TC03473

Appeal number: TC/2012/01953

VAT- single or multiple supply – supply of land – provision by club of private booths for exotic dances

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAZMONDA LTD t/a SUGAR & SPICE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MRS SONIA GABLE

Sitting in public in Norwich on 17 and 18 December 2013

Simon Goodings and Darren Crawford, officers of the Appellant, for the Appellant

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Sugar & Spice is an adult entertainment club in Norwich. Upstairs it has a dance floor, seating accommodation and a bar. Downstairs it has six booths in which dancers may give private performances to patrons.

2. The dancers are not paid by Sugar & Spice; they receive tips for dancing on the dance floor, if they dance there, and fees from patrons for private performances in the booths. The dancers make payments to Sugar & Spice for the use of its facilities. HMRC accept that the dancers are neither employees not agents of the club.

3. This appeal concerns the VAT nature of the supplies made by Sugar & Spice to the dancers in return for these payments. HMRC argue that the supplies are standard rated, but Sugar & Spice that they, or at least some of them, are exempt supplies of the letting of land.

4. The payments made by the dancers to Sugar & Spice were: (i) a house fee of £20, or £40 on a Saturday or Sunday, and (ii) a commission of 25% of the fee they received for the private performances in the booths. One factual issue before us was whether some dancers received only the use of the booth (for which they paid only the commission) and did not in addition receive supplies for which they paid the house fee.

5. The Appellant's notice of appeal indicated that it was appealing against a decision of 15 November 2011. This was a letter of review. By the time of this letter Sugar & Spice had agreed that the house fee was paid in return for a taxable supply, but they argued that the commission was for an exempt supply of land. The review letter addressed the question of whether the commission paid for the use of the booths was for a standard rated supply. The officer who wrote the letter concluded that it did relate to such a supply.

6. Following the letter of review HMRC wrote to Sugar & Spice on 16 November 2011 with calculations for 09/10 (the VAT period ending in September 2010) and assessments for the periods 12/10 and 03/11 (originally made on 19 August 2011 but withheld until the outcome of the review).

7. Sugar & Spice's notice of appeal was signed on 6 January 2011 and was therefore given more than 30 days after the letter of review. It appeared however that the letter was not received until 29 December. We permitted the appeal to proceed.

8. The notice of appeal referred only to the review letter of 15 November 2011, and not the assessments. In this decision we therefore address the decision in that letter only, and by reference to the facts as we find them at that time. It is possible that the operation of the Appellant’s business may have changed since then.

The nature of the evidence

9. We heard oral evidence from Darren Crawford and Simon Goodings whom we understood to be directors of Sugar & Spice, and from Veronica Clarke, the officer of HMRC who had made to the original decision that the club's supplies were taxable.

10. We had before as a bundle of copy correspondence between the parties which included various versions of the documentary link between the dancers and the club. At the hearing Mr Crawford also provided a notebook entitled Pre-Booked Rooms, and, following our request to see accounting entries, a printout of the club's accounting daybook entry for a particular day.

The Evidence and our Findings of Fact

11. Mr Crawford told us that Sugar & Spice opened in late October 2010. It has premises in the centre of Norwich. It advertises on the internet.

12. The booths are small (about 6 feet by 9 feet) partitioned cubicles with a small sofa. They are dimly lit. The music playing in the upstairs area also plays downstairs. One of the booths has a pole to dance around. Each booth has a curtain which may be drawn across its entrance.

13. There are lavatories (used by customers and dancers) and a secure room which dancers may use to apply make up, change clothes, and in which personal belongings may be stored.

14. The club has CCTV. In each of the booths there appeared to be a CCTV camera. There were monitors in the office. Mr Goodings said that that whoever was in charge could check what was going on.

15. Mr Crawford told us that at about the time the club started another similar club in Norwich had closed. Many of the dancers at that club had come to Sugar & Spice. Those dancers had regular customers who came to see them at Sugar & Spice, and who came to see private dances in the booths.

16. He told us that the dancers' patterns of work varied: one dancer might come on one day from 9 pm to 4 am, and then not come for several days; those dancers who did not have their own coterie of regular customers would use the facilities of the club to build up a cadre of regulars.

