[2014] UKUT 0336 (TCC)

VAT – Classification of supply of plot of land and storage container - Item 1 Group 1 Schedule 9 Value Added Tax Act – supply exempt – no – appeal allowed

IN THE UPPER TRIBUNAL **FTC/47/2011**
TAX AND CHANCERY CHAMBER

BETWEEN

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

DAVID FINNAMORE (t/a HANBIDGE STORAGE SERVICES)

Respondent

Tribunal: Mr Justice Warren, Chamber President

Sitting in public in London on 12 February 2014

Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

The Respondent in person

DECISION

Introduction

1. This is an appeal by the Appellants ("**HMRC**") against a decision of Judge Geraint Jones QC and Mr Andrew Perrin ("**the Tribunal**") released on 2 February 2011 ("**the Decision**"). The Tribunal allowed the appeal of the Respondent taxpayer ("**Mr Finnamore**") holding that his storage business involved the making of supplies of a single service, the predominant element of which was the provision of a licence to occupy a defined parcel of land. Accordingly, the supplies were held to be exempt from VAT under Item 1 of Group 1, Schedule 9 Value Added Tax Act 1994.

2. Mr Michael Jones appears for HMRC; Mr Finnamore appears in person. I shall refer to the Court of Justice, one constituent part of the Court of Justice of the European Union, as "**the Court**".

The facts

3. The facts, taken from the Decision, are accurately summarised by Mr Jones in his skeleton argument as follows:

    a. Mr Finnamore trades as Hanbidge Storage Services from a site at Hanbidge Marina, Littlehampton, West Sussex. He provides self storage facilities by providing containers which are located upon open land which he owns.

b. The containers used are large and of metal construction**.** At one end there are metal doors that can be opened but, when closed, can be secured with a semi-concealed padlock. The containers ensure that any stored goods are protected from the elements. The containers are of the type regularly seen on lorries and being transported on ships in bulk. By their nature they are movable although specialist lifting gear is required to move them from place to place or onto a lorry or ship. Mr Finnamore has approximately 184 containers located on his land. They are arranged in such a way as to allow vehicular access to each container so that goods may be loaded into or taken from any container with comparative ease. The units can be moved but they "usually" rest on the ground under their own weight. The word "usually" was used by the Tribunal but there was no evidence that they were ever attached to the ground.

c. Mr Finnamore's customers can either store their goods in a container on Mr Finnamore's site or can choose to rent a container only and take it away from Mr Finnamore's premises to use it at another location. The weekly cost of the former, as at 1 October 2010, was £28.58 per unit, and the weekly cost of the latter was around a quarter of that sum.

d. The entire site is surrounded by a fence and there is also a security team present. Access to the site is through a single pair of matching security gates which are locked at night. People who store goods at the facility can have unrestricted access during normal working hours but outside such hours, they can secure access by arrangement with the on-site security team.

e. Mr Finnamore advertises the service and facilities offered at his site as a self storage facility, and he does so in the local press, telephone directories and on a web site. Such advertisements appear in the "storage" section of such advertising material.

f. There is a minimum period of storage, being two weeks, with many units being rented on a much longer term basis.

g. Mr Finnamore's customers enter into a standard form rental agreement described as a "Licence Agreement". The name of the customer is inserted prior to a particular unit being identified by its number and its size. The start date for the hire is specified and the storage charge rate is also inserted. The agreement contains standard form "Terms and Conditions", including:

    i. Clause 2, which provides that provided that the fees are paid, the customer is licensed to use the identified unit for the storage of goods in accordance with the agreement. It further provides that the customer may have access to the unit at any time during access hours (which are defined) only for the purpose of depositing, removing, substituting or inspecting the goods. "Unit" is defined in clause 1 as

        > "the storage unit specified overleaf or any alternative storage unit we may specify under condition 11".

    ii. Clause 11 of the Agreement which reads as follows:

        > "During the course of this agreement with us you will have use of (a) the numbered storage container occupying the area of land coloured in red on the attached plan and (b) the land coloured red on the attached plan".

