



TC01454

Appeal number: TC/2010/05882

Value Added Tax; supply of equipment or appliances; supply of mattresses; whether mattresses designed solely for use by a handicapped person; VATA 1994 Schedule 8 Group 12 Item 2(g); yes; appeal allowed in principle.

FIRST-TIER TRIBUNAL

TAX

PURE INDEPENDENCE (UK) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL JUDGE: J GORDON REID Q.C., F.C.I.Arb.
Member: CHARLOTTE BARBOUR C.A., CTA**

Sitting in public at George House, 126 George Street, Edinburgh on 15 & 16 August 2011

Phillip Simpson, Advocate, Terra Firma Chambers, for the Appellant, instructed by Johnston Carmichael, Glasgow

William Brooke, senior officer of HMRC, for the Respondents

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DECISION

Introduction

1. This appeal raises the question whether goods supplied by the Appellant, namely
5 mattresses, were designed solely for use by a handicapped person, and therefore fall
to be zero-rated in terms of Schedule 8, Group 12 Item 2(g) of VATA 1994. The
Respondents (the “Revenue”) have decided that the supply should be standard rated.
The sum of about £13,000 is currently at stake.

2. Phillip Simpson, advocate appeared on behalf of the Appellant. He led the
10 evidence of James Foster, the Appellant’s managing director. William Brooke, a
senior officer with the Revenue appeared on their behalf. He led the evidence of
Margaret Paton, an experienced Revenue officer, who has been an assurance officer
since 2002. A Joint Bundle of documents was produced.

3. We are asked to determine as a matter of principle, whether the supply of
15 mattresses by the Appellant fall to be zero-rated. This means that it is unnecessary to
consider the detail of all the various invoices produced.

Statutory etc. background

4. Section 30 of VATA 1994 provides that the supply of goods or services are to be
20 zero rated if they are of a description specified in Schedule 8 to that Act. Group 12 of
that schedule specifies the following supply:-

2 The supply to a handicapped person for domestic or his personal use, or to a charity for
making available to handicapped persons by sale or otherwise, for domestic or their personal
use of-

.....

25 (g) equipment and appliances not included in paragraph (a) to (f) above designed solely for use by
a handicapped person;

.....

Note (3) to Group 12 provides that *Handicapped* means *chronically sick or disabled*.

30 5. HMRC notice 701/7 (August 2002) contains information and guidance to
taxpayers on VAT reliefs for disabled people. Neither party asserted that it contained
administrative directions which required to be followed as a matter of law. Rather it
contains the Revenue view of what it considers the law to be and what they consider
requires to be done or produced for relief to be given. Neither party submitted that
35 any part of the Notice was binding on the Tribunal or required to be followed as a
matter of course.

6. Paragraph 3.7 recommends that the trader obtain a written declaration from each
customer claiming entitlement to VAT relief. It provides that-

Such a declaration should contain sufficient information to demonstrate that a customer fulfils all the criteria for eligibility. The declaration should be separate, or clearly distinguishable from, any order form or invoice against which the goods or services are supplied. A customer signing an order should not automatically be signing a declaration of eligibility for VAT relief.

5 There is a suggested declaration form at Section 10 that may be copied or otherwise reproduced by you or the customer.

7. Paragraph 4.5 provides *inter alia* as follows:-

OTHER EQUIPMENT AND APPLIANCES DESIGNED SOLELY FOR USE BY A DISABLED PERSON

10 4.5.1 General

You can zero rate the supply to an eligible customer.....of any other equipment and appliances that have been designed solely for use by disabled people.

15 It is not sufficient for zero-rating that the equipment or the appliance is merely destined or intended for use by a disabled person, or is mainly purchased by disabled persons. For example, general purpose equipment such as most computer hardware, ordinary orthopaedic beds, orthopaedic or reclining chairs may benefit a disabled person, but are designed for general use or for use by disabled and able bodied persons alike. Such products are not eligible for relief.

20 Equipment which has been designed solely for use by a disabled person will remain eligible for relief even though they are available to be purchased by people who do not have a disability. VAT relief will however only apply to supplies which are made to eligible persons or bodies

4.5.2 Meaning of “designed solely for use by a disabled person”

25 This means the original intention of the designer was to produce equipment or an appliance designed solely to meet the needs of persons with one or more disabilities. The design must succeed in that the product does in fact meet the needs of disabled persons. There are a number of conditions which may, but do not invariably result in disability-such as:

- Asthma
- Psoriasis; and
- 30 • Dyslexia

Equipment which meets the needs of people with such a condition will only qualify for zero-rating if designed solely for the purpose of meeting the needs of disabled sufferers of the condition.

8. 4.5.3 Who determines if the goods are eligible?

