



TC01341

Appeal number: TC/10/07883

VALUE ADDED TAX - VAT Act 1994 – Section 73(1) and Schedule 8, Group 12, Paragraphs 2A and 5L. Zero Rating – Whether motor vehicle “substantially and permanently adapted for a handicapped person who usually uses a wheelchair” – whether for domestic and personal use to enable a handicapped person to enter and drive in a motor vehicle. Appeal allowed.

FIRST-TIER TRIBUNAL

TAX

CROALL BRYSON & COMPANY LTD

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: W RUTHVEN GEMMELL, WS
Member: MRS HELEN M DUNN, LL.B.

Sitting at George House, 126 George Street, Edinburgh, EH2 4HH on Tuesday 31 May 2011

Mark Burke for the Appellant

Garry Borland, Advocate, for the Respondents

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DECISION

1. Croall Bryson and Company Ltd (“CB”) appealed against a review decision upholding assessments for Value Added Tax (“VAT”) in the total sum of £19,471 contained in a notice of assessment dated 13 July 2010, for the period 01/07 to 07/07 issued by the Commissioners of HM Revenue & Customs (“HMRC”).

2. HMRC issued the assessment as they were not satisfied that CB was entitled to treat as zero-rated supplies under Item 2A of Group 12 of Schedule 8 to the Value Added Tax 1994 (“VATA”) being the supply of qualifying motor vehicles to handicapped persons, who usually use wheelchairs or are usually carried on stretchers, for domestic or personal use. The assessments were made under Section 73 (1) of VATA.

3. CB claimed that they had met the statutory requirements for entitlement to treat the sales as zero-rated under the provisions of Schedule 8 and in particular within Note 5L, Item 2A of Group 12 by supplying “qualifying motor vehicles” which were substantially and permanently adapted to enable a handicapped person who usually uses a wheelchair to enter and drive or be otherwise carried in the motor vehicles.

4. HMRC claimed that there was insufficient evidence to demonstrate that these requirements had been met. HMRC led evidence that, since 2006, there had been systematic abuse of the exemption for handicapped persons in claiming zero-rating for VAT on motor vehicles.

5. Evidence was given by George Dance, Director of CB, David Miller, Sales Executive of CB, Mrs Karen Ross (“KR”), an employee of HMRC in the Pre-repayment Credibility Team and by Graham Kay, an employee of HMRC and a Senior Investigator of HMRC.

6. All the witnesses were credible.

Legislation

7. Value Added Tax Act 1994 - Section 73

Failure to make returns etc.

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

8. SCHEDULE 8 - Zero-rating -

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

2A The supply of a qualifying motor vehicle —

(a) to a handicapped person—

(i) who usually uses a wheelchair, or

(ii) who is usually carried on a stretcher,

5 for domestic or his personal use; or

(b) to a charity for making available to such a handicapped person by sale or otherwise, for domestic or his personal use.

10 (5L) A “qualifying motor vehicle” for the purposes of item 2A is a motor vehicle (other than a motor vehicle capable of carrying more than 12 persons including the driver)—

(a) that is designed or substantially and permanently adapted to enable a handicapped person—

(i) who usually uses a wheelchair, or

15 (ii) who is usually carried on a stretcher,

to enter, and drive or be otherwise carried in, the motor vehicle; or

(b) that by reason of its design, or being substantially and permanently adapted, includes features whose design is such that their sole purpose is to allow a wheelchair used by a handicapped person to be carried in or
20 on the motor vehicle.

9. HMRC Reference: Notice 701/59 (March 2002): -

Motor vehicles for disabled people

3. Adapted motor vehicles

3.1 What is an eligible adapted motor vehicle?

25 It is any motor vehicle (such as a car, light van, multi-passenger vehicle (MPV) or motor home) that is:

designed, or substantially and permanently adapted for the carriage of a disabled wheelchair user – see paragraphs 3.2 to 3.6; and

30 has a carrying capacity of no more than 12 people – see paragraph 3.7.

3.2 What does ‘adapted for the carriage of a disabled wheelchair/stretcher user’ mean?

A motor vehicle is adapted for the carriage of a disabled wheelchair user if it is:

35 adapted to suit his specific needs; and

the adaptation:

allows him to enter and travel in the vehicle whilst seated in the wheelchair or on the stretcher;

allows him to enter, travel in or leave the vehicle;

enables him to drive the vehicle; or

5 allows a wheelchair to be carried on or in the vehicle.

3.3 What is a 'permanent' adaptation?

An adaptation is permanent if it can be used for as long as the disabled wheelchair user requires it. Generally the adaptation would require welding or bolting to the vehicle.

10 3.4 What is a 'substantial' adaptation?

A substantial adaptation enables a wheelchair user to use a vehicle which he could not use before it was adapted. For example, a spinner device, such as a knob on a steering wheel, may not seem substantial to an able bodied person but it would be substantial for a disabled wheelchair user who could not otherwise drive the vehicle.

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3.5 Examples of adaptations

The following are examples of adaptations for the carriage of a disabled wheelchair user:

a swivel seat;

20 a hoist to lift a wheelchair into or onto the vehicle;

a box for the wheelchair, which is fitted to the top or the back of the vehicle;

adaptations that enable a wheelchair user to drive the vehicle, such as a push/pull brake and accelerator, hand controls or other aids that operate the primary driving controls; and

25

infra-red control unit that operates the secondary controls.

