[2017] UKFTT 0722 (TC)

TC06136

Appeal number: TC/2015/03521

VALUE ADDED TAX — rentals of holiday accommodation — appellant selling lodges to individuals — guaranteed return rental scheme — whether appellant acting as principal or as agent of individual owners — acting as principal — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILSON LEISURE DEVELOPMENTS LIMITED **Appellants**

- and –

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

Tribunal: JUDGE COLIN BISHOPP
MS JANE SHILLAKER

Sitting in public in London on 13 June 2017, with subsequent written submissions

Mr Dario Garcia, Mishcon de Reya, for the appellants

Mr Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

Introduction

1. The appellant, Wilson Leisure Developments Ltd ("WLD") owns and operates three holiday parks in southwest England. It sells holiday lodges to customers who are generally private individuals and invariably not VAT-registered or, at least, not relevantly VAT-registered. We refer to the customers as "lodge owners". Each lodge is located on a designated plot within one of WLD's parks. In addition to the purchase cost of the lodge the lodge owner ordinarily also pays to WLD an annual site fee and other charges for utility supplies, insurance, maintenance and repairs. There are no restrictions on the length of the periods during a year when a lodge owner may use the lodge, provided that it does not become his or her main residence.

2. The lodge owners may let their lodges, on a short-term basis, to holidaymakers. If they do, they must use one of two schemes devised by WLD. No other method is permitted, and in particular lodge owners are prohibited from letting their lodges themselves, though they may allow their families and friends to use them free of charge.

3. The first scheme is referred to as "casual rental". In this case the lodge owner makes the lodge available to WLD for booking by holidaymakers for a number of weeks determined by the lodge owner. The lodge owner is required, in addition to his ordinary obligations, to pay for, but not arrange, any necessary cleaning, changing of bed linen and the like and to pay WLD 20% of the rent charged to the holidaymaker. Here, WLD arranges for the cleaning, changing of bed linen etc to be done by its own staff or by third parties, and it accordingly incurs costs which it treats as disbursements. It recharges the costs, with VAT, to the lodge owner, accounts for that VAT as output tax and recovers the input tax it incurs. HMRC accept that this accounting method is correct.

4. It is the second scheme with which we are concerned in this appeal. A lodge owner using that scheme, known as "guaranteed rental income" or "GRI", makes his lodge available to WLD for a specified number of weeks in the year—typically 46 or 48—and retains the lodge for his own use for the remaining weeks, which are usually out of season. WLD guarantees that, whether or not the lodge is actually let, the lodge owner will receive a set income, typically 6% of the original cost of the lodge, and itself arranges for its letting to holidaymakers, commonly via a third party booking agent. It also pays all the costs incurred in connection with the lettings, including advertising, the provision of a sufficient quantity of crockery, cutlery, bed linen and towels, cleaning and laundry, utility supplies, maintenance and repair, and historically it claimed credit for all the input tax it incurred on that expenditure.

5. A lodge owner using the GRI scheme is relieved of the obligation to pay site fees or bear any of the other costs which are generally the responsibility of a lodge owner unless the rental income exceeds the amount guaranteed by the scheme. In that case the GRI agreement allows WLD to charge the costs it incurs, as well as site fees and a 20% commission, against the surplus: the lodge owner benefits from the surplus only to the extent that it exceeds the costs WLD has incurred, the site fees and the commission.

6. At first WLD accounted for VAT on the assumption that the income it earned from both schemes was the consideration for a standard-rated supply. In 2010 it submitted a voluntary disclosure by which it sought to recover the output tax previously

declared, arguing that it acted as agent for the lodge owner in each case. HMRC have agreed that it did act as agent for those lodge owners using the casual rental scheme, but they maintain that it acted as principal when letting lodges under the GRI scheme.

