



Appeal number: UT/2017/0141

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Appellant

- and -

JIGSAW MEDICAL SERVICES LIMITED

Respondent

**TRIBUNAL: The Honourable Mr. Justice Marcus Smith
Judge Guy Brannan**

**Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 18 and
19 June 2018**

**Eleni Mitrophanous and Joanna Vicary, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Appellant**

Dario Garcia of Mishcon de Reya LLP, for the Respondent

DECISION

A. INTRODUCTION

5 1. The Respondent, Jigsaw Medical Services Limited (“Jigsaw”), carries on business as the supplier of ambulance services. Ambulance services are normally exempt from value added tax (“VAT”) because they constitute “the supply of transport services for sick or injured persons in vehicles specially designed for that purpose” within Item 11 of Group 7 of Schedule 9 of the Value Added Tax Act 1994 (“VATA”).

10 2. It was common ground before us that the ambulance services provided by Jigsaw are exempt from VAT by reason of this provision. The question before us was whether certain of Jigsaw’s ambulance services (the “Supplies”) are also zero-rated for VAT purposes. As to this:

15 (1) The Supplies in issue are emergency ambulance services, which were (as a matter of fact) provided by Jigsaw using vehicles specially converted and fitted out for stretchers and other equipment. It will be necessary to describe these vehicles in a little greater detail in due course. For present purposes, what needs to be noted is that emergency ambulance services (the Supplies in issue) are to be contrasted with patient transport ambulance services.

20 (2) It was common ground and not in issue before us that patient transport ambulance services are both exempt and zero-rated for VAT purposes. What was controversial was whether emergency ambulance services were similarly zero-rated for VAT purposes, it being accepted that they were VAT exempt.

25 (3) It was also common ground before us that, if the supply of emergency ambulance services was both zero-rated as well as exempt, the zero-rate would take precedence by virtue of section 30(1) VATA.¹ The difference is significant, for the following reason. For both zero-rated and exempt supplies the supplier does not charge any amount of VAT. However, it is only for zero-rated supplies that the supplier can claim a deduction for input tax (i.e., a deduction of the VAT on supplies made to it that are used in making its own taxable supplies).

30 3. On 9 March 2016, the Appellant, the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”), determined that the Supplies were exempt from VAT, but not zero-rated. After a statutory review, that decision was confirmed by HMRC on 28 April 2016. This decision was appealed by Jigsaw to the First-tier Tribunal (Tax Chamber) (the “FTT”).

¹ This was how patient transport ambulance services were treated for VAT purposes. This issue was not before us for determination.

4. By a decision of the FTT (Judge Gillett and Mrs Jo Neill) released on 25 July 2017 (the “FTT Decision”), the FTT allowed Jigsaw’s appeal, holding that the Supplies were zero-rated for VAT purposes. Although Judge Gillett refused permission to appeal, HMRC appeal to the Upper Tribunal with the permission of Upper Tribunal Judge Sinfield.

5. Appeals from the FTT to the Upper Tribunal are on points of law only: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. Normally, the relevant factual findings on which the appeal is disposed of are derived from the FTT’s decision, and in this case many of the relevant facts are so derived. However, HMRC contended that certain additional facts, not found by the FTT, were necessary for the proper hearing of the appeal. Accordingly, an application was made, which was not opposed by Jigsaw, to admit further evidence. We acceded to that application because:

(1) HMRC contended it was necessary for the proper determination of the appeal. We make no judgment in relation to that contention: but it seemed to us that if, without prejudice to Jigsaw, this additional material could be admitted, then it should be.

(2) The application was, as we have noted, not opposed by Jigsaw, who identified no prejudice to them.

(3) The additional evidence was uncontroversial, in that Jigsaw and HMRC were agreed on the facts. We were not required to make findings on disputed questions of fact.

6. This decision is our determination of HMRC’s appeal from the FTT Decision. It is structured in the following way:

(1) Section B sets out the relevant statutory provisions and the law relating to them.

(2) Section C describes the FTT Decision.

(3) Section D contains our construction of the relevant statutory provisions.

(4) Section E sets out how we dispose of the appeal.

B. THE RELEVANT STATUTORY PROVISIONS

7. Section 30 VATA provides:

“(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 –

(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.

(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.”

5 8. Schedule 8 of VATA is divided into various groups. Group 8 relates to transport. Item No. 4 in Group 8 specifies:

“Transport of passengers –

(a) in any vehicle, ship or aircraft designed or adapted to carry not less than 10 passengers...”

