



TC03639

Appeal number: TC/2011/09834

*VAT – exemption – whether Appellant is a “state regulated institution” – no -
whether Appellant provides welfare services – no – VAT Act Schedule 9,
Group 7, Item 9 – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SLIDE & SEEK LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE LADY JUDITH MITTING
 MR ALAN REDDEN FCA**

Sitting in Manchester on 8 November 2013 and 28 April 2014

Mr Jay Behan, Director, for the Appellant

**Mr John Nicholson, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The decision under appeal is that of the Respondents to refuse a claim for over-declared VAT in the sum of £24,196 covering the period 1 August 2008 to 31 July 2010. The issue underlying the decision and to be determined by the Tribunal is whether the Appellant's supplies amount to the provision of welfare services thus enabling them to be treated as exempt pursuant to Item 9, Group 7, Schedule 9 of the VAT Act 1994.

10 **Legislation**

2. Item 9(b) exempts the supply by a state regulated private welfare institution of welfare services and of goods supplied in connection with those welfare services.

Note 6 to Group 7 provides that "welfare services" means, *inter alia*, services which are "directly connected with the care or protection of children and young persons".

15 Note 8 provides that "state regulated" within Group 7 means "approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act ...".

3. The Childcare Act 2006 lays down the requirement for the regulation of provision of childcare in England. The requirement for compulsory registration is broadly drawn but is then narrowed down by a series of exemptions. The exemptions are set out in the Childcare (Exemptions from Registration) Order 2008. Of specific relevance here are paragraphs 5, 6 and 7 of the Order which read as follows:

"Exempt temporary provision

25 **5.-(1)** The circumstances referred to in articles 2(2) and 2(4) are where the provision is made –

(a) for a particular child –

(i) for two hours or less per day, or

(ii) for four hours or less per day and the provision is offered –

30 (aa) on a day to day basis with no longer term commitment to clients, and

(bb) for the convenience of clients who intend to remain on the premises where the provision is made or within their immediate locality; or

35 (b) on particular premises for 14 days or fewer in a year commencing with the relevant day, and the person making the provision has notified the Chief Inspector in writing at least 14 days before the relevant day.

40 (2) The "relevant day" means the first day on which the provision is made on the premises in question.

Exempt activity-based provision

6.-(1) Subject to paragraph (2), the circumstances referred to in articles 2(1) to 2(4) and where –

- 5
- (a) the provision is made for a child who has attained the age of three,
 - (b) the person making the provision is providing to the child an activity of a type listed in paragraph (3), and
 - (c) the provision is incidental to the activity.
- (2) The circumstances in this article are not met if –
- 10
- (a) the child has not attained the age of five and attends the activity for longer than four hours per day, or
 - (b) the person making the provision offers more than two of the types of activity listed in paragraph (3).
- (3) The types of activity are –
- 15
- (i) school study support or homework support;
 - (ii) sport;
 - (iii) performing arts;
 - (iv) arts and crafts;
 - (v) religious, cultural or language study.

Exemption for open access childcare

7.-(1) The circumstances referred to in articles 2(2) and 2(4) are where the provision is open access childcare.

- 25
- (2) “Open access childcare” means childcare, other than childminding, under the arrangements for which a child, other than a young child (3), may leave the premises unaccompanied.”

4. Paragraph 18(2) Childcare Act 2006 defines “childcare” as meaning “any form of care for a child” and further defines “care” as including education for a child and “any other supervised activity for a child”.

30 5. It was common ground that:

- (1) An institution registered by Ofsted would be “State regulated” within the Note 8 definition.
- (2) as from 21 November 2012 the Appellant was registered by Ofsted as a
35 “provider of childcare on non-domestic premises on the voluntary part of the Childcare Register”;
- (3) the Appellant was not Ofsted registered during any of the period covered by the assessment.

The evidence

6. Slide & Seek Limited is operated by its two directors, Mr Jay Behan and his wife Mrs Lorraine Behan. The company was registered for VAT with effect from 25 February 2008 and in its application for registration, the business was described as a “children’s play centre”. This description of the business activity was also that which was used in the planning documentation from Tameside Metropolitan Borough.

7. The business activity with which we are concerned is carried on in a large open plan area. (There are in addition three rooms which are separated off and hired out for parties but this activity does not form any part of the current appeal). Mr Behan very helpfully provided us with a plan of the Centre. On the plan, the entrance and reception area were in the middle of the left long side. Within this paragraph we describe the area to the left of the reception as the top of the room and the area to the right as the bottom. Across the top short wall is an area for older children containing a football area and a play frame. Towards the bottom on the right hand long wall is a similar area for younger children containing its own appropriately aged play frame. In the middle of the room are sofas and coffee type tables and a suspended television for the parents. We will, for ease, refer throughout this decision to “the parents” but this term will merely denote the adults who are accompanying the children who may of course not necessarily be their parents. Along the bottom short wall is a large kitchen, the counter of which forms a servery. In front of the servery are three long “activity tables” to which we refer below and a number of round tables and chairs for the use of parents and children.

