TC01780

Appeal number TC/2009/10689

VAT – recovery of input tax on exempt supplies pursuant to VATA s.26(2)(c) – Exempt supplies under VATA Schedule 9, Group 5, item 1 ("The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money") – Supply of foreign exchange services (FOREX) to persons, principally from Australia, New Zealand and South Africa, who are in the United Kingdom on a "working holiday" or "overseas experience" – whether services "supplied to a person who belongs outside the member States" (Value Added Tax (Input Tax) (Specified Supplies) Order 1999 (SI 1999/3121) art 3(a)) – no in the circumstances of the case – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

1st CONTACT LIMITED **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MR JOHN ROBINSON (Tribunal Member)

Sitting in public in London on 9 and 10 November 2011

Mr Barrie Akin, counsel, and Miss Hui Ling McCarthy, counsel, for the Appellant

Mr Rivett, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. This is an appeal against assessments raised by the Respondents ("**HMRC**") for VAT periods 09/05, 12/05, 03/06, 06/06, 09/06, 12/06, 03/07, 06/07 and 09/07. The original amounts in the assessment for the first four of these periods have already been revised by HMRC. At the hearing of this appeal it was common ground that the appeal now concerns a single issue, which was formulated in the Appellant's skeleton argument as follows:

> Did certain of the Appellant's customers who received supplies of foreign exchange and money remittance services belong outside the United Kingdom for the purposes of s.9(3) of the Value Added Tax Act 1994 ("VATA 1994") and Article 56 of Council Directive 2006/112/EC (the "Principal VAT Directive") (previously article 9(2)(e) of Council Directive 77/388/EEC (the "Sixth Directive")) with the consequence that input tax attributable to such supplies is available for credit under s.26 VATA 1994?

2. The Appellant's case in essence is as follows. Its customers are young people, principally from Australia, New Zealand and South Africa, coming to the United Kingdom temporarily for a "working holiday" or "overseas experience". They come with the intention of travelling around this country and other parts of Europe, while taking on incidental, temporary work to pay for their short-term living expenses and travel plans. In the period to which this appeal relates, most came under the "working holidaymaker" provisions of the Immigration Rules, which allowed young persons from specified countries to come to the United Kingdom on a "working holiday" for up to two years, during 12 months of which they were permitted to undertake work "incidental to" the holiday. Other customers had other types of immigration status, but typically acted in the same way as those on working holidaymaker visas. Most of the Appellant's customers in fact were in the United Kingdom for 18 to 19 months, on and off between travel elsewhere.

3. This appeal relates specifically to foreign exchange ("**FOREX**") services provided by the Appellant to these customers, enabling them to exchange sterling for their home currency and to repatriate the funds to their home countries. It is common ground that these services were exempt supplies for purposes of the Value Added Tax Act 1994 ("**VATA**"), being services falling within the exemption under item 1 of Group 5 of Schedule 9 VATA ("*issue, transfer or receipt of, or any dealing with, money* ..."). It is furthermore common ground that input tax in respect of these services would be recoverable if they were "*supplied to a person who belongs outside the member States*" within the meaning of article 3(a) of the Value Added Tax (Input Tax) (Specified Supplies) Order 1999 (SI 1999/3121) (the "**1999 Order**"), but that they would not otherwise be recoverable. HMRC contends, and the Appellant disputes, that the Appellant's customers who were in the United Kingdom at the time of supply of the services "*belonged in*" the United Kingdom for purposes of article 3(a) of the 1999 Order.

The applicable legislation

4. Section 31 VATA provides that "*A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ...*"

5. Schedule 9 VATA, at Group 5, item 1 specifies "*The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money*".

6. By virtue of sections 25 and 26 VATA, a supplier is generally not entitled to recover input tax in respect of exempt supplies.

7. However, s.26(2)(c) VATA provides for input tax recovery in respect of "*such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection*".

8. Articles 2 and 3(a) of the 1999 Order provide that supplies specified for purposes of s.26(2)(c) VATA include services "*which are supplied to a person who belongs outside the member States*", provided that "*the supply is exempt, or would have been exempt if made in the United Kingdom, by virtue of ... items 1 ... of Group 5, of Schedule 9 to the Value Added Tax Act 1994*".

9. Section 9(2) VATA, as in force at the material time, relevantly provides: "*... subsections (3) and (4) below shall apply ... for determining, in relation to any supply of services, whether the recipient belongs in one country or another*".

10. Section 9(3) VATA, as in force at the material time, provides: "*If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him, he shall be treated as belonging in whatever country he has his usual place of residence*".