4. There are two comments to make on these facts. The first is that, as can be seen, the Licence Agreement refers in the definition of "Unit" to any alternative unit specified under condition 11 but condition 11 itself does not in fact contain any

such provision. This may simply be because the Licence Agreement is a standard form which has been slightly amended with no proper account being taken of the knock-on effects of the amendments. Nothing turns on this for present purposes. The second comment is that the Licence Agreement does not require Mr Finnamore to provide a security team. The storage facility is next to a larger family enterprise, the Littlehampton Marina Ltd. A security team is employed by that company. As a matter of practice, the personnel employed do patrol the storage area and are available to provide access during the hours when the gates are locked.

The relevant statutory provisions

5. The relevant domestic legislation is found in Item 1 of Group 9 of Schedule 9 VAT Act 1994 ("**Item 1**") which provides for exemption from VAT in the following terms:

> "1. The grant of any interest in or right over land, or any licence to occupy land…."

6. This item implements paragraphs (j) and (l) of article 135(1) of the Principal Directive (EC/2006/112) ("**article 135(1)**")(formerly article 13B(b)) and (g) of the Sixth Directive) which provides as follows:

> "1. Member states shall exempt the following transactions:
>
> ……
>
> (j) the supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (a) of Article 12(1)
>
> (l) the leasing or letting of immovable property."

7. Mr Finnamore has also referred to article 135(1)(k) which is in the following terms:

> "the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1)"

8. Article 12 of the Principal Directive (formerly article 4 of the Sixth Directive) provides so far as relevant as follows:

> "(1) Member States may regard as a taxable person anyone who carries out, on an occasional basis….. one of the following transactions:
>
> (a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands….
>
> (2) For the purposes of paragraph 1(a), **'**building**'** shall mean any structure fixed to or in the ground."

9. In the course of the Decision, the Tribunal concluded that whether Mr Finnamore's storage units were to be regarded as "immovable property" for the purposes of the exemption was not a significant or relevant issue in the appeal. It considered whether the predominant or overall nature of the transaction was properly to be described as involving a licence to occupy land. In the course of that exercise, the Tribunal decided that the licence agreements amounted to a "licence to occupy land"; and it held that the supply made by Mr Finnamore should be viewed as a single supply for VAT purposes. On any footing, the supply comprised more than one element of service to each customer since there was a licence to occupy the plot on which the storage unit sat and the use of the storage container. The Tribunal appears to have thought that there was also a supply of security in relation to the storage area but this may not be correct: see paragraph 4 above. The Tribunal went on to characterise that single supply. Whilst recognising the importance of both the licence to occupy and the use of the storage container, it concluded that the predominant nature of the supply was the provision of a licence to occupy a defined parcel of land and held that the supply was accordingly exempt under Item 1.

Grounds of Appeal

10. At this point it is convenient to mention HMRC's Grounds of Appeal. There were originally three Grounds of Appeal reflecting the three ways in which it was said that the Tribunal had erred in law:

    a. In dismissing as not "significant or relevant" the issue of whether or not the storage units were, of themselves, to be regarded as "immovable property". In so doing the Tribunal overlooked one of the key issues in the appeal (namely, whether Mr Finnamore's activities fell within the scope of the VAT exemption for the "leasing or letting of immovable property"). This error resulted from a failure to give due consideration to the EU law meanings of the terms in the exemption. In essence, therefore, the Tribunal failed to identify and address one of the determinative issues in the appeal.

    b. In holding that the licence agreements entered into by Mr Finnamore with his customers amounted to "licences to occupy land" for VAT purposes.

    c. In applying the test for determining the predominant or overall nature of the supplies made by Mr Finnamore. As a consequence the Tribunal wrongly concluded that the supplies were properly to be described as consisting principally of the granting of a licence to occupy land and therefore that Mr Finnamore's activities were VAT exempt.

11. In the light of the decision of the UT in *UK Storage Company (SW) Ltd v HMRC* [2012] UKUT 359 (TCC); [2013] STC 361 ("***UK Storage***"), HMRC did not pursue their appeal in relation to the second Ground of Appeal and alleged error of law.

Are the storage units containers immovable property?

