TC01394

Appeal number: TC/2009/16764

VAT – Item 1 of Group 1, Sch 9 Value Added Tax Act 1994 – whether licence to occupy land an exempt supply or standard rated supply of storage facilities – whether storage units 'immovable property' – predominant purpose of supply

FIRST-TIER TRIBUNAL

TAX

U K STORAGE COMPANY (SW) LIMITED **Appellant**

- and -

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

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
MISS S C O'NEILL (MEMBER)

Sitting in public at 45 Bedford Square, London WC1 on 14/15 April 2011

Michael Conlon QC, instructed by Freshfields Bruckhaus Deringer LLP, for the Appellant,

Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Decision under appeal

1. The Appellant ('UK Storage') appeals a decision of 21 October 2009 of the Commissioners that the Appellant's supplies are not exempt from VAT under item 1 Group 1 Schedule 9 to the Value Added Tax Act 1994 ('the Act') but are standard rated.

2. UK Storage operates self-storage facilities at unit 3 East Quay, Bridgwater, Somerset ('Bridgwater') and at Courtlands Industrial Estate, Norton Fitzwarren, Taunton, Somerset ('Norton Fitzwarren').

Issue to be determined

3. The main issue for determination by the Tribunal is whether licences granted by UK Storage to customers to use the self-storage units are a taxable supply for VAT purposes as the Commissioners contend, or licences to occupy land and therefore VAT exempt.

Preliminary application for a stay

4. Before the hearing of the substantive appeal the Commissioners applied to stay the appeal behind an appeal in the case of *David Finnamore (T/A Hambridge Storage Services) v HMRC*, (TC/2009/13968), which the Commissioners say concerns substantially similar factual circumstances to those featured in this appeal. The First-Tier Tribunal (FTT) allowed the taxpayers appeal. The Commissioners intend to appeal to the Upper Tribunal against the FTT's decision, and, given the substantial similarities between the *Finnamore* case and the present appeal, the Commissioners submit that the most appropriate course in the circumstances would be to stay the present appeal pending the outcome of the appeal in *Finnamore* thereby avoiding potentially unnecessary time and costs and the risk of conflicting FTT decisions on essentially the same issue. The Commissioners originally attempted to stay this appeal behind *Finnamore* on the 29 July 2010. The application was refused by Judge Radford by direction issued on 5 August 2010. The Commissioners submit that the express breadth of the FTT's conclusion in *Finnamore* (to the effect that, (at paragraph 14) '…in most storage facility arrangements, at the very least, there will be a licence to occupy a defined area of land...), makes it appropriate to make a further application for a stay.

5. UK Storage objects to the Commissioners application for a number of reasons:

a) The Commissioners had 56 days in which to apply for permission to appeal the *Finnamore* decision which is dated 2 February 2011. The time limit therefore expired on 30 March 2011.

b) The Commissioners need the permission of the Upper Tribunal before they can appeal. Obtaining permission to appeal and prosecuting an appeal will take time and it will be contrary to the interests of justice and the overriding objective to further delay this appeal.

c) This appeal turns on different facts and to some extent different issues of law from those in the *Finnamore* decision.

6. Having heard further submissions by Mr. Conlon for UK Storage and Mr. Jones for the Commissioners we refused the application to stay this appeal.

Background

7. UK Storage is not VAT registered.

8. UK Storage is the freehold owner of both Bridgwater and Norton Fitzwarren. It is common ground that UK Storage is engaged in VAT exempt letting of land at Bridgwater. It is only the activities at Norton Fitzwarren which are in dispute.

9. The self-storage units at Bridgwater and Norton Fitzwarren are available to customers for a fee. The storage units are of varying sizes and priced accordingly. Customers are required to enter into a standard form of agreement ('the licence agreement') for an indefinite period terminable by either party on one weeks' notice, the fee being based on the duration of storage, plus if required an additional fee for the benefit of being covered by UK Storage's own insurance.

10. The Bridgwater premises comprise a 20,000ft.^{2} warehouse which accommodates 400 individually lockable storage units located over three floors. Each floor is accessed by a lift or stairs and corridors run alongside the units. The individual units have no ceiling or roof.

11. The Norton Fitzwarren premises consist of a concrete surfaced compound surrounded by a secure perimeter fence and are monitored by 24 hour security. Within the compound are around 300 individual single storey storage units.

12. Each unit at Norton Fitzwarren is self-contained and is fully enclosed with a base, sides and a roof. Depending on the type, the units can be accessed from

outside, either by a roller shutter front door or by a side door. The units are constructed from steel sheet and are clad in 0.4 mm and 0.8mm steel cladding. They weigh 600 kg, and are designed to hold a load of up to 6 tons when sitting on a flat surface.

13. The units are erected on site by a trained team of self-employed fitters. It takes a team of three one day to assemble one storage unit.

14. Once assembled the storage units are lifted into place by a tele-handler (a tractor like vehicle with a single telescopic boom that can extend forwards and upwards from the vehicle and that can be fitted with a forklift attachment), using a lifting frame and straps. The units are positioned side-by-side in gap free rows. A second row of units is then lifted into position and placed back to back with the first row so as to create a block.

15. When in position the storage units rest upon the ground under their own weight in the surrounding concrete and are not fixed to the ground.

16. A prospective customer informs UK Storage of his or her requirements. UK Storage then checks to ensure that the items to be stored are suitable for storage, following which the customer signs a licence agreement, pays the requisite storage and insurance fee (if applicable), purchases a lock for the unit and stores his goods. Thereafter UK Storage ensures the safe and effective running of the storage facility.

