[2012]UKUT 130(TCC)

Appeal number FTC/77/2011

Value Added Tax - whether transport supplies rendered with stretched limousines, originally designed to carry 10 people, but adapted to carry only 9 people, were zero-rated - Appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MATTHEW DAVIES t/a
SPECIAL OCCASIONS/2XL LIMOS

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Howard Nowlan
Judge Greg Sinfield

Sitting in public in London on 30 March 2012

Nigel Gibbon of Northgate Company Services Ltd for the Appellant

Ewan West, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This was a relatively straightforward appeal on the issue of whether the supply of transport services in stretched limousines originally designed to carry 10 persons, but currently adapted to carry only 9 persons, is zero-rated.

2. Item 4(a) of group 8 of Schedule 8 to the VAT Act 1994 provides that zero-rating applied to the:

> "transport of passengers … in any vehicle, ship or aircraft designed or adapted to carry not less than 10 passengers".

3. The Appellant's vehicles were stretched limousines which had all initially been designed to carry 10 persons. It was common ground between the parties that the driver counted as a passenger when applying the provision just quoted. Whilst the vehicles had been designed to carry 10 passengers, they had been adapted by the removal of the seat to the side of the driver, such that, as adapted, they could only carry 9 passengers. The explanation of that adaptation was not particularly significant but, as we understood it, vehicle licensing requirements would have been more onerous, and effectively impossible to satisfy, with the vehicles in question had they carried 10, rather than 9, persons. Whether the licensing requirements actually required the removal of the tenth seat, or whether the seat next to the driver was simply removed to provide more luggage space when the vehicle was used for airport trips, once it could not be used to carry a passenger was not clear to us but it is immaterial.

4. The Appellant's case was that the test quoted above bore only one possible interpretation, namely that there were two distinct ways in which the test might be satisfied. The first was that the vehicle had to have been designed to carry 10 or more persons and, if so, it was then irrelevant that it might have been adapted to carry fewer persons. The second way in which the test could be satisfied was by showing that a vehicle initially designed to carry fewer passengers had been adapted, implicitly at the time the services were being provided, to carry 10 or more persons. The supply of transport services would be zero-rated if either limb of the test was satisfied.

5. The Respondents contended that the reference to the vehicle being "designed or adapted" to carry 10 or more persons simply contemplated the reality that at the time the vehicle was used it might either be in the state or configuration as it was designed, or it might have been adapted. Whichever was the case, it simply had to be demonstrated that, at the time of the supply of the services, the vehicle was then configured for the carriage of "not less than 10 passengers". In the present case, this test was not satisfied because the vehicles had all been adapted to carry only 9 passengers.

6. The First-tier Tribunal (Judge Hacking and Mr. Whitehead) heard the Appeal on 4 April 2011 in Manchester and dismissed the Appellant's Appeal against the decision

and review decision of HMRC to deny zero-rated treatment. For substantially the reasons given by the First-tier Tribunal (albeit that we express one point slightly differently), we confirm the decision of the First-tier Tribunal and dismiss the Appellant's appeal.

The facts in more detail

7. It is barely necessary to amplify the facts. We might mention that two, and at one time three, of the limousines were the fairly familiar stretched Lincoln Town Cars, painted respectively pink, white and silver. The other vehicle was a Ford Expedition. The facts varied in that one had been bought new from a UK dealer with only 9 seats fitted; two of the Lincoln Town Cars had been purchased with 10 seats fitted but the Appellant had then removed the tenth seat; and one had been purchased second-hand in the UK with only nine seats fitted. It seems that in all cases the mounting points for the removed seat and the anchorage points for the seat belt remained in place. Of slightly more relevance, we were told that in the case of the Ford Expedition, it was sometimes the case that an occasional folding seat, a "light universal folding seat" was re-fixed beside the driver. That was usually to accommodate a parent or teacher if children were carried, and when this seat was re-attached, it followed that licensing requirements meant that only 7 rather than 8 passengers could be carried in the rear of the vehicle.

8. We were also told that, whilst the prime use for the vehicles was for parties and graduation ceremonies, the vehicles were sometimes used for airport trips, when luggage was sometimes then carried beside the driver.

The First-tier Tribunal decision

9. The First-tier Tribunal dismissed the Appellant's appeal, reaching the conclusion that the test that we have quoted at paragraph 2 above was not one that could be satisfied by demonstrating simply that the vehicles had been designed to carry "not less than 10 passengers". If they had been adapted, as indeed they had been adapted, to carry only 9 passengers, then it was their state, as adapted, that governed the VAT liability on the provision of transport in the vehicles, and therefore the supplies were standard-rated.

