[2021] UKFTT 0068 (TC)

TC08053

VAT - grant of rights over land - whether commercial lease agreement granted facilities for parking vehicles or a licence to occupy - item 1(h) of Group 1, Schedule 9 of the Value Added Tax Act 1994 – Article 13B(b) of the Sixth Directive - whether HMRC correct to issue assessment to recover output tax – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06278
TC/2018/02543

BETWEEN

R K FUELS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA
PATRICIA GORDON

The hearing took place on 11 February 2021. With the consent of the parties, the hearing was held remotely by video using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

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. As such, the hearing was held in public.

Mr Bhikhu Mohanlal Kotecha, Accountant, for the Appellant

Ms Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondent

DECISION

APPEAL

1. The Appellant appeals against an assessment of VAT ('the Assessment') in the sum of £8,000, issued on 20 November 2017, pursuant to s 73(1) of the Value Added Tax Act 1994 (hereinafter referred to as 'VATA'). The Assessment followed HMRC's decision that the grant of a car wash facility within a car park by the Appellant is a taxable supply of parking. The periods assessed were 12/13 to 09/17.

2. The Appellant further seeks to appeal against HMRC's decision, dated 24 March 2017, that an Option to Tax as a Transfer of a Going Concern ('TOGC') remained in place since 11 March 2004 and had not been revoked since that date ('the Option to Tax decision'). For the reasons we will give later, the First-tier Tribunal ('FTT') does not have any jurisdiction to determine the appeal against the Option to Tax decision. This decision therefore only relates to the appeal against the Assessment.

BACKGROUND

3. On 26 November 2003, the Appellant submitted a VAT 1 application for a new business. Advance notification of the registration number was sent to the Appellant on 4 December 2003 and it was proposed that the Appellant would be registered for VAT, with effect from 14 January 2004, with the VAT allocation number 824 4439 29.

4. By a letter dated 2 February 2004, Woolley Bevis and Diplock ('the solicitors') wrote to HMRC requesting confirmation from HMRC as to (a) whether the purchase of the business met the conditions of a TOGC; and (b) whether VAT was chargeable on the sale. The solicitors followed up the letter by a further letter dated 26 February 2004. HMRC responded on 9 March 2004, confirming that the sale met the conditions for a TOGC. By a letter dated 10 March 2004, Sterling Accountants wrote to HMRC enclosing a completed option to tax notification Form 1614. On 8 June 2004, HMRC granted the option to tax, with effect from 11 March 2004. The Appellant's position is that HMRC's letter dated 8 June 2004 was never received.

5. On 25 March 2004, HMRC advised that the purchase of the business did not constitute a TOGC after all as the Appellant would not be carrying out the same business activity as the previous owner. This was because the previous owner of the business had let the premises out to another business, whereas the Appellant would be running the business and this therefore constituted a new business. Following exchanges of correspondence, HMRC decided not to pursue the VAT on the sale of the business as it was accepted that the Appellant had acted in good faith due to the earlier conflicting correspondence from HMRC.

6. On 9 November 2016, Officer Girithananda, of HMRC, visited the Appellant's business premises ('the Inspection'). Exempt supplies were identified by her as being made in

relation to the rental of a car park area as a car wash. On 9 December 2016, the Option to Tax National Unit confirmed that the option to tax had never been revoked or withdrawn by the Appellant. The unit further confirmed that if the Appellant had no interest in the land for six years after 2008, the option is automatically revoked.

7. On 15 December 2016, Sterling Accountants wrote to HMRC stating that the income received by the Appellant from the car wash was zero-rated as the option to tax had been withdrawn. They further referred to the previous conflicting advice that had been given by HMRC. On 19 January 2017, HMRC requested documentary evidence to show that the Appellant had withdrawn the option to tax when the purchase was made. No evidence was provided as the solicitors who had acted for the Appellant during the purchase were no longer retained and had destroyed the file.

