



**TC02554**

**Appeal number: MAN/2008/164**

*VAT – single or multiple supply- 10 year lease of memorial in a crematorium and right to inscribed plaque – held single supply; nature of supply – held supply of letting of immovable property- Group8 Sch9 also considered.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SANDWELL METROPOLITAN BOROUGH COUNCIL      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER  
SUSAN HEWETT OBE**

**Sitting in public at Bedford Square WC1B 3DN on 7 and 8 October 2012**

**Frank Mitchell instructed by PWC Legal LLP for the Appellant**

**Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

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1. This appeal relates to the nature of the VAT purposes of the provision made by Sandwell Metropolitan Borough Council ("Sandwell") at its cemetery and crematorium gardens for the commemoration of the deceased.

10 2. Sandwell offers the relatives of the deceased a number of different options. The range extends from the placement of a plaque on a wall in a garden close to which ashes may be scattered, to the housing of an urn containing the ashes in an impressive pink granite above ground vault with a plaque on its front.

15 3. Sandwell makes this provision under an agreement with the relatives of the deceased which provides that the memorials will remain in place for 10 years (which period may be extended by the payment of a further fee). The agreement describes the period for which the memorial is retained as a period of lease.

20 4. Sandwell's primary argument is that its supplies are exempt supplies of land, HMRC's primary argument is that Sandwell makes supplies of "commemorative focal points" which are standard rated. Each party has a number of subsidiary arguments.

### **The facts**

25 5. We draw the following facts from the evidence of Brendan Day, the Bereavement Services Manager at Sandwell. He was responsible for a team of 60 who together managed and maintained the cemeteries, crematoria, registrars and coroners' services of Sandwell. We found his evidence expert and informative.

6. There are 262 crematoria in the UK of which 60 are privately run.

30 7. Sandwell provides to the public the service of the cremation of the bodies of the dead. In addition it offers to the public the interment, scattering or retention of cremated remains within the grounds of its crematoria, the provision of memorials within those grounds, information and advice to the bereaved, and the use of a chapel. Separate charges are made for cremation, for the burial of remains (scattering ashes is free), and for the provision of memorials. Where cremation takes place at one of its crematoria Sandwell imposes no obligation to purchase a memorial or to inter or scatter the remains in its gardens.

35 8. Sandwell also supplies memorials for those whose bodies have not been cremated by it.

9. Originally the scattering of ashes was accompanied only by an entry in a book of remembrance, but in recognition of the fact that some families needed a specific

location to visit as a focal point, Sandwell began providing memorials within its crematorium grounds in 1972.

10. Initially remains were buried beneath the memorial, but the land so used could not be reused because of the restrictions in section 25 Burial Act 1857 on the removal of buried remains. Thus the burial of remains used up limited space. If instead remains were stored above ground they could be removed on the expiry of a term. Thus although some memorial options allow for the burial of the ashes beneath the memorial, Sandwell promotes those which do not.

11. The memorials are arranged in the gardens in a uniform manner so that particular types are grouped together. A customer may express a preference for a memorial to be in a particular location and Sandwell may try to accommodate that wish, but the last word is with Sandwell. Memorials other than those provided by Sandwell are not permitted, and memorial masonry is not supplied by Sandwell for use elsewhere.

12. The grounds of the crematorium and cemeteries are open from 9 am to 7 pm (summer) and 5 pm (winter), but pedestrian access is possible day and night.

13. Generally those who wish for some memorial for a deceased person will discuss the options after the cremation with a member of Mr. Day's department. They will then decide upon an option and complete an order form. Apart from the contents of the brochures, this is the only written record of agreement between the customer and Sandwell. The order form describes the arrangement as a lease. Mr Day appended a brochure to his witness statement which described the various options. We think it likely that the brochure, or something very similar to it, would have been provided to those who signed an order form. A single price is paid by the customer which is detailed on the order form.

14. Sandwell orders the inscribed plaques from stonemasons. The contract with the customer makes a single charge for the provision of the memorial which exceeds the cost to Sandwell of the inscribed plaque.

15. All the options provided by Sandwell have two features in common: (1) a stone plaque with an inscription upon it, and (2) a lease for an initial period of 10 years which may be extended, at commencement or later by payment of a further fee.

16. At the end of the lease period the plaque, and, if stored above ground, the ashes, are removed from their location. The customer is asked if he wishes to collect the plaque. It is kept for 12 months and if not collected is destroyed. Only about 10% of customers collect the plaque at the end of the 10 year period. If the customer does not collect stored ashes they are scattered in the grounds.

17. During the lease period the plaque is generally screwed in position with tamper proof screws. Sometimes customers move house during the lease period and wish to remove their deceased's ashes to a new location. In such circumstances the plaque may also be taken away.

18. We have recorded Mr. Day's evidence that the reason why Sandwell started to provide memorials in 1972 was because some families needed a specific location to visit as a focal point. We accept Mr Day's description of the object of a typical customer, namely to have "a location where they can come and remember their loved one". In some cases a memorial would be acquired when the remains were not within the grounds: an attractive comforting location was important to customers. But he said that the physical presence and appearance of memorials were also important. What was needed was something to commemorate a loved one in a suitable location.

