



TC04428

Appeal number: TC/2013/08136

VAT – Craft fairs organised by appellant – General public charged admission – Space sold to stallholders to sell their products – Whether supply to stallholders an exempt supply of a licence to occupy land or composite supplies of taxable services comprising of the organisation of a craft fair – Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**KATI ZOMBORY-MOLDOVAN
trading as CRAFT CARNIVAL**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
JOHN ROBINSON**

Sitting in public at the Royal Courts of Justice, London, on 7 and 8 May 2015

Philippa Whipple QC, instructed by Cubism Law, for the Appellant

**Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. Craft Carnival, the sole trade of Mrs Kati Zombory-Moldovan, is a business that organises craft and garden fairs in and around Dorset. Spaces are sold to businesses and individuals involved in various crafts to enable them to sell their products at a Craft Carnival fair to which the general public are admitted on payment of a reasonable entrance charge. Following her registration for VAT, which took effect from 1 August 2003, Mrs Zombory-Moldovan has accounted for VAT on the admission fees paid by the public but not on the supply of spaces to stallholders which she has treated as an exempt supply of land.

2. However, HM Revenue and Customs (“HMRC”), in a letter dated 15 May 2013, notified Mrs Zombory-Moldovan that the supplies to stallholders were “not capable of falling within the land exemption” but should more properly be described as a “package of services” taxable, at the standard rate, the purpose of which was to provide the stallholders with an opportunity to trade. This decision was upheld following a review. Mrs Zombory-Moldovan was notified of this in a letter from HMRC dated 24 October 2013. On 21 November 2013 she appealed to the Tribunal.

3. Ms Philippa Whipple QC, who appeared for Mrs Zombory-Moldovan, contends that only the right to use an allocated space is supplied to the stallholder and, as this meets the EU law criteria of “leasing or letting of immoveable property” it is an exempt supply. Alternatively, if, as HMRC contend, there are supplies “above and beyond the right to use the particular space” she submits the supply in question remains exempt either because there is a single supply of property which predominates to which the other elements are ancillary or because there are a number of essential elements making a composite whole, the essential feature of which is the right to land.

4. Miss Hui Ling McCarthy, who appeared for HMRC, argues that rather than an exempt licence to *occupy* land Mrs Zombory-Moldovan supplies stallholders with a taxable licence to *use* land. She contends that the land, like food in the supply of restaurant services, is not ancillary but of central and indispensable importance to a single supply, namely the organisation of a craft or garden fair at which stallholders are able to exhibit their wares for sale.

Evidence

5. In addition to the sworn oral evidence of Mrs Zombory-Moldovan we were provided with a bundle of documents. These included copies of correspondence between the parties, copy of a letter sent to potential stallholders, comments from exhibitors and visitors to craft fairs organised by Craft Carnival, the *Craft Carnival Craft and Garden Fairs 2014* brochure, price lists for stallholders, pages from Craft Carnival’s website as well as copies of the booking forms for stallholders with terms and conditions attached.

6. On the basis on this evidence we make the following findings of fact.

Facts

7. Mrs Zombory-Moldovan, trading as Craft Carnival, has organised craft fairs at various venues in and around Dorset since 1988. In a typical year there would be five or six such fairs with each taking place over the two days of a weekend or three days of a Bank Holiday weekend. Although some are held wholly or mainly indoors most fairs take place on land close to a stately home or historic property such as Sherborne Castle, Kingston Lacey or Somerley.

8. As the “Welcome” page on its website explains:

Craft Carnival organise major craft and garden shows at unique and beautiful venues in and around Dorset.

Each of our events showcase a tempting range of the best traditional and contemporary crafts, where you can see and meet crafts people in action and choose from a wide variety of handmade items – or commission something special.

Crafts range from woodturning to fine jewellery, from the handmade pottery to one-off fabrics, and from ironworking to traditional hurdle-making. Our exhibitors create special and highly desirable objects of utility and beauty from almost every imaginable material, using age old skills which can take many years to master.

Most of our events also feature a huge selection of plants, garden furniture and ornaments from specialist suppliers, always ready to give practical advice if you need it. There is something for every garden lover, whether you are looking for a rare herb or fine traditional handmade outdoor furniture that will stand the test of time.

All of our shows take place in and around specious marquees, with a separate refreshments tent. The marquees at our Christmas event at Kingston Lacey are heated. Even if the weather is unpredictable, there is always plenty to see and do under cover!

Although this would appear to be directed towards the public who would pay to attend the fairs the website provides a link for “Exhibitors” to provide their details to receive information about booking stalls.

9. In addition to the erection of marquees, which are hired for the duration of a fair, Mrs Zombory-Moldovan arranges for the provision of other necessary temporary facilities including portable toilets, electrical generators and security fencing. She also employs between five and seven members of staff to act as ticket sellers and car park marshalls. Before the fair takes place Mrs Zombory-Moldovan would have issued a press release and advertised the event in local newspapers and on Craft Carnival’s website and booked a children’s entertainer, such as a magician, to encourage families to attend.

10. However, no promises are given to stallholders by Mrs Zombory-Moldovan regarding the pre-show advertising and publicity or number of visitors likely to attend. That said, depending on the time of year and venue, a fair can attract between 40 to 110 stalls with 20% to 30% being taken by regular stallholders and be attended by between 1,200 and 3,500 paying visitors. In 2014 admission prices varied from £4.50 and £5.00 depending on the venue with free admission for accompanied children.