This is not an exhaustive list.

The following are not adaptations for the carriage of a disabled wheelchair user:

30 the fitting of a roof rack or standard roof box;

the attachment of a trailer to the back of a vehicle; or

the fitting of automatic transmission;

because they are for general use and not specifically designed for disabled people.

35 This is not an exhaustive list.

Cases referred to

Quentin Hylands and The Commissioners of Customs & Excise 2004, Decision 18560.

Queenspice Limited and HMRC [2010] UKUT 111(TC).

5 **The Facts**

10. The followings facts were found -

11. CB carries on business as a motor dealer selling new and used cars in Kelso and have been registered for VAT since 1 April 1973. On 1 February 2010, KR wrote to CB requesting details of any vehicles which had been zero-rated since 1 April 2006 and asking for copies of sales invoices, together with copies of eligibility declarations and details of adaptations.

12. By letter dated 18 February 2010 CB confirmed they had identified seven vehicles which had been zero-rated since 1 April 2006 and enclosed copies of the sales invoices together with the eligibility declarations. An apology was made in this letter for the copy quality of the invoices caused by copying text on a coloured background and this defect was also noted by the Tribunal.

13. Each invoice was accompanied by an eligibility declaration by the disabled person and CB, with the exception of the invoice to the Priory of the Order of St John in relation to a purchase by Border Search & Rescue which was accompanied by a different form but which was also signed on behalf of Border Search and Rescue and by CB.

14. Each eligibility declaration stated that the purchaser of the vehicle was claiming relief from VAT having declared that “I am chronically sick or have a disabling condition by reason of (and here he/she was asked to give a full and specific description of the condition)”, that the adapted vehicle was for their personal use and that they usually used a wheelchair or stretcher. This was signed by the purchaser. The supplier stated that they were supplying the goods and services to the persons named in the certificate and gave, amongst other information, a description of the vehicle and details of the adaptation which was being supplied for “domestic or personal use”.

15. A summary of the seven transactions with the date of the eligibility certificate, the name of the purchaser, the stated disabling condition and the adaptation to the vehicle were respectively:-

- (1) 6 June 2006, Prior of the Order of St John, no condition specified, no adaptation specified;
- (2) 28 June 2006, Finbow, T12 spinal cord injuries, hand controls;
- (3) 5 December 2006, Owen, spastic paraplegia, hand controls;

(4) 13 February 2007, Miles, left leg amputee due to chronic diabetes, steering adaptations;

(5) 31 May 2007, Thompson, double above knee amputee, hand controls;

5 (6) 5 October 2007, Kennedy, spinal injury, no description but reference to photograph showing hand controls;

(7) 30 November 2007, Short, leg, hip disarticulation, wheel chair adaptation.

16. All the vehicles were Range Rovers or Land Rovers.

17. Consequently, there were gaps between these sales of approximately five months, two months, three months, five months and two months in a period covering
10 approximately eighteen months.

18. On 18 March 2010, KR visited CB's premises and examined their books and records. The VAT Audit Report of this visit only stated that the audit started on 18 March and that GD was interviewed on the 23 March 2010 but referred to comments "added by Karen Ross ASR063B7 (7093574) on 9 September 2010 at
15 07:59:42". This information appeared to have been written by KR some five and a half months after the visit and included a statement that "some of the names are familiar to Department, spoke to Greg Pitts from Motor Trade UofE. Agreed the way forward was to visit the trader and look at the deal files in more depth".

19. The document then referred to notes or bullet points in relation to each of the
20 seven zero-rated transactions.

20. The transactions for Thomson, Short and Borders Rescue were deemed to be acceptable to HMRC for zero-rating purchases and the Thomson and Short files or "deal bags" contained eligibility certificates. The Kennedy purchase contained photographic evidence of adaptations and reference was made to these by way of an
25 asterisk at the section of the eligibility certificate where the supplier is requested to fill in the details of the adaptations.

21. On 18 March 2010, KR wrote stating that the purchaser had to be a wheelchair user and that the vehicle had to be "substantially and permanently adapted". "Substantial means an adaptation that enables the disabled wheelchair user to use a
30 vehicle they would not otherwise be able to use without the adaptation. The underlying principle is that the adaptation must suit the condition of that particular person and must be necessary to allow the disabled person, despite their disability, to "enter and drive" or "enter and be carried in the vehicle". The mere fact that a vehicle has been adapted is not sufficient. In short, the adaptation must accommodate the
35 specific disability the person has".

22. It continued -

"Permanent – means for as long as the disabled person requires it to enable them to enter, drive, enter and be carried in the vehicle. The vehicle has to be for domestic or
40 personal use – this means normal every day use by the disabled wheelchair user, such as going to the shops, taking the children to school, going to and from work etc. It

also includes incidental use at work providing the main use remains as a private vehicle. It does not include vehicles purchased for resale. In respect of the zero-rated supplies listed in the schedule attached to this letter, I believe they have failed to meet at least one of these conditions.”

5 23. The schedule referred to the sales transactions with Owen, Miles and Finbow and CB were asked to review the deal files for these vehicles and provide any further information to support the zero-rating.

