



[2019] UKFTT 581 (TC)

TC07375

VAT – Flat Rate Scheme – allowable input tax – regulations 55A and 55E of the Value Added Tax Regulations 1995 - whether or not supplies relating to escape room games were capital expenditure goods with a value of more than £2,000 – yes in respect of supplies of rooms, sets and props – no in respect of miscellaneous supplies – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03556

BETWEEN

THE GREAT ESCAPE GAME LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MR JOHN ADRAIN**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 3
May 2019**

Mr John Waining, Accountant, for the Appellant.

**Mr Bernard Haley, Presenting Officer of HM Revenue and Customs’ Solicitor’s Office,
for the Respondents**

DECISION

INTRODUCTION

1. As its name suggests, The Great Escape Game Limited (“Great Escape”) operates a game whereby players are locked in a themed room and must navigate various puzzles and tasks in order to unlock the room and “escape”. This appeal relates to HMRC’s decision to disallow input tax claimed in respect of the rooms and their contents (“the Rooms”) whilst Great Escape was on the flat rate scheme. In short, the dispute is as to whether or not the Rooms were capital expenditure goods of more than £2,000.

FINDINGS OF FACT

2. We heard evidence on behalf of Great Escape from Mr John Waining (Great Escape’s accountant) and Ms Hannah Duraid (a director of Great Escape). We also heard evidence on behalf of HMRC from Ms Kelly Symonds (the decision-making officer). We are of the view that all witnesses were clearly honest, credible and doing their best to assist the Tribunal.

3. We make the following findings of fact. In doing so, we bear in mind that the burden of proof is upon Great Escape to establish that it is entitled to the input tax claimed. We also bear in mind that the standard of proof is that of the balance of probabilities.

4. By a notice dated 16 November 2015, HMRC approved Great Escape’s application to use the flat rate scheme for VAT with effect from 1 October 2015. On 21 November 2016, Great Escape withdrew from the flat rate scheme as its turnover exceeded the £230,000 upper limit for using the scheme.

5. Great Escape operates its business from two sites in Sheffield. A further site in Leeds is operated by a connected company. The invoices which are the subject of this dispute solely relate to the two Sheffield sites run by Great Escape itself.

6. Ms Duraid gave evidence as to the get up of the Rooms. She said that the Rooms have panels attached to stud walling. Fibreglass parts then go into the panel to act as part of the puzzles or as sets and props to support the theme. Screens are also fitted into the panels to act as monitors for playing visual and audio media and giving instructions. Other sets and props are located within the Room, again as puzzles or to support the theme and to immerse the players in the game. There may also be doors, gates or suspended ceilings. Speakers and lighting are in the ceilings and can be triggered at various points during the game. Other interaction is provided using electronics. In principle, the Rooms (including the panels) could be dismantled and reinstalled elsewhere; for example if something happened to the building. An example of a Room was called “Mad Scientist” in which there was a periodic table with LED lights, cabinets of bubbling liquids and Bunsen burners. Further examples of themes were “Alcatraz”, “the Underworld” and “Devil’s Playground”. Mr Haley did not suggest that this explanation was not a fair reflection of the Rooms and we accept Ms Duraid’s evidence in this regard.

7. Ms Duraid also gave evidence as to how the Rooms are created. She said that Great Escape’s creative team research potential themes and puzzles for the Rooms and design the look of the props and the role of those props in the puzzles. These are reduced to a plan and a computer aided design drawing. At that point, the designs are passed to Norse Sky Limited (“Norse Sky”) who manufacture the Room. Norse Sky convert Great Escape’s designs into manufactured items using, amongst other things, computer-controlled machinery. Ms Duraid said that Great Escape are the designers and Norse Sky are the builders. Norse Sky incorporate into their manufacture compliance with health and safety and other regulations. Norse Sky then installed the Room at the sites.

8. An example of the electronics provided by Norse Sky is set out in the following narrative contained within an invoice dated 27 May 2016.

“ROUND TABLE ELECTRONICS

50% Deposit

Push button switch outside the room will be pressed to start the lighting and FX. If pressed and held for 3s this will end the game (All lighting full up, Audio OFF).

