TC07709

VAT – opted property – occupied by four businesses in succession – no rent paid – whether obligation to pay – whether expectation that payment would be made – held, no –input tax on expenses claimed on final VAT return disallowed by HMRC – that decision upheld and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/06510

BETWEEN

COLIN AND SUSAN SLAYMARK **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS CATHERINE FARQUHARSON

Sitting in public at Taylor House on 8 October 2019 and 23-24 January 2020

Miss Laura Ruxandu of Counsel, instructed by the Appellants, for the Appellants

Mr Anharul Qureshi, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. In 2008 the Appellants purchased an industrial unit/warehouse in Eastbourne ("the Property") which they opted to tax. It was sold on 16 October 2015 for £1.5m plus VAT of £300,000. During the intervening seven year period, the Property was occupied by four companies, Fender Limited ("Fender"); Adkat Distributions Limited ("Adkat"); Hotel Leisure Limited ("HLF") and South East Refurbs Limited ("SER"). None of these companies paid rent for their occupation of the Property.

2. The Appellants' final VAT return included the VAT of £300,000, reduced by input tax of £68,541. Mr Mercer, the HMRC officer who made the decisions under appeal, disallowed most of the input tax and issued two assessments of £54,935.16 and £9,511.16, a total of £64,446. The balance was allowed as relating to the fees of solicitors and estate agents on the sale of the Property.

3. The Appellants appealed the assessments on the basis that the costs were allowable because they had carried on the economic activity of letting the Property, and/or of selling the Property.

4. There were two main issues:

   (1) whether the occupants of the Property were required to pay rent, and if not, whether the Appellants nevertheless expected that they would pay rent; and

   (2) whether the Appellants had proved that the disallowed expenses related to the Property.

5. In relation to the first issue, we found that none of the occupants had an obligation to pay rent; that the Appellants had no expectation that rent would be paid, and that the Appellants were not carrying on the economic activity of letting the Property. In relation to the second issue, we found that some of the expenses were clearly unrelated to the Property, and the Appellants failed to meet their burden of proof in relation to the remainder. As a result, none of the claimed expenses related to the economic activity of selling the Property.

6. We dismissed the Appellants' appeal and upheld HMRC's assessments of £54,935.16 and £9,511.16.

THE EVIDENCE AND THE HEARINGS

Before the hearing

7. The appeal was filed on 21 November 2016. The Tribunal sent Mr and Mrs Slaymark directions to provide a list of documents on four separate occasions. On 9 November 2018, Judge Bailey issued an Unless Order, saying that the appeal would be struck out unless the Appellants filed their list of documents by 7 December 2018.

8. The directions required that the Appellants provide the hearing Bundle, which was to include the notice of appeal; HMRC's Statement of Case; the documents on both parties' lists of documents; the witness statements; all directions issued by the Tribunal, and all correspondence with the Tribunal which was to be referred to by the parties.

9. The Appellants were given an extension of time to file the Bundle, but when it was received by HMRC it did not include all the documents on the parties' list of documents, and

the version of some of the documents in the Bundle differed from those in HMRC's Bundle. The Tribunal gave HMRC permission to file a supplementary Bundle.

The first day of the hearing

10. The hearing was listed for a day. HMRC's supplementary Bundle contained around 240 pages which had been omitted from the hearing Bundle; the missing documents included HMRC's Statement of Case. The hearing Bundle also included documents which:

(1) were not in the hearing Bundle provided to HMRC;

(2) had not been on the Appellants' documents list; and

(3) HMRC had not seen.

11. We directed that the Appellants remove those documents from the Bundle and suggested a short adjournment to allow Mr Qureshi to consider them, after which the hearing would recommence and the Appellants could apply to admit some or all of these documents. The Appellants decided instead to remove the new documents. We said that if the hearing were to be adjourned for lack of time, we would issue directions giving the Appellants permission to apply to admit the documents into evidence, providing they had been supplied to HMRC.

12. For his part, Mr Qureshi applied for six documents to be admitted late, and said they had been omitted by oversight. The Appellants confirmed they had previously seen those documents and they were admitted into evidence.

13. Mr Qureshi also applied to admit an email chain between himself and Ms Emma Fisher, whom he identified as SER's administrator (although as is clear from the Bundle, she was in fact the liquidator). Mr Qureshi said that the email exchange discussed (a) the documents relating to SER which had been made available to Ms Fisher, and (b) contradicted some of the Appellants' witness evidence. He explained that he had been unable to make an earlier application to admit this evidence because the final email had been received only the day before the hearing; for the same reason, he had not had time to ask Ms Fisher to provide a witness statement or attend the hearing. However, he submitted that her evidence was both relevant and significant, and that it would be in the interests of justice to admit it. Ms Ruxandu said she had not had time to consider the email chain, and that Ms Fisher should be asked to provide witness evidence and be available for cross-examination..

14. The Tribunal decided not to admit the email chain because the Appellants had not had time to consider it, but that if the hearing were to be adjourned in any event, we would issue directions giving HMRC permission to call Ms Fisher, and permission to renew their application to admit the email chain into evidence.

The Tribunal's Directions

15. Mr and Mrs Slaymark had both provided witness statements. At the end of the first day, only Mrs Slaymark had entered the witness box, and she had been unable to complete her evidence (see §16). Neither party had made submissions. The Tribunal adjourned the hearing with directions. These were that:

(1) the hearing was relisted for two further days;

(2) the Appellants had permission to remake their application to admit the documents removed from the Bundle at the beginning of the hearing ("the Appellants' further documents"), but only if they were provided to HMRC within seven days;

(3) HMRC had permission to call Ms Fisher as a witness and to remake their application to admit the email chain;

(4) the Tribunal was unlikely to admit any further new documents into evidence at the relisted hearing; and

(5) all witnesses were to attend the relisted hearing and be available for cross-examination.

Mrs Slaymark's health and her attendance

16. Mrs Slaymark suffers from significant ill-health. On the first day of the hearing she gave oral evidence-in-chief led by Ms Ruxandu, and was cross-examined by Mr Qureshi. The Tribunal asked her to indicate whenever she required a break, and she both required and took frequent breaks. However, she found it impossible to complete her evidence. As already noted, the hearing was adjourned and relisted with directions, including that Mrs Slaymark attend the relisted hearing to complete her evidence.

17. Shortly before that hearing, the Tribunal was informed that Mrs Slaymark's continued ill-health meant she was unable to attend, and that it was also not possible to know when she would be well enough to do so. Mr Slaymark asked that the hearing continue as listed, and said that he was also speaking on behalf of Mrs Slaymark. Mr Qureshi agreed that this was the right course of action.

18. In deciding whether to continue in Mrs Slaymark's absence, the Tribunal took into account the fact that she had given evidence-in-chief at the first hearing, and had been cross-examined for over an hour, but that Mr Qureshi was expecting to resume that cross-examination at this hearing and Ms Ruxandu would have had the opportunity to re-examine her and the Tribunal might have had some questions. However:

(1) both parties were in agreement that the case should proceed;

(2) Mrs Slaymark had given evidence that her husband was "fully involved" in the partnership, including its "ongoing workings", and he was available to give oral evidence;

(3) the Tribunal had over 600 pages of documentary evidence;

(4) Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provided that "dealing with a case fairly and justly" includes:

(a) dealing with it in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; and

(c) avoiding delay, so far as compatible with proper consideration of the issues;

(5) although we must therefore ensure that the parties are able to participate in the proceedings, that requirement applies "so far as practicable". Mr Slaymark had told us that he did not know when Mrs Slaymark might be able to attend the hearing were it to be adjourned. Given the other evidence before the Tribunal we were confident that we could consider the issues properly despite her absence. It was self-evident that that continuing with the hearing would avoid delay, and that outcome was proportionate to the factors set out at (4)(a) above.

19. We therefore decided that it was in the interests of justice to continue in Mrs Slaymark's absence.

The new documents

20. At the beginning of the relisted hearing, Ms Ruxandu applied for the documents removed from the Appellants' Bundle at the previous hearing to be readmitted. Mr Qureshi confirmed that HMRC had been provided with that material at the end of the previous day's hearing and that he had had time to consider it. The Tribunal accepted those documents into evidence.

