



TC04994

Appeal number: TC/2015/05757

VAT - Trout Fishery - Sale of tickets with right to take away up to a certain number of fish caught - Whether separate supplies of fishing and fish? - Card Protection Plan Ltd [2001] UKHL 4 considered - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**STOCKS FLY FISHERY
(A PARTNERSHIP)**

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
 MR LESLIE BROWN**

**Sitting in public at Manchester Tribunals House, Parsonage, Manchester on 14
March 2016**

Mr Ben Dobson, a partner, on behalf of the Appellant

Mr John Nicholson, an Officer of HMRC, for the Respondents

DECISION

Introduction

5 1. Stocks Fly Fishery ('the Fishery') is based at Stocks Reservoir in the Forest of Bowland. The reservoir is 360 acres in size and has several miles of fishable shoreline. It is kept stocked by the Fishery with various kinds of trout, and attracts both bank and boat anglers.

2. In order to fish, it is necessary to buy a ticket in advance. For daily fishing, there is a tariff which depends on two factors: (i) the duration of the ticket; and (ii) whether the angler is fishing entirely for sport (in which case the angler must return any fish caught to the reservoir - so-called 'Catch and Return' - a 'sporting' ticket) or whether he is also fishing for a catch (which can be of up to 2, 3 or 5 fish) which, if caught, must be taken away (which we shall refer to in this Decision as a 'take' ticket). It costs more to fish for a day than for a half-day. A 'take' ticket costs more than a 'sporting' ticket. It costs more to take up to 5 fish away than it does to take up to 3 fish away.

3. On 25 January 2012, the appellant's then-representatives, RSM Tenon, wrote to HMRC explaining that it had been the Fishery's practice to account for VAT on all income received. That letter said:

20 "For example, current rates include sporting tickets (which do not allow anglers to keep any fish they catch). The rate for a 4 hour ticket in these circumstances is £13.00 inclusive of VAT. Where the angler wishes to take 2 fish for the same length of time fishing, the charge is an additional £4.50. Currently therefore, the business is accounting for VAT on a figure of £17.50 rather than the 'fishing' element of £13.00. As the type of fishing is for trout, it is our view that the sum of £4.50 should correctly be treated as zero-rated as explained in VAT Notice 742 paragraphs 6.4.1(a) to (c)."

4. That letter concluded by asking HMRC to agree that two supplies were being made: one of fishing (taxable at the standard rate) and another of fish (trout) for human consumption (taxable at the zero rate).

5. A claim for repayment of 4 years' worth of overpaid VAT on the 'fish' element was made.

6. After some exploratory correspondence, HMRC decided, for the reasons set out in a letter dated 31 August 2012, to treat the supply as a single supply rather than separate supplies.

7. The decision was subject to a formal departmental review, and the original decision was upheld, for the reasons set out in a letter dated 28 October 2013.

8. The Notice of Appeal puts the matter very succinctly. The appellant's position is that 'the relevant supplies made by Stocks Fly Fishery should be treated as two separate supplies of standard-rated fishing and zero-rated fish suitable for human consumption'.