17. The licence agreement allows the customer to occupy the designated unit for the purpose of storing goods for an agreed period. The term of the licence is for an initial minimum period of four weeks. Thereafter payments are made, once every four weeks. One weeks' notice is required to terminate the licence. Access to the unit is restricted to the customer, and any named person permitted by the customer and (in certain limited circumstances) UK Storage. The customer is entitled to access the storage facility during its opening hours, which are 8:30 am to 6 pm Monday to Friday and 9 am to 4 pm Saturday. At the Norton Fitzwarren premises customers are able to opt for 24 hour access to the facility.

18. Ordinarily, the UK Storage staff will not enter an occupied storage unit but is entitled to do so (by means of breaking the lock) in the event of an emergency or in any case where a customer fails to observe the terms of the licence agreement. Clause 11 of the licence agreement provides that the agreement "shall not, confer [on you] any right to exclusive possession of the unit." It also allows UK Storage to require the customer to move his goods to another unit and gives the company the right to enter the storage unit to move the

goods if the customer does not comply. UK Storage say that this requirement has never been invoked in practice and that it has no intention of doing so.

19. The same licence agreement is used at both Bridgwater and Norton Fitzwarren.

VATA provisions and European Directives

20. Section 4 of the Act prescribes the scope of VAT on taxable supplies:

> 4 Scope of VAT on taxable supplies
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, were it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom, other than an exempt supply.

21. Section 31 (1) of the Act exempts a supply of goods or services if it is of the description for the time being specified in Schedule 9.

> '31 (1) a supply of goods or services is an exempt supply if it is of the description for the time being specified in Schedule 9 and acquisition of goods from another member state is an exempt acquisition if the goods are acquired in pursuance of an exempt supply'.

22. Schedule 9 to the Act prescribes exempt supplies of goods and services. Item 1 of Group 1 of Schedule 9 specifies that the following supplies are exempt from VAT:

> '1. The grant of any interest in or right over land, or of any licence to occupy land…..'

23. European Union VAT Directives are transposed into domestic legislation. From 1 January 2007 Council Directive 2006/112/EC, the Principal VAT Directive ('PD') applies. Prior to that Council Directive No 77/388/EEC – the Sixth Directive applied. There is no material difference between the two provisions.

24. The legislation referred to in the preceding paragraph 22, implements the provisions of article 135(1) PD (formerly article 13B(b) and (g) of the Sixth Directive) which states that:

1. ‘Member states shall exempt the following transactions (inter alia):

(j) the supply of a building or parts thereof, and of the land on which it stands, other than the supplier referred to in points (a) of article 12 (1);

(l) the leasing or letting of immovable property’.

25.. Article 12 PD (formerly Article 4 of the Sixth Directive) provides, so far as is relevant:

(1) ‘Member states may regard as a taxable person anyone who carries out on an occasional basis…. one of the following transactions:

(a) the supply before first occupation of a building or part of a building and of the land on which the building stands…

(2) for the purposes of paragraph (a), ‘building’ shall mean any structure fixed to or in the ground.’

25. Excluded from the scope of the article 135 exemption:

(a) the provision of accommodation in the hotel or similar sectors, including holiday camps and camping sites;

(b) the letting of premises and sites for parking vehicles

(c) letting of permanently installed equipment and machinery; and

(d) hire of safes’

UK Storage’s case

26. By their letter dated 29 June 2009 the Commissioners confirmed that supplies of storage space at Bridgwater, pursuant to the licence agreement, are VAT exempt. UK Storage agrees that this ruling is correct and contends that the same analysis applies to its supplies of space at Norton Fitzwarren. UK Storage contends that the supplies at Norton Fitzwarren are made pursuant to a licence agreement, which imposes legal rights and obligations which are in all material respects identical to those applicable at Bridgwater. UK Storage’s grounds of appeal may be summarised thus:

i. The storage units at the Norton Fitzwarren premises are effectively buildings forming part of the land on which they are installed following prefabrication. They therefore fall within the meaning of 'land' within item 1 Group 1 Schedule 9 the Act. Removal of a storage unit would not be possible (particularly when loaded with a customer's goods) without causing substantial damage to the unit. The units are to that extent 'immoveable property' within the meaning of Article 135(1)(*l*) of the PD.

ii. Under the licence agreement a customer is entitled to store his goods in a specifically identified and numbered storage unit and enjoys exclusive occupation of the unit to which only he has access and holds the key. The agreement therefore confers 'an interest in or a right over land' within the meaning of item 1 above and /or the grant of a 'lease or letting' within the meaning of Article 135(1)(*l*)

iii. A storage unit is a 'building' within the meaning of Article 135(l) (j) of the PD, read with Article 12(2) thereof.

UK Storage also argues that having regard to the similarity of the supplies at Brigwater and Norton Fitzwarren and the principles of fiscal neutrality its supplies of storage space at Norton Fitzwarren are VAT exempt.

The Commissioners case

27. The Commissioners say that the storage facility at Bridgwater where the rooms are a fixed part of the warehouse is exempt within the Act but that the supply of self-storage units at Norton Fitzwarren is taxable at the standard rate. They contend that:

i. The units at Norton Fitzwarren are not immovable property because they are not fixed to the land but rather simply sit on the land and can be easily moved.

ii. The licence agreement falls short of a licence to occupy land for the purpose of Schedule 9 because a customer's licence for a unit does not guarantee exclusivity of possession.

iii. Article 135(l) (j) does not assist UK Storage in this case and is of no relevance.

iv. If UK Storage is engaged in the letting of immovable property then that letting forms only part of a composite supply. The Commissioners contend that it is the use of the storage unit that is the predominant supply not use of the land and that therefore UK Storage cannot be

supplying a licence to occupy land. The Commissioners say it follows that the supplies made by UK Storage are not exempt pursuant to item 1 of Group 1 of Schedule 9 of the Act.

