# TC02833

**Appeal number: TC/2010/1368**

**TAX: VAT – whether birthday income constituted a single composite or separate supplier for VAT – appeal allowed in part – adjustment to best judgment assessment.**

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ZOOPARK LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE IAN HUDDLESTON**

**Sitting in public in Belfast on 5th December 2012**

**Ian Huddleston, Tribunal Judge**

**Kim Tilling, HMRC**
**Glynn Edwards, CTA, Senior VAT Consultant of CCH, Volters Kluer**

## DECISION

*Appeal*

1. This is an appeal against disputed decisions of the Commissioners of Her Majesty's Revenue and Customs ("HMRC") in relation to the following:

> (1) an assessment to value added tax ("VAT") in the sum of £7,888 (plus interest) raised against the Appellant for the VAT periods ending 03/07 to 03/09;
>
> (2) a Misdirection Penalty under Section 69 of the VAT Act 1994 ("the 1994 Act") in the sum of £369 for the period ending 02/08 as issued on the 20 November 2009; and
>
> (3) the decision to assess the Appellant for a penalty pursuant to Schedule 24 of the Finance Act 2007 ("the Finance Act") in the sum of £511 for the period ending 03/09 as issued on the 13 April 2010.

2. The assessment has been raised on the basis that the birthday parties which are held at the Appellant's crèche facilities ought to have been standard rated and the penalties on the basis of the Appellant's failure to correctly return that VAT.

3. The Appellant's counter argument (in summary) is that the "supplies" are separable into:

> (1) catering / provision of food – which it accepts are standard rated; and
>
> (2) play facilities – which it argues ought to be exempt supplies.

*Facts*

4. Zoopark Limited ("the Appellant") is a private limited company incorporated in Northern Ireland under company number NI 044465. It operates a children's crèche and café from premises at Unit 2, Carrickfergus Leisure Complex, Rodgers Quay, Carrickfergus, BT38 8BE.

5. The Appellant was registered for VAT under VAT registration number 815 4094 32 with effect from July 2003.

6. After registration there appears to have been an inspection in March 2005. Following that, HMRC sent a letter dated 3 May 2005 ("the May 2005 Letter") in which it stated *"should you use these facilities for birthday parties as part of an overall package this would be considered a standard rated supply."*

7. It would seem that the next letter was a fax sent on behalf of the Appellant dated 27 July 2006 from its then accountant, which provided further information which HMRC had sought and gave a breakdown of the party income (then charged at £7.50 per child), represented by crèche income of £4.00 (exempt) and £3.50 for food and

party bags (standard). The delay between the two letters was attributed in evidence to the accountant's illness.

8. HMRC replied on 14 September 2006 reiterating their position as outlined in the May 2005 Letter, but continuing that if "*use of the crèche facilities included standard rated supplies*" then a portion of the input tax relating to the improvements carried out would be recoverable.

9. As a result of a change of accountant and the suggestion that some of the VAT payable in respect of alterations to the Appellant's premises ought to have been reclaimable the Appellant commenced dialogue with HMRC. That, in due course, led to a pre-notified routine assurance visit to the trading premises on 24 June 2009 where the visiting officers met with Julie McCartney (Director and Manager) and Laurie McMullan (Bookkeeper).

10. As a result of that inspection the inspecting Officers established that the crèche facility – trading as "Little Monkeys" - was operated for children between 2 and 4 years during the hours 09.45 to 12.15 Monday to Friday, and that the cost of each session was £8.50 regardless of age and was supervised by appropriately qualified people and effectively provided childcare for a maximum of sixteen children.

11. Outside of those hours the Appellant operated sessional crèche provision and provided an ad hoc play service charged on a sessional basis with the charges levied being based on time slots of between 0.5 to 2.5 hours.

12. In addition to the childcare facilities, the Appellant operated a café which provided both eat in and cold takeaway supplies.

13. Finally, in addition to both the childcare and catering supplies, the Appellant also provided facilities for children's parties. This separated out into supplies of children's parties and, separately, play sessions, for groups – which I will call "group play".

14. The "group play" involved no catering. It should be noted that this distinction did not become apparent out of the visit, but was clarified later through correspondence between the parties.

15. The children's parties were advertised both by way of flyer and through the Appellant's website. Both advertising mediums "sold" the party option as a package with a play element being delivered within the play area, a hot or cold "food option" and a party bag (the latter being provided within the café area) together with various other add ons as supplied, such as birthday cards, balloons etc. There was some debate as to whether or not these add ons were customarily supplied.