8. We are concerned only with the Monday to Friday activities, different activities taking place at weekends, the VAT liability of which is not in dispute. The Centre offers activities for children aged 0 – 11 but is in fact open to all ages, young and old alike. Adults can come in on their own and make use of the catering facility. Children can come in with their parents but need not join in any of the activities and merely stay with their parents. The Centre is open from 9.30 a.m. to 6.00 p.m. and users stay for as long or short a period as they like, all day if they wish. Adults are admitted free of charge. Children under 1 pay £1.00; aged 1-3, £3.50 and aged over 3, £4.50.

9. Entrance is through a reception area where the children are booked in. On entry, payment is taken and in return the parent is given an “Admission Pass, which as well as recording the name and the time of entry sets out the “Rules of Play”. Of particular relevance to this appeal are the following:

- (1) Children must accompanied by a responsible adult/guardian for the duration of their session at Slide & Seek.
- (2) Slide & Seek does not accept responsibility for the supervision of children.
- (3) Parents/guardians are responsible for the behaviour and wellbeing of the child in their care and must maintain supervision of their children at all times.

(4) The Slide & Seek team supervise the play equipment and help maximise your children's enjoyment from the play experience, they are not however a replacement for parental supervision.

...

5 (11) Parents/guardians should note that whilst every consideration has been given for the safety of children using the play centre, Slide & Seek cannot be held responsible for accidents which occur as a result of children playing on the equipment.

10 10. Once registered and inside, children do very much what they like, subject at all times to the supervision of their parents. They can play on any of the equipment or participate in the craft activities which are provided throughout the day, every day. This activity includes drawing, colouring, painting and gluing, etc. with the Centre providing the equipment and paper and a member of staff will normally be on hand to offer any help if needed. This member of staff will not have any art and craft
15 qualification or give formal tuition or classes. He or she will have an NVQ Level 2 or 3 qualification in children's care, learning and development. On Monday and Friday afternoons a sports coach comes in for one hour and provides various sporting activities which children can join in or not as they wish. These sessions are open access at no additional charge. Additionally on Tuesday, Wednesday and Thursday
20 afternoons an outside company called Joe Jingles comes in to provide singing and rhyme sessions with the use of musical instruments. Again, these sessions are open access at no additional cost. The Centre staff have no involvement in or responsibility for the musical or sporting sessions and indeed as far as the music is concerned, we were told that the parents would normally accompany their children and join in.

25 11. The Centre employs six members of staff, three of which are involved in the catering facility. Of the remaining three one will man reception and two will be in and around the activity tables.

30 12. The Centre staff do not provide any personal care for the children. If the children wish to use the toilet they will go on their own or be taken by a parent. There are no rest facilities provided for the children and it will be up to the parent to bring for example a pushchair if a sleep is needed. If a child needs disciplining, he or she will not be disciplined by the Centre staff but will be referred to his or her parent for such action as the parent considers appropriate to be taken.

35 13. Twice a day the children have "snack time". This consists of the provision of juice and something such as toast, fruit or biscuits. These two snacks are free of charge and are provided by the kitchen staff from the servery. They are consumed at the activity tables. Older children go to the servery themselves to collect their snack and the parents will collect them for the younger children. Younger children are supervised at snack time by the parents, not the Centre staff.

40 14. The Centre offers, from its servery, a comprehensive menu. Mr Behan described what was offered as a "general restaurant service. The menu provides all manner of light meals, including pasta, chips and burgers. There is a wide range of coffee and cakes available and juices and fizzy drinks for the children. Everything

from this menu is prepared to order and is paid for on top of the entrance fee. Again the parents are responsible at all times for their children in both the ordering of their food (usually lunch) and helping them to eat it. All the Centre staff do is take the order, prepare the food, bring it to the table and collect it from the tables afterwards.

5 15. We were provided with the insurance documentation covering the Centre. The nature of the insurance cover is in a category named “Children’s Indoor Play”. All the activities at the Centre are covered within the policy which is in standard form. The only two matters particularly relevant to this appeal are the declarations by the Centre that there will at all times be a minimum of two full time members of staff on
10 the premises and that parents/guardians will be present and responsible for their children at all times.

16. We were referred by the parties to a number of additional documents. We were shown a news cutting on the opening of the Centre which described the “friendly, relaxed atmosphere” and the “excellent café serving great food which is both tasty
15 and healthy”. The item concluded with the paragraph “You can also sit and relax in the comfy area on our leather settees in front of the TV (as long as you have one eye on the kids!) or kick off your shoes and join in the fun with the little ones”.

