Neutral Citation: [2025] UKFTT 93 (TC)

Case Number: TC09419

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/02635

VAT, input tax recovery, dispute as to existence of exempt supply of land between parent and subsidiary - no written contract in place. No supply of land identified - appeal allowed

Heard on: 29-31 January 2024
Judgment date: 30 January 2025

Before

JUDGE VIMAL TILAKAPALA
MEMBER MOHAMMED FAROOQ

Between

SARABANDE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Christiaan Zwart of counsel, instructed by PL Vat Consultancy

For the Respondents: Gift Nyoni, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal relates to a claim to recover input tax on expenditure incurred by the Appellant ("Sarabande" or "SB") on the acquisition and refurbishment of property at Kingsland Wharf, Hackney (the "Building").

2. The appeal is against a decision by the Respondents ("HMRC") dated 24 May 2021 and upheld on statutory review on 11 March 2022, to disallow an input tax claim in respect of a sum of £341,487.31 on SB's first VAT return (the "VAT Return") submitted on 7 August 2018 covering the period from 21 February 2014 to 30 June 2018.

3. SB also appeals against an assessment issued on 22 November 2019 arising from an amendment made to the VAT Return under s.25(3) of the VAT Act 1994 ("VATA") resulting in a payment of £20,735.58 being due under s.73(1) VATA.

4. The hearing took place over three days. We received skeleton arguments from each side, a hearing bundle of 536 pages and an authorities bundle of 498 pages. We were also shown a video recording containing a "walk-through" of the Building.

5. Witness evidence was given by Ms Trino Verkade, the CEO of SB, Ms Shirin Fathi an artist and former SB lease-holder, and from Jacob Mathers the HMRC officer in charge of the case.

6. Written closing submissions were provided by each party in April 24 together with two additional authorities bundles.

BACKGROUND AND RELEVANT FACTS

7. SB is a registered charity established by Lee Alexander McQueen, the late fashion designer.

8. SB is the owner of a long leasehold interest in the Building. It also employs a number of staff.

9. Suture Inc Limited ("Suture" or "SIL"), incorporated on 9 October 2015, is SB's wholly owned subsidiary.

10. SIL is not registered for VAT. It is managed by SIL and has no staff of its own. Its directors include SB and trustees of SB. Ms Verkade is and at the times relevant to this appeal was a director of SIL.

Summary of SB's dealings with HMRC

11. SB applied for voluntary VAT registration on 20 February 2018. In its application it described its business activities as "collaboration projects" and "educational consulting". The application was voluntary as its taxable turnover had not exceeded the then applicable VAT threshold of £85,000 in the previous 12 months.

12. The "collaboration projects" which were stated to be SB's main business activity were described as collaboration agreements with large brands under which SB would receive at least £120,000 per year. Under these projects SB explained that it would: "manage and co-ordinate marketing projects i.e. commission work of one or two artists in residence for the brand. It would also provide services to brand companies by the education of their clients via studio tours, meeting with students and artist being supported by the charity or curating consumer events for the brand's clientele."

13. The VAT registration application was successful and notified to SB on 22 March 2018, the effective date of registration was, as requested by SB, 21 February 2018.

14. SB submitted its first VAT return on 7 August 2018. This was a repayment claim for £341,487.31, covering a period of 4 years and 4 months from 21 February 2014 to 30 June 2018.

15. The repayment claim related to the acquisition and refurbishment of the Building which SB had converted into art studios, exhibition space and meeting rooms.

16. HMRC Officer Ricky Sandhu queried the VAT Return and Ben Hooper, a partner in ADG Accountants ("ADG"), SB's agent, provided the following further information in respect of SB's activities: "the freehold to the building was acquired by Sarabande in February 2014. Studio and exhibition space is charged to artists via the charity's subsidiary, Suture Inc Limited (SIL) a company incorporated in the UK but not registered for VAT. In turn Sarabande charges SIL an annual fee for the running costs of the building associated with this space, The fee charged to SIL is a business activity and subject to VAT at 20%.".

17. Mr Hooper recognised that there was a non-business element to SB's activities – specifically where the Building was used for events for which there was no commercial sponsorship or where no entrance fee was charged. He explained to HMRC that SB had sought to determine business versus non business use for input tax recovery purposes by examining the events that had taken place since the Building opened in order to arrive at a proportionate disallowance by reference to business versus non-business day counts.

18. On 2 October 2018 HMRC Officer Christine Marples asked for further information, including an explanation as to why rental income shown in SB's accounts had not been included on its VAT Return. She also asked for a copy of the rental agreement and details of the VAT treatment and a copy of the agreement between SB and SIL.

19. On 23 October 2018 Mr Hooper responded to Ms Marples stating, inter alia, that (a) studios were rented to artists (the "Artists") by SIL and not SB, (b) for some studios incorrect bank details had been provided to the Artists which was why rent was being paid to SB – this would be corrected as those agreements expired, and (c) SB had not shown rental income in its accounts as rent received was offset against amounts owed by SIL to SB. Mr Hooper also said that no formal agreements existed between SIL and SB in respect of the intercompany arrangements. Copies of invoices from SB showing the charges made to SIL were provided to HMRC.

20. On 12 November 2018 the case was transferred to Officer Jacob Mathers ("Officer Mathers"). He asked for additional information in respect of the fee including the basis on which it was computed and whether it allowed SIL to use the Building.

21. On 5 December 2018 Officer Mathers asked why the supply from SB to SIL was not an exempt land transaction as there was no option to tax had been made. He also asked for details of the expenses included in the recharge arrangements between SB and SIL.

22. On 28 November and 20 December 2018 Mr Hooper explained that SIL used SB's resources, including its employees and the Building, to operate. The recharge was a way of apportioning costs fairly and so not exempt as in their view it was more akin to a management charge. The email included spreadsheets showing how the fee was computed and what it included. Mr Hooper also explained that SIL had been established so that commercial activities could be run through it in order to "protect SB from any associated risks". As letting to the Artists was a commercial activity it was decided that it would go through SIL.

23. On 8 April 2019 Mr Hooper confirmed to Officer Mathers that the supply to SIL from SB included a licence to occupy land although the supply did not consist exclusively of that licence.

24. On 23 July 2019 Officer Mathers issued a decision letter. This letter dealt with SB's treatment of events held in the Building and SB's business/non-business calculations. His letter concluded that SB's methodology for its "non-business calculation" did not produce a fair or reasonable result taking into account the nature of its activities.

