

**B E T W E E N:**

**EXPRESS MEDICARE LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS OF CUSTOMS AND EXCISE**

**Respondents**

**Tribunal: Mr Theodore Wallace (Chairman)**

**Mr John Brown CBE, FCA, ATII**

**Mrs Rosalind Rudd, JP**

**Sitting in public in London on 19 and 20 September 2000**

**Mr P White, Director, for the Appellant**

**Mr Hugh McKay of Counsel, instructed by the Solicitor of Customs & Excise, for the Respondents**

## DECISION

1. This appeal concerns an assessment of £5,082 for the three month period ending 29 February 1996 in respect of incontinence pads supplied by the Appellant. More specifically it concerns the effect of s.47(2A) of the VAT Act 1994, inserted with effect from 1 May 1995, on zero-rating of supplies under Schedule 8, Group 12, item 2(g). The Appellant treated supplies billed to thirty-three private non-charitable nursing homes for use by named residents, who paid the nursing homes for them, as zero-rated under Group 12, item 2(g). The Commissioners assessed them as standard-rated by reason of s.47(2A).

2. Schedule 8, Group 12, which covers “Drugs, Medicines, Aids for the Handicapped, etc”, includes under item 2,

“2. The supply to a handicapped person for domestic or his personal use ... of —

...

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

...”

The Commissioners accept that persons needing incontinence pads are handicapped within Note (3) as “chronically sick or disabled.” It is common ground that the pads were appliances not included in paragraphs (a) to (f) and that they were designed solely for use by a handicapped person.

3. The Commissioners contend however that, by reason of s.47(2A), which took effect from 1 May 1995, the supplies were not made to the handicapped persons but to the nursing homes. Section 47(2A) which was inserted by the Finance Act 1995 provides,

“Where ... goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent.”

The Commissioners say that this provision has the effect that the incontinence pads are to be treated as supplied to the nursing homes rather than the individual users, and that consequently item 2(g) does not apply to any of the supplies of pads for residents of the thirty-three homes.

4. Before 1 May 1995, s.47(3), which empowers the Commissioners to treat supplies through an agent who acts in his own name as made both to and by the agent, covered goods as well as services. The Commissioners did not apply it to the Appellant’s supplies which it accepted as zero-rated. For example they wrote as follows to Abbey Crest (Reading) Ltd on 12 May 1993,

“...

From the information provided in your letter, this office is satisfied that your nursing home complies with the following conditions:

a. You act as an agent of your incontinent residents;

- b. You have provided us with a list of the claimants to the relief for whom you are acting as agent;
- c. Payments for each supply comes from your residents' own funds (in most cases those funds include D.S.S. support); and
- d. The supplies do not form part of your overall accommodation package.

As such, you may produce this letter to your supplier of incontinence pads, along with the normal declarations (as per Annex A of the enclosed leaflet 701/7/86). Your supplier may then zero-rate the supply of the pads to you.”

5. A declaration which was exhibited was on a form prepared by the Appellant as follows (the part in italics was filled in by the nursing home):

“V.A.T. Declarations

Care homes with HM Customs and Excise Compliance  
Authority for Incontinence Products only

The following goods are being supplied to individuals in

|                          |   |
|--------------------------|---|
| Name/Address of home     | <i>Abbey Crest Nursing Home Essex<br/>Way, Kennylands Road, Sonning<br/>Common, Reading, Berks.</i> |
| Goods ordered/supplied - | INCONTINENCE PRODUCTS,<br>Supplied by Express Medicare Ltd  |

DECLARATION: I am the proprietor/responsible representative of the above-named Nursing/Residential Home acting on behalf of my handicapped residents and I certify that I am using the residents' own funds for the purchase of incontinence products.

I claim that the supply of these goods is eligible for relief from Value Added Tax under Group 14 of the Zero-Rated Schedule to the Value Added Tax Act 1983.

I have received compliance Authority from HM Customs and Excise Local VAT office a copy of which I attach for your records.

|           |                    |      |                   |
|-----------|--------------------|------|-------------------|
| Signature | <i>(illegible)</i> | Name | <i>L J Wright</i> |
| Position  | <i>Matron</i>      | Date | <i>7/8/95”</i>    |

We observe that the form in Annex A Notice 701/7/86 was designed to be signed by the individual declaring that he is chronically sick or disabled etc; the form prepared by the Appellant was an adaptation. Annex A was not a statutory prescribed form, being only contained in a Notice. Group 14 was the predecessor to Group 8.

