[2015] UKFTT 0242 (TC)

TC04434

Appeal number: TC/2014/01582

Supply on leasing agreements of residential caravans – separate pitch agreements between occupiers and site owners – whether supply zero rated or exempt – VATA 1994 Sch 8 Grp 9, item 1 & Sch 9 Grp 1, item 1 – use of ESC to disadvantage of taxpayer – whether unreasonable conduct – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

C JENKIN & SON LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Malachy Cornwell-Kelly

Sitting in public at the Royal Courts of Justice, London on 7 & 8 May 2015

Mr Michael Finn of Michael Finn & Co for the taxpayer
Mrs Lisa Fletcher of HMRC for the Crown

DECISION

1 This is an appeal against assessments for the VAT quarters 12/09 to 04/13 to recover overclaimed input tax. The input tax had been reclaimed by the taxpayer on the basis that the supplies in question were zero rated, whereas the Revenue considered that they were exempt. The assessments now under appeal were confirmed on review on 21 February 2014. The sum at issue is £481,068.

Facts

2 I had written and oral evidence from Ms Angela Seymour, the assessing officer, Mr Robin Skilton, the taxpayer's Finance Manager, and from Mr Michael Finn; it was supplemented by the usual bundle of documentary evidence. There is essentially no dispute about the facts themselves, and I find the following position established at least on the balance of probabilities.

3 The taxpayer supplies caravans, used as mobile homes, to members of what is known as the 'travelling community' eligible for housing benefit for use as their homes and to be sited on pitches provided, in general, by local authorities. (It is common ground that the caravans are within the definition of a "caravan" for the purposes of zero rating – see below.) The caravans are the subject of leasing agreements made between the traveller and the taxpayer, and there are separate pitch agreements made between the traveller who has leased a caravan and the owner of the site on which it is placed.

4 The leasing agreement for the caravan made between the taxpayer 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" and has the following features:

- The taxpayer is defined and the "Landlord" and the traveller as the "Tenant".
- The mobile home is defined as the "Property", together with the fixtures, furniture and effects in it, and the pitch to be used is identified.
- The term of the lease is 5 years.
- The rent is payable monthly in advance.
- Clause 2 provides that the agreement "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, as to repair, residential use, subletting, etc.
- 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.

5 The agreement ends with a clause which gave rise to much debate at the hearing in view the Revenue's Public Notice 701/20 (which I refer to below):

> The Tenant 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.

6 The evidence was that these agreements had an average duration of over 5 years and that up to 12% of the tenants did move their mobile homes. (Overall, some 75-80% of the taxpayer's leasing income comes from leasing mobile homes to the traveller community and this appeal is concerned with that aspect of the business only.)

7 The taxpayer feels very aggrieved by the circumstances in which the assessments were made. A control visit took place in June 2013 at which Ms Seymour identified what was in her view a failure to use a suitable apportionment method to block input taxable attributable to what she viewed as the exempt supplies to the travellers. The company was treating them, as I have indicated, as zero rated and claimed that three earlier control visits from the Revenue had endorsed that practice.

8 I explained at the hearing that, if this was the case and the taxpayer has a valid complaint of misdirection or had a legitimate expectation based on the earlier visits, the remedy lies in a complaint to the Revenue Adjudicator or in an application for judicial review. It is not within the jurisdiction of the tribunal to address matters falling outside the statutory framework of the tax, and it must consider only whether the assessment under appeal is good in law.

9 Public Notice 710/20 was much relied upon and cited during the correspondence preceding the appeal and at the hearing, despite my observing repeatedly that the task of the tribunal is related to the legislation in point and not to the application of public notices. The Notice deals with caravans and houseboats. At 2.3 it states:

> 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

and, at 5.3, it states:

> 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.

10 I was shown a copy of the 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 being made under the terms of the Mobile Homes Act 1983. Part 4, clause A2, of the agreement specifies that it constitutes a licence to occupy the

allocated site but does not confer exclusive possession of the site or create a tenancy.