11. Article 56(1) of Council Directive 2006/112/EC (the "**2006 Directive**") (which applies to types of services specified in that provision, including "financial ... transactions") provides: "*The place of supply of ... services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides*".

The hearing and evidence

12. Two witnesses gave evidence at the hearing on behalf of the Appellant, Mr Ashely Deakin and Mr Jonathan Nish. One witness was called by HMRC, Ms Kirsten Marie Kendall.

13. Mr Deakin adopted his two witness statements dated 18 May 2010 and 8 July 2010, which state amongst other matters as follows. He is the co-founder and finance director of the group of companies to which the Appellant belongs. The group's

services include money remittance, visas, vaccinations, shipping, tax refunds, financial service advice, assistance with opening bank accounts, accounting and payroll services. The group's customers are predominantly young people, typically aged 21-30, from Australia, New Zealand and South Africa who come to the United Kingdom on a "working holiday" or "overseas experience" ("**OE**"), which they see as a once in a lifetime opportunity to come to the United Kingdom to earn a bit of money in order to fund travelling around Europe. They are itinerant, with flexible work/travel arrangements and no fixed plans. They are usually interested in temporary work, predominantly 3-6 month contracts.

14. In the period to which this appeal relates, most customers came to the United Kingdom on working holidaymaker visas (10,554 out of 16,339 customers in the period 1 January 2005 to 30 September 2007). Smaller numbers had other forms of immigration status, including UK ancestry visas, work permits, and indefinite leave to remain, and some had British or other European passports.

15. The working holidaymaker visa entitled the holder to come to the United Kingdom for an extended holiday up to a maximum of two years, but customers rarely spent a full two years in the United Kingdom. Most arrived with a small amount of money without concrete plans, and if they were unable on arrival to find accommodation or a job, they would travel around until their money ran out and then return home.

16. The Immigration Rules in force in 2005 and 2006 contained the following requirements for working holidaymaker visas. A working holidaymaker had to be between the ages of 17 and 30, and normally unmarried (the Appellant only ever experienced two instances of married couples). A working holidaymaker could not have dependent children aged 5 years or over (and none of the Appellant's customers had children), and were not entitled to bring other family members to the United Kingdom on their visa. Work could only be "incidental" to their holiday. Working holidaymakers were prohibited from engaging in business, and were required to intend to leave the United Kingdom at the end of their working holiday. Customers usually came for a working holiday either (1) when they had just left school on a gap year before university, (2) immediately after graduating from university and before starting work in their home countries, or (3) as a sabbatical in their mid to late 20s.

17. The branding and the services that the Appellant offered appealed to the young, transitory market of overseas customers, and most customers therefore had a similar profile regardless of the type of immigration status they had. Almost all customers had the following characteristics. They came to the United Kingdom on an OE to combine work with as much travelling as possible before returning home, were aged 17 to 30 years, single and without children or other family members in the United Kingdom, were from Australia, New Zealand or South Africa, arrived with no fixed plans and had flexible living arrangements, remained here for 18 or 19 months, undertook temporary work (3 to 6 month contracts) incidental to their holiday, and lived in hostel accommodation, flat shares or short-term lets.

18. In cross-examination, Mr Deakin said amongst other matters as follows. It was possible for the Appellant's customers to utilise a personal service company ("**PSC**"). This lead to savings on National Insurance ("**NI**"). At present perhaps 10% of the Appellant's customers use PSCs, but in 2005, about 60% of customers did so. The percentage went down particularly in April 2007 when new legislation made this arrangement less tax efficient. The Appellant would advise customers on whether it would be worthwhile setting up a PSC and could set one up for the customer. The PSCs did not need to be VAT registered, as they operated through the Channel Islands. The typical customer requiring a PSC would have a finance degree or accountancy qualification and would be a professional person. This category of customer would not be described as a typical backpacker or "gap year kid".

19. Although only 65% of the customers were on working holidaymaker visas, they all shared common characteristics and typically behaved in a similar way. They typically do not have surplus funds when they arrive, and are looking for hostel accommodation. The desire for such accommodation may or may not diminish after the person has been here for some time. The Appellant has never arranged shipping of effects from customers' countries of origin to the UK, but only ever from the UK back to their countries of origin. Customers typically do not accumulate furniture in the United Kingdom, and the shipping of effects is limited to tea cartons of excess baggage, not furniture.

