

Zero-rating – Whether certain products were designed for use by a handicapped person – Was a product delivered by aerosol spray "equipment or appliance"; VATA 1994 Schedule 8 Group 10 item 2(g) – Appeal allowed

TRIBUNAL CENTRE: LONDON

MEDIVAC HEALTHCARE LIMITED

Appellant

-and-

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: JUDITH POWELL
CAROLINE ALBUQUERQUE

Sitting in public in London on 22 and 23 May 2000

Mr Hugh McKay of Counsel instructed by Travers Smith Braithwaite, for the Appellant

Mr Nigel Poole of Counsel instructed by the Solicitor's Office of HM Customs and Excise, for the Respondents

Decision

This is an appeal against a decision of the Commissioners of Customs and Excise that certain products sold by the Appellant company do not qualify for zero-rating under Schedule 8 Group 12 Item 2 of the Value Added Tax Act 1994 – which we shall refer to as the 1994 Act.

The products in issue are:–

1. Medivac Bedding covers – this includes covers for pillows, mattresses and duvets
2. Medivac Vacuum Cleaner
3. Banamite Dehumidifier
4. Medivac Allergen Medication system
5. Banamite Anti-Allergen spray

The appeal in relation to a Venta Airwasher (designed for filtering and cleaning air) was withdrawn by the Appellants and the Commissioners confirmed that they do not oppose zero-rating in respect of a Nebuliser which featured in earlier correspondence. The appeal relates solely to the five products described above.

The Appellant carries on business supplying these products from premises at Wilmslow House, Wilmslow, Cheshire SK9 5AG. Oral evidence was given by Mr Colin Taylor director of the Appellant company and Professor John Ayres (the Appellant's expert witness) and by James Whiteoak (the Commissioner's Policy Adviser in the Charities and Health Care Branch of VAT, Policy Directorate).

Item 2(g) of Group 12 of Schedule 8 of the 1994 Act provides as follows:–

"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".

By virtue of note (3) to Group 12 "handicapped" means chronically sick or disabled.

The Appellant contends that each of the five products in question qualifies for zero-rating when supplied to a handicapped person on the basis that each of the items falls within paragraph (g) of item 2. The Appellant does not contend that any of the products might fall within any other paragraph of item 2.

The Commissioners accept that all the products, with the exception of the Banamite spray, are equipment and/or appliances for the purposes of item (g). Therefore, except in relation to the spray (where there is the additional question of whether it is either "equipment or appliance"), the issues are:–

1. For whom are the Appellants' products designed; and
2. Are those people "handicapped" which in this context and by virtue of note (3) means "chronically sick or disabled".

It is worth disposing of one issue at this stage. If this Tribunal finds that the products are designed for use by a handicapped person, not all supplies will be zero-rated; but only the supply of such equipment to a handicapped person for domestic or his personal use. When the Appellant company supplies any of the products, it requires any recipient who claims to qualify for zero-rating to sign a certificate which contains a declaration that he or she is handicapped. The Commissioners accept that this procedure is satisfactory so that if the products fall within item 2(g) the Commissioners will accept that a supply to a person who signs this certificate is zero-rated.

We found it convenient to address the two issues by asking ourselves a series of questions.

1. How does the Tribunal determine for whom the Appellant's products were designed?

For the Respondents, Mr Poole contended that Tribunal cases lean towards an objective test of the designer's intention and that the physical characteristics of the items determine the matter rather than a subjective assessment of the intent in the designer's mind – although he accepted that this remains relevant.

The Commissioners invited the Tribunal to find that provided the sole purpose in the designer's mind is that the equipment or appliances used by handicapped persons, it matters not that it is capable of use by others but that if the designer intends a general purpose then the word "solely" prevents the test from being satisfied. WE agree with that approach and particularly that the word 'solely' qualifies "designed".

Mr McKay on behalf of the Appellant did not accept that any real principles emerged from the many Tribunal cases which had considered similar issues although he suggested that the correct approach could be found in the words of Mr Theodore Wallace (Chairman) in *Foxer Industries v Customs and Excise* (LON/95/1452A) as follows:–

"Although in our opinion the Tribunal must consider the evidence by the designer of his intention, it is our view that, in a case where, as here, there is a wider potential use, the designer's evidence of intention must be approached with considerable circumspection and must be considered in the light of the surrounding evidence including the promotional material".