17. Since 2009 Mr Crawford said that between 100 and 300 different dancers had used the club. Of these only one of the initial cohort still performed. It was, he said, a short term industry for a lot of the dancers, and whether they worked or not on a particular day could depend on what they had earned last time they appeared.

18. We accept that evidence.

19. When a dancer required the use of a booth one would be allocated to her by the management. Different booths could be allocated to the same dancer during the course of an evening. The dancers would occupy the booth with their customer for between 5 minutes and several hours.

20. Mr Crawford told us that while in a booth with her customer, the dancer is given control of the booth and is told she can exclude anyone from it. Subject to some minor caveats we accept that evidence: it seems to us that in the absence of express agreement to the contrary, it must be a fundamental term of the contract for the use of such a booth for such purposes that the dancer can exclude or admit whomsoever she wishes. The caveats are these:

(1) Mr Gooding was told that if it appeared from the CCTV monitors that drugs were being taken in a booth he would march the users off the premises. We find that the right to occupy a booth was subject to entry to effect summary termination if the booth was used for illegal purposes or in a manner which contravened the club's licence; and

(2) there would be a right to enter in the case of fire or other emergency.

21. Mr Crawford told us that two dancers dancing for different customers would never share a booth, but it was possible for two dancers to use a booth to dance for one customer. We accept this evidence.

22. Mr Crawford told us that the tips received by dancers dancing on the upstairs stage were not large: a dancer would be doing well if she received £20 a night from this source. The principal source of the dancers' income was from the private dances in the booths. Most dancers earned at least £100 a night from this source, and a successful dancer could earn up to £1,600 in a night. We accept this evidence.

23. On 1 March 2011 Mrs Clarke visited the club and met Mr Goodings. Mrs Clarke's visit was during the day and she did not have an opportunity to see what happened when the club was open.

24. Mr Goodings gave Mrs Clarke a copy of a document entitled Performance Licence and another headed Application for License to Occupy Space (this latter required the dancer to give details such as her age and national insurance number, and to give certain warranties, but imposed no obligation on Sugar & Spice to do anything).

25. Mrs Clarke was told that weekends were busier than weekdays and more dancers worked at weekends. She was told that on very busy nights the dancers would have to wait for a booth to be free. Mr Crawford and Mr Goodings told us that that happened only very occasionally, but might happen for example if two large stag parties were taking place at the club at the same time; it did not happen during the week. We find that on weekdays there were always free booths and that at weekends only occasionally would all the booths be occupied at any particular time.

Pre-Booking

26. In their evidence to us Mr Crawford and Mr Goodings said that there were two different ways in which dancers would use the booths. Some dancers danced on the stage upstairs and would invite an interested customer to go to a booth for a private dance. These dancers paid the standard house fee - effectively for the facility of being able to find customers who would pay for private dances - and also paid the club's

commission of 25% on their private dance income. But they said other dancers did not dance on the stage and came to the club only to use the booths. These dancers, they said, made a prior arrangement with their customer: they would meet him at the club door at an appointed time and take him to the booth which they had booked in advance. These dancers, they said, paid only the 25% commission for the use of the booths.

27. Mr Crawford said that about 80% of dancers would call in and pre-book a room for a specified time rather than finding clients from the club floor.

28. Mrs Clarke told us that she had no recollection of pre-booking being discussed at the time of her visit. Mr Goodings made no comment when he received a copy of Mrs Clarke's visit report which did not mention pre-booking. Mr Gooding said he had not thought it relevant at the time. Sugar & Spice's grounds of appeal (of January 2012) make no reference to pre-booking. The first-time pre-booking appears in the correspondence is in a letter of 30 May 2012 from Mr Crawford to HMRC in response to HMRC's statement of case in which, at point 10, he says:

> "The licence is for the use of the private room only. The dancer does not have use of the main floor, dressing room facilities, microwave, fridge, music, manager etc. E.g. a dancer could pre-book a room for a specified time, arrive at the club, proceed straight to the room, stay there for the specified time that she requires, pay her 25% and leave the premises. She will not have incurred the house fee."

