[2017] UKUT 239 (TCC)

Appeal number: UT/2015/0186
UT/2016/0024

VALUE ADDED TAX – Supply of residential caravans under leasing agreements to persons for use as their homes on sites under separate pitch agreements between occupiers and site owners – whether zero rated supply of caravan or standard rated supply of accommodation in a caravan – items 1 and 3 and Note (b) Group 9 Schedule 8 VAT Act 1994 – whether FTT wrong to hold assessment had no legal basis and must fail - whether FTT had duty to increase assessment - section 84(5) VAT Act 1994

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants (2015/0186)
Respondents (2016/0024)

- and –

C JENKIN & SON LIMITED

Respondent (2015/0186)
Appellant (2016/0024)

Tribunal: The Hon Mr Justice Norris
Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 21 and 22 February 2017

Tarlochan Lall, counsel, instructed by Croner Taxwise Limited, for C Jenkin & Sons Limited

Marika Lemos, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Commissioners of HM Revenue and Customs

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DECISION

Introduction

1. C Jenkin and Son Ltd ('CJS') supplied caravans to 'the travelling community' on long term leases for use as their homes on sites under separate pitch agreements between occupiers and site owners (usually, local authorities). CJS treated those supplies as zero rated by items 1 and 3 of Group 9 of Schedule 8 to the Value Added Tax Act 1994 ('VATA94'). In 2013, the Commissioners of HM Revenue and Customs ('HMRC') decided that the supplies made by CJS were supplies of accommodation in caravans and, as such, excluded from zero rating by Note (b) to Group 9. HMRC considered that, as supplies of accommodation, the supplies were grants of an interest in or right over land or a licence to occupy land and exempt under item 1 of Group 1 of Schedule 9 to VATA94. HMRC issued assessments to recover input tax of £481,068 that had been reclaimed by CJS in the VAT quarters 12/09 to 04/13 on the ground that the input tax was attributable to exempt supplies. Following a review by HMRC, the decision was confirmed in a letter dated 21 February 2014.

2. CJS appealed to the First-tier Tribunal (Tax Chamber) ('FTT'). At the hearing, both parties agreed that there was no legal basis on which the supplies could be held to be exempt. It was accepted by HMRC that CJS was not making supplies of an interest in or right over land as such supplies were made by the site owners who granted the lessees of the caravans the right to occupy the pitches.

3. In a decision released on 21 May 2015 with neutral citation [2015] UKFTT 0242 (TC) ('the Decision'), the FTT (Judge Cornwell-Kelly) allowed CJS's appeal. Save as otherwise indicated, paragraph references in square brackets in this decision are to paragraphs in the Decision. The FTT held, in [26], that the caravans were "used, and intended to be used, as peoples' homes to live in as residential accommodation" and, as such, were excluded from zero rating. In [28], the FTT stated that, as everyone agreed that CJS's supplies were not exempt and it had found that the supplies were excluded from zero rating, the only possible conclusion was that the supplies were standard rated. The FTT observed that, as no one had argued that the supplies were chargeable to VAT at the standard rate (and HMRC had supported the conclusion only reluctantly), the Decision was not authority for that conclusion, even though it was probably right. The FTT then went onto consider the validity of the assessments. In [29], the FTT held that, as it had not been established that CJS made exempt supplies, the assessments lacked any legal basis and must therefore fail.

4. HMRC and CJS now both appeal, with the permission of the FTT, against the Decision.

Factual background

5. There is no dispute about the background to and facts of this appeal. The FTT set out the material facts at [3] – [6] and [10]. For the purposes of this appeal, the facts can be summarised as set out in the following paragraphs.

6. CJS supplies caravans, used as mobile homes, to members of what is known as the 'travelling community' eligible for housing benefit. The caravans were for use as their homes and to be sited on pitches provided by third parties, generally local authorities. The supplies with which this appeal is concerned are those where CJS leases the caravans to the travellers.

7. A caravan is plainly a chattel; but the leasing agreement for the caravan made between CJS and the traveller is couched in the terms of a tenancy of real property, although no interest in land is created. It is headed "Long Term Leasing Agreement". CJS is described as the "Landlord" and the traveller as the "Tenant". The "Property" is defined as the "mobile home to be sited on [a specified site]", together with the fixtures, furniture and effects in it. The agreement states that the term of the lease is 5 years and the rent is payable monthly in advance.

