[2013] UKUT 0162 (TCC)
Appeal number FTC/21/2012

VAT – zero rating – aircraft for use by disabled persons - whether aircraft modified for use by disabled persons after manufacture are "designed" for such use – held yes but one aircraft not so designed at time of supply - whether Respondent is a "relevant establishment" for the purposes of Group 15 to Schedule 8 VAT Act 1994 – held no – whether Tribunal has jurisdiction to decide whether appellant had legitimate expectation – held no - appeal allowed in relation to one aircraft and dismissed in relation to the other

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

THE BRITISH DISABLED FLYING ASSOCIATION

Respondent

Tribunal: Judge Greg Sinfield
Judge Richard Barlow

Sitting in public in London on 29 January 2013

Nicola Shaw QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Kieron Beal QC, instructed by Hausfeld & Co LLP, for the Respondents

DECISION

Introduction

1. The Appellants ("HMRC") appeal against the decision of the First-tier Tribunal ("FTT") released on 15 November 2011, [2011] UKFTT 743 (TC), ("the Decision").

2. The Respondent ("the BDFA") is a charity that provides opportunities for disabled persons to experience and participate in aviation. The BDFA appealed against a decision of HMRC that supplies to the BDFA of two light aircraft modified for use by disabled persons, together with associated repair and maintenance, were chargeable to VAT at the standard rate. The FTT allowed the BDFA's appeal.

3. HMRC appealed to this Tribunal and contended that the FTT had misconstrued the relevant statutory provisions. For the reasons given below, we have concluded that the supply of one of the aircraft was subject to VAT at the zero rate, as found by the FTT, but the other aircraft was standard rated.

Facts

4. There was no real dispute about the facts and HMRC did not seek to challenge any findings of fact by the FTT before us. The material facts are as follows.

5. The BDFA is a registered charity, regulated by the Charity Commission. Its principal object is "to promote and provide education, recreation and leisure time activities for disabled persons by providing opportunities in aviation with the object of improving conditions of life". The BDFA achieves its objective by providing free and subsidised flying lessons to chronically sick and terminally ill and disabled persons under the name "Aerobility".

6. In 2008, the BDFA bought two light aircraft. No aircraft manufacturer produces aircraft specifically manufactured for disabled persons nor could any such modification be requested from the manufacturer. Any such modification must be carried out after manufacture. The modification is a hand control which fits over the foot pedals and allows the aircraft to be controlled by hand. The hand control can be removed to allow the aircraft to be flown by an able bodied pilot but that does not happen except when the aircraft is being flown by an engineer when being serviced or being tested after the service. The modifications do not enable a wheelchair to enter the cockpit.

7. The first aircraft (registration G-BRFM) was purchased from GT Ventures Limited on 19 February 2008 for £26,500 plus VAT of £4,637.50. There was no dispute that the supply of Aircraft G-BFRM to the BDFA took place on 19 February 2008. At the time of the sale, the aircraft had not been modified for use by disabled persons. The parties intended that Aircraft G-BFRM would be modified immediately after the purchase was completed. The modification was carried out by a third party on the day after the aircraft was purchased by the BDFA.

8. The second aircraft (registration G-BSYY) was purchased from Aviation Rentals on 23 June 2008 for £37,500 plus VAT of £6,562.50. Prior to purchase, the BDFA had leased Aircraft G-BSYY from Aviation Rentals. The aircraft had been modified for use by disabled persons during the lease period and continued to be so modified at the time of the sale.

The Decision

9. The FTT concluded that the supplies of both aircraft to the BDFA were zero rated on both of two grounds, namely that they fell within:

(1) item 2(g) of Group 12 of Schedule 8 to the VAT Act 1994 ("VATA94") as a supply to a charity of equipment designed solely for use by a handicapped person, for making available to handicapped persons for their personal use; and also

(2) item 5 of Group 15 of Schedule 8 to the VATA94 as a supply of relevant goods to a charitable institution providing care for handicapped persons in a relevant establishment.

Relevant legislation

10. Section 30(2) of the VATA94 provides that a supply of goods or services is zero-rated if the goods or services are of a description for the time being specified in Schedule 8 to VATA94 or if the supply is of a description so specified.