The Facts

9. The tariffs in 2011 were as follows:
- | | | |
|---|---|--------|
| | (1) Full day (over 6 hrs) - up to 5 fish | £24.00 |
| | (2) Half day (up to 5hrs) - up to 3 fish | £19.00 |
| 5 | (3) Half day (up to 5 hrs) - up to 2 fish | £17.00 |
| | (4) Day sport (over 6 hrs) | £17.50 |
| | (5) Half-day sport (up to 5 hrs) | £13.00 |
10. Having heard from Mr Dobson, a partner in the Fishery, we find the following facts:
- 10 (1) The Fishery restocks annually with 18,000 trout (a combination of rainbow, brown, and blue trout) at a cost to it of £80,000;
- (2) The fish are bought at a small size, about 12oz, and are fed in rearing pens at another site with specialist food, which is more expensive than ordinary food;
- 15 (3) The aim of this is to produce superior fish, suitable for human consumption;
- (4) This aim is accomplished. The fish produced are suitable for human consumption;
- (5) There are 6,000 - 7,000 rod visits per year;
- 20 (6) Although the Fishery does offer annual season tickets, not many are sold. Almost all the visits are on tickets for a day (or a half-day);
- (7) Those tickets are purchased on the day, from the tackle shop on site, and before the purchaser does any fishing. This is policed by the Fishery;
- (8) A good proportion - estimated by Mr Dobson at 40-50% - of the visits are from anglers who buy sporting tickets;
- 25 (9) By inference, 50-60% of the tickets purchased are 'take' tickets;
- (10) All anglers produce catch returns, which are collated into daily totals showing numbers of fish caught and returned, caught and taken, and heaviest weights;
- 30 (11) Some of the fish (especially the rainbows) are of considerable weight - well over 10lbs. The average bag for the month which we were shown (March 2011) was 5.88lbs.
11. We were also referred to the Fishery Rules, which are appear on the back of the daily fishing tickets. These include the following rules:
- 35 (1) Except for sporting tickets, all fish caught must be killed up to the bag limit (Rule 1);
- (2) Fish are charged at a minimum price of £4.50 per fish. Extra fish exceeding 2.25lbs in weight will be charged at £2.00/lb. (Rule 4)

12. As we understand Rule 4, it applies to fish caught over and above the bag limit on a 'take' ticket, or to people who buy a sporting ticket but change their mind and want to buy the fish they catch. Mr Dobson told us that very few people do either of those things.

5 **The Appellant's case**

13. In summary, the Appellant's case in support of its argument that this is two separate supplies is as follows:

- (1) There is a fundamental difference between a case in which only sporting fishing is offered, and one in which catch and release fishing is offered;
- 10 (2) In reality, this is a contingent sale of fish by the Fishery: see *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18;
- (3) The pricing structure and other materials, including the Rules, mean that the supply of fish can, for VAT purposes, be segregated from the supply of fishing;
- 15 (4) The pricing structure adopted is one which incentivizes anglers (both for reasons of trophy, and price) to catch the biggest fish they can. That is to say, if the business model was one in which anglers had to pay for any fish caught at the end of the day by weight, then they would be discouraged from catching big fish, or perhaps from visiting the Fishery at all;
- 20 (5) The supply of fish cannot properly be regarded as an ancillary purpose for those anglers who choose to buy a 'take' ticket.

HMRC's case

14. In summary, HMRC's case is as follows:

- 25 (1) This was a single supply: *Chalk Springs Fisheries* (1987) (LON/86/706) *Roger Cambrai Haynes* (1988) (LON/87/624) and *Card Protection Plan Ltd v Commissioners of Customs and Excise Case C-349/96* [1999] 2 AC 601; [2001] UKHL 4;
- 30 (2) This was not a case in which the Fishery was making a separate charge solely for the fish taken away, within the meaning of Public Notice VAT 742 Paragraph 6.4.1(b), so as to allow the separate charge to be zero-rated as a supply of those fish;
- (3) The dominant purpose is fishing. The supply of fish is an ancillary purpose.

The Law

- 35 15. *Chalk Springs Fisheries (A Firm)* LON/86/706 was decided in 1987 by Lord Grantchester. It deals with a strikingly similar scenario to the one in this appeal. It was a challenge to the VAT treatment of moneys paid by anglers to fish at a still-water trout fishery. The taxpayer argued that the moneys were received in consideration for two supplies - one being the right to come onto the land to take fish

(standard-rated) the other being the trout caught (zero-rated) - and that these should be apportioned. Tickets were available for a day, morning or afternoon, with a 4 or 2 fish limit. However, and unlike the present appeal, there were no sporting tickets: all fish caught had to be killed.