29. Mr Crawford told us that he managed the pre-bookings. He would receive a text message from a dancer booking a booth for a particular time. After lunch on the first day of the hearing he provided us with the Pre-Booked Rooms notebook. This was a spiral-bound book which did not look as if it had been written up recently. On each page there were two columns of entries, each column had been divided into girls' names and times under a date. Thus, for example, the first column of a page headed August 2011 reads:

Thurs 25th	
Brooke	12 -1.30
Rebecca	11 -11.45 / 1.30 - 2
Natalie	12 - 1
Cat	10 - 10.30 / 3-3.30
Jasmine	9.30 - 10 / 12 - 1.30
Crystal	12 – 1 / 3.30 - 4.30
Fri 26th	

…	…

30. The manuscript entries in the book appeared to be in the same hand throughout. Mr Crawford told us it that it was his. The first page in the book started with 12 September 2011, and the last page started and finished with 31 December 2012.

31. Mr Crawford told us that bookings were made a day or so beforehand: he said that the dancers would speak to their regular clients and know some 24 hours in advance when they wanted a booth.

32. We noted that:

(1) for each day there were between two and about 10 names;

(2) on the first few pages, rather than a gap opposite the date (as in the example above), sometimes a time appeared without any name, thus

"Sep14 10.30 -11.15"

(3) there were no crossings out or amendments, save that between Tuesday 11 April and Saturday 30 April 2011 the numerical date for each day had been initially one in advance of what it should have been and had been corrected to the correct number; so that, for example "Wed 13" was an amendment of “Wed 14";

(4) the entries for one day were (save at the end of a column) followed immediately by those for the next day, as in the example above;

(5) there were a large number of girls’ names. In March 2011 there were 86 names, of which two appeared five times, eight appeared four times, eight appeared three times, 23 appeared twice and the remainder, 46, once only.

33. Mr Crawford said that he was a film actor and film producer and that he spent significant spells of time on the west coast of the USA. But he said that he was never out of the UK for more than 6 to 8 weeks. When he went to the US he said that he took the Pre-Bookings notebook with him (despite the text on the front cover "Do Not Remove") and used the texts which the dancers sent him to make the pre-booking entries in it. He said he was able to communicate with Mr Gooding at the club by e-mail, and that they spoke by phone on most days.

34. Mr McGurk drew Mr Crawford's attention to the amended dates in the April entries referred to above. He asked whether all the errors had been corrected at the same time. Mr Crawford could not remember.

35. We noted that the west coast of the USA is some eight hours behind the UK so that, for example, had a dancer texted Mr Crawford at 8 pm on a particular day in the UK he would have received it at 12 noon on the same day. The errors in the dates did not therefore seem likely to have been attributable to Mr Crawford's presence in the USA at the relevant time.

36. Mr Goodings told us that the club got its fair share of 'no shows' for booked booths, but that the notebook was used as a rough guide to check that the dancers were paying the correct amount of commission to the club. Whilst the club was not privy to the bargain between a dancer and her client, they had a rough idea of the fee from the time spent in the booth. Generally though, he said, it was a trust relationship. Mr Crawford said that he regarded the booking system as more about ensuring availability of the booths, rather than checking on the dancers' commission payments.

37. We were shown a printout of an Excel spreadsheet from the club's accounting package for a particular day (we were not told which day). This showed takings from six dancers, three of whom had paid the £20 house fee, and three who had not. Those who had not paid the house fee had apparently declared private dance fees of £360-£480, and those who had paid the house fee, private dance fees of £110-£140.

38. Mr Goodings and Mr Crawford told us that those dancers who had pre-booked, and did not pay the house fee had limited use of the club's facilities (other than the relevant booths). They had use of the lavatory, and the secure room to keep their handbag, but were not otherwise allowed to use the dance floor or bar. Only those who paid the house fee had use of the changing room**.** They said that dancers' clients, whether of pre booking dancers or of those who paid the house fee, could buy drinks at the bar and take them down to the booths**.**

39. Mr Goodings said that the club took security very seriously, and that he would escort dancers who paid the house fee back to their car or their transport when they left the premises, and would escort pre-booking dancers in the same way if they asked. Overall he said that he took dancers back to their cars or transport about twice a night.

