2DS 2023/23

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
STAFF OF GOVERNMENT DVISION

Between:

BLS1 LIMITED Appellant

and

ISLE OF MAN TREASURY (CUSTOMS AND EXCISE DIVISION) Respondent

Constitution of the court:

Judge of Appeal Cross KC
Acting Deemster Sinfield

Judgment of the court
delivered on 24 May 2024

INTRODUCTION

1. The Appellant ['BLS1'] is a company incorporated in the Isle of Man. It owns a building known as The Quarters in Swiss Cottage, London. BLS1 uses The Quarters to make supplies of residential accommodation for varying lengths of time. During the period 1 July 2018 to 31 December 2019, BLS1 accounted for VAT on the basis that it was providing sleeping accommodation in an establishment similar to a hotel and the 'reduced value rule' in paragraph 9 of Schedule 7 to the Value Added Tax Act 1996 ['VATA 1996'] applied to its supplies of accommodation. In summary, the reduced value rule provides that, once a guest stays for more than 28 days, the value of the supply on which VAT is chargeable is reduced to the amount attributable to facilities other than the right to occupy the accommodation (which must not be less than 20% of the total). In effect, where the reduced value rule applies, VAT is not charged on the supply of long-term accommodation in a hotel or similar establishment.

2. In June 2020 the Isle of Man Treasury (Customs and Excise Division) ['IOMTCE'] assessed BLS1 for VAT and later amended two of BLS1's VAT returns. The assessments and amendments were based on IOMTCE's view that the supplies by BLS1 of accommodation in The Quarters were chargeable to VAT at the standard rate on their full value, regardless of how long the guests stayed. BLS1 appealed to the VAT and Duties Tribunal [the 'Tribunal'].

3. The Tribunal heard the appeal in September 2022. It was common ground that there were three issues to be determined, which may be summarised as follows, namely:

    (1) Disregarding the exclusion in Item 1(d) Schedule 10 VATA 1996, are BLS1's supplies of accommodation in The Quarters the grant of licences to occupy land within Item 1 Schedule 10?

(2) If BLS1 grants licences to occupy land when it supplies accommodation, is The Quarters a similar establishment to a hotel, inn or boarding house so that the exclusion in Item 1(d) Schedule 10 applies?

(3) If BLS1 does not grant licences to occupy land within Item 1 Schedule 10, does the reduced value rule in paragraph 9 Schedule 7 apply in any event because BLS1 is providing sleeping accommodation in a similar establishment to a hotel, inn or boarding house within Item 1(d)?

4. In a decision released on 13 February 2023 [the 'Decision'] the Tribunal decided that:

(1) BLS1's supplies in relation to The Quarters did not amount to licences to occupy land within Item 1 Schedule 10 VATA 1996.

(2) The Quarters is a similar establishment to a hotel, inn or boarding house and BLS1's supplies of sleeping accommodation fell within Item 1(d) Schedule 10.

(3) The reduced value rule in paragraph 9 Schedule 7 does not apply to BLS1's supplies of sleeping accommodation in The Quarters.

5. With the permission of the Staff of Government Division, BLS1 now appeals on two grounds, namely:

(1) The Tribunal erred in law when they concluded that BLS1's supplies in relation to The Quarters were not grants of licences to occupy land because:

(a) the occupants were not entitled to have overnight guests without the permission of the management and

(b) the additional services supplied by BLS1 beyond the grant of a right to occupy were not sufficiently passive and were not plainly accessory to the supply of land.

(2) The Tribunal erred in law when they held that the reduced value rule in paragraph 9 Schedule 7 only applies where the supply would otherwise be an exempt supply within Item 1 Schedule 10 if it did not fall within Item 1(d).

6. The IOMTCE served a Respondent's Notice challenging the Tribunal's conclusion that The Quarters is a similar establishment to a hotel and BLS1's supplies fell within the description of supplies in Item 1(d) Schedule 10.

7. BLS1 was represented by Mr Alun James and Ms Marika Lemos appeared for IOMTCE. We are grateful to counsel for their submissions both written and oral.

LEGISLATIVE FRAMEWORK

8. As the relevant legislative provisions in the Isle of Man Value Added Tax Act 1996 were intended to implement provisions relating to the leasing and letting of immoveable property in Article 135 of the Council Directive 2006/112/EC [the 'Principal VAT Directive' or 'PVD'], the parties agreed that we must construe the VATA 1996 provisions conformably with the requirements of the PVD as far as possible. Accordingly, we begin by considering the scope of the PVD provisions.

9. Article 135 PVD provides:

> *"1 Member States shall exempt the following transactions:*
>
> *(a) … (k) …*
> *(l) the leasing or letting of immovable property.*
>
> *2 The following shall be excluded from the exemption provided for in point (l) of paragraph 1:*
>
> *(a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;*
>
> *(b) the letting of premises and sites for the parking of vehicles;*
>
> *(c) the letting of permanently installed equipment and machinery;*
>
> *(d) the hire of safes".*

10. Article 135 of the PVD replaced Article 13B of the Sixth Directive, which is referred to in some of the authorities. For completeness, we set out the material terms of Article 13B:

> *"Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse*
>
> *…*
> *(b) the leasing or letting of immovable property excluding:*
>
> *1. the provisions of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites".*

11. It is common ground that at all material times until 31 January 2020, the Principal VAT Directive had direct effect in the Isle of Man. Judgments of the Court of Justice of the European Union released up to that date have effect in Manx law. Further, judgments of the UK courts and the Upper Tribunal (Tax and Chancery Chamber) ['UT'] are authoritative in the Isle of Man in interpreting VAT legislation.

12. Group 1 Schedule 10 VATA 1996 provides for exemption from VAT in relation to certain supplies of land. Item 1 of Group 1 is as follows:

> *"1. The grant of any interest in or right over land or of any licence to occupy land, 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;".*

13. Note (10) to Group 1 provides as follows:

> *"(10) "Similar establishment" includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers".*

14. Section 19 VATA 1996 makes provision for the valuation of supplies:

> *"19. Value of supply of goods or services*
>
> *(1) For the purposes of this Act the value of any supply of goods or services shall, except as otherwise provided by or under this Act, be determined in accordance with this section and Schedule 7, and for those purposes subsections (2) to (4) have effect subject to that Schedule.*
>
> *(2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the VAT chargeable, is equal to the consideration".*

15. For present purposes, we are concerned with paragraph 9 of Schedule 7 VATA 1996 which provides:

> *"9 (1) This paragraph applies where a supply of services consists in the provision of accommodation falling within paragraph (d) of Item 1 of Group 1 in Schedule 10 and —*
>
> *(a) that provision is made to an individual for a period exceeding 4 weeks; and*
>
> *(b) throughout that period the accommodation is provided for the use of the individual either alone or together with one or more other persons who occupy the accommodation with him otherwise than at their own expense (whether incurred directly or indirectly).*
>
> *(2) Where this paragraph applies —*
>
> *(a) the value of so much of the supply as is in excess of 4 weeks shall be taken to be reduced to such part thereof as is attributable to facilities other than the right to occupy the accommodation; and*
>
> *(b) that part shall be taken to be not less than 20 per cent".*

RELEVANT CASE LAW

16. It is useful at this point to consider the relevant case law on how the exemption of the leasing and letting of immovable property has been interpreted and the principles to be applied when considering whether a supply is a leasing or letting of immovable property.