Witness evidence as to the nature of the units

28. Mr. Keith Taylor, a director of UK Storage gave evidence in accordance with his witness statement dated 22 December 2010 which stood as his evidence in chief. He explained that the individual storage units were set in blocks and that the blocks of units have paths between them which allow vehicle access. The units have a lifespan of 15 to 20 years, are constructed from steel profiled sheet material commonly used for commercial buildings as well as the self-storage industry. The material is designed to be of a thickness and quality to protect customers' goods from the elements. A robust structural design in order to facilitate transportation was simply not necessary. Once in place the units have no structural integrity. They were not designed to be lifted or moved with customer's goods inside them like a freight container. Customers were not advised to tie down or otherwise secure their goods. The unit's design is not consistent with any intention of lifting or transporting goods. The units were not movable from either a structural or practical standpoint and would crumple with the weight of goods inside if moved. Attempts to move the unit with goods inside would cause irreparable and permanent damage to the unit itself and probably to the customer's goods. No units at the Norton Fitzwarren premises had been moved or removed once put into place, nor he said was there any intention to do so.

29. Mr. Taylor said that the concrete paths between the units are 4 inches higher than the bays in which the units sit. This, he explained was for two reasons; firstly to keep the units in place and secondly to allow level loading in order to reduce the risk of injuries to customers when loading and unloading their goods. Once the units are lifted into place they were pushed up tight to the adjacent unit to prevent any movement. This not only gives the units added strength and structural integrity but also an element of permanence. Because the units are erected in blocks and sit in a base lower than the concrete surrounding them there is no means of access for the purpose of lifting them out of position. Equipment could not get under or around the units in order to lift them out. Any badly damaged units would have to be unscrewed and there were over 600 fixings per unit which would take two – man days. It may be possible to re-erect any unit that had been dismantled in this way but the company could not guarantee that the re-erected unit would be watertight.

30. Mr. Ian Hayter gave evidence to the Tribunal on behalf of the Commissioners in accordance with his witness statement dated 20 December 2010 which was

accepted as his evidence in chief. Mr. Hayter is an Officer of Her Majesty's Revenue & Customs based in Taunton and dealt with the Commissioners enquiry regarding UK Storage's VAT registration status in the context of the company's business relating to the letting of buildings and other storage structures. He explained that he was aware, following previous advice received from the Commissioners Land and Property Unit of Expertise that the VAT treatment of rental space for storage could be different depending on whether the storage was in containers which were movable or immovable. Mr. Hayter visited both the company's Bridgwater premises and the Norton Fitzwarren site. He was satisfied that the Bridgwater premises as described in paragraph 10 above consisted of the letting of buildings and were VAT exempt. Mr. Hayter said that Mr. Taylor had explained to him that the units at Norton Fitzwarren could theoretically be moved when empty. They were not bolted to the ground as that would require planning permission. They were not designed to be moved and were unlikely to fit together again properly if they were.

31. Mr. Hayter says that he formed the view that the Norton Fitzwarren units fell outside the definition of 'immovable property'. He then received a communication from the Unit of Expertise agreeing with his view that the supplies at the Bridgwater site are VAT exempt and that the units at the Norton Fitzwarren site should be taxable at the standard rate on the basis that the units were capable of being moved. There is no further explanation in Mr. Hayter's witness statement as to why the Commissioners Unit of Expertise concluded that the units were 'movable' within of Article 135(1)(*l*) although correspondence from the Commissioners to Mr. Taylor says that 'storage in prefabricated units… falls short of a licence to occupy land and is therefore not exempt from VAT'.

Analysis of the issues in the context of relevant legislation and case law

32. The principle issues for determination by the Tribunal are firstly whether the storage units at Norton Fitzwarren are 'immovable property' as referred to in Article 135(1)(*l*), secondly whether there was a licence to occupy land and thirdly whether there was a single or composite supply.

Were the units 'immovable property?'

33. It is necessary to examine the concept of 'immovable property' within the context of the Principle Directive and how this has been transposed into domestic legislation. Article 189 of the EC Treaty (now art 249 EC) provides that a directive is binding, as to the result to be achieved, upon each member state, although the choice of the form and method of implementing a directive is left to the member state. A directive sets out a framework within which each

member state must enact its own domestic legislation, in order to implement the directive. It is therefore settled law without need for citation of authority, that where a directive has been implemented or transposed into domestic legislation the Tribunal need look no further than the domestic legislation, save that the directive may assist in its interpretation. In interpreting legislation the Tribunal must prefer an interpretation which gives effect to the wording and purpose of the directive and if that is not possible the directive must be applied to the exclusion of the domestic legislation.

34. The exemptions provided for under article 135 have their own independent meaning in Community law and must therefore be given a Community definition. Accordingly, the interpretation of the expression 'letting of immovable property' cannot be determined by the interpretation given by the civil law of a member state. However, the directive does not define the term 'letting of immovable property' and it is thus appropriate to consider the context in which the provision occurs and the objectives of the rules of which it forms part. Domestic legislation is an autonomous concept of European law and the meaning of the expression 'letting of immovable property' is derived from settled case law of the Court of Justice of the European Communities ('the ECJ') and as applied by Courts and Tribunals in the United Kingdom.

