[2017] UKUT 298 (TCC)

UT/2016/0234

VAT – whether the letting of prefabricated temporary classrooms was an exempt supply in terms of Schedule 9, part II, group 1, item 1 of VATA - whether a letting of immovable property in terms of Article 135(1)(l) of Council Directive 2006/112/EC - whether building fixed to or in the ground - whether easily dismantled and easily moved - Appeal allowed.

Upper Tribunal
(Tax and Chancery Chamber)
ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

SIBCAS LIMITED

Respondent

Before

THE HONOURABLE LORD DOHERTY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Heard at The Tribunal Centre, George House, Edinburgh
On Thursday 1 June 2017

Representation:

For the Appellants:	Elisabeth Roxburgh, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs.
For the Respondent:	Philip Simpson QC, instructed by Maria McConnell, French Duncan LLP.

DETERMINATION AND REASONS

DECISION

The appeal is allowed.

REASONS

Introduction

1. The issue in this appeal is whether the respondent's supply of goods and services to the Ian Ramsay Church of England School, Stockton-on-Tees ("IRS") was an exempt supply. The appellants maintain that it was. The respondent says that the supply was not exempt, and that it was chargeable to VAT at the standard rate.

2. On 13 February 2015 the appellants determined that the supply by the respondent was an exempt supply. The respondent appealed against that decision. On 15 July 2016 the First-tier Tribunal ("FTT") allowed the respondent's appeal ([2016] UKFTT 502 (TC)). On 7 November 2016 it granted the appellants leave to appeal to the Upper Tribunal ("UT").

3. This appeal proceeds under section 11(1) of the Tribunals, Courts and Enforcement Act 2007. Section 11(1) refers a right of appeal from the FTT "on any point of law arising from a decision made by the First-tier Tribunal" with certain exceptions that do not apply in the present case. In Advocate General for Scotland v Murray Group Holdings Ltd 2016 SC 201 the Second Division of the Inner House of the Court of Session (at paragraphs 42 to 48) outlined the four different categories of cases which an appeal on a point of law covers. If the UT finds that the FTT has made an error on a point of law it is empowered by section 12 of the 2007 Act to set aside the FTT's decision and to remit it to the FTT with directions for its reconsideration, or to remake the decision.

Community Legislation

4. Article 4(3)(a) of Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes common system of value added tax ("the Sixth Directive") made provision concerning VAT relating to the supply of buildings or parts of buildings. It also provided:

> "'A building shall be taken to mean any structure fixed to or in the ground;"

The French and German language versions of the definition were:

> "Est considérée comme bâtiment toute construction incorporée au sol;"

> "Als Gebäude gilt jedes mit dem Boden fest verbundene Bauwerk;"

Article 13B(b) provided that Member States should exempt from VAT:

> "the leasing or letting of immovable property…"

5. In 2006 the Sixth Directive was repealed and the content of the aforementioned provisions was repeated, virtually unchanged, in Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT ("the 2006 Directive"). The current provision dealing with the supply of buildings or parts of buildings is Article 12(1)(a). Article 12(2) provides:

> "For the purposes of paragraph 1(a), 'building' shall mean any structure fixed to or in the ground."

The French and German translations are:

> "Aux fins du paragraphe 1, point a), est considérée comme "bâtiment" toute construction incorporée au sol."
>
> "Als 'Gebäude' im Sinne des Absatzes 1 Buchstabe a gilt jedes mit dem Boden fest verbundene Bauwerk."

The replacement provision for Article 13B(b) of the Sixth Directive is Article 135(1)(*l*):

> "Member States shall exempt the following transactions:
> …
> (*l*) the leasing or letting of immovable property."

6. Section 31 of the Value Added Tax Act 1994 ("VATA") provides:

> "31. Exempt supplies and acquisitions
>
> (1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9…"

Schedule 9, part II, group 1, item 1 of VATA exempts:

> "(1) the grant of any interest in or right over land or of any licence to occupy land…"

7. Initially VATA implemented, and fell to be construed in accordance with, the Sixth Directive. The 2006 Directive recast the Sixth Directive and its successive amendments (see Leichenich v Peffekoven [2013] STC 846 (Case C-532/11), judgment of the Court paragraph 5). It is well established that, so far as possible, VATA must be construed consistently with the 2006 Directive.

The Cases which the FTT Considered

8. During the course of the appeal the FTT was referred to HM Customs & Excise v Sinclair Collis Limited [2001] STC 989; EC Commission v France [1997] E.C.R. I-3827 (Case C-60/96); Rudolf Maierhofer v Finanzamt Augsburg-Land [2003] ECR I 535 (Case C-315/00); University of Kent v Customs and Excise Commissioners [2004] B.V.C. 2215, [2004] V. & D.R. 372; Revenue and Customs Commissioners v UK Storage (SW) Limited [2013] S.T.C. 361; and Leichenich v Peffekoven, *supra*.

Submissions for the Appellants

9. Miss Roxburgh submitted that the FTT had erred in law. It had misdirected itself as to the relevant law and as to the proper application of the law to the facts (Advocate General for Scotland v Murray Group Holdings plc, *supra*, per Lord Drummond Young delivering the Opinion of the Court at paras 41-47).

10. Whether the letting of a building constructed from prefabricated components was a letting of immovable property had to be determined under reference to objective criteria. The question was whether the building in issue was fixed to or in the ground so that it could not be easily dismantled or moved (Rudolf Maierhofer v Finanzamt Augsburg-Land, *supra*, paras 32-35; Revenue and Customs Commissioners v UK Storage (SW) Limited, *supra*, paras 21, 28).

11. The FTT had approached matters wrongly. Rather than ask itself whether the building was fixed to or in the ground and whether it could be easily dismantled or moved, its principal focus had been on whether individual component parts were fixed to or in the ground and whether such parts could be easily dismantled or moved. Further, when, on an alternative basis, it had come to consider the position of the building it had not addressed matters correctly.