6. As already stated, prior to the insertion of s.47(2A), the Commissioners accepted that similar supplies were zero-rated. It is not suggested that this was a concession or that it was

incorrect. That treatment was therefore on the footing that, before the change in law in respect of supplies of goods “through an agent who acts in his own name”, these supplies were “to” the handicapped person as opposed to the nursing home. The Statement of Case made no mention of s.47(2A) or of agency; the assessments were however clearly made on the footing that the insertion of s.47(2A) meant that the supplies could no longer be zero-rated. The hearing was conducted on the footing that, apart from s.47(2A), the Appellant would succeed.

7. At this point a brief historical narrative is needed. The Appellant, which was registered for VAT in 1987, had been zero-rating supplies billed to nursing homes which provided declarations such as that by Abbey Crest together with lists of residents without any dispute by the Commissioners. The bills being zero-rated were not in fact tax invoices.

8. Section 47(2A) was inserted into the VAT Act 1994 by the Finance Act 1995 with effect from 1 May 1995. Initially, its potential impact on arrangements such as those adopted by the Appellant was not apparently appreciated by the Commissioners.

9. On 24 October 1995 a Business Brief was published by the Central Office of Information on behalf of the Commissioners stating that the law concerning VAT on incontinence pads supplied through a nursing home as an agent had been changed by s.47(2A) with effect from 1 June 1995. The brief stated that the new treatment would be applied to all contracts entered into after 9 October, but that, where Customs had approved zero-rating on the basis of past interpretation, local VAT offices would be contacting suppliers to ask them to notify their customers by 1 December at the latest. The brief stated “Customs accept that zero-rating can continue until these contracts expire ...”

10. The Commissioners wrote to the Appellant on 6 November 1995. The letter contained in the following passage:

“Supplies to commercial nursing homes or NHS Trusts: new arrangements

The main supplier can zero-rate his supply if:

There is a direct contract between the main supplier and each patient receiving the supply; the nursing home or Trust plays no part in the supply apart from initially introducing the patients to the supplier or vice versa; and

The incontinence products are delivered directly to the patients and are not held by or taken into common stock of the nursing home or Trust.

If these conditions are not met the main supplier must standard rate the supply.”

We are not satisfied that this was a correct statement of the law. As held by the Tribunal in Mölnlycke v. Commissioners of Customs and Excise (1996) VAT Decision No.14641, where the chairman was the same, zero-rating could apply where a nursing home contracts with a supplier for incontinence pads to be supplied to the residents. In that case there was a contract conferring third party rights rather than an agency situation. Furthermore, the Commissioners’ letter of 6 November assumed that an agent acts “in his own name” even when expressly acting for a named principal. We return to this.

11. On 20 December 1995, Southern Medical wrote to the Commissioners complaining that it was losing business to six competitors (including the Appellant) who were not charging VAT

on incontinence pads. On 19 January 1996 Vale Care Medical wrote to the same effect.

12. On 23 January 1996 the Appellant wrote to the Commissioners enclosing a sample nursing home agreement which provided for the nursing home to contract with the Appellant for the Appellant to supply incontinence pads to patients at the nursing home's expense with no title vesting in the nursing home. The draft agreement bore strong similarities to the agreements held to be effective for zero-rating in Mölnlycke, which of course had not then been decided, although it was under appeal to the Tribunal.

13. The Commissioners replied on 31 January 1996,

“4. In the agreement provided the Nursing Home is acting in its own name, and such contracts now relate (sic) to standard rated supplies ...”

Further correspondence followed. The Appellant registered for VAT and charged the nursing homes VAT with effect from 15 April 1996 in compliance with the Commissioners' ruling.

14. Assessments totalling £10,123 for periods 11/95 and 02/96 were made on 13 June 1996, £5,610 being for 02/96. The Appellant asked for a review. The assessments were confirmed on 20 August 1996. The Appellant appealed on 18 September 1996. The grounds of appeal were that the changes in legislation had not been communicated adequately. Since the correspondence was conducted on a wider basis, we gave leave for the grounds to be amended to accord with paragraph 7 of the Statement of Case, see below. The Commissioners accepted on 17 January 1997 that payment of the tax before the appeal would involve hardship.

15. Repeated stand-over applications were made by the Commissioners for negotiations. The assessment for 11/95 was withdrawn in June 1998. In November 1998 the 02/96 assessment was reduced to £5,252 and it was further reduced on 23 June 1999 to £5,082. Further negotiations followed.