7. Lengthy correspondence followed the submission of the voluntary disclosure. At first HMRC did not question WDL's assertion that it was acting as agent, and issued an assessment to recover the input tax incurred on utility supplies for which WDL had claimed credit, on the basis that if WDL was acting as agent the utility supplies had been made to the lodge owners. Later, HMRC had a change of mind and in March 2013 wrote to WDL stating that it was, in HMRC's view, acting as principal and that it should account for output tax on the entirety of the rental charges. The input tax assessment was withdrawn and replaced by assessments for the output tax for which, if HMRC were right, WDL should have accounted in periods following the submission of the voluntary disclosure. The amount in issue, as later adjusted, is in excess of £400,000, though we are not concerned in this appeal with the arithmetical correctness of the assessments. HMRC also imposed, but later withdrew, an inaccuracy penalty.

8. The correspondence continued, but neither party changed its position and the output tax assessments were substantially upheld (there were some minor monetary adjustments) in a formal review of 7 May 2015. WLD appealed to the tribunal against the assessments in June 2015. It raised two arguments: that it acted as agent and not as principal in operating the GRI scheme, and that its transactions came within the scope of the Tour Operators' Margin Scheme. The second of those grounds was later abandoned, and the only issue before us, therefore, is whether WDL acted as agent or principal. However, if we decide that it was an agent, we must also go on to determine whether it was acting for a disclosed or undisclosed principal, since the answer to that question has a bearing on the identification of the consideration on which output tax is due.

9. Before us, WLD was represented by Mr Dario Garcia, and HMRC by Mr Howard Watkinson. We had the written and oral evidence of only one witness, Mr William Wilson, a director of WLD, but were provided additionally with a comprehensive set of documents.

The evidence

10. Mr Wilson described in his statement the basic facts as we have set them out above. There was no real controversy about them, and Mr Watkinson did not cross-examine Mr Wilson on any point. He added that the lodge owners who use the GRI scheme have generally bought the lodge as an investment and the attraction to them is of a guaranteed income without any of the burden of equipping, maintaining and cleaning the lodge themselves, or of finding short-term tenants. WLD imposes a limit on the number of lodge owners on each site who may use the GRI scheme, in order to make it commercially viable; in general no more than one in three may do so.

11. All the lettings made pursuant to the GRI scheme are made through a booking agency. When the GRI scheme was introduced the agency was exclusively the Hoseasons Group Limited ("Hoseasons"), which also set the prices to be charged. Mr Wilson said that he respected Hoseasons' expertise in determining the prices, though occasionally he challenged what was proposed. Hoseasons continue to act as a booking

agency for the lodges, but other agents have more recently been appointed as well, and it is also possible for holidaymakers to book directly with WDL.

12. Of rather greater importance, for the purposes of this appeal, than Mr Wilson's evidence were the agreements between the various participants—WLD, the lodge owners, Hoseasons and the holidaymakers. Both parties laid emphasis on the requirement that the contractual position be respected—as Lord Neuberger put it in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] STC 937 ("*Secret Hotels2"*) at [31]:

> "Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham."

13. There is no suggestion that any of the agreements in this case might constitute a sham, and we need therefore to embark on a detailed description of their relevant provisions. The agreement between Hoseasons and WDL appears to have been prepared by a trained legal draftsman but the remaining agreements clearly were not. They leave much unsaid and in some respects are ambiguous.

14. The first relevant agreement is that between a lodge owner and WDL for the purchase of a lodge. It is expressly stated to be legally binding. It does not, in terms, confer title to the lodge on the lodge owner, nor does it confer the right to place the lodge on WDL's site, and one is left to infer that it is intended to do so. The agreement is expressed to endure for 99 years from the date of delivery of the lodge, with provisions for early termination in certain events. The only clause relevant for present purposes, however, is clause 8, entitled "Letting your lodge":

> "The Lodge Owner may, but is not required to, sublet the Lodge & may do so provided it is conducted through the Park Owner [*ie* WDL]. Details of the Park Owners [*sic*] subletting service may be obtained from the Park Office. The Lodge Owner subletting is responsible for all associated legal obligations including annual gas and electrical testing. These must be carried out by the Park Owner. Where the Park Owner arranges subletting, a charge will be made as set out in the Site Charges List.… Subletting is strictly not allowed unless by prior written agreement from the Park Owner."

