



TC03797

Appeal number: TC/2009/13459

Value Added Tax - Appeal against HMRC's decision that supplies rendered (generally to local authorities) of accommodation for the homeless were exempt supplies of interests in land and not standard rated hotel supplies or supplies of accommodation in a "similar establishment" - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ATLAS PROPERTY LONDON LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
MR IAN SHEARER**

Sitting in public at 45 Bedford Square in London on 20 June 2014

Harry Beharry, manager of Atlas Property London Limited on behalf of the Appellant

Mark Fell, counsel, on behalf of the Respondents

DECISION

Introduction

5 1. This was an Appeal not against an assessment, but simply against a decision by HMRC that the supplies of a particular category rendered by the Appellant were exempt supplies of land, and not, as the Appellant had contended, supplies consisting of:

10 *“the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering”.*

15 2. The supplies in question can be shortly described as follows. The Appellant had interests in a considerable number of houses. The houses were generally semi-detached or terraced houses in suburban streets, often in the London area. The houses had been converted so as to provide fairly basic furnished living accommodation for different numbers and combinations of people. The accommodation would often include a bedroom (or bedrooms, where the accommodation was intended for families), bathroom, kitchen and sitting-room, accessed through a lockable door in the common parts of the house. The conversions had always followed the requirements laid down by local authorities to render the accommodation suitable for temporarily homeless people.

25 3. The Appellant notified local authorities, notably Islington Council, of vacancies that it had in these dwelling units, and if the local authorities then had homeless people who they were responsible for housing, they might well take a lease or licence of the relevant accommodation and make that available to an individual, a couple, or a family who were temporarily homeless.

30 4. We will summarise the services for which the Appellant was responsible below, but in short the services were very limited. Once an individual or a family had been given the keys, they were responsible for cleaning the property, and the main service rendered by the Appellant was simply to collect and empty the waste bins once a week. Until about 2012 the Appellant had provided, as required by the local authorities, a weekly delivery of food for breakfasts, but since 2012 when the requirement had been withdrawn, no food of any sort had been provided.

35 5. Occupants could aptly be described as “temporarily homeless”, in the sense that it was always hoped that they, or the local authorities, would find different longer-term accommodation for them in future. However, many of the occupants had occupied for many months, and some for years. HMRC’s calculation of the average period of occupancy by occupiers who had left (so ignoring those still in occupation) demonstrated that the average period of occupancy was 8 months.

The irrelevant points

45 6. Prior to summarising the law and the facts, it may be worth listing various points that were mentioned, but which were in no way part of the Appeal before us.

50 7. There had been some debate between the parties as to whether the Appellant itself had an interest in land, such that it might itself be granting interests in land to Councils, and

indirectly perhaps the occupants. This resulted from the fact that most or all of the houses were owned either by an affiliated company or by individuals. The Respondents accepted, however, that the Appellant itself had been granted some relevant interest in land such that unless the “hotel” exception applied and the supplies by the Appellant became standard-rated supplies, then the Appellant’s supplies would indeed have been “the grants of interests in land”, and would have been exempt.

8. It was common ground that the only basis on which the Appellant’s supplies might rank as standard-rated supplies was if the exclusion from the normal exempt-supply rule of paragraph 1 Group 1 in Schedule 9 to the VAT Act 1994 was disapplied by the provision mentioned in paragraph 1 above for “hotel supplies”. Since the properties were dwellings, there was, in other words, no possibility of the Appellant opting to tax its supplies.

9. The Appellant never explained why it wished to ensure that its supplies were standard-rated. We naturally assumed that, were the Appellant’s supplies to be standard-rated, considerable input tax might be available to it in respect of conversion costs, and that in some periods those might exceed the standard-rated rentals. We were far from clear, however, that local authorities would be able to recover the input tax in respect of the supplies to the local authorities, and naturally we also ignored the issue of how rentals would be adjusted, were the supplies to be ranked as standard-rated supplies. Conceivably the local authorities might have accepted the additional cost of VAT in respect of the rentals, regardless of whether the input deduction available to the Appellant for conversion costs might have meant that in some periods relatively little actual VAT would be accounted for to HMRC by the Appellant. None of this was revealed to us, so that these points remained something of a mystery to us. These points were strictly irrelevant to the point that we had to decide.

