[2017] UKFTT 010 (TC)

TC05576

Appeal number: TC/2016/01345

VALUE ADDED TAX – sales of package including licence, lodge (caravan) and removable contents – whether part of consideration attributable by appellant to removable contents properly attributable where all profit made on licence – held yes – grant of licence only where customer provides own lodge – whether grant standard rated or zero-rated as part of composite supply by two suppliers – held standard rated – whether time limit for assessments breached – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

COTTINGHAM PARK LODGES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Wilberforce Court, Hull on 14 October 2016

Mr Richard Lacey of Harris Lacey and Swain (Chartered Accountants) for the Appellant

Mr Bernard Haley, Presenting Officer, for the Respondent

DECISION

1. This was an appeal by Cottingham Park Lodges Ltd ("the appellant") against assessments to Value Added Tax ("VAT") made by the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), the respondents in this case.

2. The assessments appealed against were made, in all but one case, to recover additional VAT which HMRC said that the appellant should have accounted for on the sale by it of the removable contents of the lodges it supplied to customers ("the contents issue"). In the other case the assessment sought to recover VAT which HMRC said should have been accounted for on the grant of a licence for a "pitch" on the appellant's land ("the pitch issue").

3. I should add here that it was not until 13 October 2016, the day before the hearing, that the appellant filed a skeleton argument. Had this simply followed the grounds of appeal and the Statement of Case and list of authorities filed by the appellant with the Tribunal on 5 July 2016, I would not, unless HMRC raised the point, said or done anything about the lateness. However the appellant's skeleton mentioned a case in support of its arguments on the contents issue which had not been previously mentioned. It also raised a wholly new point, that a "global assessment" made to recover VAT was made after the time limit for making it and was therefore invalid ("the time limit issue").

4. Because of the new points I asked Mr Haley if he wished to apply for a postponement to enable him to deal with the points. He was happy to start the hearing as arranged and he did make points in response to the time limit issue. Nevertheless I considered it fair to allow HMRC some time to make written submissions on the time limit issue and in relation to the newly cited case. Mr Haley made submissions on the time limit point, but did not address the new case.

5. In the course of my pre-reading of such of the papers as had been supplied to me by the Tribunal I noticed that the appellant's accountants, Harris Lacey and Swain ("HLS") had suggested in correspondence that the case of *Colaingrove* might be relevant. HMRC's response was that the case was about the meaning of removable contents, not about their valuation where sold together with the lodge. No more was said.

6. HMRC overlooked however that there is more than one *Colaingrove* case, and that one was indeed about the meaning of removable contents, but there was also one about valuation. I therefore gave the parties the correct reference for the relevant case ([2013] UKFTT 295 (TC) referred to as *Colaingrove* after this paragraph) and gave both parties permission to make written submissions about that case, which they did.

7. The making of these submissions (and the fact that they did not reach me immediately on their receipt by the Tribunal) explains why this decision is released rather later than would be ideal in a case of this nature.

8. Because the three issues in this appeal are so different, after setting out the nature of the evidence and certain background and undisputed facts I make further findings of fact and deal with the law, the submissions of the parties and my analysis and conclusions for each issue separately.

9. Here I set out in tabular form details of all the assessments made which were under appeal. In each case period "XX/YY" means the prescribed accounting period of three months ending on the last day of the month ("XX") in the year 20YY. This convention is also used later in the decision.

Period	Date made	Issue
02/10	24 February 2014	Removable contents
05/11	30 July 2014	Removable contents
02/12	30 July 2014	Removable contents
02/12	30 July 2015	Credit for input tax
08/12	30 July 2015	Sale of pitch
05/13	30 July 2015	Credit for input tax
11/13	30 July 2015	Removable contents
05/15	30 July 2015	Removable contents

Evidence

10. I had a bundle of documents prepared by HMRC which included some of the correspondence in the case. I also had a witness statement from Mr Christopher Moody, the officer of HMRC responsible for the case.

11. In addition I had a witness statement from Mr Robert Wiles, managing director of the appellant. Shortly before the hearing the appellant applied for a short postponement of the hearing as Mr Robert Wiles had an appointment elsewhere in the country. The judge handling that application informed the appellant that the postponement was denied. Accordingly the appellant's representative informed the Tribunal that Mr John Wiles, Robert Wiles' father, would be attending instead. Mr John Wiles gave oral evidence having adopted Robert's witness statement as his own to the extent that the information in it was known to him.

Background facts

12. The appellant was registered for VAT on 1 April 2006.

13. It carries on a business of selling lodges, that is wooden buildings which are moveable, for which it grants a licence to occupy for a lump sum on a pitch on land at Spring Park Farm, Cottingham, East Yorkshire which it owns and which had been in the family (as farm land) for many years.

14. A golf course is also operated on that family land by another family company, not the appellant.

15. The lodges qualify as "caravans" within the meaning of Group 5 in Schedule 8 to the Value Added Tax Act 1994 ("VATA").

16. Lodges are in general acquired from one or two manufacturers and when acquired are equipped with the removable contents specified by the purchaser. The manufacturer issues an invoice on which a small amount of VAT is charged, being the VAT on the removable contents element of the whole lodge as calculated by the manufacturer. The lodge itself is zero-rated.

17. The appellant is allowed a discount of at least 30% on the price the manufacturer charges retail customers who buy directly from it.

18. The appellant in its invoices to its customers charges the same amount of VAT on the removable contents as it was charged by the manufacturer in its invoices.

19. I find the above matters, taken from the correspondence and the witness statements, and not challenged or disputed in any submissions, as fact.

The removable contents issue

20. The issue here is what part of the overall consideration for the sale of the lodge should be regarded as the consideration for the removable contents of the lodge. The issue is significant because, as mentioned above, the supply of the lodge itself is zero-rated but the supply of the removable contents is not.