5 16. Lord Grantchester remarked:

10 "In my opinion, the question for my determination is what supply or supplies in substance and reality does an intending fisherman receive when he makes the payment required for a ticket, whether a day ticket, a morning ticket, an afternoon ticket, or an evening ticket. Does he get merely the right to take fish (trout) from the lakes for a period of time and limited in number? Alternatively does he get both such a supply and also a supply of trout, being food of a kind used for human consumption."

15 17. He approved the approach laid down by Lord Widgery CJ (with whom the other members of the Divisional Court agreed) in *Commissioners of Customs and Excise v Automobile Association* [1974] STC 192 at 199f:

20 "As I see it the Tribunal has approached this as a matter of fact. They asked themselves what in substance and reality is the service for which the subscription is paid. They concluded that as a matter of substance and reality the subscription is paid for the package of individual benefits..."

18. Lord Grantchester remarked:

25 "Proceeding on that basis to ask the question which I have posed for myself above I have no doubt that, as a matter of common sense, what the intending fisherman receives for his money is simply the right to go onto the land to catch trout, limited in duration and in number. No trout is, in my view, supplied to him at all. Instead the fisherman must go out and catch them, if he can."

19. He found that there was a single supply.

30 20. The following year, Lord Grantchester dealt with a similar appeal in *Roger Cambrai Haynes* (LON/87/624) (1988). That was also a case of a 'take' fishery, with a very similar pricing structure (in that regard) to this case. An angler who had caught his limit could be granted a further permit allowing him to catch further fish upon the making of a further payment.

35 21. However, the decision does not take matters beyond *Chalk Springs Fisheries* since the appellant Mr Haynes accepted that:

40 'purely from the point of view' (of the legislation imposing the tax) 'the payment made by the anglers were the consideration for supplies of the right and privilege to fish for trout, and not the consideration of two supplies. In this (the appellant) concedes that the decision of this tribunal on the appeal of Chalk Springs Fisheries was correct and applies to the facts of (these appeals)'.

22. The appellant's argument in that case (which was rejected) was the somewhat different one that the Commissioners should have alerted him sooner to the way in which he could operate the business of his fishery so as to allow the fish caught to be treated as a separate zero-rated supply.

5 23. *Card Protection Plan Ltd v Commissioners of Customs and Excise* Case C-349/96 [1999] 2 AC 601 involved the tax treatment of a 'credit card protection plan' provided by CPP to its customers for a single price (£16). The purpose of that plan was to ensure that a person who had paid the fee suffered as little financial loss or inconvenience as possible if credit cards were stolen or lost.

10 24. The package was made up of a package of 15 services, of which perhaps the most eye-catching was £750 insurance cover against fraudulent use. It also included registration of credit card numbers, replacement cards, change of address service, lost luggage recovery, and emergency medical cover.

15 25. One of the questions which the House of Lords asked the Court of Justice of the European Communities to consider was the proper test for deciding, for VAT purposes, whether a transaction which comprised several elements was to be regarded as a single (albeit composite) supply or as two or more independent supplies to be assessed separately.

26. The Court of Justice remarked as follows:

20 " 28. However, as the court held in *Faaborg-Gelting Linien A/S v. Finanzamt Flensburg* (Case C-231/94) [1996] E.C.R. I-2395, 2411-2412, paras. 12-14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in
25 which that transaction takes place.

29. In this respect, taking into account, first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service from an
30 economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

35 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if
40 it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied: *Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel)* (Joined Cases C-308/96 and 94/97) [1998] S.T.C. 1189, 1206, para. 24.

5 31. In those circumstances, the fact that a single price is charged
is not decisive. Admittedly, if the service provided to customers
consists of several elements for a single price, the single price may
suggest that there is a single service. However, notwithstanding the
single price, if circumstances such as those described in paragraphs 7
to 10 above indicated that the customers intended to purchase two
distinct services, namely an insurance supply and a card registration
service, then it would be necessary to identify the part of the single
price which related to the insurance supply, which would remain
10 exempt in any event. The simplest possible method of calculation or
assessment should be used for this: see, to that effect, *Madgett and
Baldwin*, at p. 1208, paras. 45 and 46."