The law

10. The relevant law was extremely simple. The terms of the exemption granted by Item 1, Group 1 of Schedule 9 to the VAT Act 1994 are for “*the grant of any interest in or right over land or of any licence to occupy land*”, and the only presently relevant exception to that provision which leaves the supplies as standard-rated is that quoted in paragraph 1 above for hotel supplies. Note 9 is the only other provision of relevance. This provides that:

“*“Similar establishment” includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers.*”

11. Notice 709/3 defines “similar establishments” to include:

*“Motels,
Guesthouses
Bed and breakfast establishments
Private residential clubs,
Hostels, and
Serviced flats (other than those for permanent residential use)”*

12. It seems that in or before 2012, HMRC had conducted a general review into the types of accommodation made available to the homeless, and in particular to the level of services

rendered in respect of different categories, and possibly as a result of this study, HMRC had produced, principally for internal use by HMRC officers (but also available on HMRC's website), a paper, VATLP 11400, contrasting the suggested status, as exempt or standard-rated, of 7 different examples relating to the provision of accommodation for the temporarily homeless. This document is naturally not legislation and is not binding on us, but the Appellant referred to one or two of the examples, and in due course we will make further reference to this document.

The facts

13. The Appellant provided accommodation of various categories but the only category with which we were concerned was that where local authorities were able to take leases or licences of blocks of rooms, almost invariably in perfectly ordinary houses (numbering some 50 to 60 properties) that had been converted to provide two or more units of accommodation. The accommodation usually contained the rooms that we mentioned in paragraph 2 above. Such a house thus almost certainly had some "common parts" behind the original front door, which led to further lockable doors behind which were the units of self-contained accommodation.

Ancillary services

14. Considerable attention was given to the level of services provided in relation to the accommodation, since that was obviously a material factor when deciding whether the supplies in question were realistically analogous to hotel and inn supplies.

15. While the local authority requirements appeared to insist that the accommodation always included a kitchen and cooking facilities and a washing machine, and these requirements were always met, there was no respect in which the Appellant actually provided meals or laundry services to occupiers. Until about 2012, the requirements had involved the provision of weekly "cold" parcels of food for breakfasts but even that requirement, and facility, had now been withdrawn.

16. The accommodation was provided with basic furnishings but bed linen was not normally provided. We were told that in exceptional circumstances (for instance where the previous accommodation of the people to be housed had been burnt down or flooded or perhaps where occupants with addiction problems arrived straight from living "on the street"), bed linen and towels were provided but this was the exception and not the norm.

17. The Appellant was responsible for emptying the waste bins weekly, but the occupiers were expected to clean the properties themselves. We were told that the three employees of the Appellant responsible for the waste bins would generally check that the kitchen and bathroom were being kept clean and would even clean these rooms if they were obviously being neglected. This was done, however, not as a service to the occupiers but principally to ensure that health and safety requirements were satisfied and to keep the Appellant's properties in decent condition. It was certainly not a cleaning service. The Appellant also provided hygiene and sanitation checks, and were responsible for dealing with any infestations.

18. The Appellants never provided "live-in" receptionists. There was one person on call at all times should any major problem arise in any of the occupied properties, but the function

of that person was more to deal with emergencies, to ensure that electrical and plumbing type faults were rectified and that there would be no anti-social behaviour in the properties. Such behaviour was required to be notified to the local authorities. The responsible individual did not live at any of the relevant properties. There was certainly no equivalent of the receptionist services of hotels.

Other responsibilities

19. Whilst some of the following responsibilities might be regarded as further ancillary services, we will list them separately since they are more in the nature of obligations to the immediate lessees, Islington Council (“the Council”) for instance, and responsibilities often geared to monitoring the presence of the occupants and their conduct.