25. On 20 August 2019, Officer Mathers received an email from Victor Dauppe at ABG. Amongst other items, Mr Dauppe stated (for seemingly the first time) that it was SB and not SIL that provided use of the studios to the Artists. A formal review of Officer Mather's decision of 23 July 2019 was also requested. This review concluded on 4 October 2019 and upheld the decision. As the review does not relate to the decisions under appeal currently it is not considered further.

26. Officer Mathers was then directed to contact Graham Elliott of City and Cambridge Consultancy Limited regarding the VAT matters. In contrast to what Officer Mathers had been told by Mr Dauppe, Mr Elliott said that it was SIL and not SB which carried out the activities in relation to the studios and that SB made taxable supplies to SIL.

27. On 20 March 2020 Mr Elliott provided more detailed information. This explained, inter alia, that: (a) SB had taken legal advice from Bates Wells Braithwaite, its then lawyers, on establishing SIL and that no activities were carried out prior to SIL being formed, (b) no record was kept of the advice nor was there any business plan or similar document showing what was proposed or implemented, (c) a business plan had been developed by Ms Verkade which took into account the wishes of Lee Alexander McQueen, but this was not recorded and was "held in Trino Verkades's mind", (d) no copies of minutes recording any of those discussions were available. Copies of the lease agreements (the "Leases") entered into by the Artists were produced.

28. Mr Elliott also said that the lawyers responsible for drafting the Leases had erred as SIL rather than SB should have been named as landlord. He added that in accordance with what should have been drafted, rental payments had actually been made to SIL and the accounts of the companies prepared on the basis of SIL being the "supplier".

29. On 1 September 2020 the original appeal was struck out on the basis that the decision issued on 23 July 2019 was not appealable.

30. Mr Elliott provided further information to Officer Mathers on 14 August 2020 confirming, inter alia, Officer Mather's understanding that the only supplies made by SB were the "recharge" to SIL, sponsorship and making grants. Everything else was done by SIL. He added that SIL would be named on the Leases as landlord in October 2020 when new contracts were to be issued to the Artists.

31. On 24 May 2021 Officer Mathers issued a new decision letter to SB denying its input tax reclaim and amending its repayment claim to £20,735.58. His decision was based on his conclusion that SB had made an exempt supply of a licence to occupy land to SIL. This reflected the information provided by Me Hooper and Mr Elliott's confirmations that SB's only supplies were: (i) the supply to SIL which was described as the "management charge" and which Mr Elliott had acknowledged included a licence to occupy land, (ii) the sponsorship agreement (Diageo), and (iii) making grants and bursaries to students, with everything else being done by SIL.

32. On 23 August 2021 Gary Jackson in his capacity as SB trustee requested a review of the decision. He also requested that the review be limited to the decision on whether the supply by

SB was exempt – with other matters being set aside for the time being. In his letter he stated that SB rather than SIL was landlord under the Leases and that SB made taxable supplies direct to the "residents". He denied there being any supply of an interest in land from SB to SIL noting that no written agreement providing for such a supply existed.

33. On 21 January 2022 Officer Mathers replied setting out his view of the situation having taken into account Mr Jackson's new version of events. In short, his view had not changed as he considered the earlier information received in relation to SB and SIL's activities to be more consistent with the factual evidence he had seen.

34. On 11 March 2022 HMRC issued a review decision upholding Officer Mather's decision.

35. On 8 April 2022 SB lodged its appeal to the Tribunal.

The Building

36. The Building consists of 9000 square feet of a Victorian stable block located in Kingsland Basin off Regents Canal in the "De Beauvoir" neighbourhood in the London Borough of Hackney, an area described by SB as a "creative hub".

37. SB described the Building's physical features as follows: "the Building was a former stables and has an external ramp from ground level to first floor (originally for horses). The former ground floor stable area remains so divided but today into particular studio areas that are distributed along, and accessed from, a central corridor accessed from each external end of the building, The First Floor contains a "Gallery Space" and an "Office Space", as well as vertical circulation spaces leading to and from the outside at Ground Level. Access from the Ground Floor to the First Floor remains impossible except by; (i) exiting the Building and re-entering it at the North End to the First Floor or up the external Ramp, or (ii) using the North Ground floor entrance. The Ground Floor contains common parts such as a kitchen"

38. The Building is staffed by SB employees or contractors (including security personnel) employed by SB. CC TV is provided and maintained by SB. SB is also responsible for the Building's fire alarm systems. Artists are required to complete a risk assessment and the studios can be subject to spot checks to ensure compliance with building safety requirements

Witness Evidence

Ms Trina Verkade

39. Ms Verkade is CEO of SB. She became CEO in 2020 and prior to that was a SB trustee. She was one of the trustees involved in the decision to acquire and convert the Building. She is also a director of SIL.

40. The following is a summary of the key points which we found from Ms Verkade's written and oral evidence:

(1) A series of options were considered for the Building's refurbishment. The aim was to have a home for SB with sufficient space for a community to be established that would bring artists from a wide range of disciplines together.

(2) SB was established by Alexander McQueen to help individuals start out in design and to develop as artists. From its inception through to September 2014 it did this mainly by funding scholarships to students on arts courses – covering fashion, art and jewellery. It became apparent to SB that a qualification or skill was not enough to help those individuals become established as designers or artists. More was needed, in particular the

need for those individuals to have "business acumen; reputation and kudos for purchasers; [and] to be networked into the artistic community and experience"

(3) SB decided to help selected artists to develop these skills and achieve their potential through a charitable programme of support – to be undertaken in addition to the scholarships provided by SB.

The "Accelerator Programme"

(4) The support programme is known as "the Accelerator Programme" as it is designed to "proactively accelerate" talent. It is also referred to colloquially as a "Sarabande Residency" – but it is more than an artistic residency in the "normal sense".

What is provided

(5) Artists are provided with subsidised curated space which includes (a) studio space, and (b) exhibition, talk and meeting space. They also receive a package of benefits which includes: the use of professional equipment (such as lighting and camera equipment), advice from industry experts, individual consultancy and advice from lawyers and accountants, the opportunity to participate in exhibitions, introductions to clients, the ability to sell through the Sarabande website, introductions to other artists and to the artistic community, free travel to and participation in international art events together with other support "tailored to the needs to the individual artist".

(6) Ms Verkade estimated the value of the support provided to be between £35,000 - £40,000 per artist per year – although the participants on the programme were not required to pay anything near that. She said that the cost estimate was calculated by reference to what an artist in that area of London would need to pay for studio rental and the benefits provided – such as the use of photographic equipment. The figures were based also on experience and knowledge of local fees and gleaned from industry sources. She acknowledged that the amounts would differ depending on the artist's particular discipline.

