



TC06308

Appeal number: TC/2016/01847

VAT – Schedule 7A Group 13 Item 1 –did the appellant provide the transport and the right of admission/enjoyment?-yes- appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SNOW FACTOR LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

**Sitting in public at George House, Edinburgh on Wednesday 20 September 2017
Site visit on 1 November 2017**

Phillip Simpson, QC, for the Appellant

**David Thomson, QC, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

The decisions under appeal and the consequential assessments

5 1. The appellant is located at “Soar INTU” at Braehead in Glasgow which is a large
leisure and adventure complex promoted as a family entertainment destination. The
appellant operates an indoor snow dome and conference facility (“the Snow Dome”).
The Snow Dome has lifts which are used to transport passengers to the top of the two
10 indoor ski slopes. The primary retail shopping centre is in a separate building from the
leisure complex.

2. In brief, the appeal relates to the Value Added Tax (“VAT”) treatment of the
receipts from the lift passes for the main ski slope.

3. The disputed decision of the respondents (“HMRC”) is a decision communicated
by letters dated 31 March 2015 (“the initial decision letter”) and 20 November 2015
15 (“the further decision letter”) (together the “decision letters”). That was upheld on
review by letter dated 22 February 2016 (“the review letter”). The decision was that
the appellant’s liability to account for VAT output tax on its “lift pass receipts” is not
at the reduced rate of 5%, in terms of section 29A Value Added Tax Act 1994
 (“VATA”) on the basis that those supplies fall within Schedule 7A Group 13, Item 1
20 and are therefore standard rated for VAT purposes.

4. HMRC sent the appellant a Notice of Assessment dated 15 March 2016 (“the first
assessment”) for the six accounting periods from 1 June 2013 to 30 November 2014.
The sum assessed is £156,160 plus interest.

5. On 26 May 2016, HMRC sent the appellant a further Notice of Assessment (“the
25 second assessment”) for the five accounting periods from 1 December 2014 to
29 February 2016. The sum assessed is £138,555 plus interest.

6. The appellant appealed the decision letters and the two assessments. On
24 August 2016 the Tribunal directed that the appeals be consolidated under appeal
number TC/2016/01847.

30 **Background**

7. The appellant has been registered for the purposes of VAT from
16 December 2011. With effect from 1 June 2013, the appellant accounted for VAT
at the reduced rate of 5% on the receipts generated from what it viewed as the sale of
lift passes. The appellant argued that that was the correct interpretation of
35 Schedule 7A, Group 13, Item 1 VATA which had been introduced with effect from
1 April 2013.

8. On 9 August 2013, the appellant submitted an Error Correction Notice to HMRC
reclaiming the difference between the standard rate of VAT (20%) and the reduced
rate of 5% in respect of output tax for April and May 2013. That amounted to
40 £20,097.

9. On 10 December 2013 and 17 September 2014, Officers Marshall and Maciver of HMRC visited the appellant's premises. Correspondence ensued until 17 March 2015.

5 10. On 31 March 2015 the initial decision letter was issued to the effect that the reduced rate of VAT was not applicable to the receipts generated from the sale of the lift passes. HMRC argued that a lift pass provides access to the activity areas within the Snow Dome and not solely the lift and therefore the correct interpretation of VATA is to exclude payments made for a right to use the facilities within the Snow Dome from the reduced rate of VAT.

10 11. The further decision letter was issued on 20 November 2015 and HMRC continued to argue that the appellant was charging customers for the use of the Snow Dome as a whole and not simply to access the lift.

15 12. On 10 December 2015, the appellant requested a review. HMRC responded on 22 February 2016 and upheld the earlier decision stating that "...the charge for the ski lift includes an admission charge or a right to use the skiing facilities" provided by Snow Factor. The argument was that the relief in VATA was aimed at operators providing cable suspended transport services alone and specifically excluded supplies that also include a right of admission or a right to use facilities. HMRC referred to the appellant's website and special offers or price plans as evidence of the lift pass providing a right to use facilities within the Snow Dome. Their core argument was that a customer is purchasing "slope time".

The Hearing

25 13. By agreement, at the outset of the hearing, the appellant's application for a site visit was deferred. Although the Tribunal heard extensive evidence about the Snow Dome from Mr Smith, the Managing Director of the appellant, supplemented by anecdotal evidence from Officer Stone it was difficult to envisage the detail so a site visit in the presence of both counsel and others took place on 1 November 2017.

