[2021] UKUT 36 (TCC)

Appeal number:
UT/2020/0053

VAT– welfare exemption – Article 132(1)(h) – services directly connected to the care or protection of children - exclusion in Note 7 Group 7 Schedule 9 VATA 1994 for accommodation for "supply" of accommodation except where it is "ancillary" to the provision of care – "supply" did not cover supply within a composite supply - "ancillary" in Note 7 in VATA 1994 did not incorporate definition of ancillary supply used in Card Protection Plan (Case C-349/96) – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE LILIAS GRAHAM TRUST **Appellant**

-and-

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

TRIBUNAL **JUDGE SWAMI RAGHAVAN**
JUDGE GUY BRANNAN

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 8 February 2021

Leslie Allen and Richard Harvey, instructed by Mishcon de Reya LLP for the Appellant

Natasha Barnes, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Lilias Graham Trust ("LGT") is a charity. It provides a residential assessment centre where it assesses the parenting capacities of those referred to it by a local authority in return for a fee charged to that authority. LGT appeal, with the permission of the First-tier Tribunal ("FTT"), against a decision of the FTT issued on 10 March 2020[1] ("the FTT Decision").

2. The FTT held, contrary to LGT's case, that LGT's supplies were exempt supplies of "welfare services" under Item 9, Group 7 Schedule 9 of the Value Added Tax Act 1994, being directly connected to the care or protection of children. LGT accept that conclusion and do not seek to appeal it. Instead, LGT's appeal concerns its alternative case. That centred on the exception to the exclusion to exemption in Item 9 as provided by Note 7 to Group 7 ("Note 7"). Note 7 provides that Item 9 does not include the supply of accommodation or catering except where it is "ancillary to the provision of care, treatment or instruction". The FTT rejected LGT's argument that the accommodation was outside the scope of the Note 7 exclusion. It found the provision of accommodation was ancillary to the provision of care for the purposes of Note 7 and therefore exempt. LGT's motivation to argue that the supply of the accommodation is standard-rated rather than exempt is the significant amount of input tax which arises in relation to the accommodation.

Background

3. The relevant UK legislation implements provisions of Council Directive 2006/112/EC Principal VAT Directive ("PVD"). Although LGT's position is that the UK implementation of the exemption faithfully transposes the PVD provisions, we set the Directive provisions out because they are relevant to the parties' submissions and because they inform the construction of the UK provisions.

4. Article 131 provides:

> "The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

5. Article 132(1)(h) of the PVD then provides in relation to welfare services:

> "1. Member States shall exempt the following transactions: …

[1] This amended, upon the FTT's review, the FTT's decision of 29 August 2019.

> (h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing;…".

6. Article 134 provides the supply of goods "shall not be granted exemption as provided for in points …(h)…where the supply is not essential to the transactions exempted".

7. Section 31(1) VATA provides that "a supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9…"

8. Item 9 of Group 7 of Schedule 9 VATA, provides exemption for:

> "The supply by
>
> (a) a charity,
>
> (b) a state-regulated private welfare institution or agency, or
>
> (c) a public body,
>
> of welfare services and of goods supplied in connection with those welfare services".

9. Note 6 of Group 7 then defines "welfare services":

> "In item 9 'welfare services' means services which are directly connected with-
>
> b) the care or protection of children and young persons"

10. Note 7 of Group 7 provides:

> "Item 9 does not include the supply of accommodation or catering except where it is ancillary to the provision of care, treatment or instruction."

FTT Decision

11. No challenge is made to the findings of fact the FTT made (at [8] – [40]). For the purposes of this appeal, it is sufficient to note the following.

12. LGT run a residential assessment centre where the parenting capabilities, of parents who are referred to LGT by local authority social workers, are assessed. The social worker refers a family unit where there are concerns over whether the parents can care for the child safely and adequately or, because of lack of engagement, the social worker has been unable to evaluate whether there is a risk ([16][17]).

13. The average placement lasts for 12 weeks. The families are accommodated on-site in a "typical family home". LGT support staff observe the parent's interactions with the child making detailed notes against the key criteria which include the parent's ability to respond, cuddle, relax, talk to and play with the child. The support staff remain physically in the room with the family or elsewhere. The child remains under the supervision of the parent ([21][23][24]).

14. The advice and support offered includes helping a parent to budget, to wake up on time to feed the child, taking a child to school on time, keeping a clean and tidy home, demonstrating how to play with the child to encourage bonding and pointing out that a child may be hungry or dirty ([25]).