17. The Tribunal quoted some passages from the judgment of the Court of Appeal in *HMRC v Fortyseven Park Street Limited* [2019] EWCA Civ 849 ['*FPSL*'] which was given by Lord Justice Newey with whom the other Lord Justices agreed. We agree with the Tribunal that *FPSL* contains useful guidance on the principles to be applied in determining

whether supplies fall within Article 135 and Group 1 of Schedule 9 to the United Kingdom Value Added Tax Act 1994 (which is identically worded to Item 1 Schedule 10 VATA 1996). We also consider other authorities below when discussing the specific issues in this appeal.

18. In *FPSL*, the taxpayer company sold 'Fractional Interests' in a property in London's Mayfair containing 49 residences. Each Fractional Interest entitled the purchaser to occupy a fully furnished and operational residence for 21 nights without further payment and for up to 14 further nights on payment of a daily rate. In return for an Annual Residence Fee, the property was managed and maintained by a management company that also provided a valet service, a 24-hour front desk, a concierge service and tour desk, a business centre, free Wi-Fi, fax and photocopying services, a daily maid service and luggage storage. On appeal, the First-tier Tribunal (Tax Chamber) ['FTT'] held that a supply of a Fractional Interest was a leasing and letting of immovable property but was excluded from exemption because the grant of a Fractional Interest was the provision of relevant accommodation in a similar establishment to a hotel. On further appeal, the UT held that the supply of a Fractional Interest was a leasing and letting of immovable property but it was not a supply of relevant accommodation in a similar establishment to a hotel and thus was exempt.

19. In the Court of Appeal, Newey LJ set out the following points at [23]:

> *"(i) The exemption has its own independent meaning in EU law and must be given an EU definition (see eg Sinclair Collis Ltd v Customs and Excise Comrs (Case C-275/01) EU:C:2003:341, [2003] STC 898, [2003] ECR I-5965, at para 22 of the judgment; Belgian State v Temco Europe SA (Case C-284/03) EU:C:2004:730, [2005] STC 1451, [2004] ECR I-11237, at para 16 of the judgment);*
>
> *(ii) While the exemption should not be construed in such a way as to deprive it of its intended effect, it is to be interpreted strictly since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Temco, at para 17 of the judgment);*
>
> *iii) In contrast, the exclusion in respect of 'the provision of accommodation … in the hotel sector or in sectors with a similar function' 'cannot … be interpreted strictly' (Case C-346/95 Blasi v Finanzamt München I [1998] All ER (EC) 211, at paragraph 19 of the judgment);*
>
> *iv) The concept of 'the leasing or letting of immovable property' is 'essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right' (Temco, at paragraph 19 of the judgment; also Case C-150/99 Swedish State v Stockholm Lindöpark AB [2001] STC 103, [2001] ECR I-493, at paragraph 38 of the Advocate General's opinion; Sinclair Collis, at paragraph 25 of the judgment; and Case C-55/14 Régie communale autonome du stade Luc Varenne v Belgium [2015] STC 922, at paragraphs 21 and 22 of the judgment);*
>
> *v) The 'leasing or letting of immovable property' is 'usually a relatively passive activity linked simply to the passage of time and not generating any significant added value' (Temco, at paragraph 20 of the judgment). If, however, a payment also takes account of other factors, that need not matter if they are 'plainly accessory' (see Temco, at paragraph 23 of the judgment). In Temco, the CJEU*

said that it was for the national Court to establish 'whether the contracts, as performed, have as their essential object the making available, in a passive manner, of premises or parts of buildings in exchange for a payment linked to the passage of time, or whether they give rise to the provision of a service capable of being categorised in a different way' (see paragraph 27 of the judgment);

vi) A landlord may reserve the right to visit the property without rendering the exemption inapplicable (see Temco, at paragraphs 24 and 25 of the judgment); and

vii) Article 135 of the Principal VAT Directive 'does not … refer to relevant definitions adopted in the legal orders of the member states' (Temco, at paragraph 18 of the judgment). The exemption for 'the leasing or letting of immovable property' can include arrangements that English law would categorise as licences rather than leases (see eg Customs and Excise Commissioners v Sinclair Collis Ltd [2001] UKHL 30, [2001] STC 989, at paragraph 35, per Lord Nicholls). Conversely, the words 'any licence to occupy land', as used in schedule 9 to the VATA, 'should not be construed so as to include the grant of rights that would not, for the purposes of the Sixth Directive [now, the Principal VAT Directive]*, constitute "the leasing or letting of immovable property"' (Customs and Excise Commissioners v Sinclair Collis Ltd, at paragraph 58, per Lord Scott)".*

20. At [28], Newey LJ also identified various general principles of VAT law which included:

(vi) When determining the nature of a taxable transaction, 'regard must be had to all the circumstances in which the transaction in question takes place in order to identify its characteristic features …

(vii) Although 'every supply of a service must normally be regarded as distinct and independent', 'a supply which comprises a single service from an economic point of view should not be artificially split'… There is therefore a single supply where 'two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split' (Minister Finansow v Wojskowa Agencja Mieszkaniowa v Warszawie (Case C-42/14) EU:C:2015:229, [2015] STC 1419, at para 31 of the judgment). In particular, there is a single supply in cases where 'one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service' (Card Protection Plan, at para 30 of the judgment), and 'a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied' (Wojskowa Agencja Mieszkaniowa, at para 31 of the judgment)".

21. In relation to the issue of whether the supply of a Fractional Interest was a leasing and letting of immovable property, the Court of Appeal disagreed with the UT. At [49] Newey LJ said:

"In the end, I have concluded both that the grant of a Fractional Interest involved more than a mere letting transaction and that the obligations which FPSL undertook as regards the provision of hotel-type services cannot be regarded as ancillary or (in the words of the CJEU in Temco) 'plainly accessory'. The 'essential object' of the transactions was not, as I see it, 'the making available, in a passive

manner, of premises or parts of buildings in exchange for a payment linked to the passage of time', but 'the provision of a service capable of being categorised in a different way' (to quote the CJEU in Temco once again). This was not 'simply the making available of property' (Temco, para 20 of the judgment), but pre-payment for accommodation 'in an environment similar to a hotel and with the services which can be expected in a hotel, repeatedly over a number of years' (para [289] of the FTT decision). As in the Luc Varenne case, what was being supplied was 'a more complicated service'. It is also not without relevance that the land exemption has to be construed strictly (see para [23](ii) above)".