30 14. The Tribunal had heard evidence from HMRC Officer Stone who is a keen skier and had visited the site on more than one occasion as a customer. The appellant argued that his evidence was a subjective opinion and thus was irrelevant. Mr Thomson conceded that it was a subjective opinion and therefore might not be compelling but argued that in the absence of expert evidence it showed how the Snow Dome operated from the perspective of a typical customer. However, ultimately his evidence as to his experiences facilitated a degree of clarity as, for example, in regard to the fact that the Terms and Conditions were not correct in relation to instructors (see paragraph 59 below).

15. The site visit was extremely useful and informed the extensive findings in fact. The co-operation of all involved is greatly appreciated.

40 16. The List of Authorities which was provided is annexed at Appendix 1 with those to which reference is made highlighted.

17. There was one Bundle to which both parties referred.

The Issue

18. The applicable legislation is set out in full at Appendix 2. The parties both accept that the ski lift facilities operated by the appellant, and with which this appeal is concerned, fall within the Item 1, Group 13, Schedule 7A VATA. However, the appeal turns on whether there is a supply for the purposes of VATA on the basis that the proviso to Item 1 is engaged, namely:

“NOTES:

Supplies not within item 1

10 1 Item 1 does not include the transport of passengers to, from or within-

a place of entertainment, recreation or amusement; or

a place of cultural, scientific, historical or similar interest,

by the person, or a person connected with that person, who supplies a right of admission to, or a right to use facilities at, such a place.”

15

Overview of the appellant’s arguments

19. The appellant argues that the sale of a lift pass does not supply a right of admission or a right to use the facilities in the Snow Dome. The cost of the lift pass simply entitles those who wish to use a ski lift on the main slope to access the lift. It is not mandatory to purchase a pass in order to access the main slope or indeed all of the rest of the Snow Dome.

20. The appellant had also previously argued that HMRC had not considered the principle of fiscal neutrality and it is their view that the appellant operates the same activities as Scotland’s other five snow sport resorts who were involved in the effort to lobby government for the reduced VAT rate introduced by VATA. The terms of access to facilities and the basis of charge for use of the ski lifts mirrors that of the other ski slopes which currently apply the reduced rate to their supplies.

21. In the event Mr Simpson made no submission on fiscal neutrality.

Overview of HMRC’s contentions

22. As indicated above, HMRC argue that on a proper analysis of the facts the supply made by the appellant comprises both the use of the lifts to reach the top of the main slope and admission to, and use of, all of the facilities that have been created and maintained by the appellant at great expense.

23. That supply falls within the exception specified in Note 1 in Item 1, Schedule 7A Group 13 VATA. It is the appellant who provides the availability and nature of the snow and on occasion food is also supplied. That contrasts with outdoor slopes where customers have a legal right of access to the hills and nature provides the snow.

24. The customers who purchase a lift pass have a contractual right to use the main ski slope.

25. The principle of fiscal neutrality is not infringed.

5 **The Joint Minute of Admissions**

26. Prior to the Hearing, the parties had been unable to agree either a draft Statement of Agreed Facts or a draft Joint Minute of Admissions. At the outset of the Hearing it was agreed that, subject to possible issues of both competency and relevancy, the Joint Minute of Admissions should be lodged in process. It is annexed at Appendix 3.
10 Ultimately it proved uncontentious.

Findings in Fact

27. The appellant operates what it describes as an “indoor snow sport resort” and considers that it ranks with the five outdoor resorts in Scotland. It was purchased on 16 December 2011; having been constructed in 2008 at a cost of £32 million. Since
15 then, when a surplus has been generated, there has been significant further investment by the appellant. None of the companies in the sector, including the appellant routinely operate to profit.

28. Although the core concept has not changed, the business has changed dramatically and in excess of 150 products are available for purchase. Those products include
20 lessons but also corporate and party activities. The vast majority relate to either skiing or snowboarding. Bookings for all of the different products can be made by telephone, online or at reception.

29. The target customer base is diverse. It caters to not only individuals from a very young age but also groups, such as University ski societies, corporate entertainment and team building (there are conference facilities), and birthday and other parties.
25 Disability Snowsport UK (“DSUK”) have a serviced office, and a permanent presence, opposite reception in the “dry” part of the Snow Dome. They are not charged for the office or use of the slopes.

30. The snow area of the Snow Dome is effectively a vast freezer and the primary components of that are:

- (a) Main slope;
- (b) Nursery slope;
- (c) Ice wall, and
- (d) Sledging area where from time to time an ice-slide or snow tube course is
35 constructed.