15. The majority of families see one or more LGT's consultants, who include educational psychologists, play therapists and psychiatrists ([27]).

16. At the end of the placement LGT compiles a comprehensive report detailing the staff and consultant reports and making recommendations to social workers on future support for the parents ([31]). LGT may also support the family's transition from the residential assessment to the community with visits to help with daily living activities such as shopping ([29]).

17. The Local Authority is charged a fixed fee per family per week which includes the cost of all the specialist consultants ([17]).

18. Before the FTT, the central issue in dispute between the parties, and therefore the focus of the FTT's consideration, was whether LGT's supplies were "directly connected with…the protection of children and young persons" and thus exempt "welfare services", as HMRC maintained ("the welfare exemption issue"). As is clear from the FTT's background explanation (at [12] and [56]), LGT's case, that the supplies were not exempt, arose because of input tax sought on the costs of new accommodation.

19. After a detailed discussion of the relevant legal provisions and facts (at [83] to [124]) the FTT concluded the supplies were exempt welfare services. As we have noted, LGT make no appeal against that conclusion. Rather, their challenge is to the FTT's decision in respect of LGT's alternative argument regarding the applicability of the exclusion from exemption in Note 7. The FTT dealt with this issue before the welfare services exemption issue in the section of its decision at [58] to [70].

20. First, it dealt with the question of whether there was a single supply. It noted LGT's submissions that the "accommodation provided is not merely ancillary but is essential to the service being provided", that the supply was "a single supply of residential accommodation and the assessment of parenting capacity", and that HMRC had always maintained there was single (exempt) supply. Accordingly, the FTT considered both parties agreed the supply of accommodation was essential and stated it agreed with that view ([59]-[61]).

21. Next, the FTT considered whether there was single supply. Although LGT confirm they accept the FTT's finding that there was a single supply, we set out this section of the decision because the FTT's reasoning on the point is relevant to LGT's grounds of appeal.

22. The FTT set out the European Court's analysis at [30] of *Card Protection Plan v CCE* (Case C-349/96) ("*CPP*") which LGT relied on. There was a single supply where one or more elements constituted the principal service, while the others in contrast were ancillary. The court explained those terms as follows:

> " …A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal service".

23. The FTT then cited the further principles on characterising supplies as single or composite supplies set out in the Upper Tribunal's decision in *The Honourable Society of Middle Temple v HMRC* [2013] UKUT 0250 (TCC) (at [60] of that decision), which included among them the *CPP* principle stated above. The FTT agreed with both parties that the supply of accommodation did not constitute an aim in itself. It also observed "from an economic point view [the supply was] evidently a single supply, the accommodation is not independent from the assessment and there is certainly no freedom not to utilise it." It found that "in all these circumstances…LGT must be treated as making a single supply" ([67]).

24. The FTT continued:

> "68. If the supply of accommodation does not constitute an aim in itself, then in VAT terms it must be an ancillary supply.
>
> 69. LGT argue that because it is an essential part of the supply then it cannot be ancillary and therefore the qualification in Note 7 applies. The definition in The New Shorter Oxford English Dictionary is clear: "Subservient, subordinate, auxiliary, providing support; now esp. providing essential support or services to a central function or industry…".
>
> 70. I cannot accept LGT's argument."

Grounds of Appeal

25. LGT does not challenge the FTT's conclusion there was a single supply. LGT's case is that the FTT made a number of errors of law by concluding the supply of accommodation was ancillary to the provision of care treatment or instruction and that it therefore fell within the exception to the exclusion from exemption in Note 7. These errors may conveniently be grouped under the following headings:

> (1) ***Meaning of "supply" in Note 7 and ability to attach different tax treatments to elements within a composite supply***:
>
> LGT argues the FTT wrongly conflated *identification* of supply for purposes of Note 7 with the *nature of a transaction* for the purposes of VAT liability classification. LGT argues "supply" in Note 7 can take any form (s5(2)(a) VATA states "supply" in VATA "includes all forms of supply"). It is not therefore necessary for the purposes of Note 7 to reach a view that the supply takes any particular form in terms of it being a single, mixed, composite or ancillary supply. In any case a finding that the provision of accommodation fell within a larger single composite supply did not, consistent with European case-law, preclude Note 7 carving out accommodation from the exemption and applying a different tax treatment.