10. The reasons given for this decision were as follows. First, purely interpreting the wording of the relevant Item 4(a), the Tribunal dismissed the Appellant's claim that there were two distinct limbs to the test, satisfaction of either of which would make the supplies zero-rated. The relevant wording, in their words, was quite properly to be read "in a conjunctive sense which requires a consideration of any adaptation undertaken after the original design of the vehicle". That indeed, they concluded, was the more realistic construction.

11. A second approach was also advanced. The Tribunal considered that addressing the interpretation in a purposive manner, it was appropriate to consider the relevant use for which the vehicles were actually to be used by the Appellant. Accordingly it was appropriate to add words to the actual phrase set out in Item 4 (a), and expand the

test to refer to the "vehicle being designed or adapted for the operation of the vehicles in the UK as Small Limousines".

12. Finally the Tribunal considered the decision of the House of Lords in *Boss Holdings Limited v. Grosvenor West End Properties and others* [2008] UKHL 5, to which we will refer in more detail below, to support the Respondents' contentions, and the Tribunal's own conclusions.

The contentions on behalf of the Appellant

13. The Appellant contended that:

(1) The only natural meaning of the reference in the test for the purposes of Item 4(a) that the vehicles must have been designed or adapted for the carriage of not less than 10 passengers was that the test could be satisfied under either of the two relevant limbs. Accordingly, under the first limb of the test if the vehicles had been designed for the carriage of not less than 10 passengers, zero-rated treatment was established and it did not matter whether the vehicles had subsequently been adapted so as to carry 9 or fewer passengers.

(2) No purpose could be discerned under the relevant statutory provision so that the asserted "natural meaning" of the phrase should not be modified or strained to accord with some presumed purpose.

The contentions on behalf of the Respondents

14. The Respondents contended that:

(1) The more natural meaning of the contentious phrase was that it contemplated that at the time of supply of the transport services, the vehicles might be in their state, as designed, or as adapted, and we should simply consider the carrying capacity at the time of supply, and as the vehicles were then configured.

(2) In support of that contention, it was stressed that we should be considering the supply of transport services whenever they were being provided, and were clearly not concerned with the original supply of the vehicles. Concentrating then on the situation at the time of supply of the transport services, when VAT was so inherently concerned with the situation at the "time of supply", it would be distinctly odd for the VAT outcome to be influenced by a factor that was then irrelevant.

(3) The Appellant's contentions would also throw up some odd results. It would for instance be odd for "adaptation" effectively only to be relevant if it increased carrying capacity "up to or above 10", and irrelevant if it reduced it to below 10. It would also be distinctly odd for transport in two vehicles to be subjected to VAT in different ways if two vehicles were each configured to carry 4 persons, one having been designed to carry 4 persons from the outset, and the other having been adapted from the original design configuration to carry 10 persons, thereafter to carry only 4 persons.

15. Both parties advanced contentions on the basis of the authorities that we will refer to in explaining our decision. We might say at this point that we do not consider that any of the three authorities that were referred to was particularly relevant, albeit that one has some marginal significance in relation to the peripheral issue of the insertion of the "occasional seat" in the Ford Explorer.

Our decision

16. We consider that this is not a case where we are concerned to strike a balance between the most natural literal interpretation of a statutory provision and some other construction that is tenable and that should be adopted in order to achieve a result that is consistent with the clear and perceived purpose of the legislation. It is simply a case where we should construe the statutory language in a natural way, paying attention to common sense and the context in which the provision is to operate.

17. We disagree with the Appellant's representative's proposition that the only, or much the most natural, interpretation of the contentious phrase in Item 4(a) is that there is a two-limbed test, where zero-rating can be sustained either by reference to the original design configuration or by reference to the passenger carrying configuration after some adaptation. That is, admittedly, a possible interpretation, albeit that if this had been the statutory intention, it would more obviously have been achieved by the following wording:

> *Transport of passengers in any vehicle, ship or aircraft that was either:*
>
> *(a) designed to carry not less than 10 passengers; or*
> *(b) that has been adapted such that, at the time of supply, it was suitable for the carriage of not less than 10 passengers.*

18. Although we accept that the Appellant's claimed interpretation is tenable, we have no doubt that there is an alternative possible construction. This is to read the reference to the vehicle "being designed or adapted" to refer just to the factual possibility that the vehicle might, at the point of the relevant supply of transport services, be in the configuration in which it was originally designed, or it might have been adapted for some different passenger carrying capability. And we should consider the carrying capacity by reference to whichever of those two situations is in point at the time of the relevant supply.

