



TC02690

Appeal number: TC/2010/05387

*Inheritance Tax – Business Property Relief - office building and shares-
whether business wholly or mainly making or holding of investments –yes –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**THE TRUSTEES OF DAVID ZETLAND
SETTLEMENT**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE DR K KHAN
RUTH WATTS DAVIES MHCIMA
FCIPD**

Sitting in public at Bedford Square on 11 & 12 February 2013

Hui Ling McCarthy, Counsel, for the Appellant

**Christiaan Zwart, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. The Appellants (“the Trustees”) are appealing against a Notice of Determination issued by the Respondents (“HMRC”) on 16 February 2010 (and a review of 28 April 2010) whereby HMRC refused IHT Business Property relief (“BPR”) on the grounds that the Appellants were carrying on a business excluded under Section 105(3) of the Inheritance Tax Act 1984 (“IHTA”) namely that of “making or holding investments”.

2. The relief was refused because immediately before the Ten Year Anniversary (22 September 2007), none of the property comprised within the David Zetland Trust (“The Settlement”) were relevant business property for the purposes of Section 104 IHTA 1984.

3. The core issue is whether the Appellants can show that its activities prevent the business from being “mainly” one of dealing in land or making or holding investments.

Background Facts

4. The facts are largely agreed. The Tribunal has relied on the statement of agreed facts.

5. The Settlement was made on 22 September 1987. The present Trustees of the Settlement (“the Trustees”) are Stuart Barry Katz and his wife Jacqueline E. L. Katz.

6. The beneficiaries of the Settlement are set out in Schedule 2 to the Settlement Deed. They are Mrs Jacqueline Katz, one of the Trustees, and Michelle, Karen and Hayley Katz, the daughters of Jacqueline E.L. and Stuart B. Katz.

7. A 10 year anniversary tax charge fell on 22 September 2007.

8. On 22 September 2007 a Schedule of Assets of the Settlement included:

(a) The Leasehold interest in the property known as Zetland House (“Zetland House”) 5-25 Scrutton Street, London EC2, the terms of the lease being 98 years to 24 March 2089 (from 25 March 1991);

(b) Two ordinary shares in a company known as Avidpride Ltd (“Avidpride”); and (ii) one ordinary share in Mainlegion Ltd (“Mainlegion”), which owns the freehold to Zetland House.

(c) A “Property Portfolio” comprising eleven residential properties, and one non-business asset being a residential property occupied rent free by a beneficiary of the Trust.

9. The Directors of Avidpride are JEL Katz and SB Katz, whose registered office 5-25 Scrutton Street, London EC2. The 31 December 2005 and 2006 accounts record that the company’s ultimate controlling parties are the directors. The holding in Avid

Pride on 22 September 2007 represented all the issued shares of the company. The principal asset is the freehold interest in a property known as 96 George Lane, South Woodford, London E18. This is divided into 20 units either let or available for letting to commercial tenants and a car park.

5 10. On 22 September 2007, the issued share capital in Mainlegion was 2 ‘A’
ordinary shares. Its 31 December 2005 and 31 December 2006 Accounts record that
its directors are JEL Katz and SB Katz and that the company rents its investment
property to the Settlement for £119,674 per annum. The holding in Mainlegion on 22
10 September 2007 of one ordinary share represented 50% of the issued share capital.
The other shareholder in the company at that date was Mrs JEL Katz, who is the “the
ultimate controlling party” of the company as she also has a beneficial interest in the
Settlement and is its trustee.

11. The assets aggregate value is £6,297,300. This breaks down into unquoted
shares (£1,149,300); residential property (£775,000); business property (£4,373,000).
15 The latter is Zetland House business tenancies (£3,180,000) and a portfolio of let
properties (1,193,000).

Documents

20 On 25 March 1971, Dalmore Property Investment Ltd granted a Lease to David
Zetland of Land at No. 32 Paul Street and Nos. 109-123 (inclusive), Clifton Street in
the City of London for a term of 20 years for £75,000. The freehold of Zetland House
was purchased by Mainlegion from Dalmore Property Investment Company Ltd on 9
January 1984. The freehold was subject to two leases: a twenty year lease from 15
25 March 1971 to David Zetland and a 98 year reversionary lease from 15 March 1971.
The property was purchased with the help of a bank loan. One share in Mainlegion
and the leasehold interest in Zetland House were transferred into the Settlement when
it was formed.

12. From 24 March 1991 on unidentified terms to 24 March 2089, Mainlegion
rented its commercial property of Zetland House to the Settlement. The lease terms
30 entitled the freeholder to £119,674 rent per year.

Zetland House

13. Zetland House is a commercial building divided into units which are let to
tenants for different periods of time normally ranging between 1 and 5 years. There is
one lease for 36 years granted in March 1972 and two leases for 15 years were
35 granted in June 1993 and March 1992. There are approximately 51 sub leases. A
sample lease was provided to the Tribunal for the tenant Empowering Learning Ltd
showing terms and conditions.

14. Zetland House started life as a multi-story factory occupied by a few firms of
printers. The property was becoming redundant and had outlived its original purpose.
40 There was a recession in the economy at the time. Leases were for very long periods
and there were large parts of the property which was empty. In 1987, 6,074 sq ft were

vacant. By 1992 this figure had arisen to 20,190 sq ft and 34,587 in 1993. By 1997, one quarter of the building was empty.

15. The gross rent was then approximately £510,000.

5 16. Mr Katz is an entrepreneur. His business model was to offer flexible office space for computer, media and high technology businesses. This required major changes to the property, both physically and in terms of use and type of occupant. He made office space more available and reduced the terms of the lease where there was no break clause, which made rentals more attractive. He made the offices smaller and in reconfiguring the business lost approximately 15,000 sq ft of letting area.

10 17. The gross rent and service charges in the year 5 April 2007 was slightly under £2.4m which is over four times the level received in 1997. The business model of Mr Katz had clearly worked.

15 18. In order to assist with the running of the building he hired more staff to provide services and facilities to tenants. The building had a restaurant, gym, cycle arch, Wi-Fi, portage, 24 hour access, meeting rooms, media events, outdoor screens for viewing football matches and film shows as well as an art gallery area. It was run on the basis of a community with regular barbeques and socials.

20 19. By September 2007, Zetland House was split into 53 units and had between 80-90% occupancy during the course of the year. This high level of occupancy has been retained over the years. The Appellant attributes this to a flexible tenancy approach coupled with the additional services and facilities offered to tenants.

25 20. The management of Zetland House is delegated to an independent property management company called Mylako Ltd (“Mylako”) whose offices are based at Zetland House. The Principal of that company is Michael Kohn, whose is a director of Mylako and a chartered surveyor.

21. Mr Katz is a chartered surveyor. He is based with his wife at New Malden. They deal with the “general management” of property enterprises of the Settlement including major repairs, lease renewals, liquidators, agents, solicitors and insurance among others.

30 22. In 2005 a resident porter and a porter/cleaner were employed to work at Zetland House. Their contract of employment was signed by Michael Kohn of Mylako (though the actual contract was with Alpha Property Asset Management Ltd, a company where Mr Kohn worked before setting up his own business). An assistant porter was employed in 2009. All these employees report to Mr Kohn at Mylako but are paid by the Settlement.