10 9. The various items in Schedule 8 are supplemented by Notes. Section 96(9) VATA provides:

“Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include a power to add to, delete or vary those notes.”

Thus, the Items in Group 8 must be interpreted in accordance with the Notes.

15 10. Schedule 8 contains a note relating to Item No. 4. Note 4D provides:

“Item 4(a) includes the transport of passengers in a vehicle –

(a) which is designed or substantially and permanently adapted for the safe carriage of a person in a wheelchair or two or more such persons; and

20 (b) which, if it were not so designed or adapted would be capable of carrying no less than 10 persons.”

11. Note 4D was inserted into VATA by The Value Added Tax (Passenger Vehicles) Order 2001, S.I. 2001 No. 753. The Explanatory Note – expressly not a part of the statutory instrument, but nevertheless relevant as a material to aid in construction² – provides (in the last paragraph):

25 “The Order also allows zero-rating to apply where passengers are transported in vehicles which, but for the fact that they have been designed or adapted for wheelchair users, would have been capable of carrying 10 or more passengers.”

30 12. Item No. 4 and the Note to it have been the subject of some consideration in the cases. In *Cirdan Sailing Trust v. Customs and Excise Commissioners* [2005] EWHC 2999 (Ch), the question was whether a boat, the “Duet”, fell within Item 4(a). The case did not involve wheelchair design or adaptation to the boat, so the court did not consider Note 4D. The issue was simply whether Duet was “designed or adapted to carry not less than 10 passengers”. As to this:

² Explanatory Notes in statutory instruments are matters to which we can, in certain circumstances, have regard: *Re Briggs (Incapacitated Person)* [2018] Fam. 63 at [34]-[35], [81]-[83]; Greenberg, *Craies on Legislation*, 11th ed. (2017) at [6.1.7] and [27.1.8].

(1) Duet was capable of carrying 14 passengers on a day trip, but only had nine berths, two for crew and seven for passengers.³

(2) Park J. rejected the day trip figure as the applicable figure for the purpose of Item 4(a). He held as follows:

5 “22. The area, however, where I respectfully differ from Mr. McNicholas
[counsel for the shipowner] is on his first proposition that Duet must
be regarded as a ship designed or adapted to carry not less than ten
passengers. That proposition is based on Mr. Back’s evidence that the
10 vessel could carry 14 passengers on a day trip. However, it is also
clear that the vessel could not carry 14 passengers, or at least could
not do so in acceptable circumstances, on trips which involve one or
more overnight periods. There are only nine berths on the boat, only
seven of which are available for passengers. Thus, Duet is a boat
15 which it can be said is capable of carrying ten or more passengers on
day trips, but is not realistically capable of carrying ten or more
passengers on longer voyages which include overnight passages. I
have to take that situation in conjunction with the feature that the
normal use to which Duet has been put has not been a use for day trips.
20 There may, for all I know, have been occasional day trips, but the
normal use has been for long voyages which typically include
overnight passages.

23. In my view the condition set out in Item 4(a), which involves
identifying the number of passengers a ship is designed or adapted to
carry, must be applied in a sensible way by reference to the actual and
25 anticipated ways in which the ship will be used. Further, where a
vessel is equipped with a significant number of bunks, it appears to
me realistic to regard those bunks as giving an indication of what the
vessel is designed or adapted to do. If a vessel was designed or adapted
predominantly or solely for day trips it would be unlikely to have a
30 considerable amount of space occupied by bunks.”

13. In *Davies (trading as Special Occasions/2XL Limos) v. Revenue and
Customs Commissioners* [2012] UKUT 130 (TCC), the Upper Tribunal (Judges
Nowlan and Sinfield) considered the status under Item 4(a) of certain limousines,
originally designed to carry not fewer than ten passengers, but subsequently
35 adapted to carry only nine passengers. The Note to Item 4(a) was considered only
in passing, and we derive no assistance from this part of the ruling.⁴

14. However, Item 4(a) itself was the subject of consideration by the Upper
Tribunal. As to this:

³ At [17] and [22].

⁴ See [38]-[39], where the Upper Tribunal itself stated that “[w]e 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.”

(1) It was contended before the Upper Tribunal that there were two distinct ways in which the Item 4(a) might be satisfied:⁵

5 “...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 ten 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 ten or more persons. The supply of transport services would be zero-rated if either limb of the test was satisfied.”

