Neutral Citation: [2023] UKFTT 00271 (TC)

Case Number: TC08748

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/02942

EXEMPTION – temporary reduced VAT rates – VAT liability of the driving experiences – do they fall within Item 1 in Group 16 of Schedule 7A VAT Act 1994 – no appeal dismissed

Heard on: 10 June 2022
Judgment date: 07 March 2023

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
LESLIE BROWN

Between

THE YOUNG DRIVER TRAINING LIMITED

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ian Mulingani, Managing Director of the Appellant company

For the Respondents: Mr Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal Video Platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was, therefore, held in public.

DECISION

INTRODUCTION

1. The issue in dispute is whether supplies made by the Appellant were subject to VAT at the temporary reduced rates which were introduced for certain types of supply in the Government's response to the Covid-19 pandemic or whether they were subject to VAT at the standard rate.

2. On 13 August 2021, the Appellant appealed to the Tribunal against the decisions of the Respondents ("HMRC") dated 4 June 2021 to raise an assessment under s 73(1) of the VAT Act 1994 ("VATA") for the VAT periods: 09/20 to 12/20 (inclusive) in the amount of £125,013.00 and the decision also dated 4 June 2021 being an adjustment to the VAT return for the period 03/21 for the undeclared output tax resulting in the VAT credit of £11,877.47 being denied and an assessment made for the VAT due of £8,796.45.

3. Following the statutory review on 6 August 2021, the assessments for periods 09/20 to 12/20 were amended to £125,085.00 and the 03/21 periods was also amended and the VAT due adjusted to £8,534.70.

ISSUES

4. The issues to be determined were as follows:

(1) Whether the supplies provided by the Appellant fall within Item 1 in Group 16 of Schedule 7A VATA ("Group 16");

(2) If the supplies do not fall within Group 16, does the principle of "fiscal neutrality" mean that the Appellant should be entitled to benefit from the temporary reduced rates; and

(3) Whether the Tribunal is satisfied that the relevant assessments raised by HMRC satisfied the statutory requirements.

During HMRC's oral submissions, Mr Mulingani confirmed that the Appellant no longer relied upon the ground in its Notice of Appeal that the supplies fell within Item 2 in Group 15 of Schedule 7A VATA.

LEGISLATION

5. All references are to VATA unless stated.

Provisions relating to reduced rate of VAT

> "29A Reduced Rate
>
> (1) VAT charged on—
>
> (a) any supply that is of a description for the time being specified in Schedule 7A, or
>
> …
>
> shall be charged at the rate of 5 per cent.
>
> …
>
> (3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it."

6. Groups 14 to 16 were added to Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Coronavirus) Order 2020 ("the Order"). By article 2 of the Order, the Groups were to have effect for the period 15 July 2020 to 12 January 2021. This was subsequently extended

to 31 March 2021 and then again to 30 September 2021. There was a further extension to 31 March 2022 but during this period (i.e. from 1 October 2021 to 31 March 2022) the reduced rate applicable in respect of supplies within Groups 14 to 16 was 12.5 per cent rather than 5 per cent.

7. Relevantly for these purposes, Group 16, Part II Schedule 7A VATA (which has now been repealed) was in the following terms:

> "GROUP 16—SHOWS AND CERTAIN OTHER ATTRACTIONS
>
> Item 1 – Supplies of a right of admission to shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities but excluding any supplies that are exempt supplies by virtue of Items 1 or 2 in Group 13 of Schedule 9."

Provisions relating to assessment etc.

> 73 Failure to make returns etc
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.
>
> (6A) In the case of an assessment under subsection (2), the prescribed accounting period referred to in subsection (6)(a) and in section 77(1)(a) is the prescribed accounting period in which the repayment or refund of VAT, or the VAT credit, was paid or credited.
>
> 77 Assessments: time limits and supplementary assessments
>
> (1) Subject to the following provisions of this section, an assessment under section 73 … or 76, shall not be made—
>
> (a) more than [4 years]2 after the end of the prescribed accounting period or importation … concerned, or
>
> (b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, [4 years] after the event giving rise to the penalty.
>
> 83 Appeals

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the

following matters—

…

(b) the VAT chargeable on the supply of any goods or services …

…

(c) the amount of any input tax which may be credited to a person;

…

(p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act

HMRC Guidance

8. HMRC Guidance titled: "VAT: reduced rate for hospitality, holiday accommodation and attractions" published on 9 July 2020 stated:

"If you're a VAT registered business, check if you can temporarily reduce the rate of VAT on supplies relating to hospitality, accommodation, or admission to certain attractions.