15 27. When the case was remitted for final decision by the House of Lords ([2001]
UKHL 4) Lord Slynn of Hadley (with whom Lords Jauncey, Nolan, Steyn and
Hoffmann agreed) held that, in the circumstances of the card protection plan in issue,
there was a plainly identifiable dominant purpose, which was the provision of
insurance, with a range of ancillary purposes. He remarked as follows:

20 "22 It is clear from the Court of Justice's judgment that the
national court's task is to have regard to the "essential features of the
transaction" to see whether it is "several distinct principal services" or
a single service and that what from an economic point of view is in
reality a single service should not be "artificially split". It seems that an
overall view should be taken and over-zealous dissecting and analysis
of particular clauses should be avoided.

25 [...]

25 If one asks what is the essential feature of the scheme or its
dominant purpose—perhaps why objectively people are likely to want
to join it—I have no doubt it is to obtain a provision of insurance cover
against loss arising from the misuse of credit cards or other documents.

30 [...]

[26]

27 The dominant purpose in my view is thus plainly one of
insurance [...]

35 28 In so far as there are services which are not independently to
be categorised as insurance they are in my view ancillary and in some
cases minor features of the plan. They were, as CPP contends,
preconditions of the client making a claim for cash indemnity or
assistance or a precondition of the furnishing of insurance cover. I
doubt whether they can in any event be regarded as sufficiently
40 coherent as to be treated as one separate supply but even if they can it
is ancillary to the provision of insurance. To regard the provision of
insurance as ancillary or subsidiary to the registration of credit card
numbers is unreal and the consequences for the client of being able to
take protective action with CPP with whom the cards are registered is
45 closely linked to the insurance service. It is not possible to say that
some elements of the transaction are "economically dissociable" from
the others: *Commission of the European Communities v United*

28. VAT Notice 742 (March 2002 edition) reads:

"6.4 Supplies relating specifically to fishing

5 6.4.1 Still-water fisheries

If you operate a still-water fishery, the charges you make are standard-rated even if you supply both fishing rights and fish.

However, if:

10 (a) you allow a person to choose whether to take away fish caught or to throw them back into the water; and

(b) you make a separate charge solely for those fish taken away; and

(c) the fish taken away are of a species generally used for food in the UK (see Notice 701/14 Food),

15 then the separate charge is zero-rated as a supply of those fish.

Discussion

29. The guidance handed down by the European Court and adopted by the House of Lords in *Card Protection Plan* is binding on us. We must follow and apply it. The earlier reasoning of Lord Grantchester in *Clear Springs* is still of relevance and value where it is materially consistent with that guidance (which, in our view, it largely is).

30. We must therefore determine the essential features of the transaction.

31. In our view, the essential feature is fishing. This element is present in all cases, both of sporting tickets and 'take' tickets. Moreover, we also consider that the primary or dominant motive of anglers going to the Fishery, looked at objectively (and whatever sort of ticket they have) is to fish. In our view, their primary or dominant purpose is to enjoy the recreational aspects and challenge of the sport in beautiful surroundings. This is to a large degree corroborated by the fact that a large proportion of anglers at the Fishery do fish simply for sport.

32. We accept that *Chalk Springs* is a case in which only sport fishing was on offer, but we do not find the decision materially distinguishable on that account. Its reasoning still holds good. This is because, looked at objectively, we are unable to discern anything materially different between the motivation of those who go to fish entirely for sport, and those who go to fish intending to take away any fish they catch.

33. We do not consider that there are several distinct principal services. We are simply not persuaded that the dominant purpose of those who buy 'take' tickets is to buy fish. In our view, to adopt such an analysis would be to wholly and erroneously ignore the circumstances and physical surroundings in which the fish are caught, as

well as the time which it takes, in comparison (for example) with buying fish at the local fishmongers.

