[2014] UKFTT 0743 (TC)

TC03862

Appeal number: TC/2012/00690

VAT — Service charges in respect of accommodation units at golf resort — Some units timeshare units, others subject to 99 year leases — Whether units are "holiday accommodation" (Group 1 of Schedule 9 VATA) — In the circumstances of the case, yes — Whether particular items in the service charges are disbursements — In the circumstances of the case, no — Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHMOND PARK MAINTENANCE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS HELEN MYERSCOUGH

Sitting in public in Norwich on 14 January 2014

Mr Simon Jessup, Mrs Margaret Jessup and Mr Michael Moore of the Appellant

Mr Philip Rowe, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant company appeals against decisions of the Respondents ("HMRC") to refuse repayment of two claims for overpaid output tax, against an assessment for underpaid output tax, and against a decision of HMRC that the annual service charge made by the Appellant to occupiers of accommodation units is liable to VAT at the standard rate.

2. All of these decisions stem from a finding by HMRC that the annual service charge that the Appellant issues to owners of units and to owners of timeshares of units is liable to VAT at the standard rate. This is because, according to HMRC, the units in question are all "holiday accommodation" within the meaning of Group 1 of Schedule 9 of the Value Added Tax Act 1994 ("VATA").

3. The primary position of the Appellant is that none of the units are "holiday accommodation" within the meaning of Group 1 of Schedule 9 VATA, and that the maintenance charges are VAT exempt. HMRC accept that if the Tribunal finds that the units are not "holiday accommodation", the maintenance charges would be VAT exempt.

4. The Appellant's alternative position is that even if the units are "holiday accommodation", various items in the maintenance charges are disbursements and therefore not to be taken into account in the calculation of VAT on the service charges. The items that are disbursements are said to include insurance, rates, water and sewerage, TV licence, trustee fees, golf privileges, the fee for management of the units (done by the Appellant's own staff), and cleaning (done by the Appellant's own staff). HMRC do not accept that any or all of these items are disbursements.

Background

5. There are a number of legal entities associated with the ownership, administration and management of accommodation units at the Richmond Park Golf Club. The Appellant company is one of these entities. Others are:

(1) The Richmond Park Golf Club Partnership (the "**Partnership**"). This is a partnership of members of the Jessup family, which holds the freehold to the Richmond Park Golf Club, including all units of accommodation at the site. It supplies lodges to third party owners by means of a long lease, typically of 99 years duration. It also enters into agreements with owners of timeshares whereby exclusive use of an apartment, on a timeshare basis, is vested in them by means of a "Holiday Certificate" issued by Hutchinson & Co Trust Company Limited ("**Hutchinson**") (see below). The Partnership also arranges for the management and administration of the apartments under Rule 4 of the Rules of Occupation.

(2) Golf Apartments Richmond Park Title Limited (the "**Title company**"). The Partnership vests exclusive rights of occupation of the timeshare units

to this company, acting as trustee, normally for a period of 80 years. This tenure is subject to the Rules of Occupation.

(3) Hutchinson: This company has control of the Title company together with a nominated custodian. In the case of the timeshare units, Hutchinson is required to issue a "Holiday Certificate" to the "Holiday Owner" under Rule 2(c)(i) of the Rules of Occupation and clause 6.2(c) of the deed of trust, entitling the "Holiday Owner" to occupy exclusively the apartment indicated on the certificate for the weekly period allocated.

6. The Appellant company is the management company appointed by the Partnership to manage the site and collect management charges as specified in Rule 4 of the Rules of Occupation. The Appellant company issues an annual invoice for the service charges to either:-

(1) the Holiday Owner (in the case of timeshare units), or

(2) the owner (in the case of long lease units).