12. In relation to the first alleged error of law, I believe that it is now common ground, even if it was not common ground before the Tribunal, that the storage units, the containers, are movable property as a matter of EU law. But in case that is not accepted by Mr Finnamore, I consider that it is clear that the storage units are not immovable property. The decision of the Court in Case C-315/00 *Maierhofer v Finanzamt Augsburg-Land* [2003] STC 564 provides guidance on this issue. In that case, the Court answered the question referred in this way:

> "the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constituted a letting of immovable property for the purposes of art 13B(b) of the Sixth Directive, even if the building is to be removed at the end of the lease and re-used on another site."

13. In reaching that conclusion, the Court noted, at [32] of its judgment, that the buildings were not mobile nor could they be easily moved; they were buildings with a concrete base erected on concrete foundations sunk into the ground, although they could be dismantled on expiry of the lease for subsequent re-use but only by the use of the labour of eight persons over ten days. The Court contrasted that type of structure with the property concerned in Case C-60/96 *EC Commission v France* [1997] ECR I-3827 which comprised caravans, tents, mobile homes and light-framed leisure dwellings. As the Court explained, a characteristic of such property, classified as movable, was that it was either mobile, in the case of caravans and mobile homes, or could be easily moved, in the case of tents and light-framed leisure dwellings.

14. Mr Jones relies on the decision of the Upper Tribunal (Judges Sinfield and Sadler) in *UK Storage*, in which the tribunal considered *Maierhofer*. The tribunal held that the storage units in that case were not immovable property. A building or structure would be immovable property only if it was fixed to, or in the ground in such a way that it could not be either easily dismantled or easily moved. I am not at all sure that such a prescriptive test can properly be derived from *Maierhofer* although if that is the correct test then clearly the storage units, the containers, in the present case are not immovable property. I do not need to say anything more about that aspect of *UK Storage* because I consider that on any view the containers can only properly be categorised as movable property. Looking at the contrasting factual situations in *EC v France* and in *Maierhofer* itself, and in the light of what was said in [31] and [32] of the judgment, the containers in the present case fall on the movable property side of the dividing line. The Court attached great importance to whether the relevant structure was mobile or could be easily moved. In the present case, the containers, if not mobile, can be easily moved. Indeed, they are just the sort of containers that one sees regularly on road transporters and container ships. As the Tribunal put it in [4] of the Decision, "By their nature they are movable although, we accept, specialist lifting gear is required to move them from place to place or onto a lorry or ship".

The construction of the legislation

15. The approach to construction of the legislation was addressed in a little detail by the tribunal in *UK Storage*. I do not propose to repeat the exercise. I can state the relevant conclusions, with which I agree subject to one caveat:

    a. The exemptions found in the Principal Directive must be interpreted in accordance with EU law. Thus the expression "leasing or letting of

immovable property" cannot be determined according to a Member State's domestic concepts.

b. The exemptions are to be construed strictly although not restrictively.

c. The exemptions in Group 1 of Schedule 9 must be interpreted, so far as possible, consistently with the equivalent EU legislation so as to give effect to the Directive which it has sought to implement (*ie* a conforming construction must be adopted so far as possible).

16. As to that last conclusion, it is put more dogmatically in *UK Storage*: I have added the words "so far as possible". I think that the addition more accurately reflects the authorities. The tribunal referred to *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30; [2001] STC 989 in support of the conclusion as they stated it relying in particular on the words of Lord Slynn in [12] of his speech. However, what he said is that the words "licence to occupy land" could not go wider than the words "leasing or letting of immovable property". In other words, if something is a licence to occupy land within VAT Act 1994 it will also be a letting of immovable property within the Sixth Directive (or, for the purposes of the present case, within the Principal Directive). Lord Nicholls made the same point at [35] of his speech, observing that the concept of "leasing or letting of immovable property" has not been comprehensively defined in Community jurisprudence but does include what in English law is characterised as a licence to occupy land.

A single composite supply?

17. I have already mentioned that the supply by Mr Finnamore comprises more than one element of service to each customer (see paragraph 9 above) although it is

perhaps not clear whether the provision of security services in the form of patrols was one such service. I believe it to be common ground that for VAT purposes there is a single composite supply and that it would not be right to treat Mr Finnamore as having made separate supplies of each element of service. Whether or not it is common ground, that is, in my view, an obviously correct conclusion in the light of the authorities, in particular *UK Storage* and *The Honourable Society of the Middle Temple v HMRC* [2013] UKUT 0250 (TCC); [2013] STC 1998 ("***Middle Temple***") and the cases cited in them. In any case, it is the conclusion which the Tribunal reached (see [21] of the Decision) and there is no appeal from that aspect of its decision.

