



[2021] UKFTT 0477 (TC)

**TC 08351/V**

*VAT – characterisation of supply – provision of accommodation to homeless young people – land exemption for ‘the leasing or letting of immovable property’ – whether supply a ‘licence to occupy land’ within Group 1 Schedule 9 VATA land exemption – legal classification by reference to ‘exclusive possession’ and Community law criterion ‘to the exclusion of all others’ – whether supply falls within Directive hotel exclusion – a functional approach and purposive construction for ‘similar establishment’ under Item 1(d) exclusion from land exemption – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/05201**

**BETWEEN**

**CITY YMCA LONDON**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON**

**The hearing took place on 29, 30 and 31 March 2021 by video.**

A face-to-face hearing was not held because of the coronavirus pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

**Mr Peter Mantle of Counsel, instructed by Buzzacott LLP, for the Appellant**

**Ms Isabel McArdle of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. This is a VAT appeal by City YMCA London ('CYL') against the respondents' ('HMRC') decision in respect of the classification of the supply of service made by CYL to young people with hostel accommodation in return for payment ('the Supply').

2. The substance of the decision of HMRC under appeal is contained in a letter dated 1 March 2019, which was upheld on statutory review by letter dated 18 July 2019 ('the review conclusion' or 'the liability decision'), with the result that VAT was held to be chargeable on the 'normal' full value of the Supplies at the standard rate.

3. The crux of the issue is whether the recipient of the Supply gains 'exclusive possession of the property' in question for the supply to be 'a licence to occupy land' within the terms of Item 1 of Group 1 in Schedule 9 to the Value Added Tax Act 1994 ('Item 1' and 'VATA'). HMRC's decision is that the recipient of the Supply does not gain exclusive possession for the Supply to be a 'licence to occupy land'. Consequently, VAT is chargeable on the full value of the supply at the standard rate.

4. If CYL wins on the principal issue, then a secondary issue arises, in that the appellant contends that its Supply is eligible for the 'reduced value supply rule' as CYL is a 'similar establishment' to a hotel. In reply, HMRC contend that the reduced value concession does not apply to the Supply made by CYL, as it is not an establishment similar to a hotel.

5. By email dated 2 March 2021, the respondents stated that as a result of the liability decision, notices of assessments were issued on 26 March 2020 and 2 October 2020. These assessments are not matters under appeal. The matter under appeal concerns HMRC's decision on the classification of the Supply, and the Tribunal's decision is a decision in principle.

### WITNESS EVIDENCE

6. For the appellant, Dr Gillian Bowen gave witness evidence as the present Chief Executive Officer of CYL. She was also the CEO at all material times to this appeal. Her evidence was led by Mr Mantel, and she answered supplementary questions from the Tribunal in a direct and straightforward manner. I find Dr Bowen a reliable and credible witness, and accept her evidence as to matters of fact.

7. The respondents adduced no witness evidence. In relation to witness evidence for the appellant, HMRC intimated by email dated 2 March 2021 that they did not intend to cross-examine Dr Bowen. Where Dr Bowen has expressed her views, such as how the Supply should be characterised, HMRC notified their disagreement with those views. I have set aside Dr Bowen's opinions, whether stated in writing or given in her parole evidence.

### LEGISLATIVE FRAMEWORK

8. The provisions under VATA relevant to this appeal are as follows:

(1) Section 19 defines 'Value of supply of goods or services' to be:

'For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.'

(2) Section 31 'Exempt supplies and acquisitions' provides under subsection (1)<sup>1</sup>:

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<sup>1</sup> The version of s 31 applicable in this appeal was the version in force from 17 July 2012 to 30 December 2020.

‘A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ...’

(3) Section 96 ‘Other interpretative provisions’, *inter alia*:

‘(9) Schedules 7A, 8 and 9 shall be interpreted in accordance with the notes contained in those Schedules; and accordingly the powers conferred by this Act to vary those Schedules include the power to add to, delete or vary those notes.’

(4) Schedule 6(2) at paragraph 9 provides for the ‘*reduced value of supply*’ as follows:

(1) This paragraph applies where a supply of services consists in the provision of accommodation falling within paragraph (d) of Item 1 of Group 1 in Schedule 9 and –

(a) that provision is made to an individual for a period exceeding 4 weeks; and

(b) throughout that period the accommodation is provided for the use of the individual either alone or together with one or more other persons who occupy the accommodation with him otherwise than at their own expense (whether incurred directly or indirectly).

(2) Where this paragraph applies –

(a) the value of so much of the supply as is in excess of 4 weeks shall be taken to be reduced to such part thereof as is attributable to facilities other than the right to occupy the accommodation; and

(b) that part shall be taken to be less than 20 per cent.’ (henceforth ‘**the reduced value supply concession**’)

(5) Schedule 9 lists the groups of supplies that are Exempt Supplies, and Group 1 lists supplies in relation to Land where Item 1 states as follows:

‘1 The grant of any interest in or right over land or of any licence to occupy land, [henceforth ‘**Item 1 or Land exemption**’] ... other than –

[(a), (b), (c)]

(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;’ (henceforth ‘**Item 1(d) exclusion**’)

(6) The *Notes* to Item 1 at paragraph (9) defines ‘similar establishment’ as follows:

‘(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.’

9. The provisions relevant to this appeal under VATA are those implementing into domestic legislation the specific exemption (and exclusions to the exemption) under Art 135 of the Principal VAT Directive (‘the PVD’); that is, the EU Directive 2006/112/EC.

(1) Chapter 3 of the PVD is under the heading ‘*Exemptions for other activities*’, and begins with Article 135, which lists the *transactions* which shall be exempt, and under of Art 135(1) point (l) ‘*the leasing or letting of immovable property*’ falls to be exempt.

(2) The general exemption of the leasing and letting of immovable property under Art 135(1) (l), however, is subject to exclusions specified under Art 135(2)(a) as follows:

‘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;’ (**‘Directive hotel exclusion’**)

(3) The exclusions as specified under Art 135(2)(a) are given effect within the domestic legislation of VATA by virtue of Item 1(d) (see §8(5) above), which excludes from the Item 1 exemption ‘the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation’ etc.

10. There has been no divergence following the exit of the UK from the European Union on 31 December 2020, either through legislation or appellate courts. Consequently, the parties are agreed that retained EU law, both domestic and the Court of Justice of the European Union (‘CJEU’), remains the relevant law for the purposes of this appeal: section 4 of the European Union (Withdrawal) Act 2018.

#### **AUTHORITIES**

11. The citations of authorities lodged by the parties are set out in the Annex. The citation references of any additional authorities referred to in this Decision and not included in the bundle are set out in the body of text.

#### **THE FACTS**

##### **Background**

12. The appellant is a company limited by guarantee and a registered charity. Although affiliated to YMCA England & Wales, CYL is an independent charity, and is part of the YMCA global movement. It was constituted in December 2005, following the merger of two hostels in London dating back to 1971.

13. The ‘Objects’ of CYL as stated in its Memorandum and Articles of Association include:

‘3. to provide, improve and manage (whether directly or in association with others) houses or hostels providing residential accommodation for people (particularly young people) in necessitous circumstances upon terms appropriate to their means; ...’

14. The appellant has operated two hostels, at Monarch Court in Hackney, London (‘Monarch Court’) and Errol Street (now LandAid House) in Islington, London. These two hostels are operated in line with YMCA’s objective of providing temporary accommodation to young people who are homeless.

15. At the time when HMRC made the decision under appeal, which was in July 2019, CYL was making the Supply only at its Monarch Court Hostel. The Errol Street hostel had been demolished, and a new hostel was being constructed on the site during 2019 when the relevant decision was made.

##### **The Supply**

###### ***Monarch Court building***

16. Monarch Court is leased by Anchor Hanover Group (‘Anchor’) as head-lessor, from a private company called Renaissance Homes Limited. CYL has a sub-lease from Anchor, which commenced on 4 November 2014 with an expiry date of 31 July 2028. CYL was granted planning permission to change the use of the building to a hostel, and had the building refurbished. It was opened as a hostel by CYL on 9 June 2015.

17. The hostel comprises 87 single bedrooms across 4 floors (ground and floors 1,2,3). All bedrooms are en-suite, and uniformly furnished with a single bed, a bedside cabinet, a wardrobe, a chest of drawers, a desk, and a chair.

18. Entrance at the street level is by intercom or a key fob, with bright red signage and white lettering for 'Monarch Court' and 'YMCA'. The entrance leads to a front porch with fully glazed partitions and a doorway into the reception area. Access beyond the reception area is by using a fob on a keypad to open a double door, which leads to a lobby with lifts.

19. Communal facilities include two kitchens and eating areas (the larger one on the ground floor, the smaller on floor 3), laundry facilities, a lounge, a meeting room, a quiet room, and an outside, enclosed courtyard.

20. Apart from the bedrooms situated on the ground floor, the accommodation and facilities on the ground floor include:

- (1) The reception area.
- (2) Three administrative offices, one being a meeting room.
- (3) A quiet room with a table and chairs.
- (4) The communal lounge is well lit with large muntined windows. All exterior facing walls of the lounge seem to be lined with these large windows, uniform in shape (semi-circular with upper curvature) and size (from floor to ceiling). Amenities in the lounge include workstations with computer equipment, a snooker table, a football table, a table tennis area, televisions, sofas and armchairs, vending machines for drinks and snacks.
- (5) The ground floor kitchen with cooking facilities, refrigerators and storage cupboards for the use of residents.
- (6) Laundry room with washing machines and tumble dryers.
- (7) Enclosed courtyard with picnic benches.

### ***Access to accommodation by application***

21. CYL's focus is to provide temporary accommodation to homeless young people in the age range of 16 to 35. In practice, rooms are predominantly made available and occupied by young people aged 18 to 24. Proof of homelessness is a prerequisite to access the Supply, so that it not only aligns with CYL's objective, but is essential to CYL's 'financial model', which works on the basis that the accommodation costs can be met by a potential resident's eligibility for state benefits (such as Housing Benefit or Universal Credit).

22. The key stages to access the accommodation supplied by CYL are the following:

- (1) The young person attends a referral agency due to being homeless or is threatened with homelessness.
- (2) An Application Form (for room enquiry) is completed (online since 3 December 2019) by the referral agency (not the potential resident) and then submitted to CYL, the completion of which enables an enquiry to go onto CYL's system, and the waiting list.
- (3) When a room becomes vacant, a potential resident on the waiting list is invited to Monarch Court for an 'Initial Appointment', when an internal form entitled '*Initial Assessment Appointment Form*' will be completed during this face-to-face meeting.

23. The main channels for marketing CYL's accommodation are:

- (1) Referral Agencies (local authorities, other charities working with homeless young people); referrals are the key sources of young people coming to CYL;

- (2) Local Authority Accommodation Directories, which include the London Boroughs of Islington, Hackney, Westminster and Tower Hamlets;
- (3) CYL's official website at [www.cityymca.london](http://www.cityymca.london);
- (4) Online or Google Search engine.

24. CYL operates a high occupancy rate. It generates its own waiting list via its referring agencies, which would provide sufficient proof of the applicant's homeless status. Direct enquiries by callers in person or over the telephone typically come from people aged 16-35, and direct callers seldom have sufficient evidence of being homeless at the point of enquiry. CYL would 'encourage' them to get the necessary proof through a local authority. When proof of homelessness has been obtained, an enquiry can then be added to the waiting list.

#### *The Application Form*

25. Dr Bowen referred to the Application Form as CYL's internal record for 'room enquiry', which is to be completed by the referral agency on behalf of a homeless young person (an 'applicant'). The completed form is submitted to CYL by the referral agency. There are Guidance Notes to the referral agencies for the purpose of completing the Application Form.