24. The schedule identified specific problems with these transactions. In relation to the Owen transaction it stated “Vehicle not permanently or substantially adapted” and
10 “Adaptation not consistent with disability”. In relation to the Miles transaction, it stated “Adaptation invoice made out to Mr Miles – was vehicle adapted before sale” “How was the vehicle paid for” and “Adaptation not consistent with disability”. In relation to the Finbow transaction, it stated “There is no evidence of adaptation in deal bag, is there any chance you could have a purchase invoice or further details of the
15 adaptation”.

25. On 28 April, CB responded to HMRC’s letter of 18 March 2010 stating in relation to the Owen transaction that the vehicle adaptation was “hand controls” and the disability was Spastic Paraplegia.

26. It enclosed a paper obtained from the internet explaining the disability and noted
20 that leg muscles “are affected making walking (and presumably driving) difficult”. CB said the vehicle was suitably adapted for the needs of this customer.

27. In relation to the Miles transaction, CB stated the hand control was fitted to the vehicle before sale and referred to a CB jobcard dated 13 February 2007 with the work instructions “fit hand control to steering wheel (supplied)” and the initials FOC
25 which was explained meant free of charge and which had a large score or tick which was then crossed.

28. Mr Burke explained that Mr Miles was a left leg amputee and that he had contacted the dealership several months after the first sale at which time CB became suspicious that he was being fraudulent and refused to deal with him.

30 29. In relation to Mr Finbow, CB stated that David Miller, who still worked with the company, recalled that the customer was driven to the dealership and that the hand controls which he supplied himself were fitted in their showroom prior to taking delivery.

30. The purchase by Mr Owen of the Range Rover Sport SM56 SCX was shown on
35 order form number 5245 and had a basic cost of £40,010.00 to which had been added “fitment of hand controls as supplied by customer half an hour £37.50” and set out a total cost of £40,532.20 inclusive of a £150 delivery package charge with the words “Del to Doncaster”.

31. The invoice for the same car amounted to £40,344.70 making a difference of
40 £187.50 from the order form total cost.

32. In relation to the “fitment of the hand controls” Mr Miller stated that a steering ball had been fitted to the steering wheel with Mr Owen’s own spanner and that no welding was involved but that Mr Miller had checked that it had been securely fitted. The fitting had taken ten minutes to attach and had been carried out by Mr Owen who was in a wheelchair. Mr Miller confirmed that the steering ball could almost certainly be removed within the same time period in which it had been fitted. He had taken no photographs and had not asked Mr Owen if he was a dealer in cars or whether he had sold any cars prior to the purchase.

33. The evidence of the purchase by Mr Miles of a Range Rover SM56 SCV included an eligibility declaration, a DWP Disability Living Allowance award letter backdated from 9 August 2006 and a photocopy of a “blue parking badge” (a parking card for people with disabilities) issued by Stockport Metropolitan Borough Council on 13 October 2007.

34. Also submitted was an invoice from UKS Mobility for “one x steering balls” for an amount of £30.00 in the name of Mr Miles with a declaration stating that the supply of goods were exempt from VAT because he was “a left leg amputee due to chronic diabetes” and was dated 13 February 2007.

35. The order form for this vehicle showed a nil charge for dealer fitted accessories and corresponded to a legible invoice received on 13 February 2007.

36. KR commented that the adaptation being a steering ball was not in her view a level of adaptation that was of permanent significance and she failed to see how the steering ball would allow Mr Miles to enter, travel or drive in a vehicle he could not otherwise travel in given that he is a left leg amputee.

37. Mr Dance was examined and cross examined and led evidence that CB were very careful in their treatment of customers claiming a zero-rate for purchases which was evidenced by their refusal to deal with Miles on his second and third attempts to buy vehicles.

38. The purchase by Mr Finbow was of a Range Rover registration SMO7 WLP and the order form made no mention of any adaptations. The eligibility declaration was signed only by Mr Miller on 28 June 2007 but referred to the fitment of hand controls. A separate eligibility declaration was signed by Mr Finbow declaring that he had a T12 spinal cord injury and was also dated 28 June 2007.

39. In the file were also a Disability Living Allowance form (faxed on 28 June 2007) which confirmed Mr Finbow was entitled to exemption from paying a vehicle licence, a disabled driver photo ID and a certificate of declaration eligibility of VAT relief for a disabled person.

40. Mr Miller gave evidence that the hand control mechanism was fitted on CB’s premises and as Mr Finbow was arranging to have this fitted himself he had decided an installation charge was not appropriate which is why it was absent from the invoice.

41. Mr Miller confirmed that he saw Mr Finbow's driver fit the mechanism with a spanner in a period of five to ten minutes and he checked that it had been done securely. Once the mechanism had been fitted, Mr Miller stated that an able-bodied person could no longer drive the vehicle and without it a disabled person such as Mr Finbow, in his opinion, could not drive the vehicle.

42. Mr Miller confirmed the hand controls could easily be removed, that he had not taken a photograph of the adaptation nor had he asked Mr Finbow if he had bought or sold any cars prior to the purchase nor whether he was a dealer in cars.

43. On 7 June 2010, KR wrote stating that there was no mention of an adaptation on the order for the Owen transaction to support the zero-rating nor was there an adaptation invoice. In her view there was no satisfactory evidence that the vehicle was adapted at all, nor that the vehicle was substantially or permanently adapted.