The central issue

18. The issue is therefore the correct classification of that single composite supply. The question is whether it is exempt either as the grant of a "licence to occupy land" or as the "leasing or letting of immovable property".

19. I dealt at length with the question of the proper classification of a single composite supply in *Byrom and others (trading as Salon 24) v HMRC* [2006] STC 992 ("***Byrom***"). I included a lengthy discussion of several cases including *Card Protection Plan Limited v HM Customs and Excise* [2001] UKHL 4; [2002] 1 AC 202; [2001] STC 174 ("***CPP***") when it returned to the House of Lords after a reference to the Court, *Dr Beynon and Partners v HMC&E* [2005] STC 53 ("***Dr Beynon***") and *College of Estate Management v Customs and Excise Comrs* [2005] UKHL 62, [2005] STC 1597 ("***College of Estate Management***"). I do not see any reason to qualify anything which I said in my judgment in *Byrom*.

20. At [30] of my judgment in *Byrom*, I looked at the issue of whether questions of classification were questions of law or not. I cited [26] and [27] of Lord Hoffmann's speech in *CPP*. He concluded that the characterisation (to use his word) of a supply was, indeed, a matter of law, although it would be "customary for an appellate court to show some circumspection before interfering with the decision of the tribunal merely because it would have put the case on the other side of the line". Although Lord Hoffmann said what he did in the context of the question "one supply or separate supplies", the same approach must, in my view, be applied to the correct classification of the single supply once identified. Thus, in *Dr Benyon*, once it was decided that there was a single supply, it was a matter of law that the supply was one of medical services and not of drugs as such. Likewise, in *College of Estate Management*, it was also a matter of law that the supply was one of educational services and not of the printed materials as such. It is perhaps worth noting that, conceptually, a supply of medical services was capable of subsuming a supply of drugs and a supply of educational services was capable of subsuming a supply of educational written material: there was no need to invent some new concept to cover all aspects of the supply.

21. Since the issue is one of law, I must make my own decision about the proper categorisation of the composite supply made by Mr Finnamore, bearing in mind that element of circumspection referred to by Lord Hoffmann if I were minded to interfere with the tribunal's decision. Before coming to that, however, I want to refer further to *UK Storage*.

22. In *UK Storage*, the tribunal identified, at [42], the two well-established distinct types of single composite supply. These were accurately described in this way:

> "(1) where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single,

> indivisible economic supply, which it would be artificial to split (see Case C-41/04 *Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* [2006] STC 766 at [22]); and
>
> (2) where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied (see Case C-349/96 *Card Protection Plan Limited v HM Customs and Excise [1999] STC 270* ("***CPP***") at [30])."

23. In [43], the tribunal went on to consider the decision in Case C-392/11 *Field Fisher Waterhouse LLP v HMRC*, [2013] STC 136 and mentioned my own decision in *Byrom.* The tribunal concluded that the nature of the single supply was to be found by determining the economic reason or purpose of the whole transaction from the point of view of the typical customer. This was so whichever category of single composite supply was involved. This would involve looking at what the tenant in that case would obtain as a result of the grant of the lease to him and the supplies of services linked to the leasing; and looking at whether any one of the services might be regarded an end in itself for an average tenant of premises such as those at issue. They saw that approach to be essentially the same as that taken by me in *Byrom* at [70] where I referred, reflecting the language of Lord Hoffmann in *Dr Beynon and Partners v HMC&E* at [31], to the "description which reflects the economic and social reality" of a single supply and considers it from the point of view of the recipient of the services. I agree with the Tribunal's conclusion and agree also that the words it uses are essentially what I was saying in *Byrom*.

