[2017] UKFTT 0517 (TC)

TC05957

Appeal number: TC/2016/01524

VAT – zero rate supplies – Schedule 8, Group 12, Item 2(b) VATA 1994 – Note (5E) – electronically or mechanically adjustable beds – whether standard rated by virtue of Note (5E) – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASHWORTH TRADING **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS GAY WEBB

Sitting in public at Liverpool Civil and Family Court, 3rd Floor, 35 Vernon Street, Liverpool, L2 2BX on 20 April 2017.

Mr Daniel Morton, Accountant, for the Appellant

Mr Bernard Haley, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal arises out of a decision to assess Ashworth Trading, a partnership, for £17,022. This followed a liability ruling that certain supplies treated by Ashworth Trading as zero rated were in fact standard rated. The supplies involved were of adjustable beds and mattresses (together "the Beds") to nursing and care home residents ("the Homes" and "the Residents" respectively) in the periods 10/11 to 07/15.

2. The liability ruling was issued on 9 September 2015 to Mr Robin Ashworth, one of the partners in Ashworth Trading. The other partner is Mr Ashworth's daughter, Ms Sonia Ashworth. The assessment was originally made on 23 October 2015 in the sum of £20,259 together with interest of £1,032.37, again to Mr Ashworth rather than to the partnership. A penalty was also issued to Mr Ashworth on 3 December 2015 in the sum of £7,090.

3. By a review dated 11 February 2016, the liability decision was upheld but the assessment and the penalty were withdrawn upon the basis that they had been issued to the wrong entity (namely, to Mr Ashworth rather than to Ashworth Trading). An assessment was made against Ashworth Trading on 10 June 2016 in the sum of £17,022. No penalties were imposed. Although the notice of appeal was received by the Tribunal on 11 March 2016 (and so before the assessment on 10 June 2016) the parties have proceeded before us upon the basis that it is the liability decision and the assessment upon the partnership which are being appealed. We agree with this approach and adopt it.

The Legal Framework

4. The key dispute in this appeal is whether or not the Beds are excluded from being treated as supplied for the domestic or personal use of a disabled person for the purposes of Schedule 8, Group 12, Item 2(b) of the Value Added Tax Act 1994 ("Schedule 8" and "VATA 1994" respectively). If the Beds are excluded, then they are standard rated. If they are not excluded, then the Beds are zero rated.

5. Schedule 8, Group 12, Item 2(b) provides as follows.

> "The supply to a disabled person for domestic or his personal use, or to a charity for making available to disabled persons by sale or otherwise, for domestic or their personal use, of –
>
> …
>
> (b) electrically or mechanically adjustable beds designed for invalids."

6. Notes (5B), (5D) and (5E) provide as follows.

"(5B) Subject to Notes (5C) and (5D), in item 2 the reference to domestic or personal use does not include any use which is, or involves, a use by or in relation to a disabled person while that person, for the purposes of being provided (whether or not by the person making the supply) with medical or surgical treatment, or with any form of care –

(a) is an in-patient or resident in a relevant institution; or

(b) is attending at the premises of a relevant institution.

…

(5D) Note (5B) applies for the purpose of determining whether a supply of goods by a person not mentioned in any of paragraphs (a) to (g) of Note (5H) falls within item 2 only if those goods are –

(a) goods falling within paragraph (a) of that item;

(b) incontinence products and wound dressings; or

(c) parts and accessories designed solely for use in or with goods falling within paragraph (a) of this Note.

…

(5E) Subject to Note (5F), item 2 does not include –

(a) a supply made in accordance with any agreement, arrangement or understanding (whether or not legally enforceable) to which any of the persons mentioned in paragraphs (a) to (g) of Note (5H) is or has been a party otherwise than as the supplier; or

(b) any supply the whole or any part of the consideration for which is provided (whether directly or indirectly) by a person so mentioned."

7. Note (5H) lists the persons referred to in Notes (5C) to (5F). It is common ground that these include the Homes but do not include Ashworth Trading.

8. Note (5I) defines "relevant institution" for the purposes of Notes (5A), (5B) and (5H). It is common ground that the Homes are relevant institutions.

9. The assessment was made pursuant to section 73(1) of VATA 1994.

The Issues

10. The grounds for appeal focussed upon whether or not the Homes provided care for the purposes of Notes (5B) and (5H). However, Mr Morton expressly stated to us in his submissions that he no longer pursued this point and so we take him to accept that they did provide such care.

11. It follows that the parties agree that (5B), if applied by itself, would mean that the Beds are zero rated because they are used by people being provided with care whilst an in patient or resident in a relevant institution. However, the parties also agree that Note (5D) restricts the operation of Note (5B) where, as here, the goods are

supplied by a person not mentioned in paragraphs (a) to (g) of Note (5H) to specified goods which do not include the Beds.

12. The only dispute between the parties, therefore, is whether or not Note (5E) operates to cause the Beds to be standard rated. The question for us to determine is whether or not the supply of the Beds was made in accordance with any agreement, arrangement or understanding (whether or not legally enforceable) to which the respective Homes are or have been a party otherwise than as the supplier.