35 23. As explained later, there are others who work at Zetland House and include Michelle Katz who deals with tenants’ issues, new leases and renewals. Hayley Kohn, a solicitor, manages legal matters and property manager, Mr Green, who works in “the management of Zetland House and other properties”.

24. Mylako deals with all management issues. They have created a Tenants Guide which lists the following facilities at Zetland House:

(a) Within the basement area:

5 i. A coffee shop which was initially ran by the Settlement and now run by a tenant.

ii. A gallery for hire for photographic and art exhibitions and parties and events together with film shoots. Michele Katz is the contract person.

(b) Parking/bike park which is rented for parking bicycles.

10 (c) Meeting rooms with wireless Wi-Fi and catering which is available for hire by both tenants and public.

Lease

15 25. Under the terms of the lease provided with Empowering Learning Ltd (“ELL”) the tenant is obliged to pay service charges and rent. They covenant to keep the property in good repair, not to alter the premises and on expiration of the lease to give the property back in the same condition as when it was first leased.

20 26. The landlord agrees to “maintain, repair, amend, review, cleanse, repaint, decorate and otherwise keep in good repair and tenantable condition” the common parts which include windows, lifts, entrances, staircases, passages, landings, toilets, walls, forecourt and car park.

25 27. The landlord covenants to keep in good working order and repair “all sewers, drains, channels, water courses, gutters, rain water and soil pipes, sanitary apparatus, pipes, wires and cable and supply lines together with all lifts and lift shafts, heating, and electric installation and lighting of the common parts” and to employ staff needed for the general management of the building. There is a covenant to keep the building insured.

28. The landlord therefore has responsibility for providing a number of services for the non-demised areas or common parts and for employing staff to undertake such work.

30 29. The property expenditure for Zetland House as shown on 24 January 2008 included the cost for the following: porter’s flat, wages, electrical expenses, external redecoration electrical expenses, external redecoration and repairs and internal redecoration including repairs to the roof and signage, utility bills, general cleaning, lift maintenance, fire safety and professional fees.

35 30. For the years 2007 and 2006 the rent received was respectively £1,744,189 and £1,733,701 with service charges of £354,120 and £379,367. The total income for these years was £2,343,951 and £2,174,483.

Correspondence and Events

31. In 13 May 2008, the Appellant wrote to the Respondents stating:

5 “It is not possible to consider the claims for business property relief independently in relation to Zetland House and the holding of shares in Avidpride Ltd and Mainlegion Ltd ... The shares in Avidpride and Mainlegion Ltd are not excepted asset since they are both held for the purposes of the Trustees property business”

32. On 21 November 2008, the Respondents wrote to the Appellants stating that:

10 “The report on the question of the application of business relief forwarded with the account assumes that all the assets and activities of the Trustees comprise one composite business for this purpose. I do not think that this is a correct line to take.

15 The three “strands” of the enterprise comprise (a) Avidpride Ltd (b) Mainlegion Ltd and (c) the remaining assets and activities of the trustees which are held outside a corporate structure. The companies themselves form business entities in their own right and must be looked at completely independently of each other (and anything else). This treatment is implicit in the wording of s.105 (4) (b) Inheritance Tax Act 1984, which clearly shows that each company is looked at individually. The directors of the companies and the trustees may be the same individuals, but they are acting in different and (at least in theory) independent capacities.

25 This leaves the remainder of the assets and activities which are owned and managed by the trustees to be considered in their own right. The second point at issue therefore is whether they constitute a business which is not precluded from business relief by s.105 (3) of the Act.

30 This comprises two separate elements (a) Zetland House and (b) the residential properties included at Part III of the “Schedule of Business Assets” included with the account” provision.”

33. On 30 September 2009, the Respondents wrote to the Appellant after their visit to 96 George Lane and Zetland House and confirmed the following:

35 “The business of the settlement is excluded under Section 105(3) IHTA as it is a business that consists mainly of making and holding investments and dealing in land and buildings ...

40 Our starting point with Zetland House is that holding land to exploit a proprietary interest in it for profit falls on the investment side of the line. Although we then look at the services provides, it is the nature of these services and how they relate to the investment property that is critical. The level of activity is not the determining factor.

...

5 The settlement holds 2 shares, 100% in Avidpride Ltd. The business of Avidpride is similar to that of Zetland House but with relatively fewer services provided ... [T]he shares are not relevant business property and the ownership of the shares by the settlement is an investment activity. There is no indication that dividends have been paid ...

The 50% shareholding in Mainlegion Ltd which holds the freehold of Zetland House is similarly an investment of the settlement contributing to capital value.

10 Our conclusion therefore, looking at the business of the settlement in the round, is that the business is not relevant business property. Whilst the business is actively managed, the activities are predominantly investment activities or related to investment. The services that are not investment related are insufficient to make the business one that is mainly non-investment. Even considered individually, each element to the settlement's business (Zetland House, property dealing and the shares in two companies) would not be relevant business property as they fall within the exclusions in section 105(3) IHTA 1984."

15 34. The HMRC concluded that the shares were not relevant business property and the ownership of the shares by the settlement was an investment activity. The holding of Zetland House was considered an activity of generating income from rentals and was a business of exploiting property rights and the services provided were ancillary to that activity.

25 35. On 16 February 2010, the Respondents by a Notice of Determination held that none of the property comprised in the Settlement was relevant business property for the purposes of Section 104 IHTA having regards to Section 105 (3) of the said Act.

36. On 8 March 2010, the Appellant requested an independent review. On 28 April 2010 the decision was reviewed and the assessment was upheld.

30 37. The 23 June 2010, the Appellants appealed by Notice against a decision dated 16 February 2010.

Law

Statute (as at 2007/2008)

35 38. The IHTA 1984 provides for charges to tax on a transfer for value. By section 1 inheritance tax is required to be charged on "the value transferred by a chargeable transfer". By section 2(1) "a chargeable transfer is a transfer of value which is made by an individual but is not an exempt transfer".

39. Section 64 provides:

40 "(1) Where immediately before a ten-year anniversary all or any part of the property comprised in a settlement is relevant property, tax shall be

charged at the rate applicable under sections 66 and 67 below on the value of the property or part at that time.”

That ten year anniversary “value” is the subject of this appeal.

40. Part V, Chapter 1 IHTA deals with business property.

5 (a) Section 103 provides:

(1) In this Chapter references to a transfer of value include references to an occasion on which tax is chargeable under Chapter III of Part III of this Act (apart from section 79), and

10 (a) references to the value transferred by a transfer of value include references to the amount on which tax is then chargeable, and

(b) references to the transferor include references to the trustees of the settlement concerned ...

(b) Section 104 provides:

15 (1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced –

(a) in the case of property falling within section 105(1)(a) [(b) or (bb)] below, by [100 per cent];

(b) in the case of other relevant business property, by [50 per cent];

20 but subject to the following provisions of this Chapter.

