TC02179

Appeal number: LON/2008/0781

TYPE OF TAX – VAT - exemptions – accommodation- whether the appellants supply of studio flats to the local authority was excluded from the exemptions within Group 1 of Schedule 9 of the Value Added Tax Act 1994 because they were operating a hotel or similar establishment – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR AND MRS C WARD **Appellant**

- and -

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

TRIBUNAL: JUDGE SANDY RADFORD
JOHN LAPTHORNE

Sitting in public at the Old Bakery, Norwich on 28 June 2012

Mr B Stavers for the Appellants

Mr C Zwart, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision dated 3 April 2007 to assess a supply of services by the appellants in the form of studio flats which comprised rooms supplied to local authorities as part of the appellant's Spixworth Motel.

2. The issue was whether or not the supplies were in respect of accommodation excluded from Group 1 of Schedule 9 to the Value Added Tax Act 1994 ("VATA") due to qualification within the scope of exclusion by Item 1(d).

3. The appellants submitted that there were two separate businesses, a bed and breakfast business and some studio flats ("the Studios"). They submitted that the Studios were let only on a residential basis and therefore this accommodation was not excluded by Item 1 (d).

4. HMRC submitted that the supplies qualified as a "similar establishment" to hotel accommodation.

5. Evidence was given by Mr Donnelly for HMRC and the appellants, Mr Stavers and Mrs Cogman for the appellants.

Background and facts

6. The appellants operate the Spixworth Motel ("the Motel") in Norwich and have been registered for VAT since January 1987. The business was initially registered as a sole proprietorship in the name of Mrs Ward but became a partnership on 1 August 1982 and the VAT registration number was transferred.

7. The appellants were registered for VAT trading as the Spixworth Motel whose business activity was described as Motel – accommodation.

8. In January 2004 the appellants' website included "The Spixworth Motel is convenient for both business and leisure guests" and in 2007 further to alterations stated:

> **Self-catering studio rooms**
>
> "We have 33 modern all ensuite ground floor rooms, with additional ensuite first floor rooms. All rooms have colour televisions and tea and coffee making facilities…minimum letting period residential only…tariff includes linen change".

9. Mr Donnelly of HMRC carried out a routine assurance business on 27 and 28 February 2007. The appellant's business activities were established as the provision of bed and breakfast accommodation to paying guests with occasional restaurant sales using self employed staff if required.

10. The Motel consists of rooms and self contained studio flats known as Firs Residential Studios ("the Studios"). Rooms in the Motel as well as the Studios are

also provided to six local authorities for homeless people and those seeking refuge from, for instance domestic violence.

11. The appellants informed HMRC that the provision of accommodation to local authorities for homeless people and those seeking refuge could last from one or two days to a year or more. No services were supplied with this type of accommodation. VAT was charged on the first 28 days of the lets but no VAT was charged after this time. The Studios had separate records and non-VAT sales were treated as supplies.

12. Mr Stavers told the Tribunal that originally the appellants had charged VAT throughout. However after being told by one of the local authorities to query the VAT treatment of the supply of accommodation to the local authorities the appellants telephoned the National Advice Centre ("NAS") twice.

13. Records of the telephone calls on 11 May 2004 and 18 May 2005 were produced to the Tribunal. From these transcripts it appeared that on both occasions the appellants were informed that as long as the supply was of residential accommodation and not holiday lets the supply was exempt from VAT.

14. Following the visits by HMRC the appellants were informed by letter that in particular by reference to HMRC Notice 709/3 and Update 1 the accommodation supplied to the local authorities should be standard rated. HMRC stated in the letter that where a supply was made to a local authority VAT is chargeable on the full value of the supply regardless of the length of stay. As a consequence there were errors in the VAT returns.