21. Mr Qureshi said that Ms Fisher had originally agreed to attend to give witness evidence, but had made contact shortly before the hearing to say that owing to staff sickness she was unable to attend. Mr Qureshi asked that the email chain nevertheless be admitted into evidence. Ms Ruxandu did not object to its admission, but asked that the Tribunal should allow her to make submissions as to weight. We decided that it was in the interests of justice to admit the email chain because it was relevant to the matters we had to decide and because the Appellants had had plenty of time to consider it; Mr Slaymark could give evidence as to the information within those exchanges and Ms Ruxandu could make submissions as to weight.

22. Ms Ruxandu also applied for SER's 2013 statutory accounts to be admitted into evidence. Mr Qureshi said he had never seen those accounts and that if they were now admitted, he would need time to consider them, and in particular to see whether they had any implications for the other evidence already in the Bundles (which ran to almost 600 pages). In answer to questions from the Tribunal, Ms Ruxandu said that the accounts had been finalised in 2013, and she did not know why they had not previously been produced.

23. We decided it was not in the interests of justice to admit the accounts, because the Appellants had had plenty of time to provide that evidence previously; if they were admitted, the hearing would be further delayed because Mr Qureshi (and the Tribunal) would need time to consider them in the context of the evidence already provided; and the appeal had already been adjourned and relisted with an explicit direction that further new evidence was unlikely to be admitted.

The documents provided

24. The documents in evidence before the Tribunal consisted of those in the hearing Bundle handed up by the Appellants and those in HMRC's supplementary Bundle, together with the documents discussed above which were admitted late. In the rest of this decision, all the documents are simply called "the Bundle", and they include the following:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) various VAT returns submitted by the Appellants;

(3) various documents from Companies House;

(4) three documents stated to be lease agreements for the Property;

(5) other documents relating to the Property;

(6) a list of expenses produced by the Appellants to support their VAT reclaim, and an amended list; and

(7) certain documents relating to those claimed expenses.

The witness evidence

25. Mr and Mrs Slaymark provided witness statements. These were "mirror" statements: in other words, they were identical apart from where they referred to each other. The copies provided to the Tribunal had not been signed, but Mr and Mrs Slaymark both confirmed that they had given signed copies to Lexlaw (who was advising them at that time) and that the evidence in the statements was true to the best of their knowledge and belief. We accepted the statements as being their evidence.

26. Mrs Slaymark also gave evidence-in-chief led by Ms Ruxandu and was cross-examined by Mr Qureshi. Mr Slaymark gave evidence-in-chief, was cross-examined by Mr Qureshi and answered questions from the Tribunal.

Assessing credibility

27. In assessing the credibility of the witnesses, we were guided by the case law. In *The Ocean Frost* [1985] 1 Lloyds Rep 1 at 57 Robert Goff LJ said:

> "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

28. In *Lachaux v Lachaux* [2017] EWHC 385 Mostyn J cited that passage and said "these wise words are surely of general application and are not confined to fraud cases". Similar guidance was given in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [22], where Leggat J (as he then was) said:

> "the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

29. In a number of cases, including *Bailey v Graham* [2012] EWCA Civ 1469, the courts have also referred to an article entitled "The Judge as Juror: The Judicial Determination of Factual Issues" in which Bingham J (as he then was) identified the following indicators of where the truth lies: the consistency of the witness's evidence with what is agreed to have occurred, or what is clearly shown by other evidence to have occurred; the internal consistency of his evidence; and the consistency of his evidence with what he has said or deposed on other occasions.

Application to Mr and Mrs Slaymark

30. Having applied that guidance, we found Mr and Mrs Slaymark's evidence to be unreliable in significant respects, and that they were not credible witnesses. We set out a small number of examples here. The main body of this judgment contains further examples.

31. In relation to Mr Slaymark:

(1) when Mr Qureshi pointed out contradictions between the witness statements and the documents, Mr Slaymark twice changed his evidence, see §62; and

(2) he gave evidence that invoices from a firm of solicitors "in connection with defending a claim by Bank of Scotland under a personal guarantee" and for "breach of

trust" related to a dispute about the mortgage on the Property. However, that was plainly not the case because they were the mortgagors, as explained further at §§151-156.

32. In relation to Mrs Slaymark:

(1) when asked about documents said to be invoices to Fender, she contradicted her own oral evidence and that in the witness statement, see §66;

(2) on 5 March 2012, she emailed HMRC saying that the Property "had been empty for some time". However, the Bundle for the hearing included what a document stated to be a five year lease dated 1 April 2011 between Mrs Slaymark and HLF. When Mr Qureshi asked her to explain the contradiction between the contemporaneous evidence from 2011, and the document said to be a lease, she was unable to do so.

THE FACTS

33. This part of the Decision sets out of our findings of fact about

(1) the Appellants and the Property generally;

(2) the periods when each of the four companies occupied the Property, including the nature and terms of their occupation;

(3) the Appellants' application to deregister in 2011;

(4) the disposal of the Property; and

(5) the expenses claimed on the final VAT return

34. We make further findings of fact later in this Decision.

THE APPELLANTS AND THE PROPERTY

The Appellants' background

35. Mr Slaymark has a university degree in business studies. He began working in sales, before finally becoming the director of a company which sold and distributed electronic equipment. He gave up that job when he and Mrs Slaymark purchased Fender in 2006, see §45 below.

36. Mrs Slaymark was involved (as we explain below) with three of the four companies which occupied the Property, as well as working in partnership with her husband. During part of the time she also worked in London as an employee of a large public sector organisation.

The Property

37. In January 2007, Mr and Mrs Slaymark set up a partnership and traded under the name UK Innovations. This bought and sold various goods and was registered for VAT with effect from 1 January 2007 as "UK Innovations, Fender House"; the trade classification for the partnership was photographic, optical and office equipment.

38. In 2008, Mr and Mrs Slaymark completed on the Property, which was an industrial unit/warehouse at 23 Marshall Rd, Eastbourne of around 2,000 m^2 situated on an industrial estate. It comprised a ground floor of 1.8m^2 including offices of 220m^2, a mezzanine of 72m^2 and offices on the first floor of 220 m^2.

39. The Appellants' witness statements said that the transaction took place "on or around 12 May 2008 for £1,600,000 plus VAT". However, we were also provided with (a) a document

issued by Stiles, Harold Williams ("SHW"), the vendor's estate agents, which gave the purchase price of the Property as £1,988,819 and (b) the VAT return for period 04/08 to 07/08, which gave a purchase figure of £1,803, 690 with VAT recoverable of £315,645.75. We were therefore unable to make a finding as to the purchase price, but we did not need to do so for the purposes of this decision; it was common ground that Mr and Mrs Slaymark paid VAT on the purchase.

40. It was also common ground that Mr and Mrs Slaymark obtained a mortgage from HBOS and were the only mortgagors. Mr Slaymark told the Tribunal that they paid the mortgage themselves until 2010, after which they entered into a legal dispute with HBOS about the LIBOR-linking of that mortgage and suspended payment of the mortgage as part of that dispute. That evidence was not in dispute and we accepted it.

VAT registration and payments

41. On 25 February 2008 Mr and Mrs Slaymark registered for VAT with effect from 1 April 2008 as "Susan and Colin Slaymark" operating as a partnership from their home address; the trade classification was "renting own or leased real estate". They opted to tax the Property.

42. Because Mr and Mrs Slaymark had now registered as a partnership on two occasions, HMRC made contact. Mr and Mrs Slaymark agreed to cancel the original registration with effect from 31 January 2008, although they continued to run the UK Innovations business.

43. Mr and Mrs Slaymark submitted quarterly VAT returns for the Partnership. All but three showed both inputs or outputs as being £nil. The three exceptions were periods 01/09 and 10/10 and the period in which the Property was sold. We refer to these three exceptions later in our Decision.

44. As explained at §§81ff, on 4 June 2011, Mrs Slaymark submitted a form cancelling the Partnership's VAT registration**.** In answer to the question "do you use the VAT cash accounting scheme" she ticked "No". However, the witness statements said that cash accounting was used. We find the contemporaneous evidence from 2011 to be more reliable, and find as a fact that the Partnership did not use the cash accounting scheme.

FENDER GROUP

45. Fender was a distributor for major brands including Hoover, LG and Samsung**.** Mr and Mrs Slaymark purchased the company in 2006 for £3.5m, so they were the only shareholders. They were also directors and Mrs Slaymark was responsible for its financial affairs. it was common ground that Fender was owned and controlled by Mr and Mrs Slaymark.

