

[2013] UKFTT 89 (TC)

TC02507

Appeal number: TC/2011/03380

Value Added Tax – *antiques centre supplying stallholders with space and a sales service – whether one single exempt supply of a right over land or one single standard rated supply of a sales service – neither – two distinct individually rated supplies – Appeal allowed in part*

FIRST-TIER TRIBUNAL

TAX CHAMBER

ANTIQUES WITHIN LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE LADY JUDITH MITTING
MR MOHAMMED FAROOQ**

Sitting in public at Stoke on 9 January 2013

Mr Nigel Ferrington, VAT Consultant, for the Appellant

Mr John Nicholson, Officer of HMRC, for the Respondents

DECISION

1. Under appeal is the Commissioners' decision to raise an assessment to VAT against the Appellant in the sum of £8,479 dated 28 August 2010. The assessment arises from the Commissioners' contention that in the circumstances which we set out below, the Appellant was making one single standard rated supply of a sales service. The Appellant, on the other hand, maintains that the supply was one single exempt supply of a right to occupy land with an incidental, ancillary sales service. This is the issue before the Tribunal.
2. We heard oral evidence on behalf of the Appellant from its Managing Director, Mr Robert Hicks. The Assessing Officer, Mrs Diane Jenkins, gave evidence for the Commissioners.
3. The Appellant had also raised in its Notice of Appeal an argument of legitimate expectation arising out of a control visit by the Commissioners on 23 September 1998. It was accepted by Mr Ferrington that, quite apart from the issue of our jurisdiction, there was insufficient factual evidence to mount this argument and he withdrew this limb of the Appeal, leaving before us the single issue of the nature of the supply.

Legislation

4. Item 1 Group 1 Schedule 9 Value Added Tax 1994 exempts, subject to a number of exceptions which are not relevant to the issue before us, “the grant of any interest in or right over land or of any licence to occupy land”.

The Facts

5. The facts were not in dispute and we find to be as follows: Mr Robert Hicks was at all material times the Managing Director of Antiques Within Ltd (“Antiques Within”). The company traded from a set of premises called Compton Mill, occupying the ground floor. The company was in the nature of an antiques centre and rented out in the region of 70% of its floor space to other antique dealers who were referred to throughout the Hearing as “stallholders”. There would at any given time have been between 5 and 9 such stallholders, each one occupying either a designated room or a designated space in the main retail area. In either case the stallholder’s allocated space was specified and discrete to him and within it he would display his goods for sale. Each stallholder made one single payment to Antiques Within ranging from £50 to £100 per week depending in the main on the size and location of his particular space. All agreements between Antiques Within and the stallholders were oral, there being no written contracts.
6. The nature of the business meant that the stallholders would not always be able to be on site. They would have to source and collect and deliver goods and a number of them would have additional stalls elsewhere. To assist an absentee stallholder, Antiques Within offered what we will call a sales facility. Other than a small fee for certain payment types as described in paragraph 7, no additional fee was paid for this facility. Whether or not it was taken up would depend entirely on the stallholder. No evidence was given that any stallholder had ever refused the facility. Equally the amount of time which a stallholder would spend on site would vary enormously and therefore the individual stallholder’s use of the facility would also vary. We were led to believe that the majority of stallholders would probably be absent for over half the time.
7. The facility offered operated as follows. The stallholder would label each individual item of the goods which he was displaying. The label would bear his own name and possibly a contact number and it would thus be immediately obvious to a prospective purchaser who the vendor of that particular item was. The label would also display the retail price of the item and a coded trade price which trade customers were able to read. In the absence of the stallholder to deal with a sale, the sale would be handled by Mr Hicks or his wife. If the customer paid cash, the cash would be put aside in a pouch for the stallholder. If payment was by cheque, the cheque would be made payable to the stallholder and again placed in his pouch. In neither case of cash or cheque payment did Antiques Within bank the proceeds. Cheques and cash alike merely awaited collection by the stallholder. If payment was by card, this would be processed by Mr or Mrs Hicks and all receipts would be paid automatically into a designated stallholders’ account which was a bank account operated by Antiques Within. Antiques Within charged the stallholders a £5 credit charge for each card payment. Basic records were kept for each stallholder detailing all sales made on his behalf. The stallholder would just pick up, when next on site, the cash and cheques which had accumulated in his pouch. Distribution of the card receipts out of the stallholders’ account were made weekly by cheque and each stallholder was charged £1 for their cheque. In the event of Mr or Mrs Hicks making a sale partly of their own goods and partly those of a stallholder, if the customer paid by cheque, the cheque would be banked by Antiques Within and the relevant stallholder paid out on distribution.
8. Mr & Mrs Hicks had no power to barter or negotiate a sale price different from that displayed. Any such negotiation had to be conducted between the customer and the stallholder, probably by telephone, and the Hicks would merely deal with the sale at whatever price they were instructed by the stallholder. When the customer asked for an invoice, they were given an Antiques Within invoice on which would be added “as Agent for (the stallholder)”.