…

As announced at budget 2021, the government will be legislating to:

- extend the temporary reduced rate of VAT of 5% until 30 September 2021
- prepare for a new rate of 12.5% from 1 October 2021 to 31 March 2022

The supplies to which the temporary reduced rates will apply remain the same.

The government made an announcement on 8 July 2020 allowing VAT registered businesses to apply a temporary 5% reduced rate of VAT to certain supplies relating to:

- hospitality
- hotel and holiday accommodation
- admissions to certain attractions

The temporary reduced rate will apply to supplies that are made between 15 July 2020 and 31 March 2021.

These changes are being brought in as an urgent response to the coronavirus (COVID-19) pandemic to support businesses severely affected by forced closures and social distancing measures.

…

Admission to certain attractions

If you charge a fee for admission to certain attractions where the supplies are currently standard rated, you will only need to charge the reduced rate of VAT between 15 July 2020 and 31 March 2021.

However, if the fee you charge for admission is currently exempt that will take precedence and your supplies will not qualify for the reduced rate.

> More information about how these changes apply to your business can be found in VAT:
>
> Admission charges to attractions (https://www.gov.uk/guidance/vat-on-admission-charges-to-attractions)."

The Guidance titled "VAT on admission charges to attractions" provided the following examples:

> "Examples of where the reduced rate may apply could be attractions such as:
>
> - a planetarium
> - botanical gardens
> - studio tours
> - factory tours"

EVIDENCE AND WITNESSES

9. We were provided with a Hearing Bundle comprised of 189 page and a Supplementary Bundle comprised of 76 pages. The two bundles contained the witness statements of:

(1) Mr Ian Mulingani, the Managing Director of Young Driver Training Limited; and

(2) Ms Rachel Wills, Higher Officer, VAT Tax Specialist, HMRC.

10. Both witnesses gave evidence at the hearing. Their witness statements stood as their evidence in chief and they both answered questions put to them in cross-examination. Ms Wills' evidence addressed the chronology and procedural background of the appeal which we have adopted and set out below. The questions put to Mr Mulingani in cross-examination were mostly by way of clarification rather than challenge. We found both witnesses to be credible and we accepted their evidence of fact in relation to the issues in this appeal. We have incorporated the evidence of Mr Mulingani in our findings of fact and discussion below.

Background facts

11. The Appellant's principal place of business is Holly Grange, Holly Lane, Balsall Common, Coventry CV7 7EB. The Appellant registered for VAT under reference 979 0365 76 on 1 September 2009. The nature of the Appellant's business was described on the VAT1 as "*Other Personal Services not elsewhere classified- Provision of driving lessons off the highway for under 17 year olds*."

12. On 9 July 2020 the Appellant's then representative, Mr Steve Hands of Accountancy Admin Ltd, telephoned HMRC to make a general enquiry about the temporary reduced VAT rate of 5% available on certain supplies relating to hospitality, hotel and holiday accommodation and admission to certain attractions. Mr Hands was advised to call back the following week when more information would be available.

13. On the same day, 9 July 2020, Mr Hands submitted form V484 to make a change to the Appellant's VAT registration. The Appellant requested their Standard Industry Code ("SIC") code was changed from 96090 (Other personal services n.e.c.) to 93210 (Activities of amusement parks and theme parks) and the business activity changed to "*Driving experience for under 17 year olds*". The application was made one day after the Government announced its intention to introduce reduced rates of VAT on a temporary basis for certain types of supplies in response to the Covid-19 pandemic.