20. The Appellant was responsible for cleaning the common parts of houses and for the gardening.

21. The Appellant was required to permit the Council officers to inspect the premises as they considered necessary.

22. The Appellant was required to notify the Council in the event that any unit was being occupied by more than the number of people agreed and noted in the nomination notice, and to notify the Council of any change in an occupier’s household circumstances that might be relevant to the Council’s obligation to provide temporary housing.

23. The Appellant was required to notify the Council and any relevant external agencies such as the police and social services where occupants and/or members of their household were experiencing social problems such as harassment or abuse, whether as victim or perpetrators, or if there were concerns over the safeguarding of children or vulnerable adults.

24. The Appellant was responsible for obtaining a signature from occupants on a weekly basis and for providing that to the Council as proof that the occupants were still residing at the premises, and that the Council were not thus paying for and providing accommodation for people who might have left.

25. When a unit was made available to a new occupant, the Appellant was responsible for meeting the occupant at its central office and then for taking him or her to the premises, and for providing keys and a welcome pack giving information on local amenities (including shops, transport links, schools, health services, police, job centres and benefit offices), and for instructing the new occupant on the general rules of occupation and the use of gas and electric appliances. There was no accommodation at the central office.

Payment terms

26. Rents were set for each unit, and when occupied the rent was paid by the local authority. The rent was taken to include an element in respect of utilities which the Appellant itself paid directly to the suppliers. Occupiers might be expected to make a small contribution towards utilities to the local authorities, but that did not directly concern the Appellant.

27. The Appellant was required to see that occupiers (who were principally liable for Council Tax) applied for Housing Benefit and Council Tax Benefit (although it was stated in evidence that the Housing Benefit was then claimed by the local authority on behalf of the occupant). There was no issue of the properties being subject to business rates in the manner that hotels and inns are so subject.

Duration of occupation

28. We were shown statistics in relation to periods of occupancy. There were a very few cases where somebody might be housed in one of the Appellant's properties for just a few days. This was, however, not the norm and a considerable number of occupants had been in occupation for around two years. As we have already indicated, HMRC's calculation demonstrated that the average period of occupancy was about 8 months. The publication VATLP 11400 referred to above indicated that it was also the practice of local authorities to house the temporarily homeless in low-end hotels, some of which set aside some rooms principally for this purpose. We rather imagine that the normal aim of local authorities would be to locate people, who it was realistically expected would be in need of temporary accommodation for only short periods, in hotels, rather than in the Appellant's and equivalent properties. There was no evidence in relation to this, though this seemed to make sense.

29. There was a requirement that those occupying the Appellant's properties should not have guests in the properties at night. This seemed to be a local authority requirement, and there was speculation as to whether it might have been to prevent overcrowding. There was no evidence as to why this was a condition of occupancy, though it seemed to us that whatever the reasoning it would not have been the same as that applicable in hotels, where the aim of the hotel behind a similar condition (where there happened to be one) would more likely be directed to ensuring that the hotel charged the right, and higher, amount for double occupancy. That would presumably not have been the explanation for the requirement in this case. Whether in the present case, the requirement was more directed to monitoring and precluding long-term sharing, whereupon the local authority might wish to review the requirement, and suitability of the accommodation, we do not know, but this seems a possibility.

Selectivity and Marketing

30. There was no respect in which the Appellant's accommodation was available to the general public. It was only available to accommodate those who local authorities had a duty to house and there was no intention that the general public would request accommodation or be eligible to reside in any of the units. There were naturally never signs like hotel and pub signs outside the houses, and as the Respondents' counsel observed, in considering whether the accommodation could be said remotely to fall within the meaning of "hotel accommodation", the properties were simply houses in the same street as, and indistinguishable from, other owner-occupied or tenanted houses similar houses. We were also told that there were covenants precluding the use of the houses otherwise than as private dwelling-houses.