26. The Form is 16 pages long in sections to include: (a) personal details (of the applicant) – name, gender, previous addresses, marital status, date of birth, telephone number, email address, National Insurance Number; (b) next of kin details; (c) additional details – religious belief, sexual orientation, whether transgender; immigration status, ethnicity, country of origin, nationality; (d) Housing details – whether 'found statutory homeless by a housing authority' or 'not found statutory homeless but considered to be homeless by the service provider'; referral information; the main reason for leaving last settled home; (e) 'which client groups define you' – e.g. single, homeless, with support needs; (f) the type of accommodation last occupied; (g) length of time in local area, whether with immediate family living in the local area, whether currently employed or trained in local area; any previous eviction.

27. The Form continues with questions on aspects of the applicant's personal circumstances: (h) income section – current economic status, source of income, how much salary/ benefits received; date of receipt; ever claimed Housing Benefit or the Housing Element of Universal Credit; whether entitled to Housing Benefit if in receipt; (i) health section – health problems past and present; support need; medication prescribed by doctor for both physical and mental health history; (j) alcohol, drugs/substance use history – any used now and in the past; length of time used; how much/often and the main problems it causes; support agency used (name of worker and telephone number); any support needs due to alcohol, drug/substance use; (k) crimes against you – whether a victim of domestic violence, racial harassment, or hate crime, (l) history of being accepted as requiring services under the following statutory frameworks: Care Management by Social Services; Secondary Mental Health Service; Probation Service or Youth Offending Teams; Drug Intervention Programme; (m) history of having been assessed at higher risk under – Care Programme Approach; Multi-Agency Public Protection Arrangements; Multi-Agency Risk Assessment Conference; (n) any conviction – 'Tell us even if the offence is "spent"'; (o) offences, court cases, and orders; (p) offending/criminal history – cautions, referral orders, convictions, warnings; (q) court appearances – pending and/or past.

28. The Form continues with sections as concerns the applicant's reason for choosing CYL accommodation provision and support need self-assessment:

- (1) A 'Statement' by the applicant as to the choice of CYL's accommodation, with a preamble before the applicant's statement from CYL as follows:

'Residents are required to attend regular key working meetings and work towards the Outcome Star Model. Please say why you want to live in City

YMCA, London housing. (Don't tell us what support you need; we'll ask you about that later, just say why you want to live in our accommodation.)

- (2) Initial Support Assessment section is introduced with the following wording:

'This is a self-assessment of the applicant's support needs. While the applicant may need support in completing the assessment, it should remain a representation of the applicant's view of their support needs.

This form will be used, along with other information provided as part of the referral process; to make an initial assessment about which supported housing provider might provide the most suitable accommodation and support service for the applicant. As such, all support needs should be accurately recorded.'

- (3) The self-assessment includes the following sub-sections: (a) finances, (b) personal, (c) employment and training, (c) housing; (d) any other needs – immediate/ longer-term; physical disability; need for an interpreter; preference of provided accommodation (with reasons), etc.
- (4) Referral Agency – (a) details of the referral agency; (b) relationship to applicant – e.g. how long known by agency, reason for the referral.
- (5) A reminder to 'attach file' to support the application, followed by a signature box.

### ***Assessment and admission process***

#### ***Initial Assessment Appointment***

29. When a room becomes vacant, a potential resident (from the waiting list of applicants whose referral agencies have submitted the Application Form for room enquiry) is invited to come to Monarch Court. On arrival, the person will be greeted by a member of staff, typically the manager if available. The assessment/admission process takes place in an office inside the CYL building, and follows the key stages as set out in the 'Initial Assessment Appointment Form' (the 'Assessment Form'). The Form is completed by CYL staff during this initial appointment with a potential resident. The copy exhibited was the paper form in use, which has since been superseded by an online database system.

30. The purpose of the Assessment Form would seem to be three-fold: (a) to ensure that the means of payment are put in place; (b) to ensure there is no risk to other young people currently residing in the building; and (c) to establish suitability that a potential resident can be sign-posted to agencies to help him/her move on.

#### ***The Assessment Form***

31. The Assessment Form is also an aid to the staff in explaining the operational aspects of CYL to the young person during the appointment meeting, and is set out in four 'stages':

- (1) The Housing Model – discussions of open access, residents can come and go; the need for the assessment process to establish suitability and no risks to others; to make clear that the accommodation is temporary and the need for residents to 'move on'; signposting by CYL to what is available from third parties to assist with moving on. (A void room if available, or an occupied room with the resident's consent, will be shown.)
- (2) Multi-Agency Consent Form – to be completed with the young person and to explain the consent will enable CYL to liaise with other agencies on his/her behalf.
- (3) Support History Information – to explain to the young person that CYL will collate information about a range of topics from other sources as part of the Support History Check, to include: finances, offending history, health (physical and mental), social responsibility and anti-social behaviour, substance mis-use, social network and family

relations, and to ask for contact details in relation to each, making clear that the young person is not obliged to give any of the contacts, but to note why if not.

(4) The '4<sup>th</sup> Stage' of the Form is entitled: *Initial Interview Questions* with sub-headings being: (1a) obtain paid work, (1b) participate in training, (1c) reduce debt; (2a) participate in leisure/informal learning activities, culture and faith, (2b) participate in work like activities, (2c) establish contact with services, family and friends; (3a) manage mental health e.g. self-harm issues, (3b) reduce substance mis-use/addiction, (3c) aids and adaptations, safety and security; (4a) maintain accommodation and avoid eviction, (4b) comply with statutory orders in relation to offending behaviour, (4c) avoid causing harm to others, (4d) avoiding harm from others; (5a) develop confidence/ ability to have greater choice and/or control, and/or involvement, (5b) independent living skills, (5c) parenting skills (if young person has any children), (5d) moving on – other housing providers: local council, private rent, social landlord, supported housing providers.

32. In relation to Stage 4, Dr Bowen explained that the questions asked are those known to have an impact on a young person's ability to claim Housing Benefit, Universal Credit, and Disability Living Allowance. There is repetition of questions asked in the Assessment Form to those asked of the referral agency in the Application Form, as 'young people are not always open and transparent with the referral agency', said Dr Bowen. If the potential resident is not already claiming the relevant benefit at the point of the assessment interview, which is more often the case, staff will ask and assist (if so required) the young person to complete an online benefit application, with the resident opting for the part of the benefit which relates to their accommodation costs to be paid direct to CYL on his/her behalf.

33. The length of time of the initial appointment can vary from 30 minutes to 1.5 hours, depending on the time taken for the Housing Benefit application to be completed for submission. If English is not the young person's first language, it will take longer for translation of information to a suitable level of understanding for the young person.

34. Dr Bowen confirmed that the accommodation is offered to homeless young people, rather than to the general public. Other than that criterion, she said there are 'very limited grounds' on which CYL would exclude young homeless people from becoming residents. The main reason for excluding a young homeless person will be if CYL consider that the person would put at risk the safety of others (e.g. will continue using drugs in the hostel; is a convicted arsonist; or has certain diagnosed mental health needs requiring treatment).

#### *Means of payment*

35. Each resident has the responsibility to pay the room fee, most likely with the assistance of Housing Benefit, or the Universal Credit. CYL accepts payment in arrears from residents. The absence of a requirement to make payment in advance can be vital to potential residents. Almost all residents have no, or limited, financial means, and have no point of credit reference as they are of no fixed abode and cannot supply an accommodation reference.

36. To mitigate the risk of non-recovery of room rental, CYL achieves a sufficient level of assurance from potential residents that they will be entitled to benefit payments. This assurance usually comes from confirmation via a referral agency, most often a local authority.

37. CYL does not require full payment in advance of the charge for the room in advance. As upfront payments, CYL would require a Key Deposit of £10 and a contribution of up to £60 (i.e. £15 per week for 4 weeks to cover breakfast, non-communal gas, electricity, water, TV licence and laundry). If residents are not able to provide this (generally via friends, family, employment or savings), then the referring agency will provide the deposit and contribution.



### *Admission*

38. At the Initial Appointment, the potential resident will be shown either the empty room available to be offered as the accommodation, or if that room is not yet vacant or cleaned, an occupied room with the resident's consent, as well as other parts of Monarch Court where the communal areas and facilities are situated. The viewing is normally at Stage 1 of the appointment. Some young people offered a room choose not to take up the offer, for example, because the bedroom does not suit their needs, or because they are not prepared to agree to CYL's house rules.

39. If the young person chooses to move in, the standard form agreement will be signed before admission ('the Agreement'). Most potential residents who move into a room in Monarch Court will move in either straightaway, on the day of the Initial Appointment, which is most usual, or on the next day. A bedroom key with a key fob will be issued on admission.

### ***The Agreement***

40. The Agreement is in a standard form of six pages, headed 'City YMCA, London Six Months Excluded Licence Agreement', and has 48 clauses, and is to be signed by the 'Licensee' and a staff member on behalf of CYL. The signatures are followed by the house rules (30 in total) of Monarch Court.

41. The clauses in the Agreement include the following:

(1) Clauses 1 and 2 identify the parties to the Agreement with clause 1 being 'City YMCA, London' and clause 2 being 'Name of Licensee' with name to be inserted.

(2) Clause 3 is to particularise the room with details to be inserted, and contains the following proviso:

'(or such other room of as [CYL] may from time to time nominate on not less than 24 hours written notice to the licensee) plus shared use of the following facilities: Communal kitchens, lounge areas and communal TV, Laundry, and the use of furniture and fittings, as laid out in the house rules and where applicable.'

(3) Clause 4 provides for the period of licence, for an initial 6-month period (start and end date to be inserted) and rolling thereafter, and that the licence is an 'excluded licence' as defined in s 3A of the Protection from Eviction Act 1977.

(4) Clause 5 states as follows:

'[CYL] is registered with the Housing Corporation under Section 3 of the Housing Act 1996 and has amongst its objectives the provision of short stay accommodation for young people at risk together with support designed to enable residents to grow from dependence to independence and advice relating to move-on and permanent housing opportunities. ...'

(5) Clause 8 sets out the payment terms, whereby 'the weekly licence charge for the occupation of the premises' is stated in terms of daily charge rate (at £42.86 on the copy) payable in advance on Monday of each week, and the amount of Key Deposit, 'to be returned upon check-out'.

(6) Clauses 13 to 18 set out '*What [CYL] agrees to do*'; whereby CYL has the responsibility for the payment of council tax and water charges (c 14), to keep in reasonable repair the structure and exterior, installations (i.e. heating and sanitation, water and electricity supply), common parts (e.g. entrances, halls, stairways, lifts and communal areas) and furniture and fittings (c 15 to c 18).

(7) Clauses 22 to 43 set out '*What the Licensee agrees to*', of which:

(a) Clause 23 on Use of the Accommodation states:

‘To use the accommodation for residential purposes only and not to use the accommodation for any illegal purposes. Not to allow the premises to be used for business purposes.’

(b) Clause 24 is headed ‘Housing Benefit Residents Only’ states:

‘The licensee acknowledges the aims of [CYL] with regard to the provision of accommodation as set out in clause 5 above. The licensee therefore agrees to co-operate with [CYL] –

- a) by accepting the support offered and complying with the reasonable requirements of housing workers and [CYL],
- b) when advised by [CYL] that in their reasonable opinion the support service is no longer needed and that it is appropriate for the licensee to move to independent accommodation, the licensee will co-operate by actively seeking alternative accommodation and will arrange to give notice to end this licence agreement as soon as reasonably possible. ...’

(8) Clauses 26 to 30 relate to the standards of behaviour as concerns anti-social behaviour (c26), safeguarding against bullying, racial and non-racial harassment (c27), disruption of ‘another licensee’s right to peacefully occupy any other accommodation in the building’ (c28), not to play any media device or musical instrument so loudly as to cause a nuisance to others (c30).

(9) Clause 29 states that CYL has a ‘Zero Tolerance Policy on drugs’, and ‘to possess, use or supply an illegal drugs on the premises’ may result in immediate eviction in case of breach in accordance with clause 45.

