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Case Number: TC08852

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House
88 Rosebery Avenue
London EC1R 4QU

Appeal reference: TC/2020/00890

*VAT – Tours Operators' Margin Scheme – apartments leased from landlords used to provide short term accommodation to travellers – whether supply by tour operator of designated travel service*

**Heard on:** 23 – 25 January 2023
**Judgment date:** 5 July 2023

**Before**

**TRIBUNAL JUDGE GREG SINFIELD**

**Between**

**SONDER EUROPE LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Jonathan Bremner KC instructed by KPMG LLP

For the Respondents: Andrew Macnab of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This appeal concerns the Tour Operators Margin Scheme ('TOMS'). The TOMS is a special VAT scheme which applies to certain supplies made by travel agents and tour operators for the benefit of travellers. It was created by the Value Added Tax (Tour Operators) Order 1987 ('TOMS Order').

2. From 2017, Sonder Europe Limited ('Sonder') provided accommodation in the UK to corporate and leisure travellers. The accommodation was in the form of self-contained apartments which Sonder had leased from third party landlords. Sonder sublet the apartments to travellers for different periods from a single night to a month or more. During the relevant period, the average stay at a Sonder apartment in the UK was five nights.

3. In VAT accounting periods ending 10/17, 01/18 and 04/18, Sonder accounted for VAT on the basis that its supplies fell within the scope of the TOMS. In 2019, the Respondents ('HMRC') decided that the TOMS did not apply to the supplies made by Sonder with the result that those supplies were chargeable to VAT at the standard rate in the sum of £252,229.29. Sonder challenged this decision and, after it was confirmed on review, appealed to the First-tier Tribunal ('FTT').

4. The only issue in this appeal is whether Sonder's supplies fell within the scope of the TOMS. For the reasons set out below, I have decided that, during the relevant VAT accounting periods, the supplies of accommodation made by Sonder were designated travel services supplied by a tour operator for the purposes of the TOMS Order.

### LEGISLATIVE FRAMEWORK

5. The issue in this case must be determined by reference to the VAT Act 1994 ('VATA') and the TOMS Order. It was common ground that, as the VAT accounting periods under consideration occurred before the exit of the UK from the European Union on 31 January 2020, EU legislation continues to apply.

6. As the UK legislation was intended to implement the mandatory special VAT scheme for supplies by travel agents ('the EU special scheme') in the Council Directive 2006/112/EC (the Principal VAT Directive or 'PVD'), the parties agreed that I must construe the UK legislation conformably with the requirements of the PVD as far as possible. Accordingly, I begin by considering the scope of the EU special scheme described in Articles 306 to 310 PVD. I will then consider whether the provisions of section 53 VATA and the TOMS Order can be interpreted and applied consistently with Articles 306 to 310 PVD. Finally, I will consider how the TOMS, as implemented in the UK by the TOMS Order (interpreted conformably, if possible), applies to the facts of this case.

### EU legislation

7. Article 26 of Council Directive 77/388/EEC ('Sixth VAT Directive') introduced the EU special scheme for travel agents. The Sixth VAT Directive was repealed and replaced by the PVD. The PVD re-enacted Article 26 of the Sixth VAT Directive in Articles 306 to 310. Article 309 PVD addresses the situation where transactions are performed outside the EU (or both inside and outside the EU) and is not relevant to this appeal. The material provisions for the purposes of this case are as follows:

> "Article 306
>
> 1. Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other

> taxable persons, in the provision of travel facilities. This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount.
>
> 2. For the purposes of this Chapter, tour operators shall be regarded as travel agents.
>
> Article 307
>
> Transactions made, in accordance with the conditions laid down in Article 306, by the travel agent in respect of a journey shall be regarded as a single service supplied by the travel agent to the traveller.
>
> The single service shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has carried out the supply of services.
>
> Article 308
>
> The taxable amount and the price exclusive of VAT, within the meaning of point (8) of Article 226, in respect of the single service provided by the travel agent shall be the travel agent's margin, that is to say, the difference between the total amount, exclusive of VAT, to be paid by the traveller and the actual cost to the travel agent of supplies of goods or services provided by other taxable persons, where those transactions are for the direct benefit of the traveller.
>
> …
>
> Article 310
>
> VAT charged to the travel agent by other taxable persons in respect of transactions which are referred to in Article 307 and which are for the direct benefit of the traveller shall not be deductible or refundable in any Member State."

8. It follows from the PVD that the EU special scheme applies to

   (1) transactions carried out by travel agents or tour operators;

   (2) dealing with customers in their own name;

   (3) using supplies of goods or services provided by other taxable persons;

   (4) in the provision of travel facilities; and

   (5) where those supplies are for the direct benefit of the traveller.