7. In both cases, VAT has been charged on this invoice.

Applicable law

8. 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" to that Act. Group 1 of Schedule 9 VATA relevantly specifies the following supply:

> The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than—
>
> …
>
> (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;
>
> (e) the grant of any interest in, right over or licence to occupy holiday accommodation; …

9. The notes to Group 1 of Schedule 9 VATA relevantly include the following:

> (11) Paragraph (e) includes—
>
> (a) any grant excluded from item 1 of Group 5 of Schedule 8 by Note (13) in that Group; …
>
> (13) "*Holiday accommodation*" includes any accommodation in a building, hut (including a beach hut or chalet), caravan, houseboat or tent which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use, but excludes any accommodation within paragraph (d). …

10. Section 30(2) VATA provides that "A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified". Item 1 of Group 5 to Schedule 8 VATA provides:

> The first grant by a person—
>
> (a) constructing a building—
>
> (i) designed as a dwelling or number of dwellings; or
>
> (ii) intended for use solely for a relevant residential or a relevant charitable purpose; or
>
> (b) converting a non-residential building or a non-residential part of a building into a building designed as a dwelling or number of dwellings or a building intended for use solely for a relevant residential purpose,
>
> of a major interest in, or in any part of, the building, dwelling or its site.

11. The notes to Item 1 of Group 5 to Schedule 8 relevantly include the following:

> (13) The grant of an interest in, or in any part of—
>
> (a) a building designed as a dwelling or number of dwellings; or
>
> (b) the site of such a building,
>
> is not within item 1 if—
>
> (i) the interest granted is such that the grantee is not entitled to reside in the building or part, throughout the year; or
>
> (ii) residence there throughout the year, or the use of the building or part as the grantee's principal private residence, is prevented by the terms of a covenant, statutory planning consent or similar permission.

The hearing

12. Various e-mails were exchanged between the Appellant and HMRC in early January 2014, shortly before the hearing of this appeal, in which the Appellant contended that it has not been served in a timely manner with all of the HMRC material. In particular, an e-mail from the Appellant dated 8 January 2014 stated that "We would appreciate [the Tribunal's] thoughts and consideration on [HMRC's] latest surprise development please as we feel it is greatly prejudicial to our case to be presented with new details at this very late stage".

13. However, at the hearing, Mr and Mrs Jessup and Mr Moore of the Appellant, who attended to present the Appellant company's case, indicated that they were content for the hearing to proceed as scheduled.

14. The hearing was conducted relatively informally. Evidence was given on behalf of the Appellant by Mr and Mrs Jessup and Mr Moore.

15. At the end of the hearing, the Tribunal issued a direction that the Appellant may file with the Tribunal and serve on HMRC any further documents on which it wishes to rely in this appeal, and a direction allowing for the possibility of HMRC filing further documents in response. Further documents were submitted by the Appellant pursuant to this direction. No further documents were submitted by HMRC.

16. The Tribunal's decision below does not seek to reproduce all of the detail of the many documents, oral evidence and submissions that are before to the Tribunal. The decision below focuses on those aspects of the case that the Tribunal ultimately found to be most directly relevant to the Tribunal's decision. This does not mean that other material has not been considered by the Tribunal.

The Appellant's oral evidence

17. At the hearing, Mr and Mrs Jessup and Mr Moore gave the following oral evidence on behalf of the Appellant.

18. Richmond Park Golf Club is a golf club and "timeshare resort". At the time of the HMRC decisions under appeal, it had 14 timeshare units of different sizes (referred to below as the "timeshare lodges"). It also has 4 units for "golf rentals", used to provide accommodation for 1-2 night stays including use of the golf course (referred to below as the "golf rental units"). At the time of the decisions under appeal, there were additionally a number of lodges which had been let on 99 year leases (referred to below as the "long lease units"), 4 built within the curtilage of the site and 6 built outside the curtilage on "Fairway Drive". Since the decisions under appeal, additional long lease units have been built.

19. The initial planning permission (which covered the timeshare units, the 4 rental properties and the lodges within the curtilage) contains no occupancy restriction. It only required "connection with the golf club" which is fulfilled by membership of the golf club being included within the mandatory maintenance fee.

20. The planning permission for the further 6 lodges outside the curtilage required the properties not to be primary residences or residential accommodation.

21. As to the timeshare units, all of the property is held in trust by the Trust company on an 80 year lease that expires in 2076.