The evidence and findings of fact

21. Mr Robert Wiles' evidence, agreed as correct by Mr John Wiles, was that the appellant's business model was that, as landowners for generations, they sought to make a profit from the land element only when they sold a package of land and infrastructure, lodge and contents, and not to mark up the cost of lodge and contents (thus they passed on the manufacturer's discount to the customers). That method had served the appellant well in terms of profitability and in enabling the company to go through the recession still maintaining the sale of lodges.

22. Mr John Wiles explained that in order to determine the sale price for the package the appellant finds the cost of the infrastructure (about £15,000 per plot) and adds a profit of about £35,000 to £40,000 to arrive at the price for the cost of the licence to the purchaser of £55,000 (it had been £50,000). To that is added the cost of the lodge and contents as charged to the appellant by the manufacturer.

23. A schedule containing a breakdown of the sale price of six lodge transactions was provided to Mr Moody by HLS. This showed for each lodge (1) the date of the sale (2) the sales proceeds (3) the Lodge Cost (4) VAT included (5) Extras/Siting (ie what was referred to as infrastructure by Mr John Wiles) (6) Plot value.

24. Figures for lodge 20 were (2) £155,000 (3) £78,893 (4) £3.000 (5) £14,000 and (6) £62,107. The invoice for lodge 20 (the only one in the bundle) showed an agreed sale price of £155,157 (after some small adjustments) payable in three tranches.

25. A document (showing it was page 3 of 5) called "Finance Sheet Home Price Estimation" was also in the bundle. This was part of the quotation documentation issued by the manufacturer to the appellant. It showed a Unit Price for lodge 20 of £78,962 plus VAT of £3,056. After small adjustments this became "unit price £78,893" and "VAT £3,006", ie figures (3) and (4) in the accountants' breakdown of the price to the customer in §24, but for a difference of £6 in the VAT figure. The document warned that the final VAT figure may be different.

26. This document also showed the RRP (recommended retail price) for this lodge at £121,480 and VAT on the RRP of £4,702. This means that the price to the appellant is at a discount of 35% from the RRP.

27. Mr John Wiles accepted that the customer was not aware of the breakdown between the land/infrastructure and the lodge/contents elements of the sale price, and agreed that the invoice for lodge 20, showing a total price of £155,157, did not show the VAT element for the contents.

28. There was one further piece of evidence on this issue. One of the sites was sold (or rather a grant of a licence was made) without the appellant at the same time selling a lodge to the purchaser. This transaction is the subject of the second issue as to its correct VAT treatment. HMRC assessed this grant on the basis that, shorn of the sale of the lodge, it was a supply chargeable to VAT. The amount of VAT charged by HMRC was £9,166. Grossed up at 20% that shows a sale price of £55,000.

29. I accept all the evidence of Mr Robert Wiles and Mr John Wiles on the way the business was operated and of their thinking about the elements of the total sale price.

The law (and not the law)

30. The arguments in correspondence and before me were conducted by reference to VAT Notice 701/20. The version in the bundle was that of 27 December 2013 and it referred to the previous version of April 2012 though the change made was not relevant to this appeal. Neither party suggested that any earlier version in force during the periods of any assessments was relevantly different. Nor did either party suggest that any part of the Notice had the force of law.

31. I therefore asked the parties to tell me what the relevant law was, but neither knew. Mr Haley was closest, referring to s 19(5) VATA, but the answer is s 19(4) VATA. Section 19 provides:

> "(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 6, and for those purposes subsections (2) to (4) below have effect subject to that Schedule.
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> (2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration.
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> (3) If the supply is for a consideration not consisting or not wholly consisting of money, its value shall be taken to be such amount in money as, with the addition of the VAT chargeable, is equivalent to the consideration.
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> (4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.
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> (5) For the purposes of this Act the open market value of a supply of goods or services shall be taken to be the amount that would fall to be taken as its value under subsection (2) above if the supply were for such consideration in money as would be payable by a person standing in no such relationship with any person as would affect that consideration."

32. Thus the only question for my determination is whether the appellant's method of calculating the VAT on sales is one that attributes a proper part of the consideration for the overall supply to the removable contents. VAT Notice 701/20 section 8.1 refers to the attribution as needing to give a result that is "fair and reasonable".

33. At section 8.2 the Note gives a formula for calculating the consideration attributable to removable contents where there is a sale of a new caravan. This section mentions that where the caravan and the contents are advertised at separate prices and the customer is permitted to buy the caravan at the lower price without the removable contents then the advertised price for the contents may be used instead of the formula.

34. Section 8.1 stresses however that "[y]ou do not have to use any of the methods shown below but, if you do use a different method, it must still give a fair and reasonable result and will be subject to inspection by HMRC."

The appellant's arguments

35. The appellant in its skeleton argued:

(1) They make no profit on the supply of the removables, simply passing on what the manufacturer charges them. Mr Wiles' evidence supports that.

(2) Thus, that being the case, the only fair and reasonable approach is the appellant's.

(3) HMRC's example given in 8.2 of VAT Notice 701/20 (their contention) is not law, and no reasoning is given to support the example.

(4) HMRC's attitude is the precise opposite of their approach to partial exemption input tax recovery where they insist at looking at where the profit is made as a highly relevant or decisive factor (that is their approach in *VWFS*.)

(5) The appellant's approach gives the same result as that of a builder incorporating goods other than building materials into a new dwelling (see SI 1992/3222 regulation 6).