Players enter room, ambient audio of castle sounds are playing and continue to loop randomly along with DMX lighting (needs specifying), orange spot in fireplace etc.)

If a player approaches the suit of armour a Range Finder sensor (Long) will trigger one of 3 scripted vocal lines will be triggered [sic] and played back via a single transducer inside the suit of armour helmet. Once each of the 3 lines has been replayed this feature will disable until the system is reset (to avoid repeating the same lines.).

Players solve physical puzzles to gain access to a sub-room which contains the Sword and a set which requires 4 unique rune stones to be placed in the correct locations (detected by range finders, short).

When all 4 stones are correctly placed, this triggers the Fanfare Sound FX and a DMX spotlight above the sword to illuminate. The Sound Stage Motor controller then releases 2 electro magnets which allow the sword to be pulled from the stone.

This ends the game.

Ambient audio will continue to loop until manually stopped by the operator.

Sound triggered when bookcase is opened.

Sound triggered when picture frame is opened.”

9. Ms Duraid accepted that there was some limited element of design involved in Norse Sky’s work but that the vast majority of the design was by Great Escape itself. Ms Duraid stated as follows in her witness statement.

“The agreement with Norse Sky Limited was that no charge would be made for the work they performed on the design side on the condition that the manufacture and installation of the room was performed by Norse Sky Limited.”

10. We accept and find as facts Ms Duraid’s evidence as set out in paragraphs 6 to 9 above and in particular as to how the Rooms are created and Sky Norse’s role in that process. This is for the following reasons.

11. First, we note that Ms Symonds’ written evidence was that Norse Sky was primarily providing consultation, design and installation of the Rooms, with the provision of the goods (which she defines as props and sets) as being incidental. In the course of her oral evidence, Mr Waining put to Ms Symonds that it was Great Escape that was doing the designing. She replied that Norse Sky was still providing a design service in some capacity and that the installation and labour were certainly services. However, Ms Symonds was effectively providing her own opinion as to the way in which the facts should be analysed. We do not criticise her for this as she was explaining how and why she reached her decision to disallow the input tax. We deal with our own analysis of the consequences of these facts below.

However, she was not presenting (and in fairness to her was not purporting to present) her own factual evidence to dispute the primary facts presented by Ms Duraid.

12. Secondly, we find that Ms Duraid was an honest and helpful witness.

13. Thirdly, there was no documentary or other evidence to contradict what Ms Duraid said. Mr Haley properly and fairly put HMRC's case to her that Norse Sky was providing a service and that the design was joint. Ms Duraid stood firm and did not accept this.

14. Fourthly, we note that it was not suggested by HMRC that Ms Duraid was incorrect in her witness evidence that Norse Sky agreed not to charge for design.

15. We also find as a fact that (with the exception of the supplies referred to at paragraphs 24 and 25 below) Great Escape purchased from Norse Sky a number of finished installed Rooms and (where it was not the whole Room being purchased) sets and props installed in a Room. Great Escape was not, therefore, purchasing separate design, manufacturing and installation services or materials. We reach this finding because Ms Duraid said that Great Escape made payment to Norse Sky for everything and their builders installed the Room. Further, Ms Duraid's evidence was that the bulk of the costs were in the manufacture and HMRC did not produce any evidence to detract from this.

16. We also reach this finding in respect of the finished installed Rooms because Norse Sky's invoices are primarily based upon stage payments for Rooms as a whole. The invoices are divided between sets and props on the one hand and electronics on the other. However, we find that the invoices should all be taken together as a whole because their dates establish that the supplies are being made at the same time in the course of the same projects, by the same supplier and all pursuant to Great Escape's designs.

17. By way of example, an invoice dated 20 May 2016 in the sum of £20,934.28 plus £4,186.85 VAT included the following narrative descriptions:

“40% deposit payment for the design, manufacture and installation for the Hell puzzle room.

...

40% deposit payment for the design, manufacture and installation for the Round Table puzzle room.

...

40% deposit payment for the design, manufacture and installation for the Grave Robbers puzzle room.

...

40% deposit payment for the design, manufacture and installation for the Die.com puzzle room.”