46. In order to secure the mortgage to purchase the Property, Mr and Mrs Slaymark had to demonstrate that it would be tenanted. They provided HBOS with a lease dated 12 May 2008 between themselves and Fender; it was signed both on their own behalf and as directors of Fender. The lease was stated to be for a 20 year term, and that the rent was £12,000pcm paid in advance, plus VAT. HBOS also made a number of loans to Fender; Mr Slaymark described the company as "highly leveraged".

47. Around September 2009, HBOS put Fender into liquidation; at that time it had debts of some £750,000. The liquidators entered the Property and sold Fender's goods and then returned the Property to Mr and Mrs Slaymark**.**

48. Mr and Mrs Slaymark did not pursue Fender for unpaid rent, either before it went into liquidation in September 2009, or through the liquidators after that date. On 14 October 2011, Mr Slaymark was disqualified as a director as the result of "conduct while acting for Fender Group Ltd", the Order lasted until 13 October 2018.

Whether payments were made by Fender

49. The parties disagreed on whether Fender actually paid any rent. We first consider the evidence and then make our findings of fact.

The evidence in summary

50. Mr and Mrs Slaymark relied on the following to show that rent was paid to them by Fender:

(1) the VAT return for 01/09;

(2) two pages from a bank statement; and

(3) five documents headed "Invoice", dated 1 April 2009, 1 May 2009, 1 June 2009, 1 July 2009 and 1 August 2009, each for £12,000. The description on each document was "rent for 23 Marshall Rd, Eastbourne", followed by the period, being the month commencing with the date on the document. VAT of 15% was added to the £12,000, making £13,800, and the Partnership's VAT number was on the bottom of the documents.

51. Although Mr and Mrs Slaymark's witness statement make a reference to payments from Fender in August and September 2009, and that this is supported by documentary evidence, there was no such evidence in the Bundle. The bank statement is for August 2008.

Whether the VAT return contains the VAT on the "invoices"

52. Mr and Mrs Slaymark's evidence was that the VAT shown on the documents headed "invoice" was reported on the VAT return for the period ending January 2009, which showed sales of £88,000 and related VAT of 14,850, and that there was a delay in accounting for the VAT because they were operating the cash accounting scheme.

53. Mr Qureshi challenged that evidence on the following bases:

(1) the Appellants' evidence in their witness statement that they operated the VAT cash accounting scheme contradicts that on the application to deregister, dated 4 June 2011, see §81.

(2) the documents headed invoices were dated 1 April 2009, 1 May 2009, 1 June 2009, 1 July 2009 and 1 August 2009; in other words after the 01/09 VAT return was submitted. It was therefore not possible for invoices issued on those dates to have been included in the 1/09 VAT return.

54. We agree with Mr Qureshi. We have already found as a fact in reliance on the contemporaneous evidence that Mr and Mrs Slaymark did not operate the cash accounting scheme. As Mr Qureshi said, the documents headed "invoice" cannot therefore have been the source of the income shown on the 01/09 VAT return, and we find that there is no link between the "invoices" and that return.

The bank statement and the VAT return

55. The Appellants provided two pages from a bank statement which contained no header or other identification. On 27 August 2008, a payment of £13,800 was shown as paid from that bank statement to Mrs Slaymark. In oral evidence, Mrs Slaymark said that the bank statement

was Fender's and that the £13,800 was a payment of rent from Fender under the lease. Mr Slaymark said he "didn't know what [the payment] represents".

56. Ms Ruxandu invited us to find that this £13,800 payment was part of the £88,000 shown on the 01/09 VAT return. However, as Mr Qureshi pointed out, neither Mr or Mrs Slaymark gave that evidence. Their witness statements said the £88,000 on that return was made up of the "invoices" issued after the date on that VAT return.

57. Mr Qureshi said that if the payment in the bank account was rent due or payable in or around August 2008, it should have been included on the VAT return for 10/08, but that was a nil return; if it was for an earlier period, it would have been on a previous return, but these were also nil returns. Finally, he said that there was only Mrs S's oral evidence that the bank statement was Fender's, as it had no heading.

58. We agree with Mr Qureshi. There is no reliable evidence that the £13,800 payment made in August 2008 is in any way related to the £88,000 on the 01/09 VAT return, and we find that it was not.

The bank statement taken alone

59. We also considered whether the payment of £13,800 shown as made on 27 August 2008, was rent from Fender, as Mrs Slaymark had asserted was the case.

60. Mr Qureshi challenged that evidence, and submitted that:

(1) there was only Mrs Slaymark's oral evidence that:

(a) the bank statement was Fender's, and

(b) the payment was rent;

(2) much of her evidence was unreliable;

(3) this new evidence was not in her witness statement and was in fact contradicted by that witness statement ;

(4) even if the bank statement was Fender's, the £13,800 could be a payment to Mrs Slaymark for something other than rent;

(5) no related invoice has been produced in evidence; and

(6) no VAT was accounted for in the period in which the "rent" was paid;

61. We again agree with Mr Qureshi. The bank statement is not reliable evidence that rent was paid by Fender to Mrs Slaymark for occupation of the Property.

The VAT return taken alone

62. When the contradictions between the witness statements and the oral evidence about the figure on the 01/09 return were pointed out to Mr Slaymark during cross-examination, he said that the latter must have related entirely to rent received in that quarter and that the evidence in both witness statements was wrong. Mr Qureshi then asked him why, if that was the position, the £88,000 turnover on the return was not a multiple of the rent due under the lease. Mr Slaymark then changed his evidence again, saying that the figure on the return was "predominantly" rent.

63. Mr Qureshi submitted that this evidence should not be accepted. Mr Slaymark had changed his position twice under cross-examination and there was no reliable supporting

evidence for any of his assertions. Mr Qureshi added that UK Innovations was active during this period, and correspondence between the parties dated May 2011, following an unannounced HMRC visit, records Mr Slaymark's acceptance that the sales shown on the 10/10 VAT return of £171,479 and purchases of £174.414 related to UK Innovations. He invited us to find that the same was true of the 01/09 VAT return.

64. We again agree with Mr Qureshi. We find that the figure on the 01/09 VAT return was not rent received from Fender, but on the balance of probabilities taking into account the 2011 evidence, was instead related to UK Innovations.

The "invoices" taken alone

65. Finally, we considered whether the "invoices" taken alone provided reliable evidence that Fender paid rent for the Property.

66. Mrs Slaymark's evidence on this was contradictory:

(1) her witness statement states "we accounted for VAT charged to Fender Group on the VAT return for January 2009 based on seven months rent" and "this can be seen from the invoices", and she agreed in oral evidence that this reference to "invoices" was a reference to the five documents with that heading. Thus, according to the witness statement, the invoices were all paid;

(2) when Mrs Slaymark was asked during evidence-in-chief whether Fender paid these "invoices", she said "the first one I think was. I don't know it's so long ago"; and

(3) she was asked the same question by Mr Qureshi under cross-examination, and said "all the invoices were paid until Fender Group went into liquidation".

67. The following exchange took place in the course of Mr Qureshi's cross-examination of Mr Slaymark:

> "Mr Qureshi: Did you issue Fender Group with invoices?
>
> Mr Slaymark: No
>
> Mr Qureshi: Did the partnership?
>
> Mr Slaymark: I don't know, I wouldn't have done the invoices
>
> Mr Qureshi: Did Fender Group pay the invoices which they were issued?
>
> Mr Slaymark: There was a VAT return and payment through one of the accounts. the intention was that they would all be paid but I can't say whether they were all paid. Mrs Slaymark could answer that question – she was the accountant not me, she looked after the accounts for the business."

68. We find that Mrs Slaymark's oral evidence about these "invoices" was inconsistent and not credible and that Mr Slaymark was unable to give reliable evidence about the issuance of invoices or any related payment.

69. We have already found as a fact that the Partnership was not operating on a cash basis. It follows that if these documents had been VAT invoices issued to Fender, they would have been included on the VAT return, whether or not they had been paid, and there are no such entries. We also find that the documents headed "invoices" were not issued to Fender.

Overall finding of fact

70. We find as a fact that Fender did not pay rent for the occupation of the Property.

Whether any obligation or expectation of rental payment

The evidence

71. On 8 April 2016 there was an email exchange between Mr Merson, the HMRC Officer who issued the VAT assessments under appeal, and Mr Slaymark, who sent his email on behalf of both himself and Mrs Slaymark:

> "Mr Mercer: just to clarify, only Hotel Leisure were required to pay rent. The other tenants were granted occupation of the warehouse with no requirement to pay rent?
>
> Mr Slaymark: Mr Merson yes you are correct."