35 It is only the designer or manufacturer who is able to determine whether the goods qualify for zero-rating. The designer, manufacturer or importer of the goods must retain evidence which demonstrates that the goods in question fulfil the conditions for relief. There is no single piece of evidence that must be held but may include contemporaneous records on:

- the disability needs to be addressed;
- 40 • the product specification for meeting those needs;
- results of tests demonstrating that the product meets the design intention; or

- patent or patent application.

5 If you are not the designer, manufacturer or importer, and you think that the equipment or appliances you are selling have been designed solely for use by a disabled person you should ask the manufacturer or importer whether this is in fact the case. The manufacturer's or importer's advertising literature will sometimes contain a statement that the equipment has been designed solely for use by disabled people.

Where VAT relief depends on the manufacturer's or importer's design intention only the manufacturer or importer should seek liability rulings from Customs. Local Business Advice Centres have been asked to refuse requests for liability rulings from retailers.

10 9. We have also been provided with Chapter V1-7 Chapter 12 of the HMRC Guidance. This is directed principally at Revenue officials. Section 3.1 provides *inter alia* as follows:-

3.1 How to decide if goods are "designed solely"

.....

15 Tribunal and Court cases give a number of indicative criteria, which you can use to make your decision. These are:

- Your own or colleagues' knowledge of the trader's activities
- To whom in practice is the product sold?
- Any representations received from other traders selling the same or similar goods; and
- 20 • Are similar products already on the market? If so, what liability is applied to them?

You should also consider the following points:-

- Does the appearance and method of operation of the equipment or appliance suggest that it was designed solely for use by a disabled person?
- 25 • Is it something of a single-purpose design, that is, manufactured to a design for the sole use of people with disabilities?
- Has it been "planned and fashioned" in such a way as to render it for use solely by a disabled person?
- Would it be used solely by disabled persons?
- Would it be of similar value to people other than those with disabilities?

30 If it was designed solely for use by disabled people, but has subsequently been developed or adapted for use by a wider range of people, then it would continue to qualify for zero-rating.

35 There are many products which are useful or even essential to people with disabilities. But they are not necessarily "designed solely for use by a disabled person". Item 2(g) is drawn in very narrow terms by use of the word "solely". It is not intended to relieve products which people with disabilities might find useful in coping with their disability, but were designed for wider applications.

And finally, consider examining the goods.....

3.2 Intention of the manufacturer or designer

.....
You will be able to decide if the manufacturer set out to design something solely for disabled people by looking at documents which originated at a very early stage of the design process, such as

- design specifications,
- 5 • patent applications, and
- documents commissioning clinical trials or reporting on their outcome

3.3 Can an existing product be adapted or developed for use by a disabled person?

A manufacturer might adapt, further develop or add features to a product to facilitate its use by disabled people, but this would not necessarily ensure its zero-rating if it is still of use to a wider group of people

10 **3.4 Medical condition of end user**

A product may be designed

- to help with a range of medical conditions or
 - for general hospital use or
 - for medical use
- 15 Not all of these conditions may render the sufferer chronically sick or disabled. This means that the product would not qualify as designed solely for use by a disabled person.

The same will apply where a product is designed for all sufferers of particular chronic conditions, such as back complaints, but a significant number of people with these conditions may not be rendered sick or disabled by their condition.

- 20 Only if a manufacturer can establish that only those suffering from the condition to such an extent that the person is disabled and would need the product, does it qualify for zero-rating.

There is also a section on adjustable beds (section 6) but mattresses are not discussed in the extract produced.

Facts

25 *General Business*

10. James Foster and his wife are the shareholders of the Appellant. He is the managing director and his wife is the company secretary. The business was established in about July 2009. The business engages about six self-employed sales personnel; it also has a book keeper. The Appellant sells a variety of products the
30 general purpose of which is relieve the symptoms of pain and discomfort caused by disability and illness. The products sold include adjustable beds and chairs, bath lifts, mattresses and toppers. Toppers are a thin mattress like layer which is placed upon a conventional mattress. For the purposes of this appeal neither party drew or founded upon any distinction between the mattresses and toppers supplied by the Appellant.
35 The Appellant holds no stock of mattresses or toppers. Each item sold is manufactured to specific order to meet the particular requirements of each individual customer.

How the Appellant Operates

11. The Appellant sells mattresses to individuals who have been identified as having some long term sickness or disability. The market for the mattresses supplied by the Appellant is limited. The Appellant does not have a website; it does not have a shop
5 or other retail outlet. It obtains business through what is generally known as *cold calling* potential customers. The mattresses are sometimes referred to as therapy units (see for example the Appellant's undated letter (Bundle page 43) but we shall simply refer to them as mattresses.