24. A more detailed exegesis can be found in *Middle Temple.* The entirety of the section from [28] to [59] repays reading. This section is primarily directed at the question whether there is a single composite supply and not directly at the correct categorisation of the supply, if a single composite supply is established. These

two aspects are, of course, very closely connected. Accordingly, what the tribunal says about the correct approach to the first aspect informs the correct approach to the second. At [60], the tribunal summarised the key principles relating to the first aspect, that is to say for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies. Certain of those stated principles are apposite also to the second aspect, that is to say for determining the correct classification of the single composite supply. Thus in relation to that second aspect, it is possible to derive the following principles to be applied in conjunction with those explained in *Byrom*:

a. The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply. Those same features and characteristics will inform the answer to what is the nature of the single supply, from the point of view of a typical customer, in a case where the conclusion is that there is a single supply.

b. Where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services, the overarching supply will take the tax treatment of the principal element.

c. A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

d. A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.

The present case

25. Applying these principles to the present case, it cannot, in my view, sensibly be contended that this is a situation where one element of the supply is predominant and the others or others are ancillary, although this is not to say that one element may not be more important than another. In this context, the separate elements are these: (i) in terms of VAT Act 1994, the granting of a licence to occupy land (the plot) and in terms of the Principal Directive, the leasing or letting of immovable property (again the plot) (ii) the supply consisting of the right to use the container (in VAT terms a supply of services) and (iii) possibly the supply of security services. My reasons for saying that the present case is not one of predominant/ancillary supplies are these:

    a. One element of a supply will be ancillary to another element (which will thus be predominant over it) where the latter is not an aim in itself but is simply a means of better enjoying the principal service supplied.

    b. In the present case, it cannot be said that element (i) is predominant in that sense since element (ii) is clearly one aim of the transaction and cannot be said to be a means of better enjoying the licence to occupy the plot.

    c. Conversely, although this is less clear, I consider that it cannot be said that element (ii) is predominant in that sense. It is less clear because a customer obtains a licence or leasing or letting of the plot only because it is to be used as the site for the container. It cannot seriously be suggested (and it is probably not even open to Mr Finnamore, on the evidence and

findings of fact, to suggest) that the "economic and social reality" (as to which see paragraph 28 below) of the transaction is that the customer might use the plot for any other purposes. Indeed, I very much doubt that he would be entitled to do so. Although the Licence Agreement contains no express prohibition on the customer moving the container, it is not easy to see how he could do so: he has no property right in it and would not, for instance, be entitled to remove it from the site to use or store it elsewhere nor would he be able to place it somewhere else on the site unless he obtained permission from Mr Finnamore. It is not easy to see, therefore, how the customer would ever be able to use the plot for any purposes (such as open-air storage) other than as the site for the container. In those circumstances, it cannot be said that the supply of the container is ancillary to the supply of the plot.

26. Instead, there is, in my judgment, a single composite supply because elements (i) and (ii) (and element (iii) if that is to be taken into account at all) are so closely linked that they form, objectively a single, indivisible, economic supply. The Tribunal did not express that conclusion in so many words but the language which it uses in [30] of the Decision suggests that this was its approach too. Its view that "the storage is parasitic upon the customer's ability to occupy the land" and its rejection of the view that any right to occupy the land arises parasitically from a contract for storage, do not amount, in my view, to a conclusion that there is a single composite supply because storage is ancillary to occupation.

27. In ascertaining whether the single composite supply falls within the exemption of Item 1 or of article 135(1)(l), the issue is whether or not the single composite supply takes its character from element (i). I do not perceive a different answer

being given to that question depending on whether the analysis proceeds on the basis the provisions of VAT Act 1994 or of the Principal Directive. In each case, element (i) is concerned with the plot, which is both "land" in English law and "immovable property" for the purposes of EU law. And in each case, elements (ii) and (iii) have nothing to do with either land or immovable property.

28. In ascertaining the correct description of the single composite supply, in order to establish whether it is an exempt supply, it is necessary, in accordance with the principles I have discussed, to take proper account of all the circumstances and to assess the matter from the perspective of a typical user of the plot and the storage facilities. Thus it is possible to arrive at a description which reflects "the economic and social reality" of the supply. Those words come from Lord Hoffmann in *Dr Benyon*. They are portmanteau words designed, I think, to capture all the surrounding circumstances, including the commercial imperatives of the customer; I use them in that sense below.