8. On 20 November 2017, HMRC proceeded to issue the Assessment in the amount of £8,000, for under-declared output tax for the periods 12/13 to 09/17.

RESPONDENT'S CASE

9. HMRC's case (as set out in the Statement of Case) can be summarised as follows:

(1) The question for the Tribunal is whether the rental income received by the Appellant is an exempt supply of land or a supply of a car park (which is standard-rated). The legislation relating to exemption is set out at para 1, Schedule 9 VATA and is referred to in VAT Notice 742.

(2) The Appellant submits that the car wash constitutes a licence to occupy the land and not the supply of a parking facility. The Appellant relies on the 'Permitted Use' clause of the commercial lease agreement. The term *'car park'* is however consistently used throughout the lease agreement. The section of the lease agreement upon which the Appellant places reliance is under the heading 'Let Premises'. The paragraph states that *'the landlord agrees to rent to the tenant the car park. The car park will be used for only the following permitted use (the Permitted use): as a car wash business. Neither the car park nor any part of the premises will be used at any time during the terms of this lease by the tenant for any purpose other than the permitted use.'*

(3) Mr Odedra confirmed in a telephone conversation on 9 November 2017 that the lease agreement was on a rolling basis, covering a two-year period. Mr Odedra further confirmed that the wording of the lease agreement has remained the same since 2004. The lease agreement clearly describes the land as being leased as a 'car park', upon which a car wash business was allowed to operate. The fact that the Appellant has permitted an alternative use of the car park to run a car wash does not cause the area to cease to be a car park, nor does it mean that it cannot be used as a car park. There is a need for cars to be parked on the land whilst waiting to be washed, dried and cleaned. Without the ability to park a car on the land, the permitted use could not occur.

(4) The decision to raise an Assessment was made under s 73 VATA. The time-limits for raising an assessment under s 73(1) and (2) VATA are contained in s 73(6)(b)

VATA. The provision allows assessments for accounting periods of up to four years, provided that the assessment is made no later than one year after the facts come to the knowledge of the Commissioners. HMRC received a copy of the commercial lease agreement on 8 November 2017. The Assessment was issued on 20 November 2017. The earliest period assessed was 12/13 and this was therefore within the four-year time-limit.

APPELLANT'S CASE

10. The Appellant's grounds for appealing against the Assessment (as set out in the Notice of Appeal and the witness statements of Mr Odedra and Mr Kotecha) can be summarised as follows:

(1) In 2008, a VAT inspection was carried out by HMRC and the point about the rental income being exempt was raised and accepted by HMRC. This is contrary to HMRC's current decision that an option to tax is in place, giving rise to VAT on the rental income.

(2) The car park is rented to carry out the business of car washing and this is clearly stated in the lease agreement. It is not rented as a car park to park cars.

APPEAL HEARING

Documents

11. The documents before us were as follows:

(1) Documents Bundle consisting of 198 pages; and

(2) Amended Authorities Bundle consisting of 273 pages.

12. Both parties confirmed that they had the same documents.

Preliminary Issue

13. The Appellant seeks to appeal against the Option to Tax decision. In further amplification of this ground of appeal, it is submitted on behalf of the Appellant that HMRC previously gave conflicting advice in relation to whether the business was a TOGC. It is further submitted on behalf of the Appellant that the option to tax was withdrawn.

14. At the commencement of the appeal hearing, Ms Donovan submitted that the appeal number TC/201706278, relating to the Option to Tax decision, was not an appealable

decision and that therefore this Tribunal did not have the jurisdiction to hear that appeal. She referred to s 83(1) VATA, which deals with appealable decisions. She added that the Option to Tax decision was not a matter that was listed under s 83 VATA. Whilst Mr Kotecha objected to this submission, we are satisfied that the Tribunal does not have the jurisdiction to consider the Option to Tax point, having considered the matters listed under s 83 VATA as giving a right of appeal. It is correct that the Option to Tax decision is not one of the matters listed within s 83 VATA.

