Neutral Citation: **[2022] UKUT 175 (TCC)**

UT (Tax & Chancery) Case Number: **UT/2021/000044**

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London
EC4A 1NL
Heard on: 11-12 May 2022

Judgment given on 28 June 2022

Before

MR JUSTICE MILES
JUDGE RUPERT JONES

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Appellant

and

NETBUSTERS (UK) LIMITED

Respondent

Representation:

For the Appellant: Kate Selway QC, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondent: Michael Firth, Counsel

DECISION

Introduction

1. Her Majesty's Revenue and Customs ('HMRC') appeal the decision of the First-tier Tribunal ('FTT') dated 2 November 2020 which was released as [2020] UKFTT 438 (TC).

2. As the FTT outlined at [1] of its decision: 'The appeal concerns the proper classification for VAT purposes [of] the supplies made by [Netbusters]. The activities in question are the organisation by [it] of various competitive football and netball leagues and the supply of pitches for these league matches to be played upon.'

3. The FTT allowed the appeal of the Respondent, Netbusters (UK) Ltd ('Netbusters') against decisions of HMRC: (1) to refuse to repay VAT that Netbusters contended was overdeclared output VAT for the periods 04/13 – 10/16 in the total sum of £414,622; (2) to assess Netbusters to pay VAT for the periods 01/17 – 07/18 totalling £218,542.

4. Netbusters organises competitive 5-a-side football and netball leagues. It hires pitches from third parties (such as schools and local authorities) as regular series of block bookings. It then makes these pitches available to the teams who have signed up to the league to enable them to play their league fixtures. Netbusters manages all aspects of league administration. Typically, a team will pay one match per week on the same evening each week and each booking will be long enough to enable two or more matches to be played one after the other. On the larger pitches two matches might be played at any one time.

5. The FTT decided at [35] that the services provided by Netbusters were one single composite supply. The FTT allowed the appeal, finding that the objective character of the supplies made by Netbusters fell within the definition of "the grant of any interest in or right over land or of any licence to occupy land" for the purposes of Schedule 9, Group 1, Value Added Tax Act 1994 ('VATA 1994') (see [37] of the decision). Thus, the supplies were exempt from VAT.

6. HMRC appeal the FTT's decision on the basis it was made in error of law. They were granted permission to appeal by the Upper Tribunal to pursue five grounds of appeal which are set out below. HMRC submit in short that the FTT should have concluded that the objective character or economic reality of Netbusters' supplies was not the grant of a licence to occupy land, the hiring out of sports pitches, but, rather, was supplying competitive league sports management services.

The FTT's decision

7. References to numbered paragraphs in parentheses, [xx], unless stated otherwise, are references to paragraphs in the FTT's decision.

8. The FTT made the following findings of fact at [16] (references to the Appellant being to Netbusters):

> (1) The Appellant was registered for VAT on 15 February 2012.
>
> (2) The Appellant enters into binding agreements with third parties, such as local authorities and schools, to hire venues belonging to these third parties for set periods of time. It then hires

these venues to its customers. The Appellant also organises competitive football and netball leagues and the majority of the pitches are hired by teams participating in one of its leagues - either as a block booking for the season or one-off bookings.

(3) The venues hired are 5/6/7-a-side artificial football pitches and netball courts. There is no one overseeing the use of pitches during the period of hire. Usually, but not always, the venue comes with toilet and changing room facilities. There are no other facilities provided and people tend to turn up to the games and leave straight after. No parking facilities are provided at any of the grounds.

(4) Where the pitches have floodlighting this is sometimes turned on by the Appellants, but it is usually turned on and off automatically.

(5) There is minimal equipment supplied by the third party school or local authority consisting usually of goal posts which the Appellant puts up. The Appellant has purchased around 3-4 sets of goals which it supplies for one of its venues.

(6) On rare occasion when one team fails to attend a fixture the other team's hire of the pitch goes ahead in their pre-allocated slot resulting, often, in a friendly match supervised by the referee (or not) depending on the preference of the players.

(7) The Appellant's league/tournament management services are, in principle, available independently of pitch hire, but in practice rarely are.

(8) A team who wishes to participate in a league and make a block booking will register online. Once on the site the participants are asked to supply a team name, captain's details, to choose a league and agree with the terms and conditions.

(9) The cost to each team of entering a league is between £350-£779 per season of around 10 matches. There is a single price to pay for both pitch hire and league management services. The Appellant allocates 87.5% of the fee to pitch hire and 12.5% to league management services which, absence any other evidence, we accept at face value.

(10) It is possible for individuals who do not have sufficient numbers to form a team to register, choose the venue and pay an individual price. The Appellant will then try to form a team from these individuals. This accounts for between 2-3% of the teams.

(11) Once a team has registered it will receive a fixtures notification at the beginning of the season. After that the teams check their fixture times on the website. The teams play ten or more matches at the same venue and at the same time slot every week. The teams know in advance when the pitch will be theirs to play the match.

(12) The Appellant provides a referee and a ball as part of the league organisation and occasionally bibs (but not kits).

(13) First aid kits are usually brought by the referee although the Appellant supplies ice packs.

(14) The Appellant gives a plastic trophy (costing £5) to the team that wins the league.

9. The FTT took account of various factors when considering whether the objective character of the supplies made by Netbusters fell within the definition of the grant of any interest in or right over land or of any licence to occupy land at [36]:

Supplies made by the Appellant - all the characteristics, circumstances and objective character

36. Having concluded that the supply made by the Appellant is one composite supply we next consider the objective character of that supply. In order to come to a conclusion on this issue we take into account the following:

(1) Exclusion: can some of the Appellant's customers properly exclude others from the pitch or facility during the duration of the hire? Whilst not explicitly set out in the terms and conditions [HB 907] there must, in our judgment be implied (in order to give the agreement business efficacy) a right to exclude others from the pitch / facility during the duration of the hire. The Appellant's customer must be able to say to anyone else on the pitch during their allotted time "*we have paid to play here for the next 45 minutes and you must not come on the pitch during this time*". It is no argument, in our judgment, to say that there are two teams on the pitch at the same time and one cannot exclude the other. The answer to that is that the teams, together, are jointly entitled to exclude any other individual or team - subject to any retained rights of inspection.