29. In this context, Mr Jones submits that from the perspective of the typical customer, his purpose, when using the storage facility, is to obtain storage and protection of his goods for a period of time in a fixed location to which no other person has access. The typical customer's purpose is not to be granted an interest in land or a right to use immovable property but is to be provided with a secure storage unit which he can access and store his goods. The customer is not concerned with where on Mr Finnamore's land his goods or the storage container are kept; his only concern is that the goods are stored and kept safely. The licence to occupy the plot on which the container stands may be necessary in order for the customer to achieve his purpose, but the grant of such a licence, *per se*, is not the reason he enters into his agreement with Mr Finnamore.

30. The Tribunal did not, in express terms, address the matter from the perspective of a typical user nor did it expressly consider the economic and social circumstances in which the agreements between Mr Finnamore and his customers came into being. However, I remind myself of what is recorded in paragraph 3e. above (which is taken from [6] of the Decision) and note some other observations of the Tribunal, in [6]:

> "Upon a simplistic view of this appeal it might be thought instructive to enquire into what the ordinary man in the street would think that he is obtaining when he enters into a storage facility agreement with the appellant. There can be little doubt that the man in the street would say he has simply rented storage space. Indeed, that is what he has done. However, the man in the street will not have undertaken an analysis of the legal nature of the legal rights that he has acquired by entering into the storage agreement….."

31. The Tribunal went on at [25] to say this:

> "From the perspective of a property lawyer, there can be no doubt that the contract between the appellant and a customer involves the appellant granting a right to occupy a defined parcel of land. It carries with it implied rights to gain access to and egress from that defined parcel of land. We accept Mrs Hamilton's [Mr Finnamore's counsel] submission that the function of the metal container which rests upon the land licensed for occupation by the customer, is to provide storage space. Indeed, that will be why most customers have entered into the arrangement. We must avoid looking at the subjective purpose because, to do so, would be to characterise the nature of the transaction by reference to that perception. However, the view of the reasonable man in the street must be that of the reasonable man well versed in the applicable legal concepts."

32. In that passage, the Tribunal appears to be accepting that the reason why most customers enter into the arrangements with Mr Finnamore is to obtain storage space. And it repeats its view that the man in the street is to be treated as versed in the applicable legal concepts.

33. There are three points to make about these passages:

    a. First, I see no reason to think that, for this purpose, the typical user is any different from the man in the street who has rented storage space. Accordingly, the perspective of the typical user (which the cases make

clear is an important element in ascertaining the proper classification for VAT purposes of a transaction containing more than one element) is no different from the perspective of the man in the street who is being referred to by the Tribunal.

b. Secondly, the typical user is no more likely to have undertaken the legal analysis referred to than the man in the street. The Tribunal seeks to imbue the typical user with the attributes and knowledge of a lawyer, which he does not have. I do not consider that this is a correct approach to the attempt to establish the proper description of the single composite supply.

c. Thirdly, the Tribunal seems to be suggesting that the conclusion about why most customers enter into their agreements involves attributing a subjective view to the ordinary man in the street. I do not agree. The imputation of a view or belief to a reasonable man in the street is, I consider, precisely what establishing an objective view is about. It is to be contrasted with the actual view of any particular individual.

34. As to the second of those points, even if the typical user is to be imbued with the attributes of a lawyer, it ought not to make any difference to the result. The economic and social reality is the same whether the typical user is a lawyer or not. Whether a transaction comprising different elements it to be treated as a single supply cannot, in my view, turn on whether the notional typical user is a lawyer or not; nor can the correct classification of a single composite supply do so.

35. Mr Finnamore submits that the Tribunal was right to reach the conclusion which it did. His case is that the provision of the plot is an essential part of the transaction. Economically, it is the most important element of the transaction as is indicated

by the relative cost of the provision of a container on-site as compared with the cost of renting the container alone for use off-site: see paragraph 3c. above. The customer is not simply interested in the use of the container: he is interested in the ability to use it in the environment of Mr Finnamore's land and obtains his licence over the plot for that purpose. The man in the street or the typical user is taking not just a container but a secure plot. The security services provided by patrols are an irrelevance since they are not provided as part of any contractual obligation. The staff are employed by Littlehampton Marina Ltd and since they are patrolling the marina, it is simply a convenience that they also patrol the storage area and provide access out of hours.

