THE ISLE OF MAN
VAT AND DUTIES TRIBUNAL

Appeal references: TC/2020/00424
TC/2020/02977

Heard on: 21-23 September 2022
Judgment date: 13 February 2023

Before:

TRIBUNAL CHAIR: JUDGE JONATHAN CANNAN
MEMBER: MR LAURENCE VAUGHAN-WILLIAMS

Between

BLS1 LIMITED

Appellant

and

ISLE OF MAN TREASURY
(CUSTOMS AND EXCISE DIVISION)

Respondent

Representation:

For the Appellant: Alun James of counsel, instructed by Wright Hassall solicitors

For the Respondents: Marika Lemos of counsel, instructed by the Attorney General's Chambers

DECISION

INTRODUCTION

1. BLS1 Limited ("the appellant") is an Isle of Man company which was incorporated on 28 February 2011. It owns a property called "The Quarters" Swiss Cottage, 120 Finchley Road, London and has been registered for VAT in the Isle of Man since March 2015. The appellant provides high quality accommodation in 102 units at The Quarters. We set out in detail below the nature of the accommodation and the basis upon which the appellant contracts with individuals for the supply of accommodation. For reasons which will become apparent, the appellant has charged VAT on the value of those supplies at the standard rate for the first 28-days that individuals stay at The Quarters. VAT on the basis of a reduced value has been charged after the first 28 days. That is the basis on which some hotels would charge VAT to longer staying guests.

2. The Treasury Customs & Excise Division ("the respondent" or "IOMCE") commenced an enquiry into the appellant's VAT returns with an inspection visit at the appellant's offices in the Isle of Man on 11 September 2019. The enquiry gave rise to an assessment to VAT dated 25 June 2020 in the sum of £104,714. The assessment covered VAT periods 2018/07 to 2019/03. The appellant's returns for VAT periods 2019/06 to 2019/12 have also been amended and those amendments are under appeal. The relevant period for the purposes of this appeal is therefore 1 July 2018 to 31 December 2019. IOMCE contend that the supplies being made by the appellant were standard rated at full value, irrespective of the period that individuals stay at The Quarters.

3. We set out below our findings of fact relevant to the issues we must decide. Those findings of fact are based on the witness and documentary evidence adduced by the parties. We heard evidence from two witnesses. The principal evidence came from Mr Alon Demol, who is the CEO of Bravo Management UK ("Bravo") which acts as managing agent of The Quarters on behalf of the appellant. He also has an indirect interest in 50% of the share capital of the appellant through a family trust. We also heard evidence from Mr James Kelly, a senior customs VAT assurance officer employed by IOMCE. The respondents also served a witness statement from Mr Mike Doyle, although that was apparently for the sake of completeness and it did not contain any evidence relevant to the issues before us.

4. Both witnesses provided witness statements and were cross-examined on their evidence. Mr Demol had provided two witness statements, and shortly before the hearing the appellant applied for permission to rely on a third witness statement. The respondent objected to that application, but we granted permission for reasons given during the hearing.

OUTLINE OF THE ISSUES

5. We set out below detailed references to the relevant legislative provisions. All references in this decision are to the relevant provisions contained in the Isle of Man Value Added Tax Act 1996 ("VATA 1996"). For present purposes we can summarise the issues as follows.

6. The appellant contends that supplies made by the appellant in relation to The Quarters are prima facie exempt supplies of land pursuant to Item 1 Group 1 Schedule 10 VATA 1996. That is because the supplies involve a licence to occupy land pursuant to which the occupants obtain sufficient rights of occupation. However, it is further contended that in this case there is an exclusion from exemption pursuant to Item 1(d) which applies to the provision in a hotel, inn, boarding house *or similar establishment* of sleeping accommodation. The appellant says that The Quarters is a similar establishment to a hotel, inn or boarding house.

7. The appellant then contends that having established that it is excluded from exemption by virtue of Item 1(d), it is entitled to account for VAT on what is known as a "reduced value" pursuant to paragraph 9 Part 2 Schedule 7 VATA 1996. The reduced value applies where a supply consists of the provision of accommodation which falls within Item 1(d) for a period exceeding 4 weeks. The value on which VAT is charged under paragraph 9 is reduced for the period in excess of 4 weeks to so much of the value as is attributable to facilities other than the right to occupy accommodation. Further, the part attributable to those facilities shall be not less than 20% of the full value.

8. The appellant further contends in the alternative that even if the supplies do not fall to be treated as exempt under Item 1 Schedule 10, the supplies still consist of the provision of accommodation within Item 1(d) and the reduced value rule in Schedule 7 still applies. In other words, it is not necessary for the supply to be prima facie exempt to obtain the benefit of the reduced value.

9. The respondent contends that the supplies fall to be standard rated and are not prima facie exempt because there is no grant of a licence to occupy land as that term is properly construed for the purposes of VAT. There is a taxable supply of sleeping facilities and other related services. On that basis, there is a standard rated supply and the reduced value rule is not engaged.

10. The respondents also say that in any event, the supplies do not fall within Item 1(d) because The Quarters is not a "similar establishment" to a hotel. The supply would therefore be exempt or standard rated at full value.

11. Finally, the respondents say that if the supplies are exempt, then the appellant would have no right to recover input tax, or at least a restricted right.

12. Having set out the parties' cases, it is common ground that the following issues arise for determination:

> (1) Do supplies at The Quarters prima facie fall to be treated as exempt on the basis that they are licences to occupy land, as that term is construed for the purposes of VAT?
>
> (2) If the supplies are prima facie exempt, are the supplies excluded from exemption by virtue of Item 1(d) on the basis that The Quarters is providing sleeping accommodation in a similar establishment to a hotel, inn or boarding house?
>
> (3) If the supplies are not prima facie exempt, does the reduced value rule apply in any event on the basis that The Quarters is providing sleeping accommodation in a similar establishment to a hotel, inn or boarding house within Item 1(d)?

13. If issues (1) and (2) both fall to be answered in the affirmative, the appeal must in principle be allowed. Similarly, if issue (3) arises and falls to be answered in the affirmative. Otherwise, the appeal must in principle be dismissed. Both parties invited us to determine this appeal in principle, on the basis that they would be able to agree the quantum of the assessments, if necessary. We are content to proceed on that basis. This also means that we are not concerned in this decision with the appellant's right to recover input tax.

14. The appellant also notified an option to tax the property on 19 August 2015. The effect of an option to tax is that an otherwise exempt supply becomes a taxable supply, which also

has implications for the recovery of input tax attributable to the supply. Following the hearing, the parties agreed that the issues on this appeal are not affected by the option to tax.

THE LEGAL FRAMEWORK

15. In this section we set out relevant provisions of the VATA 1996, together with references to the Principal VAT Directive. We also consider some of the relevant authorities, and the remaining authorities later in our discussion of the issues.

16. Group 1 Schedule 10 VATA 1996 provides for exemption from VAT in relation to certain supplies of land:

> Item No.
>
> 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;

17. Note (10) to Group 1 which has the force of law 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.

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

> 19(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.

19. For present purposes we are concerned with Paragraph 9 Part 2 Schedule 7 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.

20. The exemption in Schedule 10 for certain supplies of land is intended to implement Article 135 of the Principal VAT Directive which provides as follows:

> 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;

21. Article 135 of the Principal VAT Directive replaced Article 13B of the Sixth Directive, which is referred to in some of the authorities. 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 are authoritative in the Isle of Man in interpreting VAT legislation.

22. A number of authorities were cited to us in connection with the correct approach to determining the nature of a supply for VAT purposes. In particular, the starting point is the contractual position, which will normally reflect the economic and commercial reality of a transaction and the nature of a supply for VAT purposes. However, the contractual terms are not necessarily determinative of the nature of a supply if they do not correspond with the economic and commercial reality. It became apparent in later submissions that neither party suggests there is any disconnect between the contractual arrangements involving the supply of accommodation at The Quarters and economic and commercial reality. In the circumstances, it is not necessary to explore those authorities in this decision.

23. Exemption for the leasing or letting of immovable property was recently considered by the Court of Appeal in *Fortyseven Park Street v HM Revenue & Customs* [2019] EWCA Civ 849. The following points were identified at [23]:

> 23. … Amongst the points that emerge from the authorities are these:
>
> (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 e.g. *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).

24. The Court of Appeal also identified various general principles of VAT law at [28] 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).