(2) Perception of the parties is irrelevant: the Respondents argue that Appellant's customers would describe the purchase of the Appellant's service as a right to play netball or football in a league organised by the Appellant at a designated venue and not that they had been granted an interest in property for the duration of the match. The Respondents took us to the Trustpilot reviews [TB 828 – 872] to demonstrate that many of the Appellant's customers enthused about the league and, accordingly, that this was the most important element to them. Mr Firth was equally able to take us to many reviews where the customers complimented the pitches. In addition Ms Selway took us to the annual directors reports and financial statements filed by the Appellant [TB 416 to 510] to show that the Appellant considered its principal activity to be "*the arrangement of football [and netball] tournaments and other related services*." In our view the Trustpilot evidence is not, by itself, conclusive of the view that the customers had about the supplies that they were receiving. In any event we are not concerned with how the parties choose to categorise the transaction.

(3) Additional services: In addition to the hire of the pitch the Appellant provides league administration services- including referees, balls, bibs and awards a league prize. The Respondents rely upon the decision in *Luc Varenne* to illustrate how a transaction that might otherwise be capable of involving the letting of immovable property can be taken out of the land exemption by the provision of other services. The additional services in that case represented 80% of the total charge. In the present case only 12.5% is allocated by the Appellant to additional or league management services.

(4) The business that the Appellant is engaged in or the business model it has chosen to adopt: The Respondents argue that the core activity that the Appellant is engaged in is the organisation of football and netball leagues. Its business model does not involve acquiring long leases and then spending significant sums in creating a venue as was the case in *Goals Soccer*. The Appellant argues that the pitch hire is plainly the more valuable of the two supplies (87.5%) and league participation enables the pitch hire to be better enjoyed.

10. The FTT concluded at [37] that the supply of league management services was additional (ancillary or incidental) to the fundamental nature of the supply – that of pitch hire:

37. In our judgment, taking the above matters into account, we are led to the conclusion that the objective character of the supplies made by the Appellant is such that they are properly categorised as the granting of interests in, rights over or licenses to occupy land. In coming to this conclusion we were not referred to and nor did we considered [sic] any aspect of English property law for the obvious reason that the terms used must be given a Community meaning, as set out earlier in this decision. We placed significant weight upon the ability of the

Appellant's customers to exclude others from the pitches during the period of the matches. Additionally, the league management services, in our view, are integral to the pitch hire service and vice versa. The attraction of the business to its customers lies in the bundle of services that it can provide. One enhances the enjoyment of the other. Good pitches and good league administration make for an optimal experience. The additional (league management) services in the present case are, based upon the evidence available to us, of modest value. The additional services do not, therefore, change the fundamental nature of the more valuable service of pitch hire.

The Law

11. The general rule is that supplies of land are exempt from VAT. This is because Article 135 of the PVD requires member states to exempt from the scope of VAT transactions which come within the definition of "the leasing or letting of immovable property" (whilst permitting member states to apply further exclusions to the scope of the exemption).[1]

12. The general rule, and the various qualifications to it, are found in s. 31(1) and Schedule 9, Group 1 VATA 1994. Section 31(1) provides that goods and services specified in Schedule 9 to the Act are exempt supplies.

13. There are 16 categories of exempt supplies in Schedule 9. Group 1 specifies supplies of land and buildings that are exempt from VAT in the following terms:

> "The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than
>
> […]
>
> (m) the grant of facilities for playing any sport or participating in any physical recreation;"

14. However, Note 16 provides that the exclusion for sports facilities under paragraph (m) shall not apply (i.e. that the exemption in s.31 and Schedule 9, Group 1 will continue to apply) as follows:

> (16) Paragraph (m) shall not apply where the grant of the facilities is for:
> (a) a continuous period of use exceeding 24 hours; or
> (b) a series of 10 or more periods, whether or not exceeding 24 hours in total, where the following conditions are satisfied—
> (i) each period is in respect of the same activity carried on at the same place;
> (ii) the interval between each period is not less than one day and not more than 14 days;
> (iii) consideration is payable by reference to the whole series and is, evidenced by written agreement;
> (iv) the grantee has exclusive use of the facilities; and
> (v) the grantee is a school, a club, an association or an organisation representing affiliated clubs or constituent associations."

[1] Article 135 provides: *"Member States shall exempt the following transactions: … (l) the leasing or letting of immovable property … Member States may apply further exclusions to the scope of the exemption referred to in point (l) …".*

15. Note 16 is not in issue on this appeal because the FTT decided that HMRC was precluded from arguing that Netbusters' supplies did not fall within Note 16(b)(v) (see [38]-[45]). HMRC does not have permission to appeal that part of the decision. For the purposes of this appeal, it is therefore assumed that Netbusters' customers (the teams using the sports facilities) were a school, club, association or relevant organisation.

16. So the only issue on this appeal is whether the FTT erred in finding that Netbusters' supplies came the within Group 1 exemption (*"the grant of any interest in or right over land or of any licence to occupy land …"*).

17. It is well established that the Group 1 (property) exemption cannot go wider than the words "leasing or letting of immovable property" in Article 135 of the PVD. The exemption has its own independent meaning in EU law and must be given an EU definition independent of any definition in domestic property law.