8. Clause 2 of the agreement states that it "is intended to create an Assured Shorthold Tenancy as defined in the Housing Act 1988" with the provisions for recovery by the landlord in section 21 of that Act being applicable. Clause 4 lists the tenant's obligations in the terms in which they would be found in a tenancy of a house or a flat. They included obligations as to repair, residential use, subletting, and indemnifying the landlord against all rates and/or council taxes. Clause 5 specifies the landlord's obligations in the same way, dealing with quiet enjoyment, insurance, forfeiture and re-entry pursuant to section 21 of the 1988 Act. Clause 5 ends with the following clause:

> "(d) That the Leasee [sic – and an undefined term] may request that the home be moved to another park or other place of their choosing and the Landlord will endeavour to facilitate this request, subject to agreement on costs and the economic viability of the move to the Company [undefined]."

That clause is repeated at the end of the agreement using the term "Tenant" instead of "Leasee". It was not disputed that up to 12% of the CJS's customers actually moved their mobile homes.

9. We were shown, as was the FTT, a copy of a standard agreement for the siting of a mobile home on a local authority pitch belonging to East Sussex County Council setting out the terms on which the occupant of the home is permitted to keep it on site. It is described as made under the terms of the Mobile Homes Act 1983. Clause A2 of Part 4 of the agreement specifies that it constitutes a licence to occupy the allocated pitch but does not confer exclusive possession of the pitch or create a tenancy.

Legislative framework

10. Although it does not specifically authorise the zero-rating of supplies of caravans, Article 110 of Directive 2006/112/EC (the 'Principal VAT Directive') allows Member States to retain, on a transitional basis, provisions that derogate from the standard rate of VAT. The zero rating of certain caravans is such a provision. Article 110 states:

> "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.
>
> The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

11. In so far as material, section 30(2) VATA94 provides that supplies of goods or services of a description specified in Schedule 8 are zero-rated. At the relevant time, Group 9 of Schedule 8 to VATA94 described the following goods and services:

> "Item No

> 1 Caravans which exceed the limits of size of a trailer for the time being permitted to be towed on roads by a motor vehicle having a maximum gross weight of 3,500 kilogrammes and which -
>
> (*a*) were manufactured to standard BS 3632:2005 or BS 3632:2015 approved by the British Standards Institution, or
>
> (*b*) are second hand, were manufactured to a previous version of standard BS 3632 approved by that Institution and were occupied before 6 April 2013.
>
> …
>
> 3 The supply of such services as are described in paragraph 1(1) or 5(4) of Schedule 4 in respect of a caravan comprised in item 1 …
>
> Note: This Group does not include --
>
> …
>
> (*b*) the supply of accommodation in a caravan …"

12. There has never been any dispute that the caravans supplied by CJS were qualifying caravans within the item 1 of Group 9 of Schedule 8 to VATA94. Both parties also agreed that the reference in Item 3 to services described in paragraph 1(1) or 5(4) of Schedule 4 brings the leasing of caravans within Group 9 and the scope of zero rating. So the starting point is that the supply of a caravan under a chattel lease is zero-rated: and the question is whether the actual supply by CJS under its arrangements is taken outside that general provision because what CJS does is as a matter of economic reality to supply accommodation in a caravan.

13. Although the supply of accommodation in a caravan is excluded from zero rating by Note (b) to Group 9, the legislation nowhere defines what is meant by "accommodation".

14. HMRC's interpretation of the provisions of Group 9 of Schedule 8 to VATA94 is contained in VAT notice 701/20 'Caravans and houseboats', published 27 December 2013. Paragraph 2.3 of the Notice states:

> "**2.3 What is meant by the supply of a caravan?**
>
> You are supplying a caravan if you do any of the following:
>
> - sell it
> - lease it under a long term leasing agreement under which the lessee is free to transport it to a park or other place of their own choosing
> - loan it without making a charge
> - divert it to your own personal use"

15. Paragraph 5 of Notice 701/20 gives HMRC's views on supplies of accommodation in caravans:

> "**5.1 Holiday accommodation**
>
> If you provide accommodation in a caravan that is:
>
> - sited on a park advertised or held out for holiday use, and
> - let to a person as holiday accommodation
>
> your supply will be standard-rated.