15. Mr Ward replied to Mr Donnelly's letter stating that the enquiry had caused considerable stress and damaged the integrity of the business. He stated that to go back on the sales listed in the VAT error schedule would now be a daunting task with no financial benefit to HMRC. If they charged the VAT to the local authority and paid it to HMRC the local authority would then claim that money back from HMRC. In a letter dated 14 March 2007 Mr Ward claimed that there were two separate businesses collectively occupying the site. There was the Motel and then situated to the rear of the motel there were the Studios.

16. The appellants were advised on invoicing local authorities and an assessment in the amount of £83,851 was issued on 27 March 2007. The appellants stated that they intended to appeal against the assessment in light of the fact that they had acted in accordance with the advice given to them by the NAS but stated that they would charge VAT on future supplies made to local authorities.

17. On 15 May 2007 Mr Donnelly HMRC together with Mr Spooner of the HMRC revisited the Motel to review the assessment as requested. He explained to the appellants that in his view the premises were a "hotel or similar establishment" as defined in the legislation. The appellants explained that contrary to Mr Donnelly's understanding at his previous visit there was more profitability in local authority lets and so they would not want to let the room to someone else thus making it unavailable for a local authority placement.

18. Mr Donnelly and Mr Spooner inspected the premises and at the end of the review and inspection Mr Spooner explained to the appellants that he supported Mr Donnelly's view that the premises were a hotel or similar establishment. The appellants were however still unhappy and felt that they had been misdirected by HMRC.

19. Mr Donnelly told them that all the evidence he had seen supported his view. He told them that if they could provide evidence that each of the units to the rear of the main motel building could be sold separately by leasehold or freehold without any restrictions on them then he would reconsider.

20. By letter dated 5 June 2007 HMRC confirmed the assessment but informed the appellants that the dispute concerning the NAS's advice would be considered by them.

21. After HMRC's investigation no misdirection by the NAS was found and it was determined that the advice given was in accordance with the information supplied by the appellants at the time.

22. On 28 August 2007 HMRC visited the appellants again to discuss the implications of the tribunal decision in *Afro-Caribbean Housing Association v HMRC* [2006] UKVAT V19450. HMRC agreed the use of the resultant reduced value rule for stays over four weeks for local authority referrals. HMRC informed the appellants that this could be backdated. HMRC offered to reduce the assessment but informed the appellants that they required more information in order to do this. The appellants however declined to provide the information as a result of the time it would take as by then Mr Ward was seriously ill.

23. However the Tribunal was informed that it would be necessary to go back and charge the correct amount of VAT if the appellants wished the local authorities to pay the VAT which was owed to HMRC.

24. The appellants investigated the question of selling the units separately. In a letter to Mr Donnelly dated 17 September 2007 Mr Ward explained that the residential accommodation consisted of ground floor purpose built or adapted self catering flats. He stated that reference to the housing sales sections in the local press would confirm that studio flats were offered for sale on the open market and that their stock would be quickly sold should they wish to sell them. He referred to a nearby hotel which had a similar layout to theirs and which had sold similar studio flats to theirs.

25. He had spoken to the Broadlands District Council who had admitted that having set a precedent by allowing these sales would find no reason to object should the appellants wish to do the same. Mr Ward informed Mr Donnelly that a number of interested potential buyers had made serious approaches to buy the properties.

26. In a letter dated 8 May 2008 Mr Ward wrote to Mr Donnelly and informed him that they could sell their studio flats in part or in whole if they wished provided that the conditions of their core business were observed that is letting studio flats.

27. The Tribunal examined the letter from the Council which stated that the studios could be sold provided that no variation of the current planning permission was necessary. The studios could only be let or sold for the permitted use which was as part of the hotel and not for private residence.

28. Mr Donnelly explained to the Tribunal that he had told the appellants that he would only reconsider if the studios could be sold without restriction. As the current planning permission only allowed for their use as part of the hotel this meant that in order to sell them without restriction new planning permission was required.