18. The principles to be applied in determining whether supplies fall within Article 135 and Schedule 9, Group 1 were recently conveniently summarised by the Court of Appeal in *HMRC v Fortyseven Park Street Ltd* [2019] EWCA Civ 849 ('*Fortyseven Park Street*') by Newey LJ at [23]:

> *The land exemption: article 135 of the Principal VAT Directive and item 1, group 1, part II of schedule 9 to the VATA*
>
> 23. The exemption for "the leasing or letting of immovable property" has been considered on a number of occasions by the Court of Justice of the European Union ("the CJEU"). Amongst the points that emerge from the authorities are these:
>
> i) The exemption has its own independent meaning in EU law and must be given an EU definition (see e.g. Case C-275/01 *Sinclair Collis Ltd v Customs and Excise* [2003] STC 898, [2003] ECR I-5965, at paragraph 22 of the judgment; Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451, [2004] ECR I-11237 at paragraph 16 of the judgment);
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> ii) While the exemption should not be construed in such a way as to deprive it of its intended effect, it is to be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (*Temco*, at paragraph 17 of the judgment);
>
> iii) In contrast, the exclusion in respect of "the provision of accommodation … in the hotel sector or in sectors with a similar function" "cannot … be interpreted strictly" (Case C-346/95 *Blasi v Finanzamt München I* [1998] All ER (EC) 211, at paragraph 19 of the judgment);
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> iv) The concept of "the leasing or letting of immovable property" is "essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right" (*Temco*, at paragraph 19 of the judgment; also Case C-150/99 *Swedish State v Stockholm Lindöpark AB* [2001] STC 103, [2001] ECR I-493, at paragraph 38 of the Advocate General's opinion; *Sinclair Collis*, at paragraph 25 of the judgment; and Case C-55/14 *Régie communale autonome du stade Luc Varenne v Belgium* [2015] STC 922, at paragraphs 21 and 22 of the judgment);
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> v) The "leasing or letting of immovable property" is "usually a relatively passive activity linked simply to the passage of time and not generating any significant added value" (*Temco*, at paragraph 20 of the judgment). If, however, a payment also takes account of other factors, that need not matter if they are "plainly accessory" (see *Temco*, at paragraph 23 of the judgment).

> In *Temco*, the CJEU said that it was for the national Court to establish "whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way" (see paragraph 27 of the judgment);
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> vi) A landlord may reserve the right to visit the property without rendering the exemption inapplicable (see *Temco*, at paragraphs 24 and 25 of the judgment);
>
> and
>
> vii) Article 135 of the Principal VAT Directive "does not … refer to relevant definitions adopted in the legal orders of the member states" (*Temco*, at paragraph 18 of the judgment). The exemption for "the leasing or letting of immovable property" can include arrangements that English law would categorise as licences rather than leases (see e.g. *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989, at paragraph 35, per Lord Nicholls). Conversely, the words "any licence to occupy land", as used in schedule 9 to the VATA, "should not be construed so as to include the grant of rights that would not, for the purposes of the Sixth Directive [now, the Principal VAT Directive], constitute 'the leasing or letting of immovable property'" (*Customs and Excise Commissioners v Sinclair Collis Ltd*, at paragraph 58, per Lord Scott).

19. It will be seen that in this passage Newey LJ summarised a number of decisions of the CJEU. He did not suggest that the law had changed recently or was in a state of flux.

The threshold for the Upper Tribunal to interfere with factual findings, evaluative judgments or multi-factorial assessments of the FTT

20. The Upper Tribunal helpfully summarised the position in relation to appeals which involve challenges to factual findings and evaluative judgments of the FTT in *HMRC v Anna Cook* [2021] UKUT 15 (TCC), at [18]-[19]:

> 18. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[2].
>
> 19… we have borne in mind the caveats helpfully summarised in *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC), at [54]-[69]. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment. ….

21. In *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 Lewison LJ said this at [114]:

[2] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

> Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

22. Hence the question before an appellate tribunal or court exercising an "error of law" jurisdiction is not whether it would have made the same decision as the first-instance tribunal. The test is whether the FTT's factual finding or evaluative judgment was within a reasonable range of conclusions that a properly directed tribunal could have made on the evidence before it.

23. Likewise, there is a high threshold for an appellate court or tribunal to find an error of law where the FTT has undertaken a multifactorial assessment. *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407, concerned the classification of a supply for VAT purposes. The Court of Appeal explained why the appellate body should be slow to interfere with assessments and evaluative judgments of first instance tribunals at [9] – [11]:

> [9] Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment.
>
> [10] I gathered together the authorities about this in *Rockwater v Technip* [2004] EWCA (Civ) 381:
>
> > [71] … In *Biogen v Medeva* [1997] RPC 1 at p. 45 Lord Hoffmann said when discussing the issue of obviousness:
> >
> > > "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans la nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. When the application of a legal standard such negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."
> >
> > [72] Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media v Carlton* [1999] 1 WLR 605 at pp. 613-614 (*per* Robert Walker LJ) in the context of a decision about "fair dealing" with a copyright work; by Hoffmann LJ in *Re Grayan Building Services* [1995] Ch 241 at p.254 in the context of unfitness to be a company director; in *Designer Guild v Russell Williams* [2000] 1 WLR 2416 in the context of a substantial reproduction of a copyright work and, most recently in *Buchanan v Alba Diagnostics* [2004] UKHL 5 in the context of whether a particular invention was an "improvement" over an earlier one. Doubtless there are other examples of the approach.

> [73] It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designer Guild:*
>
> > "Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle."
>
> [11] It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *SH (Sudan)* at [30] cited by Toulson LJ."

Grounds of Appeal and issues to be determined

24. HMRC were granted permission to argue five grounds of appeal:

(1) The FTT failed to have any proper regard to the relevant case law.

(2) The FTT failed to properly consider and apply the 'passivity principle'.

(3) The FTT failed to consider the objective character/economic reality of the supplies made by Netbusters.

(4) The FTT erred in finding that 87.5% of the value of the Netbusters' supply was attributable to pitch hire and 12.5% to league management services.

(5) The FTT failed correctly to analyse the true nature of the rights granted to Netbusters by third parties.