12. The Appellant obtains lists of the names and telephone numbers of individuals who are over the age of sixty years. Mr Foster operates what is in effect a call centre
10 from the Appellant's premises at Dundee, where seven people work for his company there full time. They contact individuals on the lists with a view to establishing whether the individual suffers from a condition that one of the Appellant's products would or might assist in alleviating. The sales team follows scripts, which were
15 produced to us. In summary, the sales team state that they are carrying out a national survey of retired persons and enquire whether the individual suffers from arthritis, heart or mobility problems, breathing difficulties, or whether they are registered as disabled; they also try to identify the age bracket of the individual. The callers use a check list (entitled *Health Survey*) which contains some eighteen questions about
20 various ailments and disabilities. The information is noted and if the individual does suffer from one of those ailments or is registered as disabled a scripted follow up call is made a few days later with a view to offering a demonstration of the mattress. If a positive response is received, a salesman subsequently visits the individual, demonstrates the product, using a topper, which is more convenient to use for
25 demonstration purposes and may secure a sale.

13. Mr Foster gave unchallenged evidence which we accept, that his sales team had three or four training sessions each year in accordance with recommendations of Trading Standards officials, who had also approved the scripts mentioned above.

The Sale

14. The Appellant uses a standard Order Form and Contract, the first page of which was produced. The model and description of the product is specified on the form,
30 along with a diagram to show what is required in relation to the electrically operated massage component which may be fitted into the mattress. There is also a box for the height and weight of the customer. At the bottom of the form is a declaration which
35 the customer signs. The declaration is headed-

AIDS FOR CHRONICALLY SICK OR DISABLED PERSONS SUPPLY TO AN INDIVIDUAL
701/7/02

15. The declaration specifies the ailment from which the customer is suffering, records that the goods are being supplied for personal or domestic use, and claims that
40 the supply of the goods is eligible for relief from VAT under Group 8 of Schedule 12 to VATA 1994. The form also notes at the bottom that there are severe penalties for making a false declaration.

16. If a sale is achieved, the Appellant places an order (described in more detail below) with a third party company which manufactures the mattress to the Appellant's specification. That company delivers the finished article to a company named Independence UK Ltd; that company in turn delivers the mattress to the customer, installs it, explains its operation and, if necessary, removes any old mattress or bed. In spite of its name, neither the Appellant nor Mr Foster has any formal direct interest in that company. However, Mr Foster, in unchallenged evidence which we accept, explained that Independence UK Ltd only carried out work for the Appellant. He said that installation of the mattresses in the homes of handicapped persons was a somewhat delicate and sensitive operation. He used only experienced operatives which Independence UK Ltd provided.

17. The purchase price of one of the Appellant's mattresses is about £2,000; the price of a topper is between about £800 and £1200. These prices are significantly higher than the type of general mattress which can be bought in the High Street. Such a mattress would cost a few hundred pounds. The reason for the high price of the Appellant's products is the bespoke nature of the product coupled with the delivery and installation costs and the relatively small market. The Appellant's mattresses would be of no interest to anyone who did not require relief from long term pain or pressure sores.

20 *The creation of the product in dispute*

18. The mattresses supplied by the Appellant have two layers of foam. The foam is designed and manufactured by Vitafoam Limited, which is the UK market leader in cellular polymer technology. Vitafoam Limited has carried out development work in relation to this type of foam which they have patented. No details of the patents or any other intellectual property rights in relation to the design, manufacture or supply of the mattresses under consideration were given in evidence.

19. The top layer of foam is known as Vasco 60 and is a Visco-Elastic Cellular Polymer. The properties of this foam are such that it is a high density temperature and pressure sensitive material which moulds itself to the customer's body shape.

20. The other or under-layer is called Reflex APT (advanced polymer technology). This provides the support and flexibility for the upper layer. This support layer can be provided in various strengths depending on size and weight of the customer and the extent of use. Thus, if the customer is more or less bed-ridden, then a firmer under-layer will be required.

21. The two layers are, in broad terms, cut to size and glued or upholstered together. Further components may be installed between the two layers. These are heat and massage elements. The massage unit is a series of electrically operated egg shaped transducers placed at specified points (which will vary depending on the customer's requirements or preference). Normally, they are located at five or ten different points. These may be in the middle, or at one or other side of the mattress or a combination of locations. These massage and heat units are bought from third parties. Mr Foster pointed out in evidence that while the application of heat or massage is often found to

ease muscular pain he was not aware of any clinical studies on the topic. He also told us, and we accept, that about 95% of the Appellant's sales of mattresses incorporate a massage element.

22. The two layered mattress has a removable cover around it. The Appellant has specified a zipped cover for ease of removal for washing and replacement. The cellular structure of both layers is such that there are V shaped air channels which enhance ventilation and airflow through the mattress. This is not a feature found in what Mr Foster described as *standard mattresses*.