(10) The Housekeeping aspects of what the licensee agrees to do include: to comply with health and safety or fire instructions given by CYL with (i) window restrictor, (ii) bed-bug monitor, (iii) smoke alarm not to be removed or tempered with; no cooking equipment of any kind is allowed in the room (c31); not to keep any animal, bird, fish or reptile at the premises (c32); to pay for costs to make good damage to the accommodation caused by the licensee and invited visitor (excepting fair wear and tear) (c33); disposal of all rubbish daily from communal and room areas (c34), not to make alterations with the fixtures, fittings and furniture (c35), reporting disrepair (c36), car parking (c37); not to take in any lodger or allow anyone else to live in the accommodation; not to allow visitors to stay overnight without the permission of CYL (c39).

42. The House Rules of Monarch Court include: (i) fire instructions and fire drills; (ii) noise levels to be kept to a minimum during the day and at night after 10.30pm and before 8.30am ‘no noise must be heard outside of your room’; (iii) not to be rude, abusive or violent or threaten any staff member, visitor or other resident, failure to comply could result in the termination of the licence agreement; (iv) alcohol allowed in own rooms, but not in communal areas, and not in excessive amounts; (v) not to store or use petrol, paraffin or any inflammable liquid; (vi) smoking allowed in rooms but not in communal areas; (vii) dress code.

43. House rules that represent some form of restriction to the use of the room include:

(1) Rule 12 provides that all visitors to the building must show photographic identity proof displaying their date of birth.

(2) Rule 13 whereby a resident is allowed a visitor in the building between 8am to 1am from Monday to Sunday, but a visitor must be signed in and out by the resident, and stay only in the resident’s allocated room; entry of a visitor can be refused by staff on grounds of age (no under 16 allowed to access the building), or likely cause of a nuisance.

- (3) Rule 14 restricts overnight guests to those over the age of 18, and limited to 3 nights in one week, and a form must be completed and signed by a CYL staff member before 8pm of the night. Residents aged between 16 to 17 years of age are not allowed overnight guest for legal reasons. Failure to comply will result in a relevant sanction.
- (4) Rule 17 provides for any resident who has committed an illegal/criminal act on the premises to be removed immediately and the police will be called.
- (5) Rule 28 stipulates that candles or any form of incense are not allowed in the room

***The contentious clauses***

44. The contentious clauses in the Agreement in this appeal are the following:

- (1) Clause 7 is headed *Type of Agreement*:

‘This agreement is not intended to confer exclusive possession on the Licensee nor to create the relationship of landlord and tenant between the parties. The Licensee shall not be entitled to a tenancy, or to an assured shorthold or assured tenancy, or to any statutory protection under the Housing Act 1988 or to any other statutory security of tenure now or upon the determination of the Licence.’

- (2) Clause 12 for *Access*:

‘City YMCA, London will retain spare keys to the room and any person authorised by [CYL] (which will include employees, agents and contractors) will have an absolute right of entry to the rooms at all times.’

- (3) Clauses 13 to 18 in relation to *What [CYL] agrees to do*, of which clause 13 states:

‘To allow the licensee to occupy the accommodation and receive the services detailed in this agreement.’

- (4) Clause 25 has as its heading *Change of Rooms*:

‘To use only the room nominated by [CYL] and to change rooms when required, in line with section 3 of this agreement.’

- (5) Clause 38 on *Access (letting people into your premises)*:

‘To allow [CYL]’s employees or contractors acting on behalf of [CYL] including House Workers, maintenance and housekeeping staff access at all reasonable times to inspect the condition of the premise or to carry out repairs or other works to the premises or adjoining property (immediate access may be granted in an emergency or when a fault is reported and for Health and Safety checks by The Housing Team). The House rules state the visiting times and the overnight guest procedures for the licensee to adhere to.’

***What CYL provides to residents in practice***

45. The Supply by CYL to a young person who has signed the Licence Agreement includes:

- (1) The accommodation, being a single room with en-suite facilities (including a shower), furnished with a bed (with one bedding set), wardrobe, side-table, chest of drawers, desk and chair.
- (2) CYL places restrictions on a residents’ right to invite others into their rooms; a maximum of 2 guests (with valid ID) per day, and one visitor (with valid ID) overnight on request with a maximum of 3 nights per week.
- (3) Each single room is charged at £43.94 per night with approximately £41.79 being met by the individual’s housing benefit.

- (4) The following supplies are included in the £43.94 daily room rate:
- (a) Continental breakfast with a choice of cereal, yoghurt or cereal bar, carton of milk or fruit juice or a bottle of water; (subject to availability, free lunchtime sandwiches are distributed which have been donated by third parties).
  - (b) Non-communal gas and electricity, water and TV licence.
  - (c) Wifi access.
- (5) Access to communal areas and facilities, being: (i) kitchens with cooking and eating facilities; (ii) lounge with a pool table, table football, internet suite and television; (iii) a quiet room for training or meeting, which residents can use when not in use by staff; (iv) laundry room with washing machines and tumble dryers; (v) outside courtyard (opportunity to undertake voluntary garden maintenance if wished).
- (6) Guest events and entertainment organised such as talent shows, meet the team and football in the park for participation on a voluntary basis.
- (7) Every day, the kitchens are serviced, the communal areas vacuumed, the external spaces cleared, and communal bins emptied. These daily tasks are carried out by cleaning contractors engaged by CYL. The Reception is attended to by CYL staff during office hours or outsourced Security undertaking general concierge duties.

46. CYL signposts young people to services delivered off-site via noticeboards and social media. For example, the Brandon Centre which provides counselling services, health services, employment and training advice, some employment opportunities and access to permanent rental housing.

47. Some third parties are invited on-site to deliver certain services, such as counselling by Waverley Abbey College and Life-skills by MYBNK. The social, emotional, and digital skills developed by young people during the time of stay at accommodation provided by CYL are intended to enable the young people to manage their personal finances to meet rent and bill payments and living costs, and to make informed choices about their future for living independently. CYL actively refer young people to The Money House Programme (operated offsite by MYBNK) so that they do not return to another temporary accommodation situation.

48. Dr Bowen said in evidence that MYBNK comes on site to deliver a series of sessions, each time with two sessions of 1.5 hours each, three times a year. That means 6 sessions of 1.5 hours each and 6 residents can attend at a time. The session focuses on money management, debt relief information, how to budget. Waverley Abbey College nearby delivers counselling courses, and a student placement with CYL means offering counselling service to residents for 2 hours per week in a 12-week period, and for 24 weeks if there are two students. A counselling session is an hour long, and two residents per week can access the service.

#### ***Access by CYL into a resident's room in practice***

49. There is no daily room service; beds are only made up for each young person prior to admission. Once in occupation, the residents have responsibility for the upkeep of their rooms, although additional housekeeping can be arranged on request.

50. CYL requires access to individual bedrooms for repair, upkeep or an emergency. One such example is for pest control, which is a part of the general cycle of building maintenance. Periodically CYL's external pest control contractors will be given entry to some or all of the bedrooms to treat bedding and beds to try and prevent bed-bugs.

51. On a rare occasion, a resident may be asked to change room. This is generally where a room, notably with disabled access, is required by another person with special needs. Dr Bowen said this ‘only happens rarely and for a good reason’.

52. CYL retains a master key for all bedroom doors for access. Dr Bowen said that CYL makes it ‘abundantly clear’ to residents the requirement at clause 38 of the Licence Agreement, together with Rule 10 of the House Rules, that there will be ‘need and requirement for access’ into the bedroom by CYL after admission of a resident. Before accessing an occupied bedroom, Dr Bowen said CYL will ‘typically seek to get the resident’s consent at the time or in advance, unless absent or urgent’. Dr Bowen referred to the ‘typical circumstances’ when CYL ‘utilises clause 38 for a good reason’ are instances for pest control, window cleaning, bedroom cleaning, room maintenance (i.e. keeping fixtures and fittings, and furniture in good repair, ensuring rubbish is being removed from Bedrooms by residents).

53. Other goods reasons include ‘Health and Safety Room checks’ to ensure that the Agreement and House Rules are not being contravened, such as exceeding permitted overnight visitors, and acute health or welfare or anti-social behaviour concerns, illegal behaviour or illegal drug concerns’. Dr Bowen stated that the Agreement ‘does impose some restrictions on what the residents can use their rooms for’, which she regards as ‘sensible and normal’ to ensure that the accommodation is not used for illegal or business purposes.

### ***Residents’ stay in practice***

54. The length of stay varies from one week up to 2 years. A ‘resident snapshot’ taken in February 2020 indicates that the majority (56%) have resided with CYL for less than 12 months, and broken down as (i) 29% for 0- 6 months; (ii) 27% for 6-12 months. The remainder (44%) of the residents have resided up to two years, broken down as: (i) 24% for 12-18 months, (ii) 18% at 18-24 months, and (iii) 2% at over 24 months.

55. In relation to clause 7 of the Agreement, Dr Bowen stated that it was discussed about 10 years ago by CYL Trustees, some of whom are legally qualified, with the Executives including herself. It was decided that clause 7 was to be included in the Agreement to make sure that residents (licensees) do not get statutory rights as a tenant, by specifying that there is no landlord-tenant relationship between CYL and a resident to avoid the possibility of creating a Shorthold Tenancy which will confer statutory protection on the residents under the Housing Acts. The purpose of clause 7 is to make the Agreement fall in line with the objective of CYL in offering *temporary* accommodation, and to moving residents on as soon as they are ready.

56. Dr Bowen spoke of CYL’s concerns of creating a situation of an Assured Shorthold Tenancy, which would mean the need to apply to Court for an eviction which is generally an 8-week process. This could lead to a situation of increased debt if there is a non-payment issue. It is important for CYL’s operation to be able to evict a resident by giving 24-hour notice.

### **History of the VAT treatment of the Supply**

57. Dr Bowen’s witness statement charted the history in relation to the VAT treatment of the Supply. She stated that this part of her evidence was assisted by Elizabeth Rees, CYL’s Head of Finance, who met with HMRC officers during the VAT inspection visits. The factual aspects of this part of her evidence are not in dispute.

(1) In late 2010, changes to CYL’s funding structure due to the loss of supporting people grant funding previously received meant that CYL would be supplying minimal welfare services. CYL sought confirmation of the VAT treatment of its Supply.

(2) By letter dated 10 March 2010, (mis-dated, as in reply to CYL’s letter dated 20 January 2011 and received on 24 March 2011), HMRC stated that the provision of its accommodation and general advice services was subject to VAT at the standard rate.

(3) CYL then accounted for VAT on its Supply, applying the 28-day rule where relevant by charging VAT at the reduced value of supply.

(4) On 10 September 2014, Officer Stewart Muir visited CYL's offices to review its VAT accounting records, and followed up on the application of the 28-day rule.

(5) On 21 August 2017, Officer Julie Lyddon visited CYL's offices and informed Ms Rees that the Welfare Exemption would apply to CYL's Supply. This was followed up in writing by letter dated 25 August 2017, wherein Officer Lyddon stated that CYL was 'currently delivering accommodation and support to the young and homeless', which 'would be covered under the welfare exemption'.

(6) By letter dated 5 October 2017, and in reply to CYL's letter of 28 September 2017, Officer Lyddon stated: 'you are not offering your residents any care and therefore I can agree that your supplies will be "a similar establishment" of sleeping accommodation and the VAT liability will be standard rated.'

(7) On that basis, CYL continued to apply the 28-day rule to its Supply.

(8) By letter dated 25 October 2018, Officer Lyddon referred to the last VAT inspection and advised that HMRC's Policy Department had recently given rulings to other YMCA's operations, ruling that the services offered did not meet the 'hotel like' accommodation criteria, and requested more information from CYL.

(9) By letter dated 24 January 2019, Officer Lyddon issued a VAT ruling letter, in which it was stated that CYL was not providing welfare services and what is provided is 'residential accommodation of a particular sort', but that it was not 'the supply of the "hotel-like" accommodation' within Item 1(d) to take advantage of the 28-day rule. The letter then went on to conclude that CYL's supplies are exempt:

'I understand you have had a couple of visits from HMRC officers, including myself, who have accepted that your supplies are similar to "hotel like" accommodation, and wholly taxable, but having taken further advice ..., HMRC have concluded that these supplies do not meet the criteria and that the supplies are therefore exempt.'