16. On 27 March 2000 the Commissioners served a Statement of Case bearing the date 27 March 1998. Paragraph 7 stated that the Appellant contended “that the supplies in question were properly zero-rated as being made to qualifying recipients”. In paragraph 8, the Respondents contested this stating that, in the absence of evidence to the contrary, the supplies were standard rated and denying that there had been any misdirection.

17. Mr McKay, for the Commissioners, submitted that the Tribunal had no jurisdiction to consider misdirection as a ground of appeal and said that the Appellant's complaint that the changes had not been communicated in time was not a matter for the Tribunal. He said that there did not appear to be any Human Rights point. Mr White did not contend otherwise and we proceeded on the footing that Mr McKay's submission on this aspect is correct.

18. Mr McKay accepted that, before s.47(2A) came into effect, nursing homes would contract as agents for the residents who were the actual users to whom the supplies were made so that zero-rating applied. He did not challenge this treatment, but said that s.47(2A) changed everything, and that as a result the supplies should now be standard-rated.

19. There was no allegation in the Statement of Case that any of the documentation was colourable and Mr McKay addressed the Tribunal on the footing that the declarations and other paperwork should be taken at face value. In our judgment if the Commissioners had contended otherwise this should have been clearly pleaded in the Statement of Case. In fact there was no real suggestion to that effect in the lengthy correspondence. Consideration of the arrangements with the individual nursing homes would have taken considerable time.

Although Mr Taylor, the assessing officer, had visited the Appellant for two days in May 1996, examining records and collecting material, his visit notes were not included in the Commissioners' List of Documents and were not in their bundle for the hearing. Although Mr Taylor was present he was not called as a witness. Mr McKay, who was only instructed shortly before the hearing, was thus in the awkward position that much of the material which ought to have been available was not before the Tribunal and had not been listed by the Commissioners. We can only assume that the Commissioners did not appreciate the potential importance of this appeal: on the basis of the Commissioners' interpretation of s.47(2A), nursing homes would have to register for VAT in order to recover the VAT on pads "supplied" to them and supplied on by them to residents as zero-rated goods.

20. The Bundle of Documents, which by agreement was prepared by the Commissioners ran to 163 pages, some 50 pages having been provided by the Appellant with correspondence. These latter only appeared in the bundle as "4. VAT Declarations and accompanying correspondence". This was most difficult for the Tribunal, and no doubt for Mr McKay. The Commissioners knew that the Appellant was not professionally represented. In those circumstances the production of a bundle which itemised the correspondence between the parties but not the primary material was not helpful.

21. In the event Mr McKay based his case fairly and squarely on the effect of s.47(2A), relying on the declarations made by representatives of the nursing homes that they were "acting on behalf of my handicapped residents" (the Appellant's standard form document). He said that the nursing homes were acting as agents, and that their level of involvement went to the phrase "acting in his own name".

22. Unfortunately this approach involves consideration of some of the facts which the visiting officer should have ascertained but which were not placed before us. There was no evidence or explanation as to why the incontinence pads were not obtained on prescription under the National Health Service.

23. The only witness was Mr White, director of the Appellant, who was transparently honest.

24. We find the following additional facts from his evidence and the documents.

25. The bills for the incontinence pads were made out to the nursing homes and usually covered supplies to a number of named patients. Although payments to the Appellant were by the nursing homes, the individual residents were debited by the nursing homes for their particular supplies. Lists of residents were normally provided by the nursing homes with the declarations. Otherwise they were provided later.

26. Incontinence pads are not of a standard size or price. A thin and elderly person obviously needs a different size to someone who is overweight. Some are designed for urine only, some are not. The thickness will vary as will the quality. Some are self-supporting. There was usually a nursing assessment by the Appellant as to need and type.

27. It was difficult for the Appellant to take orders by telephone. Nursing homes did not usually give the individual patients' names when ordering in 1995/96. However if the nursing home did not know the patients' needs they would not know what to order for his or her use. The number of patients for whom an order was placed varied from one to perhaps twenty. Sometimes the Appellant would know for which individual resident each type of pad was ordered by reason of the nursing assessment and or the types ordered.

28. When placing an initial order a home might ask for prices and regular deliveries. Although prices were agreed, the Appellant did not have a written contract. There was no suggestion that any nursing home charged or received a commission or made any charge to

the residents for the pads, although the cost was of course debited to them. We infer that there was no such commission or charge.

29. The Appellant in fact kept sales files. Mr White had not told the visiting officer about these, but this was probably because he had not asked and Mr White did not appreciate their potential relevance.