9. The EU special scheme does not apply to travel agents and tour operators where they act solely as intermediaries and are merely reimbursed expenditure incurred in the name and on behalf of the customer which has been entered in the supplier's books in a suspense account. The specific exclusion in the EU special scheme for supplies by intermediaries on a reimbursement only basis does not apply in this case.

**UK legislation**

10. Articles 306 to 310 PVD are implemented in UK law by section 53 of the VATA and the TOMS Order.

11. Section 53(1) VATA provides that:

> "53 Tour operators

> (1) The Treasury may by order modify the application of this Act in relation to supplies of goods or services by tour operators or in relation to such of those supplies as may be determined by or under the order."

12. Section 53(2) sets out (without prejudice to the generality of section 53(1)) a series of matters for which an order under section 53 may make provision. Section 53(3) specifies that:

> "(3) In this section 'tour operator' includes a travel agent acting as principal and any other person providing for the benefit of travellers services of any kind commonly provided by tour operators or travel agents."

13. The relevant order is the TOMS Order which, as noted in the Explanatory Note, "introduces with effect from 1 April 1988 a special VAT scheme for supplies by tour operators." At the relevant time, Articles 2 and 3 of the Order defined the supplies which fell within the scope of the TOMS as follows:

> "2 Supplies to which this Order applies
>
> This Order shall apply to any supply of goods or services by a tour operator where the supply is for the benefit of travellers.
>
> 3 Meaning of 'designated travel service'
>
> (1) Subject to paragraphs (2) and (4) of this article, a 'designated travel service' is a supply of goods or services –
>
> (a) acquired for the purposes of his business; and
>
> (b) supplied for the benefit of a traveller without material alteration or further processing;
>
> by a tour operator in a member State of the European Community in which he has established his business or has a fixed establishment.
>
> (2) The supply of one or more designated travel services, as part of a single transaction, shall be treated as a single supply of services.
>
> (3) […]
>
> (4) The supply of goods and services of such description as the Commissioners of Customs and Excise may specify shall be deemed not to be designated travel services."

14. So far as relevant to this appeal, the TOMS applies to:

(1) supplies of goods or services by

(a) a tour operator,

(b) a travel agent acting as principal,

(c) any other person providing, for the benefit of travellers, services of any kind commonly provided by tour operators or travel agents

who is established or has a fixed establishment in an EU member State; and

(2) the goods or services

(a) were acquired for the purposes of the supplier's business; and

(b) are supplied for the benefit of a traveller without material alteration or further processing.

15. The TOMS does not apply to supplies that HMRC have specified as deemed not to fall within the TOMS. During the relevant period, HMRC had not specified that any of the supplies that are the subject of this appeal were deemed not to be within the TOMS.

16. It seems to me that section 53 VATA and the TOMS Order are consistent (or can be interpreted conformably) with Articles 306 to 310 PVD save possibly in one respect. That is the requirement in Article 3(1)(b) of the TOMS Order that goods or services acquired for the purposes of the tour operator's business must be supplied to the traveller without material alteration or further processing. Article 306 PVD merely requires that the supplies of goods or services provided by other taxable persons should be used to provide travel facilities. There is no further requirement that the goods of services should be used in their original state. If necessary then I must decide whether that condition in the TOMS can be interpreted conformably with Article 306 PVD.

17. Another apparent inconsistency is that Article 306 refers to the tour operators acquiring goods and services from "taxable persons". The TOMS Order does not contain any reference to taxable persons but, in relation to supplies of accommodation, there is no difficulty in interpreting the TOMS Order conformably with the PVD for the reasons set out in [69] below.

18. I was also referred to Notice 709/5 which contains HMRC guidance on the TOMS. Some parts of the TOMS Notice have the force of law but the paragraphs that I was shown do not have force of law and I did not find them of any material assistance.

**ISSUES**

19. In order for its supplies to come within the scope of the TOMS, Sonder, which bears the burden of proof, must establish that:

(1) it was a tour operator, as defined section 53(3) VATA; and

(2) its supplies were designated travel services within Article 3(1) of the TOMS Order.

20. A tour operator for the purposes of the TOMS includes a travel agent acting as principal or a person providing, for the benefit of travellers, services of any kind commonly provided by tour operators or travel agents. Sonder did not contend that it was a tour operator or travel agent. Accordingly, it must show that it provided services for the benefit of travellers which were the kind of services that were commonly provided by tour operators or travel agents.

21. To be regarded as making supplies of designated travel services, Sonder must show that it was established (or had a fixed establishment) in an EU member State and that it had acquired supplies of goods and services for the purposes of its business which it supplied for the benefit of a traveller without material alteration or further processing. It was common ground that Sonder was established in the UK which, at the relevant time, was an EU member State.

22. It follows that Sonder was a tour operator for the purposes of the TOMS and its supplies were designated travel services if Sonder:

(1) acquired the accommodation for the purposes of its business;

(2) provided the accommodation

  (a) for the benefit of travellers

  (b) without material alteration or further processing; and

(3) the accommodation was of a kind commonly provided by tour operators.