31. Most of the snow area of the Snow Dome is designed to offer facilities for skiers, snowboarders and sledgers from complete beginners through families and other groups to racers keen on keeping their ski legs in the off-season and for pre-season, race or park (jump) training.
- 5 32. Although the primary focus of the snow area is those activities, the ice wall is available to climbers for tutored or untutored use. The latter is only possible at a certain level of competence. Ice slides are also sometimes available.
- 10 33. On entering “Soar INTU” which contains bars, restaurants, retail outlets, a multiplex cinema, a bowling alley, arcades and various children’s activity centres, access to the Snow Dome is on the second floor. The customer can either enter the bar/restaurant operated by the appellant or descend three flights of stairs (there is separate disability access). At the foot of the stairs, reception is to the right and DSUK to the left. Cordonning is in place to enable queue management at reception.
- 15 34. If queuing, the customer passes signs promoting the benefits of becoming a member. There are a number of different types of membership available (including ice wall only) offering a range of special offers and discounts on a wide spectrum of products including lift passes.
- 20 35. At reception lift passes, gift vouchers, lessons, sledging, ice climbing and ice slides and other products can be purchased, bookings made and enquiries handled. Approximately one-third of the enquiries at reception relate to the slopes and ice wall, one-third to corporate or birthday activities and one-third to food and beverages (usually linked to the corporate or birthday activities).
36. Gloves and socks are also available for purchase at reception. In recent times the wearing of gloves has been mandatory for safety reasons.
- 25 37. There are numerous benches available for customers to use when organising clothing and equipment. There are changing rooms, showers and toilets. Lockers can be rented for storage of personal items. The rental of the locker (for £1) is not time limited or linked to the timing for the lift pass or lesson.
- 30 38. To the left of reception there is a large clothing rental department where waterproof outer garments can be rented. There is no time limit on the period of rental. The appellant has an onsite laundry.
39. Wellington boots can be rented for those who wish to sledge.
- 35 40. Adjacent to that are all of the skis, snowboards, sledges and boots. There are machines on which a customer stands and height and weight are measured. There is no charge for any of the “hard” equipment. That has been the case since before the appellant bought the Snow Dome.
41. Every customer, whether or not they buy a lift pass, is entitled to access the free equipment and to rent clothing etc. If the customer uses his/her own equipment there is no discount on lift passes or lessons.

42. Whilst customers are free to use their own ski and snowboarding equipment, for health and safety reasons the appellant's sledges must be used for sledging.

43. Since 2013, the use of helmets has been compulsory at all times on the slopes and those too are provided free of charge. In 2012, only under 16's and freestyle and mogul users or those involved in race training or racing had to wear helmets.

44. On leaving this area to access the snow, ski poles in different heights are available at no charge. There are sensor activated double airlock doors in order to maintain the relevant temperature both in the snow area and in the dry area.

45. The rest of the Snow Dome that is open to the public (disregarding the three conference rooms) comprises a very large bar/ restaurant, currently named Bar Valia, where both food and drinks can be purchased. It has a very long viewing window overlooking the snow area. Bar Valia is accessible directly from "Soar INTU" without going to reception. It opens out onto a large (35 metre diameter) decked balcony on two sides. That is primarily utilised as a viewing area. There are wooden racks where customers can leave their skis etc if they wish to go into Bar Valia from the snow area without returning through reception.

46. They can do so by leaving the middle of the main slope and coming up what is described as the snow link or Link Bridge which connects to the balcony. Originally, there was free access from the balcony onto the main slope via the snow link but, for health and safety reasons, because children were prone to having snowball fights at the base of the snow link, access to it is now restricted to snowboarders and skiers.

47. Conversely, technically, a customer with his or her own equipment would be able to access the main slope without going through the dry area if they did not wish to use the lifts. That is not publicised as such.

25 *The main slope*

48. The Snow Dome has a main ski slope which is 168 metres long and 35 metres wide. That slope is constructed to offer more gentle aspects lower down (15°) and becomes slightly steeper further up (17°). Those angles mean that greater speed can be offered. It is primarily used by skiers and snowboarders who ski or snowboard with or without instruction. The slope is partly restricted on a Thursday and Friday whilst a freestyle park is created on it for use on those evenings.

49. On either side of the slope there is a ski lift, which is a drag lift. (It is referred to in the Joint Minute of Admissions and the appellant's documentation as a "POMA" or "poma" lift. That is a trademark so the generic term is used in this decision.) The drag lift features a metal pole with a "button seat" on which the customer stands. It is about 40 or 50 cm wide. The pole is attached to a cable. Each such lift has to be moved regularly from its position on the cable to avoid issues with wear. The drag lift machinery is installed at the top and bottom on both sides of the main slope. The lifts allow customers to be conveyed up the slope on skis or boards with minimal effort. They cannot come down the slope on the lift. The appellant has 168 such individual lifts attached to the two sets of cabling.