16. During the period since the business began (in 2003) the cost for parties increased from £7.50 to £8.50 per head.

17. The Tribunal heard evidence that the Appellant had a total of three cash tills. One of those was located within the crèche / play area and through that payments for the sessional crèche and play supplies were recorded. The café had two tills, one located

at the ice cream counter (which on the evidence before us was rarely used), and the other was used primarily for recording the café or food sales.

18. On the evidence before the Tribunal, the whole cost of a party was rung through and payment received into the till which was located in the crèche area. The cost of the food supply and party bag was then separately rung through the café till as a single payment, at an amount of £3.50 per head.

19. Supplies of children's meals eaten in the café were rung through the café till using the "kids" button.

20. It appears that no "z" readings for the till located in the crèche / play area were retained, but the income was presented on a daily record sheet with the party income being posted as a single figure on that daily cash sheet which, in turn, was then summarised weekly.

21. It was during the assurance visit that the Officers identified that the Appellant treated supplies in respect of the birthday parties as separate supplies of food and children's play for the purposes of VAT, and further that in respect of the play element this was treated as an exempt supply.

22. The supplies relating to food and party bags were treated as standard rated.

23. Subsequent to the visit, HMRC wrote to the Appellant on the 14 August 2009 referring to the May 2005 Letter and the 2006 correspondence and detailing the outcomes of their findings.

24. Insofar as they are relevant to this Appeal, HMRC indicated in that letter that as regards the supplies of birthday parties they considered that they should be treated as a single standard rated supply as opposed to the separate supplies upon which the Appellant had declared its VAT liability. In short, they considered that the supply of the package consisting of play and food was an "economically indisassociable" and single supply for VAT purposes, and that there had been an underdeclaration of VAT.

25. The letter also requested that the Appellant provide a schedule of the income that it had received for the play element of the birthday parties for VAT periods ending 03/07; 02/08; 03/08 and 03/09. That information was sought for the purposes of issuing an assessment but no additional information was supplied.

26. HMRC wrote to the Appellant on the 18 September 2009 indicating that they had taken the view that there had been an under declaration of output tax made in respect of the supplies and, in the absence of the requested information, that they were using the information provided by the Appellant's own records in respect of April 2009 for the purposes of issuing an assessment to best judgment. The April 2009 information was that which had been disclosed to the Officers during the assurance visit.

27. Using that information, HMRC calculated that the value of the play element of the total party income for April 2009 was £1,557.50.

28. HMRC took the view that this was representative of other months falling within the assessment period and applied best judgment in respect of the relevant periods (ie. 03/07 (a twelve month period); 02/08 (an eleven month period); 03/08 (one month) and 03/09 (a twelve month period). Adopting this approach HMRC identified that there had been a total under declaration of £7,888.

29. A Notice of Assessment in that amount (plus interest) to a calculation date of 9 October 2009 was duly issued.

30. By a letter dated the 19 November 2009 HMRC notified the Appellant of their intention to issue a penalty under Schedule 24 of the Finance Act – that letter setting out the nature and value of the inaccuracies and HMRC's view of the Appellant's behaviour, and the impact of that behaviour on the penalty issued.

31. By a letter of the 20 November 2009 HMRC separately advised that they considered that the Appellant had breached the objective tests for a Misdirection Penalty and issued a Notice of Assessment under Section 63 of the VAT Act in respect of the VAT period ending 02/08 in the sum of £369 – representing 15% of the error within that period.

32. On the 13 April 2010 HMRC issued a Notice of a Penalty Assessment in the sum of £511 in respect of the earlier notified proposal to issue a penalty pursuant to Schedule 24 assessment for the period ending 03/09.

*Evidence*

33. The Tribunal had the benefit of both witness statements and sworn testimony from Mrs. McCartney (Director and Manager) and Julie Nesbitt, Officer of HMRC.

34. In addition, we had the benefit of oral and then written submissions by both HMRC and the Appellant, the latter of which were presented after the hearing.