12. The temporary school supplied had been a very substantial building. It had foundations cut in the ground into which imported stone was compacted. The levelling beams and the foundations were part of what was supplied and were part of the building. The foundations were in the ground and the beams were very substantially within the ground. The rest of the building rested on the beams, which in turn rested on the stone foundations. The beams were not, and did not require to be, fastened to the stone. They were held firmly in place on there by the trenches and by the weight of the building. The appellants may not have intended that the 36 friction clamps between the beams and the ground floor of the building remain in place during the letting, but they did remain in place. They were fastenings notwithstanding that they were not structurally necessary after the building had been erected. That part of the building which was above the beams was held firmly in position on them by its mass and weight without the need for any fastening. On any reasonable view the building was fixed to or in the ground. It could not be dismantled and moved easily. Ninety-eight man days had been needed to dismantle and move it.

13. Had the FTT adopted the correct approach the only reasonable conclusion open to it would have been that there was a letting of immovable property, and that the supply of the temporary school was an exempt supply in terms of Schedule 9, part II, group 1, item 1 of VATA. In so far as the FTT made findings or drew inferences to the contrary, those findings and inferences were inconsistent with the evidence or contradictory of it (Advocate General for Scotland v Murray Group Holdings plc, *supra*, paras 43 and 44; Edwards v Bairstow [1956] AC 14, per Viscount Simonds at p. 29, Lord Radcliffe at p. 36).

Submissions for the Respondent

14. Mr Simpson moved for the appeal to be refused. He submitted that the FTT had not made any error of law. It had not misdirected itself in any respect. It was a specialist tribunal and the UT should exercise caution before interfering with its decision or with any of its conclusions (Advocate General for Scotland v Murray Group Holdings plc, *supra,* paras 46 *et seq.*; NHS Greater Glasgow and Clyde Health Board v Revenue and Customs Commissioners [2017] UKUT 19 (TCC), at paras 21 *et seq*; Procter & Gamble UK Limited v HMRC [2009] STC 1990; Secretary of State for the Home Department v AH (Sudan) [2008] 1 AC 678).

15. In paragraph 35 of Maierhofer the court had provided clear guidance as to the circumstances in which the letting of temporary buildings would be a letting of immovable property. The relevant question was not whether the building was fixed to or in the ground, but whether the

prefabricated components could be easily dismantled or easily moved having regard to such fixing as there was. Any other difficulties of dismantling or moving the components (eg because of connections between units or their integration into the building) were irrelevant. Being "fixed" required some "active connection" with the ground, such as by fastening. Where a component merely rested on or in the ground by virtue of its weight there was no such active connection.

16. Here, the FTT had addressed the correct questions. Its primary approach - to answer the questions in relation to each individual unit - had been correct. It had been entitled to answer the questions in the way it had. It had not erred in law in any respect. There was not the required connection between the units and the ground. Looked at separately and in isolation each unit could be easily dismantled from the ground and could be easily moved.

17. In any case, the FTT had also applied its mind to the position if it was the building as a whole which had to be examined. Here too it had been entitled to answer the questions in the way it had, and it had not erred in any respect in doing so. There was not the required connection between the building and the ground. The FTT had been entitled to conclude that, taking account of its scale, the building could be easily dismantled and easily moved.

18. Mr Simpson also referred to Belgium v Temco Europe SA [2004] ECR I-11237 (Case C-284/03) at paragraphs 16 and 17 of the judgment of the Court; and to Stichting Goed Wonen v Staatssecretaris van Financiën [2001] ECR I-6831 at paragraphs 50-52 of the judgment of the Court.

Correspondence Following the Hearing

19. At the hearing I requested clarification as to whether the order of the Bundesfinanzhof in Maierhofer making the reference to the Court of Justice disclosed more details of the buildings. I also indicated that if any reliance was being placed on any parts of the German language version of the Court of Justice's judgment (German being the language of the case), and if it was not accepted that the Court of Justice's English version was an accurate translation of the German text, it would be helpful to have an agreed translation of the relevant parts of the judgment.

20. After the hearing, on 7 June 2017, the respondent provided a copy of the Bundesfinanzhof's order dated 25.5.00 (Beschluss vom 25.05.2000 V R 48/99). The appellants commented on this by letter to the UT dated 21 June 2017. The respondent responded by letter dated 29 June 2017. It appears to be common ground that the only additional information of significance in the order is that the concrete foundation slab on which the buildings stood measured 35 metres by 12 metres, and that the walls of the buildings were being constructed using panels which measured 5 metres by 7 metres.

21. On 7 June 2017 the respondent also provided an English translation of paragraphs 32 to 35 of the German text of the judgment. For the most part, the translation coincides with the Court's English version. The only difference worthy of mention is that instead of the words "fixed to or in the ground" in paragraphs 33, 34 and 35, in the respondent's translation the words are "sunk into the ground". The respondent suggested that that was a more accurate translation of the words "in das Erdreich eingelassen" where they appeared in those paragraphs. It pointed out that the term "fixed to or in the ground" appeared to come from the definition of building

in Article 4(3)(a) of the Sixth Directive (now Article 12(2) of the 2006 Directive) and that the German language versions of each provision used the words "mit dem Boden fest verbunden" rather than "in das Erdreich eingelassen". In its response on 21 June 2017 the appellants indicated that they saw no reason to question the accuracy of the Court's official English language version. They observed that the respondent appeared to be seeking to adopt, after the hearing, a different position from that taken at the hearing. At that time its position had been that the issue was whether the units, failing which the building, were fixed to or in the ground.

Decision and Reasons

Introduction

22. It is convenient to begin by examining some of the cases to which the parties referred. I shall then look at the salient facts here. Finally, I shall examine the FTT's conclusions and reasoning.

The Cases

(i) Maierhofer

23. Maierhofer concerned temporary buildings erected from prefabricated components on two separate sites. The Bundesfinanzhof sought a preliminary ruling on two questions. For present purposes it is only necessary to note the first question:

> "1. Does the term "letting of immoveable property" in Article 13B(b) of Directive 77/388/EEC cover the provision for consideration of a building constructed from prefabricated components which is to be removed following the termination of the contract and may be re-used on another site?"