We agree with this summary, and have adopted the approach described. It is particularly relevant to this case where each of the products (apart from the Spray) has a wider potential use. In this case, we heard the oral evidence of Mr Taylor (who was directly involved to a greater or lesser extent in the design process of each product) and we were shown promotional material for 3 of the 5 products (the bedding, Medivac and Medivap). We were given the opportunity to read a booklet written by Mr Taylor called "Fight the Mite" as well as instruction leaflets supplied to purchasers of the relevant products. This evidence contrasts with the evidence available to the

Tribunal in a number of other cases, which did not include oral evidence from the designer.

The Appellant says in this case that each of the products was designed solely for use by those sufferers from house dust mite allergy who are handicapped by the condition in the sense of being chronically sick or disabled. The Appellant does not assert that all sufferers from the allergy are chronically sick or disabled but does assert that it was only for those who are disabled in this sense that the products were designed. The Appellant accepts that each of the products might be used by those who are not disabled by the allergy but said – and we believed that evidence – that none of the products is necessary for a person who has no allergy to house dust, and that any person not suffering from such an allergy would be discouraged from purchasing any of the items.

We found as a fact that the main purpose for which each of the products was designed was either to reduce the house dust allergen or to neutralise its effect in those who are sensitive to it. The products – other than the Banamite Spray – also had the normal use associated with the type of product in question. The Medivac, for example operated as an ordinary vacuum cleaner – the bedding had an ordinary function as bed coverings and so on.

We found the expert evidence of Professor Ayres helpful and clear both in explaining the effects of house dust on sufferers of allergy to it and his understanding of the expression "chronically sick or disabled".

2. What is the effect on an individual of house dust allergy?

Amongst his many medical qualifications, Professor Ayres is Professor of Respiratory Medicine at Warwick University and is a Consultant at Birmingham Heartlands Hospital. He has a special interest and expertise in the condition of asthma.

He explained that of the 3 conditions asthma, rhinitis and eczema, asthma is that most importantly associated with house dust mite sensitisation. His evidence concentrated on the asthmatic condition, but he referred briefly to the symptoms suffered by those with the other two conditions.

It seems that when certain individuals are first exposed to an allergen such as house dust mite, there is an immune reaction which sets up the ability to recognise future exposures to the allergen; this is called sensitisation. Once a person has become sensitised, future exposure will trigger a response.

A common allergen is the house dust mite. Of the total estimated 3,000,000 asthmatics in this country, between 85% and 95% will be allergic to house dust mites.

Professor Ayres explained that the severity of the patient's asthmatic condition is commonly described with reference to 5 "steps". Step 1 describes a sufferer with the mildest symptoms with those falling into steps 2 to 5 showing progressively more severe symptoms. A sufferer may progress from one step to another during his life; some sufferers may improve and "move down" a step. 80% of the 3,000,000 or so people in this country suffering from asthma fall within steps 1 or 2 and their condition is normally controlled by their own General Practitioner; the condition is

not regarded as severe and responds well to medication. Professor Ayres will normally become involved in treating a sufferer who falls within steps 3, 4 or 5; by stage 4 and 5 he tells us that attacks are likely to be frequent, the individual will usually be chronically symptomatic, may become unable to work and even in between attacks his abilities will be permanently impaired.

Professor Ayres confirmed his view that if a sufferer were to be compliant in taking all steps to reduce his exposure to house dust mite, his symptoms would be likely to improve; he might even achieve a step down in severity or avoid a step up. Professor Ayres would not advise every sufferer to look seriously at eliminating or reducing his exposure to trigger factors. Where a sufferer falls within steps 4 or 5, the drugs available to alleviate his symptoms may not completely control them and may cause unpleasant side effects. At this stage, he would encourage a sufferer to look seriously at trigger factors on the basis that if he could reduce or eliminate his exposure to them he might achieve an improvement beyond the best condition that can be achieved with drugs alone. When asked, Professor Ayres was unable to confirm whether or not a mild sufferer could control his symptoms solely by effective house dust mite eradication; no studies have been done about this because, in his view, people suffering from mild asthma were sufficiently well controlled through use of medication that they had no incentive to try other methods of control which were either expensive or demanding to use.

Professor Ayres was also helpful in describing what he understands by the phrase "chronic sickness or disability".

3. What is the meaning of chronic sickness or disability?

In his written evidence, Mr Whiteoak helpfully referred to the Tribunal case of *G D Searle and Co Limited v Customs and Excise* (LON/94/1290A) where the Tribunal Chairman noted that "sick" had been defined by the New Shorter Oxford English Dictionary as "suffering from illness of any kind, ill or unwell", whilst "chronically" means "lasting a long time, lingering, invertebrate" and "disability" as a "physical or mental condition (usually permanent) that limits a persons activities or senses, especially the ability to work".