18. Remaining stage payments for the Hell puzzle room, the Round Table puzzle room and the Grave Robbers puzzle room were invoiced on 11 July 2016 and 1 October 2016. It appears that the Die.com puzzle did not proceed as a credit for the deposit was given on an invoice dated 3 November 2016. Electronics for the Hell Room, Round Table Room and Grave Robbers Room were divided between a 50% deposit on an invoice dated 27 May 2016 a 50% deposit for additional electronics on 17 June 2016 and a completion payment for the remaining 50% of all electronics on 3 September 2016.

19. By way of further example, the same was the case for Rooms known as “The Asylum” and “Battle Sub Pair”. An invoice dated 3 November 2016 in the sum of £14,829.76 plus

£2,965.95 VAT (after the application of credit in respect of the Die.com puzzle) and included the following narrative descriptions:

“The Asylum: As detailed in quote: QU-0074. Manufacture of sets & props.
40% Deposit Payment.

...

Battle Sub Pair: As detailed in quote: QU-0075. Manufacture of sets & props.
40% Deposit Payment.”

20. Remaining stage payments for the Asylum and the Battle Sub Pair were invoiced on 3 November 2016 and 21 January 2017. The electronics for The Asylum and Battle Sub Pair are on invoices dated 14 December 2016 and 21 January 2017.

21. The other invoices which appear on their face to relate to the purchase of finished installed Rooms are those dated 28 November 2016, 10 December 2016, 14 December 2016 and 21 January 2017.

22. We note that some invoices refer to “design, manufacture and installation”. However, the stage payment invoices do not differentiate between these different elements or attribute any particular value to each element. Further, as set out above, Ms Duraid’s unchallenged evidence is that Norse Sky agreed not to charge for design.

23. The purchase of sets and props installed in a Room (as distinct from the entirety of the Room) are those contained in the invoices dated 4 April 2016 and 25 April 2016. These do provide greater itemisation than for the purchase of finished installed Rooms as they separate out the charges for the props themselves (referred to as “Periodic table & cardiovascular system” and “To supply 2 science experiment modules”), an LED wall, labour and some materials. Ms Duraid referred to this invoice in her oral evidence and said that this was an example of Great Escape providing Norse Sky with designs, Norse Sky putting those designs through their manufacturing system and producing the props. She noted that the labour was the installation of the props and the painting was onto a panel rather than the wall itself. Ms Duraid’s evidence was not challenged in this regard and we accept it.

24. There are also various invoices which are on their face for miscellaneous items and materials rather than being attributable to a whole Room or prop (“the Miscellaneous Invoices”). Three of these invoices are from Norse Sky. One invoice is dated 30 November 2016 and refers to various items of sound and lighting systems without reference to any particular Room or props. A further invoice is dated 1 October 2016 and appears to be a collection of unconnected items which are either not attributed to a Room or (in the case of the Hell Tunnel puzzle and Round Table puzzle) appear to be additional materials after the Room has already been supplied. The final invoice is dated 25 October 2016, does not appear on its face to relate to the provision of a Room and there is no evidence it does so. Instead, it refers to materials for a table and workshop labour.

25. There are also Miscellaneous Invoices from suppliers other than Norse Sky. Again, these are either not attributed to a Room or are additional materials. In particular, this relates to the following invoices: two invoices dated 5 August 2016 and 1 September 2016 from GH Brooks and Co (Harrogate) Ltd in the sum of £7,277.60 plus VAT of £1,455.52 and £1,987.33 plus VAT of £397.47 respectively for various materials; an invoice dated 24 November 2016 from Red Dot Mediahouse Ltd in the sum of £5,150 plus VAT of £1,030 for video production; an invoice dated 22 November 2016 from Vapour Ltd in the sum of £1,850 plus VAT of £370 for art work; and an invoice dated 20 December 2016 from Kalcrest Site Services Ltd in the sum of £2,867.42 plus VAT of £573.49 for joinery and general labour.

26. Given this lack of any attribution to a room or given that they are for additional materials, we find that the Miscellaneous Invoices were not part of the supply of finished installed Rooms or sets and props by Norse Sky and instead were individual supplies of the items set out in those invoices.

