

SCHEDULE

REQUEST FOR A PRELIMINARY RULING UNDER ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION BY THE FIRST-TIER TRIBUNAL (TAX CHAMBER) OF THE UNITED KINGDOM

INTRODUCTION

1. This request for a preliminary ruling is made in consequence of an appeal to the First-tier Tribunal (Tax Chamber) of the United Kingdom (“the Referring Court”) by the lessee of commercial office premises. It is concerned with the question of whether service charges paid as a condition of a lease for certain floors of commercial premises attract a charge to value added tax (“VAT”) where the lessors have not opted to tax the leases themselves. The issue is whether the provision of the services and the use of the premises ought to be seen as a single supply the whole of which is exempt from VAT or whether the services in respect of which service charges are paid represent a separate taxable supply or supplies.
2. This request raises questions as to the proper interpretation and application of the Court of Justice’s earlier judgment in Case C-572/07 RLRE Tellmer [2009] ECR I-4983 (“Tellmer”). The Referring Court is aware that a request for a preliminary ruling has recently been made by the Upper Tribunal (Tax and Chancery Chamber) of the United Kingdom in the case of Purple Parking Ltd and

Airparks Services Limited v. HMRC (“Purple Parking”) which raises similar questions albeit in a different factual context. The Referring Court seeks a preliminary ruling in the present case so that the interpretation and application of Tellmer can be considered in the context of leasing and servicing of property and that particular issues that will not fall to be considered in Purple Parking but which arise in the present case can be considered by the Court.

THE APPELLANT

3. The Appellant is Field Fisher Waterhouse LLP, a firm of solicitors established in the United Kingdom. The Appellant is represented by David Goy QC and Michael Jones instructed by Field Fisher Waterhouse LLP, 35 Vine Street, London EC3N 2AA (Ref: Mr. N. Beecham – e-mail: Nick.Beecham@ffw.com)

THE RESPONDENTS

4. The Respondents are the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) who are responsible for the administration and collection of VAT in the United Kingdom. The Respondents are represented by Raymond Hill instructed by the General Counsel and Solicitor to Her Majesty’s Revenue and Customs, HMRC Solicitor’s Office, 2nd Floor, North Spur, South West Bush House, Strand, London WC2B 4RD (Ref: Mr G Williams – e-mail: geraint.williams@hmrc.gsi.gov.uk)

SUMMARY OF FACTS IN THE CASE

5. The Appellant is a firm of solicitors who occupy various floors of commercial office buildings as tenants. The landlords of the buildings in question have not exercised their option to tax now provided for by Article 137(1)(d) of the Council Directive of 28 November 2006 on the Common System of Value Added Tax (2006/112/EC) (“the Directive”) with the consequence that the supplies they make in letting the buildings are exempt from VAT (see Article 135(1)(l) of the Directive). Under the terms of the leases in question the Appellant is required to pay a “service charge” to the landlords in return for the landlords providing certain services in respect of the premises let (see further paragraph 7(c) below). The landlords have treated the various supplies of services as exempt in accordance with the Respondents’ view of the position. The Appellant says that this is incorrect and that the service charges are properly to be treated as taxable supplies. They have sought to reclaim unclaimed input tax in respect of such supplies, which claim has been refused by the Respondents, both on the principal ground that there is a single exempt supply of the lease and on the alternative ground that, in any event, the landlords have not charged and the Appellant has not paid any VAT on the service charge and the Appellant cannot recover VAT as input tax which the landlords have not charged to the Appellant. Against such refusal the Appellant has appealed to the Referring Court and it is in the context of the appeal against the Respondents’ principal ground for refusing recovery of input tax that this request for a preliminary ruling is made.

6. The relevant premises occupied by the Appellant are at Ibex House, 42-47 Minories, London EC3 and Portsoken House, 155-159 Minories, London EC3. The Appellant has entered into separate leases of different floors of the two buildings. Altogether the Appellant has entered into nine leases. For present purposes, the Referring Court will refer to only one of the leases that is the lease of part of the 5th Floor of Ibex House. A copy of the lease is attached as the appendix to this Schedule.