The contentions on the part of the parties

31. There was little contention about the law in this case, nor about the point of interpretation to the effect that, in considering whether accommodation was provided in a

similar establishment to that provided in hotels, inns and boarding houses, a normal and sensible meaning should be given to how to construe the word “similar”. In short, the required approach involved considering all the attributes that we have considered in summarising the facts. We will accordingly address these points in giving our decision, without itemising them as specific contentions.

32. We should mention that the Appellant placed considerable stress on the contention that its accommodation was properly to be regarded as “serviced flats”, and not as such flats for permanent residence. Reference was then made to the Appellant’s various obligations and services in support of this claim.

33. The Appellant also drew our attention to some of the paragraphs in the publication VATLP11400 to which we referred in paragraph 12 above, and we will make a number of references to that publication below.

Our decision

34. We consider it perfectly obvious that the accommodation provided in the present case was not actually accommodation provided in hotels, inns or boarding-houses. Everything thus revolves around the meaning to be given to a “similar establishment”. Since we will consider in detail the second issue of whether the establishments in question were similar to hotels etc and we will reject that claim as well, we consider it superfluous to expand on the point that the establishments were not actually hotels etc. In other words, the Appellant’s case must be more promising in relation to the “similar establishment” issue, and if we are right to reject that claim, as we do, we must certainly be right to reject any claim that the establishments were actually hotels, inns or boarding-houses. We should perhaps mention that in one document the Appellant referred to the premises as “hotel annexes”. We considered this unrealistic. If annexes are generally annexes to some principal property, generally a hotel, the houses in this case were not annexes to anything. They were certainly not annexes to a hotel.

35. Note 9 quoted above identifies one category of establishment that is to be taken to be “similar” to hotels and inns etc, and the key feature of the establishments to which Note 9 refers is that they, like hotels and inns, provide “*sleeping accommodation used or held out as being suitable for use by visitors or travellers*”. We accept that this characteristic is a common feature of hotels and inns, and a sensible characteristic on which to concentrate for the purpose of including at least one category of “other establishments” as being “similar to hotels and inns etc”.

36. For present purposes this observation is of only marginal relevance because it is perfectly obvious that the occupants of the accommodation in the present case cannot be described as “visitors or travellers”. We note that it is specifically accepted in the HMRC internal guidance to which we have already briefly referred, namely VATLP11400, that classifying the establishments in the present case (i.e. that of accommodation for the homeless or asylum seekers) and classifying the broadly similar establishments with which VATLP11400 was concerned, will have to be based on other characteristics of hotels and inns to which such establishments might realistically be considered to be similar because none of the occupants with whom we are concerned, and none addressed in VATLP11400, can be described as visitors or travellers.

37. We agree, however, that it is clear that Note 9 merely addresses one category of other establishment that should be considered “similar to hotels and inns”, and certainly does not preclude other types of establishment from being classed as “similar” by reference to different characteristics. That must be a valid approach in this case, just as HMRC considered it appropriate in drafting VATLP11400. As we indicated in paragraph 31 above, we consider it relevant to consider all the characteristics of the accommodation in the present case that we mentioned in paragraphs 14 to 30 in order to decide whether the establishments with which we are concerned can be said to be similar to hotels and inns etc on different grounds from those addressed in Note 9.

38. The Respondents’ counsel suggested that we should analyse the characteristics of the present accommodation that we considered to be similar to those of hotels and inns, and then balance those against other characteristics more obviously commonplace in ordinary leasehold tenancy terms, and services quite distinct from those supplied by hotels and inns. We consider that this is a correct approach and we consider that applying this approach we conclude that the present establishments are not similar to hotels and inns.