10 (2) The Upper Tribunal rejected this contention. The test, in Item 4(a), did not refer to “just 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”.⁶ Instead, the test referenced the configuration of the vehicle at the time the supplies in question were rendered.⁷

C. THE DECISION OF THE FTT

(1) The nature of the Supplies

15 20 15. The Supplies – that is, the emergency ambulance services – provided by Jigsaw used especially converted vehicles for the transportation of patients. As regards these vehicles:

(1) Jigsaw used three different types of van (Renault, Citroen and Mercedes⁸) to provide the Supplies.

25 (2) These vehicles were purchased by Jigsaw from companies specialising in the conversion of vans according to a specification provided by the customer.⁹ These companies purchase from the vehicle manufacturer a “base state vehicle” – which is essentially a shell, with just the front seats installed¹⁰ – to which adaptations and modifications are made, so that the customer’s specification is met.

30 (3) It is unnecessary to set out in full detail the adaptations and modifications that Jigsaw required to the base state vehicles: clearly, these would be extensive, given their use as emergency ambulances. For the

⁵ At [4].

⁶ At [18].

⁷ At [18], [22] and [23].

⁸ The use of the Renault and Citroen vans was found by the FTT: FTT Decision, [6(2)]. After the FTT Decision, but before the appeal to the Upper Tribunal, Jigsaw informed HMRC that Mercedes vans were also used. HMRC took no point on this: see HMRC’s written submissions at [13(c)] and [18].

⁹ FTT Decision, [6(3)].

¹⁰ FTT Decision, [6(6)]. The vehicle obviously has an engine, transmission and the mechanics of transport. We are here concerned only with the passenger configuration.

purposes of this decision, it is simply necessary to consider the provision that was made for the accommodation of people.¹¹ Essentially, each make of van had:

- 5 (a) The front seats – driver and passenger(s) – that formed part of the base state vehicle.
- (b) Three rear seats in the main, load compartment.
- (c) Space for a stretcher. Self-evidently, given the need to move patients, the stretcher is not a fixture to the van, but can easily be moved in and out of the ambulance via a ramp.
- 10 (d) Fixings for a wheelchair, so that the wheelchair (like the stretcher, moved in and out of the ambulance via the ramp) can securely be fastened to the floor of the ambulance by way of a number of restraints.

In summary, the position is as follows:

	Renault	Citroen	Mercedes
Front seats	2	3	2
Seats in the rear load area	3	3	3
Wheelchair capacity	1	1	1
Stretcher capacity	1	1	1
Total number of passengers	7	8	7

Table 1: Capacity of the emergency ambulances

15 As can be seen from Table 1, the total number of passengers is either 7 (the Renault and the Mercedes vans) or 8 (the Citroen). HMRC did not take any point regarding the driver not being a passenger nor the patient in the stretcher not being a passenger. We proceed on the basis that this is correct, but stress that we make no finding in this regard.

20 16. It was also common ground that – had Jigsaw specified this, it would have been possible to configure the base state vehicles so as to produce a vehicle at the outset capable of carrying ten or more persons.¹² Of course, this would have involved losing the wheelchair and stretcher capacity of the vehicles.

25 17. Equally, it would have been possible for Jigsaw to have the emergency vehicles adapted so as to become capable of carrying ten or more persons.¹³ The

¹¹ This information is derived from the statement of Mr. Chris Percival, and the exhibits to that statement. Although this statement was prepared for the purposes of the appeal, similar information was before the FTT and the facts here stated are uncontroversial between the parties.

¹² See the finding to this effect in FTT Decision, [6(7)].

¹³ See the finding to this effect in FTT Decision, [6(8)].

evidence before us – which we accept¹⁴ - was that this process could be accomplished relatively quickly. Essentially, the stretcher and any wheelchair would be removed and additional seating carried on board and bolted in. The process would take about two hours; and would take about the same amount of time to reverse.

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(2) The FTT’s approach

18. The FTT considered that the sole issue before it was whether or not the Supplies fell within Note 4D(b), i.e. whether, had the emergency ambulances not been adapted for the safe carriage of a person in a wheelchair, would the vehicle be capable of carrying no less than ten persons?¹⁵

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19. The FTT’s approach is shortly stated. The FTT Decision holds at [37]:

“In our view, the correct approach is to look at the vehicle itself and to determine whether or not that vehicle can, without complete rebuilding, be converted into a vehicle capable of carrying ten or more persons.”

15

20. In other words, the FTT considered that the fact that the emergency ambulances were capable of being converted into ten (or more) seater vehicles was determinative. The fact that this involved removal not just of the adaptations to accommodate the wheelchair, but also the removal of the stretcher, was held to be irrelevant to the test contained in Note 4D.