7. Relevant features of the lease are as follows:-

(a) Under clause 3 of the lease (see p.3) the landlord leases the premises to the Appellant in consideration of the “rents” specified in clauses 3.1, 3.2 and 3.3. The first rent specified in clause 3.1 is the sum payable for occupation of the premises and the second rent specified in clause 3.2 is the Appellant’s share of the cost of the landlord insuring the whole building in which the relevant premises are situated. The third rent specified in clause 3.3 relates to the provision of services by the landlord to the Appellant (“the Service Charge”). The detailed rules in relation to the Service Charge are contained in Schedule 4 to the lease (see p.25);

(b) Schedule 4 to the lease obliges the landlord to provide certain services. It requires the Appellant to pay as a Service Charge a

proportionate part of the total costs incurred by the landlord in respect of such services. The proportionate part is determined by reference to the proportion of the entire building comprised in the part of the building let under the lease;

(c) The services to be provided by the landlord are set out in clause 2 of Schedule 4 and include:

(i) repair, decoration and cleaning of the exterior and structure of the building, as well as of the parts of the building used by all tenants of the building (“the Common Parts”);

(ii) maintenance, repair and renewal of machinery used in the building, some of which is situated in the premises let to the Appellant (e.g. pipe work and outlets for air conditioning equipment) and some not (e.g. the lifts and central cooling and ventilation supply plant);

(iii) maintenance, repair and renewal of heating equipment (part of which is situated in the premises let to the Appellants and part not);

(iv) lighting to the Common Parts;

- (v) supplies of hot and cold water;
 - (vi) heating to the radiators found both within the premises let to the Appellant and in the Common Parts;
 - (vii) staff for management and security of the building;
 - (viii) cleaning of the Common Parts.
- (d) If the Appellant failed to pay the “rents” which include the service charge, the lease provided that the landlord was entitled to terminate the lease agreement itself (see clause 6.1 of the lease agreement), rather than just to refuse to provide the services.
- (e) Under the terms of the lease the Appellant was entitled to receive the services referred to from its landlords. It had no right to obtain any of those services from third parties.
- (f) It is the Appellant’s case that, instead of the landlord providing the services as provided for in Schedule 4 to the lease, it would have been possible for it to have obtained such services from third parties.
- (g) It is likely that the possibility of obtaining the services from third parties would vary, as a practical matter, depending upon the service

in question. Thus the Appellant says that there would have been no practical difficulty in obtaining security services from third parties or in obtaining services for the cleaning of common parts from third parties. As regards certain other services (e.g. the provision of heating, cooling and water throughout the building) the Appellant accepts that it would have been more difficult, although not impossible, for it to have agreed with the landlords that it would obtain such services from third parties or provide them for itself;

- (h) The service charges were invoiced separately from the rent but contain no identification of the particular charge levied in respect of each separate service provided by the landlord. The landlord provides information annually of the total costs incurred by the landlord in respect of the services provided and the proportion of such costs payable by the tenant.

THE APPELLANT'S SUBMISSIONS

8. The Appellant's case is that the services in respect of which the Service Rent is charged are properly to be treated as taxable supplies. They are not to be regarded

as exempt on the basis that they fall to be treated as part of the supply of the premises themselves.

9. The terms used to specify the exemptions in Article 135 are to be interpreted strictly (see Tellmer Judgment para.16) and most particularly should not be interpreted so as to include services such as those provided in the present case wholly different in nature from a letting of land.

10. The Appellant accepts that there are exceptional circumstances in which different transactions are to be treated as part of a single transaction. While the Directive does not make any specific provision when this should be so the case law of the Court of Justice indicates that a single supply will be made where:-

- (i) one or more services can be regarded as ancillary to the principal supply or;
- (ii) two or more elements supplied are so closely linked that they form objectively “a single indivisible economic supply which it would be artificial to split”.

See Tellmer Judgment paras.18-19.

