FIRST-TIER TRIBUNAL
TAX

Appeal Number: TC/2014/01582

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

-and-

C JENKIN AND SON LTD

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

Sitting at the Royal Courts of Justice, London, on 12 November 2015

Marika Lemos, counsel, on behalf of the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants

Tarlochan Lall, counsel, on behalf of the Respondents

DECISION ON AN APPLICATION TO APPEAL TO THE UPPER TRIBUNAL

Introduction

1. This was a rather involved application to appeal against the Decision in this matter dated 21 May 2015 given by Judge Cornwell-Kelly. One immediate complication resulted from the fact that, doubtless through some administrative error, the Application was listed before me, when the normal procedure is for the Judge who gave the original decision to deal with any Application to appeal. Since the parties had not known which judge would hear the Application, and I for my part had not learnt until the evening preceding the hearing the nature of the hearing, I obviously had no alternative but to deal with the Application, though the switch of Judge made the hearing slightly more complex than would otherwise have been the case.

2. Stated shortly, the largely uncontested facts were as follows. The Respondents (the Appellant in the original Appeal, that we will refer to as "CJS") manufactured and supplied large caravans, not the type to be towed behind cars, but the substantial caravans that would ordinarily have fixed mountings and be transported to the some chosen site by a substantial truck, and thereafter used as long term accommodation.

3. CJS apparently sold about 20% of the caravans manufactured to private purchasers. These sales were regarded as zero-rated sales, and it was accepted that this was the correct VAT treatment of these sales. Most of the remaining caravans manufactured were supplied to "the travelling community" on five-year leases. Although these leases included no form of purchase option at the end of the five-year period, it was certainly mentioned to me during the hearing that the rentals recovered during that period would have returned to CJS effectively the sale price plus interest as if the caravan had been sold. It was also said that at the end of the five-year period the caravan would often be in a poor condition and would be replaced by a new one. Rental payments for the caravans were generally paid out of housing benefit. The lessees of caravans then arranged to acquire some licence from a local authority in a site in which to locate the caravan, for which a separate charge was made. I presume that CJS than transported the caravan to the chosen site and installed it.

4. For about 20 years, the leases of the caravans mentioned in the previous paragraph had been treated (and accepted by HMRC to be) zero-rated under Item 1 Group 9 of Schedule 8 to the VAT Act 1994. The relevant provision simply referred to the supply of caravans exceeding certain sizes, there then being a Note that provided that zero-rating under the relevant Item did not include "the supply of accommodation in a caravan or house boat".

5. HMRC decided in 2013 that as the caravans were supplied to provide accommodation, the zero-rating provision should not have applied on account of the provision in the Note just quoted. Instead HMRC contended that the supplies by CJS were exempt supplies. The result of this contention was that HMRC sought, by an assessment, to recover refunded input tax of £481,069, that CJS had received in the periods 12/09 to 04/13.

6. During the hearing, the first conclusion reached, indeed by both parties, was that because CJS's supply conferred no interest in land whatsoever, the supplies could not have been exempt. There was an extra statutory concession that conceded exempt treatment

where a supplier provided *"accommodation in a caravan that is on a site designated by the local authority for permanent residential use, and the caravan is let to a person as residential accommodation"*. The original judge made it clear that he had no power to force HMRC to apply a concession, and in any event, CJS's supplies were not of a caravan that was already on such a site.

7. The judge then decided that HMRC were right to say that the supplies were not zero-rated. He held that since the caravans were clearly to be used to provide accommodation, the status of supplies as zero-rated supplies under Item 1 Group 9 was undermined by the Note referred to in paragraph 4 above.

8. Having thus reached the conclusion that the supplies were neither exempt nor zero-rated, the judge asked HMRC's representative how she considered that they were properly classified and she replied, apparently reluctantly, that the supplies were presumably standard-rated. The judge said that he inclined to the view that that was probably right but he expressly refrained from making a decision to that effect, since it had not been raised before him. Accordingly he said that since HMRC's original contention had been that the supplies were exempt, and they plainly were not exempt, HMRC's case must fail and CJS should be entitled to retain the input tax that it had recovered over the relevant periods.

9. In terms of figures, it appeared that had the analysis been that CJS's supplies had been standard-rated, this would have resulted not only in there being no repayment of input tax of £481,069 that CJS had received in the relevant periods, but there would have been an additional output liability of £393,717. HMRC would have been out of time to make assessments for much of the relevant additional VAT, though if the Tribunal exercised its jurisdiction under section 84(5) VAT Act 1994 to amend and increase the assessment, the whole of the additional VAT might be recovered.