14. Mr Hands telephoned HMRC again on 14 July 2020 to check if the Appellant was eligible to use the reduced VAT rate of 5%. Mr Hands was advised to provide specific details to HMRC's VAT Written Enquiries Team ("VWET") for a definitive answer regarding the position on the reduced rate of VAT and whether it applied to the Appellant's business. Mr

Hands was also given guidance on how to update Business Activity and SIC codes on the VAT registration.

15. On the 7 September 2020, VWET received a letter dated 24 August 2020 from Ms Tamara Habberly of The VAT People. The letter requested guidance on the scope of the temporary 5% reduced VAT rate.

16. On the 24 September 2020, VWET replied to Ms Habberly. The reply confirmed that VWERT is an advisory service and could not provide a definitive answer but only general advice and referred Ms Habberly to the relevant publication: https://www.gov.uk/guidance/vat-on-admission-charges-to-attractions

17. On 26 January 2021, HMRC received a letter dated the 25 January 2021 from Ms Habberly. The letter also included a copy of a previous letter dated 6 October 2020 from Ms Habberly which claimed that the Appellant's business charges an admission fee to a driving experience and so should qualify to use the reduced rate of 5%. Ms Habberly requested clarification by policy as to whether the Appellant's supplies should be classed as admission to events at the reduced rate or venues at the standard rate.

18. On 16 April 2021, the Appellant submitted a claim return of £11,877.47 for period 03/21. A credibility check was required to be carried out by HMRC before the 03/21 return could be repaid. On 12 May 2021, HMRC telephoned Mr Hands (no authority was held for HMRC to speak to the VAT People) who confirmed that the Appellant had been applying the reduced VAT rate of 5% since 15 July 2021.

19. On 12 May 2021, HMRC e-mailed Mr Hands requesting a VAT summary, detailed listing of sales and purchased for the 03/21 periods and any calculations relating to the adjustments made. On 13 May 2021, HMRC e-mailed Mr Hands confirming that the Appellant's supplies did not qualify for the reduced VAT rate as HMRC had concluded that the Appellant's supplies were not admission to attractions but were supplies of driving lessons and did not qualify for the temporary reduced rate of VAT for hospitality, holiday accommodation and attractions. On 13 May 2021, Mr Hands replied by e-mail disputing HMRC decision that the Appellant's supplies did not qualify for the reduced VAT rate.

20. HMRC replied on 13 May 2021 confirming that as the Appellant's supplies did not fall within the Group 16 list of attractions, they would not qualify for the reduced VAT rate. On 19 May 2021, Mr Hands e-mailed HMRC to request clarification of the VAT rate for the experiences of driving classic cars, fire engines and small electric buggies. HMRC replied on 19 May 2021 to confirm that they did not believe that the lessons, experiences of driving classic cars, fire engine, Bentleys and small electric buggies are a right of admission to attractions or events. The customer is buying the right to drive a vehicle not admission to an attraction. None of these supplies fall into any of the Group 16 list of attractions and therefore they do not qualify for the temporary reduced VAT rate.

21. On 26 May 2021, Mr Hands e-mailed to HMRC the VAT return details for the periods 06/20, 09/20, 12/20 and 03/21 requested that HMRC "consider your judgement [sic] and give a clear and concise determination which back up your decision from the rules applied". On 3 June 2021, Mr Hands e-mailed to HMRC the calculations based on the Gross sales apportionment figures for periods 06/20, 09/20, 12/20 and 03/21. A request for a ruling on HMRC's position regarding the use of the reduced VAT rate was again made. The calculations were agreed by HMRC and on 4 June 2021 HMRC issued Notice of Assessments for the period 09/20 of £56,698.00 and for the period 12/20 of £68,315.00.

22. A statutory review was requested on 2 July 2021, the statutory review was completed and review conclusion letter issued on 28 June 2021 varying the decision. The decision was

varied as there was a discrepancy in the figures provided by Mr Hands on 3 June 2021. On the same date, 28 June 2021, HMRC issued a letter confirming an adjustment to the VAT return of the period 03/21 for the underdeclared output tax, resulting in the VAT credit of £11,877.47 being denied and an assessment made for the VAT due of £8,534.70.