72. Mr Slaymark was asked about this exchange in cross-examination and he agreed "I said that". When Mrs Slaymark was cross-examined, she said Mr Slaymark's response "was a mistake" which had been caused because "the question was ambiguous".

73. Mr Slaymark also said in cross-examination they needed the rent paid so that they could service the mortgage. Mrs Slaymark's evidence was that she was "hoping" to be paid rent by Fender, and that this hope was based on the terms of the lease.

The parties' submissions

74. Ms Ruxandu invited us to find that, even if there was no reliable evidence of actual payment, Mr and Mrs Slaymark had nevertheless intended and expected that rent would be paid, and that this could be inferred from the existence of the legal obligations set out in the lease, and from the Appellants' oral evidence.

75. Mr Qureshi submitted that the lease was not determinative. He cited *HMRC v Newey* (Case C-653/11) [2013] STC 11 at [44], where the CJEU said that although contractual terms normally reflect the reality "it may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions". He said that it was clear from the email exchange of 8 April 2016 that there was no expectation that rent would be paid, and that the oral evidence was contradictory and unreliable. Ms Ruxandu responded by saying that *Newey* should not be followed as it was an authority on abuse of law, which had not been pleaded here.

The Tribunal's findings

76. It is well established that "the state of a man's mind is as much a fact as the state of his digestion", see *Edgington v Fitzmaurice* (1884) 29 Ch D 459. One of the issues in this case is Mr and Mrs Slaymark's intentions and expectations. We took into account the following:

(1) the lease (including in particular the term as to rental payments) was required as a condition of HBOS issuing the loan to Mr and Mrs Slaymark to purchase the property;

(2) it was a term of the lease that rent of £12,000 pcm plus VAT be paid in advance;

(3) the lease was between (a) Mr and Mrs Slaymark, and (b) Fender, a company owned and controlled by Mr and Mrs Slaymark;

(4) no invoices were issued;

(5) no rent was paid;

(6) Mr and Mrs Slaymark did not require that rent in order to pay the mortgage on the Property because they paid it themselves until the dispute with HBOS, when payments of the mortgage stopped, see §40;

(7) Mr Slaymark told Mr Mercer that there was no intention to charge rent. Mrs Slaymark asked us to find that this was a response to an ambiguous question, but there was no ambiguity in the question and Mr Slaymark confirmed that he had made that statement; and

(8) no claim was made at any time against Fender for unpaid rent.

77. The only evidence that Mr and Mrs Slaymark intended to charge rent is the clause in the lease agreement. Although Mrs Slaymark said she "hoped" rent would be paid, she said this was because of the agreement. The weight of the evidence is clear that there was no intention to charge rent and no expectation of payment.

78. We find as facts that (a) the clause was included because a lease agreement charging rent was required by HBOS as a condition of the mortgage, and not because there was any genuine intention to charge rent to Fender for the use of the Property, and (b) Mr and Mrs Slaymark had no intention of charging rent to Fender.

79. We did not need to rely on *Newey,* but as it was raised by the parties, we note that the CJEU said at [44] that "it may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions" and at [45] that this is the case "in particular" if they constitute a purely artificial arrangement. We therefore agree with Mr Qureshi that this is a case where the contractual term as to the payment of rent does not reflect the economic and commercial reality of the Appellants' relationship with Fender.

THE APPLICATION TO DEREGISTER AND THE SHW PARTICULARS

80. We have dealt with these points next as they are relevant to the Property's occupation by Adkat and by HLF.

The application to deregister

81. On 8 June 2011, HMRC received an application to deregister the Partnership. It was dated 4 June 2011 and signed by Mrs Slaymark. She gave the Partnership's business address as 23 Marshall Rd, Eastbourne, and ticked the boxes stating "I have ceased to trade" and that the Property was not opted and (as already noted) that they did not operate on a cash basis. She gave the date of cessation as 1 January 2011. Mr Slaymark's oral evidence was that it had been a joint decision to deregister.

82. After receipt of the application, HMRC noted that, contrary to the statement on the application, the Property was in fact opted. On 14 February 2012, they issued the Partnership with a VAT assessment for £266,666 for the period 1/2/11 to 30/4/11. The basis for the calculation of that figure was not in issue before the Tribunal.

83. On 5 March 2012, Mrs Slaymark emailed HMRC, asking to reverse the application to deregister, and stating that it had been made because "the building had been empty for some time". She also said (wording as in original):

> "the building that I own currently up for sale/rent with Stiles, Harold, Williams based in Eastbourne. I currently have two customers interested in the building, one for rent and one for sale".

84. On 14 March 2012, HMRC reinstated the Partnership's VAT number.

The SHW particulars

85. The Tribunal was also provided with the following:

(1) a copy of particulars from SHW. It is undated but the picture of the Property shows Fender's logo. It states that the Property is "for sale with vacant possession" at a price of £1.85m or at an annual rent of £175k pa, exclusive; and

(2) a document headed Heads of Terms (subject to contract) drafted by Mr Hunt of SHW between the Appellants and G&M (UK), trading as "my tuxedo". This provided for a five year lease from 1 September 2013 at an annual rent beginning at £90,000 and rising to £120,000 in annual increments over five years.

86. In reliance on the above evidence, we find that the Property was on the market with vacant possession between at least March 2012 and September 2013 and that the market rent for the Property was between £175k pa and £90k pa or between £14,500pcm and £7,500pcm.

ADKAT LIMITED

The company

87. Mr Slaymark's evidence was that he and Mrs Slaymark were approached by a Mr Levey who told them he had a lot of contracts for the supply of electrical equipment and wanted to occupy the Property, and that he and Mrs Slaymark agreed to allow occupation with a rent-free period.

88. On 14 October 2009, Adkat was incorporated with Mr Slaymark as a director. He resigned on 21 January 2010, and Mr Levey and Mrs Slaymark were appointed instead. Mr Slaymark remained as an employee, being paid a salary of around £10k pa plus commission. On 11 February 2010 Mrs Slaymark also resigned as a director, leaving only Mr Levey.

89. The Appellants' Bundle included an document headed "shareholders agreement" to which the parties were stated to be Mr Levey and a Mr Peter Lapage. That document is undated and unsigned and we are unable to place any weight on it. We do not know its provenance, or whether it was ever signed, and we had no evidence from either Mr Levey or Mr Lapage. We are therefore unable to make findings as to whether they were Adkat's shareholders during the period the Property was occupied by that company.

Adkat's period of occupation

90. It was common ground that from around January 2010 Adkat was in occupation of the Property without a lease agreement, and we find that the occupation was therefore under licence. No documentary evidence as to the terms of the licence was provided to the Tribunal.

91. Mrs Slaymark had informed HMRC that the Partnership had ceased to trade in January 2011, and that by June 2011 the Property had been empty for "some time". We find as a fact that Adkat ceased to occupy the Property around the end of 2010.

92. On 26 August 2011, Adkat's directors passed an extraordinary resolution to wind up the company, and a voluntary liquidator was appointed. On 7 June 2012, the final meeting of a creditors voluntary liquidation was held and the company was dissolved on 7 September 2012.

Whether payments were made and/or required to be made by Adkat

93. It was common ground that Adkat made no rental payments for its occupation of the Property.

Whether invoices were issued

94. There was no documentary evidence that invoices had been issued. Mrs Slaymark's oral evidence was that invoices had been issued to "all tenants", but that evidence was not included in her witness statement and was challenged by Mr Qureshi. The related VAT returns were all on a nil basis, other than that for 10/10 which related to UK Innovations, see §63. The issuance of invoices would be inconsistent with Mr Slaymark's email to Mr Mercer stating that Adkat had been allowed to occupy the Property "with no requirement to pay rent", see §71.

95. Having considered and weighed all relevant evidence, we find that as a fact that no invoices were issued by the Partnership to Adkat for the occupation of the Property.

Whether Mr and Mrs Slaymark intended that Adkat pay rent

96. As to whether the Partnership intended that rent be paid, we considered the following evidence:

(1) The Appellants' witness statements said that "the intention was for the Partnership to receive rent as per the terms of the licence" and this was repeated during oral evidence and challenged by Mr Qureshi;

(2) there was no documentary evidence as to the terms of the licence or as to the length of the rent-free period;

(3) Mr Slaymark's email to Mr Merser, confirming that there was " no requirement" that Adkat pay rent, see §71;

(4) Mr Slaymark's oral evidence that the only action taken in relation to collecting rent was that when he contacted Mr Levey on the company entering liquidation, he was told that there was no money available. The company entered liquidation eight months after Adkat had ceased to occupy the Property; and

(5) the Partnership did not make a claim in the liquidation for unpaid rent.