22. Timeshare owners can own 52 weeks of the year. The majority of the guests in the timeshare units are exchange guests, that is to say, people who own timeshares in other developments, and who have exchanged their right to use their timeshare period in the other development for the right to use someone else's timeshare period at the Richmond Park Golf Club development. There are a number of companies that exist to enable owners of timeshares to undertake such exchanges. These companies make a profit from fees charged to arrange such exchanges.

23. In cross-examination, the following evidence was given. For water, insurance, rates and the TV licence, the service provider invoices the Golf Club. The trustee

expenses are invoiced to the Golf Club. For golf privileges, the Golf Club invoices the Appellant company. For cleaning, the Appellant company uses its own staff. The Appellant company only charges its actual costs in relation to the 14 timeshare units and the long term lease units. In relation to the long term lease units, the Appellant company is responsible for external maintenance only, and for the 14 timeshare units it is responsible for both internal and external maintenance. The Appellant company has no responsibility for the golf rent units. Timeshare owners do not own a portion of the title deed, but have only a contractual right to occupy a given unit for a given week each year.

24. Subsequently in the hearing, the following evidence was given.

25. The timeshare agreement provides that timeshare owners have use of the golf club. This was a mistake and did not reflect the original intention that timeshare owners would be entitled to two golf club memberships for the period of the relevant timeshare and that these would be charged for in the maintenance fee. A draft deed of variation was prepared to give effect to this intention. The draft deed was never executed, but all parties were happy with the original intention, and that was the basis on which things were run.

26. If any of the timeshare accommodation burned down, it would have to be rebuilt by the freeholder for the benefit of the timeshare owners. The timeshare owners would be liable for the excess under the insurance policy.

27. The Appellant company pays for a TV licence for a set number of televisions, and the licence is in the name of the Appellant company.

The Appellant's submissions

28. The Appellant's submissions included the following.

29. HMRC should be required to administer the collection of VAT in a fair and consistent manner. This has not been the case. There are huge differences in the way that individual resort developments are treated. In the present case, HMRC has ignored key facts and precedents, and has taken an unacceptable amount of time to decide matters, requiring the Appellant to expend a great deal of time and money to resolve matters. The Appellant does not seek preferential treatment, but wishes merely to be treated consistently with others. Other timeshare resorts in the UK are charging VAT on fewer items than the Appellant company, giving them an advantage. The Appellant feels that HMRC has a lack of knowledge and understanding of how the industry works.

30. The accommodation in this case has never been held out by the Appellant as holiday accommodation. The word "holiday" is used in documentation prepared by Hutchinson, who are a company unrelated to the Appellant. While the Appellant (and other companies related to the Appellant) used the services of Hutchinson, they were not aware of the VAT implications of the wording used in the Hutchinson

documentation. The accommodation was not held out by the Appellant as anything other than timeshare accommodation.

31. In relation to the long term lease units, reliance was placed on *Phillps & Ors v Francis & Anor* [2010] EWHC B28 (QB) and the decision of the Leasehold Valuation Tribunal in case no CAM/33UB/LSC/2011/0015 dated 17 August 2011 (the latter of which specifically concerned the Richmond Park Golf Club).

32. The characterisation of property by the local council as "holiday accommodation" cannot be decisive for VAT purposes.

33. HMRC VAT Notice 709 states at paragraph 5.1 that "Residential accommodation that happens to be situated at a holiday resort is not necessarily holiday accommodation". It is very clear that the long lease units are not holiday accommodation. That is also true of the timeshare units. That paragraph of the VAT Notice also states that a requirement for holiday accommodation is that "occupation throughout the year is not permitted". However, a person who owns 52 weeks of a timeshare unit is permitted to occupy it throughout the year. Timeshare rights are owned, unlike a hotel room which is rented on a pay as you go basis. Furthermore, a person staying for a period at a hotel has no guarantee that they will be permitted to stay in the same room throughout the stay. Paragraph 5.6 of VAT Notice 709 states that the supply under a timeshare scheme of holiday accommodation that is new is standard rated. The units in this case were rented out for 3 years before being put into trust for purposes of timeshare accommodation, so they were not new. That paragraph of the VAT Notice also says that some components of the periodic charge such as insurance and rates may be treated as disbursements. Consistently with the practice of other timeshare schemes in the UK, the maintenance charge in this case treats certain items as disbursements.