**EVIDENCE**

23. Sonder served statements from two witnesses who described various aspects of Sonder's business and produced contractual and related documents which I refer to below. HMRC did not produce any witness evidence. The witnesses for Sonder were:

(1) David Gardener, Head of Tax at Sonder; and

(2) Lia Prendergast, General Manager of Dublin and interim UK General Manager.

24. At the hearing, the witnesses' statements stood as their evidence in chief. Although Mr Macnab, who appeared for HMRC, cross-examined both witnesses, there was no substantial dispute as to the facts. I found both witnesses for Sonder to be credible and fully accept their evidence which I have taken into account in my findings of fact below.

25. There was evidence about the current Sonder App which had more functionality than the App in use in 2017-18. As the current App did not come into use until after the period being considered in this appeal, I do not consider it further.

**FACTUAL BACKGROUND**

26. Sonder is a company incorporated and registered in England and Wales. It is part of an international corporate group operating under the 'Sonder' brand. It was registered for VAT in the UK with effect from 12 September 2017.

27. In his witness statement, Mr Gardener said that Sonder's aim was to revolutionise the hospitality industry by using technology, including the Sonder App, which enabled Sonder to provide a better experience for travellers than staying in a traditional hotel. In cross-examination, Mr Gardener accepted that this was Sonder's aim and not the aim of Sonder's landlords. The landlords were not hoteliers and their aim was simply to lease apartments to Sonder. The landlords did not provide any additional services such as the concierge and cleaning services described below.

**Supplies made by landlords to Sonder**

28. When Sonder started its UK operations in 2017 and during the relevant accounting periods, it rented 40 individual apartments from third party landlords. The landlords charged Sonder an annual rent. The rent paid by Sonder remained the same regardless of the number of days the apartments were occupied by travellers. I was shown two tenancy agreements entered into by Sonder. The first in relation to a property called Anglers Lane and a second for a property at Inverness Mews. The tenancy agreements contained the usual provisions that one might expect to see in such agreements. Sonder's use of the property was restricted to residential use. For example, in clause 11.1 of the agreement for Inverness Mews, Sonder agreed:

> "To use the Property only as a serviced apartment for the residential occupation of one or more Occupiers."

29. Approximately 37.5% of the apartments were furnished and 62.5% were unfurnished. Furnished accommodation is accommodation where the landlord provided all the furnishings and the apartment was essentially 'ready to go'. Unfurnished accommodation is accommodation where Sonder was responsible for providing the furniture and similar items (with the exception of white goods, which were always provided by the landlord). The unfurnished accommodation could not be used to provide accommodation until Sonder had furnished it to Sonder's specification. The look and feel of the apartments were very important to Sonder and part of its value proposition was the distinctive Sonder style. Sonder used a third-party sourcing team to add the required items to the unfurnished apartments before making them available to travellers. The furnishings included beds, sofas, armchairs, coffee and side tables, chairs, bookcases and lamps as well as smaller decorative items (rugs, vases and wall art) and basic kitchen utensils.

30. Anything Sonder did to the apartments, whether furnished or unfurnished, was only ever purely superficial and cosmetic in nature. Sonder never made any changes which would have altered the fabric or structure of the apartment or building, such as moving a wall or door or changing windows. The agreements with the landlords typically prohibited Sonder from

making any alterations or additions to the property. In relation to Anglers Lane, the agreement provided that:

> "The Tenant shall not make any alteration or addition to or redecorate the Property."

31. In a small number of cases, in respect of unfurnished accommodation, Sonder arranged for an accent wall to be painted or for other minor decorating to be done. However, this was not typical and it was more common for any work of that nature to be undertaken by the landlord prior to Sonder entering into the agreement with the landlord.

32. Sonder's agreements with the landlords were 'Internal Repairing Insuring' leases. Sonder was responsible for keeping the apartments and any furnishings provided by the landlord as they were when they were first provided to Sonder. For example, if any damage were caused to the accommodation (such as a broken TV or a scratch on the wall), it would be Sonder's responsibility to replace the TV and repair the damage to the wall. In relation to Inverness Mews, the agreement provided that Sonder's obligations included the following:

> "7.1 To keep the interior of the Property (including all the doors, locks, windows and window frames) clean and tidy and in the same state, condition and decoration as at the start of the Term as shown in the Inventory and Schedule of Conditions. The Tenant shall not be liable for fair wear and tear, damage covered under risks insured by the Landlords (as long as the Tenant has not voided the policy in whole or in part), or repairs which are the statutory obligation of the Landlord.
>
> 7.2 To clean and repair or replace (where necessary) any Fixtures and Fittings, including any of the sinks, sanitary fittings, cisterns, drain, waste or soil pipes, or other installations which may be damaged, blocked or broken by any act, negligent or omission on the part of the Tenant or Occupiers
>
> 7.3 To take reasonable precautions to keep all gutters, sewers, drains, sanitary apparatus, water and waste pipes, air vents, and ducts from obstructions.
>
> …
>
> 7.6 To promptly replace all cracked or broken glass with the same quality glass where the breakage was due to the negligence of the Tenant or the Occupiers to the reasonable satisfaction of the Landlord."