The remedies requested in HMRC's Application to Appeal

10. HMRC asked me to review the Decision and to conclude that because it had to follow that the supplies were standard-rated if they were neither zero-rated nor exempt, the input tax could only be refunded if there was no output liability to set against it. Since on the standard-rated analysis, there was indeed such a liability, at least to the extent of the £481,068 of claimed input tax, the assessment to recover the repaid input tax should still be confirmed. It was said that although general law, as distinct from statute law, required HMRC to give reasons for their assessments, assessments could still later be justified on the basis of different reasons. Accordingly even though it had initially been contended that the input tax should be repaid to HMRC because the supplies had been suggested to be exempt supplies, the assessment to recover the input tax could now be justified on the different basis that the supplies must have been standard-rated. It was certainly common ground that the supplies could not have been outside the scope of VAT or liable to VAT at the reduced rate so that they had to have been standard-rated once the judge had concluded that they were neither exempt nor zero-rated.

11. I was then asked to consider whether to increase the assessment, so as not only to deny the retention of repaid input tax to CJS but to increase the liability by the £393,717 mentioned in paragraph 9 above.

12. I was then asked, should I not be minded to review the Decision myself, to grant permission for HMRC to appeal to the Upper Tribunal in relation to the same matters.

13. The first contention advanced by CJS was that there had been no error of law in the Decision and that I should therefore neither review it nor grant permission to appeal. Matters might have been different if HMRC had sought to advance a new argument during the hearing, i.e. to the effect that instead of being exempt, the supplies had been standard-rated, and the same might have applied had the judge asserted that it seemed that the supplies had indeed been standard-rated, thereupon calling upon both parties, possibly after an adjournment, to address him on that possibility. But neither HMRC nor the judge had tabled the proposition that the supplies had been standard-rated, and the most that the judge had said was that they probably were standard-rated but that his decision was not to be taken as authority for that proposition since it had neither been formally advanced by HMRC nor formally put to the parties by him.

14. CJS confirmed that, having won the original Appeal, and thus retained the repaid input tax, they had not yet sought to appeal against the decision by the judge that the supplies were not zero-rated. CJS was, however still returning its VAT liability currently on the basis that the supplies were zero-rated, and since CJS had been assessed for additional VAT in relation to those later filings, CJS had apparently already commenced appeals against those assessments.

15. One possible course of action, suggested on behalf of CJS, was that I should stay the present application to appeal behind later appeals of the type just referred to in the second sentence of the previous paragraph.

My Decision

16. While I am of course heavily influenced by the need to address the issue of possibly reviewing the Decision or granting leave to appeal properly, I am also keen to promote a course of action that is likely to resolve all matters as swiftly as possible. One of the adverse implications of delay is of course that if it is eventually decided that all the supplies are standard-rated, it will add to CJS's problems if there have been numerous further supplies for which it will doubtless not have increased its lease rentals in order to fund the additional VAT. In the light of the fact that neither party appeared ready to abandon its contentions without appealing at least to the level of the Upper Tribunal, it would be bound to take longer for matters to be resolved if I was to accede to the request mentioned in paragraph 15 above. I was not told whether the pending appeals in relation to later supplies had yet even been listed, but plainly this present Appeal is considerably more advanced than those, as yet, future appeals.

17. It therefore seemed to me that the most expedient course would be for CJS to advance a cross-appeal in relation to the original Decision with which I am now concerned. CJS will be out of time to seek leave to bring that Appeal but I managed to persuade HMRC to confirm that they would take no objection to an out of time application on the part of CJS to appeal against Judge Cornwell-Kelly's decision that the relevant Note mentioned in paragraph 4 above precluded CJS's supplies from ranking as zero-rated supplies.

18. I have a reasonably firm initial view as to the right analysis in this case, and I will certainly mention that below. I consider it inappropriate, however, to review the Decision

myself and will refrain from doing so, largely because although any amended Decision following a review would give both parties a fresh opportunity to bring Appeals, it still seems likely that one if not both of the parties would wish to appeal against the reviewed decision, and it would therefore simply be swifter to grant the Respondents permission to appeal now and then to await CJS's application to bring a cross-appeal such that shortly hopefully the Appellant will also have permission to appeal to the Upper Tribunal and all matters can be considered in the same Upper Tribunal hearing.