15. We were provided with specimens of the GRI agreements, all headed "Guaranteed Rental Income Sub-Letting Agreement" followed by the year. Each begins with the following paragraph, which seems to have remained unchanged save for amendment of the year between, at least, 2009 and 2015:

> "Mullacott Park (the Company) [a footnote indicates that Mullacott Park is a trading name of WDL], upon the Holiday Home owner complying with the following Terms and Conditions, will obtain bookings for the Holiday Home identified below within the 2009 season (and for any subsequent seasons where the Guaranteed Rental Income is for a set number of years/seasons). All processing and administration in relation to advertising, taking bookings, confirming reservations, acknowledging receipt of payment and other related management costs will only be taken from any surplus rental income over and above the agreed GRI (guaranteed rental income) figure."

16. There have been some minor changes of wording in the remainder of the agreement as time has gone by, but we have not detected any of significance and none were drawn to our attention. Clause 10 of the agreement provides, in the 2012 specimen produced to us, as follows:

> "The Holiday Home Owner [*ie* lodge owner] agrees that for 46 weeks made available (which must include all prime weeks), the Guaranteed Rental Income will be £10,400 for a period of 1 year(s), with any subsequent years to be agreed with the Company. The Company will guarantee the agreed figure regardless of the number of bookings received for that lodge over the 46 week period. It is the responsibility of the Holiday Home Owner to establish which weeks are prime weeks for that particular year in which the agreement exists."

17. The figures "£10,400" and "1" have been inserted in manuscript, and we understand they are separately agreed, albeit against the background of the assumed 6% return to which we have referred, with each lodge owner. The requirement that the lodge owner ascertain for himself which are the prime weeks appears to have been imposed because of the lodge owner's residual right to use the lodge during those weeks. The agreement does not make it clear what is meant by "46 weeks made available", and in particular does not indicate whether or not WDL has a licence over, or some similar interest in, the property, during those weeks. The agreement does, however, provide that the lodge owner "may enter into direct bookings but only if monies agreed are paid directly to the Park before the guests occupy." Again, the clause is equivocal in not making it clear whether it applies during the 46 week period, but we are willing to assume in WDL's favour that it does. More importantly, in our view, the agreement does not state, if it be the case, that WDL will be acting as agent for the lodge owner, and it does not authorise WDL to enter into agreements with holidaymakers either in its own name or in the name of the lodge owner; it merely says, in the opening paragraph quoted above, that it will "obtain bookings".

18. Save when the lodge owner arranges a booking himself (which we understood to happen rarely) there is no provision by which he may play any part at all in the selection of the holidaymakers to whom the lodge is to be let, or to refuse to let to a particular applicant; indeed, the indications are that the lodge owner is unlikely even to know who has agreed to occupy the lodge at any time. In essence, whether or not WDL acquires some interest over the lodge, the lodge owner simply hands it over for the requisite number of weeks. WDL alone determines the level of rent to be charged to a holidaymaker; the lodge owner is given no say in the matter at all although we recognise, since a minimum return is agreed and the lodge owner will have only a limited interest in any surplus should there be one, that he is likely to be relatively unconcerned on that score. The agreement imposes some obligations on the lodge owner to ensure that the lodge is maintained to an acceptable standard. A number of other provisions one might expect to see in such an agreement are absent, but their absence does not seem to be material for present purposes. We should, however, set out one further clause:

> "The Holiday Home Owner agrees that a commission of 20% plus VAT will be deducted from each hiring fee to be retained by the Company, but only after the Guaranteed Minimum Rental Figure has been reached. The 20% amount will then apply to all bookings made including those counting towards the Guaranteed Rental Income."

19. It is not altogether clear to us how that clause is intended to work in practice, since it appears to mean that once the guaranteed amount is exceeded it can be eroded by deduction of commission, which is contrary to the purpose of the scheme as it was explained to us. Mr Wilson was unable to help since, he said, in no case have the rentals received exceeded the guaranteed figure and the clause has therefore never been invoked.

