[2010] UKUT 26 (TCC)
Appeal number: FTC/04/2010

VAT - Single or multiple supplies - test where no single principal supply - land exemption - supply of hall with play equipment for children's parties.

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

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

- and -

DIANA BRYCE
Trading as THE BARN **Respondent**

TRIBUNAL: MR JUSTICE ROTH

Sitting in public at Royal Courts of Justice on 13 January 2011

Mr Peter Mantle instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Roly Pipe, Tax Adviser, for the Respondent

DECISION

Mr Justice Roth :

1. This an appeal brought by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") with permission granted by the First Tier Tribunal ("FTT") against its decision dated 6 November 2009 ("the Decision") concerning a claim to repayments of VAT for the periods 12/04 to 9/07 inclusive. It raises the questions whether the transactions concerned involved single or multiple supplies for VAT purposes and the proper interpretation of the "land exemption" from VAT.

2. The respondent to the appeal is the taxpayer, Mrs Diana Bryce, trading as "The Barn". She has also been involved in a separate but related business trading as "Birch Farm".

THE FACTS

3. The underlying facts were not in issue and are relatively simple. The factual evidence before the FTT comprised the oral evidence of the taxpayer, which I am told followed her written witness statement which is before this Tribunal; a printout of the website that covered both The Barn and Birch Farm; and three colour photographs. I take the facts from that undisputed evidence and the findings of the FTT (save for a minor correction to those findings which was raised on behalf of the taxpayer and not resisted by HMRC).

4. The Barn is so-called because it is a very large venue that includes a hall of 327 square metres with a high ceiling. The hall is referred to on the website as "The play barn". It resembles a sports hall with sports pitches marked out on a wooden floor. However, the venue also comprises a small reception area, a room for café seating with a small adjoining kitchen, toilets and changing facilities, including nappy changing facilities, and an upstairs room. The business of The Barn is concerned with the holding of children's parties.

5. Separately, the taxpayer is involved in the Birch Farm business, which is concerned with the operation of a day-care nursery for very young children in the 1-4 age group. That is carried on primarily at distinct physical premises from The Barn but within the same complex. The complex also includes a swimming pool.

6. The provision offered by the taxpayer for children's parties can be conveniently taken from the relevant page of the website. The page is entitled "Birthday Parties". It states:

> "Are you looking for somewhere to hold your child's party? Our parties are suitable for children 1-14 years and start from just £6.95 per head including food. All parties are for 2 hrs.
>
> Weekday - 2 Hour Activity play party for under 5's - £6.95 per head including food - minimum of 6 children.

> Weekend Play party - Exclusive use of the play barn for 1 hour 15 minutes followed by our hot or cold buffet all for just £8.95 per head, £3.95 for 6-12 months and under 6 months free.
>
> Craft Parties - A choice of craft specifically chosen to suit the needs of your child's party with staff on hand to help with activities £12.50 per head includes all craft materials and a hot and cold buffet.
>
> Cookery parties - Staff assist children to make 1 savoury and 1 sweet dish £12.50 per head includes all cookery materials and party food to follow."

7. The buffet referred to on the website was characterised in the Decision as a "rudimentary buffet meal" and is the standard refreshment package that was also provided by the taxpayer at other times, outside a children's party, at the price of £2 per head (including VAT).

8. Hence, during the week, The Barn is used for very young children and at the weekend it is used for the three other kinds of parties offered for children who may include the same under-5 age group but can go up to age 14. For all the parties, the buffet of party food is served in the café. The craft and cookery parties take place in the upstairs room whereas the "play parties" use the hall or "play barn". According to the website, children attending the day nursery during the week operated by Birch Farm also have access to the play barn for recreation, in particular when shelter is needed from the weather.

9. Included in the play barn are a range of play equipment, which is illustrated in the photographs. As noted by the FTT:

> "The play equipment is appropriate for the use of very young children and most of it would not normally be used by older children.": para 6.