The factual description of the buildings provided in the Court's judgment is rather vague. The number of buildings is not specified. Their function was to provide communal accommodation for the temporary housing of asylum-seekers. Paragraph 13 of the judgment indicates:

> "13. Mr Maierhofer had constructed … single-storey and two-storey buildings similar to prefabricated houses using prefabricated components. The buildings stood on a concrete base erected on concrete foundations sunk into the ground. The walls, which were made of panels, were secured to the foundations by bolts. The roof framework was covered with tiles. The floors and walls of the bathrooms and kitchens were tiled. The construction system was such that the buildings could be dismantled at any time by eight persons in ten days and subsequently re-used."

It is not entirely clear from the report whether the 80 man days was needed to dismantle all of the structures at both sites, or whether 80 man days were needed at each site. As already discussed it is also evident from the order of the Bundesfinanzhof that the concrete foundation slab for the holdings measured 35 metres by 12 metres, and that the panels from which the walls of buildings were made up measured 7 metres by 5 metres.

The Court noted that the exemptions provided for by Article 13 of the Sixth Directive had their own independent meaning in Community law and that they must therefore be given a Community definition. It opined:

> "28. The wording of Article 13B(b) of the Sixth Directive does not define the term "letting of immovable property". It is thus appropriate to consider the context in which the provision occurs and the objectives of the rules of which it forms part.
>
> 29. It is apparent from the wording of Article 13B(b) of the Sixth Directive that the Community legislature intended the letting of movable property to be subject to tax in contrast to the letting of immovable property which, as a general rule, is to be exempt.
>
> 30. The Court has thus held that a national provision which extended to certain movable property the exemption from VAT which, pursuant to Article 13B(b) of the Sixth Directive, is restricted exclusively to the letting of immovable property was contrary to the provisions of that directive (see Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 16).
>
> 31. The property at issue in *Commission* v *France* was caravans, tents, mobile homes and light-framed leisure dwellings. A characteristic of that property, classified as movable, was that it was either mobile, in the case of caravans and mobile homes, or could be easily moved, in the case of tents and light-framed leisure dwellings.
>
> 32. By contrast, the buildings at issue in the case before the national court, described at paragraph 13 of this judgment, are not mobile; nor can they be easily moved. They are buildings with a concrete base erected on concrete foundations sunk into the ground. They can be dismantled on expiry of the lease for subsequent re-use but by having recourse to eight persons over ten days.
>
> 33. Such buildings made of structures fixed to or in the ground must be regarded as immovable property. In that connection, it is significant that the structures cannot be easily dismantled or easily moved but, contrary to the German Government's submission, there is no need for them to be inseverably fixed to or in the ground. Nor is the term of the lease decisive for the purpose of determining whether the buildings at issue are movable or immovable property.
>
> 34. If 'building' is defined in that way, that is consonant with the definition of the term in Article 4(3)(a) of the Sixth Directive concerning the supply of buildings or parts of buildings. There is no reason to treat that term differently depending on whether what is concerned is a letting transaction under Article 13B(b) of that directive or a supply under Article 4(3)(a).
>
> 35. The answer to the first question must therefore be that the letting of a building constructed from prefabricated components fixed to or in the ground in such a way that they cannot be either easily dismantled or easily moved constitutes a letting of immovable property for the purposes of Article 13B(b) of the Sixth Directive, even if the building is to be removed at the end of the lease and re-used on another site."

Part 1 of the Court's ruling was in essentially the same terms as paragraph 35.

(ii) Revenue and Customs Commissioners v UK Storage Company (SW) Limited

24. UK Storage provided self-storage facilities to members of the public. Their Taunton site consisted of a compound containing about 300 single-storey storage units. Each unit was self-contained and weighed 600 kg. The units were not bolted or fastened to the ground.

Each unit rested through its own weight in a shallow bay which was 4 inches below the level of concrete paths at either end of the unit. Each unit could be dismantled in two man-days. The FTT concluded that the units could not be easily moved and that they were immoveable property. The UT allowed the taxpayers' appeal, opining:

> "21. In our view, applying *Maierhofer*, it is necessary in this case to ask the following questions:
>
> (1) were the storage units fixed to or in the ground?
> (2) if so, could the units be
> (a) easily dismantled and removed; or
> (b) easily moved without being dismantled?
>
> In order for the storage units to be classified as immovable property, the answer to the first question must be "yes" and the answer to both parts of the second question must be "no"."
>
> 26. … In our view, the FTT, having referred … to the principles set out in *Maierhofer,* failed to apply those principles properly. The FTT considered that the concept of movability was key. The FTT concluded … that the units, although not bolted to the ground, were for all practical purposes fixed to the ground. This is not how the CJEU expressed the first question in *Maierhofer*. The first question is simply whether the structure is fixed to or in the ground. Had the FTT asked whether the storage units were fixed to or in the ground then the only answer that it could have given, having found that the units were not fixed to the ground but rested on their own weight and that they could feasibly be moved, was that the units were not fixed to or in the ground. How the units are enjoyed and the "practical purposes" are not to be substituted for the test of whether the units are fixed to or in the ground based on objective characteristics of the units. It follows that, in our view, the storage units are not immovable property.
>
> 27. Given the answer to the first *Maierhofer* question, it is not necessary to consider the second which is whether the building or structure could be easily dismantled or easily moved. In case we are wrong, however, we point out that even if the units had been found to have been fixed to or in the ground, they would not, in our view, be immovable property as they could be easily dismantled.
> …
> 29. … [W]e do not consider that the findings of the FTT that it would take two man days to dismantle a storage unit support the conclusion that the units were not easily dismantled. In *Maierhofer*, it would have taken eight persons a period of ten days to dismantle the structures. The CJEU … held that the structures in that case could not be easily dismantled. This was in contrast to tents and light-framed leisure dwellings that, as the CJEU observed, ... could be easily moved … In our view, it is not possible to specify the number of persons or period of time required before a building or structure ceases to be easily dismantled but we consider that two man-days, in relation to the storage units, does not establish any material degree of difficulty in dismantling the units. We consider that the units in this case are closer to the light-framed leisure dwellings referred to by the CJEU than the structures at issue in *Maierhofer* and the FTT erred in not concluding that the storage units could be easily dismantled. On the facts as found by the FTT, we consider that the only conclusion that it could have reached was that the units could be easily dismantled and removed and, therefore, were not immovable property.
>
> 30. The FTT also found that the units, when empty, could not be moved easily but could feasibly be moved without being dismantled although that was never intended by UK Storage and never actually done. The FTT found that the units were not for the transportation of goods and were not movable containers. We consider that the question posed by the CJEU in *Maierhofer* has to be answered based on the objective characteristics of the structure.