(10) By letter dated 1 March 2019, Officer Lyddon wrote to CYL to overturn the previous ruling that the 'supplies would be that of exempt accommodation'. The new ruling was on account of clause 7 of the Licence Agreement, and that in her view 'the resident does not gain exclusive possession of the property' and 'cannot be treated as an exempt supply of land'. She continued by stating as follows:

'... as previously ruled your supplies are the provision of accommodation, but not as "hotel like" accommodation, for the reasons already explained, ... your supplies are taxable at the full standard rate of VAT and you cannot take advantage of the concession offered when you can reduce the rate of your supply after 28 days.'

(11) The new ruling would be effective from the date of the letter of 1 March 2019 and HMRC would not be assessing for 'the previously under declared VAT'.

(12) The review conclusion letter dated 18 July 2019 made reference to *Temco* and held clause 7 of the Agreement as indicative that there is no relationship of landlord and tenant for the Supply to fall under Group 1 Schedule 9 exemption.

## APPELLANT'S CASE

### *Issue 1: whether a supply of an interest in land*

58. Mr Mantle submits that the Supply is a supply of 'a licence to occupy land' within the opening words of Item 1. As a matter of statutory construction, Item 1 is to be interpreted consistently with 'the leasing and letting of immovable property' under Art 135(1) point (l) in line with the legal principles derived by the Court of Appeal in *47 Park Street*.

59. The contractual terms of the Licence Agreement relating to the residents' rights and CLY's obligations establish an arrangement for a licence to occupy land.

(1) Clauses 3 and 13 provide for the sole use of a simply furnished en-suite bedroom with a lockable door to which the resident has a key, together with common access to communal areas. The resident is thereby granted the right to occupy the Bedroom as if the resident were the owner and the right to exclude any other person from enjoyment of such a right, meeting the relevant requirement set out in *Temco* and *47 Park Street*.

(2) There are express terms of restrictions to the Licence Agreement on the use of the Bedroom by the resident, but they are not restrictions which can prevent the Supply from being a licence to occupy land. The restrictions are 'unexceptional', 'of types routinely to be expected, as express or implied terms, in agreements for provision of accommodation in an hotel, boarding house, or 'similar establishments'.

(3) CYL does reserve the right for its staff and contractors to enter the Bedrooms (clauses 12 and 38). However, on binding authority (*Temco* and *47 Park Street*) that does not prevent the Supply from being a licence to occupy land.

(4) *Walderdorff* was decided after *Temco*, but before *47 Park Street* and cannot be read as departing from the CJEU's consistent case law on this point.

(5) The Licence Agreement otherwise gives no other persons the right to enter or use the resident's Bedroom, and the need for express reservation of rights of access for CYL is strongly indicative of the right of the resident under the Licence Agreement to exclude all others from access to the Bedroom.

(6) Under clauses 3 and 25, the resident is entitled to a nominated Bedroom, but can be required by CYL to move to a different room in the hostel. This is by no means inconsistent with the Supply being a licence to occupy land and is supported by the reasoning in *47 Park Street*. The provision of a Bedroom to a resident is clearly at the core of the Supply, and is 'the principal and predominant element of the transaction'.

(7) The resident is given the right to shared use of certain communal areas. In the context of all the terms of the Licence Agreement, that is joint use in common with other residents (and their lawful visitors) and CYL's own staff and contractors. These are accessory rights to the dominant element of the supply as established in *Temco*.

60. It is submitted that clause 7 does not reverse the correct analysis of the parties' contractual rights and obligations:

(1) Clause 7 is a 'labelling type provision'. As a matter of UK law, it should not be labelled as a type of agreement that could be categorised as creating a landlord and tenant relationship between the parties, or as giving rise to statutory security of tenure or other statutory protections sometimes given to occupiers of residential premises under UK housing legislation. This raises three further points:

(a) Labels used in an agreement to describe the parties' relationship cannot be conclusive, and are often of little weight: *Secret Hotels2*.

- (b) The EU law concept of ‘the leasing and letting of immovable property’ is independent of national land law, so any clause seeking to categorise the Licence Agreement in terms of the land law in England and Wales and UK statutory provisions under housing legislation is unlikely to be helpful to the VAT analysis.
- (c) In terms of commercial context as evidenced by CYL’s objectives and Dr Bowen’s statement, such statutory protections for residents would hinder CYL’s objectives and the operation of its hostels, in particular because CYL seeks to provide young people with temporary accommodation and to encourage them to move on to other accommodation (emphasis original).

(2) Clause 7 is not to be interpreted in isolation, but with reference to clauses 12 and 3, which provide for retained rights of access to Bedrooms for CYL’s staff, agents and contractors. However, the retained rights cannot lead to the conclusion that a resident did not have the right to occupy the Bedroom as if he or she were the owner and to exclude any other person from enjoyment of such a right, and to make the Supply a licence to occupy land for VAT purposes.

(3) Clause 7 cannot bear the weight HMRC have placed on it in reaching, upholding and defending the review conclusion that the Supply is not a ‘licence to occupy’.

61. In relation to the economic reality, Mr Mantle submits that what ‘actually is provided by CYL to residents in return for the licence charge paid’ is as follows:

(1) What is provided ‘fits completely with the terms’ of the Agreement and ‘reinforces, rather than vitiates’ the characterisation of the Supply as a licence to occupy land.

(2) CYL in retaining the right to enter a resident’s Bedroom does not prevent a licence to occupy, as emphasised by Dr Bowen’s evidence of the ‘limited accessing of Bedrooms by CYL, occurring in practice, on average once a month (absent an emergency) and only for good reason’.

(3) Even if clause 7 were to be given such weight as to characterise the Supply as *not* a licence to occupy land, such a characterisation would be vitiated by what is in fact supplied by CYL in practice. The true position is that the proper interpretation of clause 7, applying commercial common sense, set in the context of the overall terms of the Licensing Agreement, will lead to a conclusion which fits with what actually happens.

*Issue 2: whether ‘similar establishment’*

62. On the facts, it is submitted that Monarch Court (and LandAid House) are a ‘similar establishment’ interpreting Item 1(d) consistently with Art 135(2) PVD by reference to:

(1) The physical characteristics of the layout, bedrooms and communal rooms and their significant similarities to an hotel;

(2) The accommodation and attendant facilities and services provided to residents and their similarities to what is provided in a budget hotel;

(3) What CYL provides is:

- (a) Exclusive use of an en-suite furnished bedroom;
- (b) Water, heat and power for that room and a TV licence;
- (c) Shared use with other residents of communal rooms;
- (d) A daily continental breakfast.



(4) The purpose and function of the hostels as operated by CYL, in essence to provide temporary accommodation to young people before they move on to other permanent accommodation.

(5) The provision of accommodation is not associated with the residents undertaking education, medical care (whether for physical or mental health problems), or receiving personal care or anything like that.

63. In response to HMRC's contentions in the Statement of Case, Mr Mantle submits in turn:

(1) *'the supply provided is specific to the needs of the recipients and not supplies normally associated with ordinary accommodation'* – there is 'simply no evidence' that the Supply is 'specific to the needs' of the residents, as stated in Dr Bowen's evidence that residents are not selected by reference to personal characteristics or needs.

(2) *'A person cannot simply walk into CYL's hostels, pay and immediately obtain a room. The long "suitability questionnaire" has to be completed by a potential resident'* – (a) any popular, busy hotel in practice would require booking in advance, CYL operates on a high occupancy rate; (b) the process of the initial meeting with a potential resident does not in itself disqualify the Supply from being within the scope of Item 1(d).

(3) *'The building is not publicly held out as being a hotel or similar establishment'* – Monarch Court was and is held out as being a hostel providing sleeping accommodation of the kind it actually provides; 'holding out' as being a hotel is not a requirement, nor is any kind of holding out critical given the facts of the case.

(4) *'Services normally provided in a "hotel" are "non-existent"'* – an unspecific and unsustainable on the unchallenged evidence.

(5) *'The degree of selectivity exercised in this case prohibits the supply [from] being a "similar establishment"'* – the assertion of a high degree of selectivity is unsupported

## HMRC'S CASE

### *Issue 1: whether a supply of an interest in land*

64. For the respondents, Ms McArdle submits that to qualify as a supply of an interest in land, the interest concerned must either constitute a supply of a building or parts thereof (which has no relevance as property ownership is not in issue), or be a supply of leasing or letting, within the meaning of the European jurisprudence.

65. Exemptions to VAT are to be interpreted strictly and objectively, and in the present case by analysing what the licensees are actually supplied with. As the CJEU has correctly observed in *Newey*, normally the contractual terms will reflect the economic and commercial reality. On the first issue, the supply in question is not a supply of an interest in land, both as a matter of contractual terms and as a matter of economic and commercial reality.

66. As a matter of contractual terms:

(1) Under Art 135(1)(l), the recipients of the supply must, as a pre-cursor of the supply being a passive supply, be allowed exclusive possession of a specific piece of land: *Walderdorff* at [17] and [20].

(2) The Agreement 'plainly and obviously does *not* confer exclusive possession'. The plain words of clause 7 are important: 'This agreement is not intended to confer exclusive possession on the Licensee nor to create the relationship of landlord and tenant between the parties'.

(3) Additional terms under clauses 3 and 25 are important in this respect, and provide express rights to move recipients between rooms, which is plainly not exclusive

possession. The appropriate interpretation of the Agreement as a whole is that exclusive possession is not supplied, and it is more than just a passive supply of an interest in land.

(4) Clause 12 provides an absolute right to enter rooms at all times for the appellant, and is a contractual term incompatible with a finding of exclusive possession.

67. As a matter of economic and commercial reality:

(1) VAT is a tax on supplies made for consideration, not contracts (whose definition may vary between EU Member States). However, it would be to fall into serious error to find that the contractual terms in this case are not conclusive as to the nature of the supply, (such that exclusive possession *is* supplied).

(2) Contractual terms should be the starting point of the exercise of characterising the supply. The supply can be found to differ, but only where there are appropriate reasons for such a finding, and the circumstances where this will be the case are narrow:

(3) Dr Bowen's evidence is consistent and supportive of the conclusion that exclusive possession is not granted; that clause 7 was to ensure that a situation of Assured Shorthold Tenancy is not created. Clauses 3 and 25 give the appellant the right to require a resident to change rooms, notably where a disabled access room is required, but is a clear and unambiguous example of a lack of exclusive possession.

(4) Factors as to what would lead the appellant's staff or agents to enter rooms beyond situations of emergency and for maintenance are 'evidently entry of rooms to supervise and enforce good behaviour of residents'. As a commercial reality, entry of rooms by the appellant's staff or agents occurs 'typically monthly'. These reasons for access go far beyond the type of access which the supplier may be expected to reserve to itself in a typical tenancy agreement, or a licence to occupy.

(5) The commercial and economic reality is in line with the contractual terms, that exclusive possession is not supplied. Consequently, the requirements for a grant of leasing or letting are not made out on the facts. The supply in question is not one meeting the criteria to fall into the land exemption.

68. The respondents contend that the Supplies fall to be treated as a supply at the standard rate for VAT purposes, as being a supply of facilities:

(1) The recipients are receiving use of a bedroom (without exclusive possession), and access to communal facilities such as kitchens and lounges, signposting to services provided by others, and a degree of oversight and control.

(2) This is far from a passive supply of exclusive possession of a specific part of a building, for a term, in exchange for a rent: *Temco* and *Mesquita*.

*Issue 2: whether 'similar establishment'*

69. If the respondents are incorrect on the first issue, and that the supply in issue falls within the Land Exemption, then HMRC's alternative position is that the supply does not fall within Item 1(d) of Group 1 in Sch 9 VATA to be a supply of accommodation similar to that supplied by a hotel. Consequently, the 28-day reduced value rule does not apply, as the concession only specifically applies to Item 1(d) of Group 1.