36. In relation to *Colaingrove*, in its supplementary submissions the appellant argues that:

(1) Unlike the position in that case, here the appellant does have evidence as to the actual structure of the package from the perspective of the supplier (in Mr Wiles' witness statement and evidence)

(2) Based on *Colaingrove* in [16], [28] and [40] in particular, that is the end of the matter: the appellant makes no margin on the lodges let alone the removables, and that is the basis on which the supply should be allocated.

(3) There is no need to address the questions of theoretical complexity found in *Colaingrove*.

HMRC's arguments

37. HMRC argue in their statement of case that:

(1) The value of the removable contents should be calculated on a "cost proportion" basis as given in Notice 701/20 Paragraph 8.2, unless the appellant's calculation gives a reasonable result.

(2) The appellant's calculation does not give such a result, as all the value (ie profit margin) in the supply is assigned to a non-taxable element, the land.

(3) The appellant's method does not give a reasonable result because it gives a lower amount of VAT than the HMRC method. This was Mr Moody's evidence given in response to a question from the Tribunal, evidence which was adopted expressly by Mr Haley.

38. In its further submissions HMRC argued that:

(1) In *Colaingrove* the Tribunal found that no method would be completely satisfactory but approved what it identified as Method 2A which HMRC say is the one in section 8.2 of the VAT Notice.

(2) As an alternative the *Colaingrove* Tribunal accepted Method 1, being to apportion to the removable contents and amount equal to their cost plus that proportion of the margin which that cost represents of the total cost.

HMRC made no comment on *VWFS*.

Discussion

39. I deal first with *Volkswagen Financial Services (UK) Ltd v HMRC* [2015] EWCA Civ 832 to give *VWFS* its full name and citation, as this is a decision of the Court of Appeal and so is binding on me. (The appeal by HMRC against the judgment of the Court of Appeal was heard by the Supreme Court on 3 November 2016 but no judgment of that Court had been given at the time of preparing this decision).

40. The point made by the appellant can be seen clearly in [15] and [16] of the judgment of Patten LJ:

> "15. Perhaps most critically for the purposes of this appeal the FtT made specific findings about how VWFS recovers the cost of the overheads which account for its residual input tax:
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> > '15. From the evidence we find that the overheads that are the subject of this appeal are built into the interest rate, the option to purchase fee and the acceptance fee. There is no separate fee charged to cover overheads. Overheads do not form part of the cash price for the vehicle, as that merely reflects the price paid by VWFS to the retailer.'
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> 16. The dispute about the recoverability of residual input tax in relation to the taxable supplies of vehicles centres on the fact that none of the relevant portion of overheads attributable to the retail sector is recovered as part of the price of the vehicle. It is now part of HMRC's published policy (see Revenue & Customs Brief 82/09) not to allow the recovery of input tax in respect of vehicles and other goods that are re-sold under hire purchase contracts without any increase in price to cover the cost of overheads. In such cases where the overheads are recovered as part of the cost of the finance, HMRC's view is that the economic use of the overheads lies solely in the financing of the purchase and that they cannot be cost components of the taxable supply of vehicles where the consumer of that supply bears none of the cost of the overheads and VWFS (as the supplier in this case) is able to recover all of the relevant overheads as part of the price charged for the exempt supply of finance in respect of which the recovery of the residual input tax is not permitted. The principle of fiscal neutrality requires the recovery of input tax to be limited to those cases in which the maker of the taxable supply passes on to the ultimate consumer the cost of the overheads as part of the price and with it the VAT on that increased price which it recovers by the deduction of input tax. This correspondence is lacking in the present case where none of the cost of the relevant overheads is added to the price of the vehicle."

41. The approach set out in Revenue & Customs Brief 82/09 is, says the appellant, the approach which the appellant has taken in this case – here it says that since it sells the lodge and contents at the same price as it paid to the manufacturer and makes its profit on the land element, it is wrong to treat the sale of the contents as having been for a profit, just as HMRC say it is wrong to attribute overheads to a no profit/no loss sale of one component of a package so as to generate a tax loss and a tax repayment.

42. These are clearly different issues. I cannot see anything on a first reading of the decision of the Court of Appeal which is relevant to this case and is binding on me – indeed the Court found against HMRC who are the appellants in the Supreme Court. I would have needed the help of the parties, particularly the appellant, in identifying what, if any, other passages in the judgment in *VWFS* should be seen as assisting its case.

43. Without that the arguments seems to be merely that what is sauce for the HMRC goose should also be sauce for the appellant gander, without establishing why.

44. I turn then to *Colaingrove*. There are similarities of fact in the cases and there are differences.

45. Like the appellant Colaingrove Ltd bought its caravans from a manufacturer whose invoice showed VAT but no detailed account of what was regarded as contents. The total amount of the consideration relating to contents could obviously be calculated by grossing up the VAT.

46. Unlike the appellant Colaingrove Ltd:

(1) Did not grant a licence, at least not as part of the sale of the caravan

(2) Sold removable contents separately from a caravan at a mark up of 20%

(3) Applied that mark up of 20% to the VAT charged by the supplier to arrive at the VAT due from it (from 1996 to 1999 and after the *Talacre* decision of the ECJ).