19. The fact that the provision makes reference to the design capacity of a vehicle is almost certainly explained by a fact that both parties readily accepted, namely that the relevant test is one geared to the capacity of a vehicle to carry a given number of passengers, and the actual number of passengers carried on any particular journey or supply is irrelevant. Accordingly the wording quite naturally addresses what a vehicle was designed to do and not what was actually done on a particular journey.

20. Not only do we consider that the second meaning of the contentious phrase mentioned in paragraph 18 above is possible, but with the First-tier Tribunal, we consider that it is by far the more natural meaning to be given to the phrase. As a pure

matter of language, it seems obvious to us that where the reference is to the vehicle having been designed or adapted for a particular seating configuration, it is simply addressing the two possible explanations for the current passenger capacity of the vehicle. If the vehicle has been adapted, and the seating capacity changed from that in the original design, the wording needs to address the fact that the reference to the design capacity (referred to for the reason we gave in paragraph 19) must be modified to refer to the other possible scenario, namely the passenger capacity after the adaptation. And where the vehicle has been adapted, it is the seating capacity following the adaptation alone that is relevant. Having regard to the way in which VAT concentrates on the situation at the "time of supply", we consider that the very clearest words would have been required (somewhat along the lines of the wording that we suggested in paragraph 17 above) to render a historic, and now irrelevant state of affairs, to be material to the VAT treatment at the time of supply. We also agree with the Respondents that the Appellant's contention could lead to some odd, and unfair, distinctions. We have referred, in paragraph 14(3) above, to one that the Respondents mentioned.

21. Another marginal factor that supports our construction is how the provision should be applied where a vehicle had been designed to carry 9 passengers, then adapted to carry 10, and then re-adapted to carry only 9 passengers. We understood the Appellant to concede that, where the design configuration of the vehicle and the current adaptation were both only suitable for the carriage of 9 passengers, supplies would not be zero-rated. This is the construction that we had expected the Appellant to advance, though this approach does prompt two observations. First, on a very literal, and we admit absurd, interpretation, the vehicle in this example would at one point have been adapted to carry not less than 10 passengers, so that the second limb of Item 4(a) would, on the Appellant's construction, still be satisfied. The second observation is that the acceptance by the Appellant that one should only address the current relevant adaptation points to the obvious common sense of addressing the situation at the time of the supply. If, in other words, it is obvious that on any basis we should ignore an intermediate adaptation that is now irrelevant, is it not somewhat odd that we should nevertheless address an equally irrelevant original design capacity?

22. Whilst we entirely agree with the First-tier Tribunal that much the more natural meaning to the contentious phrase is that advanced by the Respondents, we do not agree with the Tribunal's reference to the necessary insertion of words into the phrase that we mentioned at paragraph 11 above. We accept that in *Cirdan Sailing Trust v. HM C&E* [2006] BVC 514, Mr. Justice Park regarded it as appropriate to consider how a sailing vessel was to be used in judging whether it was designed to carry 9 or 14 people. In that case, there was no issue in relation to adaptation. The simple point in that case was that the vessel was suitable for the carriage of 14 persons if day trips were involved, but only 9 if the trips or cruises would involve people sleeping on board for several nights. Mr. Justice Park considered that, because the vessel was equipped with bunks and was almost invariably to be used for relatively long trips where people would use the bunks to sleep in at night, it was relevant to address the way in which the vessel was to be used. In other words, it was to be used for long

trips when its realistic capacity would be 9 persons, not 14, and Item 4(a) should be applied by reference to that reality.

23. In the present case, there was no dispute or issue about how the limousines were to be used, and we consider that the suggestion of inserting wording into the relevant test was irrelevant and confusing. As actually worded, the test can, and should be, applied in this case without any modification.

The authorities

24. We have already said that none of the three principal authorities quoted to us seems to be directly relevant, though we will now refer to each.

25. In the *Cirdan Sailing Trust* case, there was no question of some original design having been adapted, so that the case is of no great assistance in relation to the current appeal.