23. The size, shape, depth and firmness of each mattress are all specified by the Appellant in their instructions to the company that manufactures the mattresses. Additional components (heating and massage elements) may also be specified by the Appellant in their instructions to the manufacturer. The configuration of each mattress is specific to each individual customer and is noted in diagrammatic form on the order. These mattresses are described as *bespoke* mattresses in the Appellant's advertising brochure. The manufacturer assembles the various specified components to the specification received from the Appellant, using materials sourced from third parties, such as the foam from Vitafoam and the massage and heat elements.

24. A topper is essentially a cheaper version of the mattress described above. It is thinner, generally about three inches thick, and may comprise either upper-layer or under-layer described above or both. It may also incorporate a massage unit. Any unit over four inches thick would be regarded as a mattress rather than a topper.

25. Between the summer of 2009 and September 2010, the mattresses in issue were manufactured, or perhaps more accurately, assembled, by Excellent Relax Ltd to the Appellant's order. They upholstered the foam layers, which they in turn purchased from Vitafoam Ltd. Excellent Relax Ltd also incorporated, again to the order of the Appellant, heat and massage elements mentioned above. Excellent Relax Ltd did not design the foam for either layer. They did not design the heat or massage elements. They did not decide where within the mattress they would be located. They did not select the particular strength of the under-layer (Reflex APT). They exercised no discretion as to the specification or composition of the mattress. They simply assembled it in accordance with the instructions of the Appellant.

26. In September 2010 the Appellant stopped instructing Excellent Relax Ltd. Instead they instructed another company named ABC Furniture Ltd who performed the same tasks as Excellent Relax Ltd, as described above. In a letter to the Appellant dated 1 September 2010, ABC stated *inter alia* that

all products with the ABC Furniture Ltd range i.e. Pressure Relieving mattresses and Pressure Relieving Therapy Units, have all been designed and developed specifically for chronically sick and disabled people. Each of our manufactured bespoke products are built to the exact size and weight specification of the end user, in order to give the maximum pressure relief. We use Vitafoam exclusively, which is all high density Vasco and Reflexfoams, conforming to BS555852. The density grade of each product is matched to the end users weight, again allowing maximum pressure relief. As you are aware ABC Furniture Ltd has its own foam conversion factory, which enables us to manufacture/match the correct density of foam to each specific order.

5 We have verified that in every case, you complete a comprehensive enquiry form in the customer's home in order to give accurate details of the end user's requirement, needs, weight, size and all details of the user's illness or disability. We have also verified that in every case, the user has signed a VAT exemption document, which forms part of their contract with Pure Independence (UK) Ltd, and gives accurate details of the user's health conditions and disability.

27. ABC have recently become insolvent and the Appellant now instructs a different business (described in evidence only as NHC), to perform the same function as Excellent Relax Ltd and ABC Ltd.

10 28. Excellent Relax Ltd were asked by the Appellant to produce a similar letter but they declined to do so.

Advertising Brochures

15 29. The Appellant produced a copy of its brochure. The relevant part refers to a *Pure Independence Therapy Unit* and to *Pure Independence bespoke Mattresses*. The former is described as a *topper system fitted with one hand control, that fits snugly on to your existing mattress. Extra massage is available on request. Approximately 2 inches in depth. Comes in variable sizes from 2ft 6inches-7ft*. There is no mention of suitability for handicapped persons.

20 30. The *Pure Independence bespoke Mattresses* are described as *made to measure, approximately 8 inches in depth, are available in any size, with or without massage and best of all come in five different grades of firmness. Ranging from super soft to extremely firm*. There is no mention of suitability for handicapped persons.

25 31. The Appellant also produced what appeared to be a Vitafoam brochure. There was little discussion of it in the evidence. It seems to advertise something called *Multizone Reflection* which is said to be a medically tested mattress system for adjustable beds. It describes the Vasco 60 and Reflex APT foams referred to above. It contains a table showing different systems depending on the sleeper's weight. It is described as the *adjustable bed mattress everybody's been waiting for*. There is no reference to handicapped persons and the photographs (even the photocopied black and white versions with which we have been provided) make it plain that it is not
30 designed solely for use by handicapped persons.

32. The Appellant's brochures are not widely distributed by the Appellant but given to customers or prospective customers identified by its call centre operations.

35 33. In March 2004 Salisbury Health Care NHS Trust reported that following tests on the effect that a Vitafoam mattress had on interface pressures on the sacrum heels and trochanter compared to the standard hospital mattress (King's Fund mattress), their results showed that the pressure relief characteristics of the Reflexion mattress was significantly better than the Standard King's Fund mattress.

40

Other Products in the market

34. Mr Foster gave unchallenged evidence, which we accept, about other companies in the United Kingdom selling similar products. He mentioned ten including Excellent Relax. These companies sell beds, chairs, mattresses and toppers. The majority of them sell their products in the same way as the Appellant. Some, such as *Tempur Pedic*, ask their customers to sign a VAT exemption form or declaration. Mr Foster has been employed by some of those companies at various times over the last ten years. Their products have been zero-rated. Mr Foster produced a *Google Search* dated 25/10/10 (*VAT free Mattress*) which produced results showing several companies offering VAT free mattresses. Among them was Tempur which we assume is the same as Tempur Pedic.