The Facts

13. The only witness for Ashworth Trading was Ms Ashworth, who verified a written statement and also gave oral evidence. We wish to note at this stage that we found Ms Ashworth to be a clearly honest and helpful witness, whose credibility was not in doubt. Indeed, the only cross-examination of her was in order to ask for further information rather than to challenge anything which she had written or said.

14. HMRC's only witness was the decision making officer, Mr David Worby, whose witness statement was in the hearing bundle. Although he was not present to give oral evidence or to be cross-examined, we have read the witness statement and give it full weight. This is because no submissions were made that we should not, the witness statement is an administrative commentary upon the documents and there is no dispute about the facts which it presents. The rider to this is that we of course only treat Mr Worby's conclusions as evidence of his position; whether or not those conclusions are correct forms the substance of the rest of this decision.

15. In the circumstances, we make the following findings of fact. In doing so, we bear in mind that the burden of proof is upon Ashworth Trading to establish that the Beds are properly to be treated as zero rated and that the standard of proof is upon the balance of probabilities.

16. Ashworth Trading carries on business in the supply of beds and mattresses for people who are ill with a variety of complaints which either make them bed bound or cause them difficulties in using a "normal" bed. Their products include chairs, but the relevant goods for the present appeal are adjustable beds, electrical beds and pressure relieving mattresses.

17. Ms Ashworth said, and we accept, that whilst the Beds are not of a type that would be used in a hospital, they are not the type which would be used by an able bodied person. Instead, the Beds are supplied according to a person's specific medical needs and complaints. In particular, there are different types of mattresses according to the level of risk of tissue damaged caused by its use. The supplies are therefore, as Ms Ashworth put it, "fairly bespoke."

18. The products are available for rent or for purchase, whether in nursing homes or care homes or in customers' own homes. Where a rental contract is commenced in a person's own home and then he or she moves to a nursing home or care home, those rental contracts continue. There is a broadly equal split between the rental and sale of products. Ashworth Trading will occasionally buy the beds back but this is unusual

and is not how the business or the market works. The Beds to which the assessment relates were all rented or sold whilst the users were Residents at the Homes and were split between rentals and sales.

19. Ms Ashworth explained the usual process in supplying beds and we accept her evidence. Ashworth Trading would initially be contacted by the family of the Resident or alternatively by the Home on behalf of the Resident or the family. If the Home does not make it clear that it is acting on behalf of the Resident or the family (for example, if Ms Ashworth is not given a name of a Resident or forms the view that Home is purchasing the beds itself) she treats the supply as standard rated and charges VAT. Otherwise, Ms Ashworth will ask the family, the Resident or the Home to complete a certificate making it clear that the bed is for domestic or personal use.

20. If the first contact is the family or the Home on behalf of the Resident or family, then Ashworth Trading ask what the Resident is suffering from. They will then speak to the Resident's occupational therapist or tissue viability nurse to discuss the individual's needs. We were not given any evidence as to whether or not the occupational therapist or tissue viability nurse would be employed by or otherwise connected to the Home and so we make no finding in this regard. The beds are ultimately delivered to the Homes, as that is where they are to be used. Invoices are sent to the Resident. Payment is usually either made directly by the Resident or the Resident's family. In some cases, payment is made by the Home on behalf of the Resident because the Home is holding the Resident's money on trust.

21. Ms Ashworth said, and we find as a fact, that Ashworth Trading usually deals with the family to start with on initial set up of the purchase and then liaises with the Home. On some occasions, the Home will also deal with the initial set up too. She also said, and again we find as a fact, that Ashworth Trading's dealings with the Home relate to the operational logistics in the sense of identifying the correct bed and arranging for its delivery.

22. We find that the supply of the Beds followed the usual process as set out above and that the Homes gave the names of the Residents who were to use the Beds and that the Beds were being purchased by the Residents rather than the Homes. Indeed, HMRC did not suggest otherwise.

23. We note that there was no evidence at all (or even any assertion by HMRC) of anything being in place which anticipated the Homes playing any part in the supply other than assisting the Residents or their families in the process of liaising with Ashworth Trading in the choice of Bed and, in some cases, making the payment for the Resident from the funds held on trust. Sometimes, as for the usual process, the Home was also the first point of contact with Ashworth Trading.

24. In submissions, HMRC accepted that the Homes did not pay for the Beds, that the individual or family paid for them, that the purchase is by the individual user and that the Homes are not financial parties to the supplies. These concessions are well made and we make findings of fact to the same effect.

25. HMRC did assert that the Homes expressly or impliedly allowed the Beds to be sited on and delivered to their premises and accepted them as part of the Residents' care. On the balance of probabilities, we accept that this is correct as a matter of fact (although the effect of this is of course a matter of submissions, with which we deal below).

The Submissions

26. We are grateful to Mr Morton and to Mr Haley for their measured and helpful submissions. We summarise these as follows.

