[2014] UKFTT 1092 (TC)

TC04181

Appeal number: TC/2012/08144

VAT – EXEMPT SUPPLIES – Education – Land - whether term-time supplies of student accommodation exempt or standard-rated– whether supplies made by college or its wholly owned subsidiary with whom the students concluded accommodation agreements – economic reality was that college was the supplier – supply of accommodation exempt as closely related to education (Group 6 Schedule 9 VATA 1994) – in any case supply of accommodation by subsidiary would not have fallen within exception provided by Item 1(d) Group 1 Schedule 9 VATA 1994 to land exemption – college in term-time was not a similar establishment to hotel – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE PRINCIPAL & FELLOWS OF LADY MARGARET HALL **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS RUTH WATTS-DAVIES MHCIMA FCIPD

Sitting in public at 45 Bedford Square, London on 30 and 31 January 2014 and on 16 April 2014

Timothy Brown, counsel, for the Appellant

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

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DECISION

Introduction

1. The appellant, the Principals and Fellows of Lady Margaret Hall ("the College") is a college of Oxford University. This appeal relates to the VAT treatment of supplies of term-time accommodation made to students of the College and whether those supplies are standard-rated, as the appellant argues, or exempt as HMRC argues. The appellant entered into an agreement with one of its subsidiaries, LMH Hospitality Services Limited ("LMHHS") which contemplated that LMHHS was to supply accommodation to college students on predefined terms. The appellant appeals against HMRC's decision of 6 August 2012 that the supply of student accommodation did not qualify as standard-rated.

2. The appeal raises the following issues:

(1) Who makes the supply of accommodation to the students? Is it LMHHS as the appellant argues or the College as HMRC argues?

(2) If LMHHS makes the supply, does it fall within the exemption in Schedule 9 Group 1 Schedule 1 as a licence to occupy land? Wrapped up in the above issue is the question of whether exclusive possession is necessary to fall within Group 1 Schedule 1 (the appellant argues it is not). If exclusive possession is necessary HMRC say LMHHS is not able to grant this to the student because LMHHS has not itself been granted the requisite land interest under the agreement between the College and LMHHS. The appellant argues it does not matter what LMHHS has been granted by the College; the agreement between the College and the student is nevertheless an agreement which is capable of falling within the land exemption (Group 1 Schedule 9 VATA 1994). (In any case the appellant says that if it is not within Group 1 Schedule 1 then the supply is not exempt under the education exemption (Group 6 Schedule 9 VATA 1994) because LMHHS is in essence not an eligible body).

(3) If the supply is within Group 1 Schedule 1 is it nevertheless standard rated as the appellant argues because it falls out by virtue of the exception in Item 1(d) of the Schedule for provision of accommodation which is provided in a similar establishment to a hotel?

(4) If the answer to issue 1) is that the College makes the supply, is the supply exempt because it is a supply by an eligible body of something which is "closely related" to the supply of education? HMRC argue the supply of accommodation is "closely-related"; the appellant disagrees.

Evidence

3. We heard oral evidence from Mr Richard Sommers. He is the Treasurer and also a fellow of the College and has held this post since January 2008. He is responsible for the financial affairs of the College and its administration. Mr Sommers

is also a director of LMHHS. His evidence was subject to cross-examination by HMRC and he also answered the Tribunal's questions. He was a credible witness of fact. To the extent some aspects of his evidence covered legal matters such as the legal characterisation of the relationship between the College and LMHHS we have discounted these. We also had before us various documents which included correspondence between the parties, bank statements of the College and of LMHHS, examples of sample agreements with students, agreements between the College and LMHHS, a statement of account, extracts from the College regulations, copies of pages from the College's website, and sample accommodation booking forms.

Background Facts

4. The appellant is a college of Oxford University set up by Royal Charter. It is also a registered charity.

5. The College has approximately 60 academic staff, of which 40 are fellows, 150 graduates and 400 undergraduates.

6. An undergraduate typically spends three years studying his or her chosen subject and will occupy a room in the College throughout the period of his or her studies. Fourth year undergraduates and some other undergraduates who choose to live out rent accommodation in or around the city of Oxford.

7. The Oxford academic year comprises three eight week terms and undergraduates of the College occupy rooms for periods of nine weeks in each term. Approximately 60 of the 150 graduates live in college and they occupy rooms for nine or ten months of the year.

8. Conferences are held for education and commercial clients, some with accommodation some without. Events include for example wedding receptions and silver service dinners.

9. Where the client is an educational institution the contract is with the College. For non-educational clients the contract is made with LMHHS and cheques are made payable to LMHHS.

The College and its subsidiaries

10. The College has three wholly owned non-charitable subsidiaries, one of which is LMHHS. This is described in the College's annual report (y/e 31 July 2012) as "the vehicle for the trading activities of the College". The other, Lady Margaret Hall Trading Limited, is described as the vehicle for managing new capital building projects. Mr Sommers told us that building contracts are entered into by this subsidiary. The third, Lady Margaret Hall Properties Limited, is described as having been used for the letting of rooms but as having been dormant since 1 August 2010.

11. This appeal is concerned with LMHHS whose name, before it was changed on 20 January 2011, was LMH Conference Services Limited. The company was

incorporated on 27 January 1999. In addition to Mr Sommers who is a director of the company and its company secretary there are three other directors.

12. The College has contracts with cleaners / porters etc. LMHHS does not have its own employees. It has no ownership of fixture and fittings or register of equipment.

5 13. On 2 June 1999 the College applied for and registered for VAT (as from 1 August 1999) as a Group.

The Licence and Operating and Asset Sale Agreement between the College and LMHHS

14. On 12 January 2011 the appellant and LMH Conference Services Limited
10 (defined in the agreement as "the Operator") entered into a Licence and Operating and Asset Sale Agreement for rooms and facilities at Lady Margaret Hall, Norham Gardens, Oxford. The agreement, which was drawn up by Blake Lapthorne Solicitors, is dated 12 January 2011 and contains the following relevant clauses.

15. Clause 1 contains various definitions.

15 16. Clause 1.1 defines "Business" as meaning:

> "the business of operating and providing accommodation conference facilities and catering and other facilities (akin to the provision of hotel accommodation and associated facilities) to students at the College, academics and third parties using conference facilities and all other
> 20 persons approved by the College acting reasonably but excluding Academic Conferences and the provision of catering to the students of the College."

17. "Licence Fee" is defined as:

> "…40% of the Operator's sales turnover payable annually and pro rata
> 25 for any period of less than a year and paid in arrears quarterly as required by the College or at such times as the College shall reasonably determine."

18. "Property" is defined as:

> "…all of the real property of the College where the business is carried
> 30 on"

19. Mr Sommers' evidence was that there no plan of the property covered by the agreement but that in his view it did not extend to use of the college library or of the rooms allocated to academics.

20. Clause 2 which is headed "sale and purchase" states:

> 35 "2.1 - The College shall sell and the Operator shall purchase with full title guarantee with effect from the Transfer Date the Business as a going concern and all the assets and rights owned by or (although subject to reservation of title by the College) under the control of the

College and solely used in the conduct of the Business…" including but without limitation;…"

21. The clause goes on to state this includes in summary goodwill, plant and equipment, rights and benefits (subject to burden) under contracts, records, stocks and other assets used in connection with the Business.

22. Clause 9 which is headed Licence states:

9.1 The College hereby licenses to the Operator for a period of 20 years from the Transfer Date on a non-exclusive basis the right to use upon payment of the Licence Fee the Property and any assets of the College which the Operator requests or which are reasonably necessary for carrying out the Business and which the College then has available.

9.2 To the extent possible by law the College here by licences for a period of 20 years from the Transfer Date on a non-exclusive basis the right to use the Business Name in connection with the business but for no other purpose

9.3 The College and the Operator agree that the occupation and use of the Property by the Operator is by way of licence only as the Operator will not enjoy exclusive occupation and use of the Property by reason of the continued provision of Academic Conferences by the College throughout the Licence Period

23. The term "Academic Conferences" is defined at clause 1.1 to mean:

"…conferences held at the Property by the College on behalf of educational institutions or as notified to the Operator from time to time in writing by the College."

24. Clause 11 headed "Occupation of property" states:

"11.1 The licence hereby granted to the Operator to use the Property for the Business for the License Period shall be on the conditions set out in this clause.

11.2 In respect of the Operators use of the Property

11.2.1 Such use shall not confer any entitlement to exclusive possession and the Operator shall not unless the Lease is completed become the tenant of the College

11.2.2 The Operator undertakes not to hold itself out as the owner of the Property or to admit any adverse claim in relation to it now will the Operator purport to sell charge or dispose of it any time save as expressly permitted under the terms of the Licence

…

11.2.4 In consideration for its use of the Property the Operator shall pay or reimburse to the College during the Licence Period such reasonable expenses as are agreed between the College and the Operator or in the absence of the agreement reasonably determined by the College"

25. Clause 13 headed "Accommodation" states:

> "13.1 The Operator shall not allow any student whether graduate or postgraduate of the College to occupy any accommodation at the Property upon any terms other than those set out in the Student Accommodation Agreement."