Legislation

11 The Value Added Tax Act 1994 provides as follows:

> *Zero rating: Schedule 8, Group 9 – caravans and houseboats*
> 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 approved by the British Standards Institution,
> *Note:*
>
> This Group does not include—
> (b) the supply of accommodation in a caravan or house boat.
>
> *Exemption: Schedule 9, Group 1 - land*
> 1 The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right . . .

12 The Housing Act 1988 provides:

> *Assured tenancies*
> 1(1) A tenancy under which a dwelling-house is let as a separate dwelling is for the purposes of this Act an assured tenancy if and so long as—
> (a) the tenant or, as the case may be, each of the joint tenants is an individual; and
> (b) the tenant or, as the case may be, at least one of the joint tenants occupies the dwelling-house as his only or principal home; and
> (c) the tenancy is not one which, by virtue of subsection (2) or subsection (6) below, cannot be an assured tenancy.
>
> *Assured shorthold tenancies*
> 19A An assured tenancy which—
> (a) is entered into on or after the day on which section 96 of the Housing Act 1996 comes into force (otherwise than pursuant to a contract made before that day), or
> (b) comes into being by virtue of section 5 above on the coming to an end of an assured tenancy within paragraph (a) above,
> is an assured shorthold tenancy unless it falls within any paragraph in Schedule 2A to this Act.[1]

[1] This new section, with others, replaced the original definition of "assured shorthold tenancies" in section 20, as from 1996.

Recovery of possession on expiry or termination of assured shorthold tenancy

21(1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter I above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—

(a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and

(b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.

Submissions

13 For the taxpayer, Mr Finn submitted that the supplies made were essentially those of zero rated caravans within item 1, Group 9 of Schedule 8. It was common ground that the mobiles homes supplied were within the definition of 'caravan' and this appeal was concerned exclusively with supplies to the traveller community where the caravans were sited on local authority pitches. The housing benefit which the travellers received effectively paid the rent for the caravan and, separately, the traveller paid the local authority for the right to site the caravan on its land.

14 In so far as the exclusion of 'accommodation' by Note (b) to item 1 was concerned, it was necessary to look to the ordinary meaning of the term since it was not otherwise defined. One definition Mr Finn cited (although he could not be sure where it came from) was "a room, group of rooms, or building in which someone may live or stay". Another definition, from Merion Webster's Encyclopaedia Britannica dictionary, was "a place where people can live, stay or work". The caravan itself did not amount to accommodation, but it was the caravan *in situ* on the local authority pitch which, in total, provided the traveller with accommodation and the licence to occupy a particular pitch given by the local authority was a necessary element of that.

15 Notice 701/20, section 2.3, makes it a condition of zero rating that "the lessee is free to transport [the caravan] to a park or other place of their own choosing" and the evidence shows that, as a practical matter, the lessees are free to move. The restrictions in the leasing agreement which give the landlord a discretion to approve a move or not, do not in practice operate to restrict the tenant's freedom, and the tribunal must look at the economic reality of the situation. The evidence is that a significant minority of those to whom the caravans are leased do move, and it would be wrong to ignore that.

16 In substance, the taxpayer's business resembles that of a builder who would, in the case of newly built houses, be treated as supplying a zero rated product. Fiscal neutrality required that the taxpayer should not be treated differently or be at a competitive disadvantage to builders. It was, in any event, clear that the taxpayer was not making an exempt supply of an interest in land since that was covered by the

pitch agreement with the local authority. With that in mind, it could not be correct that the taxpayer had been making partially exempt supplies and the assessments to recover input on that basis could not therefore be well-founded.

17 This point is underlined by the Value Added Tax (Land Exemption) Order 2012, which exempts the supply of seasonal caravan pitches used for residential as opposed to holiday purposes (and puts on a statutory footing the exemption that was previously under ESC 3.16). The effect is that the provision applies to the provision of pitches on (a) permanent residential sites where caravans can be lived in at all times, and (b) sites for travellers where the caravans are used as principal private residences.