30. Salesmen called on potential new customers, i.e. nursing homes. They did not have special training or instructions regarding VAT, although they would have been provided with Declaration forms. They would have been told to tell nursing homes to sign these only if correct.

### **Submissions for Customs**

31. Mr McKay's submissions were, as we have said, based on s.47(2A).

32. He said that s.47(2A) implements Article 5.4(c) of the Sixth Directive which reads,

“4. The following shall also be considered supplies within the meaning of paragraph 1:

...

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.”

The underlining of “goods” in Article 5.4(c) and “services” in Article 6.4 below is ours. Article 5.4 (c) has been the subject of a derogation during the transitional period under Article 28.3(c), which permitted Member States, during that period, to apply measures derogating from the provisions of Articles 5.4(c), 6.4 and 11A(3)(c).

33. Mr McKay pointed to the similarity between s.47(2A) and Article 6.4. Article 6.4 provides,

“Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.”

He said that s.47(2A) brought the UK legislation into line with Articles 5.4(c) and 6.4, treating goods in the same way as services.

34. Mr McKay said that s.47(2A) applies to nursing homes whether acting as agents for undisclosed principals (if the patients are not named) or for named principals. He said that s.47(2A) obviously covers the situation where an agent is acting without disclosing that he is not the principal but that it also covers an agent acting on behalf of named principals where the involvement of the agent is high. He said that “acting” goes to involvement.

35. He said that although the words “in his own name” are not in Article 5.4(c) they are implicit by reason of the concept of “contrat de commission” in the French version; these words cover an intermediary acting in his own name even where the identity of the principal both is known and expressed. He said that in Bashir Mohammed Ltd v. Customs and Excise Commissioners (2000) VAT Decision 16762 it was immaterial that the buyer did not know the identity of the seller which was not named in the catalogue or sale documentation.

36. He said that here the level of involvement of the nursing homes was quite high; they

arranged for delivery monthly or weekly and negotiated on price and quality as well as placing the orders.

## Conclusions

37. We find the words of s.47(2A), “supplied through an agent who acts in his own name”, lacking in precision; they must add something to the concept of agent otherwise they are otiose. It does not seem to us that the words “through an agent” are directed at the physical delivery of goods or the arrangements made for delivery; if an agent places an order for, say future, it cannot logically be relevant whether it is he or the principal who actually arranges the delivery date, or whether the furniture is delivered to one premises or another; the delivery arrangements will often not be made at the same time as the order; delivery may be to a neighbour if the customer is out.

38. Except perhaps on a retail sale, the name of the agent will almost always be known to the other contracting party. In a bipartite contract, it is axiomatic in English law that if he renders himself liable to the other contracting party, otherwise than by implied warranty of authority or some collateral warranty, he is not an agent at all but is the principal. The words “acting in his own name” will obviously cover the situation where the third party does not know that the agent is acting for someone else and possibly also the situation where, although the fact of agency is apparent, the identity of the principal is not disclosed, as was the case in Bashir Mohammed Ltd. We note that that decision is under appeal to the High Court. In Metropolitan Borough of Wirral v. Customs and Excise Commissioners [1995] STC 597, Potts J proceeded on the assumption shared by both parties that the predecessor to s.47(2A) in respect of services covered an agent acting for a disclosed principal; no reference was made in Wirral to Article 5.4(c) which of course concerns goods. We do not consider that assumption to be correct. If an agent signs a contract “for and on behalf of his principal we consider that he is not acting in his own name, but in that of his principal. In the present case the declarations which were clearly contractual documents expressly stated that the nursing home was acting “on behalf of” its handicapped residents and was using their fluids and the names were supplied to the Appellant.

39. Section 47(2A) must, however, be interpreted so as to conform with the Sixth Directive, and in particular Article 5.4(c), if that is possible.

40. The question arises therefore whether the wording of s.47(2A) is capable of being so interpreted and indeed what Article 5.4(c) means, given its own strange wording.

41. This appeal is concerned with goods and not services. The relevant Article is thus Article 5.4(c) rather than Article 6.4 which applies to services. The English version of Article 5.4(c) refers to a contract under which commission is payable on purchase or sale and makes no mention of agency (see paragraph 32 above). That bears no resemblance whatsoever to s.47(2A) which (1) in its terms makes no reference to commission and (2) applies to any supply whatsoever through an agent acting in his own name.

42. Unfortunately the English version of Article 5.4(c) differs radically from the French version which reads,

“4. Sont également considérées comme une livraison, au sens du  
paragraphe 1:

...