*The different types of memorial*

10 (a) Memorials which do not contain or cover remains

19. The Rose Nameplate is an inscribed plastic plaque attached to a stake by a rose bush in a rose garden. Ashes might be scattered on the adjoining lawn. It would be possible to move the nameplate and the stake by hand. Mr Day said that they would not be moved during the lease period. (We note for completeness that whilst Mr Day's witness statement indicated that the agreement was for a period of 10 years, the order form in the bundle before us indicated a five year period.)

20. The Wall Mounted Plaque is an inscribed granite tablet attached to a wall between two rails. Each plaque is supported by the one beneath it. Ashes may be scattered in the nearby garden.

20 21. The Wall Mounted Plaque with Flower holder is similar but the tablets (and flower holders) are slotted into individual brackets secured by screws.

22. The Ashby Garden Memorial is a modest (5–10kg) inscribed plaque resting on a concrete base located along the path edge. They are held in place by their own weight.

25 23. The Memorial Vase is a fairly heavy piece of white marble with a flower holder on the top and a slanting side in which there is a recess for the inscribed tablet. It is cemented to a concrete base located along path edges. Ashes can be scattered behind it.

(b) Memorials which may contain or cover ashes

30 24. The Path Edge Plaque is a low granite block with a flower holder and an opening for an inscribed plaque. It is located along path edges and cemented to a concrete foundation. It would be possible, but not particularly easy, to move it by hand. Ashes may be scattered nearby but there is an option (for a separate fee) to bury remains beneath the memorial.

35 25. The Black Granite Plaque (and the White Marble Vault) are variations on the Path Edge Plaque with a below ground chamber for up to two sets of ashes which is sealed by the inscribed plaque.

26. The Sanctum and the Columbarium are quite substantial. They are above ground chambers in a granite or brick edifice in which ashes may be kept. The chamber is sealed by a large inscribed plaque. The Columbarium structure houses a number of separate above ground chambers (up to four high and four wide); the Sanctum is a lower structure providing housing for only one or two sets of ashes. The structures are expected to last for 50 years or more.

27. In the remainder of this decision we use the “plaque” or “tablet” to refer to the inscribed piece of stone (generally black granite), and the “memorial” to refer to any identified structure to which it is affixed during the term.

10 **The agreement between Sandwell and the customer.**

28. The order form, signed by the customer, is of two pages. The heading of the form indicates the type of memorial. Below that is half a page for the precise details of the inscription to be put on the plaque. Then the following words appear (the square brackets are ours and indicate differences between the words for different types of memorial) :

"Please supply the following memorial with the inscription as set out above. I understand and agree that the [plaque/memorial] shall be subject to the conditions as follows:

Conditions of lease [these three words are not in the Path Edge Plaque form].

1. The authority reserves the right to amend any inscription as may be necessary
2. Positioning the [plaque/memorial] shall be determined by the Memorial Manger within the crematorium Grounds.
3. [Memorials/plaques] shall remain in place for a period of 10 years from the date of erection. After this period a renewal letter shall be sent requesting a renewal fee for a further 10 years
4. If the renewal fee is not received within three months of the due date then the [memorial/plaque] will be removed
5. A [flower holder/container] is provided for each memorial. Other types of floral containers, potted plants etc, are NOT permitted.
6. An additional inscription may be added at any time within the period of lease, at the current cost at the time of application. This is in the form of a replacement memorial.
7. Please notify the Bereavement Services Office of any change of address - failure to do so may result in non-receipt of renewal.
8. The inscribed tablet is the property of the purchaser who may collect the plaque after the expiry of a lease period which is not intended to renew.

I, the undersigned agree to the conditions above. Signed....”

On the second page there is a description of the relevant memorial and details of the cost. There is a box for office use in which the receipt number, authorisation code, memorial number and the total amount paid are recorded by Sandwell's officials.

5 29. The brochure supplied by Mr. Day describes the memorials and has pictures of them. It speaks of the "period of lease" and says that "all memorials are subject to a period of lease" Mr. Day told us that he regarded the council as having no right to move a plaque during the currency of the lease, and that it had not done so. The same would be true of any memorial to which a plaque was affixed. We believe that such would be the understanding of the agreement by the parties at the time it was made,  
10 even though not expressly stated.

30. In our judgment therefore the understanding and intention of the parties was that, in relation to memorials other than the Rose Garden Memorial (and possibly the simpler wall mounted plaque), the customer would obtain an exclusive right to the memorial (and the space occupied by it and the plaque) for the relevant period; such  
15 right being subject to conditions preventing the removal or alteration of the memorial or the plaque by the customer. That seems to us to be an intention to grant an interest in land.