(2) For the purposes of this section, the value transferred by a transfer of value shall be calculated as a value on which no tax is chargeable.

(c) Section 105 provides:

25 (1) Subject to the following provisions of this section and to sections 106, 108, [...] 112(3) and 113 below, in this Chapter “relevant business property” means, in relation to any transfer of value, -

(a) property consisting of a business or interest in a business;

30 (b) ... securities of a company which [are unquoted and which] (either by themselves or together with other [securities owned by the transferor or any unquoted shares so owned]) gave the transferor control of the company immediately before the transfer;

(bb) any unquoted shares in a company;

...

5 (3) A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks and shares, land or buildings or making or holding investments ...”

41. Cases

- (1) *Saloman v Saloman* [1897] AC 11
- 10 (2) *Scales (HM Inspector of Taxes) v George Thomson & Company Limited* (1927) 13 TC 83
- (3) *Salisbury House Estate v Fry* [1930] AC 432
- (4) *Bartlett v Barclays Bank* [1980] Ch 515
- (5) *Griffiths v Jackson* [1983] STC 184 (Ch)
- 15 (6) *Martin and anor (exors of Moore decd) v IRC* [1995] STC (SCD) 5 (“Martin”)
- (7) *Brown’s Executors v Inland Revenue Commissioners* [1996] STC (SCD) 277
- (8) *Furness v Inland Revenue Commissioners* [1999] STC (SCD) 232
- (9) *Weston (executor of Weston, deceased) v IRC* [2000] STC 1064
- 20 (10) *Stedman’s Executor’s v IRC* [2002] STC (SCD) 358
- (11) *CIR v George & Loochin as Stedman’s Executors* (2003) 75 TC 735
Inland Revenue Commissioners v George and another (executors of Stedman deceased) [2003] EWCA Civ 1763 (“George (CA)”)
- 25 (12) *McCall and another (personal representatives of McClean (deceased)) v RCC* (2009) 79 TC 758 (“McCall”)
McCall v RCC [2009] NICA 12
- (13) *Brander (representative of James (deceased), Forth Earl of Balfour) v RCC* (2010) 80 TC 163
- (14) *Ramsey v HMRC* [2012] UKFTT 176 (TC)
- 30 (15) *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395
- (16) *Nicolette Vivian Pawson (Deceased) v HMRC* [2012] UKFTT 51 (TC)
- (17) *HMRC v Thoresby Lockyer and another (personal representatives of Nicolette Vivian Pawson (Deceased))* [2013] UKUT 50 (TCC)(“Pawson”)

35 Other materials

HMRC Manual, para. IHTM25263

Witness Statement of Stuart B Katz

42. The witness statement of Mr Katz was signed in June 2012 comprises approximately 16 pages.

43. He did not give oral evidence.

5 44. The following points were made:

(1) He is a chartered surveyor and entrepreneur in property development and the trustee of the Settlement since 1 November 1991.

(2) He manages Zetland House on a full time basis.

10 (3) The original settlor of the Settlement was David Zetland who died in 1991. He is the father of Jacqueline Katz who is his wife. He has three daughters, Michelle, Karen and Hayley.

15 (4) The strategy for Zetland House was described as “akin to the business of a serviced office whereby the former plan of granting long leases was reduced to one to five years and, even when there was no break clauses, consideration and negotiation was undertaken to vary terms to meet the tenants’ requirements”.

(5) Tenants were from the media and technology sectors.

(6) The management of Zetland House was described as a “flexible management” structure.

20 (7) Various staff were employed by the Settlement to assist with the running of Zetland House.

(8) There are services which are offered to tenants including a gym, Wi-Fi, security, bicycle spaces and the recycling of waste which is recharged as service charges.

25 (9) The Settlement offers hire of conference rooms, photo shoots and events.

(10) A building works service is offered to tenants who have special requirement and to make good leased premises to comply with surrenders or termination requirements.

(11) Remedial works are undertaken in respect of dilapidations.

30 Witness statement of Michael Kohn

45. Mr Kohn is a director of Mylako, the property manager and a short witness statement was signed on 31 July 2012.

He made the following points:

35 (1) Mylako is an independent firm of chartered surveyors offering services to the property sector. Its services include building and asset management, investments, sales and lettings. His firm manages commercial properties.

- (2) Their work involves, *inter alia*, debt recovery.
- (3) They describe themselves as “the first point of contact” for tenants’ problems at Zetland House
- (4) His dealings with Zetland House are less “hands on” since lettings are not conducted in the same manner as those of other landlords.
- (5) He said that Mr Stuart Katz is known to all the tenants and provides services to them on a daily basis. He promotes a community spirit at Zetland House and it is not uncommon for units to be split or altered or added to at the tenants’ requests.
- (6) He confirmed that Mr Katz’s main concern was to encourage high occupancy and to increase rental returns.

46. **Finding of facts**

- (1) The Settlement assets comprise the property in the Schedule of Assets of the Settlement with the main asset being Zetland House. It is a commercial building divided into units which are let to tenants for different periods of time ranging between one and five years.
- (2) Tenants receive services and facilities under their lease as well as those provided by their landlord which they may or may not pay for.
- (3) The Settlement assets have a combined value of approximately £6 million.
- (4) The Settlement trustees are Mr and Mrs SB Katz. Its beneficiaries the Katz family. Zetland House is managed by Mylako Limited, an independent company.
- (5) Mr and Mrs Katz deal with the general management of the property enterprises of the Settlement. They are assisted by staff members performing different tasks.
- (6) The tenants at Zetland House have the use of various facilities including a café, gallery, meeting rooms, bicycle arch parking, Wi-Fi.
- (7) The tenants pay service charges as well as rent to the landlords.
- (8) The Katz family are all actively involved in the management of the property.
- (9) The business model employed in running Zetland House is more akin to a short let business with flexible leases. This is attractive to companies at the start-up stage in the technology and media sectors.
- (10) The business model has been designed to increase occupancy and rental returns.

Discussion

47. The Tribunal would look at the different strands of the business separately. The shareholding in Avidpride Ltd and Mainlegion Ltd and the remaining assets and activities comprising mainly Zetland House.

5 48. Whilst the Respondents originally took the view that the business comprises a single composite business of making and holding investments, they later explained that the businesses within the companies are separate businesses which fall even more clearly within the exclusions of s.105 (3) IHTA 1984. This suggests that the business as carried on by Avidpride and Mainlegion should be treated as separate.

10 49. The separate business approach is consistent with HMRC's correspondence on 21 November 2008 where they stated:

15 "The Appellants' advisors' report on the question of the application of business relief forwarded with the account assumed that all the assets and activities of the Trustees comprised one composite business for this purpose. I do not think this is a correct line to take."

50. In taking the separate business approach, it would mean that the core business carried on by the Settlement, Zetland House, can be viewed separately from the holding of shares in Avidpride and Mainlegion.

20 51. The legislation is clear that a business or interest in a business on the one hand and unquoted shares on the other qualify on a separate basis for BPR purposes under s.105 (1) (a) and s.105 (1) (bb) IHTA 1984.