35. The issue of what constitutes a 'letting of immovable property and in particular what constitutes 'immovable property' was considered by the ECJ in *Maierhofer v Finanzamt Audsburg-Land [2003] STC 564* in the context of temporary housing for asylum seekers, made of prefabricated components that were assembled and bolted onto a concrete apron and could be dismantled by eight persons in ten days. The Court held that the letting of the building constructed from prefabricated components fixed to or in the ground in such a way that they could not be either dismantled or easily moved constituted a letting of immovable property for the purposes of art 13B (b), (now article 135(1) PD), even if the building was to be removed at the end of the lease and re-used on another site.

36. The Court had been asked to provide guidance and interpretation on the term 'immovable property' and in particular whether the term covers '…a building constructed from prefabricated components which is to be removed following the termination of the contract and may be reused on another site'. In analysing the basis of the exemption Advocate-General Jacobs said that he could not accept the proposition that '… there is no letting of immovable property where the buildings let are attached to the ground for temporary purposes only and that the letting of the prefabricated dwelling units may thus be subject to VAT'.

37. In *Maierhofer* the German government had argued that the buildings at issue in that case were comparable to the tents, caravans, mobile homes and light framed leisure dwellings in *EC Commission v. France* [1999] STC 480 [1997] ECR I-3827 even though fixed to the ground, because they could be dismantled without damage at any point and put up again on another plot. The rationale was that additional value was generated, which went well beyond the mere letting of immovable property and was hence comparable to the exclusions to the exemption from tax laid down in art 13B(b).

38. Advocate-General Jacobs disagreed with the German government's arguments and in paragraph 32-43 of his opinion he analysed the basis of the exemption. He said that although the concept of 'immovable property' is not expressly defined in the VAT directives the only property that is inherently immovable is land itself. He expressed the view that even conventional buildings intended to be permanent fixtures may in many cases, be removed and re-erected if sufficient care is taken and that:

> 'there are clearly different degrees of 'movability' of property other than land; a true building, with walls and foundations will, in view of the costs only very exceptionally be moved, whereas a circus tent's core function is precisely to be immovable….
>
> It can be deduced from the existing case law that the term 'letting of immovable property' covers not only the letting of land but also the letting of conventional buildings and parts of buildings. This is implicit in the many judgments concerning other aspects of the interpretation of art 13B(b) in which neither the court nor the parties raised doubts about the classification of conventional buildings as immovable property.'

39. Advocate-General Jacobs set out the following principles:

a) There had been no relevant guidance from the Court on the criteria to be applied in borderline cases. He said that although the ruling in *EC Commission v France* indirectly concerned the issue whether tents, caravans, mobile homes and light framed leisure dwellings were 'immovable property' for the purpose of art 13B(b), its value as a precedent was limited since France did not contest the Commission's action and there had therefore been no analysis of the concept.

b) In order to determine the meaning of 'immovable' in art 13B(b), subjective criteria such as the intended duration of the attachment, should not be taken into account. It cannot necessarily be assumed that, simply because it is intended when a building is erected that it should not remain permanently on its site, the building will in fact subsequently be removed. Many prefabricated buildings were put up

in the aftermath of the 1939-45 war expressly as a temporary measure to alleviate the then housing crisis and remain standing today. Nothing in the Sixth Directive supports the use of subjective criteria for determining the borderline between immovable and movable tangible property. On the contrary, art 4(3) (a) defines 'building' objectively as 'any structure fixed to or in the ground'.

c) It is desirable therefore that the criterion for determining whether a building or similar structure constitutes immovable property should be objective. The correct criterion is whether the structure is firmly fixed to or in the ground. Advocate-General Jacobs reached that conclusion on the basis that the term immovable property must be construed in the light of the concepts used in art 4(3)

d) It is not appropriate to construe the term 'immovable' as meaning inseverable from the ground; that test might not only entail the exclusion of practically all buildings but also require a complex assessment of whether a given building could in fact be removed and re-erected.

e) It is not correct to assume that the letting of structures which are firmly fixed to or in the ground, but which may be removed and re-erected elsewhere necessarily entails a more active exploitation of the property comparable to the transactions listed in art 13B(b) (1) to (4). The letting of a building which could be dismantled and re-erected elsewhere does not exploit the property more actively than the letting of a conventional building. The concern of the national authority may be that the value added to the land in question inherent in the possibility that the structure may be dismantled and re-erected should be subject to VAT but the likelihood of such possibility is merely hypothetical and cannot without undermining legal certainty influence the correct classification of a building at a given time as 'immovable property' for the purpose of art 13 B(b).

40. The Court held [at 35] that

> 'the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a letting of immovable property for the purposes of art 13B(b) of the Sixth directive even if the building is to be removed at the end of the lease and re-used or another site'

41. Both Mr. Conlon for UK Storage and Mr. Jones on behalf of the Commissioners referred to the principles laid down in Maierhofer. Mr. Jones said that *Maierhofer* established that the distinction between movable and immovable property for VAT purposes came down to an objective question of how easily a structure in question can be dismantled or moved. In essence, he said, there is a scale of degrees of movability or immovability and the real question is where on that scale a particular structure falls.

42. The Court in *Maierhofer* also decided that 'whether the lessor makes available to the lessee both the building and the land on which it is erected or merely the building which he has erected on the lessee's land is irrelevant in determining whether a letting constitutes a letting of immovable property'. Mr. Jones argued that it follows from this that, a licence to occupy the land on which a structure is placed does not mean that the letting itself is one of immovable property for VAT purposes.