70. Factors such as '*selectivity*' over the choice of residents, a high degree of '*care and supervision*' provided over residents, and emphasis on '*a family concept*' in *Dinero* are significant parallels to the present case. Factors such as '*relatively long term nature of stays*', '*home-like nature of the accommodation*', and very few '*hotel-like*' facilities all contributed to

the determination in *Atlas Property* that it was an exempt supply of land, and not a supply of a similar establishment to a hotel.

71. The factors that have informed the respondents' position on issue 2 are the following:
- (1) The underlying purpose of the supply is not to provide accommodation of a similar nature to a hotel for a visitor or traveller, but to assist homeless young people in improving their lives through the provision of temporary accommodation.
  - (2) There is a high degree of selectivity of residents; the properties are not available to the general public to access. Potential residents must go through an application process which assesses matters such as their need for support in relation to conditions such as mental health or self-harm issues.
  - (3) The properties are not held out publicly as offering accommodation similar to hotels, and are not marketed as hotel-type accommodation aimed at travellers.
  - (4) The services provided are not similar to those in a typical hotel. Residents are signposted to outside agencies offering support for their specific needs as homeless young people.
  - (5) There is an absence of typical hotel-style facilities. The arrangements instead include communal basic facilities; no cleaning of bedrooms once residents move in; no restaurant and no room service.
  - (6) Residents sign a six-month Licence Agreement and may stay for much longer, although they can also leave earlier. The Agreement is not similar to a contract for staying in a hotel; such as with clause 5, which sets out the appellant's charitable objective.
  - (7) The respondents therefore contend that the supply in question is *not* a standard rated supply of an hotel or similar establishment.

## **DISCUSSION**

### **Issues for determination**

72. The parties have made their submissions in relation to two issues. It is expedient to set out the issues in relation to their respective legislative provisions.

- (1) Issue 1: whether the Supply is a supply of a 'licence to occupy land' for it to be an exempt supply under Item 1 of Group 1 in Sch 9 to VATA: *Item 1 or land exemption*;
- (2) Issue 2: if the Supply is held to be an exempt supply on Issue 1, then whether Item 1 paragraph (d) applies to take the Supply out of exemption: *Item 1(d) exclusion*.

73. The first issue involves a consideration of whether the land *exemption* applies, and the second issue concerns whether the Supply is to be an *exclusion* from the land exemption. On the first issue, it is advantageous to CYL that its Supply is categorised as an exempt supply. On the second issue, however, it is advantageous to CYL that its Supply falls within the Item 1(d) exclusion, which means bringing the Supply back into the VAT charging provisions. It is somewhat counter-intuitive that the appellant's position is staked on winning on both issues.

74. In the present case, the ultimately optimal VAT position for CYL is to be entitled to the provisions under paragraph 9 of Schedule 6 to VATA, whereby the value of the supply is to be assessed at 20% of the full value of supply after 28 days (the '28-day rule').

75. CYL's Supply is made for more than 28 days in most instances. Therefore, if Item 1(d) exclusion applies, then CYL would be able to claim the full amount of its input VAT, while accounting for its output VAT on one-fifth of the value of its Supply by virtue of the 28-day rule on a significant proportion, if not the majority, of its income.

76. To arrive at this optimal VAT position, CYL's Supply needs to be an exempt supply for Group 1 Sch 9 purposes, and to be excluded from exemption under Item 1(d) for the reduced value supply concession under para 9 of Sch 6 to apply. Indeed, this optimal VAT position was the ruling by HMRC from 10 March 2011 (according to the mis-dated letter of 10 March 2010) until the new ruling of 1 March 2019, which was upheld on review on 18 July 2019.

### **Approach in characterising a supply**

77. In *Newey*, the Court of Justice of the European Union ('CJEU') set out the general approach in characterising a supply as follows:

'[43] ... Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a "supply of services" transaction ... have to be identified.

[44] It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

[45] That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.'

78. The CJEU in *Newey* continued by stating the occasions when the national court should depart from the contractual analysis for 'preventing possible tax evasion, avoidance and abuse'; these are circumstances in which to prohibit the abuse of rights 'is to bar wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage' (at [46]).

79. In a similar vein to *Newey*, Lord Neuberger's leading judgement of the Supreme Court in *Secret Hotels2* (2014) describes the approach in categorising a supply in the following terms:

'[31] Where parties have entered into a written agreement which appears on its fact to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligation, unless it is established that it constitutes a sham.'

80. In giving the leading judgment in the majority decision of the Supreme Court in *Airtours* (2016), Lord Neuberger referred back to [35] of *Secret Hotels2* and reiterated that 'when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts' (*Airtours* at [47]).

81. There are qualifiers to be borne in mind when construing a written agreement, as set out by Lord Neuberger at [35] of *SecretHotels2*:

[32] When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as a whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and often be of little weight.'

## European Jurisprudence

82. The exemption under Item 1, and the exclusion under Item 1(d) are both referable to the Principal VAT Directive, and specifically:

- (1) Item 1 exemption under Group 1 Sch 9 is the domestic implementation of Art 135(1) point (l) of the PVD viz. ‘*the leasing or letting of immovable property*’, and
- (2) Item 1(d) exclusion is the domestic implementation of the Directive hotel exclusion to the exemption under Art 135(2)(a) of the PVD.

83. As such, it is the jurisprudence of the CJEU that is relevant to the construction of both Item 1 exemption, and Item 1(d) exclusion. The key CJEU authorities referred to by the parties are *Blasi* (Germany 1998), *Temco* (Belgian 2005), and *Walderdorff* (Austria 2007). These CJEU judgments were interpreting the predecessor provision of Art 135(1)(l) of the PVD, namely art 13(B)(b) of the Sixth Directive, which provided as follows:

**‘Exemption within the territory of the country ...**

*B. Other exemptions*

Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and preventing any possible evasion, avoidance and abuse ...

(b) the leasing or letting of immovable property excluding:

1. 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;

[...]

Member States may apply further exclusions to the scope of this exemption.’

84. The Directive hotel exclusion under Art 135(2)(a) of the PVD is equivalent to the exclusion under art 13B(b)(1) of the Sixth Directive as cited above.

85. To all intents and purposes, there is no material difference in the provisions under Art 135 of the PVD to its predecessor provisions for the CJEU judgments not to be directly relevant to the construction of the domestic legislation under VATA implementing the article provisions. The European jurisprudence observes a clear distinction in the approach for interpreting an ‘exemption’ provision from an ‘exclusion’ provision as set out below.

### ***Construction: whether strictly or broadly***

86. The CJEU authorities interpreting the equivalent articles in the Sixth Directive are to be read in the context of the following article provisions within the Sixth Directive, which in turn have their own equivalents in the PVD. The relevant articles from the Sixth Directive are:

- (1) Article 2 defines a taxable event as ‘the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such’.
- (2) Article 4(1) defines a taxable person as ‘any person who independently carries out in any place any economic activity... whatever the purpose or results of that activity’.
- (3) Article 4(2) provides specifically that ‘[t]he exploitation of tangible and intangible property for the purpose of obtaining income therefrom on a continuing basis’ is to be considered an economic activity.
- (4) Article 6(1) defines a taxable event as ‘a supply of services’ on a residual basis, in terms of ‘any transaction which does not constitute a supply of goods’.

87. The general principle and purpose of the Sixth Directive (and now the PVD) is that value added tax (or turnover tax) is to be levied on all supplies for consideration made by a taxable person. Any departure from this general principle represents an *exception*, and to exempt a supply from the turnover tax regime is an exception to this general principle.

88. It is in the context of this exception to the general principle that the exemption under art 13B(b) of the Sixth Directive is to be interpreted. As described at [24] in *Temco-AGO*, the exemption applies to ‘certain transactions which constitute an economic activity within the meaning of art 4 of the directive’. The economic activity, being the exploitation of tangible property in this case, means that the transactions ‘do not produce relevant added value’, and it ‘renders exemption appropriate for financial reasons’.

89. It is this lack of added value in relation to the economic activity under Art 135(1) point (I) for ‘*the leasing or letting of immovable property*’ that underpins the exception to the general principle. It is because to exempt a supply represents a departure from the general principle, the exemption provision under Art 135(1) point (I), and by corollary, Item 1 exemption under VATA, must be interpreted strictly: *Blasi* at [18].

90. In contrast, the tailpiece of art 13(B)(b) where it is stated that ‘*Member States may apply further exclusions to the scope of this exemption*’ is ‘broadly worded’ to allow member states ‘a large degree of discretion in placing limits on the scope of the exemption’: *Blasi-AGO* at [12]. An exclusion provision is to be broadly construed because an exclusion to an exemption has the effect of bringing a transaction under the general principle.

91. *Blasi* is the earliest of the key authorities interpreting art 13B(b) of the Sixth Directive. The AGO (Jacobs) at [12] states succinctly the rationale behind the differing approach when construing an exemption provision from that of an exclusion provision.

‘The last sentence of art 13B(b) is broadly worded so as to allow the member states a large degree of discretion in placing limits on the scope of the exemption in art 13B(b). ... “member states are free to limit the scope of the exemption by providing for additional exclusions”. Unlike exemptions, which generally fall to be construed narrowly because they constitute exception to the general principle that turnover tax is levied on all supplies for consideration made by a taxable person ..., the exclusion of transactions from exemption is in conformity with that general principle.’

### ***The concept of ‘the leasing or letting of immovable property’***

92. The concept of ‘the leasing or letting of immovable property’ is defined in the Community case law. The Sixth Directive (or the PVD) neither defines the concept of ‘leasing and letting’, nor does it leave that definition to the legal orders of the member states. It is important to distinguish the Community law definition for leasing or letting from the legal concepts of leasing or letting pertaining to the national laws of member states. The blurring of this distinction would seem to be the origin of the respondents’ ruling that led to the appeal.

93. Advocate General Jacobs, who gave his opinion in *Blasi* (1998), later expanded on the construction of art 13B(b) in more detail in *Stichting ‘Goed Wonen’ v Staatssecretaris van Financiën* (Case C-326/99), [2003] STC1137 (*‘Goed Wonen’*). This authority is not included in the bundle, nor referred to in parties’ submissions, but was mentioned in *Temco* as one of the CJEU judgments on art 13B(b). In *Goed Wonen*, the CJEU considered whether usufructuary right<sup>2</sup> for a term of ten years in respect of new dwellings falls within art 13B(b).

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<sup>2</sup> Usufruct is not a legal concept that exists in England and Wales, Northern Ireland or Scotland, and the close equivalents to usufruct are life estates, life interest, or leases terminable on death: [57]-[60] AGO in *Goed Wonen*.

94. The following principles enunciated by AG Jacobs in *Goed Wonen* in relation to the application of the Community law definition for ‘the leasing or letting of immovable property’ are apposite to the present case.

- (1) The terms used to specify the exemptions provided by art 13 constitute independent concepts of Community law which must be given a Community definition: at [69].
- (2) The Community definition of ‘leasing or letting’ cannot be found by simply referring to legal concepts used by only some of the national laws because of:
  - (a) the substantive differences between the legal institutions in the member states: at [73]; and
  - (b) the substantive differences are reflected in important linguistic differences of terminology as regards the phrase ‘leasing or letting’: at [76].
- (3) Instead of referring to legal categories of national law, the CJEU’s case law on the concept of ‘leasing or letting of immovable property’ takes ‘a functional approach which takes into account the context in which the concept is used and the general structure of the Sixth Directive’: at [78].
- (4) ‘A functional interpretation of the concept of “leasing or letting of immovable property” moreover guarantees the equal treatment of taxable persons’: at [80].
- (5) ‘The fact that usufruct grants the holder a right in rem whilst rental contracts grant only rights in personam is irrelevant’: at [88].

#### **Issue 1: whether Item 1 exemption applies**

##### ***Contractual analysis***

95. In the present case, while the parties disagree with the interpretation of certain clauses in the Agreement in terms of their implications in characterising the Supply, there is no dispute that the contractual terms contained in the Agreement reflect the economic and commercial reality of the transactions. No issue arises either as concerns possible tax evasion, avoidance, or abuse in the arrangements to necessitate a departure from an analysis of the contractual terms for the purposes of characterising the Supply.