33. During the relevant periods, Sonder undertook the following types of repairs: paint touch ups, replacing items that guests had broken, removing stains from carpets and sofas and other minor issues such as fixing a leaky tap. The landlords were, however, responsible for repairs relating to, among others, electrical and plumbing services and the exteriors of the buildings.

34. Between October 2017 and May 2018, Sonder spent approximately £20,000 on maintenance (including painting, maintenance and repairing items damaged by guests). In that same period, Sonder paid approximately £1.5m in rent to landlords.

35. When an agreement ended and an apartment was returned to the landlord, it had to be returned in its original condition, i.e. any walls that had been painted had to be re-painted in the original colour and any items added had to be removed.

**Supplies made by Sonder to travellers**

36. Sonder did not market itself as a tour operator or travel agent. Mr Gardener said that Sonder would typically use the term 'hospitality company' or 'hospitality business' in corporate presentations. Sonder only offered travellers self-catering accommodation. It did not provide any transport services or the opportunity to book travel, eg flights.

37. Sonder used the apartments to provide accommodation to business and leisure travellers for however long they wished to stay. Travellers booked the apartments online on Sonder's website. It was not possible to book through the landlords. The travellers also accessed the apartments by checking-in online on Sonder's website Once security checks had been concluded, Sonder sent an access code to the traveller with instructions on what to expect and how to access the apartment.

38. Sonder did not have staff on site. In the periods under consideration in this appeal, Sonder used a third-party housekeeping company to provide all cleaning and housekeeping services. Apartments were cleaned before the traveller arrived. The apartments were not normally cleaned during a stay unless requested and paid for by the traveller.

39. The apartments had all the normal features of an apartment such as a kitchen, bathroom, living room and a bedroom or bedrooms. The furnishing varied from one apartment to another depending on the size and layout of the apartment. Furnishings would typically include a bed and mattress, bedside unit, mirror, wardrobe, desk and chair, sofa, armchairs, TV, coffee and side tables, bookcases and lamps. There would also typically be decorative items such as a rug, vases, wall art etc. White goods would also be included if the apartment had a kitchen, as would a dining table, dining chairs, crockery and cookware etc.

40. During the relevant period, Sonder did not provide any food or beverages in the apartments apart from items such as tea and coffee in some rooms. However, the apartments were equipped with utensils to enable travellers who provided their own ingredients to cook food for themselves.

41. If guests had any questions about the apartment, eg how to turn down the heating, or required any additional items such as fresh towels or toiletries, they would contact Sonder's 24 hour Hospitality Team by phone, text or email. The Hospitality Team would try to resolve any issues remotely, eg by explaining how to change the heating thermostat. If a traveller required items such as new towels or toiletries, they could be obtained from a self-service 'consumables cabinet' in some apartments or, if the property did not have a consumables cabinet, would be delivered by Sonder staff. In most cases, there was very little interaction between the traveller and the Hospitality Team during the stay.

42. There was no check out procedure. At the end of the stay, the traveller simply left the apartment.

**CASE LAW ON EU SPECIAL SCHEME**

43. I must interpret the TOMS Order in a way that is consistent with the provisions of the PVD. It is appropriate therefore to consider the case law of the CJEU in relation to the scope and application of the special scheme for travel agents in articles 306 to 310 of the PVD and its predecessor article of the Sixth VAT Directive. I was referred to a number of decisions of the Court of Justice of the European Communities ('ECJ') as it then was, now the Court of Justice of the European Union ('CJEU'), all of which are, of course, binding on me.

44. The ECJ explained the reason for the EU special scheme for travel agents and tour operators in Case C-163/91 *Van Ginkel Waddinxveen BV, Reis- en Passagebureau Van Ginkel BV and others v Inspecteur der Omzetbelasting Utrecht* [1992] ECR I-5273 ('*Van Ginkel*') at [13] – [15]:

> "13. The services provided by these undertakings most frequently consist of multiple services, particularly as regards transport and accommodation, either within or outside the territory of the Member State in which the undertaking has established its business or has a fixed establishment.

> 14. The application of the normal rules on place of taxation, taxable amount and deduction of input tax would, by reason of the multiplicity of services and the places in which they are provided, entail practical difficulties for those undertakings of such a nature as to obstruct their operations.
>
> 15. In order to adapt the applicable rules to the specific nature of such operations, the Community legislature set up a special VAT scheme in Article 26(2), (3) and (4) of the Sixth Directive."