50. When the lifts are operating they are on a permanent loop so it can be difficult to grab hold of the pole and balance on the button seat. Members of staff are stationed both at the top and at the bottom of the lift. There are isolator switches at both ends and the staff members have radios.

5 51. The staff members are there primarily to assist customers getting on and off the lifts and, in order to prevent injury, to stop the lifts if a customer falls off (which is a frequent occurrence). The staff wear skis and the staff member at the top will ski down to assist a customer if he/she cannot remount. They operate in the same way as snow patrollers in outdoor resorts. Safety and observation are their key roles.

10 52. With the exception of peak periods, the appellant runs only one of the two lifts since they are expensive to run and require very regular maintenance. When one is being maintained the other is put into use.

15 53. Apart from the freestyle park, from time to time the appellant creates additional facilities on the main slope both for training for athletes and for fun. Those include ramps designed to kick a rider into the air for practising moves akin to gymnastics. There may be a box or a pipe set into the slope creating a challenge to negotiate along without falling off.

20 54. At the time of the site visit there was an “alpine chalet” near the base of the main slope next to the snow link. A man in a red suit might be found there. One of the products noted was “Dine with Santa”.

The nursery slope

25 55. The second slope is a nursery slope which is entirely separate with its own facilities and it is sectioned off. It is 50 metres long and 50 metres wide and features two rope tows. The rope tow is also a surface lift. It moves through a bully wheel, which allows customers to be pulled up the slope. The customer simply holds on to the rope at waist height using both hands.

56. The rope tow on the left hand side looking up the slope can also be used by those accessing the sledging and ice slide areas. There is no separate charge for using the rope tow. No passes are available or required for that.

30 57. The nursery slope is a safe area to teach skiing and snowboarding and is used exclusively for lessons.

Lessons

35 58. All lessons, on either slope, are standard rated for VAT and on the main slope include a lift pass. The appellant employs some 49 full time instructors. The lessons are tailored to and for different age groups, capabilities and differing levels of experience.

Instructors

59. It is widely stated on the website, in the Terms and Conditions and on material in reception that only the appellant's instructors can teach or coach on the slopes. In fact, DSUK provide lessons and, by negotiation, if a customer or group of customers has an instructor who meets the appellant's standards (and the appellant runs training courses for instructors) then that individual will be permitted to teach or coach.

Terms and Conditions

60. Terms and Conditions are issued regardless of the product that is booked. The same Terms and Conditions apply to everything.

61. The Bundle included three sets of Terms and Conditions that have been issued by the appellant. Mr Smith explained that as at the date of purchase of the Snow Dome it was a condition of purchase that the marketing would not be changed until rebranded. The first Terms and Conditions were therefore the originals and the second followed the rebrand. The third was introduced after the website was changed.

62. The Tribunal was primarily referred to the first version of the Terms and Conditions but in fact also looked at the other two. The 2012 and 2013 versions, being the first two, are almost entirely identical.

63. The most recent version coincided with changes in the website and looks very different, albeit there are not many substantive changes from 2013. It is, as Mr Smith indicated, more concise and clear and certainly more accessible.

64. An example from the first version, in 2012, reads in regard to the main slope:-

“We require everyone who wishes to use the main slope to be of minimum competency (recreational standard) unless attending a lesson and accompanied by a Snow Factor instructor. You should be able to control your speed, confidently link turns & use the poma/button lift. ... You agree to being of this standard when purchasing a main slope pass and Snow Factor reserves the right to ask you to leave the slopes with no refund if you are deemed unable to meet the minimum standard.”

The same wording was used in the second version.

65. The third version reads:

“The Lift Pass is sold subject to the user compliance with the **FIS Snowsport Safety Code**, specifically, that you can:

- **Fit your boots correctly**
- **Use the POMA/Button Lift safely and appropriately**
- **Link turns with confidence**
- **Control your speed**

You will be assumed to have declared yourself of this standard when purchasing a lift pass.
If you are unsure about your ability or of any questions regarding minimum competency standards please ask for advice before booking.”

66. Under the heading “Spectators/Photography/CCTV”, the 2012 version states:-

5 “There is NOT a dedicated spectator area on the slope but we advise all customers to spectate through the panoramic windows...or on our balcony...Snow Factor accept no responsibility for spectators going onto the slope & reserve the right to ask any spectators to leave.”