25 52. The Tribunal accepts the Appellants' contention that the unquoted shares in Avidpride and in Mainlegion fall to be considered as separate business assets in their own right under s.103(1)(bb) IHTA 1984. The relevant test under s.105 (3) in relation to the shares is whether the business carried on by the company qualifies for relief.

30 53. The Appellants' IHT return had summarised the assets held by the Settlement under the same heading of "Business Assets". The Tribunal has to look at the underlying businesses themselves and not at how they have been reported by the Appellants. The categorisation under the IHT form as "Business Assets" and "Non-business Assets" may be the result of the forms' layout.

35 54. It is important that this separation is made at the start. The core business activity under consideration is that of Zetland House and it would be wrong to look at the other businesses in making a determination on this business given the greater proportion of time and resources which is attributed to this asset when compared to the other assets which are more or less passively owned by the Appellant. The key issue is whether the property comprised within the Settlement is relevant business property for the purposes of s.104 IHTA 1984 or whether the Appellant can show that its activities prevent the business from being "mainly" one of dealing in land or making or holding investments.

55. The Appellants say that they provide sufficient services to the tenants of Zetland House that it ought not to be classified as an investment business. They are active managers rather than purely passive property investors. The business is therefore not one of “mainly” dealing in land or making investments.

5 56. A good place to start is with the common ground between the parties. First, the parties agree on the length of time to consider prior to the 10 year anniversary. The parties agree that the Tribunal should look back 5 years (2002) in order to get a flavour of the Appellant’s business. This is time period supported by the case of *Martin*.

10 57. The parties agree that when looking at the income and profits from rent when compared with the income and profits from additional services, it is important to apply a qualitative rather than quantitative test. It is accepted that while quantitative consideration may show something, they may not be determinative. The point is that there must be sufficient non-investment activity for a business to attract BPR and this
15 must be tested by reference to the “nature of the activities carried out”.

58. In the recent Upper Tribunal decision in *Pawson* the judge explained that the “relevant test is not the degree or level of activity, but rather the nature of the activities which are carried out”. This would be in keeping with the intention of s.105 (3) IHTA. The section requires the Tribunal to look at the business itself or the
20 business carried out by the Settlement rather than to look at the nature of the business carried out by the owner or shareholder. The case *George (CA)* requires the Tribunal to look at the business “in the round” with no one factor being determinative.

59. There is agreement between the parties that the case law in this area relates to different taxes and different subject matters and one has to be cautious when applying
25 their reasoning to BPR. It is required to consider all of the BPR cases in order to get a measure of the level, quality and quantity of services which would be sufficient to attract BPR. The cases provide a helpful guide of the approach taken to the treatment of services provided by the owner. The Courts have relied on cases with very different fact patterns to evolve legal principles which can be applied in looking at
30 BPR.

60. The Court of Appeal in *George* undertook a detailed analysis of the facts and reasoning in *Martin* even though *George (CA)* concerned a caravan park and *Martin* concerned industrial units. The Court of Appeal in *McCall* looked at a range of cases
35 in deciding a matter relating to grazing land. The Tribunal therefore has no difficulties in taking a comparative approach. The Appellants want the Tribunal in particular to consider the A3 Schedule of services which they have provided to show that there is sufficient non-investment activity for BPR purposes when compared to other cases. This information should be considered in terms of its nature, quality and quantity.

61. In the case of *George (CA)* the Court noted that it is common ground that the
40 exploitation of a proprietary interest in land for profit is in principle an “investment” activity. There was however, a “wide spectrum” of activities involved in the

exploitation of land. The Court quoted from the Special Commissioner's decision where he said:

5 "It is not in dispute that the Company carries on a business; the question is whether it is a business consisting mainly of holding or making investments. There is a spectrum at one end of which is the exploitation of land by granting a tenancy coupled with sufficient activity to make it a business, which may be activity in granting tenancies rather than activity in relation to the tenancy once granted. At the other end of the spectrum, while land is being exploited, the element of services means that there is a trade, such as running a hotel or a shop from premises owned by the trader. Normally for income tax, leaving aside services for which a separate charge is made, the income must be either income from land or trading profits. Here the concept of the trade is irrelevant and one is required to determine whether the business of Company consists mainly of making or holding investments or some other business."

62. There is a wide spectrum in cases involving land exploitation which makes the cases distinguishable on the facts. Land may be held as an investment where profits are derived from its use even where the landlord has to undertake maintenance and management required by the lease or incidental to the letting. In other cases, the activities carried out may be incidental to some other business or one of a number of businesses carried on by the landlord. The nature and purpose of the activities must be carefully examined. Clearly business which requires a high level of provision of services such as a hotel or a residential home and where the tenants are paying separately from the use of the land then those can be considered a business which is not the holding of investments.

63. The degree of services required to take a business out of the "mainly" holding of investments category is not stated in law. Consideration would be given to the main or preponderant activities of the business, assets and the source of income over a reasonable period. The business must be looked at as a whole and consideration given to all relevant factors to decide if mainly an investment. This would include the level of profits from the activities, turnover, employees, use of assets and time required for management. It is a question of degree and proportion.

64. In the case *Martin*, which concerned non-residential units, the court accepted that if additional services such as cleaning and security had been offered then that "might have tipped the balance" which suggested that if the Appellants had done more in that case they could have qualified for BPR. The bar was set low in this case.

65. The parties also have areas of disagreements. The first area of disagreement concerns what can be called the starting point of the discussion. In the case of *Pawson* the Court indicated a starting point as:

40 "... the proposition that owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity." (para.42)

66. In support Carnwarth LJ in *George (CA)* said:

5 “In the case of a building for letting, [additional services or facilities provided to the occupants are] unlikely to be material. They will not be enough to prevent the business remaining “mainly” that of holding the property as investment.” (para.27)

67. The Respondents say that the correct starting point is the assumption that the property business will not qualify for BPR and the Appellants must show that sufficient additional services and facilities were provided to rebut that presumption.

10 68. The Appellants say that approach is wrong. They say that that the vast majority of residential and business landlords will generally provide their tenants with nothing more than the lease to the property and in such cases any additional services are unlikely to be material. The landlord would do the minimum required under the lease and collect the rent.

15 69. The Appellants say that Zetland House is a different business enterprise. First, the Trustees are not typical landlords because of the additional services made available to the tenants. The business model used by Mr Katz in developing the business is that of “serviced offices” which the Appellants say is “more akin to that of a hotel than to that of a typical office letting”. The Appellants suggest that the correct starting point is for the Tribunal to keep an open mind and review the whole business and not start with any particular assumption. The whole spectrum of businesses should be considered.

20 70. The case law is helpful in understanding the approach. The cases suggest that where income is derived from property rights by the owner of the land, whether a freeholder or leaseholder, then that is not treated as income which is derived from carrying on a trade but rather as income which arises from a business. The business is that of the letting of property and the Court’s view is that the income arises from the exploitation of land rights.

25 71. In the case of *Griffiths v. Jackson* [1983] STC 184, an income tax case, which concerned a partnership which had acquired 11 properties for letting as furnished rooms to students where the students shared communal facilities but could not sublet the property. Laundry and cleaning facilities were provided. The business was short term letting to students and tourists with the provision of connected services. The Court said that the activities of selecting and finding tenants, preparing rooms for letting, providing TV sets and other facilities required including inventories and provision of linen constitutes the carrying on of a business.