44. The letter went on to state that the steering ball for the Miles vehicle was not an acceptable level of adaptation and that in the Finbow transaction there was no documentary evidence to support zero-rating. Calculations were included with this letter and comments requested by 28 June 2010.

45. On 1 July 2010, an assessment was raised for £19,471 which with interest amounted to £22,462.70.

46. On 26 July 2010, Mr Burke of Abbey Tax Protection responded stating that it had come to his attention that HMRC were aware of unscrupulous individuals travelling the country buying up numerous vehicles, presumably with a view to resale and claiming zero-rate for VAT.

47. Mr Burke stated that he felt it was harsh for his clients to be expected to be aware of nationwide buying patterns and that each sale by them was made individually and dealt with on the facts presented to the dealership. Mr Burke stated that CB should not be expected to make exhaustive enquiries of purchases about where they had bought previous vehicles or how frequently they planned to make future purchases. Instead, they had to deal only with the extent of the adaptations and the documentation they needed to hold.

48. In the Owen transaction, Mr Burke explained that the lack of strength in his legs meant that without hand control adaptations the driver would otherwise be unable to drive the vehicle as he would not be capable of operating the foot pedals, that the sales invoice clearly mentioned the adaptation of the vehicle and that Mr Owen had supplied and fitted the hand controls himself in the dealership's premises prior to taking delivery of the vehicle to save on the further cost of the adaptation services.

49. Mr Burke stated that the mechanisms "are fairly straight forward to assemble and fit and this is not unusual and would further support the reason why you could find no invoice from a "subcontract" provider of adaptation services".

50. In relation to the Miles transaction, Mr Burke made reference to HMRC's Guidance 701/59, paragraph 3.4, which states "a spinner device such as a knob on a

steering wheel, may not seem substantial to an able bodied person but it would be substantial for a disabled wheelchair user who could not otherwise use the vehicle”.

51. He stated “Mr Miles is a left leg amputee and a pommel clamp that sits over the steering wheel is designed to allow more grip/torque for the user and undoubtedly in the case of an amputee would assist with balance”.

52. CB’s said this was an essential adaptation to allow someone in their physical condition to enter and drive the vehicle.

53. Reference was made to the suspicions that CB had in dealing with Mr Miles in relation to his legitimacy to obtain VAT relief when he approached them for a second and third time which Mr Burke said evidenced that CB acted diligently when considering the VAT status of tax sales.

54. In relation to the Finbow transaction, Mr Burke’s letter stated that VAT exemption was supported by the customer’s declaration stating the vehicle was bought with a steering adaptation, that further documentation from the Department of Work and Pensions (“DWP”) and Department of Transport supported the disabled status and that the salesman could vouch for the fact that Mr Finbow fitted the hand controls himself in the showroom as fitting these controls was not a major task and entailed only the clamping of the mechanism over the foot pedals which then connected to the hand controls by means of rods. A diagram explaining this was submitted to the Tribunal.

55. The letter concluded that in all three cases the adaptations had been made before the customers had taken delivery of the vehicles; that sufficient evidence of their medical conditions was obtained to satisfy the condition that without the adaptations they would not have been able to enter and drive the vehicles and that appropriate certificates giving descriptions of the adaptations were obtained and that further evidence was exhibited by obtaining supplementary documentation supporting their disabled wheelchair-user status.

56. On 28 July 2010, KR stated that she was surprised that the hand controls had been fitted personally given the fitter’s level of disability and that if that was the case CB was not the recipient of the conversion services. KR also stated it was unlikely the necessary conversion work was carried out before the supply of the vehicle as she could not accept the dealership would allow the modification of a vehicle by a customer before delivery.

57. In relation to the Miles transaction, KR noted that Mr Miles had purchased a steering ball adaptation in Manchester on the same day he took delivery of the vehicle and in her view the car was “not adapted to meet the specific needs of a left leg amputee or allow him to drive the vehicle which he could otherwise not”.

58. A review was requested and on 25 August Mr Burke contacted the review officer expressing concern at the tone of KR’s letter of 28 July stating that there was a clear inference she had already made up her mind about the case and “her intransigence is

mirrored by what can only be described as a somewhat blinkered view of how capable and adaptable some people are despite their unfortunate disabilities”.

59. This letter claimed that KR made unsubstantiated assumptions and reiterated the comments about the need for a left leg amputee to have assistance with balance by having an adaptation to a steering wheel.

60. It was also stated that CB would allow a customer to make a pre delivery adaptation if it secured a sale, in a difficult economic environment, and could see no reason why a customer could not supply the fitting free of charge at the dealership’s premises prior to the dealership making the sale of the adapted vehicle.

61. A review letter was issued on 8 September 2010 upholding KR’s assessment and stating that in the Owen and Finbow cases the appropriate adaptation was made by the customers on CB’s premises and that having examined the documentary evidence HMRC were not satisfied there was sufficient evidence to show that this course of events took place.

62. HMRC also stated there was no documentary evidence showing to whom the supply of the adaptation services were made and when the supply of such services took place. Reference was made to paragraph 11.2 of Notice 701/59 which states that motor vehicles for disabled people must be adapted before they are supplied to the disabled wheelchair user in order to be eligible for VAT relief.