25. It is clear that the English law distinction between leases and licences is irrelevant in terms of the exemption. The Court of Appeal also quoted the following passages from the decision of the CJEU in *Belgian State v Temco Europe SA* [2004] ECR I-11237:

> 20. While the court has stressed the importance of the period of the letting … it has done so in order to distinguish a transaction comprising the letting of immovable property, which is usually a relatively passive activity linked simply to the passage of time and not generating any significant added value (see, to that effect, *Stichting 'Goed Wonen' v Staatssecretaris van Financiën* (Case C-326/99) [2003] STC 1137, [2001] ECR I-6831, para 52), from other activities which are either industrial and commercial in nature, such as the exemptions referred to in art 13B(b)(1) to (4) of the Sixth Directive, or have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property, such as the right to use a golf course (*Sweden v Stockholm Lindöpark AB* (Case C-150/99) [2001] STC 103, [2001] ECR I-493, paras 24 to 27), the right to use a bridge in consideration of payment of a toll (*EC Commission v Ireland* (Case C-358/97) [2000] ECR I-6301) or the right to install cigarette machines in commercial premises (*Sinclair Collis Ltd v Customs and Excise Comrs* (Case C-275/01) [2003] STC 898, [2003] ECR I-5965, paras 27 to 30).
>
> 21. The actual period of the letting is thus not, of itself, the decisive factor in determining whether a contract is one for the letting of immovable property under Community law, even if the fact that accommodation is provided for a brief period only may constitute an appropriate basis for distinguishing the provision of hotel accommodation from the letting of dwelling accommodation (*Blasi v Finanzamt München I* (Case C-346/95) [1998] STC 336, [1998] ECR I-481, paras 23 and 24) …
>
> 23. Furthermore, while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of art 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property.
>
> 24. Lastly, as regards the tenant's right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers.
>
> 25. The presence in the contract of such restrictions on the right to occupy the premises let does not prevent that occupation being exclusive as regards all other persons not permitted by law or by the contract to exercise a right over the property which is the subject of the contract of letting.

26. The exclusion from exemption in Article 135(2), which Item 1(d) seeks to implement, was succinctly described by the CJEU in *Blasi v Finanzamt Munchen I* Case C-346/95 at [20] as follows:

> 20. …the words 'sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.

27. We were referred to three decisions of the FTT and the UK VAT Tribunal which have considered the land exemption in the context of similar establishments to hotels.

28. Firstly, *City YMCA London v HM Revenue & Customs* [2021] UKFTT 0477 (TC) where the FTT considered whether the provision of accommodation to homeless young people was the supply of a licence to occupy land falling within the land exemption, and if so, whether it fell within Item 1(d) as a "similar establishment" to a hotel. The FTT held that the supplies were prima facie exempt, but were excluded from exemption by Item 1(d). Whilst there was no appeal by HMRC, Ms Lemos submitted that the case was wrongly decided. In the event, it is not necessary for us to express any view as to whether it was rightly decided.

29. Secondly, *Acorn Management Services v HM Customs & Excise* (Decision 17338) where the taxpayer made supplies of accommodation pursuant to an agreement between the taxpayer and certain American universities. The accommodation was occupied by students whilst studying in the UK for periods between three weeks and six months. The appeal was concerned solely with the application of Item 1(d). HMRC contended that Item 1(d) was engaged and that the supplies were therefore standard rated. The VAT Tribunal held that Item 1(d) was engaged.

30. Thirdly, *Lady Margaret Hall v HM Revenue & Customs* [2014] UKFTT 1092 (TC) which concerned supplies of term-time accommodation to students at an Oxford college. The FTT held that the supplies were exempt as being closely related to education rather than pursuant to Item 1. In case it was wrong, the FTT went on to consider the land exemption. It stated that the supplies would have been exempt within Item 1 and would not have fallen to be excluded from exemption by Item 1(d).

31. It has been helpful to consider the broad approach of the tribunals in these cases, but they are not authoritative. We have not found it necessary to explore the facts in any detail, or to conduct a close analysis of the reasoning.

32. We were also referred to HMRC guidance in relation to Item 1(d). Again, the guidance is not authoritative, but it does provide a helpful summary of some relevant factors to which we shall return.

FINDINGS OF FACT

33. Most of the evidence relevant to our findings of fact comes from the documentary evidence and from the oral evidence of Mr Demol. Save where otherwise stated, our findings relate to the period 1 July 2018 to 31 December 2019. Ms Lemos invited us to be cautious about Mr Demol's evidence because he had an interest in the ownership of the appellant and therefore in the outcome of the appeal. We recognise that is the case, but whilst Mr Demol's evidence at times veered into argument and submissions we accept much of his evidence. In some respects his evidence was not supported by the documentary evidence that we would have expected to be adduced. In those areas, we did not accept Mr Demol's evidence at face value.

34. Bravo manages four buildings on behalf of the appellant offering accommodation under what is described as "The Quarters" brand. In addition to The Quarters, the appellant has a property in Watford which offers accommodation on a similar basis to The Quarters. It also has properties in Kilburn and Croydon where it offers longer stays on assured shorthold tenancies. We understand that Kilburn and Croydon were developed by way of "build to rent", whereas Watford was formerly a hotel which the appellant purchased after it went into administration.

35. The Quarters is a modern city centre style building which was recently constructed and began operating in July 2018. The appellant had acquired the property from a company called

Sisem Limited in May 2015, at or about the time building was being developed. Prior to that, Bravo had been advising Sisem Limited on the development, including planning aspects. Once developed, the building contained 102 units over 6 floors, together with a basement and a lower basement. The buildings surround a private open courtyard and a partially covered terrace. The front entrance is on Finchley Road, almost opposite Finchley Road underground station. 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 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.

42. In 2010, Mr Demol was advising the then owners of the land in relation to planning permission. It was hoped to obtain planning for a residential block, but Camden Council would not accept the proposal. In the event, full planning permission for the site was granted on 30 April 2010 for the following development:

> Erection of part 4-storey, part 7-storey building over two floors of basements to provide hostel (sui generis) with commercial floor space for flexible (131 (office), retail (Class Al), financial/professional services (Class A2), restaurant cafe (Class A3) and drinking establishment (Class A4)) uses, including works of hard and soft landscaping.

43. The following planning condition was imposed:

> 5. The hostel rooms shall be provided and equipped as non self-contained units in strict accordance with the details demonstrated on the approved plans and thereafter permanently maintained and retained as such.
>
> Reason: To ensure that the units provide an acceptable standard of residential accommodation in accordance with Policy H1 of the Replacement Unitary Development Plan 2006 and to ensure that the scheme does not create an unacceptable mix of residential units contrary to Policy H8 of the Replacement Unitary Development Plan 2006.

44. A note on the planning permission stated:

> 4. You are reminded of the requirement to register the residential element of the scheme under the Housing Act. Applications should be submitted to the Council's Environmental Health Team.

45. Whilst Mr Demol was asked about this requirement during cross-examination, we did not have submissions as to the circumstances in which the requirement to register under the Housing Act arose. We cannot therefore make any observations on the significance of this requirement.

46. Following the grant of planning permission, we understand that Mr Demol continued trying to persuade the council to grant planning permission for residential use, without success.

47. The original developer, Sisem Limited, entered into a section 106 agreement with Camden Council which included provisions for the "hostel" to be managed according to a Hostel Management Plan and a Code of Conduct approved by Camden Council. The section 106 agreement contained the following provisions to ensure that the hostel element of the development was used for no purposes other than as a hostel:

> 4.5.2 To ensure that Hostel Element of the Development is used at all times as a single planning unit and that:
>
> a) No part of the Hostel Element of the Development shall at any time be used as separate, independent self-contained dwelling units; and
>
> b) No part of the Hostel Element of the Development shall be sold leased licensed or otherwise disposed of in any form as a separate unit of use or occupation and in the event of any breach of this clause to cease Occupation of the Hostel Element of the Development forthwith.

> 4.5.3 To ensure that the Hostel Element of the Development is occupied for periods of not less than 90 days by any one occupant or group of occupants.

48. The evidence included a "draft operating manual" dated January 2010 which was intended to outline the basis on which the hostel element of the development would be operated. The manual stated that the hostel would provide short term accommodation for single persons and couples who are seeking affordable accommodation, whilst offering a degree of comfort and convenience. It would not provide accommodation for homeless persons or other persons with alcohol or drug dependency or persons referred by the Department for Work and Pensions. It was anticipated that leases would be granted for one month up to a maximum of one year and the majority of rooms would be in the single occupancy of students and postgraduates, visitors to London, young professionals and key workers in employment. These residents were described as being "essentially transient in nature" and as people who "often find it difficult to compete within the housing market". It was intended that a Code of Conduct would be agreed with Camden Council and issued to all occupiers.