The qualifying word "most" is significant. Mr Mantle for HMRC took me to the photographs and pointed out that along with toys clearly suitable only for the very young, the equipment includes a low balance beam (with padded matting below); a "bouncy castle"; and a climbing frame and slide, all of which may be attractive to children over the age of 5 although probably not up to age 14. There is also fencing enclosing an area where tables and chairs are set out, for the use of adults accompanying the children.

10. The weekday layout of the play barn is one where the children's play equipment is spread out widely over the floor area. When the play barn is used for children's parties at the weekend, the play equipment is gathered together and placed against the wall, and the tables and chairs are also set out in the main at the side of the hall, leaving the main floorspace free of any encumbrances: paras 6-7.

11. The small error in the Decision is the statement that the play barn is used during the week for the day nursery, and that the play equipment is for the

purpose of the day nursery, whereas it is in fact used for the weekday play parties and more as an adjunct to the nursery which primarily takes place in a different building. I expect that this confusion resulted from the combined website that does not make the distinction very clear and the fact that children attending the Birch Farm nursery have access to the play barn. But this mistake does not affect the reasoning in the Decision.

12. For play parties, the taxpayer usually provides only one member of staff, save that for larger parties extra assistance may be provided. This person is described by the taxpayer as "the party host". I quote from the Decision (para 13):

> "…That person is responsible for greeting the customer and her/his guests. Once the customer is ready to start the party in the Hall, the member of staff leaves the Hall and goes away to prepare the refreshments in the kitchen and arrange the café room for the later use of the customer and her/his guests. Food and cutlery are presented to the customer by the member of staff, but no service of the food is provided. The customer organises this aspect of the refreshment time. The member of staff does, however, clear up the café room and, while the customer and her/his guests are taking refreshments, the member of staff clears up and rearranges the Hall to make it ready for the next customer. There may be other users of the café room at the same time as the children's party customer and her/his guests are taking refreshments. The customer has no entitlement to the exclusive use of the café room during the 45 minute time slot."

13. If the customer wants to arrange for entertainment for the party, such as a Punch and Judy show or a magician, the customer makes arrangements for this privately. The taxpayer is not involved. Similarly, the customer chooses which items from the play equipment, if any, will be used at the party and has to provide supervision for the children. The customer and guests are free to use the toilet facilities, nappy changing facilities and so forth in the premises, but do not have exclusive use of those facilities. In particular, when one customer and their guests are having refreshments in the café room, the next play party may be taking place in the play barn. The FTT notes that there might also be other customers using the swimming pool at the time of the party who will be making use of the changing facilities.

14. An important finding of the FTT is in paragraph 16, which I set out in full:

> "16. We find that the main attraction to customers of the children's party arrangements is that they obtain the exclusive use of a very large and uncluttered covered and heated space for a children's party. Customers find it easier to control children if they have the exclusive use of the space. Most of the business in children's parties is done in the winter months, because in the summer months customers can arrange outside parties in gardens, etc. In the winter months the children's

> party arrangements offer to customers the advantage of a much larger space than most domestic premises could provide, and also relief from the disruption that having such a party at home might cause. In addition, children can make as much noise as they like in the Hall. This is an advantage to customers because the making of noise in other venues might cause inconvenience."

THE PROCEEDINGS

15. The taxpayer advanced her case before the FTT on the basis that for VAT purposes there was a single supply since the licence to occupy the play barn was the principal supply to which the two other elements referred to by the taxpayer, namely the use of the play equipment in the play barn and the refreshments supplied in the course of catering, were ancillary. Accordingly, on this basis the supply constituted a licence to occupy land and fell within the land exemption in Item 1 of Group 1, in Part II of Schedule 9 to the Value Added Tax Act 1994 ("the VATA")

16. For their part, HMRC also contended that the relevant supplies constituted for VAT purposes a single supply. However, they submitted that this was so looking at the transaction as a whole, as a matter of economic reality, since the services and facilities other than the simple use of the space in the play barn were more than merely ancillary. They submitted that the transaction was to be characterised as the supply of a children's party and thus not exempt but subject to VAT at the standard rate.