9. Mr Hicks also had an understanding with each stallholder that if a stallholder's designated area was looking empty or sparse, he could display Antiques Within goods within that area. These goods would clearly be labelled as belonging to Antiques Within and would be dealt with throughout as such. We understood that Mr Hicks obtained the agreement in principle of the stallholder that he could do this at the inception of the letting but did not seek specific consent on each occasion. It was however always open to the stallholder when he saw what was being displayed to object and Mr Hicks would immediately move the item(s) out.
10. Antiques Within held insurance cover for all the goods stored on the business premises, including those of the stallholders, and was responsible for security of the entire site. Antiques Within would also be responsible, as no additional payment was made by the stallholders, for the payment of all outgoings on the premises, including for example heating, lighting, business rates etc.
11. Mr Hicks had always treated the rental income which he received from the stallholders as exempt from VAT. However on a control visit by Mrs Jenkins in July 2010, she formed the view that such was the nature of the entire and additional services offered by Antiques Within, that what was being supplied was not just the land but a sales service which should have been standard rated. She issued a ruling accordingly and also drew up an assessment to cover past receipts. We heard evidence from both Mr Hicks and Mrs Jenkins as to what had taken place at the July 2010 meeting as it was Mr Ferrington's contention that Mrs Jenkins had made inadequate enquiries and had thus reached a flawed decision. Mrs Jenkins accepted that she had not at the time fully understood certain of the details but stated that, even having heard them in Mr Hicks' evidence, her view remained unaltered.

Case Law

12. We were referred by the parties to the following cases;

Sinclair Collis Ltd v Customs & Excise Commissioners (C-275/01) [2003] STC 898
Revenue & Customs Commissioners v Weight Watchers (UK) Ltd [2008] STC 2313
Card Protection Plan Ltd v Customs & Excise [2001] UK HL/4 [2001] 2 AllER 143
Levob Verzekeringen BV v Staatssecretariat van Financien (c-41/04) [2006] STC 766
Purple Parking Ltd & Anor v Revenue & Customs Commissioners (C-117/11)

Submissions

13. Mr Ferrington, for Antiques Within, relying on *Purple Parking*, argued that there was one single exempt supply of a right to occupy land. In *Purple Parking*, the customer's principal aim was to obtain airport parking at a reasonable price. The "park and ride" service from car to plane was found to be ancillary and no more than a means to enjoying the principal supply of the parking. Similarly, contended Mr Ferrington, the principal aim or objective of the stallholders was to secure a good site from which to market their goods, without which no goods could be sold. The sales facility offered by Antiques Within was no more than incidental and was not essential to the sale of the goods. Antiques centres such as this, he told us, were common throughout the UK and he knew of no other where the occupier charged its stallholders VAT on the rent.
14. Mr Nicholson, for the Commissioners, submitted also that there was only one single supply but it was his contention that that supply was a standard rated supply of the sales facility. In citing *Sinclair Collis* which concerned the granting of a right to install and operate vending machines, Mr Nicholson contended that the objective of the stallholders was to secure sales of their goods. The provision of the site from which the sales took place was no more than the means of effecting the sales. The situation of the stallholders was identical, in his submission, to that of the operators of the vending machines in *Sinclair Collis* where it was said at paragraph 30 that;

“In those circumstances, the occupation of an area or space at the commercial premises is, under the terms of the agreement, merely the means of effecting the supply which is the subject matter of the agreement, namely the guarantee of exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines, in return for a percentage of the profits”

The provision of the space to the stallholder did not constitute an aim in itself but merely a means of better enjoying the principal aim of securing sales.