63. In relation to the Miles transaction, the review stated that there was no evidence to support the contention that a steering ball adaptation would assist an amputee with his balance and that no evidence was provided that the steering ball is a specific or substantial adaptation given the customer’s disability.

64. In conclusion, it was stated there was insufficient evidence to show the vehicle had been adapted to meet the customer’s specific needs and there was no evidence to show the adaptation was substantial.

65. Mr Miller who gave evidence said that Mr Finbow was driven to the dealership by someone who he assumed to be a friend or a member of his family and that at this time Mr Finbow explained that he would require to adapt the vehicle in order to drive it. On the day of the delivery he had with him a hand control mechanism that would first need to be fitted and that hand control was fitted at the dealership by Mr Finbow’s driver.

66. Mr Dance gave evidence and said he did not consider it was appropriate, or an easy step, to quiz customers who were buying cars and who appeared to all intents and purposes to be in wheelchairs, whether they were dealers in vehicles and that at the time of these sales there was no reason to doubt that customers were acting in good faith.

67. Mr Dance also stated that when customers were buying a one off vehicle it was assumed that it was for their private use.

68. Evidence was given by Mr Kay, an HMRC investigator of 36 years experience, relating to his involvement in a project team which had been started in March 2006 to consider abuse following a substantial increase in sales of zero-rated premium or expensive cars.

5 69. The perception of abuse related to repeated sales by individuals which had been started by a team of disabled basketball players and a car salesman.

70. In this scheme disabled individuals would buy vehicles at zero-rate and sell them back three months or less later, usually for a return of £1,000 for each car and approximately 80% of these cars were Range Rovers.

10 71. It was stated that this was an abuse on a massive scale and widespread throughout the United Kingdom and had led to a number of well publicised arrests in July 2007 when the matter had become public.

15 72. Mr Kay estimated that the loss to the HMRC was in the region of £20m - £30m and that certain names appeared with frequency. Documents were produced to the Tribunal showing, in particular, the transactions of Steven Owen who Mr Kay felt was number two in terms of a league of people abusing the system based on information from VAT Auditors from the ninety largest car dealerships in the United Kingdom.

20 73. In addition to Mr Owen, Mr Ken Miles had been a regular purchaser of vehicles and the vehicle he had bought, SM56 SCV, on 8 February 2007 was sold on 12 February 2007.

25 74. It was explained that an intermediary, Ready to Retail, of which Mr Miles was thought to be the principal, was involved in this abuse. A business card showing his name and the name of Ready to Retail was found following a search by the DWP who had had Mr Miles under surveillance for three months during which time they had ascertained that his requirement or need of a wheelchair was false.

75. Mr Kay explained that some car salesmen had colluded in the abuse but he confirmed that CB had not been a company they had targeted as part of the project as they were concentrating on the bigger dealerships.

30 76. Mr Kay stated that there had been discussions with the National Association of Car Dealerships or other relevant bodies in approximately July 2007, but also that there had been no change to the legislation or guidance or any other documents provided by HMRC at that time.

Submissions by HMRC

35 77. HMRC say that the assessment was made in terms of Section 73 (1) VATA and Schedule 8 Paragraph 2A of VATA. This required two conditions, firstly that there was a qualifying motor vehicle and secondly that it was for domestic and personal use.

78. HMRC referred to Note 5L and emphasised the requirement for any adaptation to be substantially and permanently adapted to enable a handicapped person to drive the vehicle so that both requirements had to be met, not one or the other.

5 79. HMRC say that their guidance is only that and does not have the force of law. This original guidance was issued in 2002 and that the abuse of this zero-rate exemption became evident in 2006.

80. HMRC stated that there was little authority on this matter but submitted extracts from Tolley's Value Added Tax 2010-2011 which largely repeated the provisions already stated contained in the VATA and the HMRC Guidance.

10 81. Reference was made to a VAT Tribunal case, *Quentin Hylands and The Commissioners of Customs & Excise*. This case involved the adaptation of a motor home and a claim for customs duty relief because the vehicle had been adapted by the installation of "handicapped wheelchair ramps". The appeal also claimed relief from import VAT. Reference in this case was made to HMRC Notice 701/59 and the
15 Tribunal considered the definitions of the words "substantial" and "permanent". The Tribunal held that as mounting for the ramp was bolted to the floor and a further mounting was either bolted or welded to the floor then the adaptations were permanent.

20 82. In relation to the definition of "substantial" the Tribunal held that the tests had been met as "the nature of the adaptation did not appear to us to be of a temporary nature or to be composed of material such that they could be un-adapted at short notice". The decision went on to consider that the criteria were satisfied as it "enabled the wheelchair user to use the vehicle".

25 83. HMRC say that the nature of the adaptation is significant as is how the adaptations are fitted and that it is a matter of common sense as to whether adaptations are "substantial" and "permanent".