17. In response to these competing submissions, the FTT rejected the contention that all other elements were ancillary to the right to use the play barn but held that this was not a case of single supply. The FTT concluded that the taxpayer made two supplies: a supply of the use of the hall (play barn) and a supply of refreshments. Further, the FTT held that the first of those supplies fell within the land exemption. It apportioned the cost of £8.95 per child as to £6.95 to the exempt supply and £2 for the refreshments, on the basis that the latter was the price charged for the same refreshments when available separately at other times.

18. The contention that this was a case of two supplies for VAT purposes accordingly originated with the FTT and not with either of the parties. On this appeal, HMRC repeat their submission that the transaction should properly be characterised as a single supply. However, the respondent taxpayer adopts and seeks to uphold the Decision and no longer contends that this was a single supply on the principal/ancillary basis. Further, HMRC submit that if (contrary to their primary submission) this was the case of two supplies, the supply of the facilities of the play barn does not fall within the land exemption, properly interpreted.

SINGLE SUPPLY OR MULTIPLE SUPPLIES?

(a) The Law

19. It is common ground that whether a transaction involves the provision of one or more supplies for VAT purposes is a question of law. As stated by Patten LJ in *Revenue & Customs Comrs v Baxendale* [2009] EWCA Civ 831, [2009] STC 2578 at [8]:

> "On an appeal the court is concerned to decide what are the correct VAT consequences of the contractual arrangements which the parties have entered into having regard to such of the background facts as are material for that purpose. The tribunal's findings of fact are therefore relevant to this exercise but any challenge to their conclusions on the law is not limited to *Edwards v Bairstow* principles (see *Edwards (Inspector of Taxes) v Bairstow* (1955) 36 TC 207, [1956] AC 14). The appeal court must decide what is the correct legal outcome by applying to those facts the relevant principles of European law in relation to art 2 of EC Council Directive 77/388 ('the Sixth Directive'). It is not required to find that the tribunal has misdirected itself."

20. Further, in a case where there is no misdirection of law by the Tribunal, it has been said that the question is one of fact and degree, taking account of all the circumstances, such that:

> "…it is customary for an appellate court to show some circumspection before interfering with the decision of the Tribunal merely because it would have put the case on the other side of the line." *Dr Beynon and Partners v Customs and Excise Comrs* [2004] UKHL 53, [2005] STC 55, [2005] 1 WLR 86, per Lord Hoffmann at [27].

21. There is now an extensive jurisprudence on the question of when for VAT purposes supplies made by a taxpayer should be considered to be a single supply. This includes several important decisions of the European Court of Justice ("ECJ") and the House of Lords. The task of analysis is considerably assisted by the recent judgment of the Court of Appeal in *Baxendale*, which quotes extensively from those leading judgments and also from another important judgment of the Court of Appeal, *Revenue & Customs Comrs v Weight Watchers (UK) Ltd* [2008] EWCA Civ 715, [2008] STC 2313. Neither of these recent Court of Appeal decision was cited to the FTT, perhaps because the question of multiple as opposed to single supply emerged in the course of the hearing before it and not in the original submissions of the parties.

22. The relevant principles are summarised in *Baxendale* by Patten LJ in his judgment (with which the Master of the Rolls and Goldring LJ agreed) as follows (at [21]-[22]):

> "Where the transaction under consideration prima facie involves more than one identifiable supply neither of which can be regarded merely as ancillary to the other the correct tax treatment will still depend on whether, from an objective view, they form a single indivisible economic supply which it would be artificial to split.
>
> The determination of this question will depend upon a global assessment of all facts relevant to the transaction under which the supply or supplies took place. That is the taxable event. This will obviously include a consideration of the terms upon which the supply or supplies were made; how they were invoiced for; and what the consumer in fact acquired under the contract."