The Law

29. The Town and Country Planning Use Classes Order 1995 states within Part C of Schedule 2:

> Class C1 Hotels and hostels: Use as a hotel, boarding or guest house or as a hostel where in each case no significant element of care is provided.
>
> Class C3 Dwelling houses: Use as a dwelling house (whether or not as a sole or main residence)—
>
> (a) by a single person or by people living together as a family, or
>
> (b) by not more than 6 residents living together as a single household(including a household where care is provided for residents)

30. Schedule 9 (1)(d) of the Value Added Tax Act 1994 ("VATA") which deals with exemptions states:

> 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—
>
> (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;

31. Note 9 to Group 1 Schedule of VATA defines "similar establishment" as:

> (9) "similar establishment" includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers.

32. In the case of *Namecourt Ltd* (LON/83/253) the appeal was against HMRC ruling that the appellant was supplying accommodation in a similar establishment to a hotel, inn or boarding house. In dismissing the appeal the Tribunal concluded:

> "It seems to us that this exception to Item 1 is really directed towards the sort of establishment which provides accommodation for a transient or floating, though not

> necessarily short stay class of resident. It may be long term or may be short term but it is accommodation which you go to with a view to moving on from in due course; and it will be accommodation which carries with it some element of service."

33. In the case of *Westminster City Council* (LON/87/664) the characteristics of a hotel were considered in reaching the conclusion that the accommodation offered should be standard rated for VAT. The characteristics considered were that a hotel, inn or boarding house, unlike a school or prison, provided accommodation as its main purpose and that the accommodation was usually provided for people who were for varying periods away from home or who were for the time being homeless. The Tribunal stated in respect of the interpretation of Item 1(d):

> "It seems to us that this exception is really directed to the sort of establishment which provides accommodation for a transient or floating, though not necessarily short-stay, class of resident. It may be long-term or may be short-term, but it is accommodation which you go to with a view to moving in due course; and it will be accommodation which carries with it some element of service. Again the level of service which you would get in a small boarding house is very much less than the level of service you would get in a five star hotel, but some level of service would be involved."

34. In *Acorn Management Services* (LON/00/534) this approach was approved and developed when the Tribunal held that studio apartment accommodation with a cleaning service and catering facilities provided by a commercial organisation for visiting occupying students from the United States for a period of some fifteen weeks qualified within the meaning of "similar establishment".

35. In *McGrath v Commissioners of Customs and Excise* [1992] STC 371 it was decided that a guest house which provided accommodation to long term guests and temporary residents in two discrete areas was nevertheless "a similar establishment" even although the long term guests might stay for years and could even do some decoration of their own. In his judgement Macpherson J alluded to the fact that the Customs and Excise guidance at the time pointed out that accommodation in motels, guest houses and the like were considered "similar establishments".

36. In the *Afro-Caribbean Housing Association* case it was decided that a reduced rate of VAT should be applied when accommodation was provided for more than four weeks.

Appellants' submissions

37. The appellants submitted that the residential studios were let only on a residential basis. The tenants regarded the studios as their home and attended to all their needs themselves. Trade was only conducted with local authorities who expected them to provide residential studio homes to their referrals on the housing register. This residential accommodation was not at any time on offer as holiday accommodation.

38. The appellants submitted that the motel was in a separate building and the Studios were totally self-contained in a separate building.

39. The tenants had no access to the motel facilities such as the bar, games room, restaurant or cleaning services.

40. The appellants submitted that the Studios were operated on a new account named the Firs Guest House and invoices were raised by and payments received in respect of this business. The appellants submitted that the Studios were operated as an entirely different business to the hotel and were not operated as a hotel or similar establishment.

41. At no time were the motel rooms and the Firs accommodation interchangeable.

42. The appellants referred to the NAS advice which they had understood to mean that VAT should not be charged on residential lets to the local authorities.

43. The appellants submitted that to go back on the sales listed in the error schedule would be a daunting and expensive task.

44. The appellants submitted that if they invoiced a backdated VAT bill for the £83,000 claimed by HMRC to the local authorities, on recovery they would pay HMRC, whereupon the local authorities would claim it back from HMRC. A recovery that went round in such a circle would achieve a nil result.

