National Coal Board v. Commissioners of Customs and Excise. Commissioners of Customs and Excise v National Coal Board

Queen's Bench Division.

30 July 1982

Value added tax - Pension scheme - Supply of services - Whether supply of services for consideration - Finance Act 1972 - sec. 6(2).

The National Coal Board ("NCB") was responsible for the collection of contributions, and the payment of benefits, payable in respect of two pension schemes (the "MPS" and "SS"). The trustees of the MPS were the members of a committee of management who were responsible for the management and administration of the scheme. On an appeal by the NCB against an assessment to value added tax made on the basis that the NCB had been supplying administrative services to the two pension schemes, the Tribunal upheld the assessment in respect of the MPS. This was for the reason that until 1975 the NCB had paid value added tax but the scheme was amended in 1975 allegedly with a view to avoiding tax. The Tribunal allowed the appeal in respect of the other pension scheme.

The NCB appealed against the decision of the Tribunal in respect of the MPS and the Crown cross-appealed against the decision in respect of the SS.

The NCB contended that their activities did not amount to a supply of services within sec. 6(2)of the Finance Act 1972 and they were, in any case, carried out without consideration.

The Crown contended that under each scheme there was a proviso which enabled the NCB to set off charges for its services against contributions payable by it to the schemes and that this amounted to consideration.

The NCB and the Crown agreed that there was no distinction between the two schemes.

***Held*, taxpayer's appeal allowed and the Crown's cross-appeal dismissed.**

1. The amendments made to the scheme, although designed to avoid tax were not suggested as not being genuine and it was wrong for the Tribunal to take into account this alleged motive of the NCB in coming to its decision to amend the provisions of the MPS.

2. Under the terms of the MPS, part of the NCB's activities could not be categorised as a supply of services. In providing some services it was acting as principal not agent in carrying out its own responsibilities under the pension scheme. The amount deducted under the provision could not be regarded as consideration with regard to such activities.

3. The NCB did also supply services to the committee of management. However, the fact that some charges which are not consideration have to be deducted under the provision is an indication that the other charges should also not be regarded as consideration.

Mr. J. Gardiner Q.C.(instructed by Mr. R.V. Cowles, Legal Adviser and Solicitor to the National Coal Board) appeared for the taxpayer.

Mr. A. Collins (instructed by the Solicitor for H.M. Customs and Excise) appeared for the Crown.

Before: Woolf J.

JUDGMENT

Woolf J.: This judgment is on an appeal and a cross-appeal by the National Coal Board and the Commissioners of Customs and Excise in respect of a decision of a Value Added Tax Tribunal, dated the 1st December 1981, presided over by the President of that Tribunal. The Tribunal, in its decision, had dealt with an appeal by the National Coal Board against an assessment made by the Commissioners for VAT in the sum of £966,781.66 which the Commissioners alleged was due from the Board for the period commencing

The major part of the assessment, namely the sum of £912,466.83 related to the Mineworkers' Pension Scheme and the balance of £54,314.83 related to the Staff Superannuation Scheme.

The Tribunal upheld the assessment in respect of the Mineworkers' Pension Scheme but allowed the appeal in respect of the Staff Scheme and accordingly reduced the assessment appropriately. The Board now appeals against the decision of the Tribunal in respect of the Mineworkers' Scheme and the Commissioners cross-appeal in respect of the decision in relation to the Staff Scheme.

Both before the Tribunal and on this appeal, the Board and the Commissioners were in agreement that there was no reason to distinguish between the two pension schemes and that the decision should be the same in relation to both. The explanation for the Tribunal distinguishing between the two schemes was that in respect of the Staff Scheme, the Board had never paid tax, but in relation to the Mineworkers' Scheme, until that Scheme was amended in 1975 to bring its provisions in line with the Staff Scheme, the Board had paid tax from the introduction of the tax on the 1st April 1973.

Having given their decision in respect of the Mineworkers' Scheme, the Tribunal explained the decision as follows:

It will be appreciated that, in reaching the foregoing decision, we have not restricted ourselves merely to a consideration of the provisions of the Mineworkers' Scheme, as both Mr. Gardiner and Mr. Linton suggested we should do. Instead we have considered how the relevant proviso came to be included in this scheme, and in the clause thereof dealing with the calculation of the Board's contributions thereto. In our opinion, this is necessary to determine whether or not, in substance, the Board is supplying services "for consideration", and the amount of such consideration.