39. We initially support that decision by agreeing with the Respondents’ counsel that the relatively long-term nature of the occupation in the establishments in this case is a factor that makes it difficult to treat the establishments as being similar to hotels and inns. Without reverting to the traveller and visitor point, we still accept that it is very unusual for the vast majority of occupants in hotels to be staying in hotels for very long periods. We accept with the Appellant that, in one sense, all the occupants in the present case can be termed “temporary occupants”, in that they and the local authorities will have hoped to find different long-term accommodation for the people in question at some time in the future. In the meantime, however, such accommodation has neither been found, nor is it on the immediate horizon and when the expectation is that many will be occupying the Appellants’ establishments for many months, or even several years, and regarding those establishments as the nearest thing to homes that they have, we cannot ignore these features that we consider distance the present establishments from ranking as being “similar to hotels and inns”. We accept that construction workers, working away from home, might end up living for very long periods (possibly only during the working weeks) in bed and breakfast establishments close to their work sites that may be well away from their homes, but that example apart, we consider that periods of long stay are highly unusual features of the use of accommodation in hotels and inns.

40. While this is a factor that was advanced strongly by the Respondents’ counsel, and one with which we agree, we have to accept (regardless of whether the Appellant specifically advanced this point) that in the 7 examples in VATLP11400 (and particularly in Examples 2 and 3 which we will refer to below), very little attention was given (save in Example 5) to this factor of long periods of occupation. We consider that it should have been, and we rather imagine that HMRC will not find that observation too surprising in the light of the contention by their own counsel in the present case that the long-term nature of the accommodation was a very material factor and one that obviously suggested a marked distinction from, rather than similarity to, hotel and inn accommodation.

41. Our decision is not just based on the long-term, and “home-like” nature of the accommodation in the present case but on the fact that very few “hotel-like” services were provided by the Appellant in this case. In this regard, we are applying very much the same tests that HMRC has adopted in VATLP11400, and we are arriving at different conclusions

because the level of hotel-like services that the Appellant provided were considerably less than those assumed in HMRC's examples (dealt with as Examples 2 and 3 in VATLP11400), where the conclusion was reached that the establishments were, albeit marginal, probably similar to hotels and inns.

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42. We will not quote HMRC's Examples 2 and 3 in full, and it is not our primary purpose to comment on the cogency or correctness of the VATLP11400 guidance. We might mention, however, that we find it difficult to discern much difference between the two relevant examples, perhaps not surprisingly since HMRC suggest that both should be analysed in a similar manner, albeit that the hotel-like characteristics in Example 3 were said to be more marginal.

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43. The basis on which HMRC conclude that the establishments addressed in both their Examples 2 and 3 are probably similar to hotels and inns etc is that, although the ancillary services are described as "minimal", there are services that would commonly be provided in hotels and inns. Thus the two Examples pre-suppose "a weekly surface clean of rooms", the provision of bed linen at the commencement of the stay and the provision of food, albeit in a weekly package form, for breakfasts. The only obvious distinction between Examples 2 and 3 is that in the former, described as a hostel, there is always an on-site manager, while in Example 3, a representative of the owner is not generally present on the premises, but nevertheless one makes periodic visits and is available to guests should the need arise.

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44. In the present case, we note that none of the services that we have just identified was provided. The kitchen and bathrooms were only cleaned by the Appellant if the occupiers failed in what was their primary responsibility to keep the accommodation clean. We attach little importance to the obligations to clean the common parts and to attend to the gardening, because without the Appellant being required by the Council to attend to those responsibilities (fairly common in any event in the case of ordinary leasehold properties) the work would just be neglected. Bed linen was only provided in the presumably rare cases mentioned above, and we were told that it was far from the norm. No food was now provided at all, and there was no live-in manager, available on a 24-hour basis. We accept that there was a person available to deal with building type emergencies, and anti-social behaviour, but he did not live at any of the properties, and his services were more analogous to those that might be provided by substantial landlords responsible for the maintenance of the services etc in ordinary leased properties, than to the services of receptionists in hotels.

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45. Accordingly our conclusion is that, while we find it odd that HMRC gave no attention in the relevant Examples 2 and 3 to whether the expected periods of occupation in the relevant establishments might be "long-term" in the manner so stressed in the hearing before us, we still consider that since all the services that led to the tentative "hotel-like" conclusion in those examples were absent on the facts of our case, and it was in reliance on those services that it was suggested that the supplies were "hotel-like" in the case of the two examples, we consider that our decision in this case is entirely consistent with the relevant examples.