(7) Ms Verkade pointed out that the Accelerator Programme was also referred to in the annual trustees' reports – which contained (an albeit brief) summary of how the programme had grown since inception and an idea of how the building had been used by the artists in each year.

Studio spaces

(8) Each Artist is assigned a studio. SB curates the spaces – deciding on the appropriate mix of different types of artist in order to ensure "effective interaction and cross fertilisation of ideas" between participants. The mix includes photographers, fashion designers, jewellery designers, performance artists and those working in fine arts.

(9) Ms Verkade estimated that 89% of artists collaborated with another artist (although this statistic was not verified).

(10) The studios are designed to be artists studios with MDF walls that allow the resident artist to decorate them and adapt them to suit their talents. They are between 50 – 250 square feet.

(11) Specialist equipment is provided for use in the studios or adjacent communal areas.

(12) The spaces are not exclusive spaces for the Artists – in that visitors are shown around the spaces regularly in order for them to interact with the Artists. Ms Verkade described interaction as a critical part of the programme and the visitors as "connected

people in the artistic community". Visitors have included patrons of the Tate and Serpentine galleries. They are generally people with an interest in emerging talent who have bought art or supported new artists. One example given was Esme Hawes – curator of the Design Museum.

(13) Visitors must visit all of the studios as part of the tours – even those they might not be interested in – this is intended to promote "cross-fertilisation".

(14) As well as interacting with the Artists, visitors are encouraged to purchase their works. This makes the tours an important mechanism for "validating the Artists" as well as a means of selling their work.

(15) Tours usually take around two hours. They could be in large or small groups (one was of 35 people) or occasionally on an individual basis (she gave the example of Antony Gormley who came by himself). The Artists would be given notice beforehand - to allow them to prepare. The groups would always be escorted by a SB member. They would have access to studios even if the Artists were not present (as SB had keys to all of the spaces).

Industry expert advice

(16) Artists on the programme receive mentoring and support from a range of experts including previous programme participants. They are each allocated a specialist mentor who they are expected to meet every few weeks. In some cases SB commissions specialist expert support. An example given was of SB commissioning specialist jewellery makers to assist an artist with a particular project.

External advisors

(17) Artists are provided with free advice from lawyers, accountants and artistic professionals. This can be by way of group seminars or one to one consultancy. A resident bookkeeper also provides assistance on using accounting software. SB's "press and communication team" advise and assist Artists on raising their public profile

Meeting Rooms

(18) Three meeting rooms are available for Artists to book. No charges are levied for this.

Exhibition Space and Events

(19) There is exhibition space on the first floor and a small portion of the ground floor where regular exhibitions of the Artists' work are held. These are either solo exhibitions or exhibitions for multiple Artists. SB assists with curating and promoting the exhibitions. Works are also sold at the exhibitions (with SB taking no commission).

Involvement after leaving

(20) SB aims to retain links with the Artists once they leave. This is a critical part of the Programme as it enables its community and network to be developed. There is no contractual requirement underpinning this as it is more of an expectation that the Artists will remain in contact and involved with SB.

Integration/Economics

(21) All of the benefits are provided to the Artists as a single package. The components are not offered separately. The provision of studio space, although key, is one element only.

(22) Artists are charged a monthly fee calculated by reference to the space of the studio assigned. For the period relevant to this Appeal it was as set at £1 per square metre.

(23) Ms Verkade explained that pricing by reference to the studio area was a simple and fair way of determining the pricing for the Programme. It also enabled there to be some differentiation between those Artists with small studios and those with large ones.

(24) She also explained that the pricing did not nor was it intended to correlate to the value of the Programme benefits received by the Artists. The fee was instead designed to provide a contribution towards SB's costs. It was not intended to generate a profit for SB or even to cover its costs.

(25) Ms Verkade acknowledged that the Programme was heavily subsidised. When asked why, given the level of subsidy and the minimal amount of the contributions, the Artists were expected to pay anything at all, she said that the fee was important to instil a sense of "financial discipline" in them

The Application process

(26) There is a 6 week application period for the Programme in each year followed by a six week interview period. For 2024 SB had 350 applications for 15 places.

(27) Artists are accepted on to the Accelerator Programme if they are regarded as having unique artistic vision, clear objectives as to what they want to achieve and needs that SB believes it can meet.

Collaboration

(28) Artists are expected to interact with each other and participate actively in the SB "community"

(29) The SB team visit the Artists daily. Those found to not be attending or interacting sufficiently are written to and if their behaviour does not change suitably they can be asked to leave the Programme.

(30) At the time of giving evidence 3 Artists had been asked, since inception of the Programme, to leave for not "being present enough". SB had also had discussions with several other Artists about their behaviour and not being engaged sufficiently but those conversations had led to a suitable change in behaviour.

(31) Artists need to be present on a full-time basis – if they had for example part time jobs they would not be give a space.

SB's relationship with SIL

(32) Ms Verkade was unable to clearly explain SIL's role. She recalled that SB's solicitors had suggested establishing a subsidiary in order to "protect the Charity from health and safety issues". She did not recall specific VAT or legal advice being taken in respect of it. She accepted that less time was spent on the legal agreements and structure than should have been spent. This was because of all the work that was being put into getting the building ready and developing the Programme.

(33) Ms Verkade said that SB entered into the "rental agreements" directly with the Artists and received payments from some of them. The agreements were accompanied

by the "studio operating guidelines" which formed part of the agreement between the artist and SB.

(34) SIL was formed after these agreements were entered into (and after commencement of the Programme). Payments were initially received by SB but Artists were then asked to make their payments to SIL once it was set up and that practice then continued.

(35) She believed that SIL's role was simply to collect money from the Artists on behalf of SB. It has no employees and no ability to provide any services. All services related to the Programme are provided by employees of SB, contractors appointed by SB or supporters of SB.

Evidence from Ms Shirin Fathi

41. Ms Fathi is an Artist who had been on the Programme and retained a link with SB. The following is a summary of what we considered to be the key points from her written and oral evidence:

(1) Ms Fathi confirmed that the example Leases contained in our Hearing Bundles were materially the same as the one that she had signed.

(2) Ms Fathi confirmed the importance of SB's desire to foster an artistic community. She said that the Programme was very much a "two-way street", with the community expectation being considered exceptionally important for the Artists to uphold.