15. The FTT is a creature of statute and its jurisdiction is wholly derived from statute. The FTT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA') for the purposes of exercising the functions conferred on it by virtue of TCEA. This point was made clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22. The point was also made by Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, where he adopted what had been said by Moses J in *Marks and Spencer plc v Customs and Excise Commissioners* [1999] STC 205, at 247c, as follows:

> "….in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear that the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct."

16. It is clear that the legislation (TCEA) does not confer any judicial review function on the FTT. It is also clear s 83(1) VATA does not confer a general supervisory jurisdiction and there is no other provision of VATA which confers such a jurisdiction: We are satisfied that the FTT has no general supervisory jurisdiction over the decisions of HMRC that do not give rise to a right of appeal: *HMRC v Hok Ltd* [2012] UKUT 363 (TCC).

17. We therefore proceeded to hear the appeal against the Assessment.

Evidence and Submissions

18. Ms Donovan proceeded by opening HMRC's case as set out in the Statement of Case summarised above and we shall not therefore repeat those submissions here. Ms Donovan further cross-referred us to various documents included in the Documents Bundle and the Authorities Bundle, including the correspondence between the parties, the VAT schedule of assessment and the commercial lease agreement. She submitted that despite the fact that the Appellant relies on the 'Permitted Use' clause in the lease agreement to say that the car park was only being used as a car wash, the words '*car park*' appear frequently throughout the lease agreement. She further submitted that whilst there might be a car wash business in operation, the area is primarily a car park.

19. Ms Donovan relied on the case of *Fareham Borough Council v Revenue & Customs* [2014] UKFTT 1033 (TC), which she submitted was on all-fours with this appeal. In further amplification of her submission in this regard, Ms Donovan submitted that the grant of a

licence to use a car park for washing does not fall within the criteria of the lease of immovable property. The area remains a car park that is used to carry out a trade.

20. Ms Donovan further submitted that whilst HMRC's VAT Notice 742 did not have the force of law, it clearly defines what a licence to occupy land is. She added that the notice was consistent with Article 13B(b) of the Sixth Directive and the grant of a licence to use a car park for car washing does not fall within the criteria for a lease of immovable property. She concluded by submitting that the car park was used for carrying out a trade.

21. In opening, Mr Kotecha submitted that whilst appreciating that the option to tax was not the subject of the appeal before the Tribunal, in 2008 HMRC had carried out an inspection. At that point, the rental income was highlighted and was accepted as being exempt income. He added that it had been clarified at that time that the rental income was from a car wash and not a car parking facility. He further added that Officer Girithananda had visited the premises during the Inspection and the car wash is in a designated area, which is controlled by the person who runs the car wash. Mr Kotecha further submitted that the car wash model operated on the Appellant's premises has been replicated at many fuel stations. He concluded by saying that there are no specific areas in which to park a vehicle, although it is a car park. Cars would come in for washing and then leave.

22. In relation to *Fareham*, Mr Kotecha submitted that the Appellant's case can be distinguished because a specific area had been designated for use as a car wash. He added that although it was a car park, parking facilities were not being provided.

23. We then heard oral evidence from Officer Girithananda and Mr Odedra.

24. The first witness to give evidence was Officer Girithananda. Officer Girithananda is a higher officer of HMRC and she has been an employee of HMRC since 1992. Officer Girithananda adopted the contents of her witness statement, dated 7 August 2019, as being true and accurate. In her witness statement, Officer Girithananda explained that she was part of a team that carried out assurance visits on business premises and that she was the officer who carried out the Inspection on 9 November 2016. She continued by explaining that the review of the records that she had sight of during the Inspection showed that the rental income from the car wash was being treated as an exempt supply to occupy the land by the Appellant and had not been included in the Appellant's VAT returns. She had asked Mr Odedra why this was so and Mr Odedra had advised that Mr Kotecha dealt with VAT returns and could shed further light.