43. Both Mr. Jones and Mr. Conlon also referred us to the Decision in *University of Kent v CCP* [VTD 18625]. The case involved the letting or licensing of accommodation units, known as 'Lodja sleep' units to students for the period of an academic year. The units were parked in the University car park connected to utility services and fixed to the ground by bolts and timber battens. It was estimated that the units could be removed in about half a day. Applying the ECJ decision in *Maierhofer* the Court held that because the units' attachment to the ground was minimal and they could be moved relatively easily, the letting was of movable property. Mr. Jones observed that this was so notwithstanding the fact that, from an English law point of view the student licensees enjoyed a licence to occupy the land on which the units sat.

44. Mr. Conlon argued that *Kent* can be distinguished from the facts of the present case on the basis that, firstly the process of relocating the 'Lodja sleep' units would not have entailed them being dismantled and reassembled. They would have remained substantially intact following removal. Secondly, it was clearly much easier to move the accommodation units in terms of time and labour than the UK Storage's storage units, and thirdly, that there is some doubt whether the student licensees indeed held a licence to occupy a designated space on the land on which the sleep units were accommodated.

45. Mr. Jones referred to his earlier submission that the letting of movable or immovable property for VAT purposes is a question of degree which he says was recognised in the case of *Elitestone Ltd v Morris and another* [1997] 2 ALL ER 513 The case helped to further clarify the extent to which annexation

of an object to the ground was necessary. The House of Lords laid down the following propositions:

> 'if a structure can only be moved in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel'

Their Lordships continued on to say that whether a building is part of the land is a question of the degree of annexation and the object of annexation. In terms of the degree of annexation, there need not be an actual physical attachment. When considering the object of annexation, it must:

> 'be assessed objectively and not subjectively. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land, or for the more complete or convenient use or enjoyment of the thing itself.'

46. Mr. Jones argues that the storage units at Norton Fitzwarren are designed and constructed for the more convenient use and enjoyment of the storage facility. He submits that in this appeal, the evidence that has been provided establishes that the containers are 'fixed' to the land only in that they sit upon the ground under their own weight. Although the units in question are designed to be bolted to the ground, they are not, (as to do so would require planning permission) and the units are not therefore attached to the ground in any way. He argues that, contrary to UK Storage's contention, the units are not 'in' the ground because they simply sit on the ground surrounded by a concrete slab. He also contends that although the units could not be moved whilst full of goods, that is an incorrect test as it is an empty unit which is being leased by the customers. The correct question he says is whether or not a unit can be moved in an empty state. On the basis that the unit can be disassembled by two men within a day he contends that the units are movable property.

Was there a licence to occupy land?

47. In addition to establishing whether the units are 'immovable property' it is also necessary for UK Storage to establish that there was a *leasing or letting* of the units. Item 1 of Group 1 of Schedule 9 states that the '*grant of any interest in or right over*' land, or of '*any licence to occupy*' land constitutes supplies that are exempt from VAT. The exemption must be interpreted consistently with the equivalent European legislation. This principle of consistent interpretation was established by the ECJ in *Marleasing SA v La Comercial Internacional de Alimentation SA* Case C 10689 [1990] 1 ECR 4135 and has been confirmed in subsequent cases.

48. In the cases of *Sinclair Collis Ltd v CCE* [2003] STC 898 the House of Lords confirmed before referring the case to the ECJ, that 'licence to occupy' in Group 1 should be interpreted as having a meaning consistent with and can go no wider than the equivalent European concept of 'the *leasing or letting* of immovable property'. It was stated by the ECJ (at paragraph 25) that the fundamental characteristic of a '*letting*' of immovable property lay in:

> 'conferring on the person concerned for an agreed period and payment, the right to occupy property as if that person where the owner and to exclude any other person from enjoyment of such right'

In that case an agreement to site cigarette vending machines in public houses, clubs and hotels was held to not constitute a letting of immovable property because the owner of the machines had no control over the exact positioning of the machines; moreover, the subject matter of the contract agreed between the parties was the maximising of sales and not the occupation of a precisely defined space. The case therefore emphasised the importance of (a) the contract conferring the right to occupy a specific area; and (b) the circumstances in which the transaction takes place, or 'subject matter' of the transaction.

49. In the more recent case of *Macdonald Resorts Limited v HMRC* [2011] STC 412, the court stated:

> '46. …in order to determine whether the contract falls within the definition,(of 'letting of immovable property'), account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties'.

50. Mr.. Jones submits that in order to determine whether there was a '*letting*' it must be decided whether the licences to use the storage units included exclusive possession of the land during the period of occupancy .He maintains that the licence agreement did not confer exclusive possession of the units upon UK Storage's customers, as clause 11 of the licence agreement specifically states,

> 'This agreement shall not confer on you any right to exclusive possession of the unit'.

He therefore contends that the licence agreement does not amount to a licence to occupy land for the purposes of Schedule 9.

51. Mr. Conlon argues that however clause 11 is to be construed it cannot have the effect of overriding the true nature, or economic reality of the contract. The agreement included the power to exclude any other person from enjoyment of

the right to occupy the specific unit of space which customers rented, and to that extent they were entitled to exclusive possession.