The documentary material

40. Three versions of documents recording an agreement between a dancer and Sugar & Spice were shown to us. The first version was used in early 2010, the second from October 2010, and the third bore the date January 2011. Each included a Performance Licence and an Application to Occupy Space.

41. The first set of documents was based upon those documents used by Spearmint Rhino, a club in London, the effect of whose arrangements with dancers had been considered by the High Court in *Spearmint Rhino Venture (UK) v HMRC* [2007] EWHC 613. It contains provisions obliging the dancer to work for a set number of shifts per week, and sets the charges to be made for private dances.

42. In the second version the set private dance price clause was removed. In the third version many of the more technical clauses such as those relating to the status of the parties, termination, assigning and severability had been removed: the obligations to pay a house fee and to work specified shifts were absent, and the only obligation imposed on the club was to let the booth and to advertise the business "in a manner… for the benefit of both Performer and Owner".

43. Mr Crawford told us, and we accept, that initially they had intended to follow the Spearmint Rhino model, but they found that that model did not work in Norwich. As the versions evolved they became shorter and more directed towards Sugar & Spice's actual business model in which dancers came and went more or less as they pleased and charged such fees to their clients as they wished. He suggested that pre-booking had been part of this adjustment.

44. The first set of documents was used in connection with obtaining approval from the police and the relevant licence for the club. We were told that every dancer had signed at least one version of the agreement.

45. Common to all the agreements were the following provisions:

(1) recitals that (a) Sugar & Spice operates an establishment where live nude, semi nude or bikini clad dance entertainment is provided, (b) Sugar & Spice desires to license the dancer to use certain private areas;

(2) a provision that the club licenses the dancer to "use those parts of the premises designated by the Owner (private rooms only) for performing entertainment" and that "whilst in occupation of the room the Performer shall have the right to exclude and admit others as they shall choose";

(3) A provision delimiting the period of the licence to the duration of the performance;

(4) a provision for the payment of the 25% commission; and

(5) provisions designed to indicate that the dancer was not employed by the club but in business on her own account.

46. In the first two versions of the agreement, the dancer agrees to pay the house fee of £20 or £40, but in the third version the only fee payable is the commission. Further, in the first two versions, the club expressly undertook to provide lighting and dressing room facilities. This obligation was not present in version three. Mr Goodings explained that the house fee was paid nevertheless by agreement between the parties by those dancers who worked upstairs.

47. With the Performance Licence was a Dancers Pack, again we understood derived from Spearmint Rhino's documentation. This comprised a Code of Conduct and "Tips, Tricks and Useful Information for main floor".

48. The Code of Conduct spoke of a house fee for "the use of the dressing room and changing facilities, fridge, freezer, microwave, access to the main part of the club only, music and manager", and of a 25% commission. It indicated that dancers would be asked to attend staff meetings – which did not appear to have taken place, and advised dancers not to give out their phone numbers - advice which would have been difficult to follow by a dancer arranging at 24 hours notice a private dance with a client in a booth.

The documentation - our appraisal

49. It seemed to us that, given the effort involved in amending the documentation it was likely that, as Mr Goodings and Mr Crawford had said, each dancer did sign a version of the paperwork.

50. But we find, as was implicit in Mr Crawford's statement that they spent the early months fudging things and finding their way through making mistakes, that the first two versions of the agreement did not fully reflect what happened in practice. Dancers did not operate a shift system, did not receive fixed fees, and did not perform a set number of dances. There was no house mum, but a club manager. As Mr Crawford said, Sugar & Spice in Norwich was not Stringfellows in London: the earlier documents did not properly reflect (developing) reality.

51. Indeed it seemed to us that the early versions of the agreement in particular were designed principally to encourage the licensing authorities to license the club and to give the formal impression of a relationship with the club in which the dancers were not employees.

52. As a result we take the formal terms of the documentation with a good pinch of salt, and treat only parts of this documentation as reflecting part of the relationship between the dancers and the club.

53. We find however that, consistently with the oral evidence of Mr Goodings and Mr Crawford, the agreement conferred on the dancer the exclusive right to the occupation of an allocated booth for the duration of her dance, with the right to exclude others therefrom.

Pre-booking - our appraisal.