35. Part of an Excellent Relax brochure was produced. It appears to have been downloaded from the Internet. It offers Visco elastic mattresses which are said to be specially designed to complement electronically adjustable beds which they also sell. The brochure describes in a table the appropriate mattress system depending on the sleeper's weight. The Vasco 60 is mentioned, confusingly under the heading VISCO ELASTIC MATTRESS AND REFLEXION MULTIZONE. The brochure is not directed at and so far as we can see makes no reference to the elderly, the infirm or the handicapped. There is also no mention of massage or heat components. This document was not explored or discussed by or put to either witness.

History of Dispute

36. Following receipt of the Appellant's VAT return for the period ended 31 December 2009 the Revenue notified the Appellant, by letter dated 1 March 2010, of their intention to visit its business premises in order to verify the claim for repayment of £13,537 made in the return. However, the Revenue officer, Margaret Paton, instead visited the Appellant's book-keeper who was based at Blairgowrie. Mrs Foster was also present but Mr Foster was not. Mrs Paton expressed various concerns. She took away various documents for further examination.

37. A further meeting took place on 17 March 2010 at the Revenue's offices at Dundee (Caledonia House). Mr Foster was present at that meeting as was a Mr Isherwood who runs or ran Independence UK Ltd mentioned above. Mrs Paton accepted that zero-rating was appropriate for certain products sold by the Appellant such as adjustable beds but she concluded on the basis of the material then before her, which included a number of invoices, that the supply of mattresses did not satisfy the requirements of Item 2(g) of Group 12 and that the Appellant's return should be amended accordingly i.e. by including output tax on the sale of the mattresses. The Appellant was so informed; his books and records were returned to him. Mr Foster indicated that he would return some of his invoices to his customers for alteration of the declaration. Mrs Paton's letter dated 19 March 2010 to the Appellant confirmed her position. The letter records *inter alia* the additional output tax as amounting to £13,041.00.

38. Thereafter, further correspondence and discussion ensued between the parties. By letter dated 30 April 2010, Mrs Paton modified her position to some extent in the light of alterations to some of the invoices. The Appellant requested a review of the Revenue's decision. By letter dated 14 June 2010, the reviewing officer confirmed the decision. The reviewing officer's conclusion was based on the view that it was only the designer or manufacturer who was able to determine whether the goods qualified for zero rating and that evidence had to be retained which demonstrated that the goods in question fulfilled the conditions for relief. This simply adopted paragraph 4.5.3 of VAT leaflet 701/7.

39. On the same date a Notice of Assessment was issued in the sum of £41.24. This comprised tax of £13 due by the Revenue and interest of £28.24. The underlying calculation shows that the sum of £13 is made up of an under-declaration of £3,463.00 for the period from 15/8/09 to 30/9/09 less a slightly larger over-declaration of £3476.00 for the period from 1/10/09 to 31/12/09.

40. The net result is that the amount currently at stake is the output tax of £13,041 less the sum of £13 i.e. £13,028.00. The returns submitted by the Appellant for the periods between 1/1/10 and about 1/9/10 will have to be adjusted in the light of our decision. Mrs Paton informed us that these returns (which will be repayment claims) have been held in suspense meantime.

Grounds of Appeal

41. In summary, the grounds of appeal contend that (i) the supply is similar to the supply in *Tempur Pedic (UK) Ltd* which was decided in favour of the trader; (ii) the Appellant's products are bespoke to each individual customer and are designed for a special purpose, (iii) each customer is a handicapped person; and (iv) the Appellant is the designer of the product; thus the statutory requirements for zero-rating are met.

Submissions

42. On the facts, counsel for the Appellant submitted that Mr Foster should be regarded as reliable and credible; there was no competing account of how the goods were assembled and supplied. The Appellant should be regarded as the designer of the goods. The product should be considered as a whole. Here, the Revenue's emphasis on the manufacturer, was misplaced. Mr Simpson referred to *Princess Louise Scottish Hospital v CC&E 1983 VATTR 191*, *Niagra Holdings Ltd v CC&E 1993 VATTR 503*, *Tempur Pedic Ltd London 1995 Decision No 13744 (Dr N Brice)*, a summary of *Foxer Industries (LON/95/1452- Chairman Theodore Wallace)*, a summary of *CF Leisure Mobility Ltd v CC&E 2000 Decision 16790 (Chairman Malachy Cornwall-Kelly)*, a summary of *Medivac Healthcare Ltd v C&CE 8 September 2000 No 16829 (Judith Powell)*, a summary of *The Kirton Healthcare Group Ltd v C&CE 23 January 2001 No 17062 (Miss JC Gort)*, a summary of *Joulesave Emes Ltd v C&CE 16 February 2001 Decision No 17115 (Chairman MS Johnson)* and *Leisure Karts (UK) Ltd v HMRC 2005 UKVAT V19403*.

