NCN: [2021] UKFTT 368 (TC)

TC 08299

VAT – exemptions – whether lease of immoveable property – long lease – whether supply of part of a building - yes – exempt in terms of Article 135(1)(j)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03014

BETWEEN

HARLEY SCOTT COMMERCIAL LIMITED
(FORMERLY STORE FIRST MIDLANDS LIMITED) **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: JOHN WOODMAN

The hearing took place on 25 May 2021 via the Tribunal video platform

We heard Michael Firth, counsel for the Appellant and Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

We also had written submissions from both parties dated 28 May 2021

DECISION

1. The appeal is allowed save to the extent, if any, that any Investor used the Store Pod personally. It is remitted to the parties to quantify that, if so minded.

INTRODUCTION

2. This is an appeal against the review conclusion decision dated 30 April 2018 upholding the decision dated 13 February 2018 rejecting the appellant's claim that supplies it made in the relevant periods were exempt. HMRC had issued VAT assessments dated 13 February 2018 as follows:

a) Period 11/14 in the sum of £638,305.17
b) Period 12/15 in the sum of £13,205.50
c) Period 12/16 in the sum of £1,064.53

3. The substantive issue is how the grant of long leases of, what are described as, Store Pods is correctly characterised for VAT purposes.

4. The appellant contends that it is the supply of part of a building within Article 135(1)(j) of the Principal VAT Directive[1] ("PVD") and thus exempt, or, alternatively if the grant of the leases fall within Article 135(1)(l) of the PVD, then they did not fall within any exclusion from the exempt treatment that thereby applies (in particular Item 1(ka) of Group 1 of Schedule 9 of Value Added Tax Act 1994 ("VATA")).

5. HMRC contend that it is a single composite supply of storage facilities taxable at the standard rate. Alternatively, if the supply is found to be the leasing or letting of immoveable property in terms of Article 135(1)(j) of the PVD then they are supplies that do fall into the exception to the land exemption for the grant of facilities for the self-storage of goods being Item 1(ka) referred to above.

6. The other issue is whether HMRC's decision to issue assessments for periods 11/14 and 12/15 is out of time.

Preliminary issue

7. At the outset of the hearing, Ms McArdle intimated that Mr Firth, that morning, had provided what she described as a supplementary Skeleton Argument, and he described as a speaking note, and having read that, she now wished to cross-examine the appellant's witness, Mr Chris Parkinson, on a very limited basis in relation to the nature of the storage units. Mr Firth objected vigorously. Having heard argument, we, having identified in pre-reading that the specification of the storage units in the contractual documentation did not accord with Mr Parkinson's evidence, decided that he should give evidence on that aspect. He did.

The hearing

8. In addition to Mr Parkinson's evidence on that aspect, we also heard from Officer Currie for HMRC. We had a joint bundle of authorities to which was added *Leichenich v Peffekoven*[2] ("Leichenich"). We had Skeleton Arguments for both parties and the appellant's speaking note.

[1] 2006/112/EC
[2] [2012] EU ECJ C-532/11 (15 November 2012)

9. In the course of the hearing, we drew the parties' attention to *Sibcas v HMRC*[3] ("Sibcas") because it authoritatively reviewed the other authorities to which we had been referred and both parties subsequently lodged written submissions in that regard.

The limitation issue

10. Section 73(6) VATA provides as follows:-

> "An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following:-
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) One year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, comes to their knowledge …".

11. In this case the disputed assessments for periods 11/14 and 12/15 were made on 13 February 2018.

12. The dispute between the parties is quite simple. The appellant alleges that the information provided by Mr Parkinson, in an email with an attached spreadsheet dated 21 October 2016, had furnished HMRC with sufficient information to enable them to raise an assessment to best judgement.

13. By contrast, HMRC argue that the information in that spreadsheet did not suffice and that it was only on 23 February 2017, when Mr Parkinson confirmed that there had been errors in several of the square footage figures provided, that they were in a position to consider raising an assessment.