26. Clause 14 headed "Hotel arrangements" states:

> "14.1 It is the intention of the College and the Operator that the Operator shall operate such parts of the Property as the Operator shall reasonably require or in the case of dispute as the College shall reasonably determine from time to time for the purposes of the Business as if the Operator was operating a hotel business at the Property on its own account.
>
> 14.2 Nothing in this licence shall constitute the Operator as being the agent of the College or the College's subcontractor
>
> 14.3 Nothing in this Licence shall team [sic] or constitute the College and the Operator as being in partnership.
>
> …"

27. Mr Sommers' evidence was that if there was ever a dispute between the College and LMHHS it would be the College who would be the arbiter. He was not aware of there ever having been a dispute as to the parts of the College to be used by LMHHS.

28. Under Clause 18 the College was obliged to grant, and the Operator was obliged to accept, the Lease (a defined term in Clause 1) if the College or the operator reasonably required it in writing.

29. As at the date of the hearing the College had not granted a lease to LMHHS.

Student Accommodation Agreement

30. A sample Accommodation agreement was attached to the above agreement. This corresponded in all material respects to an actual agreement we were shown of a particular student. There were no material changes to this agreement in the relevant period.

31. The agreement stated the "Accommodation Provider" to be the Operator.

32. Clause 4 headed "Your Room (the "accommodation")" states:

> "4.1 This Agreement permits you to occupy a furnished room which we will allocate to you at Lady Margaret Hall, Norham Gardens, Oxford, OX2 6QA (referred to in this agreement as "the College") or such other room at the College as we may allocate to you"

33. Clause 4.1.1 provided:

> "You do not have exclusive occupation of your room and we are entitled to access to your room at any time although where possible we will try to give at least 24 hours notice."

34. Under the agreement services were provided to the student such as lighting, water, rubbish disposal, cleaning, and placement of mail.

35. Clause 10 on College Rules states:

> "You must comply with the University of Oxford's Regulations and with the College's Handbook and Regulations which will be provided upon request."

36. The College Regulations 2013 are set out in a 28 page handbook (including annexes) and cover matters such as discipline and behaviour, academic work, the library, fees and payments, residence, notices, security, health and safety, medical matters, and complaints procedures.

37. The Introduction to the Regulations states:

> "…it is the essence of College life that residence and teaching are combined. Therefore, as well as providing tuition and a library, the College has made arrangements to ensure that most of its undergraduates and many of its graduate students may rent living accommodation during term in buildings within the college perimeter…and in which they will have opportunities to meet informally at meals and at leisure. For these reasons undergraduates are normally required to live in this accommodation for three years of their course."

38. In relation to the complaints procedure set out in the Regulations there is a table outlining who to ask for various matters. For "Practical matters about accommodation" the table says to ask "Your scout, or the Head Housekeeper or the Estates Manager."

39. Clause 6.2 of the Regulations provides that if all or part of the fees or charges remain unpaid, without a satisfactory arrangement having been agreed with and confirmed in writing by the Treasurer, the student will be required to withdraw.

40. Clause 7 of the Regulations deals with residence. It notes that living accommodation is provided to students under accommodation agreements and that students living in such accommodation are required to observe the terms of the accommodation agreement. Their failure to do this may lead to termination of the agreement and to disciplinary action by the College. Permission from the Dean is required for parties in a room provided under an accommodation agreement. The Regulation states that:

> "Undergraduates are normally required to live in buildings within the College perimeter…during term for three years of their undergraduate course and therefore must obtain the permission of their tutor if they wish to apply to the Education Committee for permission to live elsewhere…"

41. Clause 9 deals with security, health and safety issues. It notes the perimeter gates and entry points to buildings are closed at 7pm and that members are issued with key fobs which admit them when the doors are locked. Information on arrangements for testing of portable appliances is available from the bursary.

42. Students are required to record their own absence at night and the names of any overnight guests in books kept in the Porter's Lodge to enable the college to account for the whereabouts of members and guests resident in the college buildings in case of fire or other emergency.

43. Clause 12 on complaints mentions that the college endeavours to ensure amongst other matters "good accommodation and catering services".

44. Under the College's Charter of 17 March 1926 as amended by various subsequent supplemental charters, students of the College are lifetime members of the College.

45. Statutes of Lady Margaret Hall provide variously for bye-laws to be made, and for contracts to be made on behalf of the College. There is a residency requirement for the College's Principal.

Allocation and use of accommodation in practice

46. Students typically come back to the same room across the year but the room is not specified in the agreement. They have to clear out their room in holidays. This is so even if there is no known booking at the time for conference use. If a student is sent down (expelled) the College does its best to re-let the room. Students are given a more than reasonable period of time (42 days) to clear out.

47. The provision of accommodation to students includes utilities. Rooms are not individually metered.

48. If a room becomes available during term time, it is offered to students on the waiting list for it. Sometimes rooms may be offered for bed and breakfast externally but during term-time rooms which are surrounded by other rooms occupied by students are not typically offered externally to visitors / travellers to Oxford.

49. Where rooms are offered externally this is done by putting details onto the Oxford University services website advertising room to have bed and breakfast in. Persons accessing the website can search for availability on their specified days.

50. Some of the accommodation in the college is used by academics as some fellows choose to live in college. They have separate agreements. Under the Statute of the College tutorial fellows are entitled to live in College. If they choose to live out they get a "live out allowance" which is paid for by the College.

College's website

51. The College website states "the College will house you on its main site for three years."

52. Under the heading of "Graduate accommodation" it is stated that "A number of graduates live in College…Some graduates prefer to live in accommodation they arrange for themselves in shared houses or flats elsewhere in the city".

53. A webpage on LMH Board and Lodgings information 2013/14 states the daily average room rate is £21.73. Room charges include all fuel costs as well as room cleaning.

Marketing material

54. Under the heading "Conferences" the website explains:

> "We can host some types of events all year round. During vacations we are also able to offer en-suite single or twin accommodation. Make a booking on the Bed and Breakfast page."

55. The material on Conference and Event Information 2012/2013 states there is a wide range of individual delegate bedrooms: 181 en-suite rooms, 69 standard plus rooms (with basin) and 67 standard rooms. Toiletries, linen and hand and bath towels are provided in all rooms. Tea and coffee making facilities are provided in en-suite rooms and in pantry areas adjacent to the other bedrooms.

56. The College handles provisional bookings and confirmation of bookings. 24 hour rates are given ranging from £110 in the standard bedrooms to £140 in the en-suite bedrooms. Bed and breakfast only, and half board rates are specified. The contact e-mail is at the College's address.

57. The Booking contract mentions the term "company" but all obligations / payment etc. refer to Lady Margaret Hall. The signature on the form is expressed to be "by or on behalf of Lady Margaret Hall".

Annual report and accounts

58. The College's Annual report of 13 July 2012 emphasises public benefit objectives.

59. The report explains the College charges a) fees and b) accommodation and meal charges at reasonable rates.

60. The report refers to expenditure on repairs to boilers and on fixing water leaks.

61. The Consolidated accounts for the College included some information which related to LMHHS only.

62. The turnover figure for LMHHS is stated to be £2,501,596 for 2012 and £2,492,078 for 2011. The cost of sales for those years respectively is £2,047,313 and £2,028,078.

63. The "cost of sales" figure on the detailed profit and loss account of LMHHS y/e 31 July 2012 is split into "conferences & functions" – the amount is £263,313 for 2012 and £418,379 for 2011 and "student accommodation" where the amount is £1,784,000 for 2012 and £1,610,000 for 2011.

64. The College's Annual report for 2008 mentions an aim of building approximately 110 new rooms and refurbishment of 150. It reports on the progress of aims relating to building.

Accounting and Payment flows

65. Mr Sommers' evidence was that services are provided from the College to LMHHS and LMHHS is charged for those. He said that LMHHS used money paid from the College to LMHHS in respect of accommodation charges to pay the service charges.

Payment from student to college

66. Each student has a "battels" account. The College invoices the student.

67. The College collects other amounts on behalf of the university such as tuition fees and gym membership.

68. We saw the agreement of a particular student which the parties agree was representative of the agreements concluded with students more generally.

69. We saw a sales invoice for £1325.27 for "UG Accommodation- Fresher" issued by the College (STP135809). ("UG" stands for undergraduate). This invoice appears on a "statement" issued by the College to the student Also on the statement are invoices for catering charges, tuition fees and gym membership.

70. The accommodation charge above of £1325.27 is one of the amounts in a schedule of "LMH amounts payable/ receivable HS Ltd". This shows amounts payable by the College to LMHS Ltd and vice versa.

71. On 31 October 2013 there is a debit for £467,343.29 for "UG Student Accomm HS Ltd". The named student's invoice of 7/10/13 is comprised within that amount.

72. We saw the bank statement for the College's current account showing the money coming in from the student on 25 October 2013.

Payment from College to LMHHS

73. The aggregate of the student accommodation receipts is accounted for by LMHHS.

74. Mr Sommers explained that the accounts and the payment flows were two different things. The accounts also show the bank transfers. On 31/10/2013 £100,145.50 is shown as the balance payable to "HS Ltd" (LMHHS). The minus figures on these accounts indicate that these are monies held by the College to be paid to the LMHHS.