96. For the avoidance of doubt, and notwithstanding the fact that HMRC had twice considered ruling the supplies made by CYL as exempt within the ‘welfare exemption’ (Item 9 of Group 7 Schedule 9 VATA), the parties are agreed that CYL is not a welfare provider.

##### *The concept of ‘the leasing or letting of immovable property’*

97. The PVD does not expressly define the concept of ‘leasing or letting’. The parties’ submissions have proceeded by adopting the definition for ‘the leasing or letting of immovable property’ by the Court in *Temco*:

‘[19] In numerous cases, the court has defined the concept of the letting of immovable property within the meaning of art 13(B)(b) of the Sixth Directive as 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 ...’

98. The Advocate General Ruiz-Jarabo Colomer (henceforth ‘AG Colomer’) in *Temco* itemised the constituent elements that must be present in an agreement to meet the definition for the leasing or letting of immovable property at [20]:

‘According to the Community case law, there is an exemption from VAT for (1) transfer by the owner of an immovable property to another person, (2) to

the exclusion of all others, (3) of the use and enjoyment thereof, (4) for an agreed term, (5) in exchange for the payment of rent. In order to decide whether that definition applies to a specific agreement, account must be taken of all the elements of the transaction and the circumstances in which it takes place, the objective content thereof being decisive, regardless of how the parties have characterised it.’

99. In the present case, the Supply in question is an exempt supply if the following five constituent elements are all present in the Agreement.

(1) *Transfer of immovable property* – clause 1 identifies CYL as the transferor, clause 2 identifies the named individual resident as the transferee, and clause 3 identifies the immovable property by the Room Number in the relevant building as the habendum, being, for example, one of the 87 bedrooms at Monarch Court.

(2) *To the exclusion of all others* – no express clauses to that effect.

(3) *Of the use and enjoyment thereof* – clause 13 allows the transferee ‘to occupy the accommodation’, and under clause 23 the transferee agrees ‘to use the accommodation for residential purposes only’.

(4) *For an agreed term* – clause 4 provides for the start and end date of the agreement to be for an initial six months, and then on a rolling basis ‘from week to week’.

(5) *In exchange for the payment of rent* – clause 8 sets out the payment terms with the charge being per diem, and payable weekly in advance.

100. The crux of the dispute viz. Issue 1 is whether CYL grants the transferees enjoyment of the allocated room ‘to the exclusion of others’. The respondents rely on the pronouncement by Advocate General Sharpston in *Walderdorff* at [23]:

‘... it is not enough for a contract to comprise certain elements which are typical of the leasing or letting of immovable property if it does not meet all the essential criteria in the Community law definition of leasing or letting. One such criterion is the extent to which the contract assigns the right to occupy the property and to exclude other persons from it.’

101. HMRC argue that the essential criterion as held in *Walderdorff* is absent to make the Supply the leasing or letting of an immovable property. The respondents submit that clause 7 vitiates any claim that a resident has ‘the right to occupy the property as if the person were the owner and to exclude any other person from enjoyment of such a right’.

102. In turn, Mr Mantle urges on the Tribunal to consider clause 7 as having its meaning specific to the legal context of housing legislation, and that such labels do not inform the characterisation of a supply for VAT purposes; that the respondents’ case has put too much weight on clause 7, when such a label is ‘often of little weight’ and ‘cannot be conclusive’ as to the nature of the Supply for VAT purposes: *Secret Hotels2* at [32]. The commercial reality is as stated in Dr Bowen’s evidence.

#### *Legal concepts in the law of property*

103. The parties have made submissions in relation to clause 7 of the Agreement in the light of *Street v Mountford* to support their respective case. Lord Templeman, in giving the leading judgment in *Street v Mountford*, gave an extensive review of case law on the distinction between contractual tenancy and contractual licence, and settled with the position as summarised by Windeyer J, sitting in the High Court of Australia, in *Radaich v Smith* (1959) 101 CLR 209, at 22, (and being cited in *Street v Mountford* at 827) as follows:



‘What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes, and how is it to be ascertained whether such an interest in land has been given? [sub-paragraphing added]

By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant, and he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. ... A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession.’

104. The concept of ‘exclusive possession’ comes to be regarded as a hallmark of tenancy in accordance with Lord Templeman’s conclusions in *Street v Mountford*:

‘... in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide upon its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable.’ (at 825)

‘Henceforth the courts which deal with these problems will, save in exceptional circumstances, only be concerned to inquire whether as a result of an agreement relating to residential accommodation the occupier is a lodger or a tenant.’ (at 827)

105. Based on the contractual analysis of the Agreement, there is no exclusive possession of the habendum by a resident at Monarch Court. The Agreement does not grant any interest in or right over land for the purposes of Item 1 exemption. According to *Street v Mountford*, the resident is a lodger, and not a tenant.

*Licence to occupy treated as ‘leases’*

106. Does it mean that the appellant loses on Issue 1? By no means, while the Supply does not qualify for Item 1 exemption as a ‘grant of any interest in or right over land’, there is the statutory alternative to Item 1 exemption, namely: ‘or [a grant] of any licence to occupy land’.

107. As a ‘lodger’ of CYL, what a resident has is the permission for himself personally to occupy the allocated room as a licensee. The agreement is correctly ‘labelled’ as a Licence Agreement, and what the Supply amounts to is a licence to occupy a specified room by the recipient of the Supply.

108. In HMRC’s view, the Supply cannot be characterised as that of the leasing of an immovable property: *Temco-AGO* at [22].

‘The leasing of an immovable property is characterised by the transfer of the powers of the owner – with the exception of the power of disposal – and, therefore, the capacity to exclude all others (including the owner) from enjoyment of the property’.

109. It is not necessary to speculate whether AG Colomer at [22] was referring to ‘the leasing of an immovable property’ as strictly applicable to leasing, or whether it is to be taken as encompassing ‘leasing and letting’. What is of facility is to construe ‘the capacity to exclude all others (including the owners)’ at [22] in conjunction with what AG Colomer stated at [30]:

‘Licences do not, for such purposes, lose their status as leases by reason of the fact that their expiry is dependent on the will of the owner. It is necessary to take the reality of each case into account and, as in the *Blasi* case, to evaluate the period of the legal relationship, a task which also falls to the national court. As the Belgian State indicates in its written observations, the decision to *exclude licences from the scope of the tax exemption infringes the principle of neutrality*, since transactions which are intrinsically the same would be treated differently. It is not mistaken when it observes that that Community law concept must be defined by reference to the nature of what is supplied rather than to the way in which it comes to an end.’ (italics added)

110. In characterising a supply, European jurisprudence has consistently placed emphasis on the commercial and economic reality over and above the legal classification of a transaction. As AG Jacobs stated in *Goed Wonen*, the Community definition of ‘leasing or letting’ cannot be found by simply referring to legal concepts used in domestic law. Similarly, AG Colomer described the key to characterising a supply in the following terms at [25] of *Temco-AGO*:

‘The key is to be found, therefore, in the nature of the transaction and its economic reality, regardless of the legal classification attributed to it by the parties ... art 13B(b) ... [does] not preclude a national provision which, for the purposes of the application of the VAT exemption, allows the grant, for an agreed period and for payment, of a right in rem entitling the holder to use immovable property to be treated as the leasing or letting of immovable property.’

111. To that end, VATA has included ‘any licence to occupy land’ as falling within the Item 1 exemption under Group 1 Schedule 9. On one interpretation, the domestic implementation of the PVD in the statutory provisions contained in VATA means that the Community law definition has been used to inform the assimilation of legal concepts operative in the national law; the direction of travel is from Community law to domestic legal concepts. On that basis, if the legal classification of the Supply is ‘a licence to occupy land’ following a contractual analysis, then the conclusion from that legal classification should be sufficient to found a decision that the Supply by CYL falls within Item 1 exemption, unless there are other factors that vitiate such a determination.

112. However, as highlighted in *Temco*, art 13B(b) of the Sixth Directive (or Art 135 of the PVD) does not ‘refer to relevant definitions adopted in the legal orders of the member states’ (at [18]). To characterise a supply by reference to the legal classification of a transaction according to the national law has its pitfalls. Not only is it likely to be inconclusive, but there is also an inherent circularity and may lead to confusion by conflating the legal classification of a transaction with the Community law definition of a supply.

113. The case of *Customs and Excise Comrs v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989 illustrates the inconclusiveness of such an approach. The supply in question was the grant of a right to situate a cigarette vending machine on the supplier’s premises in return for a share of the profits. Lord Nicholls was of the view that the exemption for ‘the leasing or letting of immovable property’ can include arrangements that English law would categorise as licences rather than leases (at [35]). Conversely, Lord Scott considered the issue arising on the appeal concerned ‘the width to be given to the words “any licence to occupy land”’ as used in Sch 9 to the VATA, and that the words ‘should not be construed so as to include the grant of rights that would not, for the purposes of the Sixth Directive, constitute “the leasing or letting of immovable property”’ (at [58]).

114. A reference ruling was made by the House of Lords, and in *Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01), [2003] STC 898, the CJEU ruled that the supply did not

amount to a letting of immovable property within the meaning of art 13B(b) of the Sixth Directive because the claimant's occupation of a site owner's space was merely the means of effecting the service supplied by the site owner, and no rights of possession or control of the space on which the machine was sited were being granted to the owner of the machine.

115. Given the foregoing as regards the 'short-cut' approach, I accept that while the contractual analysis allows me to conclude that the Agreement grants a resident 'a licence to occupy land' as a matter of legal classification, it does not necessarily enable me to conclude that the Community law definition of 'the leasing or letting of immovable property' is met, which should be interpreted strictly, since an exemption is an exception to the general rule.

116. I also have regard to the respondents' reliance on certain factors pertaining to the economic reality of the Supply, which in their submission, constitute vitiating factors to the Community law definition for 'the right to occupy the property as if the person were the owner and to exclude any other person from enjoyment of such a right'. For these reasons, I need to consider the economic and commercial reality of the Supply in order to characterise the Supply.

### ***The commercial and economic reality***

117. In analysing the economic reality for the purpose of characterising the Supply, I have in mind two main issues I need to address from HMRC's submissions.

(1) Is the Supply made to a recipient in such a manner as to meet the Community law definition for 'the leasing or letting of immovable property' in respect of the essential criterion of 'to the exclusion of all others'?

(2) Is the Supply to be characterised as a supply of 'added value' facilities subject to VAT at the standard rate as HMRC have ruled?

*First: Is the Supply made 'to the exclusion of all others'?*

118. In summary, the respondents' submission is that clauses 3, 12 and 25 act in conjunction with the express provision under clause 7 of no 'exclusive possession', and are vitiating factors to any possible interpretation that a resident could have the use or enjoyment of an allocated bedroom as if he/she were the owner to the exclusion of all others.

119. In determining the economic reality of a transaction, 'the national court [is] to analyse the content of the contracts and the circumstances in which they are put into effect, in order to determine whether they grant the transferees enjoyment vis-à-vis the world at large and, in particular, vis-à-vis the owner': *Temco-AGO* at [26]. What AG Colomer in *Temco* referred to as 'the circumstances in which [the contracts] are put into effect' is equivalent to what Lord Neuberger referred to in *Secret Hotels2* as having regard to 'the surrounding circumstances' and to 'commercial sense'. Thus far, I have analysed the content of the Agreement, and this part of my consideration concerns the circumstances in which the Agreement is put into effect.