(3) The community expectation was emphasised to her by SB when she accepted a place on the Programme. It was made clear that SB was offering an opportunity to participate in a unique scheme and one which required real commitment from her. The Programme was much more than the provision of studio space. She was also aware that if she did not attend and participate in the manner expected she was likely to be asked to leave.

(4) She had no knowledge of which entity – SB or SIL was the supplier of what to the artists. As an artist and not being a tax or legal expert she had no idea as to why that would be significant for VAT or any other tax purpose. She was not sure about what SIL did. She was aware that the contract asked for direct debits to be paid to SIL and that was the first time that she had become aware of SIL as an entity. She did not really question why it was involved in the arrangements and would not have been able to dispute it anyway.

Evidence of HMRC Officer Jacob Mathers

42. Officer Mathers is and at the relevant time was a VAT Charity Higher Officer in the VAT charity team. He was responsible for the HMRC decision to disallow the VAT Repayment and for the issue of the VAT assessment under s 73 for the same period. Officer Mathers took over the matter from HMRC officers Ricky Sandhu and Christine Marples.

43. Much of Officer Mather's witness evidence recounted the sequence of events and the information provided to him by SB's agents over the course of HMRC's investigation leading to this appeal. A material amount of that information is included in the background facts and procedural history section of this judgment and we have not, therefore, repeated it in our summary of Officer Mather's evidence.

44. The following is a summary of what we found to be the key points from Officer Mather's written and oral witness evidence:

(1) Having considered the information presented to him, Officer Mathers' concluded that the arrangement between SB and SIL amounted to the exempt supply of a licence to occupy land. As that was an exempt supply, it meant that input VAT recovery should have been restricted.

(2) He noted that SB's activities were described as including sponsorship which he accepted was in part standard rated - but he did not see there being a sufficient direct link between the building and renovation costs and the taxable supply of sponsorship to justify full input tax recovery.

(3) He accepted that during the earlier stages of the investigation HMRC's focus had been on whether input VAT had been overclaimed because of an unsuitable non business restriction adopted by SB. However, as more details emerged, he explained that his position moved instead to there being an exempt supply by SB.

(4) His views were formed from a combination of information received from SB's agents and his interpretation of the facts presented. It was not a straightforward case given the inconsistency in the information provided together with the fact that the arrangements between SIL and SB were not documented nor were there any written records of discussions between the entities.

Summary of events

(5) Officer Mathers took us through the sequence of events and how the various versions of the facts emerged.

(6) The first, routine, check of SB's VAT Return was instituted by Ricky Sandhu on 3 September 2018 and followed up by Christine Marples. In response to those enquiries Ben Hooper from ADG provided the initial description of the position which was that SIL and not SB rented the studios and that SB received rent as a result of incorrect details being provided to the tenants.

(7) When he (Officer Mathers) took over the case in November 2018 he contacted Mr Hooper for further information. Mr Hooper's precise and comprehensive responses to his questions led him to form his views. He noted in particular the confirmation that the supply to SIL from SB included a licence to occupy land although the supply did not consist exclusively of that licence.

(8) On 20 August 2019 Officer Mathers heard from Victor Dauppe at ABG. Although Mr Dauppe made the point (amongst other issues) that SB and not SIL provided use of the Studios that argument was not developed. He was directed to correspond with Graham Elliott of City and Cambridge Consultancy Limited who confirmed unequivocally that SIL and not SB carried out the activities in relation to the studios. Mr Elliott also explained that reference to SB in the leases was a drafting mistake which would be changed.

(9) The decision issued on 24 May 2021 was based on the information provided by Ben Hooper and Graham Elliott.

(10) A best judgement assessment was carried out for the period ending 06/18. This reduced the output tax due to HMRC and decreased the input tax due from HMRC. The overall impact was to change the return from £341,487.31 due from HMRC to £20,735.58 due to HMRC

(11) On 23 August 2021 Gary Jackson requested a review of Officer Mather's decision – providing at the same time a list of reasons as to why that decision was wrong. In

setting out his reasons, he provided a different version of the facts. Here he said that SB did not grant any interest in land to SIL – the grant was instead by SB direct to the Artists with SIL simply collecting the payments on its behalf. Mr Jackson also raised for seemingly the first time the argument that the supply to the Artists (the Accelerator Programme) was more than a simple supply of land. He also pointed out the lack of documentation as between SIL and SB.

Officer Mathers noted that Mr Jackson's responses contradicted what he had been told previously. Having considered Mr Jackson's responses he felt that the earlier information provided over the previous two years by Ben Hooper and Graham Elliott reflected more closely what had actually happened. Their version of events was also evidenced by the records available. The only documents that appeared to contradict this were the Leases which specified SB as landlord. However, two agents of SB had explicitly said that this was an error which would be corrected. Rental payments were also being accounted for as SIL's income. On that basis he did not change his previous decisions.

(12) The subsequent HMRC review of his decision upheld it in full.

(13) Officer Mathers explained that he had considered whether the inconsistency of the information provided by SB and its agents could have been due to mistakes made by lay people. However, he checked who the trustees and advisors were and noted that Gary Jackson, Ben Hooper and Victor Dauppe were ABG partners. He noted also that Graham Elliot was well known in the charity tax world as a charity tax specialist. They were therefore, in his view, very unlikely to have been confused or mistaken as to the questions being asked or the answers they provided.

(14) Officer Mathers confirmed that he reviewed the Trustees' reports as part of his efforts to assess the VAT treatment of the arrangements. He did not find them particularly helpful as they did not include any detailed description of the facts (nor were they intended to).

(15) He also made the point that the information he was presented with post-dated the dates of the Leases Agreements in question.

(16) Officer Mathers said that he had made no decision on the VAT treatment of the Accelerator Programme. That was because it was not a supply which he thought was made by SB. He was clear that if the Tribunal found that the Programme was supplied by SB then HMRC would need to consider that supply to see if it was carried out for business purposes and if so its VAT treatment. He agreed however that it fell short of being a supply of land. This was because there was no exclusive right of occupation for the end users. He also accepted that the supply was more than a passive exploitation of land, acknowledging that if the lease and the studio guidelines were taken into account the supply was an active one – and so an active exploitation of land.

(17) In Officer Mather's view, the key issue was who made the supply to the Artists. On the information he had been presented with - it was, on balance, in his view SIL and not SB.