49. There is a conflict between the section 106 agreement, where the minimum period of occupation was stated to be 90 days, and the draft operating manual which referred to leases of one month. In any event, it is common ground that in practice licences are granted for periods of one month or longer.

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.

53. The appellant applied to be registered for VAT with effect from 31 March 2015. It was not making any taxable supplies at that stage, but intended to do so in the future. It had purchased the land at Finchley Road from Sisem Limited on 14 May 2015. At that stage the land was a vacant plot, possibly partly developed. The appellant intended to develop the land, reclaiming input tax on property development costs. The appellant's intended business activities were variously described in the application as follows:

> Property ownership and development into commercial and residential units.
>
> Vacant plot of land being developed for a mix of commercial and residential lettings.

54. IOMCE would not normally accept registration of a business as a hotel or similar establishment where the property is located in the UK. The business would be expected to register for VAT with HMRC in the UK. This is because of the logistical difficulties associated with site visits and inspections. In the event, however, the appellant was registered for VAT by IOMCE with effect from 31 March 2015. The certificate of registration included the following trade classification:

> Letting or operating of own or leased real estate (other than Housing Association real estate and conference and exhibition services)

55. At the same time as applying for registration, the appellant also notified an option to tax the property, which was acknowledged by IOMCE on 16 September 2015.

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.

61. A 2020 version of the licence agreement contained the following additional provisions:

> (1) For the appellant to provide the occupier with electricity, which was charged to the occupier at £40 per month, including VAT. Actual use would be reconciled on check out and any excess recovered from the occupier or refunded to the occupier as appropriate. The previous license agreement had been silent about utilities, but we understand that electricity was charged to occupiers in a similar way prior to 2020.
>
> (2) Additional services for which a separate payment was required, including reference to a bed linen service, gym access (at £20 per month) and the restaurant.
>
> (3) The appellant was entitled to require the occupier to transfer to a comparable alternative room on giving at least one weeks' notice.
>
> (4) The appellant was entitled to full access to the studio, without notice, in the month before the expiry of the licence to conduct viewings for potential licensees. The occupier was required to keep the studio tidy, clean and well-presented during that period.

62. The 2020 version did not include what were clauses 8.7.7 or 8.11 in the 2018 version.

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.

64. Mr Demol regarded various factors as establishing that the studios would not be regarded as "self-contained", and therefore compliant with the planning conditions. In particular, the exclusion of hobs and a traditional oven from the kitchenettes, the absence of sockets for external wifi, the absence of washing and drying machines and of independent utility meters. He contrasted this to studios in Kilburn which had these items. Mr Demol also said and we accept that that a significant number of potential occupiers at The Quarters did not take up licence agreements when they realised that there were limited cooking facilities.

65. The planning material indicated an expectation that students would be one category of typical occupiers. In practice, few students could afford the licence fees and typical occupiers were young professionals, corporate clients and people relocating, such as divorcees.

66. Potential occupiers would view a studio, either in person or by video. A studio would be reserved by payment of a reservation fee, equivalent to one week's licence fee. The individual would be made aware that the agreement was not a tenancy, but a licence agreement. The appellant or its agent will then make various checks on the individual. People cannot simply turn up at The Quarters and obtain a studio room. The appellant wants to know who an occupier is and where they are coming from.

67. The appellant has a reference check-list which confirms that the following documentation is required and has been obtained in respect of a potential occupier:

(1) A valid passport, and where appropriate a valid residence permit.

(2) Evidence of funds, such as 3 months bank statements and evidence of monthly salary.

(3) Where the occupier is not employed, details of a guarantor for the licence fee.

(4) Details of employment or place of study.

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.

69. The appellant has a check-in cover sheet which is an internal confirmation that the licence has been signed, the contract check-list completed, sums due have been paid in full, identification documents have been checked and an inventory completed.

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. The appellant has an agreement with Camden Council that it will collect council tax on behalf of occupiers and account to the Council for sums collected. The licence fee paid by occupiers includes council tax. The appellant pays a fixed sum every quarter to the Council. There is a reconciliation at the end of the year taking into account any applicable 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. For example, on 4 September 2018 Bravo entered into a contract with an agent acting on behalf of Deepmind Technologies Limited, a UK subsidiary of Alphabet Inc, to provide short-term accommodation to employees of Deepmind. This was a framework agreement, and individual licence agreements were entered into between the employees and the appellant. The price paid by the individuals is a price agreed with the corporate client. The framework agreement was for a term of 5 years and the appellant paid commission to the agent of Deepmind. It was intended that there would be an aggregate of 750 reserved weeks for Deepmind in the year ended 31 December 2019. It was a term of the framework agreement that a restaurant would be open at The Quarters by 31 December 2019, serving breakfast, lunch and dinner. It was also provided that licence fees would include council tax, utilities, internet access at 50mb/s and a weekly sparkle clean. The contents of the studios were defined, and expressly excluded a heating plate/hob.

75. The Deepmind agreement provided that Deepmind's agent would collect "the rent" from individual occupiers and pay it to the appellant's agent less its commission.

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.

77. 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.

78. In May 2021, there were entries on Rightmove describing the "let type" in one case as "short term" and in another case "long term". Those entries also included an energy performance certificate for the building itself.

79. Marketing material on Homeviews, a site similar to Rightmove, states that The Quarters "offers aspiring guests a seamless short-term living experience … [in] self-contained spacious units … In addition, guests can also enjoy a range of services and amenities". The website includes reviews by occupiers, including one in December 2019 which describes The Quarters as a "hotel experience". It also identifies The Quarters Kilburn, Croydon and Watford as being "also by this company".

80. Marketing material on Excel and Fuji London Property, both estate agencies, describe studios as being available for short term stays of 1 – 3 months or long term stays of 3 – 12 months.

81. The appellant uses its own website and social media platforms as marketing tools. Most occupiers now find The Quarters directly through the appellant's website. In October 2019, the appellant's website described The Quarters along with its properties in Kilburn, Croydon and Watford as "the best value short-term rental value in London" and a "smart short-term rental solution … for stays of six months … with tenants welcomed and looked after as guests". The Deluxe studio was described as having "the extra space that makes an apartment a home".

82. There was no distinction between the appellant's four properties as to the descriptions and procedures for signing up for a studio. The website stated that "as with all rental agreements, we'll ask you to supply us with a reference and income guarantees". Foreign students required a character reference as well as confirmation from a college or university. A 6-month stay also had to be paid in advance. Persons in full-time employment were required to demonstrate a monthly salary at least twice the "rental amount". Guarantors were required to show a monthly salary at least 2.5 times the rental amount.

83. The website says that once these checks have been passed, "you're ready to sign the Assured Shorthold Tenancy contract". It is common ground that assured shorthold tenancies were only used at Kilburn and Croydon. At The Quarters and in Watford, licence agreements were entered into.

84. Mr Demol accepted that the appellant's website initially used language appropriate to its tenanted properties, such as The Quarters Kilburn. When The Quarters was added to the website, the language was not changed. It was updated sometime in 2020, after the IOMCE inspection commenced. It then described The Quarters as "smart short-term accommodation", creating "an effortless, managed experience for our guests". It continued to refer to assured shorthold tenancies at all four properties. However, we accept that potential occupiers would be told at the first opportunity that there would be a licence to occupy and not an assured shorthold tenancy. Mr Demol accepted and we find that until 2021, the impression given by the appellant's online marketing, including that of third party estate agents, was that The Quarters was a residential building.

85. The appellant's twitter account suggested that occupiers might want to take time out from the hustle and bustle of London to "enjoy a quiet weekend at home". It also talks of occupiers living in London and "feeling at home" and refers to the proximity of The Quarters to Heathrow, suggesting that it is useful when planning a holiday away from The Quarters.

86. A Google search describes The Quarters as a "3-star hotel". We do not know on what basis Google has applied that description and we do not find this evidence particularly reliable or relevant. Indeed, Mr Demol was offended by the fact that The Quarters had only been given a 3-star rating.

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.

88. Mr Demol gave evidence seeking to show that the pricing of studios at The Quarters was 30-40% higher than the "residential rate" for property in the area. That evidence was said to derive from a report Mr Demol commissioned from CBRE, property agents. The report was not in evidence. Mr Demol also gave evidence of a price comparison between The Quarters and the property in Kilburn. He sought to establish that there was a premium to stay at The Quarters because it was similar to a hotel. We view Mr Demol's evidence in this regard as being in the nature of expert evidence, without any expert report and only a limited opportunity for Ms Lemos to challenge the evidence. In the end, Mr James did not rely on this evidence and we disregarded it.