43. Mr Simpson submitted that neither Excellent Relax nor Vitafoam was the designer. The Appellant made all the design decisions. It was not put to Mr Foster in cross-examination that the Appellant was not the designer or that Excellent Relax was the designer. The design intention was to provide relief from pain. All the Appellant's customers suffered from various conditions rendering them liable to pressure sores. The marketing evidence of cold calling potential customers over the age of 60 years with chronic conditions supported this. The absence of a declaration from Excellent Relax was of no moment. Mr Simpson submitted that *solely* should not be interpreted strictly. It meant specially or specifically.

44. Mr Brooke, for the Revenue, submitted that *solely* meant *nothing other than* or *no one other than*. He relied heavily on the Revenue's own guidance, parts of which we have quoted above. He founded on the fact that the Appellant had not consulted the Revenue's Notice 701/7 before proceeding. Design intention should be gleaned from objective and subjective considerations. The Tribunal should decide the issue on the evidence before it and not on the more restricted material presented to Mrs Paton, who acted reasonably throughout. Excellent Relax was the designer as they determined the type of foam from a chart which can be seen in the advertising literature. Mr Brook referred to *Made to Measure 2011 UKFTT 154 (TC) (Chairman Michael S Connell)*. He also referred to several other cases but did not produce copies of the decisions. He pointed out that in *Tempur* and *Niagra* the appellants were both designers and manufacturers. Here, the mattresses were not similar to those in *Tempur*.

45. Mr Brooke also pointed to the fact the evidence of what was transmitted to Excellent Relax by the Appellant was limited, being only the height and weight of the customer from which the density of the foam would be determined.

Decision

46. For the purpose of this decision in principle we must assume that the sale of each of the mattresses constituted the supply of equipment or appliances to a handicapped person for domestic or his personal use. The question we have to answer is whether the mattresses were designed solely for use by such a person, that is to say a person who is chronically sick or disabled. The evidence and discussion at the hearing focused on the question of design and what was meant by solely. Both parties assumed, and we proceed on the basis that the mattresses in question constituted *equipment* or *appliances* within the meaning of Item 2(g) and were not included in paragraphs (a) to (f) of that paragraph. We found both witnesses to be generally reliable and credible.

47. Neither party submitted that Vitafoam was the designer of the product being supplied. This is perhaps surprising as the largest and probably most important components are the two layers of foam, which Vitafoam manufactures. They also appear to hold a patent or patents relating to this foam. We understand this foam is a development of material used in the NASA space programme in 1970s created to help astronauts withstand the forces of take-off and re-entry.

48. Mr Brooke submitted that Excellent Relax were the designers. We disagree. They could be described as the manufacturer or, more properly, the assembler but any design function carried out by them was or must have been limited. They did not design the foam. They did not specify the strength of the foam. They up-holstered the foam, but whether they designed or manufactured the upholstery material is unknown on the evidence. They provided the cover. Whether they designed or manufactured the cover is unknown on the evidence. What is known is that the Appellant specified that the cover should have a zip. The zip, as such, could not have been designed by Excellent Relax. They did not design the heat or massage elements.

49. On the other hand, each mattress was fashioned according to the Appellant's plan. The Appellant specified the strength and location of the different types of foam by reference to the height and weight of the intended user, who might be a single user or a couple. The Appellant specified (having regard to the customer's wishes) whether there was to be a heating element and/or a massage element, and their extent and locations. Each mattress was designed to meet the particular wishes and needs of the particular customer. It was *bespoke*. It was designed exclusively for the particular customer in the same way as a suit is made to measure by a tailor for one particular customer. In these circumstances, each mattress was plainly intended to be used exclusively by the (assumed) handicapped person purchasing it.

50. The ordinary dictionary definition of *solely* is *exclusively*. That is a stricter test than specially or specifically. Nevertheless, we consider the test has been met.

51. The ordinary dictionary definition of *designed* is *planned, intended, designated, or fashioned according to a design*. To design something is to intend that something be created for a specific purpose. It imports the exercise of a discretion or choice and the making of a decision; thus, the designer may specify and thus decide whether a product will be yellow or blue or made of thick plastic or thin metal or a combination of both and if so, in what proportions. Here, the design choices were made by the Appellant, namely types of foam, their location, heating and massage elements and their location; the design or plan was intended to meet only the requirements of the particular customer.

52. Ultimately, the question is not so much who designed but whether the product was *designed solely for use by a handicapped person*. Even if it can be said that several different parties contributed to the design of each mattress, each mattress was planned or fashioned to meet the particular wishes or requirements of the individual customer. For present purposes, that individual customer is assumed to be a handicapped person.