14. The spreadsheet set out the square footage, the first date available for sale, the acquisition date, the value including VAT and the fit out cost for 20 storage locations across the UK. This Tribunal and the assessments in question are concerned only with Nottingham. The square footage for Nottingham was shown as being 3,234 and the value was £1.144m with a fit out cost of £1,100,402.71. The appellant argued that if that was compared with two locations specified in Liverpool, both of which were stated to be approximately 32,000 square feet with values of £1.2m and fit out costs of £736,718 it should have been clear to HMRC that there was a problem and that there must have been a typographical error.

15. On 10 February 2017, Officer Riley had emailed Mr Parkinson stating:

> "However, I have started my review of the further information that you kindly provided in your mail (*sic*) of 21 October 2016. I have attached an extract – Tab A(SFL request for information) and would be grateful if you could confirm or otherwise my assumed corrections to typos re the sq/ft for storage shown as a factor in red of 10 x and in purple 100 x as indicated?".

16. The Nottingham square footage was shown as 32,340.

17. Mr Parkinson replied on 23 February 2017, stating:-

> "I have reviewed the attached and can confirm that the square footage is in fact incorrect by the multiples that you have indicated".

18. In summary, the appellant's argument was that whilst Mr Parkinson's confirmation may have been helpful, it was not necessary for HMRC to be able to raise their assessment as

[3] [2018] CSIH 49

the error was clear on the face of the document and HMRC had identified it and corrected it for themselves. HMRC would clearly have had sufficient evidence to raise precisely the same assessment as was ultimately raised. That was more than a year before the assessment was raised and accordingly it was out of time.

19. Officer Currie's witness statement was not challenged. She had taken over from Officer Riley and she was aware that he had asked for information from the appellant and the response from Mr Parkinson on 21 October 2016 had only been partial.

20. She conceded in cross-examination that the figure for Nottingham might be considered unlikely but it was not impossible. She pointed out that there was a figure for Burnley which showed 3,171 square feet with a value of £1,033,497 and that that was in the same range as the figures for Nottingham. She was very clear that she did not think that it was possible to make a best judgement decision based on that table alone and that the assumption that Officer Riley had made was only one of a number of possible assumptions that could have been made. She did not consider that a decision based on that assumption would, or should, have been made without further investigation.

21. When we looked at the table, we could see that, quite apart from that argument about Burnley there were two locations in Rochdale where the value per square foot was roughly equivalent to the ones for Nottingham and Burnley. Those were in the range of approximately £300 to £353 per square foot. By contrast the Liverpool values were a mere £32 per square foot. We observe that Ellesmere Port had a value of almost £950 per square foot whilst Glasgow was approximately £13 per square foot.

22. In summary, we agree with Officer Currie that it would not be a decision to best judgement to guess the degree of typographical error. It might not have been a typographical error and it might not have been the error that Officer Riley thought that it was. The officer needed to know the square footage in order to issue the assessment. The table in isolation is of very limited value.

23. We, and Ms McArdle, agree with Mr Firth's statement at paragraph 66 of his Skeleton Argument that:

> "… a genuinely held opinion that there was insufficient evidence to justify making an assessment at a particular time cannot be challenged except on the basis that it was *Wednesbury* unreasonable …".

24. Given the huge variety of information in that table, and we have not explored any other errors in that table, since it is the production of the table on which the appellant relies, we do not consider that it would have been reasonable to have issued an assessment based on a guess which might have been wrong.

25. We therefore find that the disputed assessments for periods 11/14 and 12/15 were both timeously and competently raised.

Background facts

26. On 4 December 2014, the appellant ("SFML"), purchased the freehold of the building at Unit 1, Observatory Way, Low Moor Road, Nottingham ("the building") which it did not opt to tax.

