



TC04129

Appeal number: TC/2013/04892

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FAREHAM BOROUGH COUNCIL

Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT
MS ELIZABETH BRIDGE**

**Sitting in public at Barrack Block, 83-85 London Road, Southampton on
Tuesday 18 March 2014**

Mr K Colledge, Corporate Accountant, for the Appellant

L Bingham, Officer of HMRC, for the Respondents

DECISION

The Appeal

5 1. This appeal was against HMRC's decision, dated 13 March 2013 and confirmed following review on 21 June 2013, that the grant of a catering concession at a car park is a taxable supply of parking and the right to trade.

2. Fareham Borough Council (the Appellant) is a local authority which is VAT registered. It has a car park at Salterns Car Park, Fareham. At that car park the
10 Appellant permits a concessionaire to park his ice cream van and trade from that site. It is the contention of the Appellant that the charge made to the concessionaire for the right to park his van and sell ice cream at Salterns Car Park is exempt from VAT under Group 1 of Schedule 9 to the Value Added Tax Act 1994 and is not liable to VAT at the standard rate. HMRC disagree.

15 Background

3. The facts are not in dispute.

4. In November 2007 HMRC carried out a routine inspection of the Appellant's VAT records and on 16 November 2007 wrote to the Appellant to inform them that they should account for output tax on mobile catering concessions, as these were
20 regarded as standard rated rights to operate rather than exempt rights over land. That was not disputed at that point and the standard rate of VAT was accounted for thereafter.

5. On 30 January 2013, the Appellant wrote to HMRC requesting that they review the decision of 16 November 2007 in regard to the supply at the site at Salterns Car
25 Park. With that letter the Appellant enclosed what was described as a "licence agreement and map relating to 'Salterns Car Park'". It stated that that agreement differed from others in that there was a "specifically marked bay in the car park for sole use by the concessionaire to the exclusion of others".

6. That "agreement" was produced and is entitled "Catering concession – 2011,
30 2012 and 2013 seasons". That catering concession referred to the "attached plan". The "attached plan" is simply a reproduction of a portion of an ordnance survey map and an arrow has been drawn on it marked "position of site within car park". It was agreed at the hearing that that arrow was not in fact strictly accurate since the photographs produced showed a hatched area where the arrow is positioned. It is the
35 area adjacent to the hatched area to which this appeal relates. It was not disputed that the catering concession did not stipulate that the concessionaire had to use the hatched area ("the site").

7. There are no Notices near the site indicating any penalties etc for the use of the site by anyone other than the concessionaire. Further there is nothing indicating the
40 periods during which the area is reserved for use by the concessionaire. The only indication of anything at all is the marking on the road where there are white lines within which appear the words "RESERVED ICE CREAM VAN".

8. The concessionaire has the right to place the van on the site between the hours of 9.00am and 9.30pm only, between Good Friday or 1 April until 20 September in the relevant periods.

5 9. The Appellant also produced copies of invoices issued to the concessionaire. Under the heading “Details of service provided” the service was described as “ice cream concession” and the venue “Salterns Road car park”.

10. The full terms of the catering concession are set out at Appendix 1.

The Appellant’s principal argument

10 11. The principal argument is that the supply being made is that of a “licence to occupy” and therefore it is an exempt supply.

12. The Appellant relied on *HMRC’s VAT Notice 742* on the basis that that specifies at 2.5 that:- “For a licence to occupy to exist, the agreement had to have all characteristics of a “leasing or letting of immovable property”. That is the case if the
15 licensee is granted right of occupation of :-

i) a defined area of land....;

ii) for an agreed duration;

iii) in return for payment; and

iv) has the right to occupy that area as owner and to exclude others from
20 enjoying that right.

All of those characteristics must be present.

Where a licence to occupy is granted together with other goods and services as part of a single supply, the nature of the overarching supply will determine how it should be categorised for VAT purposes.”

25 13. The Appellant states that those criteria are all met in this instance.

14. The Appellant further avers that the concessionaire is in a not dissimilar position to someone with a pitch at a car boot sale and that is generally accepted to meet the criteria.

The Appellant’s other contentions

30 15. The catering concession is not an ambulatory concession as the concessionaire can only operate from the car park (It was originally argued that the concessionaire could only operate from the marked bay but see paragraph 6 above).

16. The concessionaire has been provided with a licence to occupy land for the purpose of providing “cold catering” and not with a season ticket to park the vehicle.
35 It is not the policy of the Appellant to charge for car parking at the seafront.

HMRC’s principal argument

17. HMRC argue that the supply made is not a licence to occupy land. HMRC agree that for a transaction to be classified as a “licence to occupy”, and therefore be exempt under Group 1, Schedule 9 VATA 1994, it must have all the characteristics of “leasing or letting of immovable property” and that that would be the case if the criteria set out in paragraph 12 above are met. Their principal argument is that they are not all met. They concede that the occupation is for an agreed duration and for payment but dispute the other two criteria.