11. Mrs Zombory-Moldovan explained that the business is cyclical. During spring and summer each year she identifies potential fair venues for the following year. These include places such as historic houses within easy reach of major population centres which have plenty of firm level ground and good vehicular access. She then approaches the owner or managing agent of the property and negotiates a licence of letting agreement allowing a fair to take place on the land over a given weekend (including access immediately before and after the event). In most cases a fixed rent or licence fee is agreed, usually in accordance with terms and conditions prepared by the landowner, although in some cases Mrs Zombory-Moldovan has agreed to pay the landowner by way of a percentage of the admission charges paid by visitors.

12. Following agreement with the relevant landowner Mrs Zombory-Moldovan arranges for the production of Craft Carnival's annual brochure listing the fairs for the year. These are sent to some 4,000 craft workers and gardening goods suppliers on her mailing list in September/October.

13. The covering letter sent to exhibitors enclosing the *Craft Carnival Craft and Garden Fairs 2014* brochure highlighted that the stall fees remained unchanged for fairs in 2014 and referred to "special discounts", 10% if a stall was booked before 30 November 2013 and 10% of all six shows were booked. Also that an extra three feet of space was offered "absolutely free" to those stallholders who demonstrated their craft, noting that demonstrators "always enjoy extra sales!"

14. The brochure itself consists of colour photographs of the venues and provides a price list showing the discounts referred to in the covering letter. Its first page states:

We have pleasure in inviting you to sell and demonstrate your work at the best fairs in the region

It continues:

Our 27 years of experience as organisers – above all, listening to what you, the exhibitor, and your customers, the visiting public have to say – go into every Craft Carnival event.

Prestigious settings; quality products; extensive advertising and publicity; caring about the little things that create a friendly and relaxed atmosphere on the day, so that visitors are ready to buy from you – together these are the things that make our shows unique.

Our affordable stall prices and reasonable entrance charges ensure that you reap the financial rewards you deserve at a Craft Carnival fair. Everything we do is designed to make your experience of our events pleasurable and stress-free, as well as profitable. Your comments and suggestions are always welcome and, as ever, we will do our best to accommodate any special requirements you may have.

15. To participate in a fair a potential stallholder must complete a booking form and agree to Craft Carnival's terms and conditions (which we set out below) and decide whether an indoor or outdoor pitch is required.

16. An indoor pitch, which is selected by approximately 60% of stallholders, is generally inside a marquee or occasionally a building and consists of an area 10 feet by six feet. It is demarcated by a trestle table which is made available with two folding chairs to each stallholder. However, a stallholder is not required to have the trestle table and chairs and may choose to use their own display fittings and furniture

within the space provided. Stallholders are also given an option of having an electricity supply point at a fixed cost of £30 to enable them to light their displays and approximately 20% of them take up this offer.

5 17. A scale plan indicating the allocation of the indoor pitches is attached to a board outside the marquee and an A4 sheet of paper with the stallholders name is placed on the trestle table marking the space allocated to the stallholder as shown on the plan. The allocation of spaces is at the sole discretion of Mrs Zombory-Moldovan although she does, where possible accommodate any requests for a particular location within the marquee.

10 18. Nothing is provided to the stallholders who take an outdoor pitch. This consists of a 20 foot square patch of ground demarcated by posts with a sign stating the name of the stallholder who is free to erect a tent or gazebo and arrange their items for display. Although it is possible on some occasions to provide electric power points to outdoor pitches this is very much the exception and generally these are not offered.

15 19. At some venues on site overnight camping in caravans or campervans is offered to stallholders free of charge with the agreement of the landowner provided prior notice is given to Mrs Zombory-Moldovan. She explained that this was to help stallholders from further afield who had to travel to the fair and was offered on a “first come first served” basis without the provision of any kind additional services. If this
20 was offered Mrs Zombory-Moldovan would typically expect 10 to 15 stallholders to take stay on site.

20. On receipt of a booking form, provided that there is space at the particular fair and everything is in order, Mrs Zombory-Moldovan returns an acceptance form, which includes a photocopy of the booking form and terms and conditions, to the
25 stallholder to confirm the booking. A few weeks before the fair “setting-up” instructions are sent to the stallholder often together with fliers advertising the fair and two complimentary tickets for the stallholder to distribute to favoured customers. The allocation of the pitches for each stallholder are decided by Mrs Zombory-Moldovan a few days before the fair.

30 21. Feedback and comments from exhibitors and visitors to Craft Carnival’s fairs, which is taken from the covering letter sent to potential stallholders with the *Craft Carnival Craft and Garden Fairs 2014*, includes:

- 35 • “What a fantastic location/show Sherborne Castle was! We were in awe of the venue, and – the icing on the cake – sales were really good.” (J.M., Fordingbridge)
- “We look forward to being with you again next year. We did well at all your shows this year; enjoyed the company of other stall holders and the clientele were also very pleasant.” (H.H., Bournemouth)
- 40 • “We visited your lovely craft fair today at Kingston Lacy. It was lovely and my wife and I bought many things. Thank you for your organisation” (P.T., by email)
- “The Kingston Lacy Craft and Garden Fair last weekend was brilliant for us (50% sales up this time) and lovely to see so many people attending no matter what the weather!” (K.S., Blandford)
- 45 • “Just wanted to say how much I enjoyed the show. I had good sales and would like to thank you for organising such a ‘comfortable’

show – it was easy to get in and out, well signed and generally a pleasure.” (S.B., Solihull)

- “Great organisation and a nice crowd of exhibitors. As a fairly ‘new member’ we’ve enjoyed a good welcome (W.S., Cardiff)
- 5 • “I would recommend Craft Carnival to any stall holder.” (S.W., Southampton)
- “I really do look forward to exhibiting at your shows. Not only are they very professionally run – they are fun too!” (S.S., Essex)

Terms and Conditions

10 22. Although each craft fair has its own stallholder booking form, the details required and terms and conditions are common to all events organised by Craft Carnival. We have taken those for the 2014 Easter Craft and Garden Fair at Somerley as an example as not only is it the first event in the *Craft Carnival Craft and Garden Fairs 2014* brochure but is the one to which we were referred by counsel.