30 72. In *Martin*, the Special Commissioner looked at a business which involved owning and letting of industrial units on 3 year leases at fixed rents. The question was whether the business of an active landlord could be described as “wholly or mainly the making or holding of investments”. The landlord undertook repairs and maintenance of the building, painting and other maintenance of the common parts which included dealing with parking and rubbish, advertising and interviewing

prospective tenants and negotiated lease renewals and complaints. In addition they ensured that the occupants had insurance cover which the Court viewed as an unusual term.

73. The Special Commissioner noted that:

5 “Where ... the value transferred by a transfer of value is attributable to let
property, entitlement to business property relief depends on the 2 tests in
s.105 being satisfied. The Appellant has first to show positively that the
let property is compromised in a business (s.105 (1) (a)); then he has to
10 establish at the second stage that the business does not consist wholly or
mainly of the making or holding of investments (s.105 (3) ... I still have
to determine the essential nature of the business before proceeding to the
second stage.”

74. The Judge did not accept that a distinction can be drawn, under the legislation,
15 between an active and passive landlord. The words “holding investments” was not
confined to passive investments. The question is whether anything other than the lease
produces income and is it sufficient to “tip the balance” in determining whether the
business consisted wholly or mainly of the making or holding of investments. It is this
tipping of the balance which the Tribunal must ascertain by looking at the actual
features of the business undertaken.

20 75. The Tribunal acknowledges that with Zetland House the business is not simply
the receipt of rent from let property. There is the provision of certain services and
activities. The question is whether those services and activities elevate the business
from mere ownership or mere investment into a business which is relevant for
business property relief purposes.

25 76. The Tribunal must not start with the fact that the business consists entirely of
the ownership of land giving rise to investment activity. It must be mindful of the
broad spectrum of businesses and the fine distinctions between different businesses.
The better approach is for the Tribunal to have an open mind and not to pre-judge the
30 issue at the start. There are clearly activities which are attributable to the holding of
investments and there are activities that produce income separately from rent and
which are not part of the investment holding activities.

77. The second area of disagreement between the parties concerns services and
activities. The Tribunal must decide whether the business consists of sufficient non-
investment activity which would qualify for business property relief. In *Martin*, the
35 Court decided that certain core activities were all “part and parcel of the business of
making or holding investments.” Consequently the business was excluded from
ranking as qualifying business property by the words of exclusion in s.105 (3) IHTA
1984. The activities identified were:

40 (1) activities directed at making investments which is to say finding
tenants, negotiating rent, granting of leases and dealings with surrenders
and assignments;

- (2) compliance activity which the landlord will have to carry out to comply with the terms of the lease including external repairs; and
- (3) activities that are “incidents” of the business of holding investments which includes management activities such as dealing with complaints, advertising and interviewing prospective tenant.

5

78. These activities were more connected to the lease and related to the property ownership. They were therefore in the nature of investment activity.

79. The Appellants say that they do not rely on any of the above precluded categories of services or activities. They say that the provision of additional services and facilities itemised in their A5 Schedule are the relevant consideration. The fact that the itemised services are available to members of the public supports their view that they are separate from those provided under the lease. The Respondents say that the “purpose” of providing the services listed in A5 Schedule is not, as the Appellants contend, based on a serviced office business model, but rather to increase occupancy and increase the rent collected under the lease. They say the Appellants are in effect “active managers” of Zetland House and the services are incidental to their core activities.

10

15

80. The Appellants refute this submission. First, they say that the purpose test finds no support in the authorities and is wrong as a matter of law. The authorities are clear that services such as those provided by the Appellants are relevant, non-investment activities. They point out that Carnwarth LJ in *George (CA)* said that the term “management” is not to be extended to “additional services or facilities provided to the occupants such as those referred to by Slessor LJ (i.e. cleaning, lighting, heating and other services severable from the tenancy) whether or not they are included in the lease and covered by the rent”.

20

25

81. The Appellants say that it is not relevant whether or not the tenant pays under the lease for the services and facilities. They draw reference to hotels where the additional facilities provided are to increase occupancy rates and charges but the business qualifies for BPR. In the Appellants’ view it is wrong for the Respondents to argue that the Tribunal should ignore the café, gym and hair salon because these businesses are owned and operated by others. Again, using the hotel analogy it is not uncommon for hotels to bring in outside operators to run restaurants and spas, for example, and still qualify for BPR. The point is well made but there are important differences between the letting of offices and a business of running a hotel. A guest in a hotel does not sign a lease with attendant obligations nor have exclusive occupation for a fixed period of time. The tenancy is fundamentally different and the services are less personalised. The Appellants draw reference to a statement by Henderson J in *Pawson* where he said:

30

35

“It is clear from *George* that the provision of these additional services and facilities (i.e. cleaner, heating and hot water, television, telephone, and being on call to deal with emergencies, welcome packs, etc... is not to be regarded as part of the maintenance of the property as an investment, and

40

that their categorisation as services is unaffected by the fact that no separate charge was made for them.”

5 82. In furnished lettings or holiday lets, the owner is substantially involved with the holidaymaker in relation to activities on and off the premises. This is not the case with commercial office space.

83. It is not disputed that the Settlement provided more to their tenants than most landlords. The motive is to keep occupancy and rentals at a high level. Mr Kohn, the property manager, in his evidence confirmed that the Appellants were able to charge 10% more rent because of the additional facilities offered to tenants.

10 84. The Appellants say the Settlement was involved in producing all manners of turnover in addition to rent. This includes income generated from project management of building works which were charged separately and undertaken to meet particular clients’ requirements. There is a distinction between the letting of units in a commercial building and businesses where the owner provides services as part of a trading activity. For example, letting plots in a caravan park involves site owners
15 looking after the welfare of residents on the site and staying in active contact. The only investment element is the granting of the right to station the mobile home on the plot and the connection to services. Everything else provided is non-investment and produces a profit in its own right. The tenants in an office building in central London
20 who manage independent businesses are not normally as dependent on the landlord.

85. The Respondents say having additional services does not prevent the business from being an investment. These services are ancillary to the main investment which is the exploitation of the real estate for rent. The nature of the income which has been derived from the activities is rent. The capital assets contained in the Settlement are
25 used in the activity of generating income from rent or from holding property for resale. None of the assets are specifically for the purposes of providing services. Zetland House is not a business of providing services but rather for exploiting property rights and the service provision, such as it is, is ancillary to that activity.