The only difference in 2013 was the use of the words “on our viewing deck” instead of a “balcony” and the addition of a sentence concerning the Link Bridge which confirmed
10 that spectators could not access that (see paragraph 46 above).

67. The third version reads:-

“There is no dedicated spectator area on the slope; we advise all customers to use Bar Varia or the viewing deck. Snow Factor accepts no responsibility for spectators going onto the slope and reserves the right to ask any spectators to leave.

15 No spectators are allowed to walk or stand on the Link Bridge – it is restricted for use only by Skiers and Snowboarders.”

68. The primary difference in the third version is that under the heading “Main Slope Use” it reads:-

20 “Access to all public areas on the main slope are unrestricted, with the use of the lifts and tows accessible to those with a valid lift pass or lesson booking. To avoid any misunderstandings, please ensure that your lift pass is visible to our staff ...

Snow Factor lift passes only entitle users to use the Poma lifts on the main slope. The small slope is exclusively for use by lessons.”

Lift passes and Special offers

25 69. The appellant does not advertise the fact that it is possible to access the main slope without a lift pass. A very small percentage of those who use the Snow Dome, perhaps 1%, choose to walk up the main slope without using the lifts. This is because it is physically tiring to wade through snow at an angle of 15 degrees whilst carrying
30 skiing equipment or a snowboard. Some customers will do this once or twice, but the vast majority choose the lifts. The customers who tend to walk up the slope (as opposed to using the lifts) are primarily telemark Nordic skiers who will use special skins on their skis to allow them to move uphill. The other group of customers that walk up the hill would be park and freestyle customers, who tackle the jumps, bumps and berms. The fact is that, just as in the mountain resorts, very few customers
35 choose to walk up the hill when a ski lift is provided.

70. The lift passes sold separately by the appellant relate only to the drag lifts on the main slope. Approximately 50,000 of those are sold each year.

71. On the main slope the staff check the lift passes which customers are requested to keep visible at all times and usually wear attached to their jackets. The lift pass is

approximately 10 x 6 ½ cm and laminated. There is a hole punched in it so that it can easily be attached to clothing. A typical pass looks like:



5 The pass specifies the date and the window of time within which the pass can be used. Skiers are free to remain and ski on the slopes after that time limit has expired. Passes must be shown before using the lifts.

72. There are numerous special offers made available to customers, for example, “Monday madness”. The marketing for that reads “Looking for a great discount on slope time! Then look no further than Monday madness. Enjoy skiing or snowboarding for the whole evening! 6.00pm – 10.00pm £15”.

73. Passes sold by the appellant for certain offers such as “Ladies morning” and “Student night” also include the provision of food and drink.

74. The offers allow the skier/snow boarder to buy a lift pass at a discount compared with the standard rate and usually they run at off peak times when the slopes are normally quiet.

75. The appellant offers the facility to book lift passes. The two earlier Terms and Conditions stated “We advise that you pre-book as slope time is subject to availability.” When referring to peak and off-peak pricing policy both stated:-

20 “If your visit overlaps between our off-peak and peak times your pass price will be reconciled accordingly and you will be charged at off-peak rates for the amount of time you are on the slope in off-peak period and peak rate for the amount of time you are on the slope in peak period.”

25 In the two earlier versions that paragraph is included under the heading “Main Slope Use” where the other paragraph specifies levels of competency (see paragraph 64 above).

76. The third version was expressed in exactly the same terms but defined off-peak and peak times.

Capacity

77. The Snow Dome, and in particular the snow area, is enormous and, for example, recently approximately some 1,500 people attended to watch a movie.

5 78. The capacity of the main slope is largely limited by the finite number of drag lifts and equipment available for hire.

79. The appellant did a risk assessment for insurance purposes and formed the view that it would be appropriate and sensible to limit capacity on the main slope to 450 to 600 people at a time. However, in order to avoid queues for the lifts and optimise the experience their objective is to limit capacity to 300 people for any one hour period.
10 That is tied to the capacity for the lifts.

80. For that reason, and in order to manage expectations whilst still leaving some capacity for “walk in” customers, the appellant encourages booking for lessons and passes.

15 81. A customer bringing his or her own equipment and choosing to walk up the slope would not impact on that capacity.

82. During the Commonwealth Games numerous visitors came simply to experience snow and play snow balls. Mr Smith confirmed that on an average day dozens of people would access the snow area to walk, take pictures and play snowballs. Pictures can only be taken with the appellant’s consent – a disclaimer must be signed at
20 reception.