(18) Officer Mathers made clear that the following issues were not in question: (a) that the grants and bursaries were agreed to be non-business supplies, and (b) that the sponsorship arrangement he had reviewed was a standard rated supply. The disagreement was simply over what was supplied by SB to SIL. He saw it as an exempt supply of leasing or letting of property. SIL was being granted the right to use the building in order to make studio rentals and other supplies. In addition to his decision on the nature of the exempt supply made by SB to SIL he determined that there was no direct and immediate

link to a taxable activity sufficient to give SB an entitlement to deduct the input VAT incurred on the building. This was on the basis that the events being sponsored were being carried out by SIL which was being charged by SB – such a charge reflecting the use of building related costs. As the management charge (for supply of the building) was exempt it broke the link between the costs being incurred on the building and the taxable activities.

The Documentation

The "Lease" agreements

45. We were presented with a copy of a contract between Sarabande and Isabel Garrett. This was stated on its face to be a "Lease relating to Studio 8, 22 Hertford Road, London, N1 5SH".

46. We also had sight of a contract between Sarabande and Esna Su – which was on materially identical terms save for the rent payable and studio unit leased. We refer to these agreements as the "Leases".

47. Key terms (by reference to Isabel Garrett's Lease) included the following:

(1) The parties to the Lease were Sarabande, referred to as the "Landlord" and Isabel Garrett, the "Tenant". The term "Landlord" was specified as including a reference to "the person entitled to the immediate reversion to this lease."

(2) An annual rent of £948 per annum was provided for (see Clause 5).

(3) The specified term was 12 months.

(4) The "Property" let was defined as: "the part of the ground floor of the Building known as Studio 8, 22 Hertford Road, London N1 5SH shown for the purposes of identification only edged red on the plan attached to this Lease bounded by and including the internal wall and ceiling finishes and floor coverings of that part [and the windows and door frames in those walls], but excluding all Service Media which are within that part but which do not serve It exclusively and excluding any load bearing or structural part". This is, in effect, a description of the studio allocated to the artist.

(5) The "Permitted Use" of the Property was descried as "use as a workspace for an artist's practice".

(6) The contract incorporated "Studio Guidelines" as a schedule and the Tenant was obliged to observe and perform those obligations (see Clause 23).

(7) Clause 2.1 provided as follows:

> 2.1 The Landlord lets the Property to the Tenant for the Term.
>
> 2.2 The grant is made together with the ancillary rights set out in clause 3, excepting and reserving to the Landlords the rights set out in clause 4, and subject to all rights, restrictions and covenants affecting the Building.
>
> 2.3 The grant is made with the Tenant paying to the Landlord as rent, the Annual Rent, and all other sums due under this lease.

(8) Clause 3.1 "Ancillary Rights" provides, so far as relevant that the Landord grants the Tenant, certain rights to use to the Common Parts of the Property for access/egress and the right to use any kitchen or bathroom.

(9) The contract was stated to be executed as a Deed.

(10) "Rights Excepted and Reserved" included;

> 4.1(c) "the right to enter the Property for any purpose mentioned in the lease or connected with it or with the Landlord's interest in the Building or any other property at any reasonable time and, except in the case of an emergency, after having given reasonable notice (which need not be in writing) to the Tenant ..."

(11) Clause 5.1 provided for an annual rent to be paid in twelve equal instalments.

(12) 12. Clause 6 provided for the Landlord to keep the Property insured.

(13) 13. Clause 7 provided for the Landlord to keep the common parts lit, clean the outside of the building, provide hot and cold water and heating and to keep the service media in reasonable working order.

(14) 14. Clause 9 provided for the Tenant to keep the Property clean and tidy and in reasonable repair.

The Studio Obligations

(15) These included the following:

Studio access – for the studios to be accessible 24 hours a day, seven days a week with an absolute prohibition on residential use.

Sharing and sub-letting – for sub-letting to be prohibited and for sharing to be allowed only with consent from Sarabande.

Cleanliness – food and drink not to be left out in the studios or communal areas.

Alterations – no alterations allowed without prior consultation with Sarabande.

Keys – artists are provided with an access card and keys to the shared the studio main entrance as well as keys for their individual studios.

Site security – the premises are patrolled by a security officer between 6 pm to 6 am. Artists are required to sign in and out when entering and leaving the building.

Health & Safety management – Artists to compete a risk assessment form twice each year, be subject to spot checks and be responsible for their fire safety. Sarabande is responsible for a fire alarm in the building.

Emergencies – the building to be staffed between 9.30-6.00 on weekdays with staff available to deal with emergencies during those times.

Rent – all rent to be paid by standing order into the Sarabande account.

Community – this is arguably the most important of the obligations; As part of the Sarabande ethos, we wish to harbour a creative community and spirit of working together within the studios.

"We would like to share the work of the community through the use of our social media outlets such as Instagram, Facebook and the Sarabande website. This is to encourage conversation about Sarabande, introduce people to the artists and to the work being

created. This is an important and mutually beneficial exchange to raise the profiles of the studios and artists. We will ask you to share 4 original images of your work/inspiration each month for this use. Please include a sentence explaining each image of your work and the appropriate reference for work of other artists, i.e. Artist, title, media, year. Please send these images by the 1st of each month to […]

We also ask that you connect with us whenever sharing on social media. Our links are as follows: […]

To help grow our community, Sarabande will endeavour to host monthly meetings, giving artists the opportunity to talk about their current projects. We will try to keep these regular and at a consistent time, depending on artist availability.

Sarabande would like to capture video content in order to keep a record of the charity's development, to be documented in the archive. This will include interviews with artists and tours of the studios. These will be scheduled at your convenience.

We expect that after tenancies have ended, all artists will continue to support the foundation by staying on as alumni. Alumni activities include but are not limited to; attending foundation evets, contributing to foundation exhibitions and supporting the next generation of Sarabande artists. We will also request all artists donate a piece of their own original artwork to the Sarabande Foundation archive when they leave.

SB employees can inspect the studios at any time and without notice.

48. SB's annual trustee reports for 2015 and 2016 indicated that rental income was a small amount which provided a contribution to SB's costs, with sponsorship and grants making up the bulk of its income.

Agreed Facts

49. Following the hearing Mr Zwart submitted what he described as an agreed list of facts setting out what he considered to be points agreed during the hearing. That list was not confirmed by HMRC and so we do not include it in this judgment.

THE RELEVANT LEGISLATION

50. The relevant legislation for the issue of VAT assessments is s.73 VATA.

51. Sections 25(2) and (3) VATA entitle a taxpayer to a credit or repayment for input tax. Section 26 VATA regulates the amount of input tax which is allowable.