(4) Made a voluntary disclosure

47. The Tribunal in *Colaingrove* (Judge Charles Hellier and Tym Marsh) examined the ECJ jurisprudence in the absence they said of any help from either the VAT Directive or VATA. At [16] to [19] they said:

> "16. From the ECJ jurisprudence it is clear that the consideration attributable to a supply must be the subjective value of the consideration from the point of view of the supplier: because the charge is based on what is received by the supplier. This principle however helps only a little: there was no evidence to suggest that the appellant or its customer regarded any particular part of the consideration is applicable to any particular part of the caravan. We were, as Mr Cordara said, in the unusual position that all we had to go on were objective factors.
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> 17. In *Madgett v Baldwin* [*sic*] C-94/97 the ECJ considered how to split the single margin made on a mix of services, some of which fell within the Tour Operators Margin Scheme (TOMS) and some (the in house provision of accommodation) outside that scheme. Although the judgment dealt with apportioning the margin the arguments seem to us to be as relevant to the apportioning of consideration.
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> 18. Two principle methods of apportionment were in issue: one based on the actual cost of the services, and the other on the market value of

the services. The Court noted that both were problematical: the actual cost method because there was no reason to suppose that the margins made on different services were in proportion to their respective costs, and the market value method because it presupposed that the price of accommodation offered as part of a package would be the same as its price if offered separately. But the Court then said:

> '[45] The actual cost method in relation to the in-house services requires a series of complex sub apportionment exercises and thus also means substantial additional work for the trader. By contrast, use of the market value of the in-house services, as the Advocate General observes ..., has the advantage of simplicity, since there is no need to distinguish the various elements of the value of the in-house services.
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> "[46] In those circumstances - bearing in mind that it is common ground in the present case that calculation of the VAT on the margin for the bought in services by using one alternative or the other in principle gives the same figure for VAT - a trader may not be required to calculate the part of the package corresponding to the in-house services by the actual cost method where it is possible to identify that part of the package on the basis of the market value of services similar to those which form part of the package'.
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> 19. Two questions arise from these passages: (1) whether the guiding principle of "simplicity" relates to the practical operation of the method or to its theoretical appraisal, and (2) whether it was a condition for the use of the market value method that it provided the same figure for the VAT (see the passage between the dashes in [46]). …"

48. After discussion of the principles in *My Travel plc v Commissioners of Customs and Excise* C-291/03 the Tribunal continued:

> "21. Thus it seems that, whilst there will no doubt be some overlap between the concepts, the "simplicity" which recommended the market value method was simplicity in theory rather than in application. The market value approach raised fewer theoretical questions about questions such as the allocation of overheads, not fewer practical difficulties in determining the figures.
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> 22. We take the guiding principle to be to attempt to achieve an apportionment which would reflect the consideration actually received by the supplier by using methods of robust theoretical simplicity, but note that if it is possible for a taxpayer to show that a less simple method more accurately reflects the actual structure he may rely upon that method. Further it is not required that two methods should produce the same or even broadly the same result.
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> …
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> 24. A handful of cases have come before the tribunal in which apportionment has been considered.
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> 25. In *Haulfryn Estates Company Ltd* VAT Decision 16145 the tribunal faced the same question which faces us - the division of a

single sum between the zero rated caravan and a standard rated content. The tribunal said at paragraphs 21 and 22:

> "There is no evidence...that the purchasers took any interest in an apportionment of the purchase price ... I agree ... that the view of the Vendors alone is unlikely to lead to a "proper attribution" ... I would not rule out an apportionment based upon proper valuations of the caravan and the removable contents ... I also consider that in view of the object of the valuation, the [reported valuation] should have covered the value of the caravan itself. Against this background I do not think that the tribunal is in a position to approve or make a valuation-based apportionment.
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> "[22] I agree with Mr. Ewart that an apportionment based on that used by the appellant's own supplier may be less than perfect in terms of logic or even fairness. However this is a case where there has to be an apportionment and I have to determine the "proper attribution" of the parts of the consideration as directed by section 19(4). Although the May 1996 leaflet is not binding on me ... I consider that any method of…apportionment used must give "a fair and reasonable result". In my judgement the method favoured by the Respondents, based on the 1989 leaflet is much more likely to produce such a result than that advanced by the appellant. I therefore find that the respondents' method of apportionment is the proper one ..."

26. The tribunal in that case had been referred to *Tynewydd Labour Working Mens' Club and Institute Ltd v Commissioners of Customs & Excise* [1979] STC 570 at 578 in which Forbes J had observed that the apportionment should take account of the profit element by ensuring that the relevant part of the payment included a due proportion of the profit made from the corresponding part of the enterprise.

27. There have been other cases in which tribunals have conducted apportionment by reference to the cost of items supplied (see *IC Thoma*s 1995, *DH Bright* VAT Decision 4577 and *River Barge Holding* VAT Decision 572). Such an apportionment effectively determines the due part of the supplier's profit in relation to any one item as the proportion of that profit which the cost of the item bears to the whole cost (and thus assumes that the margin is the same on each item).

28. From these cases we conclude that unless a direct link between a particular part of a supply and a particular element of the consideration can be shown (as in *Baxi*), the object is to find an approximation to what the taxpayer would have sold the item for if he had had to separate out the consideration for the items in the package (which is not the same as selling them separately), that is why taking into account a due part of his profit is relevant and why if he can show specific cost allocation, as was suggested in *My Travel*, a simpler apportionment of profit may not be required. A method which consists of the attribution of the stand alone value of part of a package to that part (rather than the apportionment of the price by reference to the fraction represented by such value) does not generally address the need

to consider from the point of view of the supplier the attribution of a due proportion of his profit."

49. The Tribunal then identified ten possible methods of apportionment (Nos (1), (1A), (2), (2A) and (3) to (8)) and considered their compliance with the principles they derived from *Madgett and Baldwin*. They considered that Method (2A) gave the best result, but if it was not possible to use that method then Method (1) should be used.

50. Methods (2) and (2A) are described thus:

"(2) The Notice 701/20 Method

47. HMRC's VAT notice 701/20 section 8, proposes an apportionment of the sale price of a caravan between standard rated and zero rated items in the same ratio as the apportionment by the manufacturer between the standard rated and zero rated elements of the cost of caravan. The application of this method would give rise to a larger standard rated proportion than the 1995 agreed method because the gross profit made by the appellant on a caravan exceeds 20%.