This explanation has to be considered in conjunction with the earlier statement by the Tribunal that the alteration in the Mineworkers' Scheme was made because the Board desired to avoid the payment of tax. There is no suggestion in this case that, although their motive was a desire to avoid the payment of tax, the alterations which were made to the Mineworkers' Scheme were not genuine or that since they were made the Scheme, as amended, has not reflected the reality of how the Scheme was operated and, in the circumstances of this case, it was wrong for the Tribunal to take into account this alleged motive of the Board in coming to its decision. In these circumstances, the question of whether or not VAT is payable must be judged objectively having regard to the terms of the Schemes and the activities performed by the Board.

However, the fact that the Tribunal made this error of approach does not mean that their decision was wrong in relation to the Mineworkers' Scheme. What it does mean, in my view, is that it is not possible to

---

distinguish the position of the two Schemes. I therefore propose to consider the arguments advanced on behalf of the Board only in relation to the Mineworkers' Scheme, my decision as to that Scheme being equally applicable to the Staff Scheme.

The statutory provisions which are relevant have their source in the*6th VAT Council Directive* (77/388/EEC). Article 2 states:

The following shall be subject to value added tax: 1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such.

Effect to that provision is given in the *Finance Act* 1972, as now amended, whereby, pursuant to sec. 2,supplies of services by taxable persons are charged to tax and bySch. 6(2) which provides so far as relevant:

> (a) "Supply" in this part of 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.

Mr. Gardiner, on behalf of the Board, contended that the activities of the Board in relation to the Schemes did not amount to a supply of services or if they did amount to a supply of services, they were done otherwise than for a consideration. Mr. Collins, on behalf of the Commissioners, argued to the contrary.

In order to consider these submissions, it is necessary to look with some care at the terms of the Scheme. I here set out the various clauses. Clause 2(i) states:

The total amount of the Standard Contributions payable by an Employer during any period shall be reduced by an amount equal to the total amount of any payments in lieu of contributions made by that Employer under the *National Insurance Act* during that period, in so far as such payments are referable to service in employments which are or were non-participating employments for the purposes of the *National Insurance Act* or any statutory provisions directly or indirectly replaced by it by virtue of membership of the Scheme or the Ancillary Workers Scheme.

Clause 2(ii) states:

The total amount of the Standard Contributions payable by an Employer during any period on or after 6th April 1978 shall be reduced by an amount equal to the difference between the total amount of any Contributions Equivalent Premiums paid by that Employer during that period in so far as they relate to periods of service in respect of which a pension would or might otherwise have become payable under Rule 9A and the total of the amounts recovered by that Employer during that period under or by virtue of section 47 of the *Pensions Act.*

Clause 2(iii) states:

The total amount of the Standard Contributions payable by the Board in relation to any period after 5th April 1975 shall be reduced by such sum as may from time to time be agreed by the Board and the Committee of Management as being fair and reasonable, having regard to the costs of managing and administering the Scheme (other than such costs as are referred to in paragraph (c) of Clause 7) and the cost to the Board of services rendered by the Board in connection with or for the purposes of the Scheme insorfar as incurred in either case on or after 1st October 1975, or in default of agreement as shall be determined to be fair and reasonable having regard to such costs or cost by an Accountant who shall be agreed by the Board and the Committee of Management or in default of agreement nominated by

time to time be determined by the Board) the following amounts in respect of the period since the last preceding payment made under this paragraph-

(i) the amount of contributions payable under the Rules by or in respect of members employed or deemed to be employed by such Employer (other than Final Contributions payable in accordance with Rule 6 by way of deduction from benefits) in so far in the case of contributions payable under the Rules as they have effect on and after 6th April 1975 as they are calculated on the basis of Earnings paid or deemed to be paid by that Employer; and

(ii) the amount of all sums payable by that Employer as Standard Contributions and Deficiency Contributions.

Clause 4 states:

Each member shall contribute such sums as may from time to time be provided under the Rules. The Board shall be responsible for the collection of all contributions payable by or in respect of members and for the payment of all such contributions to the Scheme.