54. We had the following concerns about the nature of the Pre-Booking notebook:

(1) it started on 12 September 2010, but Mr Crawford had told us that Sugar & Spice started business in late October 2010;

(2) Mr Crawford spent significant periods and substantial amounts of time in the US, yet in one month he was able to recognise the senders of texts from 86 different dancers, all of whom had his phone number and the majority of whom booked only once in the month;

(3) we were surprised by the number of dancers (46) who booked a booth only once in March 2011. It was odd that so many dancers had only one client who wanted a private dance on an evening in which that dancer was not working in the upper part of the club. It also fitted ill with Mr Crawford's statement that the dancers built up a cadre of regular customers (para 16 above);

(4) it seemed very odd to us that all or most of the bookings were 24 hours ahead. Mr Crawford's evidence was to that effect and indeed, if they were not, and bookings for today might be received at the same time as bookings for tomorrow, it would have been impossible to ensure that the list of names for any particular day in the Pre-Booking notebook was complete before the entry was

made for the next day's date and bookings, and yet there were no gaps or squeezed-in additions in the notebook for any day;

(5) given Mr Gooding's evidence that it was rare that all the booths were occupied at the same time, it seemed unnecessary to rely upon the book principally as a system to ensure availability of booths, as Mr Crawford had suggested;

55. It also seems to us that a desire to see a private exotic dance was rarely something which arose coolly and clinically for preplanned consumption in 24 hours time, but was more readily understandable as something more immediate and far more likely to be arranged over a shorter time. We thought that whilst one might go to such a club thinking that, perhaps, even probably, such an occasion might eventuate, it would be unusual to fix an appointment in advance with a particular dancer one had met on some previous occasion. We thought that at the very least there would be more spur of the moment bookings, although it was possible that some organised a private dance in advance as part of an evening out and in such a case that such organisation might even be more than 24 hours ahead.

56. It seems to us far more likely that the notebook rather than being a record of pre-bookings, was a record of those dancers who on a particular day had actually used a booth, or that it was a record of something entirely different (given its start date).

57. As a result we did not believe Mr Crawford's evidence that this was a record of pre-bookings. Nor did we believe the evidence that 80% of those using the booths pre-booked without first dancing in the upper part of the club. Instead we find that it was not proved that between 2009 and November 2011 any dancer used only pre-booked booths. This is for the following reasons:

(1) given that we disbelieved Mr Crawford's evidence of the nature of the Pre-Booking notebook, we found his evidence on pre-bookings of little weight;

(2) we find it unlikely that all or most customers would wish to book substantially in advance;

(3) if pre-booking booths was a significant feature of the club's business it would be likely that it would have been mentioned to Mrs Clarke on her visit;

(4) versions 1 and 2 of the documents are inconsistent with pre-booking only; and version 3 is inconsistent with a house fee. Taken together they do not indicate that there was any pre-booking of booths only;

(5) the letter of 30 May 2012 (quoted at [28] above) speaks of pre-booking as an example rather than a normal occurrence. Had 80% of booths been pre-booked, it seems likely that the terms of the letter would have been different; and

(6) the accounting daybook page indicated that the three highest earning dancers had not paid the house fee whereas the three lowest earning dancers had. That is consistent both with a system in which some dancers were provided only with booths, but it was also consistent with a system in which the house fee was waived when commission income exceeded a particular threshold.

58. We accept however that the pattern of the club's business was not uniform. The third version of the documentation – which made no mention of the house fee and dealt solely with the right to use a booth – suggests that it is possible that in and after 2011 some dancers may have entered the club only to go to a pre-booked booth and to dance there for a client without making any other use of the club's facilities. The conclusion we reach above is that on the evidence before us we were not convinced that this happened during the period covered by the review letter and the decision therein.

59. We conclude that although some dancers may have paid only commission, all the dancers in the relevant period were provided with the same facilities by the club

What was provided to the dancers for the monies they paid?