48. HMRC submit that this method is likely to produce a fair apportionment.

49. Mr. Scheers made a number of criticisms of the approach advocated in HMRC's notice 701/20: he noted that it assumes that manufacturers' view of removable contents was correct; and he asked whether any part of the sale price might be regarded as attributable to the pitch location - if so he said that should be excluded from the caravan sale price before applying the approach described in the leaflet.

50. This method, like Method (1) has the advantage of practical and theoretical simplicity.

51. The method applies a mark up to the removable contents which is the same as that for the caravan. Mr Cordara says that this application of a uniform profit margin is a flaw in this method. He says that the evidence which led to the adoption of the agreed method demonstrated that this was not the case.

52. We disagree. We saw no evidence to suggest that the Appellant had a particular business model under which it expected to realise the same margin on the individual sale of items of contents as it did on their sale as part of a package. It therefore seemed to us that this part of this method was a better way of apportioning the margin made by the seller than the corresponding part of Method (1).

53. But this method suffers from the same major stumbling block, namely that it relies on the manufacturers' cost allocations which may well not reflect what we regard as a proper apportionment between zero and standard rated supplies

54. It may be possible to avoid the problem with the identification of the split by the manufacturer by the same method as that proposed in (1A). We call such a method (2A)."

51. This discussion, and [53] in particular, needs putting into context. The Tribunal had in *Colaingrove Ltd v HMRC* [2013] UKFTT 312 (TC) decided that not all the items which the manufacturer and Colaingrove had treated as removable contents were in fact removable contents within the meaning in VATA. It was for this reason that the remarks in [53] were made. HMRC in this case has made no suggestion that the manufacturer or the appellant has misidentified any of the amounts of the removable contents. It seems to me then that in relation to a case where [53] of *Colaingrove* does not apply, the chosen method would be Method (2), not (2A). Method (2), as it says, is the method in VAT 701/20 section 8.2. This is the method HMRC say they have used in making the assessments in this case.

52. As to Method (1) the Tribunal said:

> "(1) the Agreed Method
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> 36. The agreed basis has the advantage of both theoretical and practical simplicity.
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> 37. It also has the advantage that there is an apportionment of Colaingrove's profit across all elements of the caravan.
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> 38. HMRC say that it "was also evident from the evidence given by Mr Dermot King that the mark up on caravans sold to customers by Bourne was in the order of 100%. Thus the limited (20%) mark up on the manufacture's allocation of removable contents (approximately 25% of the manufacturer's allocated cost) resulted in a position which was very favourable to the appellant..".
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> 39. In using a 20% mark up this Method assumes that Colaingrove made a lower margin on the removable items sold with the caravan than on the rest of the caravan. Whilst this assumption effectively ensures that the burden of tax on the removable items sold separately is the same as that on items sold with the caravan, we do not see that as a result required by the principle of neutrality – for the items are being sold by the same supplier arguably for different prices. We recall in this context the reservation the ECJ had in *Madgett and Baldwin* over the market value method – namely that items sold as a package might not be sold for the same price as the items individually, and Forbes J's injunction to include a "due" proportion of the seller's profit.
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> 40. Colaingrove buys complete caravans and sells them. Commercially and economically what is bought and sold is a single package (even if different parts of it are taxed in different ways) We can see no reason why it should be treated as realising a different margin on different parts of that package. The evidence that items sold separately achieved a 20% margin was not enough in our view to meet the requirement to prove that a 20% margin allocation "accurately reflected the actual structure of the package" (see [71] Advocate General in *My Travel* quoted above)
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> 41. Furthermore, in our view a serious problem is that the method assumes that the allocation by the manufacturer on its invoice is correct. As Mr Scheers, noting that the precise nature of the figures they adopted suggested that the manufacturers carried out a detailed

> calculation, said "I would presume that manufacturers adopt HMRC's view of 'removable content'". But our division between standard rated and zero rated is somewhat different from that for which HMRC contended. And in any event, although we believe that it is likely that the manufacturers would have attributed standard rating to a wider spectrum of items than we would have done, there is no way of testing the accuracy or fairness of the manufacturer's allocation.
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> 42. Unless one regarded the possibility of properly zero rated items being included in the manufacturer's apportionment as being roughly counterbalanced by the use of the 20% margin, this method seems to us not to achieve a proper (or fair) allocation."

53. It is necessary to consider how the "agreed method" is described in the decision. This is at [8] and 9]:

> "8. Colaingrove sold certain items of replacement fixtures and fittings at a profit of about 20%. That was materially less than the markup at which it sold complete caravans.
>
> 9. The appellant has accounted for VAT attributable to the standard rated contents on various bases over time. From 1996 to 1999 it operated under a method agreed with HMRC under which treated its sale price as containing a standard rated element which was 120% of the standard rated element shown on the invoices it received from the manufacturers. This method reflects that the Appellant sells replacement items for caravans at a profit of 20%."

54. This is the method the appellant has used in this case, with the difference being that the mark up that the appellant has used is 0%, which is consistent with the appellant's business model as explained in Mr Robert Wiles' evidence.

55. As I have mentioned a major difference between this case and *Colaingrove* is that the sales in this case were sales of both land and chattels. This is not a circumstance that seems to be catered for by Notice 701/20 so it is necessary to look closely at the method used by HMRC when applying the formula in section 8.2 to this situation.