31. Section 2 Law of Property (Miscellaneous Provisions) Act 1989, provides that  
20 "a contract for the sale... of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document...". It seems to us that all the terms expressly agreed were contained in the order form although there were intended terms which were not expressed. The contract thus seemed to us to satisfy the provisions of section 2. No formal deed granting the interest was made. Thus there was no formal conveyance of a legal  
25 interest in the land to the customer.

32. We concluded that the effect of the order form, taken with payment and the surrounding circumstances is that a contract was formed between Sandwell and the customer under which in particular:

- (1) Sandwell would determine where the memorial would be;
- 30 (2) once that determination had been made the customer would acquire a 10 year lease of the land which comprises the space occupied by the plaque and, if it is attached to a memorial, by the memorial (of which land the memorial would form part). During this period Sandwell were not permitted to move the memorial or the plaque;
- 35 (3) the customer would be obliged to use the memorial only for the purposes of a memorial to the deceased (containing if relevant only ashes);
- (4) the customer would be given title to the plaque (the tablet) on its fixation but agree not to remove it without the consent of Sandwell during the currency of the lease;
- 40 (5) the customer would have the right of access on foot to the space occupied by the memorial and the plaque at any time.

33. Even if the contract was unenforceable and no right over land was granted under English law, the result of the transaction was that in return for the fee the customer in fact received the benefits described above.

34. From these conclusions we except the Rose Nameplate (and possibly the wall mounted plaques if, because each rests on the one beneath it, that means that if a tablet beneath a particular plaque is removed at the end of its term, the plaque moves down) . The Rose Nameplate is a plaque affixed to a stake near a rose bush. It seemed likely that wind, weather and gardening would be expected to cause it to move, and it cannot have been understood or intended that the customer would acquire an interest in any particular space. Rather the customer was given a licence to keep the plaque in roughly the same place in the rose garden for 10 years.

### **The parties' arguments.**

35. HMRC say that when a customer pays a single charge she or he receives not only a physical memorial but the right to place it in the grounds of a particular crematorium for 10 years. They contend that there is a single supply, not because a principal/ancillary analysis applies, but because the elements of the supply are so clearly linked that they form a single indivisible supply which it would be artificial to split. In rejecting the principal/ancillary analysis they contrast the supply of the tablet with the supply of the right to place it in the grounds. They say that neither is subservient to the other.

36. They categorise the single supply as a supply of a commemorative focal point. They say that that supply cannot be characterised as the supply of land because such a supply would not meet the fundamental aim of the transaction for which the tablet is needed.

37. Mr. Singh says that a supply falls in article 13B(b) of the Sixth Directive if it is essentially the passive provision, in return for payment, of the right to occupy land as owner and to exclude others. He says that the single transaction between Sandwell and the customer does not have the object of such provision: the customer does not want space but something to commemorate the deceased - a physical memorial to which appearance is important. Any right granted by Sandwell to use any space was very restricted. The location of the memorial played second fiddle to the type of memorial. What was provided was not the right to occupy land as owner.

38. Even if there were a land element within the single complex transaction, the dominant feature of the transaction was commemoration: the brochure described the transaction as being for "a lasting reminder of a loved one and a tribute to their life". The appearance of the memorials - marble and granite - is important. An average customer sought precisely a combination of the space and the physical memorial. That could not be classified as a supply of land.

39. Mr. Mitchell argues that:

(1) each memorial and its tablet is so fixed to the land such as to be part of it and to constitute immovable property. He relies in this context on *Maierhofer v*

*Finanzamt Augsburg-Land* C315/00. He says that a lease of the Memorial without the tablet would clearly be a letting of immovable property; the only complicating factor was that the customer could collect the tablet at the end of the lease; he says that a lease of the Memorial without a tablet would clearly be a letting of immovable property;

(2) in any event during the term of the lease he says that the customer does not have possession of the tablet or the right to dispose of it as owner;

(3) the right to the tablet (whether arising immediately or only at the end of the lease) was ancillary to the letting of the memorial in the same sense in which the bill payment services in *Everything Everywhere v HMRC* [2011] STC 316 were ancillary to the main supply of telecommunication services. As the court in that case said at [27]:

“The supposed supply of services which those customers are unable to access separately from the use of the mobile telephone service can offer such customers nothing that is independent of that service.”;

(4) alternatively he submits that the supply may be ancillary to the interment of remains, which he says is exempt by Group 8 Schedule 9.

## **Discussion**

### *A. A single supply or multiple supplies.*

#### (a) The relevant law

40. Neither party put near the front of its submissions any suggestion that Sandwell made for VAT purposes more than one supply, namely (1) a supply of the tablet, and (2) the supply of a 10 year lease of the space in which the plaque was placed or of the memorial to which it was attached.

41. We do not think that they were wrong. It was plain that the customer paid for, required and received a single indivisible economic supply

42. Roth J summarised the authorities in relation to the question of whether a package of items is a single supply (of a number of elements which are not independent) or a number of separate supplies in *HMRC v Bryce (trading as The Barn)* [2010] UK UT 26 (TCC) at [23]:

“(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 be artificially split into separate supplies ...

(b) For this purpose, regard must be had to all the circumstances in which the transaction takes place ...