83. An example of a non-sporting person being in the snow area is that an adult is required to be present in the snow area when children under 10 are having lessons on the nursery slope or sledging. When booking the child activity, the adult must pay to access the snow area even although they play no part in the activity in question and do
25 not use any of the equipment. The same adult accompanying an older child could access the slope in the same way and stand and watch the supervised activity from the same vantage point but there would be no payment required.

General

30 84. The snow is created artificially. 1,200 gallons of water are chilled in what amounts to a swimming pool and then passed through an ammonia pipe system. The ambient air temperature is -4° and 16 snow cannons in the roof blast the water with carbon dioxide which atomises the ionised particles of water creating snow. Some 1,500 tonnes of snow are produced and the snow is blown into place; it is then groomed and sculpted by machine and by hand into a suitably varying slope profile.
35 To ensure high quality snow requires the correct temperature and humidity to be maintained within the Snow Dome to ensure that the texture of the snow does not vary too much. It is at its best first thing in the morning as the snow is blown every evening.

85. The ground temperature is -12° and the snow on the main slope is almost 1.5 metres deep.

86. The ice wall requires a high degree of maintenance.

87. There is no charge for admission to the Snow Dome.

5 **Reasons for Decision**

88. Both parties expended considerable time and energy in exploring the nature of the supply made by the appellant.

89. Obviously, it was a matter of agreement that “anything done otherwise than for a consideration” is not a supply in terms of section 5(2) VATA. Accordingly anyone using the Snow Dome without paying for a lift pass or lesson but using the free equipment does not receive a “supply” for VAT purposes from the appellant. Therefore this appeal is concerned only with supplies furnished by the appellant for a consideration and the only contentious issue is the sale of lift passes.

90. Although Mr Simpson referred the Tribunal to *CPPI* at paragraphs 9, 10, 12 and 26 when looking at characterisation of the supplies by the appellant, neither party referred us to *Beynon* which was in the Bundle of Authorities. Lord Hoffman observed in that case that *CPPI* was a restatement of principle and he quoted from that case pointing out that “Regard should always be had to the circumstances in which the transaction took place”. He went on to comment on and quote from *CPPI* at paragraph 20 in the following terms:-

“Every supply of ‘a service’ is by definition distinct and independent but a supply which ‘from an economic point of view’ comprises a *single* service should not be artificially split into separate ‘services’. What matters is ‘the essential features of the transaction’. The court went on to say in paragraph 30:

“There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services, which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied ...”.

91. The primary case on which both parties founded was *Findmypast*. The conclusion reached at paragraph 14 was not in dispute between the parties and read:

“It is clear from those provisions that the scope of VAT is wide, and is intended to cover all forms of economic activity. That is subject to one important qualification, however: there must be a consideration for a service if it is to be a supply for VAT purposes. This means that there must be a direct link between the service and the consideration, a point that was emphasised by the Court of Justice in Case C-520/10 *Lebara Ltd v HMRC*”.

92. The Court went on to analyse *CPPI* and *Levob* and at paragraph 16 found that:

¹ 2012 STC 1536

“A number of important elements emerged from the foregoing statements of the law. First, transactions must be considered in context. This obviously includes the economic context. Secondly each supply of a service will normally be regarded as independent, but if as a matter of economic reality what is provided is a single service it should not be artificially split. Thirdly, on a proper analysis, in some cases it will be found that there is a principal service and a series of other services that are ancillary to that principal service; in that event the ancillary services share the tax treatment of the principal service. ... an important question is whether a service is a not an aim in itself but rather an enhancement of the principal service. Fourthly, the approach taken by the Court of Justice involves the application of a practical test, based on economic reality and having due regard to the factual legal context in which a possible charge to tax arises.”

93. At paragraph 18 “... it is necessary to examine the whole of the taxpayer’s relationship with its customers, and to do so in context, in order to discover the true nature of the supply.”.

94. At paragraph 26

“The court should have regard to precisely what the taxpayer does and what it undertakes to do for its customers; the notions of consideration and reciprocity are of fundamental importance ... It is also necessary to determine what the principal supply is that the taxpayer makes to its customers, and whether any particular features of that supply are to be regarded as merely ancillary or as independent supplies. At all times a practical test, based on economic reality, must be applied”.

95. Establishing what constituted “consideration and reciprocity” was not straightforward not least because at the hearing, Officer Stone was very clear that when he paid for a lift pass he paid for admission to the Snow Dome, whereas Mr Smith was equally clear that all of the facilities other than the drag lifts on the main slope could be enjoyed without purchasing a lift pass. However, the range of facilities available in the Snow Dome and what a customer experienced became clear on the site visit.