52. Section 24(1) VATA 1994 defines "input tax" and provides:

> 24 (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-
>
> (a) VAT on the supply to him of any goods or services;
>
> …
>
> Being (in each case) goods or services used or to be used for the purpose of any business carried on by him or to be carried on by him.

53. Section 25(2) and (3) VATA 1994 provide an entitlement to credit for input tax incurred as follows:

25(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct from that amount any output tax that is due from him

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit, or as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to as a "VAT credit".

54. Section 26 provides so far as relevant:

26(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies … in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business-

(a) taxable supplies;

…

55. Section 73(1) VATA provides (so far as relevant):

73(1) Where a person has failed to make any returns required under this Act … or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him"

56. Council Directive 2006/112EC (the Principal Vat Directive or "PVD") provides, so far as relevant, at Article 135(1)(l) for member states to exempt from VAT:

"the leasing or letting of immovable property".

This is an exception to the general principle that VAT is to be levied on all services supplied for consideration.

57. This exemption is contained in domestic law in Group 1, Schedule 9 VATA which provides that, other than in specified circumstances, for:

"the grant of any interest in or right over land or of any licence to occupy land …"

to be exempt from VAT.

THE ISSUES BEFORE THE TRIBUNAL

58. SB's notice of appeal contained an eleven page document outlining the background to its appeal. This concluded that:

"the issue appears able to be determined by the single question of whether the supplies were exempt or were taxable supplies. The recovery of the input tax should follow suit. The Tribunal is requested to determine this Appeal on that issue"

59. HMRC's statement of case's described the "points at issue" as follows:

"33. Whether the supply from SB to SIL contains a supply of land which is exempt under Schedule 9, item 1, VATA 94

34. and, consequently whether SB is entitled to claim input tax in relation to these supplies in VAT period 06/18"

60. Mr Zwart's skeleton argument and submissions also focused on the nature of the supply made by SB.

61. We have accordingly limited ourselves in this Appeal to determining whether, on the evidence before us; (i) SB made a supply to SIL and if so whether that supply was an exempt supply of land, and (ii) if not, the nature of the supply made by SB.

62. Our decision is a decision in principle. It does not consider the sums in question (including the amount of any input tax that may be allowable) as we have not been asked to do so by the Parties and no submissions have been made in that regard.

BURDEN OF PROOF

63. The burden of proof is on SB to show that HMRC's assessments are incorrect. The standard of proof is the UK usual civil standard which is the balance of probabilities.

PRELIMINARY ISSUES

64. This case has an unusual history. HMRC has been trying for over three years to establish the fact pattern in order to determine the VAT treatment applicable.

65. SB has made it exceptionally difficult for HMRC to do so. This is because; (i) it and its agents have provided HMRC with entirely inconsistent information as to the arrangements in place between SB, SIL and the Artists, (ii) it seemingly kept no clear records of what those arrangements were – even though external advice was apparently sought and meetings held, and (iii) its accounts (and SIL's accounts) and their respective VAT returns and direct tax returns appear to have been prepared on an inconsistent basis.

66. Mr Zwart acknowledged the inconsistency of the information provided and sought to explain this as a consequence of lay trustees being asked technical tax questions and external advisors being led into providing incorrect answers as a result of HMRC's insistence that a licence to occupy the Building had been transferred by SB to SIL.

67. Mr Zwart also argued that HMRC failed in its duty to establish properly the facts of the matter before making its decisions. He cited in this regard *Secretary of State for Education v Tameside* [1977] AC 1014.

68. We find Mr Zwart's position difficult to accept.

69. The advisors who provided the information to HMRC were experienced professionals – a fact verified by Officer Mathers. The information provided from September 2018 to March 2021 by those advisors was unequivocally that SIL and not SB made supplies to the Artists and SB made supplies to SIL. Other than an email from Victor Dauppe (which shortly afterwards was contradicted by Graham Elliott), it was only in August 2021 that SB formally began to claim that SB rather than SIL supplied all elements of the Accelerator Programme (including the studio rights) to the Artists.

70. We do not agree with Mr Zwart that *Tameside* provides what might be construed as a defence here - his submission being that it is authority for the proposition that it was incumbent on HMRC to ensure that it had the relevant information needed. That case centred on the obligations of a public official (the Secretary of State for Education) to establish the existence of certain facts before making a particular decision. Specifically, he had to satisfy himself that a local authority's proposals were "unreasonable". So far as relevant, it was found that the local authority had submitted a detailed letter to the Department of Education setting out

comprehensively its reasons for its actions. Having reviewed the contents of that letter, the court found it difficult to conclude that the local authority was acting unreasonably (in the *Wednesbury* sense). The court's decision hinged largely on the fact that the contents of the letter were likely to have been known within the Secretary's department but were not taken into account at all in his decision. Lord Diplock (at [1065]) summarised the question for the court as;

> "… did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer [the question] correctly"

71. The situation in the current case is not the same. HMRC attempted to establish the facts over a significant period of time but were given what transpires to have been entirely incorrect information. To expect it to then accept a very different version of events – the acceptance of which would require it to disregard inconsistencies (such as the entries in the first VAT Return and the corporation tax and accounting position of the companies in question) without explanation, is entirely different from the fact pattern in *Tameside* and the principle that can be derived from that case.

72. It is of course encumbent on HMRC to establish the correct facts before making decisions but in doing so it is reliant naturally on the taxpayer providing clear and correct information as to its affairs. That is the fundamental basis of the self-assessment system. SB did not do this and has not, as far as we can see, provided a rational explanation as to why that was the case.

73. It is not entirely surprising that Officer Mather made his initial decision based on what he had been told consistently for over two years – that version of events being backed up by what he pointed to as objective facts (the VAT Return, SB's failure to account for output tax, the corporation tax position and the accounts of the companies).

74. This does not reflect well on SB's trustees or its advisors.

HMRC's approach

75. Mr Nyoni in his further written submissions asked the Tribunal to take into account the Appellant's inconsistency and failure to provide accurate information. Although he did not contend that deliberately false information was provided by SB, he suggested that the inconsistency and inaccuracy ought to have some bearing on the outcome of the appeal. Mr Nyomi also made the point that the facts presented by Mr Zwart were relatively new and if found true by the Tribunal, would describe a transaction which HMRC had not considered for VAT purposes.