22. Although the decision in [49] was sufficient to allow the appeal, Newey LJ went on to consider whether, if (contrary to his view) the supplies were in principle capable of falling within the exemption for the leasing and letting of immovable property, they would have been excluded from the exemption by Item 1(d). Newey LJ considered that the UT was not entitled to interfere with the FTT's decision that the grant of a Fractional Interest was *"the provision in an hotel … or similar establishment of sleeping accommodation"* within the meaning of Item 1(d). He set out his reasons at [58] – [60], the material parts of which are as follows:

"58. … It was common ground that 47 Park Street was a 'similar establishment' and that the grant of a Fractional Interest carried with it the right to 'sleeping accommodation'. That was not necessarily conclusive: if 'sleeping accommodation' is provided as part of a wider supply, Item 1(d) may not apply. On the other hand, Item 1(d), unlike the land exemption, is not to be construed narrowly. Moreover, I cannot see why the FTT should not have been able to have regard to 'the length and characteristics of the individual stays to which a member was entitled by virtue of the Fractional Interest acquired' … The fact that Membership gives 'the flexibility to enjoy short stays of a stated maximum amount each year, in an environment similar to a hotel and with the services which can be expected in a hotel' … was surely something that the FTT could properly take into account in arriving at its assessment …

59. As I understand it, the UT concluded that FPSL had supplied 'a right which comprises more than something in the nature of short-term accommodation in the hotel sector' on the basis, essentially, that the supply was 'of a long-term right'. However, [counsel for the taxpayer] *did not suggest that the CJEU has ever held that the grant of a right to short-term sleeping accommodation in an establishment similar to a hotel cannot fall within the exclusion from the land exemption to be found in article 135(1)(l) of the Principal VAT Directive merely because the right is to last for an extended period. Nor does it seem to me that the fact that such a right is of a long-term nature should necessarily preclude application of the exclusion. To my mind, the duration of the right is not of itself determinative but rather a factor which can properly be taken into account.*

60. In my view, it was open to the FTT to consider that the grant of a Fractional Interest, carrying with it rights to 'sleeping accommodation' in an establishment similar to a hotel, is appropriately characterised as 'the provision in an hotel … or similar establishment of sleeping accommodation' within the meaning of Item 1(d). As [counsel for HMRC] *pointed out, Issue 3 only arises at all if the supplies at issue are taken to have had as their 'essential object' the making available of premises 'in a passive manner': the supplies would not otherwise be capable of falling within the land exemption and the Item 1(d) exclusion would be immaterial. If, however, FPSL's role was sufficiently passive for the land exemption to be in point, it is hard*

to see how, leaving aside the UT's concern that the supply was 'of a long-term right' (which I have already commented on), 'sleeping accommodation' could be considered to have been provided as part of a wider supply in such a way as to render the exclusion inapplicable".

THE DECISION

23. The Tribunal set out its findings of fact at [33] – [105]. The key passages for the purposes of this appeal are as follows:

> *"35. … Above the front entrance is a prominent sign which says 'The Quarters Swiss Cottage'. It is not identified as a hotel or aparthotel. There is a lobby which has a reception desk and a small seating lounge. The building contains a restaurant fronting Finchley Road, which is open to the general public for lunch and dinner.*
>
> *36. The units may be described as studios, and are marketed as standard studios (81 units), deluxe studios (11 units) and premium studios (8 units). The description of the remaining 2 units is unclear. The studios have floor areas of 29m², 32m² and 43m² respectively. It is not necessary to describe them in every detail, but we will give a flavour of the facilities and services available. Each studio has a floor to ceiling window, and many have balconies with an outdoor table and two chairs. They all have a king size bed, a living area including a sofa, a small desk, a kitchenette, and a bathroom. Deluxe and premium studios have a larger floor area and in the case of premium studios correspondingly more furnishings. Premium studios have two armchairs and a coffee table in addition to a sofa. There are sofa beds in 17 of the studios, which appear to be the deluxe studios and the premium studios. Bathrooms include Moulton Brown products which are refreshed by housekeeping. The studios are fully furnished in an identical, contemporary style. There are several accessible rooms suitable for people with disabilities.*
>
> *37. The kitchenette in each studio has a microwave grill, a sink, a kettle, a Nespresso coffee machine and a small refrigerator with an icebox. There is a very small worktop with two kitchen cupboards. Basic crockery is provided.*
>
> *38. Each room is accessed via a key card and key cards are controlled by the appellant's staff. The rooms contain a smart TV and a room safe. The TV system is similar to that provided in hotels and is supplied by a business called Airwave, which supplies the hospitality sector. It includes a facility for direct messaging to the reception desk.*
>
> *39. The studios have no kitchen hob, toaster or open flames. There are no laundry facilities in the studios. There are no separate sockets for internet service providers and no separate utility meters, save that each studio has a sub-meter for electricity which records the use of electricity by each studio. Occupants do not contract separately with utility providers, but they are charged separately by the appellant for their electricity usage. Mr Demol's evidence* [Mr Demol is the CEO of Bravo Management UK ['Bravo'] which acts as managing agent of The Quarters on behalf of BLS1] *was that this was part of an environmental effort to educate occupants to be environmentally friendly and use less electricity. The studios each have an energy saver key card system which activates lights and sockets on entry to the studio, similar to the system used by many hotels. The studios have underfloor heating which is not separately charged to occupiers.*

40. Every other floor of the building in each of the two blocks has a large communal kitchen. There are 11 communal kitchens in total. Each communal kitchen includes two sinks, two ovens, a microwave, large worktops, numerous cupboards on two levels, an airfryer, a toaster and a kettle. There are also tables and chairs.

41. There are presently 12 members of staff working at The Quarters who are employed by the appellant. There is a general manager, a guest relations manager, 2 night managers, 2 maintenance staff, 5 cleaning staff and an accountant. By way of comparison, at Kilburn there is simply a general manager, a cleaner and a maintenance person. There is no suggestion that there has been any material change in staffing and we are satisfied that this is representative of the period of assessment.

…

50. The Code of Conduct, also referred to as the "House Rules", identifies an aim to "create and maintain the perfect living environment". It includes the following provisions:

> *Your weekly clean will include: Arranging the shower and toilet and cleaning it, hoovering the floor and changing linen and towels.*
>
> *Your room will be attended by the cleaning staff on communicated times.*
>
> *You are responsible for your visitors whilst they are on site. Please ensure they behave respectfully at all times. If you'd like someone to stay overnight, you will need to inform a member of the On-site Management Team beforehand.*
>
> *Smoking is not permitted anywhere within any of our properties. This covers all communal areas, lounges, hallways, corridors and stairwells as well as bedrooms and internal courtyard areas.*
>
> *Part of the pleasure of living at The Quarters is being supported by your On-site Management Team. One of the key benefits is that faults will be fixed quickly and effectively.*
>
> *A couple of times throughout the year, your On-site Maintenance Team or one of our contractors will need to carry out servicing and safety checks on appliances or check the need for repairs in the property.*
>
> *We'll always ask permission to enter your Studio to carry out the repair work. And, if you want to be there, we can arrange a time that's convenient for both of us.*
>
> *We carry out non-emergency repairs on weekdays between 10am and 5pm. Emergency repairs, i.e. those that have to be done to avoid danger to your health and safety or serious damage to the property, are always given priority. In those cases, we may need to access your Studio without getting your permission beforehand.*

51. Mr Demol accepted and we find that house rules are not unusual for serviced residential accommodation. Indeed, we were told that the appellant's property in Kilburn has similar house rules, although there was no copy in evidence.

52. The House Rules require occupiers to have permission for overnight guests. Permission would be given by the guest relationship manager. Mr Demol was aware of one occasion where an occupier had been refused permission to have her boyfriend overnight because he was drunk. We note that some of the marketing material refers to certain studios being made available for "single occupancy". The Quarters does have a twitter account which refers to premium rooms having sofa beds which can be used for family and friends. We are satisfied that where permission was occasionally sought for someone to stay overnight in a studio then the appellant's manager would generally grant permission.