20. There is no agreement, properly so called, between WDL and the holidaymaker. Instead, the holidaymaker receives a receipt for the deposit and subsequently the balance of the rental charge, which records the holidaymaker's name and address, the lodge reserved, the beginning and end dates of the relevant period, the number of persons for which the booking has been made, and the amounts paid and due. There then follow the statement that "All our holiday units are strictly NON smoking", following which the recipient is invited to read "our" terms and conditions. A holidaymaker receiving such a receipt could, in our view, take the "our" to refer only to WDL. The document does state that "all our units are privately owned", and it refers to "the owner" or "the owners" on a number of occasions. Although, again, the document could be more clearly worded we are willing to accept that the careful reader would understand that WDL was not the owner of the lodge. He would not, however, be able to determine the identity of the owner from the material provided to him, and would have no means of determining the nature of the agreement between the lodge owner and WDL. In our view a holidaymaker who had read the document could not realistically believe that he had entered into an agreement with the unnamed owner; he would consider, rather, that his agreement was with WDL and that, in case of complaint, he should seek recourse against WDL. We should add, in case of any residual doubt, that there is no separate agreement of any kind between the lodge owner and the holidaymaker.

21. WDL's agreement with Hoseasons, dated in 2012, is described on its face as an agency agreement, and by clause 2.1 the Principal, meaning WDL, appoints Hoseasons "as its sole agents". The lodge owners are not mentioned in the agreement, and there is no indication that, if it be the case, WDL is itself acting as their agent. We are willing to accept that Hoseasons may have been aware that WDL did not own the lodges, since the agreement does not contain any statement to the effect that WDL owns or has a right to occupy the lodges—indeed, it is entirely silent as to any interest WDL has—but it defines "Holiday Homes" as "all accommodation owned, managed or operated by the Principal and listed in Schedule 1 to this Agreement …". Schedule 1 lists a number of lodges on WDL's site, without identifying, directly or indirectly, who their owners might be. The agreement imposes several obligations on WDL, which must ensure that the lodges as well as the site meet certain standards and that holidaymakers are treated correctly; some of those obligations are reflected in the requirements imposed on the lodge owner by the GRI agreement.

The issues

22. In the correspondence to which we have briefly referred above each party raised a number of arguments, and there was shifting of ground on both sides. To some extent that shifting, on HMRC's side, was caused by the rather confusing manner in which WDL's case was put, and it is clear, on any view, that if it was acting as agent only it was claiming credit to which it was not entitled for some at least of the input tax

incurred in acquiring the utility supplies and some other goods and services. However, by the time the hearing began, the principal issue before us was simply whether WDL acted as agent for the lodge owners, or as principal, in the lettings made pursuant to the GRI scheme. HMRC raised two subsidiary issues. The first was this: if WDL could show (the burden being on it) that it was acting as an agent, was it acting in its own name and, if so, what effect did that have on its liability to account for output tax? The second was put in Mr Watkinson's skeleton argument as follows: "If the Appellant can prove that it was acting as an agent and not in its own name a third issue arises: since the Appellant charged VAT at 20% to its customers on its rentals of the lodges under the GRI scheme is the amount charged recoverable in any event?" That issue arises because of the irony, as Mr Watkinson also put it, that WDL claims not to be liable to account for any output tax, yet it has charged that VAT to the holidaymakers. However, for the reasons which follow we do not need to deal with the subsidiary issues.

23. At the beginning of the hearing Mr Garcia said that it did not matter whether WDL was an agent for a disclosed or undisclosed principal, but his position changed somewhat as the hearing proceeded, and there was some disagreement between the parties about whether he was, in reality, raising a new argument. However, Mr Watkinson later provided us with written submissions addressing what he perceived as the new argument, and Mr Garcia replied, again in writing. We shall not dwell on this particular disagreement, not least because it is unnecessary, in view of our other conclusions, to decide the new argument, if that is what it is.

24. For similar reasons it is unnecessary to say very much about the law, although we shall refer to some authorities in what follows. The critical question is simply whether WDL acted as principal or agent in the letting of the lodges to holidaymakers, a question which can be determined only by reference to the relevant agreements and such other evidence as may be material, albeit the authorities to which we shall come throw light on the approach to be adopted.