> **5.2 Off-season letting at holiday sites**
>
> If you provide accommodation in a caravan during the off-season, you may treat your supply as exempt from VAT provided:
>
> - it is let to a person as residential accommodation
> - it is let for more than 28 days, and
> - holiday trade in the area is clearly seasonal
>
> You should keep a copy of the tenancy agreement or similar evidence to show that the accommodation was occupied for residential purposes only. In such cases the whole of the let, including the first 28 days should be treated as an exempt supply.
>
> The holiday season normally lasts from Easter to the end of September, but areas are not regarded as having a seasonal holiday trade if in practice it is common for tourists or holiday goers to come and go at all times throughout the year. This is likely to be the case, for example, in places of historical interest which attract tourists for reasons not dependent on good weather.
>
> **5.3 Residential accommodation**
>
> If you provide accommodation in a caravan that is:
>
> - on a site designated by the local authority as for permanent residential use, and
> - let to a person as residential accommodation
>
> your supply will be exempt."

Issues on appeal

16. CJS contends that the FTT erred in concluding that its supplies were accommodation in caravans and thus not zero rated. HMRC argue that the FTT correctly found that the supplies were excluded from zero rating but erred in failing to make an express finding that CJS's supplies were standard rated.

17. The first issue is: what is the correct VAT liability of the supplies made by CJS? It was common ground that the caravans are within the definition of a "caravan" for the purposes of zero rating. HMRC accepted that a supply which constitutes the transfer of possession of a qualifying caravan under a lease is a zero-rated supply within Item 3 of Group 9 VATA94 unless the supply can properly be characterised as a supply of accommodation in a caravan. Accordingly, the first issue is whether, when it leased caravans to the travellers, CJS supplied:

(1) caravans; or

(2) accommodation in caravans within note (b) to Group 9.

18. If, as CJS contends, the supplies of the caravans were zero-rated then its appeal should be allowed and HMRC's appeal dismissed. If the supplies by CJS should have been treated as standard rated supplies of accommodation then the issue is what consequences follow. HMRC contend that the FTT was wrong to hold that the assessments had no legal basis and also erred in failing to exercise the power in section 84(5) VATA94 to increase the amount of an assessment if the assessments are found to have under-assessed CJS.

VAT liability issue

19. Both parties in this case agreed that the distinction between the supply of a caravan and the supply of accommodation in a caravan is a fine one. Ms Lemos, who appeared for HMRC, submitted that the FTT found a basis for distinguishing between the two in the extent of the tenants' ability freely to move the caravans which is the test set out in section 2.3 of Notice 701/20. In [26], the FTT rejected HMRC's reliance on the test in section 2.3 of Notice 701/20 on the ground that it had no basis in law and was, therefore, irrelevant to the issue in the appeal. In case it was wrong on that point, the FTT went on to find that the tenants were not free to move or transport their caravans because the pitch to be used for the caravan was identified in the leasing agreement and the contractual obligation was to use it there unless CJS agreed otherwise. Ms Lemos sought to rely on this finding to justify the FTT's conclusion that CJS supplied accommodation in the caravans rather than the caravans themselves.

20. We do not consider that the FTT's finding that the tenants did not have freedom to move the caravans supports HMRC's case. It is quite clear from the FTT's comments in [26] that the FTT did not consider that the criteria in section 2.3 of Notice 701/20 had any basis in law and we agree. In our view, there is nothing in the legislation that imposes a "freedom to move" test or from which such a test can be inferred. Further, there is nothing in the meaning of "accommodation" that imports such a criterion. We cannot see that the right to move the caravan to another park or other place of the lessee's choosing is relevant. We can see that it might be relevant where the same person both leases the caravan to the customer and grants a right to put the caravan on a pitch on a site. The freedom to move the caravan to another site or other place could be a relevant, if not conclusive, factor in demonstrating that there were two separate supplies (letting of immovable property and leasing of movable property) with two different VAT liabilities. That, however, is not the case here.

21. In [25], the FTT accepted HMRC's submission that note (b) to Group 9 must be read as focusing on what happens to the caravan itself rather than on the wider issue of what constitutes "accommodation". On that basis, the FTT went onto hold in [26]:

> "Undoubtedly, these caravans are used, and intended to be used, as peoples' homes to live in as residential accommodation. The legislation does not address the question of where the caravans are used, but concerns itself only with their actual use as accommodation."