…

56. The appellant has entered into various forms of licence agreements with occupiers since developing The Quarters. These have been in substantially the same form and we shall illustrate the licence terms by reference to the agreements entered into in 2018. The following definitions and terms appear in the sample licence which was in evidence:

"Deposit"	*Equal to £2,010.*
"Licence Fee"	*£1,455.65 payable pcm*
"Licence Period"	*The period starting on 17-Oct-2018 and ending on 16-Apr-2019*
"Room"	*Room [A.xx] within the Property or such other room from time to time designated by the licensor in accordance with clause 3.1.*

3. Licence

In consideration of the Licensee paying the Licence Fee to the Licensor, the Licensor permits the Licensee, for the Licence Period, in common with the Licensor on the terms of this Licence:

3.1 To occupy Room A.xx and to use the furniture and furnishings of the Room, an inventory of which is attached …

57. The deposit was equivalent to 6 weeks licence fee and was payable on the date of the licence agreement. It was intended to compensate the appellant for any losses and damage during the period of occupancy, such as costs of repairs and replacements to the fabric, fixtures and furniture. The licence agreement made provision for the following on the part of the occupier:

(1) Check-in and check-out times on the first and last day of the licence (clause 4).

(2) To keep the room, its furniture and furnishings in good order, clean and tidy (clause 8.1.2).

(3) Not to re-decorate or make any alterations or additions to the room (clause 8.2).

(4) Not to take any furniture, equipment or goods from the room (clause 8.4).

(5) Not to use any cooking appliance that was not supplied by the Licensor, including any countertop hob, stove or grilling machine (clause 8.4).

(6) Not to use the room other than "for residential accommodation as a guest of the Licensor's Property Business" (clause 8.7.1).

(7) Not to permit anyone else to stay in the room (clause 8.7.7).

(8) To share use of The Quarters amicably and peacefully with the Licensor and with such other Licensee's as the Licensor from time to time permits to use The Quarters and not to interfere with or otherwise obstruct such shared occupation in any way whatsoever (clause 8.7.9).

(9) Not to impede the Licensor … in the exercise of the Licensor's rights of possession and control of the Room and to allow them to enter the Room at any time and for whatever reason (clause 8.11).

(10) Not to assign, transfer or part with possession of the room or any part of it (clause 11).

58. By clause 9, the appellant agreed to provide the following services in respect of the room:

(1) Cleaning, at a cost of £15 including VAT per hour.
(2) High speed fibre internet (from £25 including VAT per month).
(3) Laundry facilities at £3.20 per wash and £2.20 per dry.

59. The licence was terminable on breach of any obligation by the occupier, in the event of the occupier's insolvency or if the property or access ways were damaged so that the room became inaccessible.

60. The licence stated that it was not intended to create a relationship of landlord and tenant.

…

63. In practice:

(1) Housekeeping would always knock first when cleaning a studio. In case of emergency, the appellant's staff would go straight in, if necessary without seeking permission, but giving as much notice as possible.

(2) Occupiers would only very rarely be moved to another studio. For example, if there was a water leak. An occupier could also ask to move studio. For example, if having moved in the occupier preferred a studio in a block away from the main road.

(3) Entry for viewings in the month prior to the end of a licence would be co-ordinated with the occupier. Often a video of the studio would be used instead of a physical viewing by a prospective new occupier.

(4) There were occasions on which an occupier might be reminded not to use their own hob or toaster in the studio.

(5) Whilst the licence agreement stated that no-one else was permitted to stay in a studio, the House Rules made provision for an occupier to obtain permission for overnight guests.

68. The appellant also has a contract checklist which contains certain confirmations given by an occupier and is signed by the occupier. For example, the occupier confirms that he or she has been advised as follows:

> *(1) Notification should be given to The Quarters if the occupier will be away from their studio for 28 days or more.*
>
> *(2) The studio will be accessed every Wednesday for a weekly clean.*
>
> *(3) Only small packages will be signed for and placed inside the studio by a member of staff.*
>
> *(4) There is a strict no-smoking policy in the building.*

…

70. The appellant holds deposits under a deposit protection scheme, which is a scheme designed to provide protection for deposits paid by tenants to landlords and includes a dispute resolution service. Mr Demol said that this was done to give occupiers peace of mind and we accept that is the case.

71. A welcome letter invites occupiers to enjoy their stay and offers assistance in settling in. It gives details of additional services such as upgrading to faster broadband, dry-cleaning services and signing up for the gym. Another letter describes the weekly one hour clean which is carried out. Additional cleaning services can also be purchased.

72. Occupiers must also sign a council tax authorisation form, which authorises the appellant to act on their behalf in dealing with council tax matters, including making payment and applying relevant discounts. …

73. The first monthly licence fee and other charges such as administration fees and deposits are invoiced at the commencement of the licence agreement. The administration fee to set up a licence was £400 in 2018. Ongoing licence fees and other charges such as for utilities or a gym subscription are invoiced monthly. The invoices in evidence described the licence fees as 'rent'.

74. Approximately 25% of studios at The Quarters are occupied by employees of corporate clients …

76. The appellant does not use online travel agents to market the studios. Those websites generally charge 20% of the room rate. The appellant considered that they were too expensive and uses relocation agencies, the short term let departments of estate agents and platforms such as Rightmove, which Mr Demol considered provided better value.

Marketing material on Rightmove described The Quarters as presenting ambitious people with an "effortless short term living experience" and providing "high-quality self-contained studios that represent the best value short-term rental option in London". It referred to:

> *A dedicated management team ensures that guests settle in well and enjoy a seamless experience throughout their stay. First class services are available through the guest relations team, including 24h reception, weekly cleaning, post & parcel collection and in-house maintenance.*

…

87. There is no signage outside The Quarters to indicate that it is a hotel or hostel. This is because the appellant is targeting the market for extended stays, and not short stays. Potential occupiers cannot simply walk in off the street to obtain a studio. There was some evidence to the effect that many upmarket hotels do not have signage indicating that they are hotels. We do not consider the existence or absence of signage as particularly relevant to the issues in the circumstances of this case.

…

95. We are satisfied on the evidence that in the period 1 July 2018 to 31 December 2019, a typical licence would be between 3 and 6 months. Taking into account renewals, the majority of occupiers would stay at The Quarters for 6 months or more. However, some stays are for less than 3 months. We do not know whether this is because occupiers only wish to stay for that period of time, or whether they wish to try the premises out and if satisfied subsequently extend their stay.

96. Mr Demol did not accept that The Quarters was in the "housing market". However, we are satisfied that the market targeted by the appellant is corporate customers, young professionals and people relocating such as divorcees who require relatively short term living accommodation for at least 3 months and often for 6 months or more.

97. The services available to occupiers at The Quarters included weekly cleaning, in-house maintenance, 24h reception, superfast and secure wifi, a lounge area, bicycle shelter, post & parcel collection and housekeeping. Additional services of cleaning, a linen service, an on-site gym and a restaurant were available for a charge.

…

99. The restaurant … now operates 12 noon until midnight. Occupiers receive a 15% discount on prices. They can take their meals either inside the restaurant, in a terrace area also open to members of the public dining in the restaurant or in their studio using a delivery service. Orders can be placed by phone and are delivered on a tray to the studio door. Empty trays are collected from outside the studio door.

100. The buildings and contents owned by the appellant are insured on the basis that The Quarters is a residential building, and not a hotel. Mr Demol says that he strongly disagreed with the insurers view, but the appellant did not contest the decision.

101. The appellant does not pay business rates on The Quarters. Individual occupiers are liable to pay council tax. This indicates that the studios are treated as dwellings for council tax purposes …"

24. The Tribunal set out its consideration of the issues at [106] – [196] of the Decision. It is not necessary to set out the Tribunal's reasoning in full and we only do so below as necessary to discuss the issues raised in this appeal. It is sufficient at this point to summarise the Tribunal's conclusions on the three issues to be determined.