89. There was some evidence as to the periods of time that occupiers stay at The Quarters. During the course of Officer Kelly's enquiry, he spoke with Mr Steven Leach who was a director of the appellant. Mr Leach told Mr Kelly that a typical licence would be between 3 and 6 months. Taking into account renewals, the majority of licences would be for 6 months or more. Mr Leach also stated that where a licence lasted for longer than 6 months, he considered that The Quarters would be the occupier's main residence, but not for the shorter lets. Whilst the latter point was the view expressed by Mr Leach, it will carry little weight in our consideration of the issues.

90. During the enquiry, the appellant produced evidence from its records showing the "tenancy start date" and tenancy end date" for studios at The Quarters occupied in September 2019. The average length of a tenancy was over 5 months, although that did not take into account occupiers who would have extended their agreements.

91. Mr Demol also produced what he described as a representative sample of the lengths of completed stays in studios. This indicated that on average, initial licence agreements of occupiers in January to April 2022 lasted 4.98 months. The average length of stays which ended in the period January to March 2022 including renewals was 5.9 months.

92. There was an issue as to whether the period looked at by Mr Demol was representative. It related to a period after the pandemic, and it was common ground that the pandemic had a considerable effect on The Quarters and the profile of occupiers changed. The appellant lost almost all corporate clients and occupiers tended to be temporary key workers. Mr Demol did not look at the period covered by the assessments.

93. It is not clear to us why Mr Demol did not produce sample evidence for a period before the pandemic and during the period covered by the assessments. In our view, what happened in January to April 2022 in the period following the pandemic carries little if any weight.

94. Mr Demol also said that renewals were seasonal, and average stays would be longer in winter than in summer. There was no evidence to that effect and we make no finding in that regard.

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.

98. The appellant originally intended to lease part of the ground floor and basement to a restaurant operator who would fit out and operate the premises. The appellant's agreement with Deepmind required it to have a restaurant operating at the premises by 31 December 2019. In the event, the appellant fitted out the restaurant premises itself and leased them to a restaurant called Terra Terra. However, the lease was then passed to a company related to the appellant which now operates the restaurant as Terra Terra.

99. The restaurant originally opened 8am to midnight. It 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. Mr Demol says that he obtained advice from professional consultants that the decision of Camden Council in this regard was wrong, but because the council tax liability would be lower than the expected business rates they decided not to challenge the council's ruling. However, no correspondence either with the consultants or with Camden Council was produced in this regard. We therefore make no findings beyond our findings that the appellant is not required to pay business rates and occupiers are liable to council tax on the basis that studios are treated as dwellings.

102. Mr Kelly gave evidence seeking to establish that The Quarters provided a similar offering to Kilburn, which it was accepted was a residential block and not a similar establishment to a hotel. However, there is no gym or restaurant at Kilburn and in Kilburn, occupiers must provide their own TV equipment and acquire their own TV licence. Mr Demol said that the ethos and feel of the two buildings was completely different. The Quarters feels like a hotel whereas Kilburn feels like a residential block. We are not in a position to make any findings in that regard. In any event, the "feel" of premises derives from the nature of the facilities and the way in which occupiers use the facilities. We have made our findings in that regard.

103. Mr Demol gave evidence that rooms at Kilburn were intended as a permanent base for occupants. His view of what was intended is of little relevance, but they were let on assured shorthold tenancies. The rooms at Kilburn had hobs and extractors so that occupants could cook in their rooms. There were only three members of staff at Kilburn and there was no 24/7 reception desk.

104. Whilst we have made findings in relation to Kilburn, the comparison between The Quarters and Kilburn does not greatly assist us. We must determine this appeal on the facts we

find as to the nature of the offering at The Quarters. It is not a helpful exercise to make a detailed comparison of the similarities and differences in operation between The Quarters and other buildings operated by the appellant.

105. Bravo has a property management agreement with the appellant relating to The Quarters, dated 1 April 2018. There is reference throughout that agreement to tenants, leases and residential units. Mr Demol explained that at this time the appellant and Bravo did not distinguish between tenants and guests. The agreement emphasised "Brand" uniformity, and Mr Demol's evidence was that the brand encompassed both residential properties and short stay properties, with The Quarters being in the latter category.

CONSIDERATION OF THE ISSUES

106. We shall consider the issues arising in the following order:

(1) Does the appellant make supplies of licences to occupy land within Item 1?

(2) If there are supplies of licences to occupy land, is The Quarters a similar establishment to a hotel within Item 1(d)?

(3) If there are no supplies of licences to occupy land, but The Quarters is a similar establishment to a hotel within Item 1(d), can the reduced value rule apply to the resulting standard rated supply?

107. Before addressing these issues it is helpful to consider the judgment of the Court of Appeal in *Fortyseven Park Street* in a little more detail. In that case the taxpayer owned a property which was refurbished to create 49 self-contained apartments or residences in which fractional interests were sold. Those interests entitled the purchaser (also known as a member) to occupy an apartment for 21 nights a year. Members paid an annual residence fee. Another company in the taxpayer's group managed the property, the membership scheme and other customer services which were available to members. Those services included a 24/7 reception desk, concierge service, a business centre, daily maid service and luggage storage. Other services such as laundry and dry cleaning were available for an additional payment. The issues included whether the supply fell outside the land exemption either because there was no right to occupy as owner and no right to exclude any other person from enjoyment, or because the supply was not sufficiently passive. If the supply did in principle fall within the land exemption, was it excluded by Item 1(d)? Similar issues arise in the present case, although the facts are quite different.

108. The FTT and the Upper Tribunal held that the supplies fell within the land exemption in Item 1. The Court of Appeal disagreed, holding that the land exemption did not apply to the supplies.

109. The first part of HMRC's argument was that at the time of the supply there was no right to occupy an apartment as if the member was the owner and to exclude others from occupying. Those rights only arose when the member made a reservation each year. The Court of Appeal rejected those arguments at [34] and held that members did gain "a sufficient right to occupy" as owner. However, it accepted the second part of HMRC's argument and held that the supply was not passive in nature. The additional services could not be regarded as ancillary or plainly accessory to the supply of land.

110. In relation to passivity, Newey LJ said as follows:

> 49. 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*, paragraph 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" (paragraph 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 paragraph 23(ii) above).

111. The hotel-type services in that case were provided subsequent to the supply, and it was the obligation to provide those services in the future in an environment similar to a hotel which caused the supply of the fractional interests to be characterised as something different to a passive supply of land.

112. The Court of Appeal went on to consider whether the property was a similar establishment to a hotel so that Item 1(d) would have applied if the supply had in principle fallen within the land exemption. This was not necessary for the decision and is therefore not binding, although the approach of the Court of Appeal is of course highly persuasive. The FTT had found that the property was a similar establishment to a hotel and that Item 1(d) was engaged, but the Upper Tribunal disagreed. The Upper Tribunal considered that supplies to members of their fractional interests carried with them financial obligations and risks which were "alien to supplies of accommodation in the hotel sector" and that the FTT made an error of law in having regard to the length and characteristics of individual stays of members. The Court of Appeal observed that it was common ground that Fortyseven Park Street itself was a similar establishment to a hotel. However, that was not necessarily conclusive if sleeping accommodation was provided as part of a wider supply. It held that the Upper Tribunal had not been entitled to interfere with the FTT's finding. Newey LJ stated:

> 58. In my view, however, the UT was not entitled to interfere with the FTT's decision. Under Item 1(d), "the provision in an hotel … or similar establishment of sleeping accommodation" is excluded from the land exemption. 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" (to quote from paragraph 108 of the UT decision). 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" (as the FTT observed in paragraph 289 of its decision) was surely something that the FTT could properly take into account in arriving at its assessment.

113. We now address the three issues on this appeal in more detail.

(1) Licence to occupy land

114. The first issue which arises is whether the appellant's supplies are of licences to occupy land, as that term is construed for the purposes of the exemption.

115. We were referred to [55] of the judgment of the CJEU in *Stichting 'Goed Wonen' v Staatssecretaris van Financien* Case C-326/99, an early case on the land exemption which was referred to in passages quoted by the Court of Appeal in *Fortyseven Park Street*:

> 55. The fundamental characteristic of such a transaction, which it has in common with leasing, lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right.