11. In the particular circumstance of the present case the Appellant's case is that it would be wrong to classify the services in question as ancillary to the principal supply of the letting of land in that:

- (i) the services are themselves unconnected to letting and do not fall within the concept of letting within Article 135;
- (ii) to a significant extent the services concern not the subject matter of the letting agreement but the Common Parts of the building enjoyed by persons other than the Appellant;
- (iii) the landlord and the Appellant could have agreed that the services be supplied by third parties direct to the Appellant rather than by the landlord;
- (iv) the services are separately invoiced to the Appellant.

12. The Appellant accepts that the practical likelihood of obtaining certain of the services from persons other than the landlord may vary between the different services in question. If contrary to its principal submission this has the result that certain services might otherwise be treated as involving separate standard-rated supplies and some not then either:

- (i) the service charge ought properly to be apportioned between those services that are to be treated as standard-rated and those not; or
- (ii) the services supplies are to be treated as so closely linked to each other that they form a single indivisible economic supply which it would be artificial to split being of itself a single taxable supply separate from the leasing of property.

13. In its contentions the Appellant takes support from the decision of the Court of Justice in Tellmer which, in the Appellant's submission, is indistinguishable from the present case. That case was concerned with a lease of residential premises where the landlord provided cleaning services for the common parts in return for a separate payment. The Court of Justice considered that such services represented a separate standard-rated supply. The Respondents in this case say that Tellmer is distinguishable since the Court of Justice was merely considering the single/multiple supply issue in general terms, which included cases where the lease did not oblige the landlord to carry out the cleaning and the tenant to pay for such cleaning (see para. 18 below). The Appellant does not accept that this a proper ground for distinguishing the two cases. As a matter of fact the tenants in Tellmer were required under the terms of their lease to pay their landlord to provide cleaning services. In any event, the Appellant says that if the Court of Justice were considering alternative situations then one of those situations was that the landlord agreed to provide services under the terms of the lease to the tenants and under

those terms the tenants had no option but to take the services from the landlords. The relevant fact, as in the present case, was that the landlords and tenants had the ability, exercising their contractual freedom, to agree that the particular services could be provided in different ways.

THE RESPONDENTS' SUBMISSIONS

14. The Respondents' case is that the lease and the services in respect of which the Service Rent is charged are a single supply. This is because they form objectively a single indivisible economic supply which it would be artificial to split. Alternatively, the Respondents argue that the services provided by the landlords are ancillary to the principal supply, being the leasing of land.

15. The Respondents rely particularly in support of their approach on the Court's previous judgment in Case C-41/04 Levob [2005] ECR I-9433, which required the adoption of an economic approach to the question of whether there was a single supply. In particular, the Court of Justice considered at paragraph 24 of its judgment "the economic purpose of the transaction" before rejecting an approach based on "entering the realms of the artificial".

16. Applying that approach in the present case, the two elements supplied to the Appellant, the relevant land and the relevant services, are both supplied as a package under the same lease. The lease does not permit the Appellant to obtain the

services from a third party supplier and if the Appellant fails to pay for the services then the landlord is entitled to terminate the lease itself. Furthermore, the services would be of no use to the Appellant if the Appellant did not also lease the relevant office space – and the economic purpose of the services supplied by the landlord is to enhance the lease of those offices. The leased areas would be unusable without certain of the supplies – e.g. hot and cold water, heating, lighting, lifts and a weatherproof building – and they would be considerably less attractive to the Appellant as a professional services firm without others – e.g. the repair, decoration and cleaning of the structure and common parts of the building and the repair of the air conditioning, heating and lift machinery.

17. The Respondents submit that the factors identified by the Appellant at paragraph 11 above do not indicate that there were two separate supplies in the present case:

- (i) The fact that the services in question do not fall within the concept of letting could equally be said in all cases where there is a single supply and the subsidiary element takes the tax treatment of the principal element. For example, in Case C-349/96 Card Protection Plan [1999] ECR I-973, it was found that the insurance element predominated and thus the single supply was to be treated as being exempt, even though the subsidiary elements of the single supply would have been standard-rated if supplied separately;

(ii) The fact that some of the services concern the Common Parts does not prevent those services from forming part of a single supply with the lease of the offices occupied exclusively by the Appellant. The lighting, heating, cleaning, repair and security of the Common Parts would be of no use to the Appellant unless it was able to obtain a lease of the offices themselves and conversely the lease of the offices occupied exclusively by the Appellant would have been considerably less attractive to the Appellant without those services being performed in the Common Parts;