35. HMRC's written submissions were received on the 22 February 2013 and the Appellant's on the 21 March 2013.

36. In the main, the facts as highlighted above are not in dispute, but a few salient points did come through on the evidence:

> (1) the play area is a completely segregated area, accessed only by a keypad and is available only to children and to staff of the Appellant;
>
> (2) the play area is open for public use Monday to Friday from 12.30 (ie. after the crèche facility has closed) to 17.00 and on Saturdays and Sundays from 10.00 to 17.00. During this time the play area caters for children aged between 3 to 9 and can accommodate up to a maximum of 30 children;
>
> (3) access to the play area is offered on a pre-bookable or unplanned basis in slots of thirty minute sessions up to a maximum of 2.5 hours to individuals and groups and is available both within and outside term time.

37. Mrs. McCartney's evidence confirmed that the website advertising the Appellant's facilities had been created originally when the business was opened (in 2003) and had not been updated.

38. In evidence and through cross examination, it became apparent that, in fact, the website had been updated in 2009 (the copyright notice had been updated to that date) notwithstanding the fact that, according to Mrs. McCartney, some of the information – particularly around the nature of available parties – was either inaccurate or had related to a particular line of business which had not, ultimately, been developed. To use an example, it was confirmed that parties which were described as "VIP" parties for children aged 3 to their teens had never actually been held. The Tribunal did not consider that the dispute on this detail to be material, but did note the clear advertising of "parties" and what that encompassed.

39. What was more relevant was Mrs. McCartney's evidence that daily receipts were combined onto a weekly slip which then recorded on a cumulative basis the total for both play and café sales.

40. In that regard, Mrs. McCartney's evidence was that "play receipts" included all "parties", but that, in reality, some of those bookings were for "group play" alone and others were for a combination of group play and catering - properly interpreted as "birthday parties" or similar.

41. Mrs. McCartney's evidence was that all the elements of the "birthday party" could be supplied separately (ie. the play, the party bag and the food from the café menu).

42. As an example, she explained that parties could come to enjoy the play element, but after that equally could, and as a matter of fact did, go to one of the other neighbouring cafes or fast food takeaways for the food element, rather than purchase it from the Appellant.

43. HMRC did not seek to contest this aspect of Mrs. McCartney's evidence. In short, they accept that group bookings of "play" could be provided by the Appellant. Their issue is that, despite having been asked for documentary evidence as to the quantum of those group bookings, none has been provided and, as a result, on the basis of the information before them, ie. the April 2009 figures, the assessment which has been made has been correctly raised to "best judgment".

44. HMRC say that the first time that the distinction between "party" income and "group play" income was first raised was in a letter of the 25 February 2010 from the Appellant's representative.

45. In cross examination, much time was spent in assessing what constituted the benefits of booking a "party" as opposed to the separate and distinct elements.

46. In short, on the evidence before the Tribunal, these benefits appeared to be as follows:

(1) the ability through booking to secure availability of both places in the play area and the café;

(2) an overall reduced cost - when a comparison is undertaken between either the "cold food" party option and/or the "hot food" party option and standard menu pricing. According to HMRC's representations these savings varied, depending on the length of the period of play, but were in the region of between £0.95 and £1.45;

(3) the availability of a party bag which contains a small toy (of negligible value);

(4) the fact that payment is sought at the end of the party where one bill is produced and one receipt given, with the payment being processed through one card payment machine.

47. On the question of communication between the parties, ie. the May 2005 Letter and 2006 Correspondence, there was again a dispute on the evidence.

48. Mrs. McCartney gave evidence that HMRC's letters of the 3 May 2005 and 27 September 2006 which had highlighted HMRC's view on the correct treatment of "party" income, had not been received by either she or her bookkeeper.

49. Under cross examination however, Mrs. McCartney was directed to consider the content of the faxed letter from her accountant dated 27 July 2006 which specifically referred to HMRC's letter of the 3 May 2005 which tended to confirm that the May 2005 letter had been received.

50. When Officer Nesbitt gave evidence, she explained both the content of her visit in June 2009 to the Appellant and the subsequent correspondence between the parties. Ms. Nesbitt gave evidence that she had seen advertising for the supply of "birthday parties" during her visit and, when she asked how the liability of those supplies were returned, had been advised that the overall cost (which was then at the level of £8.50 per child) was split into £5.00 exempt "play" and £3.50 for the standard rated food and party income.

51. Upon return to the office, Ms. Nesbitt considered the earlier correspondence with the Appellant and undertook further research on the specific point regarding the liability of the supply for the "party" income.