11. Group 12 of Schedule 8 to the VATA94 provides for zero-rating of certain drugs, medicines and aids for the handicapped etc. Item 2 of Group 12 includes the following:

> "2. The supply … to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of -
>
> …
>
> (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;
>
> (h) parts and accessories designed solely for use in or with goods described in paragraphs (a) to (g) above;
>
> (i) boats designed or substantially and permanently adapted for use by handicapped persons."

12. Item 4 of Group 12 zero rates the supply to a charity of services of adapting goods to suit the condition of a handicapped person to whom the goods are to be made

available, by sale or otherwise, by the charity. Items 5 and 6 provide for the zero rating of certain supplies of repair or maintenance, together with goods in connection with such services, of any goods specified and supplied as described in item 2.

13. Group 15 to Schedule 8 to the VATA94 covers Charities etc. Item 5 of Group 15 is as follows:

> "The supply of any relevant goods to an eligible body which pays for them with funds provided by a charity or from voluntary contributions or to an eligible body which is a charitable institution providing care or medical or surgical treatment for handicapped persons."

14. Items 6 and 7 of Group 15 zero rate the repair and maintenance of relevant goods owned by an eligible body together with the supply of any goods in connection with such services.

15. Note (3)(d) to the Group defines "relevant goods" as including "goods of a kind described in item 2 of Group 12" of Schedule 8.

16. Note (4)(f) to Group 15 defines "eligible body" as including "a charitable institution providing care or medical or surgical treatment for handicapped persons."

17. Notes (4A) and (4B) to Group 15 relevantly provide that

> "(4A) …, a charitable institution shall not be regarded as providing care or medical or surgical treatment for handicapped persons unless
>
> (a) it provides care or medical or surgical treatment in a relevant establishment; and
>
> (b) the majority of the persons who receive care or medical or surgical treatment in that establishment are handicapped persons.
>
> (4B) “Relevant establishment” means
>
> (a) a day-centre, other than a day-centre which exists primarily as a place for activities that are social or recreational or both; or
>
> (b) an institution which is
>
> (i) approved, licensed or registered in accordance with the provisions of any enactment …; or
>
> (ii) exempted by or under the provisions of any enactment … from any requirement to be approved, licensed or registered;
>
> ..."

Grounds of appeal

18. Ms Nicola Shaw QC, who appeared for HMRC, submitted that the FTT erred in law in two respects, namely:

> (1) in failing to distinguish between the "design" of equipment solely for use by a handicapped person and the "adaptation" of equipment for use by handicapped persons in construing in item 2(g) of Group 12 of Schedule 8; and
>
> (2) in holding that the aircraft are "goods of a kind" described in item 2 of Group 12 and the BDFA is a "relevant establishment" for the purposes of Group 15 of Schedule 8.

Approach to interpretation of zero rating provisions

19. As exceptions to the rule that VAT is chargeable on all supplies of goods and services, provisions for exemption must be interpreted strictly (see Case C-348/87 *Stichting Uitvoering Financiele Acties v Staatssecretaris van Financien* [1989] ECR 1737 ("*SUFA*") at [13]). It was common ground that provisions for zero rating, such as those at issue in this appeal, must likewise be interpreted strictly.

20. The requirement of strict interpretation does not mean that the provisions must be interpreted restrictively. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [17]:

> "A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question."

That passage was endorsed by the Court of Appeal in *HM Revenue and Customs v Insurancewide.Com Services Ltd* [2010] EWCA Civ 422, [2010] STC 1572 at [83].

First ground of appeal

21. HMRC's first ground of appeal is that the FTT erred in law in holding that the two aircraft, which had been adapted post-manufacture to allow them to be piloted by a disabled person, were designed solely for use by a handicapped person as required by item 2(g) of Group 12 of Schedule 8 to VATA94. HMRC contended that the FTT reached the wrong conclusion because it did not interpret "designed" correctly.