25. Officer Girithananda further explained that on 10 November 2016, she emailed HMRC's option to tax unit to check if the option to tax had been revoked by the Appellant. She followed this email up with a letter to Mr Kotecha on 5 December 2016, requesting to know why VAT was not charged on the rental income being received by the business. On 6 December 2016, the option tax unit had confirmed that the option to tax had not been cancelled and that a valid election was in place. Mr Kotecha responded to the letter dated 5 December 2016 and said that the option to tax had been withdrawn by the solicitors who had

been acting for the Appellant during the purchase and Mr Kotecha added that the Appellant had not received HMRC's acknowledgment of the option to tax, dated 8 June 2004. Officer Girithananda explained that Mr Kotecha was unable to provide a copy of the notice of withdrawal as he said that the solicitors who had been acting for the Appellant during the purchase had destroyed the file.

26. Officer Girithananda then issued a pre-assessment letter on 12 September 2017, which was upheld following review conclusion. On 12 October 2017, Officer Girithananda wrote to the Appellant to request additional information, including an agreement for the lease of the car wash. She then spoke to Mr Odedra on 9 November 2017, who confirmed that the lease agreement for the car park was on a rolling basis, for two years. Mr Odedra had added that the wording of the lease agreement had remained the same since 2004. Based on the information provided, Officer Girithananda concluded that the agreement for the supply provided was for a parking facility, which is a standard-rated taxable supply.

27. In her oral evidence, Officer Girithananda added that she was on the Appellant's business premises for a couple of hours when she carried out the Inspection. During that time, she observed a forecourt, where the fuel station is situated. She added that there was a shop and the car wash was to the back of the shop. She further added that there were two entrances to the car wash as one could walk around the outer circumference of the shop and enter the car wash area from either side of the shop. In terms of the car wash itself, she explained that there was a structure that was covered and had lighting and that it was possible for anyone to park their car in the area. In her opinion, one could park their car in the car park and go into the shop.

28. Mr Kotecha did not have any questions to ask Officer Girithananda in cross-examination.

29. We then heard from Mr Odedra. In his oral evidence, he adopted the contents of his witness statement dated 20 August 2020 as being true and accurate. We have already referred to the material parts of his brief witness statement at para 10 above and shall therefore not repeat the contents of the witness statement here.

30. In his oral evidence, Mr Odedra gave a description of the layout of the Appellant's business premises. He stated that the fuel station is on the left hand-side of the A511, when one approaches the fuel station from Burton. He continued by saying that when you enter the forecourt of the fuel station, the fuel pumps are on the right-hand side and the tankers drop off fuel where Officer Girithananda had parked her car during the Inspection, so no-one can ordinarily park there. He added that you can only park a maximum of two cars outside the shop, which is 500 square feet, and that the car wash is behind the shop. He confirmed that you can enter the area where the car wash is situated from either outer side of the shop, as explained by Officer Girithananda, and added that the fuel station takes up about 75% of the premises.

31. Mr Odedra further added that the car wash used to have automated systems but these have now been dismantled, although the structure where the automated systems were remains. The cars are washed by hand by eight to nine members of staff at the car wash. The members of staff are dropped off by another person at the start of the day and they do not therefore need to park any cars whilst they are washing cars during the day. He has never come across a situation where a customer chose to park their car there for any reason other than that their car was being vacuum cleaned, so he cannot shed light on whether the car wash operators had the power to ask people to move their cars once washing was complete.

32. Under cross-examination, Mr Odedra explained that the car wash area is a "U" shaped area behind the shop. He explained that of the eight or nine people who work at the car wash, two people wash the cars, whilst the other people dry the cars and vacuum clean them. Therefore, about four cars could be washed at a time. Customers would wait in a queue to get to the car wash and they would then park their cars when their cars are being vacuum cleaned.

33. Mr Odedra was unable to explain how the area where the car wash is situated is described in Land Registry documents and no plans or maps of the area have been provided to us.