20. In re-examination Mr Deakin said amongst other matters as follows. There is a difference between a PSC and a managed service company ("**MSC**"). An MSC is run by the Appellant on behalf of a number of customers (typically 6), while a PSC was typically for a single customer. Such customers would undertake work in this country through the PSC or MSC, but this was managed for them by the Appellant and the customer would be almost unaware that they were a director or shareholder of a PSC or MSC. The customer's visa status made no difference to whether a PSC or MSC was used.

21. Mr Jonathan Nish adopted his two witness statements dated 18 May 2010 and 8 July 2010, which cover many of the same points as Mr Deakin's statements. He also stated amongst other matters as follows. He is the operations manager of the Appellant. People on OEs are usually not that keen to integrate themselves into the London community, preferring to mix with people from home as much as possible. Customers are usually not in one place for long enough to register with GPs and dentists or with the council. Customers do not usually register landlines. In practical terms they cannot buy property in the UK, as mortgages will not be provided. They do not bring pets. They may buy cheap cars that can be disposed of easily at the end of a trip, but the Appellant has never had to advise on vehicle financing. Customers find it difficult to open bank accounts or to get mobile phone contracts. The main reason people come on a working holiday is to travel, and working holiday makers tend to maximise travel opportunities around bank holiday long weekends and breaks between contracts to visit European destinations on short breaks. They aim for short term contract work because it is more flexible and pays higher hourly rates. They also avoid working too long in one place to avoid suggestions by the UK Border Agency that their work is not merely incidental to a holiday. Popular contract roles include

working in finance and IT at banks and insurance companies in the City of London, and locum/supply roles in teaching, medicine and social care, or (at lower pay rates) in retail, security, construction, agriculture, manufacturing and hospitality. Contracts may be for 3-6 months, but some are for as little as a day or week. Certain data about the FOREX transactions of customers was provided.

22. In cross-examination it was put to Mr Nish that his descriptions of the typical customer were not based on empirical data, and that the typical customer was more likely to be in a finance or IT role than a bartender. Mr Nish said that there were different groups of customers at different stages of life.

23. In re-examination Mr Nish said amongst other matters as follows. After staying for an initial period in a hostel, a working holiday maker typically moves on to a flatshare or houseshare. They do not normally live alone due to the expense, and seek as short a lease as possible.

24. Ms Kirsten Kendall adopted her witness statements dated 10 June 2010 and 28 October 2010. The former statement states amongst other matters as follows. Ms Kendall has been an officer of HMRC for 22 years. The role of her team is to investigate tax avoidance schemes. In 2000, enquiries were being made into arrangements that the Appellant had with a Jersey-registered company which provided tax and accountancy services to individuals in the United Kingdom for a limited period, typically from Australia, New Zealand and South Africa. The Jersey company brought in the services of the Appellant, who worked directly with the customers. The focus of the enquiry were to establish whether these services were being provided to customers by the Appellant and therefore subject to VAT. There were various exchanges of correspondence between the Appellant and HMRC, copies of which are annexed to Ms Kendall's statement. Her latter statement sets out more detail of this history of the working holiday maker visa regime and changes to that regime over time, and how NI numbers and bank accounts are applied for.

25. In cross-examination, Ms Kendall accepted that the HMRC enquiries into the Jersey company had been concluded and that HMRC was satisfied in relation to those enquiries. She acknowledged that she did not have personal knowledge of types of bank accounts offered in 2005 or of immigration law. She acknowledged that in the HMRC correspondence with the Appellant, the Appellant's analysis of its typical customer had not been challenged. There was no re-examination.

The arguments of the parties

26. The submissions on behalf of the Appellant were as follows.

27. The word "*belongs*" is not defined in the 1999 Order, but section 9(3) VATA defines the concept to mean the country in which a person "*has his usual place of residence*". Articles 9(1) and 9(2)(e) of former Council Directive 77/388/EEC (the "**Sixth Directive**") used the expression "*the place where he has his permanent address or usually resides*". The same expression is now used in Article 56 of the 2006 Directive. The concept of "*belonging*" used in section 9(3) VATA and article

3(a) of the 1999 Order must be interpreted to give effect to the expression as used in the 2006 Directive: *SA Razzak & M A Mishari v Commissioners of Customs and Excise*, VAT Decision 15240, 13 November 1997 ("***Razzak***") at [45]; *Revenue and Customs Commissioners v IDT Card Services Ltd* [2006] EWCA Civ 29 at [68]. It is therefore necessary to determine the correct interpretation of the expression used in the 2006 Directive, and from that to determine the correct interpretation of the expression used in section 9(3) VATA. It is not possible for a person to "belong" in more than one jurisdiction at the same time.