23. Rather than prolonging this judgment by including again a recitation of the facts and quotations from judgments in the leading ECJ and the House of Lords cases, that summary can be amplified by the following propositions derived from those authorities and, indeed, from *Baxendale* itself:

> (a) Every supply of a service must normally be regarded as distinct and independent. However, a transaction which forms a single supply from an economic point of view should not artificially be split into separate supplies: Case C-349/96 *Card Protection Plan Ltd v Customs and Excise Comrs* [1999] ECR I-973, [1999] STC 270, para 29.
>
> (b) For this purpose, regard must be had to all the circumstances in which the transaction takes place: *Card Protection Plan*, para 28.
>
> (c) There is a single supply where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded by contrast as ancillary to that principal supply: *Card Protection Plan*, para 30.
>
> (d) However, the fact that one element in a package supplied cannot be described as ancillary to another element does not mean that it is to be regarded as a separate supply for tax purposes. The question is whether those separate elements are to be treated as separate supplies or merely as elements in some over-arching single supply: *College of Estates Management v Customs & Excise Comrs* [2005] UKHL 62, [2005] STC 1597, [2005] 1 WLR 3351, per Lord Rodger of Earlsferry at [12].
>
> (e) In that regard, the test is whether the various elements supplied to the customer are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split: Case C-41/04 *Levob Verzekeringen BV v Staatssecretaris van Financiën* [2005] ECR I-9433, [2006] STC 766, para 22
>
> (f) It is important to take an overall view at the level of generality that corresponds with social and economic reality, without over-zealous dissection: *Dr Beynon* per Lord Hoffmann at [31]; *Card Protection Plan*

[2001] UKHL 4, [2002] 1 AC 202, [2001] STC 174, per Lord Slynn at [22].

(g) The assessment should be made from the perspective of the customer, as a typical consumer, not the supplier: *Levob*, para 22; *Weight Watchers* at [17].

(h) The fact that a single price is charged for two or more elements is a relevant factor pointing to single supply but it is not decisive: *Card Protection Plan* (in ECJ), para 31. Similarly, the fact that separate prices are stipulated for various elements is not decisive where the two elements have an objective close link such that they form part of a single economic transaction: *Levob*, para 25.

(i) The fact that the same or similar goods or services could be supplied separately from different sources is irrelevant to the question whether in the particular transaction under consideration their combination produces a different economic result: *Baxendale* at [24], following Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] ECR I-897, [2008] STC 3132.

(j) The test is not whether the different elements in the services provided by the taxpayer to its customers have value and utility in their own right: *Baxendale* at [39].

24. This last proposition is of particular significance having regard to the reasoning of the FTT in the present case and merits illustration from the Court of Appeal decision in *Weight Watchers* which, like the *Baxendale* case, concerned a weight-loss programme run by the taxpayer. In *Weight Watchers*, this programme was made available through meetings or "classes". The person enrolling in the weight-loss programme paid an initial registration fee for which he or she was given a handbook at the first meeting, and then also paid a fee for each meeting at which he or she received additional printed materials and had the benefit of a talk by the meeting "leader" and a form of "group therapy". The Tribunal held that there were two separate supplies: a zero-rated supply of printed materials and a standard-rated supply of services. On appeal, the High Court held that the consideration at the first meeting was for two separate supplies of services and of printed materials (the handbook), but that the transactions at subsequent meetings were for a single standard-rated supply of weight-loss services. On further appeal, the Court of Appeal held that there was a single supply of a standard-rated weight-loss programme at the meetings, initial and subsequent: the events of the first meeting from the point of view of the enrolling member were merely a necessary preliminary to obtain the benefits of the programme as a whole at that and any subsequent meetings which the member attended. A cardinal feature of the weight-loss programme for a member was the reinforcing combination of the diets as taught in the handbook and the group therapy to be derived from the meetings.

25. In the course of his judgment (with which the other two members of the court agreed), Sir Andrew Morritt C rejected the submission of counsel for the taxpayer that the economic linkage required to constitute a single supply is that

the one element can have no practical use without the other. Accordingly it was not relevant to consideration of the question before the court that the printed materials might be of considerable use without attendance at any meetings.

26. On this appeal, Mr Pipe for the taxpayer referred to the judgment of Keene J (as he then was) in *Sea Containers Services Ltd v Customs & Excise Comrs* [2000] STC 82. The issue there was whether the offer of day excursions and charters within the United Kingdom on the Pullman train operated by Venice Simplon-Orient Express comprised the supply of catering services and transport services as two distinct services for VAT purposes or a single supply in which those two elements were combined. Keene J applied the test of whether or not one or more elements in the supply can be seen as ancillary to a principal element or elements: see at [30]. Applying that test, the judge held that the catering element was significant in its own right: it was a separate aim from the transport element and not merely a better way of enjoying the transport element: see at [34]. On that basis, he held that this was a case of two separate supplies.