(2) ***Meaning of "ancillary" in Note 7:***

The FTT applied the wrong test at [68] by only referring to one of the two elements of the *CPP* principle: it only considered whether the supply of accommodation "was an end in itself" without going on to consider whether it was "a means of better enjoying the principal services". The FTT failed (at [69]) correctly to apply the EU case-law to the meaning of "ancillary" in Note 7 and was wrong to apply a dictionary definition of the term.

26. HMRC disagree and support the decision the FTT reached. They say the FTT was correct not to exclude LGT's supply of accommodation because there was a single supply of welfare services. In that light Note 7 did not even become relevant as there was no "supply" of accommodation. The FTT was thus right to reject LGT's submission that its provision of accommodation was not exempt because it fell within the exclusion for accommodation in Note 7.

27. We consider each set of grounds in turn. The core issues underlying each are the interpretation of Note 7. We should note by way of preliminary background that neither party unearthed any decisions addressing the interpretation of the provision. Beyond HMRC establishing that the 1985 VAT Welfare Order introduced the provision, and despite the research efforts of both parties, neither were able to assist us further with any background regarding the legislative purpose underlying the Note.

(1) Note 7 "supply" can include a supply which is part of a larger supply

28. LGT's essential point is that "supply", as referred to in Note 7, means any form of supply irrespective of whether the supply is a single supply, part of a composite supply, or an ancillary supply within a larger supply and irrespective indeed of whether any conclusion has been reached on such characterisation of the supply. Thus, Mr Allen submitted, for LGT, that when Note 7 speaks of the supply of accommodation it was concerned with the supply of accommodation identified in any form, even if the supply formed part of a larger composite supply. Note 7 merely required that a supply of accommodation could be identified.

29. Mr Allen, relies on the interpretation of the term in the light of the way "supply" is defined elsewhere in VATA. He highlights that all that is required for a supply to take place is that something is provided or done for consideration and that "supply" in s5(2)(a) VATA is defined as including "all forms of supply". He also maintains that the European case-law principle, that a single supply is generally subject to a single rate of VAT, presents no obstacle because the case-law allows for exceptions to that principle, and those exceptions apply to Note 7.

30. LGT's argument that "supply" in Note 7 is unencumbered by any perception as to how such supply is characterised, consistent with s5(2)(a) VATA, echoes an argument that was advanced by the taxpayer in *Colaingrove Ltd v HMRC* [2017] EWCA Civ 332 (at [22]). That argument was however then rejected. The case concerned a composite supply of caravan accommodation where the charge paid included supply of facilities including electricity. The issue was whether the reduced rate of VAT for

supply of fuel could apply to an individual element (electricity) of the composite supply of accommodation. The Court of Appeal (Arden LJ with whom Lindblom LJ and Henderson LJ agreed) held the fuel charge did not apply where the supply was a composite supply of some other service. At [46] it rejected the argument regarding s5 VATA applying to supplies of any form in the following terms:

> "…that does not mean that something which is not a supply for VAT purposes is to be treated as such. Moreover, a statute is not the place for a variable contextual meaning. Unless there is good reason for some other interpretation, a word used in a statute conventionally has the same meaning wherever it occurs in that statute."

31. The relevant legislation in *Colaingrove* (s29A VATA) applied a reduced charge to "…any supply that is of a description for the time being specified in Schedule 7A". The reasoning for why the terms of s5 VATA did not govern the meaning of "supply" in the context of s29A VATA would apply equally to "supply" in Note 7. As Ms Barnes, for HMRC, pointed out, Note 7 sits within the same kind of statutory structure, albeit in the context of exempt rather than reduced rate provisions, whereby the legislative provision introducing the relevant Schedule (s 31 VATA - see [7] above) is written in the same terms. In any case, no good reason is advanced to show why "supply" in Note 7 should bear a different interpretation from that of meaning a supply generally for VAT purposes.

32. LGT's argument that one should consider Note 7 without any conception of the characterisation of the supply is also at odds with the importance the CJEU has placed on first identifying whether transactions comprising of several elements amount to single or multiple supplies. In *CPP* the court (see [27]) clearly had in mind that this step needed to be carried out first for identifying the place where services are provided, the application of rates of tax, or the applicability as in that case of exemption provisions. There was accordingly, in our view, no error of law in the FTT addressing the issue of whether what was supplied constituted a single supply before it went on to consider Note 7.

