

Royal Courts of Justice  
Strand  
London WC2A 2LL

20 June 2001

**B E F O R E:**

**JUSTICE NEUBERGER**

**ROYAL MIDLAND COUNTIES HOME FOR DISABLED PEOPLE**

**Appellant**

- v -

**THE COMMISSIONERS OF CUSTOMS AND EXCISE**

**Respondent**

-

Mr Hugh M<sup>c</sup>Kay appeared on behalf of the Appellant

Ms Rebecca Hayes appeared on behalf of the Respondent

*Justice Neuberger:*

1. This is an appeal from the decision of the VAT and Duties Tribunal dated 22nd December 2000 brought by the Royal Midland Counties Home for the Disabled.
2. It raises a very short, relatively narrow and not entirely easy point of construction of schedule 8 to the Value Added Tax 1994 (“the 1994 Act”).
3. The issue is whether the supply of a diesel driven electricity generator purchased by the appellant should be zero rated on the grounds that it fell within item 5 of group 15 of schedule 8. By virtue of section 30 of the 1994 Act, schedule 8 sets out goods and services, the supply of which is zero rated for VAT purposes.
4. Item 5 of group 15 (“Item 5”) provides for the zero rating of “the supply of any relevant goods to an eligible body, which pays for them with funds provided by a charity, from voluntary contributions or an eligible body, which is a charitable institution providing care or medical or surgical treatment for handicapped persons”.
5. Note 3 to group 15 (“Note 3”) provides that “relevant goods” means:  
“(a) medical equipment for use in medical ..... treatment, (b) ..... (c) parts or accessories for use in or with goods described in paragraph (a) ..... above, (d).....”

6. The facts found by the Tribunal were as follows. The appellant is known as Castel Froma and is a registered charity engaged in running a nursing home for the severely physically disabled.

“Castel Froma cares for up to fifty-seven patients at any one time. Their ages range from late teens to old age and the majority of patients will be permanently resident in the home. They will suffer from a number of conditions including multiple sclerosis and cerebral palsy. Some would have had strokes and some will have been seriously injured in medical accidents or road traffic accidents. What the majority of patients share is a very high level of dependency and most are dependent on sophisticated, electrically powered medical equipment including ventilators, feeding equipment and suction machines. Bath hoists and lifts are all electrically powered. Wheelchairs and communication devices are battery powered. The battery packs requiring overnight charging from the mains electricity supply. Some of the patients’ only means of entertainment is by electrically powered radios, cassettes and televisions. I have no hesitation in accepting Mrs Kelsey’s evidence of (the evidence of the matron of Castel Froma to the effect that).

A continual power supply is essential to the health and well-being of our client group. Any disruption to this supply would severely compromise their health status at any time and in the worst case scenario cause death.”

The Tribunal contained:

“Given this state of affairs, Castel Froma decided on the advice of the health authority that some precaution had to be taken against the possibility of a power failure over the Millennium and they therefore installed an emergency generator at a net cost of £24,237.50. This is a substantial piece of plant of 165 KVA. It is housed upon a reinforced concrete pedestal in a purpose built enclosure in the grounds and is fed from a 3,000 litre diesel tank. It is on permanent standby, kicking in immediately and without any form of intervention the moment the mains power supply fails and cuts out automatically once the mains supply is restored. The effect of the generator, as confirmed by Mrs Kelsey in cross-examination, would be that in the event of a mains failure, it would meet the entire demand for electricity for the whole home. It would be not be limited to any individual item of equipment but would enable a full function of all electrically powered equipment, machinery, lighting and heating. It would completely replace, in every regard, the mains supply for just as long as that supply was not operational.”

7. It was a common ground before the Tribunal, as it is before me, that the appellant is an “eligible body” and that the generator was paid for by funds, which fall within Item 5.