75. We saw a receipt in LMHHS's bank account of a £110,000 balance.

76. Mr Sommers said money was collected in from the students by the College on LMHHS's behalf. LMHHS services (e.g. cleaning) were provided by staff working for the College and LMHHS had to pay the College for these. There was an accounts payable and receivable. He says only the net amount was paid.

77. We were not referred to any evidence which suggested the 40% of turnover amounts representing the Licence Fee under the agreement (set out at [17] above) were paid from the College to LMHHS.

Payment from LMHHS to company

78. On 29 November 2013 the College received £55,000 from LMHHS and also £81,000.

79. Mr Sommers said the £81,000 payment was for settling a VAT payment bill. He could not remember what the £55,000 amount was for. He could not recall why he would transfer £110,000 (see [75] above) and transfer back £55,000.

80. Apart from Mr Sommers telling us that payments were run up for services provided by the College to LMHHS we were not referred to anything else in the way of supporting evidence which showed the figures and the basis upon which any such figures had been agreed between the College and LMHHS as to the amount that LMHHS was to pay for these services. The lack of documentary evidence seems surprising to us when viewed against the backdrop of the governance requirements that are otherwise apparent in relation to the College and LMHHS. In the absence of such further detail and evidence Mr Sommers' belief that services were provided by the College to LMHHS in return for payment provides us with insufficient basis to make any finding as to what was provided by the College to LMHHS in return for payment. Further there was no evidence on how the College had calculated the reasonable expenses referred to in Clause 11.2.4 of the agreement between the College and LMHHS (set out at [24] above).

Law

81. Under section 1(1)(a) of the Value Added Taxes Act 1994 ("VATA 1994"), VAT is required to be charged in accordance with the Act on the supply of goods or services, and, under subsection (2) is a liability on the person making the supply and becomes due at the time of the supply. Section 4(1) provides, VAT is required to be charged on any supply of goods or services where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him. Under

subsection (2): a taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

82. Under section 5(2)(a) supply includes all forms of supply but not anything done otherwise than for a consideration; and under (b), anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services. Under section 6(3), the supply of services is treated as taking place at the time of their performance.

83. Under s31(1) a supply of services is an exempt supply if is of a description specified in Schedule 9.

84. As set out below Schedule 9, Group 1, Item 1 provides an exemption, and a series of exceptions to the exemption. This appeal is concerned with the exception at d):

> "The grant of any interest in or right over land or of any licence to occupy land, … other than:
>
> …
>
> (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;"

85. Note 9 to the Schedule provides:

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

86. Schedule 9 Group 6 provides:

> "1. The provision by an eligible body of:
>
> (a) education …
>
> 4. The supply of any goods or services (other than examination services) which are closely related to a supply of a description falling within item 1 (the principal supply) by or to the eligible body making the principal supply provided —
>
> (a) the goods or services are for the direct use of the pupil, student or trainee (as the case may be) receiving the principal supply; and
>
> (b) where the supply is to the eligible body making the principal supply, it is made by another eligible body."

87. The Notes provide that: (1) For the purposes of this Group an "eligible body" is — ... (b) a United Kingdom university, and any college, institution, school or hall of such a university…".

88. s47 VATA (Agents etc.) provides:

> "(3) Where services are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent."

Charity law

89. Section 36(2), Charities Act 1993 required two pre-conditions to be met to disapply the subsection (1) prohibition on any land disposition by a charity of which the second required satisfaction of subsections (3) or (5). Ss(3) required the charity "before entering an agreement for sale, or lease or other disposition of the land to a) obtain and consider a written report on the disposition by a qualified surveyor acting exclusively for the charity; b) advertise the disposition; subsequently c) decide after consideration of the report if they are satisfied that the disposition terms are the best that can reasonably be obtained by the charity. Ss(5) required in summary (in relation to dispositions of less than 7 years) that before entering into an agreement for the lease the charity trustees had to a) obtain and consider the advice on the proposed disposition of a person believed to have the requisite ability and practical experience to advise on the proposed disposition, and b) decide if they were satisfied that the terms of the disposition were the best that could be reasonably obtained for the charity. In addition, subsection (6) prohibited a disposition unless the charity trustees had advertised the proposed disposition and considered any resulting representations.

90. The Charities Act 1993 has since been repealed. As from 14 March 2012 restrictions on disposition of land in relation to charities and provisions on advertising the disposition and seeking and considering the report of a qualified surveyor are contained within the materially similar terms of s117 and s119 of the Charities Act 2011.

Parties' submissions

91. We deal with these where appropriate in more detail in our discussion of the various issues. In summary, the appellant says the supplies are made by LMHHS. There is no question of LMHHS being the agent of the College. The appellant says the College did not make the supply of accommodation to the students; it had an agreement with LMHHS to do so. The license agreement was not an agency. Looking at the contract and the overall view of economic reality it is LMHHS who makes supply. For agency both parties have to have consented and there was no consent. The fact the College takes money from the student for the accommodation is for reasons of convenience.

92. The appellant argues LMHHS had a license to occupy and that is all that is required. It is not necessary to have exclusivity (the appellant relies on the VAT Tribunal decision of *Abbotsley Golf and Squash Club* (VAT decision 15402). Even if it is necessary to have exclusivity and this has not been given to the appellant it is not necessary to have an interest in land to be valid tenancy for the purposes of the exemption in item 1 of Group 1. It does not matter if the interest in land which was provided from the College to LMHHS was insufficient because the Court of Appeal

decision of *Vehicle Control Services* applying the House of Lords case of *Bruton* supports the proposition that someone with no interest in land can grant tenancy between two contracting parties.

93. The appellant argues the supply is within the exception to the exemption in item 1(d) of Group 1, applying the ECJ case of *Blasi* and the VAT Tribunal case of *Acorn Management Services Ltd* (VAT decision 17338). If HMRC were correct and LMHHS could not make the supply of an item 1 lease or letting then the supply cannot be exempt because LMHHS is not an "eligible body". Even if HMRC were correct in saying that the College makes the supply of accommodation then the supply is not exempt because the supply does not count as being "closely-related" to education for the purposes of the exemption.

94. HMRC dispute all of the above. They say the supply of student accommodation is a supply by the College or a supply through LMHHS acting as the agent of the College. The supply of accommodation is closely related to the College's own supply of education to the students and therefore exempt.

Issues

Who supplies the student accommodation? Is it the College or is it LMHHS?

Legal approach

95. The contract to supply student accommodation was between the student and LMHHS. Both parties acknowledge that the case law (*Secret Hotels2 Ltd* and *Newey*) recognises that the Tribunal can have regard to the wider circumstances beyond the contractual arrangements but they disagree on the point at which it becomes relevant to look at such wider circumstances. Even if the wider circumstances are examined the parties disagree as to the conclusion to be reached on the question of who is the supplier.

96. The appellant argues the Tribunal should only look at the wider circumstances beyond the contractual agreements if there is artificiality and HMRC have not alleged artificiality. HMRC acknowledge they have not alleged the arrangements are artificial but say the wider circumstances are relevant for the Tribunal to look at even if artificiality is not present.

Secret Hotels2 Ltd v Revenue and Customs Commissioners [2014] UKSC 16

97. In *Secret Hotels2 Ltd* the Supreme Court, in a unanimous judgment given by Lord Neuberger, considered (as described at [1] of the decision), the VAT liability of a company which marketed and arranged holiday accommodation through an on-line website. It considered the "appropriate characterisation of the relationship between the company, the operators of the hotels, and the holiday-makers or their travel agents".

98. The decision considered a special scheme relating to travel agents (Article 306) which drew a distinction (as described at [25] of the decision) between travel agents who dealt with customers in their own name and those who acted solely as intermediaries. The Supreme Court referred at [29] to the following extract from *Newey* (Case C-653/11) [2013] STC 2432 in its discussion of the approach suggested by CJEU cases:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case law of the court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT … .
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."”

99. At [30] to [32] Lord Neuberger noted:

> “30. Where the question at issue involves more than one contractual arrangement between different parties, this Court has emphasised that, when assessing the issue of who supplies what services to whom for VAT purposes, "regard must be had to all the circumstances in which the transaction or combination of transactions takes place" – per Lord Reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] 2 All ER 719, para 38. As he went on to explain, this requires the whole of the relationships between the various parties being considered.
>
> *The correct approach in domestic law*
>
> 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…."

100. While we understood the appellant to be in agreement with the suggestion that the whole of the various contractual relationships could be taken into account (i.e. we could look at the College / LMHHS agreement as well as the student agreement) the appellant, referred to [31] in *Secret Hotels2* in support of its argument that the proper approach was to interpret such agreements to identify the parties' rights and obligations. Given there was no allegation that the contractual arrangements were a sham, the appellant's position is that the contractual agreement is not simply a factor to be taken account in these circumstances but is determinative.