52. On the back of that research and having taken internal advice and taking into account the nature of the advertising, she gave evidence that whilst she appreciated that the play and catering element could be separately supplied, it was her decision that when supplied as a "birthday party" it was a single supply and was "economically indissociable", she having decided that, objectively speaking, a customer was paying a single price for a single vatable supply.

53. It was Ms. Nesbitt's evidence to the Tribunal that she considered that a typical customer would perceive the supply as a single supply of the birthday party "package".

54. To that extent, therefore, Officer Nesbitt adopted the correspondence of the previous Officer as expressed in the letters to the Appellant of 3 May 2005 and 14 September 2006.

55. In establishing the quantum of her "best judgment" assessment, Ms. Nesbitt gave evidence that she had considered the Appellant's own records, specifically the information recorded on the weekly slips for the months in April 2009 which showed party income to be £1,557.50. She gave evidence as to how she extrapolated that figure over the VAT periods in question, acknowledging that she initially applied the wrong VAT rate to her calculations, applying the lower rate of 15% with effect from 1 December 2007, instead of from 1 December 2008.

56. This had produced an error in the Appellant's favour (to a value of £345) that she was unable to rectify giving the capping provisions and timing of issue of the original assessment.

57. As to the distinction between "group play income" and "party income" for April 2009, Ms. Nesbitt's evidence was that when the distinction between the two was pointed out (ie. in the Appellant's letter of the 25 February 2010) she had replied indicating that if documentary evidence was available to substantiate the distinction between "group play" and "party" income, that she would give it full consideration, but that no such evidence had been provided.

58. Ms. Nesbitt also gave evidence that in her response to the Appellant she had indicated that she would widen the comparative assessment if additional figures were provided.

59. It was her clear evidence that she had relied on the April 2009 figures, but had offered to consider the income from November 2009 (as provided under the letter of the 25 February 2010 or an average of that and the April 2009 figures) but that she had not been provided with the relevant evidence or documentation to allow her to do so.

*Cases Referred To*

60. We referred to the following cases:

(1) *Card Protection Plan Limited v Custom and Excise Commissioners [1999] STC270 ("CPP");*

(2) *College of Estate Management v Custom and Excise Commissioners [2005] 1597 HL ("CEM");*

(3) *Levob Verzekeringen BV and Another v Staatssecretaris Van Financiën (C-41/04) [2007] (ECJ) ("Levob");*

(4) *Custom and Excise Commissioners v Wellington Private Hospital Limited CA 1997;*

(5) *Custom and Excise Commissioners v FDR Limited CA 2000;*

(6) *RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem (Case C-572/07) ("Tellmer");*

(7) *Custom and Excise Commissioners v Weightwatchers (CA 2008 STC 2313);*

(8) *HMRC v Diana Bryce trading as The Barn (UT 2011 STC 900);*

(9) *Byrom and Others (trading as Salon 24) v HMRC 2006 EWHC111 (Ch)*

*HMRC's Case*

61. HMRC advanced the view that domestic legislation does not provide a definition of a single supply, a multiple supply or a composite supply for VAT supplies and that, as a consequence, one must have regard to the three leading cases in this area for the determination of the issue in this appeal, ie. whether there is a single or multiple supply for the proper assessment of VAT.

62. The three cases upon which they have based their arguments are:

(1) *Card Protection Plan Limited v Custom and Excise Commissioners [1999] STC270 ("CPP");*

(2) *College of Estate Management v Custom and Excise Commissioners [2005] 1597 HL ("CEM");*

(3) *Levob Verzekeringen BV and Another v Staatssecretaris Van Financiën (C-41/04) [2007] (ECJ) ("Levob").*

63. As regards CPP, HMRC are of the view that the ECJ in that case made the distinction between a service which could be regarded as a principal service, and one which could be regarded as ancillary to that principal service, but more relevantly that a transaction which comprises a single supply from an economic point of view should not be artificially split so as to distort the functioning of the VAT system. They say that the Appellant's argument for such a "split" is "artificial".

64. As regards the question of payment, HMRC accepts that whilst "*….. a single price … is not decisive ……*" suggests (as per CPP) that "*if the service provided to customers consists of several elements or more for a single price, the single price may suggest that there is a single service*" (CPP at paragraph 31).