33. LGT also relied on the Privy Council's interpretation of the European case-law in *Director General, Mauritius Revenue Authority v. Central Water Authority (Mauritius)* [2013] UKPC 4. (It was not disputed that case-law was relevant as the Mauritian VAT legislation was framed on the model of VATA 1994 which in turn gave effect to European Directive requirements). There, the renting out of water meters and the carrying out of infrastructure works by the water authority were exempt from VAT (by virtue of amending regulations). The supply of water above 15 cubic meters per month was, however, a taxable standard-rated supply. The water authority argued that it was making one composite taxable supply of water and that its input tax incurred on the acquisition of meters and on infrastructure works (which were necessary prerequisites to the supply of water) was deductible input tax attributable to taxable supplies. The supply of meters etc was not itself a supply, so the argument ran, but part of a larger supply, on *CPP* principles, of water. The tax authority submitted that it was open to the legislator (by the amending regulations) to identify a "concrete and specific aspect" of an overall supply, such as that of water made by the CWA, and to give that aspect a different VAT status, whether

by making it exempt, by making it zero-rated or by attaching to it a different rate of VAT. The Board accepted the tax authority's argument stating at [26]:

> "In so far as this submission suggests that the only relevant or recognisable supply was or should be treated for all purposes as having been of water, because that was the aim of all of the CWA's activities, the Board cannot accept it. In speaking of a "single service", the *CPP* principle does not mean that ancillary services or supplies entirely disappear. Rather, it treats them as ancillary services or supplies which share the tax treatment of the principal service."

34. On the basis of the case-law (including *Commission v France*[2] and *Talacre Beach*, which we discuss below*)* the Board considered at [26] that it was "both permissible and relevant to identify the ancillary elements for particular purposes". Thus, the Board concluded at [29]:

> "In a case such as the present, customers need to be supplied with a meter and a connection if they are to be connected to the mains and to receive water. That the supplying of a meter and connection are necessary pre-requisites to any supply of water to a customer is highly relevant to the *CPP* question whether either is an independent, as opposed to ancillary or incidental, supply, but this does not affect the fact that they are very important, concrete and specific elements which any potential water customer seeks to have installed as soon as possible and maintained thereafter, and correspondingly capable of being recognised as such by the legislator and treated separately for VAT purposes."

35. The *Mauritius* case was therefore one in which it was found that the legislator could apply a different VAT treatment to certain concrete and specific elements of a composite supply from that which would have been accorded to the overall composite supply.

36. The *Mauritius* case was also referred to by the parties in *Colaingrove* (see [18] and [44]) but it was not specifically considered in the Court of Appeal's analysis. That is not surprising. In that case, as here, there is no argument that there are certain circumstances where domestic legislation *might* provide for a different tax treatment of elements within a single supply. Similarly, LGT's reliance on the view implicit from Arden LJ's discussion of the absence of apportionment provisions (at [48]), that legislation was in principle *capable* of applying separate rates to a single supply, does not take the matter further.

37. That leads on to the next issue between the parties: the scope of circumstances in which national legislation may apply different tax treatments to a single supply and

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[2] The Board referred to two decisions of the CJEU entitled *Commission v France*. In the present context we are referring to the decision concerning undertaking services.

whether Note 7, a provision which caveats an exemption to VAT, falls into such circumstances.

38. In summary, LGT say the principle that Member States' legislation can apply different rates of VAT to "concrete and specific aspects of the category of supply", as reflected in the European Court's decisions in *Talacre Beach Caravan Sales Ltd v CCE* (Case C-251/05) and *European Commission v France* (Case C-94/09), enables Note 7 to carve out a discrete supply of accommodation from what would otherwise be a single exempt supply. The principle is not limited, as HMRC submit, to the particular context of those cases which concerned Member States' legislation applying a reduced rate to certain elements of a single supply.

39. *Talacre Beach* concerned a taxpayer who supplied caravans along with contents. The UK legislation zero rated the caravans but excluded the contents from zero rating. The taxpayer argued there was a single composite supply (of caravans and contents) subject to the zero rate on the basis that was the rate which applied to the main element of the supply, the caravan. The court rejected the taxpayer's argument that UK's zero-rating exclusion for contents was impermissible because Member States were not allowed to apply multiple rates of taxation to a single supply.

40. The court began by noting (at [16] to [19]) the legislative background (Article 28 of the Sixth Directive) to the zero-rating provision (termed exemptions with refund of the tax paid). These allowed Member States to derogate from standard rating and apply zero-rating provided certain conditions were fulfilled, including that derogation was expressly covered by national legislation as at a specified date (1 January 1991). The purpose of the derogation was to prevent social hardship likely to follow from the abolition of national exemptions not included in the Sixth Directive. The court regarded the content of that legislation in force on 1 January1991 determined the scope of supplies which were zero-rated. The taxpayer's argument entailed extending zero-rating to items (the contents) which had been specifically excluded ran counter to the purpose of derogation. In addition, it was well-established that exceptions to the general principle of VAT taxability were to be interpreted strictly ([21] – [23]).