The meaning of "chronic sickness or disability" was also dealt with at length by Professor Ayres in his written report which was available to the Tribunal. His oral evidence was helpful in explaining some parts of this. He started by explaining that of the 3 conditions of asthma, rhinitis and eczema, asthma is that most importantly associated with house dust mite sensitisation. We have dealt in the previous section with his description of the asthmatic condition. Rhinitis was described as an inflammatory condition of the nose and where the symptoms are due to sensitisation to the house dust mite the symptoms are perennial; of those whose symptoms are due to allergy, the predominant allergen to which they are sensitised is the house dust mite. There is apparently a strong association of rhinitis with asthma. It is described as particularly causing disturbed sleep and poor performance at school or work the following day. There have apparently been cases of suicide as a result of severe symptoms. Eczema is described as an allergic inflammatory condition of the skin linked with asthma. This is also commonly associated with allergy to house dust mite. It also can result in severe and distressing symptoms.

Professor Ayres described the term "chronic" in medical terms as meaning a condition that is long standing and not as implying a level of severity.

So far as disability and sickness are concerned, he regarded them as words which to some extent overlap and it is worth quoting from his report as follows:—

"A patient with a chronic disease (e. g. asthma) has a persistent condition. This may be well controlled in which case the patient is not regarded as sick or disabled. Some patients, however, have persistent symptoms and will be regarded as not being in perfect health (i.e. sick) but this may not disable them from leading a normal life. As the severity of the condition worsens the patient may well then be regarded as both sick and disabled. This a matter of semantics and has no real significance in the clinical management of such patients. The reference in the VAT legislation to "chronically sick or disabled" is interpreted by me as a "spectrum of disease severities".

He went on to summarise "Overall therefore, asthma, rhinitis and eczema are all chronic diseases and a cause of disability in a proportion, but not all, patients. One of the major causes of these three conditions is allergic sensitisation to the house dust mite and there is evidence that persisting and continued exposure can worsen the condition. Disability from these various conditions can be severe resulting in loss of job and in severe cases suicide. Consequently, I would recommend the use of mite controlled exposure in these patients who I would register chronically sick or disabled as they experience significant distress or degradation of quality of life." (our emphasis)

There was not any real disagreement between the parties about the meaning of "chronic sickness or disability", nor that some asthmatics can be regarded as chronically sick or disabled but not all sufferers can be so regarded. We agreed with those words we have chosen to emphasise which were used by Professor Ayres to describe a person who is chronically sick or disabled; and noticed particularly that it was this type of sufferer who would be encouraged by Professor Ayres to use mite controlled exposure. He did not suggest that he recommended these measures to those whose symptoms did not result in significant distress or degradation of quality of life.

This leads to the next question which is for what purpose did the Appellant design its products.

4. **For what purpose did the Appellant design its products?**

(a) **Medivac**

It was clear from Mr Taylor's evidence that in developing the Medivac he was aiming to design a machine able to arrest house dust mite particles which because of their microscopic size could not be arrested by a conventional vacuum cleaner. In order to help him achieve his goal, Mr Taylor used in his design very specialised equipment originally developed for nuclear purposes.

The Tribunal accept that the Medivac, which uses a special filter known as a "high particulate air filter", is particularly effective in arresting minute particles of dust. In addition, the Medivac compares favourably with other "top of the range" ordinary vacuum cleaners (which now incorporate a similar air filter), by collecting the dust in

sealed bags so that if the person emptying the machine is the sufferer, he or she has no direct exposure with the contents of the bags. By contrast, other cleaners have no dust collection bags so that, when emptied, there is a tremendous and sudden exposure to the dust which has been collected with the case. The Medivac also operates as a normal vacuum cleaner. A person who purchased the Medivac with the express intention of reducing house dust mite would not also have to purchase a conventional vacuum cleaner for general cleaning tasks in the house.

(b) **Banamite Dehumidifier**

The Banamite dehumidifier is designed to reduce humidity levels. Mr Taylor explained that if humidity levels were reduced to 45% or below the equilibrium of the climate for house dust mites was disturbed sufficiently to cause them gradually to be eliminated over a period of about 12 months. The dehumidifier which he modified relied on a sophisticated filter mechanism which was able to filter out particles as small as house dust mite allergen. The principal UK manufacturer of dehumidifiers was persuaded to incorporate a specific filter into one of their dehumidifiers and this was then available for distribution by the Appellant under the Banamite name. Apparently the machine has not been a commercial success; Mr Taylor explained this in part as being because of its relatively high cost compared with other dehumidifiers on the market. Again, the machine is designed to reduce the house dust mite allergen present in the house, but also operates generally as a dehumidifier.