15 23. This fair was held over the Easter weekend on 19-21 April 2014 and is described in the following terms in the *Craft Carnival Craft and Garden Fairs 2014* brochure:

20 Our show occupies the elegant parkland which looks onto Lord Somerton’s graceful stately home. Marquee and outside stall spaces are available. There is easy setting up on the level ground and plenty of parking for exhibitors next to the showground. Friday setting up and free caravan spaces available.

see more of Somerley at [website details provided]

Stall fee for the three days:

25 Marquee (10 x 6 feet minimum including 6-foot table and chairs) or outside space (20 x 20 feet minimum) £180.

electric point £30

30 The booking form for this event requires a stallholder to provide details of his or her name and address and telephone number and the “type of craft” with which he or she is involved and to state if there are any “special requirements”. There are also boxes for the stallholder to tick to indicate if they want a stall inside a marquee or outside, whether an electric point is required and whether they will be demonstrating their craft. After indicating, by ticking a box, how payment is to be made (eg by cheque or bank transfer) the stallholder is required to sign and date the form confirming:

35 I have read and agree to the Terms and Conditions on the reverse of this form and I understand that I am responsible for my own insurance at the show.

24. The Terms and Conditions (“T&C”) to which the stallholder agrees (and which are relevant to this appeal) are as follows:

- 40 1. These Terms and Conditions and the details overleaf [ie the booking form] are the entire terms upon which the person signing the booking form overleaf, or on whose behalf it is signed, of the address given overleaf (“the Exhibitor”) offers to enter into a contract (“the Agreement”) with Kati Zombory-Moldovan, trading as Craft Carnival, successors in business and assigns (“the Organiser”) for a licence to
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use a stall or pitch at the event specified overleaf (“the Show”) to offer certain goods for sale.

5 2. The Organiser may accept or decline the Exhibitor’s offer. Acceptance shall be by post sent to the Exhibitor’s stated address. If the Organiser declined the Exhibitor’s offer, any deposit and other payment tendered in respect of the offer will be returned to the Exhibitor.

10 3. It is a condition of the Agreement that all goods displayed or offered for sale at the Show by or on behalf of the Exhibitor conform to the description of the Type of Craft given overleaf, and to other information given by the Exhibitor to the Organiser including as to origin, materials, means of manufacture and identity of maker.

15 4. The Organiser will endeavour to accommodate any Special Requirements specified by the Exhibitor overleaf insofar as reasonable and practicable, but neither these nor their satisfaction constitute a term of the Agreement.

20 5. The Organiser reserves the right to cancel the Show, in which case the Agreement shall be discharged and the Organiser shall repay to the Exhibitor any deposit and stall fee paid under the Agreement, which the Exhibitor agrees to accept in full and final settlement of any claim against the Organiser arising from such cancellation. In the event of a cancellation of the Show after its commencement, the Organiser shall repay to the Exhibitor, and the Exhibitor shall accept on the said terms, a pro-rata portion of the stall fee in respect of the unexpired portion of the Show, but all indemnities and exclusions and limitations of liability herein shall continue in force.

25 6. ...

30 7. The Exhibitor agrees as a condition of the Agreement, before, during, and at the setting up and taking down of the Show, to abide by, and to cause his servants and agents to abide by, such directions for its safe, lawful, proper, orderly and convenient conduct as the Organiser may at his sole discretion determine.

 8. ...

35 9. The Organiser shall licence the Exhibitor, his servants, agents and members of his party, subject to their lawful, safe and proper conduct at all times, to enter and remain upon the site of the Show during the hours that it is open to the public, and for reasonable periods for setting up and taking down, for the purposes related to the proper conduct of the Show. This licence is subject to the condition (which is also a condition of the Agreement) that the Exhibitor, his servants, agents and members of his party enter, remain upon, leave, bring property to, keep property at and remove property from the site of the Show entirely at their own risk. So far as the law allows, the Organiser shall not be liable to the Exhibitor, his servants, agents or members of his party in respect of loss or damage to the Exhibitor’s property, that of his servants, agents or members of his party, economic loss, or personal injury to or death of the Exhibitor, his servants, agents or members of his party, occasioned (however indirectly) by their presence at the Show, its taking up or setting down, whether in the exercise of this licence or otherwise, under the Occupiers’ Liability Acts 1957 and 40 1984 or otherwise, and caused by any negligent act or omission or breach of statutory duty or contractual term, express or implied, in statute or common law, of the Organiser, his servants or agents, or any
45 50

5 third party. The Exhibitor warrants that he will not cause, permit or suffer any agent, servant or member of his party to enter or remain upon the site of the Show except on the terms of this conditional licence and having notified them of its provisions beforehand, and agrees to indemnify the Organiser against any liability of the Organiser arising wholly or in part (however indirectly) from any breach of this warranty.

10. – 13. ...