27. Subsequently, SFML engaged third party contractors to fit out the building as a self-storage facility. The external structure of the building remained unchanged and was described by Mr Parkinson as being a large shed with an A-frame roof. It was not built floor by floor but had mezzanine floors which were a steel frame covered with plywood. On the ground floor the base was concrete. Each floor was kept in place with bolts. The Store Pods

themselves are manufactured from single skin sheet metal with either 1 metre swing doors or 1.5 metre wide double swing doors which are constructed from steel and swing outward. The mezzanine floors provide the ceilings for the Store Pods with the exception of the top floor. On that floor the Store Pods are fitted with, what is described in the specification as, a "mesh roof to prevent any unauthorised access". There are corridors, communal areas and stairwells.

28. The First Schedule to the Lease defines the Store Pods as including: "1. The tops, sides, floors, fronts and doors….".

29. SFML marketed and sold leases in the Store Pods with a guaranteed 8% return to investors. The purchasers comprised pension funds, Self Invested Personal Pensions ("SIPPs") and individuals (collectively "the Investors").

30. The payments made by the Investors included a lump sum premium calculated at £150 per square foot, an annual ground rent (of 50p per square foot), an insurance rent and, whilst the Store Pod was occupied, a service charge (initially of £1.95 per square foot per annum) to cover maintenance expenses, electricity and insurance. At clause 7.1 of the lease it provided that any failure in payment of any of these charges would lead to forfeiture of the lease.

31. Each Investor was granted a 999 year lease of a specific unit at a specific location in the building which is shown on a plan of the building. The Investors were registered as owners of a long lease of the specific Store Pod in the Land Registry.

32. At all times there were covenants in place providing that the Store Pods could be used solely "for the purpose only of storage and distribution use Class B8 of the Town & Country Planning (Use Classes) Order 1987".

33. The Investors obtained an option to enter a six year lease back arrangement with a two year break clause at the option of either party with a guaranteed return of 8% for the first two years. Investors also had an option to require SFML to buy back the lease after six years.

34. Where the Investor leased back the Store Pod to SFML, SFML was entitled to exclusive possession for six years in exchange for rent, which, after deduction of charges, produced the guaranteed return of 8%.

35. The Investors had the option of using the unit themselves (but there was no evidence that any did), letting it to a third party, or letting it to SFML who would seek to find persons wishing to rent storage space. However, more than 99% of the Investors decided to lease the Store Pod back to SFML on the short six year lease, with a view to SFML granting licences to customers to use the units for storage. This was done at the same time as entering into the 999 year long lease.

36. As well as the use of Store Pods for self storage, the supply also included "office facilities, catering facilities, conference rooms and free wifi as well as facilities you would expect such as manned reception areas, security facilities and supplies". Other facilities such as car parking spaces were also provided.

37. On 20 October 2017, Officer Riley raised an assessment against SFML. As he had not been provided with the actual sales values that he had requested, he used his best judgement to calculate what they would be and how much VAT should have been declared on them.

38. He based his best judgement assessment upon the following:

(i) The premium charged for the grants of Store Pod leases.

(ii) The annual service charge and ground rent payable under the terms of the Store Pod leases.

(iii) The total floor area occupied by the Store Pods.

(iv) The date from which the Store Pod leases were first available for sale to the Investors.

39. He multiplied the premium, service charge and ground rent per square foot by the total floor area of the Store Pods to arrive at a total sales value.

40. Officer Currie reviewed the methodology used by Officer Riley in his assessments made in October 2017 and, in the continuing absence of the actual sales values that had been requested, she determined that this remained an appropriate methodology that she could use to make assessments.

41. On 13 February 2018, she issued the decision letter and raised the best judgement assessments totalling £652,575.20 for the tax due in VAT return periods 11/14, 12/15 and 12/16. This included an allowance for input tax for the fit-out costs.

The legislation

42. This appeal is governed by retained EU law as at 31 December 2020 and no relevant change has since occurred. We annex the detail of the legislation as an Appendix together with extracts from HMRC's VAT Information sheet 14/12 entitled "VAT: self storage".