116. The same point was emphasised by the CJEU in *Regie communale autonome du stade Luc Varenne v Belgium* Case C-55/14 and *Sinclair Collis v Customs & Excise Commissioners* Case C-275/01, and by the Advocate General in *Walderdorff v Finanzamt Waldviertel* Case C-451/06 at [23]. We were also referred to the Advocate General in *Sweden v Stockholm Lindopark AB* Case C-150/99, a case involving the exemption for land which in Sweden had been extended to supplies of premises for the purpose of sport and physical education. At [38], in the context of a discussion about the essential characteristics of a letting of immovable property, it was said:

> 38. I would add, as salient and typical characteristics of a lease or let, that it necessarily involves the grant of some right to occupy the property as one's own and to exclude or admit others, a right which is, moreover, linked to a defined piece or area of property. In the light of all those considerations, Lindöpark's activities, as described to the Court, do not appear to me to be of the nature of a lease or let of its golf course or any part thereof.

117. The authorities establish that an exempt supply of land involves the following factors: a supply for an agreed period, in return for payment, of the right to occupy as owner and the right to exclude any other person from enjoyment of the property. The issues on this appeal focus on the last two of these factors. Ms Lemos emphasised that the respondents' case is that the fact occupiers could not control access for guests meant that they did not occupy as owners. In the alternative, if they did occupy as owners then this together with the appellant's rights of access and the provision of other services leads to a conclusion that this is not a passive supply of land.

118. We start our discussion by saying a little more about some of the CJEU authorities referred to above.

119. *Temco* is an examples of supplies where the factors identified above were all present. It operated a cleaning and maintenance business, in the same group as three other companies. It entered into contacts with those companies to allow them to occupy a building it owned, but they were not granted any individual rights over any specific part of the building. The contracts were expressed to be for the duration of the companies' activities. The Belgian tax authorities treated this as an exempt supply of land. Temco argued, amongst other things, that there was no supply of land because there was no grant of an exclusive right of occupation.

120. The CJEU held that the supply was exempt. We have already referred to the Court of Appeal's summary of the principles to be derived from *Temco*. In the context of the right to occupy, Mr James highlighted [24] of the judgment of the CJEU. Paragraph [24] concerns restrictions on an occupier's right to occupy and for convenience we repeat it here:

> 24. … as regards the tenant's right of exclusive occupation of the property, it must be pointed out that this can be restricted in the contract concluded with the landlord and only relates to the property as it is defined in that contract. Thus, the landlord may reserve the right regularly to visit

the property let. Furthermore, a contract of letting may relate to certain parts of a property which must be used in common with other occupiers.

121. *Walderdorff* is an example of supplies where the relevant factors were not all present. It concerned the letting of fishing rights. The taxpayer managed an agricultural holding and entered into a contract granting rights to an angling club to fish in ponds on the land. The taxpayer reserved the right to fish in those waters herself, and for one guest per day authorised by her. The Austrian tax authorities contended that this was a taxable supply. The Advocate General referred at [23] to *Temco*, and distinguished circumstances where a landowner may reserve a right to enter for the purposes of upkeep rather than to use and enjoy the land. The former would not prevent a letting from being exempt, whilst the latter would:

> 31. It is true that a right of unrestricted access such as that granted in the present case is a typical, and perhaps essential, element of a lease or let. Here, however, not only does the granter explicitly reserve her own right of access to use the waters for the same purpose as that for which access is granted to the club – as opposed to a purpose other than use or enjoyment, such as, for example, upkeep for which the landowner remains liable – but she also reserves the right to grant the same access to third parties.

122. The CJEU held that as the angling club did not have a right to exclude all persons from fishing in the waters the supply was not exempt:

> 21. It is clear from the order for reference that, under the contract entered into by Ms Walderdorff and the angling club, the club only has the right to fish in the bodies of water concerned. It is also clear from the documents submitted to the Court that the provisions of the contract of let state that Ms Walderdorff reserves the right to fish in those waters for herself and for one guest per day authorised by her. Accordingly, under the contract in the main proceedings, the angling club does not have any right to exclude any other person from use either of the waters owned by Ms Walderdorff or of the publicly owned waters where she has fishing rights registered in the Fisheries register.
>
> 22. … [T]he Court must hold that one of the elements in the definition of the Community law concepts of leasing or letting immovable property which are employed within the Community system of VAT is lacking in the present case, given that the contract for that grant, at issue in the main proceedings, does not confer on the angling club the right to occupy the immovable property concerned and to exclude any other person from it.

123. In relation to passivity, Ms Lemos referred us to a summary by the CJEU in *Veronsaajien oikeudenvalvontayksikkö – A Oy* Case C-215/99:

> 40. The concept of 'letting of immovable property' in Article 135(1)(l) of the VAT Directive, has been defined by the Court as the right conferred by the landlord on the tenant, for consideration and for an agreed period, to occupy that property as if he or she were the owner and to exclude any other person from enjoyment of such a right (see, to that effect judgment of 28 February 2019, *Sequeira Mesquita*, C-278/18, EU:C:2019:160, paragraph 18 and the case-law cited).
>
> 41. The Court has also clarified that the exemption provided for in that provision is due to the fact that the letting of immovable property, whilst being an economic activity, is normally a relatively passive activity, not generating any significant added value. Such an activity must therefore be distinguished from other activities which are either industrial and commercial in nature, or have an object which is better characterised as the provision of a service rather than the mere provision of goods, such as the right to use a golf course, the right to use a bridge in consideration of payment of a toll fee or the right to install cigarette machines in commercial

> premises (see, to that effect, judgment of 28 February 2019, *Sequeira Mesquita*, C-278/18, EU:C:2019:160, paragraph 19 and the case-law cited).
>
> 42. It follows that the passive nature of the letting of immovable property, which justifies the exemption from VAT of such a transaction under Article 135(1)(l) of the VAT Directive, is due to the nature of the transaction itself and not to the way in which the tenant uses the property concerned (judgment of 28 February 2019, *Sequeira Mesquita*, C-278/18, EU:C:2019:160, paragraph 20).
>
> 43. Thus, the Court has held that an activity is excluded from that exemption where it entails not only the passive activity of making immovable property available but also a certain number of commercial activities, such as supervision, management and continuing maintenance by the owner, as well as the provision of other facilities, so that, in the absence of quite exceptional circumstances, letting out that property cannot therefore constitute the main service supplied (judgment of 28 February 2019, *Sequeira Mesquita*, C-278/18, EU:C:2019:160, paragraph 21 and the case-law cited).

124. In the context of passivity, it is worth highlighting [23] and [27] of the judgment of the CJEU in *Temco*:

> 23. … while a payment to the landlord which is strictly linked to the period of occupation of the property by the tenant appears best to reflect the passive nature of a letting transaction, it is not to be inferred from that that a payment which takes into account other factors has the effect of precluding a 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, particularly where the other factors taken into account are plainly accessory in light of the part of the payment linked to the passage of time or pay for no service other than the simple making available of the property.
>
> 27. It is also a matter 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.

125. We must now translate the principles described by the Court of Appeal in *Fortyseven Park Street* and in the CJEU case law to the facts of the present case. Ms Lemos submitted that the appellant could significantly limit the extent to which occupiers were able to use the studios as owner. In particular, the appellant's permission was required for overnight guests and the appellant had significant rights of access. In the circumstances, Ms Lemos submitted that the supply should be characterised as a supply of sleeping facilities and other related services which did not fall within the exemption.

126. We first consider whether occupiers of studios at The Quarters were granted sufficient rights to occupy as owner and to exclude or admit others so as to fall within the land exemption. In doing so we take into account the treatment of hotels in Item 1(d) and in Article 135(2) PVD. Mr James submitted that it would be extraordinary if the supply in the present appeal was not prima facie an exempt supply. The supplies made by the appellant were no different to the supplies made by any hotel where guests have similar rights of occupation. If IOMCE are correct, then Item 1(d) would be unnecessary. Hotel accommodation would not be prima facie exempt and the reduced value provision would be practically redundant. The PVD and the domestic provisions proceed on the basis that supplies by a hotel or similar establishment would be exempt.