10 14. The Exhibitor warrants that, in entering into the Agreement, he is not acting in reliance upon any other representation or warranty, express or implied, made by the Organiser, his servants or agents. No purported variation or waiver of any term of, or amendment of or addition to, the Agreement shall bind or avail either party unless made in writing and signed by both parties

15 25. Mrs Zombory-Moldovan confirmed that she does not accept every booking request received but selects only stallholders whose crafts are appropriate to the particular fair. She agreed, when cross-examined, that she would not allow unsuitable goods to be sold by a stallholder and said that she has turned down booking requests from potential stallholders who were offering tarot card readings and face painting.

20 26. Although under clause 5 of the T&C the Organiser may cancel a show Mrs Zombory-Moldovan told us that such she has never had to do so but when questioned about this speculated that if, for example due to adverse weather, a site became too muddy and unsafe to use she might have no alternative but to cancel. She also confirmed that a stallholder who, having booked a space, failed to attend the fair
25 would not be entitled to a refund and, while to her knowledge it had never occurred, Mrs Zombory-Moldovan again speculated that if there was an empty space due to the failure of a stallholder to attend she might put Craft Carnival leaflets on the trestle table and/or fill any empty space with chairs for visitors to sit on.

30 27. As for admission to a fair, included in clause 9 of the T&C, for the “Exhibitor, his servants, agents and members of his party” Mrs Zombory-Moldovan explained that in general the stallholder and his or her partner would be admitted to the fair without payment but that any additional people accompanying him or her, who did not make use of the two complimentary tickets provided to the stallholder, would be charged for admission as a member of the general public.

35 **Legislation**

28. Insofar as it applies to the present case, Article 135 of Directive 2006/112/EC, the Principal VAT Directive (“PVD”), provides:

1. Member States shall exempt the following transactions:

(a) – (k) ...

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

29. This exemption has been implemented into domestic law by Group 1 of schedule 9 to the Value Added Tax Act 1994 (“VATA”) in respect of:

The grant of any interest in or right over land or of any licence to occupy land.

Authorities

Economic Reality

30. It is not disputed that to determine the nature of a supply it is necessary to have regard to the economic reality of any arrangements. As Lord Reid observed in *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] STC 784, at [38]:

“... when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place.”

31. A similar approach was adopted by the Supreme Court in *HMRC v Secret Hotels2 Ltd* [2014] STC 937 in which Lord Neuberger, under the sub-heading “The correct approach in domestic law”, said:

“31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.

32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:

“The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.”

Single or Multiple Supplies

32. The issue of single or multiple supplies has been considered by the Tribunal and appellate courts on many occasions and is probably the issue that has most frequently been referred to the Court of Justice of the European Union (“CJEU”) or the European Court of Justice (“ECJ”) as it was previously known.

33. Roth J in *HMRC v Bryce (t/a The Barn)* [2011] STC 903, having considered the authorities and cited the principles summarised by Patten LJ at [8] of *HMRC v Baxendale* [2009] STC 2578, said, at [23]:

“Rather than prolonging this judgment by including again a recitation of the facts and quotations from judgments in the leading ECJ and House of Lords cases, that summary can be amplified by the following propositions and, indeed, from *Baxendale* itself:

5 (a) Every supply of a service must normally be regarded
as distinct and independent. However, a transaction which
forms a single supply from an economic point of view
should not artificially be split into separate supplies: Case
10 C-349/96 *Card Protection Plan Ltd v Customs and Excise
Comrs* [1999] ECR I-973, [1999] STC 270, para 29.

(b) For this purpose, regard must be had to all the
circumstances in which the transaction takes place: *Card
Protection Plan*, para 28.

15 (c) There is a single supply where one or more elements
are to be regarded as constituting the principal supply,
whilst one or more elements are to be regarded by contrast
as ancillary to that principal supply: *Card Protection
Plan*, para 30.

20 (d) However, the fact that one element in a package
supplied cannot be described as ancillary to another
element does not mean that it is to be regarded as a
separate supply for tax purposes. The question is whether
those separate elements are to be treated as separate
25 supplies or merely as elements in some over-arching
single supply: *College of Estates Management v Customs
& Excise Comrs* [2005] UKHL 62, [2005] STC 1597,
[2005] 1 WLR 3351, per Lord Rodger of Earlsferry at
[12].

30 (e) In that regard, the test is whether the various elements
supplied to the customer are so closely linked that they
form, objectively, a single indivisible economic supply,
which it would be artificial to split: Case C-41/04 *Levob
Verzekeringen BV v Staatssecretaris van Financiën*
[2005] ECR I-9433, [2006] STC 766, para 22

35 (f) It is important to take an overall view at the level of
generality that corresponds with social and economic
reality, without over-zealous dissection: *Dr Beynon* per
Lord Hoffmann at [31]; *Card Protection Plan* [2001]
40 UKHL 4, [2002] 1 AC 202, [2001] STC 174, per Lord
Slynn at [22].

(g) The assessment should be made from the perspective
of the customer, as a typical consumer, not the supplier:
Levob, para 22; *Weight Watchers* at [17].

45 (h) The fact that a single price is charged for two or more
elements is a relevant factor pointing to single supply but
it is not decisive: *Card Protection Plan* (in ECJ), para 31.
Similarly, the fact that separate prices are stipulated for
various elements is not decisive where the two elements
50 have an objective close link such that they form part of a
single economic transaction: *Levob*, para 25.

(i) The fact that the same or similar goods or services
could be supplied separately from different sources is

irrelevant to the question whether in the particular transaction under consideration their combination produces a different economic result: *Baxendale* at [24], following Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] ECR I- 897, [2008] STC 3132.