22. Before discussing the meaning of "designed", we record that HMRC accepted, for the purposes of this appeal, that the aircraft are "equipment" as the term is used in item 2(g) of Group 12 of Schedule 8 to the VATA94. In view of HMRC's concession and as there was no argument before the FTT or us to the contrary, we accept for the

purposes of this decision that the aircraft are “equipment” despite the fact that we consider that it is far from clear that the term was intended to cover aircraft. Our reservations arise from the fact that item 2 refers specifically to other means of transport, namely motor vehicles at (f) and boats at (i) and it seems to us to be stretching the meaning of equipment to say that it includes aircraft in this context.

23. HMRC did not contest the FTT's finding, at [29] to [31] of the Decision, that the aircraft were for personal use by handicapped persons. Neither did HMRC take any point on the meaning of "solely" in the phrase "designed solely for use by a handicapped person" in item 2(g). HMRC also accepted that the modification that was carried out to Aircraft G-BFRM was the one contemplated by the BDFA at the time of purchase.

24. Having accepted the points just described, the only issue was whether the aircraft can be described as "designed" solely for use by a handicapped person. The FTT set out its view on the meaning of "designed" succinctly at [22] of the Decision as follows:

> "We were intuitively or *(sic)* the view that item 2(g) does apply to equipment designed solely for the use by a handicapped person regardless of when it became so designed. In our judgement any other reading on *(sic)* this provision would be unrealistically restrictive. There can be no good reason, either as a matter of statutory construction or common sense, for an item not to be designed solely for use by a handicapped person simply because a factory manufactured item, not so designed, has then been subject to modifications to make it designed for use by handicapped person *(sic)*. In our judgement the statutory saving from VAT made by item 2(g) does not look to the time of design, but to the fact of design. It looks to whether a particular item of equipment is designed, not whether it was historically designed, for use by a handicapped person. It looks to the quality of the item as used by the handicapped person, not the quality of that item when it left the factory."

25. We were referred to *The Cirdan Sailing Trust v HM Customs and Excise* [2004] V & DR 501 and *Matthew Davies t/a Special Occasions/2XL Limos v HM Revenue and Customs* [2012] UKUT 130 (TCC) among others in relation to the meaning of "designed" but we found those cases to be of very limited assistance as they referred to provisions that also included "adapted" as an alternative. Before us, as before the FTT, HMRC submitted that item 2 of Group 12 draws a clear distinction between items that are designed for a particular use by handicapped persons and items that are adapted for such use. HMRC contended that "designed" referred to the original intention of the designer or manufacturer at the time of design or manufacture. HMRC submitted that an adaptation is something that occurs after the item has been manufactured in accordance with its design. Applying that interpretation, something that has been adapted for use by a handicapped person cannot be said to have been designed solely for use by a handicapped person. HMRC contended that this interpretation accords with the natural meaning of “designed”. Further, the fact that item 2(f) and (i) of Group 12 refer specifically to items that have been "designed or

substantially and permanently adapted" suggests that the omission of adapted items from item 2(g) of Group 12 was deliberate.

26. We accept that, as exceptions to the rule that VAT is chargeable on all supplies, the zero rating provisions must be interpreted strictly and the word "designed" does not mean the same as “adapted” in the context of items in Group 12. On HMRC's submission, however, something can only ever be designed once and that seems to us to be a restricted construction of the type Chadwick LJ warned against in *Expert Witness Institute* rather than a strict construction. We consider that “designed” should be given its ordinary meaning and applied in the context of the paragraphs of item 2 of Group 12.

27. The word "designed" can refer to the fact that something is intended for a particular purpose. If "designed" means intended for a particular purpose then the VAT status of the item will turn on the purpose for which it is supplied. In *Posturite (UK) Limited v HMCE* [1992] VTD 7848, which concerned an angled writing board which could be used by the able bodied and disabled alike, the Tribunal said that “designed” in item 2(g)

> “… is not used in the sense of 'destined' or 'intended' but in the sense of something being planned and fashioned in such away as to have the quality that it is used solely for handicapped people.”

We agree with the Tribunal in *Posturite* that “designed” cannot mean merely intended or destined for some purpose. Such an interpretation would mean that the liability of the supply could only be interpreted by looking at the intentions of the parties. That would create obvious difficulties where the parties had different intentions or where they were difficult to ascertain.