26. Mr. Justice Park's decision clearly established that it was the capacity of a vehicle to carry a given number of passengers that was relevant: if a vehicle or ship was capable of carrying 10 passengers but was only licensed to carry 9 passengers, it would still qualify for zero-rated treatment. This is relevant in the present case where the occasional seat was fitted in the front of the Ford Explorer. In those circumstances, the vehicle was then capable of carrying 10 passengers and supplies of passenger transport made with the Ford Explorer would be zero-rated notwithstanding that licensing requirements meant that only 9 people (including the driver) could be carried in the vehicle.

27. Having already explained that the only points in issue in the *Cirdan Sailing Trust* case were those that we referred to in paragraphs 22 and 26 above, it is not surprising that the judgment made no reference to how the phrase "designed or adapted" should be construed. It is fair to say, however, that it seemed to be the implicit assumption of Mr. Justice Park's judgment that the phrase was merely referring to the state of the vessel at the time the supplies were made. Certainly no reference was made to how the boat was originally designed. It may be that, when built in 1912 as a private yacht, it was obvious that the boat's carrying capacity was for fewer than 10 persons, such that it would have been pointless to look to the original design configuration of the boat in that case. Every indication, however, is that nobody gave thought to this possibility and that the reference to how many passengers the boat was designed or adapted to carry, as currently used, was a reference to its state (naturally the result of a second, if not third, adaptation of the original design) at the time the supplies were made.

28. In relation to the occasional seat that might be fitted or not in the Ford Explorer, we consider that Mr. Justice Park's consideration of how the vehicle was intended to be used should be taken into account in considering the vehicle capacity when the seat was fitted. Thus if, as seemed most likely, the seat was fitted so that a teacher or parent could accompany children in the back of the vehicle, the seat would then be used when perfectly ordinary supplies were being rendered with the Ford Explorer,

and it would then be appropriate to treat the vehicle as "adapted to carry 10 passengers", even though only 9 could be carried lawfully. We posed the question during the hearing of what the position would have been if the folding occasional seat was only ever fitted to enable a co-driver to accompany the driver, when say returning from a journey to deliver another vehicle for servicing or repair, or when moving another vehicle to a different location. HMRC appeared to ignore this possibility and to operate a basic seat-counting test. We accept that this was almost certainly appropriate, having regard to the proposition that the occasional seat was in fact fitted to enable an adult to accompany children on a normal trip, but it did appear to us that Mr. Justice Park's decision in *Cirdan Sailing Trust* did render this point something that should not just be ignored, by simply counting seats.

29. The next authority quoted to us, namely that of *HMRC v. Lt Cmdr Stone* [2008] EWHC 1249 Ch was, again, not directly relevant. It related to the slightly different test of whether a ship ranked as a "qualifying ship", is defined by Note (A1)(a) to Group 8 as:

> *"any ship of a gross tonnage of not less than 15 tons which is neither designed nor adapted for use for recreation or pleasure".*

There was no question of the ship having been adapted in Commander Stone's case. The only two issues for Mr. Justice Park were whether, as designed, the ship which was built to be Commander and Mrs. Stone's home, with some office accommodation, could be said to have been designed for "recreation or pleasure", and whether the natural meaning of the UK zero-rating provision should be interpreted in a strained manner so as to accord with the test in the later Sixth Directive. Both questions were answered in the negative and, as we have said, there was no issue of the ship having been designed in one way and adapted in another way.

30. It is inappropriate for us to seek now to suggest the appropriate interpretation of the definition of "qualifying ship". We should however address the Appellant's point which is that if the reference to "design" is a reference to "original design", with therefore "adaptation" being some change from the original design (an interpretation of "design" that is at least consistent with the reference to "design" that we are currently addressing in this appeal), then it does appear arguable that in the "qualifying ship" definition, as the Appellant contends, the original design of a ship as a ship designed for recreation or pleasure might remain fatal to the ability of ship ever to rank as a "qualifying ship" however it might be adapted. And if this is right, it ceases to be quite so odd that the original design of a limousine to carry 10 persons might continue to affect the status of a limousine, however it may later be adapted. We also note that the possible interpretation of the definition of "qualifying ship" noted above appears to tally with the wording of Item 1 of Group 8, which refers to:

> *"The supply, repair or maintenance of a qualifying ship or the modification or conversion of any such ship provided that when so modified or converted it will remain a qualifying ship".*

In the context of "modifications or conversions", the wording appears to contemplate that only changes from one form of qualifying ship to another can be zero rated and the modification or conversion of a non-qualifying ship to be a qualifying ship is expressly excluded from zero-rating (as is changing a qualifying ship into a non-qualifying one).