65. On the question of what is a single supply, we were also referred to the House of Lords decision in CEM, where the House of Lords in considering whether the supply by a College of printed matter to its students undertaking distance learning was ancillary to the exempt supply of education, the House of Lords held that "*it was necessary to look for the essential purpose (objectively assessed) of a transaction and to look at the commercial reality. A supply which comprised a single service from an economic point of view should not be artificially split*" (CEM at paragraph 1).

66. Lord Walker, in CEM (when commenting on the ECJ's judgment in CPP) "*was not asserting that every distinct element of a supply must be a separate supply for*

*VAT purposes unless it was "ancillary"".* Lord Rodgers (again in CEM) used the phrase "*overarching single supply"* to describe a single supply resulting from several individual elements.

67. From the case of *Levob*, HMRC distilled the proposition that "*distinct supplies may exist where a single invoice is made out. Conversely ….. a comprehensive supply is not ruled out because separate prices are shown and separate invoices made out for individual elements"* (Levob at paragraph 75).

68. HMRC further referred to the case of *David Baxendale [2009] STC 2578 CA* where Paton LJ, referring to the Levob "test", distilled it to the following:

*"The question is whether the supplies are closely linked in the transaction as to form what, objectively viewed, is a single and indisassociable economic supply"*

and reaffirmed that in all cases that the objective view of the consumer should be preferred (as opposed to the subjective perspective of the provider) again applying the principles enshrined in Levob.

69. On the same line, we were referred to the case of *Byrom and Others (trading as Salon 24)* where Mr. Justice Warren (as he then was) provided the following guidance:

*"Where the nature of the overarching supply is obvious, it is a straightforward exercise to look at Schedule 9 VATA and ascertain whether it attracts any of the exemptions, that is to say whether the description of the overarching supply falls within the description of an exemption."*

70. Finally, in referring to the case of *Diana Bryce trading as The Barn*, a case also involving the provision of birthday parties with factual circumstances not dissimilar to the instant appeal, the Tribunal found that the supply of birthday parties in a purpose built facility constituted a "*single supply comprising various elements that enable[d] the holding of a two hour play party, and it would be artificial and involve an "overzealous" dissection to categorise that for VAT as two separate supplies."*

71. In summary, as against the Appellant's arguments for a segregated supply, HMRC take the view that:

> (1) any attempt to "disassociate" the supplies is an attempt at "overzealous dissection" of what is a single supply of birthday parties;
>
> (2) that the correct test is that if the services are so closely linked that they constitute a "single and indissociable economic supply";
>
> (3) that from the perspective of the purchase of the services that, bought as a package there is:
>
> > (a) an economic advantage (in that there is a reduction as between the individual acquisition of the separate components of food and play);

(b) that there are additional elements such as the party bag and (although there was dispute on the evidence as to whether they were supplied) the offer of birthday cards, balloons etc.; and

(c) that there is a single price - on the basis that HMRC accept that whilst not determinative, it does reinforce the conclusion of a single supply (as per Bryce at paragraph 36).

*Appellant's Case*

72. The Appellant's counter submissions are that:

(1) a single supply arises where one element is properly to be regarded as the dominant supply to which other elements are ancillary (*Card Protection Plan* applied);

(2) that this analysis must not consider whether an element is incidental to the whole of the package, but whether it is incidental to another more dominant element (per Millet LJ in *Wellington Private Hospital*);

(3) that an element must be seen as ancillary, and therefore adopt the VAT treatment of the dominant element, where it does not constitute for the customer an aim in itself, but is merely a better means of enjoying the principal supply (again applying *Card Protection Plan*);

(4) although the Appellant concedes that in some circumstances this "apex" model is inappropriate and a single supply may exist where supplies are integral to one and other, but none predominates, ie. the table top model (per *Laws LJ in FDR)*. In this analysis, a single supply exists where the elements are "physically and economically" dissociable";

(5) that there are cases where the services are neither with the "apex" or the "table top" or integrated model and therefore should be treated separately;

(6) the key question is if the elements of supply can be separated from one another.

73. Applying those principles to the present case the Appellant argues that whilst the birthday parties are advertised as an integral offering, parents are free to make up their own minds about what they want, ie. whether to buy just one element or to purchase all of the elements and that, therefore, the elements are "economically dissociable" and on that basis ought to be treated as separate supplies.