25. The parties' respective submissions are considered in more detail below. But in summary, Ms Selway QC submitted that the FTT erred in law in finding that Netbusters supplied the grant of licences to occupy land through the hiring of sports pitches and the correct interpretation and application of the evidence and law was that the supplies were of competitive sports league management services.

26. Mr Firth, for Netbusters, submitted that the FTT did not err in law and properly analysed the evidence and law, made findings of fact that were open to it and applied the correct principles of law in arriving at its conclusion.

27. We are grateful to counsel for their helpful submissions.

Discussion

Ground 1 - general failure properly to apply relevant case law

28. Ms Selway QC, for HMRC, argued that the FTT failed to have any or any proper regard to the relevant case law, erroneously finding numerous relevant authorities relied upon by the Respondent not to be a helpful aid to construction of the relevant legislation (see [11] of the decision).

29. We reject this ground of appeal. We are satisfied that the FTT did not err in law in the way submitted.

30. At [11], the FTT stated:

> "A number of cases were referred to by the parties as a means of interpreting the above legislation. We have attempted to extract the salient principles to aid our interpretation and decision below. We were also referred to a number of cases which were presented as examples of the application of the relevant legislation. These we found to be less helpful so, although we read them and have had regard to them, we do not set out the details here."

31. The FTT then went on to set out relevant passages from the House of Lords decision in *Customs and Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989 ('*Sinclair Collis Ltd')* and the CJEU decision in Case C-55/14 *Régie communale autonome du stade Luc Varenne v Belgium* [2015] STC 922 ('*Luc Varenne')*.

32. HMRC complains that the FTT did not refer in its decision to certain other decisions or said that it did not regard them as helpful.

33. Despite being granted permission to appeal on this ground, we concluded that it was unarguable. Ms Selway QC failed to identify within this ground the way the FTT is supposed materially to have misinterpreted or misapplied the law. The FTT was under no obligation to cite every authority provided to it so long as it properly interpreted and applied the relevant principles. This ground of appeal was insufficiently particularised and it did not become clearer in the course of argument. The ground identified no proposed error of law in the decision and not one that could arguably be demonstrated to affect the ultimate decision of the FTT.

Ground 2 - failure properly to consider and apply the "passivity principle"

34. Ms Selway QC submitted that the FTT correctly understood that the basic characteristics of a letting of immovable property for the purposes of the PVD and the domestic legislation lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right, as set out in the judgment of the CJEU in *Sinclair Collis Ltd-v-Commissioner of Customs & Excise* [2003] 2 CMLR 36 ('*Sinclair Collis CJEU'*) and other authorities.

35. However, she submitted that the FTT wrongly ignored, or considered inapplicable, the pre-requisite condition of the "passivity principle" developed in the EU and domestic case law, relating directly to "the leasing and letting of immovable property". Under the PVD the leasing and letting of immovable property has been held generally to be a relatively passive activity linked simply to the passage of time and not generating any significant added value. This is to be distinguished from supplies which have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property.

36. Ms Selway QC submitted that the FTT failed to give appropriate weight to the other services provided by Netbusters and in doing so erred in law. If the Tribunal had applied the law correctly it would have concluded that Netbusters' supplies were not properly categorised as being passive supplies of land because of the significant value added to the supply by it of other services (namely the provision of a wide array of additional services connected with the provision of competitive football and netball playing leagues).

37. Ms Selway QC complained that despite her making detailed submissions on the passivity principle on behalf of HMRC, the FTT's decision does not mention the principle, or explain

how Netbusters' supplies should be analysed in light of the principle. The FTT should have considered and applied the principle and would have derived assistance from the cases she had relied upon; and in the light of those cases would have concluded that Netbusters' supplies did not satisfy the passivity test and accordingly could not be lettings of immovable property under the PVD or grants of interests in land under VATA 1994.

38. We reject this ground of appeal essentially for the same reasons submitted by Mr Firth. We are satisfied that the FTT did not err in law in the way submitted.

39. At [13] of the decision, as part of identifying the "salient principles" from the case law, the FTT cited [26] of the CJEU's judgment in *Luc Varenne:*

> Accordingly, with regard to the letting of a golf course, the Court has stated that since the activity of running a golf course entails not only the passive activity of making the course available but also a large number of commercial activities, such as supervision, management and continuing maintenance by the service-provider and the provision of other facilities, letting out a golf course cannot, in the absence of quite exceptional circumstances, constitute the main service supplied.

40. In *Luc Varenne* the CJEU considered the passivity of an activity as a factor that, on the facts of that case, should be taken into account in the assessment of the character of service provided (provision of football stadium with various services representing 80% of the charge).

41. We note that Newey LJ at [23(5)] of *Fortyseven Park Street* said that the "leasing or letting of immovable property" is "usually a relatively passive activity linked simply to the passage of time and not generating any significant added value". He derived this statement from [20] of the CJEU's judgment in Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451, [2004] ECR I-11237 (*'Temco')*.

42. In our judgment these statements do not elevate passivity to the status of a principle or a determinative test. The cases refer to it as a typical feature of leasing or letting. It is not to be seen as a necessary requirement, but as one factor or characteristic in a multi-factorial assessment that should be taken into account by a tribunal when determining whether a supply is to be identified as the leasing or letting of immovable property for the purpose of Article 135 of the PVD or Note 1 of Schedule 9 to VATA 1994.

43. At [36(3)] the FTT distinguished its conclusions from the facts of *Luc Varenne*:

> "The Respondents rely upon the decision in *Luc Varenne* to illustrate how a transaction that might otherwise be capable of involving the letting of immovable property can be taken out of the land exemption by the provision of other services. The additional services in that case represented 80% of the total charge. In the present case only 12.5% is allocated by the Appellant to additional or league management services."