Discussion

43. We are not bound by the Opinion of Lord Carloway in *Sibcas* but we agree with his analysis at paragraph 65 that the "critical aspect" of *Leichenich* is the acceptance by the Court of Justice of the importance of the contractual arrangements concluded by the taxpayer. Therefore we are not looking at the Store Pods in isolation.

44. Lord Carloway had said earlier at paragraph 37 that:

> "In deciding whether a supply is, put shortly, a grant of an interest in land, such as a lease of immoveable property, the whole circumstances of the supply and not just the physical properties of the product, must be looked at in order to understand the substance of the commercial transaction (supply) undertaken."

45. Item 1(ka) which renders taxable at the standard rate the "grant of facilities for the self storage of goods" was introduced in the Finance Act 2012 with effect from 1 October 2012. Until that point the provision of self storage in a defined storage unit was exempt from VAT under Schedule 9, Group 1, Item 1 whereas storage provided by a removal company as part of the removal service was taxable at the standard rate and there was competition between the services.

46. The consultation document issued by the Government, insofar as relevant, stated:-

1. "Self storage businesses provide their customers with a clearly defined lockable space to which the customer has access for the purpose of storing goods …
2. The aim of the proposed new legislation is to tax the provision of storage facilities to the end user – i.e. to a person for the storage of their goods. The change is not intended to tax the supply of premises used for some other purposes or to tax the sale or lease of a self storage facility or warehouse to a self storage supplier, which will continue to be VAT exempt (unless the supplier of the building opts to tax the supply). Group 1 of Schedule 9 to the VAT Act 1994 will be amended to tax the provision of self storage facilities.

3. Examples of supplies affected by the change include – self storage in purpose built facilities …".

47. The VAT Information Sheet 14/12, details of which are set out in the Appendix show that that view did not change after consultation.

48. In almost every case, if not all, the Investors are patently self storage suppliers and not end users. That is clearly borne out by the documentation.

49. We find that the substance of the transactions was not the provision of self storage to the Investors. Undoubtedly that is the function of the Store Pods and that is what is provided to the ultimate lessees.

50. It is trite law that exemptions must be strictly construed.

51. In that context we must then consider whether this is the supply of part of a building as the appellant contends, or the lease or let of immoveable property. The terms of the leases including the duration are only part of the picture. If the Store Pods are immoveable then they are part of the building.

52. What then of the Store Pods themselves?

53. HMRC agree with SFML that the supply of the Store Pods includes the provision of the communal areas, car parking, security etc, are ancillary and do not affect the overall characterisation of the supply. We agree.

54. Essentially, SFML argues that the Store Pods are simply rooms in the building. They are the equivalent of flats in an apartment block.

55. By contrast HMRC argue that it is for SFML to prove that the property is immoveable and that they have adduced no evidence to establish that. The fact that the mezzanine floors and the mesh on the top floor lie on top of the Store Pods as caps and that the walls are simply steel skins point to the inference that they should be moveable.

56. SFML had originally relied on paragraph five of Mr Parkinson's witness statement which reads:-

"The storage units have walls and doors constructed from steel and concrete ceilings. There is no way of moving a storage unit – they are rooms within the building. …".

57. In cross-examination he conceded that the storage units in Nottingham did not have concrete ceilings and that that was inaccurate. Our findings in fact set out the structural nature of the Store Pods.

58. Frankly, on even a superficial basis, we had difficulty with HMRC's argument. The pictures demonstrated clearly that the Store Pods simply looked like rooms in a building. On each floor they are each constructed on a single steel floorplate in the building. They are all functionally and structurally linked together.

59. Crucially these (very) long leases were registered in the Land Registry. That equates to the registration of a long lease for a flat. Patently, to remove a Store Pod would simply be to destroy one's own asset. We find that the Store Pods are immoveable property. They form part of the building.