WDL's arguments

25. Mr Garcia accepted that clause 8 of the purchase agreement, which we have set out above, did not expressly appoint WDL as the lodge owner's agent if he chose to let the lodge but, he said, there was nothing in the clause which was inconsistent with the existence of a principal and agent relationship. Nothing relevant to this appeal could be derived from the agreement between WDL and Hoseasons; rather, the only agreement of significance was the GRI agreement. That, said Mr Garcia, did create the relationship of principal and agent: it provided for WDL, as agent, to secure bookings of the lodge owner's property for reward. The fact that, because of the guarantee, the income earned from the lettings to holidaymakers had to exceed a certain level before WDL earned any reward was immaterial; once that level was achieved WDL took what was properly described as a commission.

26. The information provided to the holidaymaker—not merely the receipt, but also the information provided about the site in a "welcome letter"—made it clear that the lodges were all privately owned, and the holidaymaker would understand that WDL was acting as an intermediary. It was true that the terms and conditions annexed to the receipt provided to the holidaymaker referred to "our contract with you", but they did make it clear that the lodge was privately owned and all of the other indications in the receipt and elsewhere, said Mr Garcia, were that WDL was letting the lodge on behalf

of the lodge owner, and not on its own account. It was immaterial that the name of the owner was not disclosed; an agency may exist even if the counterparty is unaware of it.

27. Mr Garcia relied on various observations of Lewison J, as he then was, in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2009] EWHC 2694 (Ch), [2010] STC 214. In that case the taxpayer company was in the loft conversion business. It was one of several associated companies controlled by Mr Stephen Mills and his family. When the taxpayer was contacted by a prospective customer, Mr Mills visited the customer's home on behalf of an associated company in order to determine what was required. He then produced a quotation, presented on the taxpayer's headed notepaper. The customer was not told how the quotation was made up, and was unaware of the existence of the associated company, or that the taxpayer would subcontract much of the work to self-employed tradesmen. The issue in the appeal was whether the taxpayer provided a complete package, consisting of a finished loft conversion, or whether it merely provided project management services, with the individual tradesmen making separate supplies to the homeowner. The question mattered because most of the tradesmen were not VAT-registered as their turnover was below the registration threshold. The VAT and Duties Tribunal decided that the taxpayer provided the whole package. Lewison J decided that the tribunal's analysis of the contracts was inadequate.

28. At [22] he made the point that it is necessary to identify the supplier, since it is the supplier who is liable to account for any VAT which may be due, and at [23] added:

> "In the present case there is no doubt that the contractors supply services. But to whom do they supply them? Do they supply them to the client or to A1 Lofts? Equally, there is no doubt that A1 Lofts supplies services to the client. But what services do they supply? Are they supplying project management services only, or the whole package? [Counsel for the taxpayer] submits that since the tribunal have made no finding that the contractual documents are a sham, or that the parties have departed from their contractual arrangements, the answers to these questions are to be found in the contractual documents alone."

29. Lewison J then embarked on an analysis of various authorities to which he had been referred, an analysis we do not think it necessary to repeat or summarise, save to quote (as did Lewison J) the words of Jonathan Parker LJ in *Tesco plc v Customs and Excise Commissioners* [2003] STC 1561 at [159]:

> "The terms contractually agreed may not be determinative as to the true nature and effect of the scheme …: it is necessary to go behind the strictly contractual position and to consider what is the economic purpose of the scheme, that is to say 'the precise way in which performance satisfies the interests of the parties' … Economic purpose is not the same as economic effect. The fact that two transactions have the same economic effect does not necessarily mean that they are to be treated in the same way for VAT purposes … Equally, the economic purpose of a contract … is not to be confused with the subjective reasons which may have led the parties to enter into it …."