60. In return for the payments they made, dancers received from the club:

(1) the right to use the upstairs dance floor to dance and attract clients, and to use the space around the dance floor to talk to potential private dance clients;

(2) the right to use a booth allocated to them when requested for the purpose of providing an exotic dance. The right was for the period of the dance and of any subsequent conversation with their customer;

(3) the right to admit, or exclude, other persons of their choice to the booth subject to the right of the club to enter (and to terminate a use of the booth) if (a) there was an emergency or (b) the inhabitants were doing anything illegal or contrary to the club's licence;

(4) the right to use the lavatories, and to use the secure room to keep belongings and to change and make up:

(5) the benefit of the music in, lighting, cleaning and, no doubt, maintenance and heating of, the booths and the other areas of the club;

(6) the benefit of the security and management oversight provided by the club;

(7) if required, an escort to a car or other transport at the end of the evening's work; and

(8) the benefit of the club's advertising (undertaken pursuant to the club's contractual obligation to advertise in a manner for the benefit of the dancer and the club).

61. It did not seem to us that the ability for clients to purchase drinks in the bar was a facility provided to the dancers in return for any fee; that would have been something permitted by the club in its own interest even if the client had been a client of a pre booking dancer.

The typical dancer

62. The dancers were the consumers of these benefits. We have accepted Mr Crawford's evidence that the tips earned by a dancer on the main floor would

normally fall short of the house fee. Thus the economic imperative for a dancer was to obtain fees from private dances in the booths. Thus it is likely that the typical dancer on a typical evening would make use of a booth on one or more occasions, and that for such a dancer the use of the upstairs floor of the club was necessary in order to make a profit, so that the profitability of her business was dependent upon the use of both the booths and the upstairs floor, as well as the success with which the club advertised.

The Appellant's submissions

63. The Appellant says that what was provided was an exempt supply of land: there was (i) a supply of a defined area of land, the booth, (ii) for an agreed duration, the time of the dance, for the time booked by the dancer, (iii) in return for payment, and (iv) with a right to occupy as owner and to exclude others from enjoying that right.

Discussion

64. We agree, for the reasons which follow, that if what was supplied was strictly limited to the element representing the booth, the supply would be a supply of land. The right of the club to enter in certain circumstances did not diminish the dancer's right to exclude others, and the uncertain length of the period of occupation, "the length of the dance", did not in our view prevent it being the letting of land: see [83] below.

65. But if, in return for the dancer's payment, the club supplied more than just the booth – as it did – and the elements of that supply are to be treated as one composite supply, the nature of that supply might not be of land. We therefore turn to consider whether the elements of the club's supply should be treated as a single supply for VAT purposes.

<u>One supply or many?</u>

The relevant legal principles

66. In *HMRC v The Honourable Society of the Middle Temple* [2013] UKUT 0250 (TCC), the Upper Tribunal summarised the applicable principles thus:

> "60. The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) 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.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply 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 which share the tax treatment of the principal element.

(9) 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.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) 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."

67. The Upper Tribunal considered a number of CJEU judgments in arriving at this summary, but we find the guidance given by the Court in Case C-44/11 *FinanzamtFrankfurt am Main V-Höchst v Deutsche Bank AG* [2012] STC 1951 particularly apposite where it cannot be said that there is a principal element to which the other elements are ancillary. That case concerned whether portfolio management services consisting of a number of elements, including deciding what to buy and sell

as well as implementing those decisions by buying and selling securities, should be regarded as a single supply. The CJEU held at [23] - [28]:

> "23. Having regard, in accordance with the case-law referred to in paragraph 18 of this judgment, to all the circumstances in which that portfolio management service takes place, it is apparent that the service basically consists of a combination of a service of analysing and monitoring the assets of client investors, on the one hand, and of a service of actually purchasing and selling securities on the other.
>
> 24. It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.
>
> 25. However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.
>
> 26. As the Advocate General stated at point 30 of her Opinion, to decide on the best approach to the purchase, sale or retention of securities would be pointless for investors within the context of a portfolio management service if no effect were given to that approach. Likewise, to make – or not, as the case may be sales and purchases without expertise and without a prior analysis of the market would also be pointless.
>
> .
>
> 27. In the context of the portfolio management service at issue in the main proceedings, those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.
>
> 28. Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split."

68. We find the description of the separate elements as being “pointless” on their own for a typical consumer a helpful indicator of inseparability.