34. HMRC VAT Notice 700 states that where a supplier merely pays amounts to third parties as the agent of clients and debits the client for the precise amount paid out, then it may be possible to treat these amounts as disbursements and exclude them when VAT is calculated. That is true of various items in the maintenance charges in this case. In relation to insurance, the insurance provider has provided a breakdown of the insurance premium, indicating how much of the premium related to each of the units. In relation to water and sewerage, the Appellant company receives one umbrella invoice based on actual water usage. Each unit has an individual water meter and the Appellant company has charged each unit an amount for water based on the previous year's meter readings. The Appellant only recovers through the service charge the exact amount charged by third party suppliers.

35. By law, increases in the maintenance charge are capped according to the rate of inflation (other than in exceptional circumstances, which do not apply in practice in the UK). However, in fact, the maintenance charge has not gone up each year, showing that the amounts charged reflect actual disbursements.

The HMRC submissions

36. The primary submissions made on behalf of HMRC were as follows.

37. Note 13 to Group 1 of Schedule 9 VATA refers to accommodation "which is advertised or held out as holiday accommodation or as suitable for holiday or leisure use". That is the case here, as the Rules of Occupation for the timeshare units refer to "Holiday Owners", and owners of timeshares are given "Holiday Certificates".

38. As to the long term lease units that are outside the curtilage of the golf club, and which are subject to planning permission restricting their use, these are "holiday accommodation".

39. In relation to the long term lease units inside the curtilage of the golf club, the HMRC position until the hearing itself was that these are also "holiday accommodation". At the hearing itself, Mr Rowe said on behalf of HMRC that he now made no submission in respect of these units.

40. If the units are "holiday accommodation", then the service charges are standard rated unless they can be considered as disbursements. To be disbursements, they must be a "supply", otherwise they are outside the scope of VAT.

41. In relation to insurance and rates, HMRC accept that there should be a fair apportionment of costs. There is a difficulty in relation to golf club membership, since the actual purchase of a timeshare entitles the timeshare owner to use of the golf club. The draft deed of variation allowing golf club membership to be charged for in the service costs was never executed.

The Tribunal's findings

42. The first issue that the Tribunal is required to determine is whether the relevant accommodation in this case is "holiday accommodation" within the meaning of Group 1 of Schedule 9.

43. Despite the Appellant's insistence to the contrary, the Tribunal considers the answer to this question to be very clear in relation to the timeshare accommodation.

44. The legal documentation relating to the timeshare units refers to a timeshare owner as a "Holiday Owner". In particular, clause 2(b) of the Rules of Occupation (page 67 of the HMRC bundle) provides that a purchaser entering into a purchase agreement with the vendor becomes a "Holiday Owner". It is apparent from clause 2(c)(i) of the Rules of Occupation that a "Holiday Certificate" is issued for each week of the year in relation to each timeshare unit. That clause provides that a "Holiday Owner" is entitled to occupy the unit only for the week specified in the "Holiday Certificate". Clause 2.1 of the Regulations Relating to the Occupation of the Apartment (page 65 of the HMRC bundle) provides that no "Holiday Owner" shall "use any of the Apartments for any purpose whatsoever other than as a private holiday home …".

45. The Tribunal does not accept the argument that the use of the word "holiday" in the legal documentation was due to the approach taken by Hutchinson, which is a company unrelated to the Appellant. Even if Hutchinson was an external third party used by the Appellant and related entities to produce the documentation, the Appellant and/or its related entities used that documentation, and became parties to contractual obligations based on that documentation. The use of the word "holiday" in that documentation is not just a matter of form. Clause 2.1 of the Regulations imposes a substantive obligation restricting the use of the timeshare units to that of private holiday home. Furthermore, the Appellant itself has referred to the timeshare accommodation as "holiday accommodation". For instance, in a document dated October 2009, the Appellant states that "The accommodation units are not residential but are holiday accommodation in all respects" (page 29 of HMRC bundle).