34. There was no re-examination and no further witnesses were called.

35. Following completion of the evidence, we heard closing submissions.

36. In closing, Ms Donovan submitted that the issue comes down to the lease agreement. She added that HMRC's position is that the lease relates to a car park that is being used as a car wash and therefore it does not meet the requirements for exemption included at paragraph 2.5 of the VAT Notice. She further added that the area of land described is a 'car park' and highlighted that Mr Odedra was unable to shed any light on whether the occupant had exclusive use of the area, or a right to remove any parked cars. She concluded by saying that the lease does not give the type of ownership envisaged by Schedule 9 VATA. The *Fareham* case is directly on point and the car wash is a taxable supply.

37. In closing, Mr Kotecha submitted that the lease agreement is for a specific purpose; namely car washing. He added that the car wash business has exclusive right to use the area as a car wash. If a car were to be parked in the area, this would disrupt the car washing process. He concluded by saying that the circumstances in the *Fareham* case are different from the circumstances in this appeal.

38. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

39. The Appellant appeals against an Assessment of VAT in the sum of £8,000, issued on 20 November 2017 pursuant to s73(1) VATA, that the grant of a car wash facility within a car park by the Appellant is a taxable supply of parking. The periods assessed were the period ending 12/13 to the period ending 09/17.

40. The Assessment in this appeal followed an Inspection, on 9 November 2016, by Officer Girithananda. During the Inspection, exempt supplies were identified as being made in relation to the rental of a car park as a car wash. The point at issue between the parties in this appeal is whether the letting by the Appellant of a car wash situated within a car park at the Appellant's premises is 'the letting of immovable property' or 'the letting of premises and sites for parking vehicles'. If it is the former, it will, in principle, fall within the exemption from VAT. If it is the latter, it will be excluded from the exemption and will therefore be subject to VAT.

41. We have derived considerable benefit from hearing the oral evidence given in this appeal. We have further had the benefit of considering all of the documentary evidence provided.

42. The Appellant ('R K Fuels Limited') is a limited company, with premises situated at Midway Service Station, Burton Road, Midway, Swadlincote, Derbyshire, DE11 7ND ('the premises'). The directors of the company are Mr Muluji Odedra and Mrs Odedra. The Appellant's main business activity is the retail of fuel (petrol station), with an adjoining shop. The Appellant also receives rental income from a car wash located within the premises.

43. We heard oral evidence about the layout of the fuel station but we were not provided with maps or photographs of the area. The parties were however in agreement that the car wash area is to the back of the shop that is situated on the premises and that it is possible to enter the area where the car park is situated via the outer left, or outer right, of the shop. Both parties were also in agreement that one could effectively park their car in the car park and go into the shop, albeit that the Appellant does not accept that this occurred or that the parking facilities were supplied. The oral evidence given is that whilst the car wash used to have automated systems, these have now been dismantled, although the structure where the automated systems were remains. The cars are washed by hand by eight to nine members of staff at the car wash. Customers would wait in a queue to get to the car wash and they would then park their cars when their cars were being vacuum cleaned. We therefore make these findings of fact.

44. Mr Kotecha, for the Appellant, argues that the supply being made is that of the grant of an interest in or rights over land, or of a licence to occupy land, for the purposes of car washing and therefore an exempt supply. Ms Donovan, for HMRC, submits that the supply made by the Appellant is not a licence to occupy. Ms Donovan further submits that a licence to trade is not an interest in land. Alternatively, she submits that if there is a supply of an interest in land, then it is a supply of car parking, which falls to be treated as standard-rated.