> Approached in that way, we consider that the only conclusion that the FTT could have reached on this point was that the units were capable of being moved by the tele-handler. The units were clearly not intended to be used as transport containers but that is not the relevant test. In the context of whether or not the unit is immovable property, the relevant question is can it be moved easily from one place to another…
>
> 31. It is clear that the storage units were easily moved into place initially by the telehandler and there was nothing in the facts found by the FTT to suggest that they could not be moved subsequently just as easily. Mr Conlon pointed out that it would be more difficult to move a unit in the middle of a row and we accept this but the fact that a number of units may have to be moved in order to reach a particular unit does not seem to us to increase the difficulty materially. In any event, that is not a relevant factor when considering the question of whether that particular unit, viewed in isolation, can be moved easily which is the correct approach where, as here, there was no finding that the units were in any way structurally linked to each other or dependent upon each other for their structural integrity."

(iii) University of Kent

25. In the academic year 2002-2003 the university admitted a record number of students. Due to a shortage of accommodation it hired 12 sleeping units. Each unit comprised a study bedroom. They were sited on a car park adjacent to one of the university's colleges. The units had no foundations and were sited on the ground by means of four adjustable corner points. Each unit weighed about one tonne. Since the car park had a slope a contractor was engaged to place paving slabs and concrete blocks under the legs of the units. The units were essentially free-standing. They were connected to services including electricity, water, waste and drainage. Leaving aside disconnection of services, each unit took two to three man-hours to remove from site at the end of the hire and to unload it elsewhere (ignoring journey time). A lorry crane was used to lift the units on to a lorry. Three units could be fitted on to a lorry. Restoration of the whole site after removal of the units took about 5 man days. The VAT Tribunal concluded that the letting of the units did not amount to the letting of immovable property:

> "52. … Were the units "immovable"? We accept that the appropriate test is how easily the units could be removed from the site. We also accept Mr O'Connor's contention that there is a scale of degrees of movability or immovability. Whether, in the light of *Rudolf Maierhofer*, the units are to be regarded as movable or immovable depends where on this scale they fall. In that case the Advocate General referred to the buildings in question being capable of being dismantled by a team of eight persons within a period of ten days. It is not clear whether all these persons needed to be working continuously for the whole of that period. However, the amount of work required in order to dismantle and remove the buildings was substantial. The Advocate General also referred at paragraph 43 of his Opinion to the buildings being "firmly fixed to or in the ground". In the case of the Lodja-Sleep units, there was a limited degree of attachment to the ground, both by the linkages to various utility services and by the attachment of skirting where this needed to be installed. We do not regard the linkages or this attachment as sufficient to enable the units to be regarded as having been firmly fixed to the ground. It took no more than an hour and a half to remove a unit, together with the work required to remove the service installations, skirting and attachments, and fencing. Subject to the contractors being present for two days to deal with the fencing, the other works took about half a day. The work involved was nowhere near as substantial as in *Maierhofer*. We regard the Lodja-Sleep units as much closer to the structures considered in *Commission v France*... Our conclusion on the evidence is that the units were not sufficiently attached to the ground to render them "immovable" for the purposes of the exemption in Article 13B(b) of the Sixth Directive."

(iv) Leichenich v Peffekoven

26. Frau Leichenich entered into an agreement with the German State to let from it a parcel of riverbank land and a portion of the adjacent river to operate a houseboat with a landing stage as a restaurant. The houseboat was moored in the same place for many years and was immobilised by means of ropes, chains and anchors. The anchors attached it to the demarcated area of the river bed and the ropes and chains attached it to the river bank. It had no engine or means of propulsion. It had a postal address, a telephone line, and was connected to water and electricity mains. The German tax authority determined that the letting was of moveable property and that VAT was due. Frau Leichenich brought an action against her tax advisers. The Landgericht, Koln took the view that the houseboat did not constitute immovable property or an essential element of such property, since it was not incorporated into the ground. It could be moved in a few hours, even if that implied a certain preparation and the use of specialist contractors. Frau Leichenich appealed to the Oberlandesgericht, Koln. The Oberlandesgericht referred two questions to the Court of Justice for a preliminary ruling. Only the first question is relevant to the present discussion:

> "(1) Is Article 13B(b) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes, to be interpreted as meaning that the concept of the leasing or letting of immovable property covers the letting of a houseboat, including the mooring place and landing stage belonging to it, which is designed exclusively for stationary long-term use as a discotheque/restaurant establishment at a demarcated and identifiable mooring place on the water? Does the reply depend on the means whereby the houseboat is attached to the land or on the cost of removing the fastenings of the boat?"

The Court observed (para 16) that by its first question the Oberlandesgericht asked:

> "in essence, whether, on a proper interpretation of Article 13B(b) of the Sixth Directive, the concept of the leasing or letting immovable property includes the leasing of a houseboat, including the space and the landing stage contiguous therewith, which is fixed by attachments which are not easily removable to the bank and bed of a river, stays in a demarcated and identifiable location in the river water and is exclusively used, according to the leasing contract, for the permanent operation of a restaurant-discotheque at that location."