Ashworth Trading

27. Mr Morton submits that Note (5E) is an anti-avoidance measure and is directed at avoiding a care home from achieving zero rating where it is not presented as the purchaser but is in fact the recipient of that supply. To fall foul of Note (5E)(a), it is not enough for the Home simply to act as a conduit for the purchase or rental by the Resident. Further, any agreement to site the Beds at the Homes or include them in the care is not related to any supply agreement.

HMRC

28. Mr Haley submitted that, whilst it may seem unfair, the very fact that the Homes are involved in the process of supplying the Beds at all is sufficient to make the supplies standard rated. The only involvement which Mr Haley relied upon for this purpose was the siting of the Beds in the Homes' premises and inclusion in the Residents' care. Mr Haley accepted that even where the Homes were paying for the Beds with Residents' trusts funds, they were doing so on behalf of the Residents. There was no suggestion that this was to be treated as the provision of consideration by the Homes for the purposes of Note (5E)(b).

29. Mr Haley accepted, and positively submitted, that Note (5E) is an anti-avoidance measure. He referred us to a letter from HMRC to Ashworth Trading's accountant which stated as follows:

> "The legislation changed with effect from January 1998. All of the above notes were added at that time as an anti-avoidance measure aimed at private hospitals and other institutions that had been artificially splitting exempt supplies of medical services and care packages to charge for each item separately, in order to maximise input tax recovery. HMRC is required to apply the legislation as it stands and does not have the discretion to allow zero rating of supplies that are not zero rated in law."

30. Obviously, Mr Haley does not rely upon this as evidence of the purpose of the Notes but adopts it as his explanation of the anti-avoidance measures.

Discussion

31. We note that, despite careful research, neither party has been able to provide us with any authority which has examined the construction of Note (5E).

32. We find that in the circumstances of the present case, the purchases or rentals of the Beds are not supplies made in accordance with any agreement, arrangement or understanding to which the Homes are or have been a party otherwise than as the supplier. As such, the Beds are zero rated. We set out our reasoning as follows. In doing so, we shall use "arrangement" as shorthand for "agreement, arrangement or understanding".

33. First, the supply must be one, "made in accordance with," the relevant arrangement. We find that this means that the relevant arrangement must include a requirement or obligation upon Ashworth Trading to make the supply (albeit that the requirement or obligation need not be a legally enforceable one). There is no evidence that the acceptance of a Bed onto site or as part of care is anything more than merely permissive and so does not involve any such request or obligation.

34. Secondly, the Home must be a party to the arrangement. If the Home is acting as an agent to a disclosed principal, either in dealing with the logistics of the purchase or making the payment from trust monies, the Resident is the party to the supply not the Home. We note that *Chitty on Contracts,* 32nd Edition, 2015, states as follows at paragraph 18-014:

> "Where a person negotiates a contract as agent between his principal and a third party, the contract will generally be between the principal and third party."

35. Although the agency arrangement might itself be an arrangement, the supply itself is not made in accordance with that arrangement; instead the agency is what brings about the contract of supply between Ashworth Trading and the Resident. The supply is therefore made in accordance with the supply agreement, not in accordance with the agency arrangement.

36. The position might be different if the Resident is in fact acting as agent for the Home. In such circumstances, the agency arrangement would cause the Home to become a party to the supply agreement with the supplier, whether as disclosed principal or undisclosed principal. The supply would therefore be made in accordance with that agency arrangement because it is that agency arrangement which would cause the Home to be a party to the supply agreement. However, we make no determination as to this hypothetical situation as it does not arise on the facts of the present case. Indeed, we note that HMRC does not rely on any agency agreement between the Home and the Resident or even the Home's logistical involvement in arranging the supply to suggest that this engages Note (5E)(a).

37. Thirdly, there is no evidence or material before us which enables us to determine the reasons for the inclusion of Note (5E)(a). However, we do accept that it is clear from the context of Note (5E) and in particular Note (5E)(b) that it operates as

an anti-avoidance measure, thereby preventing a Home from purchasing or renting the Beds at zero rate. Again, that is not happening in the present case as it is clear (and conceded by HMRC) that the Resident or family is the recipient of the supply.

38. Fourthly, in construing Note (5E)(a) we must consider the scheme of the Notes as a whole and their interplay with Schedule 8, Group 12, Item 2(b). If HMRC are correct, then, where a user is a resident in a relevant institution (or, for completeness in the context of Note (5B), an in-patient or attending at the premises of a relevant institution), Note (5E)(a) will in effect always apply because the Home will inevitably be allowing the bed (or other relevant item) into its premises. If this were the case then there would be no need for Note (5D) to restrict the operation of Note (5B), as Note (5E)(a) would exclude the item in any event. Construing Note (5E)(a) in this way would effectively mean that there are no exceptions to Note (5B), which does not appear to us to be consistent with the way in which the Notes are framed.

39. It follows that we allow the appeal.

40. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 16 JUNE 2017