34. We are reassured in our rejection of that analysis given that, when it comes to anglers with 'take' tickets, this is not, in our view, at the time of supply, a sale of fish (even contingently). This is because there is no guarantee (or, put another way, any contractually enforceable promise) that any fish at all will be caught, much less any such guarantee or promise that an angler will catch the authorised bag. Ultimately, the bag depends not only on the skill and determination of the fisherman but, also, good old-fashioned luck.

10 35. In our view, the correct analysis, when it comes to fish, is what is being bought is simply the chance, or a hope, of catching one (sometimes referred to by the Latin expression 'emptio spei').

15 36. For that reason, we do not consider that appellant's analogies with a 'pick your own' venture or an 'all you can eat' buffet hold true. Whilst the owner of the strawberry field may charge a fee for entrance, regardless of whether or not any strawberries (once picked, and if not consumed in the field) are eventually presented to be weighed, this is on the basis that there is fruit available. There is a contractually enforceable promise that the picker will get something. There is no element of hope or chance involved. Similarly in relation to a 'all you can eat'. It is guaranteed that there will be food available to be eaten. If the buffet were empty, there would be a claim for breach of contract.

25 37. We do not consider *Hughes v Pendragon Sabre Ltd (t/a Porsche Centre Bolton)* [2016] EWCA Civ 18 to be of assistance. We accept that section 5(2) of the *Sale of Goods Act 1979* provides that 'There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen'. This statutory provision (which first appeared in 1893) preserves an older common-law rule (referred to as '*the rule in Howell v Coupland*' (1874) LR 9 QB 462) with roots ultimately going back to Roman law.

30 38. As the Court of Appeal makes clear in *Hughes*, there may a contract to buy depending on a contingency. That is uncontroversial. But, as a matter of law, it must therefore flow that, if there is a contract of sale (as there was in *Hughes*), even contingently, then a failure by the seller to deliver the thing sold would generate an action for damages for breach of contract - as indeed it did in *Hughes*, where the disappointed buyer of an unreleased limited edition Porsche was awarded damages to compensate him when the dealership, once the limited edition was released, sold the vehicle to someone else.

39. The obvious and material difference between *Hughes* and this case is that there is no suggestion here that a 'take' angler would be entitled to demand part of his ticket price back if he did not make the bag.

40 40. In our view, the fact that there is no cause of action in contract to sue for 'uncaught fish' is a further reason why the right to take away fish, once caught, must

inevitably be viewed as ancillary to the principal purpose. Taking away fish is '*a means of better enjoying the principal service supplied*', the principal service being fishing.

5 41. In relation to VAT Notice 742, there is a separate supply of zero-rated fish from still-water fisheries if and only if the three conditions are all met. In this case condition (b) is in dispute. The appellant's argument is that it makes a separate charge solely for the fish taken away. We do not agree. There is no 'separate charge' solely for fish. There is only a single charge, which encompasses the right to fish and the chance of catching them which we have already identified and discussed. On that 10 basis, there is no separate charge for fish at all.

42. In terms of the appellant's argument as to the pricing differential between 'sporting' and 'take' tickets, we consider that separation to be an artificial one. We agree with the Respondents, consistently with VAT Notice 742, that the supply can only be treated as separate if the three conditions are all satisfied. They are not here.

15 43. One element (that is, the right to fish) must be regarded as constituting the principal service and the other element (the right to kill and keep up to a certain number of fish, if caught) is to be regarded as ancillary.

44. In short, we consider that this is a case in which there is a single supply.

Decision

20 45. For the above reasons, the Appeal is dismissed.

46. 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 25 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.

30 **DR CHRISTOPHER MCNALL**
TRIBUNAL JUDGE

RELEASE DATE: 30 MARCH 2016

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