69. Were the elements of the supply limited to the provision of the booth, the right of access to it, lighting, heating, cleaning, security and use of the lavatories we would have found that the other elements of the supply were ancillary to the provision of the booth: for a typical dancer those elements would not have been aims in themselves but provided as a means of better enjoying the occupation of the room (see in a similar vein Warren J at [68] in *Byrom, Kane & Kane Trrading as Salon 24 v HMRC*

[2006] EWHC 111 (Ch)) In that case the supply would have been exempt as a supply of land.

70. But the elements of the club's supply were not so limited and in particular included the use of the upper floor. It does not seem to us that the club's provision to the dancer of all these elements can be treated as comprising a principal supply of the booth to which the other elements are ancillary (in the sense that for a typical dancer the other elements would not be an aim in themselves but a means of better enjoying the use of the booth).

71. That is because, while these other elements enable the dancer to make money by attracting custom which needs the booths, and are not therefore aims in themselves, they are not (save lighting, heating etc) means of better enjoying the use of the booth: they enable the use of the booth but do not add to it - indeed once, and while, the booth is taken the benefit of the ability to use the main floor recedes. They assist the dancer's business but not the enjoyment of the occupation of the booth.

72. But it does seem to us that the provision of the booth is not economically divisible from the other elements of the supply. That is because the dancer's ability to make money is dependent upon the use the main part of the club to attract customers for private dances. Therefore for the typical dancer the use of the main floor facility would be largely "pointless" without the use of the booth, and without the use of the main floor any use of the booths would be "pointless" since she would have attracted no customer to make payment. These elements are thus inseparable or indispensible from the provision of the booth from an economic point of view..

73. The provision of lighting, heating etc in relation to the booth may either be treated as ancillary to the booth which use would then, for the reasons in the preceding paragraph, be treated as a single supply with the other elements of the club's provision to the dancer; or the use of the main part of the club, the advertising and so on may be regarded as pointless without occupation of the booth and vice versa, so that, taken together, they fall to be treated as a single supply.

74. It is true that the use of the booth is charged for separately and that a dancer might use the main floor but choose not to use the booth, or not to find customers who wished for private dances, and that it therefore might be said that the use of the main floor was independent of the use of the booths.

75. The Upper Tribunal recognised (see (10) and (11) from paragraph 60 of *Middle Temple* quoted above) that freedom to choose elements of a multiple supply, and separate invoicing and pricing were factors which may point to a supply being divisible.

76. But a *typical* dancer will use a booth in the course of an evening, and will come into the club intending to make money from the use of the booths; as a result the ability to use the main floor will be economically inseparable from the ability to use the booths. While there was in theory freedom to choose whether to make the use of

the main floor only, but for a typical dancer, the use of the booths and the main floor will not be economically separable.

77. We therefore find that in return for the monies paid to it (including the house fee and the commission), the club made a single supply to the dancer. We now turn to consider the nature of that single supply for VAT purposes.

The Nature of the Supply

The relevant legal principles

78. Article 135(1)(*l*) of the Principal VAT Directive provides for the exemption of the leasing or letting of immovable property, but Article 135(2) provides:

> "135(2) The following shall be excluded from the exemption provided for in point (*l*) of paragraph 1.
>
> (a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;
>
> (b) the letting of premises and sites for the parking of vehicles;
>
> (c) the leasing of permanently installed equipment and machinery;
>
> (d) the hire of safes.
>
> "Member states may apply further exclusions to the scope of the exemption referred to in point (*l*) of paragraph 1."

79. The UK's enactment of the Directive takes advantage of the right to apply further exclusions. It exempts (in Group 1 Schedule 9 VAT Act 1994) the grant of a licence to occupy land but excludes, in addition to the exclusions of Article 135(2):

> "(*l*) the grant of any rights to occupy a box, seat or accommodation at a sports ground, theatre, concert hall or other place of entertainment."

80. Mr McGurk argued that if the club made what would otherwise be a supply of land to a dancer, the rights granted to her fell within this carve-out from the exemption.

81. In *Blasi v Finanzamt München* [1998] STC 336 the Advocate General at [16] described the common feature of the exclusions in what is not Art135 as being that "they entail more active exploitation of the immoveable property". He went on (at [19]) to note that short term letting justified treatment as being outwith the exemption since it was more likely to involve additional services such as cleaning and more active exploitation of the property than long term lettings, in so far as greater supervision and management was required.