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21. On this basis – it being uncontentious that the emergency ambulances could be converted or adapted in this way¹⁶ – Jigsaw’s appeal was allowed by the FTT.

D. CONSTRUCTION OF THE RELEVANT STATUTORY PROVISIONS

(1) The proper construction

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22. We consider that the starting point for the purposes of construction is Item 4(a) and not Note 4D. The relevant statutory provision determining whether a supply is zero-rated or not is Item 4(a). Note 4D does not, of itself, determine zero-rating, but rather is a mandatory interpretive provision, requiring Item 4(a) to be read in a certain way.¹⁷

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23. Accordingly, it is necessary to begin with Item 4(a), and to ask whether the vehicle in question is designed or adapted to carry not less than ten passengers.

¹⁴ See the evidence of Mr. Paul Duke.

¹⁵ FTT Decision, [33].

¹⁶ As we have described, this is a process that can be carried out relatively quickly and easily: see paragraph 17 above.

¹⁷ See paragraph 9 above.

This test must be applied at the time the supplies in question were rendered;¹⁸ and (where variable numbers of passengers are capable of being carried) requires consideration of the actual and anticipated ways in which the vehicle is being used.¹⁹

5 24. Clearly, on this basis, the Supplies fall outside the ambit of Item 4(a). As Table 1 shows, none of the three vehicles used by Jigsaw could – at the time the Supplies were rendered – carry not less than ten passengers given their purpose. The maximum was seven or eight, depending on the vehicle.

10 25. That, of course, is not the end of the story. It is necessary to read Item 4(a) in light of Note 4D. As to this:

(1) Note 4D(a) requires regard to be had to the question of whether the vehicle in question is designed or substantially and permanently adapted for the safe carriage of a person in a wheelchair.

15 (2) Unless this requirement is satisfied, consideration of Note 4D(b) does not arise at all. Here, of course, the requirement is met. All of the emergency vehicles constituting the Supplies were adapted for the safe carriage of a person in a wheelchair. Note 4D(b) is therefore engaged.

20 (3) Note 4D(b) asks whether, if the vehicle had not been designed or adapted for the safe carriage of a person in a wheelchair (the words “not so designed or adapted” can refer to nothing else), the vehicle would be able to carry no less than ten persons.

25 (4) It is plain that this exercise (inevitably a hypothetical one) requires consideration of what might be achieved in terms of passenger capacity were the features enabling a wheelchair safely to be carried to be removed. In other words:

(a) One must first identify what was done to the vehicle to design it or adapt it for the safe carriage of a person in a wheelchair. We shall, as shorthand, refer to such design or adaptation as the “wheelchair modifications”.

30 (b) Next, one must ask, supposing the wheelchair modifications were not undertaken, what could be done in terms of additional passenger capacity.

35 What is impermissible, in our judgment, is to postulate changes going beyond assuming that the wheelchair modifications were not undertaken. That seems to us to be inconsistent with the rule – articulated in *Cirdan* and *Davies* – that one looks at the vehicle as it actually was at the time the supplies in question were rendered and bearing in mind the actual and anticipated ways in which the vehicle is being used.

¹⁸ See paragraph 14 above.

¹⁹ See paragraph 12 above.

5 (5) To take a simple example: suppose a van has the capacity to carry 12 passengers provided there are no wheelchair modifications. The vehicle plainly falls within Item 4(a). Suppose, however, the consequence of making wheelchair modifications involves the removal of four seats. The capacity of the vehicle is now maximally nine (eight ordinary passenger seats plus one wheelchair passenger). Supposing the wheelchair modifications were not made, what would happen? Self-evidently, in this example, four ordinary passenger seats would be added back in, and the vehicle capacity would be 12.

10 (6) The short answer in the case of the Supplies is that no seating was actually taken out in order to configure an emergency vehicle with wheelchair modifications. All that was done was to add the restraints enabling a wheelchair safely to be carried.

15 26. Such an approach is consistent with what we anticipate was the policy underlying Note 4D. This was to ensure that – in terms of zero-rating for VAT purposes, at least – the provider of transport supplies is not prejudiced when making wheelchair modifications.

27. We consider this construction of the relevant statutory provisions in light of:

20 (1) The Explanatory Note in The Value Added Tax (Passenger Vehicles) Order 2001.

(2) The fact that the construction we consider to be the correct one is consistent with policy, whereas the construction adopted by the FTT is not.