23. On 13 August 2021, the Appellant filed a Notice of Appeal.

THE FACTS

24. The Appellant provides driving experiences ("the Experiences") to 4 to 17 year olds at 75 UK venues. The venues used for the Experiences are peripatetic and include shopping centre car parks, exhibition centre car parks, council park and ride car parks, county show grounds and military bases.

25. The Appellant's website lists the venues across the UK at which the Experiences are offered. When booking an Experience, the website user is prompted to enter their postcode. The website then displays nearby venues. After selecting the preferred venue, the user is shown a calendar which identifies available dates and times for the relevant Experience at the selected venue. Although it is possible to turn up without having a booked Experience (a "walk-in") and take a chance on whether an Experience is available on that day and at that time, the majority of Experiences are pre-booked. Almost half of all Experiences are bought as Christmas or birthday presents by parents or grandparents as a 'one off' annual treat for an under 17-years-old child.

26. The Experiences take place on a Saturday or Sunday on private land that is fenced off for safety, only the child and those accompanying the child are granted access to the fenced off area. Within the fenced off area there are two separate areas: one for the child taking part in the Experience and one for those accompanying the child. Those accompanying the child are not given access to the separate area on which the Experience takes place, access is reserved solely for the participating child.

27. Experiences for 4 to 10 years old take place in specially built 2-seater miniature electric cars restricted to a maximum speed of 10 mph called "Firefly". Firefly cars have independent suspension, disc brakes, twin electric motors and rack and pinion steering to enable them to drive and handle just like a road going vehicle. Firefly Experiences take within the fenced off area on a special course that replicates a realistic road system, the Firefly Experiences are available at nine UK locations. The child is unaccompanied during the Firefly Experience but is supervised by the Appellant and, in the event of an emergency, the Firefly can be stopped by a remote control cut off switch. The Firefly Experience includes a five-minute briefing/demonstration followed by 15 minutes driving on the special course.

28. The majority of the Experiences for 10 to 17 year olds take place in a conventional car (Vauxhall Corsa or similar) that has a manual gearbox and is fitted with dual controls- identical to vehicles used for driving lessons on the public highway. Experiences for 10 to 17 years old are also available in vehicles such as classic cars, a fire engine and a Bentley Continental. The 10 to 17 years old is always accompanied by an experienced, qualified adult driving instructor in the vehicle (conventional or otherwise), this is a requirement of the Appellant's insurers and as a necessary safety precaution.

29. The Appellant, on its website and in marketing material, has always described its Experiences as "*driving lessons for under 17 year olds*", '*driving lessons* and the Appellant as a '*driving school*'. When the Appellant started business in 2009 there was public resistance to under 17 year olds being taught to drive cars as it was thought knowing how to drive would encourage them to take and drive their parents' cars without consent. To combat that perception, the Appellant focused on the safety aspects of learning to drive at a young age:

"*nurturing a future generation of safe drivers*". The children, being under 17 years old, cannot legally have driving lessons on public highways as they must be at least 17 years old and possess a provisional driving licence. A learner driver is required to have taken and passed the driving theory test before a practical driving test can be booked. The Experience additionally provides the child with increased awareness of road safety when the child is a pedestrian or cycling on the public highway. The Appellant's competitors are not driving schools as the child cannot legally drive on the public highway and the Experiences are not competitive in terms of price as they are three times the cost of a driving lesson.