44. The FTT gave sufficient reasons for finding that the more active element of the supply – the supply of league services - did not take the supply of the pitch hire outside the scope of the letting of immovable property. At [37] the FTT concluded that, aside from pitch hire, the "additional…services in the present case are…of modest value". Accordingly, in our view, the FTT did consider the "passivity principle" and concluded that the additional service of the competitive league services, did not represent significant added value to the supply of pitch hire which therefore constituted the grant of a licence to occupy land.

45. Further, in our view the FTT did not err in law by failing "to give appropriate weight to the other services" by not concluding that the additional services represented "significant value added". The passivity of letting was but one factor in the multifactorial assessment that the FTT properly considered and applied at [36]-[37]. The FTT was entitled, indeed bound, to make a multifactorial assessment. We consider that its conclusion was open to it on the evidence available.

46. Questions of weight were for the FTT and HMRC's submissions amount to no more than a disagreement with the conclusion of the FTT. It is not for the Upper Tribunal to interfere unless the FTT's conclusion was one that a properly instructed tribunal could not reasonably have reached – see *Procter and Gamble* at [9]-[11].

Further arguments that arose during oral submissions

47. Ms Selway QC developed two further arguments orally in support of her submission that the FTT had failed to extract and apply the relevant principles from the European and domestic case law when making its decision. She submitted that the FTT failed to consider these principles in deciding whether the Respondent's supplies constituted the grant of a licence to occupy land or the letting or leasing of immovable property.

(1) Sinclair Collis CJEU, [30]

48. She relied on [30] of the judgment in *Sinclair Collis CJEU*. She argued that the FTT did not consider this point and therefore erred in law. What the CJEU said at [30] was:

> "In those circumstances, the occupation of an area or space at the commercial premises is, under the terms of the agreement, merely the means of effecting the supply which is the subject matter of the agreement, namely the guarantee of exercise of the exclusive right to sell cigarettes at the premises by installing and operating automatic vending machines, in return for a percentage of the profits."
>
> [Emphasis Added]

49. Ms Selway QC submitted that the FTT failed to consider whether the hirings of the pitches were merely a means of effecting the fundamental and essential supply of the competitive league services.

50. She suggested that this principle was to be found in *HMRC v Diana Bryce, trading as The Barn* [2010] UKUT 26 (TCC) ('*Bryce*') per Roth J at [41(5)]:

> (5) The right to occupy an area or space for a period of time may not be a letting of immovable property if it is merely the means of effecting the supply which is the principal subject matter of the relevant agreement: see *Sinclair Collis* at para 30.

51. However, we are satisfied that the critical words at [30] of the judgment in *Sinclair Collis CJEU* are "in those circumstances". The circumstances were that the machine owner had no right to have the machine in any particular area or space (see [28] – the site owner could move it about) and there was no right to control or restrict access to the area where the machine was placed ([28]). It was because the supply did not have any of the characteristics of a right to occupy as owner and exclude that it had to be characterised as an exclusive right to sell. That conclusion has no relevance to the present case. We do not consider that Roth J in *Bryce* was seeking to state a broader principle. He was merely applying the reasoning in *Sinclair Collis* to the facts before him.

52. The means of effecting the supply is not to be elevated to a distinct principle or unilateral requirement when considering Note 1, Schedule 9 and Article 135 PVD. It was not so identified by the Court of Appeal in *Fortyseven Park Street*.

53. The FTT was entitled to apply the test of considering the objective character / economic reality of the supply and decide its fundamental nature.

(2) Abbey National

54. Ms Selway QC referred us to [31(14)] of the judgment of the Court of Appeal in *Revenue and Customs v Abbey National Plc* [2006] EWCA Civ 886 ('*Abbey National*'). She submitted that it was authority for adopting a "functional approach" which appeared to involve considering the function of the supply of land. She submitted that the FTT had failed to adopt this approach in its decision and that this was an error of law.

55. *Abbey National* concerned a "virtual assignment" of a lease that could not be assigned, by transferring the economic benefits and burdens without any assignment of a right to occupy (see [8]). In *Abbey National* the Court of Appeal set out the principles set out by the High Court Judge in his judgment. The Judge had applied a functional approach to identifying the essential features of a leasing or letting and concluded that a right to occupy was not one of them ([32(24)]). The idea was that a transfer of all the economic benefit and burden could be functionally equivalent and therefore treated the same.

56. At [31(14)] of the judgment, the Court of Appeal set out what the Judge below had said as follows:

> 14. Fifthly, the "essential features" of leasing or letting should be identified by adopting a functional approach. Applying that approach Advocate General Jacobs in *Goed Wonen*, after referring to Advocate General Darmon's formulation in *Lubbock Fine* at paragraph 39, ventured the following as a definition:
>
> > '84. 'Leasing or letting of immovable property' within the meaning of Article 13B(b) includes in my view agreements whereby one party grants the other the right to occupy a defined immovable property as his own and to use or even take profits from that property for an agreed (definite or indefinite) duration in exchange for remuneration linked to that duration.'

57. The Court of Appeal did not endorse those propositions. On the contrary, it overturned the Judge's decision and held, specifically (after considering the references to "functional" in the case law):

> "[70] As I read the above passage in its judgment, the ECJ is saying that notwithstanding that in form a usufructuary right such as was in issue in that case differs in a number of respects from leasing or letting, in substance it may be considered the same since (and this is the important point for present purposes) it shares the "essential common characteristic" – also described in paragraph 55 of the judgment as "the fundamental characteristic" – that it confers on the grantee, for an agreed period and for payment, a right of exclusive occupation of the property as if it were the owner: i.e. as if it were the grantor. What it is *not* saying, as I read the judgment, is that a mere right to receive an income stream from property, which is neither accompanied by nor derived from any right of occupation, is to be treated as a leasing or letting within the meaning of Article 13B(b). Nor do I find that in the least surprising, since such an interpretation of Article 13B(b) would in my judgment extend its scope far beyond the limits of any "strict" interpretation, wherever precisely such limits may be set."