52. We were referred by Mr. Conlon to the case of *Grimsby College Enterprises Ltd v HMRC* [2010] STC 2009 which further clarified the concept of a 'right to occupy.' This case concerned a tax avoidance scheme where input tax on construction and fitting out of a new building was used for a supply described as a 'licence to use facilities'. The Tribunal in that case concluded that the true nature of the agreement was a licence to occupy land. Thus, because the supply was exempt, attributable input tax could not be recovered. The Upper Tribunal (Briggs J) upheld the Tribunal's conclusion that the reality of the arrangement was a right of occupation.

    Briggs J said inter alia (at para 16):

    a) the right to occupy an area 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.

    b) Occupation (in the sense outlined above) is to be distinguished from mere user of land.

    c) An agreement is not disabled from being a letting of immovable property merely because the grantees 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.

53. In his evidence Mr. Taylor said that the typical customer at both Bridgwater and Norton Fitzwarren 'is looking for a contained space, of which he has sole use of the storage and protection of his personal items for a period of time in a fixed location, to which no other person has access'. A particular numbered unit is let and occupies a particular area of land identified on the site plan. The term 'site' and 'unit' are defined in clauses 1 to 3 of the licence agreement and each are identified on the site plan. Mr. Conlon therefore contends that this clearly amounts to a licence to occupy a land of which the customer has exclusive possession and that following the principles enunciated by Briggs J. in *Grimsby* the agreement was not precluded from being a licence to occupy simply because its terms and conditions may have allowed UK Storage to retake possession. A landlord's right to repossess is a standard condition of virtually all leases and licences.

54. The case of *Belgian State v Temco Europe SA* (Case C 284/03 [2005] STC 1451) provides a helpful analysis of the approach to be adopted where a licence or letting may not include a right to enjoy exclusive occupation. In that case Temco was liable to VAT in respect of its cleaning and maintenance business. It deducted VAT invoiced to it in connection with refurbishment work carried out on a building which it owned but did not occupy for its own business. Temco entered into contracts with other companies in the same group which allowed the companies to occupy a building for their activities without any individual rights over any specific part of the property. Rent was payable annually calculated by reference to each company's turnover. The contracts were expressed to be for the duration of the company's activities but Temco was entitled at any time and without notice to require the companies to vacate the building. The Belgian tax authority decided that the contracts were lettings of immovable property and therefore exempt from VAT within art 13B (b) of the Sixth Directive and accordingly deduction of VAT was not justified. Temco maintained that the contract did not satisfy the definition of *letting* under Community law by reason of the absence of exclusive right of occupation of the property, the inherent insecurity in that right and the fact that payment in respect of that right was not set with regard only to the period of occupation of the property. The Brussels Court of Appeal referred the case to the Court of Justice of the European Communities.

55. The Court held that art 13B had to be interpreted strictly, but not however, in such a way as to deprive the exemptions of their intended effect. To achieve that result, the Court said that as regards the right of exclusive occupation, the presence in the contract of restrictions on the right of the licensee to occupy the premises would not prevent that occupation being exclusive as regards third parties. Accordingly, the licences to occupy were lettings of immovable property within art 13B (b).

56. So far as is material to the present case, the findings of the Court in *Temco,* as contained in paragraphs 16 -28 set out the following principles:

    a) As regards the exemption laid down under article 13B(b) of the Sixth Directive, 'leasing or letting,' is not defined. The provision must therefore be interpreted in the light of the context in which it is used and the objectives and the scheme of the Directive having particular regard to the underlying purpose of the exemption which it establishes.

    b) The Court decided that it is necessary

    '.. to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the

passage of time and not generating any significant added value, from other activities which are either industrial and commercial in nature, such as the exemptions referred to in part 13B(b) (1) to (4), or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property… Such as the right to install cigarette machines in commercial premises (*Sinclair Collis*)'.

c) It is necessary to take into account the reality of the contractual relations between the parties. While a payment to the landlord which is strictly linked to the period of occupation by the tenant appears best to reflect the passive nature of the letting transaction, it is not to be inferred from that, that a payment which takes into account other factors, has the effect of precluding a 'letting of immovable property' within the meaning of art 13B(b), particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or payment for no service other than the simple making available of the property.

d) As regard a tenant's right of exclusive occupation of the property, this can be restricted in the contract and only relates to the property as it is defined in the contract. Thus the landlord may reserve the right to access the property let and the presence in the contract of any such restrictions does not prevent that occupation being exclusive as regards third parties not permitted by law or by the contract to exercise any rights over the property.

Was there a single or a composite supply?

57. Mr. Jones submits that the supply by UK Storage is a package of services. He argues that this comprised, firstly, the service of safeguarding and storing the customers' goods, secondly, the use of a movable storage unit, and thirdly the granting of a formal licence to customers to occupy a particular unit in order to enjoy those facilities. He argues that when one takes account of all the circumstances of the case in order to identify which is the predominant element or elements, and in particular when one looks at the supply from the point of view of the typical consumer, the principal aim of UK Storage's customers in using the storage unit is to have the company safeguard and store their goods. Mr. Jones submits that any licence to use a part of UK Storage's premises for the purpose of storing the customer's goods is an incidental, albeit essential prerequisite of the supply. In other words, any such licences are the means by which the main aspects of the supply are enjoyed but it is not an end in itself.

58. Mr. Jones also argues that, unlike in the case of a classic lease of property, the actual area of UK Storage's site which the customers' goods occupy is immaterial to the customer concerned. The customer is only concerned to ensure that his goods are kept secure by the company, which he says is reinforced by the terms of the license in which, at clause 11, UK Storage is permitted to move the customers' goods from one unit to another. It is submitted that this can be contrasted with a classic letting for example of office space where the occupation of the land in question is the principle aim of the lessee and in which occupation of a specific office or area of an office is of central concern and therefore a fundamental aspect of the lease agreement.