25. At [126] – [137], the Tribunal decided that BLS1 did not grant any licence to occupy land within the meaning of that term in Item 1 Schedule 10 VATA 1996. It first held that the occupants did not enjoy rights to use a studio as an owner. The rights to occupy were granted in the context of an establishment where occupiers would typically

stay for at least three months and where the majority of occupiers stayed for more than six months. At [133], the Tribunal stated:

> *"Against that background, the restriction on overnight guests leads us to conclude that an occupier does not enjoy rights to use a studio as an owner. Someone who is living in a studio for those periods of time would expect, if occupying as owner, to be able to invite any guest to stay overnight. In contrast, a short stay guest at a hotel would not necessarily expect to be able to invite any guest to stay overnight without restriction."*

26. The Tribunal further held that the services provided by BLS1 took its supply at The Quarters during the relevant period outside the Item 1 Schedule 10 exemption. The services provided by BLS1 were weekly cleaning and housekeeping, in-house maintenance, 24 hour reception desk, superfast and secure Wi-Fi, a television service, a lounge area, bicycle shelter, post and parcel collection and underfloor heating. BLS1 also engaged with Camden Council and satisfied the council tax liability of occupiers, which was included in the licence fee. Other services such as a linen service, an on-site gym and a restaurant were available for an additional charge. The Tribunal held at [136]:

> *"There is no requirement that a supply which is exempt under Item 1 should be entirely passive. However, in our view the services provided by the appellant in the context of the periods for which studios are occupied would alter the essential object of the supply if it would otherwise have been exempt. We are satisfied that they involved considerable supervision and management on the part of the appellant. Ultimately it is a question of fact and degree. In our view, the services provided or available to occupiers were not plainly accessory to the supply of land".*

27. As to whether The Quarters was a similar establishment to a hotel, inn or boarding house, the Tribunal engaged in a detailed consideration of the relevant case law and facts in [138] – [187]. The Tribunal held (at [145]) that a similar establishment *"will be marked by a supply of temporary accommodation, with an element of service, which is in competition with or potential competition with the hotel sector"*. In [146], the Tribunal stated that, in considering whether The Quarters is a similar establishment, they took the view that Note 10 to Group 1 of Schedule 10 applied to premises which:

    (1) provide sleeping accommodation, and either
    (2) are used by visitors or travellers, or
    (3) are held out as being suitable for use by visitors or travellers.

28. As there was no dispute that The Quarters provided sleeping accommodation, the Tribunal moved on to consider what makes someone a 'visitor' or a 'traveller'. As far as visitors are concerned, the Tribunal said this (at [148] - [150]):

> *"148. It is not always helpful to try and define terms which might be described as ordinary words of English. It is more helpful in the present context to identify the general characteristics of visitors and travellers. It seems to us that a visitor in the context of Note (10) is generally someone who is visiting an area for a particular reason and whose stay at the premises does not have sufficient degree of permanence to mark that person out as a resident. There are many reasons why someone might be a visitor, including work, study, leisure, or family reasons. On any view, it would not include someone who treats the premises as their home for the time being. It may be difficult in any particular case to draw a line between a*

visitor and someone whose intended stay has such a degree of permanence that they are not a visitor. The purpose for which an individual is staying may say something about the degree of permanence of the stay. It appears to us that the distinction is between a visitor and a resident, taking into account that an individual may intend to be resident for a relatively short period of time.

149. A further point that arises is whether a visitor must intend to return home after the visit. Someone may be visiting having given up their home. They may be in search of a new home. In most cases, visitors will intend to return home or to establish a new home elsewhere following their visit. If not immediately, that same person might be regarded as a traveller and it may be that to some extent there is an overlap between those two types of occupiers.

150. Note (10) does not indicate that there is any particular place the visitors referred to must be visiting. In our view, a visitor may be visiting Swiss Cottage, London, the UK or even Europe generally. Nor does Note (10) require that the premises be used or be held out as suitable for use exclusively for visitors or travellers. Ms Lemos did not suggest there was any such requirement. Having said that, it seems unlikely that Note (10) was intended to be satisfied simply by establishing that some occupiers of the premises were visitors or travellers. In the context of a similar establishment to a hotel it may be that the premises must be generally used by visitors or travellers. Similarly, it may be that Note (10) would only be engaged where the premises are held out as primarily suitable for visitors or travellers. Many residential properties may be viewed as suitable for short term lets to visitors. However, we did not have submissions on these points, and given that Issue 2 is not determinative of the appeal we shall simply consider whether The Quarters is used by some visitors or travellers and whether it was held out as being suitable for visitors and travellers as well as residential occupation".

29. At [151], dealing with travellers, the Tribunal said that *"an individual might be a traveller for work, for leisure or for other reasons. Their stay at the premises will be intended as one stay amongst a number of stays in different places".*

30. Turning to the question whether the premises were a similar establishment to a hotel, the Tribunal noted (at [161]) the comments of the Advocate General in *Blasi* that the provision of meals and drinks, cleaning of rooms and provision of bed linen were among the characteristic features of many establishments in the hotel sector. The Tribunal concluded that such services might also indicate that an establishment was suitable for use by visitors and travellers.

31. At [166] the Tribunal observed that it found it *"notable that the PVD excludes from exemption the provision of accommodation in the hotel sector "or sectors with a similar function". This indicated to the Tribunal that it is necessary to consider the function of hotels, which is generally to provide short term accommodation for visitors, travellers, and others who might require short term accommodation with associated services".*

32. The Tribunal's conclusion on these linked points was that BLS1 would satisfy the terms of the exclusion in Item 1(d) Group 1 Schedule 10:

"186. There is grey area between what might be described as the hotel sector and the residential property sector. Serviced residential apartments fall within that grey area. It seems to us that such premises may bear more similarities with either the hotel sector or the residential property sector depending on the particular facts.

187. It is difficult to say which side of the line The Quarters falls. It is a very marginal case. On balance, taking into account all the evidence, we are satisfied that The Quarters is likely to be used by some visitors and is held out for use by visitors. Whilst there is little evidence of who uses The Quarters, we infer from the way it is marketed and the nature of the rooms and facilities on offer that some visitors to London will use The Quarters as a base for their visit, as well as people who would be regarded as resident at The Quarters. We are also satisfied that The Quarters is held out for use by visitors, as well as residents. The evidence of holding out is essentially the marketing material, including the appellant's website and social media presence. Considering that evidence in the context of our findings of fact as a whole, we are satisfied that The Quarters is held out as being suitable for visitors. On that basis, subject to the points made at [150] above, the appellant would satisfy the terms of Item 1(d)".

33. The Tribunal decided in [188] – [196] that the reduced value rule did not apply in this case because it only applies where the supply would otherwise be exempt (i.e. be a licence to occupy) if it did not fall within Item 1(d). Although the Tribunal had found that The Quarters is a similar establishment to a hotel, they had also found that BLS1 did not grant licences to occupy land within Item 1 Group 1 Schedule 10. The Tribunal set out the competing positions in [193]:

"The essential question is whether Tynwald and the UK Parliament intended that only supplies which would otherwise be exempt but are standard rated because the premises involved are a hotel or hotel-like should get a reduced rate in respect of longer stays. Alternatively, that any supply from hotel-like premises should benefit from a reduced rate in respect of longer stays. Ms Lemos says the former, Mr James says the latter".