(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 ...

5 (d) However the fact that one element in a package supplied cannot be described as ancillary to another element does not mean 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 single overarching supply ...

(e) In that regard, the test is whether the various elements supplied to the customer are so closely linked as to form, objectively, a single indivisible economic supply, which it would be artificial to split ...

10 (f) It is important to take an overall view of the level of generality that corresponds with social and economic reality, without overzealous dissection ...

(g) The assessment should be made from the perspective of the customer, as a typical customer, not the supplier ...

15 (h) The fact that a single price is charged for two or more elements is a relevant factor pointing to a single supply but it is not decisive .... Similarly, the fact that separate supplies are stipulated for various elements is not decisive where the two elements have an objective close link such that they form a single economic transaction ...

20 (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 ...

(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 ....”

25 43. If for the typical customer one element of what is supplied is of no use without another that indicates that the elements are not independent (see for example *Everything Everywhere* at [27], *Levob v Staatssecretaris van Financien* [2006] STC 766 [24]).

#### (b) Single/Multiple supply – conclusion

30 44. In our judgment the provision of the tablet and the memorial space are so closely linked that they form a single indivisible economic supply which it would be artificial to split. They are not independent. The acquisition of a space for the tablet or memorial without an inscription would have been no use to a typical customer and title to a tablet a customer plainly intended to be affixed (to a memorial or wall) for at least 10 years would be no use without the memorial space. The making of a single charge for the supply reinforces this conclusion. We discuss below whether this treatment as a single supply relies upon the principal/ancillary analysis.

#### *B. The nature of the supply.*

45. This is a more difficult question.

(a) the relevant law

46. If a congery of items is to be treated as a single supply because there is a principal item in that congery to which all other items are ancillary, then it is clear that the VAT classification of the principal item determines the VAT classification of the package. (Thus in *Everything Everywhere* the payment handling charge was ancillary to the telecommunication services and the package was VATable as telecommunication services).

47. However where there is no principal supply to which other items are ancillary but an economically indivisible supply of many items, the position is more difficult – at least in practice.

48. In our opinion, for the reasons which follow, what is required is that the tribunal consider the essential nature of a package of services and goods and then determine whether that fits any of the statutory provisions. This is different from finding a description of the package and asking whether that description can be found within any particular statutory heading. For example if you provide me with carrots coated in chocolate, you may be said (1) to supply the service of satisfying my hunger; (2) to supply me with luxury food; or (3) to supply me with food. But the question is not whether "satisfying my hunger" or any other description falls within the ambit of the "food for human consumption" and Schedule 8 VATA, but whether providing the chocolate coated carrots falls within the words "food of a kind for human consumption" in Schedule 8. The important thing is not to be misled by attaching a description to the package when such exercise is not required by the legislation.

49. This, at least where the exercise concerns the direct application of a directive, also clearly follows the requirements that the directive must have uniform application across the Community: the possible absence in one territory of a direct translation of any particular description in another cannot affect the VAT treatment of the transaction. The test must be by reference to the economic substance and the words of the directive not to a particular description of the supply.

50. In 2006 Warren J considered nature of a package of services supplied to a masseuse (*Byrom and others (trading as Salon 24) v HMRC* [2006] STC 992). These services included the use of a room but were not ancillary to the licence to use the room. He concluded at [70]:

"... it is then necessary to categorise the single supply viewed as a complex of elements (the provision of the licence and the various services). In my judgement, the overarching single supply is not to be regarded as a supply of a licence to occupy land. The description which reflects economic and social reality is a supply of massage parlour services, one element of which is the provision of the room. That, in my judgement, is the correct conclusion even if, which for my part I think probably the case, the provision of the room was, to the masseuse, the most single most important element of the overall supply and, indeed, one predominating over all the other elements taken together. This is a case where the tax treatment of the supply is self evident once it is established that the other service elements are not ancillary to the provision of the licence."

51. Earlier in his judgement he had identified:

(1) that if one element was principal and the others were ancillary to it, the VAT treatment followed that of the principal element ([38]), but

(2) where the single complex supply was not of the principal/ancillary mould:

5 (a) *College of Estate Management v Customs and Excise Commissioners* [2005] STC 1597 showed that the nature of the single supply was not determined by the main elements: the supply in that case was of education even though books were the main elements of the provision;

10 (b) that there were cases, like *College of Estate Management*, where the nature of the overarching supply was self-evident, but there were other cases where it was not. In such cases it did not make sense to go back to look at which elements predominated in order to determine the nature of the single supply [48].

15 (c) "...once having identified a number of elements as constituting a single supply, it is then necessary to see whether that supply - whether or not it is given a name but let us call it a supply X - falls within any of the exemptions in schedule 9." ([51])

20 52. Seen in the light of that analysis it does not seem to us that when in [70] he classified the supply of being of massage parlour services he was then simply looking to see whether that phrase or description appeared in one of the relevant groups of the schedule. Rather he examined whether the complex of supplies constituted by the service could properly be said to fall within a particular group.