The Court held:

> "22 The houseboat, the non-submerged part of the ground and the submerged part of the riverbed constitute a whole which forms the main subject-matter of the leasing contract."

It continued:

> "23 It is apparent from the order for reference that the houseboat, without any system of propulsion, has been immobilised on that part of the river water for many years. It is attached to the demarcated part of the riverbed by means of anchors and is attached to the bank by chains and ropes. Those immobilisation measures cannot be removed easily, that is to say without effort and considerable cost. In accordance with the case-law of the Court of Justice, it is not necessary for a construction to be indissociably incorporated into the ground in order to be regarded as immovable property for the purposes of applying the rules on VAT (*Maierhofer*, paragraph 33).

> 24 By the terms of the leasing contract which is concluded for a duration of five years and which shows no wish of the parties to confer an occasional and temporary character to the use made of the houseboat, the latter is used exclusively for the permanent operation of a restaurant-discotheque. Moreover, the houseboat has a postal address and telephone line and is connected to the water and electricity mains.
>
> 25 Taking account of the houseboat's link with the elements that constitute its site and of the fact that it is fixed to those elements, which render it, in practice, a part of that space taken as a whole, and taking into account also the contract which allocates the houseboat exclusively and permanently to the operation, on that site, of a restaurant-discotheque, and taking account of the fact that the latter is connected to the various mains, it must be held that the whole constituted by the houseboat and the elements which compose the site where it is moored must be regarded as immovable property for the purposes of applying the exemption referred to in Article 13B(b) of the Sixth Directive.
>
> 26 The European Commission correctly observes that, having regard to the objective envisaged by the contracting parties and the function allocated by them to the houseboat, it is, for those parties, immaterial, from an economic point of view, whether it is a building incorporated into the ground in a fixed manner, for example by piles, or a simple houseboat such as that at issue in the main proceedings."

The Court concluded (para 29, and part 1 of its ruling) that on a proper interpretation of Article 13B(b) of the Sixth Directive the concept of the leasing or letting of immovable property includes the leasing of a houseboat, including the space and the landing stage contiguous therewith, which is fixed by attachments which are not easily removable to the bank and bed of a river, stays in a demarcated and identifiable location in the river water and is exclusively used, according to the terms of the leasing contract, for the permanent operation of a restaurant-discotheque at that location.

The Facts in the Present Case

27. The FTT noted (paragraph 27) that the parties had lodged an extensive agreed Statement of Facts which it did not set out at length in its decision. Its findings in fact were set out at paragraphs 28 to 65 of its decision.

28. As is evident from the documents referred to in the Agreed Statement of Facts, the background to the supply in the present case was that part of a secondary school had been condemned. Temporary accommodation was needed until more suitable permanent arrangements were made. (Eventually funding for a new school was obtained). A very substantial temporary school building was supplied by the respondent. The supply was to be for a minimum period of 24 months. In fact, it lasted for 32 months. The temporary school was a two-storey building made up of three interlinked blocks. It contained 19 classrooms, staff and office accommodation, toilets, stores and ancillary accommodation, an internal lift and lift shaft, and internal staircases. The surface area of the accommodation extended to 3,876 m^2. It had central heating and air conditioning. Sixty-six modular prefabricated units were used, plus four landings and steps, one disabled access ramp to the ground floor, and two landings and external stairs to the first floor. Several of the classrooms (eg the IT suite and the language suite), toilets, corridors and other areas were created by combining a number of units. The building was well provided with services, including IT services, which had been installed to run throughout the building and which entered from the ground. The component units of the building were clipped or clamped together to create a structurally integrated

building. In the interior, the décor and tiling ran across component units. On the exterior a sealant membrane was applied to roof joints and all other vertical and horizontal joints were plated to provide weather seal and cosmetic finish.

29. Each of the 66 units weighed 7 tonnes. The total weight of the units alone was 462 tonnes. Other components (eg the external staircases, ramps, levelling beams, lift, etc.) added to the total weight of the building, but there appears to have been no evidence clarifying the weight of those components. An articulated lorry was needed to move each unit, and the other components filled a further eight lorry loads.

30. The building needed foundations. In terms of the contractual work package it was for the respondent to create any necessary foundations. It supplied the required materials and services. Three large trenches were cut in the ground. Fresh stone was imported and compacted into the trenches. Large steel levelling beams were then laid into the trenches on top of the compacted stone. The site sloped. The purpose of the levelling beams was to keep the building level. At the uphill end of the slope the whole of the beams were within the trenches, but as the slope declined the top of the beams emerged gradually above the top of the trenches until at the end of the beams almost all of the beam was above the top of the trench. The ground floor of the building rested on the beams. Thirty-six fixing clamps connected the levelling beams to RSJ beams on the base of the ground floor units. Those connections were not necessary to keep the building securely in place on the levelling beams - the mass and weight of the building kept it in position. The weight of the building, including the levelling beams, was supported by the compacted stone.

31. When the letting came to an end it took 98 man days to dismantle the building and remove it from the site. The respondent took away all the prefabricated components including the levelling beams. In terms of its contract with IRS it was not responsible for restoring the ground and that work was done subsequently by others.

32. The FTT's primary reasoning was that the Maierhofer guidance had to be applied not to the building as a whole but to each of the units:

> "73 In my view the wording of paragraph 35 of *Maierhofer* is very clear. Whilst it refers to the letting of a building it goes on to refer to the pre-fabricated components being fixed to or in the ground in such a way that **they** cannot be either easily dismantled or easily moved. It is quite clear to me that the relevant question is whether the prefabricated components and therefore the units are fixed to or in the ground and whether they can be easily dismantled or easily moved."