46. The Tribunal is also not persuaded by the argument that any timeshare owner could purchase 52 weeks in respect of any of the units. Even if a timeshare owner had all 52 weeks, he or she would still be subject to the substantive obligation to use the unit only as a private holiday home. In any event, even where someone owns all 52 weeks in respect of an individual timeshare unit, what the person has is 52 separate "Holiday Certificates" each entitling the person to one week's occupation, and each requiring the person to pay service charges in respect of a right to 1 week's occupation.

47. The Tribunal finds in relation to the timeshare units that they were clearly held out as holiday accommodation or as suitable for holiday or leisure use, within the meaning of Note 13 to Group 1 of Schedule 9 VATA. For this reason alone they were "holiday accommodation" for purposes of Schedule 9. Furthermore, the Tribunal finds that the interest granted pursuant to each "Holiday Certificate" was "such that the grantee is not entitled to reside in the building or part, throughout the year". The timeshare units for this reason were excluded by Note 13 to Item 1 of Group 5 to Schedule 8, and were therefore "holiday accommodation" by virtue of Note 11(a) to Group 1 of Schedule 9.

48. As to the long lease units, a "sample lease" has been included at pages 76-103 of the Appellant's bundle. The Appellant has not provided copies of all of the leases of all of the long lease units. On the evidence before it, the Tribunal is not persuaded that there was any material difference in the wording of the leases for any of the long lease units, despite the evidence that the planning permission was not identical for all of these units. The Second Schedule to the lease describes the demised premises as a "holiday lodge". The definitions clause in the lease also defines the "Dwellings" to mean the "holiday lodges from time to time comprised in the Estate including the Demised Premises".

49. The Tribunal concludes from the evidence that the long lease units were at the very least held out as holiday accommodation or as suitable for holiday or leisure use, within the meaning of Note 13 to Group 1 of Schedule 9 VATA, and for this reason were "holiday accommodation" for purposes of Schedule 9.

50. However, it is furthermore noted that clause 16 of the Eighth Schedule of the sample lease (pages 98-99 of the Appellant's bundle) expressly requires the lessee to comply with the provisions of an applicable planning agreement "restricting the use of the Demised Premises to short term holiday accommodation and restricting the occupation of the Demised Premises by any person for a consecutive period of 28 consecutive days in one calendar year". The long lease units for this reason were also excluded by Note 13 to Item 1 of Group 5 to Schedule 8, and were therefore "holiday accommodation" by virtue of Note 11(a) to Group 1 of Schedule 9.

51. The Appellant's evidence was that it was not responsible for the golf rental units, in which case they are not material to the present appeal. However, the evidence is that these units are used to provide accommodation for 1-2 night stays including use of the golf course. Based on the material before it, to the extent relevant, the Tribunal is also satisfied on a balance of probability that these units have been held out as holiday accommodation or as suitable for holiday or leisure use.

52. The Tribunal finds that the above conclusions are not inconsistent with the case law relied upon by the Appellant.

53. The Leasehold Valuation Tribunal in case no. CAM/33UB/LSC/2011/0015 found that the Landlord and Tenant Act 1995 applies to the long lease units at the Richmond Park Golf Club. However, it so found that on the basis that the Landlord and Tenant Act 1995 could apply to a holiday home. At paragraph 67 of its decision, the Tribunal expressly refrained from expressing any view on whether the long lease units were holiday accommodation for VAT purposes, stating that "This is a matter where the parties should seek their own professional advice". However, at paragraphs 1 and 2 of its decision, the Tribunal noted the reference to "holiday lodges" in the sample lease, and said that "It is the reference to 'holiday lodges' and the nature of the planning permission granted which perhaps led the freeholder to believe, erroneously, that these houses were holiday homes rather than dwellings and therefore that the provisions in the Landlord and Tenant Act 1995 did not apply". In other words, although the Tribunal found that the Landlord and Tenant Act 1995 applied even if the units are holiday accommodation, it noted that the Appellant and related entities had apparently always proceeded on the basis that they are holiday homes.