120. For present purposes, it is instructive that *Temco* is a case concerned with a licence to occupy (rather than a lease). AG Colomer's proposed reply to the first question of the referring court in *Temco* is at [48]:

'(1) The letting of immovable property referred to in art 13B(b) of the Sixth Directive is a legal transaction whereby the owner of an immovable property *assigns the use and enjoyment thereof to another person, to the exclusion of all others* – including the owner – for a period of time, in exchange for payment of a price. (italics and sub-paragraphing added)

The decision as to whether a transaction fulfils those requirements is a matter for the national court which, for that purpose, must take account of all the elements of the transaction, in addition to the material circumstances in which

it takes place, in particular the possible intent to defraud or the possibility of tax avoidance, the following being irrelevant:

(a) the legal classification which the parties attribute to the agreement;

[(b) to (e)]'

121. The categorical statement by AG Colomer that 'the legal classification which the parties attribute to the agreement' is irrelevant to deciding whether the essential criteria are fulfilled, the inescapable conclusion is that the second criterion viz. '*to the exclusion of all others*' (at [20] of *Temco-AGO*) must be capable of encompassing circumstances where the right of 'exclusive possession' is not conferred. In other words, there are circumstances where no legal right of exclusive possession is conferred as a matter of contractual analysis, but that does not preclude the criterion 'to the exclusion of all others' being met as a matter of economic reality. To use AG Jacobs' terminology in *Goed Wonen*, it is 'a functional approach which takes into account the context in which the concept is used' rather than the legal classification of the transaction; or as Lord Neuberger puts it in *Secret Hotels*<sup>2</sup>: the label(s) 'cannot be conclusive' and 'often of little weight'.

122. The economic reality with which the Tribunal should be concerned is whether the Supply *assigns the use and enjoyment* of a bedroom to a resident, *to the exclusion of all others, including the owner, for a period of time, in exchange for a price*, and I make the following findings of fact in relation thereto:

(1) The Agreement grants a resident a right in rem, in relation to an allocated bedroom which assigned to only one grantee at a time. (It is irrelevant that the grantee only has a right in rem and not rights in personam as in a rental contract: *Goed Wonen-AGO* at [88]).

(2) Each room is assigned to an individual who has a room key to exclude all others from the allocated room.

(3) On one interpretation, to the exclusion of all others in present context, includes the presumption that no person, other than the grantee, can be staying in the allocated room without CYL's authorisation. Even a guest invited by a resident has no automatic right to stay overnight without the authorisation by CYL.

(4) The exclusion of all others includes the 'owner', or in present case, the representative of the owner in the persons of CYL staff. It is a fact that no CYL staff can use a bedroom at will (as a bedroom) or assign another person to the same bedroom that has been allocated to a resident. *Walderdorff* would only have been apt if the owner (or some other person) could use and enjoy the habendum for the same purpose.

'The concept of leasing or letting of immovable property in art 13B(b) of Sixth Directive 77/388 involves assigning the right to occupy the property and to exclude other persons from it. It does not extend to a situation in which the owner of the property assigns the right to use it for a specific purpose but retains the right to use the property himself, or to authorise others to use it, for the same purpose or for other purposes' *Walderdorff-AGO* at [36].

(5) The right exercised by CYL to move residents between rooms (under clauses 3 and 25) does not interfere with the use and enjoyment of an allocated room at any one time. That is to say, if a resident was allocated room X (on the ground floor with disabled access) for the first 4 weeks of his licence, and is moved to room Y on the first floor, his use and enjoyment of room X (for the first 4 weeks) would be to the exclusion of all others, and his use and enjoyment of room Y (from week 5 onwards) would be similarly to the exclusion of all others.

(6) CYL retains a master key which can access any room, and has ‘an absolute right to enter residents’ rooms at all times’ (clause 12). The means of access retained by CYL, and the rights of access being exercised in reality, are necessary and proportionate to ensure that the transferee can have the use and enjoyment of an allocated room to the exclusion of all others. The rights of access are exercised for emergency or maintenance purposes, or for health and safety reasons such as pest control and rubbish clearance, or for safeguarding issues such as an under-aged visitor staying overnight, or for oversight of substance or drug abuse, or in relation to anti-social behaviour. These are part of the surrounding circumstances under which the contract is to take effect, and represent the exercise of common sense, and for reasons that are either for the common good of the collective community of residents, or the personal safety and benefits of the individual transferee, or both. For instance, when anti-social behaviour can be stopped by CYL staff, it is to the benefits of all other residents with the result that the use and enjoyment of their own rooms, to the exclusion of all others, can be safeguarded.

(7) Clause 38 is unexceptional in an agreement where the owner has the responsibility to keep the premises in reasonable repair. Access under clause 38 is granted to authorised personnel only by CYL for housekeeping and maintenance, and to inspect the condition of the bedrooms (e.g. bed bugs, and emptying of bins). If these measures represent restrictions to the criterion ‘to the exclusion of all others’, these are restrictions to ensure that a resident can have the use and enjoyment of the allocated bedroom where maintenance and hygiene issues are being monitored and addressed by CYL as the owner. Given the surrounding circumstances in which the contract is to put into effect, the retention of access rights by CYL is not a vitiating factor against the essential criterion that the Supply must grant the transferees enjoyment and use of their bedrooms to the exclusion of all others. On the contrary, the measures to have access are proportionate and reflect sound commercial sense.

123. In *Temco* the CJEU used the phrase ‘exclusive occupation’ to denote a right in rem, (instead of ‘exclusive possession’ with its connotation of a right in personam). In relation to ‘restrictions’, the court made the following pertinent observations at [24]:

‘Lastly, as regards the tenant’s right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers.’

124. For the reasons stated, and in line with the court’s judgment in *Temco*, I have no difficulty in finding that the second criterion ‘to the exclusion of all others’ essential to defining ‘the leasing or letting of immovable property’ for Community law purposes is met in the Supply made by CYL, notwithstanding the restrictions provided in the Agreement.

125. Taking a functional approach, the economic reality for ‘the leasing or letting of immovable property’ is concerned with the ‘use and enjoyment’ of the habendum ‘to the exclusion of all others’. While the existence of a right in the form of ‘exclusive possession’ is one way of establishing that there is a transfer of ‘the use and enjoyment to the exclusion of all others’, it is not the only way to ascertain if the criterion is met. It seems to me, the fundamental flaw in the respondents’ position is to start with the legal classification of ‘exclusive possession’ for the purpose of informing the construction of the second criterion. By adopting the legal concept of ‘exclusive possession’ to interpret the essential criterion of ‘to the exclusion of all others’ for Community law purposes, other clauses in the Agreement came to be read in the confused light mediated by the conflated meaning.

126. Finally, the principles of fiscal neutrality and equal treatment are overarching principles for construing Community law in general. For this reason, while ‘the leasing or letting of immovable property’ is to be construed narrowly, these overarching principles are at play to bring ‘any licence to occupy land’ into the definition of ‘the leasing or letting of immovable property’ for Community law purposes. In this respect, I have regard to the following pronouncements from European jurisprudence.

(1) From AG Jacobs in *Goed Wonen* at [80], that a functional interpretation of the concept of ‘leasing or letting of immovable property’ is to guarantee ‘the equal treatment of taxable persons’.

(2) From AG Colomer in *Temco* at [30], that a decision ‘to exclude licences from the scope of the tax exemption infringes the principle of fiscal neutrality, since transactions which are intrinsically the same would be treated differently’, as rightly observed by the Belgian State.

127. Both *Goed Wonen* (2003) and *Temco* (2005) made reference to an earlier case *Lubbock Fine & Co v Customs and Excise Comrs* (Case C-63/92) [1994] STC 101, wherein Advocate General Darmon’s definition for art 13B(b) purposes is related in *Goed Wonen* at [80] as follows: ‘a letting was a contract by which the owner transfers in return for a rent certain rights in his property, such as the right to enjoyment of the property, whatever the nuances of national law on that point’. In a footnote to [39] of *Lubbock Fine*, AG Darmon expressed his view that leasing and letting for Community law purposes includes a ‘lease’, a ‘licence’, a ‘bail’ or a ‘convention d’occupation précaire’.

128. In accordance with European jurisprudence, I conclude that the Supply made by CYL, namely the grant of a right for the use and enjoyment of a bedroom to the exclusion of all others, for an agreed term, in exchange for a payment linked to the passage of time, is a supply within the meaning of ‘leasing or letting of immovable property’ for the purposes of Art 135(1) of the PVD.

*Second: Is the Supply of ‘added value’ facilities?*

129. The respondents’ submission in this respect is that the Supply is far from being ‘a passive supply of exclusive possession of a specific part of a building’, but includes the access of communal facilities such as kitchens and lounges, and services such as signposting, and a degree of oversight and control. The Supply is therefore to be characterised as the supply of a range of added value facilities at the standard rate.

130. As I understand it, the respondents’ position is that the Supply, as an economic activity, is ‘far from passive’, and has ‘added value’ so as to make exemption inapplicable. To that end, I understand HMRC as submitting that the Supply comprises several components, of which accommodation is only one. The composite supply is to be treated collectively as added value supplies at the standard rate.

131. The factual matrix in the present case supports a finding of fact that the preponderant element of the Supply is that of the provision of sleeping accommodation, and other facilities and services being provided are of an ancillary nature, rendered in the course of making the main supply of accommodation.

(1) The consideration for the Supply is calibrated to the accommodation cost, which is stated in the version of the Agreement lodged at a daily rate of £42.86 under clause 8.

(2) Dr Bowen’s evidence stated the daily rate (to have increased) to £43.94 per night, of which £41.79 is met by the individual’s housing benefit.

(3) The daily charge is to cover predominantly the occupation of a bedroom, and ancillary costs of continental breakfast, non-communal gas and electricity, water supply, TV licence, and Wifi access.

(4) Communal facilities are provided on the premises for laundry and cooking and are accessory facilities in the course of making the predominant supply of accommodation.

(5) Routine maintenance and repair services to bedrooms and the communal areas to ensure the premises are kept in good order are ancillary to making the main supply.

(6) Daily cleaning services for all communal areas and to include rubbish clearance, are provided as a necessity for health and hygiene requirements in connection with making the main supply.

(7) A level of concierge service in the form of security and reception, signposting and oversight in the observance of House Rules is provided to ensure the personal safety of each resident, and to assist a resident to 'move on' in line with the temporary nature of the accommodation. These management services are ancillary to the main supply.

132. If the Supply is a composite supply of facilities, then the characterisation of the supply falls to be determined by the preponderant element of the supply. The economic reality of the Supply is underpinned by the eligibility of the recipients of the Supply as claimants of housing benefits, and these benefit payments are made in relation to the provision of accommodation to the claimants. As a matter of fact, and using the figures given by Dr Bowen, 95% of the daily charge was related to the provision of accommodation. As such, the economic and commercial reality is that the preponderant component of the Supply remains the provision of a bedroom to the recipient of the Supply, and it is the provision of the bedroom that forms the basis for characterising a supply.

133. Notwithstanding any ancillary elements that are included in the Supply, I find that the essential object of the Supply remains that of 'the making available, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time' in accordance with the ruling by the Court in *Temco* at [29]:

'Article 13B(b) of the Sixth Directive must be interpreted as meaning that transactions by which one company, through a number of contracts, simultaneously grants associated companies a licence to occupy a single property in return for a payment set essentially on the basis of the area occupied and by which the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time, are transactions comprising the "letting of immovable property" within the meaning of that provision and *not the provision of a service capable of being categorised in a different way.*' (italics added)

134. The Court in *Temco* has held that where the 'essential object' of a supply is that of making available of premises, then the supply in question cannot be characterised as a provision of a service. In accordance with that ruling, and having found that the essential object of the Supply to be the making available of a part of the premises (i.e. a bedroom) to each resident, in a passive manner, of premises or parts of buildings in return for a payment linked to the passage of time, and as such, the Supply is not the provision of a service capable of being categorised in a different way. On the face of it, the question here appears to be the same, or similar to, whether Item 1(d) exclusion applies. I have addressed the critical question here as concerns the nature of the Supply as a whole, while the critical question for Issue 2 is a consideration based on the a priori determination that the Supply is (predominantly) one of immovable property.

## Issue 2: whether Item 1(d) exclusion applies

### *Directive hotel exclusion*

135. The exclusion under Item 1(d) is intended to implement the Directive hotel exclusion, under Art 135(2)(a), and applies to the provision in a ‘hotel, inn, boarding house or similar establishment’: (i) ‘of sleeping accommodation’, or (ii) ‘of accommodation rooms which are provided in conjunction with sleeping accommodation’, or (iii) ‘for the purpose of a supply of catering’. Note (9) states that the term ‘similar establishment *includes*’ for the purposes of Item 1(d) ‘premises in which there is provided furnished sleeping accommodation’.