Grant of permission to appeal in favour of the Appellant and indication in relation to any cross-appeal for which CJS might seek permission

19. I therefore grant permission now for the Applicant's present request to appeal to the Upper Tribunal. If, as CJS indicated that it would, it very shortly makes its own Application to appeal against Judge Cornwell-Kelly's decision, and that Application comes before me, I will immediately grant that application.

The grounds for my conclusion that there were errors of law in the original Decision

20. I will now indicate my initial view as to the correct rationalisation of the various issues in this Appeal. Since I am merely having to conclude that the Applicant, and also CJS as the expected further Applicant, have adequate grounds to say that there was an error of law in the original Decision, it is not strictly relevant whether the following paragraphs are entirely correct. I certainly consider that the various points that I will advance make it quite clear that there are grounds for saying that there were arguably errors of law in the original Decision, and that is all that I need strictly to conclude.

21. The first ground for saying that there was a possible error of law in the original Decision is that, as HMRC have contended, once it had been decided that the supplies were neither exempt nor zero-rated, then because it was absolutely clear that they were certainly not outside the scope of VAT or chargeable at the reduced rate, it had to follow either that one of the two decisions just referred to was wrong, or else that the supplies simply had to have been standard-rated. Whether that had been contended or not, I consider that it was not possible to allow the original Appeal and leave CJS with the refunded input tax when the parties and the judge had addressed the standard-rated analysis. Once it was obvious that the supplies were neither outside the scope of VAT nor subject to VAT at the reduced rate, and once it had also been decided that the supplies were neither exempt nor (more materially) zero-rated, there could be no basis on which the VAT, so far refunded to CJS, should remain in the hands of CJS. Were it proper for the VAT refunded to be left in the hands of CJS, the only explanation for this would have to have been that the supplies had ben zero-rated, and the judge had rejected that possibility.

22. There has been considerable attention given (largely because HMRC's original contention all related to the claim that the supplies had been exempt supplies) to the proposition that the supplies were not zero-rated because they were exempt. Since zero-rated treatment trumps exempt treatment if both are available, in this case zero-rated treatment is only disapplied if the terms governing the availability of zero-rated treatment are not satisfied.

23. I agree with CJS that there is a very respectable argument that the Note referred to in paragraph 4 above did not apply in this case, and that indeed the supplies of the caravans to

the various travellers were zero-rated. The first ground for reaching this conclusion is surely that there is something utterly remarkable in granting zero-rated status for the supply of large caravans that are only suitable for use as accommodation if the zero-rated status is to be disapplied if the caravans are to be used for accommodation. That, however, appears to be the effect of the meaning so far given to the relevant Note.

24. There seems to me to be a much more natural meaning to the contrast between one supply being of a caravan, and another being of accommodation in a caravan. The notion of supplying *"accommodation in a caravan"* appears to me to be entirely apt to cover the situation where a caravan might be located permanently on a site designated for permanent residential use, and then without in any way selling the caravan or granting a long lease in respect of the caravan as such to a user, the owner of the caravan and the site provides accommodation to a user in the caravan as residential accommodation. The owner and operator in that example is not supplying a caravan at all. The owner keeps the caravan and the land on which it is situated. The owner simply grants some right for residential occupation, and is therefore aptly to be said to be *"supplying accommodation in a caravan"*.

25. HMRC almost appeared to concede in the hearing before me that the structure of the legislation for which they were contending was odd and unexpected, but it was of course their job to apply the legislation and not to question it. The odd thing about their analysis, however, was that there was not the outcome that one might have expected of there being some symmetry between the treatment of houses and lettings of real property on the one hand and sales of residential caravans and the provision of accommodation in caravans on the other hand. That, however, appears precisely to be the outcome if the distinction mentioned and the meaning given to *"the provision of accommodation in a caravan"* is as suggested in paragraph 23 above. For it then follows, that just as the supply of new build houses is zero rated, so too would the supply of residential caravans be zero-rated. Correspondingly a lease of a dwelling-house is exempt and not zero-rated, and so too would the provision of accommodation in a caravan, without supplying the caravan itself, also be exempt.

26. The symmetrical treatment of caravans and accommodation in caravans, alongside that of new build houses and leases of residential properties appears to be confirmed by various paragraphs of Notice 701/20 in relation to Caravans and houseboats.