30 84. HMRC referred to assessment being made in terms of VATA Section 73(1) and to the Upper Tribunal case of *Queenspice Ltd*. This case arose from an under declaration of VAT and quoted Lord Pentland as stating that "the task of HMRC under Section 73 (1) is to make "an assessment of Tax to the best of their judgement. The very use of the word "judgement" makes it clear that HMRC are required to exercise their powers in such a way that they make a value judgement on the material before them. Clearly, they must make their judgement honestly and in good faith. It must be borne in mind that the primary obligation is on the tax payer to make a
35 Return himself. It follows, the respondents do not have to carry out exhaustive investigations; they have only to consider the material which is before them in a fair way and come to a decision which is reasonable and not arbitrary as to the amount of tax which is due".

40 85. This case then refers to the *Commissioners of Customs & Excise v Pegasus Birds Ltd* where Lord Justice Carnwath observed that the word "best", where it is used in the phrase "to the best of their judgement", has to be understood in the context in

which the tax payer's records may be incomplete so that a fully informed assessment is unlikely to be possible. Rather than implying a higher than normal standard, the word "best" accordingly recognises that the result may necessarily involve an element of guess work. It simply means to the best of HMRC's judgement on the information available. Generally, the burden lies on the tax payer to establish the correct amount of tax due.

86. HMRC contend that KR and the HMRC Review Officer fulfilled all the requirements and conditions laid down in these judgements in relation to the matter under appeal.

10 87. HMRC say in the Owen case that there were no photographs of the adaptation, that there was no production of a disabled blue parking badge, that the contract sale document made no reference to hand controls, although this was stated on the order form, and also made a reference to the words "Delivered to Doncaster".

15 88. HMRC say that Mr Owen fitted a steering ball himself with the use of a spanner in five to ten minutes; that a steering ball is not a hand control and that Mr Miller stated in evidence that what was fitted in such a short period of time could be removed in the same period of time.

20 89. HMRC say that standing the guidance in the *Hylands* case, an adaptation of a temporary nature which could be un-adapted at short notice fails the test and that a natural construction of the words substantial or permanent leads to the same conclusion.

25 90. HMRC say that, specifically in relation to the Miles case, there are no photographs; that the hand controls that were fitted were nothing more than a steering ball which appeared to have been purchased in Manchester on the same day but fitted in Kelso; that the job sheet provided very limited evidence as is not clear whether it was ticked or scored and that there was no witness statement to confirm it.

30 91. HMRC say that the invoice from UK Mobility, being the sale of the steering balls on 13 February 2007, does not indicate whether they were fitted to the vehicle sold, that there is no evidence how they were fitted nor whether bolts were required. HMRC say that there is no evidence of a non temporary nature and no other evidence other than a document to substantiate that any adaptation was substantial and permanent.

35 92. HMRC say, specifically in relation to the Finbow case, that there were no photographs, that the adaptation was fitted in five to ten minutes with a spanner and so it could be unadapted in a similar period and that it did not have the appropriate degree of substantiality and permanence.

93. In relation to the extra statutory concession Notice 48, which was drawn to the Tribunal's attention, HMRC say that it is not applicable in these circumstances and that the Tribunal should engage cautiously in its construction.

94. HMRC say that CB did not take reasonable steps to ascertain the appropriate facts and should have asked whether or not the wheelchair user had sold a number of other vehicles and/or whether they were dealers in motor vehicles.

5 95. HMRC say that, taking all these factors into account, CB failed to establish that the criteria for zero-rating the motor vehicles had been established and accordingly the assessment should stand and that the appeal should be refused.

Submissions on Behalf of CB

10 96. CB say that at the time of the sales they had no knowledge of the regrettable abuse of the zero-rated scheme for wheelchair users and the underlying fraud activity which accompanied it, nor the names of any of those involved.

97. CB say they can see no differentiation between the amount, standard and quantity of evidence for the four vehicles that were deemed to satisfy the zero-rating criteria and say that the three disputed sales to Owen, Miles and Finbow were chosen because of HMRC's existing knowledge of those individuals.

15 98. CB say that in each of these three cases an eligibility certificate was obtained.

99. CB say that where a customer or a customer's driver/family friend made an adaptation to a vehicle there was no need or requirement, nor little practical purpose, in this being stated on the invoice. Such adaptations as were necessary were written on each eligibility certificate and signed by the sales person of CB.

20 100. CB say that all adaptations of the vehicles were fitted prior to sale.

25 101. CB say that it is appropriate for a steering hand control to be fitted to a motor vehicle, such as the one for Mr Miles who was a left leg amputee as although such an individual does not require any foot pedals for an automatic transmission car the steering control allows the steering wheel to be operated with one hand which allows the other hand to provide stability to someone in that condition.

102. CB say that the work sheet is correct and that the tick or cross simply means that the work was completed and that the letters FOC stand for free of charge.

30 103. CB make reference to HMRC Notice 701/59 which states that the conditions here are that the vehicle must be supplied to a disabled person who normally uses a wheelchair or stretcher to be mobile; that the vehicle must be adapted to enable the disabled wheelchair user to enter, drive or otherwise travel in the vehicle. The adapted vehicle must be for the domestic or personal use of the disabled wheelchair user and the retailer must hold documents to show eligibility.

35 104. The guidance states that an adaptation is permanent if "it can be used for as long as the disabled wheelchair user requires it. Generally the adaptation would require welding or bolting to the vehicle". It continues, "a substantial adaptation enables a wheelchair user to use a vehicle which he could not use before it was adapted. For example, a spinner device, such as a knob on a steering wheel, may not seem

substantial to an able bodied person but it would be substantial for a disabled wheelchair user who could not otherwise drive the vehicle”.