30. During the period in dispute the Appellant's website variously stated:

(1) The Experience helps children "*learn to drive*";

(2) The section titled "*30 minute driving lessons- 10 to 17 year olds*" stated:

> "*YOUNG DRIVER experience lessons for 10 to 17 year olds*! *Our flagship training programme encourages teens to become safer drivers, giving them a head start when it comes to learning to drive. Teens get plenty of teaching and fun behind the wheel*.
>
> *Whether it's their first ever time sitting in the driving seat, or they've already had a lesson with us, these 30-minute Driving Lessons are suitable for teenagers aged between 10 and 17 years wanting to get an early start in driving.*
>
> *We use funky new-generation Vauxhall Corsas or similar vehicles for our junior driving lessons. All cars are dual-controlled, so your children will be learning in complete safety. Lessons are given on a one-to-one basis by experienced driving instructors, all of whom are highly skilled at encouraging youngsters taking their first steps to learning to drive.*
>
> *On their very first lesson, teens will be starting the car, moving off, changing gears and steering. Expect to see them stepping out of the car with a huge smile on their face at the end of their experience. And no doubt you'll feel very proud! All lessons are geared towards the child, so if they've already done a Young Driver lesson, they'll move on to more advanced skills such as junctions, turning, parking and driving in two-way traffic*."

(3) The "About Young Driver" section states:

> "*We've been delivering driving lessons for teens and driving experiences for kids, and adults too, since 2009. We sold our millionth Young Driver lesson in 2021 and we operate out of 70 private venues all over the UK*.
>
> *We love nothing more than to see the huge smile on the children's faces as they get out of the car after their very first driving experience with us. We're here with you to support all the family on that journey to getting a driver's licence, with some fun for the grown-ups and littlest ones too along the way. Responsible learning, in a safe, controlled environment in a fun way, to nurture the future generation of safe drivers – that's what Young Driver is all about."*

(4) Available Experiences include a "*mock practical driving test*" and "*driving lesson bundles*" (comprised of six "driving lessons").

31. Refreshments, including ice cream from an ice cream van, are available to purchase at certain venues and are located outside the fenced off area. A road safety film may also be shown, again, outside the fenced off area. As these amenities are located outside the fenced off area they may also be enjoyed by the general public. Certain venues, such as the NEC,

Birmingham, which have franchise agreements with refreshment providers, permit the Appellant to only sell refreshments to its own customers.

SUBMISSIONS

32. Mr Mulingani's submissions on behalf of the Appellant are summarised as follows.

33. The Experiences or 'driving lessons' cannot be classified as 'real' driving lessons as the children are not aged 17 years old, they have not taken the driving theory test and are ineligible to take the practical driving test, they do not have a valid provisional driving licence and the Experiences take place on fenced off private land, not on the public highway. The Experiences are bought for reasons of entertainment and fun and therefore the Appellant is in the amusement and attractions industry in the same way as theme parks, amusement parks, funfairs and circuses.

34. The peripatetic nature of the venues is very much in the style of a circus or funfair. An area is fenced off for safety and to keep out non-participants in the same way that a circus, funfair or fixed visitor attraction would do. Admission to the Experience includes access for the child to the fenced off private land on which the driving takes place.

35. Whilst the Appellant has always described its Experiences as "driving lessons for under 17 year olds" that does not mean that the Appellant is providing driving lessons, the taxation of the Appellant's supply should be based on what is actually delivered not the description used for marketing purposes. It advertises the Experiences as 'driving lessons' but nobody could mistake the Experiences for 'real' driving lessons. What the Appellant creates is an attraction that should be taxed at the temporary reduced VAT rate. Attending an Experience is no different to attending a circus, zoo, cinema, fair or amusement park. The legislation providing for the reduced VAT rate was understandably introduced quickly and is not as precise as it may have been in less urgent times but it was clearly intended to apply to the Appellant's Experiences.

36. The Appellant is at a considerable commercial disadvantage compared to its competitors (other leisure and amusement activities for children) who have enjoyed the reduced 5 per cent VAT rate. The Experiences satisfy the criteria in the legislation as the price includes admission to a private driving area which is not accessible to the public or those accompanying the child. That is no different to other peripatetic event based activities with admission by ticket only. The ticket to the circus includes admission to the 'big top' tent and taking part in the activities within in the same way that a ticket for an Experience includes admission for the child to the driving area plus the driving activity itself.

37. Mr Waldegrave's submissions on behalf of HMRC are summarised as follows.

38. The Appellant supplies are not "rights of admission" and, even if they are, they are not rights of admission falling within Group 16.