101. HMRC also agree it is necessary to look at all the arrangements (both the College/ LMHHS agreement and the student agreement) but argue that the contractual arrangements are a factor to be taken account of and are not determinative even if no allegation of sham is made. They say that where there is a "disjunct" from economic reality, then the economic reality is determinative.

102. At [33] of the Supreme Court's decision Lord Neuberger noted the circumstances where under English law the subsequent behaviour or statement of parties could be an aid to interpreting their written agreement (in summary, arguments that the written agreement was a sham, to support rectification, to support a claim the agreement was later varied, rescinded or replaced by a later contract (agreed by words or conduct) or that it was only part of the totality of the contractual relationship.) He noted that sham and rectification were not relevant on the facts, and went on to say at [34]:

> "…In these circumstances, it appears to me that (i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms ("the contractual documentation"), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts…"

103. Sham and rectification are also not relevant on the facts of this case. Having regard to what is said at [30] to [35] of the decision we suggest the approach the Tribunal must take is the following. We should:

(1) characterise the relationship in the light of the contractual documentation (having considered parties' subsequent conduct to see if contractual relationship has been varied etc. and acknowledging that the labels parties place on their legal relationship are not necessarily conclusive) .

(2) consider whether the characterisation represents the economic reality of the relationship in the light of any relevant facts.

104. In *Secret Hotels2* we note there was no allegation of sham, or of artificiality. Nevertheless the Supreme Court went through various factors ([45] to [50]) relating to the wider circumstances relied on as being relevant by HMRC but found that these did not undermine the existence and nature of the agency arrangement. It did not simply say there was no artificiality and therefore it only needed to look at the contracts. We

therefore disagree with the appellant's argument that we should only look to the wider circumstances beyond the contractual terms when there is artificiality. It seems clear from the Supreme Court's approach that we must look at the wider circumstances put forward by the parties as against the contractual terms (once the contractual terms have been established).

The accommodation agreement between student and LMHHS and agreement between the College and LMHHS

105. The details of these agreements are set out above at [14] to [35] above. It is not argued that these agreements are a sham.

106. Is there any evidence that these agreements are varied by post-contract conduct?

107. In our view there was nothing on the evidence we were referred to to suggest that after the student accommodation agreement was entered into that it was contractually varied. However, in relation to the agreement between the College and LMHHS while there was no evidence to suggest this had been formally varied there were several gaps considered below in the conduct of the parties in implementing the agreement in practice which lead us to question whether the written agreement properly reflected the contract between the parties. We consider below whether the conduct of the parties is more consistent with LMHHS acting as the College's agent in entering into the accommodation agreements with the students.

Agency relationships

Is LMHHS the agent and the College the principal in relation to the supply?

108. HMRC's Statement of Case states that "to the extent" the college argues it is an agent of LMHHS the indicators of agency are not satisfied and there is no agency/principal relationship in respect of a supply of accommodation. The appellant contends there is no agency agreement between the College and LMHHS in relation to who makes the accommodation supply as the parties have not consented to this (referring to *CCE v Johnson* [1980] STC 624). HMRC refer to the House of Lords decision *Garnac Grain Inc. v HMF Faure and Fairclough Ltd* [1968] AC 1130n (a case which points out that while parties must consent to an agency, the consent can be by words and conduct even if the parties do not recognise the relationship of agency and *P and R Potter* [1985] STC 45 (the labels of "agency" and "commission" are inconclusive; it is necessary to look at pointers for and against agency.) According to *Johnson* whether there is an agency will be a matter of looking at the evidence.

109. In order to identify what the parties' respective rights and obligations are it is necessary in our view to consider whether there is a relationship of agency between the College and LMHHS even if the appellant does not specifically argue that there is such a relationship.

Indicators of agency

110. A list of indicators is set out in the case of *Potter* at 51 g) onwards where it was found there was no agency. HMRC also referred to the list in *Vehicle Control Services* at [28] and [29]. (The case is discussed in more detail at [166] below.) There, the contract between Vehicle Control Services ("VCS") and the landowner was found to have lacked the usual indicia of agency.

(1) VCS had the right to determine (and alter) parking charges.

(2) VCS had the right to decide what kind of enforcement action to take.

(3) VCS had no obligation to account to the landowner which is a fundamental feature of agency.

(4) VCS was pursing its own commercial objectives in taking enforcement action whereas an agent is in a fiduciary relation with his principal.

111. HMRC highlight that at [20] of the decision in relation to arrangements with the motorists, the landowner does not receive money, does not know how much money VCS received, has no control or right to know the amount VCS receives and that no money attributable to parking charges passes from the landowner to VCS.

112. HMRC equate VCS to the College here. They say we should note the College sets the charges for the rooms. While the College does not have the right to enforce, it is the ultimate arbiter of disputes. There is no obligation to account but Mr Sommers said the College operated both the accounts of the appellant and the company. The regulations make it clear students are required to be resident. The College regulates how much money is passed over, and money passes to them which is attributable to accommodation charges. The appellant argues that the College is simply the collection agent of LMHHS.

113. We note the following as matters which might indicate that the College is the principal. The college advertises the rooms, it receives payment, and its staff deal with accommodation issues and complaints. It effectively creates the demand for the supply of accommodation to the College's students by imposing a residency requirement. It sets the terms of the accommodation agreement. It effectively controls the price of the accommodation. There was no evidence of marketing or promotion by LMHHS or in respect of a supply being offered by LMHHS as might be expected if LMHHS was the principal.

114. Factors which might indicate that the relationship is not an agency one are the absence of any remuneration under the agreement for LMHHS. There is no separately identified remuneration for agency services e.g. in the form of commission passing from the College to LMHHS. The evidence of Mr Sommers was that any money held back was in respect of services the College provided to LMHHS. Although the accommodation fee is paid to the College there is evidence to suggest it is paid on to LMHHS. There is no commitment on the part of LMHHS to offer accommodation, or to promote or market it.

115. Clause 14.2 of the agreement between LMHHS and the College (see [26] above) says that nothing in the license agreement shall constitute LMHHS as being the agent of the College. While this clause is not of course determinative the fact the parties have included this in the agreement they made is nevertheless something to be taken account of.

116. The fact that according to Mr Sommers money is transferred net once received by the College to LMHHS also seems inconsistent with the College being the principal. It is more consistent with LMHHS making the supply, and as the appellant argues, the College being a collection agent of the LMHHS. It is not inconsistent with the agreement which leaves open who the payment is to be made to. If the College were the principal it might be expected that the College would retain the money received from the students.

117. On balance however we think LMHHS is acting on behalf of the College as the College's agent when it enters into contracts with the students.

118. The pointers towards there not being an agency do not outweigh the pointers towards an agency because of the following.

119. Under clause 11.2.4 of the College / LMHHS agreement we think it is significant that the College may ultimately determine the reasonable expenses which LMHHS must pay and also that the College effectively gets to determine the costs of the student accommodation. There is no evidence before us that LMHHS played any independent part in determining this amount.

120. While there is no obligation on LMHHS to offer student accommodation in practice there appears to be no occasion on which LMHHS have not offered student accommodation to the College's students.

121. In relation to the College making net payments the basis of the retained sum and how it was calculated was not clear at all. We are wary therefore of putting any significant weight on this factor. Even if the payments were made net, it is insufficient in our view to outweigh the pointers to the opposite conclusion. It appears that movements of monies between the two accounts (College and LMHHS) took place even before the LMHHS and College agreement was put into place. This suggests the movements of monies were not necessarily motivated by the agreement. Mr Sommers' evidence was also that funds were moved between accounts in order to earn as much interest as possible. We were not referred to any evidence which showed the 40% license fee amount (as described at [17] above) was paid or set off according to the agreement. These points tend to suggest we cannot assume that monies were transferred from the College to LMHHS as a matter of routine even if there was at least one occasion where this happened.

122. The way the accounts of LMHHS are set out (recording the turnover and cost of sales of student accommodation supplies as LMHH's) cannot be determinative.

123. A further reason is the fact the staff and employees are those of the College. There was no evidence to support the appellant's argument that the staff of the college

(e.g. security staff and cleaners) were acting on behalf of LMHHS and not the College in carrying out their duties. There was no evidence we were referred to as to how any retained sum related if at all to the employment costs of the appellant's staff.

124. The agreement between the College and LMHHS is expressed to be "non-exclusive". There is no non-compete clause in relation to the College offering student accommodation and no legal obstacle to the College being able to offer student accommodation as principal.

125. We therefore think that despite the clause in the agreement indicating that no agency was intended; LMHHS was acting as an agent for the College and concluded contracts on the College's behalf. The necessary consent for the agency relationship is apparent from the nature of the other terms in the written agreement (the lack of control on the part of LMHHS over the terms of the student accommodation agreements) and the conduct of the College in promoting the accommodation providing staff to maintain it, and receiving payment from the students for the accommodation and in LMHHS's implicit agreement to such conduct.

If LMHHS was acting as agent was it acting in its own name?

126. Although the issue of whether the agent was acting in its own name was not discussed it is relevant given s47 VATA 1994 which HMRC referred to (see [88] above). In our view it would be abundantly clear to the student signing the agreement even though the agreement the student signed was with LMHHS that the identity of the principal was the College.