56. What the website linked from section 8.2 says is this (ignoring pence):

> "Cost of caravan plus removable contents £20,000
>
> Plus VAT £150
>
> **Example: You sell the caravan for £30,000 including VAT. The VAT must be the same proportion of the sale price as it was of the cost (see also paragraph 8.6 below).**
>
> The VAT due is:
>
> Sale price x VAT on purchase/total cost
>
> £30,000 x £150/£20,150 = £223"

57. Mr Moody shows his workings in relation to the sale of Plots 20 and 17 in a letter of 30 July 2015. I take Plot 20 to test, as I have set out the figures for that Plot at §24. Mr Moody's workings show, using the Section 8.2 formula above:

> "Cost of caravan plus removable contents £78,893
>
> Plus VAT £3000
>
> You sell the caravan for £155,000 including VAT. The VAT must be the same proportion of the sale price as it was of the cost (see also paragraph 8.6 below).
>
> The VAT due is:
>
> Sale price x VAT on purchase/total cost
>
> £155,000 x £3000/£81893 = £5678"

58. This calculation ignores the fact that the £155,000 that he has used as the sale price of the lodge is nothing of the sort: it is the sale price of the whole package. The appellant has not sold the caravan for £155,000. Using the lodge sale figures from §24 we get

> "Sale price x VAT on purchase/total cost
>
> £81,893 x £3000/£81893 = £3,000"

59. Mr Moody's figures therefore attribute no value at all to the land and the infrastructure. I find that they are not a proper application of the method in VAT 701/20.

60. In the light of that finding it seems to me that appellant's method must be accepted unless it is clear that it is not in the circumstances one that gives a fair and reasonable result. HMRC argue that it does not because it assumes that there is no profit (or loss) on the lodge. It might be said that the appellant's business model, as explained by Mr John Wiles to me, is simply a rationalisation of a scheme to understate the taxable element of the whole package, especially given that the customer will know nothing about the split between the various components.

61. I have to say that I would have been greatly helped by further evidence on this point, which might have included the accounts of the company as filed with Companies House and the Corporation Tax returns which would have shown for example a calculation under Part 4 Corporation Tax Act 2009 or the Taxation of Chargeable Gains Act 1992 for the land element demonstrating the amount of consideration attaching to the land element.

62. But the piece of evidence that has convinced me that what the Messrs Wiles describe as their business model is not a ploy to save VAT is the evidence of the consideration for the grant of a licence without a lodge on Plot 19 as £55,000, the figure which is shown as the profit element of all the lodge sales in the calculations made by HLS. This is verifiable evidence of the putting into practice of the business model in an arm's length transaction.

63. A true calculation using the *Colaingrove* Tribunal's method 2 gives the same result as Method 1 if, as I have accepted, the mark up for the lodge is accepted as correctly being 0%.

Conclusion

64. On this issue I therefore find that the appellant's method is "fair and reasonable" and is one that properly attributes the appropriate part of the consideration to the removable contents.

The single plot issue

65. The issue here is whether the grant of a licence without the sale of a lodge is standard rated.

The evidence and findings of fact

66. In a letter of 3 October 2014, Mr Moody asked HLS for "confirmation of the amount of output tax on … Plot 19 – deposit of £15000 in the May 2012 quarter, with a balancing payment of £40000 as described in a letter dated 2 April 2012 from Mr Wiles". [I do not have that letter of 2012]

67. On 27 February 2015 HLS replied saying that Lodge 19 was a plot-only sale.

68. In a letter of 3 February 2016 from a reviewing officer of HMRC to HLS, it was stated that Plot 19 was one where the customer supplied his own lodge.

69. What is set out above is all I have in the bundle relating to Plot 19. Mr Wiles in oral evidence said that the purchaser of Plot 19 was connected with the manufacturer of the lodges. He liked the site and wished to buy a pitch so that he could put his own lodge on it.

70. I find all the matters in this section as fact.

The law

71. The law relating to sales of pitches for caravans is in Group 1 Schedule 9 VATA:

> "Group 1 — Land
>
> Item No
>
> 1 The grant of any interest in or right over land or of 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—
>
> …
>
> (e) the grant of any interest in, right over or licence to occupy holiday accommodation;

(f) the provision of seasonal pitches for caravans, and the grant of facilities at caravan parks to persons for whom such pitches are provided;

NOTES

…

(14) A seasonal pitch for a caravan is—

…

(b) a non-residential pitch on any other site.

(14A) In this Note and in Note (14)—

…

"non-residential pitch" means a pitch which—

(a) is provided for less than a year, or

(b) is provided for a year or more and is subject to an occupation restriction,

and which is not intended to be used as the occupant's principal place of residence during the period of occupancy;

"occupation restriction" means any covenant, statutory planning consent or similar permission, the terms of which prevent the person to whom the pitch is provided from occupying it by living in a caravan at all times throughout the period for which the pitch is provided."

72. It was common ground that the pitch concerned was a "seasonal pitch for a caravan" within the meaning in Note (14) and that, accordingly, if the supply of the pitch had to be considered separately, it did not fall to be exempt, but should have been standard rated.

The appellant's arguments

73. The appellant had argued (through HLS) in correspondence that "a plot is pointless without a lodge as the sale only gives the use of the plot for a lodge, not for any other purposes. Likewise a lodge is a pointless purchase without a plot, as there would be nowhere to site it. On this basis there would be a composite supply even if from different suppliers (this is allowed and accepted in the [l]egislation)."

74. In its skeleton the appellant argued that the correct analysis of this transaction is that a lodge manufacturing company supplied a lodge to the appellant who then supplied a lodge and plot to a director of the company in the ordinary way.

75. The fact that the lodge came from a person connected with the ultimate customer does not, they say, change the analysis from that which applies in all the other of the appellant's supplies.

76. The supply of the lodge to the appellant was third party consideration for the supply of a lodge and plot to the director.