Ofsted

17. The Ofsted Childcare Register is in two parts, the compulsory part and the
20 voluntary part. The law provides that anyone providing childminding or childcare on domestic or non-domestic premises must register on the compulsory register unless exempt from doing so. Providers who are exempt from compulsory registration are entitled, though not obliged, to register on the voluntary register. The Appellant on 22 June 2012 applied to join the voluntary part of the Childcare Register. Question
25 E12 of the application asks for the Appellant to stipulate the age groups of the children for whom care is to be provided. Mr and Mrs Behan indicated it was all ages from birth to 11. Question E13 contains the following tick box statements to which both boxes were ticked.

Please tick all that apply

- 30 The provision will care for children in the early years age group and is exempt from registration on the Early Years Register.
- The provision will care for children aged under 8, but older than the early years age group, and is exempt from registration on the compulsory part of the Childcare Register.

35

There follows the command “if you have ticked either box, please explain here why your provision is exempt from compulsory registration”. Unfortunately, in the copy of the application form which was before us, the section for the response had been left blank. Mr Behan told us however that they had given the answer “the parents don’t

leave their children unaccompanied”. The application to register on the voluntary register was granted without enquiry, as we gather is standard practice, with effect from 21 November 2012.

Submissions

5 18. Mr Behan based his submissions on two Ofsted publications. The first one was entitled “Framework for the regulation of those on the Early Years and Childcare Registers” which was published in April 2011. The second publication was a fact sheet entitled “Registration not required” which sets out the circumstances in which a provider need not register. The HMRC guidance does not have the force of law and
10 both the Ofsted and HMRC publications do nothing more than summarise and explain the legislative provisions and helpfully for prospective applicants provide examples. We have cited the legislative provisions at the beginning of this decision (paragraph 3) and we specifically referred Mr Behan to them and he was able to marry up his submissions with the legislative provisions.

15 19. The crux of Mr Behan’s case was that the Appellant was not and never had been compulsorily registrable because the Centre was not the primary carer. The children were never left unaccompanied but were at all times in the care of their parents. He developed this argument in two alternative ways. First, he contended that because they were allowed to register voluntarily, it must follow that prior to such registration,
20 the Centre was exempt. His second argument was that the Centre was in fact specifically exempted from registration by virtue of the legislation and he expressly drew our attention to paragraphs 5, 6 and 7 of the Order referred to in paragraph 3. These exemptions are also summarised in the second of the two Ofsted publications to which we have previously referred. We expand upon the development of Mr Behan’s
25 argument when we come to consider the extent of the exemptions in our consideration.

20. Mr Behan was adamant that even though the parents were primarily responsible for the children, the Centre did provide care. He referred to how he ensured the safety of the children, made sure the premises were clean and tidy and “abided by the rules”
30 in adhering to Council, Fire Service and Hygiene Regulations.

21. Mr Behan further referred us to an extra-statutory concession which is set out in paragraph 3.3.2 and 3.3.3 of the HMRC guidance published in February 2007 but omitted from their later guidance published in 2011. 3.3.2 states that “a welfare provider becomes state regulated when the relevant regulatory body approves its
35 application to register. The provider is not state regulated whilst its application is under consideration and so it is not obliged to exempt its supplies of welfare services during that period.” 3.3.3 then goes on to provide that where a body is not actually registered but “will in due course become so registered or regulated” then by concession the Applicant can exempt their services. It was Mr Behan’s contention
40 that the Centre fell within this concession because they were in due course to become voluntarily registered.

22. Mr Nicholson submitted on behalf of HMRC that the Appellant did not meet the requirements for exemption. The Appellant does not provide services involving the care and protection of children. The parents were in attendance at all times; never handing over responsibility for their child to the Appellant and without this the Centre could not exempt its services.

Consideration

23. We will take first the discrete point raised by Mr Behan on the extra-statutory concession. There are two reasons why this argument has to fail. First, the Tribunal has no jurisdiction over the exercise of extra-statutory concessions and it is not therefore within our power to find that the Appellant falls within it and that it should have been exercised in its favour. Secondly and in fact fundamentally, the circumstances applicable to the Appellant do not, in our view, fall within the circumstances for which the ESC is available. As is prefaced in the HMRC publication, this concession applies to bodies who have applied to register and it is expected that such registration will be granted in a matter of time. It does not apply when a provider has not even made an application, even though it might be their intention to do so in the years to come.