53. If the statutory test (*designed solely etc.*) is met, it does not matter that the equipment or appliance, here a mattress, is capable of being used by a person who is not handicapped.

54. The cases cited to us are simply examples of the supply of particular goods in particular circumstances. The decisions turn largely, if not solely or exclusively on their own facts. They are all first instance decisions and none is binding on us. It is

difficult to detect a common *ratio* or principle which must be applied in all circumstances.

55. In *Princess Louise* there was a supply of *overbed* tables to hospitals. Not surprisingly, the Tribunal found that these tables were not designed solely for use by
5 handicapped persons. The Tribunal noted that the manufacturer's advertising booklets did not indicate that the tables were designed solely for use by such persons. The evidence was that the table was generally useful for all sorts of hospital patients and was not designed with a particular class in mind.

56. *Niagra* concerned the manufacture and supply by the trader of adjustable beds to
10 handicapped persons. The Tribunal, in allowing the appeal, noted that the question of design (for invalids) did not relate to the intention in the mind of the purchaser (511B); it was necessary to consider who would be expected to use the item (511D); the intention of the designer and also the finished product must be considered (512B). The Tribunal had the opportunity of inspecting one of the beds in issue, and were
15 impressed by the fact that the bed was not a normal bed and was not designed for normal sleep and rest; all its features pointed objectively towards the fact that it was a bed designed for a special purpose (512D).

57. *Tempur* related to mattresses and pillows which the Appellants supplied. One of the types of mattresses was a topper. The Appellants were a subsidiary of the
20 manufacturer of the goods. The Tribunal heard detailed evidence from the designer of the mattress and the foam used; and accepted that the mattresses were designed solely for the use of those suffering long term pain or pressure sores. The evidence disclosed that the mattresses were sold directly and not through shops, to people who were suffering pain and not to people who just needed a bed (paragraph 13); each order
25 contained a declaration similar to the declaration discussed above; the appellant's advertising literature referred to one of the mattresses as a revolutionary pain relieving mattress (paragraph 17); there were testimonials from a variety of professionals to the effect that the mattresses were beneficial to those suffering from chronic back pain and/or various other conditions.

58. The Tribunal in *Tempur* noted that both parties accepted that a subjective test should be applied; what was in the mind of the designer should be considered (paragraph 31); nevertheless the Tribunal also took into account the fact that (i) the cost (among other things) made it most unlikely that it would be purchased by anyone who did not suffer from long term pain or pressure sores (paragraph 32); (ii) the
35 promotional literature made it clear that the mattress was not intended for sale as a normal mattress but was directed only towards those with pain or pressure sores (paragraph 33); (iii) the mattress could be used by a normal person did not mean that it was not designed solely for use by a handicapped person (paragraph 34); and (iv) the products were not similar to those which could be bought in stores (paragraph 35).
40 The Tribunal also concluded the very conditions for which the mattress was designed, namely the relief of long term pain and pressure sores, fell within the meaning of *chronically sick* (paragraph 40).

59. *Foxer* concerned the sale of battery powered golf buggies which could be dismantled, stowed in the boot of a car and could also be used as a conventional trolley. The issue was whether the buggies were designed solely for use by a handicapped person. The Tribunal held that the fact that the buggy was capable of being used by those who were not handicapped was not fatal. In refusing the appeal, at least in part, the Tribunal had regard to the promotional literature and concluded that the buggies were not, in general, designed solely for use by handicapped persons. The Tribunal also appeared to construe *solely* as meaning *especially*.

60. *Leisure Mobility* was another golf buggy/cart case. The Tribunal noted that exceptions to the principle that VAT applied to all forms of economic activity had to be strictly construed but then proceeded to conclude that *solely* meant *especially; dicta* in *Foxer* were followed. The Tribunal stated that eligibility for zero-rating required a clear and overwhelming bias towards use by handicapped persons; the supplier's intention had to be substantially inferred from the sales material. The Tribunal by a majority, dismissed the appeal subject to certain qualifications.

61. *Medivac* concerned the supply of products such as bedding covers, and vacuum cleaners with a high particulate filter designed to reduce the house dust mite allergen or reduce the effect of the allergen in persons sensitive to it. The Tribunal allowed the appeal holding that the specific purpose of each of the products was to reduce a person's sensitivity to the house dust mite; that such products were not necessary for those who were not sensitive to the allergen; they would be discouraged from buying the products. The evidence was that the products were designed solely for people who would be recommended to buy them by their medical adviser; such people were chronically sick or disabled by reason of their allergy.