In further amplification of this submission, she refers to and relies on VAT Notice 742, which provides, *inter alia*, that:

> *"**2.5 A licence to occupy land***
>
> *A licence to occupy is a written or oral agreement which falls within the European concept of leasing or letting of immovable property, but falls short of being a formal lease for the purpose of UK land law.*
>
> *For a licence to occupy to exist, the agreement has to have all characteristics of a 'leasing or letting of immovable property'. This is the case if the licensee is granted right of occupation of a defined area of land (land includes buildings…….), for an agreed duration in return for payment, and has the right to occupy that area as oner and to exclude others from enjoying that right.*
>
> *All of these characteristics must be present.*
>
> *Where a licence to occupy is granted together with other goods and services as part of a single supply, the nature of the overarching supply will determine how it will be categorised for VAT purposes."*
>
> …
>
> ***4. Parking***
>
> ***4.1 The basic VAT position***
>
> *If you provide facilities for parking vehicles your supply will normally be standard-rated. There are exceptions to this general rule. This section will help you decide the liability of your supplies.*
>
> ***4.2 When to make a standard-rated supply of parking facilities***
>
> *If you make a grant of the right to use facilities which are either designed for parking vehicles or provided specifically for that purpose your supply is standard-rated except in the circumstances described in paragraph 4.4 and 4.5. The following are examples of standard-rated supplies of parking facilities:*
>
> - *a letting or licence of a garage or designated parking bay or space, the letting is standard-rated even if the facilities are not used for storing a vehicle (unless the lease or licence specifically prohibits the use of facilities for parking)*
> - *a right to park vehicles (including trailers) in, for example, a car park or commercial garage*
> - *a letting or licence of a purpose built car park….*

4.3 When a supply is of land rather than parking facilities

If you grant an interest in, or right over or licence to occupy land in the following circumstances, your supply will be exempted, unless you have opted to tax:

- *letting of land or buildings (but not garages, designated parking bays or other facilities specifically designed for parking) where the conveyance or contract makes no specific reference to the use for parking vehicles*
- *letting of land or buildings where any reference to parking a vehicle is incidental to the main use*

45. We bear in mind that HMRC Guidance is not an exhaustive code or a comprehensive edict. It is trite law that guidance and kindred instruments do not have the status of law and, thus, are subservient to primary legislation and secondary legislation.

46. In relation to whether the arrangement amounted to the grant of an interest in or rights over land, or a licence to occupy land, we have considered the relevant statutory provisions and case law, together with the documentation setting out the characteristics of the agreement between the parties.

47. The supply of all goods or services is subject to VAT, unless expressly exempted. The provisions providing exemption are exhaustive. The starting point is Article 13B(b)(2) of EC Council Directive 77/388 ('the Sixth Directive'), which provides that:

> "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 of preventing any possible evasion, avoidance or abuse:
>
> (b) the leasing or letting of immovable property excluding:
>
> …….
>
> (2) the letting of premises and sites for parking vehicles

[Emphasis added]

48. As far as domestic legislation is concerned, for a transaction to be classified as a "licence to occupy" and therefore exempt under Group 1 of Schedule 9 VATA ("Schedule 9"), it must have all of the characteristics of "leasing or letting immovable property". The statutory provisions which specify the supplies of land and buildings that are exempt from VAT are found in s 31 VATA and Group 1, Schedule 9, as follows:

49. Section 31 VATA provides that:

> "**31.-Exempt supplies**
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9
>
> ……"

50. Schedule 9 provides that:

> "Exempt supplies; Interpretation; Real property; VAT

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	The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than- …….
	(h) the grant of facilities for parking a vehicle; ……..

51. Item 1(h) clearly includes an exception that "the grant of facilities for parking a vehicle" makes the supplies non-exempt. HMRC argue that the grant is properly categorised as falling within exception (h).

52. A licence to occupy therefore requires, amongst other things, the leasing or letting of immovable property for a specified duration and for payment, with the right to exclude others.

53. In *Sweden v Stockholm Lindö Parkab* Case-150/99 (2001) STC 103, at [126], the Advocate-General said this:

> "According to the case law of the Court of Justice, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features..."