97. The only evidence in support of there being an intention to charge rent was the paragraph in the Appellants' witness statements , repeated in evidence-in-chief. We prefer to rely on Mr Slaymark's evidence in his email to Mr Mercer, which is consistent with the lack of claims in the liquidation and the absence of any documentary evidence . We find as a fact that Mr and Mrs Slaymark did not intend to charge rent to Adkat.

HOTEL LEISURE FACILITIES LIMITED

98. On the basis of the evidence on which we were able to rely, we make the following findings of fact about HLF:

(1) The directors were a Mr Williams and a Mr Bharani.

(2) The Appellants had no interest in HLF's shares.

(3) HLF's business consisted of stripping out hotels which required refurbishment, and reselling or otherwise disposing of the furniture and effects which had been removed.

(4) HLF stored furniture and other goods in the Property. The public were allowed into the Property to view this furniture.

(5) HLF occupied the Property without making any payment of rent.

(6) It vacated the Property by March 2012, leaving behind various items of furniture and other materials taken out of hotels. Some of this was of no value, but some was used by Mr and Mrs Slaymark when they set up SER, see further below.

(7) On September 2012, Companies House records that "First Gazette notice for compulsory strike off" of HLF; this was suspended on 12 November 2013. On 27 May 2014, there was another "First Gazette notice for compulsory strike off"; this was suspended on 8 July 2014. On 10 March 2015, Companies House records a "First Gazette notice for *voluntary* strike off" (our emphasis), although this was an error, because the records continue by saying that the notice for "compulsory strike off" was suspended on 15 May 2016. HLF was finally struck off on 12 July 2016.

99. We were also provided with a document stated to be a lease agreement between the Partnership and HLF for a five year period from April 2011, about which Mr and Mrs Slaymark gave evidence. We are unable to rely on any of that evidence for the following reasons:

(1) The April 2011 start date of the lease agreement cannot be reconciled with Mrs Slaymark statement to HMRC that the Property had been "empty for some time" in June 2011.

(2) The rent stated to be payable under the lease was £3,000 pcm, but the market rent was between £7,500pcm and £14,500pcm.

(3) The lease was stated to be for "the Premises", defined as "the commercial premises at [the address of the Property]. However, Clause 14 stated that:

> "Base Rent for the Premises will increase over the Term of the Lease as follows: based around the increase in the use of the warehouse area one month in arrears".

(4) Clause 14 is therefore fundamentally inconsistent with the express scope of the lease, because it implies that only part of the Property was being let. It also does not define that usage, or how to calculate any increase in rent, both of which would be necessary if the Clause were commercially operative.

(5) The lease provides for a rent free period from April 2011 until October 2011. HLF had left the Property by March 2012. The rent due under the lease would therefore have been five months at £3,000, so £18,000. However, Mr and Mrs Slaymark said in their witness statements that they were owed £70,000 by HLF "in accrued rent", and Mr Slaymark told Mr Mercer on 7 April 2016 that HLF left "owing £70,000+ and huge amount of rubbish and damage". That £70,000 figure cannot be reconciled with the £18,000 of rent said to be payable under the lease.

(6) Mr and Mrs Slaymark relied on a letter dated 27 February 2012, which they said had been sent to HLF by Mrs Slaymark, referring to the lease and saying "No payment has been received for 3 months at the increased amount (allowable under section 14 of the lease) of £5,000 per annum". That evidence was challenged by Mr Qureshi and we find that he was right to do so. As noted above, Clause 14 does not set out any basis for calculating an increased rent and in any event, three months at £5,000pcm is £15,000, not the £70,000 referred to in the witness statements. Thus, the content of this letter is inconsistent with the other evidence.

(7) Mr and Mrs Slaymark said in their witness statement that they had "registered as creditors in the company's administration". However, as is clear from the above summary, HLF never entered administration. When this was pointed out to Mr Slaymark during cross-examination, he changed his position and said they had objected to the striking off. No supporting evidence for this change of position was provided, such as letters to Companies House.

100. There is thus no reliable evidence that (a) HLF was under any obligation to pay rent for its occupation of the Property or (b) Mr and Mrs Slaymark expected to be paid rent. We find as facts that there was no obligation to pay rent and no expectation it would be paid.

SOUTH EAST REFURBS

101. The Property was occupied by SER from 1 August 2012 until some time before it was sold in 2015.

The Company

102. SER was incorporated on 25 June 2012**.** The original shareholder was Lily Slaymark, Mr Slaymark's mother, but in 2014 she transferred the shares to Mrs Slaymark**.** On the same date, 25 June 2012, Mrs Slaymark was appointed a director. On 9 January 2013, Mrs Lily Slaymark and a Mr Stuart Leaney were also appointed as directors. On 25 August 2014, Mrs Slaymark was appointed as the company's "managing director". Mrs Lily Slaymark resigned as a director on 31 March 2015 and Mr Leaney on 26 November 2015**.**

The business

103. It was not in dispute that SER was controlled by Mr and Mrs Slaymark. Mr Slaymark was its full time project manager and Mrs Slaymark ran the business; she initially worked four days a week and then five days a week.

104. SER carried out a similar business to HLF, initially using the goods and materials abandoned by that company. However, SER's business did not only consist in stripping hotels and on-selling or otherwise disposing of the contents, it also refurbished those hotels. Mr Slaymark said that they stripped almost everything out of a hotel from top to bottom, including carpets, furniture and loose furnishings, and stored what was not junk in the Property. It was common ground that SER paid no rent for its occupation.

After the sale of the Property

105. Before the Property was sold, Mr and Mrs Slaymark identified new premises for SER's business and moved there. SER got into difficulties following a dispute with one of its customers, and litigation ensued. SER lost the case and entered liquidation in May or June 2018.

106. Meanwhile, on 18 May 2017, Mrs Slaymark had become a director of a company called SER Logistics Ltd; on 9 March 2018 she became a director of SER Group Holdings Ltd and on 12 March 2018 she became a director of SER Furniture Ltd and SER Renovations Ltd. At the time she prepared her witness statement for this appeal, she was working full time as the managing director of these companies. We make the reasonable inference that these companies carried out a similar business to SER.

Whether rent was payable under the lease

107. We were provided with a lease agreement between Mrs Slaymark and SER dated 1 August 2012 which was stated to be for a five year period with a "base rent" of £3,000 per month. However, we were unable to rely on this document, because:

(1) contemporaneous evidence from December 2012 and 2013 is inconsistent with the existence of this five year lease agreement;

(2) Mrs Slaymark's evidence about SER's occupation of the Property was inconsistent with her witness statement; and

(3) the liquidator was not provided with any record of a lease between SER and the Partnership, or with any evidence of accrued rents.

108. We explain each of these further below.

The contradictory evidence about December 2012.

109. The Bundle contained a letter dated 10 December 2012 from Mr Leaney saying "following our telephone conversation on Friday, I would like you to consider a rent-free period?". Mr Slaymark replied on 18 December 2012, saying:

> "further to your letter dated 10 December 2012, after consulting with my property consultant, I am prepared to offer a 12 month rent free period from 1 March 2013. This is granted on the proviso that we meet in early December 2013 to discuss extending the term of the lease to 10 years. I will draw up an amendment to the lease which we both need to sign."

110. Mr Slaymark said in his oral evidence that "my property consultant" was Mr Hunt of SHW. However, we were also provided with an email between Mrs Slaymark and Mr Hunt dated 5 December 2012. This said that Paxtons (who operated from an adjacent building) had declined the terms offered to move into the Property, but that Mr Hunt had another person interested and assumed that it would be okay for him to view the Property later the same day.

111. It is simply not credible that on 5 December 2012 Mr Hunt would be introducing potential new purchasers/tenants to the Property on the basis that it was available for rent, and a few days later advising Mr Slaymark about granting a rent-free period for an existing 5 year lease.

112. We are unable to rely on the letters of 10 and 18 December 2012 and find from the contemporaneous correspondence about Paxtons that Mr Hunt understood the Property was available to let.