27. There was no dispute that the invoices all relate to the VAT periods when Great Escape was using the flat rate scheme. However, Great Escape's previous accountant did not use the scheme correctly. This resulted in HMRC checking Great Escape's returns for the periods 01/16 to 01/17 and an estimated assessment in the sum of £52,146.

28. In the course of correspondence between HMRC and Mr Waining, Great Escape provided invoices to HMRC and sought to claim input tax upon them as capital expenditure goods. On 8 September 2017, HMRC allowed these input tax claims for the periods 04/16 to 10/16 and calculated that a repayment was due to Great Escape in the sum of £29,677. Great Escape then included this on its 10/17 return. We have not been provided with a schedule of the invoices which made up the input tax claim and which are therefore included in HMRC's adjustments. However, we take it from the fact that the Miscellaneous Invoices were attached to Mr Waining's letter justifying the input tax claim and exhibited to Ms Symonds' statement that they remain in dispute.

29. Great Escape's 10/17 return was then selected for a pre-credibility check. On 7 February 2017, HMRC disallowed the input tax claimed in relation to the 04/16 to 10/16 periods on the 10/17 return upon the basis that they did not (on HMRC's analysis) relate to capital expenditure goods. The amount of input tax disallowed was £17,080.89, resulting in the 10/17 return being amended to show an amount due to HMRC of £5,051.07. This was followed by a further explanation in a letter from HMRC dated 8 February 2017. Great Escape sought a review of the decision, which HMRC upheld in a letter dated 16 April 2018. Great Escape appealed by a notice of appeal received by the Tribunal on 16 May 2018.

THE STATUTORY FRAMEWORK

30. There was no dispute as to the relevant statutory framework to be applied.

31. Sections 5(1) and (2) of the Value Added Tax Act 1994 ("VATA 1994") provide as follows:

"(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below –

(a) "supply" in this Act includes all forms of supply, but not to anything done otherwise than for a consideration.

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services."

32. Neither party suggested that Schedule 4 of VATA 1994 impacts upon the present case.

33. Regulation 55A of the Value Added Tax Regulations 1995 ("VATR 1995") provides as follows:

"(1) In this part –

...

‘capital expenditure goods’ means any goods of a capital nature but does not include any goods acquired by a flat-rate trader (whether before he is a flat-rate trader or not) –

- (a) for the purpose of resale or incorporation into goods supplied by him,
- (b) for consumption by him within one year, or
- (c) to generate income by being leased, let or hired.”

34. Regulation 55E of VATR 1995 provides as follows:

“(1) For any prescribed accounting period of a flat-rate trader, he is entitled to credit for input tax in respect of any relevant purchase of his of capital expenditure goods with a value, together with the VAT chargeable, of more than £2,000.

(2) Where paragraph (1) above applies, the whole of the input tax on the goods concerned shall be regarded as used or to be used by the flat-rate trader exclusively in making taxable supplies.

(3) Section 26B(5) of the Act shall not apply to prevent a taxable person from being entitled to credit for input tax in respect of any supply, acquisition or importation by him that is not a relevant purchase.

(4) Nothing in this regulation gives an entitlement to credit for input tax where such entitlement is excluded by virtue of any order made under section 25(7) of the Act.”

ISSUES

35. The following issues arise for determination:

- (1) Whether or not Great Escape’s purchases were of supplies of goods.
- (2) To the extent that the supplies were of goods, whether or not they were capital expenditure goods.
- (3) To the extent that the supplies were of capital expenditure goods, whether or not they were of a value of more than £2,000.

36. Although some of the correspondence referred to legitimate expectations arising out of the original allowance of the input tax claims, this was not included as a ground of appeal and was not included within the parties’ submissions. As such, we do not deal with this any further in this appeal (whether in terms of considering if we have jurisdiction to consider this point or substantively).

SUBMISSIONS

Great Escape

37. Mr Waining’s key submission was that all the invoices related to supplies of capital expenditure goods because the Rooms, sets and props are used by Great Escape to generate income over a number of years. He submitted that the majority of the cost and value is the manufacture of the assets. Further, the Rooms, sets and props were not part of the building and were not consumed by Great Escape. In addition. Mr Waining submitted that the invoices should be analysed by reference to what they were providing as a whole rather than the individual items on them and so all exceeded the £2,000 threshold.