74. In support of that argument they rely on internal correspondence between the Policy Section of HMRC and Mrs. Nesbitt quoted in an internal email:

*"On the basis that the trader holds this out as the provision of a birthday party service and not as a separate catering and play facilities <u>and</u> it is not possible to purchase one without the other so that they are economically "[in]dissociable" I can't see that it would be anything other than a single supply."*

75. The Appellant argues that HMRC have taken into account the first part of this advice, ie. the advertising of the package, but have ignored the second part, ie. whether it can be sold separately and that (again referring to the internal guidance):

*"[If] it is possible to purchase one without the other so that they are economically separable, I can't see it would be anything other than a [mixed multiple] supply"*

76. As to the question of the single price, the Appellants rely on CPP (at paragraph 34) namely:

*"That a single price ….. is not decisive …."*

77. As I have said above, the case of *Diana Bryce* is very similar, in terms of its factual basis, to this appeal.

78. The Appellant, however, drew the Tribunal's attention to a number of key differences in an attempt to distinguish it.

79. Firstly, that Mrs. Bryce's case sought to rely on the exemption from VAT for land to argue that the venue represented a VAT exempt part of the supply.

80. Secondly, that in Bryce, the Judge found that there was a package of supplies which were *"integral and indisociable from one and other"*. Those supplies involved:

(1) use of the hall;

(2) use of (or the opportunity to use) tables and chairs in the hall;

(3) use of (or the opportunity to use) play equipment in the hall;

(4) the provision of refreshments;

(5) the service of members of staff;

(6) the non-exclusive use of (or opportunity to use) the toilet and changing facilities.

with the Judge in Bryce concluding that "once all of the elements of the transaction are brought into account, I have no hesitation in finding that, from the perspective of the customer, what was supplied was a group of facilities for a children's party, provided as a single supply."

81. In Zoopark's case the Appellant suggests that the elements supplied were:

(1) one hour of supervised childcare;

(2) hot or cold food (according to the option selected);

(3) filled party bags.

82. In attempting to distinguish from Bryce, the Appellant says that the fact that the catering takes place on the same premises, and immediately after supervised play,

means that the two are economically and physically dissociable and therefore are properly to be treated independent supplies, and for support looks to the Court of Appeal in *HMRC v Weightwatchers* where Sir Andrew Morritt LJ (paragraph 17) stated that:

*"The extent of the linkage between the relevant transactions must be considered from an economic point of view, rather than, say, a physical, temporal or other stand point."*

83. The Appellant says that in the present case the elements are clearly economically distinct and again, referring to the Judge in Bryce:

*"The fact that parents may have been interested and found value in the purchase only of use of the hall, or only of the provision of refreshments in the café room is not relevant in determining whether, from the perspective of a typical customer, objectively viewed, what was in fact being supplied was as a matter of economic reality to be regarded as a single supply for VAT purposes."*

84. As to that, the Appellants say that the Judge failed to reconcile this proposition with one of the key parts of the CPP test, namely:

*"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."*

On the facts of this case the Appellant asserts the separate supplies were independent aims in themselves.

85. As to the question of single pricing, and more particularly the fact that an economic benefit arises from the "package" the Appellant would say this is simply part of normal commercial practice and does not, of itself, make the elements economically or physically indissociable.

*Discussion*

86. As I have said before, the facts, largely speaking are not in dispute.

87. Equally, there is clear acceptance by the parties that the childcare provision made by the Appellant is an exempt supply and that as regards food there is a distinction between the carry out (exempt) and the sit in supply (which is standard rated).

88. The dispute between the parties, therefore, focuses purely on the treatment of party income in its wider sense.

89. What became apparent in the course of the proceedings is that this breaks down into, firstly, "group bookings" (which are restricted solely to play) and, secondly, the provision of "birthday parties" (which are advertised and constitute the supply of (in the main) both play and catering).

90. It is equally accepted that there is no statutory definition of what constitutes a single supply, a multiple supply or a composite supply, and that it is for that reason that the Courts have been exercised with this particular issue.

91. Having heard, and had the benefit of the written representations of both parties, based on that case law has been very helpful.

92. Taking all of those into account, and having reviewed the cases, it rather seems to us as though the "test" to be applied has the following elements:

> (1) firstly, it is an objective assessment based on the commercial realities;
>
> (2) secondly, that the assessment should be applied to what customers actually thought they were purchasing;
>
> (3) thirdly, that the assessment is predominately an economic one;
>
> (4) fourthly, one then has to "stress test" those considerations against issues such as whether one particular supply dominates over another more ancillary supply or if a supply is integral to another as distinct from those that are independent of one another before one is able to categorise the correct VAT treatment.