58. We are satisfied that the Court of Appeal did not endorse a "functional approach" to identifying the elements of a lease. It adopted the usual approach of considering the various features or characteristics of the arrangements between the parties, considered realistically. In any event the concepts of functional equivalence or similarity discussed in that case have no bearing on the present case, which concerns the provision of football pitches and additional services. The FTT made no error of law in not applying this approach in its decision.

Ground 3 - failure properly to consider the objective character / economic reality of the supplies made by the Respondent

59. Ms Selway QC submitted that in failing to take account of the relevant authorities, in particular *Luc Varenne*, the FTT failed to have any or any proper regard to the principle that required the FTT to consider the economic reality and/or the objective character of the supplies made by Netbusters. Alternatively, she argued that the FTT had regard to that principle but applied it in a way that no reasonable tribunal would have done (given the occasional and temporary nature of Netbusters' supplies to its customers) and accordingly erred in law. If the FTT had correctly applied the law to the facts of the case it would have concluded that the objective character and/or economic reality of the supplies made by Netbusters was the organisation of competitive football and netball leagues and that therefore the supplies were taxable.

60. She argued that the provision of league competitions was the most important part of the supplies. The teams and individuals were seeking to play a competitive game of football (or netball) and to test themselves against other teams and not just hire a pitch for a "kick around". The key selling point of the Netbusters' business was that the entire league structure was already in place. All that the customers had to do was sign up, pay, and turn up. All aspects of the league organisation were dealt with by Netbusters.

61. Ms Selway QC submitted that the FTT failed to give any or any proper weight to the relevant evidence by concluding that the objective character and/or economic reality of the supplies made by the Respondent was the grant of interests in, rights over, or licences to occupy land: in particular to the description of the Respondent's business in its director's reports and financial statements and to the perceptions of the Respondent's business provided by its customers in various Trustpilot reviews. The FTT wrongly dismissed this evidence as being irrelevant because "[it was] not concerned with how the parties choose to categorise the transaction". No properly acting tribunal would have dismissed this evidence as irrelevant. Instead, that evidence was highly relevant to the fact-finding that the FTT had to undertake in order properly to consider and analyse the objective character / economic reality of the supplies made by the Netbusters. The only reasonable conclusion to draw from an analysis of all the relevant facts, which the FTT failed to consider in the round, was that the fundamental or core business activity of Netbusters was the arrangement and provision of football and netball league services to customers (as individual and team participants) rather than the provision of interests in land.

62. She submitted the FTT also failed to give proper weight to the bundle of league services provided by Netbusters, as being fundamental to its business activity. The overwhelming economic reality of their business is that supplies are made to customers primarily because they want to participate in a series of competitive games where their success can be measured and recorded via a league position and/or prize at the end; this bundle of services being fully organised by the Respondent, rather than the teams or individuals wanting to hire a relevant

pitch once a week. The FTT appeared to recognise the importance of the bundle of league administration services but then erred in categorising these as providing only modest value.

63. We reject this ground of appeal. We are satisfied that the FTT did not err in law in the ways submitted. We agree with Mr Firth's submissions.

64. At [13] of its decision, as part of its recitation of the salient principles, the FTT specifically identified [21] of *Luc Varenne* as follows:

> "According to settled case-law, the fundamental characteristic of the concept of 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. In order to determine whether a contract falls within that definition, account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties." (underlining added)

65. At [23], the FTT identified the test it should consider, including: "(3) Take into account all of the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties."

66. At [35], the FTT referred to the "economic reality or objective character of the transaction" in the context of determining that there was a single supply.

67. At [36], the final section on the analysis of the exemption is titled: "Supplies made by the Appellant - all the characteristics, circumstances and objective character". The FTT concluded at [37]:

> "In our judgment, taking the above matters into account, we are led to the conclusion that the objective character of the supplies made by the Appellant is such that they are properly categorised as the granting of interests in, rights over or licenses to occupy land…"

68. It follows that the ground of appeal that the FTT misdirected itself about the need to consider the objective character of the supplies is without merit. We also reject the suggestion that it did not in fact undertake that consideration. These various passages show that it did so.

69. In our view, the FTT reached an available conclusion on this issue.

70. The FTT recognised that there were two elements, pitch hire and league administration, where each enhanced the enjoyment of the other but concluded that the additional services (the league management) were of modest value and did not change the fundamental nature of the supply. Essentially the same conclusion was reached by the FTT in *Goals Soccer Centres plc v. HMRC* [2012] UKFTT 576 (TC) ('*Goals Soccer*') at [133].

71. The reality of this challenge is that HMRC disagrees with the multifactorial assessment and conclusion of the FTT. That is insufficient to meet the high threshold of an error of law for the reasons we set out above. The FTT was entitled to reject HMRC's submissions for the reasons it gave.

72. Further and in any event, the omission of relevant facts relied upon by HMRC to establish an unreasonable conclusion are not made out:

(1) HMRC asserted their own view that the provision of league competition was the most important part of the supplies and the key selling point. That factual assertion does not identify an error of law in the FTT's analysis.

(2) HMRC submitted that the FTT failed to give any or any proper weight to the description of the Respondent's business in its director's reports and financial statements. However, the FTT referred to these at [36(2)]. The question of what, if any, weight to give such a factor was a matter for the FTT, particularly given that the FTT heard cross-examination on the point in which Mr Jaume Mascaro said that it was written by the accountants and was a quite a narrow definition of what the Respondent did. As set out above, the CJEU has expressly ruled that what matters is the objective character of the transaction "irrespective of how the transaction is classified by the parties" (*Luc Varenne* at [21]). The FTT correctly identified the parties' own classification of the transaction is irrelevant. The FTT was entitled to place little or no weight on how the Respondent's accountant described the business (rather than the supplies) for an unrelated purpose, and without reference to the relevant legal concepts. The same would apply to classification of the business for VAT purposes on its certificate of registration or in directors' reports.