136. From the parties’ submissions, Issue 2 comes down to the question as to whether CYL is a ‘similar establishment’ for Item 1(d) purposes. Neither party has sought to argue that CJEU decisions are not directly relevant to interpreting Item 1(d) exclusion, as HMRC did in front of the FTT in *47 Park Street* [2016] UKFTT 569 (TC), where HMRC advanced the argument in front of the FTT that the interpretation of Item 1(d) is the preserve of domestic law on the premise that in enacting Note (9), the UK was exercising its permitted discretion under Art 135(2) of the PVD. In this respect, I agree with the FTT’s conclusion in *47 Park Street* at [241]:

‘... it seems clear that the wording in item 1(d) is intended to enact the Directive hotel exclusion in UK law .... Note (9) states that the term “similar establishment *includes*” premises of the specified type. On the basis that “similar establishment” is intended to equate to “sectors with a similar function”, it is difficult to see the enactment of note (9) as anything other than the UK seeking to set out what it considers is a particular instance of such a sector. Our view, therefore, is that the entirety of the provision, including note (9), represents the UK setting out the Directive hotel exclusion in UK law.’

137. On the basis that the term ‘similar establishment’ in VATA is intended to equate to ‘sectors with a similar function’ in the Directive hotel exclusion, the guidance from AG Jacobs in *Blasi* as respects the Directive hotel exclusion is directly relevant, as summarised below.

- (1) The tailpiece of art 13B(b) is broadly worded so as to allow the member states a large degree of discretion in placing limits on the scope of the exemption in art 13B(b) by providing for additional exclusions: at [12].
- (2) The exclusion of transactions from exemption is in conformity with that general principle, and is to be construed broadly: at [12].
- (3) Under the directive the supply and leasing of immovable property are in principle exempt from VAT. ‘The same applies to the letting of such property, which is normally a comparatively passive activity not entailing significant added value’: at [15].
- (4) An express provision in art 4(2) makes it clear that the ‘exploitation of tangible ... property for the purpose of obtaining income therefore on a continuing basis shall also be considered an economic activity’: at [15].
- (5) ‘The common feature of those transactions is that they entail more active exploitation of the immovable property justifying further taxation in addition to that levied upon its initial sale’: at [16].
- (6) The phrases ‘*accommodation, as defined in the laws of the Member States*’ and ‘*sectors with a similar function*’ are ‘somewhat imprecise’; ‘the intention was to leave the member states some latitude in defining the precise limits of the exclusion’: at [17].
- (7) The words ‘sectors with a similar function’ should be given ‘a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax’: at [18].



138. The economic reality of lettings in the hotel sector as distinct from exempt lettings of residential property is analysed by AG Jacobs in *Blasi* in the following terms.

- (1) A taxable person offering, for example, short-term holiday lets of residential property fulfils essentially the same function as (and therefore in a competitive relationship with) a taxable person in the hotel sector: at [19].
- (2) ‘The essential distinction between such lettings and exempt lettings of residential property is the temporary nature of the accommodation’: at [19].
- (3) Short-term lets are more likely to involve additional services such as provision of linen and cleaning of common parts of buildings, and ‘more active exploitation of the property than long-term lets in so far as greater supervision and management is required’: at [19].
- (4) A hotel or hostel will be willing to accept guests for potentially short stays, whereas a landlord interested in more passive longer term lets will require an agreement with the tenant’s confirmation of intention of a longer stay: at [21].
- (5) The German authorities in *Blasi* provide a ‘workable and legally certain means’ of distinguishing short-term accommodation similar to the provision by the hotel sector from long-term letting of residential property which is under Directive exemption: at [21]. The German State is justified in considering that a letting is of a long-term nature and qualifies for exemption only if there is evidence of an intention that the accommodation is to be provided for a minimum of six months from the outset: at [24].

#### ***Principles for considering Item 1(d) exclusion***

139. The phrase ‘similar establishment of sleeping accommodation’ in Item 1(d) is to be construed as implementing the phrases ‘accommodation, as defined in the laws of the Member States’ and ‘sectors with a similar function’ in art 13B(b)(1) of the Directive hotel exclusion. The principles from *Blasi* that are relevant to the determination of Issue 2 are encapsulated in the Court’s judgment in *Blasi* at [20]:

‘... the words ‘sectors with a similar function’ should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.’

140. The principles I distil from CJEU jurisprudence as applicable to the construction of the phrase ‘*similar establishment of sleeping accommodation*’ in Item 1(d) are as follows:

- (1) ‘similar establishment of sleeping accommodation’ is to be construed broadly;
- (2) ‘similar establishment’ is to be given a purposive construction, having regard to the purpose of the provision by the hotel sector as that of temporary accommodation;
- (3) A functional approach is to be adopted in construction by assessing whether the accommodation provision in question is in ‘potential competition’ with the hotel sector.

#### ***A purposive construction of ‘similar establishment’***

141. The respondents’ submissions in this respect have focused on the physical attributes of Monarch Court, as against what would be customarily expected for a hotel, or a budget hotel. Physical attributes of the premises may constitute an indicator of ‘similar establishment’, but I do not consider physical attributes of the premises to be of significance. For present purposes, similarity is not by reference to the physical attributes of the premises. It is plain from CJEU jurisprudence that the critical factor in determining when exclusion to land exemption is applicable is concerned with the *purpose* of the accommodation provision.

142. The critical distinction is to be drawn between long-term lettings of residential accommodation (an exempt supply) and short-term lettings of accommodation as in the hotel sector (excluded from exemption). The rationale behind the exclusion is the economic reality associated with the provision of short-term accommodation, which invariably involves additional services, and greater supervision and management being provided for the purpose of providing the short-term accommodation.

143. As a matter of fact, the temporary nature of the accommodation provision is the very essence of the Supply, and is a criterion understood by relevant referral agencies at the enquiry stage, and made clear to a potential recipient of the Supply from the outset. In reality, the length of stay of a resident varies from one week to two years, with about 30% of lets being less than 6 months. The fact that no assured tenancy can arise from the contractual arrangement, however long the overall duration of stay, allows CYL to exercise its right to evict a resident with 24 hours' notice. While the majority of lets (70%) last for longer than 6 months, that does not change the short-term nature of the accommodation provision, given that there are multiple factors that enable CYL and a resident to terminate the Agreement at short notice.

144. The Supply by CYL therefore falls to be a supply by a 'similar establishment of sleeping accommodation' by virtue of its intended purpose of providing temporary accommodation to homeless young people. It is the temporary nature of the accommodation provision at CYL which sets it apart from long-term lettings of residential accommodation, and makes the Supply similar to the provision in the hotel sector. The additional services in terms of cleaning and maintenance, and greater oversight of resident's compliance to house rules, and management of residents in terms of their admission are all present in the Supply made by CYL to make the economic activity in the nature of 'more active exploitation of the property'. (For the avoidance of doubt, the *active exploitation remains tied to an immovable property*, and is to be distinguished from the supply of a range of facilities as submitted by the respondents.)

145. The respondents put forward submissions as negating the interpretation that CYL is a similar establishment to a hotel. In this respect, HMRC rely on the fact that the accommodation provided by CYL is not tendered to the general public, and that there is a selection process whereby potential residents are being checked for their homeless status in the first instance, and then being assessed for their personal suitability by reference to any health or dependency issues. In my view, these factors are not relevant to the determination of whether Item 1(d) exclusion applies. The critical factor in construing 'similar establishment' for present purposes is by reference to the temporary nature of the accommodation provision as the purpose of the supply. The phrase 'similar establishment' is to be broadly construed with reference to the critical factor, which means secondary factors should not be accorded much weight in the construction. In any event, selectivity is not peculiar to the Supply made by CYL; selectivity is operative in all hotels one way or another, by means of pricing, locality, ambience, choice of niches, and so on. Selectivity is not a relevant factor to determine if the Directive hotel exclusion is in point, in view of the broad construction it is to be given.

#### *A functional approach to the construction*

146. The principle of equal treatment underpins the broad construction of Item 1(d) exclusion, by having to regard to the function being performed by a 'similar establishment'. The phrase 'sectors with a *function* similar to that of the hotel sector' is used in the Directive hotel exclusion, and it is clear from CJEU jurisprudence that it is the function performed by a competitor provider to a hotel that the Directive exclusion has in mind in order to achieve fiscal neutrality among providers of accommodation similar to the hotel sector.

147. In the present case, if a potential resident is not accommodated by CYL, the relevant agency or local authority may be sourcing alternative accommodation in a hotel or a hostel for

the homeless young person. Adopting a functional approach to the construction of Item 1(d) exclusion, and having regard to the economic reality in relation to the function of the Supply, I conclude that Item 1(d) exclusion is applicable to the Supply provided by CYL.

148. The principles of equal treatment and fiscal neutrality are relevant to the construction of Item 1(d), and are far more important than factors as concerns the physical attributes of the premises or criteria relating to selectivity or public access to the supply. By applying the Directive hotel exclusion to the Supply made by CYL, it is in conformity with the principle of equal treatment by regarding CYL as a similar establishment, and to ensure fiscal neutrality for VAT purposes, whereby short-term accommodation provided by CYL is excluded from exemption as that provided by a hotel.

#### **DISPOSITION**

149. The Supply made by the appellant falls within the meaning of Item 1(d) exclusion from land exemption as provided under Group 1 of Schedule 9 to the Value Added Tax 1994. The appeal is accordingly allowed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

150. 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.

**DR HEIDI POON  
TRIBUNAL JUDGE**

**Release date: 17/12/2021**

## ANNEX

The authorities are listed in the order as provided in the bundle.

- (1) *The Lord Mayor and Citizens of the City of Westminster v Commissioners of Customs and Excise* (VAT Decision: 3367) VATT [1990] 2 CMLR 81 (**'City of Westminster'**)
- (2) *Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, CJEU (**'Blasi'**)
- (3) *Dinaro Limited t/a Fairway Lodge v CCE* (VAT Decision 17148), VATT (**'Dinaro'**)
- (4) *North East Direct Access Ltd v CCE* (VAT Decision 18267) VATT (**'Direct Access'**)
- (5) *Belgian State v Temco Europe SA* (Case C-284/03) [2005] STC 1451, CJEU (**'Temco'**)
- (6) *Walderdorff v Finanzamt Waldviertel* (Case C-451/06) [2008] STC 3079, CJEU (**'Walderdorff'**)
- (7) *HMRC v Paul Newey* (Case C-653/11) [2013] STC 2432, CJEU (**'Newey'**)
- (8) *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16; [2014] STC 937, SC; [2011] UKUT 308 (TCC), [2011] STC 1750 (**'Secret Hotels2'**)
- (9) *Atlas Property Ltd v HMRC* [2014] UKFTT 674 (TC), FTT (**'Atlas Property'**)
- (10) *The Principal & Fellows of Lady Margaret Hall v HMRC* [2014] UKFTT 1092(TC), FTT (**'Lady Margaret Hall'**)
- (11) *HMRC v Airtours Holidays Transport Ltd* [2016] STC 1509, SC (**'Airtours'**)
- (12) *Fortyseven Park Street Ltd v HMRC* [2019] EWCA Civ 849, [2019] STC 1258, CA (**'47 Park Street'**)
- (13) *Sequeira Mesquita v Fazenda Publica* (Case C-278/18) Celex No. 62018CJ0278, CJEU (**'Mesquita'**)
- (14) *Street v Mountford* [1985] 2 WLR 877, [1985] AC 809, HL (**'Street v Mountford'**)
- (15) *Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners* [2014] EWCA Civ 773, [2014] STC 2508, CA (**'Subway'**)
- (16) *Prudential Assurance Company Limited v HMRC* [2021] UKFTT 50 (TC) (**'Prudential'**)