96. In fact, and I find as fact, a customer purchases a lift pass which is only valid for a limited window of time. However, whilst the customer can only use the lifts within that window, the customer can spend as long as (s)he wishes on the slopes or in the Snow Dome. Furthermore, the customer can use the equipment, the rented clothing etc and the lockers for as long as (s)he wishes.

97. Indeed, in both the earlier versions of the Terms and Conditions customers are encouraged to arrive “...at least 30-45 minute (sic) prior to the activity start time to collect passes and get kitted up”. Once kitted up the customer can go into the snow area and could certainly ski, snowboard, sledge or throw snowballs but will have to wait until the allotted time to use the lifts. After the allotted time for the lift pass the customer can remain on the slope.

98. HMRC placed much emphasis on the use of the words “slope time” or “time on the slope” in the Terms and Conditions arguing that that is precisely what a lift pass purchased. However, those words have to be read in context. In the current version it is under the heading “Peak/Off Peak Pricing Policies” and in the earlier versions under “Bookings”. As can be seen from paragraph 75 above, although the word “slope” is used, in fact, the reference is to the window of time shown on the lift pass. I accept and

agree with Mr Smith's explanation that what was intended was to show a method of calculation for the quantum when booking or seeking a refund.

5 99. As I indicate above, there is no limit at all on the period of time a customer can spend in the Snow Dome or on the main slope during opening hours. The wording in the Terms and Conditions, and particularly the earlier versions, where errors have not been corrected in the second version, is not a model of precision. The Terms and Conditions are not specific to the lift passes.

10 100. Although ultimately fiscal neutrality was not an issue and therefore sections of both parties' arguments fell away, nevertheless, those arguments set the general parameters relating to the economic context within which the appellant trades.

15 101. As indicated above, the appellant has at all times argued that that which they supply is very similar to the other five outdoor resorts in Scotland. The distinction is that because of the urban location many customers would wish to come for a short period, for example, after work or early in the morning and would not be bringing their own equipment, even if they owned that. For an outdoor ski resort travel is involved and for that reason ski passes are for a day or a half day or even for a season. The equipment is not free and is available to hire.

102. HMRC had argued that any comparisons were based on a false premise in that:

20 "... the mountain and the snow are not provided by the operator but by nature. Moreover such an operator would in any event not be able to make a 'supply' of access to the snow-covered mountain because, quite apart from anything else, the public has access rights in terms of the Land Reform (Scotland) Act 2003, Part 1 ... There is not and could not be any charge to use the 'facilities' at an outdoor ski resort where the 'facilities' simply take the form of natural physical features/and landscape combined with the effects of weather".

25 103. As Mr Smith explained in evidence, and as I am well aware having lived in the Highlands for many years, that is not the whole picture. Certainly the mountain is furnished by nature, however, snow and the weather are a major problem which require to be managed by the ski operators. If there is too much snow then the snow has to be cleared, access to the slopes provided and the slopes contoured. If the winds
30 are too high, the drag lifts may be, and often are, closed. The "facilities" provided are not restricted to the mountain, snow and lifts. Like the appellant the other resorts provide lessons and other activities.

35 104. Both in the Snow Dome and on the mountains, access to the lifts and the areas immediately adjacent thereto, can be and is curtailed by the operators, where necessary on health and safety grounds.

40 105. I accept Mr Smith's evidence that the primary difference in terms of physicality is that the indoor resort has a roof and that the maintenance and running costs for resorts, whether indoor or outdoor, are very similar and they are both subject to similar economic vicissitudes. Obviously the other major difference is that the mountains are infinitely larger in scale.

106. I also accept that, like the previous owners of the Snow Dome, the only viable economic model in an urban environment is to provide free equipment and offer lift passes for short as well as longer periods.

5 107. Shortly put, HMRC say that the use of the lift is not an end in itself but is ancillary to use of the main slope. The appellant says that the reality is that buying the lift pass means that a customer saves time and effort and therefore is able to get to the top more frequently and come down more frequently. The supply is transport up the slope more quickly and easily.

10 108. Having looked at all of the facts, which are set out at length, I find that the supply made by the appellant when selling a lift pass is access to the lift for the duration specified on the pass. Anyone can access the slope but clearly someone purchasing a pass, in doing so, acquires an ancillary contractual right to use the slope provided they behave safely.