76. We note HMRC's frustration and the significant resources that it has expended in dealing with this matter.

77. However, notwithstanding the alternative versions of the facts presented by SB and its advisors, it is for the Tribunal to determine on the evidence before us whether or not SB made an exempt supply of land to its subsidiary as contended by HMRC. The facts on which SB's appeal are based have been submitted to the Tribunal and shared with HMRC in accordance with the Tribunal Rules and the fact that HMRC has not fully considered the transaction that SB submits has taken place cannot be relevant to the Tribunal's determination.

THE SUBMISSIONS

78. Mr Zwart submitted that SB made a supply directly to the Artists, that supply being of all of the components comprised in the Accelerator Programme. The supply of the studio rights was part of this, the entire supply being more than passive and involving instead an active

exploitation of immovable property and so outside the exemption in Article 135(1)(l) of the PVD for the leasing or letting of immovable property.

79. Mr Zwart further submitted that SB did not make any supply of land to SIL and that the transaction that HMRC had identified as falling within the VAT exemption did not exist as a matter of law.

80. Mr Nyoni submitted that there was, in reality, a supply by SB to SIL of a licence to occupy land, with SIL then making a supply to the Artists. Mr Nyomi further submitted that the supply to SIL was a passive supply of land falling within the exemption at Article 135(1)(l) of the PVD.

DISCUSSION

81. To determine whether, as HMRC submit, there is a supply between SB and SIL which amounts to an exempt licence of land, a two-step approach is necessary.

82. This is clear from *HMRC v Abbey National PLC* [2006] EWCA 886.

83. In that case *Abbey* sought to reorganise and restructure its property portfolio through broadly, a series of sale and lease back arrangements (or for leasehold properties – sale and underlease arrangements) with a third party, Mapeley Columbus Ltd ("Mapeley").

84. The terms on which it held some of its leasehold properties restricted assignment without landlord consent. To manage those restrictions Abbey entered into "virtual assignments" under which all the economic benefits and burdens of the leases in question would be transferred to Mapeley but without an actual assignment of the leasehold interests and with Abbey continuing to occupy the properties.

85. The Court had to decide whether, under the terms of the contractual arrangements between Abbey and Mapeley, the supply made by Mapeley to Abbey was an exempt supply being the "leasing or letting of immovable property" within the meaning of Article 13B of the Sixth Council Directive 77/388/EC of 17 May 1977 (the sixth directive). Article 13B is the predecessor to Article 135(1)(l) of the PVD. For our current purpose there is no material difference between the two provisions.

86. Having considered the authorities, Jonathan Parker LJ found that the issue had to be addressed in two stages:

> "… The first stage is to analyse the nature and effect of the contractual arrangements between Abbey and Mapeley … . The second stage is to determine whether contractual arrangements of that nature and having that effect fall within Article 13B(b). The first stage is exclusively a matter of national law. The first stage is exclusively a matter of national law; the second, by definition, is exclusively a matter of Community law. [48]

87. It was common ground that the contractual arrangements between Abbey and Mapeley did not involve the transfer of any proprietary interest in the properties in question – whether in law or equity [50] nor did they transfer any contractual interest to occupy the properties. In short, as Mapeley had itself acquired no proprietary or contractual right to occupy the properties in question it was not in a position to lease back such a right to Abbey.

88. The Court reviewed several European authorities on the interpretation of the expression "leasing or letting" for Article 13B(b), with Jonathan Parker LJ concluding that

> "… a right of occupation" was an essential element of a supply "of leasing or letting" within the meaning of Article 13B(b) – as Mapely had not acquired one it could not be in a position to transfer one back to Abbey and therefore

> the supply it made to Abbey could not be a supply of leasing or letting and so exempt – [86]

89. What this means is that for there to be an exempt supply of land between SB and SIL there must be a transfer of a right of occupation from SB to SIL.

90. HMRC's argument hinges on SIL having acquired such a right from SB which it then passes on to the Artists under the terms of the Leases.

91. It is common ground that no written document providing for such an acquisition existed between SB and SIL.

92. Mr Zwart submitted that as no written document existed, no proprietary interest in the Building could have been transferred by SB to SIL. In support of that submission he cited s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 which provides as follows:

> "2(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or, where contracts are exchanged, in each."

93. We agree with Mr Zwart. Although there are some exceptions to this provision, none seem applicable in the circumstances and Mr Nyoni did not contend otherwise. There can therefore have been no transfer of any proprietary interest in the Building from SB to SIL.

94. For HMRC to succeed there must therefore have been a contractual, non-proprietary right of occupation created in favour of SIL. Mr Nyoni made the point in this regard that a licence to occupy property did not need to be in writing – citing in this regard the following paragraph of HMRC's guidance.

> VAT LP 05630 "licences to occupy are less formal than leases and there will not always be a written agreement. …. To consider whether there is a licence to occupy, it is particularly important to establish the facts and to be aware of all the circumstances so you can consider 18whether all fundamental characteristics of a leasing or letting of immovable property are present"

95. An HMRC manual is not of course a statement of the law, but we agree with Mr Nyoni that as a legal matter, a licence to occupy property may be a contractual right rather than a proprietorial interest in property and so does not need to be made in writing.

96. Mr Nyoni contended that the "commercial reality" of the situation was sufficient to indicate the existence of such a contract.

97. His contention was based primarily upon the following:

(1) The clear explanation given by SB (through its agents) as to SIL being the landlord under the Leases and as having received a licence from SB to enable it to do so. This included the statements given to HMRC as to references to SB in the Leases being a "drafting error".

(2) SB's first VAT Return which showed no supplies being made to the Artists.

(3) SIL's corporation tax records which showed rental income as belonging to it.

(4) Bank/inter company records which showed funds erroneously paid to SB being set off against debts owed by SIL to SB.

98. Mr Zwart submitted that HMRC's submission could not be correct as SIL was established only after SB had started entering into the Leases. It was not, therefore, in existence at the time the supplies were made to the Artists. His point was that as a basic matter of law, a party that did not exist could not be party to a contract.

99. For SIL to be regarded as having acquired a licence to occupy the Building from SB and to have then made supplies to the Artists under the Leases would, at the very least, have required the initial Leases between SB and the Artists to have been amended to substitute SIL as landlord. However, it was not part of HMRC's case that SB had changed its activities since entry into any of the Leases. HMRC also accepted that the initial Leases included in our evidence were representative of all the Leases in place with the Artists.

100. The only change that had been made to the Leases was for rental payments to be made to SIL rather than SB. We note also the evidence from Ms Fathi as an Artist, that all her dealings were with SB other than in relation to payment of rent. It was not open therefore for HMRC to argue that the Leases had been amended to substitute SIL as Landlord.