33. In case it was wrong about that, the FTT also sought to apply the Maierhofer guidance to the building. In carrying out that second exercise it seems to have treated the temporary school as the relevant building. It found that the various components were joined together and that that gave the building structural stability. However, it proceeded on the basis that some of the components - the levelling beams, trench foundations and friction clamps - were not part of the building. It reasoned that since the friction clamps between the base of the units/building and the levelling beams were unnecessary they should be ignored, with the result that the building was not fixed or attached to the levelling beams. It continued:

> "80. Accordingly, I do not find that the friction clamps attached or fixed the units and therefore the building to the levelling beams.

> 81. I do not accept that the levelling beams resting on the compacted stone in the foundation trenches were an integral part of the building ... When [the respondent] left the site, the foundation trenches and stone remained. The units, steel beams and flitch plates had simply been removed in turn by [the respondent] and were then taken away to be used elsewhere. For the same reasons I do not find that they can possibly be an integral part of the units."

34. The FTT followed the sequential approach suggested in UK Storage, asking first whether the units/building were fixed to or in the ground and, if so, going on to ask whether the units/building could be easily moved or dismantled and moved.

35. In addressing the first question it asked itself what the possible "substantive connections" to the ground were. It dismissed the wooden framework to which skirtings were attached as not being "a mechanism for fixing the units, or the ramp, to the ground" (paragraph 75). It then continued:

> "76 That leaves only three possible substantive connections to the ground:
> (a) Foundation trenches, levelling beams and friction clamps,
> (b) the mains services, and
> (c) the two external staircases."

It considered each of those possibilities separately. It rejected (a), reasoning:

> "82. I do not accept that the foundation trenches, stone and levelling beams are the equivalent of the concrete base on sunken concrete foundations in *Maierhofer*. Although it was also argued that the stone itself was the equivalent of the concrete foundations, the point is that that concrete combination is a significant embedded and very solid enduring structure and the walls of the prefabricated components were bolted to it. That was not the case in this instance. In addition in *Maierhofer* there was a fully tiled roof framework on each building unlike in this instance.
>
> 83. Although there was no requirement for foundation trenches and stone in *University of Kent*, presumably because of the load bearing capacity of the ground in that instance (not least given that each of those units weighed one tonne and these seven tonnes), the levelling beams in this appeal are very similar in function to the paving slabs and concrete blocks utilised to support and keep level those units which were also on a slope. Those units were found not to be fixed to or in the ground."

The FTT held (para 84) that the services connections and the two external staircases were each marginal connections to the building and the units and that the services were easily disconnected and the staircases were easily dismantled.

36. The FTT concluded:

> "86. … The question is whether or not, objectively considered, the attachment is sufficient to enable the building, or the individual units, to be regarded as "firmly fixed to the ground", using the words of Advocate General Jacobs at paragraph 42 of his Opinion. In my view they are not.
>
> 87. Accordingly, I do not find that the building or the units were fixed to or in the ground."

Nonetheless, it went on to consider the remaining questions suggested in UK Storage:

> "88. However, if I am wrong in that, I must consider the other two questions posed in *UK Storage* in regard to moving and dismantling. Clearly the answer to question (b) is straightforward in that the units had to be dismantled before being moved.

> 89. I am bound by and agree with the Tribunal in *UK Storage* where it states at paragraph 29 that it is not possible to specify the number of persons or period of time required before a building or structure ceases to be easily dismantled. In that instance it was considered that two man days in relation to one storage unit weighing six tonnes presented no material difficulty. In this instance we are dealing with seven tonne units. Those 66 units plus other items were dismantled in 98 man days.
>
> 90. I find that it was a straightforward matter to disconnect the individual units from the ground and once the internal wiring, connections etc had been stripped out, the removal of the units was also very straightforward. [The respondent] moves such units all over the country on a regular basis with no particular difficulty.
>
> 91. It was simply the sheer large number of units that absorbed the man power and time. If I look at how easily the building was dismantled, given the scale of the building, I find that it was indeed dismantled and moved quickly.
>
> 92. For all these reasons I allow the appeal."

Discussion

37. While I appreciate the efforts made by parties to provide me with further information after the hearing, ultimately I have found it to be of limited assistance. I take account of the additional facts ascertained from the Bundesfinanzhof's order but they do not add much to the Court's findings. I am not inclined at this late stage to permit the respondent to challenge the accuracy of the official English translation of the German version of the judgment in Maierhofer. It was not suggested at the hearing that it contained any inaccuracy. In any case, since the Court in Maierhofer was clear that Article 13B(b) should be interpreted so as to be consonant with Article 4(3)(a), I am not persuaded that the suggested difference in translation is significant.

38. The question the FTT had to determine was whether there had been "the grant of any interest in or right over land or of any licence to occupy land" by the respondent to IRS. That in turn depended upon whether there had been a letting of "immovable property" within the meaning of Article 135 (*l*) of the 2006 Directive.

39. The expression "immovable property" has an autonomous meaning for the purposes of Community law. Article 135 (*l*) is to be interpreted in light of the context in which it appears and having regard to the underlying purpose of the exemption which it establishes. It is also settled that the letting of a building may be immovable property even if the land on which the building stands is not included in the letting (Maierhofer, *supra,* para 41 of the judgment).

40. In paragraph 23 I noted the terms of the first question referred to the Court. The terms of the first conclusion of the Advocate General's Opinion were:

> "(1) The 'letting of immovable property' within the meaning of Article 13B(b) of Sixth Council Directive 77/388/EEC … covers the letting of buildings constructed from prefabricated materials such as those in issue in the main proceedings if they are firmly fixed to or in the ground."

Both the first question which was referred and Advocate General's Opinion form part of the background against which the Court's judgment should be read. Both focussed on the nature

of the building let. The issue was not the nature of one or more of the component parts which had been integrated to form the building. It is clear from his conclusion (1), and from a reading of his Opinion as a whole, that the Advocate General advised that buildings constructed from prefabricated materials could be immovable property within the meaning of Article 13B(b) if those buildings were firmly fixed to or in the ground.