39. In order to come within Group 16 it is necessary for the supply to be of a "right of admission". Although the Appellant's supply includes access to a specific area where the Experience takes place, the supply encompasses considerably more than this as it includes use of the relevant vehicle, tuition and/or supervision. A typical consumer would not consider that they were paying for access to a particular area but for the opportunity to drive a vehicle with tuition and under supervision.

40. The Tribunal will be assisted by the approach adopted by the VAT and Duties Tribunal in *Twycross Zoo East Midland Zoological Society Limited v HMRC* [2007] V & DR 425 ("*Twycross Zoo*"). The issue was whether the provision by the appellant zoo of "animal encounters" constituted an exempt supply (in so far as is relevant) of a "right of admission" to a zoo (within Item 2 in Group 13 of Schedule 9 to the Value Added Tax Act 1994). The

encounters in question included, for example, the opportunity to help feed elephants. The Tribunal considered that it should apply the "plain and ordinary meaning of the wording", and that on this basis what was exempted was "physical admission" to the zoo: see paragraph [22]. At [24], the Tribunal commented:

> "I also cannot accept Ms. Sloane's alternative contention [for the Commissioners] that what is being supplied here is a right of admission to a designated area within the Zoo and as such, although a separate supply, would fall to be an exempt supply of a right of admission. What the Zoo is supplying here is, as I have said, a package or a range of benefits. The Zoo is not merely supplying the right of admission to a part of the Zoo to which the general public would not normally be allowed access"

41. A parallel can be drawn between *Twycross Zoo* and the facts of this appeal, similarly, the Appellant's supply cannot sensibly be regarded as constituting a "right of admission" just as the appellant in Twycross Zoo did not make supplies of rights of admission in relation to supplies of animal encounters.

42. If the Tribunal finds that the Appellant's supply of an Experience does constitute the supply of a "right of admission" it is submitted that it is not a supply which falls within Group 16. In order to fall within Group 16, the right of admission must be to a show, theatre, circus, fair, amusement park, concert, museum, zoo, cinema, exhibition or "similar cultural events and facilities". HMRC submits that, even if the Appellant supplies a "right of admission", it is not to any of the events or venues specified in Group 16 and is not to an event or facility of sufficient similarity to fall within Group 16.

43. The Appellant has asserted that if its supplies cannot benefit from the reduced VAT rates provided for by Group 16 it would be unfairly disadvantaged in comparison to its competitors. The Court of Appeal decision in *The Learning Centre (Romford) Limited v HMRC* [2020] STC 898 ("*Learning Centre*") provided a helpful overview of "fiscal neutrality". The relevant principle is that supplies of goods or services which are similar, and thus in competition with one another, should not be treated differently for VAT purposes. In order to determine whether two supplies are similar for these purposes, it is necessary to consider the point of view of the "typical consumer". In particular, supplies will be regarded as relevantly similar where they "have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other", see *Rank Group plc v HMRC* (C-259/10 and C-260/10) [2012] STC 23 at [44], cited in *Learning Centre* at paragraph [38]. The Tribunal is expected to be able to assess whether the supplies in question are sufficiently similar "*using its own experience of the world*", *Learning Centre* at [70].

44. HMRC do not understand the Appellant to challenge the validity or the quantum of the assessments. However, for the sake of completeness, HMRC's position is that the relevant statutory provisions were complied with and the assessments raised within the applicable time limits.

DISCUSSION

45. In order for the Appellant's supplies to fall within Group 16 it must meet two requirements. First, a supply of a "right of admission" and, secondly, an event or venue specified in Group 16 or an event or facility of sufficient similarity. We have first considered the two Group 16 requirements and then proceeded to consider "fiscal neutrality" and the validity of the assessments.