45. In *Van Ginkel*, the taxpayer was a tour operator and travel agent which offered its customers 'motoring holidays' in the Netherlands. The customers provided their own transport in that they travelled using their own vehicles. The tour operator arranged accommodation for its customers in bungalows, most of which were owned by third parties. The third parties agreed to put the bungalows at the tour operator's disposal for a 'tourist season'. In return, the tour operator charged its customers a commission of 20% of the letting price. The tour operator charged VAT on the commission but not on the letting price and accounted for that VAT. When the tour operator provided accommodation in one of its own bungalows, it charged and accounted for VAT on the total amount of the price invoiced to the customer for the letting. The Dutch tax authorities took the view that the provision of accommodation in a bungalow belonging to a third party was a supply of the letting of holiday accommodation by the tour operator which should account for VAT on the full amount charged to the customer.

46. In *Van Ginkel*, the CJEU held at [21] - [24]:

> "21. Article 26(1) of the Sixth Directive makes the application of that article subject to the condition that the travel agent shall deal with customers in his own name and not as an intermediary. …
>
> 22. On the other hand, Article 26(1) of the Sixth Directive does not contain any provisions expressly requiring that, for the application of the special system of VAT envisaged by Article 26, the transport of the traveller to and from his accommodation shall be arranged by the travel agent.
>
> 23. Such a requirement would run counter to the aims of Article 26 of the directive. As has already been indicated, those provisions adapt the rules governing VAT to the specific nature of the operations of travel agents. To meet the needs of customers, such agents offer widely differing types of holidays and journeys, allowing the traveller to combine, as he wishes, transport, accommodation and any other services which those undertakings may provide. The exclusion from the field of application of Article 26 of the Sixth Directive of services provided by a travel agent on the ground that they cover only the accommodation and not the transport of the traveller would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller. Such a tax system would fail to comply with the aims of the directive.
>
> 24. The fact that the travel agent provides only holiday accommodation for the traveller is not, in these circumstances, sufficient to exclude that service from the field of application of Article 26 of the directive. Moreover, … the service offered by the agent, even where it is restricted to providing accommodation, need not be confined in such a case to a single service, since it may comprise, apart from the letting of the accommodation, services such as information and advice where the travel agent provides a range of holiday offers and the reservation of accommodation. There is therefore no reason to exclude such services from the field of application of Article 26 of the Sixth Directive, provided, however, that the owner or manager of the accommodation with whom the agent has concluded an agreement is himself,

> as required by the provisions of Article 26(1) of the Sixth Directive, a taxable person for the purpose of VAT."

47. Notwithstanding the fact that it is aimed at simplifying the application and administration of VAT on supplies by travel agents and tour operators, the EU special scheme is not restricted to supplies with an international element. This was made clear by the ECJ in Joined cases C-308/96 and C-94/97 *Customs and Excise v Madgett and Baldwin (t/a Howden Court Hotel)* [1998] STC 1189 ('*Madgett and Baldwin*') at [19]:

> "Although the principal reason for the special margin scheme under Article 26 of the Sixth Directive is the existence of problems in connection with travel services which include elements in more than one Member State, the wording of that provision is such that it applies also to supplies of services within a single Member State."

48. The ECJ in *Madgett and Baldwin* also held, at [20] - [23], that the special scheme in Article 26 of the Sixth Directive applies to traders who are not travel agents or tour operators within the normal meaning of those terms where they engage in identical transactions in the context of another activity, such as that of a hotelier (as in that case).

49. The CJEU made the point again in Case C-200/04 *Finanzamt Heidelberg v ISt internationale Sprach- und Studienreisen GmbH* [2006] STC 52('*ISt*'). That case concerned a company which organised international language study and learning programmes called 'High School' and 'College' which included, inter alia, a period of between three and 10 months' language study abroad. In [22] of *ISt,* the CJEU stated that the EU special regime applies to persons who provided relevant services even if they are not travel agents or tour operators in the normal sense of the term because to "interpret art 26 of the Sixth Directive as applying solely to traders who are travel agents or tour operators within the normal meaning of those terms would mean that identical services would come under different provisions depending on the formal classification of the trader." The CJEU, at [24], stated that "it must be found that iSt provides services which are *identical or at least comparable to* those of a travel agent or tour operator" (emphasis supplied). In [34], the CJEU considered what was meant by 'travel' in Article 26 of the Sixth VAT Directive. The CJEU held:

> "34. It is true that that article does not include a definition of the concept of travel. However, in applying that article there is no need to set out in advance the factors constituting travel. That provision applies provided that the trader in question is a trader for the purposes of the special scheme for travel agents, acts in its own name and uses in its operations supplies and services provided by other taxable persons."