77. At the key time, ie when the supply by the Appellant took place, the lodge was on the plot and thus what was supplied was, on any reasonable view, a single supply of a lodge and a plot. They had cited in their Statement of Case (but not in the skeleton) *Beynon & Partners v Commissioners of Customs and Excise* [2004] UKHL 53 and Case C-41/04 *Levob Verzekering BV v Staatssecretaris van Financiën* ECR I-9433

HMRC's arguments

78. HMRC submitted that all the appellant did in this case was grant a licence over the land, the pitch, to the customer.

79. That licence was a grant of land within Item 1 Group 1 Schedule 9 VATA and would be exempt, but for the exclusion in Item 1(f) read with Notes (14) and (14A). There was no dispute that the grant of the licence fell within the description in Item 1(f), so that by itself grant fell to be standard rated.

Discussion

80. The difficulty I have with the appellant's submissions on this issue stems from three matters. Firstly the only evidence of whether the contract for the grant of the licence may have required the appellant to do more than just supply the land, for example to acquire ownership of the lodge and to dispose of it to the purchaser was in the oral evidence of Mr John Wiles. That is not the best evidence of what the contract required which is of course the contract itself. I was given no explanation of the reason the contract could not have been put in evidence.

81. Secondly I have been given no details of what the "legislation" is that supposedly allows a supply to be treated as a composite (ie single) supply even if there are two different persons involved in providing the components of that single supply. If "legislation" was a slip and what was meant was "case law" from litigation, then the two cases cited do not deal at all with a situation where there is more than one supplier of what is said to be in substance a single supply.

82. It occurs to me that, given this is a case about holiday lodges, HLS may have had in mind *Fairway Lakes Ltd v HMRC* [2016] UKUT 340 (TC). That case was if anything the reverse of this in that the appellant supplied a lodge but not the land: the question was whether in its contracts for sale of the lodge it also procured the grant of a lease by the freeholder of the land (a connected person). The case turned on a close analysis of the contracts which were before the Tribunal. I am unable to draw any help from that case in this without having had the benefit of arguments about it (my quick scrutiny may well have led me to the wrong conclusion) and of course without seeing the contract or contracts concerned.

83. My third difficulty arises from the skeleton (which I was told was drafted by counsel rather than by HLS) which refers to third party consideration as being given to the appellant. This is a different argument from that put forward by HLS in correspondence. Again I am not assisted by the citation of any case law on third party

consideration, but my understanding is that third party consideration arises in a case where A supplies goods or services to B and B pays the consideration to C. What is at issue where third party consideration arises (and again this is my understanding) is normally entitlement of B to deduct input tax.

84. But here it is said that A supplies B with a lodge and C pays A the consideration otherwise due from B by giving A the lodge that it is supplying to B. That argument seeks then to show that the appellant acquired and disposed of the lodge. But again the difficulty I have is that there is no documentary evidence, there are no contracts, no invoices, no purchase orders, no letters, no emails: nothing at all to show that the manufacturer supplied the lodge to the appellant, rather than to the customer.

85. If the manufacturer did supply the lodge then I would have expected also to find that the input tax on that supply would have been claimed by the appellant. The appellant's treatment of the transaction was as a composite supply of a pitch and caravan, the dominant element of which was the caravan and so the supply fell to be zero-rated. Thus input tax would be allowable: but there is no indication at all that any input tax was claimed on this lodge.

Conclusion

86. I am therefore driven to the conclusion that the appellant has not shown that the assessment made by HMRC was incorrect and therefore I hold that this supply should have been standard rated.

The out of time assessment issue

87. The issue here is whether the assessments made on 30 July 2015 were out of time and so invalid.

The law

88. The law on time limits for making assessments is in section 73 VATA:

> "**73 Failure to make returns etc**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1) … above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following--
>
> (a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1) … above, another assessment may be made under that subsection, in addition to any earlier assessment."

89. Section 77 (referred to in s 73(6)) says, relevantly:

"**77 Assessments: time limits and supplementary assessments**

(1) Subject to the following provisions of this section, an assessment under section 73 … shall not be made--

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, …"

90. The effect of these two sections in this case, where assessments have been made under s 73(1) VATA, is that the default time limit is two years from the end of the relevant accounting period, but the time may be extended, but not beyond four years, where the condition in s 73(6)(b) is met.

The appellant's submissions

91. The appellant submitted that the assessment made on 30 July 2015 (see the table in §9) was out of time and therefore invalid. It was, they said, a "global assessment" so that, following the decision of Woolf J (as he then was) in *International Language Centres Ltd v Commissioners of Customs and Excise (No. 2)* [1983] STC 394, if any period included in the assessment would have been out of time if assessed separately, the whole assessment was invalid.

92. The two periods that were, on the separate assessment hypothesis, out of time were 02/12 and 08/12. As the two year limit had clearly been passed, it was necessary for HMRC to show that they had not received all the information they needed in order to make the assessment before 31 September 2014 (one year before the date the assessment was made – s 73(6)(b) VATA).

93. In the appellant's view HMRC had been told everything they needed in the meetings in September and December 2012. Mr Moody had admitted that he *could* have made an assessment in early 2013.

HMRC's submissions

94. At the hearing HMRC accepted that there had been delays by them in dealing with the case but that there were also delays by the appellant. Mr Moody had needed to obtain advice from specialists and had continued to request information from the appellant which was not forthcoming for some time. As a result the assessment was not made until Mr Moody had all the information available to him that he needed, and was not out of time.

95. Because I considered that HMRC had to some extent been ambushed by the very late raising of this issue, I directed, as I have mentioned, that they be allowed to make further submissions. They did so and in them they argued that the assessment was not a "global assessment" as the assessments were raised on a period by period basis and not globally. They reiterated their argument that the assessments were made within one year of the time when Mr Moody had obtained all the evidence he required to make them.