41. Regarding the significance of the supply and its contents being characterised as a single supply the court held (at [24]) the case law "did not preclude some elements of that supply being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid".

42. *Commission v France* concerned France's tax treatment, under its legislation, of undertakers' services. The Directive provisions Article 98(1) and (2) and the list of supply categories in Annex III allowed Member States to apply reduced VAT rates to the supplies of such services. France's legislation only applied the reduced rate to the transportation of the deceased's body, leaving the other services as standard rated. The Commission argued all such supplies constituted a single supply which should be subject to a single rate. The court again began with the Directive provisions, tracing the case-law on predecessor provisions and concluding that where Members States made use of the possibility given by Articles 98(1) and (2) to apply a reduced rate to a

particular category, Member States could limit the application (subject to fiscal neutrality) to "concrete and specific aspects" of that category. That selective application was justified amongst other things by the principle that exemptions or derogations had to be interpreted restrictively ([29] and [30]).

43. We see considerable force in Ms Barnes' submission that neither of these last two cases support LGT's case regarding Note 7. In both, a key factor in the court concluding that different tax rates might be applied to elements of a single supply was that European legislation had specifically granted Member States the ability to derogate from a general provision. Denying differentiated tax rates was considered to cut across the purposes of such derogations. By contrast the exemption in Article 132(1)(h) is mandatory (Article 132(1) provides "Member States shall exempt the following transactions…"). Allowing different tax rates to apply in respect of a single supply covered by the exemption would actually undermine the harmonised approach to exemption sought by the mandatory nature of the Article 132 exemptions.

44. LGT emphasise the well-established principle that exceptions to the general principle of taxability of goods and services supplied for consideration are to be interpreted strictly, and the corollary, which HMRC take no issue with, that exceptions to exemptions (such as Note 7) should be interpreted broadly. In our view that does not support a broad interpretation of "supply" in Note 7 (such that it encompasses supplies within a larger single supply). LGT's argument implies that a Member State could carve out different tax treatments of otherwise exempt single supplies. Again, that would be at odds with the mandatory nature of the exemptions.

45. Mr Allen highlights the court's statement in *Talacre Beach* (at [25]) that all the circumstances, including the specific legal framework, have to be taken into account when analysing supplies and that would include the clear exclusion from exemption in Note 7. However, in our view, the court's subsequent reasoning confirms that that analysis would also, and importantly, mean include taking into account the European legislation pertinent to the national provision (Article 28 of the Sixth Directive). Thus Note 7 should not be considered in isolation but against the European legal framework of mandatory exemption for certain matters. When that is done, we consider it plain that the reference to "supply" in Note 7 cannot be interpreted so as to capture a supply which is itself an element in a single supply for VAT purposes. LGT does not however allege any error of law on the FTT's part in identifying a "supply" of accommodation as part of LGT's services. It says the FTT erred in regarding the supply of accommodation as "ancillary" to the provision of care and it is to those grounds which we now turn.

(2) FTT erred in law in analysing "ancillary" in Note 7

46. The first error, LGT submit, was in the FTT holding (at [68]) that: "If the supply of accommodation does not constitute an aim in itself, then in VAT terms it must be an ancillary supply". It omitted the second part of the definition of ancillary supply under the *CPP* principle that the supply "is a means of better enjoying the principal service supplied". We can deal with this ground briefly. That part of the FTT's analysis was plainly concerned with the question of whether there was single supply,

an issue in relation to which LGT make no challenge. In any case, we consider, taking account that the FTT's recitation of the full test in the case law extracts it set out shortly before in its decision at [61] and again at [64], that the FTT had the full formulation in mind even if it did not restate it in full.

47. LGT argue the FTT also erred at [69] by applying an irrelevant dictionary definition of "ancillary" rather the definition as understood under the *CPP principle* and subsequent case law.

48. While, as we mentioned before, there was little the parties could provide us by way of background to Note 7 we consider HMRC's view, that Note 7 does not incorporate the *CPP* definition, is correct.