22. In our view, the FTT was right to take account of the use of the caravans but if, as appears to us to be the case, it focussed on use without regard to other factors then we consider that it fell into error. We consider that the FTT erred when it found, in [26], that the test for whether a supply is a supply of accommodation in a caravan is whether the caravan is actually or intended to be used as accommodation. The intended and actual use of the caravans are relevant factors in determining what CJS supplied but it is only part of the inquiry. The question is whether CJS, in leasing the caravan to the customer, made a supply of accommodation in a caravan. In our opinion, it is necessary to address the issue of what 'accommodation' means and then ask whether that is what CJS supplied to the travellers, having regard to all the circumstances and, in particular, the contractual obligations under which the supplies were made. The difficulty in this case is that the agreement between CJS and its customers clearly did not reflect the reality of what was being supplied. Ms Lemos accepted that the agreement could not create the sort of rights that it purported to give to the tenants but she submitted that the

agreement showed what the parties considered was being supplied, and that was accommodation.

23. Although 'accommodation' is an ordinary word in the English language, its meaning in the context of Note (b) to Group 9 of Schedule 8 VATA94 is a question of law. We consider that a supply of "accommodation in a caravan" requires more than simply providing the caravan. In our opinion, the supplies of caravans, whether by way of sale or lease, by CJS were not supplies of accommodation but were supplies of items that could be used as accommodation. A supply of a caravan without the right to occupy it on a site is not a supply of accommodation but merely a supply of the caravan. Ms Lemos contended that, in this case, all the caravans were supplied for use on specified sites that the customer had the right to occupy and it did not matter, for the purposes of determining whether it is a supply of accommodation, that the supplies of the caravan and the right to place the caravan on the site were supplied by two different people. We cannot agree. The caravans are not merely placed on the site: they are physically connected to utilities such electricity and water as well as mains drainage. Without such facilities, it would not be possible to occupy the caravans for residential purposes and, in our view, it cannot be said that, without them, there is a supply of "accommodation in a caravan". The pitch and services are provided by a third party. CJS does not supply them and has no control over those elements. Without them, we do not consider that CJS can supply "accommodation in a caravan".

24. We should make clear that the fact that a caravan and the right to put it on a particular site are supplied by two separate persons would not necessarily result in the supplies not being regarded as accommodation in a caravan if the arrangements were an abuse (see Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] ECR I-897, [2008] STC 3132 for an example of two suppliers taking part in a leasing transaction being regarded as making a single supply of leasing).

25. It follows from our conclusion that CJS made zero rated supplies by the leasing of caravans and is therefore entitled to credit for the full amount of input tax claimed which HMRC sought to recover by assessment. Accordingly, we allow CJS's appeal and dismiss HMRC's appeal.

26. In the light of that conclusion we can deal shortly with other points that were argued.

Principle of fiscal neutrality

27. Mr Lall, who appeared for CJS, made detailed submissions that the supplies by CJS were similar to supplies of residential lettings and long term hotel accommodation and that, applying the principle of fiscal neutrality, the supplies of the caravans should be taken out of taxation by exemption or zero rating. It follows from our decision on the liability of the supplies made by CJS that it is unnecessary to go into complex questions of fiscal neutrality other than to say that we found the points made to us by Mr Lall unpersuasive as they would lead to an extension of zero rating that is not permitted by Article 110 of the Principal VAT Directive. It also appears to us that his chosen comparator of long-term hotel accommodation cannot reasonably be said to be sufficiently similar to supplies of caravans by CJS which did not have any of the facilities associated with an hotel.

Was FTT right to hold that assessment invalid?

28. It was HMRC's case that the FTT erred in failing to uphold the assessments. HMRC did not need to establish that the "taxpayer's supplies were exempt": see *HMRC v Bupa Purchasing Limited & Others* [2007] EWCA 542 ('*Bupa*'), in which the Court of Appeal held that the reasons given for an assessment are separate from the assessment itself, the purpose of which is to determine the net amount of VAT due. It was CJS's appeal to the FTT, and the burden was on CJS to prove that the amount assessed was not due.

29. We agree. In our view, the assessment is of an amount of tax and the fact that the reasons for the assessment have changed or even been abandoned (provided that the assessment is still maintained) do not invalidate the assessment except in the circumstances described by the Court in *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners (No.2)* [2003] STC 150 ('*Rahman').* The primary task of FTT is to determine correct amount of tax (per Carnwath LJ in *Pegasus Birds* at [38]) and that remains the case even where the reasons for assessment have changed.

30. But in the instant case CJS has discharged the burden of demonstrating that the amount assessed was not due because it was entitled to claim a refund of the input tax.

Does FTT have duty to increase an assessment where it undercharges VAT due?