41. In my opinion on a proper reading of Maierhofer and Leichenich v Peffekoven the following matters are clear.

42. First, Article 13B(b) of the Sixth Directive (now Article 135(*l*) of the 2006 Directive) should be interpreted in a way which is consonant with Article 4(3)(a) (now Article 12(2) of the 2006 Directive). In each case a building will be immovable property if it is fixed to or in the ground. Each of these terms ("building", "immovable property" and "fixed to or in the ground") have autonomous Community law meanings.

43. Second, in neither of these cases did the Court purport to prescribe exhaustively the circumstances in which a building ought to be treated as being fixed to or in the ground. Importantly, it did not say that the requirement could only be satisfied where there was an "active connection" such as a physical fastening. In my opinion such a restrictive approach would have been difficult to reconcile with the ordinary meaning of "fixed" - which includes stationary, and unchanging or stable in position (The Shorter Oxford English Dictionary (5^{th} ed.)). Since the purpose of the Community legislation is to distinguish between movable and immovable property, and it is not difficult to conceive of situations where buildings may be firmly fixed in position through downward compressive force without the need for an active connection or fastening, I am not persuaded that "fixed to or in the ground" has the restricted meaning which the respondent suggests and which the FTT appears to have accepted. In so far as observations at paragraph 26 of UK Storage may suggest otherwise, I respectfully disagree with them.

44. Third, the question of movability/immovability is to be determined by looking objectively at the characteristics of the building and its relationship with its site. Relevant factors include the manner in which the building relates to or is integrated with the ground and how easily (or not) it may be moved or dismantled and moved. As Advocate General Jacobs stressed in Maierhofer, even conventional buildings are capable of being dismantled and moved. There is a spectrum of movability/immovability. The caravans and mobile homes in Commission v France were clearly movable because they were mobile, and the tents and light-framed leisure dwellings were movable because they could be easily moved. On the other hand the temporary buildings in Maierhofer were not mobile, could not be easily moved, and were bolted to a concrete base which had foundations sunk in the ground. If a building can only be moved or dismantled and moved with considerable effort or cost that tends to indicate it cannot be moved easily or dismantled and moved easily (Leichenich v Peffekoven, para 23), and that it may indeed be immovable property. The objective facts may include the period of let in the lease agreement (Leichenich v Peffekoven, paras 18-19), but if the form and substance of the arrangement differ it is the latter which will be more important.

45. Fourth, Maierhofer is not authority for the proposition that where a building has been constructed from prefabricated components its movability/immovability falls to be decided by examining whether individual components are fixed to or in the ground. Rather, the issue is whether the building is fixed to or in the ground.

46. Fifth, neither Maierhofer nor Leichenich v Peffekoven indicate that the issue of movability/immovability ought to be determined using a sequential approach, and in my opinion such an approach is not appropriate. On this point too I find myself in respectful disagreement with the UT in UK Storage. The means by which a building is kept in position on its site, and the ease or difficulty of moving or dismantling and moving it, are inter-related issues. Both are relevant to the question whether the building is fixed to or in the ground. They ought to be considered together.

47. In the present case several points of law arise from the FTT's decision. In my view the appeal engages the first, second and fourth categories of cases identified by the Second Division in Advocate General for Scotland v Murray Group Holdings Plc, paragraphs 42-43. In my opinion the FTT misdirected itself as to the general law. It also failed to apply the law properly to the facts. It also made fundamental errors in its approach to the case, by asking itself the wrong questions, and by arriving at findings and a decision which no reasonable FTT could properly reach.

48. The FTT was wrong to construe Maierhofer as requiring it to address whether component parts, rather than the integrated building, were fixed to or in the ground; and whether such parts, as opposed to the building (or all the component parts comprising the building) could be moved, or dismantled and moved, easily. In Maierhofer the Court's focus was on the buildings and whether they were immovable property (see e.g. paras 32-34). Paragraph 35 requires to be read in the context of the judgment as a whole. The property described was "a building constructed of prefabricated components", and the issue was whether that building was fixed to or in the ground. The FTT's reading of paragraph 35 appears to me to be unduly literal. It fails to put paragraph 35 properly in context having regard to the whole terms of the Court's judgment and to the objective of the Community legislation. In my respectful opinion it is not a sensible reading. It would be likely to give rise to some very odd results indeed.

49. In my view it is beyond argument that the temporary school was a single integrated building - both physically and functionally. The focus should have been on the building as a whole, not on the individual components which were assembled and amalgamated to form the building. The relevant question ought to have been "Is the temporary school building fixed to or in the ground having regard to the Community law meaning of those words ?"

50. The FTT took an unduly restrictive view of what being fixed to or in the ground involved. It seems to have treated the facts in Maierhofer as though they represented minimum requirements. It proceeded, wrongly in my view, on the basis that a sequential approach was appropriate. It asked whether the building was fixed to or in the ground, and only once that question had been answered did it consider if the building could be moved, or dismantled and moved, easily.

51. The FTT also erred when it came to applying the law to the facts. It ought to have looked objectively at the building's relationship with the ground. That should have involved taking a holistic view, looking cumulatively at all of the links between the building and the ground, and whether the building could be easily moved or easily dismantled and moved. Instead the FTT looked separately at each "possible substantive connection" and asked itself if that connection fixed the building to or in the ground. It dismissed each potential connection, but in doing that it adopted an unduly restrictive interpretation of "fixed to or in the ground". It left over consideration of ease or difficulty of dismantling and removal until after it had

decided that the building was not fixed to or in the ground; and when it did carry out the latter exercise, in my opinion it did not approach it correctly.

52. While it may reasonably be inferred that the FTT accepted that the rest of the temporary school was one integrated building, it did not accept "that the levelling beams resting on the compacted stone in the foundation trenches were an integral part of the building". However, in my view the explanation which it gave for that conclusion does not stand up to scrutiny:

> "81 ...When the appellant left the site, the foundation trenches and stone remained. The units, steel beams and flitch plates had simply been removed in turn by the appellant and were then taken away to be used elsewhere. For the same reasons I do not find that they can possibly be an integral part of the units."