5 105.CB say the Notice gives examples of adaptations which include “a push/pull brake and accelerator, hand controls or other aids that operate the primary driving controls”.

106.CB say that in each of the three cases these criteria were all met.

10 107.CB say that there is no requirement as to the extent of the evidence and no absolute requirement for photographs to be taken. CB say there is no requirement for a separate invoice or for a note on the invoice of the work for any adaptation and in general terms the eligibility declaration is designed to satisfy all the HMRC requirements.

108.CB say that the time of assembly of the adaptation is not important but instead it is the length of its use by the individual that is of concern.

15 109.CB say that all the adaptations were bolted to the vehicle by means of a spanner and distinguish the *Hylands* case which was in relation to the carrying of a wheelchair not the driving of the vehicle.

110.CB say that they had to make a judgement about the suitability of an adaptation on the basis of what they expect to be a bona fide customer in a wheelchair noting that car salesmen have no medical expertise.

20 111.CB say that HMRC are not suggesting that there was anything untoward in the sale of these vehicles, that there was no commercial justification for asking for the frequency and buying and selling of vehicles and that photographs were not taken as a matter of routine. CB say that these were one off transactions by salesmen and they were not done routinely.

25 112.CB say that at the time there was no reason why the procedure should have been done differently but accept that since the publicity of the cases this is no longer the case. Similarly, at the time of the sales there was no reason why the staff should be aware of the concerns which HMRC were investigating and which subsequently arose.

30 113.CB say that they took all reasonable steps to ascertain eligibility and accept that HMRC are exercising their best judgement but say that they are reaching the wrong conclusion.

35 114.CB say that HMRC were driven by the bigger issue which, whilst clearly causing concern, was unknown to CB at the time. CB did become suspicious of a repeated request for the purchase of premium vehicles by Mr Miles and refused to deal with him. CB say this is further evidence of their correct behaviour in assessing eligibility.

115.CB say that the appeal should be allowed.

Reasons for the Decision

116.The issue before the Tribunal was whether CB were entitled to treat the sales of the three motor cars to Messrs Owen, Miles and Finbow as zero-rated which is stated in the legislation and was clearly set out during the hearing.

5 117.Throughout the hearing it was clear that since 2006 and, at the time of the retrospective review, HMRC had been concerned at a programme of systemic abuse of the scheme by which HMRC allowed qualifying vehicles to be zero-rated.

118.It was clear to the Tribunal that CB at the time of the three sales being to Owen, Miles and Finbow were unaware of this abuse and all pre-dated July 2007 when
10 HMRC stated the matter became public knowledge.

119.The Tribunal noted that after that date CB had refused to have any further dealings with Mr Miles on his second and third attempts to buy motor vehicles.

120.The Tribunal expressed some surprise that vehicles such Landrovers or Range Rovers would be attractive to wheelchair users but it was explained that their
15 relatively high driving seat position was of help in manoeuvring from a wheelchair to a driving car seat rather than an obstacle.

121.The thrust of HMRC's case was that CB failed to obtain sufficient documentation to prove the level of disability, that the level of adaptation was therefore not suitable and that, even if it was, such adaptations were neither substantial nor permanent.
20 They laid much emphasis on the need for only a spanner to fit the adaptations and the fact it took a relatively short period of time to fit such adaptations.

122.In considering the conditions for zero-rating the Tribunal considered the terms of VATA Schedule 8, Group 12, Paragraphs 2A and 5L and, in particular, whether the
25 motor vehicle was, in these cases, substantially and permanently adapted for the carriage of a person in a wheelchair. Such a supply must be to a handicapped person who usually uses a wheelchair and must be for domestic or personal use to allow that person to enter and drive the motor vehicle.

123.VATA contains other provisions relating to those carried on stretchers but these are not considered to be relevant for the circumstances of this particular case.

30 124.Did CB then make sufficient enquiry and have sufficient evidence that the disabled person usually uses a wheelchair?

125.It was clear to the Tribunal from looking at the documentation that CB's method of ensuring that the disabled person usually used a wheelchair was in each case by their physical observation of the individuals but primarily by the completion of a form
35 and "eligibility declaration" by a disabled person which claims to meet the requirements by seeking the signature of the purchaser having confirmed that they are chronically sick or have a disabling condition and stating the reason, confirming that the vehicle is adapted for their personal use and that they usually use a wheelchair. Lastly, they are asked to declare that they can claim relief from VAT.

126.The form which is then required to be signed by the seller declares that the motor vehicle being supplied is for domestic or personal use, describes the vehicle and the details of the adaptation or the services to adapt a motor vehicle to suit the purchaser's condition.

5 127.No evidence was led that requirements, such as photographs, were mandatory but in the case of the Kennedy sale, CB's salesmen had omitted to complete the details of the adaptation but instead had referred to photographs of the same.

10 128.The Tribunal noted that the original guidance for both purchasers and sellers of motor vehicles for disabled people was issued in 2002 and appeared to have had no revision of any kind after it became publically aware that there was an abuse of the system in July 2007.

15 129.The Tribunal noted that the guidance was only guidance and that the seller and the purchaser are required to make a declaration and that the "suggested" form of declaration in the guidance was the one used by CB. The guidance says that "if it is more convenient you can create your own form but it should contain the same information".