25 53. Since 2006 the ECJ have considered single and multiple suppliers on a number of occasions. The first we were referred to is that in *Finanzamt v Bog* 2011 where the question was whether a supply of ready meals was a supply of services or a supply of goods. In that case (as in *Aktiebloaget NN v Skatteverket* C-111/05 (2008)) the ECJ applied the touchstone of determining the predominant features of a supply in order to effect that classification.

30 54. In *Salon 24* Warren J points out (at [40]) that this is a different exercise from that of asking whether a supply falls within any particular group. That is because any supply must be one or the other - either services or goods; in that exercise the option is not available to say simply "it is not X" because the result of saying that it is not goods must mean that it is services. By contrast when asking whether a supply falls within a particular group, the fact that it does not, does not automatically mean it must  
35 have a particular different nature.

55. The second is *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG* [2012] STC 1951. Here the court considered the VAT nature of a portfolio management service which comprised the execution of transactions decided upon by a portfolio manager together with associated administration.

40 56. The court held that because the average investor sought a combination of management advice and execution precisely as a combination, the two elements were

so closely linked that they formed a single economic supply notwithstanding that they could be acquired separately. The supply was not of a principal/ancillary nature since:

5 "[27] In the context of the portfolio management service ... those two elements are ... not only inseparable but must be placed on the same footing. They are both indispensable for carrying out the service as a whole, the result is that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service."

57. The next question was whether that single service fell within a particular exemption. The advocate general phrased it thus:

10 "[38] I have reached the view that the services in issue, viewed broadly, forms a distinct whole. Does that whole fulfil in effect the specific essential functions described in [the exception of article)?

58. The court answered that question thus:

15 "[38] As has been stated ... the portfolio management service in issue ... consists basically of two elements, namely, on the one hand, of a service of analysing and monitoring the assets of client investors, and, on the other hand, the service of actually purchasing and selling securities.

20 "[39] Although the service of purchasing and selling securities may be covered by article 135 (1) (f) ..., the same is not, by contrast, true of the services of analysing and monitoring assets as the latter services do not necessarily involve transactions which are liable to create, alter or extinguish parties' rights and obligations in respect of securities.

...

25 [41] However, it is apparent from paragraph 27 of this judgement that it is not possible to regard the elements of which that service consists as constituting a principal service on the one hand and an ancillary service on the other. Those elements must be placed on the same footing.

30 [42] In that regard, it is established case law that the terms used to specify the exemptions referred to in article 135 ... are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person ...

[43] Consequently, since that service may be taken into account for VAT purposes only as a whole, cannot be covered by article 135 ..."

35 59. *Deutsche Bank* was thus a case where no predominant element could be ascertained. Thus the supply could not be classified by reference to it. The ECJ simply asked whether the complex whole fell within the particular statutory words.

40 60. It seems to us that the ECJ in *Deutsche bank* implicitly accepts Warren J's insight in *Salon 24*. The court does not seek to identify, or consider that it must identify, a predominant feature which will determine the nature of the supply, but rather considers the elements of the package against the purpose and meaning of the relevant exemption. We noted that in her opinion the Advocate General had at [43)

identified "the preponderant role" of the expertise rather than the transaction execution. This, however, was not a course pursued by the court.

(b) Nature of the supply – application

5 61. As a result we reject HMRC's submission that, because the supply may be described as the provision of a commemorative focal point, it cannot be a supply of immovable property even though we accept that that may be one apt description of the supply.

(c) Nature of the supply – law relating to immovable property

10 62. There is no question that the exemption in Group 1 Schedule 9 VAT Act 1994 is intended to implement, and must be construed in order to give effect to the provisions of article 13B(b) of the Sixth Directive (and its successor). That article applies to the leasing or letting of immovable property. In *Bryce* Roth J referred to eight principles encapsulated by Briggs J. In summary these were:

15 (1) the exemption must be strictly construed but not so strictly to deprive it of its effect;

(2) it must be given a meaning independent of definitions used in the legal system of any particular member state

20 (3) the concept of letting of immovable property is essentially the conferring by a landlord and 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 persons from enjoyment of such a right;

25 (4) the letting of immovable property is characteristically a relatively passive activity linked to the passage of time and not generating any significant added value to be distinguished from activities which are commercial in nature and have as their subject matter something akin to the provision of a service;

30 (5) the right to occupy may not be a letting if it is merely the means of effecting the supply which is the principal subject matter of the relevant agreement (this is drawn from *Sinclair Collis v Customs and Excise Commissioners* [2003] STC 898 at paragraph 30 and we discuss it greater detail below);

(6) there may be a de minimis exemption – the example is given of the letting of a table in a coffee shop to deal in drugs;

(7) an agreement may fall short of letting if it is merely a licence to use rather than to occupy land

35 (8) an agreement is not disabled from being a letting because the use is subject to conditions.