50. Mr Bremner, who appeared for Sonder, relied in particular on Case C-552/17 *Alpenchalets Resorts GmbH v Finanzamt München Abteilung Körperschaften* [2018] ("*Alpenchalets*"). Alpenchalets rented houses in Germany, Austria, and Italy from their owners and subsequently let them, in its own name, to individual customers as holiday rentals. In addition to accommodation, the services included the cleaning of the accommodation and, in some cases, a laundry and 'bread roll' service which were provided by the owners or their agents. The CJEU was asked to consider whether Alpenchalets' supplies of holiday accommodation only or holiday accommodation with the additional services fell within the EU special scheme. In [25], CJEU confirmed that the supply of accommodation bought in from third parties, without more, falls within the EU special scheme:

> "… the mere supply of accommodation by a travel agent can be covered by the special scheme. In order to meet the needs of customers, travel agents offer widely different types of holidays and journeys, allowing the traveller to combine, as he wishes, transport, accommodation and any other services

> which those undertakings may provide. The exclusion from the field of application of Article 306 of the VAT Directive of services supplied by a travel agent on the sole ground that they cover accommodation only would lead to a complicated tax system in which the VAT rules applicable would depend upon the constituents of the services offered to each traveller. Such a tax system would fail to comply with the aims of the Directive."

51. The CJEU stated in [29] that:

> "… although any service whatsoever supplied by a travel agent which is unrelated to a journey does not fall under the special scheme … the supply by a travel agent of holiday accommodation comes within the scope of Article 26, even if that service covers accommodation only and not transport."

52. The CJEU gave its answer to the national court's first question in [35]:

> "… Articles 306 to 310 of the VAT Directive must be interpreted as meaning that the mere supply by a travel agent of holiday accommodation rented from other taxable persons or such a supply of a holiday residence combined with the supply of additional ancillary services, regardless of the importance of those ancillary services, each amount to a single service covered by the special scheme for travel agents."

53. The second question referred in *Alpenchalets* concerned the interaction of the EU special scheme and the reduced rate for holiday accommodation. That is not an issue in this appeal.

54. I was also referred to the decision of the FTT in *The Squa.re Limited v HMRC* [2023] UKFTT 00051 (TC). In that case, the Appellant provided serviced apartments, which it had leased from landlords, to travellers. The Appellant also provided online/telephone concierge and cleaning services which, in the main, it bought in from third parties. It appears that HMRC agreed or, at least, never disputed that the Appellant's supplies fell within the TOMS and the appeal proceeded on that basis. Mr Macnab said that it was unfortunate that the issue of whether the Appellant's supplies were within the TOMS was not addressed in that case. He told me that the case had not been passed up the chain sufficiently quickly. Whatever the reason, whether the TOMS applied was not discussed in *The Squa.re Limited* and, in the absence of any discussion, I do not find the decision of any assistance in relation to the issue that I must decide in this case.

**SUBMISSIONS**

55. In brief, Mr Bremner, who appeared for Sonder, submitted that it was a tour operator because its position was indistinguishable from that of the tour operators in *Van Ginkel* and *Alpenchalets*. Just like them, Sonder bought in supplies of accommodation from the landlords and made onward supplies of that accommodation to travellers.

56. Mr Macnab, who appeared for HMRC, said that HMRC accepted that a single supply of bought-in holiday accommodation can be sufficient to bring a trader within the TOMS provided that the other conditions in the TOMS Order were met. HMRC also accepted that Sonder provided short term travel accommodation in the apartments which it leased from the landlords. HMRC's case, however, was that renting exempt residential accommodation and then subletting it to travellers does not fall within the TOMS.

57. Sonder leased the apartments from the landlords for a term of years for an annual rent. The landlord's supply was an exempt supply of land, ie the apartments, for residential purposes. Sonder used the property to make supplies of short term accommodation to travellers which was, in principle, subject to VAT. Mr Macnab submitted that the landlord did nothing but make a bare supply of accommodation to Sonder and played no part in Sonder's supplies of the furnished and serviced apartment to travellers. He said that Sonder's supplies did not fall

within the TOMS on the facts because Sonder did not make onward supplies of the leased residential accommodation but used the leased property to make in-house supplies of travel accommodation. Mr Macnab's primary case was that a trader who made supplies of travel accommodation from its own resources was, at first sight, a hotelier and not a tour operator.

58. Mr Macnab also contended that the supply by the landlord was not on-supplied by Sonder or, if it was, it was materially altered or processed when it changed from an exempt supply of land to a supply of accommodation to travellers subject to VAT. In using the leased apartments for short term accommodation, Sonder transformed the landlord's supply from one of exempt land for residential occupation into a standard rated supply of hotel accommodation. It was particularly the case that the landlord's supply was subject to alteration or further processing where there was a lease of unfurnished accommodation that had to be furnished by Sonder before it could use it to make supplies of accommodation to travellers.