28. Whether there is a sufficient degree of permanence is a matter that the Tribunal needs to determine, weighing all facts and circumstances. Reliance is placed on *Razzak*. *USAA Limited v Commissioners of Customs and Excise*, VAT Decision 10369, 27 April 1993 ("***USAA***") and *Martin-Jenkins v Revenue and Customs Commissioners* [2009] UKFTT 99 (TC) ("***Martin-Jenkins***") are distinguishable. *Martin-Jenkins* confirms that a person can be resident in only one country at a time, that the place of residence is to be determined by objective evidence and not subjective intention, and that all factors must be weighed as a whole. Reliance is placed on *Shah v Barnet London Borough Council* [1983] 2 AC 309 ("***Shah***"), *per* Lord Scarman concluded at 344.

29. The Appellant's customers did not have a sufficient degree of permanence in the United Kingdom. They were young people on working holidays, lacking a settled purpose, and were without a sufficient quality of residence in the United Kingdom for it to be said that they had their permanent address or usually resided here. They were itinerant with flexible lifestyles and no fixed plans, taking time out from their lives in their home countries before returning to their lives back home. They were typically single without children or other family members, and their family lives in their home countries continued uninterrupted. Their main purpose was to travel, and work was incidental. They travelled light, and left personal belongings, cars, pets etc back in their home country. The purposes of the FOREX transactions to which this appeal relates included remittances to pay mortgages and credit cards, and to send money to families or savings accounts, indicating that links with the home country were preserved. The rules for working holidaymaker visas required work to be incidental to the holiday, and required an intention to leave at the end of the working holiday: *AG (Working holidaymaker: "incidental") India* [2007] UKAIT 00033 at [9]; *TS (Working Holidaymaker: no third party support)* [2008] UKAIT 00024 ("***TS***") at [17].

30. Immigration cases indicate that that the situation of a working holidaymaker is different to that of a person settled in the United Kingdom: *PS (working holiday maker – maintenance – assessment) India* [2010] UKUT 280 (IAC) ("***PS***") at [21]-[22], and *TS* at [69]-[70]. In *KS (India) and JA (Bangladesh) v Entry Clearance Officer* [2009] EWCA Civ 762, Pill LJ referred with approval to *TS*, and said that the working holiday maker scheme was "*a concept different from settlement but also different from entry as a student, or as an artist, or on au pair placement*".

31. The evidence indicates that those of the Appellant's customers who did not have working holidaymaker visas behaved in a similar way. It would be a false impression

to suggest that the Appellant's customers were highly paid professionals in the finance industry. It is irrelevant that many may have worked via a PSC or MSC. It is immaterial whether or not customers would, under United Kingdom law, have been considered "resident" in the UK for income tax purposes.

32. The submissions on behalf of HMRC were as follows.

33. Input tax is allowable by reference to supplies given for a particular VAT period, and a person's usual place of residence should be assessed in a similarly temporally limited manner. *Shah* did not introduce a test akin to domicile, requiring an intention to remain in the country permanently or require any particular category of purpose. *USAA* and *Martin-Jenkins* are relied on. *Razzak* is distinguishable.

34. Even if the Appellant's description of a typical customer was correct, at most this demonstrates an intention not to remain in the UK indefinitely, but this is not sufficient. Immigration law cases on working holidaymakers do not assist as they do not deal with residence for VAT purposes. The word "holiday" is used in the specific context of the statutory scheme of "working holidaymaker" and cannot be understood in its ordinary sense to provide a definitive factual description of the nature of the Appellant's customers' presence in this country.

35. The evidence is that the Appellant's typical customer worked in the finance industry. The evidence of the FOREX transactions showed that they earned sufficient money to remit funds home. 60% of the customers were entering into tax mitigation strategies. They were not stereotypical backpackers. The typical customer had a right to be in the United Kingdom for 2 years and sometimes more, a right to work for 12 months of that period or more, was physically present in the United Kingdom for much of that period, had a United Kingdom bank account and NI number, was (in 60% of cases) a director or shareholder of a United Kingdom PSC or MSC, worked in the finance industry, had a degree of surplus wealth generated here, and paid income tax and other tax here. There was no reliable evidence that customers did not register for doctors, dentists, landline telephones and so forth.