31. We accept that if the Appellant's suggested interpretation of the definition of "qualifying ship" is right, it is slightly odd that in one provision, the original design status of a ship can remain central to the status of a ship, however it might be adapted, whilst in this case our interpretation is that the original design of a limousine to carry 10 or more persons ceases to govern the zero-rated status of a limousine if it is adapted to carry 9 or fewer passengers. This does not, however, lead us to doubt our decision in relation to Item 4(a). The wording of Item 1 and the definition of "qualifying ship" are in different terms from the wording that we are directly concerned with, and the intent there seems to be rather clearer. We consider the wording in Item 4(a) to be different, and to refer, when dealing with the transportation of passengers, just to the state of the vehicle, ship or aircraft when the supply in question is rendered.

32. The final authority to which we were referred was the judgment of Lord Neuberger, with which the other four Law Lords concurred, in the case of *Boss Holdings Limited v. Grosvenor West End Properties and others* [2008] UKHL 5. This was not a VAT case but a case in relation to leasehold enfranchisement, where a tenant was given a right to acquire a freehold or an extended tenancy if the property in question was a house, and various other conditions were satisfied. A "house" was defined to include *"any building designed or adapted for living in and reasonably so called"*.

33. This wording might have raised a point of present relevance in this appeal if the facts had been that the claimant tenant, who was seeking to pursue its rights under the Leasehold Reform Act 1967, was seeking to acquire a freehold of a property originally designed as a house but subsequently adapted for other purposes. The case itself, however, involved a house that had been designed, built and then used as a house for many years but then part of it had been used for other purposes fairly recently. At the time the claimant sought to exercise its rights under the Act, the property had become seriously dilapidated and the case did not directly raise the point just posed at all. Lord Neuberger did, however, at paragraph 18, appear to treat the question of whether a building had been *"designed or adapted for living in"* as the type of two-limbed test that might be satisfied even if a property had been designed as a house and then converted into an office. In view of this we find the reference made to this case by the First-tier Tribunal to be somewhat curious because they referred to the case as one that supported the Respondents' case rather than the Appellant's case.

34. In our view, however, there are three reasons why this case does not shake our confidence in the decision that we have reached.

35. Firstly, although Lord Neuberger appeared, in paragraph 18, to treat the test as a two-limbed test that might have been satisfied by showing that a building had initially been designed as a house and then converted into something else, this was not a point

that he was directly concerned with and when he chose to comment on this precise issue at paragraph 26 of the decision, he accepted that the point was doubtful.

36. Secondly, we note that although the requirement was later removed from the Act, when the Leasehold Reform Act was enacted, it was originally a condition of a successful claim for enfranchisement that the claimant was "occupying the house as his residence". Manifestly therefore, when the definition of "house" was enacted, no material claim could have been made in relation to a building designed as a house and converted into an office, because the claimant would not have been occupying the office as his residence. One-way conversion was therefore possible, but conversion in the reverse direction (from house to something else) would have precluded a claim under the Act.

37. Finally, we said at the outset that our job was to discern the most natural meaning of the words and then pay some regard to common sense and the context in which the words were to be applied. It is irrelevant for us here to consider policy issues in relation to leasehold enfranchisement. We simply say that the context in which similar words are used in VAT legislation, where most of the focus is on the situation at the time of supply, may very well differ from the context for the purposes of the Leasehold Reform Act. We are therefore not persuaded that the decision in the *Boss Holdings* case undermines the decision that we have reached in this appeal.

38. We were referred by both parties to a related VAT provision dealing with vehicles designed or adapted to carry wheelchairs, where but for that feature, the vehicles would have been suitable for the carriage of not less than 10 persons. We did not find anything in this provision to be of any relevance to the point in dispute in this appeal, and see no need to make any further reference to that point.

39. Our decision is accordingly that where the vehicles involved in this appeal had been adapted so as to carry only 9 passengers, that fact is fatal to the claim that the supplies of transport services with the vehicles in question were zero-rated. It is irrelevant that they were originally designed for the transportation of 10 persons.

Howard Nowlan

Upper Tribunal Judge

Greg Sinfield

Upper Tribunal Judge

Release date: 24 April 2012