59. In response to Mr Bremner's reliance on *Van Ginkel* and *Alpenchalets*, Mr Macnab said the taxpayers in those cases were established tour operators that acquired existing holiday accommodation from the owners for a season or limited period of time and used that holiday accommodation to make onward supplies of holiday accommodation to travellers. Mr Macnab contended that, in the cases discussed above, the CJEU was considering supplies of holiday accommodation and not the supply of land or property simpliciter.

60. Mr Bremner submitted that the CJEU in *Alpenchalets* made no mention of the nature of the accommodation supplied to Alpenchalets or the terms on which it was rented. He said that Sonder's activities were identical to Alpenchalets' business. Mr Macnab said that the CJEU in *Alpenchalets* was merely re-affirming what it had said in *Van Ginkel*. Mr Macnab relied on the fact that Alpenchalets, through the owners, provided the cleaning and, in some cases, laundry and "bread roll" services. He emphasised that the CJEU had assumed that the supply by the owners was a supply of holiday accommodation.

**DISCUSSION**

61. In essence, HMRC's case was that, to come within TOMS, a trader must have bought in holiday or hotel accommodation which the trader then uses to make onward supplies of such accommodation to travellers. Sonder leased the apartments from the landlords for a term of years with no stipulation that they must be used for the provision of accommodation for travellers. Sonder used the leased apartments to make supplies of short term accommodation to travellers. Mr Macnab's submission was that those supplies did not fall within the TOMS because they were supplies made from Sonder's own resources.

62. I do not accept Mr Macnab's submission that in order for a supply of holiday accommodation to fall within the TOMS, the tour operator must have bought in holiday accommodation. I do not find that requirement in the EU special scheme as set out in the PVD or in the TOMS Order. Nor, in my view, can it be inferred. Article 306 of the PVD simply refers to "supplies of goods or services provided by other taxable persons [which are used] in the provision of travel facilities". The TOMS Order states that goods or services acquired for the purposes of the tour operator's business and provided for the benefit of a traveller without material alteration or further processing are within the scope of the TOMS. In neither case is there any further requirement that the bought-in supplies must be identical to the supplies provided by the tour operator to the traveller.

63. Although it may be that the bungalows in *Van Ginkel* were holiday accommodation or second homes rather than ordinary residential property used for holidays, that fact is not mentioned in the judgment. The ECJ referred to "holiday accommodation" in [24] and [27] but that only referred to what was provided by the travel agent and not by the landlords. In *Alpenchalets*, the Advocate General referred to the properties as "houses" and the CJEU used

the term "residences". The only mention of "holiday accommodation" and "holiday rentals" again referred to the supplies made by Alpenchalets Resorts GmbH and not the supplies by the owners. I conclude that whether the bought-in accommodation was or was not "holiday accommodation" was not a factor in the ECJ's reasoning in *Van Ginkel* and *Alpenchalets*.

64. In my view, the nature or characteristics for VAT purposes of the goods and services supplied by third parties to the tour operators do not determine whether onward supplies fall within the TOMS. The purpose to which the apartments had been put by the landlords was irrelevant to the VAT treatment of the onward supply of those apartments by Sonder.

65. In order to be a designated travel service and come within the TOMS, the TOMS Order only requires that the right to use the apartments was acquired by a tour operator for the purposes of its business before being supplied for the benefit of a traveller without material alteration or further processing.

66. The first question is whether Sonder was a tour operator for the purposes of the TOMS. It is clear from *Madgett and Baldwin* and *ISt* that the terms 'travel agent' and 'tour operator' are to be interpreted broadly. Any business that provides services which are the same as or comparable to those provided by travel agents or tour operators within the normal meaning of those terms is itself a travel agent or tour operator for the purposes of the EU special scheme. That is reflected in section 53(3) VATA.

67. The apartments were used by Sonder as serviced apartments for the residential occupation of travellers. There was no suggestion that the apartments were used as permanent or long term accommodation and, during the relevant period, the average length of stay was only five nights. Sonder used the apartments to provide temporary accommodation for persons who did not reside in them as their homes. I conclude that such persons were travellers and the apartments were, therefore, travel facilities (in the terms of Article 306 PVD) and for the benefit of travellers (as required by section 53(3) VATA). I also find that the provision of accommodation in self-contained apartments is the type of service that was commonly provided by tour operators or travel agents. Indeed, I did not understand Mr Macnab to contend otherwise. I conclude that Sonder was a tour operator for the purposes of the TOMS during the relevant period.

68. The next requirement is that Sonder acquired the apartments for the purposes of its business. It was common ground that Sonder was established in an EU member State, namely the UK, during the relevant period and carrying on a business of providing accommodation in serviced apartments. It is clear (and was not disputed) that Sonder entered into the tenancy agreements with the landlords for the purposes of Sonder's business, ie to let the apartments to the travellers. I find that Sonder acquired services (leased apartments) provided by the landlords for the purposes of its business.