54. Earlier, at [113], the Advocate-General said this:

> "I would add, a salient and typical characteristic of a lease or let, that it necessarily involves the grant of some right to occupy the property as one's own and to exclude or admit others, a right which is moreover linked to a defined piece or area of property."

[Emphasis added]

55. In *Customs and Excise Comrs v Mirror Group Newspapers plc* Case C-409/98 (2001), at [27], the Advocate-General said this:

> "In order to identify the key features of a contract, however, we must go beyond an abstract of purely formal analysis. It is necessary to find the contract's *economic purpose*, that is to say the precise way in which performance satisfies the interests of the parties. In other words, we must identify the element in which the legal traditions of various economic countries term the *cause* of the contract and understand as the economic purpose, calculated to realise the parties' respective interests, lying at the heart of the contract. In the case of the lease, as noted above, this consists in the transfer by one party to another of an exclusive right to enjoy immoveable property for an agreed period…"

56. And at [29], he added that it is necessary to look at the "chief purpose" of the contract between the parties as the decisive factor.

57. This reflects the judgment in *Skatteministeriet v Morten Henriksen* (Case C-173/88) [1990] STC 768, at [41]:

> "The characteristics of a letting must be predominant in the contract. Where the use of the property is of secondary importance, this requirement is not satisfied. Accordingly the purpose of the contract and the importance of the use of the property to the recipient of the supply are relevant in determining whether the contract should be characterised as a letting of immoveable property."

58. This further reflects what the European Court of Justice held in *Svenska Staten v Stockholm Lindopark AV* [2001] 1 EC 493, at [26]:

> "According to the case law of the [European] Court of Justice, in order to determine the nature of a tactical transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features."

59. The *Svenska* case was considered in *C & E Comrs v Venuebest Ltd* [2003] STC 433.

60. In *C & E Comrs v Trinity Factoring Services Ltd* [1994] STC 504, the court held, at p508, that:

> "The proper question [for the tribunal] is whether having regard to the nature of the subjects and the terms of the lease a grant of facilities for parking a vehicle had been made wither expressly or necessary implication."

61. In *Skatteministeriet*, Advocate-General Jacobs held that the phrase "premises and sites for parking vehicles" in Article 13B(b)(2) of the Sixth Directive covered the letting of all places designed to be used for parking vehicles, including closed garages. Such lettings were however exempt from VAT if they were closely linked to the letting of immovable property, which were itself exempt from VAT. The court further held that under art. 13B, a Member State could not exempt from VAT lettings of premises and sites for parking which were not covered by the exemptions provided for in that provision.

62. Having considered the relevant statutory provisions and the case law, we proceed to determine the nature of the transaction in this appeal, as well as the characteristics of the agreement in question.

Q. What are the characteristics of the lease agreement and has a grant of facilities for parking vehicles been made, either expressly or by necessary implication?

63. We have considered all of the circumstances in which the agreement/transaction took place in order to identify its characteristic features. As already stated, we have not had the benefit of seeing a plan of the area where the car park is situated. Included in the documents before us however is a copy of the commercial lease agreement between the Appellant and the tenant (the car wash), dated 1 June 2014. The material provisions of the lease agreement are as follows:

> *"IN CONSIDERATION OF the landlord leasing the car park situated within the Premises ('the "Car park"), to the Tenant, the Tenant leasing the Car Park from the Landlord and the mutual benefits and obligations set forth in this Lease, the receipt and sufficiency of which consideration is hereby acknowledge* [sic], *the Parties to this Lease (the "Parties") agree as follows:*
>
> *…*
>
> ***Let Premises***

3.The Landlord agrees to rent to the Tenant the Car Park. The Car Park will be used for only the following permitted use (the "Permitted Use"): as a car wash business.

Neither the Car Park nor any part of the Premises will be used at any time during the term of this Lease by the Tenant for any purpose other than the Permitted Use."

