



TC05507

Appeal number: TC/2016/02129

VALUE ADDED TAX – zero rating – whether spa pools supplied by appellant correctly zero-rated in accordance with Item 2(g) Group 12 Schedule 8 VATA 1994 as “appliances designed solely for use by” a disable person – held: yes, appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WEARISIDE CIVIL ENGINEERING LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE RICHARD THOMAS
G. NOEL BARRETT LLB**

Sitting in public at the Magistrates Court, Darlington on 10 November 2016

Mr Glen Fallow, Director, for the Appellant

Ms Lisa Fletcher, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by Wearside Civil Engineering Ltd (“the appellant”) against
5 an assessment made by the Commissioners for Her Majesty’s Revenue & Customs (“HMRC”) on the basis that certain sales made by the appellant which it had zero-rated should have been standard rated.

2. We have decided that the appellant was correct to zero rate the sales and we cancel the assessment.

10 Evidence

3. We had a bundle of papers prepared by HMRC which included:

(1) Certain of the correspondence between the parties

(2) Documents supplied by the appellant including a report on and Schedule of, zero rated sales, photographs, a doctor’s letter and copies of sales invoices.

15 4. Mr Fallow also gave evidence and was cross-examined by Ms Fletcher and asked questions by us. We have no difficulty in accepting Mr Fallow’s evidence as true, as he was transparently sincere. We say this also because, not appreciating what the powers of the Tribunal were, Mr Fallow was relatively dismissive about evidence
20 that was in fact the most supportive of his case, while he concentrated on matters which, as we will describe, were not within the Tribunal’s jurisdiction.

Facts

5. The appellant trades as A19 Pools and Spas in Peterlee, Co. Durham.

6. It is registered for VAT showing its business as “the construction building and retail sales of swimming pools”.

25 7. In 2009 the appellant had a visit from an officer of HMRC. In the course of this visit the officer queried a number of sales by the appellant of “hydrotherapy pools” which the appellant had decided to zero-rate on the basis that the pools were designed solely for use by what the legislation calls the “handicapped”, but we, like other Tribunals hearing cases on this legislation, call the “disabled”.

30 8. The officer decided that one of these sales was not correctly zero-rated because the customer was not sufficiently disabled to meet the criteria by which disability was determined.

9. The appellant had made strenuous efforts after this to ensure that all their customers met the criteria for being disabled. The appellant required doctor’s letters
35 describing each customer’s disability and made it clear on each invoice what the nature of the disability was.

10. On 24 June 2014 an HMRC officer, Mrs D Muir, visited the appellant's premises to check a repayment return for 03/14 and to examine the records relating to this return. There are no notes of this meeting in the bundle.
- 5 11. On 15 July 2014 Mrs Muir wrote to the appellant about zero-rated sales of hydro pools. She stated she had consulted a unit of expertise and HMRC guidance and enclosed VAT Notice 701/7 – VAT reliefs for disabled people.
12. After setting out the criteria for zero-rating she requested further information about sales which the appellant had zero-rated to determine whether the goods and services supplied had been correctly zero-rated.
- 10 13. On 20 August 2014 the appellant must have replied with some information – the letter was not in the bundle. We did however have a “Report on Zero Rated VAT Sales 2010 -2014” created by Glen Fallow on 17 August 2014 which we assume was attached to the reply.
- 15 14. The Report addresses the requirement in VAT Notice 701/7 that “the goods are eligible to be supplied at the zero rate” and discusses the needs of different disabled people eg “sensory hot water and colour changing and massage jets to aid vascular function for a person who is brain damaged and spends their life lying down. Someone with limited muscle control will need deep water for exercises.”
- 20 15. The Report contains a list of sales and a number of attachments describing the nature of the customer's disability, and why they needed hydrotherapy.
16. Mrs Muir emailed the appellant seeking further information – the email is not in our bundle.
- 25 17. On 6 October 2014 Mrs Muir told the appellant that the information in his letter of 20 August was insufficient and she sought more information including nine invoices relating to five supplies.
18. On 10 November the appellant replied. The letter stressed that the appellant had made every effort to check on the disabled status of the customers, as they had not wanted a repeat of the 2009 experience.
- 30 19. The letter includes a report on six cases covered by nine invoices and describing the work done and the goods supplied.
20. On 16 January 2015 Mrs Muir visited the appellants. There are no notes of this meeting in the bundle. According to the Statement of Case it was agreed that each of the zero-rated sales would be “critically examined”.
- 35 21. On 19 February 2015 the appellant sent Mrs Muir a letter in which he had examined the points “in 4.11.1” and made comments on them. He attached a table for each of the disputed jobs showing which of the 13 points from “4.11.1” applied to the supplies.