27. However, *Sea Containers* was decided before all the authorities referred to above save for *Card Protection Plan,* and the judgment is not mentioned in the subsequent House of Lords or Court of Appeal cases to which I have referred. I consider that it was an application of the principal/ancillary test as the exclusive basis on which to determine the question of multiple supply and, irrespective of whether the case was correctly decided on its facts, as a statement of the approach to be adopted it cannot stand, in my view, with those later authorities.

(b) The Decision

28. In the Decision, the FTT analysed the transaction into six component elements and then held that there were two principal supplies, namely the use of the hall and the provision of refreshments, to one or both of which the other elements were ancillary: paras 44-60. Hence, the FTT concluded that the opportunity to use the play equipment was ancillary to the use of the hall, and that the service of the member of staff in receiving customers and their guests, preparing the refreshments and clearing up the hall at the end of the party, was ancillary to both the use of the hall and the provision of refreshments: para 45.

29. On that basis, the FTT proceeded to consider whether it would be artificial and distortive of the functioning of the VAT system to split the transaction into two elements, the use of the hall and the supply of refreshments. Noting that the elements were always offered as a package, the FTT found that "what the customer wants, and pays for, is a children's party (comprising both elements)": para 67. However, the FTT then continued:

> "69. In our view it would not be artificial and distortive to make the split if we are of the view that the fact that the elements were presented and accepted as a package illustrated only that the package, labelled a "Weekend Play" party, was a

> convenient and advantageous way of making what were in economic reality two supplies."

30. After referring to the *Levob* case, the FTT stated:

> "72. We consider, on the evidence in this case, that the provision of the two elements of the use of the Hall and the refreshments were not so closely linked that the purchase of one element without the other would have been of no use for the customers' economic purposes, which were to entertain the children. The fact that it was advantageous to the [taxpayer] and may have been beneficial to the customers to be able to purchase the two elements together does not of itself establish the necessary close link between the two."

(c) Discussion

31. In my view, there is a significant error in the approach of the FTT. The test which they applied was to ask whether the use of one of what they described as "the two elements", i.e. the hall and the provision of refreshments, would have been of use to customers and thus serve their economic purposes, without the other. As *Weight Watchers* and *Baxendale* make clear (although neither of those recent authorities was cited to the FTT), that is not the test. The fact that parents may have been interested and found value in the purchase only of use of the hall or only of the provision of refreshments in the café room is not relevant in determining whether, from the perspective of a typical customer, objectively viewed, what was in fact being supplied was as a matter of economic reality to be regarded as a single supply for VAT purposes.

32. I consider that this was a misdirection of law which vitiates the FTT's analysis and therefore, without any need for the circumspection referred to by Lord Hoffmann, requires the Upper Tribunal to make a fresh determination on the evidence and facts as found by the FTT.

33. Furthermore, the question of whether some elements in the supply are ancillary to one principal supply is relevant in determining whether there is a single or multiple supply according to the approach in *Card Protection Plan*, as explained in para 21 of the ECJ judgment in *Levob.* But if the case is not one where there is a single, principal supply, then the question whether the various elements are so closely linked as to form, from the customer's perspective, a single, indivisible economic supply is to be determined by looking at all the significant elements of the transaction. In my view, the FTT fell into error in effectively disregarding all those elements of the transaction that it had previously found were ancillary, so that in its determinative reasoning it considered only the two elements of the use of the hall and the provision of refreshments.

34. Once all of the elements of the transaction are brought into account, I have no hesitation in finding that, from the perspective of the customer, what was supplied was a group of facilities for a children's party, provided as a single supply. It is not quite correct to refer to this as the supply "of a children's

party", since no organisation or supervision of the children during the 75 minutes spent in the play barn is provided by the taxpayer (cp. the cookery and craft parties, for which the charge was accordingly higher). But the fact that the customer has to provide some elements towards the holding of the party, whether through the hiring of a magician or simply by organising the children's games, does not detract from the fact that the customer would receive a combination of facilities that enabled them to hold, as the website states, a party for two hours.