59. We were referred to the case of *Byrom and others (trading as Salon 24) v HMRC* [2006] EWHC. In that case the appellant taxpayers granted rights to occupy and use a massage parlour from which self-employed masseuses offered their 'services' to clients. The accommodation included toilet facilities, changing room, shower room, a day room, lounge for use by the ladies awaiting clients, bed linen, towels and other facilities. The appellant taxpayers claimed that the supply was of a licence to occupy land and therefore exempt. The Court held that the appellant taxpayers had clearly supplied a number of services to the masseuses other than the licence to occupy a room. Although it could be said that the relevant services had been provided as a means to enable a masseuse better to operate her business, it did not follow that they had been provided as a means to enable her to better enjoy the use of the room. The description which reflected economic and social reality was a supply of massage parlour services, which was an overarching single supply, one element of which was the provision of the room, which was not be treated as a licence to occupy land.

60. Mr. Conlon disagrees with Mr. Jones' submissions and says that the letting of the storage units comprises a single supply of services. The safeguarding of customers goods and the provision of secure weatherproof units were part of the supply and not an additional or separate supply. He says there is no additional services element sufficient to engage the principles applied in *Byrom.*

61. Mr.Conlon therefore argues that the 'real economic substance' or 'economic and social reality,' and for that purpose the correct characterisation for VAT purposes, is as described in Mr. Taylor's evidence being that 'customers were looking for a contained space, of which they had the sole use for the storage and protection of goods for a period of time in a fixed location, to which no other person has access' and that consequently there was no composite supply.

The Finnamore decision

62. Mr. Conlon referred us to the case of *David Finnamore t/a Hanbridge Storage Services v HMRC* (TC/2009/13968), mentioned earlier in respect of the application to stay and which appears to be factually similar to the present appeal. The case concerned a licence to store goods in large metal freight containers commonly seen on lorries and ships and used for the transportation of goods in bulk. By their nature, therefore, the containers were movable but remained in situ resting by their own weight on specific areas of land on a site owned by the taxpayer. The appellant had approximately 184, located in such a way as to allow vehicle access to each container so that goods could be loaded into and taken out of any container with comparative ease. The site was open to the elements, surrounded by a perimeter fence and access was gained via security gates. Clause 2 of the customer agreement provided that so long as the fees were paid the customer was licensed to use an identified unit for the storage of goods in accordance with the agreement. Similar wording to that in the UK Storage agreement was used with regard to the description of the unit which was defined as:

> 'the storage unit specified overleaf or any alternative storage unit we may specify under condition. 11'.

63. However whereas clause 11 in the UK Storage contract stipulated that the agreement would not confer on the customer any right to exclusive possession and included other provisions relating to termination of the agreement and removal of the customers goods in certain circumstances, the agreement in *Finnamore* stated that

> 'during the course of this agreement you will have the use of (a) the numbered storage container occupying the area of land edged in red on the attached plan and (b) the land coloured red on the attached plan.'

Both agreements contained the same provisions in clause 36 that the agreement would not create a tenancy.

64. The Tribunal in *Finnamore* allowed the taxpayers appeal, holding that the appellant's storage business involved the making of a single (exempt) supply, the predominant element of which was the provision of a licence to occupy a defined parcel of land. However, the Tribunal took the view that the issue as to whether the storage units were of themselves to be regarded as immovable property was not a significant relevant issue to the appeal. The Tribunal said that an exact reading across (from article 135 of the directive) to domestic legislation is not permissible but in any event 'the ultimate decision rests upon

whether the predominant or overall nature of the transaction is properly to be described as involving a licence to occupy land.'

Fiscal neutrality issues

65. The licence agreement used at the Norton Fitzwarren site is also used by UK Storage for supplies at Bridgwater. The Commissioners accept that the Bridgwater supplies are VAT exempt. The units at Bridgwater in practical terms had an identical use to those at Norton Fitzwarren. Mr. Conlon therefore argues that the two supplies are practically identical and that there is no objective justification for treating them differently for VAT purposes. They are interchangeable in the sense that they meet the same needs of the typical customer. Accordingly, he argues they are in competition with one another in fiscal terms and that it is for the Commissioners to present a rational basis for the differential tax treatment. He referred us to case C-309/06, *Marks and Spencer PLC v HMR.C* ([2008] STC 1408) where the Court of Justice held that the principle of fiscal neutrality is a fundamental principle of the common system of VAT and that the necessity for equal treatment precludes the infringement of such principle.

66. Mr. Jones for the Commissioners responds that neither the doctrine of fiscal neutrality nor that of equal treatment empowers or requires the responsible taxing authorities in member states to treat as VAT exempt something which does not fall within the scope of the VAT exemption as laid out (restrictively) by the directive. We accept that proposition but of course it begs the question as to whether there has been '..a grant of any interest in or right over land, or of any licence to occupy land,' which is itself the issue under appeal to be determined by the Tribunal.