34. The Tribunal decided that the reduced value rule did not apply in this case because it only applies where the supply would otherwise be exempt (i.e. be a licence to occupy in this case). The Tribunal's reasons for its conclusion are brief and are found in [196]:

"… Schedule 7 has the intended effect of exempting a supply of the right to occupy a hotel room for stays of more than 28 days. It achieves that by providing that such a supply is to be valued by reference to the amount attributable to the facilities other than the right to occupy the accommodation. One would expect it to do that only if the supply would otherwise be exempt if it did not fall within Item 1(d). It appears to us that is the scheme of the Act. Taxpayers do not benefit from a reduced rate just because the premises involved comprise a hotel or similar establishment. The supply must otherwise be exempt".

35. The Tribunal set out their overall conclusions at [197] as follows:

"For all the reasons given above we are satisfied that:

(1) The appellant's supplies in relation to The Quarters do not amount to licences to occupy land within Item 1 Schedule 10 VATA 1996.

(2) Those supplies do fall within the description of supplies within Item 1(d) Schedule 10 in that they amount to the provision of sleeping accommodation in a similar establishment to a hotel.

(3) The reduced value rule in Schedule 7 does not apply to those supplies."

DISCUSSION

36. We begin by considering the reduced value rule and when it applies, before considering whether the Tribunal erred in deciding that the reduced value rule did not apply to supplies of The Quarters.

37. The reduced value rule in paragraph 9 of Schedule 7 VATA 1996 applies to a supply of accommodation falling within paragraph (d) of Item 1 of Group 1 in Schedule 10 made to an individual for a period exceeding four weeks, subject to conditions of occupation which are not material to this case. Where paragraph 9 applies, the value of the supply of accommodation in excess of four weeks is deemed to be *"reduced to such part thereof as is attributable to facilities other than the right to occupy the accommodation"* subject to a minimum value of 20 per cent of the consideration for the supply.

38. The reference in [196] of the Decision to *"exempting a supply of the right to occupy a hotel room"* initially appears puzzling as Item 1(d) of Schedule 10 excludes the provision of sleeping accommodation in a hotel, inn, boarding house or similar establishment from exemption and there is no mention of exemption in paragraph 9 of Schedule 7. However, the reference to exemption was a response to Ms Lemos's submission, recorded at [191] of the Decision, that the purpose of Item 1(d) is to remove from exemption supplies of accommodation by hotels and similar establishments, whilst at the same time giving a reduced rate for supplies which involve longer stays and would otherwise be exempt supplies of land if they were not excluded from the exemption. In fact, Item 1(d) does not give a reduced rate or even a reduced value. Item 1(d) excludes supplies of sleeping accommodation, with or without associated services, in a hotel, inn, boarding house or similar establishment from being treated as a grant of any interest in or right over land or of any licence to occupy land. It says nothing about the value of any taxable supply or the rate of VAT to be applied to such supplies. Paragraph 9 of Schedule 7, however, addresses the value of supplies of accommodation falling within Item 1(d).

39. It appears to us that the Tribunal considered that where paragraph 9 of Schedule 7 applied, it operated so as to restore exemption for the supply of accommodation in a hotel or similar establishment save for that part of the consideration attributable (or deemed to be attributable) to facilities other than the right to occupy the accommodation. We cannot see any justification for the Tribunal's conclusion and we consider that it erred in law in reaching that decision for the reasons set out below which we note are consistent with the comments of the FTT in *Realreed Ltd Limited v HMRC* [2023] UKFTT 1042 (TC) [*'Realreed'*]. In *Realreed*, which concerned serviced apartments, the FTT discussed the Decision in this case in some detail and stated at [81], [85] and [86]:

> *"81. In BLS1 the Tribunal approached the question of exemption on the basis that supplies in the context of a hotel are capable of falling within the exemption in principle, albeit that they would then be excluded by paragraph (d). The practical relevance of this is that it would seem to be the case that only a supply which falls within the land exemption in principle but is excluded by paragraph (d) can benefit from paragraph 9 of Schedule 6 to VATA (which limits the amount on which VAT is chargeable after 28 days, but still allows full recovery of input tax). This is certainly what the Isle of Man Tribunal decided in BLS1. We are not sure that we would agree with them, but, fortunately, that is not an issue we need to address.*

…

85. We do not have all the communications between the UK and EU authorities before us, but the materials we have seen make it very clear that, where paragraph 9 operates, there continues to be a single, taxable supply but (and this is the derogation) the amount on which VAT is charged is reduced from the full amount to the higher of the proportion of the total consideration 'attributable to facilities other than the right to occupy the accommodation' or 20% of the total consideration. The UK rules (and the derogation) emphatically do not provide for any exemption of any supplies and paragraph (4) of the text at [83] above explains why (to avoid the complexities of partial exemption).

86. In BLS1 the Isle of Man Tribunal considered (at [196]) that,

> *'Schedule 7* [the IOM equivalent of paragraph 9, Schedule 6 VATA 1996] *has the intended effect of exempting a supply of the right to occupy a hotel room for stays of more than 28 days. It achieves that by providing that such a supply is to be valued by reference to the amount attributable to the facilities other than the right to occupy the accommodation.'*

For the reasons just explained, we would not agree with this observation, which is what seems to have influenced their conclusion that the IoM equivalent of paragraph 9 only operates where a supply would be exempt in principle but is excluded from the exemption by paragraph (d)".

40. Before us, Ms Lemos submitted (correctly, in our view) that whether the reduced value rule applies involves a simple question of the statutory construction of paragraph 9 of Schedule 7 VATA 1996. She pointed out that the appropriate starting point is Article 135 PVD which Item 1 is intended to implement. The transactions described in Article 135(1) are exempted from VAT and this includes, at Art 135(1)(l), the leasing or letting of immovable property. Ms Lemos correctly pointed out that, as an exemption from the general principle that all services supplied by a taxable person for consideration are to be subject to VAT, Art 135(1)(l) must be construed strictly.

41. In support of her submissions that Item 1(d) only applies where the supply would otherwise be exempt (e.g. as a licence to occupy), Ms Lemos relied on Art 135(2) which provides that certain supplies are excluded from the exemption for the leasing or letting of immovable property including:

> *"… the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites".*

42. She also referred us to the tailpiece to Art 135(2) which provides that:

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

43. Ms Lemos contended that it is impossible to exclude something from an exemption if it does not *prima facie* fall within that exemption and the last words of Art 135(2) make it clear that any further exclusions are in respect of supplies that would otherwise fall within the exemption in Art 135(1)(l).

44. We accept the logic of the proposition that, just as someone cannot be expelled from a club to which they do not belong, a supply cannot be excluded from the exemption for the leasing or letting of immovable property if it was never within it. We do not accept, however, that it follows that Paragraph 9 of Schedule 7 only applies to supplies of accommodation in the hotel sector or in sectors with a similar function that would otherwise fall within the exemption for leasing and letting of immovable property. The question is whether the correct construction of paragraph 9 is that it applies only to the provision of sleeping accommodation in a similar establishment to a hotel etc that would otherwise be exempt or to supplies of sleeping accommodation in such establishments regardless of whether they would otherwise be exempt. It seems to us that it would be strange if the VAT treatment of essentially similar supplies, namely the provision of sleeping accommodation in a similar establishment to a hotel, could be changed according to the conditions subject to which it is supplied, which is essentially a matter of contract, rather than the underlying nature of what is supplied.