36. The Appellant's submissions in reply were as follows. *Shah* is of limited assistance. If the Appellant's customers were in breach of their visa conditions by working more than was "incidental" to a holiday, this would make their residence unlawful, and it therefore could not be ordinary residence: *Shah* at 349E. *Razzak* did not turn on the fact that residence was involuntary. There is sufficient objective evidence in the present case, without the need to resort to subjective intention. Changes in the Immigration Rules at one point to enable working holidaymakers to work the whole 24 months do not affect the Appellant's case. Although many of the Appellant's customers worked in "finance", that is an ambiguous word that covers a variety of roles. The evidence does not suggest that customers were generating significant surplus wealth. Any person working in the United Kingdom would pay tax and have a NI number, but that does not mean that the person "belongs" in this country. Even a person who is not resident may be liable to pay tax in the UK. The Appellant's witnesses are in a position to know that its customers do not register with doctors, dentists and so forth.

The Tribunal's findings

37. It is common ground between the parties that the FOREX services to which this appeal relates are exempt supplies under Schedule 9 VATA, at Group 5, item 1, and that the Appellant is entitled to recovery of input tax in respect of the supply of those services if, but only if, the person to whom they were supplied is "*a person who belongs outside the member States*" within the meaning of article 3(a) of the 1999 Order.

38. The Tribunal accepts, as the Appellant argues, that the expression "*belongs outside the member States*" in article 3(a) of the 1999 Order is to be interpreted in accordance with section 9(2) and (3) VATA, as in force at the material time, which provides that "*If the supply of services is made to an individual and received by him otherwise than for the purposes of any business carried on by him, he shall be treated as belonging in whatever country he has his usual place of residence*". Neither party put their case on the basis that the supplies of FOREX services were made to customers for the purpose of any business carried on by them. It follows that the question in this case is what country the Appellant's customers had their "*usual place of residence*".

39. The Tribunal further accepts that the above provisions should be interpreted in a manner that would be consistent with the United Kingdom's obligations under relevant EU law. The Appellant argues that the expression "*usual place of residence*" in section 9(3) VATA must therefore have the same meaning as the expression "*the place where he has his permanent address or usually resides*" in Article 56(1) of the 2006 Directive. While that may be so, neither party was able to direct the Tribunal to any relevant case law on the interpretation and application of Article 56(1).

40. The expression "*the place where he has his permanent address or usually resides*" in Article 56(1) contains two alternative tests, the first being the place where a person "*has his permanent address*", and the second being the place where a person "*usually resides*". It is unclear from the wording whether the two tests are intended to be two ways of saying the same thing, or whether the former is intended to be the main test, and the latter an alternative test to be applied in cases where a person has no identifiable "*permanent address*". However, the Tribunal does not consider that anything turns on these two alternative readings of the expression, for the following reasons.

41. The evidence is that the FOREX transactions in question were provided to some 16,000 customers. It must be the case that such a large group of customers would include people with a wide variety of personal circumstances. However, the Appellant has urged the Tribunal to decide the appeal on the basis that the customers are to be treated as a single group possessing a typical profile, such that the appeal either succeeds or fails in relation to the group as a whole. This approach is said to be consistent with the approach taken in *USAA*, in which the Tribunal decided the appeal on the basis of what it considered to be a "typical case". HMRC accepted that this approach should be adopted, and the Tribunal therefore does so.

42. It was an important part of the Appellant's case that its customers lived a very transient lifestyle while in the United Kingdom. Accordingly, on the Appellant's argument, customers could not be said to have a permanent address in the United Kingdom. On the other hand, the evidence does not suggest that the typical customer maintained a permanent address in their country of origin either. It may be that some had homes in their country of origin which they let out while they were away on their working holiday. It is possible, perhaps likely, that a substantial number were renting accommodation in their country of origin immediately before coming to the United Kingdom, and terminated their leases before coming here. If so, they could not be said to have any permanent address in their home country during the period of their working holiday. As there is no evidence that the typical customer had a permanent address in either country, for purposes of the present appeal the issue must be to determine the country in which the typical customer "*usually resided*" for purposes of Article 56(1) of the 2006 Directive, or the country in which the typical customer had "*his usual place of residence*" within the meaning of section 9(3) VATA.

43. In relation to the meaning of "usual residence" for present purposes, both parties relied on *Shah*. In argument, attention was drawn to the following passages in the speech of Lord Scarman (with whom the other Lords all agreed):

> Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. [At 343G-H]
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> And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.
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> The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning M.R. in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman L.J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite

> temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose. [344C-F]
>
> My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning M.R., to appreciate the authoritative guidance given by this House in *Levene v. Inland Revenue Commissioners* [1928] A.C. 217 and *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234 as to the natural and ordinary meaning of the words "ordinarily resident." They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a *settled* purpose, whatever it be, whether study, business, work or pleasure. [At 347H-348B]
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> ... "Immigration status" ... may or may not be a guide to a person's intention in establishing a residence in this country: it certainly cannot be the decisive test, as in effect the courts below have treated it. Moreover, in the context with which these appeals are concerned, i.e. past residence, intention or expectations for the future are not critical: what matters is the course of living over the past three years.
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> A further error was their view that a specific limited purpose could not be the settled purpose, which is recognised as an essential ingredient of ordinary residence. This was, no doubt, because they discarded the guidance of the *Levene* and *Lysaght cases*. But it was also a confusion of thought: for study can be as settled a purpose as business or pleasure. And the notion of a permanent or indefinitely enduring purpose as an element in ordinary residence derives not from the natural and ordinary meaning of the words "ordinarily resident" but from a confusion of it with domicile.
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> I, therefore, reject the conclusions and reasoning of the courts below. And I also reject the "real home" test (and the variant of it) for which the local education authorities contended. In my view neither the test nor the variant is consistent with the natural and ordinary meaning of the words. [At 348D-F]

44. Lord Scarman uses the expression "settled purpose". This expression clearly is not intended to mean a "purpose to settle in a country" in the sense of becoming permanently resident there. Lord Scarman makes clear that a "settled purpose" may be "for a limited period" or "for the time being, whether of short or of long duration", and that it does not mean "real home" or "domicile". Rather, the expression "settled purpose" appears to refer simply to the fact that the person has voluntarily and deliberately gone to a particular place for a particular reason. Lord Scarman makes clear that the reason need not be employment, but might encompass "business, work or pleasure", or even "merely love of the place", that the reason may be specific or general, and that there may be more than one purpose. Lord Scarman also considered it to be necessary is that there be "a sufficient degree of continuity", and "a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences". Lord Scarman also indicated that ordinary residence, is "ultimately a question of fact, depending more upon the evidence of matters

susceptible of objective proof than upon evidence as to state of mind". Neither party in the present case disputed that this is a question of fact and degree, depending on the circumstances of the case as a whole.

45. In *Shah*, the issue before the House of Lords was whether immigrant students who had studied in the United Kingdom for the previous three years or longer had been ordinarily resident in the United Kingdom during the previous three years. The House of Lords did not itself decide the question, but held that the decisions below contained errors of law. Lord Scarman said in respect of the correct test to be applied that:

> ... it is, therefore, my view that local education authorities, when considering an application for a mandatory award, must ask themselves the question: has the applicant shown that he has habitually and normally resided in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences? If a local education authority asks this, the correct, question, it is then for it, and it alone, to determine whether as a matter of fact the applicant has shown such residence. An authority is not required to determine his "real home," whatever that means: nor need any attempt be made to discover what his long term future intentions or expectations are. The relevant period is not the future but one which has largely (or wholly) elapsed, namely that between the date of the commencement of his proposed course and the date of his arrival in the United Kingdom. The terms of an immigrant student's leave to enter and remain here may or may not throw light on the question: it will, however, be of little weight when put into the balance against the fact of continued residence over the prescribed period - unless the residence is itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary. [At 349B-E]

46. *USAA* concerned the supply of services to members of the US armed forces serving in the United Kingdom. The typical case was described as a member of the US forces who had arrived in the United Kingdom on a 3 year tour of duty (which might be extended or curtailed), accompanied by spouse and children, who had let out any home they owned back in the USA for the duration of the tour, and who would leave family members in the United Kingdom if returning during the tour of duty to the US for training. The Tribunal said that:

> I do not rule out the possibility that a taxpayer may in some cases have more than one "usual place of residence". However, it seems to me that an officer who is serving a three year term in the UK whose family are living here in a house or an apartment, whose home in the USA is let, and who may if he goes back to the USA for training leave his wife and family here, has a "usual place of residence" in the UK and has no "usual place of residence" in the USA. Although it was not put to me separately, I also think that an unmarried officer here for three years whose parents (with whom he resided when in the USA) continue to reside there, similarly has a "usual place of residence" in the UK being the quarters that he occupies here but not in the USA.

> One must concentrate on a point of time, not as in *Levine* and *Lysaght* on a year of assessment. I do not think that it can fairly be said that an officer as described with his three year residence here has "a usual place of residence" in the USA. If his house is let he has no place of residence at all in the USA. I think the question is really one of fact and degree, and in the typical case put to me I do not think the serving officer, starting without a presumption one way or the other, can fairly say that he has a "usual place of residence" in the USA at the time when, in the UK, he affects motor insurance.
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> If I am in error in considering that a person may have two usual places of residence, I reach the same conclusion, namely that the only usual place of residence in the circumstances is in the UK.
>
> A retired officer who sets up house here and does not keep a house in the USA is plainly usually resident here. An officer being in the USA and about to move to the UK has in my view a "usual place of residence" in the USA.