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46. Example 6 in HMRC's publication is also of some relevance in this case because it deals specifically with the fairly similar provision of accommodation exclusively for asylum seekers, and notes that the relevant providers of that accommodation are responsible for performing a number of services. The point in relation to those services, and indeed the present relevance of this point in the context of the various services that the present Appellant

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described to us that we shortly summarised in paragraphs 19 to 25, is that those services were all related to monitoring and providing specific help to asylum seekers. In this case the responsibilities, some of which were mentioned in the relevant paragraphs were all related to the fact that the occupants were temporarily homeless and being accommodated by the Council, and such services and responsibilities were certainly not services that would ordinarily be supplied by hotels. Accordingly these services, far from supporting any similarity with the accommodation and services provided by hotels, indicate the very opposite.

47. The only other factor mentioned in HMRC's Example 3 to which we should refer is the suggestion that where there was a rule preventing overnight guests, this was not a condition likely to be found with ordinary lettings, but might well be a condition of accommodation in hotels and inns. Since this was one of the very few factors in this case that might be said to support any similarity with hotel accommodation, we conclude that it does not tilt the balance and lead us to amend our decision. We also repeat the point that the underlying reasoning behind the rule can hardly be the same, when comparing hotel accommodation and that in the present case.

48. We also note, in considering other examples in the publication VATLP11400, that Example 5, headed "Accommodation provided by letting agents", deals with a case, the facts of which are very similar to those in the present case, whereupon the conclusion is reached that the supplies are exempt supplies of accommodation. The conclusion seems to be based on the general absence of "hotel-like" services (a conclusion said to be unaffected if weekly breakfast parcels were supplied), and by the fact that although initially the accommodation might be described as having a "short term nature", tenants might stay for several months or even years. We consider that the practical reality that the average period of occupation is in fact far from "short term", and certainly for periods that would be very unusual in the case of hotels and inns, is very significant, and that this feature is a strong indicator (both in the context of Example 5, and on the facts of this case) that the relevant supplies are not "hotel-like". We also consider that the facts of Example 5, other than on the possible question of overnight guests, are close to those in the present case, supporting the decision that we have reached.

49. Reference is also made in the examples to the fact that, where accommodation is provided in converted houses, the very feature that houses do not look like hotels is of some significance. The Respondents' counsel advanced this suggestion in this case as well. We attach relatively little significance to this consideration ourselves in the light of the obvious fact that bed and breakfast accommodation is treated as being of a similar nature to accommodation in hotels, inns and boarding houses, and bed and breakfast accommodation will almost invariably be supplied in domestic houses, usually simultaneously occupied by the supplier. Insofar as there is marginal relevance to this factor, it again supports our decision that the services in this case are not "hotel-like", but it must follow from the bed and breakfast example that this conclusion must readily be outweighed as soon as the ancillary services provided in houses match those in bed and breakfast establishments. On the facts of this case, however, the "house" feature does marginally support our decision.

50. We should finally mention the example of "serviced flats for non-permanent occupation". This is not particularly referred to in the publication VATLP11400, for the reason presumably that serviced flats are ordinarily supplied to the public at large, and would rarely be supplied to the homeless. The list in Notice 709/3 certainly assumes that the

provision of “serviced flats (other than those for permanent residential use)” would rank as hotel-like supplies, and we agree. During the hearing two examples were quoted of visitors having stayed in serviced flats (indeed fairly luxurious serviced flats) where, while no breakfast may have been supplied, nevertheless the flats were serviced and cleaned daily, and the beds made etc, and we conclude that these facts sustain the similarity with hotel supplies and distinguish the facts from those in the present case. The accommodation supplied in the present case cannot be classed as that in serviced flats.

51. Our decision is accordingly that the supplies made by the Appellant in this case are exempt supplies of interests in land, and neither supplies of hotel and inn services nor supplies of equivalent services in similar establishments. We accordingly support the Respondents’ decision in this case and dismiss the Appellant’s Appeal.

Right of Appeal

52. 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 9 July 2014