30. At [47] Lewison J summarised the principles he derived from the authorities he had examined:

> "I would summarise my conclusions as follows:

i) Where two or more persons (call them A and B) are involved in the supply of goods or services to an ultimate consumer (call him C) different contractual structures may entail different VAT consequences …;

ii) Those consequences will follow whether C knows about the contractual arrangements between A and B or not …;

iii) The starting point for determining the true relationship between A, B and C is an analysis of the contractual arrangements between them …;

iv) Where the contractual arrangements are contained wholly in written agreements, this will be a question of construction of the agreements. But a contract may be partly written and partly oral, in which case what the parties said and did may throw light on the extent of their contractual obligations …;

iv) The apparent contractual arrangements will not represent the true relationship between A, B and C if the contractual arrangements are a sham; or if the parties have failed to operate the contractual arrangements; or if the evidence is wholly inconsistent with the apparent contract …;

v) The identification of the true rights and obligations of the parties will be the same, whether the question arises in the context of VAT or in the context of an action for breach of contract; and is the same whether the question arises in a domestic or a European context …;

vi) Having identified the true rights and obligations of the parties, it will then be necessary to decide how those rights and obligations should be classified for the purposes of VAT …;

vii) Sometimes this will be concluded by the terms of the contract themselves; but it may not be …. If it is not then the classification of the parties' rights and obligations for the purposes of VAT may involve the application of particular deeming provisions of the VATA …; or deciding whether the nature of the supply falls within a particular description …; whether there is one contract or more than one …; or in some cases deciding whether on the true construction of a single contract there is one supply or more than one …;

viii) Depending on the true relationship between A, B and C the conclusion might be that A makes a supply to B, who makes an overall supply to C; or A and B may make separate and concurrent supplies to C …."

31. He then explained, at [53], why it was necessary to allow the appeal:

"In my judgment what went wrong was that the tribunal adopted an unstructured approach to the question they were asked to decide; and got off on the wrong foot by taking the view that *Kieran Mullin* [*Kieran Mullin Ltd v Customs and Excise Comrs* [2003] EWHC 4 (Ch), [2003] STC 274] and *Reed* [*Customs and Excise Comrs v Reed Personnel Services Ltd* [1995] STC 588] represented inconsistent approaches. They ought first to have construed the contract; and they should then have asked themselves whether in the light of the facts that they found, the written contract represented the true contract between the parties or was a sham or was otherwise superseded by some different contract. Once they had determined the legal rights and obligations of the various parties, they would then have been in a position to classify them for the purposes of VAT. The process of classification would have required them to determine two interlinked questions: to whom the contractors supplied their services, and what services A1 Lofts supplied to the

> client. Absent a finding of sham or departure from the written arrangements, the construction of the contracts is likely to be the finishing point as well as the starting point. What the tribunal did, in my judgment, was to elide two different stages in the process of legal analysis. They neither construed the contract, nor squarely addressed the question whether the contract, as construed, represented the real bargain between the parties. In those circumstances I consider that the tribunal's reasoning cannot stand."

32. What that analysis shows, said Mr Garcia, is that the critical contract in this case is the GRI agreement between WDL and the lodge owner; what appears in the agreements between WDL and Hoseasons and between WDL and the holidaymaker, or what is said to Hoseasons and the holidaymaker, can cast no light on the terms and effect of that agreement. Properly construed, the GRI agreement authorises WDL to offer the lodge to holidaymakers, on behalf of the lodge owner, and to do so as his agent. It follows that WDL is liable to account for VAT on the commission element only.

HMRC's arguments

33. In the absence of any definition in the relevant legislation—the Principal VAT Directive (2006/112/EC) or the Value Added Tax Act 1994—of an "agent" Mr Watkinson relied on the definition, as he said widely accepted, to be found in *Bowstead and Reynolds on Agency* as follows:

> "the relation which exists where one person has the authority or capacity to create legal relations between a person occupying the position of principal and third parties.... Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen ..."

34. In the classic, simple agency arrangement the agent introduces his principal and the third party, and any resulting contract between the principal and the third party is between them alone, creating neither a right nor an obligation in the agent. There is, rather, a separate agreement between the principal and the agent providing for the scope of the agent's authority and the commission or other reward he is to earn. If, as the grounds of appeal WDL served claim, WDL acted as a disclosed agent it must demonstrate that it created a contractual relationship between the lodge owner and the holidaymaker, and not two distinct contracts, between the lodge owner and itself for the supply of the lodge to WDL, and a further contract between WDL and the holidaymaker for the onward supply of the lodge.