Discussion

96. On the question whether there was a global assessment I agree with HMRC. This is for two reasons. Firstly the document (notice of assessment) comprising the VAT655 and two pages of details refers to five separate prescribed accounting periods, but none of them is contiguous with any other. Secondly, two of the periods are ones where there is a statement of over-declaration ie money owed to the appellant by HMRC, so they are not in fact assessments.

97. I therefore find as a fact that there is no global assessment.

98. That does not mean that the enquiry is at an end: the appellant has argued that two periods are out of date, and it hoped, by submitting that there was a global assessment, to tarnish all the periods assessed by that global assessment. It has failed to tarnish the three periods that it accepts were in date if viewed separately. But its case on the two earliest periods still needs to be considered.

99. The "assessment" which relates to the period 02/12 that was made on 30 July 2015 was in the amount of £1,773 but that amount is an amount due from HMRC not an amount of tax due to HMRC. It arose when HLS informed HMRC on 27 February 2015 that "we cannot find that any input tax has been claimed on lodges 20 and 21 …".

100. It seems to me that this is a claim in relation to an over-declaration which falls to be corrected under regulation 34 of the Value Added Tax Regulations 1995 (SI 1995/2518). Regulation 34(1A) imposes a four year limit for such a correction, and so the appellant was in date to make it and it seems that HMRC have given effect to it by deducting it from amounts of tax due to them for other periods to give the total amount due to HMRC.

101. It follows that, as there cannot be an actual assessment under s 73 VATA for a period simply to reflect an unclaimed credit for input tax, the time limits in s 73(6) are not relevant for this period.

102. If I am wrong about this however then it seems the earliest that the appellant could possibly say that HMRC were in possession of evidence of the facts of this failure to claim input tax was 27 February 2015. An assessment, even if that were possible, made on 30 July 2015, is clearly in time for the purposes of s 73(6)(b) VATA.

103. The second period which the appellant says is out of time is 08/12. This is an assessment for £9,166 and this relates to the VAT on the sale of the pitch arising as the second issue.

104. In considering this assessment and the evidence on which HMRC based it and when they acquired it, I am hampered substantially by the failure of either party to provide either notes of the meetings that took place at which the second issue was discussed or correspondence before 3 October 2014 to and from HLS or the appellant regarding this issue.

105. What I do have is a copy of Mr Moody's letter to the appellant of 3 October 2014 which says:

> "I still require confirmation of the amount of output tax declared on the following sales:
>
> - Plot 19 – deposit of £15000 in the May 2012 quarter, with a balancing payment of £40,000 as described in a letter dated 2 April 2012 from Mr Wiles."

106. On 27 February 2015 HLS replied:

> "Further to our recent meeting we have the following information to provide:
>
> …
>
> 2. Lodge 19 was a plot only sale. Following your comments we have looked in more detail at the issue. Taking a practical view point I am sure we can all agree that a plot is pointless without a lodge as the sale only gives the use of the plot for a lodge not for any other purposes. Likewise a lodge is a pointless purchase without a plot, as there would be nowhere to site it. On this basis there would be a composite supply even if from different suppliers (this is allowed and accepted in the legislation). The VAT treatment of this would be zero rated as is the supply of a sited lodge."

107. Mr Moody replied on 16 March 2015 with his opinion that the supply was standard rated and giving the legislative authority for that.

108. I consider that the earliest date on which Mr Moody had sufficient evidence of fact to justify an assessment was the date in February or more likely March 2015 when he received and digested the letter from HLS. An assessment made on 30 July 2015 is clearly in time for the purposes of s 73(6)(b) VATA.

Conclusion

109. I therefore reject this ground of appeal in relation to the two periods referred to in the appellant's skeleton. Thus all of the separate assessments (as I have found them to be) made on 30 July 2015 were in time.

Further observations

110. I need to say something about the way the argument on this issue was formulated. I have already commented on the appellant's conduct in putting in this skeleton just before the hearing.

111. The skeleton was I am told settled by counsel. The point that it makes about the time limit issue is that the two periods 02/12 and 08/12 would have been out of time had they made separately and not as part of a global assessment. It goes on to point out, correctly, that in a global assessment if one period is out of time the whole assessment falls.

112. But the skeleton says (at [3]) that the relevant time limit was two years from the end of the period concerned. If that were all then it would have been correct to say that the periods would have been out of date when the global assessment including them was made.

113. But that is not the way Mr Lacey argued this point. His main contention was that HMRC had unnecessarily delayed making the assessment – he was clearly arguing that HMRC had the evidence of fact necessary to make the assessments more than a year before the assessment was actually made, an argument about s 73(6)(b). This is also the basis on which Mr Haley replied.

114. Yet when I look back at the skeleton, at [6] its says:

> "Consequently, the entire 2015 assessment is out of time under s.73(6)(b)"

and it then quotes s 73(6) in full. But nothing in the intervening paragraphs refer to the condition in s 73(6)(b). I am not in a position to say why the skeleton did not discuss s 73(6)(b), but I am surprised that it did not, if this was the document prepared or approved by counsel.

115. What neither party mentioned is that the assessment for 05/13 was also out of time under s 73(6)(a). However 05/13 like 02/12 (in the 30 July 2015 assessment) is an input tax only period, and so what I say about 02/12 applies to this period.

Decision

116. The assessments made by HMRC for 02/10, 05/11, 02/12 (that made on 30 July 2014), 11/13 and 05/15 (removable contents) are cancelled as I uphold the appellant's appeal on this issue.

117. The assessment made by HMRC for 08/12 (sale of pitch) is upheld.

118. That assessment for 08/12 was made within the time limit allowed by ss 73 and 77 VATA.

119. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 30 DECEMBER 2016