28. We consider that, looking at the other paragraphs of item 2 of Group 12, “designed” is used in conjunction with “adapted” and refers to the physical characteristics of an item rather than its intended use. The required intended use is described in the opening words of item 2 and it would, therefore, be unnecessary to refer to it again. For those reasons, we consider that "designed" in item 2(g) refers to the physical characteristics of the equipment that make it suitable for use by a handicapped person.

29. We consider that the question of whether an item has the physical characteristics to qualify as designed solely for use by a handicapped person must be decided by reference to the item's physical characteristics at the time of supply. We did not understand Ms Shaw or Mr Kieron Beal QC, who appeared for the BDFA, to disagree. That seemed to us to point towards an interpretation of "designed" as referring to the present rather than the historic design of the object. HMRC's interpretation would, in some cases, require an investigation into the history of an object in order to determine its VAT status. That seems to us to be an unsatisfactory and unnecessarily burdensome way to decide the VAT liability of an item.

30. We consider that "designed" must refer to the item's physical characteristics at the time of supply because it seems to us that the alternative construction urged upon us by HMRC would lead to anomalous results. If "designed" in item 2(g) is restricted to the original plan then any adaptation carried out after manufacture would be irrelevant to the item's VAT status. Applying HMRC's interpretation, the first supply and all subsequent supplies of an aircraft designed at the time of manufacture solely for use by a handicapped person would be zero rated. The supplies of services and goods in adapting an existing aircraft for use by disabled persons after manufacture are also zero rated but, on HMRC's interpretation, the subsequent supply of the modified aircraft would be standard rated. That is a difference in treatment that appears to have no inherent logic.

31. On HMRC's construction of item 2(g) of Group 12, the supply of an aircraft originally designed by the manufacturer solely for use by a handicapped person but modified for use by able bodied persons would still benefit from zero rating if supplied to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use. That would allow dual use items and items adapted solely for use by able bodied persons to be supplied free of VAT. Ms Shaw did not seek to argue otherwise. We acknowledge that such a scenario is unlikely to arise in practice but that does not make it any less anomalous. The anomalies that could arise from HMRC's interpretation support us in our interpretation of "designed" as meaning the physical characteristics of the object at the time of supply.

32. Ms Shaw submitted that interpreting "designed" as referring to the design of an object after modification would make "adapted" in the other paragraphs of item 2 of Group 12 otiose. We agree that "designed", as we have interpreted it, and "substantially and permanently adapted" in item (2)(f) and (i) may overlap but the two are not synonymous. An adaptation does not necessarily involve a change in the design of an object. An adaptation may be a change in the configuration or functioning of the item. In our view, the possibility that "designed" and "adapted" may overlap does not require us to adopt HMRC's preferred interpretation of "designed" in the context of item 2(g).

33. There was no dispute that Aircraft G-BSYY had been adapted for use by disabled persons prior to its sale to the BDFA. It follows that, at the time of supply, Aircraft G-BSYY had the physical characteristics to make it suitable for use by a handicapped person. We consider that Aircraft G-BSYY was "designed" solely for use by a handicapped person and its supply to the BDFA was zero rated. Accordingly, we dismiss HMRC's appeal in so far as it relates to Aircraft G-BSYY.

34. In relation to Aircraft G-BFRM, it is clear from the facts as set out by the FTT in [1] of the Decision that the aircraft was not designed solely for use by a handicapped person, in the sense of having the physical characteristics to make it suitable for use by a disabled pilot, at the time of its supply to the BDFA. There was no dispute that the modification of Aircraft G-BFRM only happened after the aircraft had been supplied to the BDFA on 19 February 2008.

35. The FTT dealt with Aircraft G-BRFM in [1] of the Decision as follows:

> "In respect of the aircraft that was adapted subsequent to purchase we should say immediately that we accept the evidence to the effect that the only reason why it was not adapted prior to purchase is that, understandably, the vendor did not want the aircraft adapted prior to completion of the contract of sale, for rather obvious reasons. Nonetheless, the evidence satisfies us that it was the appellant's intention at the time when it negotiated the purchase to have the aircraft adapted immediately upon becoming its owner and, in fact, did so. The fact that the adaptations were to take place was, we find as a fact, in the contemplation of all relevant parties at the time of purchase."