127. The position of hotels in the context of Item 1 is not the subject of any direct authority as far as we are aware. In *Sinclair Collis*, Lord Scott did make a reference to hotels, and also to the argument now put forward by Mr James, that the exclusion of a supply from exemption indicates that apart from the exclusion that supply would fall within the exemption. He stated at [71] as follows:

> 71. The exclusions from the article 13B(b) exemption show a clear and unequivocal intention on the part of the Council that transactions falling within an excluded category should fall outside the VAT exemption. But the exclusions cannot reasonably be supposed to indicate the opinion of the Council that every transaction falling within an exclusion would, had it not been for the exclusion, have fallen within the exemption. The exclusions certainly do show that transactions of the sort described are capable of falling within the exemption, and that it is the intention of the Council that they should not do so. So it is not necessary to ask whether a contract under which a person who takes a bedroom in a hotel is a contract of "letting of immovable property". It might or might not be. The answer would depend on the facts. A contract under which a room were taken for a week might well constitute a letting. A contract under which a room were taken for half an hour so that a man might consort with a lady would, I suggest, be very unlikely to be held to do so… In my opinion, the categories of exclusion in article 13B(b) and, for the same reasons, the categories of exclusion in paragraph 1 of Part II of Schedule 9 to the 1994 Act, do no more than indicate types of transaction capable of constituting a "letting" for the purposes of the Directive or of a "licence to occupy" for the purposes of the 1994 Act. Whether, in any particular case, the transaction would, had it not fallen within one of the excluded categories, have fallen within the exemption would have depended on the facts of the particular case.

128. The FTT in *Lady Margaret College* referred to this passage at [160]:

> 160. … the words "as if that person were the owner" must be capable of being interpreted so as to cover fact patterns which involve accommodation within a hotel (which may be short term accommodation (see *Blasi*) and consistent with Lord Scott's example in *Sinclair Collis* with the one week stay in a hotel …

129. We respectfully agree with the FTT in *Lady Margaret College* and we approach the question of exemption on the basis that supplies in the context of a hotel are capable of falling within the exemption.

130. In the present case, occupiers of studios did not have the right to decide if a guest could stay overnight. Clause 8.7.7 of the licence agreement amounted to a prohibition on such guests, although in practice and according to the House Rules guests would be permitted to stay overnight with permission from management. That is certainly a factor which indicates there is not a sufficient right to occupy as owner, although in our view it is not conclusive. It is necessary to look at the overall quality of occupation pursuant to the licence agreement and the House Rules and the context in which rights are granted in relation to the studios.

131. Ms Lemos did not rely on the provisions of clause 3 of the licence agreement which provides that licensees are permitted to occupy a specific studio "in common with the Licensor". In reality however, it is not intended that the appellant should have any right to use or enjoy the studio. It has retained a right of access for certain purposes. In particular, to provide housekeeping services, to carry out necessary maintenance and for viewings in the last month of a licence. The latter right was introduced in the 2020 form of licence agreement and is rarely if ever exercised in practice. We do not consider that these rights would diminish an occupiers rights to occupy a studio as if they were the owner.

132. It is clearly intended that occupiers should be entitled to come and go as they please and to use their studios as they wish. They are entitled to invite visitors into the studio or to exclude persons from the studio, subject to the restriction on overnight guests. It is that restriction which in our view is key to Issue 1. The appellant supplies the right to enjoy the studio on these terms and subject to that restriction. Those terms are similar to the terms one might expect to see granted by a hotel to its guests. However, The Quarters is not a hotel. Leaving to one side the question of whether The Quarters is a similar establishment to a hotel, which is issue 2, the rights to occupy are granted in the context of an establishment where occupiers will typically occupy a studio for at least 3 months and where the majority of occupiers will occupy for more than 6 months.

133. 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.

134. For completeness we should record Ms Lemos' submission that even if occupiers did obtain sufficient rights as owner, the supply was not sufficiently passive and involved significant other services which could not be regarded as ancillary or plainly accessory to a supply of land. She suggested that the appellant had provided inadequate evidence as to the nature and extent of the other services provided to occupiers. For example, there was no accounting evidence to show the cost of such services so that we could not form a view as to the value added by the services. We do not agree with the latter point. We consider that we are in a reasonable position to make findings of fact, to draw inferences from those facts and to reach conclusions in this regard.

135. The services supplied by the appellant to occupiers were weekly cleaning and housekeeping, in-house maintenance, 24 hour reception desk, superfast and secure wifi, a television service, a lounge area, bicycle shelter, post & parcel collection and underfloor heating. The appellant also engaged with Camden Council and satisfied the council tax liability of occupiers, which was included in the licence fee. Additional cleaning services, a linen service, an on-site gym and a restaurant were available for a charge.

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.

137. For the reasons given above, we do not consider that the appellant's supplies at The Quarters during the relevant period fell within the Item 1 exemption.

(2) Similar establishment

138. We turn now to consider whether the supplies made by the appellant fall within the terms of Item 1(d). In other words, is The Quarters a similar establishment to a hotel, inn or boarding house. This issue remains potentially relevant despite our conclusion on Issue 1 because the appellant says that even if the supplies are not prima facie exempt, if Item 1(d) is engaged the appellant is entitled to the reduced rate.

139. It is clear from *Fortyseven Park Street* that we should not give the term "similar establishment" a narrow construction, because it is an exclusion from an exemption.

140. Mr James suggested that the purpose of Note 1(d) is to subject to tax not just supplies by hotels but supplies which are similar to and in competition with or potentially in competition with the hotel sector. The extension to similar establishments was designed to ensure fiscal neutrality and equal treatment. We accept that is right, but it does not help in answering the question whether The Quarters is a similar establishment.

141. The submissions before us focussed on the similarity of The Quarters to a hotel rather than an inn or boarding house. We shall approach the issue in the same way.

142. There is an element of tension in the parties' arguments on Issue 1 in relation to passivity and the arguments on Issue 2. If significant services are provided, the supply may be less passive and less likely to be exempt. On the other hand, it might be said that where more significant services are provided, the more likely it is that The Quarters will be a similar establishment to a hotel. However, as Mr Lemos remarked, that tension is not really relevant to how we should decide the issues. The two issues fall to be decided separately by reference to our findings of fact.

143. Mr James submitted that there are two ways in which a supply in relation to a "similar establishment" might fall within Item 1(d):

> (1) As a result of Note (10) which operates as a deeming provision. It provides that where an establishment provides furnished sleeping accommodation which is used by or held out as being suitable for use by visitors or travellers, the establishment will be a similar establishment to a hotel.
>
> (2) Where the supply is made by an establishment which otherwise falls to be treated as a similar establishment to a hotel.

144. Ms Lemos did not accept that Note (10) was a deeming provision. We do not consider that it is strictly a deeming provision, but little turns on that description, at least for present purposes. In one sense it simply provides a particular instance of an establishment that is similar to a hotel. In any event, 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. If an establishment is not used by visitors and travellers and does not hold itself out as being suitable for visitors or travellers then it is unlikely to be characterised as a hotel, but it could still be a similar establishment to a hotel. What is clear, is that if The Quarters falls within the description in Note (10), it is not necessary to look further to see if it is otherwise similar to a hotel.

145. In relation to the general test for a similar establishment falling within in Item 1(d), we agree with Mr James 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. We did not understand Ms Lemos to disagree with that proposition. The real issue is whether we can be satisfied on the evidence that The Quarters is a similar establishment to a hotel.

146. Against that background, we shall consider whether the appellant falls within the description of a similar establishment in Note (10). Note (10) applies 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.

147. There is no dispute that The Quarters did provide sleeping accommodation.

148. The tribunal in *Acorn* discussed what was meant by a "visitor or traveller" in Note (10). 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.

151. As far as travellers are concerned, 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.

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.

153. Mr James submitted that the studios are aimed at and occupied by people, often young people, who are visiting the UK generally for work or to study. Such occupiers stay for a few weeks or months before returning home or whilst seeking more permanent living accommodation. The nature and quality of such stays marks the occupiers out as visitors. Their stays were not marked by permanence.

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. In doing so, we shall focus on what we consider to be the most significant facts.

156. It is clear from the authorities that the length of stay at the particular premises is a relevant and important factor in determining whether the premises are a hotel or a similar establishment to a hotel. In our view it will also be important in determining whether occupiers are visitors or travellers. However, it is not a determinative factor.

157. We were referred to *Blasi*, which concerned provisions in German law which excluded from exemption lettings for the short term accommodation of guests. The taxpayer provided accommodation to refugee families and entered into agreements for periods of less than 6 months. In fact, the taxpayer told the German authorities that she only wanted tenants who would stay at least 6 months and on average tenants stayed for 14 months. According to German case law, a let was deemed to be short term and therefore taxable if it was for a period of less than 6 months, regardless of the actual length of stay. This appears to have been a broad brush approach to the implementation of Article 135(2), then Article 13B(b)(1) of the Sixth Directive. The taxpayer was assessed to VAT on the basis that the tenancies were short term and therefore taxable.

