangements to which the exemption refers.*”

(b) *Williams* concerned an appeal by the undertaker against an assessment made by HMRC that the provision to fellow funeral directors in the area, of cold storage and chapel of rest facilities was exempt. The taxpayer considered they were standard rated which would enable recovery of input tax. The appeal was dismissed. The cold storage and chapel of rest services to fellow funeral directors who did not have cold storage facilities were found to be “*part and parcel of the making of arrangements for and in connection with the disposal of the remains of the dead and were not a stage removed from the disposal of the remains.*” By contrast the provision of cold storage services to a hospital were not exempt.

HODGE’S CASE

7. Hodge considers that the installation of the flexible burial vaults at Elysian Gardens should be treated as the advance digging of multiple graves. It should not be regarded differently from the preparation of graves on demand.

8. The sole purpose of the preparation of a grave is to dispose of the remains of the dead.

9. It should not matter that the undertaker does not prepare the grave himself.

10. HMRC’s Notice 701/32 at para 5.1 indicates that services are exempt if they comprise “*Brick, block or concrete lining of a grave when constructed as a requirement of the cemetery management (or in the case of a churchyard, the church authorities) where for example the soil is unstable.*” The installation of the prefabricated vaults at Elysian Fields graveyard is to

deal with unstable soil in the area. The services should be exempt. The digging of graves is also an exempt supply within the list of services supplied by undertakers.

HMRC'S CASE

11. HMRC consider that the supplies of services supplied by Hodge in connection with the installation of flexible burial vaults by Hodge to RED Landscapes do not fall within item 2 of group 8 because:

- (1) Item 2 must be construed to confine the exemption to those supplies directly involved with the disposal of the remains of a particular dead person.
- (2) Item 2 is confined to supplies directly made by the funeral director with care and custody of the deceased. It does not extend to sub-contractors of the funeral director.
- (3) The construction of Item 2 as mentioned in (1) and (2) above coincides with the Guidance issued by HMRC in Public Notice 701/32 issued in 2012. Para 1.3 lists the services the Notice covers. The list includes funeral services, burials and cremations, goods and services connected with commemoration of the dead, other goods and services connected with organising funerals, and other activities relating to the disposal of the remains of the dead, including transport of a dead body. The services in issue in this case are not covered by the notice. Hodge has no responsibility for the deceased.
- (4) Although the availability of zero rating in connection with the provision of new housing can be available to sub-contractors involved in the supply of new housing, this exemption cannot extend to sub-contractors in the same way, as the sub-contractors cannot be concerned with the body of the deceased.
- (5) The construction of Item 2 as discussed in (1) and (2) above is supported by two cases *Network Insurance* and *Williams*.

DISCUSSION

12. The starting point is the legislation (Items 1 and 2 of Group 8 of Schedule 9 to the VAT Act) and the proper construction of that legislation. Moses J in *Newtwork Insurance* indicated that the correct starting point in identifying whether services fall within items 1 and 2 of Group 8 of Schedule 9 to the VAT is to identify the result of the service. To be exempt the services must directly lead to the disposal of the remains of the dead or be in connection with the disposal of the remains of the dead. They must also be of the type normally provided by undertakers.

13. We consider that the services undertaken by Hodge at Elysium Gardens resulted in the provision of many graves for the disposal of the remains of the dead. The result of the services satisfies the object of the exemption. As Hodge does not actually dispose of the remains of the dead, the services they provided do not fall within Item 1, but as the digging of graves is central to the disposal of the remains of the dead, the services are made in connection with the disposal of the remains of the dead and within Item 2.

14. As was pointed out by Moses J in *Network Insurance*, it does not matter that the services are provided in advance, and nor does it matter that the services are not provided in connection with a specific funeral.

15. The decision in *Williams* is also helpful in that it confirms that the funeral director or undertaker need not provide all the services himself. In that case the cold storage services and chapel of rest facilities were provided by CJ Williams to fellow undertakers in the locality without such facilities. These services by CJ Williams were, nonetheless, exempt supplies and not standard rated supplies as had been claimed by CJ Williams.

16. We note that HMRC’s guidance in Notice 701/32 does not have force of law. We also note that such guidance is not a guide to interpretation. However, we note that HMRC consider at para 3.1 that the digging of a grave would be an exempt service if provided by an undertaker. It is difficult to accept that the digging of a grave by another person should be regarded as anything other than an exempt supply. Indeed, the approach of Charles Potter QC in the case of *Barclays Bank plc v Customs & Excise* relied on by Moses J in *Network Insurance*, requires us to identify the sort of services normally supplied by undertakers. Digging of graves is pivotal to the disposal of the remains of the dead by burial and is normally provided by an undertaker.

17. We further note that at para 5.1 of Notice 701/32 indicates that services are exempt if they comprise “*Brick, block or concrete lining of a grave when constructed as a requirement of the cemetery management (or in the case of a churchyard, the church authorities) where for example the soil is unstable.*” The system of installation of prefabricated burial vaults in this case is to deal with the very issue of unstable soil identified at para 5.1. We consider that it should make no difference that the modern method of dealing with unstable soil requires the advance preparation of multiple graves to deal with that problem. The legislation must in our opinion be construed in a manner to enable new technology to be adopted to achieve the result expected by the legislation. The “always speaking” rule of statutory construction should apply in this case. This rule of construction applies, per Lord Hoffmann in *Birmingham City Council v Oakley* [2000] UKHL 59, “*Where a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood*”. The principle was adopted in the context of VAT in the case of *News Corp UK & Ireland Ltd* [2019] UKUT 0404 (TCC). The issue in that case was whether zero rating of newspapers should apply also to newspapers in electronic form. The UT overturned the FTT decision and determined that physical and electronic forms of newspapers should be treated identically for VAT purposes. This was so notwithstanding that the zero-rating provisions should be construed strictly. The UT determined at [85] that, “*in applying the always speaking doctrine, the essential question is whether the digital versions [of the newspaper], with the characteristics found by the FTT, fulfil the legislative purpose of the statutory provisions. That purpose is, as we have noted, agreed to be to promote literacy, the determination of knowledge and democratic accountability by having informed debate.*” They were both zero rated. In this case, the new technology in the context of preparing graves for the disposal of the remains of the dead in unstable soil areas, involves the use of pre-formed flexible vaults rather than brick retaining walls installed in each individually dug grave. The purpose of the new technology is the same as the old technology, to provide graves for the disposal of the remains of the dead in unstable soil areas.

18. We find the supplies by Hodge were arrangements made “*in connection with the disposal of the remains of the dead*” within item 2 of Group 8 and are exempt from VAT.

19. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

20. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

Release date: 04 MAY 2022