45. Ms Lemos also referred to Newey LJ's comment in paragraph 60 of *FPSL* that, if the grant of Fractional Interests in that case were not grants of licences to occupy, *"the supplies would not otherwise be capable of falling within the land exemption and the Item 1(d) exclusion would be immaterial"*. We do not regard Newey LJ's comments as support for the IOMTCE's interpretation of paragraph 9 of Schedule 7. Newey LJ made his comments in the context of the facts of that case and the basis on which it was argued. The taxpayer company was arguing that its supplies of Fractional Interests were exempt while HMRC contended that they were taxable. HMRC won in the FTT and lost in the UT. In that context, it is clear that Newey LJ meant no more in [60] than that whether or not the supplies came within Item 1(d) would make no difference if the supplies were standard rated because they were not supplies of land.

46. As we have already stated, there is no mention of exemption in paragraph 9 of Schedule 7. It does not say, as IOMTCE would have it say, that the reduced value rule only applies to supplies that are excluded from the exemption for the grant of any interest in or right over land or of any licence to occupy land under Item 1 by Item 1(d). Paragraph 9 says in plain words that it (and thus the reduced value rule) applies to supplies of services consisting in the provision of accommodation falling within Item 1(d). Paragraph 9 provides that supplies of a description within Item 1(d) will be taxed at a lower value than that determined by section 19 VATA 1996. The only question, in our view, is whether the supply in a particular case is the provision of accommodation, which includes sleeping accommodation, in a hotel, inn, boarding house or similar establishment to an individual for a period exceeding four weeks for the use of the individual either alone or together with one or more other persons who occupy the accommodation with him otherwise than at their own expense. In our view, if the supply meets that description then the reduced value rule applies regardless of how it might be taxed if it did not fall within Item 1(d).

47. We are reinforced in our view by the fact that the VAT Notice 709/3 on hotels and holiday accommodation and related HMRC guidance does not state that, in order for the reduced value rule to apply, the supplier must first show that they have granted a licence to occupy etc that would have been exempt if not for the exclusion When asked why, if it was so important, the published materials made no mention of it, Ms Lemos stated that whether or not the published guidance referred to it, it could not affect the law. She also suggested that the market had evolved over the years and the types of accommodation had changed.

48. Accordingly, we agree with BLS1 on this issue. In our view, the Tribunal erred in law when they held that the reduced value rule in paragraph 9 Schedule 7 only applies where the supply of accommodation would otherwise be an exempt supply within Item 1 of Schedule 10.

49. Our conclusion that the reduced value rule can apply even where there is no potentially exempt licence to occupy for VAT purposes is not sufficient to determine the appeal. We must now consider whether the Tribunal was correct to find that BLS1's supplies fell within Item 1(d) of Schedule 10. This is the issue raised by the IOMTCE in the Respondent's Notice. The IOMTCE challenged the Tribunal's conclusion on two broad grounds.

50. First, the IOMTCE contended that the Tribunal made no finding that The Quarters was generally used by visitors or travellers. Ms Lemos submitted that the summary of the Tribunal's conclusions at [197], namely that BLS1's supplies *"amount to the provision of sleeping accommodation in a similar establishment to a hotel"* does not reflect the Tribunal's substantive remarks on the issue in the Decision and cannot substitute for them.

51. We do not accept this criticism of the Tribunal's findings or its summary conclusion in [197] of the Decision. The Tribunal considered the issue of whether The Quarters was a similar establishment to a hotel, including what was meant by a 'visitor' or a 'traveller', at length in [138] – [187]. We have already set out many of the relevant passages above and will not repeat them here, but as the IOMTCE specifically submits that the Tribunal did not make any findings about use of The Quarters by visitors or travellers, it is appropriate to refer to some relevant paragraphs:

> *"152. We did not discern any real difference between the parties as to what characterises visitors and travellers. The question is whether the evidence is sufficient to establish the appellant's case that occupiers of The Quarters included visitors or travellers, alternatively that The Quarters was held out as being suitable for visitors or travellers.*
>
> *…*
>
> *154. There is no direct evidence that The Quarters is used by visitors or travellers. It ought to have been possible for the appellant to provide evidence as to the circumstances of occupiers who entered into licence agreements at The Quarters. We must therefore consider whether we can infer, from evidence we do have, that The Quarters is used by visitors or travellers, alternatively is held out as suitable for use visitors or travellers.*
>
> *155. Many, if not all of our findings of fact are relevant to whether we can infer that occupiers of studios are visitors or travellers, or find that The Quarters is held out as suitable for visitors and travellers. They are also relevant to whether The Quarters is a similar establishment to a hotel. We shall therefore consider the significance of our findings of fact on these issues together, once we have considered what amounts to an establishment that is similar to a hotel.*
>
> *…*
>
> *170. We start by considering the type of people who might be expected to stay at The Quarters, in particular whether they fall within the description of visitors or travellers. As previously stated, we have no direct evidence as to the people who come to stay at The Quarters and their individual circumstances. However, we do have detailed evidence as to how the Quarters is marketed, the*

descriptions of the studios available and the additional services either included within the licence fee or available at additional cost".

52. The Tribunal then described how most people stayed in The Quarters for periods of more than six months although some stayed for less than that with the minimum term being one month. The Tribunal also discussed the fact that some hotels had guests who stayed for extended periods of time. The Tribunal considered how The Quarters was marketed and rooms were booked, check-in procedures, conditions of occupation and deposits, facilities and services.

53. Finally, the Tribunal held in [187], set out at [32] above, that:

> *"On balance, taking into account all the evidence, we are satisfied that The Quarters is likely to be used by some visitors and is held out for use by visitors. Whilst there is little evidence of who uses The Quarters, we infer from the way it is marketed and the nature of the rooms and facilities on offer that some visitors to London will use The Quarters as a base for their visit, as well as people who would be regarded as resident at The Quarters. We are also satisfied that The Quarters is held out for use by visitors, as well as residents. The evidence of holding out is essentially the marketing material, including the appellant's website and social media presence. Considering that evidence in the context of our findings of fact as a whole, we are satisfied that The Quarters is held out as being suitable for visitors. On that basis, subject to the points made at [150] above, the appellant would satisfy the terms of Item 1(d)".*

54. The reference in the final sentence of [187] to it being subject to the points made at [150], also set out at [28] above, was seized on by Ms Lemos as showing that the Tribunal did not make a decision on whether The Quarters was a similar establishment to a hotel within Item 1(d). Mr James seemed to accept that the Tribunal did not reach a final conclusion on whether The Quarters was a similar establishment within Note 10 but contended that the Tribunal did find that it was a similar establishment within Item 1(d). He pointed out that the Tribunal considered both points as they stated explicitly at [155] (above).

55. We agree with Mr James. In [150], the Tribunal questioned whether Note (10) required the premises to be *"generally"* used by visitors or travellers or held out as *"primarily suitable for visitors or travellers"*. Note (10) to Group 1, set out at [13] above, simply refers to "*premises … which are used by or held out as being suitable for use by visitors or travellers"*. Words such as *"generally"* and *"primarily"* are not used in Note (10). As is clear from [144] of the Decision, Ms Lemos had submitted that one of the characteristics of hotels is that they are generally used by visitors and travellers and will usually be held out as being suitable for visitors and travellers. It seems to us that, in [150], the Tribunal was simply speculating that a similar submission could be made in relation to a similar establishment to a hotel. However, as [150] states, the Tribunal did not have submissions on the point. In [155] the Tribunal stated that they would consider whether The Quarters was used by or held out as being suitable for visitors and travellers (Note (10)) as well as considering whether it was a similar establishment to a hotel (Item 1(d)). In context, it is clear that the Tribunal's remarks in the last sentence of [187] were not an indication that it had not made a decision but a recognition that there may be other arguments for another day. On the basis of the submissions and evidence available to them, the Tribunal clearly made a finding in the penultimate sentence of [187] that The Quarters was held out as being suitable for visitors and thus fell within the wording of Note (10) and, therefore, a similar

establishment to a hotel within Item 1(d). On that basis, there is no inconsistency between [187] and [196(2)] and the Tribunal's finding of fact is clear.