30 86. The activities which the landlord carries out or is obliged to carry out under the terms of the lease would be incidental to the tenancy. Properly speaking, such activity would fall to be considered as part of the holding of investments. Any activities which the landlord carries out for which he receives no separate consideration, although not required under the lease, would normally be incidental to the holding of property as an investment. Where the landlord carries out activities or provides
35 services which are not required under the lease and for which separate payment is made then these, by their nature, would seem to be activities which are non-related to investments. The Judge in *Pawson* provided interesting guidelines in this respect. He said:

40 “It is clear from *George* that the provision of these additional services and facilities is not to be regarded as part of the maintenance of the property as an investment, and that their characterisation as services is unaffected by the fact that no separate charge was made for them. The critical question, however, is whether these services were of such a nature and extent that

5 they prevented the business from being mainly one of holding Fairhaven as an investment. Carnwarth LJ made in clear in paragraph (27) of his judgment in *George* that, in the case of a business of letting a building, the provision of such services is “unlikely to be material” because it will not be enough to prevent the business remaining mainly one of property investments. The implication is that in any normal case an actively managed property letting business will fall within the exception in s.105 (3) because the “mainly” condition will still be satisfied.”

10 87. He goes on to say that the business was mainly one of investment and he observed in paragraph 46:

15 “The services provided were all of a relatively standard nature and they were aimed at maximising the income which the family could obtain from the short term letting of property. Looking at the business in the round, there was in my view nothing to distinguish it from the actively managed furnished lettings business of a holiday property, and certainly no basis for concluding that the services comprised in the total package preponderated to such an extent that the business ceased to be one which was mainly of an investment nature.”

20 88. The word “mainly” suggests a proportionate test. In the case of a building let to tenants there are services which must be provided under the lease and managing the property as an investment. This must be balanced against additional services of facilities which are provided to the tenants whether or not they are covered in the lease and by the rent. In the case of a let building, these additional services would not be significant. The question is – are they sufficient to prevent the business being “mainly” that of holding property as an investment.

25 89. This leads us to the next area of disagreement which is whether the Appellants provided sufficient additional services and facilities to make the business a non-investment activity or to “tip the balance”. The answer is –not if it is of a standard nature or aimed at maximising income from the property.

30 90. Ms McCarthy for the Appellants provided a useful A3 Schedule which analyses the services offered in this and other BPR cases. The Schedule is colour coded with the names of the cases at the top and the services divided into investment services and non-investment services. The investment services follow the pattern in earlier cases of making investments, compliance and management activities. The non-investment activities or services include cleaning, heating, telephone, television, internet and cafe and appear to be over and above services normally provided to tenants.

35 91. The services and facilities which are submitted by the Appellants and Mr Katz’s Witness Statement as being additional are as follows:

40

A. Conference rooms

The tenant hires out conference rooms at Zetland House for a profit with optional catering facilities. The rooms are for internal and external meetings and a charge of £20.00 per hour is made.

5 Mr Katz in his witness statement states:

“The rooms are in the vicinity of the café and have Wi-Fi access, air conditioning, telephone and flipcharts. A projector can be supplied although most of those booking the room now use their own laptop computers.”

10 The rooms are booked between 2 and 3 days per week on average.

B. Mail Room, Reception and Porters

There is a mail room available for tenants at Zetland House with receptionist facilities.

15 The receptionist who runs the mail has the following duties, as itemised by Mr Katz in his witness statement:

20 “... frequent inspections of the common parts and facilities, sorting and distributing mail, maintenance of parking, visitor logging, supervision of site staff including day-to-day security issues, incident recording, reviewing procedures to take account of various operational requirements, liaising with tenants regarding operational issues, liaising with contractors and other representatives of outside organisations, maintaining all management and statutory documentation, manuals and records and a database of approved contractors.”

25 There are two Porters, one full time and one part time. There is a part time porter works on Thursdays and Fridays. The Head Porter has been employed since 1981.

C. Staff

30 There are several staff who are employed either on a full time or part time basis. These can be itemised as follows:

(a) Mr S Katz who works at Zetland House for two days per week. He works from his office at New Malden on various matters relating to Zetland House. The Appellants say that Mr Katz works full time on Zetland House business.

35 (b) Michelle Katz is based full time at Zetland House. She handles matters such as day-to-day issues with tenants including short term lettings, rent issues, alterations to leases and renewals of leases. She

is also responsible for organising events, marketing and branding of the building, including web design, Twitter and Facebook.

- 5
- (c) John Hughes is employed by the Settlement as a relief porter, fire officer and general handyman. Approximately 50% of his time is in relation to Zetland House matters.
- (d) Nick Green, a property manager is employed by the Settlement to work with and assist the trustees with the management of Zetland House and certain other properties. In addition he provides assistance with the refurbishment of units, obtaining estimates, sourcing products, overseeing works and dealing with contractor issues. He is not engaged full time with Zetland House matters but spends about two-thirds of his working week at Zetland House.
- 10
- (e) Hayley Kohn is an in-house solicitor based at Zetland House. She handles all legal matters relating to tenants, including licence granted for alterations. Approximately 70% of her time is spent at Zetland House and her works covers the preparation of new leases and liaising with external solicitors. She works with Eddie Biber, who deals with leases for Zetland House.
- 15
- (f) Claire Turner, a secretary working at New Malden is employed by the Trust and deals with meetings and minutes for the secretarial matters. She spends approximately 75% of her time dealing with Zetland House matters. She left the company in 2009 and was not replaced.
- 20
- (g) Debbie Gaynor is a secretary working at the New Malden Office. Her job involves answering telephones, taking conference room bookings and approximately 40% of her time was spent on Zetland House matters.
- 25

30

The staff list suggests that the Appellant employs approximately “7 to 8 full time staff (plus Mr Katz) and 4 part time staff over 5 years prior to the 10 year anniversary of the Trust on 22 September 2007”.

D. Café

35

The Trustees have in the past made available a café which is now operated by a tenant but we are told with the support of the Trustees. The café itself opened in 2000 with small seating capacity. The 2003 to 2005 accounts show that the café while operated by the Trust had a turnover of £16,712 in 2002, £10,498 in 2003 and £7,027 in 2004. In 2005 it was decided to wind up the company running the café and hand over the management to an external tenant. The café though run by an independent, has the support of the Trustees who provide “financial help and business advice” to the current café owner. The decision to have the café was a management decision.

40

E. Communal events

5 The Trust organises Barbeques in summer and Christmas events where tables and chairs are set out and free food and drink plus entertainment is provided. These events are normally at lunchtime and last for approximately one hour. At Christmas there are carol services. These events are social events for the tenants.

F. Internet services

10 The computer facilities of the café are owned by the Trustees and they fund the Wi-Fi access in the café. Wi-Fi is available throughout the building provided by a telecom provider for which a share of revenue is paid to the Trustees. In the two years to 22 September 2007, the Settlement received income from the internet of £4,000.

G. Bicycle stands

15 In June 2005 the Trustees installed bicycle parking at Zetland House. This facility is at the rear of the premises on the ground floor and is a covered stand in the secure enclosure with 24 hour CCTV. It is provided at a cost of £5.00 per week per cycle. The Trustees hire bike park spaces to tenants for an additional charge not included in the tenancy agreement. In the two years to 22 September 2007 the bicycle stands produced
20 income of £10,000.