158. The question referred to the CJEU was whether short term accommodation for guests as defined in German law fell within the exclusion from exemption in what is now Article 135(2)(a) PVD. In other words, whether it was the provision of accommodation in a sector with a similar function to the hotel sector. The question included whether a distinction between taxable and exempt transactions on the basis of the duration of the letting agreement, irrespective of the actual duration of the stay, was compatible with Article 135.

159. We were referred to some passages from the opinion of the Advocate General which are consistent with the judgment of the court and which it is helpful to set out here:

> 16. However, while generally exempting the leasing or letting of immovable property, Article 13B(b) also provides for exclusion of certain transactions from exemption. The common feature of those transactions is that they entail more active exploitation of the immovable property justifying further taxation in addition to that levied upon its initial sale.
>
> 17. With more particular reference to Article 13B(b)(1), it may be noted, first, that its terms, in particular the phrases `accommodation, as defined in the laws of the Member States' and

> `sectors with a similar function', are somewhat imprecise. It seems to me that the intention was to leave the Member States some latitude in defining the precise limits of the exclusion.
>
> 18. Secondly, as already noted, Article 13B(b)(1) lays down an exclusion from the exemption and therefore does not fall to be construed strictly. Indeed it seems to me that the words `sectors with a similar function' should be given a broad construction since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax.
>
> 19. As regards the German provision, it is true that the short-term letting of residential property may not entail all of the additional supplies of goods and services, such as provision of meals and drinks, cleaning of rooms, provision of bed linen etc., normally provided in hotels. Nevertheless, there can be no doubt that a taxable person offering, for example, short-term holiday lets of residential property fulfils essentially the same function as - and is in a competitive relationship with - a taxable person in the hotel sector. The essential distinction between such lettings and exempt lettings of residential property is the temporary nature of the accommodation. In any event, short-term lets are more likely to involve additional services such as provision of linen and cleaning of common parts of buildings or even of the accommodation itself (indeed a number of such services are provided by Mrs Blasi); moreover, they involve more active exploitation of the property than long-term lets in so far as greater supervision and management is required.
>
> …
>
> 21. Moreover, it seems to me that the requirement flowing from the case-law of the Bundesfinanzhof that, in order for the letting of an immovable property to qualify for exemption, there must be an intention, evidenced by a lease or other agreement, to let the property for a minimum period of six months is not unreasonable. It provides a workable and legally certain means of distinguishing between short-term accommodation similar to that provided in the hotel sector and the longer-term letting of residential property for which the Directive provides exemption. A hotel or hostel will be willing to accept guests for potentially short stays, whereas a landlord interested in more passive longer-term lets will require an agreement providing confirmation of the tenant's intention to stay for a longer period. I see no reason to interpret the Directive as imposing a maximum of three months as the Commission suggests.

160. *Blasi* does not give rise to any presumption that stays over 6 months are to be treated as long stays which preclude the premises from being treated as a similar establishment to a hotel. That was simply the broad brush approach that German domestic law took to implementing the exemption. Item 1(d) is intended to achieve the same result but it does so by reference to what is a similar establishment to a hotel rather than any temporal cut-off.

161. The Advocate General in *Blasi* touches upon some of the characteristic features of many establishments in the hotel sector, such as the provision of meals and drinks, cleaning of rooms and provision of bed linen. These are services which may indicate an establishment is suitable for use by visitors and travellers.

162. Mr James also relied on *Acorn* for the consideration it gave to the characteristics of supplies in the hotel sector. These included the provision of accommodation as a main purpose, the provision of food and some element of service, for example the provision of bed linen, regular cleaning and room service.

163. Mr James also relied on HMRC's VAT manual at VATLP11360 and 11370 as providing a helpful guide. It sets out HMRC's view as to the relevant characteristics and functions of a

hotel, inn or boarding house. We agree that the manual provides a helpful guide and Ms Lemos did not suggest otherwise. The manual states as follows:

> **VATLP11360**
>
> The following is a list of characteristics and functions often associated with hotels, inns and boarding houses.
>
> Clearly, for something to be a 'similar establishment' it is not necessary for all the features to be present; in many cases a small number of features will be sufficient to conclude that the establishment is similar to, for example, a basic hotel or boarding house.
>
> 1. The accommodation is provided on a temporary basis, generally to persons who are away from their home. It is accommodation for a transient class of people or people who are temporarily homeless (but see paragraph 2.1, Notice709/3). It is taken with a view to moving on in due course.
>
> 2. The hotel or similar establishment provides the accommodation as its main purpose, generally with a view to making profit. Providing the accommodation represents the main commercial exploitation of the property. In this respect the establishment will differ from one whose function is educate, imprison or provide care and support. Equally, an establishment which aims to provide pastoral care or create a family concept, such as some educational establishments, is unlikely to be a similar establishment.
>
> 3. The hotel or similar establishment will normally provide accommodation on a non-selective basis to persons who turn up and can pay.
>
> 4. They usually provide breakfast. However, this is no longer the case with all such establishments. Some hotel chains, for example, now provide only sleeping accommodation. Breakfast can be provided as a prepared meal or as basic ingredients (a food parcel). The provision of breakfast in the form of a supermarket voucher is not seen as a characteristic of 'hotel' accommodation.
>
> 5. Sleeping accommodation is provided with a range of services and facilities, such as room service, laundry, cleaning of rooms (as opposed to cleaning of common areas), bed making, TV rooms, telephone services, receptionist, etc. The level of services will vary according to the status of the establishment. The service provided in a bed and breakfast establishment, for example, might be very basic, consisting of no more than room cleaning and laundry. This would not in itself prevent it from being treated as a 'similar establishment'.
>
> 6. Residents will normally enjoy a degree of privacy by being provided with their own lockable rooms.
>
> 7. There will normally be a resident manager, proprietor or member of staff on the premises at all times. Some establishments may have annexes where this is not the case. However, management will be contactable at the main premises. Greater supervision and management is a feature of this sort of accommodation.
>
> 8. There is normally a booking service.
>
> **VATLP11370**
>
> The following aspects should also be considered:

• are the rules imposed consistent with those normally found in an hotel, inn or boarding house? For example, can additional overnight guests be invited into the accommodation free of charge? If so, this is not normally a feature of an hotel, and so on

• is the accommodation the main place of residence of the occupant rather than temporary accommodation

• is any form of tenancy agreement entered into, such as that required under the Landlord and Tenants Act? Such a formal agreement would normally be indicative of domestic accommodation. The same applies to formal occupancy agreements

• how is the building treated for rating purposes? Hotels and the like would normally be classed as commercial buildings

• are occupants able to bring their own furniture to the establishment or have phone lines, TV aerials and satellite dishes installed? This would not normally be possible in a hotel or similar establishment

• is the physical appearance of the building consistent with an hotel, inn or boarding house? Does it display a sign indicating the nature of the establishment? Is there any advertising to obtain custom? Care, however, should be taken. Because an establishment has the outward appearance of a boarding house it cannot be automatically assumed to be a 'similar establishment'. It is always necessary to consider whether any other characteristics are present, and

• is the establishment in competition with hotels and the like? For example, does it try to attract a similar type of customer?

164. Mr James submitted that sufficient of these characteristics and functions are shared by The Quarters to make it a similar establishment to a hotel. The only significant differences between The Quarters and a traditional hotel are those necessitated by the longer stays it offers and the need to ensure that it provides a high quality product. He described it as a hotel adapted to the modern world of students, mobile employees and others who want high-end, hotel standard accommodation for a period of weeks or months.

165. In contrast, Ms Lemos submitted that the characteristics and function of The Quarters were more akin to a serviced residential block. In determining this issue, Ms Lemos invited us to look at the analysis of the FTT in *Fortyseven Park Street* at [286-298]. We note that the Court of Appeal held that the Upper Tribunal had been wrong to interfere with the decision of the FTT, because there was no error of law. Whilst we have had regard to those passages, the decision remains a value judgment with which an appellate court will be slow to interfere. Every case must be decided on its own facts.

166. It is notable that the PVD excludes from exemption the provision of accommodation in the hotel sector "or sectors with a similar function". This indicates 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.

167. Mr James also referred us to VAT Notice 709/3 on Hotels and holiday accommodation. It refers to similar establishments as including "motels, guesthouses, bed and breakfast establishments, private residential clubs, hostels, and serviced flats (other than those for permanent residential use)". It is important to construe the statutory language, and not to put a

gloss on that language, whether by reference to HMRC notices or otherwise. The question is not whether The Quarters is a block of serviced flats for permanent residential use. The question is whether it is used or held out as suitable for use by visitors or travellers, or whether more generally it is a similar establishment to a hotel.