22. By “4.11.1” it is clear that the appellant was referring to that numbered paragraph in VAT Notice 701/7 issued in December 2014. Neither paragraph 4.11.1 nor anything like it appeared in the previous version of that VAT Notice. We set out here for convenience the terms of paragraph 4.11:

5 **“4.11 Hydrotherapy pools**

A hydrotherapy pool which incorporates certain features can be zero rated if it’s supplied to an eligible customer as explained in paragraph 3.1 for their personal use.

4.11.1 What type of hydrotherapy pool is eligible for zero rating?

10 When determining the liability of a hydrotherapy pool, you’ll need to differentiate between the features the pool incorporates at the time of supply and any subsequent services of adaptation. For example the installation of a fixed hoist provided after the initial supply of the pool will have no bearing on the liability of the hydrotherapy pool itself.
15 The liability will be based upon the bespoke pool supplied and not further adaptations made.

An eligible hydrotherapy pool will be significantly different from a normal pool, hot tub or spa and will typically include all or most of the following features at the time of installation:

- 20 • sited indoors
- a lip raised to wheelchair height to avoid people falling into the pool
- easy access to the water for disabled people
- railings at two different heights
- 25 • shallow rising steps which go up, over and down into the pool
- an invalid hoist in a fixed position so disabled people in wheelchairs can be lifted safely and easily in and out of the pool
- 30 • deep enough for disabled person to be helped to walk in it but not so deep that therapists were submerged to above shoulder height
- gradually sloping floor between the shallow and deep ends
- special non-slip floor tiles to provide better grip and prevent accidents
- 35 • thermally acoustic cladded walls to reduce muscle spasms in disabled people
- a turn around of water to account for difficulties arising from incontinence
- 40 • a feature to enable the water and atmospheric temperature to be maintained at certain temperatures and humidity
- an environmental control system to provide the right water and air temperature and water quality

4.11.2 What isn't eligible for relief as a 'hydrotherapy pool'?

Swimming and other bathing pools or general spa baths or hot tubs that aren't designed solely for disabled people don't qualify for zero rating unless they're installed as part of eligible building work as explained in paragraph 6.3."

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23. On 30 March 2015 Mrs Muir sent a Notice of VAT Assessment for the period 03/11 showing VAT due of £2,740. There is no trace of any reply to the appellant's letter of 19 February 2015 in the bundle.

24. On 23 April 2015 the appellant sent an email to Mrs Muir with a letter from the doctor of one of the customers and some invoices relating to that customer but issued by another company in respect of the supply of a hoist.

25. On 22 May 2015 replied. In relation to the sales she referred the appellant to the terms of VAT Notice 701/7 in the pre-December 2014 version, relating to the need for supplies of equipment and appliances to be designed solely for use by a disable person, and that appliances that are designed to be used by able bodied people as well the disabled do not qualify. She repeated a request for details of the adaptations that the appellant had made to the hydrotherapy pools.

26. On 3 July 2015 the appellant replied that all of the supplies are specifically adapted for disabled people and he reported again on each customer and the work done.

27. On 18 August 2015 Mrs Muir replied reiterating that "there must be some differences in the supply of a hydropool to a disabled person to that supplied to a non-disabled person". She added:

"the tick list you have provided, some of these features appear to be supplied as standard, again what has been done to adapt them for the individual customer's needs. The fitting of the spa into the grounds alone, does not qualify for zero rating." [the punctuation is as in the original]

28. On 6 November 2015 Mrs Muir raised an assessment charging VAT of £21,785.

29. On 25 November the appellant asked for a review.

30. On 29 December 2015 Mr Nicholson of HMRC's Dispute Resolution Unit informed the appellant that their request for a review was in a queue and proposed an extension for the review to 2 March 2016.

31. On 16 March it appears (from the Statement of Case) that following the review the assessment was upheld and the appellant applied to the Tribunal.

32. We find all the above as fact.

Law

33. The relevant law on zero-rating is in the Value Added Tax Act 1994 ("VATA"):

“30 Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section--

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(a) no VAT shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

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(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

The relevant Group in Schedule 8 is Group 12:

“Group 12 — Drugs, medicines, aids for the handicapped, etc

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Item No

1 The supply of any qualifying goods dispensed to an individual for that individual's personal use on the prescription of an appropriate practitioner where the dispensing is—

(a) by a registered pharmacist, or

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(b) in accordance with a requirement or authorisation under a relevant provision.