HMRC’s other arguments

18. HMRC argue that the supply made in terms of the catering concession is not an interest in land and nor is it the grant of a passive use of land. Accordingly the argument is that the Appellant is granting the concessionaire a licence to trade and not an interest in land.

19. Alternatively, if that argument were not accepted then HMRC state that the supply of the interest in land is merely an ancillary supply to the main supply being made by the Appellant namely the supply of a catering concession to sell relevant products. That concession allows the concessionaire to trade from a public area.

20. Lastly, if none of those arguments are accepted, HMRC argue that if there is a supply of an interest in land then it is a supply of car parking, which falls to be treated as standard rated in terms of the relevant legislation.

The law

21. We annex at Appendix 2, a Note of the Authorities to which we were referred and those Authorities are referred to herein by the abbreviated names. We annex at Appendix 3 the detail of the relevant legislative provisions.

22. The Appellant did not advance detailed arguments in regard to the Authorities. It was simply asserted that (a) *Temco* is authority for the proposition that an agreed duration is not the equivalent of a specified duration and it does not have to be continuous, and (b) *Sinclair* is authority for the proposition that “leasing or letting of immovable property” is the “passive provision of space” which is a defined area.

23. The Appellant did not refer to the legislation at all, relying only on the Public Notice.

24. HMRC based their arguments on detailed analysis of both the Authorities and the legislation.

25. We have considered both the Authorities and the legislation in some detail.

Discussion

26. Although we were not referred to *Sweden v Stockholm Lindö Parkab Case-150/99* (2001) STC 103 the Advocate General said at 126 “According to the case law of the Court of Justice, in order to determine the nature of a taxable transaction, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features ...” and at 113 “I would add, a salient and typical characteristics of a lease or let, that it necessarily involves the grant

of some right to occupy the property as one's own and to exclude or admit others, a right which is moreover linked to a defined piece or area of property”.

27. We also considered *Customs and Excise Commissioners v Mirror Group Newspapers plc* (Case C-409/98) (2001) where at 27 the Advocate General said “In order to identify the key features of a contract, however, we must go beyond an abstract of purely formal analysis. It is necessary to find the contract’s *economic purpose*, that is to say the precise way in which performance satisfies the interests of the parties. In other words, we must identify the element in which the legal traditions of various European countries term the *cause* of the contract and understand as the economic purpose, calculated to realise the parties’ respective interests, lying at the heart of the contract. In the case of a lease, as noted above, this consists in the transfer by one party to another of an exclusive right to enjoy immovable property for an agreed period ...”.

28. He went on to say at 29, that Advocate General Alber stated in his Opinions in the road tolls cases to the effect that “it was necessary to look to the “chief purpose” of the contract between the parties.... The Court, too, in its judgements in those cases regarded the purpose which the contract serves for the parties thereto as the decisive factor.”

Characteristic features of the catering concession

29. When we look at this transaction we must look at all of the circumstances in which the transaction takes place in order to identify its characteristic features. What do we have in this case?

30. It is clear to us that the catering concession is simply a means of allowing the supply, which is the subject matter of the catering concession, namely the right to sell ice cream and similar provisions at the seafront during defined hours on certain months in the year.

31. The features of the catering concession which lead us to this conclusion are:-

(i) It is primarily concerned with precisely how ice cream and other products are sold at the sea front. For example, the sale of hot food is specifically excluded in the first paragraph, it is specified in the second paragraph that no glass bottles or crockery are to be issued to customers, and the sixteenth paragraph provides that a well mannered approach to the public is to be maintained at all times.

(ii) The vehicle utilised has to satisfy the requirements of the Head of Estates and be approved by the Environmental Health Manager of the Appellant (Paragraphs four and five).

(iii) Paragraph eight specifies the provision by the concessionaire of a litter bin / basket and the frequency and extent of litter removal from “the site”. The litter in question is described as “litter associated with the catering rights granted by this licence”.

(iv) The nomenclature, “Catering Concession”, taken with the preamble, which follows, describing it as the “sole right to provide catering

facilities” clearly indicates that the parties thereto considered that it related to the right to sell ice cream and other refreshments.

5 32. We agree with Lord Millett in *Skatteministeriet* at paragraph 41 where he refers to recent jurisprudence in the European Court and states... “The characteristics of a letting must be predominant in the contract. Where the use of the property is of secondary importance, this requirement is not satisfied. Accordingly the purpose of the contract and the importance of the use of the property to the recipient of the supply are relevant in determining whether the contract should be characterised as a letting of immovable property.”