Right of admission

46. The Appellant submitted that the supply made is a right of admission. We do not accept that submission. We agree with the Tribunal's decision in *Twycross Zoo* and consider that it provided helpful guidance on construing the meaning of "right of admission". We adopt that guidance. At [16], the Tribunal recorded the submissions of Ms Whipple, Counsel for the Appellant, in respect of "right of admission" at [16]:

> "The UK has exempted the right of admission … and it is that wording which has to be construed strictly but not unduly restrictively. … Ms Whipple contended that when a member of the public purchased an animal encounter, he was buying an experience separate from and far beyond what was included in the general admission charge. The legislation does not exempt all the cultural services by the Zoo but merely the right of admission to it. This wording is perfectly plain and if what is supplied is beyond that right of admission, it falls to be taxed. To include within the definition of "a right of admission" supplies above and beyond that right of admission, would be to widen the scope of the exemption to an unacceptable degree. Not only was it a corruption of the wording but it would be a distortion of the legislation."

47. At [22], the Tribunal stated:

> "… the second question is how should the "right of admission" be construed. I accept Ms Whipple's contention that one looks to the plain and ordinary meaning of the wording. Member States were given a wide mandate and the UK Government exempted the right of admission, nothing more and nothing less."

48. We accept that the Appellant's supply includes admission to the fenced off area where the particular Experience takes place; however, it is our view that the supply comprises considerably more than a "right of admission" when one looks to the plain and ordinary meaning of the wording. The supply (the Experience) includes not only a "right of admission" to the fenced off area but also the use of a vehicle, driving tuition and supervision. What is being supplied is a package of benefits over and above a right of admission to the fenced off area. Without the use of a vehicle, driving tuition and supervision there would be no driving Experience.

49. We accept that the child is, in the majority of Experiences, not being taught to drive to the standard required to pass the practical driving test on a public highway (referred to as a 'real' driving lesson by Mr Mulingani) but, nonetheless, the child is being taught how to operate the clutch (if manual transmission), brake, accelerator, steering and gearbox (manual or automatic) to enable them to safely and competently drive the vehicle under supervision.

50. The expectation of those booking and paying for the Experience is, not that the child is granted a right of admission to the fenced off area but, as detailed on the Appellant's website, that the child will be taught to drive the vehicle almost immediately and spend the remainder of the time period allotted to the Experience (30 or 60 minutes) driving the vehicle. We accept that the Appellant has designed the Experiences to be enjoyable and a "fun" driving experience for under 17 year olds but the "fun" objective of driving a vehicle can only be achieved if the tuition and supervision are supplied, especially when the vehicle has a manual gearbox and clutch. The accepted evidence before the Tribunal was that nothing that the child was taught during the Experience was detrimental to good driving practice or would hinder the child's progress when having driving lessons on the public highway. If that were not the case then there would be no point in the Appellant offering a block of driving lessons and a mock driving test. Whilst what is supplied by the Appellant is not a driving lesson with the objective of passing the driving practical test, the main supply is plainly a supply of driving tuition over and

beyond the physical admission to the fenced off area. Therefore, we do not accept that the Experience can be construed as a right of admission.

An event or venue specified in Group 16 or similar cultural events and facilities

51. In the event that we were wrong to find that the Appellant's supply was not a right of admission, we have considered whether the Experience is an event or venue specified in Group 16 or an event or facility of sufficient similarity. The event and venues stated in Group 16 are:

> "shows, theatres, circuses, fairs, amusement parks, concerts, museums, zoos, cinemas and exhibitions and similar cultural events and facilities"

52. The Appellant submitted that the Experience is sufficiently similar to events and venues contained in Group 16. In particular, the Experience is similar to a circus or funfair as it takes place on fenced off land which is only accessible to those with a ticket, the venues are peripatetic in nature and there are other activities and refreshments available. A fair includes many rides such as dodgem cars. Dodgem cars are no different to the Experience offered by the Appellant: you get in the dodgem car, pay the person who comes round to collect the ride fee who tells you which direction to drive to avoid head-on collisions, tells you how to operate the dodgem car and off you go. HMRC's submitted that the "right of admission" is not to any of the events or venues specified in Group 16 nor are the Experiences "*cultural events and facilities*" of sufficient similarity to fall within Group 16. We agree with HMRC's submission.