35. It is trite to observe that a two hour party for children will almost invariably involve the provision of some food and drink. Further, the provision of the play equipment in the hall cannot, in my view, be disregarded as an insignificant benefit. The FTT records that there are often older children at the weekend play parties but there was no evidence as to what is the average, or perhaps more relevantly the median, age of children attending those parties. Although the play equipment was moved to the side, a customer holding a weekend play party has the right to use any of this equipment that is desired. As Mr Pipe accepted, provision of the play equipment is of value for most parties. Indeed, his written submissions presented for this appeal, like his submissions below, express this as one of the three components in the package supplied, along with a licence to occupy the space and the catering provision of food.

36. Furthermore, there are significant connecting elements between the use of the play barn and the provision of refreshments. The fact that one immediately follows the other is obviously a connecting element, as is the physical proximity of the location in which they are supplied. From the customer's perspective, I do not see that it would make any difference, as a matter of economic reality, if instead of children moving to the café room the refreshments were instead brought to them in the play barn either at the end of, or at an interval in the middle of, the party. Another significant connecting element is the member of staff, the "party host" who both prepares and clears up the play barn and prepares the refreshments. The importance of the former element should not be underestimated: as stated in the taxpayer's website:

> "Our birthday parties allow you to have all of the fun, while we deal with all of the mess!"

Finally, the fact that the various elements are available only as a single package at one all-inclusive price, while not determinative, reinforces this conclusion.

37. Mr Pipe, for the taxpayer, stressed that the division into two elements was not artificial in the sense of this being a tax avoidance arrangement: the supply of refreshments in the café room following use of the play barn was to enable the play barn to be used for the next party while children from the previous party were having their food and drink. I completely accept that this was not an arrangement made to avoid tax and that it was an entirely sensible arrangement to serve the economic purpose of the taxpayer. But that is not the test. From the perspective of the customer, the supply being received was, in my judgment, a single supply comprising various elements that enabled the

holding of a two-hour play party, and it would be artificial and involve an "over-zealous dissection" to characterise that for VAT purposes as two separate supplies.

LAND EXEMPTION

38. In the light of my conclusion above, this aspect of the appeal by HMRC becomes academic. However, since it was fully argued, I shall briefly address it. It is premised on the basis, contrary to my above conclusion, that the supply of refreshments is a distinct supply for VAT purposes from the arrangements concerning the hall, since the former is accepted to be standard-rated for VAT and the latter then falls to be considered separately.

39. The land exemption derives from Article 13(B)(b) of the Sixth VAT Directive, now Article 135(1)(l) of the Principal VAT Directive, Directive 2006/112 (with effect from 1 January 2007). The period in issue in the present case spans both Directives.

40. The legislation sets out various exceptions to this exemption, which have been added to by amendment from time to time and now comprise an extensive list. They may offer some assistance in construing the scope of the exemption and I set out a few of the exceptions that may potentially be more relevant in the present context, as they appear in Item 1 of Group 1 in Schedule 9 to the VATA:

> "The grant of any interest in or right over land or of any licence to occupy land, …other than -
>
> …
>
> (e) the grant of any interest in, right over or licence to occupy holiday accommodation;
>
> …
>
> (h) the grant of facilities for parking a vehicle;
>
> …
>
> (n) the grant of facilities for playing any sport or participating in any physical recreation."

41. In *Revenue & Customs Comrs v Denyer* [2007] EWHC 2750 (Ch), [2008] STC 633, Briggs J set out eight principles as to the meaning and purpose of the land exemption, which I gratefully adopt:

> "(1) Because art 13B(b) confers an exemption from VAT, it must be strictly construed, but not so strictly as to deprive the exemption of its intended effect: see Case C-284/03 *Belgium v Temco Europe SA* [2005] STC 1451, [2004] ECR I-11237, para 17 of the judgment of the Court of Justice.