93. In that assessment, and again relying on case law, it seems clear that the Courts are not going to engage in the artificial dissection of services which are objectively considered to be "composite" but that the Courts are willing to look at cases, and particular factual circumstances, to assess whether or not the services provided ought to be treated as separate supplies.

94. The case of *Tellmer* (to which we were referred) is a perfect example, where the provision of let accommodation to individuals was quite rightly, in our view, regarded as a completely separate supply to the provision of cleaning to common parts of the building of which the lettable units formed part.

95. It is on the above basis that we propose to approach the factual circumstances in this case. To do that, one has to make a number of conclusions on the factual circumstances themselves.

96. Having heard Mrs. McCartney and having considered the documentary evidence produced – particularly in light of the advertising material (both printed and website) it does seem to us that the Appellant was holding itself out as making a "birthday party" offering which was distinct from "group play".

97. The birthday party offering, on the facts, encompassed a number of possible elements:

> (1) a birthday party invitation;
>
> (2) the advantage of pre-booking – both for play and for catering;
>
> (3) the reservation of a specific area within the café which could be utilised after the play session had been concluded;

(4) a more limited menu (than that which was on offer in the café generally) but with the benefit of either a cold or hot option for food, all of which was at a discount to menu list prices;

(5) a party bag or a treat;

98. Impliedly it also encouraged use of the Appellant's premises, toilets etc.

99. That "offer" was distinct, but we find sat alongside the other supplies which the Appellant was capable of making ranging from the crèche facilities through to the café provision and, ultimately, the group play.

100. If one takes that as the "offer" which the Appellant was making to the world at large then, applying the objective criteria to which we have referred above, what did a customer think they were purchasing if they wanted to avail of that offer? In short, in our view, they felt they were buying a "party package". One can speculate as to the motivation, but it is reasonable to assume that parents / other purchasers, were looking to pay for the complete package to remove the headache of hosting a birthday party in their own homes.

101. From our experience, all of those types of birthday parties involve elements of play and, interspersed with or immediately after, the provision of some form of entertainment and catering.

102. If parents were looking at the package offered by Zoopark Limited, that's what they would have expected – in short they would have expected Zoopark, for a fixed price, to provide each of those elements – something which the Appellant clearly did and were in turn paid for the service.

103. It is the job of this Tribunal to then categorise the appropriate treatment of that service.

104. Having considered the parties' submissions on both CPP and CEM, and the analogous case of Bryce, one cannot help but be attracted by the conclusions of the Upper Tier Judge in Bryce when he concludes:

> *"Once all of the elements of the transaction are brought into account, I have no hesitation in finding that, from the perspective of the customer, what was supplied was a group of facilities for a children's party, provided as a single supply."*

105. In short, we concur with that view, insofar as it complies with the factual circumstances before us.

106. To deal with the Appellant's point that it is arguable that one of those elements may be more dominant than the other (as per CPP) we simply do not agree with that analysis.

107. The expectation of parents, and indeed their children, is that a party will encompass all of the elements. In some cases they will be intermingled, in others (as

in the present case) they will consist of something more structured, ie. play followed by catering. All the elements, however, will be equally anticipated – no doubt eagerly. It is the combined elements that given its character as a party.

108. We do not, therefore, accept the Appellant's suggestion that any is more dominant than the other nor that the elements were "independent aims" in their own right.

109. In short, the birthday parties were marketed as a composite supply and, when looked at objectively, from a purchaser's point of view we find that they were purchased as a composite supply from an economic and, indeed, practical viewpoint. To argue otherwise and attempt to separate them out we find is "overzealous".

*A Single Price*

110. The case law reviewed makes it quite clear that a single price paid for such a service is not determinative of the character of the supply, but one cannot help avoiding the conclusion (as indeed earlier cases have done) that where there is a single payment that may suggest a single service. It is certainly one factor to be taken into account and in coming to the findings which we have, we have concluded that it is one such factor in this case.

111. It is not, however, the single determinative factor. Standing back from the transaction and looking at it from an economic point of view, objectively what was being bought and sold was a composite supply.