53. It is plainly evident that the Experiences do not fall within any of the events or venues contained in Group 16.

54. Mr Mulingani's submitted that the Experience is similar to a circus or funfair. The OED definition of a fair and circus are:

> "fair- A gathering for entertainment at which rides, sideshows, and other amusements are set up, typically (but not always) on a temporary or periodical basis; the place at which such rides and amusements are set up.
>
> Circus- A circular arena surrounded by tiers of seats, for the exhibition of equestrian, acrobatic, and other performances."

55. As can be seen from the OED definition, both a circus and a fair offer a range of attractions and amusements and a customer who has purchased an entrance ticket is able to freely wander around to view all the available attractions. This can be contrasted with what the Appellant offers: a specific pre-booked Experience in a fenced off area. Mr Mulingani's evidence, which we accepted, was that it was possible to turn up on the day and "take your chance" but that the majority of the Experiences are pre-booked. Unlike a circus or fair, there are no other available amenities or attractions within the fenced off area to view or enjoy.

56. We do not accept that a dodgem car ride is comparable to the Experience supplied by the Appellant. Any instruction (if provided) on how to drive a dodgem car will, by the very nature of the vehicle, be rudimentary: you press the accelerator pedal to move and operate the steering wheel. Colliding with and trying to avoid colliding with other dodgem cars driven erratically in the enclosed space is the aim and the attraction of a dodgem car ride: bad driving is embraced as part of the enjoyment. This is in stark contrast to the Appellant's Experiences where the child is being instructed and supervised on a one-to-one basis to drive in a safe and controlled manner, avoiding collisions, following a marked course that replicates a highway and in a vehicle that is either a car or, in the case of the Firefly, a vehicle that replicates the handling capabilities of a car.

57. Accordingly, we do not accept that there is sufficient similarity between the Experiences supplied by the Appellant and the events or facilities contained in Group 16. Similarly, we do

not accept that it can argued that the Experience is a cultural event of sufficient similarity to fall within Group 16.

Fiscal neutrality

58. This point can be dealt with briefly. The Appellant submitted that if the supplies it makes cannot benefit from the reduced VAT rate provided for by Group 16 it would be unfairly disadvantaged in relation to its competitors. The Court of Appeal in *Learning Centre* at [38] helpfully summarised the relevant principles citing the decision of the CJEU in *Rank Group*:

> "**The principle of fiscal neutrality**
>
> [38] The principle of fiscal neutrality is a well-established principle in the jurisprudence of the Court of Justice of the European Union. It is sufficient for present purposes to cite what the Court said in *Rank Group plc v Revenue and Customs Comrs* (Joined cases C-259/10 and C-260/10) EU:C:2011:719, [2012] STC 23, [2011] ECR I-10947:
>
> > '32. According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes …
> >
> > 33. According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.
> >
> > 34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer …
> >
> > …
> >
> > 43. In order to determine whether two supplies of services are similar …, account must be taken of the point of view of a typical consumer … avoiding artificial distinctions …
> >
> > 44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other based on insignificant differences …"

59. As the above makes clear, in order for the Appellant's argument based on fiscal neutrality to succeed, the Appellant would need to persuade the Tribunal that its supplies of Experiences, viewed from the perspective of a typical consumer, are effectively interchangeable with supplies which do fall within Group 16. In assessing whether the Appellant's supplies are sufficiently similar from the point of view of the consumer, the Tribunal is expected to be able to make that assessment. The Court of Appeal in *Learning Centre* at [70] stated:

> "… in order to determine whether services are regarded as similar by consumers for these purposes … it is clear that in most cases the national court is expected to make an assessment using its own experience of the world."

60. In reliance upon our own experience of the world, we do not accept that a typical consumer would regard the Appellant's supply of one-to-one driving tuition as identical or sufficiently similar to be interchangeable with a supply of admission to a theatre, zoo, fair, circus, etc.

Validity of Assessments and Quantum

61. The Appellant did not challenge either the validity or the quantum of the assessments. Whilst the validity and quantum of the assessments were not challenged, we are satisfied that the assessments, as varied, were validly raised.

DECISION

62. For the reasons set out above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 07th MARCH 2023