8. The question for the Tribunal, and now for this Court, is whether, as law, in these circumstances, the supply of the generator fell within Note 3(c). After setting out the submission of Mr Rooney, the chairman of the trustees of appellant who appeared on their behalf at the Tribunal, to the effect that the supply of the generator fell within Note 3(c), The Tribunal concluded:

“I can understand Mr Rooney’s way of thinking and I can see that to his mind the generator fits fairly and squarely into the commissioners’ definition of something, which can enable equipment to be used (he omits

words) in particular circumstances. However, Mr Rooney has overlooked the beginning of that definition, which is, in my view, the vital part of it. Namely that to be an accessory, the generator would have in the first place to be same optional extra, which can be used.. The generator is a substitute for the mains power supply. When in use, it is found in the place of that power supply and provides the motive power for all electrical equipment in the home. The electricity supply itself could never be seen as an accessory. In my view, neither can the generator. This is not something, which assists or contributes to the functioning of the equipment. When in use, it is the sole means of its function. Without the generator and a power failure, the equipment would not operate at all. As such, the generator is a necessity; it is essential. It is a complete substitution for the power source. For this reason, I do not accept Mr Rooney's contention that the generator is an accessory and I therefore reject the appellant's argument that the supply of the generator should be zero rated."

9. The reference at the beginning of that paragraph to the commissioners' definition is a point to which I will return.

10. The appellant, Castel Froma, contends that the Tribunal erred in holding that the generator did not fall within the words,

"accessories for use.....with medical equipment used in medical treatment."

11. Although, one has ultimately to take an overall view, it appears to me that the convenient course for me to take is to consider the three arguments put forward by the Commissioners to support the Tribunal's decision.

12. The first argument is that a generator cannot fall within Note 3(c) because it is supplied for a general purpose, namely that of providing electricity, not for a specific purpose, namely a use, which falls, or could fall, within Note 3(c). This effectively involves saying, as Ms Rebecca Hayes who appears on the Commissioner's behalf indeed contends, that the question of whether an item is an accessory or not, for the purposes of Note 3(c), is to be judged objectively. Mr Hugh McKay, who appears for the appellant, says that the issue must be determined by reference to the purpose for which the person supplied, the consumer, intends to put the item.

13. In my judgment, Mr McKay's subjective test is to be preferred. First, it appears to me to accord better with the more natural meaning of Note 3(c). When read together with item 5, it seems to me that the words,

"the supply of in accessories for use in with (certain goods)"

although capable of being limited to accessories, which are intended by the producer or supplier to be so used, more naturally suggest that it is the consumer's intention which is to be investigated.

14. Secondly, the subject reading of the words "for use in" in Note 3(c) is consistent with the meaning of the same words in Note 3(a). In that Note, the objective nature of the item is stipulated by virtue of its description as,

“medical ..... equipment”.

If those words “for use” have that meaning in Note 3(a), then it seems to me likely that they have the same meaning in Note 3(c).

15. Thirdly the wording of Note 3(c) in Group 15 is to be contrasted with the wording of paragraph 2(h) in Group 12 of Schedule 8. Group 12 is concerned with “Drugs, Medicines, Aids for the Handicapped etc” and paragraphs 2(a) to 2(g) refer to the supply of certain specific items of goods. Paragraph 2(h) refers to “parts and accessories designed solely for use in or with goods described in paragraphs (a) to (g) above”. The effect of the addition of the words “designed solely” and their absence from Note 3(c), speaks for itself.

16. Fourthly, even on the Commissioners’ objective reading, an element of subjectivity must, as Ms Hayes to my mind rightly accepts, be involved in Note 3(c). That is because she accepts that, even on her objective test, an item would not be prevented from being an accessory within Note 3(c) merely because it could be an accessory for machinery which does not fall within paragraph 3(a), provided, of course, that it is designed or supplied as an accessory for such machinery. Therefore, in relation to an item, which could objectively be an accessory under Note 3(c), even on the Commissioners’ case it would still be necessary to ask oneself whether, from the consumer’s point of view, it is supplied for a purpose falling within the ambit of Note 3(c).