168. Unsurprisingly, Mr James focussed his submissions on the points of similarity and Ms Lemos focussed her submissions on the points of difference. However, both parties accept that what is required is a holistic approach to what, in the final analysis is a value judgment. We shall therefore describe what we consider to be the most relevant factors together with our observations on those factors. We shall then look at the matter in the round, taking into account all our findings of fact. Some factors of course carry greater weight than others.

169. It is important to note that the appellant is not suggesting that The Quarters is a hotel, but that it is a similar establishment to a hotel. Further, the term "similar establishment" should be given a broad meaning. At the same time, the rationale for the exclusion from exemption is to ensure fiscal neutrality and equal treatment with the hotel sector. It is only premises which might be said to be in competition or potential competition with the hotel sector that are intended to be excluded from exemption.

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.

171. The majority of occupiers stay at The Quarters for more than 6 months. Some might stay for less than that, with the minimum licence term being 1 month. A significant number are working in London, and occupy on the basis of corporate arrangements between their employer and the appellant. Having said that, such employees may still be described as visitors. Some licence agreements are for less than 6 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. Most occupiers do extend their licences so that their stay is more than 6 months. We do not consider that the period of initial licence agreements itself indicates that The Quarters is used by visitors or travellers. It is however a factor to be taken into account in considering the evidence as a whole.

172. Some hotels will have guests who stay for extended periods of time. The reduced value rule in Schedule 7 recognises the fact that some guests stay in hotels for longer than 28 days. Indeed, some hotels might have a relatively small number of guests who may be said to reside in the hotel.

173. People who wish to stay at The Quarters cannot walk in off the street and book a studio. There is no sign indicating that people can do so. Instead, the appellant relies on marketing via estate agents, property websites and more recently its own website and social media presence. Use of estate agents and property websites is at least indicative that potential occupiers are looking for residential accommodation rather than hotel-like accommodation. However, we accept that some visitors or travellers may use such websites when seeking accommodation.

174. We have set out in our findings of fact illustrations in the marketing material of how The Quarters was presented to potential occupiers. In broad terms, The Quarters is marketed as serving both short term and long term "living experiences" and reflects an establishment that

is similar to a residential block rather than a hotel. However, it includes reference to short term lets, and in some of the material short term is defined as 1-3 months and long term as 3-12 months. In our view, where premises in Swiss Cottage are described as being available for a short term stay of 1-3 months, that is a factor which would make The Quarters suitable for at least some visitors and travellers. Many people visit London for a variety of reasons and they may visit for several months. There are also references in the material to "guests" rather than residents, which suggest that The Quarters is suitable for visitors or travellers.

175. We acknowledge that the appellant's website and other documentation contains references to tenancies and rent. We do not give this much weight in our analysis. However, the form of licence agreements has more in common with residential property than the hotel sector.

176. The planning evidence suggests that in broad terms The Quarters was intended to be akin to a residential block, albeit with a condition that studios should not be equipped as self-contained units.

177. The check-in procedures include requirements for occupiers to show evidence of funds and salary, and in some cases to provide a guarantee. There is a £400 administration fee when entering into a licence agreement and a significant deposit is required. The deposit is held under a residential deposit scheme. These factors suggest that The Quarters is not aimed at very short stay visitors. The licence agreements are not the sort of documents one would expect in an establishment that was a hotel or similar to a hotel. They are more akin to the documents one would have in a residential context. Agreeing an inventory is more consistent with a residential letting. However, people intending to visit London for a period of several months may still consider The Quarters as an option.

178. Overall, the nature of the agreements entered into by occupiers, the checking-in process and the taking of deposits indicates more permanent rental accommodation rather than a hotel.

179. We note the restricted cooking facilities in the studios and the restrictions on overnight guests without permission. Many people may be happy to reside in accommodation which does not have those facilities and is subject to such a restriction. Looking at the rooms themselves, the studios are similar to both large hotel rooms and residential studio apartments. It is relatively unusual for hotels to have any cooking facilities in the rooms themselves, but certainly some hotels do provide such facilities. The cooking facilities that do exist in the rooms and the communal facilities are certainly the sort of facilities some visitors might want. Equally, some individuals who are resident in an apartment block might be satisfied with those facilities.

180. On balance, we consider the studios themselves and the restriction on overnight guests suggests accommodation which has more in common with the hotel sector than the residential sector. Visitors would be less likely to be put off by such restrictions than people intending to make The Quarters their home.

181. The Quarters has a restaurant on site, which is also open to the public. That is a common feature of many hotels and would be useful for visitors and travellers as well as residents. There is no room service as such, but meals can be delivered to the studio door. We do not consider this to be a significant factor, in circumstances where food delivery services will deliver to the door from many restaurants. There was no evidence as to whether third party delivery services are permitted to deliver to the studio door, or must leave their deliveries at reception.

182. Cleaning and housekeeping services are provided and a private gym is available at an additional cost. There is a 24/7 reception desk and onsite maintenance. These are common features in both hotels and some serviced apartment blocks. Occupiers are charged separately for electricity which would be very unusual in the hotel sector.

183. It is relevant that The Quarters is treated as a block of individual dwellings for rating, council tax and insurance purposes. This at least suggests that The Quarters is more akin to a residential block than a hotel. The fact occupiers are charged council tax suggests that they are not properly described as visitors. Visitors would not expect to be subject to council tax. However, from the perspective of an occupier, council tax is included in the licence fee and they have no direct involvement with Camden Council. We do not consider that this is determinative of whether The Quarters is held out as suitable for visitors or travellers, or that it is not generally a similar establishment to a hotel.

184. There was some discussion in submissions as to where occupiers of The Quarters might go if The Quarters was not available. In particular, whether occupiers might go to a hotel, an apartment block or both. Mr James submitted that if some occupiers would go to a hotel that was sufficient to establish The Quarters as similar to a hotel. We cannot easily answer that question on the evidence available. Indeed, the answer rather depends on our overall analysis as to whether The Quarters is a similar establishment to a hotel in the sense that it is in competition or potential competition with the hotel sector.

185. The existence of House Rules does not in itself provide any indication as to the nature of the premises. They can exist in both the hotel sector and the residential property sector.

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).

(3) The reduced value rule

188. It is the appellant's case that even if the supply does not fall within the exemption for supplies of land, without regard to Item 1(d), then the reduced value rule in schedule 7 still applies to the supply. The respondents' case is that it is only where a supply is prima facie exempt, but excluded from exemption by Item 1(d), that the reduced value rule is engaged.

189. The issue arises in this appeal because we have found that the supply is not exempt, but that The Quarters is a similar establishment to a hotel.

190. Ms Lemos submitted that the provisions for valuation in Schedule 7 were an exception to the general rule in section 19(2) that VAT is chargeable on the amount of the consideration. As such they fall to be construed strictly, because the principle that requires an exemption to be given a strict construction applies equally to reduced rates of VAT and reduced values. No authority was cited for that proposition. However, for the reasons which follow we do not need to give a strict construction to the provisions of Schedule 7.

191. Ms Lemos' principal submission was that the purpose of Item 1(d) is to remove from exemption supplies 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.

192. Mr James submitted that there is no basis or rationale for such a construction. Any supply which falls within Item 1(d), whether or not it would otherwise be exempt, qualifies for the reduced rate. As we understand Mr James' submission, it is the fact that supplies are made in relation to a hotel that is significant, not that they would be exempt were it not for Item 1(d).

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.

194. Ms Lemos relied on a passage from the Court of Appeal in *Fortyseven Park Street*. In considering the application of Item 1(d), Newey LJ said this:

> 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 Miss McCarthy 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.

195. We do not consider that this passage addresses the issue in this case. The Court of Appeal was not concerned with the reduced value provisions. It was concerned solely with the question of exemption. That is the context in which Item 1(d) was described as being immaterial if the supply did not in principle fall within the exemption.

196. However, we agree with Ms Lemos' principal submission. In our view, 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.

OVERALL CONCLUSION

197. 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.

DISPOSITION

198. We have determined the appeal in principle, and leave the quantum and effect of our decision to be agreed by the parties. In the event that the parties are unable to agree any consequential matters, either party may refer those matters to the Tribunal within 90 days of the date of release of this decision.

199. 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 14.19A of the Rules of the High Court of Justice 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party.

JUDGE JONATHAN CANNAN
TRIBUNAL CHAIR

RELEASE DATE: 13 FEBRUARY 2023
(Amended due to an administrative error)