47. In *Razzak*, the person to whom services were supplied was found not to be ordinarily resident in the United Kingdom in the following circumstances. She was an Indian national who had been working as a domestic servant for a family in Kuwait. She came with that family to the United Kingdom as a domestic worker on a 6 month visa. She said that she did not want to come, but was told it would be for only a month. She claimed that she was mistreated by her employers and left after 3 months and went to a refuge, where she stayed for 9 months. She brought a claim for damages against her former employers, and was eventually granted exceptional leave to remain in the United Kingdom for purposes of pursuing the claim. The claim was settled some four years after she arrived, and it appears she had left the United Kingdom by the time that the case was decided. The Tribunal said at [47] that:

> In my judgment the words in section 9(3) must be construed as encompassing "the place where he has his permanent address" and in particular the word "permanent", not necessarily in the literal sense but at least as the antithesis of purely temporary and as having a sufficient degree of permanence. Viewed in that way it seems to me that the presence of Mrs Haseena in the United Kingdom was not such as to make this "the country of her normal place of residence". When she arrived in August 1992 she only expected to stay for a month; even if she had remained in the Appellants' service and they had remained for the maximum permitted period, her visa was only for six months; I do not consider that the UK could have properly been described as "the country where she had her usual place of residence". When she left the Appellants she was prohibited by immigration law from working and her entitlement to stay was initially not accepted by the Home Office. When she was allowed to stay it was for a limited period and a limited purpose with no guarantee of extension even to pursue the litigation. During the period from November 1992 Mrs Haseena stayed in a series of different hostels which of their very nature were temporary places of abode. It is clear from the correspondence with the Home Office as early as March 1993 that if the visa had not been extended she would

> have returned to India. In my judgment throughout the relevant period India was the country where she had her usual place of residence although she was temporarily and effectively involuntarily present in the UK.

48. *Martin-Jenkins*, concerned a supply of goods made to a person who had been living in the United Kingdom for some 10 years, but who was in the process of moving to Mauritius where he had a residence permit, and a start date for his employment and his children's schooling. The goods were intended for use in Mauritius. He left the United Kingdom for Mauritius on 31 August 2007. The goods had been delivered to him in the UK some 2 weeks before he left, to be shipped with his other effects to Mauritius. The Tribunal found that he was "resident" in the United Kingdom at the time of the supply, since at the time he was living with his family in his home in the United Kingdom. It was held to be irrelevant that "his mind may well have been in Mauritius", since residence must be established by objective evidence and not subjective intention. It was held that a person can only be resident in one territory at a time, and that *Razzak* was of no assistance since his presence in the United Kingdom was voluntary.

49. Applying the relevant principles derived from this case law to the present case, the Tribunal finds the following.

50. Although a person may be ordinarily resident in a place for a short period, and although the purpose of ordinary residence may be "merely love of the place", an ordinary tourist in the United Kingdom for a period of days or weeks clearly could not generally be said to have their ordinary residence here. Presence in this country as a typical tourist would not be, in the words of Lord Scarman, "for settled purposes as part of the regular order of his life for the time being", and presence here in that capacity would not be a "regular, habitual mode of life in a particular place". A typical tourist would, for instance, have a home and employment in their country of origin. Typically, a tourist would not rent their home out while on holidays, and would be on annual leave from their employment at home and would not be taking up employment in the United Kingdom. However, each case would depend on its own facts. A person who spent a year in this country without working, and who spent the year here travelling and sightseeing, might well be described as a "tourist". Nevertheless, if the person had no home or employment in their country of origin, and if they rented a home in the United Kingdom for the year as a base from which to conduct travels and sightseeing, the conclusion might be reached that the person is ordinarily resident in the United Kingdom for the year in question.

51. The Tribunal finds that *Razaak* is of limited assistance due to its unusual facts. It concerned the supply of services to a person whose presence in the United Kingdom was involuntary, not only in the sense that she said that she did not want to come here in the first place, but in the sense that she remained beyond the one month period for which she initially thought she was coming due to supervening circumstances arising in this country that formed no part of her original purpose in coming here, and which she did not bring upon herself.

52. The case law indicates that a person's particular immigration status is not a particularly significant factor, and that a person's ordinary residence may be in the United Kingdom, regardless of where their "real home" or domicile may be. The Tribunal finds that the nature of the customers' immigration status is relevant only to the extent that is instructive in establishing material facts. The Tribunal takes into account the evidence that the Appellant's customers came here with the intention to undertake such combination of work and travel that was consistent with the requirements of a working holidaymaker visa, whether they actually had a working holidaymaker visa or had some other immigration status. Apart from this, the immigration case law on working holidaymakers is not considered pertinent.