127. It was the College who held out to them the availability of accommodation, who allocated rooms, whose staff were to be contacted in case of a complaint, and it was the College to whom payment was made. The agreement required the student to be compliant with College regulations. LMHHS was a "disclosed agent" with the college as an identified principal and for the purposes of s47 VATA 1994 was *not* an agent acting in its own name. Section 47 VATA 1994 does not therefore apply.

Wider circumstances / economic reality

128. The next issue then is to consider the wider circumstances / economic reality and see whether this is this consistent with the conclusion that the College was acting as principal?

129. It follows from the approach taken by the Supreme Court and the fact there was no allegation of artificiality in *Secret Hotels2 Ltd* that the Supreme Court did not take a restrictive view of *Newey* to the effect that it could *only* ever be relevant to look at the wider circumstances and economic reality when there were situations of artificiality. (Any such argument for the restrictive view would presumably be based on a close reading of the CJEU's decision where it said at [52] that contractual terms "…may *in particular* be disregarded if it becomes apparent that they do not reflect economic and commercial reality, *but* constitute a wholly artificial arrangement which

does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage…", [emphasis added]).

130. We were not addressed in any detail on what exactly is meant by economic reality. In *Newey* at [49] it is stated:

> "It is for the referring court, by means of an analysis of all the circumstances of the dispute in the main proceedings, to ascertain whether the contractual terms do not genuinely reflect economic reality…"

131. In the preceding paragraph [48] the CJEU, referring to the matters of fact mentioned in the third of the Upper Tribunal's questions in its reference to the CJEU, stated that it was conceivable that "…effective use and enjoyment of the services by the appellant took place in the UK and that Mr Newey profited therefrom." To the extent that outcome is more consistent with HMRC's position in that case rather than the strict contractual approach which the appellant in that case was essentially arguing for, this suggests to us that the matters of fact set out in the UT's third question are relevant in considering what is meant by economic reality.

132. Those questions (which are set at out at [37] of the CJEU's decision) were:

> "(a) Whether the person who makes the supply as a matter of contract is under the overall control of another person?
>
> (b) Whether the business knowledge, commercial relationship and experience rests with a person other than that which enters into the contract?
>
> (c) Whether all or most of the decisive elements in the supply are performed by a person other than that which enters into the contract?
>
> (d) Whether the commercial risk of financial and reputational loss arising from the supply rests with someone other than that which enters into the contracts?
>
> (e) Whether the person making the supply, as a matter of contract, sub-contracts decisive elements necessary for such supply to a person controlling that first person and such sub-contracting arrangements lack certain commercial features?"

133. Taking those factors in turn. In relation to a) LMHHS is a wholly owned subsidiary of the College. As far as b) is concerned we note that before the arrangements were put in place the College was responsible for supplying accommodation to students and expertise of how these arrangements worked. However the Treasurer of the College, Mr Sommers, is also a director of LMHHS. From that point of view LMHHS has to some extent been equipped with some business knowledge and expertise.

134. In relation to c) the supply is of accommodation in the College's rooms according to the terms the College has set. The College effectively controls the price. There is no evidence that LMHHS sets the price. The College sets the terms on which

the accommodation is supplied. It is not able to and did not in practice use a different form of agreement. Because the agreement requires compliance with College rules it does not envisage accommodation being supplied to persons who are students elsewhere. The College ultimately is able to set the amount of the reasonable expenses which are to be paid by LMHHS to the College.

135. In relation to d) if students are late in paying, do not pay, or do not conclude agreements, while it might appear at first sight that the financial risk falls on LMHHS in that the accommodation fees will not be passed on to LMHHS we think the College is at greater financial risk for the following reasons. If students did not pay this would seem to be a financial risk which fell on the College given the costs it would continue to incur in employing cleaning and security staff (i.e. the College has ongoing fixed costs rather than LMHHS). We did not see any evidence of the terms of the pricing agreed as between LMHHS and the College but the reference to the expenses in the agreement being reasonable expenses suggests that LMHHS might not continue to incur expenses if students did not live in College under an LMMHS accommodation agreement (in which case there would not be an ongoing financial risk for LMHHS).

136. The facts also indicate the reputational risk of any problems with supply of accommodation would fall on the College. It has held itself out as providing accommodation for all undergraduate students who require it. The accommodation is on premises it owns. The College extols the benefits and importance of the close association between residence and education.

137. In relation to e) (sub-contracting arrangements with non-commercial features) this is not relevant to the circumstances of this case. There was insufficient evidence before us to make any finding as to whether LMHHS as the contractual supplier sub-contracted to the College decisive elements necessary for the supply let alone whether the features of any such sub-contract were uncommercial.

138. On balance, putting aside point b) above which is neutral given expertise also resides in the College, and point e) which is not relevant to the facts we find in this case, that the factors are more consistent with the College being the person who in economic reality makes the supply to the student. The factors point away from the economic reality being that LMHHS makes the supply. (This is consistent with the principal / agent analysis above but even if it is not correct that LMHHS acts as the College's agent, we think economic reality would therefore point to the College, and not LMHHS being the person who makes the supply.)

Is the supply "closely-related" to "education" for the purposes of Item 4 Group 6 of Schedule 9 VATA 1994?

139. The excerpt from the statute is set out above at [86].

140. There is no dispute that the College is a college of a United Kingdom university and that it is therefore an "eligible body".

141. HMRC refer to the case of *CCE v University of Leicester Students Union* [2001] EWCA Civ 1972. The issue there was whether supplies of soft drinks made by the student union to students were exempt. At [52] Arden LJ after setting out the provisions of item 4 noted that it was accepted that the supply of catering to students was a supply of goods or services "closely-related" to the provision of education.

142. HMRC referred us to a passage at [53] :

> "The Commissioners accept that education does not take place simply in a lecture hall but that a wider view of education has to be taken. It must follow from this that the facilities which a university can properly provide may extend far wider than teaching activities. For instance , it may obviously cover facilities for physical recreation, a medical centre and services for the repair of students' computers. Moreover, provision of a students' union is a valuable and integral part of modern university life: see the observations of Brightman J in *London Hospital v IRC* [1976] 1 WLR 612."

143. The appellant argues that while this list is non-exhaustive it did not mention accommodation even though this might have been seen as one of the most obvious facilities to mention if it was intended to be viewed as closely-related.

144. The context of the above extract is not however the question of "closely-related" but whether the Students' Union was an "institution" of the University of Leicester.

145. Nevertheless the fact that catering was noted as being closely-related to the provision of education, and that the Commissioners' broad view of education was not rejected suggests that the argument that accommodation is "closely-related" to education is not at first blush one which is untenable.

146. HMRC point to various statements in the College rules and regulations and in particular the statement that "It is the essence of College life that residence and teaching are combined." Students must seek permission if they want to live away. Under their obligations under college regulations students are required to be compliant with their accommodation agreement.

147. We have no difficulty in these circumstances in reaching the conclusion that the supply of student accommodation by the College in term-time is "closely-related" to the provision of education by the College and therefore that the supply is exempt.

148. The appellant's argument that the supplies are standard-rated therefore fails and its appeal is dismissed.

149. The remainder of the decision deals with our views in the event we were wrong in our conclusion above that the College supplies accommodation and that it is instead LMHHS who supplies the accommodation.

Is the supply of accommodation within Group 1 item 1?

Legal issue between parties: Is "exclusive possession" as understood in domestic law necessary to fall within Group 1 item 1?

150. The appellant relies on the VAT Tribunal cases of *Abbotsley* and *Acorn.* The Respondents refer to the cases of *Sinclair Collis* and *Cantor Fitzgerald.*

151. The case of *Abbotsley Golf & Squash Club Ltd Decision 15042 (2 May 1997)* was concerned with whether an agreement between the appellant and a golf club amounted to a "licence to occupy land". In response to the Commissioners' argument that it could not be so because the license was non-exclusive the Tribunal did not consider that exclusivity was a condition of granting an exempt licence to occupy land (pg 8).

152. In *Acorn Management Services Limited (*VAT decision 17338), the appellant made arrangements with (usually) American universities under which students occupied accommodation owned by the appellant. The appellant argued the supplies were exempt under Item 1 Group 1 Schedule 9 VATA. HMCE argued they fell within the exception to the exemption in Item 1(d) Group 1 Schedule 9. The Tribunal found in favour of HMCE. The appellant did not articulate how exactly this decision assists but to the extent the Tribunal found the exception applied it must arguably have found the supply of student accommodation to be within Group 1 item 1 but for that exception and therefore we assume the appellant may be seeking to draw some kind of analogy between the facts of that case and the facts here.