36. As to those points, one response is that it is entirely unimportant to the typical customer which plot he obtains. Another point is that they do not in any way meet the primary submission on behalf of HMRC that his economic and social purpose in entering into an agreement with Mr Finnamore is to obtain safe and secure storage which is achieved by the provision of the container within the site and is not to obtain a licence to occupy a plot *per se*.

37. Mr Finnamore also refers to article 135(1)(k) which provides an exemption for the supply of land which has not been built on. This, however, adds nothing to the debate. The issue would then be whether the overarching supply was a supply of land (in the sense that word is used in EU law) so as to attract the exemption. But land within paragraph (k) is immovable property within paragraph (l) and since we are dealing with a leasing or letting of the plot viewed as immovable property it would be impossible to conclude that the overarching supply should be treated as a supply of land but not as a leasing of letting or immovable property.

38. In my judgment, the proper classification of the single composite supply in the present case is not the grant of a licence to occupy land within Item 1 even if it is correct (as to which I make no finding) that each transaction in the present case results in the grant of a licence to occupy the plot within that Item; nor is the proper classification of the single composite transaction the leasing of letting of immovable property within article 135(1)(l). In my judgment, in the light of all of the evidence and in particular the terms of the Licence Agreement, the correct classification of the single composite supply is the provision of storage facilities. In reaching that conclusion, I do not take into account the possible provision of security services in the shape of patrols of the premises. It is enough to rely only on the two important elements, that is to say the licence or leasing or letting of the plot and the provision of the container.

39. As I have already explained, the classification of the single composite supply is a matter of law. I have reached a different conclusion from the Tribunal. If I am right, the Tribunal has therefore made an error of law which I am permitted to correct on appeal.

40. I ought, I consider, nonetheless, to explain in a little more detail where I think the Tribunal has gone wrong. I have already identified one error in that the Tribunal thought that the typical user should be imbued with the attributes of a lawyer. Although I am of the view that it should make no difference to the result whether the typical user has those attributes or not, the Tribunal clearly thought that it was important. Indeed, [6] and [25] of the Decision provide clear indications that the typical user (the Tribunal's man in the street) would have regarded the single composite supply as the provision of storage space. In requiring the typical user to have certain attributes which the Tribunal must have regarded as relevant to its

decision, it was in error. I cannot be sure that that error has had no influence on the Tribunal's decision.

41. In [12] of the Decision, the Tribunal identifies what it sees as the true issue in the case. It was put this way:

> "… whether, as a matter of law, [1] the overall nature of the transaction entered into with a customer is that of granting a licence to occupy land or simply providing storage facilities or [2] whether the overall transaction involves each element so that the predominant element must be ascertained before the overall nature of the transaction can be properly characterised, so as to allow it to be determined whether the value added tax exemption does or does not apply."

42. The numbering in the quotation above is my addition. It is not entirely clear what [1] is directed at, although I read it as a reference to the question whether one element of the supply is ancillary to another. [2] is directed, it seems to me, at the case where there is a single composite supply because it would be artificial to split the component elements. In this case, I would agree that in many, if not most cases, it will be necessary to ascertain the predominant element. But if it is being suggested that the overall transaction will take its VAT classification from the corresponding classification of the predominant element, that would be wrong. One need only refer to *College of Estate Management* where the predominant element was the provision of printed material but where the overarching supply was of educational services. This has resulted in the Tribunal applying a flawed approach to the decision which it then had to make.

43. The same approach is found in [13] to [15] of the Decision. Thus, at [15], the Tribunal states that

> "we are entirely satisfied that our decision does not turn, nor should it turn, upon whether the storage units are properly to be described as movable or immovable property. We are satisfied that our ultimate decision turns upon whether the predominant or overall nature of the transaction is properly to be described as involving a licence to occupy land."