2 The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of—

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(a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury;

(b) electrically or mechanically adjustable beds designed for invalids;

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(c) commode chairs, commode stools, devices incorporating a bidet jet and warm air drier and frames or other devices for sitting over or rising from a sanitary appliance;

(d) chair lifts or stair lifts designed for use in connection with invalid wheelchairs;

(e) hoists and lifters designed for use by invalids;

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(f) motor vehicles designed or substantially and permanently adapted for the carriage of a person in a wheelchair or on a stretcher and of no more than 11 other persons;

(g) equipment and appliances not included in paragraphs (a) to (f) above designed solely for use by a handicapped person;

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(h) parts and accessories designed solely for use in or with goods described in paragraphs (a) to (g) above;

- ...
- ...
- 3 The supply to a handicapped person of services of adapting goods to suit his condition.
- 5 ...
- 6 The supply of goods in connection with a supply described in item 3, 4 or 5.”

Submissions

- 10 34. Mr Fallow’s arguments in this case and to a very large extent his correspondence with HMRC have been directed towards showing the unfairness of examining in retrospect and denying zero-rating to sales when he had followed the approach of the previous VAT officer. He has also stressed in this connection that he was following VAT Notice 701/7 as it stood at the time of these sales, while HMRC seemed to be following the new notice only published in December 2014. But nearly
- 15 all of his arguments related whether his customers were sufficiently disabled to qualify the sales to them or zero-rating, and this is not something HMRC were querying here.
35. As a result we put to HMRC the points that Mr Fallow might have put had he been advised by a specialist and we cover this in the discussion section.
- 20 36. HMRC kindly gave us a copy in writing of their submissions.
- (1) An examination of the appellant’s website and the invoices shows that what the appellant supplied were standard models of pools that can be used by anyone.
- (2) There is no evidence (or rather HMRC have found none) that the pools are
- 25 specifically designed for the use of a disabled person.
- (3) The appellant has not made any adaptations to the pools so as to bring them within Item 3.
- (4) The issues of unfairness etc are not for this Tribunal.
37. HMRC cited four cases:
- 30 (1) *Commissioners of Customs and Excise v David Lewis Centre* [1995] STC 485 (Queen’s Bench) (“*David Lewis*”)
- (2) *Made to Measure v HMRC* [2011] UKFTT 154 (TC)
- (3) *Robin Ellis Contracts Ltd & Others v Commissioners of Customs and Excise* (VAT Decision 18500 [2003]) (“*Robin Ellis*”)
- 35 (4) *Boys’ and Girls’ Welfare Society v Commissioners of Customs and Excise* (VAT Decision 15274 [1997]) (“*Boys’ and Girls*”)

Discussion

38. Throughout this case HMRC has stressed that what the appellant was supplying was a pool, a container for water. They said that the pools that the appellant supplied could be enjoyed by anyone, whether disabled or not.

5 39. This seemed to us to ignore what the invoices showed was being supplied by the appellant and, in particular, to ignore the report and particularly the attachment to the appellant's letter of 19 February 2015, which Mrs Muir ignored until she referred to it on 18 August 2015 as a "tick list" showing that what the appellant supplied were "standard features".

10 40. We therefore asked Mr Fallow to explain to us in each invoice what it was that he had supplied. He explained that the appellant does not supply merely a pool. He worked with architects who design a "hydrotherapy suite" for each disabled customer. He pointed out that when he supplies the pools to able-bodied customers they are used in the outdoors ("next to the barbecue" as he put it). Able bodied customers do not
15 have such pools indoors.

41. It is a feature of all the hydrotherapy pools that the ambient temperature must be maintained at a constant setting, and that pools themselves need to be heated sometimes to around 32°C to avoid epileptic fits etc. Mr Fallow referred to the so called "tick list" which showed what features were supplied with each pool.

20 42. We find from Mr Fallow's evidence and the documents in the files that what Mr Fallow supplies in cases where the customer is disabled is a not just a mere container of water. It is a pool together with other features including in particular an environmental control system of some sort.

25 43. We have read the cases cited by HMRC. It seems obvious to us that the bulleted list in VAT 701/7 (December 2014 version) at paragraph 4.11.1 is derived from those features found in *Robin Ellis* (at [9]) and *Boys' and Girls'* (at [7] and [8]) In *Boys' and Girls'* we note at [8] the Chairman (Mr Johnson) says:

30 "Perhaps the most important requirement for a hydrotherapy pool is the ambient temperature. For medical reasons, in particular so as to avoid spasms in those with cerebral palsy, both the air and water temperatures in the pool require to be kept above skin temperature. The power plant for the pool therefore has to be capable of maintaining an air temperature of 32 degrees centigrade, a water temperature of 35
35 degrees centigrade, and a relative humidity of 60%. Enhanced water treatment and filtration are essential: accordingly the pool needs to be an indoor one; the water would require to be well filtered and chemically treated for hygiene; and the pool needs to be designed for constant use."