153. HMRC refer to *Cantor Fitzgerald (Case C-108/99)* which referring to previous European Court case noted at [31] that:

> "The letting of immovable property for the purpose of art 13B(b) fo the Sixth Directive essentially involves the landlord of the property assigning to the tenant, in return for rent and for an agreed property, the right to occupy his property and to exclude other persons from it…"

154. HMRC also refer to *Sinclair Collis* (the House of Lords decision at [2001] UKHL 30 and the subsequent referral to the ECJ (Case C-275/01)). The facts concerned agreements made between siteholders and the appellant in relation to cigarette vending machines placed in pubs and whether the agreement was a "letting of immovable property". Lord Scott's judgment at [71] sets out the view that this issue was dependent on the facts:

> "The cited passages from the European Court's judgment in EC Commission v United Kingdom [2000] STC 777 may lend themselves to some misinterpretation. The exclusions from the article 13B(b) exemption show a clear and unequivocal intention on the part of the Council that transactions falling within an excluded category should fall outside the VAT exemption. But the exclusions cannot reasonably be supposed to indicate the opinion of the Council that every transaction falling within an exclusion would, had it not been for the exclusion, have fallen within the exemption. The exclusions certainly

> do show that transactions of the sort described are capable of falling within the exemption, and that it is the intention of the Council that they should not do so. So it is not necessary to ask whether a contract under which a person who takes a bedroom in a hotel is a contract of "letting of immovable property". It might or might not be. The answer would depend on the facts. A contract under which a room were taken for a week might well constitute a letting. A contract under which a room were taken for half an hour so that a man might consort with a lady would, I suggest, be very unlikely to be held to do so. A contract for parking space might entitle the grantee to the exclusive use of a specified parking space. Or it might do no more than entitle him, together with others to whom a similar right had been granted, to enter upon a piece of land and park wherever he could find space to do so. The former might constitute a "letting". The latter arrangement could not possibly be held to do so. In my opinion, the categories of exclusion in article 13B(b) and, for the same reasons, the categories of exclusion in paragraph 1 of Part II of Schedule 9 to the 1994 Act, do no more than indicate types of transaction capable of constituting a "letting" for the purposes of the Directive or of a "licence to occupy" for the purposes of the 1994 Act. Whether, in any particular case, the transaction would, had it not fallen within one of the excluded categories, have fallen within the exemption would have depended on the facts of the particular case. EC Commission v United Kingdom [2000] STC 777 is not, in my opinion, any warrant for treating as a "letting" or as a "licence to occupy" a transaction which would not ordinarily justify being so described.
>
> [72] Whether, in a particular case, a contract conferring a licence over land creates a relationship between the licensee and the land that can be described for VAT purposes as "occupation" is, in my opinion, a question of fact and degree. The same must, in my opinion, be true of a "letting" for the purposes of article 13B(b) of the Directive.
>
> [73] So what are the characteristics that distinguish a licence to occupy from a mere licence to use? There are, in my opinion, two characteristics, one or other of which must, in some sufficient degree, be present. One is possession. The other is control. If neither is present, I find it difficult to understand how the licensee could be said to "occupy"."

155. Lord Slynn thought the agreement was license to occupy but that the question should be referred to the ECJ. Lord Steyn agreed with Lord Slynn a referral should be made. Lord Nicholls said that for his part he would allow the appeal (he thought the license was for use rather than occupation of land) but he agreed that the question should be referred.

156. Lord Millett said he would allow the appeal – the agreement was a right to bring machines onto the premises and place them in suitable positions there. He did not think there should be a reference but agreed given the other Lordships took a different view that there should be a reference.

157. Lord Scott (in the extract quoted above) did not find the possession or control aspects to be met and would have allowed the appeal but agreed there was uncertainty as to meaning of the word "letting" and that there should be a reference to the ECJ.

158. Upon the reference from the House of Lords to the ECJ the ECJ noted at [25]:

> "… it is also settled that the fundamental characteristic of a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, 'Goed Wonen', paragraph 55, and Case C-108/99 Cantor Fitzgerald International [2001] ECR I-7257, paragraph 21)."

159. In the light of this to the extent the appellant seeks to rely on *Abbotsley* for the proposition that it is not necessary to show exclusivity for there to be a letting of immoveable property then this is incorrect. However it is worth being clear on what is meant by exclusivity in this context. As set out in the extract above, the person must have the right to occupy the property as if he were the owner and to exclude any other person from enjoying that right. Rights of access are not inconsistent with enjoyment as an owner. (See *Temco* C-284/03 a case relied on by the appellant at [24] and [25] where it was noted that restrictions on the right to occupy premises (such as a landlord reservation to visit the property, or provisions in relation to parts common with other occupiers) did not prevent the occupation from being exclusive as regards all other persons who were not permitted by law or by contract to exercise a right over the property).

160. Also the words "as if that person were the owner" must be capable of being interpreted so as to cover fact patterns which involve accommodation within a hotel (which may be short term accommodation (see *Blasi*) and consistent with Lord Scott's example in *Sinclair Collis* with the one week stay in a hotel (see [154] above).

161. The appellant referred to *Blasi* where the facts related to provision of temporary fully-furnished accommodation owned by Mrs Blasi for asylum-seekers and emigrants. The residents cleaned their own rooms. Mrs Blasi provided fresh bedding. We refer to the case in more detail in the section on the Item 1(d) exception to the Group 1 land exemption below. HMRC point out that the appellant's reference to *Blasi* by way of analogy is misplaced as in *Blasi* there was no issue over the agreement being a letting.

162. However we think that this does not detract from the similarity in facts between the accommodation provided by Mrs Blasi and student accommodation. In both there were rooms in a building with some services. While there was no discussion in *Blasi* of exclusive possession (because as HMRC point out the issue of whether there was a letting was not before the court), the case indicates that it is not untenable to say that student accommodation as set up in this case could amount to a letting.

163. In looking at what is conferred it is not simply question of looking at the terminology used in the agreement but the effect of the rights and obligations in the agreement. The fact an agreement does not explicitly state it is conferring the right to occupy as if that person were the owner and able to exclude all others is not fatal to it falling within the exemption if that is the effect of the rights which are conferred.

164. In conclusion the appellant is incorrect to the extent it argues that exclusive possession of the land (in the sense of being able to exclude another from occupying as owner) is not necessary for the purposes of Group 1 Schedule 1. It is necessary. But 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 licenses). What is fundamental is the ability to exclude others from occupying as owner. Whether the accommodation agreement grants exclusive possession in this sense is considered below at [183] onwards.

Does LMHHS have to have exclusive possession in order to be able to give it to student?

165. Is it possible for LMHHS to lease and let given the interest it has received from the College? The appellant argues it is by reference to *Vehicle Control Services* (discussed further below). HMRC disagree on the basis that you cannot give what you do not have. Also HMRC say this would have required certain charity legislation requirements to be complied with and that if they were not then the agreement would be ultra vires. They say the appellant has no capacity to grant more than a license. The appellant argues the charity legislation is irrelevant as it is not arguing that it was granted a lease or land interest which would be subject to those provisions.

Vehicle Control Services v HMRC [2013] EWCA Civ 186

166. The clients of the appellant ("VCS") owned or were lawful occupiers of car parks. VCS provided parking control services to them. It charged parking penalty charges. VCS argued those charges were not liable to VAT either because they were damages for breach of contract between VCS and the motorist or because they were damages for trespass.

167. In relation to the issue of whether there was a contract between VCS and the motorist the FTT held that there was such a contract. On appeal the Upper Tribunal (UT) disagreed. On appeal to the Court of Appeal (CA) the CA found that the UT had erred in finding that since VCS did not have the right under its contract with the car park owner to grant a licence to park, it could not have contracted with the motorist. The CA highlighted the distinction between making a contract and having the power to perform it. It referred to *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 where a housing trust with no interest in land was held to have validly granted a tenancy of the land to a residential occupier. The tenancy would not have been binding on the landowner but bound the two contracting parties in precisely the same way it would have done if the grantor had had an interest in the land.

168. The CA held one of the rights VCS acquired was the right to enforce parking restrictions and keep the proceeds and allowed the appeal on that basis. It also found that VCS was given the right to eject trespassers both in its contract with the landowner and with the motorist. To vindicate those rights it was necessary for VCS to have the right to sue in trespass. If instead of towing the vehicle away, VCS imposed a parking charge the CA saw no impediment to regarding that as damages for trespass.

169. The appellant argues it does not matter what the interest was that was granted to LMHHS because *VCS* applying *Bruton* supports the proposition that someone with no interest in land can grant tenancy between two contracting parties.

170. HMRC point to a number of matters which are different in this case as compared with the facts of *VCS*. They say that while in *VCS* there was a licence in which exclusive possession was identified which supported an action for trespass; in this case LMHHS does not have such a license. Unlike at [29] of *VCS*, the appellant receives money from the students and unlike at [28] of the decision the agency pointers are to the College being the principal.

171. They also contrast the fact that in this case the student does have services but in *Bruton* that the tenant did not have services.

172. The issue which is raised is essentially whether it is possible for there to be a lease or letting which falls within the Directive exemption, in that it provides for the exclusion of others occupying, but at the same time falls short of a domestic notion of a lease, and is not treated as a land disposition for Charities Act purposes.

Charity law concerns?

173. HMRC say s36(2) Charities Act 1993 prohibits granting a right which includes exclusive possession other than in breach of the Act. Referring to the case of *Bayoumi v Women's Total Abstinence Educational Union Ltd* [2004] CA 3 All ER they argue a charity would be incapable of agreeing a land disposition in breach of the Act and any purported agreement would be ultra vires.