(j) The test is not whether the different elements in the services provided by the taxpayer to its customers have value and utility in their own right: *Baxendale* at [39].”

34. In *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] STC 774, which concerned supplies of food for consumption on ferries operating between Germany and Denmark, the ECJ said:

“12. In order to determine whether such transactions constitute supplies of goods or supplies of services, regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features.

13. The supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a recipient, whilst at the same time an infrastructure is placed at the customer' s disposal, including a dining room with appurtenances (cloak rooms, etc.), furniture and crockery. People, whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten.

14. Consequently, restaurant transactions are characterized by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of Article 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to "take-away" food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting.”

35 *Leasing or Letting of Immovable Property*

35. As an exemption from VAT, and an exception to the general principle that all supplies should be subject to VAT, it is accepted that Article 135(1)(1) PVD should be strictly construed.

36. Although not defined in Article 135, “leasing or letting of immovable property” has its independent European law meaning under which the fundamental characteristics of such a supply confer on the person concerned, for an agreed period and for payment, the rights to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see Case C-150/99 *Sweden v Stockholm Lindöpark* [2001] STC 103 and Case C-284/03 *Belgian State v Temco Europe SA* [2005] STC 1451 (“*Temco*”).

37. In its decision in *Temco* at [20] the ECJ stated:

“While the Court has stressed the importance of the period of the letting in those judgments, it has done so in order to distinguish a

5 transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financien* (Case-236/99) [2003] STC 1137, [2001] ECR I-6831, paragraph 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in Article 13B(b)(1) to (4) of the Sixth Directive, or have as their subject-matter something which is best understood as the provision of a service rather than simply the making
10 available of property, such as the right to use a golf course (*Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, paragraphs 24 to 27), the right to use a bridge in consideration of payment of a toll (*EC Commission v Ireland* (Case C0358/97) [2000] ECR I-6301) or the right to install cigarette machines in commercial
15 premises (*Sinclair Collis Ltd v Customs and Excise Comrs.*, (case C-275-01) [2003] STC 898, [2003] ECR I-5965, paragraphs 27 to 30).”

38. In *Sinclair Collis Ltd v Commissioners of Customs and Excise* [2003] STC 898, the issue for the ECJ was whether an agreement for the installation and operation of cigarette vending machines in public houses, clubs and hotels was a supply of leasing
20 or letting of immovable property. The Court stated:

“27. According to the information supplied by the national court, the subject matter of the agreement is not the passive provision of an area or space, together with the grant to the other party of a right to occupy it as though he were the owner and to exclude all other persons from
25 the enjoyment of that right.

28. That finding is supported, first of all, by the fact that the agreement does not prescribe any precisely defined area or space for the installation of the vending machines at the premises. Contrary to the position in relation to the characteristics of a letting, the location of the
30 machine is material only in so far as it enables the maximum possible number of sales to be generated. Subject to that criterion, under the agreement there is nothing to prevent the machines from being moved about, to a degree, as the site owner wishes.

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

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

39. However, the “right to occupy property as owner” should not be assumed to be co-extensive with the concept of exclusive possession in domestic law. As the Tribunal (Judge Raghavan and Mrs Watts-Davies) noted in *The Principle & Fellows of Lady Margaret Hall v HMRC* [2014] UKFTT 1092 (TC) at [164]:

5 “... there is no reason to suppose that the concept of exclusive
 possession as set out in the European case law must be co-extensive
 with the concept of exclusive possession as that term is understood in
 domestic law as a fundamental characteristic of leases (as opposed to a
10 licenses). What is fundamental is the ability to exclude others from
 occupying as owner.”

40. An ability to exclude others did not exist in *Walderdorff v Finanzamt Waldviertel* [2008] STC 3079 in which the ECJ noted:

15 “19. In the main proceedings, it is common ground that Ms
 Walderdorff entered into a contract with the angling club whereby, on
 payment of consideration she granted the right to fish in several areas
 of water for a period of 10 years. The Court has already ruled that an
 area which is wholly or partly underwater can itself be categorised as
 immovable property that can be leased or let (see, to that effect,
20 *Fonden Marselisborg Lystbådehavn*, paragraph 34, and Case C-166/05
 Heger [2006] ECR I-7749, paragraph 20).

25 20. As the Advocate General rightly stated in point 23 of her Opinion,
 all the criteria of the definition of leasing or letting of immovable
 property, set out in paragraph 17 of this judgment, must be satisfied.
 That includes, in particular, the criterion that the leasing or letting of
 immovable property must confer the right to occupy that property and
 to exclude any other person from it. However, that is not the case in the
 facts of the main proceedings.

30 21. It is clear from the order for reference that, under the contract
 entered into by Ms Walderdorff and the angling club, the club only has
 the right to fish in the bodies of water concerned. It is also clear from
 the documents submitted to the Court that the provisions of the
 contract of let state that Ms Walderdorff reserves the right to fish in
 those waters for herself and for one guest per day authorised by her.
35 Accordingly, under the contract in the main proceedings, the angling
 club does not have any right to exclude any other person from use
 either of the waters owned by Ms Walderdorff or of the publicly
 owned waters where she has fishing rights registered in the Fisheries
 register.