64. Having considered the lease agreement in its entirety, we find that there is considerable force in Ms Donovan's submission that the words "Car Park" feature frequently throughout the lease agreement and we therefore make this finding of fact. We find that the area leased was, for all intents and purposes, a car park.

65. In *Fareham*, to which we were referred by Ms Donovan, the FTT considered a situation whereby Fareham Borough Council permitted a concessionaire to park his ice cream van and trade from Salterns Car Park, Fareham. Whilst we are not bound by a decision of the FTT in *Fareham*, we find that conclusions reached by the FTT to be persuasive. The appellant in *Fareham* had contended that the charge made for the right to park his van and sell ice-cream was exempt from VAT. HMRC disagreed and concluded that the grant of a catering concession at a car park is a taxable supply of parking and the right to trade. The FTT found in favour of HMRC on the basis that the use and enjoyment of the site was of secondary importance, since the concessionaire could indeed park anywhere within the car park. The FTT further found that the introduction of a vehicle on to the site was the primary means by which the parties achieved the joint objective of allowing ice creams to be sold and that parking was not ancillary to the catering concession.

66. It was argued on behalf of the Appellant in the appeal before us that the supply could not be a supply of parking as cars would leave once washed and vacuum cleaned. We find however that even if the owners of the vehicles did not leave the car park whilst their vehicles were being vacuum cleaned, this does not translate into a finding that the vehicles were not parked in the car park as all that is required for a vehicle to be parked is that it is stationary. We further find that the use and enjoyment of the car park as a car wash was of secondary importance since the tenant could, effectively, park anywhere within the car park. This is not a finding that the right to run the car wash was merely a consequence of being able to park in the car park. We are satisfied however that the introduction of vehicles onto the car park area was the primary means by which the objective of running a car wash was achieved. We find that the agreement is simply a means of allowing the supply; namely the right to operate a car wash.

67. We therefore hold that a grant of facilities for parking vehicles been made, either expressly or by necessary implication, and further hold that the occupation of the car park under the terms of the lease agreement is a means to enable the car wash facility to operate. We are satisfied that a site for parking is any place where a motor vehicle may be parked. We have found that the fact that a person may not leave a vehicle does not render a vehicle any less parked.

Licence to occupy and right to exclude others?

68. For completeness, we have considered the issue as to whether the Appellant had the right to exclude others. It is trite law that the exemptions provided for by Article 13 of the Sixth Directive have an independent meaning in Community law. The fundamental characteristic of a "letting of immovable property" for the purposes of Article 13 lies in conferring on the person concerned, for an agreed period and payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. The exemptions provided for by Article 13 must be interpreted strictly, since they constitute exemptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.

69. Once again, whilst we have had the benefit of hearing the oral evidence relating to the premises, we have not been provided with a plan of the premises. The description of the premises given in oral evidence is that the car wash is to the back of the shop situated on the fuel station and that there were two routes through which one could enter the car wash. We also heard that although there was a structure that housed the automated car wash system, this was not in use and had been dismantled. Cars were washed by hand and would park when being vacuum cleaned. We have already found that the area is a car park.

70. We are satisfied that an individual could, effectively, park in the car park if they were having valet services, or indeed if their vehicle was being vacuum cleaned. We further find that an individual could leave their car whilst they went to the shop that was on the premises. The evidence before us does not support a finding that the tenant could effectively ask an individual to remove their vehicle from the car park in such circumstances and there is no indication that there were any signs warning that vehicles left would be removed or asked to leave. We find that although there may be a right to occupy during the agreed times, there is no evidence before us to support a finding that there is a power to exclude others. Whilst it is submitted that parking in the car park would obstruct operations, it is clear that vehicles were indeed parked when they were being vacuum cleaned and that there could also be a queue of vehicles. We are therefore satisfied that the tenant did not have significant rights of possession or control.

71. Accordingly, we uphold the Assessment and we are satisfied that the grant of a car wash facility within a car park by the Appellant is a taxable supply.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 11 MARCH 2021