56. The second challenge is that the Tribunal was not entitled to make the findings that it made in [187] and therefore erred in law for the reasons set out in *Income Plus Services Limited v Customs & Excise Division Isle of Man Treasury* (20 July 2021) ['*IPS*'] at [20] - [23]. Specifically, the IOMTCE referred to [23] of *IPS*:

> *"23. … The test is whether the Tribunal has ignored relevant considerations, or taken account of irrelevant considerations, or reached a decision that no reasonable tribunal could have reached".*

57. The IOMTCE submitted that the Tribunal was not entitled to find in [187] that The Quarters was *"held out for use by visitors, as well as residents"* because the Tribunal took into consideration irrelevant evidence and failed to consider relevant evidence. In particular, the IOMTCE relied on the following:

    (1) BLS1 did not adduce sufficient evidence to support the findings made by the Tribunal at [187];

    (2) the Tribunal inferred that The Quarters *"is likely to be used by some visitors"* in the absence of any direct evidence and from material that could not support that inference as the marketing material, including BLS1's website, related to a later period than that under consideration in the appeal;

    (3) the Tribunal failed to have regard to other evidence from BLS1's website at the relevant time which was inconsistent with the property being held out for use by visitors; and

    (4) the Tribunal's conclusion in [187] that The Quarters is held out as being suitable for visitors was inconsistent with their finding in [84] that *"the impression given by the appellant's online marketing, including that of third party estate agents, was that The Quarters was a residential building"*.

58. Further or in the alternative, the IOMTCE submitted that the Tribunal was wrong to find that BLS1 made supplies of sleeping accommodation in a similar establishment to a hotel as the only reasonable finding on the evidence was that BLS1 supplied residential accommodation. In reaching their finding, the Tribunal failed to have regard to or placed such insufficient weight on the following:

    (1) the length of the stays;

    (2) the occupant's need to show, where appropriate, a residence permit before being permitted to occupy the accommodation;

    (3) the paying of rent additional to a deposit held under a protection scheme specific to tenants and landlords;

    (4) the way the property was marketed in the relevant period; and

    (5) the way in which council tax was charged.

59. We can deal with the IOMTCE's challenge on *IPS* grounds quite shortly. As Ms Lemos acknowledged in her skeleton, there is a high threshold which must be met before an appellate court will interfere with the decision of a fact-finding tribunal as to primary findings of fact, the weight to be given to those findings and the inferences or evaluative judgments stemming from those findings. The UT in *HMRC v Netbusters (UK) Ltd* [2022] UKUT 175 (TCC) [`*Netbusters*'] confirmed this at [22] - [23]:

> *"22. … the question before an appellate tribunal or court exercising an "error of law" jurisdiction is not whether it would have made the same decision as the first-instance tribunal. The test is whether the FTT's factual finding or evaluative judgment was within a reasonable range of conclusions that a properly directed tribunal could have made on the evidence before it.*
>
> *23. Likewise, there is a high threshold for an appellate court or tribunal to find an error of law where the FTT has undertaken a multifactorial assessment".*

60. The UT cited *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 in which Lewison LJ gave the following guidance at [114]:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. … The reasons for this approach are many. They include:*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".*

61. The UT in *Netbusters* also referred to the well-known passage from Jacob LJ's judgment in *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407 at [9]:

> *"Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment".*

62. Jacob LJ further said at [11]:

"It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker …"

63. Mr James submitted that the Tribunal's finding that the premises were held out for use by visitors and travellers was sufficient together with all the other evidence and facts to conclude that The Quarters was a 'similar establishment' within Item 1(d), irrespective of whether it also fell within Note (10). He also contended that the Tribunal was entitled to reach the conclusion that BLS1 made supplies within the description of supplies in Item 1(d) Schedule 10, i.e. the provision of sleeping accommodation in a similar establishment to a hotel. He submitted that, in relation to each point raised by the IOMTCE above, it was clear that the Tribunal was fully aware of any issues surrounding the evidence and took them into account when making their findings.

64. We agree with Mr James. In our view, it is clear that the Tribunal looked carefully at all the evidence which included evidence from which they might properly infer that The Quarters were held out for use by visitors or travellers. The Tribunal, correctly in our view, identified that there is a grey area between the hotel and residential sectors and that the issue was finely balanced. In the Decision, the Tribunal identified some facts that suggested that The Quarters was intended for long term residential use and others that indicated that The Quarters was held out for use by visitors or travellers. The Tribunal considered that some facts were neutral on the issue or of little weight. Having identified the relevant facts, the Tribunal made its evaluation and reached a conclusion on all the evidence. It seems to us that the IOMTCE's criticisms of the Tribunal's decision-making are no more than the *"roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong"* which Evans LJ held was not permitted in *Georgiou (t/a Mario's Chippery) v Customs and Excise Comrs* [1996] STC 463 at 476. In our view, the Tribunal was entitled to reach the view that BLS1's supplies amounted to the provision of sleeping accommodation in a similar establishment to a hotel on the evidence. There is nothing unreasonable or irrational about that conclusion in the circumstances of this case. The high threshold which must be met before an appellate court can find an error of law where the FTT has undertaken a multifactorial assessment has not been met in this case.

65. In view of our decision to allow BLS1's appeal on the reduced value rule issue and to dismiss the IOMTCE's cross-appeal by way of Respondent's Notice, it is not necessary to decide whether BLS1's supplies of accommodation at The Quarters were exempt licences to occupy for VAT purposes. As any views that we expressed on the point would not be binding and the meaning of 'licence to occupy' and 'leasing or letting of immovable property' for VAT purposes is already the subject of multiple decisions in other courts and tribunals, we have decided not to make any decision on this issue.

CONCLUSION

66. On the basis of the above, our determination is as follows:

    (1) there is no requirement in paragraph 9 of Schedule 7 or Item 1(d) of Group 1 in Schedule 10 VATA 1996 that the provision of sleeping accommodation in a similar establishment to a hotel must be by way of a grant of a licence to occupy;

(2) BLS1's supplies of accommodation in The Quarters are the provision of sleeping accommodation in a similar establishment to a hotel within the description of supplies within Item 1(d) Schedule 10;

(3) accordingly, the reduced value rule applies to BLS1's supplies of accommodation in The Quarters and BLS1 is liable to account for VAT on a reduced value after 28 days where the conditions in paragraph 9 of Schedule 7 are met.

DISPOSITION

67. For the reasons given above, BLS1's appeal is allowed and the IOMTCE's cross-appeal is dismissed.

COSTS

68. Any ancillary applications by any party are to be filed and served within 14 days from the handing down of this judgment together with concise written submissions in support, and any concise written submissions by the responding party are to be filed and served within 14 days thereafter. The court will determine any such applications on the basis of such written submissions without a further hearing.