35. The following principles can be derived, said Mr Watkinson, from the judgment of Lord Neuberger (with whom the other justices agreed) in *Secret Hotels2*:

(a) The economic and commercial realities of a transaction are the fundamental criteria for the application of the common system of VAT;

(b) Since the contractual position normally reflects the economic and commercial reality of a transaction, the relevant contractual terms are a factor to be taken into account when identifying a supplier and a recipient,

though bearing in mind that in some cases the contractual terms may not wholly reflect that reality;

(c) When more than one contractual arrangement between different parties fall for consideration, regard must be had to all the circumstances in which the transaction or combination of transactions takes place when assessing the issue of who supplies what services to whom for VAT purposes;

(d) It is necessary to have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense.

36. This case, said Mr Watkinson, was very similar to the VAT and Duties Tribunal case of *International Life Leisure Ltd v Revenue & Customs Commissioners* [2006] UKVAT V19649. The question in that case was whether a tour operator acted as agent or principal in the supply of holiday accommodation. The particular features of the contractual arrangement that the tribunal found to be critical, and which led to the conclusion that the tour operator acted as principal, were that there was nothing in the contract between it and the owners of the accommodation by which the owners were bound by the terms of the agreements between the tour operator and the holidaymakers, that it was the tour operator alone which set the price charged to the holidaymaker, and that the tour operator's reward was the difference between the amount charged to the holidaymaker and the amount the tour operator had agreed to pay to the owner. In other words, it was not a straightforward percentage commission.

37. The effect of the GRI agreement, said Mr Watkinson, was to supply the lodge to WDL in order that WDL could itself let it to holidaymakers. That, alone, was inconsistent with the existence of an agency arrangement. As in *International Life Leisure*, it was WDL which set the price charged to the holidaymaker, and there was no provision binding the lodge owner to the terms on which WDL let the lodge. WDL bore the cost of utility supplies, cleaning, provision of bed linen etc and became entitled to reimbursement only if the guaranteed amount was exceeded, when the excess was shared. Until then, all of the income earned from the letting belonged to WDL.

38. It was not possible, added Mr Watkinson, to disregard the Hoseasons agreement as Mr Garcia had urged us to do. What was particularly telling was clause 5.2 of that agreement:

> "The Principal [WDL] further agrees that the contract between themselves and the Hirer may be on either the 'Basic' or 'Standard' terms (as presented by Hoseasons to Hirers from time to time), and the Principal agrees that Hoseasons will send out the relevant terms to the Hirer on their behalf and that they will be bound by such 'Basic' and/or 'Standard' terms as applicable. Hoseasons may amend or vary the 'Basic' or 'Standard' from time to time at its discretion."

39. The significance of that clause, said Mr Watkinson, was, first, that it revealed the common understanding of Hoseasons and WDL that WDL was letting the lodges as principal and, second, the right conferred on Hoseasons to amend the terms on which bookings took place contrasted with the absence of any corresponding provision in the GRI agreement. Moreover, the existence of the agreement between WDL and Hoseasons was itself an indication that WDL was contracting as principal, since an agent cannot delegate his agency without the consent of his principal: see *De Bussche v*

Alt (1878) 8 Ch 286. There was no evidence, and nothing in the GRI agreement, which indicated that the lodge owners had authorised WDL to engage Hoseasons.

40. The terms and conditions annexed to the receipt provided by WDL to a holidaymaker likewise were consistent only with the existence of an agreement between the holidaymaker and WDL, and not between the holidaymaker and the lodge owner. At clause 12 they expressly referred to "our contract with you" and, even if they did mention the fact that the lodge was privately owned, they did not attempt or purport to create legal relations between the holidaymaker and the lodge owner.