HMRC

38. Mr Haley submitted that the supplies were not of capital expenditure goods. His key argument was that what was being supplied were in fact services. Mr Haley adopted HMRC's statement of case, which identifies the essence of HMRC's position as follows:

“21. The Respondents maintain that in the instant appeal the supplies are the supply of design and installation of the themed rooms and therefore fall to be considered as a supply of services.

22. The Appellant is not purchasing a room, but the services of designers, manufacturers, and labourers to design and install the rooms. The supplies of building materials in relation to the rooms' décor are not capital expenditure goods, they may be used to create something capital in nature but are not capital in and of themselves.

23. The Respondents contend that although the installation of the room does involve the supply of the decorative/interactive elements which could be considered to be goods, those items are ancillary to the main supply, which is one of design and installation services as detailed in the invoices. The items form a small portion of the overall invoices, the majority of the invoices being for design and installation.”

39. We take these references to main supplies and ancillary supplies as meaning that HMRC treat the supply of physical goods as incidental to and part of the principal supply of services, with the effect that there was a single supply of services. HMRC have not argued in the alternative that these were multiple supplies.

40. Mr Haley relied upon the First-tier Tribunal decision of *Sally March v HMRC* [2009] UKFTT 94 (TC) (Judge Michael Tildesley OBE and Mr Richard Corke) (“*Sally March*”) to establish that the supplies were of services and also that they were not capital expenditure as they were consumed in the finished room. The FTT stated as follows at [19] to [24]:

“[19] In this Appeal the question to be asked is “*What did the Appellant purchase?*” The invoice of NJ Popham stated that they were providing supplies of fitting and erecting materials to make a riding arena. The Appellant accepted that the electrical materials had been purchased by the electrician with whom the Appellant contracted to install them in the building. The contractors were required to apply their skills to meet a specification for a building. They were not simply assembling materials. We find that the Appellant bought the services of contractors to construct a riding arena and install electrical materials. The contractors were supplying their services not supplies of tangible moveable property.

[20] The Tribunal in *Whitechapel*, however, decided that supplies of construction services can be placed on the same footing as the acquisition or construction of immovable property. The Tribunal's decision was based upon a careful examination of European Jurisprudence, and appeared to confirm the interpretation of capital expenditure adopted by the Appellant's representative, which was expenditure reflected in assets of an enduring nature as opposed to expenditure on consumables. The *Whitechapel* decision gave force to the Appellant's submission that the expenditure incurred by the contractors should be regarded as capital expenditure resulting in capital goods.

[21] We carefully considered the *Whitechapel* decision which was about whether input tax incurred on the refurbishment of an existing building could be recovered up front in accordance with the *Lennartz* principles. In our view it has no application to the characterisation of the supply and the principles of

the flat rate scheme. We preferred the Respondents' submission that a supply made in the construction of a building was a supply of services as they were consumed entirely in the finished building. We, therefore, hold that supplies of NJ Popham and Dunstan House were supplies of services which meant that the Appellant was not entitled to recover the VAT on those supplies under the flat rate scheme as they did not constitute capital expenditure goods.

[22] The Appellant raised a different point in respect of a supply from Martin Collins Enterprises which was for a supply of 155.28 tonnes of Activ-track and haulage. The Respondents allowed the input tax claim on the Activ-track presumably on the ground that it was capital expenditure goods in excess of £2,000 but disallowed the VAT claim in the sum of £273 on haulage because it was a supply of services.

[23] The Appellant submitted that the haulage was incidental and part of the principal supply of Activ-track, with the result that it was a single supply of goods. Thus enabling the recovery of the entire VAT including that attributable to the haulage. The Appellant relied on a concession made by the Respondents in the VAT & [sic] Tribunal decision of *Anthony Jessop Price and Kay Price v HMRC* heard on 24 April 2008. The Appeal involved a claim for VAT incurred on haulage services under the Do it Yourself Builders scheme. During the hearing the Respondents conceded that they would refund VAT on haulage if such services were made by the same person who supplied the building materials, and in consequence issued a single invoice for the supply and delivery of the materials. The circumstances of the disputed supply in this Appeal replicated the terms of the concession made by the Respondents in the *Price* Appeal. The Respondents did not challenge the Appellant's submissions.