(c) **Bedding Products**

Mr Taylor explained that the Appellant developed the bedding products as a result of enquiries from existing customers who had house dust mite allergies. Existing bedding products which claimed a reduce exposure to the allergen were unsatisfactory on the grounds of cost and durability. The products which are now supplied by the Appellant were designed so as to enclose mattresses, pillows and duvets using a cotton fabric laminated with a breathable membrane on the underside. The products were the first to receive the British Allergy Foundation seal of approval. We could see that the bedding covers are functional rather than fashionable – they are plain white and we accept Mr Taylor's evidence that they are designed to be used as an intermediate layer between the bedding itself and a decorative cover.

(d) **Medivap**

The Medivap allergen medication system operates by heating water to very high temperatures which is delivered as steam to kill house dust mites and their eggs and to de-nature house dust mite allergen. (The effect of de-naturing is described below). Sales of this are low – because of its cost compared with other apparently similar machines on the market, and again it is effective as a conventional steam cleaner.

(e) **Banamite Spray**

The anti allergen spray is designed to "de-nature" house dust mites. Mr Taylor explained that sprays designed to kill house dust mites had been available for some time; based on the use of pesticides as a killing agent. Because house dust mites are more resistant than insects to pesticide, higher concentrations of pesticide are needed if they are to be effective in killing house dust mites. A further shortcoming of other

sprays is that although they kill the mites they do not deal with their eggs (which hatch in due course). The spray has to be applied to materials such as pillows and bedding where it (plus its chemical content) is inhaled by the sufferer.

The Banamite anti allergen spray targets the allergen rather than the mite and it does not use pesticides as a killing agent. When a sufferer is exposed to dust to which he is sensitive his system responds by issuing large quantities of anti-bodies which is the cause of the allergic reaction. The spray works on the basis of "denaturing"; which we understood to mean changing its character. If the house dust mite is "de-natured" the sufferer's immune system is less sensitive to it. The product was originally supplied in very large cans and was dispensed via a hose and liquid spray gun. This had two disadvantages. First, the cans were very heavy which made them difficult to manage for the average customer and, secondly, if the liquid was stored for any length of time – particularly in cold conditions – the product would alter in such a way that it would stain materials to which it was applied such as carpets, curtains, bedding etc. For that reason it was supplied in these smaller aerosols, sprays and foams which are the subject of this appeal.

Mr Taylor explained that the Banamite spray is a successful and popular alternative to the Medivap (which operates in the same way by de-naturing the house dust mite allergen) because the spray is much cheaper than the Medivap system.

In conclusion, we found that the specific purpose for which each of the products was designed by the Appellant was either to eradicate the house dust mite or to so change its nature that it was no longer in a form to which the sufferer was sensitive. We found that this was so even though four of the five products had another use – that conventionally associated with the type of product concerned. But this does not answer the question for whom were the products designed – which is the next question we asked ourselves.

5. For whom did the Appellant design its products?

The decision of the Commissioners in relation to the Appellant's products resulted from a wider review by Mr Whiteoak of the VAT treatment of supplies of vacuum cleaners and other allergy relief equipment. Mr Whiteoak explained that in writing his report he accepted that for some people asthma is disabling or makes them chronically sick. He admitted that, in producing his report, he was influenced by a story he had heard that about 11% of the United States of America's Olympic team for the 1984 Los Angeles Olympics were asthmatic; if his conclusion from this is that some asthma sufferers are not chronically sick or disabled (and this seems to be the only relevant conclusion), the Appellant readily accepts that this was so. The expert evidence of Professor Ayres also supports this view.

The conclusion drawn by Mr Whiteoak was that if a product was designed generally for asthma sufferers then it would not satisfy the condition of item 2(g) because all asthma sufferers could not be said to be chronically sick or disabled. His report was drafted on that basis. This is also accepted by the Appellant. Mr Whiteoak went on to say "to reiterate it was my doubts about the nature of products claimed to have been designed for use by asthmatics which also help to spur this review". Of course Mr Whiteoak may have had in mind products other than those marketed by the Appellant when he made that comment. We believed Mr Taylor's evidence that the Appellant

would discourage a person from purchasing any of its products if he was not sensitive to the house dust mite. We have no doubt that the products in question were all designed solely for use by those people who are sensitive to the house dust mite: the question which remains to be answered is whether the products were designed solely for all such people – including those who could not possibly be regarded as handicapped in the sense that the word is used in item 2(g) of Group 12 Schedule 8 of the 1994 Act. If so, the appeal must fail.

In considering for whom the Appellant products were designed, we listened carefully to Mr Taylor's oral evidence and looked at his written report. We also studied the promotional literature and the leaflets which were supplied with the products.