10 33. They do not in this case. We find that the use and enjoyment of the site was of secondary importance since the concessionaire could indeed park anywhere within the car park. The real subject matter of the catering concession was the right to make ice cream supplies etc. We do not consider that the right to sell ice creams etc was merely a consequence of the right to place the vehicle on to the premises. The introduction of
15 the vehicle on to the site was the primary means by which the parties achieved the joint objective of allowing ice creams etc to be sold on the sea front. In that regard this case is very similar to *Skatteministeriet*.

Both Parties’ Principal Argument – Licence to Occupy

The two criteria in dispute

20 *Is there a defined area?*

34. Whilst the particular parking space is painted out and described as “reserved for ice cream seller”, there are no signs nearby indicating that parking in that space will create a problem. Clearly anyone can park there if the ice cream seller is not there; it is open to the general public for large portions of the year.

25 35. Mr Colledge did confirm that if the concessionaire contacted the Council, were somebody else to be parked in the space, then either someone would come from the Council to ask the person parked to move, or alternatively, and in our opinion far more likely, the concessionaire would be allowed to park elsewhere in the car park.

30 36. Obviously the concessionaire would wish to utilise the prime parking space which constitutes the site but (s)he would have no recourse whatsoever if other vehicles were parked there. Given the lack of any Notices etc, the concessionaire’s right to exclusive use of the site is not supported in any tangible way by the Appellant. The white markings are there for the very large portions of the year when the concessionaire has no right to the use of the site. Further, the catering concession
35 specifically provides at paragraph 9 that the site cannot be fenced and at paragraph 13 that the Appellant can alter the position of the vehicle in the car park “if necessary”. There is no period of notice provided for that whereas in the following paragraph a mere five days notice must be given if works to the car park are necessary.

40 37. We find that there is a defined area that **can** be used in return for payment but it does not have to be used and may not be available for use at no or very short notice and the concessionaire has no recourse in those circumstances. The payment would still be required.

Is there a right to occupy that area as owner and to exclude others from enjoying that right?

38. It follows from the immediately preceding paragraphs that we find that although there is a right to occupy the site during the allotted hours there is absolutely no power to exclude others and that for the reasons given.

Decision

39. In the interests of simplicity, in the immediately preceding paragraphs we have dealt with “licence to occupy” within the confines of the Public Notice since that was the approach adopted by the Appellant. We made it explicit in the course of the Hearing that HMRC’s Public Notices, whilst no doubt valuable to many, are simply their interpretation of the relevant legislation and the Tribunal has jurisdiction only to find the facts in the case and then apply the relevant law. The Public Notices are not the law.

40. It is settled case law that the exemptions provided for by Article 13 of the Sixth Directive have their own independent meanings in community law and that they must therefore be given a community definition. Further, the terms used to specify the exemptions provided for by Article 13 must be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. The Appellant is a taxable person.

41. There is no definition of the wording in Article 13B(b) of “leasing or letting of immovable property”. However, it is clear that the fundamental characteristic of a letting of immovable property for the purposes of that Article lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right.

42. The parties were in agreement that the Public Notice did adequately and correctly reflect that.

43. We find that these criteria were not all met on the facts of this particular appeal.

44. Since we find for HMRC on the principal argument for both parties, the appeal is dismissed for the reasons given.

Other Arguments

45. In the interests of completeness, and since we certainly considered the other arguments, we record our decisions thereanent. We have conflated the various assertions and /or arguments since they fall together naturally.

General

46. In summary, the concessionaire has no real control of the site. If another vehicle is parked in that space the concessionaire has no right of recourse. The concessionaire would not be able to park his own vehicle in that space. The concessionaire has no significant rights of possession or control.

47. The occupation of the site, under the terms of the catering concession, is simply the means to enable the supply of ice cream and other products.

Parking

5 48. It was argued for the Appellant that the supply simply could not be a supply of parking. The basis for that argument was that in order to park the driver would have to leave the vehicle. We do not accept that. In any event that argument is wholly incompatible with the suggestion that a council official would come down to speak to the driver of the “parked” vehicle occupying the reserved space. Many people park their vehicles, particularly at the seafront, and sit admiring the view consuming food, 10 chatting or whatever. The fact that they do not leave the vehicle does not render it any the less “parked”. HMRC argued that quite simply “parking is parking”. We find as a matter of fact that parking a vehicle involves rendering a moving vehicle stationary.

15 49. There is another argument, not articulated by the Appellant, as to whether or not the parking is ancillary to the other factors. In fact, we find that it was ancillary to the catering concession.

Car boot pitch

20 50. As we indicate at paragraph 32 above, the fact that HMRC say in the Public Notice that supply of car boot sale pitches is exempt is not relevant to our deliberations. We have not considered, and would not in the context of this appeal, the supply of car boot sale pitches.