18 Thus, in Mr Finn's submission there are the following propositions: (i) the supply of a sited mobile home is a composite supply of both a home and a pitch, whereas the taxpayer's only supply is that of the mobile home; (ii) the mobile home cannot be an exempt supply in the absence of the supply of the pitch or some other right over land, since the supply of the pitch itself is not by the taxpayer but by a third party site owner, usually a local authority; (iii) the mobile home lessees are free to move their home to a park or other place of their own choosing. The taxpayer's supplies have accordingly been properly treated as zero rated supplies in the past and should continue to be so treated in the future.

19 For the Revenue, Mrs Fletcher submitted that Note (b) of Group 9 to Schedule 8 clearly excludes the supplies at issue from zero rating. The "the supply of accommodation in a caravan" must, in the context of the Group, refer to the possibility of a caravan being used as accommodation without the need to infer any requirement that it should be in a particular place, or be the subject of any given arrangement as to the real property rights which might be involved in its siting.

20 In view of the terms of the leasing agreement between the taxpayer and the traveller, it was unarguable that the purpose for which the caravan was to be used was not the accommodation of persons using it as their home. That was clearly the intention of the agreement which explicitly envisaged such use. Whatever might be the merits of the submission that the notion of 'accommodation' in general involved some kind of right or interest in real property, the Note could not be given any useful meaning unless it was read as focussing on the use of the caravan.

21 In that view, the Revenue accepted (contrary to the view expressed in the review letter upholding the assessments) that the supplies were not supplies of an interest in or right over land, and were not within the scope of Group 1 of Schedule 9. But Mrs Fletcher argued that because the agreement "creates a tenancy" the supply was thereby a supply of accommodation. The Revenue considered the pitch fee and the rental paid for the caravan as distinct supplies, and there was no question of there being a single composite supply, since there were two separate supplies by two separate suppliers.

22 In regard to the criterion cited from Notice 701/20 about the lessee's freedom to move the caravan, Mrs Fletcher submitted that the fact that some tenants did move – with the taxpayer's agreement – did not establish that they were free to do so; the reservation of the taxpayer's position in this regard in the leasing agreement was unequivocal. Mrs Fletcher accepted however that the 'freedom to move' criterion did not appear in the legislation itself, and was unable to say that it emerged from that legislation as a necessary implication of it.

23 Mrs Fletcher then referred to section 5.3 of the Notice and the statement that, if accommodation was provided in a caravan that is on a site designated by a local authority for permanent residential use and let to a person as residential accommodation, then the supply would be exempt. Asked where in the legislation this appeared, Mrs Fletcher accepted that it did not appear there but was based on an extra-statutory concession made by the commissioners to align the tax treatment of this type of situation with that of the rents paid by local authority tenants generally, which were exempt. It was she said a matter of 'social policy'. I asked Mrs Fletcher what liability should, in terms of the legislation, apply to these supplies and her view was that they should, strictly speaking, be treated as standard rated.

24 Since this argument had not been in any of the Revenue's correspondence before the appeal, or in their statement of case, or in Mrs Fletcher's skeleton, I asked whether Mr Finn had been given notice of it, to which the reply was that he had not. Mr Finn confirmed that he had not heard this submission at any point before it was made orally by Mrs Fletcher at the hearing. I then adjourned the hearing for Mr Finn to consider his position and, on resuming, I asked him twice whether he wanted to apply for a further adjournment to prepare a response; but he chose, having taken instructions, not to do so.

Conclusions

25 It is agreed that the supplies at issue are not exempt supplies within Group 1 of Schedule 9, and I therefore deal first with the question whether they are excluded from zero rating by Note (b) to Group 9 of Schedule 8. Here, I must agree with the Revenue's submission that the Note, in the context of a taxing statute, must be read as focussing on what happens to the caravan itself rather than on the wider issue of what constitutes accommodation. The purpose of the legislation is to establish the tax classification of the supply of caravans and in that perspective I believe that Mr Finn's argument about what accommodation as a general concept must involve, attractive as it is, misses the point.