82. In *C&E Comms v Sinclair Collis Ltd* [2001] UKHL 30, Lord Scott at [68-71] drew attention to the possible implication of the carve outs for hotel rooms and parking spaces that very short term lettings were capable of being lettings of land (implications reflected in judgements of the ECJ). But he considered that "the exclusions cannot reasonably be supposed to indicate…that every transaction falling within an exclusion would, had it not been for the exclusion, have fallen within the exemption. The exclusions [showed] that transactions of the sort described are capable of falling within the exemption and that it [was] the intention [of the carve out]…that they should not do so." As a result it was not necessary to ask whether a contract for a hotel bedroom was a letting of immoveable property. "It might or might not be. The answer would depend on the facts":

> "A contract under which a room is taken for a week might well constitute a letting. A contract under which a room is taken for half an hour so that a man might consort with a lady would, I suggest, be very unlikely to be held to do so."

This aspect of Lord Scott's approach was not echoed in the other speeches nor reflected in the guidance given by the ECJ on the referral to it of the case.

83. In *Belgian State v Temco Europa SA* [2005] STC 1451, at [19] to [21] the ECJ said that:

(i) 'letting' within Art 13 is the conferring of a right of occupation with the right to exclude others from such enjoyment [19];

(ii) the passive letting of land for rent linked to the passage of time and not generating added value is to be contrasted with activities the nature of which is best understood as the provision of a service rather than simply making property available (the Court gave as an example the use of a golf course; in *Sweden v Stockholm Lindöpark* [2001] STC 103, the ECJ noted at [26] that the activity of running a golf course generally entailed, not only the passive activity of making the course available but also a large number of other activities such as the supervision, management and maintenance of facilities);

(iii) the period of the letting was not the decisive factor ([21]);

(iv) it is not essential that the period of the letting be fixed at the outset ([22]); and

(v) a letting may relate to certain parts of a property which must be used in common with other occupiers ([24]).

84. It seems to us that the reason the period of letting may be relevant is because generally the longer the period of letting the less the landlord will generally do, and the shorter the period, and in particular the more repeated the letting, the more often

the landlord will be engaged in providing services which contribute to the impression that what is provided is not simply the passive provision of a right to occupy and which add value to what is supplied. It depends, as Lord Scott said, on the facts. There may be a difference between a serviced hotel room provided for half an hour, and a rather bare booth or a one off supply of an upstairs bedroom provided for the same period.

85. We accept that a central element of the composite supply made by the club is the use of the booth. That use taken on its own is the exclusive right to occupy land for a period of time. Leaving wholly to one side the other elements of the club's provision, we accept that that would be a supply of land even though the time for which it was used was short and not specified as a number of hours or days or weeks in advance. It would have been the passive right to possess land and to repel others from occupation for a period which would not involve the provision of significant services by the club. There would have been a separate supply (of the same or a different booth) each time a booth was provided.

86. The use would not be transient or for a purpose other than simply the occupation of the land, like a car on a toll bridge, but like that of a car in a car parking space – the kind of use which the Directive appears to acknowledge may fall within the main exemption by carving it out in Article 135(2)(b). (We note a similar presumption in the provision of the UK's carve-out of a seat at an entertainment – occupation of which may last minutes rather than years.)

87. But the composite service supplied to the dancers was different. The club was not passive in its provision. It provided advertising, music, lighting, heating, cleaning, management, security and the use, in common with others, of the upper floor and its facilities. It added value to the simple provision of land. That was to our minds a supply properly characterised as the provision of services rather than the passive supply of land.

88. As a result that composite supply did not fall to be treated as a supply of land and is standard rated.

89. We should mention Mr McGurk's argument that, if we had found that the supply would otherwise have been exempt as a letting of land, this particular letting fell within the exclusion from exemption in paragraph (*l*) of the UK provision: the grant of the right to occupy accommodation at a place of entertainment. We did not think that this would have applied. The natural meaning of the words "box, seat or accommodation" is redolent of what is provided to a spectator rather than to a performer. It would apply to the supply made by the dancer to her customer.

Conclusion

90. We dismiss the appeal.

Rights of appeal

91. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 9 April 2014