[24] We find that the haulage was incidental and part of the principal supply of Activ-track which constituted a single supply of goods. In those circumstances the Appellant was entitled to the recover [sic] in full the VAT incurred on the supplies made by Martin Collins more particularly described in the invoice dated 24 October 2006."

41. Mr Haley drew further support for this point from the First-tier Tribunal decision of *Eventful Management Ltd v HMRC* [2007] Lexis Citation 824 (Lady Mitting and Mrs Marjorie Kostick) ("*Eventful Management*") at [7] and [8]:

"[7] As readily agreed by Mr Poole, the Commissioners' Notice is not determinative, based as it is upon the Commissioners' own interpretation of the legislation. Regulation 55E(1) requires there to be a purchase of capital expenditure goods with a value, inclusive of VAT, of more than [£]2,000. The Appellant can satisfy neither of these criteria. By Mr Hurst's own concession, the building materials purchased were not capital expenditure goods. Mr Hurst argues that the materials were then applied in the construction of a capital asset. In other words, it was the purpose to which the purchases were put which brings them within Regulation 55E(1). This, however, is not the question. The question to ask must be "What did the Appellant purchase?". He purchased building materials which it is accepted by the Appellant were not themselves capital expenditure goods. The Appellant did not purchase a finished building, but only the materials used to construct it.

[8] As the goods purchased were not capital expenditure goods, the second limb, relating to value, does not really arise but we will address it for the sake of completeness. The Regulation quite clearly refers to "a relevant purchase". The purchase is in the singular, although we accept that goods are in the plural and there can be occasions when there is a single purchase of a number of

goods. That is not the case here. There are a multitude of separate invoices from separate suppliers for separate items on separate dates. No one single purchase reached the mandatory value and there can be no reason or justification in lumping them all together or in attempting to construe them as one single purchase of building materials. They were not. It follows therefore that the Appellant cannot be entitled to recover its input tax on the purchase of the materials and the assessment raised by the Commissioners was properly raised.”

DISCUSSION

42. In the remainder of this decision, we mark a distinction between the invoices from Norse Sky which involve the provision of whole Rooms (“the Room Invoices”), the invoices from Norse Sky which involve the provision of individual sets or props which fall short of being a whole Room (“the Props Invoices”) and the Miscellaneous Invoices (as defined in paragraph 24 above).

Whether the supplies were of goods or services

The Room Invoices

43. We find that the purchases in respect of the Room Invoices were supplies of finished installed Rooms and that these were single supplies of goods. This is for the following reasons.

44. First, our answer to the question, “What did Great Escape purchase?” is that it purchased finished installed Rooms. They gave designs to Norse Sky and, in return for payment, received the Rooms in situ. In the unusual context of Great Escape’s business, this was not decoration or building work; it was the provision of a composite whole which was supplied in situ in Great Escape’s building. In a different context, a parallel might be a piece of installation art or a complete film set.

45. Secondly, a central feature of HMRC’s case was that the majority of Norse Sky’s work was in the design and installation of the Room, with the supply of the goods themselves being ancillary.

46. In considering the question of single and multiple supplies, we bear in mind the decision of the ECJ in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] 2 AC 601 at [26] to [31]:

“[26] By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.

[27] It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.

[28] However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411–2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features

and acts, regard must first be had to all the circumstances in which that transaction takes place.

[29] In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

[30] There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).

[31] In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paras 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin* (at 1208, paras 45 and 46)).”

47. As set out above, we do not accept HMRC’s position as a matter of fact. The majority of the design work was carried out by Great Escape. Although some design was necessarily carried out by Norse Sky in making those designs a reality, these were ancillary to the supply of the Rooms. Similarly, the process of installing the Rooms was incidental to the supply of the Rooms because that is how they were to be supplied. Any services involved in the design and supply were therefore ancillary to the principal supply of the Rooms.