112. The fact that a single price was paid for it, we feel, simply confirms that conclusion.

*The Best Judgment Assessment*

113. Having come to the conclusion that birthday parties were a single or composite supply then raises the question of whether the assessment raised by HMRC was raised to "best judgment".

114. As indicated, Ms. Nesbitt gave evidence that in coming to her assessment she used:

> (1) the figures which were provided for April 2009;
>
> (2) that she did not "refine" those figures in any great particularity to account for annual or seasonal variations or, indeed, to exclude what I have described as "group bookings".

115. It is clear both from the correspondence between the parties – and in particular the Appellant's letter of the 25 February 2010 (which attached figures from November 2009) – that the Appellant, in recording "party income" largely failed to distinguish between what were actually "group bookings" (ie without food) and what was "birthday party" income (encompassing the full "package").

116. On these points Mrs. Nesbitt had indicated that she would be prepared to refine her assessment if documentary or further evidence had been supplied to her.

117. It appears that no such further information was ever supplied.

118. Given, however, our findings that birthday party income ought to be treated as a composite supply, the question does raise itself as to the proper amount of the assessment, being in mind the very separate supply of "group play" on its own.

119. In that regard, and having heard the evidence of Mrs. McCartney, and having had the benefit of looking at the figures for November 2009, this Tribunal is of the view (and now so finds) that party income (in the general sense in which it was used) should be broken down into its constituent parts.

120. As to those constituent parts, we find that, based on the evidence presented that, 37% of the income arose from group bookings for play (without catering) and therefore should be treated as exempt supplies.

121. The balance, we conclude, therefore, should be treated as "birthday party" income and be standard rated.

122. In April 2009 the party income represented £1,557.50.

123. In November 2009 the party income totalled £920.50

124. HMRC (per their letter of 10 March 2010) indicated their willingness (subject to the production of suitable documentation or evidence) that they would make an appropriate amendment to reflect a more averaged view of party income during the year – they accepting, to some extent, that April 2009 (and given the holiday period encompassing Easter) may reflect a slightly higher than normal rate of return for the Appellant.

125. On the written submissions before us, if one takes that into account, the averaged income is £1,239 per month.

126. The suggestion of this Tribunal is that that figure be adopted, but that it be further reduced by the 37% referred to above which (subject to verification on the maths) would represent an assessment of £4,127.

*Penalties*

127. The first penalty issue arises from the penalty issued under Schedule 24 of the Finance Act 2007 for the Appellant's failure to take reasonable care in its VAT returns. That penalty is in the sum of £511.

128. In basic terms, the law provides that where there is carelessness established in the making of a return, ie. it has not been made with reasonable care, that the penalty is 30% of the lost revenue. HMRC's view in this case is that carelessness did fall to the Appellant and that the inaccuracy was identified by HMRC and that, to that extent, therefore, disclosure was prompted.

129. The minimum payment for careless inaccuracy in these circumstances is 15% and the maximum is 30%. A reduction for access to records was given, reducing the penalty to 21% of the potential lost revenue ("PLR").

130. The second penalty was a misdeclaration penalty under S69 VATA 1994, which the Appellant resists because there was reasonable excuse – on the basis that HMRC failed to correctly advise the Appellant of the issue during earlier visits.

131. HMRC's position is that there are no grounds for reasonable excuse and that no grounds for mitigation have been provided, that the penalty of £369, therefore, is payable in full.

132. There is no doubt that part of the Appellant's claim for reasonable excuse arose out of its alleged failure to receive the letters from HMRC dated 3 May 2005 and 14 September 2006.

133. The Tribunal finds that in cross examination it became apparent that the letter of the 3 May 2005 was received, as confirmed by the fact that it was subsequently referred to in the bookkeeper's reply.

134. Whilst we accept Mrs. McCartney's evidence that she may have had internal staffing difficulties and that her former accountant had been ill, nonetheless we find that the letters which pointed out the issue regarding the correct treatment of birthday supplies were, on balance, received by the Appellant.

135. As a matter of interpretation we find that neither letter held out the offer of delay on the decision as to the correct treatment of birthday party packages in a manner which could have confused the Appellant.

136. We therefore find that the penalties have been properly levied – although they will need to be recalculated given our earlier conclusions on the underlying assessment itself.

137. We further take the view that the misdeclaration penalty should be upheld, but equally be reduced mathematically to reflect the foregoing conclusions.

138. 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.

**IAN HUDDLESTON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 August 2013**