17. The Commissioners’ second argument, which was considered and effectively accepted by the Tribunal in the present case, is that the generator was acquired by the appellant, not merely as a standby source of electricity for the benefit of medical equipment (for instance, ventilators, feeding equipment, suction machines) but also for the benefit of other equipment, which is plainly not medical equipment for instance, communication devices, radios, cassettes, televisions, and indeed, lighting and heating.) Accordingly even if the generator could otherwise fall within Note 3(c), the Commissioners contend, on the facts of this case, it does not do so as it was acquired to be used in connection with items of equipment, which were not medical equipment. It seems to me that if the generator is otherwise capable of falling within Note 3(c) because its use was in connection with medical equipment, the fact that it is also used, and was also acquired for the purpose of being used, in connection with other equipment is not necessarily fatal to the generator falling within the note. Whether the use referred to in Note 3(c) should be treated as a reference to exclusive use, predominant use or any use which is not de minimis is not perhaps quite the point. It is more a question of asking whether, to the ordinary speaker of English employing common sense, the relevant body, referred to in Item 5 of Schedule 15, acquired the item in question for use in or with goods falling within Note 3(a). That may, in practice, be similar to the test of predominant purpose but to my mind the question should be answered on that basis which accords with the language of Note 3.

18. In light of the evidence before the Tribunal, it appears to me that the answer to the question in the present case is that, if the use of the generator, in connection with medical equipment, would otherwise be within Note 3 (c), then the fact that it was or was to be, used in connection with other electrical equipment in the home as

well would not bring it outside the ambit of the Note.

19. Firstly, common sense suggests that it was for the purpose of ensuring the reliable, permanent functioning of the medical equipment for which the generator was really acquired.

20. Secondly, there is Mrs Kelsey's explanation, accepted by the Tribunal, that the generator was acquired,

“because disruption to the electricity supply again would severely compromise {the clients'} health status and could even result in their death.”

21. That evidence indicates that the acquisition of the generator was to guard against non-functioning of the medical equipment caused by withdrawal of the mains supply.

22. Thirdly, there is the advice that the Health Authority, which was clearly important to the appellant's decision to acquire the generator. That again suggests that it was concern about the reliable functioning of the medical equipment, which provided the real impetus of the requisition of the generator.

23. Finally, there is the practicality of the situation. As Mr McKay points out, in a home with a large amount of important medical equipment, much of it vital, the only sensible way protect against the possible failure of the power supply to the medical equipment through the mains, would have been to provide an alternative source of supply for the building as a whole. The notions of individual alternative supplies for each item of medical equipment, or of artificially rearranging the electrical system in the house so that the generator only supplied electricity to the medical equipment, seem unreal to the point of absurdity.

24. The third and final argument raised by the Commissioners, which was also relied upon by the Tribunal, and I think was the main ground for decision, is that, even if the two arguments I had been considering are wrong, as a matter of ordinary language, the generator is not an “accessory for use with medical equipment” as the word “accessory” is normally understood.

25. First to quote from Ms Hayes' skeleton argument,

“In order for an item to be an accessory for use in or with medical equipment, it must be a non-essential adjunct or ancillary attachment for use with that equipment. The emergency generator is neither ancillary or non-essential feature of the medical equipment, *per se*”

26. Secondly, she contends that if the generator is an accessory to anything in the nursing home, it is an accessory to the mains supply. So far as that second point is concerned, it seems to me that an item which is, to use a neutral word, subsidiary can be an accessory in the sense of ancillary to a main item, while at the same time being an accessory, or perhaps more normally, accessory (i.e. an adjective rather than a noun) to an alternative ancillary item. Thus a wide wing mirror, for use in towing a caravan, can be said to be an accessory, in the sense of an ancillary item, to the motor

car but it is also an accessory mirror i.e. an addition, in the sense of an alternative, to the normal wing mirror. Accordingly, the fact that one could describe the generator as accessory, in the sense of an alternative, to the mains system, does not mean that it cannot also be an accessory, in the sense of ancillary, to the medical equipment, which it is to supply if necessary.