Conclusions

15. We believe it to have been common ground that certain criteria should guide our thinking. First, the position should be examined from the standpoint of the stallholders rather than Antiques Within. With what were the stallholders being supplied? Secondly, we should have regard to the essential features of the arrangement between Antiques Within and the stallholders and consideration has to be given to all the circumstances in which the transactions took place. Thirdly, if what we have from an economic point of view is in reality a single service it should not be artificially split. Fourthly, the fact that one single price is charged for the aggregate of the transaction is relevant but not conclusive as the price may be apportioned. Fifth, if one of the services is not a principal service in itself but no more than a means of better enjoying the other, then that should be regarded as ancillary to the other.
16. Analysing the transactions before us, we are of the view that what the stallholders were getting for their payment were two distinct principal services. They were supplied with a designated and discrete area of space from which to operate – to display their goods and to make their sales. Additionally, they were offered a sales service – a facility by which their displayed goods could be sold even when they, the stallholders, were not on site. Neither of these quite distinct supplies can be seen as merely incidental to or ancillary to the other.
17. The circumstances and essential features, outlined above, of these transactions are clearly distinguishable from the circumstances of *Purple Parking* and *Sinclair Collis*. In *Purple Parking*, there were, as we have said, two identifiable supplies, namely a supply of car parking and a park and ride facility. The Court found that the first and foremost aim of the customer was to secure car parking and the provision of a transport service was only the inevitable consequence of the fact that the car park was located some distance from the airport. The parking service was so clearly predominant and the transport service so clearly ancillary that there was found to be the one principal supply. The relationship between the two supplies made by Antiques Within is much more evenly balanced. It was common ground, and indeed obvious, that the principal aim of the stallholders is to sell their goods. The provision of a site is essential to them. However, in purely practical terms, no sale can be made in the absence of the stallholder unless an alternative facility is available to him. The provision of the sales facility is therefore a vital part of the supply to him. If the stallholder is not on site, he cannot make a sale unless he makes some other arrangement. That arrangement is the sales facility supplied by Antiques Within.
18. Equally *Sinclair Collis* can be distinguished. In *Sinclair Collis* the owners of the machines were granted the right to install and operate the machines on the site owner's premises. They had no exclusive right to any particular part of the site and indeed the site owner could move the machines around as he wished. There was found to be no letting of immovable property. In contrast, the stallholders are granted their own distinct and discrete area. They choose it and once agreement has been reached, that site remains theirs. This is not negated by Antiques Within occasionally placing their own goods in a particular area to enhance the appearance. This is done with the consent of the stallholder and indeed if the stallholder doesn't like what he sees he can demand the removal of the items.
19. Another way of approaching the analysis of the transactions is to ask whether the supply of the sales facility could be omitted from the overall supply. The answer is yes. The sales facility

gives the stallholder something above and beyond the mere supply of his space. It gives him the ability to sell his goods in his absence. This facility has to be seen as an aim in itself and not merely a means of better enjoying the supply of the space.

20. Our analysis of the arrangements between Antiques Within and its stallholders leads us to conclude, and so we find, that the stallholders were receiving two separate and independent supplies. They were receiving an exempt supply of an area of space from which to operate and a standard rated supply of a sales facility which they could take up if they wished but need not if they did not. This conclusion was not contended for by either party, both contending that there was only one single supply. As however the result of our conclusion is that the assessment is not upheld in full, we take it that we are allowing the appeal in part.
21. As there was no argument before us that there was a multiple supply, there was no discussion of apportionment. We assume that this is a matter which will now be considered and negotiated between the parties and will form a separate decision by the Commissioners in due course. If however it is the wish of the parties that the question of apportionment is brought back before us then they should notify the Tribunal within 21 days of the date of release of this Decision. If no such notification is received, we will take our role as concluded.
22. 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.