The contradictory evidence about 2013

113. As already noted at §85, the Bundle also contained Heads of Terms (subject to contract) drafted by Mr Hunt of SHW between the Appellants and G&M (UK), trading as "my tuxedo". This provided for a five year lease from 1 September 2013. It follows that at that time SHW were marketing the Property as available for a new tenant, despite the supposed existence of a binding five year lease with SER.

Mrs Slaymark's inconsistent evidence

114. Mrs Slaymark said during her evidence-in-chief that part of the Property was used by another company which stored its own goods there, paid the relevant part of the rates and overheads, but did not pay rent. Instead "it was put on the system that the rent would be paid at a later date". This evidence was inconsistent with both her and Mr Slaymark's witness statements, which stated that SER was the occupant of the Property during this time. .

The liquidator's evidence

115. On 7 October 2019, the liquidator told Mr Qureshi that "there is no record of a lease agreement between SER and the Slaymark partnership" for the Property, and that she did not hold "any records or rent invoices from the Partnership to SER for the period between March 2014 and October 2015" and "SER did not recognise any rental debt in its accounts".

116. Mrs Ruxandu did not ask us to place no weight on that information and we find it to be an accurate reflection of the books and records of that company as provided to the liquidator

by Mrs Slaymark. We place weight on the fact that Mrs Slaymark did not provide the liquidator with a lease agreement, and that the company's books and records do not show any rent being accrued on a monthly basis to Mr and Mrs Slaymark.

Our conclusion

117. We were unable to rely on the lease agreement as evidence that there was any obligation on SER to pay rent to Mr and Mrs Slaymark.

Whether Mr and Mrs Slaymark expected that rent would be paid

118. SER had made no payments of rent to Mr and Mrs Slaymark and no reliance can be placed on the lease agreement. The issue was therefore Mr and Mrs Slaymark expected that rent would be paid.

Poor economic climate?

119. Mr and Mrs Slaymark's witness statements said that they decided not to enforce the rental obligation because of "the recession and the difficult economic climate". However, Mr Slaymark's oral evidence painted a picture of a flourishing business, until the difficulty with the client which led to the unsuccessful litigation and eventual liquidation in 2018.

Accrued rent?

120. Mr and Mrs Slaymark's evidence was that no rent was due initially because of a rent-free period, but that subsequently "SER have accrued for the payments…which will become payable once the company is in a position to pay". Mr Qureshi strongly challenged that evidence, pointing out that:

(1) any such "accrued" rent would have dated from March 2014 (after the stated end of the rent-free period); SER moved out of the Property in October 2015, and only went into liquidation in May 2018, some three years after the alleged accrual of rent;

(2) there is no evidence that the Appellants were seeking to collect rent in relation to the Property at any point during that period;

(3) SER's books and records as provided to the liquidator did not contain any monthly accruals of rent; and

(4) the Bundle did not contain any contemporaneous evidence that rent had been accrued each year.

121. We agree with Mr Qureshi that there is no reliable evidence of accrued rent.

The invoices

122. Mr and Mrs Slaymark sought to rely on documents stated to be invoices between the Partnership and SER for each month from March 2014 through to October 2015, apart from June 2015. Each of these was for £3,000 plus VAT.

123. However, the Partnership did not include any of these amounts allegedly invoiced to SER on any VAT return. Moreover, these "invoices" do not include the Partnership's VAT number, so were not valid invoices for VAT purposes, see Reg 14(1) of the VAT Regulations 1995. We find that these documents too are not reliable evidence that Mr and Mrs Slaymark expected SER to pay rent.

The claim in the liquidation

124. Mrs Slaymark drew up the Statement of Affairs in relation to SER's liquidation. Under the heading "Company creditors" she included an amount of £204,000 said to be owed to her by that company. Neither Mr nor Mrs Slaymark said in their witness statement that this was rent for the Property. Mrs Slaymark had not provided the liquidator with any analysis of what was included in that claim or any supporting documents. In her oral evidence, she said that this was money owed to her "personally", adding "I was owed and I put a lot of money into the business". Mr Slaymark said that the £204,000 was "not all rent. It was other payments to us not just the rent".

125. We found that there was no reliable evidence that SER owned Mrs Slaymark £204,000, and even if that money was owed there was no reliable evidence that any part of it was rent for SER's use of the Property.

Finding of fact

126. We find as a fact that SER was not required to pay rent for its occupation of the Property and Mr and Mrs Slaymark had no expectation that it would do so.

INTENTION TO MAKE TAXABLE SUPPLIES?

127. Ms Ruxandu asked the Tribunal to find as a fact that the Appellants always had the intention of making taxable supplies to tenants. She submitted that this was evidenced by the fact that they had asked HLW to either sell the Property or find tenants, and relied on the evidence relating to Paxtons and "my tuxedo".

Paxtons

128. On 5 December 2012 Mr Hunt of SHW contacted Mrs Slaymark about Paxtons, see §110. His email said that Paxtons would have been prepared to pay £100,000 pa in rent, or to purchase the Property for £1.6m, which was "£200,000 above the bank valuation". Mrs Slaymark responded by saying "Paxtons are having a laugh".

129. We do not accept Ms Ruxandu's submission that this is evidence that the Appellants had the intention of renting the Property to Paxtons, because:

(1) the Property was not vacant at the time but occupied by SER, which was actively trading and using the Property to store goods relating to that trade;

(2) the Appellants rejected Paxtons' purchase offer, even though it was above the bank estimate of the Property's value; and

(3) the Appellants turned down the opportunity to receive annual rent of £100,000.

Lease to my tuxedo

130. On 10 May 2013, Mr Hunt emailed Mr Slaymark attaching "Heads of Terms" which were "not legally binding" in relation to a proposed tenancy of the Property by my tuxedo. These terms had been agreed with my tuxedo, and included an annual rent beginning at £90,000 and rising to £120,000 in annual increments over five years, beginning from 1 September 2013.

131. However, at the time of this proposal, SER were in occupation of the Property and it was never leased to my tuxedo. In oral evidence Mr Slaymark said he said that had considered the offer from my tuxedo even though "he already had tenants" because "he was worried the tenants wouldn't be okay". The "tenants" to which he was referring were SER, a company owned and operated by Mr and Mrs Slaymark themselves.

132. We find that the draft agreement with my tuxedo is not evidence that Mr and Mrs Slaymark always had the intention of making taxable supplies to tenants. Instead, it is evidence that they turned down another opportunity to lease the Property to a third party tenant and instead continued to use the Property for their own business without any obligation for rent to be paid.

Sale to my tuxedo

133. The Property was sold to my tuxedo in 2015. Ms Ruxandu did not ask us to find that this, taken alone, was evidence that Mr and Mrs Slaymark intended to sell the Property throughout the relevant period and we agree. They had rejected offers from Paxtons to sell or to lease the Property, and an offer from mytuxedo to lease the Property. It was only sold after they had moved SER's business to new location. We find as a fact that they only intended to sell the Property after SER had relocated.

The particulars and overall conclusion

134. We accept that the Property's particulars were live on the HLW site for at least part of the relevant period. But on the two occasions when an offer was received to lease the Property, the Appellants did not accept those offers.

135. There is no reliable evidence that the Appellants ever had a genuine intention of leasing the Property for consideration, and we find as a fact that they did not have that intention. Until SER moved out of the Property, they had no genuine intention of selling it, and we so find.

THE SALE AND THE EXPENSES

The VAT return and the appeal

136. On 16 October 2015, Mr and Mrs Slaymark sold the Property to "my tuxedo" for £1.5m plus VAT of £300,000. HMRC deregistered the Partnership and issued a final return. In January 2016, HMRC chased up this return.

137. On 29 January 2016, Mr Slaymark emailed a copy of the VAT return to HMRC. It was dated 31 October 2015 and signed by Mrs Slaymark. It did not contain the £300,000 of VAT. Mr Slaymark's email said:

> "I spoke to my wife last night and a return had been submitted in October. Please find enclosed a copy of the paperwork."

138. On 29 January 2016, Mr Merson emailed Mr Slaymark, asking "where did you send this form and why did you not declare the £300,000 output tax on it". On 2 February 2016, Mr Slaymark responded, saying:

> "The hard copy VAT return for October was never returned and Sue has the original on her desk at work. Could you please disregard the copy I emailed you. Sorry for the confusion."