174. The appellant says it did not lease or dispose of property. It granted a license. The Charities Act and the cases HMRC refer to are irrelevant.

175. We agree with the appellant. It is clearly possible for something to fall within item 1 without it being a lease. LMHHS has a license to occupy. That does not in our view necessarily amount to a disposition of land. But the fact the license to occupy is not a land disposition does not mean it cannot be a "…letting of immovable property".

176. We are reassured in this conclusion in that it would be a very odd outcome if, assuming the College let out its rooms to students on the basis that during the time of the let others could be excluded from occupying the room this were to count as a land

disposition (with the result that the agreement between the College and student was ultra vires because the Charities Act restrictions had not been fulfilled).

177. In our view *VCS* stands for the proposition that a contract may be made between B and C even if B does not have power to perform the contract because of what it has been granted by A. Therefore LMHHS could in principle have contracted with students to provide accommodation even if under its agreement with the College, it did not have the right to offer accommodation. We were not persuaded that the factors HMRC pointed to (exclusive possession, the fact that payment is made to the College, and agency factors) were relevant points of distinction.

178. In *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 Lord Hobhouse makes the point that the position might have been different if the housing trust there did not have capacity to make the contract. But that is not the case here. There is no suggestion that as a result of the Charities Act LMHHS lacked capacity. The College may or may not have lacked capacity to make its agreement with LMHHS to the extent (contrary to our view above) it was a disposition of land but that did not affect LMHHS's capacity to make a contract with the student (although it might affect its ability to perform the contract).

179. The point made by HMRC about the distinction that in *Bruton* no services were provided whereas here they are is relevant to whether there was a lease. It tends to suggest the student accommodation agreement (where services were provided) was not a lease. However the provision of services does not preclude a license of occupation falling within item 1.

180. In conclusion the nature of what LMHHS received does not prevent the nature of what was granted by LMHHS to the student from being exempt within item 1. The next issue would then be to look at whether as a matter of fact the student accommodation agreement granted the student exclusive possession. This is considered below at [182].

181. If contrary to this conclusion it did matter what LMHHS received the issue would then be whether the interest LMHHS received was of a nature which meant it fell within item 1. Whether LMHHS was granted exclusive possession is considered below at [183].

Application to facts: Does the student accommodation agreement grant exclusive possession as that term is understood taking account of the European cases?

182. The following matters are to be noted in looking at whether the student has exclusive possession. The reference to the student being able to "in addition to your room" use "shared facilities" shows the room is possessed by the student. It is not shared with others. The reference at 8.2 to "invited visitors" and being held responsible for their behaviour is consistent with the student having control over who may be in their room and being able to determine who is excluded from the room. They have control over access to their room. While they occupy their room others (LMHHS) may enter the room ideally with notice. But nowhere is it suggested that

someone else could also occupy the room. Only the student may occupy the room subject to the agreement. The agreement although not explicit effectively confers on the student in our view "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right".

Application to facts: Does the agreement between LMHHS and the College grant exclusive possession as that term is understood taking account of the European cases?

183. The agreement does not give LMHHS exclusive possession in the lease sense. But the context in which "non-exclusive" is to be understood is explained in clause 9.3 by reference to the College still being able to carry out academic conferences. There is no suggestion in this agreement or in the student accommodation agreement that students are liable to be moved from their rooms or asked to make accommodation in these rooms for academic conference guests during the time they are in their rooms. Accordingly the scope of what LMHHS has is not narrower than what the students have. It seems to us that what LMHHS has is sufficient for it to grant licenses to occupy rooms to students. Indeed that is what is specifically contemplated by the agreement.

184. Clause 4.1.2 states the student does not have "exclusive occupation" of the room but it then goes to say LMHHS is entitled to *access* the room. It does not suggest to us the LMHHS could occupy the room, or allow someone else to occupy the room.

185. In *Bruton* Lord Hoffmann construing the agreement in question against the relevant background concluded that there was nothing to suggest the appellant in that case shared possession with the housing trust or the council or that the trust retained control which was inconsistent with such possession. Similarly there is nothing to suggest the student was to share possession with LMHHS, or the College or anyone else. LMHHS did not retain such control which was inconsistent with exclusive possession by the student.

186. The agreement does not envisage the room being changed mid-term or even term to term. It is for a year. In fact in practice the room is kept by the student for three terms across the academic year.

Item 1(d) Exception from exemption – similar to hotel accommodation?

187. It is uncontroversial that as set out in *Blasi* Case C-346/95 which is discussed below exemptions to VAT are to be interpreted strictly and that exceptions to exemptions are to be given a broad construction. In this case the appellant highlights that this means we must take a broad view of what sector is in potential competition with the hotel sector.

188. The appellant argues that assuming the supply of accommodation is made by LMHHS and that the supply is within Group 1 that it is then taken out of the exemption by item 1(d) of Group 1. Referring to *Blasi* it points out that there it was

held that 6 months was a reasonable time by which to ensure the transactions were taxable. Here the typical contract is of three terms of 9 weeks. The appellant refers to the fact that students have to clear their room each individual term. They argue the student can be regarded as transient. They referred us to the VAT Tribunal case of *Acorn Management* where overseas students were not regarded as visitors to the UK. They argue there is no difference between the overseas student in that case and a student who happens to be resident in UK. Both should be treated as visitors. The student comes to Oxford to go to college.

Relevant case-law:

189. In *Blasi* the German law in question used the duration of 6 months as a proxy for determining whether the exception to the exemption applied or not. The court found that duration was a valid criterion of distinction in applying the exception to the exemption and that an assumption that a stay of less than 6 months meant the let was similar to accommodation provided in a hotel was a reasonable one to make.

190. At [19] onwards the court states:

> "The phrase 'excluding ... the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function' in Article 13.B(b)(1) of the Sixth Directive introduces an exception to the exemption which Article 1 3.B provides for the leasing or letting of immovable property. It thus subjects the transactions to which it refers to the general rule laid down in the Directive, namely that VAT is to be charged on all taxable transactions, except in the case of derogations expressly provided for. That phrase cannot therefore be interpreted strictly.
>
> 20. It should be added that, as the Advocate General has noted at paragraph 18 of his Opinion, the words 'sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.
>
> 21. In defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13.B(b)(1) of the Sixth Directive, the Member States enjoy a margin of discretion. That discretion is circumscribed by the purpose of the derogation, which, in regard to making dwelling accommodation available, is that the - taxable - provision of accommodation in the hotel sector or in sectors with a similar function must be distinguished from the exempted transactions of leasing and letting of immovable property.
>
> 22. It is consequently a matter for the Member States, when transposing Article 13.B(b)(1) of the Sixth Directive, to introduce those criteria which seem to them appropriate in order to draw that distinction.
>
> 23. Where accommodation in the hotel sector (as a taxable transaction) is distinguished from the letting of dwelling

> accommodation (as an exempted transaction) on the basis of its duration, that constitutes an appropriate criterion of distinction, since one of the ways in which hotel accommodation specifically differs from the letting of dwelling accommodation is the duration of the stay. In general, a stay in a hotel tends to be rather short and that in a rented flat fairly long.
>
> 24. In this connection, as the Advocate General has stated at paragraph 20 of his Opinion, the use of the criterion of the provision of short-term accommodation, being defined as less than six months, appears to be a reasonable means by which to ensure that the transactions of taxable persons whose business is similar to the essential function performed by a hotel, namely the provision of temporary accommodation on a commercial basis, are subject to tax."

Acorn Management Services (VAT Decision 17338)

191. As noted above the facts concerned an appellant who made arrangements, usually with American universities, under which students occupied accommodation in buildings owned by the appellant. The students attended courses in the UK run by those universities. The VAT tribunal found the exception to the exemption applied.

192. The appellant referred us to a passage in the decision which makes the point the fact the student was there to pursue a course of study did not preclude him from being a visitor:

> "Many visitors have a purpose in mind when they come to a place even when they intend to be in that place only for a short period."

193. We discuss this issue further below at [208] onwards.

Dinaro (VAT decision 17148)

194. This was a VAT tribunal case which considered the applicability of the s1(d) exception to hostel accommodation for individuals nominated by social services department who had mental health difficulties of a relatively moderate nature (see [17] and [53] of decision).

195. HMRC refer to paragraphs [40] and [41]:

> "40. It is necessary in order to reach a decision that the tribunal examines the definitions contained in the test of Item 1(d) of Group 1 of Schedule 9 of the 1994 Act and note 9 to see how the situation of Fairway Lodge is to be classified. As in the appeal of International Student House it appears to be common ground between the parties of this appeal that the terms "an hotel, inn, boarding house" have a specific though wide sense and that, as the Tribunal in the decision of *The Lord Mayor and Citizens of Westminster* said, one must look for "The characteristics which these three types of establishment all of which provide accommodation, from other establishments that also provide accommodation". One such characteristic is to be found in the purpose for which the accommodation is provided. Examples are given

> in *The Lord Mayor and Citizens of Westminster* appeal of a school or a prison providing accommodation but these would not be regarded as either a similar establishment as a hotel, inn or boarding house because the accommodation therein is provided subsidiary to the main purpose of the establishment. The same argument can be used for a registered nursing home. On the other hand an hotel, inn or boarding house provides accommodation as its main purpose.
>
> 41. It appears to the tribunal that a further characteristic must be added namely that an hotel, inn or boarding house is concerned with the business of providing accommodation. Since Fairway Lodge provides long-term care and supervision for its residents amongst other factors, the tribunal concludes that on the facts before it, Fairway Lodge is not an hotel, inn or boarding house."