36. In our view, the factors identified by the FTT in [1] of the Decision (namely, the reason that Aircraft G-BRFM was not adapted before completion of the sale, the BDFA's intention to have the aircraft adapted immediately after completion, both parties contemplated that the adaptations would take place after completion and that the aircraft was adapted as intended) cannot alter the fact that, at the time of supply, Aircraft G-BRFM was unmodified and unsuitable for use by a handicapped person. The aircraft was only designed for use by a handicapped person in the sense of being destined or intended for such use and we have already rejected such an interpretation of the word. Applying the FTT's interpretation of "designed", as explained in [22] of the Decision, Aircraft G-BRFM was not, as at the time of supply, designed solely for use by a handicapped person even though that was the intended use once the aircraft had been modified. We consider that the only conclusion open to the FTT on the evidence was that, at the time of its supply, Aircraft G-BRFM was not designed solely for use by a handicapped person and, therefore, was chargeable to VAT at the standard rate. We allow HMRC's appeal in so far as it relates to Aircraft G-BRFM subject to the second ground which relates to the FTT's additional reason for finding that the supplies of the aircraft were zero rated.

37. We point out for completeness that our decision in relation to the supply of Aircraft G-BRFM means that supplies of repair and maintenance in relation to that aircraft are standard rated. Items 5 and 6 of Group 12 only apply to supplies of repair and maintenance of aircraft "supplied as described in", among others, item 2(g). Aircraft G-BRFM did not fall within item 2(g) of Group 12 at the time of its supply to the BDFA.

Second ground of appeal

38. The FTT also found in favour of the BDFA on the alternative argument that the supplies of the aircraft fell within item 5 of Group 15 of Schedule 8 to the VATA94 as supplies of relevant goods to an eligible body which is a charitable institution providing care for handicapped persons in a relevant establishment. HMRC submitted that the FTT was wrong to hold that:

(1) there was a supply of relevant goods as defined by Note (3)(d) to Group 15, namely "goods of a kind described in item 2 of Group 12"; and

(2) the BDFA is a charitable institution providing care for handicapped persons in a relevant establishment.

39. The BDFA submitted that specially adapted aircraft are "of a kind" with the specially adapted motor vehicles and boats otherwise covered expressly in item 2. The BDFA contended that such a construction is necessary to avoid discriminatory treatment between different modes of transport specially adapted for use by handicapped persons. We think that goes too far. We consider that, at a very general level, aircraft, boats and motor vehicles are goods of the same or a similar type, being means of transport. In our view, such a general taxonomic classification would not be appropriate in a Group where motor vehicles and boats are separately specified and aircraft are, we assume deliberately, not mentioned at all. We also consider that a broad classification of "goods of a kind" would not be consistent with the strict interpretation of the zero rating provision.

40. HMRC submitted that "goods of a kind described in item 2 of Group 12" means goods of the same kind ie goods that fall within the descriptions in item 2 of Group 12. We do not agree. If the draftsman had intended that the zero rating under item 5 of Group 15 should be restricted to goods within item 2 of Group 12 then it would have been easy for the draftsman to provide for exactly that by omitting the words “of a kind”. The phrase "of a kind" does not mean "identical to" but, in our view, "of the same or similar type".

41. In relation to item 2(g), HMRC accept, for the purposes of this appeal, that the aircraft are "equipment". That indicates a broad categorisation of equipment, albeit not one that encompasses all means of transport, and that must lead to a correspondingly broad view of goods of a kind described in item 2 and, more specifically, item 2(g). HMRC contended that only equipment designed solely for use by a handicapped person qualified as goods of a kind described in item 2(g) of Group 12. We do not accept this interpretation. It seems to us to be too restrictive. Clearly, if the aircraft were designed solely for use by a handicapped person then they would benefit from zero-rating under item 2(g) and there would be no need to consider zero-rating under item 5 of Group 15. We consider that aircraft that are designed solely for use by a handicapped person and aircraft that are not so designed must be viewed as of the same or similar type, ie goods of a kind.

42. That does not mean that the supplies of both aircraft were zero rated. In order to come within item 5 of Group 15 of Schedule 8 to the VATA94, the goods of a kind must be supplied to an "eligible institution" which is relevantly defined as a charitable institution providing care for handicapped persons in a relevant establishment.