25 (3) The fact that the construction we consider to be the correct one avoids absurdity, whereas the construction adopted by the FTT does not.

We consider these three points in turn below.

(2) The Explanatory Note

30 28. We described the Explanatory Note in paragraph 11 above. An Explanatory Note is always admissible as an aid to understand the context of a statutory provision. Although we consider that the Explanatory Note in this case is consistent with our narrow construction of the statutory provisions, rather than the FTT’s more expansive construction, we do not consider that, whatever its terms, an Explanatory Note can change an interpretation which, in our view, is so clearly mandated by the words used by Parliament.²⁰

²⁰ When construing a statutory instrument, resort should not be had to Explanatory Notes “in the absence of an ambiguity or some other pressing reason”: Greenberg, *Craies on Legislation*, 11th ed. (2017) at [27.1.8]; *R. (Milner) v. South Central Strategic Health Authority* [2011] EWHC 218 (Admin) at [12] (*per* Holman J). We do not understand it to be impermissible to consider an Explanatory Note when seeking to understand the “contextual scene” of a legislative provision: see *Flora (Tarlochan Singh) v. Wakon (Heathrow) Ltd* [2006] EWCA Civ 1103 at [15]-[17] (*per* Brooke LJ). However, in this case, the Explanatory Note was deployed not to explain context, but to support a specific construction. Our narrow

(3) Consistency with policy

29. Construction of statutory instruments involves a combined purposive/literal approach.²¹ Questions of policy – the purpose for which a statutory instrument was made into law – are matters that we can take into account.

5 30. In this case, as we have noted, the narrow construction that we favour is in line with the policy that we understand to underlie Note 4D. By contrast, the wide construction of the FTT leads to an outcome where a taxpayer can rely upon modifications that it never made, never intended to make and which would be inconsistent with the manner in which the relevant supplies were provided, in
10 order to gain zero-rated status.

(4) Avoiding absurdity

31. Finally, and relatedly, we consider that the expansive approach of the FTT leads to outcomes that could be described as absurd:²²

15 (1) Suppose a “luxury” van, capable – because of the extremely comfortable seating installed – of only carrying eight persons. Were less comfortable and physically smaller seating to be installed, then the van could carry 12 persons.

20 (2) Suppose, also, that, provided wheelchair restraints are fitted, and two of the extremely comfortable seats (temporarily) removed, a wheelchair passenger could safely be carried.

(3) We consider – following the FTT’s reasoning – that the fitting of wheelchair restraints would amount to a modification within Note 4D(a), triggering Note 4D(b).

25 (4) The question would then be whether the vehicle could, without complete rebuilding, be converted into a vehicle capable of carrying ten or more persons. The answer to this question is obviously “Yes”.

30 Thus, simply by way of having removable comfortable seating, and fitting (on a permanent basis) wheelchair restraints, a vehicle obviously falling outside the scope of Item 4(a) is brought within its scope through the operation of the wording in Note 4D. We do not consider this to be a reasonable construction, and it is one that leads to manifest absurdity and to the potential for abuse.

(5) Adopting a narrow construction

32. We have also borne in mind the general principle that exemptions from VAT should be strictly construed (see e.g. *Talacre Beach Caravan Sales Ltd v C*

interpretation is consistent with the Explanatory Note, but absent ambiguity that is irrelevant. An Explanatory Note cannot override clear statutory wording that is inconsistent with it.

²¹ For an outline of the law, see Section F of *Chistianuyi Limited v. The Commissioners for Her Majesty’s Revenue and Customs* [2018] UKUT 0010 (TCC).

²² Greenberg, *Craies on Legislation*, 11th ed. (2017) at [19.1.2].

5 & *E Commissioners C-251/05* at [23]). We acknowledge that in this case the choice lies between whether the Supplies are exempt or zero rated. Nonetheless, it is clear that the wide interpretation given by the FTT to Note 4D would be applicable in many other circumstances where the choice may lie between standard and zero rating. Whilst the narrow interpretation that we favour is consistent with the general rule that exemptions from VAT should be interpreted strictly, we consider the narrow construction to be so overwhelmingly the clearest one mandated by the wording of the statutory provisions here in play that it is not necessary to have recourse to this general rule of interpretation.

10 **E. DISPOSITION**

33. For the reasons given in this decision, we allow HMRC's appeal.

15 **The Honourable Mr. Justice Marcus Smith**
 Judge Guy Brannan

Judges of the Upper Tribunal

20 **Release Date: 17 July 2018**