But the relevant issue was whether the beams and the foundations were an integral part of the building *before* it was dismantled. In my opinion they plainly were - physically and functionally. The respondent supplied the levelling beams and it was responsible for preparing the foundation trenches (excavating them, removing poor stone and clay, and importing and hard packing stone). That was all part of the package which it contracted to provide. It is of no moment that it did not undertake to restore the ground. The units were firmly in position on the beams and the beams were firmly in position within the foundation trenches.

53. The FTT's rationale for ruling out "foundation trenches, levelling beams and friction clamps" as a "substantive connection" to the ground appears to be (i) that the friction clamps could be ignored; (ii) that the levelling beams and foundation trenches were not part of the building because the latter remained when the respondent left the site; (iii) that they were not the equivalent of the concrete base on sunken foundations in Maierhofer; (iv) that the levelling beams were very similar in function to the paving slabs and concrete blocks used to support and keep level the units in University of Kent, and that those units were not found to be fixed to or in the ground.

54. Even if the correct approach was to look separately at this "possible connection", the FTT's reasoning is unsatisfactory. With or without the friction clamps the levelling beams were part of the building - physically and functionally. The upper part of the building was held firmly in place on the beams by compressive force. As a matter of objective fact the friction clamps also provided some physical fastening. That fastening was unnecessary to keep the upper part of the building in place, but it was there. The only reasonable conclusion on the facts was that the levelling beams and the foundations formed part of the building. The explanation for determining that they did not - that the foundations remained after the rest of the building (including the beams) were removed - is a not a logical justification. The facts in Maierhofer do not prescribe a minimum threshold of immovability. On any view the facts in the present case are very much closer to those in Maierhofer than those in Commission v France, or those in UK Storage or University of Kent. The FTT's suggested equivalence (para 83) of the relationship between the building and the ground here and the relationship between the units and the ground in University of Kent is not a conclusion which may reasonably be reached on the facts in my opinion.

55. As already indicated, in my view the FTT's general approach was wrong. It ought to have carried out a holistic examination of the relationship between the building and the ground, asking if the building was fixed to or in the ground. As part of that exercise it should have

considered whether the building was firmly placed on or in the ground, and whether it could be moved, or dismantled and moved, easily.

56. The circumstances here are not in any sense truly comparable to the circumstances in the University of Kent case or the UK Storage case. The FTT itself observed at paragraph 68:

> "68. The building and units in this appeal are very different to those in any of the cases which have been cited to me and to which I have referred. Furthermore, the quantity of units joined together is very different and very much larger."

In University of Kent and in UK Storage each unit was separate and had not been integrated into a larger structure, and the issue was whether each unit was immovable property. The units in those cases were small. In terms of size, weight and integration with the ground they were not comparable with the school building. The sleep units in University of Kent were of a similar size to caravans (3.6m long, 2.7m wide, and 2.6m high), and weighed 1 tonne. The storage units in UK Storage weighed 600kg when empty (not 6 tonnes as the FTT here suggested at para 89). In neither case did the units require or have foundations (University of Kent, para 11; UK Storage, para 26). Each sleep unit merely had four adjustable corner points for levelling it on the ground and paving slabs or concrete blocks were put under those points to assist in keeping the unit level. The storage units simply rested on the ground. The sleep units and the storage units could feasibly be moved without being dismantled (University of Kent, para 22; UK Storage, para 4(1), paragraph 10 quoting paragraph 70 of the FTT's findings, paras 26, 30, 31). In the whole circumstances it was wholly unsurprising that the conclusion in each case was that the units were not fixed to or in the ground.

57. In my respectful opinion the FTT's error was compounded when it turned to consider the issue of dismantling and removal. Most of what it said was directed towards the dismantling and removal of a unit rather than the dismantling and removal of the building. However, in so far as it did address the latter question, in my view it misdirected itself. The inescapable facts are that the building could not be either easily moved, or easily dismantled and moved, from its site; and that in order to move it all of the components had to be dismantled. That took very considerable time and effort indeed - 98 man days. It was common ground (see para 71) that the dismantling process was fairly involved and relatively lengthy. It bore no resemblance to what was required to remove a unit in University of Kent (a matter of a few hours) or to dismantle and remove a storage unit in UK Storage (two man days). In my opinion the time and effort involved clearly place the building at the immovable end of the movable/immovable spectrum. It exceeded the time and effort required to carry out those tasks in Maierhofer. Here the only reasonable answer to the question "Can the building be easily moved or easily dismantled and moved?" is "No." The question is not, as the FTT seem to have thought it was, "For a building of its size was it relatively easily dismantled and removed?" So qualified, the FTT's question did not address the correct test. It failed to take account of the fact that the scale of a building is likely to be a very significant factor when it comes to an objective consideration of whether a building ought to be treated as immovable. Amongst other things, it is likely to bear upon whether it can be moved, or dismantled and moved, easily, without considerable effort and cost (Leichenich v Peffekoven, para 23).

58. In my opinion, on a proper application of the law to the facts the only reasonable conclusion is that the building was fixed to or in the ground. It had substantial foundations which were sunk into the ground. It was held very firmly in position on those foundations by the very large compressive force which it exerted on them. It was connected to services which ran

through the ground. Other parts of the building - the two external staircases - were secured to the ground. Importantly, the building could not feasibly be moved without being dismantled, and it could not be easily dismantled and moved.

59. For the foregoing reasons the appeal is well founded. The appropriate course is for me to remake the decision. The temporary school was fixed to or in the ground. The supply by the respondent to IRS was a letting of immovable property in the Community law sense, and it was an exempt supply in terms of section 31 and Schedule 9, part II, group 1, item 1 of VATA.

Disposal

60. I shall allow the appeal.

Lord Doherty

Sitting as a Judge of the Upper Tribunal
(Tax and Chancery Chamber)

Released: 24 July 2017