43. It was common ground that the BDFA is a charity and is, therefore, a charitable institution for the purposes of item 5 of Group 15. HMRC submitted that the services supplied by the BDFA are education, recreation and leisure time activities; not care in the ordinary sense of that word. HMRC further submitted that "relevant establishment" means premises or buildings and the BDFA does not provide care in such an establishment.

44. We do not accept HMRC's submission that the BDFA did not provide care in the relevant sense. The FTT considered the evidence and submissions at [35] to [37] of the Decision and concluded that, giving the word its ordinary meaning in 2011, the BDFA provided care. We note that the word "care" appears together with "medical or surgical treatment" and we consider that it must be interpreted in that context. We agree that the BDFA provides care for disabled persons in the relevant sense for the reason given by the FTT in [37].

45. Note (4A) to Group 15 provides that, in order to be eligible for the zero rating, the charitable institution must provide the care in a relevant establishment. Note (4B) defines "relevant establishment" as

> "(a) a day-centre, other than a day-centre which exists primarily as a place for activities that are social or recreational or both; or
>
> (b) an institution which is
>
> (i) approved, licensed or registered in accordance with the provisions of any enactment …;
>
> …".

46. At [33] of the Decision, the FTT accepted the BDFA's submissions that, because the BDFA is registered under the Civil Aviation Act 1982 and the Charities Act 2006, it is an institution which is approved, licensed or registered in accordance with the provisions of any enactment and thus a "relevant establishment". The FTT observed that:

> "[Note 4(B)] does not use the expression "establishment" as synonymous with premises or buildings. In that way the legislature has not used the expression "establishment" in what might be considered to be its ordinary meaning, but has preferred to ascribe to it a specific statutory meaning or interpretation."

For that reason, the FTT concluded that the BDFA is "an institution" and, if it provides care, it does so "in a relevant establishment".

47. We cannot agree with the FTT on this point. In our view, the legislation (it may be thought rather confusingly) uses the word "institution" in two different senses in Group 15. The phrase charitable institution in item 5 and Note (4)(f) occurs in the context of the definition of an "eligible body". It is clear that the phrase "charitable institution" in this context refers to a type of eligible body; in this case, one that provides care or medical or surgical treatment for handicapped persons. Note (4A) provides that a charitable institution shall not be regarded as providing care or medical or surgical treatment for handicapped persons unless, among other things not relevant here, it provides them in a relevant establishment. We consider that there is a clear distinction in Note (4A) between the charitable institution and the establishment in which it, ie the charitable institution, provides care etc. Note (4B)(b) defines "relevant establishment" as a day-centre of a certain type or "an institution … registered in accordance with the provisions of any enactment". In our view,

"institution" in Note (4B)(b) must be interpreted in the light of the purpose of the note which is to define "relevant establishment". We consider that the context and the reference to care being provided "in" an establishment make it clear that "institution" is used in Note (4B)(b) in the sense of a physical place such as a building or premises. We conclude that the BDFA is not an institution in the sense that the word is used in Note (4B)(b).

48. We observe that the BDFA has a physical base at an airfield that might be described as an establishment. The FTT did not make any findings of fact as to the nature of the base at the airfield, whether it qualified as a relevant establishment (for example, by being approved, licensed or registered for such use in accordance with an enactment) or, if it so qualified, whether the BDFA provided care in that establishment. We considered whether we should remit those questions to the FTT but decided that it would not be appropriate as the evidence that was before the FTT did not appear to show that the relevant care was provided in the airfield but rather outside it in the aircraft.

Further submissions

49. The BDFA submitted that the decision of the FTT was otherwise justified on the basis that any contrary conclusion would infringe general principles of EU law regarding equal treatment and the protection of fiscal neutrality in the levying of VAT on transactions. In view of our decision on the issue of liability, it is not necessary for us to deal with this submission in detail but we do so briefly. Mr Beal's submission depended on a specially adapted car or boat being seen as essentially similar to a specially adapted aircraft. The EU law principle of equality requires that similar situations shall not be treated differently unless the differentiation is objectively justified. We do not accept the proposition that specially adapted motor cars and boats are sufficiently similar to specially adapted aircraft. We have already decided that, at a very general level, aircraft, boats and motor vehicles are goods of the same or a similar type, being means of transport. The authorities dealing with the application of the principle in the context of VAT such as Joined Cases C-259/10 and C-260/10 *Rank Group plc v. HM Revenue and Customs* [2011] ECR I-0000, [2012] STC 23 at [32]-[33] and Case C-117/11 *Purple Parking Limited and Airparks Services Ltd v HM Revenue and Customs* [2012] ECR I-0000 at [38] make clear that the similar goods or services must be in competition with each other. In our view, it cannot be said that aircraft, cars and boats, whether viewed as leisure craft or personal transport, are sufficiently similar from the point of view of the consumer to be regarded as in competition with each other.