40 22. Consequently, it is unnecessary to rule on the issue whether a
 contract which grants fishing rights, such as that at issue in the main
 proceedings, relates to immovable property, since the Court must hold
 that one of the elements in the definition of the Community law
 concepts of leasing or letting immovable property which are employed
 within the Community system of VAT is lacking in the present case,
45 given that the contract for that grant, at issue in the main proceedings,
 does not confer on the angling club the right to occupy the immovable
 property concerned and to exclude any other person from it.”

Tribunal Decisions

50 41. We were also referred to the following decisions of the Tribunal and its
 predecessor, the VAT and Duties Tribunal.

42. *Tameside Metropolitan Borough Council v Commissioners of Customs and Excise* [1979] VATTR 93 which concerned the letting of market stalls by Tameside Metropolitan Borough Council. As the VAT Tribunal (Mr P A Ferns (Chairman)) noted:

5 “There are two classes of stallholder on the market ground, namely
regular stallholders referred to in the said Conditions and also casual
stallholders: the latter are not referred to in the Conditions. It is
important to observe that a p101 regular stallholder does not generally
10 occupy the same stall on each of the five days in the week on which he
may attend the market; but he does occupy the same stall on the several
days of the week on which he attends and that stall is the stall in
respect of which he has become by usage the regular stallholder. In
15 other words a regular stallholder will always occupy stall A on a
Monday, stall B on a Wednesday, stall C on a Thursday and so on. The
regular stallholders are persons who by virtue of long attendance in the
market have attained a privileged position in respect of a particular
stall or stalls which entitles them, by what can only be described as a
20 local market custom, to the prior claim to a certain stall on the day of
the week on which he is the regular stallholder in respect of that stall.
But in order to become a regular stallholder or, more accurately, to
graduate from being a casual stallholder, regular attendance at the
market over a number of years is required and careful records on a
25 points system are kept by Mr Poulter and his staff. Whereas a regular
stallholder will on arrival at the market proceed directly to his regular
stall for that day, to which he seems to be entitled not as of right but by
what we have for convenience earlier referred to as a local market
custom, a casual stallholder has no such prescriptive entitlement: he
30 must rely on the allocation by the Markets Manager of a stall which is
for the time being vacant. These matters are governed by the various
sub conditions of Condition 3, but clearly local custom takes the matter
considerably further than the mere letter of those conditions. It is
apparent from sub condition 3.1. that one of the ways in which a stall
35 may become available for casual occupation is by reason of the
nonattendance of the regular stallholder by 10 am and in this event the
provisions for payment contained in sub condition 5.1. become
operative. Having attained the status of a regular stallholder a trader is
bound to pay for his stall whether he occupies it or not and by reason
of sub condition 3.5. a regular stallholder will lose his privileged status
if he fails to pay for his stall for three consecutive weeks.

40 The Tribunal having found that there was the “quality of exclusivity” as when a
regular trader was in occupation “no other trader can sell from that stall” and as such
held that there was a “licence to occupy land”.

43. In *Firs W B Enever v Commissioners of Customs and Excise* (1537, 1983) the
Tribunal (Neil Elles (Chairman)) recorded that:

45 “Since sometime in 1977 the Appellant has been organiser and
promoter of Antique Fairs which are held on Sundays. She started this
as a hobby, but it has grown considerably in size. The general method
adopted by her is to enter into contracts with hotels or public houses
for the hire of rooms on a regular basis. Having hired a room for a
50 specified date she organises an Antique Trade Fair to take place. She
advertises this Trade Fair in suitable Trade Journals and newspapers,
and lets out spaces in that room to antique traders who reply to these

advertisements. The Appellant never takes part in selling but is present at these Antique Trade Fairs where she charges an admittance fee to members of the public, but not to traders taking part in the fair. We accept that the proceeds of these admission fees are given to charity.

5 The Appellant gave evidence which we accept that she had a contract with the Cumberland Hotel on a yearly basis for the hire of the Anglia Suite several times a year. She also had an annual contract with the Seven Hills Hotel at Cobham. No written contracts were produced to this tribunal but we find as a fact that contracts were entered into orally and were normally followed by letters of confirmation.

10 In the case of the Cumberland Hotel the Appellant hired the Anglia Suite together with the necessary tables and trestles. What the Appellant did was to allocate numbered tables to participating dealers, and a sketch of such allocation (Exhibit A2) was produced to this tribunal at the conclusion of the hearing.”

15 44. The issue in that case, clearly similar to that in the present case, was whether the Appellant in letting out space to antique dealers was making exempt supplies. The Tribunal concluded:

20 “In our unanimous judgment the allocation to Trade Dealers of "mobile" tables and trestles by reference to numbers on a sketch map not drawn to scale falls far short of amounting to a grant of the interest in or right over land or of any licence to occupy land. The right to hire such mobile tables and trestles seems to us to be fundamentally different from the grant of a right to use an established stall in a statutory market as in the *Tameside* Case. In our view what was granted in the present case was the right to use specified facilities in the Anglia Suite or other place. In our judgment the supply of such services for a consideration are taxable supplies chargeable with value added tax.