44. At [37] he then says:

40 "There is no doubt, in our view, that the pool and the environmental control system were designed solely for use by handicapped persons."

45. We observe also that in *David Ellis*, at [27] the chairman (Malcolm Gammie) said:

5 “Having regard to those principles, Mr McKay's principal submission for the Respondents was that the expenditure in this case went beyond the provision of the particular zero-rated goods in the form of a hydrotherapy pool and that the various elements should be viewed as separate supplies.”

and at [29]

10 We deal first with Mr McKay's alternative submission that this was a single standard-rated supply of construction services. There is no doubt that this was a difficult project involving extensive and expensive construction works. That does not detract, however, from the fact that the sole aim of this project and those works was to install *what the Commissioners accept is equipment qualifying for zero-rating. It was a fully installed pool that was supplied to Mr and Mrs Dent* and the fact that the particular features of the site on which it was installed added significantly to the cost of that supply does not in our view alter the nature of the supply that was being made.” [our emphasis]

20 46. In both cases zero-rating was allowed for the “suite”. We have considered the High Court decision in *David Lewis* cited to us. The point raised in the High Court was not at all on all fours with this case, but we note from the decision in *Boys’ and Girls’* at [1]:

25 “The grounds of appeal state that the radiators and hydrotherapy pool constructed for the Appellant should qualify for zero-rating on the same basis as was held in the tribunal decision of *The David Lewis Centre v C & E* No. 10860, reported on appeal as regards one aspect of that decision at [1995] STC 485 (“*the David Lewis case*”). In the *David Lewis* case at first instance, it was held inter alia that the installation of a specially designed low-temperature heating system preventing epilepsy sufferers from injuring themselves on coming into contact with radiators was zero-rated under item 2(g) of Group 14 of Schedule 5 of the Act. That aspect of the *David Lewis* case was not appealed, and the Appellant equates the present case to that decision.”

35 47. What we take from these cases is that it cannot be simply a matter of looking at the list in VAT Notice 701/7 4.11.1 and finding if “all or most” of the features are present. If they are then that will undoubtedly point to zero-rating. But it does not seem the case at first glance that “all or most” of the features were present in each of the individual cases we have mentioned. What is more it seems to us obvious that whether a feature is required or not must depend on the nature of the disability (see Mr Fallow’s remarks in the Report mentioned in §14). The tenth item on the list would only be required if there was a danger of muscle spasm for example.

45 48. What is needed is an examination of the features that were supplied and to find if they, taken with the pool, amount to a supply of appliances etc designed solely for the disabled.

49. What we can see from the appellant's "tick list" is that items four (two heights of railings) and eight (gradually sloping floor) are not supplied in any case. Item 10 (thermally acoustic walls to reduce muscle spasm) are marked by the appellant with a "?", so we assume they are not supplied.

5 50. Item 12 (a feature enabling the water and atmospheric temperature to be maintained at certain levels and humidity to be maintained at certain levels) is always present, as is item 9 (special non-slip floor tiles). An "environmental control system" is shown as present in four of six cases.

10 51. A hoist is shown as provided in three cases. But it seems from the invoices that in one case the host was supplied by another company, and Mr Fallow explained that he chose the type of hoist but that the other company was not his sub-contractor or agent.

15 52. From the evidence which we have seen and heard we find as a fact that what the appellant supplies to the customer in return for consideration is not merely, as HMRC contend, a container for water, but is a hydrotherapy suite consisting of a number of items.

20 53. The question then is whether each of these items forms a separate supply or whether the supply of the items is an "overarching" supply of a single matter. We find that there is a single supply of a complete hydrotherapy suite. The separate items cannot properly be regarded as individual separate supplies: they are each an intrinsic part of what has been designed as a whole for each individual disabled customer to meet that particular customer's needs.

25 54. Such a suite is we hold "equipment designed solely for use by a [disabled] person" (in the words of Item 2(g)). We think the situation here is the same as in *Boys' and Girls'* and in *David Ellis*.

30 55. The only case in which we had doubts was a supply to a Prison Occupational Therapy Unit where the disabilities were described as "various", and where there was no water or ambient temperature control. But it turns out that this supply was the subject of the 03/11 assessment (see §23). This assessment was not appealed and is not the subject of this case.

Decision

56. In the case of the assessment which is under appeal we hold that the supplies were all properly zero-rated and that the assessment is cancelled.

5 57. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

15 **RICHARD THOMAS**

TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016

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