40 63. In *Maierhofer*, the ECJ considered whether buildings constructed from prefabricated components standing on a concrete base to which they were secured were immovable property. It held that such structures must be regarded as immovable because they could not be easily dismantled or easily moved. There was no need for

them to be inseparably fixed to the ground. Nor was the term of the lease decisive for the purposes of determining whether the buildings were movable or immovable property. [33]. It makes no difference whether a piece of immovable property is let with or without the land on which it stands [41].

5 (d) the Nature of the supply – our conclusions

64. We start by considering the White Marble Vase. This lay about halfway in the range between the Rose Nameplate and the Columbarium. It will be recalled that the memorial is a piece of marble of trapezoidal cross section with a flower holder sunk into the top and a sloping face into which the inscribed tablet fits. They sit in groups  
10 of three along path edges and are cemented to the ground.

65. It seemed to us that the Vase was properly described as being immovable property. It would not be easy to move or to separate from the others in the group. We also thought it relevant that the agreement of the parties was that it should not be moved.

15 66. We do not think that the customer is given merely the right to place the tablet on the marble vase. What is intended is that the customer should have the use of the particular fixed marble vase complete with the affixed tablet. That conclusion is strengthened by the presence of the flower holder clearly intended for use by the customer and at his or her disposal.

20 67. It seems to us that what a typical customer wants is a place that can be identified with the deceased. At a minimum that requires an allocated space and an inscription. If ashes are to be contained or covered it requires space for the ashes.

68. Mr Singh says that if the transaction was in essence the provision of a space, then the customer could do what he wanted with that space – perhaps even put a  
25 memorial there of his own choosing. The restriction to Sandwell’s memorial means that the customer is not occupying land as his own.

69. We disagree. The fact that a customer may have no access to the inside of a piece of solid marble or granite and may not move it does not to our minds prevent the transaction being one in which immovable property is supplied: a person who  
30 leases a house will generally have no access to the interior of the stones of its construction or right to move them. What the typical customer wants is a fixed space (occupied by a fixed memorial) which is identified with the deceased, just as a person letting a house wants the house – not to build his own walls and roof.

70. Mr Singh said that location played second fiddle to the appearance of the  
35 memorial. We disagree: although a customer could not choose the location, once chosen it was essential that it could not be changed: a memorial, be it ever so grand, would not be acceptable to the typical customer if it could be moved around at the whim of Sandwell. The comely appearance of a house which attracts a lessee does not prevent its letting being of immovable property.

71. Mr Singh says that the occupation of the land is a means to an end and not the end in itself. We agree that the space is to be used as a focal point. But a house is used to live in. The question is not what the customer wants to do with what he or she gets, but objectively what he or she wants to get. Here what the typical customer wants is a space accompanied by a fixed memorial identified with the deceased. The commemorative focal point is the memorial and attached plaque and the immoveable property is the space occupied by them of which they form a part.

72. The requirement for customers that a space be identified with the deceased makes the inscription an important part of what is provided. It is not possible to regard the space as incidental to the inscription, or the inscription as incidental to the space.

73. But there is a difference between the inscription and the means by which it is delivered: just as there is between the writing and the page. The tablet is the means by which the inscription is delivered identifying the space with the deceased.

74. It seems to us that in this way the tablet shares much in common with the box in which cereals are provided (whatever their respective nutritional values) or the jar in which honey is supplied. Like the box and the jar, the tablet is largely a means of providing, and is incidental to, the provision of the required supply, although the inscription could not be provided without it.

75. The incidental nature of the tablet is apparent from the fact that 90% of customers do not collect it at the end of the lease. For the average customer it seems to us that obtaining title to, or possession of, the tablet (rather than its presence in the particular relevant space in the crematorium gardens identifying that place with a deceased) is not an object of the supply, any more than obtaining title to the cereals box is an object of a customer buying cereals.

76. In *Card Protection Plan v Customs & Excise Commissioners* [1999] STC 270 (“*CPP*”) the ECJ said:

"[30]. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied ...".

77. It is not possible however to say that the acquisition of the right to the tablet is "a means of better enjoying the principal service" because whatever the principal service it could not be provided without the inscription, and the inscription could not be provided without the tablet. However it does not seem to us that the ECJ were intending to limit the meaning of ancillary in this paragraph but to set out a sufficient condition for something to be ancillary. In *College of Estate Management v Customs and Excise Commissioners* [2005] STC 1597, Lord Walker, after quoting the passage above from *CPP* said:

"[30] ... 'Ancillary' means (as Ward LJ rightly observed ...) subservient, subordinate and ministering to something else."

78. We also note that in *Everything Everywhere* the ECJ said:

5 "[25] In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied."

thus suggesting that the formulation quoted in [33] of *CPP* above could be one of many cases where one service was ancillary to another.

10 79. It seems to us that the supply of (the title to) the stone for the tablet can properly be regarded as subservient or ministering to the provision of a fixed space identified with the deceased by the inscription, and as such not constituting for the customer an aim in itself. On that basis the provision of title to the tablet is ancillary to the provision of the immovable space occupied by it and the rest of the memorial.