50. The BDFA also submitted that the FTT should have found that HMRC had erred in law in failing to apply extra-statutory concession ("ESC") 3.19 in Public Notice 48 for the benefit of the BDFA. In summary, the effect of ESC 3.19 is to extend zero rating to supplies of relevant goods, as defined by Note (3) to Group 15 of Schedule 8 to the VATA94, to a charity:

(1) whose sole purpose and function is to provide a range of care services to meet the personal needs of handicapped people (of which transport might form a part), or

(2) which provides transport services predominantly to handicapped people.

The concession provides for zero rating without the charity having to be an eligible body that provides care in a relevant establishment. Mr Beal submitted that the BDFA had a legitimate expectation (under domestic law and/or EU law) that the terms of the ESC would be applied to it, absent a good reason not to do so. He contended that we had jurisdiction to consider the application of the ESC and the BDFA's legitimate expectations relying on the reasoning of Sales J in *Oxfam v. HM Revenue and Customs* [2009] EWHC 3078 (Ch); [2010] STC 686.

51. The FTT did not need to consider this submission as it found that the supplies were zero rated by application of the relevant provisions in the VATA94. Similarly, we do not need to consider this submission in relation to Aircraft G-BSYY as we have found that the supply of the modified aircraft fell within item 2(g) of Group 12. The issue of legitimate expectation is still relevant in relation to Aircraft G-BFRM which was supplied to the BDFA in unmodified form and thus did not qualify for zero rating on the facts but which we found was "goods of a kind described in item 2".

52. At the hearing, both counsel referred to the case of *HM Revenue and Customs v Abdul Noor* which had been heard by the Upper Tribunal although the decision had not then been issued. The case concerned whether the First-tier Tribunal had the jurisdiction to consider Mr Noor's claim to deduct input tax based on his legitimate expectation. The decision ([2013] UKUT 071 (TCC)) has now been issued. The Upper Tribunal (Warren J and Judge Colin Bishopp) held that it was not bound by the decision of Sales J in *Oxfam* and decided that the First-tier Tribunal does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may have had in relation to his claim for input tax. We adopt the reasoning of the Upper Tribunal in *Noor* and conclude that the FTT in this case did not have jurisdiction to consider whether the BDFA had any legitimate expectation founded on ESC 3.19.

53. In the circumstances, it is not necessary for us to express any view on whether or not the BDFA could have had any legitimate expectation that ESC 3.19 applied to the supply of the aircraft but we do so briefly in case the position in *Noor* changes. Our view is that ESC 3.19 did not apply in this case. It seems to us on the facts found by the FTT that the BDFA did not provide a range of care services to meet the personal needs of handicapped people. The BDFA provided flying lessons and experiences for disabled people that, as the FTT and we have held, amounted to care. We do not consider that the BDFA provided a *range* of care services to meet the personal needs of those who benefited from the experience of aviation. Nor do we consider that the BDFA provides transport services to handicapped people. The flying lessons and experiences of trips in a light aircraft cannot, in our view, be described as transport – see *HMCE v Blackpool Pleasure Beach Co* [1974] STC 138.

Decision

54. For the reasons set out above, we conclude that the appeal by HMRC should be allowed in so far as it relates to the supply of Aircraft G-BRFM to the BDFA. In so far as it relates to Aircraft G-BSYY and supplies of repair and maintenance in respect of that aircraft, HMRC's appeal is dismissed.

Greg Sinfield
Upper Tribunal Judge

Richard Barlow
Upper Tribunal Judge

Release date: 26 March 2013