(3) HMRC submitted that the FTT failed to give any or proper weight to the Trustpilot customer reviews produced by HMRC. The FTT referred to these at [36(2)] where it noted that the reviews talked about both the league and the pitches. The question of what, if any, weight to give such a factor was a matter for the FTT. It was entitled to place little or no weight on printouts of internet pages containing subjective comments by unknown and potentially unrepresentative persons who did not give evidence before the FTT when identifying the objective character of the transaction. In any event, the content of those comments was of a mixed nature and did not wholly assist HMRC's case (as the FTT noted). This material did not demonstrate that the FTT's conclusion was one which no reasonable tribunal could have reached.

73. In short, the weight to give to each element of the bundle of services supplied by the Respondent was for the FTT. HMRC were reduced to disagreeing with the FTT's view that the additional services of providing competitive league services were not the fundamental nature of the supply because they were of modest value and ancillary to the pitch hire. This ground of appeal did not demonstrate an error of law.

Ground 4 - incorrect factual finding compounding or contributing to the errors identified in Grounds 1-3

74. Ms Selway QC submitted that the FTT erred when finding, at [16(9)], that "[t]he Appellant allocates 87.5% of the fee to pitch hire and 12.5% to league management services which, absence [sic] any other evidence, we accept at face value". It was an incorrect finding of fact in that the evidence before the FTT was that Netbusters only began to make this distinction from July 2017 onwards (see the witness statement of Jaume Mascaro, at [20]) once it had determined that it wished to seek to take advantage of the *Goals Soccer* decision, which was after the VAT periods applicable to this appeal. The FTT therefore erred, if and in so far as it relied on this fact (as it did at [36(3)] and [36(4)]), in reaching its conclusion on the economic reality and/or the objective character of the supplies made by the Appellant.

75. Further and in any event, she argued that even if it had been open to the FTT (which it was not) to find that the league administration services formed a lesser part, in financial terms, of the supplies made to its customers, this itself evidences the fact that the supplies made by the Respondent were not passive supplies of land and that Netbusters had added value to the

supplies it had received under the third party agreements (with schools and local authorities etc). This should not have precluded the FTT from concluding that the objective nature or character of the supplies made was *not* the passive supply of land but a supply of competitive league management services which also included the provision of a pitch.

76. We reject this ground of appeal for the reasons Mr Firth submits. There was no error of law in the FTT's finding of fact. Again, the threshold for us to interfere with the finding is high and is not met.

77. The evidence which the FTT must have had in mind (having accepted his reliability at [14] of the decision) is the witness statement of Mr Mascaro at [20]: "The cost of the league varies depending on the venue, but is generally between £350 and £779 per season of at least 10 matches. The website shows a single price for the booking, which includes both the pitch hire and the league management services. We have allocated 87.5% of the fee is for pitch hire and 12.5% for league management services. This has been explicit on the invoice since July 2017." His evidence was that division of the fee had been such prior to 2017 even if not explicit on the invoice.

78. There was no other evidence before the FTT on this issue and HMRC did not challenge it. Accordingly, the FTT was entitled to find on the evidence available that Netbusters allocated 87.5% to pitch hire and 12.5% to league management services. It was justified in accepting this as the best evidence of what the actual relative values were and had been throughout the relevant VAT periods before and after July 2017.

79. To the extent that HMRC argued that the relative values of pitch hire and league services supplied by Netbusters varied over time such that an estimate in July 2017 would not be reliable as an indicator of the relative values prior to that time, the witness gave clear evidence on the issue. Mr Mascaro was not cross-examined on his evidence about the estimate and no submission was made to the FTT by HMRC to suggest that this was a later invention that did not reflect the relative values of the services previously provided. The FTT was entitled to accept the evidence of the witness and make the finding of fact.

80. HMRC also submit that the FTT's finding that the additional service was the lesser part of the supply should not have precluded the FTT from finding that the supply was not the passive supply of land. This point has already been addressed. The FTT found that the value added was "modest" and did not, therefore, change the fundamental characterisation of the supply ([37]). This was an available finding and was indeed consistent with HMRC's own reference to the 'passivity principle' and asking whether there was "significant added value" (see above).

Ground 5 - failure correctly to analyse the true nature of the rights granted to the Respondent by third parties

81. Ms Selway QC accepted that the FTT correctly decided that it needed to consider the rights which Netbusters itself had been granted by schools or local authorities to use the sports pitches and associated facilities in order to determine what rights it was capable of granting to its customers (see [24] of the decision).

82. However, she submitted that the FTT then erroneously decided in the case of the King Solomon Academy agreement (at [25] to [27]) that Netbusters had rights akin to ownership under that agreement (i.e. the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right). This error was made by reason of

(i) a failure to construe the King Solomon Academy agreement properly; and (ii) a conceptual confusion between the right merely to use facilities without interruption and the right to occupy as an owner.

83. She argued that the FTT should have found that on a true construction of the King Solomon Academy agreement the term "Premises" included rather than excluded the sports hall, and that Netbusters was not granted exclusive use of it (and therefore did not have the occupational rights of an owner).

84. She therefore submitted that the FTT erred at [28] when it found: that Netbusters had the right to exclude any other person from the King Solomon Academy sports hall during the hire period; that it therefore had the right to occupy the sports hall as if it were the owner and to exclude any other person from enjoyment of such a right; and that it was therefore capable of conferring such rights on its own customers/grantees.

85. Ms Selway QC argued that this error was compounded by its apparent implicit assumption that the Appellant must have been granted similar rights by every other school/college/local authority with whom it had contracted ("the third-party agreements") at [25]. She said that there was no evidence to support such an assumption. All the third-party agreements to which the FTT was referred did not confer rights of exclusive occupation on Netbusters. The only reasonable conclusion to draw from the third-party agreements was that the necessary rights of ownership were not conferred on Netbusters, meaning that it was never in a position to confer such rights on its customers.