H. Project management

25 The Trustees undertake and/or provide project management for building works at the request of Zetland House tenants. This includes knocking down walls, making units bigger or smaller, providing air conditioning and other alterations which are outside the scope of the tenancy agreement and for additional consideration. The Trustees have an on-going business relationship with contractors who provide services. This enables the Trust to maximise its profit from any building works by engaging suppliers on more favourable terms. The Trust would also undertake works for tenants
30 who are obliged to make good the premises before leaving.

I. Cleaning services

The Trustees provide cleaning services to tenants. Offices are cleaned of recycling and waste on a daily basis, which is paid for through the service charges.

35 **J. 24 hour security**

There is a 24 hour security on site. The building has several entrances and vehicular access through the main gates including loading and unloading which are all supervised by the porter on duty. In addition there are

approximately 100 visitors a day, which is recorded and monitored on CCTV cameras.

K. Gym and hair salon

5 On the premises there is a gym and a hair salon both of which are available to members of the public as well as to tenants and these are run by the tenants and not by the Trust. There is a reception and administration support for photocopying and faxing and communal fully equipped kitchens for smaller units.

10 92. The Appellants say that the extra services and facilities provided are substantial. Given the nature and extent of the services to the tenants, Zetland House should qualify for BPR.

15 93. The Appellants dispute the proposition that over 50% of the income or staff time must be attributable to additional services is to qualify for BPR. There is no general rule that a business involving office space can never qualify for BPR and there has been no objection by HMRC to that submission.

20 94. In the absence of HMRC identifying particular additional services and facilities that would be sufficient in the office context, the Appellants say they have done enough to show that the business is other than an investment business. Further, a family run business is more likely to qualify for BPR since they are the owners of the business. It is accepted that it is the nature of the business not the nature of the proprietor and the business is no altered because the proprietor is a Trustee.

95. The Appellants draw reference to Carnwarth LJ in *George (CA)* (para.61) who concluded that a family run caravan park did qualify for BPR. He said :

25 “I am happy to arrive at this conclusion. I find it difficult to see any reason why an active family business of this kind should be excluded from business property relief, merely because a necessary component of its profit-making activity is the use of land.”

30 96. The Appellants also draw a comparison with a hotel which like Zetland House derives most of its income from rent and most of the floor space is taken up for letting of rooms and offers a variety of facilities to its guests. The Appellants refute the comparison with the *Pawson* case insofar as the services provided by the Appellants would certainly “tip the balance” when compared with the services offered in the *Pawson* case.

35 97. Was there a profit making motive? In his witness statement, Mr Katz made the following observation at paragraph 11:

“My strategy was akin to the business of service offices whereby the former plan of granting long leases (15 – 30 years) was reduced to 1 – 5 years and, even where there were no break clause, consideration and negotiation was undertaken to vary terms to meet the tenants’

5 requirements. In many instances the occupiers upon expiry of their tenancy were granted licenses from month to month. As a result of the Trustees' new strategy of changing the nature of the business, some 15,000 sq ft lettable area was essentially sacrificed to facilitate this change, but the income return noticeably increased. The gross rent and service charge in the year to 5 April 2007 was slightly under £2.4million, which is over 4 times the level received in 1997, an increase which is far in excess of any inflation in office rent over that period."

10 98. The clear intention of Mr Katz was to exploit the real estate to increase return. He hired more people, reconfigured the offices and consequently the occupancy and rental return increased. He had a more flexible approach to the rental of property and management. He further noted (paragraph 21):

15 "Composition in the market for commercial premises is ever increasing which is why the Trustees are continually searching for ways to make Zetland House more attractive."

99. Mr Kohn in his witness statement and his oral evidence acknowledged that accommodating the wishes of the tenants was vital to increasing the occupancy rate. He said that maximising returns was one of the key objects.

20 100. There were several staff employed at Zetland House but there are no timesheets to show the amount of time they spent working on Zetland House matters and no contracts of employment (except Porters). The tasks undertaken by staff are varied and flexible. A substantial amount of the wage bill went on the Porters. The figures for Zetland House given for the year end 2006 shows that wages and salaries totalled £81,933 and porter's flat and wages £49,206. The Head Porter was paid by the Settlement but reported to Mylako. He lives in a flat at Zetland House. The Porter/Cleaner is paid by the Settlement but reports to the Head Porter. From 2009, there was an Assistant Porter who reports to Mylako. We are told that they spend 100% of their time at Zetland House. Their tasks include cleaning, inspection of common parts, car park maintenance, visitor login and liaising with tenants and management.

35 101. There are other people described as "staff" at Zetland House. This includes a secretary, Ms Turner, who works at New Malden and Mr Biber, a contracted solicitor who deals with leases. Mr Green, a manager, who is not full time. Miss Gaynor is the "contact" for meeting rooms and Michelle Katz is the "contact" for the gallery. Ms Gaynor, a secretary and Mr Hughes, a relief porter, are employed by another Group company and recharged within annual management charge. Michelle Katz (marketing), Hayley Kohn (Solicitor) and Nick Green (Property Manager) do not appear to be employed by the Settlement. In terms of direct line reporting, the Tenants' Guide states that Zetland House is "managed" by Mylako Limited and it is 40 the "first point of contact" for tenants. Mr Kohn's email contact is given to the tenants.

102. The Tribunal finds that the information regarding staff as presented by Mr Katz in his Witness Statement, cannot be corroborated. The picture which emerges is that not all staff are employed by the Settlement and it is unclear (except with the porters and cleaners) the percentage of time spent by staff on Zetland house matters. There are no time sheets or contracts. A majority of the employees seem to perform tasks concerned with the management of the investment. It is accepted that some services and facilities are provided by staff which are non-investment related, such as, the cleaning of common parts, post sorting services and delivery, reception, food and gift vouchers. The great majority of the other services seem to be directed at maintaining or enhancing the capital value of the property and obtaining a regular income from its letting.

103. What about income and profits from non-investment activities? The overall income rental income of £1,744,189 and £1,733,701 and service charges of £354,120 and £379,367 in 2007 and 2006 respectively and totalling £2,343,951 and £2,174,483 respectively is substantial. The income from “sundry” activities (including Brazilian lunch, computer course, carol singing and Christmas parties) in the two years prior to 22 September 2007 was as follows:

Room hire	£14,300
Bicycle Stand	£10,000
Filming	£2,000
Internet income	£4,000

This comes to approximately £30,000. Further figures were provided by the Appellants for the years 5 April 2006 and 2007 as follows:

	<u>2006</u>	<u>2007</u>
Service charge	£379,367	£354,120
Dilapidations	-	£200,722
Rent (Rutland House)	£1,733,701	£1,744,189
Other (including conferences and café)	£61,415	£47,920

These “other” figures do not tally with the figures provided in the Appellants’ letter to the Revenue dated 4 August 2008 of £30,000. The sundry income, either way, is not substantial when taken as a percentage of overall income.

104. The gym was started in July 2010 and the bicycle stand produced £5,000 of income in 2007. The conference/shoots/galleries/exhibition and room hire income figures were not available. The income generated by these additional services and activities is nominal. The figures for all service charges, includes services and

facilities recharged to tenants, as a percentage of the rental income is low being less than 25%. The issue is the relative importance of the non –investment activities to the business as a whole, not the importance of the individual services and facilities taken separately.