25 30 45. *Miller Freeman World-Wide Plc v Commissioners of Customs and Excise* (15452, 1997) concerned a business, Blenheim, organising exhibitions and conferences and the question for the Tribunal (R K Miller (Chairman)) was principally whether the supplies were to be regarded as “advertising services” or grants of licences to occupy land. The Tribunal noted:

35 “25. At some stage the specific area of the exhibition floor, the space which the exhibitor has contracted for, has to be determined and allocated. That time cannot be later than when work to erect the stand or, if it is a shell, to complete the stand commences. From then or at any rate when the exhibitor takes physical possession of the stand until the end of his clearing up of the stand after the exhibition has closed the exhibitor does have exclusive occupation of land, being that specific area of the floor of the hall which is taken up by his stand, in that he alone or by his servants has the right to and actually enjoys the use of that space. Thus in my opinion the exhibitor does, when Blenheim in accordance with its contract with him provides to the exhibitor the space which he has contracted for and for which he has already paid (the evidence was that if he had not paid before the opening he would not be allowed in), the exhibitor does, to use the words of Russell LJ in the rating case *Oswestry Corporation v. Hudd* [1966] 1 ALL ER 490; at pp 496 and 498, in highlighting this as being a significant feature of a licence to occupy land, enjoy for a measurable

period of time “a privileged position of special occupancy” in relation to a specific area of land.

5 26. It is obvious that the selling point made by Blenheim to potential exhibitors has to be the right to attend the exhibition and the opportunities for business that will give them. I accept that the success of Blenheim's business as an organiser of exhibitions depends upon its putting on exhibitions at which exhibitors get what they want so they come. That Blenheim's efforts as part of its business activities are also directed at trying to see that the right sort of potential customers turn up and in sufficient numbers makes the right of an exhibitor to be at the exhibition with his own stand likely to be more sought after. It increases the value of that right but not its nature, which is the right of the exhibitor to have his stand peculiar to him inside the exhibition to which his customers can come. The position in principle is no different to that of the stallholder with his own stall for the day in Tameside. That with a long established market, as in that case with competition amongst traders for available stalls, people come there to buy out of regular habit or because its existence is well known and so no special efforts on the part of the market owner are required to advertise it, is not in my view a significant difference changing the nature of what is being provided.

25 27. I can understand how an exhibitor may express his satisfaction with the quality and number of customers coming to his stand rather than singing the praises of his particular stand or its position, although some positions are bound to be more favoured than others. But that in my judgment does not mean that in substance and reality the true subject matter of the agreement between the organiser and exhibitor is simply the provision of an opportunity to meet potential customers (Blenheim has a disclaimer in its contract if expected customers or other exhibitors do not turn up) to which the occupation of land is merely ancillary. Having and occupying a stand at the exhibition is, as I have said, what viewed objectively is important, although of course that occupation of the land as with all occupation of land is for a purpose and not just for its own sake.

35 28. On those grounds in my judgment what in substance and reality Blenheim is providing to the exhibitor in return for the consideration which it receives is a licence to occupy land.”

40 46. Finally, in *Southport Flower Show v HMRC* [2012] UKFTT 244 (TC) Judge Cannan recorded at [16], albeit in the absence of argument, that the supply by the appellant of licensing trade stands at the annual Southport Flower Show was “certainly the supply of a licence to occupy land within Group 1” although in that case the appellant argued it was entitled to reclaim input tax as an option to tax was in place over the show site.

HMRC Guidance

45 47. “VAT Notice 742 land and property” (published 29 May 2012) states at section 2.5:

What is a licence to occupy land?

50 A licence to occupy is a written or oral agreement which falls within the European concept ‘leasing or letting of immovable property’ but falls short of being a formal lease for the purpose of UK land law.

For a licence to occupy to exist, the agreement has to have all characteristics of a 'leasing or letting of immovable property'. This is the case if the licensee is granted right of occupation of:

- 5
- a defined area of land (land includes buildings – see paragraph 2.1 [of the Notice])
 - for an agreed duration
 - in return for payment, and
 - has the right to occupy that area as owner and to exclude others from enjoying that right

10 All of these 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

15 48. The Notice then gives examples of licences to occupy land which includes “granting a catering concession, where the caterer is granted a licence to occupy a specific kitchen and restaurant area, even if the grant includes use of kitchen or catering equipment” and “granting traders a pitch in a market or at a car boot sale.” Examples of supplies which are not licences to occupy land are also included in the Notice which include, “granting of an ambulatory concession, such as an ice cream
20 van on the sea front or a hamburger van at a football match” and “granting someone the right to place a free standing or wall mounted vending or gaming machine in your premises, where the location is not specified in the agreement.”

Discussion and Conclusion

25 49. As Miss McCarthy reminds us in her skeleton argument, however helpful Notice 742 may be, we must determine this appeal according to the law and not HMRC’s guidance. It is therefore first necessary to ascertain the nature of the supply in this case and in order to do so it is common ground that we are required to have regard to the economic reality of any arrangements between Mrs Zombory-Moldovan and the stallholders.

30 50. There is no suggestion that the agreements entered into between Mrs Zombory-Moldovan and the stallholders, on the basis of the booking form and T&C, was a sham. Therefore, as Lord Neuberger observed in *Secret Hotels2 Ltd* (see paragraph 28, above) it is necessary to interpret the agreement which was clearly intended to govern the relationship between them in order to identify the parties' respective rights
35 and obligations.

51. Referring to clause 1 of the T&C, Miss McCarthy submits that the contract between Mrs Zombory-Moldovan and the stallholder is comprised of three elements:

- 40
- (1) a licence to use a stall or pitch;
 - (2) at a craft or garden show;
 - (3) to offer certain goods for sale.

In relation to the first and third of these elements Miss McCarthy contends that the that stallholders merely have the right to sell a narrow range of goods at the fair and, as in *Sinclair Collis* what was being provided to a stallholder as a licence to *use* land

not a licence to *occupy* land. Also that the stallholders' right of access is not as "owner" of the land but is limited in that they cannot invite an unlimited number of people onto the land without payment for admission to the fair. Moreover, she submits, that as the location of a stall is entirely at the discretion of Mrs Zombory-Moldovan this case can be distinguished from that of the "privileged" stallholder in *Tameside* and it is on all fours with *Firs E B Enever* and the "mobile" trestle tables hired by the trade dealers in that case.