69. Article 306 PVD makes it a condition of the EU special scheme that the supplies of goods or services to be used by the travel agents in the provision of travel facilities must be provided by other taxable persons. That condition is not found in the TOMS Order but I do not need to decide whether that is significant in this case as the landlords were taxable persons for the purposes of the PVD. Article 9(1) PVD defines 'taxable person' as any person who, independently, carries out in any place any economic activity. The definition of 'taxable person' in the PVD does not require the person to be registered for VAT or to make supplies that are chargeable to VAT at a positive rate. The second paragraph of Article 9(1) states that the exploitation of tangible property for the purposes of obtaining income therefrom on a continuing basis in particular is regarded as an economic activity. Accordingly, there can be no doubt that the landlords who leased the apartments to Sonder were taxable persons for the purposes of the PVD.

70. In order to be a designated travel service, Sonder must have provided the apartments for the benefit of travellers without material alteration or further processing.

71. Article 3(1)(b) of the TOMS Order provides that any goods or services acquired from a third party must be supplied by the tour operator for the benefit of a traveller without material alteration or further processing. I have already found in [67] that the apartments were supplied for the benefit of travellers. The remaining question is whether they were supplied without material alteration or further processing.

72. I have already concluded in [62] to [65] that the fact that the terms on which the landlords let the apartments to Sonder and Sonder let them to the travellers and that the VAT treatment of their respective supplies were different did not mean that Sonder had not made onward supplies of the apartments for the purposes of the TOMS. For similar reasons, I consider that a change from letting the apartments for a term of years as accommodation, to letting them as, as Sonder did, for holiday accommodation did not amount to material alteration or further processing.

73. In my view, the object of the alteration or processing must be the thing supplied, ie the apartment, not the characterisation of the supply for VAT purposes. In *ISt*, the German government submitted that the EU special scheme should not apply to exempt services of language training and education which formed part of the programmes offered. The CJEU rejected this argument in [39] as follows:

> "There is nothing to suggest that the application of [the EU special scheme] is dependent on such a condition. It should be noted that in respect of operations involving bought-in supplies and services for which traders should be taxed under that article, the only relevant criterion is whether or not the travel service is ancillary."

74. The CJEU's response in *ISt* shows that the EU special scheme still applies even where an exempt supply to a tour operator changes to a supply chargeable to VAT, albeit on the margin, when supplied by the tour operator as part of travel facilities. It follows that the correct question in this case is whether the apartments themselves, and not the tax status of their supplies, were materially altered or further processed before they were supplied by Sonder to the travellers.

75. I was referred to three decisions of the VAT and Duties Tribunal relating to the meaning of "material alteration or further processing" but I did not find them particularly useful as they turned on their facts as this case must do.

76. It seems to me to be clear from the nature of the TOMS that "material alteration or further processing" must refer to more than minor changes or processes which do not affect the fundamental character of the particular goods or services. It would be absurd as well as impracticable if any minor change or processing excluded a bought-in supply from the TOMS. In order to be excluded from the TOMS, I consider that the alteration and processing must change the goods or services supplied so that what is supplied by the tour operator cannot be described in the same terms as the items acquired.

77. I do not consider that it matters whether the apartments were furnished or unfurnished when they were acquired by Sonder. In both cases, Sonder supplied the apartments to the travellers without changing their structure. The evidence shows that any changes that Sonder made to the apartments were cosmetic or decorative., such as painting a wall or providing furnishings and decorative items. In the case of the unfurnished apartments, Sonder additionally acquired the furnishings which were needed to enable it to provide the apartment to the travellers. The nature of the changes that were made were such as they could be reversed

simply by removing the items of furniture or re-painting a wall. In my view, such changes cannot be described as material and do not amount to processing of the apartment.

78. The UK notion of alteration and further processing does not appear in Directive. Nowhere in ECJ case law does it say that bought-in supplies that are altered or subject to processing must be excluded from the EU special scheme. As I have concluded that furnishing an apartment did not constitute a material alteration to that apartment or further processing of it, I do not need to consider whether the exclusion from the TOMS of goods or services which have been materially altered or processed by the tour operator is consistent with the EU special scheme in the PVD.

79. Finally, I have already found, in [67] above, that the provision of accommodation in self-contained apartments is the type of service that was commonly provided by tour operators or travel agents.

80. I conclude that, during the relevant periods, Sonder was a tour operator as defined in section 53(3) VATA and its supplies were designated travel services within Article 3(1) of the TOMS Order.

**DISPOSITION**

81. For the reasons set out above, the appeal is allowed.

82. I am grateful to Mr Bremner and Mr Macnab for their helpful presentations, both written and oral, of the issues in this case.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

83. 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.

**JUDGE GREG SINFIELD**
**CHAMBER PRESIDENT**

**Release date: 05th JULY 2023**