196. They also point to the website materials and argue this shows other purposes for which the accommodation is provided such that the purpose of supplying accommodation in a similar way to a "hotel" cannot be a "main purpose".

197. The Tribunal in *Dinaro* went on to consider whether the residents were travellers, visitors or neither. The Tribunal found they were not travellers and neither were they visitors (being a person who visits a person or a place) bearing in mind the lengthy period of stay (3 to 18 months). The Tribunal found the establishment was not similar because of the selective nature of the choice of residents, the high degree of care and supervision for all the inhabitants and the emphasis of a "family concept" for residents. Accommodation was subsidiary to the primary purpose of rehabilitation.

198. The appellant argues the *Dinaro* case can be easily distinguished. It concerned residents with mental health problems who needed constant supervision.

199. We think *Dinaro* does not assist but for different reasons to the appellant. We note the statements HMRC refer to are in relation to the Tribunal's conclusion that the establishment under consideration was not a hotel. That is not in issue here. It is not being suggested the college is a hotel, inn etc. The question is whether it is a "similar establishment".

200. We also observe that in looking at primary purpose it is not that the establishment has to have an identical primary purpose. It ought to be enough for the establishment in order to be "similar" to have a similar primary purpose.

201. HMRC also refer to *City of Westminster v CCE* [1990] 2 CMLR 81 where it was held that the purpose for which accommodation is provided is a relevant characteristic of a similar establishment. It was observed there that hotels are normally run with a view to profit.

Arguments / observations on statutory drafting of exception

202. The appellant notes that Note 9 refers to "includes" which means the establishment referred to is broader than that referred to in the note.

203. We think we have to look at the place where accommodation is provided – i.e the establishment and ask whether it is similar to a hotel, inn or boarding house.

204. As explained in *Blasi* at [20] the purpose for the exception is "to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax." To the extent the appellant asserts that it is relevant to consider where students would get their accommodation if it were not for the college accommodation then we think that approaching the issue in this way does not properly capture the underlying aim of the exception to the exemption. The issue underlying the exception to the exemption is whether the establishment in question competes with the hotel sector. The customer base of the hotel sector is obviously wider than students of the College.

Note 9

205. In relation to Note 9 and "premises…which are used by or held out as being suitable for use by visitors or travellers" – the College is held out as being suitable for visitors – but only to a time limited extent. Undoubtedly, outside of term-time, visitors and travellers do stay in the College. Does that mean the College is then a "similar establishment?"

Relevant point in time for considering whether establishment is a similar one?

206. We note the use of the present tense in the drafting of Note 9 to item 1(d): "…premises in which there *is* provided". This tends, we think, to support the view that the time of supply is relevant to the question of determining whether an establishment is to be regarded as a similar one for the purposes of the item 1(d) exception. Accordingly we consider the character of the College in term-time which is when the supplies of student accommodation which are the subject of this appeal take place. The question of whether the College may or may not be such an establishment outside of term-time is not before us.

207. There are 60 academic staff, 150 graduates, and 400 undergraduates. Not all the graduates and academic staff are able to live in and there is it appears a waiting list for rooms which become available unexpectedly. There is no evidence to suggest there is scope to offer rooms to persons who are not students or academics during term time. Even if a room becomes vacant and is not filled by another student the room is not typically offered more widely in term-time because (as noted above at [48]) the student environment means they are unsuitable. The College premises do not fall within Note 9 in relation to term-time use by, or holding out to, term-time visitors or travellers.

Are students visitors?

208. In relation to the issue of whether students are "visitors" a similar issue was considered in *Acorn*. There the Tribunal referred to observations made in another Tribunal case *International Student House ("ISH")* that there must come a point where a person who resides in a place that is not his home ceases to be a visitor.

209. The Tribunal in *Acorn* said they saw the force in the observations and noted that in that case the students were normally there for a course which lasted several years of which at least one was spent in the accommodation. Here the students are also at the college for a number of years and normally all three years are spent in the accommodation. In *Acorn* it was noted the student was in the UK and in the accommodation on average for 15 weeks. The Tribunal found on the facts that the student did not cease to become a visitor during the average stay. The Tribunal's point in *Acorn* is simply, we think, that persons are not prevented from being a visitor through having another purpose such as study. It does not mean that students cannot nevertheless stop being visitors at some point. This situation must be seen as being acknowledged by the Tribunal's approval of the observations on *ISH*. The facts of *Acorn* (15 week average stays) are in our view distinguishable from the current facts (three sets of 9 week stays over the course of an academic year).

210. We are not persuaded the students can be described as visitors. It cannot necessarily be assumed that students will return to where they came from. They may have left home. The fact there are special arrangements in relation to students throwing parties in their rooms (permission must be sought in advance (see [43] above) also tends to suggest that students are not visitors. Visitors do not normally throw parties for others at the place they are visiting. The fact that parties may be thrown suggests that while they are at the College, the College becomes their home.

Even if establishment is not within note 9 is it nevertheless a "similar establishment"?

211. Even if the College is not an establishment falling within Note 9 we need to consider whether it is nevertheless a similar establishment to a hotel, inn or boarding house. We set out below the various factors we have considered.

212. According to the case law the duration of stay is a relevant factor to consider. The European court in *Blasi* found 6 months was not unreasonable. Here the duration the typical student stays is just over 6 months. The pattern of the stay in the accommodation is also something that we suggest is relevant. Three 9 week stints over a year do not strike us as a duration of stay and frequency of stay which would typically represent a stay in a hotel or similar accommodation. The length and pattern of duration points against the accommodation being similar to hotel accommodation in our view.

213. Other factors which point against the accommodation being similar during term time are the fact the recipients of the supply have to comply with the University of Oxford's Regulations and the College's Handbook and Regulations. The recipient and their visitors are asked to conduct themselves "in a manner befitting an academic institution". This is not similar to the obligations that might be expected of a hotel guest. The supplies to persons staying at the College will be students and therefore subject to these obligations.

214. In relation to the College Regulations (as incorporated through the accommodation agreement) these mention college life being the combination of residence and teaching. This does not indicate the provision of sleeping

accommodation to visitors and travellers. The accommodation is being provided with the aim of students being able to participate in college life. In practice, the accommodation is held and used by persons (students) to participate in college life. The accommodation purpose is imbued with something quite different from a hotel like purpose.

215. While we have considered the "hotel arrangements" clause (see [28]) this is a provision agreed between the LMHHS and the College. It does not necessarily affect how the nature of what is supplied to the student is to be characterised. The College and LMHHS may well have stated an intention to run the business as if it was a hotel business but that intention is not reflected in the rest of the contract and is not reflected by the actual circumstances of the way in which the accommodation is provided.

216. In relation to the College Regulations, the relevance of the point HMRC make about students normally being required to live in for three years is not so much, as HMRC say, that this is not like a hotel but that it tells us that the "establishment" is holding out that students will be accommodated there (rather than other persons) and that those students will be there for three years at a time.

217. The fact the College Regulations impose certain obligations on students is, as the appellant points out not relevant. These flow from their status as students. They are not inconsistent with the College being a "similar establishment".

218. We were not taken to any evidence of what LMHHS held out if anything to the students.

219. The College's regulations, reports, and website do not point to a conclusion that accommodation is provided in term-time in an establishment similar to a hotel or that it is provided in an establishment providing accommodation to visitors and travellers.

220. The effect of the geographical proximity of the buildings in which the accommodation is contained is that students are brought together for college life, use of the library, eating, and access to on-site academics. That is not indicative of a similar establishment to a hotel. Access to academia and library facilities are not features found in hotels or similar establishments. In relation to eating arrangements hotels typically do not have shared eating arrangements but allow for guests to be seated at separate tables. Certainly taking into account the numbers of students which the College caters for it would be highly unusual for a hotel or similar establishment to offer catering in the way the College does. There is clearly something more taking place at the establishment than the provision of hotel-like accommodation.

221. We take into account that the exception to the exemption should be interpreted broadly but even when this is done we do not think the establishment of the appellant during term time fulfils the characteristic of a "similar establishment" for the purposes of the item 1(d) exception.

222. This means that even if the appellant were correct in its submission that it is LMHHS that is the supplier of the accommodation the appeal would fail because the

exception to the exemption does not apply and the supply of student accommodation during term-time remains exempt under item 1 Group 1 Schedule 9.

Conclusion

223. The supply of student accommodation is exempt and not standard-rated. The appellant's appeal against HMRC's decision dated 6 August 2012 that the supply of accommodation by the appellant did not qualify as standard-rated is dismissed.

224. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 12 December 2014