Mr Taylor was adamant that the Appellant designed or (in some cases suggested modifications to) all the products solely for those whose allergy to the house dust mite was so severe that their symptoms caused them to be chronically sick or disabled. We were impressed with his evidence but, agreeing with the words of Mr Wallace in the *Foxer Industries* case, we approached his evidence of intention in designing these products with circumspection. We listened carefully to his answers when challenged that the promotional literature advertised the products for all sufferers of asthma, rhinitis and eczema and accepted his explanation that it would be difficult to explain that the products were designed only for severe asthmatics etc. We also accepted that he did not personally write all the promotional literature.

We accepted his explanation that the reason for emphasising in the literature that the Medivac and Dehumidifier had ordinary use as vacuum cleaners and dehumidifiers, was to reassure potential purchasers that they would not need to purchase an ordinary vacuum cleaner in addition to the Medivac, but that the Medivac would function as a vacuum cleaner and similarly in relation to the Dehumidifier.

We could see that the bedding was of a very plain design – Unlikely to be purchased by anyone indifferent to exposure to the house dust mite. All this certainly emphasised that the products were designed solely in connection with house dust mite exposure – but was it aimed at all those allergic to the mite or only to some of them?

The Medivac required our particular scrutiny because of its apparent general usefulness as a vacuum cleaner. We learned of its high comparative cost: this did not assist in establishing for whom it was designed – the cost might rule out purchase by those who are handicapped but not by those who are perfectly fit. We were told of its functional appearance. We gave little weight to this; a vacuum cleaner is less obviously an object which is judged by appearance than, say, bed linen. We listened to the description of the specific test that each Medivac underwent before delivery. This test is designed to ensure on an individual basis that no machine has leakage: we believed Mr Taylor when he said that he regarded the reliability of each single machine as being of vital importance because of the susceptibility of the intended users – which is consistent with his contention that the machines were designed solely for the person to whom reduced exposure to house dust was not merely desirable but of critical importance.

The evidence of Professor Ayres that he would not recommend allergen avoidance in patients who exhibited mild or moderate symptoms (easily controlled by drugs) does not directly assist in establishing exactly what was in Mr Taylor's mind when he

designed the products. There is no evidence that Mr Taylor had discussed these matters with Professor Ayres before he set about designing the products. However, the Appellant designed the products for sale on a commercial basis: its evidence that the products were designed solely for those suffering very severe symptoms accords with expert medical evidence that it is only those individuals who would be encouraged to take measures to reduce exposure and purchase the products. Sales outside this group are less likely to take place: the evidence of numbers of sales backs this up. So we have evidence that the persons said to be those for whom the products were solely designed are those same persons who would be recommended to purchase them by their medical advisers.

After listening carefully to this, we found as a fact that in designing each of the products, including the Medivac and the Bedding (which are clearly items, in one form or another, found in most households), the Appellant – through Mr Taylor – had designed them solely for those people whose symptoms caused by their allergy to the house dust mite can be regarded as making them chronically sick or disabled, in the sense of suffering significant distress or degradation of quality of life.

On that basis, the appeal in relation to the first four items will be allowed. In relation to the fifth item, the anti-allergen spray, the final matter to be decided is whether the spray is "equipment or appliance".

6. Is the Spray "equipment or appliance"?

The case for the Commissioners on this point is that the spray is a chemical substance and is not equipment or appliance and Mr Poole referred us to the case of Searle on this point. They contend that the chemical is by far the predominant supply with the canister being mere packaging. The Appellant's answer to this is that there is a composite delivery, and also drew out attention to remarks of the Tribunal Chairman in the case of Searle (which of course were not directly relevant to that case since the Chairman had already concluded that the product there was not designed solely for use by a handicapped person) where he said "it seems to us that the container and contents do have to be considered as a whole. The container is not merely the means of preserving the contents prior to use but the means of delivery". If an asthma sufferer who uses Actomite is going on holiday taking it with him it would not seem to be an unusual use of English to describe him as "equipped" with Actomite or to describe the Actomite as "equipment". One of the definitions of "equipment" in the new Shorter Oxford English Dictionary is "articles used or acquired for a particular purpose".

We found these comments helpful. In this case we find that the liquid on its own, while possibly effective to kill or denature the mite even if applied in liquid form to the relevant surfaces, would be of no practical use because in practice it would be used only if it could be delivered via a fine spray that did not saturate – and possibly stain or mark – the surfaces with which it came into contact. We found that the canister was an integral part of the product rather than mere packaging and we allow the appeal in relation to this product as well.

Mr McKay asked for the costs of the expert witness which we allow.