139. On 9 March 2016, Mr Merson received another VAT return, this time with output VAT of £300,000 and input tax of £68,541.42 for the period 1 August 2015 to 29 November 2015. On 10 March 2016, Mr Merson called Mr Slaymark, asking for further details and supporting evidence, including annual accounts, four years of partnership bank statements, lease agreements and all the purchase invoices. He also told Mr Slaymark that the input VAT claim could only cover a four year period, and that some of the claimed amounts were thus out of time.

140. Mr Slaymark then submitted a revised list of invoices, removing some of those which were out of time. On 8 April 2016, Mr Merson issued an assessment under Value Added Taxes Act 1970 ("VATA"), s 73 for £54,935, and on 11 April 2016, a second assessment for a further £9,511. In total, the VAT disallowed was £64,446. The balance remaining was the VAT charged on invoices issued by the solicitors and estate agents on the disposal of the Property, which Mr Mercer accepted was allowable.

141. Mr and Mrs Slaymark asked for a statutory review. On 24 October 2016, the decisions were upheld by HMRC's review officer. On 21 November 2016, Mr and Mrs Slaymark appealed to the Tribunal.

Expenses claimed by Mr Slaymark

142. Mr Slaymark included the following expenses in his revised analysis of what he said were allowable costs. None were accepted by Mr Merson, and they were therefore all in dispute.

EdwinCoe

143. On 9 November 2011, Mr Slaymark was issued with an invoice from a firm of solicitors called EdwinCoe LLP**.** The amount of the invoice was £2,500 including VAT; the text states that it is "on account of anticipated costs" and it was headed "Stillwood Property". Almost a year later, on 18 September 2012, EdwinCoe issued another invoice, this time for £22,000 including VAT and headed "Property matters".

144. The first invoice was numbered 2012-2919 and the second was numbered 2012-2920. In his oral evidence Mr Slaymark agreed that these were sequential numbers, and that this was because they were both issued to him (although they were dated a year apart).

145. Mr Slaymark told the Tribunal that Stillwood was another property previously owned by him and accepted that the first invoice related to conveyancing costs of that property, as it was headed "Stillwood" and he was unable to explain why he had sought to claim back that VAT as it clearly did not relate to the Property.

146. However, as the second invoice simply referred to "Property matters", he continued to maintain that was for legal advice given in relation to the dispute between the Appellants and HBOS about the mortgage taken out on the Property.

147. We do not accept that. It is clear from the numbering that the two invoices are linked; the first expressly relates to Stillwood and is "on account of anticipated costs" so is an advance payment and we find on the balance of probabilities that the second invoices is for the final payment in relation to the same transaction.

148. In coming to that conclusion we take into account too that there is no reference on the second invoice to any litigation dispute with HBOS; that Mr Slaymark has also incorrectly sought to claim back the VAT on the first invoice, and he had also given unreliable evidence in relation to other issues in dispute. We find as a fact that both these invoices were unrelated to the Property and that the VAT is not allowable.

Cornfield Law

149. Mr Slaymark provided a confirmation from First Direct bank dated 4 August 2010 that £72,749.19 was being transferred to a firm called Cornfield Law by CHAPS. Mr Slaymark's claim included VAT of £12,731.11 in relation to this payment. However no invoice, information or other analysis was provided to support the claim.

150. Mr Slaymark has failed to meet the burden of proof that this transfer has anything to do with the Property and we find as a fact that it is unrelated. In any event, as the payment was made on 4 August 2010, more than four years before the date of his input tax claim, it is also out of time.

Keystone Law

151. On 2 February and 15 March 2012, Mrs Slaymark was issued with two invoices by Keystone Law for £2,204 and £1,590. On both invoices the "matter description" was "Bank of Scotland plc – personal guarantee", and the text of the first read:

> "Legal services provided by Oliver Smith from 17 November 2011 to 1 February 2012 in connection with defending a claim by Bank of Scotland under a personal guarantee."

152. The text of the second was the same, other than that the dates were 2 February to 13 March 2012. Mr Slaymark's evidence was that these invoices related to Mrs Slaymark's dispute with HBOS about the mortgage taken out on the Property.

153. We do not accept that. The mortgage on the Property had been taken by Mr and Mrs Slaymark. A personal guarantee can only relate to *someone else's* debt. Mrs Slaymark therefore cannot have given a personal guarantee in relation to a mortgage she had taken out herself. We note that there were also loans between HBOS and Fender (see §46), and Mrs Slaymark may have given a personal guarantee in relation to those debts, but we do not need to make a finding on that. We find that this invoice does not relate to the Property.

154. We come to the same conclusion in relation to two other Keystone Law invoices addressed to Mrs Slaymark, which Mr Slaymark said also related to their mortgage dispute. One was dated 2 February 2012 for £3,255 and the other was dated 26 March 2012 for £4,830. Both were headed "Bank of Scotland plc – Trust claim". The text of the first read:

> "Legal services provided by Oliver Smith from 24 November 2011 to 1 February 2012 in connection with defending a claim by Bank of Scotland for breach of trust."

155. The text of the second is identical, other than that the dates of the legal services supplied were 2 February to 25 March 2012.

156. Bank of Scotland can only have made a claim for breach of trust against Mrs Slaymark if she was acting as a trustee. She cannot have been acting as trustee in relation to her own mortgage on the Property. Such a claim would have been possible in relation to her involvement in Fender, for instance as a director of that company, but again we do not need to make a finding on that.

157. Keystone Law issued a final invoice dated 22 February 2012 for £2,400, described as "fees and disbursements to be incurred conducting your legal services". No detail is provided. In view of our findings in relation to the other four invoices, and our rejection of Mr Slaymark's evidence in relation to their purpose, we find as a fact that this as well as the other four Keystone Law invoices were unrelated to the Property.

Charles Douglas

158. The schedule of expenses included a list of 11 invoices from Charles Douglas, another law firm. There were three related invoices in the Bundle, all headed "HBOS" and the text of

each says that the services were provided "as per attached schedule". No schedules were included in the Bundle.

159. Thus, for those three invoices, there is no information about the services, and for the other eight, there is no supporting evidence at all. We find that the Appellants have failed to prove that these costs relate to the Property.

The mezzanine

160. The claimed expenses also included £24,940 including VAT of £4,990 which was said to relate to the supply and installation of mezzanine floor in the Property by a firm called Bosi. The supporting document was dated July 2015. Mr Slaymark's evidence was that the mezzanine was installed for the benefit of "my tuxedo", because they required it to display their clothes, but that Mr and Mrs Slaymark had agreed to pay the invoice.

161. However, although headed "invoice" the document contains no VAT number. It is therefore not a VAT invoice. It also includes the following works "Payment details: 50% with order, 50% on completion…To secured delivery and installation date deposit with order!". The "installed" and "delivery" parts of the document remain blank. At the bottom are the words "preferred payment bank transfer" followed by Bosi's bank account details. From that information we find that:

(1) Bosi required a 50% deposit with the order, following which it would then confirm the dates on which the parts were to be delivered and the mezzanine was to be installed;

(2) at the stage this document was issued, Bosi had confirmed neither the delivery nor the installation dates; and

(3) no payment had in fact been made.

162. The document is therefore not proof of liability or of payment. In relation to proof of payment, it is also relevant that Mr Mercer asked several times for bank statements, but none was provided.

163. Mr and Mrs Slaymark have not provided a VAT invoice and they have also failed to prove by alternative evidence that they incurred costs of £24,940 in relation to the installation of a mezzanine in the Property.

164. We add the following observations, although we did not rely on them in coming to that conclusion:

(1) The Bundle also includes a document dated 8 January 2015 from Hunt Commercial, the estate agency set up by Mr Hunt after he left SHW. It describes the Property, and states that it includes mezzanine stores of 72.4m^2 . Thus, there was already a mezzanine in the Property at the time this document was issued to the Appellants

(2) When my tuxedo previously considered renting the Property, see §130, the covering email to the Heads of Terms stated my tuxedo would carry out certain alterations to the building before taking occupation. These included "possibly cut a doorway into warehouse upstairs for access onto mezzanine if left there or to metal staircase if mezzanine removed". It therefore appears that (a) my tuxedo did not require a mezzanine to be installed in the building, and (b) my tuxedo would pay for any alterations which were required.

(3) The liquidator informed Mr Qureshi that SER's accounts showed a large increase in fixed assets for the year ended 30 June 2016, and she considered it was reasonable to

assume that the mezzanine was installed in the new premises occupied by SER after the sale of the Property. That evidence is consistent with the document not relating to the Property at all.