24. Item 9(b) Group 7, Schedule 9 exempts the supply “by a state regulated ... institution of welfare services ...”. There are clearly two limbs to this and a provider has to satisfy both before it can qualify for exemption. First, the provider must be a “state regulated ... institution” and further it must provide “welfare services”. We consider firstly the second of the two limbs – i.e. does the Appellant provide welfare services.

25. The legislation, cited in paragraph 2 of this decision, defines “welfare services” as services which are “directly connected with the care or protection of children and young persons”. It was Mr Behan’s contention that the Centre does provide care. The definition of childcare, we have set out in paragraph 4 of this decision. It seems to us that the Appellant could satisfy the definition if it provided either “care” or “any other supervised activity”. The Centre does not, in our view, provide the nature of care as is envisaged within the legislation. The responsibility for the wellbeing of the children remains at all times with their parents. This is abundantly clear from the documentation and from the description of how the Centre operates. The parents have to keep an eye on the children. They are responsible for toileting and feeding them. They will come to the aid of their child if he or she is ill or has to be reprimanded. The responsibility for care remains with the parent and is at no time transferred to the Centre. The examples of care which Mr Behan gave to us are in fact, as Mr Nicholson pointed out, no more than the legal obligations of the occupier of any premises when those premises are opened to the public. The premises meet all the statutory requirements for ensuring the safety of all users (not just children) of this facility. We also do not accept that the activities provided fall within the definition of “any other supervised activity for a child”. The arts and craft activity will have a member of staff on hand but this member of staff will not give formal tuition and will

5 have no expert qualification but is merely there to assist if needed and hand out materials. The Centre brings in a sports coach for a couple of hours a week and a musical performer on three days a week but the centre staff have no involvement in or responsibility in these musical or sporting sessions and indeed as we pointed out earlier, we were told that the parents would normally be expected to accompany their children and join in.

10 26. We find therefore that the services supplied by the Appellant do not amount to the provision of “welfare services” within the statutory definition. This finding alone means that the Appellant is not entitled to the exemption it seeks. However, for the sake of completeness we will go on to consider whether or not the Appellant is a “state regulated institution” and it is our view that in the period prior to its registration, which is the period with which we are concerned, the Appellant was not a state regulated institution within the statutory definition.

15 27. To fall into the definition, bearing in mind that the Appellant was not actually registered, it would have to have been “exempted from registration”. There are two connected reasons why we believe that it was not. First, and we pick this argument up from the HMRC review letter of 22 August 2011 in which the officer stated:

20 “My understanding of the term “exempted from registration” does not refer to organisations that simply have no requirement to be registered, but to organisations that have a requirement to be registered (because they provide care to children) but are exempted from registration due to the specific nature of the care they provide.”

25 This has to be right, a provider can be exempt from compulsory registration but it is difficult to see how it can be exempt from voluntary registration unless it is simply not allowed to be voluntarily registered which is clearly not the Appellant’s case – the converse in fact.

30 28. We turn next to Mr Behan’s argument that the Centre is exempt because it falls within the statutory exemptions. In fact it falls within none of them. Paragraph 5 of the exemptions, headed “exempt temporary provision” is firstly stated to be for “a particular child” and secondly is limited to provision of four hours or less per day. The Centre allows children to remain for as long or short a time as they wish. It might well be less than four hours a day but equally it can be considerably longer. This exemption cannot therefore possibly apply and we would also question whether or not the provision is to “a particular child”. This, to us, implies a child who is registered with the provider or is expected by the provider. A child who is identifiable, a specific child. In fact a child such as would be registered with a nursery. In the present case, the Centre is open to all and every children. The Appellant have no idea who is coming or indeed who they are when they come. They are not “particular” children.

29. Neither does the exempt activity based provision in paragraph 6 apply because that is an age related exemption which is not met here as the Centre is open to all children from birth to age 11.

30. The “open access” exemption in paragraph 7 cannot apply either. Mr Behan questioned whether or not the statutory definition was “correct”. This arises from a difference in interpretation. Mr Behan maintains, and in his context he is absolutely right, that he means open access to be open to everyone and his Centre is open to everyone. It is open to all children. That however is not the definition which is contained within the statutory exemption and this is the only definition which we can apply. Open access in the context of the legislation expressly refers to children who “may leave the premises unaccompanied”. This quite clearly is the last thing which the Centre allows.

31. We are not concerned with whether or not the Centre is now correctly registered. We are concerned only with the period prior to registration and whether or not during that period the Centre met the criteria laid down by statute to entitle it to exempt its supplies. For all the reasons given above we find that it did not meet those criteria and the appeal therefore fails. This is not to diminish in any way the services and activities offered by Mr and Mrs Behan. They clearly provide a very impressive facility with a wealth of activities for the children and an impressive social environment for their parents.

32. The appeal is therefore dismissed.

33. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 21 May 2014