44. Here the Tribunal seems to be eliding the predominant nature (which is presumably a reference to the predominant element previously referred to – if it is not, there is a new unexplained concept of predominant nature) with the overall nature of the transaction. This elision is confusing because (i) as explained, identification of the predominant element does not answer the question of the nature of the overall supply (ii) the predominant element is a matter of fact whereas the overall nature of the transaction is a VAT construct and (iii) the issue is not whether the nature of the transaction is properly to be described as involving a licence to occupy land: clearly the transaction in the present case does involve a licence to occupy land. It is not clear to me what the Tribunal is saying here.

45. In [28] of the Decision, the Tribunal notes that by far the greater proportion of the money consideration is paid for "the facility of occupying the defined area of land" with the smaller portion of the payment being for the use of the container. That is based, I imagine, on the facts found as set out in paragraph 3.c above. That may be a factor to be taken into account, but it goes only to support the view that the predominant element of the supply is the licence to occupy; but, as already explained, that does not provide an answer to the ultimate issue. It seems to me that the Tribunal has placed too much weight on this factor. The fact that the consideration for the overall supply might be apportioned largely to the licence to occupy does not help to address what the transaction is really all about.

46. The Tribunal's ultimate conclusion is found in [30] of the Decision, in which can be seen a distillation of the Tribunal's reasoning. It is as follows:

> "We have arrived at the conclusion that each customer does have exclusive use of a defined space or parcel of land within the curtilage of the appellant's yard, pursuant to a contractual license. Without that licence no storage could

> take place on the appellant's land. With that licence storage may take place on the appellant's land although it need not necessarily do so. Thus, although at first blush the facts of this case might have suggested that the overall service being provided was that of storage facilities, a more detailed and necessary consideration of the facts and the legal analysis applicable to those facts leads us to conclude that the overall submission made by Mrs Hamilton is correct. The overall submission was that the transactions entered into by the appellant, by way of renting out storage facilities, amount to a single supply or facility, the predominant nature of that supply being the provision of a licence to occupy a defined parcel of land which, once the customer is entitled to occupy it, can be used, or not used, as the customer then sees fit (subject only to certain well-defined contractual limitations) for storage purposes. To put the matter another way, the storage is parasitic upon the customer's ability to occupy the land, whereas it could not properly be said that any right to occupy any land arises parasitically from a contract for storage, because such a storage contract may well amount to bailment rather than necessitating or involving the occupation of any defined parcel of land."

47. In my view, the Tribunal's "first blush" perception was correct. The Tribunal went on to refer to the more detailed analysis of the facts which it had carried out earlier in the Decision. In accepting Mrs Hamilton's submissions, it again referred to the predominant nature of the supply. But, for reasons already explained, identification of the predominant element of the supply does not necessarily provide an answer to the question of classification of the supply for VAT purposes. The Tribunal does not explain why, in the light of its conclusions concerning the man in the street, it reached the decision which it did; those conclusions surely provide the correct answer to the exercise which is to be found by determining the economic reason or purpose of the whole transaction from the point of view of the typical customer. Moreover, the Tribunal puts the matter in an alternative way: the storage is parasitic upon the customer's ability to occupy the land. This is an expression of the indivisibility of the overarching supply but it does not say anything about the customer's economic and social purpose in contracting with Mr Finnamore for the combination of the different elements of that supply. This alternative way of putting the matter is not a correct approach

and the fact that the Tribunal saw it as another way of describing the approach which it had adopted ("In other words….") suggests that its overall approach was flawed.

48. Returning to HMRC's three Grounds of Appeal, the second has, I have said, not been pursued. It follows from my analysis and conclusions that the third Ground of Appeal succeeds. As to the first Ground of Appeal, nothing turns on it in the light of my decision on the third Ground of Appeal. In any case, as I have already explained (see paragraph 27 above), the classification of the single composite supply would be the same whether the matter is addressed by reference to VAT Act 1994 or by reference to the Principal Directive. Accordingly, if I had agreed with the Tribunal's decision in relation to that classification, the fact that the Tribunal had addressed the case by reference to Item 1 rather than by reference to article 135(1)(l) would make no difference to the result (there being no suggestion that the Tribunal thought that the plot and the container together were "land" let alone that the container by itself was "land") and the first Ground of Appeal would not succeed.

Conclusion

49. HMRC's appeal is allowed and the Tribunal's decision is to be set aside.

Mr Justice Warren
Chamber President

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