Ecksteins

165. The Schedule includes two amounts relating to a flooring company called Ecksteins, both of which are said to relate to "carpet". Only one invoice is in the Bundle, for £1,728 and dated 7 December 2012. It has the Property address on it, and the reference number "HOT005", but no client or customer name, and the line "order number" is also blank.

166. On 7 December 2012, SER was in occupation of the Property, carrying out its business of stripping and refurbishing hotels. As already noted, Mr and Mrs Slaymark have failed to provide their bank statements, so have not provided any supporting evidence that these two invoices were paid by them (rather than by SER). We find that they have failed to prove that the VAT on these invoices relates to the Property.

Williams & Company

167. The Schedule contains 11 amounts said to be payments to Williams & Company; each described as "repairs to plumbing" between 11 February and 14 March 2014.

168. The Appellants originally provided Mr Mercer with four invoices to support this part of their claim. The Appellants' home address is shown on those invoices under the heading "customer order number"; there is no separate delivery address. Mr Mercer pointed out to Mr Slaymark in correspondence that these supplies had been made to the Appellants at their home address.

169. The versions of these invoices in the Bundle were significantly different. The customer order section which had contained the Appellants' home address was now blank, but the delivery address (previously blank) had been completed with the address of the Property. Mr Slaymark sought to explain this significant difference by saying that he had gone to the shop and asked them to remove the home address and insert the address of the Property, in order to correct what he said was an error.

170. The original version only contained the Appellants' home address. As there was no dispute that the the goods had been delivered, we find as a fact that they were delivered to the address on the invoices. We find the original documents to be more reliable, and further find that these supplies were made to the Appellants in their personal capacity, for their own home, and were not for the Property.

Wickes

171. The Schedule also listed 25 separate amounts said to have been paid to Wickes by the Appellants for items such as repairs to plumbing, wooden items and rawl plugs. Five till receipts are in the Bundle. The Appellants' evidence was that these were used in the Property. However, given the overall lack of credibility of the Appellants' evidence and the lack of any other evidence that these items were used in the Property, we find that they have failed to meet the burden of proof in relation to these costs.

TLC Southern

172. The Schedule lists 15 separate amounts said to have been paid to TLC for electrical items; three till receipts were in the Bundle. The Appellants' evidence is again that these were used

in the Property. For the same reasons as in relation to Wickes, we find that the Appellants have failed to meet their burden of proof.

Haulaway

173. The Schedule lists three amounts of £180 said to have been paid on 15 February 2014 and the two following days to Haulaway Ltd for waste disposal services. The Bundle includes one supporting document. The date is obscured by a visa receipt which was dated 14 February 2014. The customer name is similarly obscured. There is nothing on the document to show any link to the Property and we again find that the Appellants have failed to meet their burden of proof.

Gazprom

174. The Schedule lists two amounts payable to Gazprom for "gas supplied 01-04 and 01-05". The first is stated to be £790.02 with VAT of £131.67 and the second for £150.02 with VAT of £25.22. The Bundle contains the two invoices for the same totals. However, the VAT on the first is £37.62 and that on the second is £7.21, so the Schedule is incorrect in that respect.

175. The first is for September 2014 and the second for October 2014. Both are addressed to Mr Slaymark at the Property. As at those dates, the Property was occupied by SER, which was owned and controlled by Mrs Slaymark, and for which Mr Slaymark worked on a fulltime basis. Normally, gas bills would be payable by the occupier, not by the landlord. There is no evidence that these invoices were paid by Mr and Mrs Slaymark rather than by SER. We find that the Appellants have failed to meet their burden of proof.

DSG Catering equipment

176. The Bundle contains one more supporting document, an invoice from a firm called DSG. The Schedule lists two items, totalling £3,690, described as the cost of a new kitchen. This invoice is dated 10/2/12 so it is in any event out of time and we have not considered it further.

The other claimed expenses

177. The Schedule includes numerous other listed costs in relation to which no supporting documentary evidence has been provided. They range from £48.90 said to have been paid to the Beachy Head Hotel and £200 to the Cumberland Hotel (both without any further explanation) to a list of petrol and parking costs.

178. We have carefully considered each of the items in dispute for which some documentary support was provided, and found that none of that evidence supports the claims which have been made. On the balance of probabilities the same is true of these other expenses

Conclusion

179. We find that none of the claimed expenses related to the Property other than the solicitors' fees and estate agents' fees on disposal. The VAT on those invoices has already been allowed by HMRC.

LEGISLATION, SUBMISSIONS, DISCUSSION AND DECISION

180. As is clear from the foregoing, the major issues in this appeal were matters of fact. In this Part of the decision, we set out the relevant law, the parties submissions and our views, followed by the overall decision and appeal rights.

THE LEGISLATION

181. The legislation in this decision is cited only so far as relevant to the issues in dispute.

The PVD

182. Article 9(1) of the Principle VAT Directive ("the PVD") provides that a taxable person means "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity" and continues:

> "Any activity of producers, traders or persons supplying services…shall be regarded as economic activity. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

183. Article 2 sets out the transactions which are subject to VAT. Three relate to goods, the fourth is "the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

184. Article 168 provides:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

The Value Added Taxes Act

185. VATA s 5(2) provides that

> "'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
>
> anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

186. VATA s 24(1) provides:

> "Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b)-(c) …
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

187. VATA s 26 is headed "Input tax allowable under section 25" and provides:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—
>
> (a) taxable supplies;…"

THE SUBMISSIONS AND DISCUSSION

Economic activity of letting the Property?

188. Ms Ruxandu submitted that the Appellants were making taxable supplies to the occupiers of the Property because:

(1) the leases created obligations to pay; and/or

(2) the Appellants had an expectation that they would be paid by the occupiers.

189. Mr Qureshi submitted that there was no economic activity and/or no supply for a consideration because the lease terms did not reflect the reality and the Appellants had no expectation that they would be paid by the occupants.

190. We have found that the lease documents did not create an obligation on any of the occupiers to pay rent and that the Appellants had no expectation of payment. We agree with Mr Qureshi that there was no consideration for the letting of the Property and it did not constitute an economic activity for VAT purposes.

191. Both parties cited extensively from the case law, but we have not found it necessary to set out those submissions here. None change our conclusion in the previous paragraph, which is based on the straightforward application of the law to our findings of fact.

Economic activity of holding and selling the Property?

192. Ms Ruxandu submitted in the alternative that the sale of the Property was an economic activity, and that the claimed expenses were overheads of that sale, because they related to the upkeep of the Property, or to the settling of litigation about the Property.

193. Mr Qureshi submitted that the evidence did not support this submission. The only costs which had been shown to relate to the sale of the Property were the fees of the solicitor and estate agent, both of which had been allowed by Mr Merson. The evidence provided to support the other claimed costs was unreliable and fell well short of the necessary standard of proof.

194. Again, we agree with Mr Qureshi. We have carefully considered the claimed expenses, and found that some do not relate to the Property at all, and that the Appellants have not met their burden of proof in relation to the others. There is again no need for us to summarise the parties' submissions on the case law, because our conclusion is based on the straightforward application of the legislation to our findings of fact.

Continual supply of services?

195. Ms Ruxandu also submitted, again in the alternative, that Reg 90 of the VAT Regulations applied. This begins:

> "(1) Subject to paragraph (2) below, where services, except those to which regulation 93 applies, are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times
>
> (a) each time that a payment in respect of the supplies is received by the supplier, or
>
> (b) each time that the supplier issues a VAT invoice relating to the supplies."

196. Mr Qureshi submitted that Reg 90 was not engaged, because the Appellants did not make a supply to the companies occupying the Property, and in any event, none of the documents put forward by the Appellants as invoices were valid VAT invoices, as they did not have a VAT number.

197. Mr Qureshi is correct. On the facts as found, and on the law as applied above, the Appellants were not making a supply of services to those occupying the Property, let alone one which met the requirements of being a "continuous supply" under Reg 90.

DECISION AND APPEAL RIGHTS

198. For the reasons given above, the Appellants' appeal is dismissed and Mr Mercer's assessments for £54,935.16 and £9,511.16 are upheld.

199. This document contains full findings of fact and reasons for the decision. If the Appellants are dissatisfied with it, they have the 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 to note that this time limit is unaffected by the further general stay issued by President Sinfield on 21 April 2020.

200. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 15 MAY 2020