Clause 5(2) states:

With effect from 6th April 1975 the members for the time being of the Committee of Management shall, subject as hereinafter provided, be the trustees of the Scheme and of its monies.

Clause 6 states:

There shall be paid into or held to the credit of the Pension Fund-

(a) All Standard Contributions and Deficiency Contributions payable by the Board;
(b) All sums received by the Board from other Employers in respect of Standard Contributions and Deficiency Contributions payable by such Employers and in respect of members' contributions;
(c) All sums collected by the Board as members' contributions.

Clause 7(e) states:

All sums payable by law out of the Pension Fund or by the Committee of Management in their capacity as trustees or administrators of the Pension Fund or of the Scheme.

Clause 8 states:

Any monies of the Scheme not for the time being required for payments to be made under the Scheme may at the discretion of the Committee of Management be invested in authorised securities or in the manner authorised by Clause 11A and the Committee of Management may retain any investment made in the exercise of the powers conferred by this Clause notwithstanding that it has ceased to be an investment in an authorised security.

Clause 9 states:

The Committee of Management shall have power to appoint one or more nominees or custodian trustees to hold on behalf of the Committee of Management investments of the Scheme.

Clause 10(1) states:

Save in so far as any monies, investments or other property are for the time being vested in any such nominee or custodian trustee or in a trustee appointed under paragraph (4) of this Clause, the same shall be vested in the members of the Committee of the Management (or in such two or more members as the Committee of Management shall from time to time determine) as trustees. The members of the Committee of Management as such trustees as aforesaid may act by a majority of those present and voting at a duly constituted meeting and all the provisions of the Scheme relating to proceedings of the Committee of Management shall apply to the proceedings of members of the Committee of Management in their capacity as such trustees.

Clause 10(2) states:

The Committee of Management at their discretion may at any time vary any investments held including any immovable property or any share or interest therein whensover acquired.

Clause 10(10) states:

Without prejudice to the powers conferred on them by section 23 of the *Trustee*

Act 1925 the Committee of Management may, if they consider it advantageous to do so, enter into an agreement with any banker or stockbroker or any company or firm supplying professional services in relation to the management of investments, providing for the person or persons with whom the agreement is made to manage such part of the Pension Fund as the Committee may decide, and any such agreement may, in relation to such part of the Pension Fund, provide-

(a) For the exercise by the person or persons with whom it is made of the other powers conferred by this Clause without reference to the Committee; and
(b) For the payment of such person or persons.

Clause 13(1) states:

The Committee of Management shall at such times and in such manner as may be agreed between the Committee of Management and the Board pay to the Board such amounts as are certified by a duly authorised officer of the Board-

in so far as incurred in either case before 1st October 1975, on such basis as shall be agreed between the Board and the Committee of Management as fair and reasonable or in default of agreement as shall be determined by an Accountant who shall be agreed by the Board and the Committee of Management or in default of agreement nominated by the President for the time being of the Institute of Chartered Accountants.

Clause 13(2) states:

> (a) The costs of managing and administering the Scheme (other than such costs as are referred to in paragraph (c) of Clause 7) and the cost to the Board of services rendered by the Board in connection with or for the purposes of the Scheme in so far as incurred in either case on or after 1st October 1975 shall subject to the provisions of paragraph (1) of Clause 2 be borne by the Board.
> (b) The costs referred to in paragraph (c) of Clause 7 in so far as incurred on or after 1st October 1975 shall be payable by or with the authority of the Committee of Management out of the Pension Fund.

Clause 19 states:

All benefits payable under the Rules shall (subject to any deductions to be made therefrom in accordance with the Rules) be paid by the Board on behalf of the Committee of Management out of monies to be provided by the Scheme.

Clause 20 states:

> (1) Save in respect of the collection of contributions and the payment of benefits (the administration whereof is vested in the Board) the management and administration of the Scheme shall be vested in the Committee of Management constituted as hereinafter provided.
> (2) The costs of such management and administration by the Board and the Committee of Management in so far as incurred before 1st October 1975 and all costs and expenses incurred by virtue of the exercise of the powers conferred by paragraph (10) of Clause 10 on or after 1st October 1975 shall be borne by the Scheme.
> (3) Subject to the provisions of paragraph (1) of Clause 2 and the subparagraph (b) of paragraph (2) of Clause 13, the costs of such management and administration by the Board and the Committee of Management in so far as incurred on or after 1st October 1975 shall be borne by the Board.