45. The appellants submitted that they had contacted the Council and established that the studios could be sold. They had understood this to be what Mr Donnelly had meant and had not understood that further planning permission was required in order to sell them as residences.

HMRC's submissions

46. Mr Zwart submitted that by virtue of Item (1)(d) of VATA the provision of accommodation in a hotel or similar establishment was excluded from exemption from VAT. Further HMRC's guidance on land and property at paragraph 10.3 excluded generally the homeless and asylum seekers from qualifying as visitors or travellers. Instead at paragraph 20.1 of the guidance it was stated that the provision of local authority block bookings for rooms qualified within the meaning of hotel within Item 1(d).

47. He submitted that after a second inspection Mr Spooner agreed with Mr Donnelly's view that the premises were a hotel or similar establishment. The premises consisted of a building comprising a motel part and a residential part and were rated within the same non domestic hereditament.

48. He submitted that although the appellants had tried to establish two businesses nevertheless they were both on the same premises and were advertised together on the website and to passers-by by road sign which did not indicate any exclusion of any category of occupier.

49. He submitted that whilst the Studios were apparently self contained accommodation a laundry room facility was included and the tenants appeared to have

access to chargeable internet and use of the garden. Also the tariff included a linen change.

50. He submitted that the local authority placements were always temporary and the occupants were always looking for something more permanent.

51. Consequently he submitted that these were premises containing accommodation which qualified within the meaning of Item 1(d). It was apparent that the appellants made supplies to various local authorities of accommodation on a temporary basis for homeless people on their local housing registers.

Findings

52. We found the appellants to be honest and sincere. They believed that they were operating the VAT payments in the correct way. They had only contacted the NAS at the request of a local authority and believed that the changes they made were in accordance with the advice given. We found that unfortunately the appellants did not ask the right questions.

53. We decided that the premises as a whole should be classified as a hotel or similar premises and therefore the Studios were subject to VAT at the standard rate albeit that where occupancies lasted for more than four weeks the VAT should be at a reduced rate in accordance with the *Afro-Caribbean* principle. We made our decision for the following reasons.

54. Whilst the occupancy might last for some time it was ultimately always of a temporary nature and the tenants would eventually hope to find a permanent residence. We found therefore that the tenants of the Studios could not properly be classed as residents.

55. We found that it would not have been possible to sell the Studios as residential units as this would have required a change of planning permission and the advice from the Council was that they could only be sold provided that a change in planning permission was not required.

56. Further we found that the premises were rated as non domestic, the business was described for VAT purposes as a hotel and the Studios could not be sold as residences without a change of planning permission which the Council had indicated would not be forthcoming.

57. We found a number of similarities in this case with those set out in paragraphs 32 to 35. In the *McGrath* case Macpherson J accepted that although the guests in that case might have considered the guest house in that case as their home this was not enough to change its character to that of a residence. Indeed many hotels have long stay residents with no other residence but this still does not affect the function of the establishment.

58. There were some services provided to the tenants albeit that they were minimal.

59. In making our decision we noted that the HMRC guidance specifically excluded accommodation supplies made to local authorities from the exemptions contained within Schedule 9 of VATA.

60. We found that over the period of the assessment the appellants had had many residents who stayed for more than four weeks which should thus qualify for a reduced rate of VAT in accordance with the *Afro-Caribbean* principle but unfortunately at the time the appellants were unable to provide the Tribunal with the necessary information which would support this.

Decision

61. The appeal is dismissed.

62. HMRC's assessment is confirmed subject to the appellants within six months of the date of the release of this decision having an opportunity to provide Mr Donnelly with information showing why the assessment should be reduced and to what amount.

63. If no further information as been provided within six months of the release of this decision then the quantum of the assessment is final.

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

SANDY RADFORD
TRIBUNAL JUDGE

RELEASE DATE: 13 August 2012