Discussion and conclusions

41. In our view Mr Watkinson is correct, and broadly though not entirely for the reasons he gave.

42. Although neither party addressed us on this point, we have been struck by the unusual nature of the arrangements, to use a neutral term, between WDL and the lodge owners using the GRI scheme. Mr Wilson said in his evidence that in no case has the net rental income actually earned, to date, exceeded the guaranteed amount, from which it follows that WDL has either made a loss, or at best has broken even, in every case. The conclusion we draw is that the underlying purpose of the scheme, from WDL's perspective, is to encourage potential investment purchasers, rather than to operate a rental scheme for its own sake. It may be this factor which has led to its failure to structure the arrangements so that it acts only as the lodge owner's agent.

43. The principal shortcoming of the GRI agreement in this respect is that there is nothing in it which is consistent with the proposition that WDL's role is to let the lodge on behalf of the owner. We have already mentioned the lack of clarity about the meaning of the phrase "46 weeks made available", but in the overall contractual matrix with which we are concerned we have concluded that it can only mean that the lodge owner is required to make the lodge available to WDL in order that WDL can itself let it to holidaymakers. We agree with Mr Watkinson that there is nothing in this agreement, or elsewhere, which could realistically be construed as the appointment by the lodge owner of WDL as his agent to undertake those lettings. Not only is there no express appointment, there is no statement of the scope or extent of WDL's authority—for example whether it is to enter into contracts in its own name or in the name of the lodge owner, whether it has the power to bind the lodge owner to contractual terms, and whether and if so when it must refer to the lodge owner for further authority. Rather, the only realistic conclusion, in our view, is that the lodge owner hands the lodge over to WDL to let it, as WDL thinks fit, during the 46 or 48 weeks for which the agreement provides.

44. The fact that the lodge owner is guaranteed a certain level of income is not, we think, a certain indicator of the absence of agency—we see no reason in principle why an agent should not guarantee that his principal will receive a minimum return—but when there is no direct link between the income actually earned and the reward to the principal the argument that the supposed agent is acting for the supposed principal rather than seeking, on his own behalf, to earn sufficient income to cover his costs and match the guaranteed return is harder to sustain. Here, we do not think such a argument can succeed when there is nothing else to support the proposition that an agency agreement has been created. We accept that the arrangement which would come into

play were the guaranteed amount to be exceeded, ill-defined and confusing though it is, is of a different character, but it cannot, of itself, create an agency when none otherwise exists.

45. We differ from Mr Watkinson about the significance of the Hoseasons agreement. First, we do not read what was said in *De Bussche v Alt* as an absolute prohibition on the delegation of an agency; Thesiger LJ clearly had it in mind that in some circumstances delegation without the knowledge or consent of the principal would be permissible. Second, even though the GRI agreement is silent on the point, the promotional material produced to prospective users of the GRI scheme makes it clear that WDL does arrange lettings through "holiday operators", which we take to include organisations such as Hoseasons. On the other hand, we agree with Mr Watkinson that the agreement clearly does envisage that WDL was itself entering into contracts with the holidaymakers as principal, and that the absence of any imposition on the lodge owners of the obligations imposed on WDL by Hoseasons is inconsistent with the proposition that WDL was acting as their agent.

46. We do not think it significant that the GRI agreement provided for the eventuality that the lodge owner might arrange his own letting in (as we have assumed in WDL's favour) the 46- or 48-week period. It is evident from the remainder of the agreement that any such booking enured to WDL's benefit: the rental had to be paid to it, and unless the guaranteed amount was exceeded, it remained WDL's money. We also do not think it relevant that the holidaymaker might have realised that WDL did not own the lodge. He would not know, and would have no means of discovering, whether WDL had some other interest in it, and the knowledge that WDL was not the owner would not enable him to determine whether WDL was acting as the owner's agent or in some other capacity.

47. For those reasons we are not persuaded that WDL has discharged the burden of showing that it acted as the lodge owners' agent; on the contrary, we are satisfied that it acted as principal in letting the lodges to holidaymakers. In the light of that conclusion we do not think it would be appropriate to consider, hypothetically, the nature of any agency which might have existed had we decided otherwise.

48. The appeal is, therefore, dismissed.

Appeal rights

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

COLIN BISHOPP

TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2017