(c) la transmission d'un bien effectuée en vertu d'un

contrat de commission à l'achat ou à la vente.”

We translate that literally as: “There is equally to be regarded as a supply (of goods) in the sense of paragraph 1 (the transfer of the right to dispose of goods as owner) ... (c) the transfer of goods effected by virtue of a ‘contrat de commission’ for purchase or sale.”

43. The term “contrat de commission” is a term of art in civil law for a contract made by a “commissionaire”, see the article in [1993] British Tax Review 341, at page 344. The word “commission” in “Contrat de commission” is defined as follows in Le Nouveau Petit Robert (1995),

“Ordre qu’un negociant donne d’agir pour son compte à une autre personne, - Activité de la personne qui se charge de l’achat, du placement de marchandises pour le compte d’un tiers, ... en son nom personnel (= **commissionaire**)

The second meaning appears more relevant than the first. We translate it literally as, “The action of the person who undertakes in his personal name the sale or placing of goods for the account of a third party.” “Commission” refers to the task rather than to remuneration. We are unable to reconcile the wording of the English version of Article 5.4(c) with the French. Assuming, which appears to us to be the case, that the other language versions, or a majority, accord with the French version, s.47(2A) is, to put it mildly, a very poor rendition. We do not see how it is possible to equate a supply by virtue of “contrat de commission” with (any) supply through an agent acting in his own name. We are mindful of the fact that the abolition of the derogation for Article 5.4(c) in Regulation 94/5 coincided with the introduction of Article 26aC covering special arrangements for sales by private auction, however the position of an auctioneer is very different in that he is invariably remunerated for effecting the transaction.

44. Mr McKay relied on the similarity between Article 6.4 and s.47(2A). Article 6.4 provides,

“4. Where a taxable person acting in his own name but on behalf of another takes part in a supply of services, he shall be considered to have received and supplied those services himself.”

He pointed to the fact that the derogation in Article 28.3(c) listed them together. The problem with that submission is that Article 6.4 applies to services and not to goods and that in all languages the wording of Article 6.4 is completely different from that of Article 5.4(c). If Article 5.4(c) and Article 6.4 bear identical meanings, apart from their application to goods and services respectively, we are wholly unable to understand why totally different wording was used in all versions of the Directive. The French version of Article 6.4 reads,

“Lorsqu’un assujetti, agissant en son nom propre mais pour le compte d’autrui, s’entremet dans une prestation de services, il est réputé avoir reçu et fourni personnellement les services en question.”

There is not a single noun or verb common to Articles 5.4(c) and 6(4). We note that the structure and context of Article 5.4(c) differs from that of Article 6.4. However, if the two provisions are capable of being given the same meaning as in s.47(2A) and (3), one would expect at the least some similarity of wording.

45. In any event, the Commissioners cannot rely on the direct effect of Article 5.4(c) if the UK legislation fails to implement the Directive properly. In our judgment s.47(2A) does not apply to the disputed supplies, because the nursing homes were not acting in their own name

but were expressly acting for their residents. Furthermore the Appellant knew that they were acting for their residents because of the documentation.

46. We gave very serious consideration to making a reference to the Court of Justice on the interpretation of Article 5.4(c). The Appellant was unrepresented so that he could not deploy any argument on Article 5.4(c). This put Mr McKay in the difficult position that, apart from points raised by the Tribunal, he had no argument to answer. In fact, whatever the proper interpretation of Article 5.4(c), as stated above we concluded that s.47(2A) cannot be made to fit Article 5.4(c) without twisting the terminology to an unacceptable extent. The interpretation of the Directive is not relevant in this case if the wording of s.47(2A) cannot be made to fit it: we think that it cannot. In those circumstances a reference is not only not necessary to our decision but would be irrelevant. Mr McKay did not seek a reference. The mismatch between s.47(2A) and the Directive will have to be addressed at some stage. We do not however consider that this is the appropriate case.

47. This decision does not of course take account of the further amendments made to Group 12 both in 1998 and in 2000 which are not relevant to this appeal.

48. We summarise as follows. The words “acts in his own name” in s.47(2A) do not cover an agent who is expressly acting on behalf of named principals. The wording of s.47(2A) cannot be reconciled with Article 5.4(c) in the English version. The English version is wholly different from the French version. Section 47(2A) treats goods in the same way as services, whereas they are covered by different articles of the Directive with totally different wording. Section 47(2A) did not apply to the supplies. The appeal is allowed.

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