5 March 2014

PRESS SUMMARY

The Commissioners for Her Majesty's Revenue and Customs (Respondent) v Secret Hotels2 Limited (Appellant) [2014] UKSC 16
On appeal from [2012] EWCA Civ 1571

JUSTICES: Lord Neuberger (President), Lord Sumption, Lord Reed, Lord Hughes and Lord Hodge

BACKGROUND TO THE APPEALS

This appeal concerns the liability for Value Added Tax ("VAT") of a company known as "Med", which marketed hotel accommodation in the Mediterranean and the Caribbean through a website. An hotelier who wished his hotel to be marketed by Med had to enter into a written agreement with Med ("the Accommodation Agreement"). When a potential customer identified a hotel at which she wished to stay, she would book a holiday through a form on the website, which set out standard booking conditions ("the website terms"). The customer had to pay the whole of the sum she agreed with Med to pay for the holiday ("the gross sum") before arriving at the hotel. However, Med only paid the hotel a lower sum ("the net sum") for the holiday after it had ended.

VAT is an EU tax levied on the supply of goods or services. By article 2.1(c) of Directive 2006/112/EC ("the Principal VAT Directive") VAT is liable to be levied on "the supply of services for consideration within the territory of a Member State by a taxable person acting as such". Article 45 states that "The place of the supply of services connected with immovable property…shall be the place where the property is located…". The application of article 45 to travel agents could result in their having to be registered in many member states, and so articles 306-310 contain a special scheme relating to travel agents. Article 306 differentiates between two categories of travel agent, namely (a) those "who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities" and (b) those who "act solely as intermediaries" (referred to for convenience as, respectively, "article 306.1(a)" and "article 306.1(b)"), and provides for a special VAT scheme for transactions carried out by travel agents who fall within article 306.1(a).

The Commissioners for Her Majesty's Revenue and Customs ("HMRC") assessed Med for VAT on the basis that Med was a travel agent that deals with customers in its own name within the meaning of article 306.1(a). On that basis, it was agreed that Med would be liable for VAT on the gross sum paid by the customer to Med. Med challenged this assessment, on the ground that it was a travel agent acting solely as an intermediary within the meaning of article 306.1(b). On this approach, any VAT would be due to the Greek taxation authorities.

The First-Tier Tribunal upheld HMRC's analysis. Morgan J allowed Med's appeal, but HMRC's subsequent appeal to the Court of Appeal was successful.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Neuberger gives the only judgment, with which the rest of the court agrees. Med was acting as an intermediary rather than in its own name, and so falls within article 306.1(b). Consequently, the Supreme Court discharges the order of the Court of Appeal and restores the order of Morgan J.

REASONS FOR THE JUDGMENT

The outcome of this appeal turns on the question whether Med's activities in relation to the provision of hotel rooms to customers fell within article 306.1(a) or article 306.1(b) of the Principal Tax Directive [**20**]. What article 306 means and how it is to be applied is a matter of EU law, a topic on which the decisions of the Court of Justice of the European Community ("CJEU") are binding on national courts [**22**]. However, insofar as the provisions of article 306 depend upon the precise nature and character of the contractual relationship between two or more parties, that issue must be determined by reference to the proper law of the contract or contracts concerned [**23**].

The domestic law

Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, 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 [**31**]. While it is not possible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement, this may be invoked for other reasons: (i) to support the contention that the written agreement was sham; (ii) to support a claim for rectification; (iii) to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract; or (iv) to establish that the written agreement represented only part of the parties' contractual relationship [**33**].

It is not suggested that either the Accommodation Agreement or the website terms is a sham or liable to rectification. Accordingly, one must start by characterising 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"). One must then consider whether this characterisation represents the economic reality of the situation, and, finally, one must determine the result of this characterisation under article 306 [**34**].

The contractual documentation makes it clear that, both as between Med and the hotelier, and as between Med and the customer, the hotel room is provided by the hotelier to the customer through the agency of Med. The customer pays the gross sum to the hotelier on the basis that the amount by which it exceeds the net sum is to be Med's commission as agent [**36**]. None of the provisions of the contractual documentation relied on by HMRC is inconsistent with Med acting as the hotelier's agent: they merely reflect the relative bargaining positions of Med and the hoteliers. They do not alter the nature of the relationship between Med, the hotelier and the customer [**37**]-[**44**].

The EU law

It is clear from the guidance given by CJEU that the concepts of an "intermediary" and an agent are similar, as are the concepts of a person dealing "in his own name" and a principal [**55**]. In deciding whether article 306.1(a) or 306.1(b) applies, the approach laid down by the CJEU in order to determine whether a person such as Med is an intermediary is very similar to the approach applied in English law to determine whether Med was an agent [**56**]. For the same reasons that the contractual documentation supports the notion that Med was an agent, it also supports the conclusion that Med was an intermediary, and the economic reality does not assist a contrary view [**57**]. Once it has been decided that Med was the hoteliers' agent in relation to the supply of accommodation to customers as a matter of English law, it follows, at least on the facts of this case, that it was an intermediary for the purpose of article 306.1 [**58**].

References in square brackets are to paragraphs in the judgment