20 130.The guidance also reminds a supplier that possession of an eligibility declaration "does not mean you can automatically zero rate your charge and that the supplier must be satisfied that the declaration made by the disabled wheelchair user, charity or eligible body is valid before signing your section of the form. You should be able to show you have taken reasonable steps to confirm the validity of the declaration. You may wish to ask for additional information or documents to support a claim for VAT relief such as relevant correspondence".

25 131.The guidance goes on to say that "as a concession, if you have taken all reasonable steps to check the validity of declaration and acted in good faith, you will not normally be asked to account for VAT if the declaration is subsequently found to have been made in error" – see Notice 48, Extra Statutory Concessions.

30 132.It was clear to the Tribunal that the documentation was completed in different ways, one having photographs, for instance, and others not. Additional evidence was contained in the files although with the benefit of hindsight it is likely that at least some of this was either misleading or false.

133.The Tribunal's view was, however, that sufficient enquiry was made and additional documentation obtained based on the facts known to CB at the time.

35 134.Clearly, following July 2007, the Tribunal would expect any car dealer to be more wary of any zero-rated supplies, particularly of Range Rover vehicles to wheelchair users but that was not the case at the time.

40 135.KR said that usual adaptations included swivel chairs, ramps and hand controls and that a "good file" should include an eligibility certificate, an adaptation invoice, a note of a contemporaneous note of the salesman's discussion of the adaptation and photographs of the adaptation. It was noted that these items were not apparent in the

transactions which HMRC had decided on the balance of probabilities to approve other than the inclusion in one case of photographs.

136.The Tribunal was accordingly satisfied that on the information before them at the time CB had obtained sufficient evidence of eligibility.

5 137.The Tribunal also considered the points made by HMRC that CB should have questioned the purchasers as to when they had bought or sold vehicles previously or whether they were dealers in vehicles but were persuaded by Mr Dance’s comments that this at the time would not have been appropriate to do so nor did the Tribunal think it would have been in the ordinary course of any car sale to ask any purchaser
10 these questions unless as HMRC would expect, post July 2007, when suspicions were heightened because of an abuse of the zero rating scheme.

138.In any event given that at least two of the individuals were systematically abusing the system it is likely whether their word could have been relied upon even if it had been given and so therefore further checks would have to be considered which might
15 be difficult given that DVLA only record registered keepers rather than owners.

139.The Tribunal then considered the issue of whether the adaptations were substantial and permanent and noted the authority concerning an adaptation that clearly required welding or bolting and possibly some considerable time to carry out the adaptation.

20 140.The Tribunal considered that Parliament clearly wished to provide a zero-rate of VAT for disabled people who usually use a wheelchair to enter and drive or otherwise be carried in a motor vehicle as long as this was for their domestic or personal use. The Tribunal noted that devices were available which could be fitted by a spanner, which nonetheless required nuts and bolts, by a disabled person in a wheelchair in a
25 comparatively short period of time.

141.If hand control devices are all that is required for such a disabled person to enter and drive a motor vehicle and they are permanent in the sense that they can be used as long as the disabled person requires them and which generally will require bolting to the vehicle then the criteria are met.

30 142.The Tribunal could not accept that an adaptation must require a period of time for its installation or need to be particularly complex in order to qualify and indeed to do so might invalidate the zero-rated status for numerous disabled persons given HMRC’s evidence that hand controls are one of the usual types of adaptation.

35 143.The Tribunal then considered the question of whether the car salesman had carried out enough analysis of the disability of the purchaser to match this to the type of adaptation required and were of the view that a commonsense approach was required given that a detailed level of medical knowledge is not required and certainly at the time there may have been no reason and, indeed, it may have appeared intrusive, to make extensive enquiries.

144. In relation to the Miles sale which involved the fixing of a steering ball, it was clear this was purchased in Manchester on the same day it was fitted in Kelso but the distance is not of such a range to make this impossible and again the Tribunal felt it was understandable to see why a device that improves balance would be of benefit to a disabled person with one leg when driving a motor vehicle.

145. The Tribunal believed that CB acted in good faith and to the extent that the three sales they made turned out subsequently to be made to members of the community who were abusing a process did not necessarily mean that, as HMRC argued, the extra statutory concession would apply and the Tribunal accepted this.

146. The Tribunal accepted that HMRC used their best judgement on the information available before them and noted that the burden lies on the taxpayer to establish the correct amount of tax due.

147. The Tribunal accepted that HMRC made their judgement honestly and in good faith and that they did not have to carry out exhaustive investigations but only consider the material which was before them in a fair way and come to a decision which was reasonable or not arbitrary as to the amount of the tax that was due.

148. In construing the word "fair", the Tribunal felt that this had to be seen in terms of the context at the time of the sales, of the lack of public knowledge that any system of abuse was taking place, that there had been other purchases to disabled users including a charity, that CB did become suspicious when one purchaser returned for a second and third time in an attempt to buy motor vehicles and, accordingly, felt they met the criteria to enable them to treat the sales as zero-rated.

149. The appeal is accordingly allowed.

150. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE

RELEASE DATE: 22 JULY 2011

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules on 27 September 2011.