27. As to Ms Hayes' first point I do not see why an item is prevented from being an "accessory for use in or with medical equipment" simply because it is regarded as necessary or essential by the consumer. In some dictionary definitions of the word "accessory", there is a suggestion that inessentiality may be a feature of an "accessory" but I know of no dictionary definition, which suggests that it is necessarily of the essence of an accessory. Thus Chambers Dictionary defines accessory as,

"anything, especially an item of equipment that is secondary, additional or non-essential", (emphasis added)

However, I note that inessentiality is not even referred to either expressly, or impliedly, in the Oxford Dictionary definitions to which I have been referred.

28. The Tribunal in its concluding paragraph, which I have read, referred inferentially to the Commissioners' view contained in the Commissioners' VAT Notice, 701/6, item 5.3(k), which states,

"Accessories means optional extras, which can be used to improve the operation of the equipment or enable it to be used or to be used to better effect in particular circumstances."

29. One has to be careful about redefining a statutory word or expression, even by reference to helpful and considered guidance given to the public by the Commissioners. Nonetheless, it does seem to me that this is a good working definition. As the Tribunal accepted, the appellant can rely on the words,

"which ... enable it to be used...in certain circumstances".

30. The Tribunal and Ms Hayes, however rely on the opening words, which indicate that an accessory has to be optional. Again, the word optional can mean different things in different circumstances. To my mind, the generator in the present case may properly be described as optional. In the first place, one can clearly acquire the medical equipment without it. Secondly, for virtually all of the time the medical equipment will function without it.

31. In my judgment, the generator in the present case was an accessory for use with medical equipment within the meaning of Note 3(c). It was purchased with a view to enabling medical equipment to be dependable and reliable, or, to put it another way to enable medical equipment to be used in particular and unusual circumstances, namely the breakdown of the mains electricity supply. The fact that the electricity supply itself could never be seen as an accessory, as the Tribunal said, is not really in point. The supply of mains electricity to equipment, like the supply of electricity from the generator or the supply of diesel oil to the generator could not be regarded as such an accessory either. The question is not whether the supply of

electricity was “accessory”, as Mr McKay points out: it is whether the supply of the generator was as an “accessory”.

32. Further, the fact that, when it is in use, the generator is the sole means which enables equipment to function, is not in point. The generator was purchased so as to be a back-up, so, as to use the words of the Tribunal, “to kick in”, on the rare occasions it was needed. An outboard motor may fairly be called an accessory for use with a boat, which is primarily a sailing boat. The fact that, when the vessel is becalmed, the motor may be the sole means of moving the boat does not prevent the motor being an accessory. In other words, the fact that a machine cannot function at all in certain circumstances, or cannot be relied on to function, in unusual circumstances, without the assistance of an item, does not of itself to my mind, as a matter of ordinary language, prevent the item being described as an accessory to the machinery.

33. In the course of its decision, the Tribunal referred to two earlier decisions of the Tribunal *Norwich Camera Centre Ltd v. Customs and Excise Commissioners*, VAT decision number 11,629 and *Crown Treatment Centre v. Customs and Excise Commissioners*, VAT decision number 15,564. The former was concerned with Group 16 of Schedule 5 to the 1994 Act, and the latter was concerned with the same note with which this appeal is concerned. It is right to say that I am of the view that both decisions were correct.

34. I also note that in both these decisions, the Tribunal said:

“The point is a short one and does admit much elaboration-” I am conscious that, in the present case, I may have been guilty of a degree of over-elaboration. I think it right to end where I began, and to revert to the overall question. As a matter of ordinary language, and bearing in mind the facts I have identified, was the generator in the present case supplied as an accessory for use with medical equipment, which was itself used for medical treatment? In my view, the answer is in yes.”

35. I, therefore, allow the appeal. Having reached a different decision from that of the Tribunal it is right to say that the point is, to some extent, be a matter of impression and as I have said, I do not regard it as an easy one.