15 80. If that is right then what is supplied is an exempt supply of the letting of immovable property: the supply is passive in nature, is for a fixed period, is for a consideration, confers an exclusive right to occupy a fixed space, and is not a means of conferring any other right upon the customer.

20 81. We should at this stage discuss *Sinclair Collis* which was relied upon by both parties. This concerned the granting of the rights to install cigarette vending machines in pubs and similar places. No particular area for the location of the machines was provided in the agreements and the site owner could move the machines about. While the claimant had exclusive access to the inside of the machines they did not have the right to control access to the area where the machines were placed. The ECJ held that there was not a letting of immovable property because the agreement did not relate to  
25 a fixed space and the claimant's occupation of a site owner's space was merely the means of effecting the service supplied by the site owner, namely the guaranteeing of the exercise of exclusive rights to sell cigarettes at the premises through the machines.

30 82. It had been argued that the installation of a machine was a way of taking possession of the site on which it was placed and excluding all third parties from occupying the land by the machine. The advocate general concurred in the view that this was not the case because the agreement did not specify a site for a machine and because *Sinclair Collis* had only limited rights of access. It was left to the site owner to determine where the machine was to stand from time to time.

83. He then turned to the object of the arrangement:

35 "[41] Moreover, under the agreement in this case, unlike in a classic lease of property, the actual site is immaterial. It is only relevant in so far as it is intended to generate maximum sales. In this case the occupation of a particular site is therefore not an end of the contract in itself, but a means to that end.

“[42] The fact that machines that are not intended to be mounted on the wall may be moved around the room by the site holder at will lends further support to the view that there is no occupation of a specific piece of land.”

...

5            “[46] It is clear from all of the foregoing that the principal elements of the agreement in this case is not the occupation of a specific piece of land but the supply of the service, namely installation of the machine, for which the land itself is an incidental, albeit essential, pre-requisite.

84.    The court held that the subject matter of the agreement was not the passive provision of an area or space together with the grant of a right to occupy it as though the grantee were owner and to exclude other persons’ enjoyment of the right because  
10            (1) the agreement did not define any precisely defined area and (2) the agreement did not confer on the claimant the rights to control or restrict access to the places where the machines were placed:

15            “[29] Secondly, the agreement does not confer upon SC[Sinclair Collis] the right to control or restrict access to the area where the machines are placed. Whilst it is true that under the agreement SC retains an exclusive right of access to the machines to maintain them, keep them stocked with cigarettes and to remove the cash inside, that right concerns only access to the machine itself, in  
20            particular its inner mechanism, and not access to that part of the premises where the machine is situated. In any event according to information provided by SC at the hearing, the right is restricted to the opening hours of the commercial establishment and cannot be exercised without the owner's consent. Furthermore third parties have access to the machines within such practical parameters as are  
25            imposed by the site owner, in particular during opening hours of the establishment and not according to limits determined by SC.

          “[[30] In those circumstances, the occupation of an area or space in the commercial premises is, under the terms of the agreement, merely the means of effecting the supply which is the subject matter of the agreement, namely the  
30            guarantee of exercise of the exclusive rights to sell cigarettes at the premises by installing operating automatic vending machines, in return for a percentage of the profits.”

85.    Mr Singh points to the concentration of the court on the purpose of the contract – which was to grant the exclusive right to sell cigarettes rather than rather than the  
35            exclusive right to occupy land. But it seems to us that the position of Sandwell is different. First, we have found that once a memorial has been identified and allocated and the inscription affixed neither the memorial nor the tablets may be moved by either party during the currency of the lease. Second, the object of the customer is not to obtain an exclusive license to do something on Sandwell’s land but to have a piece  
40            of Sandwell’s land for the purposes of commemoration. Third, the customer has access to the crematorium gardens on foot at all times.

86. *In EC Commission v Ireland* the ECJ considered whether tolls for the use of roads fell within the expression “letting of immovable property”. The court held that they did not. It said:

5 "[56 ] Accordingly, that the term cannot be considered to cover contracts in which, as here, the parties have not agreed on any duration for the right of enjoyment of the immovable property, which is an essential element of the contract to let.

10 [57] Where access to roads is provided, what interests the user is a possibility offered to him of making a particular journey rapidly and more safely. The duration of the use of the road is not a factor taken into account by the parties, in particular in determining the price."

15 87. By contrast the letting by Sandwell is for a fixed period of 10 years. What interests the user is the presence of a memorial for that period. That fact is taken into account in determining the price because a further sum is payable for an extended period

20 88. The customer does not have the right to exclude others from access to the area around the memorial, but the memorial itself excludes interference with the space it occupies and in our view the contract between Sandwell and the customer gives the customer the right to exclude others from interfering with the memorial (including the affixed tablet) itself.

89. If we are wrong and the supply of the title to the plaque is not ancillary to the provision of the fixed Vase (together with the space for the tablet), then we need to consider whether the combined supply may properly be called the letting of immovable property notwithstanding the inclusion of the right to the tablet.