52. Miss McCarthy argues that under the second element of clause 1 Mrs Zombory-Moldovan is required to organise a craft and garden show which entails more than the passive activity of making space available to stallholders which, she says, consists of the provision of other commercial activities such as organisation, supervision, management and provision of other facilities. These include the organisation of the event, ensuring that other stall holders will be there (in contrast to *Miller Freeman* there is no disclaimer in the T&C if expected customers or other stallholders fail to materialise), that the public will only be charged a reasonable price for admission, that there will be advertising and publicity and provision of staff (ticket sellers and car park marshals) at the fair. She contends that clause 5 of the T&C (that the agreement is discharged in the event of cancellation of a show) supports her argument that under the agreement Mrs Zombory-Moldovan is required to organise a craft and garden fair.

53. However, as Ms Whipple points out, clause 1 provides that the T&C and the booking form are "the entire terms" agreed between the parties. This is emphasised by clause 14 under which a stallholder warrants that, "in entering into the Agreement, he is not acting in reliance upon any other representation or warranty, express or implied", made by Mrs Zombory-Moldovan or anyone acting on her behalf.

54. The reference to the show or event in the T&C does not, in our view, impose any organisational requirements on Mrs Zombory-Moldovan but merely sets out the context of the agreement, ie there will be a craft fair. Similarly the restrictions imposed as to the type of goods that may be sold at the craft fair does not materially affect the nature of the supply, eg a retail licence to sell calendars in a shopping centre would, no doubt, include a restrictions to prevent inappropriate pictures being displayed in a public place. We also consider that clause 5 of the T&C should be read as making provisions regarding frustration of the agreement rather than suggesting an obligation on Mrs Zombory-Moldovan to organise a craft fair.

55. Accordingly, despite the force of Miss McCarthy's submissions in relation to the organisation of a fair, given the absence of any reference to this in the T&C, it must follow that the purpose, and therefore the effect and economic reality, of the arrangement between Mrs Zombory-Moldovan and a stallholder is that she grants the stallholder a licence to offer for sale specific types of goods at the craft and garden fair on the dates specified in the booking form.

56. In reaching such a conclusion we agree with Ms Whipple that as the provision of an electricity supply point is an optional extra and subject to a separate charge to stallholders there is no artificiality in treating it as a distinct and independent supply. As such this can have no bearing on the nature of the supply of the space at a craft fair to stallholders. Neither, in our view, can the discretionary provision, when available, of overnight camping which is free of charge.

57. We consider that as the provision of a space to a stallholder is governed by the same T&C, whether the stall is situated within a marquee, in a building or outdoors,

and that the economic reality of the supply determined by reference to these T&C the nature of the supply cannot be dependent on whether a stall is indoors or outside.

58. For this reason we decline to follow *Enever* although, like the present case, indoor trestle tables were used. However, there does not appear to have been any detailed terms and conditions applicable to the provision of the use of trestle tables by stallholders that used them in *Enever* which clearly differs from present case, not only in this regard but by virtue of the fact that in the present case outdoor spaces, without trestle tables, are provided by Mrs Zombory-Moldovan. We regard the present case to be more like *Tameside* and *Miller Freeman*, particularly the latter notwithstanding the absence of a disclaimer in the T&C in respect of the non-attendance of other stallholders and the general public at a craft fair.

59. The present case is also distinguishable from that of *Sinclair Collis* on which Miss McCarthy relied. In that case the cigarette machines could be placed anywhere within the public house. As the ECJ noted, at [28]:

15 “...the agreement does not prescribe any precisely defined area or space for the installation of the vending machines at the premises. ... there is nothing to prevent the machines from being moved about, to a degree, as the site owner wishes.

By contrast each stallholder is allocated a pitch by Mrs Zombory-Moldovan for the duration of the craft fair.

60. This case is also different to *Walderdorff*. Quite clearly, unlike Ms Walderdorff who, having reserved the right to do, so could fish in the same waters as the angling club to which she had leased the fishing rights, it would not be open under the T&C for Mrs Zombory-Moldovan, or indeed any other stallholder, to sell their crafts from a pitch she had supplied to a particular stallholder.

61. Therefore, having regard to all the circumstances of the case, we conclude that a stallholder occupies the pitch at a craft fair, allocated and supplied to him or her by Mrs Zombory-Moldovan, as owner to the exclusion of any other person.

62. Much was made of whether such a supply was a “passive” activity so as to bring it within the definition, under EU law, of the letting of immovable property. Miss McCarthy emphasises the comments of the ECJ in *Temco* at [20] (which we have set out at paragraph 34, above) in which it referred to the letting of immovable property being “usually a passive activity linked simply to the passage of time and not generating any significant added value from other activities which are either industrial or commercial in nature”. She contends that Mrs Zombory-Moldovan did add value in the present case by way of the organisation of the craft fair including the provision of advertising, publicity, staff and facilities, matters which we have considered above (at paragraphs 51-55).

63. However, the observations by the ECJ in *Temco* should not be taken in isolation as that paragraph of the ECJ’s decision continues referring to examples of activities that are either industrial or commercial in nature:

45 “... such as the exemptions referred to in Article 13B(b)(1) to (4) of the Sixth Directive, or have as their subject-matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course