62. *Kirton* related to the sale of what were described as fireside chairs. They were said to have good postural ergonomic characteristics with an adjustable seat which prevented pressure sores; they were suitable for the frail and elderly. Having regard to certain features of one of the types of chair the Tribunal held that it was designed solely for use by the chronically sick or disabled. While it is difficult to extract any applicable principle from this case, the Tribunal appears to have been influenced by *Tempur Pedic*.

63. *Joulesave* related to radiator cabinets and pipe covers supplied to housing associations for use in a nursing home for the elderly; the radiator safety equipment was designed to prevent injury from contact with the radiators. The equipment was suitable for protecting others who were not chronically sick or disabled such as children. The Tribunal held that the design issue fell to be tested not only by reference to the mind-set of the designer but also the purpose of the goods and how and to whom they were marketed and sold. The Tribunal held that the equipment did not have to be used solely by the handicapped and concluded that the purpose of the design was to protect the handicapped. The appeal was allowed.

64. *Leisure Karts* concerned an all-terrain mobility scooter which was capable of being lawfully used on the public road. With minor alteration the scooter could be adapted into a golf buggy. A golf buggy which was almost identical to the scooter

was subsequently marketed at the same price as the scooter. The advertising literature did not refer to the scooter as being for the disabled. In dismissing the appeal, the Tribunal considered the finished article to discern from this the purpose for which it was designed. On the evidence, the tribunal concluded that one vehicle emerged with a dual purpose; it could not therefore be said to have been designed solely for the disabled. The use of the vehicle was such that it was promoted and marketed for use by persons who were not handicapped. It had only one feature which was of possible use only to a disabled person. The scooter therefore failed to meet the statutory test in Item 2(g).

65. *Made to Measure* is the most recent case in this area. There, the issue related to the zero-rating of mattresses and wave pads for the elderly and infirm. The advertising literature in that case disclosed that the mattresses and wave pads (which we assume are much the same as toppers) were manufactured specifically to each customer's individual needs and included an inbuilt electrically powered massage system which was the main feature of the product. The main feature of the system was the promotion of blood circulation which helped with many different health issues such as arthritis, diabetes and heart problems. The HMRC argument in *Made to Measure* (also presented by Mr Brooke) was that products which were useful or even essential to people with disabilities but which were designed to have a wider application were not intended to have relief under Item 2(g). In that case, however, the appellant conceded that while the mattresses and wave pads were designed in the first instance to assist individuals with their health issues they were not limited to individuals with disabilities or chronic illnesses (paragraph 14). There seemed to be little in the way of evidence to consider as the Tribunal simply said that there was no evidence produced from the designers or the manufacturers of the mattresses and wave pads which stated that the products were designed specifically for the handicapped; the correspondence from the manufacturers indicated that the products were available to anyone (paragraph 17). The appellant failed to meet the requirements of Item 2(g) and the appeal failed on that ground and on another ground which we need not consider.

66. We note that no such concession has been made in the present appeal. Our findings are more extensive and there was no argument in *Made to Measure* that the Appellant was in fact the designer. The decision is therefore distinguishable on its facts.

67. What emerges from a review of these cases is that the following, at least, should be considered in order to determine whether the equipment or appliance is designed solely for use by a handicapped person (i) the identification of the designer and his intention; (ii) the function, purpose, possible and actual uses of the finished article; (iii) any advertising and promotional literature and the market in which the product is supplied and its cost; and (iv) the availability and use of similar products and their comparative cost.

68. Mrs Paton fairly stated in evidence that she found this to be a difficult case. At one stage in the course of discussions with the Appellant she took advice from the Revenue's Policy Department or Unit of Expertise as she referred to it in evidence.

Much of the material provided to her was not clear and contained some uncertainty and ambiguity. The evidence we heard has clarified matters somewhat although some of it is still not crystal clear or free from doubt or ambiguity. The Appellant's brochures do not reflect the market in which and how the Appellant actually operates. Nevertheless, this is now sufficiently clear for our purposes. We rather suspect that if Mrs Paton had heard the explanations we have received in evidence she would have accepted (subject to some clarification or correction of the terms of some of the Appellant's invoices) that the supplies of mattresses and toppers over the periods in dispute were in principle designed solely for use by handicapped persons.

69. We should note that the letter dated 1 September 2010 from ABC Furniture Ltd is not directly relevant. It relates to a period outwith the returns which are currently the subject of dispute. We were informed, however, that our decision would affect the Appellant's returns down to September 2010. Thereafter, until ABC became insolvent, the Revenue accepts, at least in principle, that the statutory test is met.

Result

70. We decide, in principle, that the mattresses in issue were equipment or appliances designed solely for use by handicapped persons within the meaning of Item 2(g), Group 12 of Schedule 8 to the Value Added Tax Act 1994.

71. 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.

**J GORDON REID, QC., F.C.I.Arb.,
TRIBUNAL JUDGE**

RELEASE DATE: 20 SEPTEMBER 2011