27. Paragraph 2.3 of the Notice just referred to deals with what is meant by the supply of a caravan. It provides that:

> *"You are supplying a caravan if you do any of the following:*
>
> - *sell it;*
> - *lease it under a long term leasing agreement under which the lessee is free to transport it to a park or other place of their own choosing;*
> - *loan it without making a charge,*
> - *divert it to your own personal use."*

Implicitly supplies of the relevant large size caravans are then zero-rated.

28. There was considerable discussion in the original hearing and in the hearing before me as to whether the traveller, taking a five-year lease of a caravan, satisfied the condition that he was free to transport it to a park or other place of [his] own choosing. This issue was

addressed by reference to the question of whether once the caravan had been located on one site, the traveller was free to request that it be moved to another site. The relevant wording of the lease provided that *"the Lessee may request that the home be moved to another park or other place of their choosing and the Landlord will endeavour to facilitate this request, subject to agreement on costs and the economic viability of the move to the Company"*. That seems to me not to be a fetter on the lessee's freedom to move the caravan but simply a right to do so, coupled with a best endeavours obligation on CJS to assist, subject to being paid (obviously an inevitable requirement) and subject also to the move not occasioning some other material economic disadvantage to CJS. That seems to me not to fetter the freedom to move the caravan. Anybody needing to move such a caravan would inevitably need professional lifting gear and they would have to pay for it. I was also told that 12% of caravans supplied had in fact been moved from their original locations. The following point was not mentioned, and it is possible that this should be clarified in further evidence, but it also appeared that as the caravans might be located all over the county, the choice of where they were first located depended presumably on the choice on the part of the lessee, and of course, the availability of a suitable site. That fact alone would appear to me to satisfy the condition in the second bullet point quoted in paragraph 26 above concerning the lessee's freedom to transport the caravan to a place of his own choosing.

29. Paragraph 5.3 of the same Notice then deals with the matching treatment to leases of residential houses. It provides that:

> *"If you provide accommodation in a caravan that is:*
>
> - *on a site designated by the local authority as for permanent residential use, and*
> - *let to a person as residential accommodation*
>
> *your supply will be exempt."*

30. It might arguably be the case that the provision of accommodation in a caravan on a permanent site does not involve the grant of any lease or licence over the land, so as arguably not to be exempt under the strict law. Even if this is so, however, where accommodation is provided in a caravan on the relevant site for residential accommodation, there is the same exempt treatment as with any lease of a dwelling house, as mentioned in the previous paragraph.

31. This seems to me to create an entirely coherent legislative framework, and to be infinitely preferable to an interpretation of the crucial Note referred to in paragraph 4 above. The reading of that Note that precludes the zero-rated treatment of the supply of large residential caravans if they are to be used as accommodation (as obviously they are to be used) appears completely to undermine and effectively withdraw the relevant zero-rated treatment altogether and it seems to me that it cannot be right. Putting that point relevantly, there must be an arguable case, justifying a right of appeal, that it may well not be right.

32. Were I wrong in my conclusion that the supplies were properly zero-rated, I have already concluded that it should then follow that CJS's original Appeal should have been dismissed because the liability to pay output tax as a standard-rated supply would have eliminated any repayment of input tax. There is then the issue of whether the Tribunal should have exercised its discretion to increase the assessment under section 84(5) to render

the additional £393,717 chargeable. I am barely going to consider this since it was not fully argued during the hearing. My inclination is to say that as the additional liability would only arise under an analysis that had not initially been advanced, and it was then advanced towards the end of the original hearing by HMRC's representative, and apparently advanced "reluctantly", the assessment should not have been increased to permit the recovery of this further amount. This further liability would more properly have required an assessment on a new basis that had not previously been considered at all and as that assessment would have been out of time, at least as regards much of the further liability, the entire amount further amount should not simply be added, as an adjustment to the one assessment, that merely sought to deny the recovery of input tax. This is all of course academic if my relatively strong view that the supplies of the caravans were indeed zero-rated is upheld before the Upper Tribunal, assuming CJS to bring the required cross-appeal.

33. In the expectation, as I and both parties contemplated, namely that the Appellant would immediately apply to appeal the zero-rated issue and to do so out of time, and that these applications are duly granted, it will follow that there will be permission to appeal all of these issues to the Upper Tribunal. I should record the point made by HMRC's counsel to the effect that if (as CJS suggested might be the case) there was a need to produce further evidence, this could be done before the Upper Tribunal and that there was no particular need for the case to be remitted back to the First-tier Tribunal for the purpose of obtaining further evidence.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASE DATE: 19 NOVEMBER 2015