48. Thirdly, we do not treat the manufacturing process as a service as this was carried out by Norse Sky using materials which it sourced and supplied, albeit that their cost was reflected in the overall price charged to Great Escape.

49. Fourthly, both *Sally March* (in respect of the riding arena rather than the Activ-track) and *Eventful Management* were factually different to the present case as they involved a supplier constructing a building from materials purchased elsewhere. In the present case, Norse Sky was providing a finished product which it manufactured itself from (as set out above) products which it sourced and supplied.

The Prop Invoices

50. We also find that the purchases in respect of the Prop Invoices were supplies of finished installed sets and props and that these were single supplies of goods. This is for the same reasons as in respect of the Room Invoices.

The Miscellaneous Invoices

51. We find that the elements of the Miscellaneous Invoices which related to labour and joinery were supplies of services rather than supplies of goods. This is because Great Escape has not identified a principal supply which these supplies of services are said to be ancillary to. We do not accept Mr Waining's argument that these are still supplies of goods because they become goods when incorporated into Great Escape's business. This is because such an argument wrongly treats the question as being "What will the supplies become?" rather than "What did Great Escape purchase?". For the labour and joinery elements of the Miscellaneous Invoices, our answer to the question, "What did Great Escape purchase?" is services which were used in making unidentified items for Great Escape.

Whether any supplies of goods were of capital expenditure goods

The Room Invoices and the Prop Invoices

52. We find that the supplies of goods in respect of the Room Invoices and the Prop Invoices were of capital expenditure goods. This is for the following reasons.

53. First, the Rooms and the props are used by Great Escape as fixed assets in its business to generate income on an ongoing basis.

54. Secondly, the Rooms and the props are not consumed by Great Escape. The Rooms and props are not changed into anything else upon installation and can in principle be moved to other locations.

55. Thirdly, again both *Sally March* (in respect of the riding arena rather than the Activ-track) and *Eventful Management* were factually different to the present case as they involved a supplier constructing a building from materials purchased elsewhere.

The Miscellaneous Invoices

56. We find that the supplies of goods in respect of the Miscellaneous Invoices were not of capital expenditure goods. This is because, for the reasons set out above, there is no evidence as to whether or how they are attributable to any particular Room or props. Unlike the supplies relating to the Room Invoices and the Prop Invoices, the Miscellaneous Invoices do not relate to goods which have an identity of their own. As such, they are akin to the building materials in *Eventful Management*. In this regard, Great Escape purchased materials which were used in making unidentified items for Great Escape.

57. We note that, in principle, particular pieces of equipment referred to in the Miscellaneous Invoices could be capable of being a capital asset without being attributed to a particular Room or a particular prop. However, Great Escape has not sought to do this and no evidence was given as to the detail of the entries within the Miscellaneous Invoices.

Whether any supplies of capital expenditure goods had a value of more than £2,000

The Room Invoices and the Prop Invoices

58. We find that the supplies of capital expenditure goods in respect of both the Room Invoices and the Prop Invoices had a value, together with the VAT chargeable, of more than £2,000. This is for the following reasons.

59. First, it is not clear that HMRC was in fact treating the Room Invoices or the Prop Invoices (as distinct from the Miscellaneous Invoices) as being below the £2,000 threshold.

60. Secondly, each of the Room Invoices and Prop Invoices has a total of more than £2,000 including VAT.

61. Thirdly, the Rooms and (in respect of the Prop Invoices) the props were supplied in situ as finished articles. As such, it is artificial to treat the different components of the charges making up the Rooms and (where relevant) the props as individually priced goods.

The Miscellaneous Invoices

62. Given our other findings, the Miscellaneous Invoices do not relate to capital expenditure goods and so their value does not arise.

DISPOSITION

63. As such, we allow the appeal in respect of the Room Invoices and the Prop Invoices but dismiss it in respect of the Miscellaneous Invoices. As we did not hear submissions upon the effect of such an outcome, we will leave it to the parties to calculate the appropriate amendment to the 10/17 return. The parties have liberty to apply for a determination upon this if they cannot reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

64. 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.

**RICHARD CHAPMAN QC
TRIBUNAL JUDGE**

RELEASE DATE: 16 SEPTEMBER 2019