54. *Phillps & Ors v Francis & Anor* [2010] EWHC B28 (QB), which was referred to in the decision of the Leasehold Valuation Tribunal, takes matters no further. It was relied upon by the Tribunal as authority for the proposition that the Landlord and Tenant Act 1995 could apply to a holiday home.

55. Having thus found that all of the relevant units are "holiday accommodation" for VAT purposes, the next issue that the Tribunal is required to determine is whether any of the items in the service charges to which this appeal relates can be considered as disbursements, and thus excluded from the calculation of VAT.

56. The Appellant has not sought to dispute that the requirements that must be met in order for a payment to qualify as a disbursement are those set out at paragraph 2.5.1

of VAT Notice 700. The Appellant's case is that these requirements have been met in the present case.

57. These requirements are stated to include the requirement that the Appellant must have "acted as the agent of your client when you paid the third party" and the requirement that "your client was responsible for paying the third party (examples include estate duty and stamp duty payable by your client on a contract to be made by the client)".

58. The Tribunal is not persuaded that these requirements are met in relation to any of the payments which the Appellant contends are disbursements.

59. As to the television licence, the evidence indicates that this is in the name of "Richmond Park Golf Club". It is thus "Richmond Park Golf Club" and not its clients that is liable to pay for the TV licence, and in so paying, it does not act as agent on behalf of its clients. The evidence is that the television licence permits the golf club the use of a certain number of televisions, and that the cost of the licence is recouped by adding a commensurate amount to the service charges. However, this does not mean that the amount added to the service charges is a disbursement.

60. Similarly, as to insurance, water, power and rates, it appears from the evidence that the position is similar. The accounts are in the name of the Golf Club or related entity, which is responsible for paying the account. While that entity may seek to pass the cost on to the clients via the services charges, it is not the clients themselves who are directly responsible for paying these accounts. In the case of the timeshare units, clause 4 of the Rules of Occupation (page 68 of the HMRC bundle) states that the "Vendor" shall arrange for the management and administration of the apartments and resort and that the Holiday Owners shall "contribute … to all reasonable costs" through the management charge. In the case of the long lease units, the Sixth Schedule to the sample lease (page 91 of the HMRC bundle) provides that the "landlord" is responsible to pay rates, taxes and assessments and to insure the dwellings.

61. As to the right to use the golfing facilities, HMRC has identified the issue that the timeshare agreements already include the right to use these facilities, and that the deed to vary the timeshare agreements in this respect was never executed. However, even apart from this issue, the documents submitted by the Appellant after the hearing indicate that invoices for golfing privileges are issued by Richmond Park Golf Club to the Appellant company. It thus appears that it is the Appellant company that it liable to make payment, not the clients directly. This position is thus not relevantly different to the other payments above.

62. The Tribunal is not persuaded on the evidence that the position is any different in relation to the trustee expenses or "Fixtures/Fittings".

63. As regards items such as "management of apartments", "general maintenance", "power/maintenance of external area" and "cleaning", it appears that these relate to work undertaken by the Appellant company's own staff. These items cannot be

disbursements as they are not payments that clients were required to make to third parties.

64. As regards the item "contingency", by definition this is not a payment made to a third party, or a payment which a client is required to pay to a third party. It was an amount paid to the Appellant company to be kept for the eventuality of a future contingency.

65. The question whether or not payments are disbursements must be decided on the individual facts and circumstances of each case, and references to precedents in other cases that turned on their own individual facts is not necessary helpful. However, the Tribunal considers that the above conclusions are consistent with *Clowance Owners Club Ltd v Customs and Excise* [2004] UKVAT V18787, a case to which the Tribunal was referred.

66. The Appellant's arguments in relation to disbursements are therefore rejected.

Conclusion

67. For the reasons above, this appeal is dismissed in its entirety.

68. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 1st August 2014