101. Mr Nyoni submitted that the fact that SIL had not been established at the time the initial Leases were entered into did not matter. He noted that SB's agents had explained that Artists had been lined up in advance and contracts drawn up so that SIL's activities "could start as soon as possible" - in other words the Leases entered into prior to SIL's incorporation were entered into on the assumption that SIL would become party to them as soon as it was established. He noted also that the delay between the signing of the initial Leases and SIL's establishment was short. Again, he referred to the commercial reality of the situation and the need for the VAT analysis to correspond to that reality.

102. He cited the FTT case of *Hepburn* [2013] TC 02837 as an example of a case "where a supply was found to be made by a company which was not incorporated at the time the supply was made".

103. However, *Hepburn* does not in our view assist HMRC. That case concerned the provision of consultancy services by an individual who agreed to provide them via a company that she was yet to establish. The bulk of her services were performed before the company was formed. The question for the First Tier Tribunal to decide was whether the fee payable for those services should be taxed as income of the individual or the company once it was formed.

104. In that case the individual was prevented contractually from providing the relevant services in her own capacity hence the need to establish the company. It was also accepted by all involved that the company, once established, rather than the individual would be the service provider. Additionally a contract was drawn up stating that the consultancy services would be provided by "NewCo" which was described as a company that was to be incorporated if fees were found to be chargeable. Finally, under GAAP, the invoiced amounts were allocable to the company and it was agreed by the FTT that the individual would never have been entitled to the income nor did she actually receive it. The FTT found that in the circumstances the income was taxable in the hands of the company and not the individual. The decision was a direct tax decision based on a very specific set of facts and concerned ultimately with the allocation of income. The decision did not establish the existence of contractual relationships nor the existence of a supply for VAT purposes.

105. Given the entry by SB into Leases with the Artists prior to SIL being formed, and there having been no change to those Leases or SB's activities since SIL was incorporated, it is difficult to identify a sustainable basis on which a contract between SB and SIL conferring a right of occupation which SIL then passes on under those Leases can be identified. It seems to us that contractually SB has already passed on that right to the Artists.

106. We note that HMRC's position is based on its perception of the commercial situation and the facts as presented to it by SB and its agents up to August 2021.

107. However, a commercial perception together with statements made by a taxpayer (and subsequently contradicted) are not a sufficient basis on which to identify the existence of a

supply for VAT purposes. That is because the starting point relies, ultimately, on the legal relationships that exist. The VAT position may differ in the case of sham or abuse – but neither of those circumstances have been raised by HMRC in this case.

108. For the reasons given we find, therefore, that SIL did not acquire from SB a contractual right to occupy the Building.

109. We find accordingly that there can have been no exempt supply between SB and SIL of land within the scope of Article 135(1)(I of the PVD nor within the scope of Item 1, Group 1 Schedule 9 VATA as no such supply took place.

110. It follows that the disallowance of SB's input VAT claim and HMRC's best judgement assessment cannot be valid as those decisions take into account a supply that did not take place.

What was supplied

111. Mr Zwart's core submission was that SB made a direct supply to the Artists pursuant to the terms of the Leases which supply did not amount to the "leasing or letting of immovable property" and so was not exempt under Article 135(1)(l) of the PVD.

112. Mr Zwart cited several authorities in support of his proposition, the main one being *Stichten "Goed Wonen" v Staatssecretatis van Financien* [2001] 3 CMLR 54 ("*Goed Wonen*") from which he cited the following paragraphs:

> "Although the leasing of immovable property is in principle covered by the concept of economic activity …, it is normally a relatively passive activity, not generating any significant added value, Like sales of new buildings following their first supply to a final consumer, which marks the end of the production process, the leasing of immovable property must therefore in principle be exempt from taxation …" [52]
>
> "However, it is also consistent with the general aim of the Sixth Directive that if immovable property is made available to a taxable person through leasing or letting, as a means of contributing to the production of goods or services whose cost is passed on their price, the property stays within, or returns to, the economic circuit and must be capable of giving rise to taxable transactions. The common characteristic of the transactions within Article 13B(b) of the Sixth directive excludes from the scope of the exemption if indeed they involve the more active exploitation of immovable property."

113. Mr Zwart's submission was, in essence, that (a) the supply made by SB to the Artists under the Leases was of the entire Accelerator Programme of which the studio rental was only a part, and (b) the components of that Programme were inseparable and as a whole involved more than the passive exploitation of land.

114. As HMRC's focus was on identifying the purported supply from SB to SIL of a licence to occupy the Building, its challenge to Mr Zwart's submission on the nature of the supply made by SB to the Artists centred on its position that the supply was made by SIL and not SB.

115. Officer Mathers acknowledged, however, that if there was in fact such a supply it would in his opinion amount to more than a passive supply of land.

Our conclusion

116. Having considered the evidence presented, we find, on the balance of probabilities, that there was a supply from SB direct to the Artists under the Leases.

117. Factors that have assisted us in making this determination include (together with those mentioned already in relation to the purported supply between SB and SIL) the following:

(1) The Lease terms which provide, unambiguously, that each Lease is made between SB and the Artist (with SB being named as the Landlord and assuming the obligations of Landlord under it)).

(2) The evidence from Ms Verkade which outlined (a) the various components of the Accelerator Programme and (b) SB's direct, active involvement and engagement in the delivery of the Accelerator Programme and its relationship with the Artists

(3) The evidence of Shirin Fathi as to SB's involvement with the Artists and her lack of any material engagement with, knowledge of or interaction with, SIL other than in relation to the payment of rent.

118. We also find that the supply involved more than the passive exploitation of land. This is on the basis that the supply under the Leases (the terms of which included the Studio Obligations) was essentially of the Accelerator Programme of which the studio rental was, although a central element, one element only – with all elements being inseparable. The supply was not therefore an exempt supply within Article 135(1)(l) of the PVD or Item 1, Group 1, Schedule 9 VATA.

119. Although we have concluded that the supply was not an exempt supply of land we make no further findings in respect of it. We note however that there are questions in relation to its commerciality given that it is not, from the evidence provided by Ms Verkade and the submissions made by Mr Zwart, intended to generate funds sufficient to cover the costs of the programme.

DISPOSITION

120. For the reasons given we find that SB did not make an exempt supply of land to SIL and therefore HMRC's decision to deny input tax recovery and its best judgment assessment cannot be valid as those decisions reflect a supply that was not actually made. The Appeal is accordingly allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

121. 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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 30th JANUARY 2025