(iii) It is not relevant that the landlord and the Appellant *could have* agreed that the services be supplied by third parties direct to the Appellant rather than by the landlord. It is instead necessary to focus on the elements *actually* offered by the landlord to the Appellant (see here paragraph 51 of the Court's judgment in Case C-425/06 Part Service [2008] ECR I-897). Indeed, as paragraph 12 above demonstrates, the Appellant's approach would lead to endless speculation as to the degree of practical likelihood of obtaining particular goods or services which were provided as part of a package from a third party. This would lead to considerable legal uncertainty;

(iv) The fact that the services are separately invoiced to the Appellant is not decisive and cannot affect the objective close link between the letting of property and the provision of services under a single lease forming part of

a single economic transaction – see paragraph 25 of the Court’s judgment in Levob.

18. As for the Court’s previous judgment in Tellmer, it is distinguishable since in that case the Court of Justice was asked to consider the single/multiple supply issue in general terms, which included cases where the lease did not oblige the landlord to carry out the cleaning and the tenant to pay the landlord for such cleaning – and indeed the Court of Justice appears to have approached the facts of the specific case involving the Tellmer company which was referred by the Czech courts on the basis that the tenants were free to conclude a separate contract for the cleaning of the common parts with a third party other than their landlord. The Order for Reference in Tellmer did not indicate to the Court of Justice whether, in Tellmer’s particular case, its own tenants were required to obtain cleaning from Tellmer. However, the Czech Tax Authority (“the Financial Directorate of Usti nad Labem”), which was the Defendant in the national proceedings, submitted on page 5 of its written Observations that the cleaning contract was an independent contract concluded between Tellmer and its lessees on the basis of contractual freedom and that this did not fall within the legal content of the lease. Furthermore, the *Judge-Rapporteur*, Mr Makarczyk, stated in paragraph 9 of the Report for the Hearing that one of the possible answers suggested by the referring court was that, “since the tenant has the possibility of concluding with a third party an independent contract for cleaning the rented spaces, this service would no longer form part of the letting and its exemption would no longer be an issue”. This passage was repeated almost

verbatim by the Court of Justice in paragraph 12 of its judgment, before it went on to say in paragraph 24 that “since the letting of apartments and the cleaning of the common parts of an apartment block can *in circumstances such as those at issue in the main proceedings*, be separated from each other, such letting and such cleaning cannot be regarded as constituting a single transaction within the meaning of the case-law of the Court” (emphasis added). It would therefore appear that the Court believed that, on the specific facts of the Tellmer case, Tellmer’s tenants did have the choice whether to enter a separate contract for cleaning with a third party. Therefore, all that the Court was saying in the Tellmer judgment was that, where the leasing of property and the provision of other services do not form a package, so that the tenant has the option of obtaining the services from third party suppliers or to carry out the service himself, the letting and the services cannot be regarded as constituting a single transaction. The Court in Tellmer did not intend in any way to disturb the economic approach required by the Court’s earlier judgment in Levob. Indeed, since the Tellmer judgment, the Court of Justice has repeated its guidance in Levob in Case C-461/08 Don Bosco [2009] ECR I-11079, Case C-88/09 Graphic Procédé, judgment of 11th February 2010, Case C-175/09 AXA, judgment of 28th October 2010, Case C-276/09 Everything Everywhere formerly T-Mobile, judgment of 2nd December 2010 and in Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 Bog, judgment of 10th March 2011.

THE REASONS FOR A REFERENCE

19. As stated in paragraph 2 above the Referring Court is aware that a preliminary ruling has recently been sought in the case of Purple Parking. It is also aware that one of the questions referred to the Court in that case is concerned with the application of the Court's decision in Tellmer and in particular with the question, arising out of that decision, as to how relevant it is that the services in question could be supplied by third parties. The present case raises questions going further than those raised in Purple Parking.