5 105. While the Appellants say that there is no case law which says 50% satisfies the
“mainly” test, it stands to reason that if one starts with 100 then more than half would
be considered to be “mainly”. The breakdown of the figures to 2007 show that the
rental income is the main income. The area of the building given to tenants (104,000
10 square feet of the 140,000 square feet) is also substantial and is more than that
allocated to other activities. The gym, café and hair salon are run by tenants and not
the Settlement. While the financials or a quantitative assessment is not determinative,
the analysis of the figures points to an investment business. Qualitatively, the business
has to be looked at in the round without giving predominance to any one factor in
determining whether the business consists mainly of investments. If the “mainly” test
15 is satisfied then the whole business qualifies for BPR. The investment side is not
discounted in favour of the non-investment part and the idea is not to put each set of
activities in separate “bags”. The test is simply used to identify the main business of
the Settlement. The Appellants point to an actively managed business but the
activities are predominantly investment activities or related to investment. The
20 services which are not investment are insufficient to make the business one that is
mainly non–investment.

106. The provision of services and facilities to a property business will usually be
ancillary to the main business. In the *Pawson* case the Judge explained that “where
25 the business is one of letting a building, the provision of additional services or
facilities to the occupant is unlikely to be material” because they will not be enough to
prevent the business remaining mainly one of holding the property as an investment.
He went on to observe that in a normal property letting business the “provision of
additional services or facilities of a non-investment nature will either be incidental to
30 the business of holding the property as an investment, or at least will not predominate
to such an extent that the business ceases to be mainly one of holding the property as
an investment. This seems to represent the position here since the non-investment side
seems incidental to the core business.

107. In the sample lease with ELL, the service charges have 11 parts which includes
electricity, staff, soap, towels, insurance, fees for management, sinking fund,
35 professional advisors, payments to the superior landlord for repair, cost of complying
with legislation and regulations and VAT. The expenditure itemised in the property
expenditure schedule (approximately 11 pages) of 2006–2007 shows property
expenditure by the landlord. The breakdown shows, *inter alia*, wages, internal and
external repairs, plumbing, signs, roof repairs, security, electricity, telephones, water
40 rates, refuse collection, fire alarms, boiler maintenance and professional fees. It is
clear that a significant amount of the expenditure is concerned with the landlord’s
obligations to the tenants under the lease. The landlord would have to employ staff to
meet their lease and management obligations and clearly this was done.

108. The Tribunal does not accept the Appellants submission that Mylako is concerned with management and the staff are largely concerned with active management and creating income which is non-investment related. In the round the landlord incurs expenditure which includes the making of investments, compliance and management. It is correct to say that Mr Katz had a vision for a different type of management and that he structured the property as shorter term lets where tenants operated in a more communal environment with shared services and facilities offered by the landlord which were in the lease. However, to a large extent there was no separate income from those activities. What then was the purpose of the activities? In the Tribunal's view these were largely to improve the building and its fabric and to keep the tenants there and to keep the occupancy rates high. In the *Pawson* case the bar has been set quite high. The facts do not get the Appellants over the bar. The services provided were mainly of a standard nature aimed at maximising income through the use of short term tenancies.

109. A comparative review of the case law shows that the Appellants provided several services and facilities to tenants. However, we are dealing with short term commercial lets rather than caravan parks, letting of grass fields, industrial units and holiday cottages. In those cases, there is more of a management function required. When the non-investment activities in relation to Zetland House are looked at closely, the conclusion is that they are primarily concerned with increasing the return from the building. They have sought to do this by providing a flexible management, shorter leases, and tenants who can provide café facilities, gym and a hair dressing salon among others. In contemporary London where many people cycle to work, there is a cycle rack which is safe and monitored. Tenants feel part of a larger community and there are communal social activities where tenants are introduced to each other and the landlord is helpful in accommodating flexibility by providing services for expanding space, movement and alterations at competitive prices. However, the reality is that most of these activities generate rental income.

110. The income from the cycle rack and gallery as well as the coffee shop, hairdressing salon and gym is all rental income. The tenants rent office space in a large building. They are some services which are provided over and above that which is required to be provided. This includes cleaning of the common parts, post sorting and delivery, reception, free food and drink at socials and gift vouchers. It would be difficult to classify security as something which is over and above a landlord's responsibility especially in London and where a building is open late at night and early morning. However, these do not tip the balance in favour the Settlement nor are they sufficient to rebut the "mainly" investments argument.

111. The Tribunal would now look briefly at the property portfolio. The properties contained in this portfolio comprise interests in 11 residential properties and one property which is occupied rent free by the beneficiary of the trust. These are all income generating from rentals and from resale. These are clearly held as investments.

The business of the Settlement in the round is not considered a relevant business property. It is accepted that the business is actively managed and there is a different relationship between the management and the tenants. Mr Katz is a good businessman. However, the services which are not investment related are not sufficient to tip the balance in favour of obtaining business property relief.

Avidpride Limited (“Avidpride”)

112. The directors of Avidpride are JEL Katz and SB Katz and the registered office is at 5-25 Scrutton Street. The accounts for the year end December 2005 and 2006 show that the company’s ultimate controlling party are the directors.

113. The principal asset of the Company is the freehold interest in a property known as 96 George Lane, South Woodford, London E18 which is divided into 20 units either let or available for letting to commercial tenants and a car park. The shares in the company are held by the Settlement. The value of the property held by Avidpride, less outstanding loans and tax on inherent gains is put at £430,000.

114. A valuation done in 2007 put the freehold at £1,050,000 in the open market. The property itself is described as “functionally obsolescent” with many of the tenants using the premises on short term licence agreement. The rental income from the 20 tenants is approximately £175,000 per annum.

115. The Settlement owns the two ordinary shares in the company. In 1991 it acquired a 50% interest in the building. In 2004, it acquired the 50% balance in the building for £800,000. The accounts show that the directors get approximately £30,000 per year.

116. There is nothing to indicate that the directors do anything over and above that which a normal landlord would do. They provide even fewer services than that provided to Zetland House and on the basis of this the shares cannot be considered relevant business property and the ownership of the shares by the Settlement would therefore constitute an investment activity. They would therefore fall within the exclusions in s.105 (3) IHTA 1984 as shares in a company where the company is wholly or mainly concerned with investments.

Mainlegion Limited (“Mainlegion”)

117. The directors of this company are Mr and Mrs SB Katz. It owns the freehold of Zetland House and rents it to the Settlement for £119,674 per annum. It has two A ordinary shares of which one is owned by the Settlement. While Mainlegion owns the freehold in Zetland House, the ultimate controlling party is Mrs JEL Katz, who has a beneficial interest in the shares of the company. She also has a beneficial interest in the Settlement.

118. From the rent receivable, the company pays directors remuneration of £20,000 and declares no dividend income. The value of the underlying asset contributes to the value of the assets held within the Settlement. The holding of these shares is an investment for the Settlement.

Conclusion

119. The Appeal is therefore dismissed.

120. 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.

10

**Dr K KHAN
TRIBUNAL JUDGE**

15

RELEASE DATE: 1 May 2013