86. She submitted that the FTT should have found that Netbusters' supply was of competitive league matches (as opposed to pitch hire) based upon its lack of rights to occupy as an owner analogous to the analysis Roth J. conducted into when determining the supply to be of children's parties (rather than barn hire) in *Bryce* at [44].

87. We reject this ground of appeal as demonstrating no error of law for the reasons Mr Firth submits.

88. We begin with the King Solomon Academy Agreement. The FTT found the following, at [25]:

> "The agreement is expressed to be between "King Solomon Academy" and "Netbusters". The hire charge is expressed to be "£50 per hour for the sports hall". The "Premises" is defined as "King Solomon Academy", the "Hire Period" is "15 weeks" and the total number of hire hours is said to be 41.25 hours. Paragraph 5 of the special conditions provides "*The use of premises is restricted to the use, time and accommodation specified in the hire agreement. The Hirer shall have non-exclusive use of the Premises and shall have access to the toilet facilities. The Hirer is not permitted access to any other parts of King Solomon Academy".* At paragraph 18 the agreement confirms that there is no intention to create a tenancy and that the academy staff shall be given free access to the hired premises for the purpose of inspection."

89. What is hired is the sports hall, not the entirety of King Solomon Academy ('KSA') (which is the "Premises"). This is confirmed by the Schedule of Special Conditions which identifies the Area as the "Sports Hall".

90. We consider that the FTT was entitled to conclude that the objective intention and effect of the agreement is that Netbusters was granted exclusive use of the sports hall during the

identified periods, subject only to KSA's right of access "to the hired premises for the purpose of inspection" (Special Condition, [18]).

91. To our mind HMRC's suggestion that Netbusters had no right to exclude others during the hiring is not a realistic reading of the agreement nor of the practical reality. It is not clear who HMRC said had a legal right to occupy the sports hall at the same time as Netbusters or on what basis.

92. The FTT's conclusion in its decision was justified:

> "[26] Reading the agreement as a whole, and with the assistance given by the evidence that we heard, it is clear to us that the parties intended for the sports hall to be hired and that the hirer would have uninterrupted use of the hall for the period of hire."

93. This was also supported by the FTT's conclusion on Netbusters' own agreement with its customers:

> "[36(1)] Exclusion: can some of the Appellant's customers properly exclude others from the pitch or facility during the duration of the hire? Whilst not explicitly set out in the terms and conditions [HB 907] there must, in our judgment be implied (in order to give the agreement business efficacy) a right to exclude others from the pitch / facility during the duration of the hire. The Appellant's customer must be able to say to anyone else on the pitch during their allotted time "*we have paid to play here for the next 45 minutes and you must not come on the pitch during this time*". It is no argument, in our judgment, to say that there are two teams on the pitch at the same time and one cannot exclude the other. The answer to that is that the teams, together, are jointly entitled to exclude any other individual or team - subject to any retained rights of inspection."

94. There is no challenge to this conclusion, which equally applies to all the agreements entered into by Netbusters to hire the pitches/courts to customers. In any event, under the principles explained by the CJEU, what is required is not full exclusivity but, rather, that the occupation is exclusive as regards all other persons not permitted by law or the contract to exercise a right over the property - see the CJEU's judgment in *Temco* at [24] – [25].

95. That case concerned a deliberate attempt to fall outside of exemption by granting more than one person the right to occupy. The CJEU held that the attempt failed: exclusive occupation requires that the occupation is exclusive as regards all other persons not permitted by law or contract to exercise a right over the property.

96. This test was satisfied as regards Netbusters' supplies and the FTT's decision was available to it.

97. We turn to the second criticism made that the FTT failed to consider whether Netbusters had the right to occupy the pitches as an owner. Contrary to HMRC's submission, we are satisfied that the 'right to occupy as owner' is not a separate test from that of exclusive occupation. A person has the right to occupy as owner if they satisfy the exclusive occupation test, even if they do not have all the other rights of an owner – see the CJEU's judgment in *Sequeira Mesquita v Fazenda Publica* C-278/18 EUC2019160 [2019] 2 WLUK 460 at [27].

98. HMRC's suggestion of a wide-ranging enquiry into what rights an owner might have versus what rights these customers receive goes beyond what is required in the case law. Netbusters was not required to have, or pass on, the full rights of an owner over the pitches hired.

99. In the present case, in our view, the FTT was entitled to hold that Netbusters was granted the right to exclusive possession of the pitches under its hiring agreements and supplied the same right to the teams which were jointly entitled to exclusive possession of the pitches for the purpose of playing sports matches (see [36(1)] of the decision). That satisfied the requirement for a right to occupy as an owner. The conditions in Note 16(iv) to Schedule 9 to the VATA 1994 that continue to exempt the supply of specified sports facilities, where the grantee has exclusive use of the facilities, support that construction.

Conclusion and Disposition

100. Each of the grounds of appeal has failed. There is therefore no need for us to go on to consider arguments about the principle of equal treatment as explained in *Marks & Spencer plc v HMRC* C-309-06 and its application to: HMRC's Business Brief 8, (2014) – sports leagues, VAT Notice 701-45 on sports supplies that are exempt; and Notice 742 on land and property including sports facilities. Likewise, there is no need for us to consider the effect of the FTT's decision in *Goals Soccer* and the extent of any wider application.

101. It is to be noted that (for the reasons explained above) this case is confined to its own facts and that the application of Note 16 of Schedule 9 to the VATA 1994 has not been considered.

102. The appeal is dismissed. The FTT applied the correct tests in law and was entitled to reach the conclusion it did on the evidence available to it, irrespective of whether we would have come to the same conclusion.

SIGNED ON ORIGINAL

MR JUSTICE MILES
JUDGE RUPERT JONES

RELEASE DATE: 5 July 2022