53. The Tribunal finds that the nature of customers' work while in the United Kingdom (whether in the "finance" industry, or in unskilled labour) has no material bearing. As only 60% of customers used a PSC or MSC, it is not considered that it can be said that this was typical of the group as a whole, and this is not taken into account as a feature of the typical customer.

54. The evidence is that the Appellant's customers came to the United Kingdom intending to have an experience involving a combination of travel and work known as a "working holiday" or "overseas experience", and that they would typically stay some 18 months. In pursuit of that purpose, they remained regularly in the United Kingdom for that period, with temporary absences visiting other countries (including short trips back to their home countries), even if their living arrangements were short-term and transitory. The Tribunal finds that the purpose of having such a "working holiday" or "overseas experience" can in itself be a "settled purpose" in the sense used in *Shah*. A settled purpose can include more than one purpose, and there is no reason why it cannot include a combination of travel and work.

55. The evidence is that the Appellant's customers typically arrived in the United Kingdom with no fixed plans. However, the Tribunal is satisfied on the evidence that they did arrive with a general purpose of having a working holiday, which typically lasted perhaps some 18 months. It may be that they did not know at the time of arrival whether they would leave early if things did not work out, or stay longer if they did and if they could get any necessary extension of their immigration status. However, in *USAA*, the 3 year postings if US service personnel were also capable of being extended and curtailed, such that they would not know at the outset exactly how long they would stay. Lack of certainty of the duration of presence in the United Kingdom is not decisive.

56. The fact that the Appellant's customers intended that they would be in the United Kingdom only temporarily and would return to their "normal" lives in their home countries at the end of a working holiday does not mean that they could not be ordinarily resident in the United Kingdom in the meantime. It was clearly the intention of typical US service personnel in *USAA* to be in the United Kingdom for only a limited period. In *Martin-Jenkins*, the person to whom goods were supplied was actually in the process of moving to Mauritius at the time of the supply, yet was found still to be resident in the United Kingdom.

57. The service personnel in *USAA* were found to be resident in the United Kingdom, notwithstanding that throughout their posting here, they maintained very strong links with the USA. They owned homes there, which they had rented out. They remained in the service of the US armed forces. Their service in the United Kingdom was part of a continuous employment by the US employer, which existed before they came to the United Kingdom and typically continued after they left the United Kingdom.

58. It is true that in *USAA*, the US service personnel brought their spouses and children with them to the United Kingdom. However, the evidence is that the Appellant's customers typically were not married and had no children. There is no evidence that the typical customer maintained a home in their country of origin. There is no evidence that the typical customer had, for instance, a job in their country of origin from which they had taken leave of absence in order to have a working holiday. Furthermore, even if customers had homes in their home countries that they had rented out, or previously lived with their parents in their home country, *USAA* indicates that this would not mean that they continued to be resident in their home country while in the United Kingdom.

59. Although it may be presumed that many or most working holidaymakers have parents, siblings, and other family or friends in their country of origin, that would be equally true of the service personnel in *USAA*, and of many other people who take up ordinary residence in the United Kingdom. While working holidaymakers may have maintained an intention of returning to their home countries at the end of the working holiday, and although there was evidence that they might return home on short trips during their working holiday, there was no evidence that they maintained any particular types of connections or commitments in their home countries during the period that they were away.

60. It may be the case that the Appellant's customers did not remain in one place in a single employment like the US service personnel in *USAA*, or have an established home in this country as in *Martin-Jenkins*. However, it is implicit in the wording of section 9(3) VATA and Article 56(1) of the 2006 Directive that the test of residence relates to the country of usual residence, rather than a particular street address. Even if customers changed address and moved from place to place during the working holiday, that is not inconsistent with the United Kingdom being their usual place of residence for the period in question. Throughout that period, they continuously lived a working holidaymaker lifestyle, even if it was a transitory lifestyle involving a combination of travel and work.

61. The Tribunal is satisfied on the evidence that for the duration of their working holiday, the Appellant's typical customer was in the United Kingdom "for settled purposes as part of the regular order of his life for the time being", and had a "purpose of living where one does has a sufficient degree of continuity to be properly described as settled", and had a "a regular mode of life adopted voluntarily and for a *settled* purpose".

Conclusion

62. For the reasons above, the appeal is dismissed.

63. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 25 January 2012