Conclusion

51. For all these reasons this appeal is dismissed.

25 52. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. The parties are referred to “Guidance to accompany a Decision from the 30 First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 19 May 2014

Catering concession – 2011, 2012 and 2013 seasons

- 5 This licence is for the sole right to provide catering facilities for three consecutive seasons from 1 April 2011 to 30 September 2011 and Good Friday or 1 April 2012 (whichever falls first) to 30 September 2012 and Good Friday or 1 April 2013 (whichever falls first) to 30 September 2013 at Salterns Road Car Park, Hill Head (as shown on the attached plan).
- 10
1. The licence will be for the sale of ice creams, ice lollies, choc ices, hot and cold “non alcoholic” refreshments, milk, snacks e.g. sandwiches, chocolate, confectionary, crisps, cakes and fruit – NO HOT FOOD.
 - 15 2. No glass bottles or crockery to be issued to customers.
 3. The vehicle will be allowed on the site between the hours of 9.00am and 9.30pm only, between the seasonal dates listed above. The vehicle must be attended at all times and must not be left on site overnight.
 - 20 4. The licensee is to provide her/his own mobile vehicle which is to satisfy the requirements of the Head of Estates.
 5. The mobile vehicle must be approved by the Environmental Health Manager and is to comply with all Food and Hygiene Regulations.
 - 25 6. The Licensee to be responsible for the payment of all rates, taxes, insurance (including third party insurance) and other outgoings.
 - 30 7. The Licensee to indemnify the Council against any claim which may be made against the Council arising out of the exercise of the licence granted. The sum insured not to be less than £5,000,000 and the policy is to be produced to the Council.
 8. The Licensee to keep the site in a clean and tidy condition at all times and shall provide a suitable litter basket for customer use. The litter bin must be emptied daily and the licensee should undertake a thorough litter pick and removal from site of all litter associated with the catering rights granted by this licence. All rubbish and litter must be removed from site and disposed of properly at the end of each trading day.
 - 35 9. The Licensee will not be permitted to fence the site.
 10. The name and address of the Licensee MUST be legibly displayed on the vehicle.
 - 45 11. The vehicle must be removed at the expiration of the licence period (howsoever determined) and the site must be left in a clean and tidy condition.
 12. The Licensee shall bear the Council’s legal costs, if any, in the preparation of the licence.

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13. The Borough Council reserves the right to alter the position of the vehicle within the car park if necessary.
- 5 14. The Borough Council reserves the right to temporarily suspend this agreement on 5 days notice should works to the car park be necessary.
15. If any of the above terms are not complied with the licence may be terminated by the Borough Council forthwith.
- 10 16. The licensee to ensure that a well mannered approach to the public is maintained by the operator at all times.
17. The licensee to ensure that upon leaving the site each day full consideration is shown to the neighbouring residents. No noise disturbance will be tolerated.
- 15 18. The licence fee for the 2011 season is £9,850 with an automatic 5% increase for the 2012 season (namely £10342.50) and a further 5% increase for the 2013 season (namely £10859.63). Each season the licence fee is to be paid in full and in advance.
- 20 19. The licence will be personal to the licensee and will not be assignable.

APPENDIX 2

1. Decision of the ECJ in *Skatteministeriet v Morten Henriksen* (C-173/88).
- 5 2. Decision of the House of Lords in *Customs & Excise Commissioners v Sinclair Collis Ltd* [2001] UKHL 30 STC 989).
3. Decision of the ECJ in *Customs & Excise Commissioners v Sinclair Collis Ltd* (C-275/01).
4. Decision of the High Court in *Customs and Excise Commissioners v Venuebest Ltd* ([2002] EWHC 2870 (Ch) [2003] STC 433).
- 10 5. Decision of the ECJ in *Etat belge v Temco Europe SA* (C-284/03).
6. Decision of the Upper Tribunal in *Honourable Society of the Middle Temple v Revenue and Customs Commissioners* ([2013] UKUT 0250 (TCC)).

The legislative provisions

- 5 1. Article 13B(b)(2) of Directive 77/388:-

Without prejudice to other Community provisions, Member States shall exempt the following under condition which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

- 10 (b) the leasing or letting of immovable property excluding:

(2) the letting of premises and sites for parking vehicles.

2. Article 135 of Directive 2006/112:-

135(1) Member States shall exempt the following transactions:

(l) the leasing or letting of immovable property.

- 15 135(2) The following shall be excluded from the exemption provided for in point 1 of paragraph 1:

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

3. Item 1, Group 1, Schedule 9 VATA 1994:-

20 The grant of any interest in or right over land or any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right other than - ...

(h) the grant of facilities for parking a vehicle.