(2) In common with other exemptions in art 13, this exemption is to be given a meaning independent of the definitions used in the legal systems of any particular Member State, and it must be derived from an interpretation of the exemption in the light of its context, and of the objectives and the scheme of the Sixth Directive: see *Temco* at paras 16 and 18.

(3) The concept of the letting of immovable property within the meaning of art 13B(b) is essentially 'the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right': see *Temco* at para 19 and Case C-275/01 *Sinclair Collis Ltd v Comrs of Customs and Excise* [2003] STC 898, [2003] ECR I-5965, para 25.

(4) The letting of immovable property is characteristically 'a relatively passive activity linked simply to the passage of time and not generating any significant added value', to be distinguished from other activities which are either industrial and commercial in nature, or which 'have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property'. See *Temco* at para 20 and, as an example of the provision of a service, the right to install cigarette machines in commercial premises examined in *Sinclair Collis* at paras 27–31.

(5) The right to occupy an area or space for a period of time may not be a letting of immovable property if it is merely the means of effecting the supply which is the principal subject matter of the relevant agreement: see *Sinclair Collis* at para 30.

(6) There may be a *de minimis* limitation on the exemption in art 13B(b) such that, for example, the conferring of a right to the exclusive use of a table in a Dutch coffee shop, for the purpose of selling narcotics, is inherently incapable of being a letting of immovable property: see the opinion of Advocate General Fennelly in Case C-158/98 *Staatssecretaris van Financiën v Coffeeshop Siberië vof* [1999] STC 742, [1999] ECR I-3971, para 36, applied by Lord Slynn in *Customs and Excise Comrs v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989 at [15] in the House of Lords.

(7) An agreement may fall short of being a letting of immovable property if, on analysis, it confers merely a licence to use rather than to occupy land: see *Sinclair Collis* per Lord Nicholls at [35].

(8) An agreement is not disabled from being a letting of immovable property merely because the grantee's exclusive use is subject to conditions (such as a landlord's right to enter and

> inspect), or because it includes the right to use parts of the landlord's property in common with other occupiers: see *Temco* at para 24."

42. In the Decision, what are principles (3) and (4) above are effectively set out in quotations from *Temco*, and I find no misdirection in the approach adopted by the FTT. After those quotations, the FTT stated that it had no hesitation in concluding that the supply of the use of the hall to customers is a "relatively passive activity linked simply to the passage of time (75 minutes) and not generating any significant added value": para 79.

43. The FTT's reasoning on this aspect in the Decision is somewhat opaque but it appears to be based on the earlier analysis of the various other elements (the right to use the playthings, and the reception services, toilets and changing facilities) as ancillary: see para 76.

44. Although undoubtedly a question of law, it seems to me that the issue of whether a supply of which the central element is the 75 minutes use of the play barn falls within the land exemption is a matter of fact and degree on which I would feel some reluctance to interfere with the conclusion of the FTT. However, there is one significant element which was emphasised by Mr Mantle and to which the FTT does not appear to have had regard. The charge for a play party is determined on the basis of a fee per child (subject to a minimum charge of £100). The customer does not pay a flat fee for rental of the play barn, and if payment is made for 20 children then there is no right to bring 25. Although there is no limit on the number of accompanying adults, this aspect of the transaction appears to me wholly inconsistent with a right of the customer to occupy "as if that person were the owner". It cannot be equated with an overall limit on numbers that may be found in a bare rental of a hall, dictated by safety or capacity considerations. When I add to this the fact that the provision of the play equipment appears to me, for the reasons explained above, to be of greater significance in what was being provided in the play barn than the FTT appeared ready to acknowledge, I should come to the conclusion that this supply does not fall within the land exemption, properly construed. Were it necessary to do so, I would therefore have set aside the Decision on that ground.

CONCLUSION

45. Accordingly, I allow this appeal, set aside the Decision of the FTT and, insofar as necessary to do so, restore the decision of HMRC refusing to make repayments, as claimed, of output tax.

MR JUSTICE ROTH
TRIBUNAL JUDGE

RELEASE DATE: 24 January 2011