31. One consequence of HMRC's argument on appeal that the supply of caravans by CJS was standard rated was that it could advance a claim to £871,324 output tax. This had not been the subject of any assessment (because the possibility of the supply being standard-rated had only arisen before the FTT): and it had not been the subject of argument before the FTT. But HMRC argued that the FTT itself could and should have increased the actual assessment to what it would have been had the supply been standard rated (which the FTT thought it probably was). On our disposition of the appeal (the supply was zero-rated) the point does not arise: but since it was argued we address it briefly.

32. Section 73(1) VATA94 contains provisions enabling HMRC to assess the amount of VAT due from a person if it appears to HMRC that that person's VAT returns are incomplete or incorrect. Section 83(1)(p) VATA94 provides that an appeal lies to the FTT with respect to an assessment "under section 73(1) … or the amount of such assessment."

33. Section 84(5) then provides as follows:

> "Where on appeal against a decision in respect to any of the matters mentioned in section 83(1)(p) …
>
> > (a) it is found that the amount specified in the assessment is less that it ought to have been, and
> >
> > (b) the tribunal gives a direction specifying the correct amount,
>
> the assessment shall have effect as an assessment of the amount specified in the direction, and the amount shall be deemed to have been notified to the appellant."

34. HMRC submitted that. although section 84(5) VATA 1994 has been described in the VAT context as a 'discretion', it is in fact analogous to section 50(7) of the Taxes Management Act 1970 ('TMA 1970'): see *Elias Gale Racing v Customs and Excise*

Commissioners [1999] STC 66 ("*Elias Gale*"), at 75f. Section 50(7) TMA 1970 has been described as imposing a duty on the appellate body to increase an assessment on a hearing of the taxpayer's appeal, if the evidence shows this to be appropriate: see *Glaxo Group Ltd v IRC* [1996] STC 191 ('*Glaxo*'), per Millet LJ at 199j. *Glaxo* does not appear to have been addressed by the court in *Elias Gale*, or any of the later decisions on section 84(5). In light of the decision in *Glaxo*, it was HMRC's case that section 84(5) VATA 1994 imposes a duty on a court/tribunal hearing an appeal to increase the amount of an assessment, if the assessment is found to have under-assessed the taxpayer. This is subject only to proper exercise by the FTT of its case-management powers, i.e. to afford the taxpayer the opportunity to respond to any late points arising as regards an increase in the amount assessed.

35. We do not accept this submission. The question at issue in *Glaxo* was whether the Revenue was obliged to issue fresh assessments once it had decided to invoke certain transfer-pricing provisions relevant to the computation of profits (as the taxpayer contended, the Revenue being out of time to raise fresh assessments); or whether the Revenue could simply ask the commissioners on the hearing of an appeal for any existing open assessment to be increased. The Court of Appeal decided that, under the relevant charging provision, fresh assessments were not necessary: but the Court then had to face the difficulty that Lord Diplock had expressed the view in *Vandervell Trustees Ltd v White* [1971] AC 912 at 942 that the Revenue could not ask for an increase of an assessment on an appeal or adduce evidence or advance argument in support of an increase. The Court decided not to follow those dicta given clear indications elsewhere that an inspector could ask for an increase, and that since the commissioners had a statutory power to increase an assessment (but could plainly only do so on evidence) the inspector must be entitled to ask the commissioners to receive fresh evidence.

36. But that decision does not support the proposition that the FTT was under a duty (even though not asked by HMRC) to consider whether there was a case for increasing the assessment and (in the light of its provisional view that the supply was standard rated) to call for evidence and argument to support an increase, adjourning the appeal against the assessment for those steps to be taken. We are persuaded of the correctness of the view of Carnwath J in *Elias Gale* (at p.76d) where he observed that the rules that govern appeals envisage an adversarial procedure, with the running made by the two parties (a view that he has maintained in the Supreme Court – see *Volkswagen Financial Services (UK) Ltd v HMRC* [2017] UKSC 26 at [7]). They do not provide for the tribunal to raise or investigate issues of its own motion, a feature that argues "strongly against the tribunal having a free-standing power to increase the assessment entirely of its own initiative". We further consider that where one party does seek such a direction, the giving of a direction is not a matter of right, but calls for the exercise of a discretion upon proper grounds.

Disposition

37. For the reasons given above, CJS's appeal against the Decision is allowed and HMRC's appeal is dismissed.

Costs

38. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of

costs claimed in the application as required by rule 10(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Norris

Judge Greg Sinfield

Release date: 15 June 2017