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. The criterion referred to at section 2.3 of Notice 701/20, regarding the freedom to transport the caravan, has as far as I can see no basis in law and its application to this case is not therefore relevant. If I am wrong about that, I would

hold that the tenants here are not free to move or transport their caravans: the pitch to be used for the caravan is identified in the leasing agreement, and the contractual obligation is to use it there unless the taxpayer agrees otherwise. That it often does so, is in my view beside the point.

27 The leasing agreement is, however, a strange document in the context of a licence to occupy being granted by the site owner in a distinct transaction between that person and the occupier of the caravan. No explanation was given of why this agreement looks and sounds so much like a tenancy of land when in fact it is the lease of a chattel. No explanation was given either of why it describes itself as creating an Assured Shorthold Tenancy within the Housing Act 1988. As may be seen from the excerpts from that Act cited above, such a tenancy can only be that of a dwelling house, and no evidence was led, or argument advanced, that the arrangements were in substance that of the grant of a tenancy of a dwelling house. Since the taxpayer had no interest in land capable of supporting such a grant, it is indeed difficult to see how that could ever be the effect of an agreement of the kind used here.

28 As it agreed that this is not a supply that is exempt within Schedule 9, and as I have concluded that it is excluded from zero rating in Schedule 8, there is no conclusion left but that which Mrs Fletcher reluctantly supported that the supplies are properly standard rated. That issue was not however in terms argued as such and this decision is not therefore authority for that conclusion, probable though it may be. In terms of the assessments under appeal the only issue is whether they are good in law on the basis that the taxpayer was making exempt supplies in respect of which it was not entitled to recover input tax.

29 To that question, there is only one answer, namely that it has not been established that the taxpayer's supplies were exempt, except on the basis of what is said to be a concession contained in section 5.3 of Notice 701/20. It is old law that the Revenue may, within certain limits, relieve the strict effect of a taxing statute by concession and it is common knowledge that they do so. But it is certain that no liability to tax may be imposed except by legislation passed or authorised by parliament. The effect of classifying the taxpayer's supplies as exempt – which is, by definition, an exception to be the general charge to value added tax and as such must be established clearly – is in this instance to impose a liability which is not authorised by law. Lacking any legal basis, the assessments must therefore fail and the appeal succeeds.

30 I should add, for the sake of completeness, that Mr Finn's argument based on a comparison between the tax treatment of caravan pitches prescribed by the 2012 Order in my view takes matters no further, and adds nothing to the analysis of the provisions in Schedule 8 because the order makes an adjustment to the exemptions provided in Schedule 9, which is agreed not to be at issue in this case. I would in any event be wary of an attempt to construe the wording of one part of a statute by reference to a statutory instrument made to address an issue arising under another part.

31 This leaves the question of costs. Normally, in appeals to the tribunal in a standard case costs lie where they fall, but in this instance Mr Finn has applied for costs under Rule 10 on the basis that the Revenue has "acted unreasonably in

bringing, defending or conducting the proceedings". This application was made orally at the close of proceedings.

32 There are certainly matters which need explaining: the review decision letter asserted that the supplies were exempt under item 1 of Group 1 of Schedule 9 – a position which was unsustainable in view of the fact that the taxpayer had no relevant interest in land; the statement of case, did not adopt this view, but attempted to reach the same conclusion by reference to Notice 701/20 without supporting it by reference to the legislation; there is no reference to Schedule 9 in Mrs Fletcher's skeleton, but it contains the same argument by reference only to the Notice.

33 Mrs Fletcher was not, I think, in a position to respond to the application for costs at the close of the hearing and I wish to hear argument on this from the Revenue before reaching a conclusion. I therefore direct that both parties are at liberty to make written representations on the matter of costs within 30 days of the release of this decision, and must state whether they wish the application for costs to be the subject of a further hearing. I draw attention to the requirements of Rule 10(3) as to the procedure to be followed if the application is maintained.

Appeal rights

34 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application for permission to appeal must be received by the tribunal no later than 56 days after full written findings and reasons are 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 21 May 2015