Our conclusions

67. With regard to the concept of movability or immovability we accept that there is a scale of degrees. Also, following *Maierhofer*, that whether the units are to be regarded as movable or immovable depends where on this scale they fall. Further, the exemptions provided for by art 135 must be construed narrowly, (See the Advocate General's opinion in *Skatteministeriet*). This follows from the basic principle of the PD that the supply of goods and services is subject to value added tax, if effected for consideration by a taxable person acting as such, unless expressly exempted. If insofar as there is doubt or ambiguity as to the extent to which the exemption applies to an appellants supplies then that doubt or ambiguity should be resolved on the basis that the taxpayer must account for VAT in the same manner as any other taxable person. The provisions for exemption must therefore be construed restrictively although as

Mr. Conlon says, this means 'precisely' and not that the narrowest possible meaning has to be adopted as this would deprive the exemption of its effect. (*Expert witness Institute v CCE* [2001] STC 42).

68. In the present case the storage units could fairly be described as being much more permanent and immovable than those in *Finnamore*. In fact in *Finnamore* the Tribunal concluded that, literally speaking, the containers were movable but that it is necessary to look at the whole circumstances. That is correct and equally true in the present appeal.

69. In Finnamore the Tribunal did not base its decision on whether the containers were movable or immovable. However in our view whether or not a structure is movable or immovable is a relevant constituent element to be determined in deciding whether the overall nature of the transaction can be described as a leasing or letting of land. The Legislation must be interpreted in a way which gives effect to the wording and purpose of the Directive. To do so it is necessary to decide from an objective standpoint whether the core function of the unit is for it to be movable. Applying the principles set out in *Maierhofer* the structure, 'to be immovable' and construing the word in the light of the concepts used in Article 12(2) (definition of 'building'), must be firmly fixed to but not necessarily inseverable from the ground. Although not bolted to the ground the units were for all practical purposes fixed to the ground.

70. It is implicit within the concept of 'movability', that a structure can be moved without difficulty, and after being dismantled, reassembled elsewhere intact. The storage units at Norton Fitzwarren are of rigid construction slotted into bays lying 4 inches below the concrete apron which give access to them. They cannot be moved either easily when empty or at all when goods are stored in them. We accept that if the units were dismantled they could not be re-erected elsewhere in a way that would guarantee their structural integrity and that they would be waterproof. They are not designed to be easily moved. The units were demonstrably not for the transportation of goods. They are not movable containers. It is feasible that the units could be moved either in whole or in sections to another site but, on the evidence, that was never the intention and given the potential damage to the units and the length of time it would take them to be dismantled and re-erected, it would probably be easier and commercially more economic for UK Storage simply to erect new units elsewhere. Realistically therefore the structures can only be enjoyed in situ and are not designed to be moved. By any objective standard the units are designed to put to practical purpose the use and enjoyment of the parcel of land or space which they occupy. Therefore the conclusion which we reach is

that the units are 'immovable property' within the meaning of article 135(1)*(l)* PD.

71. We accept that the inclusion in UK Storage's licence agreement at clause 11, of the provision that the agreement 'shall not confer ...any right to exclusive possession,' did not affect its legal status as a licence which conferred rights of occupation. The most important characteristic of a lease as opposed to a licence to occupy is that of exclusive possession. Unless exclusive possession has been granted there is no lease, but there may still be a licence.

72. In our view the purpose and intent of clause 11 was to prevent the possible suggestion by a customer that he enjoyed a lease which would have conferred security of tenure and possibly a right of occupation of the unit beyond cessation of the contractual term of letting. Clause 11 was in fact probably unnecessary and simply reinforced the provisions of clause 36 of the agreement, which stated that the agreement 'shall not create a tenancy lease or similar agreement'. Clause 11 was included in order to ensure that customers did not have a continuing right of occupation or security of tenure beyond the termination date referred to in the agreement. It was not intended to prevent customers enjoying 'exclusive possession' of the unit, as against third parties. The customer agreement was therefore a 'licence to occupy..'

73. Where a transaction consists of a number of features, all of the circumstances in which it takes place must be considered. However we agree with Mr. Conlon that this is not a package of supplied services. The units were designed for and enabled the use and enjoyment of the land which they occupied and were a necessary feature of the storage facilities offered. It was simply the letting of space in which a customer stored his goods and of which he was entitled to exclusive possession. The situation was entirely different to that in *Byrom.* It would be entirely inappropriate from an economic point of view to artificially split the service provided by UK Storage into distinct and separate supplies. The essential feature of the transaction was that there was one element, being a licence to occupy an identified unit of property and parcel of land This was the principal service offered to which the other services were entirely ancillary. We do not accept that customers intended to purchase two or more distinct principal services with different tax liabilities which would entail an apportionment of the cost of the supply. Security on the site and weatherproof storage were ancillary services as they simply provided a means of better enjoying the principal element of the supply which was the provision of a licence to occupy the unit of property or land. There was therefore only a single supply of a licence to occupy land.

74. With regard to the principles of fiscal neutrality and equal treatment there are of course borderline cases but it is fair to say that although the Bridgwater depot may have physically different characteristics than those of Norton Fitzwarren, for all practical purposes the two depots provided the same facility. We therefore do not see any reason why they should be treated differently. The fact that the Norton Fitzwarren units were prefabricated is in our view not relevant in determining the core function of the units and whether or not they were immovable.

75. We conclude that the supplies at Norton Fitzwarren were exempt from VAT and not standard rated supplies for the reason that the licences to occupy the units were lettings of land within item 1 Group 1 Schedule 9 of the Act.

76. 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.

Decision

Appeal allowed.

The storage facilities provided by the Appellant at its Norton Fitzwarren premises are not taxable as standard rated supplies but exempt from VAT under item 1 Group 1 Schedule 9 to the Act .

Michael S Connell

TRIBUNAL JUDGE
RELEASE DATE: 12 August 2011