The provisions to which I have referred, in my view, make the respective functions of the Board and the Committee of Management reasonably clear. The Board has the task of collecting the contributions and paying the benefit but otherwise the management and administration of the Scheme is the

---

task of the Committee of Management. Although the Scheme could have been drawn up on a basis whereby the collection of contributions and payment of benefits was to be carried out by the Board on behalf and as the agent of the Committee that is not the capacity, as I read the Scheme, in which the Board perform these functions. The Board has an interest in the Scheme operating successfully and there is no reason why it should not take upon itself, as a principal, the responsibilities which if it did not carry them out would presumably have to be carried out by, or on behalf of the Committee of Management. If support for this view is needed, then I find it in the decision of Mr. Justice *Hodgson* in the case of *Manchester Ship Canal Company v. C. & E. Commrs.* [1982] STC 351; 82 BTC 5012, and the case he cites of *C. & E. Commrs. v. British Railways Board* [1975] 1 W.L.R. 1431.

If this is a correct assessment of the Board's role, then in relation to these functions, which it carries out on its own behalf, there can be no question of a supply. The Scheme may benefit from the services of the Board but they are not provided to the Committee of Management because they are the Board's own responsibility which it is obliged to carry out on its own behalf. However, with regard to matters which are the responsibility of the Committee of Management, if the Board performs such functions, then they are a supply of services to the Committee of Management and therefore taxable unless they are supplied otherwise than for consideration.

The Board undoubtedly did supply such services and therefore it is necessary to decide whether or not they were supplied for a consideration. Before 1975, they undoubtedly were supplied for a consideration. However, cl. 20(3) provides that the costs of such management and administration are to be borne by the Board so if the matter rested there, Mr. Gardiner will be undoubtedly correct in his contention.

However, Mr. Collins contends that what in substance and reality happens after 1975 is that the Board receive commission under the provisions of cl. 2, proviso (iii). This, he contends, allows the Board to set off the charges as against the amount which would otherwise be payable by the Board and that is clearly a sufficient consideration to create a liability for tax.

Mr. Gardiner, on the other hand, contends that that is not the right way to give effect to proviso (iii). He contends that what the proviso does is no more than provide for a provision which abates the amount which would otherwise be payable by the Board and this, he says, does not amount to consideration. In support of his contention, he referred me to the decision of the European Court of Justice in the *Dutch Co-Operative case* (1981) 3 C.M.L.R. 377. However, I do not find that case of any real assistance in resolving this point. In my view, the answer must depend on the proper construction of the proviso, together with cl. 20.

If we put on one side the motive for the insertion of the proviso, as I have already indicated that we should do, then it seems to me that the correct answer here is to look upon cl. 2 as providing no more than the method of calculating the amount which the Board is required to provide. It is to be noted that proviso (iii) does not stand alone; there are also deductions to be made under provisos (i) and (ii). Furthermore, it is to be remembered that the contribution may be increased by reason of the Board's liability to pay a deficiency contribution.

It t th t l k d t h l th S h i h b th B d' t ib ti t b l l t d b i hi h

activities should not be categorised as a supply of services. With regard to those activities, the amount deducted under the proviso can hardly be regarded as a consideration and the fact that some charges which are not a consideration have to be deducted under the proviso is an indication that the other charges should also not be regarded as a consideration.

On the construction of these Schemes, therefore, I come to the conclusion that the activities of the Board do not give rise to any liability to VAT. I should not, however, leave this appeal without drawing attention to the fact that the Tribunal very properly drew the attention of the appropriate authorities to the desirability of altering the statutory provisions so that in no circumstances would VAT be payable in respect of activities in relation to a pension fund. Speaking for myself, I have great sympathy for this view and recognise that the decision which I have given in this case could have been otherwise if the drafting had been slightly different. I accordingly allow the appeal.

(Appeal allowed; cross-appeal dismissed. Costs and leave to appeal granted.)

[1982] BVC 515