15 109. However, although both parties focussed on the characterisation of the supply, that is not end of the matter. The wording of Schedule 7A Group 13 is absolutely crucial. There is no doubt that a customer purchasing a lift pass is entitled to transport on that lift, or lifts, within “a place of entertainment, recreation or amusement” but the crucial point is that that transport is provided by the appellant. It is the appellant who, in the wording of the latter part of this provision “... supplies a right of admission to, or a right to use facilities at, such a place”.

20 110. It is the appellant who permits customers, whether paying or not, to enter the Snow Dome and who has the right to exclude any such customer or indeed passer-by. It is the appellant who extends the right to use the facilities, whether for payment or not, within the Snow Dome. Although Mr Simpson was ingenuous in arguing the case for the appellant, the wording of the legislative provision is very clear.

Decision

111. In all these circumstances, the appeal falls to be dismissed.

30 112. 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.

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**ANNE SCOTT
TRIBUNAL JUDGE**

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RELEASE DATE: 24 JANUARY 2018

List of Authorities

5 **Legislation**

EC Directive 2006/112 – Article 98.

Value Added Tax Act 1994 (“VATA 94”) Section 5(2).

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VATA 94 Section 29A.

VATA 94 Schedule 7A Group 13.

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Land Reform (Scotland) Act 2003 part 1 – Section 1-9.

Caselaw

6. **Card Protection Plan Ltd v Customs and Excise Commissioners 1999 2 AC 601. (“CPP1”)**

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7. Card Protection Plan v Customs and Excise Commissioners [2002] 1 AC 202.

8. *Levob Verzekeringen BV v Staatsecretaris van Financien [2006] 2 CMLR 8. (“Levob”)

9. *Beynon and Partners v Customs and Excise Commissioners [2005] 1 WLR 86. (“Beynon”)

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10. *Airtours Holiday Transport Ltd v Revenue and Customs Commissioners [2016] 4 WLR 87. (“Airtours”)

11. **Revenue and Customs Commissioners v Findmypast Ltd [2017] CSIH 59. (“Findmypast”)**

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12. Chipping Sodbury Golf Club & others v Revenue and Customs Commissioners [2012] UKFTT 557 (TC).

13. College of Estate Management v Revenue and Customs Commissioners [2005] 1 WLR 3351.

14. **Purple Parking Limited & Airparks Services Ltd v HMRC 2009 UKFTT 152 (TC). (“Purple Parking”)**

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* referred to by name in Mr Simpson’s skeleton argument but with no specific reference

The relevant statutory provisions

The relevant provisions are as follows:

5 **The Principal VAT Directive 2006/112**

Article 98

1. Member States may apply either one or two reduced rates.

10 2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.

The reduced rates shall not apply to the services referred to in point (k) of Article 56(1).

15 3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned.

Annex III

(5) transport of passengers and their accompanying luggage

Value Added Tax Act 1994

20 **5.— Meaning of supply: alteration by Treasury order.**

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

25 (a) “supply” in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

30 **Section 29A(1)**

VAT charged on-

(a) any supply that is of a description for the time being specified in Schedule 7A, or

(b) any equivalent acquisition or importation,

shall be charged at the rate of 5 per cent.

5 Schedule 7A (Group 13)

CABLE-SUSPENDED PASSENGER TRANSPORT SYSTEMS

Item No

- 10 1. Transport of passengers by means of a cable-suspended chair, bar, gondola or similar vehicle designed or adapted to carry not more than 9 passengers.

NOTES:

Supplies not within item 1

- 15 1. Item 1 does not include the transport of passengers to, from or within-
- (i) a place of entertainment, recreation or amusement; or
 - (ii) a place of cultural, scientific, historical or similar interest,
- by the person, or a person connected with that person, who supplies a right of admission to, or a right to use facilities at, such a place.

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Joint Minute of Admissions

“1. In respect of the Snow Factor indoor facility operated by the Appellant at Braehead:

- 10 a. a lift pass entitles customers, at least, to use the ski lifts to the top of the hill and the slopes and facilities generally, under explanation that the parties are not agreed as to whether a lift pass confers any other benefits or entitlements upon customers;
- b. if a customer wishes to walk up the hill, (without payment) he or she can;
- 15 c. only a very small number (fewer than 1%) of customers choose to walk up the hill;
- d. staff are routinely placed at the base and peak of the POMA ski lift who are primarily there to assist customers using the lift (and to stop the lifts if a customer falls over, in order to prevent injury) but who also look out for customers who are skiing or boarding on the slope to assist in the event of a fall.”

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