25 90. In our opinion the transaction is properly regarded as the provision of a fixed memorial for 10 years. Like the supply of education in *College of Estate Management* it involves the provision of goods (the books or the tablets) but their provision does not prevent the nature of the supply being that of the supply of something else – in this case immovable property for a fixed period. Its essence is the letting of a particular form of immovable property for a fixed period. This is a case where the nature of the complex supply is self evident.

*The other memorials.*

35 91. The memorials which provide a chamber for the storage of ashes more clearly provide a fixed space which is used by the customer. It seems to us clear that the nature of the supply in those cases is that of the letting of an interest in immovable property for the same reasons as discussed above in relation to the White Marble Vase.

40 92. The Ashby Garden Memorial is similar to the White Marble Vase and more easily moved. But the essence of the contract is that it should not be moved during the 10 year term of the lease. It seems to us that even if the plaque could be moved the contract gives the customer the right to replace it in the space allocated or to require it

to be replaced, and that that space is immovable. The right is then to occupy the space with the plaque and to refuse others' enjoyment of it. It is a smaller space than a table in a coffee shop might occupy but it is to be occupied for a much longer period than the table in the example in Briggs J's principle (6): it did not appear to us to be de  
5 minimis. For the same reasons as we have set out in relation to the White Marble Vase it seems to us that the provision of the plaque is ancillary to the provision of a fixed space identifiable with the deceased by the inscription. The treatment of the Path Edge Plaque follows similarly.

93. Where the wall Mounted Plaques are to be absolutely fixed for the duration of  
10 the term the same analysis applies.

94. However so far as concerns the Rose Nameplate and any of the Wall Mounted Plaques which could be moved during the term of the lease we concluded that nothing immovable was granted to the customer and therefore they could not be a license or leasing of immovable property. In this case there is a single supply but that single  
15 supply is not a principal/ancillary supply in which the principal element is exempt, or an overarching supply which falls within any particular group of Sch 8 or 9, and is therefore standard rated.

*Mr Mitchell's alternative argument*

95. We should mention briefly Mr. Mitchell's alternative analysis that that the  
20 supply could be exempt as being ancillary to the supply of interring of ashes. This relied upon Group 8 Schedule 9 which specifies an exemption for:

1. The disposal of the remains of the dead.
2. The making of arrangements for or in connection with the disposal of the remains of the dead.

25 *Discussion*

96. Item 6 Annex F of the Sixth Directive provides for member states to continue to exempt:

"Services supplied by undertakers and cremation services together with goods related thereto".

30 97. We ask first whether the interring of ashes falls within Item 6 Annex F.

98. Mr. Day told us that when a body was cremated, the demarcation line between the role of the undertaker and that of Sandwell was at the end of the funeral service. After the funeral the undertakers would deliver the body to Sandwell for cremation. (When bodies were buried undertakers tended to have a role in relation to cemetery  
35 memorials; that was not generally the case in crematoria).

99. There are two principal parts to Item 6: (1) services supplied by an undertaker and (2) cremation services. Although the words of that Item must be words of

autonomous EU law meaning, that division appears to us to reflect the division in the UK between the activities of a funeral director and those of a body like Sandwell.

5 100. So far as limb (1) is concerned we do not believe that it requires the provider of the service to be an undertaker; it is enough if the service is such as is provided by an undertaker.

101. It seems to us that the interring of remains or their sprinkling in the grounds are not services such as those supplied by undertakers. They therefore do not fall within limb (1).

10 102. That leaves the question of whether they are "cremation services". In our view they are not: we consider that as a matter of ordinary language, and bearing in mind the need to apply a strict construction to an exemption, "cremation services" refers to the actual cremation of the dead, and not later dealing with their ashes.

15 103. So far as possible Group 8 Schedule 9 must be read so as to implement Item 6 Annex F: so that it exempts those services exempted by Annex F and confines the exempt services in Group 8 to such services as are supplied by an undertaker or are cremation services. That would require Item 1 (the disposal of the remains of the dead) to be read, in the context of cremation, as limited to cremation services, and Item 2 be confined to the type of arrangement made by undertakers (such as dealing with the body and funeral arrangements). Such restriction requires in our view very  
20 little violence to language of Group 8 and indeed is possible.

104. Thus we conclude that the interring or sprinkling of ashes does not fall within Group 8.

25 105. Accordingly if the provision of a memorial and tablet were ancillary to the interring of a deceased's ashes (or if, which we very much doubt, the interring and the memorial could be seen as a single supply without a principal element which, as a whole, was properly described as the interring of remains) we would not find that supply except by virtue of Group 8.

### **Conclusions**

106. In the case of each type of memorial Sandwell makes a single supply.

30 107. The nature of that supply is in all cases but those in the following paragraph, a supply of the letting of immovable property. That is an exempt supply.

108. In the case of the Rose Nameplate and the Wall Mounted Plaques which are not fixed to a particular space on the wall, that supply is not of immovable property, and does not, as a single supply, fall within any exemption. It is thus standard rated.

### **35 Rights of Appeal**

109. 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.

**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 18 February 2013**