49. First, Note 7 pre-dates the relevant European case law formulation of what is meant by "ancillary". Note 7 was introduced to Group 7 of the Value Added Tax Act 1983 (the predecessor legislation to VATA 1994) by The Value Added Tax (Welfare) Order 1985. The definition of the concept an "ancillary" supply given in *CPP* (at [30]) referred to the court's earlier decision in *CCE v Madgett and Baldwin (trading as Howden Court Hotel)* (C-308/96 and C-94/97) at [24] which in turn referenced the Advocate-General's own formulation of the test in his opinion as to what an "ancillary" supply meant (at [36]).

50. Second, applying the European case law definition, as LGT seeks to do, gives rise to an outcome with no apparent rationale. This is illustrated by LGT's case. It argues its supply of accommodation is not ancillary because it is not "a means of better enjoying the principal service". Rather, it is essential and critical to the delivery of LGT's services, not a mere enhancement or means of better enjoyment. However, it is not at all obvious why the fact the provision of accommodation or catering is essential or critical to the provision of care should fall outside the scope of the welfare exemption. It might be considered that the more intimately the accommodation or catering was wrapped up with the giving of care the more deserving it was of exemption. LGT's argument gives rise to a strange and contrary conclusion, which of itself suggests that it cannot be correct. Furthermore, it is an interpretation which appears inconsistent with Article 134, which requires, in effect, that Member States must only exempt supplies which are essential to the transactions exempted (i.e. the exempt welfare services).

51. On the contrary, it can be seen why Note 7 might seek to exclude accommodation or catering as unworthy of exemption when it was not "ancillary" to such care in the sense of the accommodation or catering *not* being essential to the care. That meaning of "ancillary" was effectively the one the FTT took from the dictionary definition (which referred especially to "providing essential support") when rejecting LGT's argument. Putting aside the point that the FTT did not strictly need to engage with Note 7, because there was a single supply of parenting capacity assessment rather than of accommodation, we consider the FTT was correct in not applying the European case law definition of "ancillary". That is sufficient to reject LGT's ground on this issue.

52. We would add the definition of "ancillary", whereby accommodation and catering is excluded from exemption because it is not essential to the care instruction or advice, is consistent with HMRC's submissions that Note 7 reflects either the "directly connected" requirement in Article 132(1)(h) and/or the exclusion from exemption for non-essential supplies under Article 134. Mr Allen emphasises that consistent with the principle that, exemptions should be construed restrictively, that consequently exclusions from exemption be construed broadly. That in turn suggests that exceptions to that exclusion (which is the effect of "ancillary") should again be construed restrictively as otherwise they expand the scope of what is exempted. He submits his interpretation of "ancillary" is preferable to HMRC's as it is more restrictive. (Or put another way it is preferable because it broadens the exclusion from exemption). However, the need to take a restrictive interpretation should not undermine the exclusion from exemption which Article 134 requires. There is therefore no difficulty in concluding that "ancillary" in Note 7 has not been appropriately construed by LGT.

53. There are nevertheless unanswered questions as to the function of Note 7. Although some examples were canvassed of situations where it would serve a clear function, none readily pointed to provision of accommodation or catering caught by Note 6 (i.e. directly connected with care) but then excluded by Note 7. Also, to the extent Note 7 operates to implement Article 134, it is not clear why its scope is limited to accommodation and catering and not to other supplies that might in principle be closely-linked with the protection of children and young persons under Article 132(1)(h). However, since neither party raises the question of whether the legislation has correctly transposed the Directive obligations, and since neither of these points alter the conclusion that the errors of law LGT rely on are not made out, we do not address these matters further.

Further grounds: land exemption, similar establishment

54. LGT raised further grounds of appeal which had not been raised before the FTT. HMRC did not object to these new points being raised. Those grounds were that, on the findings the FTT made and the evidence before it: 1) the provision of accommodation fell outside the land exemption (Item 1 Group 1 of Schedule 9 VATA) 2) and, even if the accommodation fell within that exemption, it was excluded from exemption by Item 1(d) Group 1 as the accommodation was a "similar establishment" to a hotel, inn or boarding house. Both grounds are premised on LGT's success on its argument that Note 7 removes its provision of accommodation from the scope of exemption under Item 9 of Group 7 of Schedule 9 VATA. As we have not found in LGT's favour on this point we need not, and therefore do not, deal with those further grounds.

Disposition

55. The grounds of appeal that LGT raise do not establish the FTT made any error of law in its decision. LGT's appeal is dismissed.

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Signed on Original

JUDGE SWAMI RAGHAVAN

JUDGE GUY BRANNAN

RELEASE DATE: 18 February 2021