20. Because of the very different view the parties in this case take of the decision in Tellmer, with such views being fundamental to how the Referring Court should approach the case, the Referring Court considers it necessary before it can reach its decision to have the views of the Court of Justice regarding the proper application of the decision in Tellmer, in the same way as the Upper Tribunal adopted such view in Purple Parking. Instead of merely awaiting the decision of the Court in Purple Parking the Referring Court has come to the conclusion that questions should be referred in this case also for the following reasons:-

- (i) the question of how relevant it is in determining whether a single supply is made that third parties could supply the services in question can be considered in the context of the leasing of immovable property rather than in the quite different factual context in Purple Parking;

- (ii) more generally a reference of questions in this case will enable particular factors to be identified by the Court of Justice that are relevant to the facts of the present case to be taken into account by the Referring Court in determining whether a single or multiple supplies are made in the present case;
- (iii) in the event that the Court of Justice concludes that it is relevant to take account of the fact that third parties could provide the services in question, certain issues arise that are unlikely to be raised or commented on in Purple Parking. For example, is what is relevant whether such separate supply is legally or practically possible, or is what is relevant the common practice in the provision of such supplies;
- (iv) this case raises the further issue, not arising in Purple Parking or Tellmer, of what is the position where a range of services are provided for a single service charge, some of which might be regarded as in respect of standard-rated services and others as ancillary to the letting of property.

21. Given that the present reference shares some common issues with the Purple Parking reference and given that the Purple Parking reference has only recently been sent to the Court of Justice, the Court may wish to consider whether either:

- (a) to formally join the two cases (as happened in the Bog case mentioned above);
- (b) or to appoint one Advocate General to deliver a single Opinion in both cases (as happened in Case C-255/02 Halifax [2006] ECR I-1609, Case C-419/02 BUPA [2006] ECR I-1685 and Case C-223/03 University of Huddersfield [2006] ECR I-1751);
- (c) Or to allocate both cases to the same Chamber, which can conduct separate hearings sufficiently closely together that it can take both cases into account when providing its interpretation of EU law (see e.g. the AXA and Everything Everywhere cases mentioned above).

THE QUESTIONS REFERRED

22. The questions referred are these:-

- (i) The principal question in the present case is whether the services provided by landlords under a lease agreement with their tenants (“the Services”) should be regarded as an element of a single exempt supply of a lease of land, either because the Services form objectively a single indivisible economic supply together with the lease or because they are “ancillary” to the lease, which forms the principal supply (“the Principal Supply”). In determining this

question and in the light of the ECJ's decision in Case C-572/07 Tellmer, how relevant is it that the Services could be (but are not in fact) supplied by persons other than the landlords, albeit under the terms of the present leases in question the tenants had no choice but to receive the services from the landlords?

- (ii) In determining whether there is a single supply, is it relevant that a failure by the tenant to pay the service charge would entitle the landlord not only to refuse to provide the Services but also to terminate the lease agreement with the tenant?

- (iii) If the answer to question 1 is that the possibility of third parties providing the Services direct to the tenant is relevant, is it merely a contributory factor in determining whether the Services are either a single, indivisible economic supply, which it would be artificial to split or an ancillary supply to the Principal Supply, or is it a determining factor? If it is merely a contributory factor or if it is not relevant at all, what other factors are relevant in determining whether the Services are an ancillary supply? In particular how relevant is it whether the Services are performed in or in respect of the demised premises which are the subject matter of the letting or in other parts of the building?

- (iv) If the possibility of third parties providing the Services is relevant, is more particularly what is relevant whether the Services could as a legal matter be supplied by third parties, even if this would be difficult in practice to organise or agree with the landlord, or is the practical possibility or the common practice in the provision of such services the relevant consideration?
- (v) The Services in the present case represent a range of services provided in return for a single service charge. In the event that some of these services (e.g. cleaning of common parts, the provision of security services) are not part of a single indivisible economic supply or are to be regarded as ancillary to the Principal Supply, but other services are, would it be correct to apportion the total consideration between the various services in order to determine the portion of the consideration chargeable to tax and that portion not so chargeable? Alternatively would it be correct to regard the range of services provided as so closely linked to each other that they form “a single indivisible economic supply which it would be artificial to split” being of itself a single supply separate from the leasing of property?