60. Even if all of the Store Pods were owned by a single Investor it would be impossible to move a Store Pod on any of the lower floors since that would affect the adjacent Store Pods. It is conceivable, if it were possible to move it, that a Store Pod on the top floor might be capable of being moved but it would have no roof or top. Even if it were possible to move one Store Pod it would have neither a top nor a floor and the majority would have no sides

since they would still be in place supporting the other Store Pods. The lease makes it explicit that the Store Pod includes tops and floors.

61. Although we have found that they are immoveable, the facts that the Store Pods were the subject matter of leases and that rent was paid do not mean that the transactions automatically fall into Art 135(1)(l) of the PVD. The purpose of the exemption is very relevant since both parties agree that it is essentially "passive" leases which are intended to be exempt. We find that the amount of the annual rent and service charge is peripheral.

62. Albeit described as leases, effectively *de facto* ownership of the property is transferred to the Investor. It is not the lease of immoveable property.

63. Objectively, we find that looking at all of the circumstances, the clear intention of both the Investors and SFML was to obtain an interest in a building which could then be utilised to generate income. Whilst we accept that the motivation for entering into a transaction is not conclusive we find that that is in fact what the leases, ie the transactions, achieved. The fact that the Store Pods could only be utilised for self storage does not alter that.

64. We find that it is a supply of a part of a building and is therefore exempt in terms of Art 135(1)(j).

Decision

65. For all these reasons the appeal is allowed save to the extent, if any, that any Investor used the Store Pod personally. It is remitted to the parties to quantify that, if so minded.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 11 OCTOBER 2021

Appendix

Article 135

The land exemption derives from Article 135 of the PVD and reads as follows:

1. Member States shall exempt the following transactions

"…

(j) The supply of a building or parts thereof, and of the land on which it stands, other than the supply referred to in point (A) of Article 12(1);

…

(l) The leasing or letting of immoveable property …

2. …

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph (1)."

Section 31 VATA states that a supply of goods or services is an exempt supply if it is specified in Schedule 9.

The relevant provision of **Schedule 9 VATA is Group 1, Item 1** which reads:-

Item No.

1. The grant of any interest in or right over land or of any license to occupy land … other than—

(a) …

(ka) The grant of facilities for the self storage of goods".

The relevant Notes attached thereto read:-

(15A) In paragraph (ka) –

'Facilities for the self storage of goods' means the use of a relevant structure for the storage of goods by the person (or persons to whom the grant of facilities is made …)

(15B) For the purposes of Note 15(A), used by a person with the permission of the person (or of any of the persons) to whom the grant of facilities is made counts as used by the person (or persons to whom that grant is made ….

(15D) In Notes 15(A) and 15(C) 'relevant structure' means the whole or part of —

(a) a container or other structure that is fully enclosed, or

(b) a unit or building."

Paragraph 4, Schedule 4 VATA reads:-

4. "The grant, assignment or surrender of a major interest in land is a supply of goods".

Section 96(1) VATA (being the interpretation provision) reads:-

"'Major interest', in relation to land, means the fee simple or a tenancy for a term exceeding 21 years … or the lessee's interest under a lease for a period of not less than 20 years".

In August 2012, before the changes came into force, HMRC issued **VAT Information Sheet 14/12** entitled **VAT: self storage**.

Paragraph 2.2 reads:-

> "2.2 What are the new rules (from 1 October 2012)?
>
> The new rules are based on use of space for the self storage of goods. The changes ensure that the provision of space used for the self storage of goods (by the customer of the provider of the self storage space) in structures ('relevant structures') such as containers, units or buildings is standard-rated. However, there are certain exceptions set out below."

Paragraph 2.13 under the heading "Supplies of self storage that remain exempt from VAT" stated:-

> "2.13 Do the changes affect the supply of buildings to self storage providers?
>
> No. The sale or lease of a building to a self storage provider will only be subject to VAT if the person making the supply has made an 'option to tax'. The new rules only impact on supplies made by self storage providers to their customers."